Air Force Operations & The Law

A Guide for Air, Space & Cyber Forces

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AIR FORCE OPERATIONS & THE LAW

A GUIDE FOR AIR, SPACE, AND CYBER FORCES

Second Edition ***2009***

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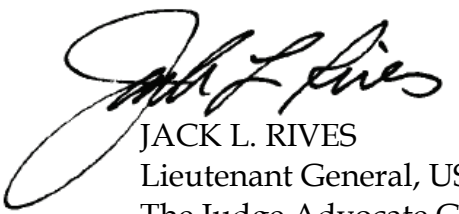
Portions of this text were drawn substantially from the previous work of our current and former colleagues in the Army, Navy, and the Air Force, especially the Army's *Operational Law Handbook,* the Navy's *Commanders Handbook on the Law of Naval Operations,* and the First Edition of *Air Force Operations and the Law.* Great credit must go to the authors of these prior texts whose efforts made this edition possible.

FOREWORD

In today's fast-paced world of overseas contingency and domestic operations, commanders rely on the advice of JAG Corps personnel to make critical decisions, sometimes involving life and death. Demand for this advice is high and will likely increase. The complexity of the operational environment is also growing.

We can be sure that technological advances on the 21st Century battlefield will take us into uncharted legal territory, where we will be expected to analyze the complexities and provide accurate advice faster than ever before. Our ability to do so will have a direct impact on America's capacity to effectively project power across the spectrum of conflict.

Commanders count on legal teams knowledgeable in subjects ranging from weapon selection and target engagement to nation building and counterinsurgency activities. That's why the second edition of the *Air Force Operations & the Law: a Guide for Air & Space Forces* is so important. Experienced subject matter experts worked hard to make this book a useful reference, and I'm confident it will help you accomplish your critical missions.



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AIR FORCE OPERATIONS & THE LAW

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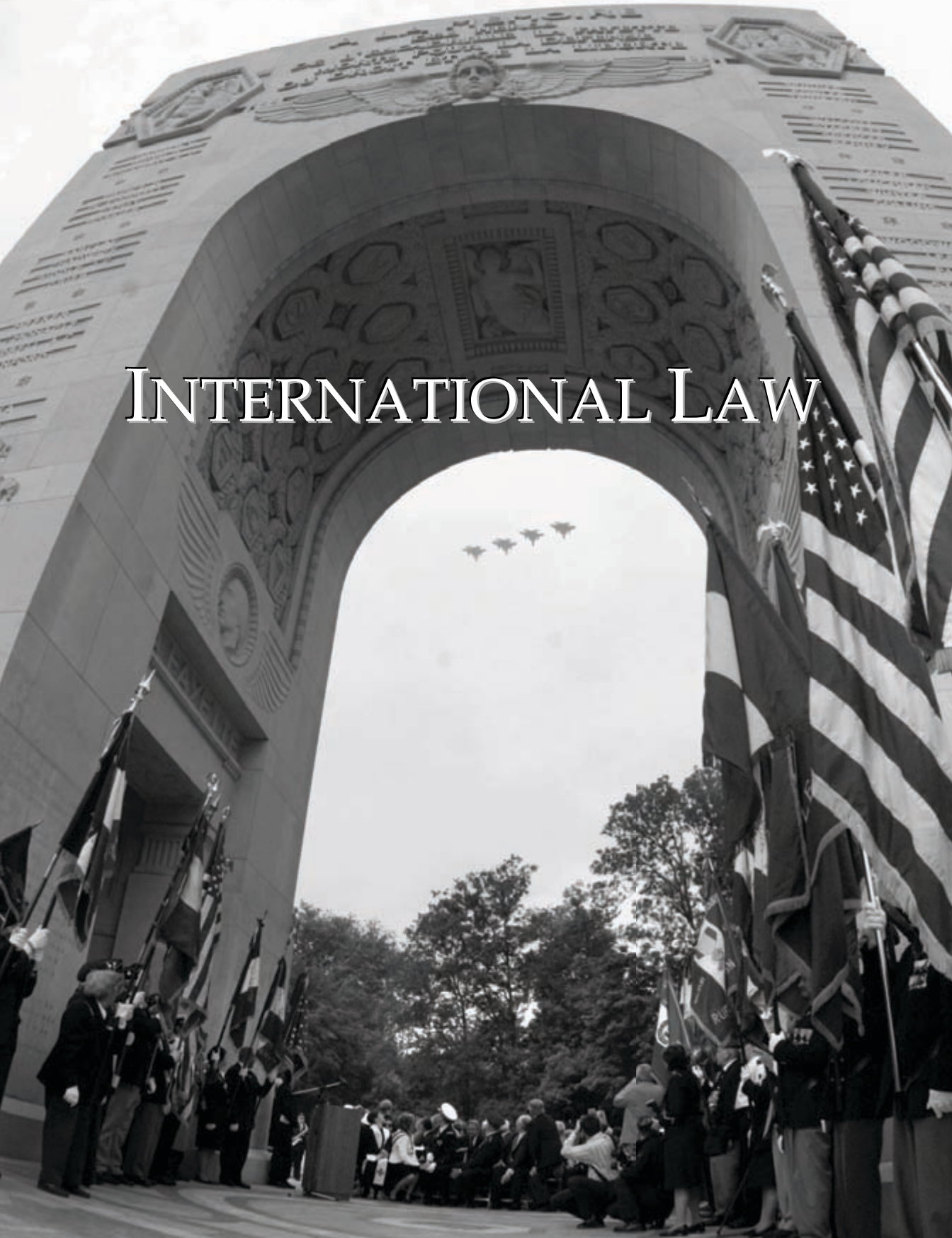

CHAPTER 1

INTERNATIONAL USE OF FORCE BY THE UNITED STATES AIR FORCE

BACKGROUND

Historically, the application of law to war has been divided into two parts. The first addresses the legality of a nation's decision to engage in war. The second provides rules and guidance on how to conduct the war. This Chapter addresses the first issue, known also as the *jus ad bellum*. The second issue, known also as *jus in bello*, will be addressed in chapter two.

Although it is important to have some understanding of the *jus ad bellum*, the decision that the USAF will use force is made by the national command authority, usually in consultation with the Department of State. This decision will normally be communicated to the USAF in the form of a mission statement.

Using the mission statement provided by higher authority, the judge advocate must become familiar with the legal justification for the mission and, in coordination with higher headquarters, be prepared to brief all local commanders on that justification. This will enable commanders to better plan their missions, structure public statements, and ensure the conduct of military operations conforms to national policy. It will also assist commanders in drafting and understanding rules of engagement (ROE) for the mission, as one of the primary purposes of ROE is to ensure that any use of force is consistent with national security and policy objectives.

LAW GOVERNING WHEN NATIONS CAN LEGALLY USE FORCE

Article 2(4) of the Charter of the United Nations (UN) provides:

"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."

An integral aspect of this proscription is the principle of nonintervention: that States must refrain from interference in the internal affairs of another. Nonintervention stands for the proposition that States must respect one another's sovereignty. American policy statements have frequently affirmed this principle, and it has been made an integral part of U.S. law through the ratification of the Charters of the UN and the Organization of American States

(OAS)[1] as well as other multilateral international agreements which specifically incorporate nonintervention as a basis for mutual cooperation.

The Charter of the UN does, however, provide two exceptions to this requirement. First, a State may use force if authorized by a decision of the UN Security Council, typically documented in a UN Security Council Resolution. Second, as recognized in customary international law and reflected in Article 51 of the Charter of the UN, force may be used in individual or collective self-defense. An additional basis not found in the UN Charter is the use of force with the consent of the territorial State; for example, to assist a State government with a conflict occurring inside their territory.

UN ENFORCEMENT ACTIONS

Chapter VII of the UN Charter, entitled "Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression," gives the Security Council authority to determine what measures should be employed to address acts of aggression or other threats to international peace and security. The Security Council must first, in accordance with Article 39, determine the existence of a threat to the peace, breach of the peace, or act of aggression. It then has the power under Article 41 to employ measures short of force, including a wide variety of diplomatic and economic sanctions against the target State, to compel compliance with its decisions. Should those measures prove inadequate (or should the Security Council determine that non-military measures would prove inadequate), the Security Council has the power to authorize member States to employ military force in accordance with Article 42.

Some examples of UN Security Council actions to restore international peace and security include:

1. Security Council Resolution 678 (1990) authorized member States cooperating with the government of Kuwait to use "all necessary means" to enforce previous resolutions. It was passed pursuant to the Security Council's authority under Chapter VII in response to the 1990 Iraqi invasion of Kuwait.

2. Security Council Resolution 1031 (1995) authorized the member States "acting through or in cooperation with the organization [NATO] referred to in Annex 1-A of the Peace Agreement [Dayton Accords resolving the conflict in Bosnia-Herzegovina] to establish a multinational implementation force under unified command and control [NATO] in order to fulfill the role specified in Annex 1-A and Annex 2 of the Peace Agreement; Authorizes the Member States . . . to take all

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

necessary measures to effect the implementation of and to ensure compliance with Annex 1-A of the Peace Agreement . . ."

3. Security Council Resolution 1264 (1999) authorized "the establishment of a multinational force . . . to restore peace and security in East Timor. . . " and further authorized "the States participating in the multinational force to take all necessary measures to fulfill this mandate . . ."

4. Security Council Resolution 1386 (2001) 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."

5. Security Council Resolution 1511 (2003) authorized "a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq."

6. Security Council Resolution 1529 (2004) authorized member states participating in the Multinational Interim Force in Haiti to "take all necessary measures to fulfill its mandate." Specifically, the Multinational Interim Force was tasked with restoring peace and security in Haiti following the resignation and departure of former President Jean-Bertrand Aristide.

Regional Organization Enforcement Actions

Chapter VIII of the UN Charter recognizes the existence of regional arrangements among States that deal with such matters relating to the maintenance of international peace and security as are appropriate for regional actions (Article 52). Regional organizations, such as the Organization of American States, the Organization of African Unity, and the Arab League, attempt to resolve regional disputes peacefully, prior to the issue being referred to the UN Security Council. However, regional organizations do not have the ability to unilaterally authorize the use of force (Article 53). Rather, the Security Council may utilize the regional organization to carry out Security Council enforcement actions.

SELF DEFENSE

The right of all nations to defend themselves was well-established in customary international law prior to adoption of the UN Charter. Article 51 of the Charter provides:

"Nothing in the present Chapter shall impair the inherent right of individual or collective self defense if an armed attack occurs against a member of the UN until the Security Council has taken measures necessary to maintain international peace and security. . . ."

While some narrowly interpret the right of self defense to require an armed attack as a condition precedent, many States, including the U.S., take an expansive interpretation of Article 51: that the customary right of self defense (including anticipatory self defense – see

below) is an inherent right of a sovereign State that was not negotiated away under the Charter. Therefore the right of self defense continues to be based on historically accepted criteria (customary international law), rather than the precise wording of Article 51. A State may respond in self defense to any threat or use of force against its territorial integrity or political independence, provided that the response is a necessary and proportionate response to the threat.

Protection of Nationals

Customarily, a State has been afforded the right to protect its citizens abroad if their lives are placed in jeopardy and a host State is either unable or unwilling to protect them. This right is the legal basis for non-combatant evacuation operations. The right to use force to protect citizens abroad also extends to those situations in which a host State is an active participant in the activities posing a threat to another State's citizens (e.g., the government of Iran's participation in the hostage taking of U.S. embassy personnel in that country (1979-81); and Ugandan President Idi Amin's support of terrorists who kidnapped Israeli nationals and held them at the airport in Entebbe).

Collective Self Defense

Collective self defense requires that all conditions for the exercise of an individual State's right of self defense are met and the threatened State has requested assistance.

Collective defense treaties, such as the North Atlantic Treaty (which established NATO); the Inter-American Treaty of Reciprocal Assistance (the Rio Treaty); the Security Treaty Between Australia, New Zealand, and the United States (ANZUS); and other similar agreements do not provide an international legal basis for the use of U.S. force abroad, *per se*. These agreements simply establish a commitment among the parties to engage in collective self defense, in specified situations, and the framework through which such measures are to be taken. For example, Article 5 of the North Atlantic Treaty provides 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-defence recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked."

The United States has entered into bilateral military assistance agreements with numerous countries around the world. These are not defense agreements and thus impose no commitment on the part of the United States to come to the defense of the other signatory in any given situation.

Anticipatory Self Defense

Anticipatory self defense was first expressed in the 1837 *Caroline* case and subsequent correspondence between then-U.S. Secretary of State Daniel Webster and his British Foreign Office counterpart Lord Ashburton. Secretary Webster posited that a State need not suffer

an actual armed attack before taking defensive action, but may engage in anticipatory self defense if the circumstances leading to the use of force are "instantaneous, overwhelming, and leaving no choice of means and no moment for deliberation." As with any form of self defense, the principles of necessity and proportionality serve to bind the actions of the offended State.

Because the invocation of anticipatory self-defense is fact-specific in nature, and therefore appears to lack defined standards of application, it remains controversial in the international community. The United States, in actions such as operation El Dorado Canyon (the 1986 strike against Libya) and the 1998 missile attack against certain terrorist elements in Sudan and Afghanistan, has employed anticipatory self defense in response to actual or attempted acts of violence against U.S. citizens and interests. In the publication, The National Security Strategy of the United States of America (2002), the United States considered that in the age of terrorism, where warnings may not come in the guise of visible preparations, there is a compelling case for taking action to defend ourselves, "even if uncertainty remains as to the time and place of the enemy's attack."

USE OF FORCE WITH CONSENT OF THE TERRITORIAL STATE

A final basis upon which a State may use resort to the use of force is with the consent of the territorial State. A State may request assistance from another State (or the United Nations) to deal with an internal armed conflict or other security situation which it is unable to resolve independently. In some circumstances there may also be a relevant UN Security Council Resolution. This is the basis for the continued use of force in both Iraq and Afghanistan in 2009.

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

The Constitution divides the power to wage war between the Executive and Legislative branches of government. Under Article I, the power to declare war, to raise and support armies, to provide and maintain a navy, and to make all laws necessary and proper for carrying into execution the foregoing is held by the Congress. Balancing that legislative empowerment, Article II vests the executive power in the President and makes him the Commander-in-Chief of the armed forces.

In 1973 Congress passed the War Powers Resolution Act (WPR). The stated purpose of the WPR is to ensure the collective judgment of both branches in order to commit to the deployment of U.S. forces by requiring consultation of and reports to Congress, in any of the following circumstances:

1. Introduction of troops into actual hostilities;

2. Introduction of troops, equipped for combat, into a foreign country; or

3. Greatly enlarging the number of troops equipped for combat, in a foreign country.

The President is required to make such reports within 48 hours of the triggering event, detailing the circumstances necessitating introduction or enlargement of troops, the Constitutional or legislative authority upon which he bases his action, and the estimated scope and duration of the deployment or combat action.

The issuance of such a report, or a demand by Congress for the President to issue such a report, triggers a 60-day clock. If Congress does not declare war, specifically authorize the deployment/combat action, or authorize an extension of the WPR time limit during that period, the President is required to terminate the triggering action and withdraw deployed forces. The President may extend the deployment for up to 30 days should he find circumstances so require, or for an indeterminate period if Congress has been unable to meet due to an attack upon the United States.

However, no President to date has conceded the constitutionality of the WPR or technically complied with its mandates. Within the Department of Defense (DOD), procedures have been established which provide for Chairman of the Joint Chiefs of Staff (CJCS) review of all deployments that may implicate the WPR. The Chairman's Legal Counsel, upon reviewing a proposed force deployment, is required to provide to the DOD General Counsel his analysis of the WPR's application. If the DOD General Counsel makes a determination that the situation merits further inter-agency discussion, he or she will consult with both the State Department Legal Advisor and the Attorney General. As a result of these discussions, advice will then be provided to the President concerning the consultation and reporting requirements of the WPR. There is no action required by the USAF in this process.

REFERENCES

1. Charter of the United Nations with the Statue of the International Court of Justice annexed thereto, 26 June 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, (as amended, 17 December 1963, 16 U.S.T. 1134; T.I.A.S. 5857; 557 U.N.T.S. 143 20 December 1965, 19 U.S.T. 5450; T.I.A.S. 6529 and 20 December 1971, 24 U.S.T. 2225; T.I.A.S. 7739) (entry into force 24 October 1945, for U.S. same date)
2. Letter of Secretary of State Daniel Webster to Special Minister Ashburton, dated 27 July 1842, reproduced at http://www.yale.edu/lawweb/avalon/diplomacy/britian/br-1842d.htm
3. War Powers Resolution Act (WPR), Public Law 93-148, 50 U.S.C. §§ 1541-1548

CHAPTER 2

LAW OF ARMED CONFLICT FOR AIRMEN

BACKGROUND

This chapter discusses the law of armed conflict.[2] After an introduction into the sources of the law of armed conflict, the chapter is divided into two parts. The first part deals with the general principles of the law of armed conflict. The second part discusses the laws of aerial warfare.

The law of armed conflict applicable to aerial warfare has not been codified. It is largely found in the general principles of the law of armed conflict, and to that end the reader should become familiar with those principles.

The 1923 Hague Draft Rules represented an attempt to codify the law of armed conflict applicable to Airmen, but the work was never adopted by any nation. Subsequent international agreements have, however, included specific references to certain aspects of aerial operations.

UNITED STATES VIEW OF THE LAW OF ARMED CONFLICT GENERALLY

The United States will comply with the law of armed conflict. Compliance with the law of armed conflict is morally imperative and critical to the maintenance of a well-disciplined military force. Air Force policy on the law of armed conflict is set forth in AFPD 51-4, which states that: "The Air Force will make sure its personnel understand, observe, and enforce LOAC and the U.S. Government's obligations under that law." It goes on to state that: "Air Force personnel will comply with LOAC in military operations and related activities during armed conflicts, no matter how these conflicts are characterized."

SOURCES OF THE LAW OF ARMED CONLICT FOR AIRMEN

The law of armed conflict for Airmen is largely derived from the general law of armed conflict which is to be found in treaty law and customary international law.

[2] The terms "law of war", the "law of armed conflict" (frequently abbreviated to "LOAC"), and "international humanitarian law" are often considered to be synonymous. The term "armed conflict" is often used in preference to "war". The Geneva Conventions recognize armed conflict as being wider in scope than war.

Treaty Law

The United States is a party to numerous international agreements with provisions that apply to aerial operations. The body of international agreements applicable to armed conflict may be conveniently divided into two groups: Hague and Geneva law.

Hague Law deals generally with the means and methods of armed conflict. It includes the Hague Conventions of 1899 and 1907. More recent international agreements focus on specific issues, such as a comprehensive ban on chemical weapons (the 1993 Chemical Weapons Convention), and bans and restrictions on some conventional weapons (the 1980 Conventional Weapons Convention and its protocols).

Geneva Law deals generally with reducing suffering of both combatants and civilians caused as a result of armed conflict. It consists of:

> Geneva Convention I (relating to the wounded and sick in the armed forces)
>
> Geneva Convention II (relating to wounded, sick, and shipwrecked armed forces at sea)
>
> Geneva Convention III (relating to the treatment of prisoners of war)
>
> Geneva Convention IV (relating to the protection of civilians)
>
> Additional Protocol I to the Geneva Conventions (relating to the protection of victims of international armed conflicts) (The United States is a signatory to Additional Protocol I but has not ratified it).
>
> Additional Protocol II to the Geneva Conventions (relating to the protection of victims of non-international armed conflicts) (The United States is a signatory to Additional Protocol II but has not ratified it)
>
> Additional Protocol III to the Geneva Conventions (relating to adoption of a distinctive emblem) (The United States is a signatory to Additional Protocol III and ratified the same on 08 March 2007) [3]

By signing Additional Protocol I and Additional Protocol II, but not ratifying them, the United States is not bound by the terms and obligations set forth in the protocols but is obliged to "refrain from acts which would defeat the object and purpose" of the same.[4]

Since the drafting of the Additional Protocols I and II, the international community has sought to expand protections for certain classes of people, including a grant of special

[3] The Geneva Conventions are frequently abbreviated as GC I, GC II, GC III, and GC IV; the Additional Protocols are abbreviated as AP I, AP II, and AP III. The Geneva Conventions were adopted in 1949, Additional Protocols I and II in 1977, and Additional Protocol III in 2005. Full citations are provided in the references part of this chapter.
[4] Vienna Convention on the Law of Treaties, Art. 18.

protections to United Nations (UN) peacekeeping personnel (the 1994 UN Safety Convention), and a prohibition on the use of children as combatants (the 2000 Optional Protocol on the Rights of the Child).

The United States has not ratified a number of international agreements. Notable examples include Additional Protocols I and II, the 1982 UN Convention on the Law of the Sea, the 1997 Ottawa Treaty banning anti-personnel mines, and the 2008 Oslo Treaty on cluster munitions. As a result, United States' allies and coalition partners may be operating under different laws relating to armed conflict.

Customary International Law

All nations are bound by customary international law. The Supreme Court of the United States has ruled that customary international law is an integrated part of U.S. law.[5]

Customary law arises from the practice of states coupled with the belief that the practice is required by law. Evidence of custom may be found in draft international agreements, declarations of international organizations like the UN, judicial decisions of international tribunals such as the International Criminal Court, and other acts of states. In addition, general legal practices common to the major legal systems of the world and opinions of leading jurists may constitute some evidence of customary law.

The point at which a consistent practice of some states becomes customary international law binding on all states is open to interpretation. Because the United States has not ratified several important treaties, the question of whether provisions in such treaties have become customary international law may become relevant, particularly when working in an alliance or coalition with states that have ratified such treaties.

Policy statements or U.S. practice will aid in determining what may constitute customary international law. In cases of doubt, Airmen should consult JAG Corps personnel for guidance.

BASIC PRINCIPLES OF THE LAW OF ARMED CONFLICT

The basic law of armed conflict principles are military necessity, unnecessary suffering, distinction, proportionality, and chivalry.

Military Necessity

The principle of military necessity authorizes the use of force required to accomplish the mission. Military necessity does not authorize acts otherwise prohibited by the law of

[5] The Paquette Habana, 175 U.S. 677 (1900).

armed conflict. This principle must be applied in conjunction with other law of armed conflict principles.[6]

The principle of military necessity is explicitly codified in Article 23, paragraph (g) of the Annex to Hague IV, which forbids a belligerent "to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war." Military necessity has been recognized through its codification into other treaties to which the United States is a party,[7] as well as treaties to which it is not a party.[8]

Military necessity does not authorize all military action and destruction.[9] Under no circumstances may military necessity authorize actions specifically prohibited by the law of armed conflict, such as the murder of prisoners of war[10] or the taking of hostages.[11]

Determining military necessity is the responsibility of commanders and other decision-makers. The law of armed conflict provides general guidance, subject to good faith interpretation and implementation by those individuals. According to the preamble to Hague Convention IV:

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[6] Department of the Army Field Manual 27-10, *The Law of Land Warfare* (1956, incorporating change 1, 1976), para. 3a. Early recognition of military necessity is found in U.S. Army General Order No. 100 (1863), usually referred to as the Lieber Code. The Lieber Code is often considered to be the seminal rulebook on modern law of armed conflict. Following the Lieber Code, the United States has defined military necessity in its law of war manuals. For example, the Commander's Handbook on the Law of Naval Operations, NWP 1-14M, para. 5.2, states that "Only that degree and kind of force, not otherwise prohibited by the law of armed conflict, required for the partial or complete submission of the enemy with a minimum expenditure of time, life, and physical resources may be applied." A U.S. Air Force definition is similar; see Air Force Pamphlet 110-31, *International Law -- The Conduct of Armed Conflict and Air Operations* (1976), para. 1-3a(1).

[7] The fifth paragraph of the preamble to Hague IV states that:

> According to the views of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war, *as far as military requirements permit*, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants [emphasis added].

Likewise, Art. 23(g) of the Annex to Hague IV prohibits the destruction or seizure of enemy property, "unless such destruction or seizure be imperatively demanded by the necessities of war," while Art. 53, GC IV, declares that:

> Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, *except where such destruction is rendered absolutely necessary by military operations* [emphasis added].

Art. 147, GC IV, makes extensive destruction or seizure of property a grave breach if it is "not justified by military necessity and carried out unlawfully and wantonly."

[8] Art. 52, AP I, prohibits attacks of objects other than military objectives. Paragraph 2 defines "military objectives" as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."

[9] As stated in Art. 22, Annex to Hague IV, "The right of belligerents to adopt means of injuring the enemy is not unlimited."

[10] Art. 13 and 130, GC III.

[11] Art. 34, 147, GC IV, and Art. 3(1)(b) common to the Geneva Conventions.

> Military necessity does not authorize all acts in war that are not expressly prohibited. Codification of the law of war into specific prohibitions to anticipate every situation is neither possible nor desirable. As a result, commanders and others responsible for making decisions must make those decisions in a manner consistent with the spirit and intent of the law of war.

Where an express prohibition has been stated, neither military necessity nor any other rationale of necessity may override that prohibition.[12] In contrast to express prohibitions, most codified portions of the law of armed conflict are written broadly in order to encompass as many situations as possible. Considerable discretion is left to the commander, which he or she is expected to exercise in good faith.[13] In such cases, commanders and others responsible for planning, deciding upon or executing military operations necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time.[14]

Unnecessary Suffering

Several law of armed conflict treaties contain the caveat that the right of a party to a conflict is not unlimited in its selection and use of means or methods of war.[15] The principle of avoiding the employment of arms, projectiles, or material of a nature to cause unnecessary suffering, also referred to as superfluous injury, is codified in Article 23 of the Annex to Hague IV, which especially forbids employment of "arms, projectiles or material calculated to cause unnecessary suffering…" and the destruction or seizure of "the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."

Additional Protocol I, in article 35, states in paragraph 2: "It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering." Unnecessary suffering and superfluous injury are regarded as synonymous. Each refers to damage to objects as well as injury to persons. In determining whether a means or method of warfare causes unnecessary suffering, a balancing test is applied between lawful force dictated by military necessity to achieve a military objective and the injury or damage that may be considered superfluous to achievement of the stated or intended objective. Unnecessary suffering is used in an objective rather than subjective sense. That is, the measurement is not that of the victim

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[12] Such as the denial of quarter, contained in Art. 23(d) of the Annex to Hague IV; misuse of the distinctive emblems of the Red Cross or Red Crescent, as prohibited in Art. 44, GC I, and Art. 38, AP I; or the torture or murder of a prisoner of war, as prohibited by Art. 17 and 13, respectively, GC III.

[13] For example, the definition of "military objective" contained in Art. 52, AP I, is "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage." The definition entrusts to the military commander the determination of military necessity under the circumstances ruling at the time.

[14] This standard is referred to as the *Rendulic rule*; for its background, see *United States v. List*, XI IMT (1948), 1296. The *Rendulic rule* is consistent with U.S. domestic law; see *Tennessee v. Garner*, 490 U.S. 386 (1989), 388, 396-397. This standard also was applied in the judgment of the European Court of Human Rights in *Case of McCann and Others v. the United Kingdom*, 17/1994/464/545 (27 September 1995), 54, para. 200.

[15] Art. 22, Annex to Hague IV; and Art. 35, para. 1, AP I.

affected by the means, but rather in the sense of the design of a particular weapon or in the employment of weapons.

The fact that a weapon causes injury or death to combatants does not mean that a weapon causes unnecessary suffering. Military necessity is an acknowledgement that employment of weapons in military operations can lead to death or injury of combatants and civilians taking a direct part in hostilities either directly or incidental to the destruction of military objectives. The act of combatants killing or wounding enemy combatants in battle is a legitimate act under the law of armed conflict if accomplished by lawful means or methods. The prohibition of unnecessary suffering does not limit the bringing of overwhelming firepower on an opposing military force in order to subdue or destroy it.

However, certain means of warfare have been prohibited from use on the battlefield, either because they are regarded as causing unnecessary suffering or for policy reasons. These means include poison,[16] chemical weapons,[17] biological (or bacteriological) weapons,[18] munitions containing fragments not detectable by x-ray,[19] and blinding laser weapons.[20]

The law of armed conflict prohibits the design or modification and employment of a weapon for the purpose of increasing or causing suffering beyond that required by military necessity. In conducting the balancing test necessary to determine the legality of a weapon, its effects cannot be weighed in isolation. Each must be examined against comparable weapons in contemporary use, their effects on combatants, *and* the military necessity for the weapon under consideration. This determination is made at the national level in the research, development and acquisition process, permitting commanders to assume that weapons, weapons systems and munitions issued to them for battlefield use do not violate this aspect of the prohibition on unnecessary suffering, that is, that those weapons and munitions are lawful for their intended purposes.[21]

The prohibition of means or methods of warfare of a nature to cause unnecessary suffering also prohibits the intentional attack of combatants *hors de combat* (i.e. no longer in the fight), unlawful destruction of civilian objects, and unlawful injury to civilians not taking a direct part in hostilities.

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[16] Prohibited in Art. 23(a) to the Annex to Hague IV. The prohibition is much older, as evidenced by Art. 16 of the Lieber Code.

[17] First use in war is prohibited by the Geneva Protocol. Possession, research, development, manufacturing, acquisition, stockpiling, transfer or use of chemical weapons is prohibited by the Chemical Weapons Convention.

[18] First use in war is prohibited by the Geneva Protocol. The United States unilaterally renounced use of biological weapons on 25 November 1969. Possession, research other than for prophylactic purposes, development, manufacturing, acquisition, stockpiling, transfer or use of biological weapons is prohibited by the Biological Weapons Convention.

[19] Protocol I, Convention on the Prohibition or Restrictions of the Use of Certain Conventional Weapons.

[20] *Id.* at Protocol IV. The nations participating in its negotiation did not conclude that blinding as such or a blinding laser weapon caused *unnecessary suffering*, but decided for policy reasons to prohibit their use. For a historical record, *see* Office of The Judge Advocate General of the Army, Memorandum of Law: *Travaux Preparatoires* and Legal Analysis of Blinding Laser Weapons Protocol (20 December 1996).

[21] DODD 5000.1 (30 October 2002).

Distinction

Fundamental to the avoidance of unnecessary suffering is the law of armed conflict principle of distinction, sometimes referred to as discrimination. Distinction is the international law obligation of parties to a conflict to distinguish between combatant forces and the civilian population or individual civilians not taking a direct part in the hostilities. Combatants must direct the application of force solely against other combatants. Similarly, military force may be directed only against military objectives, and not against civilian objects. As will be noted, the principle of distinction also obligates private citizens to refrain from engaging in hostile acts against enemy military forces.

The principle of distinction was recognized in the Lieber Code[22] and law of war manuals since then. It has been acknowledged in two UN General Assembly Resolutions, each of which the United States supported. United Nations General Assembly Resolution 2444 (XXIII [1968]), adopted unanimously, states in part "[t]hat it is prohibited to launch attacks against the civilian population;" and "[t]hat distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible."[23]

The phrase "at all times" in Resolution 2444 was not intended to create an expectation that the law of armed conflict can protect civilians and civilian objects entirely from the ravages of war, or to suggest that every injury to a civilian not taking a direct part in the hostilities or damage to civilian objects would constitute a violation of the law of armed conflict.

As articulated, the principle acknowledges the need for respect for the civilian population, individual civilians not taking part in the hostilities, and civilian objects in the conduct of military operations by all parties to a conflict, whether conducting offensive or defensive operations.

Responsibility of Governments and Non-State parties to a conflict. The principle of distinction applies to military forces engaged in offensive or defensive operations and to governments in providing protection for their civilian population and civilian objects. Each government and its military forces, as well as non-state parties to a conflict, are obligated to separate their military or other fighting forces and military objectives from the civilian population and civilian objects, to take steps to protect the civilian population (or civilians within its control) through affirmative steps such as evacuation from the vicinity of military operations and/or air raid precautions, and to avoid actions that otherwise might place the civilian population at risk from lawful military operations by the opposing force.[24] Employment of voluntary or involuntary human shields to protect military objectives or individual military units or personnel is a fundamental violation of the principle of distinction.

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[22] Art. 20-23.

[23] The other resolution was UN General Assembly Resolution 2675 (XXV [1970]).

[24] See, for example, Art. 27, Annex to Hague IV; Art. 5, Hague IX; Art. 28, GC; and Art. 51(7), AP I.

In this respect, application of the principle of distinction is often considered in three ways:

1. Intentional attack of combatants *hors de combat*. Combatants who are out of the fight, such as those who have not yet fallen into enemy hands but who are unable to continue to fight due to wounds, sickness, shipwreck or parachuting from a disabled aircraft, are protected from intentional attack. Their injury or death as the result of intentional attack constitutes a grave breach when done with the knowledge that the targeted combatant is *hors de combat*.[25]

2. Unlawful destruction of civilian objects. Physical damage or destruction of property is an inevitable and often lawful aspect of combat. Military equipment (other than military medical equipment) is subject to lawful attack and destruction at all times during armed conflict. Civilian objects, including cultural property, are protected from seizure or intentional attack unless there is a military necessity for the seizure or destruction. Destruction of civilian objects that is expressly prohibited,[26] or that is not justified by military necessity, or that is wanton or excessive, is unnecessary destruction for which a commander may be held liable.[27]

3. (3) Unlawful injury to civilians not taking a direct part in hostilities. The civilian population and individual civilians not taking a direct part in hostilities are protected from intentional attack.[28] Where civilians are present on the battlefield or in proximity to legitimate military objectives, or are being used to shield legitimate targets from an attack that otherwise would be lawful, they are at risk of injury incidental to the lawful conduct of military operations. A law of armed conflict violation occurs where the civilian population is attacked intentionally; where collateral civilian casualties become excessive in relation to military necessity; and/or where a defender or attacker employs civilians as voluntary or involuntary human shields. Each constitutes a violation of the principle of distinction.[29]

Responsibility of private citizens. Only governments, not private citizens, may wage war. United States law contains dual emphases of this rule: first, in the constitutional powers

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[25] The Geneva Conventions list the most serious war crimes as "grave breaches" of the conventions. *See*, Art. 50, GC I; Art. 51, CG II; Art. 130, GC III; and Art. 147, GC IV.

[26] For example, Art. 25 of the Annex to Hague IV prohibits the "attack or bombardment...of towns, villages, dwellings, or buildings which are undefended." The same prohibition, with clarification of what constitutes an undefended object, is contained in Art. 59, AP I. The attack of a non-defended (undefended) village, town or city is a grave breach under Art. 85(3)(d), AP I.

[27] Art. 23(g) of the Annex to Hague IV prohibits the destruction or seizure of enemy property, "unless such destruction or seizure [is] ... imperatively demanded by the necessities of war."

[28] AP I, Art. 51 states that "The civilian population as such, as well as individual civilians, shall not be the object of attack." This protection is afforded "unless and for such time as they take a direct part in the hostilities." *Id.*

[29] Intentional attack of the civilian population or individual civilians is a grave breach under Art. 147, GC, and Art. 85(3), AP I, the latter occurring only if a commander launches an "indiscriminate attack affecting the civilian population or civilian objects *in the knowledge* that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects... "[emphasis added]; similarly, Art. 85(3)(c), AP I, makes it a grave breach to launch "an attack against works or installations containing dangerous forces *in the knowledge* that such an attack will cause excessive loss of life, injury to civilians or damage to civilian objects..."[emphasis added].

(Article II, section 2) provided to the President as Commander in Chief, and second, in legislation making it a criminal offense for private citizens to engage in unauthorized military operations.[30] A corollary of this first principle is that governments wage war through their armed forces. Private citizens do not have authority to wage war.[31]

Under this facet of the principle of distinction, private citizens are obligated to refrain from combatant activities. Other than as members of a *levee en masse* (i.e. mass conscription), private citizens who wage war are regarded as unlawful combatants. Deadly force may be directed at an unlawful combatant during such time as he or she directly participates in hostilities. If captured, an unlawful combatant is subject to prosecution for violation of the law of armed conflict.

Proportionality

Proportionality is a principle with several meanings in the law of armed conflict.[32] Its principal purpose is weighing the anticipated gains of military operations against reasonably foreseeable consequences to the civilian population as such.[33] It may be viewed as a fulcrum for balancing military necessity and unnecessary suffering. Proportionality may be applied by decision makers at the national, strategic, operational or tactical level.

The principle of proportionality is considered by a commander in determining whether, in engaging in offensive or defensive operations, his actions may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated by those actions.[34]

The military advantage anticipated is intended to refer to the advantage anticipated from those actions considered as a whole, and not only from isolated or particular parts thereof.[35]

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[30] 18 U.S. Code § 960 (Neutrality Act) makes it a criminal offense for a person within the United States to begin, provide for or prepare "a means for or … [furnishing] the money for, or … [taking] part in, any military or naval expedition or enterprise to be carried out … against the territory of any foreign … state … with whom the United States is at peace."

[31] HYDE, *International Law Chiefly as Interpreted and Applied by the United States* (Second Revised Edition, 1951), 1692; Lauterpacht, ed., *Oppenheim's International Law*, Vol. 2, *Disputes, War and Neutrality* (Seventh Edition, 1952), 203-205.

[32] In addition to the context for its discussion in this section, the principle of proportionality is considered when determining whether an act of self defense is proportionate to the threat or action to which the act of self defense responds, and assessing the legality of a new weapon, munition or projectile.

[33] While the law of war often is viewed as providing protection for *enemy* civilians, those protections also extend to the civilian population of an ally. See Art. 4 and 27, GC IV; and Art. 51, AP I. See, *e.g.*, the U.S. rules of engagement for military operations in the Republic of Viet Nam, contained in *Congressional Record*, Vol. 121, Part 14, 17551-17558 (1975). The same protections apply to the civilian population of a neutral if military operations are conducted in neutral territory; see, *e.g.*, U.S. rules of engagement for military operations in Laos and Cambodia during the Viet Nam War in *Congressional Record*, Vol. 121, Part IV, 17555 (1975).

[34] FM 27-10 para. 41, change 1.

[35] See Art. 51, para. 5(b), and 57, para. 2(a), AP I; and declarations upon ratification of Austria, Belgium, Canada, Italy, and Netherlands, and at the time of signature by the United Kingdom. Military commanders and others responsible for planning, deciding upon or executing operations necessarily have to reach decisions on the basis of their assessment of the information from all sources which are available to them at the relevant time.

Generally, "military advantage" is not restricted to tactical gains, but is linked to the full context of a war strategy.[36]

Proportionality does not establish a separate standard, but serves as a means for determining whether a nation, military commander, or others responsible for planning, deciding upon, or executing a military operation have acted with wanton disregard for the civilian population.[37] A military commander must not only consider the possible or reasonably foreseeable adverse affect on an enemy civilian population of an attack he is planning, but also the possible effect of elements such as billeting his forces in a populated area, the location of supply points, or the emplacement of defensive positions. Thus, the balancing required by the principle of proportionality is a responsibility shared by commanders engaged in offensive or defensive operations.

Proportionality does not prohibit destruction for which there is military necessity. In particular, it does not prohibit the bringing of overwhelming firepower to bear on an opposing military force in order to subdue or destroy it. It does not prohibit injury to civilians that is incidental to lawful military operations. Proportionality as used in this context constitutes acknowledgment of the unfortunately inevitable, but lawful, incidental or collateral damage or injury in war to civilians not taking a direct part in hostilities, or to civilian objects, particularly when they have been commingled with military forces or objectives.

Proportionality is of fundamental interest to air commanders and target planners. The glossary to the standing rules of engagement (SROE) discusses and defines proportionality.[38] Because of the crucial importance of this concept to Airmen, it bears repeating here:

> Commanders must determine if use of force is proportional based on all information reasonably available at the time. A commander's proportionality analysis will vary depending on whether he is contemplating the use of force in self-defense or to accomplish an assigned mission.
>
> Self-defense. That minimum amount of force necessary to decisively counter the hostile act or demonstrated hostile intent [of an adversary] and ensure the continued safety of U.S. forces or other protected persons and property.

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[36] DOD, *Final Report to the Congress: Conduct of the Persian Gulf War* (April 1992), 613.

[37] Thus, in its codification of the principle of *proportionality*, AP I makes it a grave breach to launch "an indiscriminate attack affecting the civilian population or civilian objects *in the knowledge* that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects ...." (Art. 85(3)(b) [emphasis added]), or to launch "an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects ...." (Art. 85(3)(c)). These provisions are similar to the Art. 147, GC, which makes it a grave breach to cause "extensive destruction ... of property ... not justified by military necessity and carried out unlawfully and wantonly."

[38] SROE at GL-17.

> Mission accomplishment. That amount of lawful force necessary to accomplish mission objectives. Attacks against lawful military targets are authorized even if incidental injury to civilians or other noncombatants or collateral damage to civilian objects is likely to occur, so long as such injury or damage is not clearly excessive in relation to the concrete and direct overall military advantage anticipated. The military advantage to be gained refers to the operation as a whole and not from isolated or particular parts.

Additional Protocol I, though not binding upon the United States, touches upon proportionality in article 57, Precautions in attack, by stating: "[R]efrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." Proportionality in attack is an inherently subjective determination that will be resolved on a case-by-case basis.

The final determination of whether a specific attack is proportional is the sole responsibility of the air commander. Depending on circumstances the responsible air commander may be any commander from the joint forces air component commander (JFACC) down to the individual flight or aircraft commander—regardless, the decision may not be delegated. Targeteers, weaponeers, air planners, and judge advocates should offer well-reasoned advice, but the decision always remains with the responsible commander. If the commander can clearly articulate in a reasonable manner what the military importance of the target is and why the anticipated civilian collateral injury and damage is outweighed by the military advantage to be gained, this will generally satisfy a "reasonable military commander" standard.

Chivalry

The principle of chivalry has long been a basis for the law of armed conflict. Some express prohibitions have their foundation in the principle of chivalry.

Chivalry demands a certain amount of fairness in offense and defense, and a degree of mutual respect and trust between opposing forces. It denounces and forbids dishonorable means, expedients, or conduct that would constitute a breach of trust.[39] Such dishonorable conduct is known as perfidy.

Perfidy consists of committing a hostile act under the cover of a legal protection. An example of perfidy is the use of a white flag, or flag of truce, to lure an enemy into a position to be attacked.[40] Perfidy also takes the form of pretending to be a civilian, incapacitated by wounds, or otherwise pretending to have a protected status.

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[39] U.S. War Department, *Rules of Land Warfare* (1914), para. 9; and U.S. War Department, Field Manual 27-10, *Rules of Land Warfare* (1940), para. 4c.

[40] Misuse of, and refusal to recognize, a flag of truce are prohibited by Art. 23(f) of the Annex to Hague IV, and Art. 37, para. a, AP I; see also Art. 114 and 117, Lieber Code.

Chivalry does not prohibit lawful acts, such as ruses and use of the element of surprise in military operations.

THE LAWS OF AERIAL WARFARE

The laws of aerial warfare apply the general principles of the law of armed conflict to distinctive aspects of the air domain. This part deals with military aircraft and aircrew, means and methods of aerial warfare, and measures short of attack.

Military Aircraft

Characterizing Military Aircraft. The earliest efforts to characterize aircraft as military were based upon the character of the commander of the craft.[41] If the commander was a uniformed member of the military services and had on board the aircraft a certificate of military character, the aircraft would be considered military. Later, in the wake of World War I, some effort was made to distinguish between civil and military aircraft on the basis of design. Difficulty in distinguishing aircraft on the basis of design led, for a while, to "use" as being the principal basis upon which aircraft were classified.[42]

In 1923, the Commission of Jurists at The Hague drafted the 1923 Hague Draft Rules. These rules were not adopted by any nation; nevertheless, the practices of air forces are often consistent with certain rules contained therein.

Military aircraft must bear an external mark indicating nationality and military character,[43] be under command of a person duly commissioned or enlisted in military service and be crewed by military personnel.[44] State practice has not established a requirement for an exclusively military crew.

The most conclusive factor in determining military character would be the presence or absence of national military markings and the physical appearance of the aircraft. Other U.S. government publications define military aircraft as "all aircraft operated by commissioned units of the armed forces of a nation bearing the military marking of that nation, commanded by a member of the armed forces, and manned by a crew subject to regular armed forces discipline, as well as unmanned aerial vehicles."[45] A similar definition of military aircraft appears in the United Kingdom Ministry of Defence Manual of the Law of Armed Conflict.[46] This definition closely follows the definition of "warship" contained in the United Nations Convention on the Law of the Sea (UNCLOS). Department of

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[41] NICOLAS MATEESCO MATTE, TREATISE ON AIR-AERONAUTICAL LAW 80, 95 (1981).
[42] *See* FRANK FEDELE, *Overflight by Military Aircraft in Time of Peace*, IX Air Force JAG Law Review 8, 13 (September/October 1967).
[43] This view was followed in the 1923 Hague Rules of Aerial Warfare, Part II, Art. 3.
[44] 1923 Hague Rules of Aerial Warfare, Part II, Art. 14. The requirement for an exclusively military crew cannot be regarded as reflecting international law given the allowance for considering the recognition of civilian members of military aircraft crews in Art. 4(A)(4), GC III.
[45] NWP 1-14M, para. 2.4.
[46] 2004 BRITISH MANUAL, sec. 12.10.

Defense Directive 4540.1 defines "military aircraft" to include "manned and unmanned aircraft, remotely piloted vehicles…."[47]

National and Military Markings on Military Aircraft. The rules governing the marking of a military aircraft have continued without variation since 1910. The 1910 Paris Conference produced several notable provisions, including one which requires every military aircraft to bear the sovereign emblem of its state as its distinctive national mark.

The Paris Convention of 1919, a forerunner to the Chicago Convention, similarly required all aircraft engaged in international navigation, including military aircraft, to bear nationality and registration marks.[48] The 1919 Paris Convention expressly limited registration of an aircraft to a single state,[49] and further provided that the aircraft must belong wholly to nationals of the state of registration.[50] State practice continues to support this concept of aircraft continuing to bear the national marks of one state; however, some aircraft are owned and operated for and on behalf of inter-governmental organizations such as NATO and the United Nations; such aircraft will display the logo of that organization together with the flag of the state of registration.

Just as there is a requirement that combatants wear a distinctive sign or emblem, military aircraft must be marked on the exterior with the appropriate distinctive signs of their nationality and military character. It may, however, be possible to meet the requirement to distinguish military aircraft from civilian objects without markings, such as where a particular kind of aircraft is only operated by the military of a particular state. Nevertheless, distinctive markings assist in distinguishing friend from foe and serve to reduce the risk of misidentification of neutral or civil aircraft. Accordingly, military aircraft may not bear markings of the enemy or markings of neutral aircraft while engaging in combat.

Aircraft may be used for military purposes without bearing military markings. For example, a civil aircraft might be chartered to carry troops or supplies. Such an aircraft may be a valid military target for the purposes of the law of armed conflict. There is no requirement that such an aircraft be marked as a military aircraft unless used to take a direct part in hostilities.[51]

Military aircraft, like warships, are entitled to sovereign immunity.[52]

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[47] U.S. DEP'T OF DEFENSE, DIR. 4540.1, USE OF AIRSPACE BY U.S. MILITARY AIRCRAFT AND FIRINGS OVER THE HIGH SEAS, para. 3 (Jan. 13, 1981).

[48] Convention relating to the Regulation of Aerial Navigation, October 13, 1919, 11 L.N.T.S. 173, Art. 10 (no longer in force) (commonly known as the 1919 Paris Convention).

[49] 1919 Paris Convention, Art. 8.

[50] 1919 Paris Convention, Art. 7.

[51] *See* 1923 Hague Rules of Aerial Warfare, Part II, Art. 13.

[52] Aircraft, like ships, have the nationality of their country of registry although military aircraft of the United States are not 'registered'. All civil aircraft registered in states party to the Chicago Convention are required to be marked with symbols and designations of their respective nationalities; *see* Convention on International Civil Aviation, Dec. 7, 1944, Art. 17 & 20, 61 Stat. 1180, 1185, 15 U.N.T.S. 295, 308. The 1919 Paris Convention required

State Aircraft and Civil Aircraft. The principal international agreement on aviation, the Convention on International Civil Aviation (Chicago Convention), establishes two separate classes of aircraft: civil and state.[53]

State aircraft are defined as "aircraft used in military, customs and police services."[54] State aircraft used in customs or police services or other non-military roles are distinct from military aircraft. Accordingly, their markings should differ from those applied to military aircraft.

A civil aircraft may be attacked if it becomes a military objective.

Military aircraft engaged exclusively in specified medical functions are subject to a separate legal regime under the 1949 Geneva Conventions.[55]

Chicago Convention Inapplicable to Military Aircraft. International law requires that state aircraft receive the consent of another sovereign prior to entering into the receiving sovereign's airspace or landing on its territory. Furthermore, parties under the Chicago Convention must regulate their state aircraft in such a manner so as to have "due regard for the safety of navigation of civil aircraft."[56] The remainder of the provisions of the Chicago Convention, as well as the standards, practices and procedures that the International Civil Aviation Organization establish thereunder, do not apply to military aircraft. Specifically, Article 3 of the Chicago Convention provides:

1. This Convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft.

2. Aircraft used in military, customs and police services shall be deemed to be state aircraft.

3. No state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof.

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all aircraft, state and civil, to possess the nationality of the state in which they were registered. 1919 Paris Convention, Art. 6. *See* MATTE at 112. State aircraft are also marked to indicate their nationality. The attribution of nationality to aircraft reflects the legal relationships between the state whose "flag" the aircraft carries and that craft. Thus, the flag state is responsible for the international good conduct of the aircraft when it operates beyond the flag state's national boundaries. The flag state generally exercises jurisdiction over its aircraft and asserts on behalf of the aircraft the privileges and immunities to which it is entitled when in international airspace or in the airspace of other states. The flag state also has jurisdiction over the personnel who operate the craft. *See* FEDELE at 13-14.

[53] Chicago Convention, Art. 3.

[54] Chicago Convention, Art. 3(b).

[55] *See* GC I Art. 36; GC II Art. 39-40; GC III Art. 22. *See also* AP I Art. 24-31.

[56] Chicago Convention, Art. 3(d).

4. The contracting States undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft.[57]

The U.S. Government issued a detailed statement of its position on the impact of Article 3 of the Chicago Convention to military and other state aircraft.[58] The essence of the statement is that U.S. state aircraft will fly with due regard for the safety of civil aircraft.

Military Aircrew

Combatant Status. Military aircrew are combatants and entitled to participate in hostilities. Further, while civilians are not entitled to participate in hostilities, those accompanying the force on military aircraft are entitled to prisoner of war status.[59] Civilians have no belligerent rights. Should they participate directly in hostilities, they are not protected from prosecution under the domestic law of the enemy if captured. Military aircrew should conduct any role or mission that requires direct or active participation in hostilities in international armed conflict. Both military aircrew and civilian crew on military aircraft are entitled to prisoner of war status on capture by the enemy.[60]

Uniform. Military aircrew on the ground are required to distinguish themselves from the civilian population in the same manner, and in the same circumstances, as other combatants.[61] The wearing of flying clothing distinctive to and bearing identifying marks or insignia of the armed forces satisfies this requirement.

Downed Aircrew. When an aircraft is disabled and the occupants escape by parachute, they shall not be attacked on their descent.[62] This protection is not afforded to paratroopers descending from an aircraft; it is recognized that a paratrooper can form an intent to surrender while in descent, but for practical purposes it is difficult to conceive how that intent would be communicated effectively to the enemy on the ground. While in descent, downed aircrew are *hors de combat.* A person descending from a disabled aircraft who takes part in hostilities (*e.g.*, fires a weapon at the enemy) or attempts to escape loses protection and may be attacked.

Downed aircrew on the ground are subject to immediate capture and retain combatant status. On reaching the ground in territory controlled by the adversary they should be given the opportunity to surrender before being made the object of attack. They may be attacked if they take part in hostilities, resist capture, undertake evasion or escape, or are

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[57] Chicago Convention, Art. 3.
[58] Department of State Airgram CA-8085, 13 February 1964, *quoting* U.S. Inter-Agency Group on International Aviation (IGIA) Doc. 88/1/1C, MS, Department of State, file POL 31 U.S., *reprinted in* 9 Whiteman DIGEST at 430-431.
[59] GC III Art. 4(A)(4). Such a definition would not extend to refugees being evacuated on military aircraft, who would normally retain their protected civilian status.
[60] GC III Art. 4A(1)-(4).
[61] 1923 Hague Rules of Aerial Warfare, Part II, Art. 15. *See also* AP I Art. 44(3).
[62] FM 27-10 at para. 30. *See also* 1923 Hague Rules of Aerial Warfare, Part II, Art. 20.

behind their own lines. Their prisoner of war status and the protection and the protections thereby afforded begins with their surrender or capture.[63]

There is no specific law that prohibits the use of civilian clothing or enemy uniform by downed aircrew when seeking to evade capture in enemy territory. However, if downed aircrew engage in hostilities while dressed in civilian clothing they may violate the prohibition against perfidy. If they collect intelligence information while out of uniform, or give the appearance of having done so, they risk being treated as a spy under the domestic law of the enemy if captured. The lack of a military uniform or other distinctive symbol establishing combatant status *per se* does not deprive downed aircrew of their right to prisoner of war status on capture, but it will increase the possibility that such status may be denied.

Military aircrew forced to land in neutral territory due to navigational failure, combat damage, mechanical failure or other emergencies are subject to internment by the neutral state for the duration of the conflict.[64]

Means and methods of warfare

Attacks on Military Objectives on the Ground. The general principles of the law of armed conflict apply to air attack upon military objectives on the ground; however, there are few aspects of the law that are specific to this form of attack. Most discussion in this area revolves around the application of general principles to specific technologies. The practical application of general law of armed conflict principles to air attack on military objectives on the ground merits some further discussion because of the unique capabilities of air weapons.

The reach and ubiquity of air power allows it to strike at military objectives deep within the territory of an adversary, perhaps located in or near civilian population centers. Technological advances have greatly increased the accuracy of certain air delivered weapons, decreasing the risk of collateral damage when compared with the early years of air power. The same advances have to some extent created false impressions of the infallibility of air power and unrealistic expectations of the ability to limit collateral damage. Air attacks on military objectives on the ground are held to the same legal standard as other means and methods of warfare, not a higher standard.

The aerial bombardment of towns, villages, dwellings or buildings which are undefended is prohibited.[65] An undefended city in this sense means only those in the immediate zone of ground operations which can be seized and occupied by advancing ground forces without

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[63] "The present Convention shall apply … from the time they fall into the power of the enemy and until their final release and repatriation." GC III Art. 5. *See* LESLIE C. GREEN, *Aerial Considerations in the Law of Armed Conflict, in* ESSAYS ON THE MODERN LAW OF WAR 577, 579 (1999).

[64] Hague V Art. 11.

[65] Hague IV Reg. Art. 25 provides that "[t]he attack or bombardment, by whatever means, of towns, villages, dwellings or buildings which are undefended is prohibited". The negotiating record shows that the words 'by whatever means' were inserted specifically to regulate bombing attacks by air.

the use of force. The prohibition does not prevent otherwise lawful attacks upon military objectives present within civilian population centers. The prohibition merely reflects the general protection afforded to civilians and civilian objects. The prohibition must be read in the context of the central principles of military necessity, unnecessary suffering, distinction, proportionality and chivalry discussed earlier.

Air weapons used to attack military objectives on the ground come in many varieties, with varying degrees of accuracy. The law of armed conflict does not require the use of specific weapon types based upon relative accuracy. Neither does it require the use of precision guided munitions; non-precision guided munitions may be lawfully employed depending upon the circumstances of a specific attack. The selection of weapons for a particular attack will be governed by the general principles of the law of armed conflict.

Air attacks upon military objectives on the ground may fall into two broad categories: pre-planned attacks upon previously identified targets and immediate attacks upon emerging targets. In pre-planned attacks, the majority of the effort to ensure a successful attack in accordance with the law of armed conflict is carried out in advance of the attack. The identification of a target as a military objective and the assessment of relative military advantage against the extent of any collateral damage may be carried out collectively by a number of personnel during the planning process. The aircrew or operator actually carrying out the attack may be unaware of the relevant factors that have been considered and the assessment that has occurred. In the absence of clear information to the contrary, aircrew are entitled to rely upon the information provided to them identifying the target as a military objective and assessing the relative military advantage and collateral damage risk.

For attacks upon emerging targets, the obligation to identify the target and assess military advantage and collateral damage risk may fall more heavily upon the aircrew carrying out the attack or on the parties directing or controlling that attack. It is important from the perspective of the law of armed conflict to ensure that the target identification and assessment of relative military advantage against the extent of any collateral damage is properly carried out by the aircrew, by those directing the particular attack, or collectively between them.

Surrender by Enemy Ground Forces. Identifying when an enemy combatant has surrendered or is otherwise *hors de combat* poses a particular challenge for air platforms. It may be difficult for aircrew or aircraft operators to determine whether an enemy combatant is dead, injured or merely taking cover. Injury or death as the result of intentional attack constitutes a grave breach when done with the knowledge that the targeted person is *hors de combat*.[66] It would not be unlawful if the attacker merely suspected or was aware of a probability that the targeted person was *hors de combat.* There is no internationally recognized means to

[66] GC I Art. 50; GC II Art. 51.

indicate an intention to surrender to an airborne attacker and there are practical difficulties involved in accepting the surrender.[67]

Attacks on Air Targets. While the general principles of the law of armed conflict apply to attack upon airborne targets, few aspects of the law are specific to air to air combat.

Attack upon air targets in modern air warfare may be conducted beyond the visual range of the attacker. Identification of the target as a military objective may occur using electronic and other means. For example, the airfield that was the point of origin of an airborne radar contact combined with its course and speed may provide enough information to be sufficiently certain that it is an enemy military aircraft. The criteria used to determine that an airborne target is in fact a military objective may be specified in rules of engagement. These criteria may be set by commanders to specify the degree of confidence that must exist before attacking an airborne target. The law of armed conflict does not specify the degree of confidence or probability that must exist before determining that an airborne aircraft is a military objective.

Other measures that may be taken to decrease the risk of attacking an aircraft that is not being used for military purposes by the adversary include the declaration of no fly zones or air defense identification zones. By publicly declaring zones that will be hazardous for civil aircraft to enter, the belligerents provide warning to civilian aircrew. Aircraft that fail to heed such warnings are at risk of attack.

Surrender by Enemy Aircraft. Surrender by an airborne enemy aircraft is technically possible but usually impracticable. It is difficult for the attacking pilot to know when the opponent has surrendered. Likewise, it is difficult for the attacking pilot to enforce the surrender. If surrender is offered in good faith in circumstances where it can be enforced, then it should be respected and accepted. Rocking the aircraft's wings, lowering the landing gear and other signals (such as flashing of navigational lights) are sometimes cited as indications of a desire to surrender, but they cannot be regarded as conclusive evidence of surrender.[68] Moreover, when aerial combat is conducted beyond visual range, such gestures are futile. Consequently, only an appropriate radio communication - duly transmitted to the enemy (preferably on an International Civil Aviation Organization (ICAO) distress frequency) - may be deemed an effective message of surrender. The capture of enemy aircrew and aircraft may provide a greater military advantage than the destruction of the aircraft.

Attacks Upon Civil Aircraft. Civil aircraft[69] are usually civilian objects and subject to general protection under the law of armed conflict. A civil aircraft may, however, become a

[67] During operation IRAQI FREEDOM, the United States air-dropped leaflets advising Iraqi Army units how to indicate surrender, such as parking vehicles in a square formation with weapons pointing inwards and encamping the soldiers openly at a safe distance from the vehicles.

[68] Instances are cited of Royal Air Force pilots in the Battle of Britain inviting surrender by drawing alongside Luftwaffe pilots and pointing to the ground. This simple message appeared to have the desired effect on at least two occasions. See J. M. SPAIGHT, *The Battle of Britain 1940*, 77.

[69] The term civil aircraft is used here in the context of the Chicago Convention.

military objective and subject to attack by the adversary, depending upon its nature, location, purpose or use.

The Chicago Convention obliges signatories to refrain from attacking civil aircraft in flight in peacetime conditions.[70] There is, however, no special protection afforded in law to civilian airliners. The prohibition against attacking a civil aircraft does not restrict attacks upon military objectives in accordance with the law of armed conflict or prohibit acts necessary in self defense. Notwithstanding that an aircraft has become a military objective, the civilian crew or passengers of a civil aircraft may remain subject to protection provided that they are not directly participating in hostilities. This may be relevant in weighing military advantage against the collateral damage anticipated.

Measures Short of Attack: Interception, Diversion, Search and Capture

There is little treaty or customary international law in relation to the interception, search, diversion or capture of aircraft. However, a body of law exists in relation to these practices at sea. Some legal references purport to apply identical principles *mutatis mutandis* (i.e. with the necessary changes having been made) to the air.[71] It is difficult to identify a body of state practice to warrant a conclusion that the maritime law practices of interception, visit, search, diversion and capture apply in full to the air environment as a matter of law.

The full application of such principles to the air environment is fraught with practical difficulties. The regime of visit, search and capture is tenable at sea, particularly given the possibility of disabling a ship or conducting a boarding. In the air environment, any use of force against an aircraft to enforce compliance with instructions or warnings is likely to destroy the aircraft and kill those on board. There are some treaty provisions that place obligations on civil aircraft, without restricting the manner in which belligerents may conduct air operations.

Interception. In the course of an armed conflict, a party may opt to merely intercept an aircraft rather than attack it. An interception could be effected in a variety of ways, including closing to visual range or to a distance where the target aircraft is within the range of weapons systems. The purpose of interception may be to warn off a civil aircraft from entering an area of active operations, to facilitate identification of an unidentified aircraft, to force an aircraft to divert and to land at a specific airfield, or to get into a position in order to attack the aircraft. Interception is a method that may be used to assist in the obligation to take reasonable measures to distinguish between military objectives and

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[70] Under civil aviation law, civil aircraft in flight are subject to protection. Art. *3bis* of the Chicago Convention provides as follows:
The contracting states recognize that every state must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of states set forth in the Charter of the United Nations. Chicago Convention, Art. 3*bis*.

[71] The San Remo Manual purports to state international law but in fact transposes many maritime practices to the air environment in the absence of a body of state practice. The military legal manuals of some nations rely heavily upon the San Remo Manual as authority for the applying law of the sea practices to aircraft. *See, e.g.*, 2004 BRITISH MANUAL para. 12.74 – 12.103.

civilian objects and the obligation to take reasonable measures to protect the civilian population. A civil aircraft failing to comply with military instructions may become a military objective, and subject to attack.

Under international law, military aircraft may navigate freely in both their own national airspace and international airspace.[72] Subject to limited restriction,[73] military aircraft are free to intercept aircraft in international airspace in both armed conflict and peacetime. Though military aircraft are entitled to exercise freedom of navigation in international airspace, as a matter of practice the interception of an aircraft may be viewed as a hostile act or at least as a threat to air safety, depending upon the manner and location in which it is conducted.

In relation to civil aircraft, the international civil aviation legal regime sets out procedures that are binding upon civil pilots in the event of interception.[74] These procedures are not binding upon state aircraft as to the manner in which civil aircraft may be intercepted.[75] However, they do provide procedures that must be known and understood by pilots of civil aircraft, thereby reducing the risk of accident or misunderstanding.

As a general rule, military aircraft may not intercept an aircraft if doing so would require entry into the national airspace of another state.[76]

Diversion and Search of Civil Aircraft. The full scheme of the right of visit and search that may be exercised by military vessels and aircraft in relation to foreign ships under the law of the sea does not expressly apply to civil aircraft.[77] However, during armed conflict military aircraft may divert civil aircraft for the purpose of search or inspection.[78] This

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[72] The restrictions on air navigation for civil aircraft in the Chicago Convention do not apply to state aircraft. *See* Chicago Convention, Art. 3(a). Hence, military aircraft and other state aircraft may navigate freely within international airspace. In the national airspace of the state of the intercepting military aircraft, the freedom of navigation of military aircraft may be affected by national legal regimes.

[73] Under the Chicago Convention, the contracting states undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft. Chicago Convention, Art. 3(d).

[74] *See* Int'l Civil Aviation Org., Manual Concerning Interception of Civil Aircraft, ICAO Doc. 9433-AN/926 (2d ed. 1990) (issued pursuant to Chicago Convention, Art. 12.)

[75] The Chicago Convention and its subordinate legislation regime do not apply to state aircraft.

[76] Under Art. 3(c) of the Chicago Convention, a state aircraft may not enter the airspace of another state without consent.

[77] See, for example, UNCLOS, Art. 110. While the right to visit foreign vessels applies *mutatis mutandis* to military aircraft, UNCLOS does not contain any equivalent right in relation to the visit of civil aircraft. Section V of the San Remo Manual sets out quite detailed rules for the interception, visit, search, diversion and capture of civil aircraft which are clearly based upon law of the sea principles. While some sections of the San Remo Manual accurately state international law, these provisions in relation to aircraft far exceed the development of law in the air environment.

[78] 1923 Hague Draft, Part II, Art. 49 provides that private aircraft are liable to visit and search and to capture by belligerent military aircraft and Art 50 provides that belligerent military aircraft have the right to order public non-military and private aircraft to alight in or proceed for visit and search to a suitable locality reasonably accessible. The Chicago Convention requires the pilots of civil aircraft to comply with the instructions given by states to divert and land at a designated airfield where the state reasonably concludes that the aircraft is being used for a purpose inconsistent with the aims of the convention. Chicago Convention, Art. 3*bis*. While the detailed nature of the San Remo Manual provisions exceeds the development of international law, Part V of the San Remo Manual states that civil aircraft are to comply with such orders given by military aircraft.

power to order civil aircraft to divert for landing and search is merely a reflection of the law of war principle that states may take all lawful measures justified by military necessity. There is no distinction in this regard between civil aircraft of adversary states and civil aircraft of neutral states.

Interference with aircraft of neutral states outside the scope of military necessity is not authorized by the law of armed conflict.

A civil aircraft that fails to comply with directions given by a belligerent state is at risk of attack. Failure to comply with direction does not render a civil aircraft as a military objective. However, it may provide evidence that the civil aircraft is in fact being used for a military or hostile purpose.

Capture of Civil Aircraft and Goods. Civil aircraft from the state of the adversary may be seized and put to use by a belligerent.[79] Neutral civil aircraft engaged in activity in violation of their neutral status are also liable to capture.

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CHAPTER 3

WAR CRIMES AND AEROSPACE OPERATIONS

INTRODUCTION

This chapter provides an overview of the history of war crimes and an analysis of the current U.S. position in relation to the same. At the outset, it is important to note that current U.S. policy is that the United States will comply with the law of armed conflict during any military operation, whether that operation amounts to an armed conflict or not. This is a self-imposed policy. It does not follow that a breach of this policy will constitute a war crime.

This chapter will also discuss recent statutory developments regarding war crimes. However, it is vital that practitioners in this arena keep up-to-date with developments in U.S. treaty obligations and international law in general prior to providing advice to a commander on the subject.

HISTORICAL BACKGROUND

The modern principle of individual responsibility for violations of the law of armed conflict found expression in the U.S. in the Lieber Code. Following the conclusion of Word War II, The Charter of the International Military Tribunal, annexed to the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, established the Nuremberg Tribunal to try three separate categories of crime: war crimes, crimes against humanity and crimes against peace.

Prosecution of World War II War Criminals

Following the discovery of the extent of Axis atrocities committed during World War II, the Allied nations undertook a program of punishment against those responsible. This included the joint trial of 24 senior German leaders in Nuremberg, as well as the joint trial of 28 senior Japanese leaders in Tokyo before specially created international military tribunals. In addition, 12 subsequent trials of other German leaders and organizations in Nuremberg were conducted under international authority and before panels of civilian judges, and thousands of trials prosecuted in various national courts, many of these by British military courts and U.S. military commissions.[80] Following the war, the 1949 Geneva Conventions made significant progress toward codification of specific international rules pertaining to the trial and punishment of those who commit war crimes.

[80] DA Pam 27-161-2, p. 224-35.

Post 1949 Geneva Conventions

After World War II and the adoption of the 1949 Geneva Conventions, many armed conflicts have taken the form of insurgencies, civil wars and internal armed conflict. Many nations considered internal armed conflict to be outside the ambit of war crimes. Whether the conflict is internal or international, there is arguably little distinction in terms of the resulting suffering from the victims' point of view. However, states may be reluctant to adhere to the law of armed conflict during internal conflict, primarily on the ground that combatant immunity may be available to insurgents.

Ad Hoc Tribunals

International Criminal Tribunal For the Former Yugoslavia (ICTY). On 22 February 1993, the UN Security Council established the first international war crimes tribunal since the Nuremberg and Far East trials following World War II.[81] The ICTY was created to assist in restoring peace and stability in the Balkan region through the administration of justice. Pursuant to the statute of the ICTY, the tribunal was granted the authority to try persons for serious violations of international humanitarian law committed in the former Yugoslavia since 1991, including grave breaches of the Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity. The Statute of the ICTY also established individual command responsibility under a theory of superior or command responsibility.

International Criminal Tribunal for Rwanda (ICTR). On 8 November 1994, the UN Security Council created the ICTR.[82] The primary objectives under the statute of the ICTR were to restore regional peace and stability through the administration of justice and to eliminate the apparent culture of impunity that previously existed in Rwandan culture by seeking to hold individuals responsible for their part in the genocide. Violations are defined as genocide, crimes against humanity, and violations of Common Article 3 to the 1949 Geneva Conventions.

Given the International Criminal Court initiative discussed below, the ICTY and ICTR, both established pursuant to Chapter VII of the UN Charter, may be the last *ad hoc* international tribunals dealing with war crimes.

The International Criminal Court (ICC)

The UN General Assembly convened and held a diplomatic conference in Rome, Italy, from 15 June to 17 July 1998. The conference adopted an international convention, the Rome Statute, which established the ICC, the first permanent international tribunal with jurisdiction over individuals accused of war crimes. The United States has signed but not ratified the Rome Statute.

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[81] UN Security Council Resolution 808.
[82] UN Security Council Resolution 955 (the Statute of the ICTR).

Through the ICC, the international community can hold *individuals* responsible for their actions under the authority of international law.

Initially, international law governed relations exclusively between sovereign nation states. Its sphere of influence did not reach or regulate the actions of individuals. The ICC does just that without regard to whether the individuals are acting in their private or official capacity. For instance, Article 28 specifically states that military commanders and other superiors will be held criminally liable for simple negligence in failing to exercise control properly over their forces.

The ICC's jurisdiction under the statute of Rome extends to the crime of genocide, crimes against humanity, war crimes, and, once the parties agree upon a definition of the term aggression, the crime of aggression.[83] The ICC has jurisdiction over all individuals who are nationals of state parties or who allegedly commit crimes within the territory of a state party or on a vessel or aircraft that is registered to a state party.[84] The ICC may also have jurisdiction over persons who allegedly commit crimes anywhere else on an *ad hoc* basis.[85]

United States Opposition to the ICC

In spite of its early support for a permanent international court, the United States did not ratify the Rome Statute. It had a vital need to ensure that its service members were protected from politically-motivated prosecution.

The Relevance of the ICC to the United States

The ICC may assert its jurisdiction over all individuals for every incident that occurs within the territory of a state party or any other country that agrees to the ICC's *ad hoc* jurisdiction. Member states are obligated to assist the ICC in its investigation and prosecution of crimes within the ICC's jurisdiction, including detaining individuals sought by the ICC.[86] Non-party states may also be requested to do so.

DEFINITION AND CLASSIFICATION OF WAR CRIMES

A war crime is an act or omission that contravenes an obligation under international law relating to the conduct of armed conflict. The law of armed conflict encompasses all international law applicable to the conduct of hostilities that is binding on a country or its individual citizens, including treaties and international agreements to which that country is a party, as well as customary international law.[87]

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[83] Article 5.
[84] Article 12 (2).
[85] Article 12 (3) (a non-state party can accept the ICC's jurisdiction solely for the alleged crimes in question).
[86] See Article 86 (state party's general obligations to cooperate), Article 87 (ICC's requests for cooperation by a state party), Article 89 (surrender of persons to the ICC by member states), Article 90 (competing requests between the ICC and other nations), and Article 93 (other forms of cooperation by state parties).
[87] DODD 2311.01E para. 3.1.

However, not every violation of the law of armed conflict is necessarily punishable as a war crime. Historically, war crimes have included only the most serious violations of the law of armed conflict, such as grave breaches of the Geneva Conventions,[88] as well as other serious crimes that are not grave breaches but still are treated as war crimes because of the severity of the conduct involved and the injury or damage inflicted.

The Nuremberg Categories

The Charter of the International Military Tribunal, annexed to the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis,[89] defined the following crimes as falling within the International Military Tribunal's jurisdiction:

1. Crimes Against Peace: namely, planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

2. War Crimes: namely, violations of the laws or customs of war. Such violations include, but not be limited to, murder, ill-treatment, or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

3. Crimes against Humanity. A collective category of major inhumane acts committed against any (internal or alien) civilian population before or during the war. [90]

Grave Breaches and Simple Breaches of the Law of War

The codification in the 1949 Geneva Conventions of extremely serious crimes gave rise to a distinction between those crimes (grave breaches) and other acts violating other customs or rules of war. To constitute a grave breach, there must first be an international armed conflict *i.e.* Common Article 2 of the 1949 Geneva Conventions must apply. Further, the victim must be a protected person in one of the conventions.

Grave Breaches

These are crimes of such seriousness as to invoke universal jurisdiction.[91] Universal jurisdiction entitles any state to exercise jurisdiction over any perpetrator, regardless of his

[88] "Grave breaches" are a set of severe crimes under international law that are specifically identified in the Geneva Conventions. *See* GCI Article 50; GCII Article 51; GCIII Article 130; GCIV Article 147.
[89] Her Majesty's Stationery Office, Cmd 6668 at Art 6(b) (United Kingdom reference).
[90] See Charter of the International Military Tribunal, Article 6, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis. See also generally Oppenheim, p. 257.
[91] See GCI, Article 49; GCII, Article 50; GCIII, Article 129; and GCIV, Article 146.

nationality or the place where the offence was committed. Examples include: willful killing; torture or inhumane treatment (including biological experiments); willfully causing great suffering or serious injury to body or health; taking of hostages; extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war (POW) or other protected person of war to serve in the armed forces of a hostile power; and willfully depriving a POW or other protected person of the rights to a fair and regular trial.[92]

Simple Breaches

Violations of the law of armed conflict, other than those listed as grave breaches, remain war crimes and are punishable as such. A distinction can be drawn between crimes established by treaty and crimes which breach customary international law; treaties only bind parties thereto, while customary international law has universal jurisdiction; no nation can opt out of its reach. Examples of simple breaches include: making use of forbidden arms or ammunition; treacherous request for quarter; maltreatment of dead bodies; firing on localities which are undefended and without military significance; perfidy; poisoning of wells or streams; pillage or purposeless destruction; compelling prisoners of war to perform prohibited labor; killing without trial spies or other persons who have committed hostile acts; compelling civilians to perform prohibited labor; violation of surrender terms.[93]

Common Article 3 to the four 1949 Geneva Conventions

Common Article 3 to the four 1949 Geneva Conventions contains minimum standards applicable to the parties to a conflict that does not have an international character and which is occurring in the territory of one of the High Contracting parties. Nothing in Common Article 3 discusses individual criminal liability. The ICTY has held that prosecutions for violations of Common Article 3 can be brought in internal as well as international armed conflicts. Although not applicable to the United States, the Rome Statute establishing the ICC provides for the prosecution of violations of Common Article 3 in non-international armed conflicts. Within the U.S., prosecutions for violations of Common Article 3 are permitted in the U.S. federal court system under 18 U.S.C. 2441.

Genocide

In 1948, the United Nations (UN) General Assembly defined this crime to consist of killing and other acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, "whether committed in time of peace or in time of war."[94]

Other Treaties

Violations of treaties to which the United States is a party also create bases for criminal liability.

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[92] See, GCI, Article 50; GCII, Article 51; GCIII, Article 130 and GCIV, Article 147.
[93] See FM 27-10, para. 504.
[94] *See* 1948 Genocide Convention (codified in 18 U.S.C. 1091).

U.S. TREATY OBLIGATIONS

The United States must comply with the following treaty obligations with respect to war crimes:

1. To enact laws to ensure effective punishment of those committing or ordering to be committed grave breaches of the Geneva Conventions;[95]

2. To search for and either prosecute or extradite those who have committed grave breaches of the Geneva Conventions;[96]

3. To take measures necessary for the suppression of violations of the law of war that do not amount to grave breaches[97] (*i.e.*, simple breaches);

4. To provide accused persons the safeguards of a proper trial and defense;[98] and

5. To pay compensation, when appropriate, for the grave breaches committed by members of its armed forces.[99]

U.S. law and policy operate in conjunction to meet these obligations. For example, Congress has provided general courts-martial with requisite authority to both try and punish individuals committing war crimes.[100] In addition, the 1996 War Crimes Act established federal jurisdiction over, among others, those who commit a grave breach of the Geneva Conventions against a U.S. national or member of the armed services.[101]

U.S. DEPARTMENT OF DEFENSE POLICY

It is the policy of the U.S. Department of Defense (DOD) to ensure that the law of armed conflict obligations of the United States are observed and enforced by all DOD components.[102] Pursuant to this policy:

1. Members of the DOD are to comply with the law of armed conflict during all armed conflicts, however such conflicts are characterized, and in all other military operations;[103]

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[95] *See* GCI Article 49; GCII Article 50; GCIII Article 129; GCIV Article 146.
[96] *See* GCI Article 49; GCII Article 50; GCIII Article 129; GCIV Article 146.
[97] *See* GCI Article 49; GCII Article 50; GCIII Article 129; GCIV Article 146.
[98] *See* GCI Article49; GCII Article 50; GCIII Article 129; GCIV Article 146.
[99] Hague IV Article 3 (establishing that a belligerent party which violates the convention shall, if the case demands, be liable to pay compensation). *See also* GCI Article 51; GCII Article 52; GCIII Article 131; GCIV Article 148 (each identical article prohibiting a High Contracting Party from absolving itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect to grave breaches).
[100] UCMJ Article 18 (2008), 10 U.S.C. § 818 (2006).
[101] 18 U.S.C. § 2441 (2006).
[102] *See, generally,* DODD 2311.01E; JCS INSTR. 5810.01C.
[103] DODD 2311.01E para. 4.1.

2. The law of armed conflict obligations of the United States are observed and enforced by the DOD and DOD contractors assigned to or accompanying deployed U.S. forces;[104]

3. An effective program to prevent violations of the law of armed conflict is implemented by the DOD Components;[105]

4. All reportable incidents committed by or against U.S. personnel, enemy persons, or any other individual are reported promptly, investigated thoroughly, and, where appropriate, remedied by corrective action;[106] and

5. All reportable incidents are reported through command channels for ultimate transmission to appropriate U.S. agencies, allied governments, or other appropriate authorities.[107] The reporting and investigating requirements under this policy ensure that the United States can fulfill its treaty commitments to enforce the law of armed conflict.[108]

Reporting Violations

All military and U.S. civilian employees, contractor personnel, and subcontractors[109] assigned to or accompanying a DOD component shall report reportable incidents[110] through their chain of command. Such reports may be made through other channels, such as the military police, a judge advocate, or an inspector general. Reports made to officials other than those specified in this paragraph shall, nonetheless, be accepted and immediately forwarded through the recipient's chain of command.[111]

The commander of any unit that obtains information about a reportable incident shall immediately report the incident through the applicable operational command and military

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[104] DODD 2311.01E. para. 4.2.
[105] DODD 2311.01E para. 4.3.
[106] DODD para. 4.4. Consistent with this policy, broad reporting requirements and responsibilities with respect to reportable incidents are imposed on Secretaries of Military Departments and commanders of combatant commands.
[107] DODD 2311.01E para. 4.5.
[108] For example, under the four Geneva Conventions of 1949, the United States is obligated to search for persons alleged to have committed, or ordered to have committed, grave breaches of the Geneva Conventions, and to prosecute such persons before its own courts or to hand over such persons to other States party to the Geneva Conventions for trial. GCI Article 49, GCII Article 50, GCIII Article 129, and GCIV Article 146. The United States is also obligated to take measures to suppress acts contrary to the Geneva Conventions that fall short of being grave breaches.
[109] DODD 2311.01E para. 6.3. Contracts shall require contractor employees to report reportable incidents to the commander of the unit they are accompanying or the installation to which they are assigned, or to the combatant commander. *Id*.
[110] A "reportable incident" is defined as "a possible, suspected, or alleged violation of the law of war for which there is credible information, or conduct during military operations that would constitute a violation of the law of war if it occurred during an armed conflict." DODD 2311.01E para. 3.2. DODD 2311.01E and JCS INSTR. 5810.01C contain detailed guidance on the reporting responsibilities of U.S. military and civilian personnel. All reportable incidents are reported through command channels for ultimate transmission to appropriate U.S. agencies, allied governments, or other appropriate authorities.
[111] DODD 2311.01E para. 6.3.

department. Reporting requirements through operational and Service chains of command are concurrent. The initial report shall be made through the most expeditious means available. Higher authorities receiving an initial report are required by DOD policy to submit a report of any reportable incident, by the most expeditious means available, through command channels, to the responsible combatant commander.[112]

Investigating Violations

As noted above, it is DOD policy that all reportable incidents are to be thoroughly investigated.[113] Note, however, that even where U.S. personnel are not involved, follow-up investigations may nevertheless be required in order for the United States to fulfill its obligations under the law of armed conflict.[114]

The allocation of responsibility between DOD and the Department of Justice (DOJ) for investigation and prosecution of war crimes committed by or against DOD personnel is set forth in a 1984 memorandum of understanding (MOU) between DOD and DOJ regarding responsibility for investigating and prosecuting crimes generally.[115] Under the MOU, DOD is responsible for investigating most crimes committed on a military installation or during military operations, and, if the crime was committed by a person subject to the Uniform Code of Military Justice (UCMJ), the military department concerned also will take the lead in prosecuting the offender.[116] The Department of Justice will be responsible for prosecution where the suspect is not subject to the UCMJ.

Legal Advisers

Each head of a DOD component must make qualified legal advisors available at all levels of command to provide advice about law of war compliance during planning and execution of exercises and operations.[117] Each combatant commander must also designate a command legal adviser to supervise the administration of those aspects of the command's program dealing with possible, suspected or alleged enemy violations of the law of armed conflict.[118]

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[112]DODD 2311.01E para. 6.4.

[113] DODD 2311.01E para. 4.4.

[114] For example, under GCIV Article 29, when acting as an occupying power, the United States is responsible for the treatment accorded to protected persons by its agents.

[115] *See* U.S. DEP'T OF DEFENSE, DIR. 5525.7, IMPLEMENTATION OF THE MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENT OF JUSTICE AND THE DEPARTMENT OF DEFENSE RELATING TO THE INVESTIGATION AND PROSECUTION OF CERTAIN CRIMES (22 January 1985) [hereinafter DODD 5525.7]. *See also* MCM app. 3.

[116] DOD is required to notify DOJ of any significant cases in which the subject or victim is not a Service member or dependent. DODD 5525.7 para. C.2

[117] DODD 2311.01E para. 5.7.4.

[118] DODD 2311.01E para. 5.11.5. A combatant commander may direct component commanders to appoint a legal advisor for this purpose. *See*, *e.g.*, U.S. CENTRAL COMMAND, REG. 27-1, LAW OF WAR PROGRAM para. 6.2 (Mar. 2, 2000). In U.S. Forces Korea ("USFK"), for example, the Judge Advocate, USFK, is specifically tasked with, *inter alia*, "supervis[ing] the administration of those aspects of this regulation dealing with possible, suspected or alleged enemy violations of the LOW." USFK, REG. 525-2, LAW OF WAR PROGRAM para. 6.e.(3) (26 November 2001).

METHODS OF ENFORCEMENT

In the event of a violation of the law of armed conflict by a belligerent in an international armed conflict, a State may resort to one or more of the following remedies:

1. A formal or informal complaint to the offending belligerent or neutral States;

2. Publication of the facts, with a view to influencing public opinion against the offending belligerent;

3. A request for a formal inquiry among the parties into alleged violations;

4. A request to the UN Security Council to take appropriate action under the UN Charter;[119]

5. Protest and demand for compensation[120] and/or punishment of the individual offender by the belligerent responsible for the offender;

6. Solicitation of the good offices, mediation or intervention of neutral States for purposes of compelling the offending belligerent to observe its obligations under the law of armed conflict;

7. Punishment of captured individual offenders as war criminals,[121] either by tribunals of the aggrieved belligerent or by international tribunals, if such tribunals have jurisdiction over the offense and the offender; and

8. Subjecting the offending belligerent to reprisals.

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[119] The UN Charter provides, among other things, that the UN Security Council, "may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security." UN Charter Article 34.

[120] Hague IV Article 3. Demands for compensation and/or punishment may be sent through a protecting power, a humanitarian organization performing the duties of a protecting power, or a neutral State, or may be relayed directly through a "parlementaire" to the commander of the forces of the offending belligerent. FM 27-10 para. 495b.

[121] Captured personnel who are entitled to be treated as prisoners of war or retained personnel under GCIII may not be punished for belligerent acts, but may be punished for violations of the law of armed conflict. *See U.S. v. Lindh*, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002) ("Lawful combatant immunity, a doctrine rooted in the customary international law of armed conflict, forbids prosecution of soldiers for their lawful belligerent acts committed during the course of armed conflicts against legitimate military targets…. [T]he doctrine also finds expression in the Geneva Convention Relative to the Treatment of Prisoners of War….", citing GCI Articles 87, 99). Captured personnel who are not entitled to be treated as prisoners of war or retained personnel under GCIII do not enjoy combatant immunity and may be punished for belligerent acts under the law of the capturing State and in the capturing State's tribunals, even if those belligerent acts would not be violations of the law of armed conflict if committed by a lawful combatant. *Id.* at 554 (citing *Ex Parte Quirin*, 317 U.S. 1, 30-31 (1942)).

REPRISALS

Reprisals are otherwise unlawful acts done in response to a prior unlawful act by, or attributable to, the enemy in order to persuade the enemy to cease violating the law of armed conflict.[122] Reprisals are not intended to be a form of retaliation, but rather a means of inducing an enemy to cease violating the law of armed conflict.[123] Reprisals should also be distinguished from collective punishment, as reprisals are not intended as a punishment against individuals with respect to past acts, but rather as an incentive to force a party to comply with the law of armed conflict.

Under law of armed conflict treaties signed following World War II, the international community has sought to significantly limit the circumstances in which reprisals can be used. Notwithstanding these limitations, there is no customary international law prohibition on reprisals *per se,* and recent State practice indicates that States have yet to give up the possibility of exercising a right of reprisal in response to serious violations of the law of armed conflict to prevent further violations.

PROSECUTION OF WAR CRIMES UNDER U.S. LAW

An act which constitutes a war crime under the law of armed conflict will also likely constitute a crime under U.S. domestic law. For example, the premeditated murder of a protected person by a U.S. Service member in violation of Article 32, GCIV, would also be punishable as murder under Article 118 of the Uniform Code of Military Justice (UCMJ). Accordingly, persons subject to the UCMJ are ordinarily charged with violations of a specific provision of the UCMJ rather than a violation of the law of armed conflict.[124]

Other Federal Crimes

Various provisions of U.S. criminal law can also be employed in prosecuting violations of the law of armed conflict. For example, the War Crimes Act authorizes the prosecution of individuals for certain war crimes if the victim or the perpetrator is either a U.S. national[125]

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[122] "Reprisals are measures contrary to law, but which, when taken by one State with regard to another State to ensure the cessation of certain acts or to obtain compensation for them, are considered lawful in the particular conditions to under which they are carried out." GCIV COMMENTARY at 227. Reprisal should be distinguished from retortion, which is the withdrawal of benefits afforded by one belligerent to its enemy or to the armed forces or citizens of its enemy, where the withdrawn benefits exceed the benefits and protections required by the law of armed conflict. Thus, withdrawal of these extra benefits would not violate the law of armed conflict since the benefits were not required to be given in the first place. GCI COMMENTARY at 342.

[123] The Lieber Code addressed reprisals (called "relation" by Professor Lieber), as follows:

The law of war can no more wholly dispense with retaliation than can the law of nations, of which it is a branch. Yet civilized nations acknowledge retaliation as the sternest feature of war. A reckless enemy often leaves to his opponent no other means of securing himself against the repetition of barbarous outrage.

Retaliation will therefore never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and moreover cautiously and unavoidably--that is to say, retaliation shall only be resorted to after careful inquiry into the real occurrence and the character of the misdeeds that may demand retribution.

See LIEBER CODE Articles 27, 28.

[124] MCM, R.C.M. 307(c)(2)(D).

[125] A "national of the United States" refers to a citizen of the United States, or a person who, though not a citizen of the United States, owes permanent allegiance to the United States. 8 U.S.C. § 1101 (2006).

or a member of the U.S. Armed Forces, whether inside or outside the United States.[126] Under this provision, an individual can be prosecuted for:

1. A grave breach of any of the Geneva Conventions or any protocol to one of those conventions to which the United States is a party;

2. Violations of certain listed articles of Hague IV;[127]

3. "Grave breaches" of Common Article 3 of the Geneva Conventions, as more specifically defined in the War Crimes Act;[128] and

4. Violations of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices,[129] where the violator, in an armed conflict, willfully kills or causes serious injury to civilians.

U.S. federal law also criminalizes acts of torture, attempts to commit torture and conspiracy to commit torture outside the United States where the offender is a U.S. national or is located within the United States.[130] Regardless of the nationality of the victim, the statute can be used to penalize torture, which is considered to be a grave breach of the 1949 Geneva Conventions.[131]

Other relevant provisions of U.S. law can be used to prosecute (i) genocide,[132] (ii) murder or manslaughter of foreign officials, official guests, or internationally protected persons,[133] (iii) piracy,[134] and (iv) various acts involving biological weapons,[135] chemical weapons[136] or nuclear weapons.[137] A number of these provisions limit their application to offenses committed within the United States or by or against citizens of the United States, but others,

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[126] 18 U.S.C. § 2441 (2006).
[127] The specified articles are Articles 23, 25, 27, and 28 of the Annex appended to Hague IV, all of which cover the conduct of military operations.
[128] The Military Commissions Act of 2006 amended the War Crimes Act of 1996 to provide that the latter will apply to "grave breaches" of Common Article 3, including (i) torture, (ii) cruel or inhuman treatment, (iii) performing certain biological experiments, (iv) murder (v) mutilation or maiming, (vi) intentionally causing serious bodily injury, (vii) rape; (viii) sexual assault or abuse; or (ix) taking hostages. MILITARY COMMISSIONS ACT § 6 (codified at 18 U.S.C. § 2441(d) (2006)).
[129] Amended CCW Protocol II.
[130] *See* 18 U.S.C. § 2340A (2006). Torture is defined as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control." 18 U.S.C. § 2340(1) (2006). The statute also defines "severe mental pain and suffering." 18 U.S.C. § 2340(2) (2006).
[131] The statute authorizes imprisonment up to twenty years, or if any person dies as a result of the torture, life in prison or death. 18 U.S.C. § 2340A(a) (2006).
[132] 18 U.S.C. § 1091 (2006).
[133] 18 U.S.C. § 1116 (2006).
[134] 18 U.S.C. § 1651 (2006).
[135] 18 U.S.C. § 175 (2006).
[136] 18 U.S.C. § 229 (2006).
[137] 18 U.S.C. § 831 (2006).

such as piracy, apply regardless of the location of the offense or the nationality of the offender or his or her victim(s).[138]

Prosecution of Civilians and Former Military Members

1. Military Extraterritorial Jurisdiction Act of 2000 (MEJA). This law permits the U.S. government to prosecute individuals who committed certain offenses outside the United States (i) while employed by or accompanying the U.S. armed forces; or (ii) while a member of the U.S. armed forces subject to the UCMJ.[139] Under MEJA, the U.S. government can assert jurisdiction over offenses that cannot otherwise be prosecuted under the UCMJ or other U.S. law, such as violations committed outside the United States by civilians accompanying the U.S. armed forces (e.g., contractors and civilian employees)[140] or by persons who were military members at the time of the offense but have since been discharged from the U.S. armed forces.[141] Although not directed solely at war crimes, MEJA broadens the circumstances under which the United States can prosecute U.S. civilians for violations of the law of armed conflict committed outside U.S. territory.[142]

   Foreign nationals, as well as U.S. citizens, who are employed by or accompanying U.S. forces may be charged with offenses under MEJA. However, MEJA does not apply to offenses committed by persons who are nationals of, or ordinarily resident in, the country in which the offense occurred.[143]

2. Uniform Code of Military Justice (UCMJ). Section 2(a)(10), UCMJ, states that "[i]n time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field" are subject to the UCMJ.[144] The term "in the field" has been construed to mean a military operation with a view toward engaging the enemy or a hostile force.[145] As such, only qualifying contingency

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[138] *See, e.g.*, 18 U.S.C. § 1651 (2006).

[139] 18 U.S.C. § 3261(a) (2006). MEJA cannot be used against a member of the Armed Forces who is subject to the UCMJ unless (i) such member ceases to be subject to the UCMJ or (ii) an indictment or information charges that the member committed the offense with one or more other defendants, at least one of whom is not subject to the UCMJ. 18 U.S.C. § 3261(d) (2006).

[140] UMCJ Article 2(a)(10) also provides authority to prosecute civilians accompanying the armed forces in the field during time of war or in certain qualifying contingency operations.

[141] Military retirees who continue to receive retired pay or hospitalization remain subject to the UCMJ. UCMJ Article 2(a)(4), (5) (2008), 10 U.S.C. § 802(a)(4), (5) (2006).

[142] Federal crimes that could be charged under MEJA to address war crimes include murder (18 U.S.C. § 1111 (2006)), manslaughter (18 U.S.C. § 1112 (2006)), attempt to commit murder or manslaughter (18 U.S.C. § 1113 (2006)), kidnapping (18 U.S.C. § 1201 (2006)), hostage taking (18 U.S.C. § 1203 (2006)), malicious mischief (18 U.S.C. § 1363 (2006)) and various forms of sexual abuse (18 U.S.C. §§ 2241-2245 (2006)).

[143] 18 U.S.C. § 3267 (2006) (definitions of "employed by the Armed Forces outside the United States" and "accompanying the Armed Forces outside the United States" exclude persons who are "a national of or ordinarily resident in the host nation"). As a matter of DOD policy, persons with dual citizenship who are citizens of the host nation are not subject to MEJA. DOD INSTR. 5525.11 para. 6.1.7.

[144] 10 U.S.C. § 802(a)(10) (2006).

[145] *U.S. v. Smith*, 10 C.M.R. 350 (A.B.R. 1952); 14 Op. Att'y Gen. 22 (1872) ("The words 'in the field' imply military operations with a view to an enemy. When an army is engaged in offensive or defensive operations, it is safe to say that it is an army 'in the field.'"); WINTHROP at 100.

operations conducted for the purpose of engaging an enemy or hostile force in combat qualify as the basis for this extended UCMJ jurisdiction. Military contingency operations conducted for other purposes, such as disaster relief, humanitarian assistance, or other non-combat missions, do not qualify for this UCMJ jurisdiction. Disciplinary authority over civilians is governed by the UCMJ, the Manual for Courts-Martial, and a Secretary of Defense Memorandum issued on March 10, 2008.[146]

As a matter of DOD policy, when an offense that could be charged under the UCMJ or MEJA occurs, the DOD will notify and consult with DOJ to see if DOJ wishes to exercise federal jurisdiction. However, while the notification and decision process is pending, commanders and military criminal investigators should continue to address the alleged crime. Commanders should also ensure that any preliminary military justice procedures that would be required in support of UCMJ jurisdiction over civilians continues to be accomplished during the concurrent DOJ notification process. Commanders should be prepared to act should U.S. federal criminal jurisdiction prove unavailable to address the alleged criminal behavior.[147]

PROSECUTION OF WAR CRIMES UNDER INTERNATIONAL LAW

U.S. Courts and Tribunals

1. U.S. Civilian Courts. The War Crimes Act has made possible the prosecution of several types of war crimes under international law in U.S. federal criminal courts.

2. U.S. Courts-Martial. In addition to its authority to try persons subject to the UCMJ under the UCMJ's punitive articles, a general court-martial also has jurisdiction to try any person who, by the law of armed conflict, is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of armed conflict.[148] No distinction is made in the UCMJ and the Manual for Courts-Martial (MCM) between the procedures applicable in trials of offenses under the UCMJ's punitive articles and those applicable in trials of offenses under the law of armed conflict. Therefore, even in courts-martial of offenses under the law of armed conflict, all rights and procedures provided under the MCM, including the Rules for Courts-Martial and the Military Rules of Evidence, would apply.[149]

3. U.S. Military Commissions. Military commissions have concurrent jurisdiction

[146] Secretary of Defense, "UCMJ Jurisdiction Over DOD Civilian Employees, DOD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations," 10 March 2008 [hereinafter UCMJ JURISDICTION OVER CIVILIANS LETTER]. The letter also specifies who within DOD can convene a court-martial to pursue charges against a civilian or impose non-judicial punishment on a civilian. *Id*. Attachment 2.

[147] UCMJ JURISDICTION OVER CIVILIANS LETTER, Attachment 2.

[148] 10 U.S.C. § 818 (2006).

[149] *See* MCM pt. I, § 2b(1). In the case of prisoners of war under GCIII, this is consistent with GCIII Article 102, which provides that a prisoner of war can only be validly sentenced if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the detaining State.

with general courts-martial with respect to offenses that by statute or the law of armed conflict can be tried by military tribunal.[150] Historically, military commissions have been used to try enemy combatants accused of offenses under the law of armed conflict, as well as prisoners of war.[151] It is no longer possible to use a U.S. military commission to try a prisoner of war in an international armed conflict subject to GCIII, but a commission can be used to try others, including unprivileged belligerents, for violations of the law of armed conflict and other offenses triable by military commission under U.S. law.[152]

The President may prescribe pretrial, trial, and post-trial procedures, including modes of proof, for cases before military commissions and other military tribunals, but such procedures and modes of proof shall, so far as the President considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in U.S. district courts.[153] Those principles of law and rules of evidence may not be contrary to or inconsistent with the provisions of the UCMJ.[154]

In addition, all rules and regulations promulgated by the President for courts-martial and for military commissions, are to be uniform insofar as practicable.[155]

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[150] UCMJ Article 21 (2008), 10 U.S.C. § 821 (2006).

[151] *See Ex parte Quirin,* 317 U.S. 1 (1942); *In Re Yamashita*, 327 U.S. 1 (1946). Commissions were used not only for war crimes trials but also for trial of offenses under U.S. law where local courts are not open and acting (*i.e.*, where martial law applies) and for trial of violations of occupation ordinances and orders of theater commanders. *See, e.g.,* WINTHROP at 839. After World War II, a number of U.S. allies employed military courts to try war crimes. For example, under a Royal Warrant issued by King George VI in June 1945, U.K. forces convened military courts for trial and punishment of violations of the laws of armed Conflict committed during any war with the United Kingdom after September 2, 1939. "British Law Concerning Trials of War Criminals by Military Courts," UNITED NATIONS WAR CRIMES COMMISSION, I LAW REPORTS OF TRIALS OF WAR CRIMINALS 105 (1947). The regulations governing these courts generally applied the rules of court-martial, but with relaxed rules of evidence that permitted the Court to accept evidence that it believed would be of assistance. *Id*. at 108. Canada also employed similar military courts to try war crimes. "Canadian Law Concerning Trials of War Criminals by Military Courts," *Id*. at 125.

[152] The Military Commissions Act of 2006 provides significant additional detail and guidelines about the use of commissions to try offenses under the law of armed conflict. *See generally* MILITARY COMMISSIONS ACT. Note that although the Military Commissions Act uses the term "unlawful alien enemy combatant" to define the class of persons who can be tried by Military Commission under that Act, the term "unprivileged belligerent" more accurately describe the legal status of such persons under the law of armed conflict (*i.e.*, persons who do not enjoy the privilege of "combatant immunity.") *See*, *e.g.*, "Crimes and Elements of Trials by Military Commission," 68 Fed. Reg. 39381 (1 July 2003) (*codified at* 32 C.F.R. pt. 11 (2008)) (defining, *inter alia*, the crimes of "murder by an unprivileged belligerent" and "destruction of property by an unprivileged belligerent," as crimes committed by persons who do not enjoy "combatant immunity" or "belligerent privilege.") The foregoing provision is still in effect, but has been superseded by provisions of the Military Commissions Act, which includes a similar set of crimes that can be tried by commissions established pursuant to that Act.

[153] UCMJ Article 36(a) (2008).

[154] UCMJ Article 36(b) (2008).

[155] UCMJ Article 36(b) (2008)..

International Tribunals

Since the beginning of the Twentieth Century, war crimes, crimes against humanity, genocide, and crimes against peace have been prosecuted by special international tribunals established to address allegations that such crimes were committed during specific periods or in connection with specific conflicts.

More recently, several tribunals have been established by or at the direction of the UN Security Council. The most prominent of these are the International Criminal Tribunal for the Former Yugoslavia (ICTY)[156] and the International Criminal Tribunal for Rwanda (ICTR).[157] Another example of a UN-sponsored tribunal is the Special Court for Sierra Leone, created in 2002 by agreement between the United Nations and Sierra Leone to prosecute persons who bear the greatest responsibility for the commission of serious violations of international humanitarian law and Sierra Leonean law. [158]

In general, these tribunals apply international law.[159] The statute governing each tribunal typically stipulates the specific types of crimes to be addressed by the tribunal, as well as the standards for culpability.[160] The temporal and territorial extent of the tribunal's jurisdiction may also be specified[161] as well as the rules applicable to situations in which the defendant has been tried by another national court or tribunal.[162] The decisions of these tribunals are not binding on the United States and its courts. However, they do provide useful examples of the application of international law, and, as such, have been cited with approval from time to time by U.S. courts.[163]

Forum Considerations Connected With Status of the Accused

1. Ordinarily, U.S. service members should be tried by court-martial under appropriate provisions of the UCMJ or, if separated from the military, in federal

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[156] *See* ICTY Statute. In establishing the ICTY, the UN Security Council was exercising its authority under Chapter VII of the UN Charter to take measures to restore international peace and security. See footnote 2, *supra*, and accompanying text.

[157] Statute of the International Tribunal for Rwanda, S.C. Res. 955, UN SCOR, 49th Sess., 3453d mtg., Annex, UN Doc. S/RES/955 (1994), reprinted in 33 I.L.M. 1598 (1994) . See footnote 3, *supra*, and accompanying text.

[158] *See* Agreement on the Establishment of a Special Court for Sierra Leone, UN—Sierra Leone, 16 January 2002, UN Doc. S/2002/246, annex, app. 2 (to which the Statute of the Special Court is attached) [hereinafter Statute of the Special Court]; Sierra Leone, Special Court Agreement, 2002 (Ratification) Act, Act No. 9, 29 March 2002. The Special Court is a hybrid tribunal in which the judges are both Sierra Leonean as well as jurists from other countries.

[159] The Special Court for Sierra Leone applies both international and Sierra Leonean law. Statute of the Special Court Article 1(1).

[160] The ICTY Statute, for example, grants that tribunal the power to prosecute (i) grave breaches of the Geneva Conventions of 1949; (ii) violations of the laws or customs of war; (iii) genocide, and (iv) crimes against humanity. ICTY Statute arts. 2-5. The Statute also specifies standards for individual criminal responsibility. *Id.* Article 7.

[161] The ICTY Statute Article 8, for example, provides that "[t]he territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991."

[162] *See*, *e.g.*, ICTY Statute Article 10.

[163] *See, e.g.*, Ford *ex rel*. Estate of Ford v. Garcia, 289 F.3d 1283 (11th Cir. 2002).

court under applicable federal law, such as the War Crimes Act (18 U.S.C. § 2441).[164]

2. Civilians who commit war crimes while serving with or accompanying U.S. forces outside the United States can be charged under the War Crimes Act or other federal law and tried in federal court. Where those crimes occur outside the United States, MEJA may provide the necessary jurisdiction, and, in time of war, civilians serving with or accompanying an armed force also may be tried by court-martial for violations of the UCMJ.[165]

3. The United States may only prosecute enemy prisoners of war or retained personnel captured in an international armed conflict who commit war crimes (either pre-capture or while detained) in the same military tribunals that are used to try offenses committed by U.S. Service members, *i.e.*, courts-martial.[166]

4. Any person not entitled to prisoner of war status may be tried in the same forum that is available for the trial of war crimes committed by civilians accompanying U.S. forces. Persons who are not entitled to prisoner of war status include (i) unprivileged belligerents in an international armed conflict subject to the Geneva Conventions and (ii) any enemy belligerent captured in a conflict that is not such an international armed conflict. Thus, the United States may prosecute such persons by court-martial for violations of the law of armed conflict. Such persons may also be prosecuted in federal civilian courts for violations of U.S. law (including the War Crimes Act) if the offenses were (i) committed in the United States or by U.S. citizens, (ii) committed against U.S. persons or property, or (iii) otherwise subject to U.S. jurisdiction (*e.g.* some crimes committed outside the United States are subject to U.S. jurisdiction even though lacking any connection with U.S. persons or property.)

5. An accused who is not a U.S. citizen and who meets the definition of an "unlawful enemy combatant" under the terms of the Military Commissions Act of 2006,[167] may also be tried before a military commission for offenses that are triable by military commission under the terms of the Act.[168]

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[164] Where the United States and a foreign national both claim jurisdiction over a Service member, "[a]s a matter of policy, efforts should be made to maximize the exercise of court-martial jurisdiction over persons subject to the [UCMJ] to the extent possible under applicable agreements." MCM, R.C.M. 201(d) discussion.

[165] UCMJ Article 2(a)(10) (2008), 10 U.S.C. § 802 (2006).

[166] GPW Article 102. As civilians accompanying enemy forces would be entitled to status as prisoners of war, this provision would appear to limit trial of such civilians to courts-martial.

[167] An "unlawful enemy combatant" is "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant. MILITARY COMMISSIONS ACT, § 3, *codified at* 10 U.S.C. § 948a(1) (2006). Also included in this category are persons who have been determined to be unlawful enemy combatants by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense. *Id.* Under the law of armed conflict, such a person is commonly referred to as an "unprivileged belligerent."

[168] One example is spying, which is not a crime under the law of armed conflict, but is punishable under the Military Commissions Act. MILITARY COMMISSIONS ACT, § 3, *codified at* 10 U.S.C. § 950v(b)(27) (2006). Spying is not

Punishments

If a specific punishment is not stipulated by applicable U.S. law, punishments for violations of the law of armed conflict must be proportionate to the seriousness of the offense. The death penalty may be adjudged, but under GCIII, prisoners of war in an international armed conflict must be informed as soon as possible of the offenses which are punishable by the death sentence under the law of the detaining State.[169] In addition, the death sentence cannot be pronounced on a prisoner of war in an international armed conflict unless the attention of the court has been particularly called to the fact that since the accused is not a national of the detaining power, he is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will.[170] Similar rules under GCIV apply to civilians in occupied territory who are charged with offenses by the occupying power.[171]

CRIMINAL RESPONSIBILITY

Individual Responsibility

Any person who commits an act which constitutes a crime under international law is responsible for such crime and may be punished.[172] The fact that the law of the perpetrator's country does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.[173] Moreover, the fact that a person who committed an act which constitutes a crime under international law acted as a Head of State or other governmental official does not relieve him or her from responsibility under international law.[174] Finally, the fact that a person acted pursuant to the order of his or her government or of a superior does not relieve him or her from responsibility for acts that violate international law.[175]

The rights and responsibilities of combatants and others derived from international law must be distinguished from their enforcement, which is a matter of state responsibility. Simply put, the obligations of combatants do not necessarily parallel those of his or her state or the party to the conflict to which he or she belongs.[176] As an example, breaches of

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a war crime under international law, but is punishable under the laws of the capturing State if the spy is caught while engaged in spying. *See*, *e.g.*, Hague IV Article 31 (providing that a military spy who has rejoined his or her army is not subject to punishment for spying if subsequently captured by the enemy.)

[169] GCIII Article 100. The Protecting Powers shall also be informed. Other offences shall not thereafter be made punishable by the death penalty without the concurrence of the State of whose armed forces the prisoner is a member.

[170] GCIII Article 100. *See also* GCIII Article 87.

[171] GCIII Article 68.

[172] *See* Principle I of the Principles of International Law Recognized in the Charter of the Nuremburg Tribunal and in the Judgment of the Tribunal [hereinafter Nuremburg Principles], UN GAOR, 5th Sess., Supp. No. 12, at 11-14, UN Doc. A/1316 (1950).

[173] *See* Principle II of the Nuremburg Principles ("The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.").

[174] *See* Principle III of the Nuremburg Principles.

[175] *See* Principle IV of the Nuremburg Principles.

[176] Baxter, p. 323.

military discipline (including breaching applicable rules of engagement) which are punishable may not necessarily constitute violations of the law of armed conflict.

Command Responsibility

1. General. Under the doctrine of command responsibility, commanders may be held liable for the criminal acts of their subordinates or other persons subject to their control, even if the commander did not personally participate in the underlying offenses.[177] Thus, for instance, if the subordinates of a commander commit massacres or other atrocities against the civilian population of occupied territory or prisoners of war, the commander may be held responsible. Such responsibility may arise directly when the acts in question have been committed pursuant to an order of the commander concerned that clearly directs that such acts be carried out.[178]

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[177] *See generally Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2781 n.36 (2006) (noting that "the Geneva Conventions do extend liability for substantive war crimes to those who 'orde[r]' their commission, and this Court has read the Fourth Hague Convention of 1907 to impose 'command responsibility' on military commanders for acts of their subordinates….") (citations omitted). The U.S. Supreme Court, in *In Re Yamashita*, affirmed that a military commander could be held liable for crimes committed by those under his or her command, but did not outline the standard that was to apply in determining when a commander would be liable. 327 U.S. 1, 15-16 (1946). Instead, the United States has looked for the applicable standard to a post-World War II tribunal, *United States vs. List*. Aside from *Yamashita*, there have been few prosecutions in U.S. courts under a theory of command responsibility, but the theory has been used by U.S. courts in determining liability of foreign officials under the Alien Tort Statute for crimes committed by their subordinates. *See* Ford *ex rel*. Estate of Ford v. Garcia, 289 F.3d 1283, 1288 - 1289 (C.A.11 2002).

A somewhat different standard has been used in international tribunals. *See* Statute for the International Tribunal for Yugoslavia and the Statute for the International Criminal Tribunal for Rwanda, which provide in Article 7(3) and 6(3), respectively:

The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

Finally, the Military Commissions Act, which provides for the prosecution of offenses by military commissions, includes the following command responsibility standard that incorporates both the *United States v. List* standard and the international tribunal standards:

Any person is punishable as a principal under this chapter who—

(1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission;

(2) causes an act to be done which if directly performed by him would be punishable by this chapter; or

(3) *is a superior commander who, with regard to acts punishable under this chapter, knew, had reason to know, or should have known, that a subordinate was about to commit such acts or had done so and who failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.*

10 U.S.C. § 950q (2006) (emphasis added).

[178] Ordering commission of an offense punishable under the UCMJ is criminalized by Article 77 of the UCMJ, which provides that "[a]ny person punishable under this chapter who— (1) commits an offense punishable by this chapter, or aids, abets, counsels, *commands*, or procures its commission; or (2) *causes an act to be done* which if directly performed by him would be punishable by this chapter; is a principal." UCMJ Article 77 (2008), 10 U.S.C. § 877 (2006) (emphasis added). The term "principal" in criminal law refers to a person who commits or participates in a crime, and can thus be prosecuted for its commission.

The "should have known" standard of command responsibility is not expressly included in Article 77, and therefore command responsibility may result in a commander being treated as a principal to offenses considered to be violations of the law of armed conflict in circumstances in which he or she would not be treated as a principal for those offenses under the UCMJ. However, in such circumstances, the substantive offense of failure to obey an order or regulation, or dereliction of duty under Article 92 of the UCMJ, likely would apply as a separate offense that could be brought against the commander.

Responsibility may also arise if the commander has actual knowledge,[179] or should have known, on the basis of reports received by him or through other means, that troops or other persons subject to the commander's control are about to commit or have committed a war crime, and he or she fails to take the necessary and reasonable steps to ensure compliance with the law of armed conflict or to punish violators thereof. [180]

2. Standard for Culpability. The theory of command responsibility is premised on the duty of the commander to maintain order and discipline within his command, and to ensure compliance with applicable law by those under his command or control. Such a duty may derive from orders, directives or guidance issued by higher command, even if those orders, directives or guidance are not punitive in nature.[181] However, a commander is not strictly liable for all offenses committed by subordinates. The commander's personal dereliction must have contributed to or failed to prevent the offense.[182]

Others Theories of Responsibility

1. General. Under either U.S. law or international law, individuals may be held liable for violations of the law of armed conflict that they did not personally commit. Under U.S. law, common law theories of liability, such as conspiracy and aiding and abetting, may be employed, while under international law, liability may be based upon theories such as "joint criminal enterprise," as well as aiding and abetting.

See also ICTY Statute Article 7(1), and ICTR Statute Article 6(1) (both providing that a "person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to [the applicable articles of] the present Statute, shall be individually responsible for the crime.").

[179] Actual knowledge can be established by direct or circumstantial evidence. Factors to be considered in determining whether there is sufficient circumstantial evidence include the number of illegal acts; the type of illegal acts; the scope of illegal acts; the time during which the illegal acts occurred; the number and type of troops involved; the logistics involved, if any; the geographical location of the acts; the widespread occurrence of the acts; the tactical tempo of operations; the *modus operandi* of similar illegal acts; the officers and staff involved; and the location of the commander at the time. *See Prosecutor v. Delalaic*, Case No. IT-96-21-T, Judgment, 386 (ICTY Trial Chamber, Nov. 16, 1998) [hereinafter Celibici Trial Case].

[180] The "should have known" standard stems from a landmark post-World War II war crimes trial, *United States v. List*, commonly referred to as "The Hostage Case." XI TRIALS OF WAR CRIMINALS 757-1319 [hereinafter The Hostage Case].

[181] *See. e.g.*, the duties to prevent, report, and investigate violations of the law of armed conflict imposed under DOD Directive 2311.01E and regulations, orders and directives issued pursuant to DOD Directive 2311.01.

[182] Command responsibility is analogous in some respects to a violation of Article 92 of the UCMJ, which authorizes punishment for failure to obey orders or regulations or for dereliction of duty by military personnel and other persons subject to the UCMJ, including a duty imposed "by treaty, statute, regulation, lawful order, standard operating procedure or custom of service." MCM pt. IV, para. 16.c. In the case of dereliction, punishment may be imposed for negligent as well as willful failure to perform the duty, as well as culpably inefficient performance of the duty. *Id*. para. 16.c.(3)(c). Mere ineptitude is not sufficient, however. MCM para. 16.c.(3)(d). Punishments under Article 92 may include confinement, forfeiture of pay and, except in the case of culpably inefficient dereliction of duty, punitive discharge. *Id*. para. 16.e. Charges under Article 92 may also form the basis for adverse administrative actions. While these are significant consequences, maximum punishments under Article 92 are much shorter than those available if a commander were charged as a principal to serious law of war violations by subordinates under a theory of command responsibility.

2. Joint Criminal Enterprise. The idea of group criminality in the context of war crimes was first introduced to international law during the war crimes trials at Nuremberg.[183] The Charter of the International Military Tribunal at Nuremberg empowered the Tribunal to declare organizations to be criminal organizations. As a result of such a declaration, mere membership in the organization would itself be criminal.[184] The Tribunal found several Nazi organizations to be criminal organizations.[185] However, despite this finding, the Tribunal did not rely on membership by itself to serve as the sole ground for convicting an accused. In fact, the International Military Tribunal held that mere membership in a criminal organization was not sufficient to cause an individual to be criminally liable.[186]

   In contrast, the British and American tribunals sitting in occupied Germany after the International Military Tribunal, did find a number of such individual members guilty of having engaged in criminal activity, even though the accused themselves were not involved in the commission of all criminal acts carried out by the group.[187]

   Relying on these precedents, international tribunals in recent years have held that an individual acting together with others pursuant to a common design may be guilty of the offense or offenses committed by other members of the group, even though the individual did not commit all acts necessary for the commission of the offense.[188] This theory, sometimes referred to as "joint criminal enterprise" (JCE) has been relied on extensively by the ICTY, and has been used in other international tribunals such as the ICTR.[189]

3. Aiding and Abetting. Like JCE, the theory of aiding and abetting holds an individual (the aider and abettor) liable for acts committed by a third party

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[183] *See, e.g.*, Judgment of the International Military Tribunal re: Criminal Organizations, I TRIAL OF MAJOR WAR CRIMINALS at 256 ("If satisfied of the criminal guilt of any organisation or group this Tribunal should not hesitate to declare it to be criminal because the theory of 'group criminality' is new….").

[184] Charter of the International Military Tribunal Articles 9, 10.

[185] The Leadership Corps of the Nazi Party , the *Schutzstaffel* (S.S.), the *Sicherheitsdienst* (S.D.), and the Gestapo were found to be criminal organizations. I TRIAL OF MAJOR WAR CRIMINALS at 262, 268, 272, 275, 278. Key to determining whether an organization was a criminal organization was whether it was involved in a plan to wage aggressive war.

[186] I TRIAL OF MAJOR WAR CRIMINALS at 256.

[187] *See, e.g.*, *The Einsatzgruppen Case* (Trial of Ohlendorf et al.), IV TRIALS OF WAR 372 [hereinafter *Einsatzgruppen Case*]; Trial of Franz Schonfeld and Nine Others, XI UN LAW REPORTS 64-71; Trial of Martin Gottfried Weiss and thirty-nine others (The Dachau Concentration Camp Trial), XI UN LAW REPORTS 5-17; Trial of Josef Kramer and 44 others (The Belsen Trial), II UN LAW REPORTS 1-154; and Trial of Erich Heyer and Six Others (The Essen Lynching Case), I UN LAW REPORTS 88-92.

[188] The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) has held that "the notion of common design as a form of accomplice liability is firmly established in customary international law…." *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, para. 220 (ICTY App. Chamber, 15 July 1999) [hereinafter *Tadic*].

[189] *See, e.g., Tadic*; *Prosecutor v. Furundzija*, Case No. IT-95-17/1-A, Judgment (ICTY App. Chamber, 21 July 2000); *Prosecutor v. Zejnil Delalaic, Zdravko Mucic, Hazim Delic and Esad Landzo*, Case No. IT-96-21-A, Judgment (ICTY App. Chamber, 20 February 2001) (hereinafter *Celibici Case*); *Prosecutor v. Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2-T, Judgment (ICTY Trial Chamber, Feb. 26, 2001); *Prosecutor v. Brdjanin*, Case No. IT-99-36-T, Judgment (ICTY Trial Chamber, 1 September 2004); *Prosecutor v. Gatete*, Case No. ICTR-2000-61-I, Amended Indictment (ICTR, 10 May 2005).

(commonly referred to as the principal). Aiding and abetting differs from JCE in that the principal and the aider and abettor need not have a common plan or agreement.[190] It is possible that the principal may not even know about the contribution made by the aider and abettor.

Aiding and abetting requires acts that are specifically directed to assist, encourage or lend moral support to the commission of a specific crime by the principal, and this support must have a substantial effect upon the perpetration of that crime. This type of act differs from the type of act required under JCE, which only requires that the accused perform an act that in some way furthers a common plan or purpose.[191]

The aider and abettor must know that the acts he performs assist in the commission of a crime by the principal. In contrast, JCE requires the intent to pursue a common plan or purpose that either involves the commission of a crime or that foreseeably could result in the commission of crimes outside the common purpose.[192]

Aiding and abetting is recognized under both U.S. and international law.[193]

4. Conspiracy. Conspiracy, unlike JCE and aiding and abetting, is a substantive offense in and of itself, meaning that an individual can be held liable simply for participation in a conspiracy, in addition to any violations of the law of armed conflict that may be committed by the individual or his co-conspirators. Additionally, in order to prove a charge of conspiracy, the production of a formal agreement is not required. The conduct of the parties alone can demonstrate that they arrived at a common understanding or "meeting of the minds" regarding the intended offense.

   The crime of conspiracy is not unknown under international law, and has been used in limited contexts. The International Military Tribunal at Nuremberg recognized "conspiracy to commit aggressive war" as a crime under international law.[194] Article 3(b) of the Convention on the Prevention and Punishment of the Crime of Genocide specifically recognizes "[c]onspiracy to commit genocide" as a crime punishable under international law.[195]

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[190] *Tadic* at para. 229.

[191] *See, e.g., Tadic* at paras. 221-29; Prosecutor v. Brdjanin, Case No. IT-99-36-A, Decision on Interlocutory Appeal, paras 7-8 (ICTY App. Chamber, 19 March 2004).

[192] *See Tadic* at para. 229.

[193] *See, e.g., Tadic* at para. 229. Under UCMJ Article 77 (2008), 10 U.S.C. § 877 (2006), someone who aids and abets is considered a principal. Similarly, under § 950q of the Military Commissions Act of 2006, an individual who aids and abets is considered to be a principal.

[194] 1 TRIAL OF THE MAJOR WAR CRIMINALS at 224 (Judgment: The Law as to the Common Plan or Conspiracy).

[195] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 UNT.S. 277 [hereinafter Genocide Convention]. On the other hand, a number of writers, including Colonel William Winthrop, whose treatise *Military Law and Precedents* has been recognized as a landmark restatement of U.S. military law, have long stated that conspiracy is not a crime under international law. WINTHROP at 841. Further, in *Hamdan v. Rumsfeld*, the Supreme Court decided, by a plurality, that other than the two specific types of conspiracy

5. Planning, Instigating, and Ordering. Since the trial of the major German war criminals before the International Military Tribunal in Nuremberg, an accused can be held liable under international law for planning, instigating or ordering a violation of the law of armed conflict, even though the accused does not physically commit the violation. The Statute of the ICTY codifies this theory of liability.[196]

   The ICTY has determined that an accused engages in planning a violation of the law of armed conflict if the accused, alone or with others, designs the criminal conduct constituting one or more violations of the law of armed conflict and these violations are later perpetrated. To convict the accused, it is sufficient to demonstrate that the planning was a factor substantially contributing to the criminal conduct.[197] An accused engages in "instigating" a violation of the law of armed conflict if he prompts another person to commit the violation. It is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused. It is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.[198] As with "planning," to be found guilty, an accused who instigates another person to commit an act or omission must also have been aware of a substantial likelihood that a crime would be committed as a result of that instigation.[199]

   An accused engages in "ordering" a violation of the law of armed conflict if he is in a position of authority and instructs another person to commit a violation. A formal superior-subordinate relationship between the accused and the perpetrator is not required.[200] To be found guilty, an accused who orders an act or omission must have been aware of a substantial likelihood that a crime would be committed in the execution of that order.[201]

   If an accused is guilty of planning, instigating, or ordering a violation of the law of armed conflict, the accused will be guilty of the violation itself.

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recognized by the International Military Tribunal at Nuremberg, international law has not yet recognized conspiracy to commit violations of the law of armed conflict as a substantive crime. 548 U.S. 557, 603-604, 126 S.Ct. 2749, 2780-2781 (2006). Therefore, although punishable under U.S. law, it is not clear that an individual could be tried under international law for the separate crime of conspiracy.

[196] ICTY Statute Article 7(1).

[197] *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-A, Judgment, para. 26 (ICTY App. Chamber, 14 December 2004) [hereinafter *Kordic and Cerkez*].

[198] *Kordic and Cerkez*. para. 27.

[199] *Kordic and Cerkez* para. 32.

[200] *Kordic and Cerkez* para. 28.

[201] *Kordic and Cerkez* para. 30.

DEFENSES

General

Affirmative defenses asserted by persons accused of war crimes fall into two major categories: (1) affirmative defenses that negate criminal responsibility under general principles of municipal criminal law; and (2) defenses that are peculiar to war crimes trials.[202] Additionally, combatant immunity provides a defense to many acts that would otherwise be offenses under municipal criminal law (*e.g.,* the killing of an enemy combatant in combat). These defenses are available in any U.S. tribunal responsible for adjudicating the guilt or innocence of a person accused of war crimes. Further, a U.S. service member being tried by court-martial for war crimes (either as violations of the UCMJ or as violations of other federal law or the laws of armed conflict) also may assert defenses available under the UCMJ.[203]

Defenses Under General Principles of Municipal Criminal Law

Self-defense. The plea of self-defense may be successfully put forward in war crimes trials in much the same circumstances as in trials held under municipal law. In the post World War II war crimes case of *United States v. Krupp*,[204] the Tribunal implied that it would accept a defense of self-defense, defined as executing "the repulse of a wrong," and would even accept a defense of necessity, which was defined with reference to "the invasion of a right."[205]

Mistake of fact. Mistake of fact is a defense if it negates a knowledge element required for a crime. A failure to take reasonable steps to verify information might give rise to criminal responsibility; however, such responsibility would be determined in light of the facts as the accused believed them to be, based upon the information reasonably available to him from all sources.

Ignorance of the law. In general, ignorance of a published law is not an excuse for the commission of an offense. Lack of clarity of law or lack of understanding of local law in an occupied country can serve as a mitigating factor, but generally is not an absolute defense.[206] International law generally does not possess the exactness or the degree of exposure that pertains to municipal law. Ignorance of international law can arise where a rule of international law is dependent on an independent set of facts, and the accused is unaware of those facts.[207] Ignorance of international law may serve as a defense when the

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[202] *See* DA PAM. 27-161-2 at 247.
[203] *See* MCM, R.C.M. 916.
[204] Reported as Case 10 in IX TRIALS OF WAR CRIMINALS; and in X UNITED NATIONS LAW REPORTS at 69-181.
[205] *United States v. Krupp* (*The Krupp Case*), IX TRIALS OF WAR CRIMINALS 1435-39. *See also* DA PAM. 27-161-2 at 246.
[206] *See, e.g., United States v. Flick* (*The Flick Case*), XI TRIALS OF WAR CRIMINALS 1208.
[207] *See, e.g., United Kingdom v. Grumfelt* ("*Scuttled U-Boats Case*"), I UN LAW REPORTS 55-70, in which the accused carried out an order to scuttle U-boats unaware that Germany had surrendered and the scuttling was therefore a violation of international law.

accused follows local law and is unaware that the rule of local law is itself in violation of international law.[208]

Duress. Duress is likely to be used in cases in which the subordinate has committed a war crime as a result of following the orders of a superior. This defense is subject to a number of limitations that are generally similar to those imposed under municipal law.

In order for the defense to prevail, the accused must show: (i) the act charged was done to avoid an immediate danger both serious and irreparable; (ii) there was no adequate means of escape; and (iii) the consequence of the act was not disproportionate to the difficulty it was intended to address.[209]

More recently, the ICTY in *Prosecutor v. Erdemovic*, held that duress does not afford a complete defense to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings. However, ICTY did consider that duress could be grounds for mitigation of punishment in such circumstances.[210]

For trials by court-martial, the Rules for Court Martial provide that duress "is a defense to any offense except killing an innocent person."[211]

Accident. Death, injury, or damage which occurs as the unintentional and unexpected result of doing a lawful act in a lawful manner (*e.g.*, conduct of military operations in accordance with the law of armed conflict) is an accident and is excusable. The defense of accident is not available when the act which caused the death, injury, or damage was a negligent act.[212]

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[208] *See United States v. Sawada*, V UN LAW REPORTS 8 (conviction reversed because accused was not shown to have known of the illegality of the Enemy Airman's Act under which he executed U.S. Airmen).

[209] *See* Prosecutor v. Erdemovic, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vorah, para. 42 (ICTY App. Chamber, 7 October 1997); *see also* DA PAM. 27-161-2 at 247-48; UN LAW REPORTS at 174.

[210] Prosecutor v. Erdemovic, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vorah (ICTY App. Chamber 7 October 1997). The Statute of the International Criminal Court provides that duress constitutes a defense when it constitutes a threat of imminent death or of continuing or imminent serious bodily harm against the accused or another person, and the accused acts necessarily and reasonably to avoid this threat, provided that the accused does not intend to cause a greater harm than the one sought to be avoided. Rome Statute of the International Criminal Court Article 31, para. 1(d), UN Doc. A/CONF.183/9 (entered into force 1 July 2002). The United States has not ratified the Statute of the International Criminal Court, however, and is therefore not a party to that Statute.

[211] MCM, R.C.M. 916(h); *accord* MMC, Rule 916(h).

[212] *See, e.g.*, MMC, Rule 916(f); MCM, R.C.M. 916(f); U.S DEP'T OF ARMY, PAM. 27-9-1, MILITARY JUDGE'S HANDBOOK FOR TRIAL OF ENEMY PRISONERS OF WAR para. 5-4 (4 October 2004).

Defenses Peculiar to Alleged War Crimes

Military necessity. An accused may generally not raise the defense of military necessity unless the applicable treaty states that an allowance will be made for military necessity. Many provisions of law of armed conflict treaties have been drafted with the concept of military necessity in mind. Thus, if the defense is raised, the accused must show that the action was demanded by military circumstances and was done to prevent a greater harm.[213]

Obsoleteness of the law. This defense was raised in some of the Nuremberg Tribunals, and was usually associated with the law of armed conflict relating to economic offenses against property in occupied areas. The Tribunals were ready to concede that international custom may change and the advancement of science may render obsolete certain rules relating to the conduct of hostilities. Admiral Doenitz, at his trial before the International Military Tribunal in Nuremberg, raised the defense of obsoleteness of the law with regard to the Naval Protocol of 1936 regarding unrestricted submarine warfare, and, in particular, the requirement that submarines rescue survivors. The Tribunal recognized that the law might be obsolete, but still found him guilty of violating the Protocol of 1936, although it expressly stated that a sentence should not be assessed on the basis of that violation. It is also worth noting that the Tribunal expressly recognized that the Allies were engaged in exactly the same tactics.[214]

Act was done in accordance with municipal law. In general, this plea does not constitute a defense. The Nuremberg tribunals treated this plea in a manner similar to the plea of superior orders, but found the plea admissible as a circumstance possibly justifying mitigation of sentence.

Act was done in an official capacity. Heads of State and their ministers have no immunity from prosecution and punishment for war crimes, nor does acting in an official capacity serve as a mitigating factor.[215]

Tu Quoque. Latin for "you, too," this defense puts forth the argument that breaches of the law of armed conflict by the enemy justify similar breaches by an opposing belligerent. Alternatively, this defense argues that breaches of the law of armed conflict by the enemy legitimize similar breaches by an opposing belligerent in response to, or in retaliation for, such violations. This second approach can be compared with the doctrine of reprisals. The accused in the Nuremberg Tribunals attempted to introduce a *tu quoque* argument, claiming that the Allies, too, had committed crimes similar to those of which the Nazi regime was accused.[216] This line of defense was rejected, and in the *High Command* case, the U.S. Military Tribunal held that under general principles of law, an accused can not exculpate himself from a crime by showing that another has committed a similar crime[217]. In

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[213] *See, e.g,* Hague IV Article 23; Charter of the International Military Tribunal Article 6(b).
[214] I TRIAL OF THE MAJOR WAR CRIMINALS at 556-57.
[215] *See, e.g.,* Charter of the International Military Tribunal Article 7; 1958 BRITISH MANUAL para. 632.
[216] *See United States v. von Leeb*, (The High Command Case), XII UN LAW REPORTS 64.
[217] Law-Reports of Trials of War Criminals, The United Nations War Crimes Commission, Volume XII, London, HMSO, 1949

Prosecutor v. Kupreskic et al., ICTY held that there was no support either in State practice or in the opinions of publicists for the *tu quoque* defense.[218]

Act was performed as a legitimate reprisal measure. (See discussion of reprisals earlier in this chapter.)

Superior Orders. Persons accused of committing war crimes cannot defend their acts simply by asserting that they were following the orders of their superiors. This sort of unqualified "superior orders" defense has consistently been rejected by U.S. courts and international tribunals.[219] In all cases, the fact that an offense was committed pursuant to superior orders may be considered in mitigation of punishment.[220]

NON-INTERNATIONAL ARMED CONFLICT

General

A non-international armed conflict is an armed conflict (i) between either the armed forces of one or more States and organized or unorganized dissident or insurgent forces who are not acting on behalf of another State, or (ii) among two or more dissident and insurgent forces, none of which are acting on behalf of a State.[221] Because such dissidents or insurgents are not members of an armed force acting on behalf of a State, they do not have the right under international law to engage in belligerent acts, and would not be entitled to be treated as prisoners of war if captured. Rather, they are unprivileged belligerents who do not enjoy combatant immunity under international law. If captured by a State, they can be prosecuted under the criminal laws of the capturing State for acts committed against that State or its citizens, even if those acts would not rise to the level of war crimes in an international armed conflict. For example, an unprivileged belligerent could be prosecuted for acts committed in the course of normal military operations, such as wounding or killing an enemy belligerent or seizing, damaging or destroying enemy military property. This is true even if the unprivileged belligerent could show that his or her belligerent acts, if committed by a lawful combatant, would be permitted by the law of armed conflict. By

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[218] *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, Judgment (ICTY Trial Chamber, 14 January 2000).

[219] *See, e.g., Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851). Charter of the International Military Tribunal Article 8, ICTY Statute Article 7(4); ICTR Statute Article 6(4). Despite efforts to include a provision on the defense of superior orders in the 1949 Geneva Conventions, and in API, nations could not agree on the balance between military discipline and the requirements of humanitarian law, and thus left unchanged the international law on the defense of superior orders. *See* HOWARD LEVIE, PROTECTION OF WAR VICTIMS: PROTOCOL I TO THE 1949 GENEVA CONVENTIONS: SUPPLEMENT (1985) (providing overview of negotiating history of the effort to include a provision on the defense of superior orders in API).

[220] *See, e.g.,* ICTY Statute Article7(4); ICTR Statute Article 6(4) (each including almost identical language with minor variation from each other as indicated in brackets: "The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him [or her] of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal [for Rwanda] determines that justice so requires").

[221] Traditionally, a non-international armed conflict occurs within a single State and involves dissidents or insurgents rebelling against the government of that State. Recently, the U.S. Supreme Court has indicated that the definition is broader, and includes any conflict other than a conflict between nations. *Hamdan v. Rumsfeld*, 548 U.S. 557, 628-31 (2006) (interpreting the phrase "conflict not of an international character" in Common Article 3 as "bear[ing] its literal meaning" and being used "in contradistinction to a conflict between nations.")

contrast, the armed forces of any State against which the dissident or insurgent forces are fighting do have a right under international law to engage in belligerent acts against the dissidents or insurgents, and would enjoy combatant immunity under international law that would protect them from criminal responsibility for belligerent acts against the dissident or insurgent forces, provided those acts otherwise comply with the law of armed conflict.

Applicable International Law

Few treaties relevant to the law of armed conflict expressly apply to non-international armed conflicts, although some clearly apply implicitly.[222] Only one article in each of the Geneva Conventions explicitly addresses war crimes in non-international armed conflicts. Common Article 3 explicitly prohibits the following "in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties:"

1. violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

2. taking of hostages;

3. outrages upon personal dignity, in particular humiliating and degrading treatment; and

4. the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.[223]

Although these crimes represent serious violations of international law, they are not characterized as grave breaches under international law.[224] As a result, they are not expressly subject to the provisions of each of the Geneva Conventions dealing with repression of abuses and infractions.

The 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, adopted at Geneva, 10 October 1980, (CCW) was amended by The Amended CCW Protocol II. Article I (3) of Amended CCW Protocol II also explicitly applies to "armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties." Article 14(1) of Amended CCW Protocol II explicitly requires parties

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[222] For example, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide bans acts of genocide "whether committed in time of peace or time of war" and whether they are committed by "constitutionally responsible rulers, public officials or private individuals," but does not expressly refer to non-international armed conflict.

[223] *See, e.g.*, GCI Article 3. Identical language appears in Article 3 of GCII, GCIII and GCIV.

[224] Grave breaches are widely understood to be committed only in international armed conflict. *See, e.g., Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, para. 71 (Oct. 2, 1995). Accordingly, notwithstanding the inclusion of offenses called "Grave Breaches of Common Article 3" in the War Crimes Act, these offenses are not grave breaches under international law.

to take "all appropriate steps, including legislative and other measures" to "prevent and suppress" infractions of the Protocol, which would include criminalizing violations of Amended CCW Protocol II. The United States has complied with this requirement by enacting the Expanded War Crimes Act of 1997, Pub.L. 105-118, Title V, § 583, 26 November 1997, 111 Stat. 2436. Note that the CCW and its protocols (other than Amended CCW Protocol II) were amended in 2001 to expressly apply to non-international armed conflicts. See amendment to article 1, CCW, dated 21 December 2001. The United States has yet to ratify the amendment, so, as a matter of U.S. law, only the Amended CCW Protocol II applies to non-international armed conflicts.

Other law of armed conflict treaties that expressly address non-international armed conflicts include the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (APII), which governs the conduct of military operations in non-international armed conflicts and the protection of those who are *hors de combat*, and the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention), which governs the protection of cultural property in armed conflicts.[225] Neither of these treaties expressly states that a violation of its provisions would be treated as a crime under international law. The United States has signed but not ratified APII. The 1954 Hague Convention entered into force with respect to the United States on 13 March 2009.[226]

Neither Common Article 3 nor APII expressly states that violations of their provisions are to be treated as war crimes. However, the United States has taken the position that violations of Common Article 3 are violations of the law of armed conflict triable by international tribunals such as the ICTY.[227]

U.S. Law

By enacting the Expanded War Crimes Act of 1997 and the Military Commissions Act of 2006, which amended the War Crimes Act, the United States has expressly criminalized violations of Common Article 3. However, even prior to the enactment of the 1997 amendments to the War Crimes Act, other provisions of U.S. law could be used to punish violations of Common Article 3. The War Crimes Act, as amended, serves to ensure that serious violations of Common Article 3 committed by or against nationals of the United States that do not otherwise fall under the UCMJ or other federal criminal law (*e.g.*, a crime

[225] Only certain provisions of 1954 Hague Convention expressly apply to non-international armed conflicts. Chapter 4 of the 1999 Second Protocol to the 1954 Hague Convention does provide for criminal responsibility for violations of its provisions, but these provisions do not expressly apply to non-international armed conflicts. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, March 26, 1999, 38 I.L.M. 769 Article 3 (1999).

[226] The United States has not signed nor ratified any of the protocols to the 1954 Hague Convention.

[227] *See, e.g., War Crimes Act of 1995: Hearing on H.R. 2587 Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 104th Cong., 2d Sess. 12-13 (1996) (testimony of Michael J. Matheson, Principal Deputy Legal Advisor to the Dept. of State) available at http://www.state.gov/s/l/65717.htm . The ICTY has taken the same position with respect to Common Article 3. *See, e.g.,* Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, para. 128 (2 October 1995)

committed abroad by a U.S. national who is not subject to the UCMJ) can be prosecuted in a U.S. federal court.

The War Crimes Act also applies to violations of Articles 23, 25, 27 and 28 of the Annex to the 1907 Hague Convention IV, Respecting Laws and Customs of War on Land (the "Hague Regulations"). These provisions address prohibited means and methods of warfare, including:

1. the use of poison or poisoned weapons;
2. killing or wounding an enemy treacherously;
3. killing or wounding an enemy who has surrendered;
4. denial of quarter;
5. employing weapons calculated to cause unnecessary suffering;
6. making improper use of a flag of truce, the national flag, the uniform or insignia of an enemy or the symbols of the Geneva Convention (*e.g.*, the Red Cross);
7. seizing or destroying enemy property where not required by military necessity;
8. declaring the rights and actions of enemy nationals to be abolished, suspended or inadmissible;
9. compelling an enemy national to take part in operations against his own country;
10. attack or bombardment on undefended towns, villages, dwellings or buildings;
11. failure to spare buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected provided they are not being used for military purposes; or
12. pillage of a town or place.

PEACETIME OPERATIONS[228]

U.S. forces may be involved in a broad spectrum of peacetime activities, such as peace-keeping and humanitarian assistance, that do not involve the waging of war, but which may lead to the application of military force, either in self-defense or in connection with a specific objective of the activity. In these operations other than war, the law of armed conflict may not apply as a matter of international law,[229] although, as noted above, the

[228] Often referred to as "military operations other than war" or simply "operations other than war."

[229] In cases in which the law of war does not apply as a matter of international law, it would be incorrect to characterize misconduct committed by or against U.S. personnel as a "war crime," regardless of the seriousness of

United States applies the law of armed conflict to all military operations as a matter of policy. In all cases, the UCMJ will continue to apply to the activities of the military members of U.S. armed forces, regardless of the nature of the operation.

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1. Instructions for the Government of Armies of the United States in the Field
2. Convention on the Prevention and Punishment of the Crime of Genocide, New York, 9 December 1948
3. Charter of the International Military Tribunal, article 6, annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, reprinted in 1 TRIALS OF WAR CRIMINALS 9-16
4. Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, adopted 12 August 1949, 6 U.S.T. 3114, 75 U.N.T.S. (1950) 31-83 (entry into force 21 October 1950, for U.S. 2 February 1956)
5. Geneva Convention for the Amelioration of the Conditions of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, adopted 12 August 1949, 6 U.S.T. 3217, 75UNT.S. (1950) 85-133 (entry into force 21 October 1950, for U.S. 2 February 1956)
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7. Geneva Convention Relative to the Protection of Civilians in Time of War, adopted Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. (1950) 287-417 (entry into force 21 October 1950, for U.S. 2 February 1956)
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10. Rome Statute of the International Criminal Court, 17 July 1998, A/CONF. 183/9, found at http://www.un.org/icc/part1.htm
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15. DODD 2311.01E, *DOD Law of War Program*, Annotated Supplement to the Commander's Handbook on the Law of Naval Operations, vol. 73, A.R. Naval War College, Newport, RI (Thomas & James C. Duncan eds.) (1999)

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the misconduct. Of course, certain offenses under international law, such as genocide, can be committed in both peacetime and in war.

16. Headquarters, US Armed Forces Central Command, Regulation Number 27-25, *Reporting and Documentation of Alleged War Crimes* (9 February 1991) (Persian Gulf conflict)
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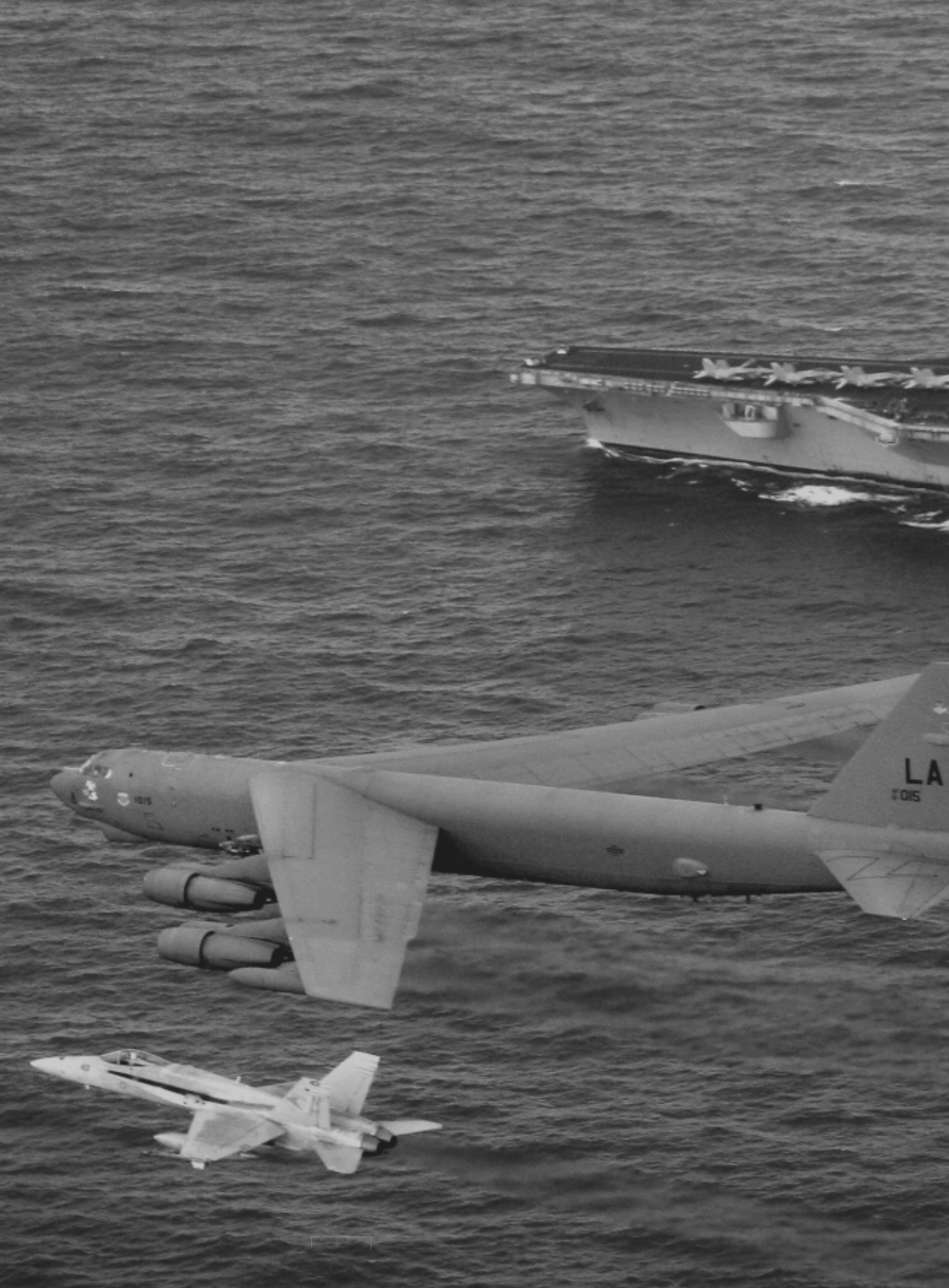
20. William B. Cowles, Universality of Jurisdiction over War Crimes, 33 CAL. L. REV. 177-218 (1945)
21. William H. Parks, Command Responsibility For War Crimes, 62 MIL. L. REV. 1 (1973)
22. Y Sandoz, C Swinarski, and B Zimmerman (eds), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (1987)



CHAPTER 4

AIR AND SEA LAW FOR AIRMEN

BACKGROUND

An understanding of international law affecting the status of airspace, aircraft and air navigation rights is of primary concern for the Air Force. International aviation law is derived from two widely adhered to multilateral treaties of particular importance: the 1944 Convention on International Civil Aviation (also known as the Chicago Convention) and the 1982 United Nations Convention on the Law of the Sea (commonly referred to as the UNCLOS).

The Chicago Convention was adopted to facilitate the safe and orderly development of international civil aviation. Although much of the Chicago Convention applies only to civil aircraft, it contains key provisions applicable to state aircraft, to include military aircraft, and is of paramount importance in that, along with UNCLOS, it defines national and international airspace. The UNCLOS also contains key provisions applicable to state aircraft.

The UNCLOS reaffirms the traditional law and customs of the sea, but it also contains important innovations contributing to the progressive development of international law.[230] The legal regime created by the treaty ensures the global mobility of U.S. forces and is therefore of critical importance to U.S. national security. The treaty's key provisions include identifying the right of overflight in international airspace and the right of transit passage over international straits and through archipelagoes like Indonesia. Earlier treaties on the law of the sea had been concluded, but a major defect of the previous conventions was the failure to define the breadth of the territorial sea; the edge of which simultaneously marks the boundary between national and international airspace.

[230] Opened for signature on 10 December, 1982, UNCLOS entered into force in 1994 and has now been ratified by over three-fourths of the international community. The United States signed the UNCLOS but did not ratify the treaty because it initially objected to provisions concerning deep seabed mining. The United States accepts the UNCLOS as reflecting either customary international law or an appropriate "balance of interests" worthy of recognition. Statement on United States Oceans Policy, 10 March 1983, 19 Weekly Comp. Pres. Doc. 383, *reprinted in* 22 I.L.M. 464 (1983). The United States thus follows the UNCLOS and it has worked "both diplomatically and operationally to promote the UNCLOS as reflective of customary international law." William H. Taft IV, Legal Advisor, U.S. Department of State, "Written Statement Before the Senate Armed Services Committee on 8 April 2004, Concerning Accession to the 1982 Law of the Sea Convention and Ratification of the 1994 Agreement Amending Part XI of the Law of the Sea Convention" available at http://armed-services.senate.gov/statemnt/2004/April/Taft.pdf.

Hence, the military legal advisor must be familiar with both treaties. This chapter draws on these two treaties, as well as other principles of international law, to provide an overview of law affecting peacetime military air operations.

AIRSPACE AND AIR NAVIGATION

From an air operations legal perspective, the world's airspace is vertically divided into two parts, namely, national and international airspace. These two parts are determined by the status of the land or water beneath them. In short, national territory and national waters lie below national airspace, while international waters and non-national territory lie below international airspace. It is therefore critical to know the status of the land or water to be overflown.

National Airspace

The Chicago Convention and the UNCLOS codify the customary norm that every state enjoys complete and exclusive sovereignty over the airspace above its territory, with certain navigation rights reserved to the international community. This airspace consists of the airspace above the state's land territory as well as its national waters. Terms synonymous with national airspace are "territorial airspace" or "sovereign airspace." National waters include internal waters, territorial seas, archipelagic waters. These national waters are under the territorial sovereignty of coastal and island nations, subject to the right of innocent passage, transit passage, and archipelagic sea lanes passage. The right of innocent passage does not extend to aircraft.

Internal Waters. Internal waters are those waters landward of the baseline from which the territorial sea is measured.[231] Lakes, rivers, some bays, harbors, some canals, and lagoons are examples of internal waters.

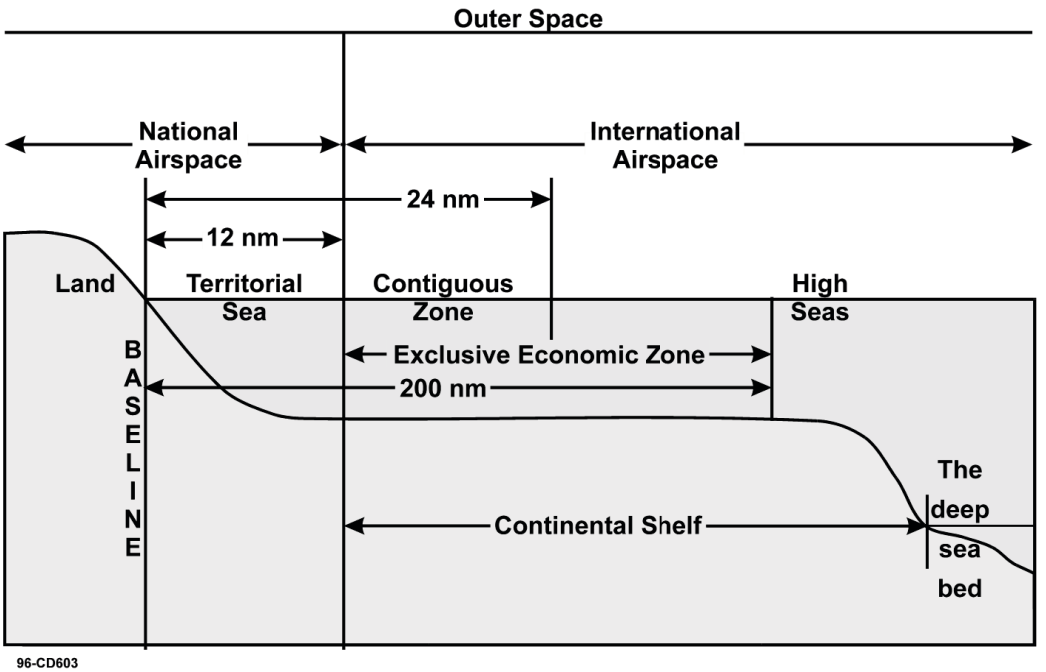
Territorial Sea. The territorial sea is a belt of ocean extending seaward up to a maximum breadth of 12 nautical miles from the baseline of the coastal or island nation subject to its sovereignty. The U.S. claims a 12-nautical mile territorial sea and recognizes territorial sea claims of other nations up to a maximum breadth of 12 nautical miles.[232] Each island has its own territorial sea and, like the mainland, has a baseline from which it is calculated. An island is defined as a naturally formed area of land, surrounded by water, which is above water at high tide. Rocks are islands that cannot sustain human habitation or economic life

[231] Territorial seas and all other maritime zones are measured from baselines. In drawing baselines, special rules apply to various geographical characteristics. In general, the baseline from which maritime claims of a nation are measured is the low-water line along the coast as marked on the nation's official large-scale charts. *UNCLOS*, Art. 5. Where it is impracticable to use the low-water line, as where the coastline is deeply indented or where there is a fringe of islands along the coast in its immediate vicinity, the coastal or island nation may instead employ straight baselines. *Ibid.*, Art. 7. For bays and gulfs, the baseline across the mouth of a bay may not exceed 24 nautical miles (approximately 27.6 miles) in length. *Ibid.*, Art. 10. Historic bays may exceed 24 nautical miles. *Ibid.*, Art. 10(6). But the U.S. does not recognize historic bay claims, such as Libya's claim to the Gulf of Sidra (closure line in excess of 300 nm). If a river flows directly into the sea, the baseline is a straight line across the mouth of the river between points on the low-water line of its banks. *Ibid.*, Art. 9. The low-water line of a reef may be used as the baseline for islands situated on atolls or having fringing reefs. *Ibid.*, Art. 6.

[232] *Annotated Supplement*, para. 1.4.2.

of their own. Provided they remain above water at high tide, they too possess a territorial sea determination in accordance with the principles discussed in the paragraphs on baselines. A low-tide elevation (above water at low tide but submerged at high tide) situated wholly or partly within the territorial sea may be used for territorial sea purposes as though it were an island. Where a low-tide elevation is located entirely beyond the territorial sea, it has no territorial sea of its own.

Archipelagic Waters. An archipelagic nation is a nation that is constituted wholly of one or more groups of islands. The national airspace of archipelagic nations consists of the airspace above the islands, the territorial sea and the archipelagic waters. Archipelagic waters are the parts of the sea enclosed by archipelagic baselines joining the outer-most points of their outermost islands of the archipelago, provided that the ratio of water to land falls within certain parameters. The archipelagic baselines are also the baselines from which the archipelagic nation measures seaward its territorial sea, contiguous zone, and exclusive economic zone. The U.S. recognizes the right of an archipelagic nation to establish archipelagic baselines enclosing archipelagic waters provided the baselines are drawn in conformity with the UNCLOS.[233] The significance of the airspace above archipelagic nations is discussed below.



International Airspace

International airspace includes the airspace above land areas not subject to national sovereignty, such as Antarctica, and international waters. International waters consist of

[233] *Ibid*, para. 1.4.3.

the maritime zones defined in the UNCLOS: the contiguous zones, exclusive economic zones, and the high seas. Coastal and island states are, however, granted additional specified rights in respect of contiguous zones and exclusive economic zones.

Contiguous Zones. A contiguous zone is an area extending seaward from the territorial sea in which the coastal or island nation may exercise the control necessary to prevent or punish infringement of its customs, fiscal, immigration, and sanitary laws and regulations that occur within its territory or territorial sea (but not for so-called "security" purposes). For this reason, it is possible that the coastal or island nation could intercept any aircraft or vessel bound for its territory in order to exercise control over the aircraft for customs or immigration purposes. However, the coastal or island nation may not otherwise interfere with international flight above the contiguous zone. Contiguous zones may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured. The U.S. will respect contiguous zones extending up to 24 nautical miles in breadth provided the coastal or island nation recognizes U.S. rights in the zone consistent with the provisions of UNCLOS.[234]

Exclusive Economic Zones. Exclusive economic zones (EEZs) are resource-related zones adjacent to the coast and extending beyond the territorial sea. As the name suggests, its central purpose is economic. The EEZ extends up to 200 nautical miles from the baselines used to measure the territorial sea. The United States recognizes the sovereign rights of a coastal or island nation to prescribe and enforce its laws in the EEZ for the purposes of exploration, exploitation, management, and conservation of the natural resources of the waters, seabed, and subsoil of the zone. The United States also recognizes the EEZ for the production of energy from the water, currents, and winds. The coastal or island nation may exercise jurisdiction in the zone over the establishment and use of artificial islands, installations, and structures having economic purposes; over marine scientific research (with reasonable limitations); and over some aspects of marine environmental protection (primarily implementation of international vessel source pollution control standards). Aircraft operating in the airspace in the EEZ must have "due regard" for the rights and duties of the coastal state. The United States established a 200-nautical miles exclusive economic zone by Presidential Proclamation of 10 March 1983.

High Seas. The high seas form the largest part of international waters, comprising the part of the sea that are not territorial sea or included in EEZ. When a coastal or island nation has not proclaimed an EEZ, the high seas begin at the seaward edge of the territorial sea.

AIRCRAFT

Aircraft Defined. International law defines aircraft as those machines that "can derive support in the atmosphere from the reactions of the air."[235] This definition includes both heavier than air and lighter than air objects, but it excludes objects more properly viewed as projectiles which do not derive support from the reactions of the air, such as rockets. Under

[234] *Ibid*, para. 1.5.1; *See also* Presidential Proclamation 7219.
[235] Definitional Annex to the Chicago Convention.

the Chicago Convention, there are two categories of aircraft: state and civil. There is no settled definition of state aircraft in international law. Under the Chicago Convention, aircraft used in military, police and customs services are "deemed" to be state aircraft but the term is not specifically defined. Civil aircraft are aircraft that are not state aircraft. Civil aircraft possess the nationality of the state in which they are registered.

Military Aircraft Defined. Like the term "state aircraft," there is no settled definition of military aircraft in international law. As a general rule military aircraft include all aircraft operated by commissioned units of the armed forces of a nation bearing the military markings of that nation, commanded by a member of the armed forces, and manned or operated by a crew subject to regular armed forces discipline. International custom regarding national markings on military aircraft was developed to preclude any abuse or confusion as to who exercises control over the aircraft.[236] However, state practice has not established a requirement for an exclusively military crew.

Status of Military Aircraft. As military aircraft are "state aircraft" within the meaning of the Chicago Convention, they, like warships, enjoy immunity from foreign boarding, search, inspection and taxation.[237] Local officials may not board the military aircraft of another state without the consent of the aircraft commander.[238] The territorial sovereign may not arrest or seize foreign military aircraft lawfully in its territory, but it may order it to promptly leave. U.S. military aircraft commanders should not authorize boarding, search, seizure, inspection, or similar exercises of jurisdiction by foreign authorities except by direction of the appropriate service headquarters or the U.S. embassy in the country concerned.

Additionally, U.S. policy prohibits the payment of navigation and overflight fees. Moreover, U.S. military aircraft do not, as a matter of policy, pay landing or parking fees at foreign government airports.[239] Landing and parking fees may be paid at commercial airports. Disputes have arisen with some host nations on the issue of landing and parking

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[236] SECSTATE Cable 250803 ("NATO AWACS Registration in Luxembourg"), para. 2.

[237] The 1919 Paris Convention was the only air law instrument to expressly codify the rule that military aircraft are entitled to "the privileges which are customarily accorded to foreign ships of war." Convention Relating to the Regulation of Aerial Navigation, 13 October 1919, 297 L.N.T.S. 173 (1922), Art. 32. Although this provision was not included in the Chicago Convention, Professor John Cobbs Cooper, the chairman of the committee who drafted and reported Article 3 of the Chicago Convention, stated:

> It is felt that the rule stated in the Paris Convention that aircraft engaged in military services should, in the absence of stipulation to the contrary, be given the privileges of foreign warships when in national port is sound and may be considered as still part of international air law even though not restated in the Chicago Convention.

John Cobb Cooper, "A Study on the Legal Status of Aircraft" in Ivan A. Vlasic, ed., *Explorations in Aerospace Law* (Montreal: McGill U. Press, 1968) 205 at 243. The UNCLOS confirms that military and other government aircraft enjoy sovereign immunity the same as a warship. *See UNCLOS*, Art. 42(5) (addressing international responsibility of state of registry for loss or damage caused by aircraft entitled to sovereign immunity during transit passage), Art. 236 (like warships, military and other government aircraft are expressly immune from provisions regarding the protection and preservation of the marine environment).

[238] DOD 4500.54-M, *DOD Foreign Clearance Manual*, 1June 2009, para. C2.1.5

[239] SECSTATE Message 071536Z OCT 00.

fees. The United States uses the Interagency Working Group on Aviation Fees to determine whether it will regard an airport to be a government or commercial airport. Where fees are payable, then U.S. military aircraft, as with all U.S. state aircraft, will pay reasonable fees based on International Civil Aviation Organization standards or some lesser negotiated sums for parking and landing. Reasonable fees for services requested (e.g., fuel and routine maintenance fees) are routinely paid regardless of the type of airport.

Status of Civil Aircraft Chartered by the Department of Defense (DOD). The United States regularly charters civil aircraft to provide air transportation and other services. Such aircraft retain their status as civil aircraft unless the U.S. Government specifically designates them to be state aircraft.[240] The U.S. normally does not make such a designation. Unless designated as state aircraft, aircraft chartered by DOD are subject to the *regime* applicable to international civil aviation. Although many Status of Forces Agreements, base rights, and other agreements grant civil aircraft chartered by DOD the same privileges of access, exit and freedom from landing fees and other similar charges enjoyed by U.S. military aircraft, such agreements do not have the effect of declaring chartered aircraft to be military or any other form of state aircraft. Consequently, civil aircraft chartered by DOD are not immune from landing or similar fees and from foreign search and inspection.[241]

Foreign State Aircraft. In respect to foreign state aircraft (military or non-military) visiting the United States, the U.S. practice is that U.S. authorities do not board or inspect without the consent of the commander of the aircraft. Should extraordinary circumstances arise in which boarding and inspection is warranted and consent to board the aircraft is refused, the aircraft will be required to depart the country immediately.[242]

AIR NAVIGATION

National Airspace

As has been previously noted, every nation has complete and exclusive sovereignty over its national airspace. The unauthorized or improper entry of foreign aircraft into a state's national airspace is a violation of that state's sovereignty. There is no customary right of innocent passage for foreign aircraft to fly over any portion of another state's land territory, internal waters, territorial sea or archipelagic waters analogous to the right of innocent passage enjoyed by surface ships. Launching and recovery of aircraft by ships undergoing innocent passage are likewise not allowed. Except for overflight of international straits and archipelagic sea lanes discussed below, all nations have complete discretion in regulating or prohibiting flights within their national airspace.

Under the Chicago Convention, civil aircraft on scheduled international air service are permitted to enter another state's national airspace by the extensive use of standing multinational and bilateral international agreements covering overflight and landing

[240] *See* 49 U.S.C. § 40125(c)(1)(C) (public aircraft includes aircraft designated as such by the Secretary of Defense).
[241] SECSTATE Message 071536Z OCT 00.
[242] DOD 4500.54-M, *DOD Foreign Clearance Manual*, 1June 2009, para. C2.2.2.3.

rights.[243] Civil aircraft on non-scheduled international air service do not need to obtain prior permission to overfly or land in the territory of another state. However, the state overflown may require the aircraft to land for inspection and the state overflown may impose regulations, obligations or limitations it considers desirable. Furthermore, no civil aircraft engaged in international navigation may transport munitions or implements of war, or other prohibited cargo over the territory of any state without the special permission of that state.

The Chicago Convention mandates that no state aircraft, to include its military aircraft, may fly over or land in the territory of another state without authorization by special agreement. Such situations are often dealt with on an *ad hoc* basis. Absent a standing agreement, each state aircraft wishing to enter another state's national airspace must obtain special authorization, identify itself, seek or confirm permission to land or to transit, and must obey all reasonable orders to land, turn back, or fly a prescribed course and/or altitude. This special authorization is often referred to as a diplomatic flight clearance.[244]

Aircraft in Distress. Aircraft in distress are entitled to special consideration and must be allowed entry and emergency landing rights.[245] State aircraft in distress are permitted under principles of customary international law to make emergency landings in the territory of another state without the permission of that other state. The crew must be treated humanely and the aircraft permitted to depart. A state aircraft on the ground as a result of distress continues to enjoy sovereign immunity. This immunity precludes search, inspection or detention of the aircraft without consent. As stated earlier, U.S. military aircraft commanders will not authorize boarding, search, seizure, inspection, or similar exercises of jurisdiction by foreign authorities except by direction of the appropriate service headquarters or the U.S. embassy in the country concerned. Moreover, U.S. consular officials shall be free to communicate with the aircrew and *vice versa*. The U.S. consular post must be informed if any U.S. persons are detained. Consular officials have the right to visit any detained U.S. citizens.[246]

Right of Assistance Entry. Unauthorized entry into national airspace is normally considered a breach of the coastal or archipelagic state's sovereignty. However, all ship and aircraft commanders have an obligation to assist those in danger of being lost at sea. This long recognized duty to render emergency assistance to those in danger or distress at sea permits entry by foreign aircraft into the coastal or archipelagic state's national airspace without its consent. This right of entry applies only when the location of the danger or distress is reasonably well known. It does not extend to entering the airspace over the territorial sea to conduct an area search, which requires the consent of the coastal state. Moreover, the efforts to render emergency assistance must be undertaken in good faith and not as a subterfuge. Operational commanders should notify the appropriate state's authorities of

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[243] *Chicago Convention*, Art. 6.

[244] The procedures for a U.S. military aircraft to obtain diplomatic clearance to enter another state's national airspace may be found in the DOD Foreign Clearance Guide. The procedures for foreign state aircraft to obtain diplomatic clearance to enter U.S. airspace may be found at http://useg.net/useg.html.

[245] *Chicago Convention,* Art. 25.

[246] Vienna Convention on Consular Relations, 24 April 1963, 21 UST 77; TIAS 6820; 596 UNTS 261. Art. 36.

the entry to promote international comity, avoid misunderstanding, and alert local rescue and medical assets. An important document with regard to the right of assistance entry is the Statement of Policy by the Department of State, the Department of Defense and the United States Coast Guard concerning the exercise of the Right of Assistance Entry of 8 August 1986.[247]

Violation of National Airspace. If a U.S. military aircraft violates foreign national airspace (or a violation is alleged to have occurred), the DOD Foreign Clearance Guide (definitions section) outlines the procedures to be followed to report the violation.

International Airspace

International airspace is open to the aircraft of all nations. As noted previously, international airspace comprises the airspace above the high seas and the EEZ. The high seas freedom of overflight, along with all "other internationally lawful uses of the sea" related to this freedom, is made fully applicable to the EEZ.[248] The only express limitation on the freedom of overflight in the EEZ is that this freedom must be exercised with "due regard" to the natural resource related rights and duties of the coastal state in the exclusive economic zone. Additionally, every state must show "due regard" for other states in their exercise of the freedom of the high seas.

The International Civil Aviation Organization (ICAO) performs an important function in promoting the safety of navigation of civil aircraft in international airspace. The ICAO publishes "Rules of the Air," which are mandatory for civil aircraft in international airspace.[249]

While the ICAO Rules of the Air are not compulsory for state aircraft, the Chicago Convention requires that state aircraft must operate with "due regard" for the safety of navigation of civil aircraft.[250] This obligation is identical to the obligations to show "due

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[247] *See* CJCSI 2410.01B which implements the policy statement. The instruction specifically deals with assistance entry by aircraft for both life-threatening and nonlife-threatening situations.

[248] *UNCLOS,* Arts. 58(1) (high seas freedoms applicable to EEZ); 86 ("This article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with Article 58."). Accordingly, aircraft, including military aircraft, are free to operate in international airspace without interference from coastal or island nation authorities. Military aircraft may engage in flight operations, including ordnance testing and firing, surveillance and intelligence gathering, and support of naval activities. All such activities must be conducted with "due regard" for the rights of other nations and the safety of other aircraft and of vessels. These same principles apply with respect to the overflight of high seas or EEZ corridors through that part of international straits not overlapped by territorial seas.

[249] *Chicago Convention,* Art. 12 ("Over the high seas, the rules in force shall be those established under this Convention. Each contracting State undertakes to insure the prosecution of all persons violating the regulations applicable."). The "Rules of the Air" are contained in Annex 2 of the Chicago Convention.

[250] *Ibid.*, Art. 3(d). The position of the United States Government on the effect of Article 3 on the relationship of the Chicago Convention to state aircraft was stated as follows in 1964:

> The Chicago Convention expressly excludes state aircraft from its scope and thus from the scope of ICAO responsibility. The United States intends that its state aircraft will follow the ICAO procedures set forth in Annex 2 to the greatest extent practicable; however, the United States considers that state aircraft of any nation are subject to control and regulation

regard" in the UNCLOS. United States military aircraft as a matter of policy follow ICAO flight procedures on routine point-to-point flights through international airspace as they are of great benefit to U.S. forces.[251] State aircraft following the ICAO flight procedures satisfy the requirement of "due regard." When U.S. military aircraft conduct classified missions or politically sensitive operations, aircraft flight commanders need not follow the ICAO flight procedures but may operate under the "due regard" option, in which they will be their own air traffic control agency for purposes of separating their aircraft from other air traffic.

International Straits. The UNCLOS extends the territorial seas up to 12 nautical miles from the baseline, effectively closing over 100 international straits which are narrower than 24 nautical miles and are absorbed in the territorial seas of the coastal states over which there is no right of passage for aircraft. Such straits include the Straits of Gibraltar, Bab el Mandeb, Hormuz, and Malacca.[252] The UNCLOS introduced a new legal regime—transit passage—which both ships and aircraft may enjoy through these straits. Transit passage is available for straits used for international navigation through the territorial sea between one part of the high seas or an exclusive economic zone and another part of the high seas or an

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> exclusively by that nation (unless operating within airspace over which another nation has sovereignty). With respect to State aircraft, contracting States need not undertake any commitment, and the United States does not undertake any commitment, to other nations as to the rules and regulations which any specific state aircraft or class of state aircraft will follow, except when issuing regulations for their state aircraft, that 'they will have due regard for the safety of navigation of civil aircraft.' (Article 3(d), Chicago Convention)
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> In the application of these principles to all areas of civil/military coordination, . . .it is the position of the United States that when aircraft used in the military services of contracting States, are operating in international airspace in which another State is responsible, under ICAO arrangements, for the provision of civil air traffic services, States operating such aircraft should in their discretion, and the United States will in its discretion, advise the other States of the procedures being utilized by such aircraft. The State providing air traffic services can thus better judge what information concerning aviation activities in the area should be given to the authorities operating such state aircraft and what information or air traffic clearances should be given to civil aircraft in the vicinity. While contracting States operating such state aircraft should consider any information so received to determine whether, and the extent to which, they should utilize the information in controlling these aircraft activities, no State is required to obtain the concurrence of any other State when issuing rules, regulations or operating instructions for its state aircraft operating in international airspace. . . .
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> Because the Chicago Convention does not apply to state aircraft, contracting States are under no obligation to give to ICAO the notification of differences contemplated by Article 38 of the Convention when state aircraft are not complying with international Standards established by ICAO; nor is there any requirement to notify ICAO of noncompliance by state aircraft with international Recommended Practices and Procedures.

Department of State Airgram CA-8085, 13 February 1964, *quoting* U.S. Inter-Agency Group on International Aviation (IGIA) Doc. 88/1/1C, MS, Department of State, file POL 31 U.S., *reprinted in* 9 WHITEMAN DIGEST at 430-31.

[251]DODD 4540.1 *Use of Airspace by U.S. Military Aircraft and Firings Over the High Seas,* 13 January 1981, at paras. 4.2.1, 5.3.1. The *Commander's Handbook* para. 2.9.3.acknowledges the value of ICAO rules to military aircraft.

[252] The UNCLOS does not purport to affect the existing legal regime in straits in which passage is regulated by long-standing international conventions in force specifically relating to such straits. *UNCLOS*, Art. 35(c). For example, transit passage does not apply to the Bosphorus and Dardanelles straits which are governed by the Montreux Convention of 1936.

EEZ. Transit passage exists throughout the entire strait and not just the area overlapped by the territorial sea of the coastal nation(s). All aircraft, including military aircraft, enjoy the right of unimpeded transit passage through the airspace above international straits overlapped by territorial waters. Such transits must be continuous and expeditious in the normal modes of operation, and the aircraft involved must refrain from the threat or the use of force against the sovereignty, territorial integrity, or political independence of the nation or nations bordering the strait; and must otherwise refrain from any activity other than those incident to their normal modes of continuous and expeditious transit. The exercise of the right of overflight by aircraft engaged in the transit passage of international straits cannot be suspended in peacetime for any reason. The UNCLOS, however, imposes two obligations on all aircraft engaged in transit passage. First, civil aircraft must observe the "Rules of the Air" established by ICAO while state aircraft must operate with "due regard" for the safety of navigation. Secondly, civil and state aircraft must at all times monitor the radio frequency assigned by the ICAO designated air traffic control authority or the appropriate international distress radio frequency.

The importance of the right of transit passage over an international strait was demonstrated during operation El Dorado Canyon. Air Force F-111s and KC-135s operating from England and bound for Libya were denied overflight access over continental Europe by the French and the Spanish governments. As a result, the fighter-bombers and their tankers were required to take a circuitous route of flight from the U.K. south over the Atlantic, through the Strait of Gibraltar, and eastward over the Mediterranean before turning south to attack Libya. The right of transit passage ensured the U.S. access to Libya.

Archipelagic Sea Lanes. All aircraft, including military aircraft, enjoy the right of archipelagic sea lanes passage while transiting over archipelagic waters and adjacent territorial seas *via* all routes normally used for international overflight. The legal regime of archipelagic sea lanes passage is substantially the same as the legal regime for transit passage. Archipelagic sea lanes passage is defined under international law as the exercise of the freedom of overflight for the sole purpose of continuous, expeditious and unobstructed transit through archipelagic waters, in the normal mode of operation by the aircraft involved.[253] This means aircraft may carry out those activities normally undertaken during overflight of such waters, including activities necessary to their security, such as flying in formation. Archipelagic nations may not legally require prior approval or notification for exercise of the right of archipelagic sea lane passage.[254] The UNCLOS imposes the same two obligations on all aircraft engaged in archipelagic sea lanes passage as it does for transit passage.[255] Whether flying in accordance with ICAO rules and procedures, or flying with due regard, no diplomatic clearance will be sought from an archipelagic nation for archipelagic sea lanes passage. Archipelagic sea lanes passage cannot be suspended for any reason. There is no right of overflight through airspace over archipelagic waters outside of archipelagic sea lanes.

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[253] *UNCLOS*, Art. 53(3).
[254] DOD 4500.54-M, *DOD Foreign Clearance Manual*, 4 February 2009, para. C2.2.1.2.2.
[255] *UNCLOS*, Art. 54 (incorporating by reference the provisions of Article 29, 40, 42 and 44).

SPECIAL NAVIGATION ISSUES

Excessive Maritime Claims

The U.S. will protest excessive maritime claims and assert freedom of overflight in the airspace above international waters. As announced in the President's U.S. Oceans Policy Statement of 10 March 1983,

> The United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the [1982 LOS] convention. The United States will not, however, acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.
>
> When maritime nations appear to acquiesce in excessive maritime claims and fail to exercise their rights actively in the face of constraints on international navigation and overflight, those claims and constraints may, in time, be considered to have been accepted by the international community as reflecting the practice of nations and as binding upon all users of the seas and superjacent airspace. Consequently, it is incumbent upon maritime nations to protest diplomatically all excessive claims of coastal or island nations and to exercise their navigation and overflight rights in the face of such claims.

The Freedom of Navigation Program implements U.S. policy to challenge excessive maritime claims.[256]

Security Zones

Some coastal nations, including North Korea and Vietnam, have claimed the right to establish military security zones, beyond the territorial sea, of varying breadth, in which they purport to regulate or prohibit the activities of warships and military aircraft of other nations. This includes such restrictions as prior notification or authorization for entry, limits on the number of foreign ships or aircraft present at any given time, prohibitions on various operational activities, or complete exclusion. International law does not recognize the right of coastal nations to establish zones in peacetime that would restrict the exercise of non-resource-related high seas freedoms beyond the territorial sea. Accordingly, the U.S. does not recognize the peacetime validity of any claimed security or military zone seaward of the territorial sea which purports to restrict or regulate the high seas freedoms of navigation and overflight.

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[256] *Annotated Supplement*, para. 2.6.

Air Defense Identification Zones

International law does not prohibit nations from establishing air defense identification zones (ADIZ) in the international airspace adjacent to their territorial airspace. Security zones are distinguishable from ADIZs, as the latter are merely a reporting and identification regime for civil aircraft used by coastal and island states. ADIZs are legally justified on the basis that a nation has the right to establish reasonable conditions of entry into its national airspace. Accordingly, an aircraft approaching national airspace may be required to identify itself while in international airspace as a condition of entry approval. ADIZ regulations published by the United States apply to aircraft bound for U.S. territorial airspace and require the filing of flight plans and periodic position reports. Some nations, however, purport to require all aircraft penetrating an ADIZ to comply with ADIZ procedures, whether or not they intend to enter national airspace. The United States does not recognize the right of a coastal or island nation to apply its ADIZ procedures to foreign aircraft in such circumstances. Accordingly, U.S. military aircraft not intending to enter national airspace need not identify themselves or otherwise comply with ADIZ procedures established by other nations, unless the United States has specifically agreed to do so.[257]

Flight Information Regions

A flight information region (FIR) is a defined area of airspace within which flight information and alerting services are provided. FIRs are allocated to coastal states by ICAO for the safety of civil aviation and encompass both national and international airspace. The FIR system ensures the provision of air traffic control and flight service to civilian air traffic. Coastal states often favor having FIRs allocated to them for reasons of prestige and because they can charge flight service fees. Some nations, however, purport to require all military aircraft in international airspace within their FIRs to comply with FIR procedures, whether or not they utilize FIR services or intend to enter national airspace. The United States does not recognize the right of a coastal nation to apply its FIR procedures to foreign military aircraft in such circumstances. Accordingly, U.S. military aircraft not intending to enter national airspace need not identify themselves or otherwise comply with FIR procedures established by other nations, unless the United States has specifically agreed to do so.[258]

Warning Areas

Any nation may declare a temporary closure or warning area on the high seas to advise other nations of the conduct of activities that, although lawful, are hazardous to navigation and/or overflight. The United States and other nations routinely declare such areas for missile testing, gunnery exercises, space vehicle recovery operations, and other purposes entailing some danger to other lawful uses of the high seas by others. Notice of the establishment of such areas must be promulgated in advance, usually in the form of a "notice to mariners" (NOTMAR) and/or a "notice to airmen" (NOTAM). Ships and aircraft of other nations are not required to remain outside a declared closure or warning area, but are obliged to refrain from interfering with activities in it. Consequently, U.S. ships and

[257] DODD 4540.1, para. 5.4; *Annotated Supplement*, para. 2.5.2.3.
[258] *Ibid*, para. 2.5.2.2.

aircraft may operate in a closure area declared by a foreign nation, collect intelligence and observe the activities involved, subject to the requirement of due regard for the rights of the declaring nation to use the high seas for such lawful purposes. The ships and aircraft of other nations in a U.S. declared closure area may do the same.

SELF-DEFENSE AND ARMED CONFLICT

It should be emphasized that most of the foregoing discussion on airspace and air navigation rights and duties contemplates a peacetime or non-hostile environment. In the case of imminent or actual hostilities, a nation may find it necessary to take measures in self-defense that will affect the status of international airspace and air navigation. States may suspend provisions of the Chicago Convention, whether as belligerents or as neutrals, provided they declare a state of national emergency and notify ICAO of this fact.[259] Moreover, where countries are involved in international armed conflict, the law of armed conflict (LOAC) applies. Concepts such as neutrality may become relevant and may affect airspace and navigation rights and duties during the conduct of hostilities and must be taken into consideration.

United Nations and Other Collective Action

Freedom of navigation in international airspace and the sovereignty of states with respect to their own national airspace may be impacted by action taken by the United Nations (UN) through the UN Security Council. For instance, UN Security Council Resolution 816 tasked member states to enforce a "no-fly" zone in the airspace of the Republic of Bosnia-Herzegovina, clearly interfering with sovereign rights to national airspace. Furthermore, the use of the words "all necessary means" in UN Security Council Resolution 678 of 29 November 1990, dealing with the UN Security Council's previous demand that Iraq withdraw from Kuwait (under UN Security Council Resolution 660 of 2 August 1990), gave the coalition forces the right to interfere with the use of international and national airspace insofar as it related to forcing the Iraqi forces to leave Kuwait. Regional security organizations may also, in certain circumstances, have the right to affect the use of international or national airspace.

[259] *Chicago Convention*, Art. 89. The primary multilateral agreement granting civil aircraft on scheduled international air service the rights of overflight and landing in other states stipulates that "in areas of active hostilities or of military occupation, and in time of war along the supply routes leading to such areas, the exercise of such privileges shall be subject to the approval of the competent military authorities." Air Services Transit Agreement, Art. 1.

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CHAPTER 5

SPACE LAW

INTRODUCTION—WHAT SPACE BRINGS TO THE FIGHT

For years, the warfighter has relied heavily on space products and services to help reduce the fog of war. The Department of Defense (DOD) capabilities providing these products and services fall into four missions: 1. space force enhancement; 2. space support; 3. space control; and 4. space force application.

Space force enhancement operations multiply joint force effectiveness by increasing combat potential, operational awareness, and providing needed joint force support. Joint doctrine describes five force enhancement functions: 1. intelligence, surveillance, and reconnaissance (ISR); 2. missile warning; 3. environmental monitoring; 4. satellite communications; and 5. space-based positioning, navigation, and timing. Such non-aggressive uses of space are an integral part of military air, land, and sea operations. Some of these capabilities are also essential to the everyday functioning of civilians around the world. These types of capabilities are so internationally well accepted that they raise few operational law issues.

Likewise, the space support area rarely raises operational law issues. This mission includes those combat service support operations that deploy and sustain military and intelligence systems in space—in particular, space launch and satellite operation. The operational lawyer, however, must pay particularly close attention to operations in the space control and space force application mission areas.

Space control consists of those combat and combat support operations that (a) ensure freedom of action in space for the United States (U.S.) and its allies, and (b) deny an adversary freedom of action in space when directed by the President or the Secretary of Defense. Space control includes surveillance of space, protection of U.S. and friendly space systems, prevention of an adversary's use of U.S. and friendly space systems and services for purposes hostile to U.S. national security interests, and negation of space systems and services used for such hostile purposes. The negation sub-mission consists of actions to disrupt, deny, degrade or destroy space systems or services. The prevention and negation space control activities can raise significant legal and policy questions. Force application in, from, or through space raises similar questions. As military space capabilities evolve, the military lawyer must be prepared to guide commanders and operators through the legal issues that arise.

THE LEGAL AND POLICY FRAMEWORK

Just as there are legal regimes that apply to air, land, and sea operations, there is a legal regime that applies to space operations. Nevertheless, general principles of international law, including those in the United Nations (UN) Charter and the law of armed conflict, also constitute part of space law. Additionally, several arms control agreements directly impact military space activities. Domestically, the effect of U.S. laws and policies on U.S. space activities must also be considered. While the space legal regime imposes a few significant constraints, the majority of this legal regime provides a great deal of flexibility for military operations in space.

The Core Space Treaties

The major principles applicable to space activity are found in four core space treaties—the Outer Space Treaty, the Rescue and Return Agreement, the Liability Convention, and the Registration Convention. All of these treaties apply equally to military and non-military space activities and provide no exception for classified activities. Additionally, insofar as they are incompatible with a state of hostilities, the provisions of these treaties may be suspended between belligerents involved in conflict, although they would continue to apply between belligerent and non-belligerent parties.

It should first be noted that international law does not define the term "outer space." Indeed, the boundary between airspace and outer space has not been established. Although States generally accept that there is a limit to the sovereign airspace above their territory, they have been unable to arrive at a consensus establishing where airspace ends and outer space begins. The U.S. favors a functional approach to the demarcation between airspace and outer space. Specifically, the U.S. distinction is based on the aeronautical and the astronautical activities that can be undertaken in these domains rather than on a fixed geographical boundary. According to this approach, the upper limit to airspace is above the highest altitude at which an aircraft can fly and below the lowest possible perigee of an earth satellite in orbit. The result is that anything in orbit or beyond can safely be regarded as in outer space. None of the internationally proposed spatial boundaries (e.g., 100 km above sea level) are accepted by the U.S. The U.S. has consistently opposed establishing such a boundary in the absence of a showing that one is needed. A primary rationale for not accepting a predetermined boundary is that once such a boundary is established, it would limit flexibility and might preclude the ability to take advantage of evolving space technologies and capabilities.

The Outer Space Treaty. The Outer Space Treaty is the cornerstone of the space legal regime. It contains broad principles regarding use and exploration of outer space, including the applicability of the UN Charter and other international law to space activity. It also contains specific prohibitions on military activities in space. Additionally, the treaty imposes international obligations upon States, as well as responsibilities and liability for the activities of its nationals in outer space, whether they are carried out by governmental or non-governmental actors. All the remaining space-specific treaties are derived from and expand upon the general principles set out in this treaty.

The Rescue and Return Agreement. The Rescue and Return Agreement addresses the rescue of spacecraft personnel and the retrieval of space objects found outside the territory of the launching State. Further, it addresses the obligation of State Parties to the Agreement to return any recovered personnel or objects to the launching State.

The Liability Convention. This treaty renders States internationally liable for damage their space objects cause to other States or to foreign nationals. It describes the circumstances under which States may be held liable for such damage, and sets out the procedures to follow in pursuing a claim for damages.

The Registration Convention. To assist States in identifying ownership of space objects, the Registration Convention requires a launching State to provide certain data to the UN as soon as practicable on every object the State launches into space. The UN publishes the data in a register available to the public via the Internet at http://www.unoosa.org/oosa/en/SORegister/index.html.

Arms Control Agreements Impacting Military Space Operations

The Limited Test Ban Treaty. This treaty forbids nuclear weapons tests or any other nuclear explosion under water, in the air, and in outer space.

The Environmental Modification Convention (ENMOD). ENMOD prohibits military or hostile use of environmental modification techniques having widespread (encompassing an area on the scale of several hundred square kilometers), long-lasting (lasting for a period of months, or approximately a season), or severe effects (involving serious or significant disruption or harm to human life, natural and economic resources or other assets) for purposes of destroying, damaging, or injuring another State. The treaty applies on earth, in the atmosphere, and in outer space. This treaty does not prohibit environmental modification techniques used for peaceful purposes and is intended to apply during times of armed conflict. Additionally, it has not been interpreted to outlaw the use of nuclear weapons.

Treaty on the Reduction and Limitation of Strategic Offensive Arms (START I). The terms of START I require the reduction and limitation of the strategic offensive arms of the U.S., Russia, Belarus, Kazakhstan, and Ukraine. Heavy bombers, submarine launched ballistic missiles (SLBMs), and inter-continental ballistic missiles (ICBMs) are subject to the treaty. The treaty also includes an obligation to provide advance notice of any flight test of an ICBM or SLBM, including those used to launch objects into the upper atmosphere or space. The treaty will expire on 31 December 2009 unless the parties agree to extend it.

Strategic Offensive Reductions Treaty (SORT). The Strategic Offensive Reductions Treaty, also known as the Moscow Treaty, requires reduction of the number of "strategic nuclear warheads" to between 1700-2200. Unlike START I, which is detailed and contains many definitions, the SORT treaty does not define strategic nuclear warheads or require the destruction of excess nuclear warheads. The treaty will expire on 31 December 2012 unless

extended. The U.S. declared it reached compliance with the SORT requirements in early 2009.

Launch Notification Agreements. The 1971 Accidents Measures Agreement, the 1988 Ballistic Missile Launch Notification Agreement, and the 2000 Pre- and Post-Launch Notification System (PLNS) Memorandum of Understanding (MOU) are some of the bilateral agreements between the U.S. and Russia that require advance notice of ballistic missile and space object launches. The purpose of these agreements is to prevent a party from mistaking accidental launches, test launches, and unidentified objects as hostile launches. The U.S. is also a subscribing State to the Hague Code of Conduct (HCOC). The HCOC is not a treaty, but subscribing States agree to various measures in order to curb the proliferation of ballistic missiles. Parties to the HCOC also agree to exchange pre-launch notifications of their ballistic missile and space vehicle launches and tests flights.

U.S. Space Policies

National Space Policy. The 2006 National Space Policy states that the U.S. considers space systems to have the rights of passage through and operation in space without interference, and that the U.S. will view purposeful interference with its space systems as an infringement of its rights. The policy also says the U.S. will preserve its rights, capabilities, and freedom of action in space; dissuade or deter others from either impeding those rights or developing capabilities intended to do so; take actions necessary to protect its space capabilities; respond to interference; and deny, if necessary, adversaries the use of space capabilities hostile to U.S. national interests. Finally, the policy declares that the U.S. will oppose the development of new legal regimes or other restrictions that seek to prohibit or limit U.S. access to or use of space. Although President Obama has not issued a new space policy, the Administration has declared its intent to begin discussions concerning an agreement on banning weapons in space.

DOD Space Policy. The 1999 DOD Space Policy, as articulated in DODD 3100.10, has themes within it similar to the National Space Policy, even though it predates the current national policy. This Directive is currently under revision but remains in effect.

Standing Rules of Engagement. The U.S. Standing Rules of Engagement (SROE) contains a classified annex, Enclosure E, concerning space operations.

MAJOR SPACE PRINCIPLES AND THEIR IMPLICATIONS FOR MILITARY SPACE ACTIVITIES

The Right to Freedom in Space

The Outer Space Treaty declares outer space, including the moon and other celestial bodies, to be free for use and exploration by all States, even those which have not ratified this treaty. Unless authorized by international law, no State or group of States may prohibit another State or group of States from accessing space or any areas on celestial bodies. Most States understand and accept that another State's satellites may freely operate in space even

though they might "overfly" their territory or the territory of other States. While there is a requirement to obtain prior authorization from a State to fly any scheduled air services or State aircraft through its territorial airspace, there is no such requirement for a space object while in space. Nevertheless, the right of those objects to pass without authorization through foreign airspace en route to or from space is not widely accepted.

International law does not require that any particular distance be maintained between space objects. Instead, international law addresses the obligation for States to conduct their activities with "due regard" for the corresponding interests of all other States, to include the prevention of harmful interference with space activities. Therefore, a State has no recognized legal authority to establish a "buffer zone" around its satellites by announcing that it will destroy or otherwise interfere with the space objects of any country that come within a certain distance.

Use of Space for Peaceful Purposes

The preamble to the Outer Space Treaty recognizes that it is in the common interest of all mankind to use space for peaceful purposes. Article IV of the treaty, however, requires that only the moon and other celestial bodies be used exclusively for peaceful purposes. The treaty does not declare that space itself must be used for peaceful purposes. Also, the treaty does not define "peaceful purposes." The majority view is that "peaceful" in this regard equates to non-hostile, non-aggressive activities. Thus, intelligence collection, missile early-warning, and transmission of communications and navigation signals to, from, and through space all constitute non-aggressive, peaceful, and therefore lawful activities. Furthermore, since Article 51 of the UN Charter recognizes the inherent right of States to engage in individual or collective self defense, military use of force in space in response to an aggressor would not violate the peaceful purposes tenet of the treaty.

A minority of States believe that the requirement that space be used only for peaceful purposes was intended to demilitarize outer space, though these same States generally acknowledge that the Outer Space Treaty authorizes the presence of military personnel in space "for scientific research or for any other peaceful purposes." This minority has been proposing treaties as well as non-binding agreements that would prevent the stationing or use of weapons in space. So far these proposals have not resulted in any changes or additions to the legal regime.

U.S. law and policy echo the peaceful purposes tenet as well as the majority "non-aggressive use" interpretation. The National Aeronautics and Space Act of 1958 declares that it is U.S. policy that activities in space should be devoted to peaceful purposes for the benefit of all mankind. The 2006 National Space Policy reiterates this policy, but clarifies that peaceful purposes allow for defense and intelligence-related activities in space in pursuit of national interests.

National Appropriation of Space is Prohibited

The Outer Space Treaty prohibits national appropriation of outer space, including the moon and other celestial bodies, whether by claim of sovereignty, by means of use or occupation, or by any other means. In light of this prohibition, claims of ownership of orbits, orbital slots, or certain portions of the radio frequency spectrum are not legally supportable. Some States do sell or lease orbital slots or radio frequencies registered with the International Telecommunications Union (ITU). Nevertheless, these practices do not constitute ownership or appropriation since that is prohibited by the Outer Space Treaty.

International Law Applies to Space Activities

As stated above, the Outer Space Treaty specifically requires that space activities be conducted in accordance with international law, including the UN Charter (and its rules governing the use of force). The body of law applicable to space activities includes customary international law (e.g., the right to engage in anticipatory self defense), general principles of humanitarian and armed conflict law, and applicable terms of status of forces, facilities and access, or other relevant international agreements. The law of armed conflict must therefore be considered during operational planning and targeting processes.

Military Activities in Space are Permissible, with Few Limitations

Generally. As discussed above in the section on peaceful purposes, the Outer Space Treaty divides all areas outside the earth into two regions: outer space and celestial bodies (including the moon). The restrictions on military activities apply only to celestial bodies and not to outer space itself.

Using Weapons in Space or on Celestial Bodies. The Outer Space Treaty only prohibits placing nuclear weapons or any other weapons of mass destruction (WMD) in orbit around the earth, installing such weapons on celestial bodies, or stationing such weapons in outer space. Thus, the treaty's prohibitions on weapons in space are quite limited. Conventional weapons may be orbited, installed, or stationed in outer space. Also, most lawful weapons may be employed in, from or through outer space (except for the peacetime explosion of nuclear weapons). Consequently, although ICBMs spend a portion of their trajectory in outer space, this temporary presence of nuclear weapons in space does not violate international law. Likewise, the stationing in space of anti-satellite weapons that are not WMDs is permitted by international law.

As stated above, space negation pertains to those actions that can be taken against an adversary's space assets to deny, degrade, disrupt, or destroy the adversary's space capability. The DOD's policy is that the preferred approach will be tactical denial of space systems or services used for purposes hostile to U.S. national security interests. DODI S-3100.15. To accomplish tactical denial, weapons will be developed in scale to tactical applications to provide capabilities with localized, reversible, and temporary effects. Nevertheless, in accordance with the policy, the U.S. retains its option to develop weapons capable of irreversible denial. Because space negation involves harmful interference with

another State's space activities, it will raise the types of legal and policy issues discussed in the preceding section.

Even though the Outer Space Treaty permits conventional weapons in space, a State may decide to forego the offensive use of weapons in space for various reasons. For example, use of a particular capability might result in the creation of space debris that would pose a danger to non-belligerent space objects, including those of friendly States. This potential for collateral damage and fratricide should be addressed during the targeting process; it may necessitate a change in the desired course of action. For example, instead of destroying a satellite ("hard kill"), a State may engage in some form of temporary interference with it instead ("soft kill").

For purposes of self-defense, however, a State might decide that the collateral damage to non-belligerent space assets from a hard kill might be necessary and proportional to the military advantage to be gained. The State causing the damage, however, might be subject to liability claims under the Outer Space Treaty and the Liability Convention, even though claims would not ordinarily be paid if the damage was inflicted during combat operations. Additionally, a State might refrain from using a particular space weapon in hopes of discouraging an adversary from attacking friendly space assets. The bottom line, however, is that a State is within its rights to use a weapon in space in self-defense, so long as that weapon is otherwise lawful and is used in accordance with law of armed conflict principles.

Testing Weapons in Space. The Outer Space Treaty does prohibit the testing of any type of weapon on celestial bodies. The testing of weapons in space itself, however, is not prohibited by the Outer Space Treaty. The Limited Test Ban Treaty, discussed earlier, does prohibit peacetime testing of nuclear weapons in outer space. The prohibition on testing nuclear weapons in space, however, may not apply between belligerents in an armed conflict. In fact, after the U.S. ratified the Limited Test Ban Treaty, it maintained a nuclear armed ASAT system from 1963 to 1975. Nevertheless, using a nuclear weapon in outer space would cause indiscriminate damage to all satellites and would likely violate the law of armed conflict principle of distinction.

Establishing Military Bases in Space. The Outer Space Treaty prohibits establishing military bases on celestial bodies. Placing man-made military space stations in space itself, however, is not prohibited.

Conducting Military Maneuvers in Space. The Outer Space Treaty prohibits conducting military maneuvers on celestial bodies. It does not prohibit conducting such activities in space.

Harmful Interference with Space Activities of Others

Generally. The Outer Space Treaty requires that State parties to the treaty conduct their activities in space with "due regard to the corresponding interests" of all other State parties to the treaty. Additionally, it requires States "to undertake appropriate international consultations" with other State parties to the treaty prior to engaging in space activities that

"would cause potentially harmful interference" with the other State's space activities. These restrictions, however, would likely be suspended between belligerents during times of armed conflict. Nevertheless, the provisions would still apply between belligerents and non-belligerents. For this reason, satellites owned by multiple nations, and commercially-owned satellites, that are used by a belligerent for military purposes will raise sensitive political issues. In addition to the required determination that the satellites constitute a valid military target, consideration should be given to the political repercussions that might result from interfering with these satellites or their use by non-belligerent owners and customers.

ITU Constitution and Convention. The ITU Constitution and Convention declare that the radio frequency spectrum and the geostationary orbit are limited natural resources to which all States are authorized equitable access. Thus, one purpose of the ITU is to prohibit harmful interference with the communications of another State. Therefore, under the ITU Constitution and Convention and the Radio Regulations, once a State registers its use of an orbital slot or radio frequency, it is entitled to use that slot or frequency indefinitely and without harmful interference. Article 45 requires States to use radio frequencies in such a manner as not to cause harmful interference with the radio services or communications of others. Details regarding access to and use of the radio frequency spectrum are contained in the Radio Regulations, which have the effect of binding treaties. While the ITU does not purport to regulate military communications, it does require that a military observe "so far as possible" measures for preventing harmful interference. Indeed, the Frequency Management Manual requires that all spectrum users give due regard to the rights of other spectrum users. Finally, status of forces and basing rights agreements may impose restrictions on use of frequencies within particular countries.

National Technical Means of Verification. The START I treaty (and other treaties not discussed in this article) prohibits interference with a party's ability to verify treaty compliance by national technical means (NTM). Intelligence, surveillance, and reconnaissance satellites constitute a form of NTM. The treaties are silent as to their application when the parties are in an armed conflict. As in any situation involving an armed conflict, the applicable SROE must be consulted.

U.S. Law and Policy. U.S. law and policy also address interference with space activities. For example, 18 U.S.C. § 1367 makes it a felony to intentionally or maliciously interfere with the operation of telecommunication or weather satellites or to hinder or obstruct any satellite transmission. While Section 1367 specifically exempts authorized law enforcement and intelligence activities, it does not expressly exempt other military or national security actions from its purview. Also, 47 U.S.C. § 502 makes it a crime to knowingly and willfully violate any rule, regulation, restriction, or condition made or imposed by the ITU. Any activities implicating this statute should be referred to AF/JA and SAF/GC.

States are Responsible and Liable for Their Space Activities

The Outer Space Treaty holds States responsible for their national space activities, including activities by governmental and non-governmental entities. The Registration Convention

provides one means of determining which State is responsible for a particular space object. This treaty requires States engaged in space activities to establish a national registry to record every object the State launches into space. It also requires the UN to maintain a registry and for each State to forward data to the UN for inclusion in the registry as soon as practicable on every object the State launches into space. The minimum data to be provided to the UN is the name of the launching State, the registration number or other designator of the object, the date and territory or location of the launch, the basic orbital parameters, and the general function of the object. Although the treaty defines "launching State" as the State that launched or procured the launch and the State from whose territory or facility the object was launched—a definition that could result in more than one "launching State"—only one State may register the object.

The Outer Space Treaty also declares that for non-governmental activities in space "the appropriate" State must provide authorization and continuing supervision. The State of registration under the Registration Convention is strong evidence of which State is "the appropriate" State, though other factors may be involved. For example, if there are multiple launching States and the object is not registered, "the appropriate" State might be decided by determining which State's nationals have ownership or operation and control of the object. One way in which the U.S. exercises its authorization and supervision is through the licensing process. Depending on the function and operations of the satellite, various U.S. agencies are involved, including the Federal Aviation Administration (for launches), the Federal Communications Commission (for communications links with satellites), and the National Oceanic and Atmospheric Administration (for remote sensing satellites).

The Liability Convention also provides a means of holding States responsible for their space activities. This treaty establishes a bifurcated legal regime for addressing liability for such damage. Launching States are "absolutely liable" for damage their space objects cause on earth or to aircraft in flight. For all other locations (including outer space), a launching State is only liable if the damage is "due to its fault or the fault of persons for whom it is responsible." The Liability Convention uses the same definition of "launching State" as the Registration Convention; thus, more than one State may potentially be held liable (joint and several liability). A launching State can be exonerated from absolute liability if it can establish that the damage resulted either wholly or partially "from gross negligence or from an act or omission done with intent to cause damage" on the part of a claimant State. Normally, the treaty applies equally to damage caused by or to military and non-military space objects. However, like the other space-specific treaties, the Liability Convention may be suspended between belligerents during times of armed conflict. Damage caused during times of armed conflict to the space objects of non-belligerent parties could still be addressed under this treaty. The Liability Convention does not preclude resorting to other channels for relief.

Protection of Spacecraft Personnel and Space Objects

The Outer Space Treaty requires that States retain jurisdiction and control over their space objects and personnel when in outer space. Additionally, States retain ownership of their space objects regardless of their location. The Rescue and Return Agreement embodies the

concept of State jurisdiction and control. Essentially, this treaty requires that State Parties to the treaty immediately rescue foreign "spacecraft personnel" who land in their territory, and safely and promptly return them to the launching State. The treaty also provides a measure of protection for space objects; a State party to the treaty must retrieve objects in its territory when assistance is requested by the launching State, but only to the extent practicable. The treaties do not give a launching State any authority to enter the territory of another State to recover its space objects, even if the space object is in the territory of a State that is a party to this treaty. Additionally, they do not impose a requirement to return an object in the same condition in which it was found; therefore, the foreign State can inspect the object, reverse engineer it, or take it apart prior to returning it. The launching State is responsible for costs of the recovery and return. Finally, these treaties would likely be suspended between belligerents during times of armed conflict.

The space treaties do not protect commercially-owned space objects from being targeted if they otherwise constitute valid military objectives (such as being used to aid a belligerent in the prosecution of war). Nevertheless, the potential for fratricide or adversely impacting a neutral or other non-belligerent State should be considered when determining whether to target such a space object.

Some provisions of U.S. law are also relevant. For example, 18 U.S.C. § 7 extends the special maritime and territorial jurisdiction of the U.S. to U.S. registered space objects when those objects are in the atmosphere or in outer space. The statute also covers all places outside the jurisdiction of any nation with respect to an offense by or against a U.S. national. Under such circumstances, the U.S. could enforce violations of its federal criminal laws in outer space. Likewise, U.S. military personnel will be subject to the Uniform Code of Military Justice while in space, just as they are everywhere on earth.

Space Debris

International law does not prohibit the creation of space debris or require that objects be de-orbited or transferred to another orbit prior to the end of their useful life. The Outer Space Treaty merely declares that States shall avoid "harmful contamination." All operations in space, however, do create some amount of space debris. Because of the nature of the physical environment in space, much of this debris will last for hundreds or thousands of years. Even small pieces of debris, including debris that is too small to be tracked by current sensors, can disable or destroy an operational satellite. For these reasons, the U.S. and other space-faring States have developed guidelines to limit the creation of new debris.

The Inter-Agency Debris Coordination Committee (IADC) is an international forum of governmental bodies for the coordination of activities related to the issues regarding orbital debris, and is comprised of experts from the 11 space-faring States' space agencies. The IADC does not create binding rules. Instead, it has developed guidelines suggesting ways to limit debris released during normal operations, to minimize the potential for on-orbit break-ups, to dispose of spacecraft at the end of the mission, and to prevent on-orbit collisions. The United Nations General Assembly has also adopted similar guidelines.

The National Space Policy declares that "the United States shall seek to minimize the creation of orbital debris by government and non-government operations in space in order to preserve the space environment for future generations." The policy requires compliance with the United States Government Orbital Debris Mitigation Standard Practices, which is similar to the IADC and UN guidelines. The DOD directs that debris should be minimized, consistent with mission requirements and cost effectiveness; that spacecraft should be removed from space or placed in a storage orbit at the end of the mission; and that debris mitigation must be taken into account when purchasing and operating spacecraft. The SROE also contain provisions requiring that debris be minimized as much as practicable. Since international law does not prohibit the creation of debris, ultimately rules of engagement and law of armed conflict principles will govern how the U.S. conducts military operations that have the potential to create space debris.

OTHER OPERATIONAL CONSIDERATIONS

This section highlights additional issues that may arise regarding DOD space activities during times of armed conflict and other contingencies.

Space Prevention

Space prevention includes those actions taken that would prevent an adversary from using U.S. or allied space assets for purposes hostile to the U.S. With allied satellites, the U.S. could request through diplomatic channels that the allied satellite operators prevent the adversary from using the assets. If such diplomatic requests are unsuccessful, the U.S. would have to accept the decision, unless there are grounds under international law that would authorize the U.S. to prevent the access as a matter of self defense. The following paragraphs outline additional prevention measures.

Shutter control

The legal, policy, or diplomatic means employed for national security reasons to deny or limit access to commercially available remote sensing imagery is popularly referred to as "shutter control." The Land Remote Sensing Act requires that commercial remote sensing satellites licensed in the U.S. be operated in such a manner as to preserve the national security of the U.S. See 15 U.S.C. 5622. If the Commerce Secretary agrees with DOD assertions that a licensee is operating its satellite in a manner detrimental to national security, the Secretary may take appropriate action against the licensee, to include terminating or suspending the license to operate the satellite. Further, in accordance with the U.S. Commercial Remote Sensing Policy, the U.S. may restrict operations of commercial systems to limit collection and dissemination of certain data and products to only the U.S. or other approved recipients.

Navigation Warfare

Another means of preventing adversary access to friendly space assets concerns use of the Global Positioning System for positioning, navigation, or timing (PNT) purposes. Just as

DOD uses GPS in support of military land, air, space, and sea operations, an adversary may also desire to use it for military purposes, such as for guiding weapons. A complicating issue is the fact that the GPS signal has become a "global utility," and is widely used in many civil, commercial, and scientific applications.

Until 1 May 2000, the GPS signal provided to the public was a degraded signal; this was known as "selective availability." On that date, the President declared that since the U.S. has demonstrated the capability to selectively deny GPS signals on a regional basis when its national security is threatened, the U.S. would stop the intentional degradation of the public GPS signal. On 18 September 2007, the President declared that future GPS satellites would be launched without the capability to employ selective availability. The purpose of this announcement was to eliminate a source of uncertainty about GPS capabilities and future access.

Title 10, section 2281 of the United States Code and the 2004 PNT Policy set out broad policy goals for the U.S. concerning GPS. The PNT policy declares that the U.S. shall provide uninterrupted access to GPS for U.S. and allied national security systems; provide access to GPS on a continuous, worldwide basis free of direct user fees for civil, commercial, scientific uses, and homeland security purposes; improve capabilities to deny hostile use of any PNT services, without unduly disrupting civil and commercial access; and maintain the commitment to discontinue use of selective availability.

While an adversary would have no legal grounds upon which to complain if the U.S. denied or degraded access to GPS, the decision to do so would have to be made in light of obligations the U.S. might have via international agreements to provide continuous GPS access to allies near the area in which GPS would be denied or degraded. Moreover, even in the absence of such a specific agreement, the impact of GPS denial on non-DOD users must still be taken into account before such denial is implemented.

Space Situational Awareness

The U.S. has the world's most robust and complete catalog of space objects, which forms the foundation of space situational awareness (SSA). The DOD is authorized to provide SSA data and services to non-United States Government entities through a program known as the Commercial and Foreign Entities (CFE) program. See 10 U.S.C. § 2274. This is currently a temporary pilot program operated by Air Force Space Command; however, Congress will likely make the program permanent, and the Secretary of Defense will probably transfer it to United States Strategic Command in October 2009.

The CFE program consists of two parts. The first part is a web page, www.space-track.org, which enables users with an account to obtain data on the locations of most space objects tracked by the Space Surveillance Network (SSN). In the second part, CFEs sign an agreement in exchange for other data and services beyond what is available on the web page. The agreement, among other things, waives U.S liability for the data or service and forbids the CFE from redistributing the data without permission. Although the statute authorizes the DOD to charge for such data and services, to date the DOD has not charged

any such fees. Under the pilot program, several launch providers and satellite operators have signed such agreements. The U.S. has a significant interest in the CFE program because sharing SSA with those operating in space helps commercial and foreign satellite operators avoid creating new debris.

In the event of armed conflict, DOD would have to evaluate the risks of providing operational SSA data to non-U.S. users. On the one hand, withholding this information might increase the possibility of collisions in space, creating more debris. Also, there might be international agreements with other nations that require the U.S. to provide a certain level of SSA data. On the other hand, providing the data may expose U.S. and allied government, civil, or commercial satellites to increased risk.

CONCLUSION

As the foregoing summary indicates, a substantial body of domestic policy and domestic and international law addresses civil, commercial, and military space activity. With a few significant exceptions, this body of law and policy provides the DOD wide-ranging freedom and flexibility to engage in space activities—from force enhancement to force application. Because this is a relatively new and rapidly evolving area, readers are cautioned to ascertain whether a policy described above that affects a particular course of action is still in effect or whether it has been modified. Nevertheless, it is unlikely that the international space legal regime will change substantially in the foreseeable future. Finally, while many of the space-specific treaty provisions may not be applicable to belligerents in an armed conflict, the law of armed conflict provides a legal framework under which to operate in the absence of other applicable international law.

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I-West Det 3/AMC
GUARD NOSC
AFNOC Mission
Stripes Crew Assig
Event Manager
INOSC East/CENTAF
TSgt Robinson
SrA Wagoner
SSgt Stoll
AFNetOps C2 Relations
SIPRNET

CHAPTER 6

CYBERSPACE LAW

BACKGROUND

Understanding cyberspace law and operations requires basic understanding of computers and the Internet. The origins of the Internet may be traced back to the 1960s when the United States Government (USG) funded research projects of its military agencies to build robust and distributed computer networks. What has developed is an Internet that is not a single system, but rather a number of linked networks. Unlike a telegraph cable, the Internet routes data through nodes; if one node is destroyed or degraded, electronic data will still flow to its intended location provided the intended location remains viable. Packets may contain programs which extract information, commandeer the computer, or destroy a system entirely. Packets may travel through multiple nodes of the Internet, including some nodes used by civilian and commercial users. Factors such as these must be taken into account when examining the legal issues relating to cyber operations.

APPLICATION OF THE LAW OF ARMED CONFLICT

The USG adheres to the law of armed conflict in all military operations as a matter of policy. The law of armed conflict has as its core, the basic principles of:

1. Military necessity;

2. Humanity (also referred to as unnecessary suffering);

3. Proportionality; and

4. Distinction (also referred to as discrimination).

The fundamental targeting issues arising are no different in cyber operations as compared to those applicable to kinetic targeting.

Whether the law of armed conflict applies to a particular cyber operation will largely depend upon the particular facts and circumstances, not the least of which is whether a state of armed conflict exists.

The law of armed conflict may apply to cyber activity conducted by a state in the same manner as it applies to the conduct of other activities. However, it is not settled what levels and types of cyber operation will be considered to constitute a use of force and hence subject to rules of distinction, collateral damage, *etc*. If injury, death, damage, or

destruction to the citizens and property of the other belligerent result from a cyber attack, those actions are likely to constitute a use of force.

LAW OF ARMED CONFLICT PRINCIPLES

General

Cyber operations differ significantly in terms of the amount of suffering or physical damage they are capable of producing. The application of the law of armed conflict to cyber operations ensures that defined standards of conduct are owed by and to belligerent states.

Military Necessity

The principle of military necessity is explicitly codified in Article 23, paragraph (g) of the Annex to Hague IV, which forbids a belligerent "to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war." Other provisions acknowledge the principle implicitly. A commander is granted latitude in assessing a situation; the commander cannot and need not know just what degree of force is required to conclude an attack successfully. A commander is charged with deciding what is reasonable in light of the circumstances prevailing when making the targeting decision. Both military and civilian infrastructures are vulnerable to cyber attacks. During an armed conflict virtually all military infrastructure will be a lawful target.

Humanity

Several treaties contain the caveat that the right of a party to a conflict is not unlimited in its selection and use of means or methods of war.[260] The principle of avoiding the employment of arms, projectiles, or material of a nature to cause unnecessary suffering (also referred to as superfluous injury) is codified in Article 23 of the Annex to Hague IV, which states: "It is especially forbidden…[t]o employ arms, projectiles or material calculated to cause unnecessary suffering..." In addition, Additional Protocol I (AP I), Article 35(2) states: "It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering."[261]

Although at first glance, cyber operations may not appear to have the potential for causing superfluous injury, new systems or techniques should be reviewed for an assessment of

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[260] Article 22, Annex to Hague IV; and Article 35, para 1, API. The former refers only to *means*; the latter refers to "*methods* or *means* of warfare."

[261] Both *unnecessary suffering* and *superfluous injury* are inexact translations into English of the official French text of Article 23(e) of Hague IV Reg., in which the French text uses the phrase *maux superflus*. The unofficial English text of the 1899 Hague II translated *maux superflus* to mean *unnecessary suffering*; the unofficial English translation of the successive 1907 text used *superfluous injury*. Neither precisely translates *maux*. As both phrases have been used synonymously during the Twentieth Century, both were incorporated into the re-codification of Article 23(e), Hague IV, as Article 35(2), API. Although President Ronald Reagan declined to submit API to the Senate for its advice and consent to ratification, some commentators consider the language of Article 35(2) to be a codification of customary international law insofar as it is consistent with Article 23(e), Hague IV Reg., and therefore binding on all nations.

their potential for the same. The excerpts above refer to projectiles and materials which naturally conjure up images of tangible and visible things. However, cyber operations frequently rely upon the use of electrons, sub-atomic matter, but matter nevertheless. Regarding cyber activity in this manner eases any philosophical difficulties one might have in applying the law of armed conflict to such operations.

Distinction

The principle of distinction is the customary rule of international law which requires that belligerents distinguish between combatants and non-combatants.[262] It requires that the effects of armed conflict be limited to combatants and military objects as much as possible in the prevailing circumstances. Civilians and civilian objects must not be targeted and are to be spared from collateral effects as much as reasonably possible. Combatants and other military objectives are lawful targets during armed conflict.

The law of armed conflict requires that lawful combatants be distinguished from the civilian population, be trained in the law of armed conflict, serve under effective discipline, and fall under the command of officers responsible for their conduct. Only lawful combatants are entitled to immunity from prosecution for their lawful actions during armed conflict as belligerents. It is therefore arguable that cyber attacks amounting to a use of force should only ever be conducted by combatants.

Civilians who actively participate in cyber operations may lose the protection afforded to them on account of their civilian status under international law. States that use civilians to conduct cyber operations may also compromise the safety of other non participating civilians due to the difficulty in distinguishing civilians participating in cyber operations from the rest of the civilian population. Furthermore, any such civilian conducting cyber operations may be subject to criminal prosecution either by the enemy or by an international tribunal.

The increasing complexity and interconnectedness of information systems that may be the subject of a cyber attack renders the issue of discrimination significantly more complex in the employment of cyber operations as compared to kinetic military operations. Prior to conducting a cyber attack against an enemy state's networks, a belligerent must assess intelligence collected to determine which computers or systems are lawful targets. However, cyber operations may be used in preference to the kinetic alternative to better ensure compliance with the law of armed conflict.

Proportionality

The principle of proportionality requires that unnecessary damage or injury resulting from military action should not be excessive in relation to the anticipated military advantage. A

[262] The principle of distinction, also sometimes referred to as the principle of discrimination or identification, is given expression in API in Articles 48 and 49(3). The United States is not a party to API, but the articles may provide useful guidance on the definition.

cyber attack may result in damage to property and injury or death to humans.[263] It follows that the traditional balancing test between military necessity and superfluous injury should be carried out for all forms of cyber operations. Determining proportionality constraints for cyber operations may present more challenges as compared to kinetic military operations due to the increased difficulty inherent in predicting the extent of the effects of the cyber operation.

USG AND DOD POLICY

In 1997, President Clinton established the President's Commission on Critical Infrastructure Protection (PCCIP). The PCCIP predicted that by 2002, nineteen million people would have the ability to launch cyber attacks. It also noted that since little in the way of specialized equipment is needed to conduct such attacks, governments could expect an exponential growth in increasingly sophisticated malicious cyber activity.[264] On 22 May 1998, President Clinton issues Presidential Decision Directive/NSC-63. In it, the President noted:

> The United States possesses both the world's strongest military and its largest national economy. Those two aspects of our power are mutually reinforcing and dependent. They are also increasingly reliant upon certain critical infrastructures and upon cyber-based information systems.

In 2002, President George W. Bush issued National Security Presidential Directive (NSPD) 16, which directed the government to review offensive capabilities against enemy computer networks.[265] In 2004, President Bush issued NSPD-38, National Strategy to Secure Cyberspace. The two strategy documents are related in the same manner in which offense and defense are related in a military operational construct. However, both of these documents are not releasable to the general public.

In 2008, President Bush promulgated NSPD 54, Cyber Security and Monitoring. While NSPD 54 remains classified, its definition of cyberspace is unclassified and listed as follows: "Cyberspace means the interdependent network of information technology infrastructures, and includes the Internet, telecommunications networks, computer systems, and embedded processors and controllers in critical industries." Later, Deputy Secretary of Defense Gordon England issued a memorandum that defined cyberspace as "a global domain within the information environment consisting of the interdependent network of information technology infrastructures, including the Internet, telecommunications networks, computer systems, and embedded processors and controllers."[266]

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[263] By way of illustration, it is easy to envisage how CNO conducted against a nation's air traffic control systems may lead to considerable loss of life.

[264] White Paper, The Clinton Administration's Policy on Critical Infrastructure Policy: Presidential Decision Directive 63 (May 22, 1998).

[265] See Bradley Graham, "Bush Orders Guidelines for Cyber Warfare," Washington *Post*, February 7, 2003, pg A1.

[266] Both definitions are contained in the DepSECDEF Memo to the Military Departments *et al*, "The Definition of Cyberspace", 12 May 2008, and its accompanying staff papers.

EXAMPLES OF CYBER OPERATIONS

Although not directly involving the USG, two recent attacks against Estonia and Georgia succeeded in disrupting the governments of those nations.

Estonia

In 2007 the Estonian government became the victim of cyber attacks on its infrastructure.[267] Enough critical media and communications systems were degraded to render the government impotent to conduct its essential functions of monitoring the country's economy and command and control over military forces. Further, emergency services were adversely affected.

Georgia

On 19 June 2008, an Internet cyber security firm reported on a denial of service cyber attack against the country of Georgia.[268] Three weeks later, on August 8, security experts observed a second round of cyber attacks against the country. Analysts noted that the second round of attacks appeared to coincide with the movement of Russian troops into South Ossetia in response to Georgian military operations a day earlier in this region. By 10 August cyber attacks had rendered most Georgian governmental websites inoperable.[269]

ADDITIONAL AND RELATED ISSUES IN CYBERSPACE LAW

Computer Network Operations

Computer network operations are categorized as computer network attacks, computer network defense and computer network exploitation. Computer network attacks are "operations to disrupt, deny, degrade, or destroy information resident in computers and computer networks, or the computers and networks."[270] On the other hand, computer network defense entails "actions taken to protect, monitor, analyze, detect, and respond to unauthorized activity within DOD information systems and computer networks."[271] Finally, computer network exploitation consists of enabling operations and intelligence

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[267] Jeffrey T.G. Kelsey. *Hacking into International Humanitarian Law: The Principles of Distinction and Neutrality in the Age of Cyber Warfare*, 106 MICH. L. REV (2008), 1428-1429, citing, Newly nasty, Economist, May 26, 2007, at 63, 63.

[268] Id., also, Steven Adair, "The Website for the President of Georgia Under Attack – Politically Motivated?" Shadowserver Foundation Report, July 20, 2008. Shadowserver specifically reported: "For over 24 hours, the website of President Mikhail Saakashvili of Georgia has been rendered unavailable due to a multi-pronged distributed denial of service (DDoS) attack. The site began coming under attack very early Saturday morning. Shadowserver has observed at least one web-based command and control (C2) server taking aim at the website hitting it with a variety of simultaneous attacks. The C2 server has instructed its bots to attack the website with TCP, ICMP, and HTTP floods….the C2 server involved in these attacks is on IP address 207.10.234.244, which is subsequently located in the United States."

[269] Karl Zimmerman, "Webhosting Report," Steadfast Networks, comment posted July 20, 2008; Steven Adair, "Georgian Websites Under Attack - DDoS and Defacement," August 11, 2008; Shaun Waterman, "Georgia Hackers Strike Apart From Russian Military," *Washington Times*, (Internet version), August 19, 2008.

[270] JP 3-13, *supra.*

[271] JP 3-13, *supra.*

collection capabilities conducted through the use of computer networks to gather data from target or adversary automated information systems or networks.[272] A proposed computer network operation in time of peace should be analyzed in advance to determine whether it amounts to a use of force. Resort to the use of force against another state is prohibited under international law except in self-defense or pursuant to United Nation (UN) authorization.[273]

Neutrality

The obligation of neutral states with regard to cyber operations is currently unsettled. Generally, while neutral states are not obliged to cease all interaction with belligerent states, their relationship with belligerents is subject to regulation. International law provides that a neutral state is not obliged to forbid or restrict the use by belligerents of telegraph or telephone cables or of wireless technology belonging to the neutral state or a third party. However, should such a prohibition or restriction be applied by a neutral state, any such prohibition or restriction must be impartially applied to both belligerents.[274] International law also prohibits belligerents from erecting or using previously erected devices on the territory of a neutral state for communications with belligerent forces or for "military purposes."[275]

The obligations incumbent upon a neutral state in times of armed conflict become more complex as cyber capabilities increasingly utilize international networks, including the Internet. In the event that a belligerent were to launch a cyber operation but in so doing used infrastructure owned by a neutral state, the issue of the neutral state's obligations would fall to be addressed.[276]

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[272] JP 3-13, *supra.*

[273] See, *e.g*, UN Charter, Articles 2(4), and 51.

[274] Hague V, Articles 8 and 9. *See,* Waldrop, E. "*Integration of Military and Civilian Assets: Legal and National Security Implications*," 55 A.F. L. REV. 157, 227 (2004).

[275] Hague V, Article 3. Hague V, Article 5 obligates a neutral state not to allow those belligerent actions prohibited by Article 3 thereof to take place in its territory.

[276] This leads to the arguably more complex question of the use of infrastructure owned by private citizens of the neutral state. The determination of whether the neutral state is violating its obligations of neutrality in allowing cyber operations to be conducted through such assets would depend largely on the degree of control the neutral state had over the infrastructure in question. In the event that the neutral state became aware that privately owned assets in its territory were being used for the conduct of cyber operations and the neutral state had the ability to prevent the activity, the neutral state would be obliged to prevent the activity if it were to maintain its neutral status. If, however, the neutral state was aware of the activity, but had no reasonable means of preventing it, it is arguable that the state's neutral status would be unaffected.

Electronic Warfare

Electronic warfare is: "[m]ilitary action involving the use of electromagnetic and directed energy to control the electromagnetic spectrum or attack the enemy."[277]

The application of the law of armed conflict to this type of operation is reasonably well settled. Similarly, electro-magnetic pulse weapons and directed energy weapons such as lasers, microwave devices, and high energy radio frequency guns operate in a manner analogous to traditional weapons. The law of armed conflict applies to such operations; the fact that bullets are substituted by electrons does not alter the fundamental character of an attack.

The use of electronic warfare to disable a system that could otherwise be lawfully destroyed by use of kinetic force will likely comply with the law of armed conflict. As both civilian and friendly signals may be adversely affected by the use of electronic warfare, commanders should consider the collateral impact electronic warfare may have on signals that do not contribute to a belligerent's war effort. Special care should be taken to avoid interference with international emergency, safety and distress frequencies.[278]

REFERENCES

1. National Security Presidential Directive 38, *National Strategy to Secure Cyberspace*, 2004
2. JP 6-0, *Joint Communications System,* 20 March 2006
3. JP 5-0, *Joint Operational Planning*, 26 December 2006
4. DODD 3600.01, *Information Operations*, 14 August 2006
5. DODD O-8530.1, *Computer Network Defense*, 08 January 2001

[277] JP 1-02, *Department of Defense Dictionary of Military and Associated Terms*, 12 April 2001 (as amended through 04 March 2008). Electronic warfare consists of three divisions: electronic attack, electronic protection and electronic warfare support. Electronic attack includes functions preventing or reducing an enemy's use of the electromagnetic spectrum, such as jamming and electromagnetic deception. See JP 3-51, *Joint Doctrine for Electronic Warfare*, 7 Apr 2000 at I-2.

[278] Constitution of the International Telecommunications Union, Dec. 22, 1992, S. Treaty Doc. No. 104-34 (1996) (as amended through 1994).


U.S. AIR FORCE

CHAPTER 7

INTERNATIONAL AGREEMENTS

WHAT CONSTITUTES AN INTERNATIONAL AGREEMENT

Under International Law

Under international law, "international agreement" and "treaty" are synonymous. The Vienna Convention on the Law of Treaties provides: "treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." Although the United States (U.S.) has not ratified this multilateral treaty, the U.S. Department of State (DOS) regularly invokes many of its terms as declarative of customary international law.

Under Domestic Law

Under U.S. domestic law, international agreements fall into two categories: treaties and executive agreements. Both treaties and executive agreements, as contemplated in U.S. domestic law, constitute international agreements within the meaning of international law.

Treaties in Domestic Law. Treaties are international agreements concluded pursuant to Article II, Section 2 of the U.S. Constitution, which provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." Treaties are part of the "supreme Law of the Land" under Article VI of the Constitution. To the extent that a treaty's provisions are self-executing, it is on an equal footing with U.S. statutes and takes precedence over any existing U.S. statutes in conflict with its terms. Later statutes, however, may under certain circumstances override provisions of an existing treaty (e.g., where Congress clearly intends such result).

Executive Agreements in Domestic Law. Executive agreements are international agreements concluded by an authorized member of the executive branch of the U.S. Government (USG) based upon legal authority found in the Constitutional powers of the President (e.g., as "Commander in Chief of the Army and Navy of the United States" Article II, Section 2), U.S. statutes, treaties, executive orders, regulations, and other executive agreements. The validity of executive agreements is recognized in 1 U.S.C. Sections 112 and 112a, wherein it is provided that the "United States Statutes at Large" and "United States Treaties and Other International Agreements" shall be legal evidence "of the ... international agreements other

than treaties ... in all the courts of the United States, the several States and the Territories and insular possessions of the United States."

AUTHORITY FOR EXECUTIVE AGREEMENTS

> Authority for executive agreements thus concerns two separate matters: the procedural authority of members of the executive branch of the U.S. Government to negotiate and conclude international agreements, and the substantive legal authority for the specific obligations contained in international agreements.

PROCEDURAL AUTHORITY

> Procedural authority for the negotiation and conclusion of international agreements by officers and employees of the Department of Defense (DOD) is governed by the Case Act, State Department Regulations, DOD Directives (DODDs) and Instructions (DODIs), and the regulations of the Joint Chiefs of Staff, the Military Departments, and other DOD agencies.

Under the Case Act, the Secretary of State must transmit to the President of the Senate and the Speaker of the House the text of any international agreement (other than a treaty) to which the U.S. is a party (including an oral agreement, which must be reduced to writing) not later than sixty days after the agreement enters into force for the U.S. (*see* 1 U.S.C. Section 112b) Classified agreements must be sent to the Senate Foreign Relations Committee and the House Foreign Affairs Committee.

The President must personally report annually to the Speaker of the House and the Chairman of the Senate Foreign Relations Committee any international agreement transmitted to Congress after expiration of this sixty-day period, describing "fully and completely" the reasons for late transmittal. Any department or agency of the U.S. Government which enters into an international agreement on behalf of the U.S. must transmit the text of the agreement to the DOS not later than twenty days after signature of the agreement.

Consultation with the Secretary of State is required prior to signing or otherwise concluding an international agreement on behalf of the U.S. Such consultation may encompass a class of agreements rather than a particular agreement. The Secretary of State determines for and within the executive branch whether an arrangement constitutes an international agreement within the meaning of the Case Act. The President, through the Secretary of State, promulgates such rules and regulations as may be necessary to carry out the Case Act.

State Department Regulations

In implementation of its responsibilities under the Case Act, the DOS has promulgated regulations on the coordination and reporting of international agreements. *See* 22 CFR Part 181. The following is a synopsis of the key provisions of these regulations:

Application. The regulations apply to all agencies of the U.S. Government whose responsibilities include the negotiation and conclusion of international agreements, but do not constitute a delegation by the Secretary of State of authority to engage in such activities. 22 CFR section 181.1(a).

Effect of Deviation or Derogation. Deviation or derogation from the regulations will not affect the legal validity under U.S. or international law of agreements concluded; will not give rise to a cause of action; and will not affect any public or private rights established by such agreements. 22 CFR section 181.1(b).

Criteria for Determining Application of Case Act. The regulations set forth criteria for deciding whether any undertaking, oral agreement, document, or set of documents, including an exchange of notes or of correspondence, constitutes an international agreement within the meaning of the Case Act, to wit:

1. identity of the parties: a state, state agency, or intergovernmental organization;

2. intention of the parties to be legally bound by their undertaking and to have such undertaking governed by international law (excluding arrangements governed solely by the law of the U.S., a state or jurisdiction thereof, or the law of a foreign state);

3. significance of the arrangement (excluding minor or trivial undertakings);

4. specificity, including objective criteria for determining enforceability;

5. two or more parties (excluding unilateral commitments);

6. form is not normally important, but failure to use the customary form may constitute evidence for a lack of intention to be legally bound;

7. agency level agreements meeting above criteria are included even though concluded on behalf of a particular USG agency rather than the USG;

8. implementing agreements meeting above criteria are included unless their terms are closely anticipated and identified in the underlying agreement;

9. extensions and modifications of international agreements also constitute international agreements; and

10. oral agreements meeting (1) - (5) above are included and must be reduced to writing.

Responsibility for Applying Criteria. The Legal Adviser of the DOS, a Deputy Legal Adviser, or the Assistant Legal Adviser for Treaty Affairs determines whether any undertaking, document, or set of documents constitutes an international agreement within the meaning

of the Case Act. 22 CFR section 181.3(a). Thus, the criteria for determination of an international agreement summarized above may not be used by DOD or other USG agencies as a basis for not reporting a particular arrangement as an international agreement. As stated previously, the Case Act specifically reserves authority for making such determinations to the DOS.

Requirement of Consultation with DOS. In order to assure that all proposed international agreements are consistent with U.S. foreign policy objectives (and in view of the requirements of the Case Act), no USG agency may conclude an international agreement without prior consultation with the DOS. The only exception to this rule is that agencies who negotiation a large numbers of implementing arrangements are only required to transmit the texts of the more important arrangements to the DOS prior to entry into force. While this exception does exist, it has limited applicability because only a small number of those implementing agreements constitute international agreements within the meaning of the Case Act. 22 CFR sections 181.4(a) and 181.3(c).

DOS Authorization. In effecting consultation, the DOS gives approval for any proposed agreement negotiated pursuant to State authorization, and an opinion on any proposed agreement negotiated by an agency with separate authority to negotiate such agreement. The approval or opinion is given in accordance with DOS procedures contained in Volume 11, *Foreign Affairs Manual*, Chapter 700 (Circular 175 procedure). State Department officers are responsible for the preparation of all documents required by the Circular 175 procedure. 22 CFR section 181.4(b).

Process for Initiating DOS Consultation. Requests by USG agencies to the DOS for consultation on a proposed international agreement shall include a draft text or summary of the proposed agreement, a precise citation of the Constitutional, statutory, or treaty authority for such agreement, and other background information requested by the DOS. Requests for consultation shall be made before commencement of negotiations if feasible or as early as possible in the negotiating process and in no event later than 50 days prior to the anticipated date of conclusion of the agreement. If unusual circumstances prevent meeting the 50 day requirement, the agency shall use its best efforts to transmit the required documentation "as early as possible" prior to the anticipated date of conclusion of the agreement. 22 CFR section 181.4(d).

Consultation on Class of Agreement. Consultation may encompass a specific class of agreements rather than a particular agreement where a series of agreements of the same general type is contemplated. An information copy of any particular agreement within such a class shall be sent to the Legal Adviser no later than 20 days before conclusion of the agreement. 22 CFR section 181.4(f).

Consultation may be effected with State Department representatives to interagency committees established for the purpose of approving particular agreements. 22 CFR section 181.4(g). The DOS attempts to complete its consultation within 20 days of receipt of a request for consultation. 22 CFR section 181.4(c).

Any USG agency, including the DOS, that concludes an international agreement must transmit the text of the concluded agreement to the Assistant Legal Adviser for Treaty Affairs as soon as possible and in no event to arrive at that office later than 20 days after signature of the agreement. 22 CFR section 181.5(a).

Department of Defense Procedures

DOD procedures for the negotiation and conclusion of international agreements are embodied in DODD 5530.3 *International Agreements*, implementing Joint Chiefs of Staff (JCS) and Military Department regulations, and various DOD memoranda and agency regulations dealing with particular types of international agreements. Key features of the DOD procedures are as follows:

1. prescribes procedures for implementation of the Case Act;

2. assigns responsibility for central repositories of international agreements within DOD;

3. assigns responsibility for controlling the negotiation and conclusion of international agreements by DOD personnel;

4. assigns authority to approve the negotiation and conclusion of international agreements and to delegate such authority;

5. establishes procedures for obtaining approval before initiation of negotiations; and

6. establishes procedures concerning resolution of questions of compliance by parties to international agreements.

This directive defines international agreements in terms embodying the essential elements of the criteria used by the DOS (i.e., concluded with a foreign government (including an agency thereof) or an international organization; signed or agreed to by USG personnel; and signifying intention to be bound in international law). The definition specifies that such agreements include oral agreements, which shall be reduced to writing, and that the term embraces agreements in whatever form, whether a memorandum of understanding, memorandum of agreement, memorandum of arrangements, exchange of notes or letters, technical arrangement, protocol, note verbale, aide memoire, agreed minute, etc. The definition further provides that contracts under the Federal Acquisition Regulations (FAR), Foreign Military Sales (FMS) Credit Agreements, FMS Letters of Offer and Acceptance and Letters of Intent, certain standardization agreements (STANAGs), leases under 10 U.S.C. Sections 2667, 2675, and 22 U.S.C. Section 2796, agreements solely to establish administrative procedures, and acquisitions or orders pursuant to cross-servicing agreements under 10 U.S.C. §§ 2341, *et seq*., are not international agreements for purposes of the directive.

Section 5 of DODD 5530.3 assigns responsibility to the DOD General Counsel for maintaining the central repository for all international agreements concluded by DOD personnel except for intelligence agreements and standardization agreements. The Defense Intelligence Agency (DIA) and the National Security Agency (NSA) each shall maintain a central repository of international agreements in the intelligence field that are coordinated, negotiated, or concluded on its behalf. In the Air Force, AF/JAO maintains the central repository.

Section 7 of DODD 5530.3 requires all DOD components to forward directly to the Assistant Legal Adviser for Treaty Affairs, DOS and to the DOD General Counsel an original or certified true copy of an international agreement concluded by the component. This transmittal must be accomplished within 20 days after entry into force of the agreement, or be accompanied by a full and complete explanation for the late transmittal. A DOD component (other than NSA) that enters into an international intelligence agreement, within 15 days after conclusion, will provide a copy of the agreement and background statement to DIA. The DIA then transmits the agreement to the DOS to assure compliance with the Case Act. The directive reiterates the fundamental requirement of the Case Act that the DOS determines the applicability of the Case Act to any particular international agreement, and that any question whether a document constitutes an international agreement shall be referred to State within the 20 day limit for submission of agreements.

Requirements and Restrictions. The requirements for, and restriction on, negotiation and conclusion of international agreements are as follows (*see* Section 8, DODD 5530.3):

1. Substantive Legal Authority Required. The directive is procedural only and does not constitute substantive legal authority for obligations proposed to be assumed in any international agreement, i.e., substantive legal authority may be found only in the law applicable to the subject matter of the agreement.

2. Written Approval. Written approval of the DOD officer having approval responsibility is required prior to the initiation or conduct of negotiations on an international agreement by DOD personnel.

3. Foreign Approaches. Efforts by foreign representatives to initiate negotiations not yet authorized in accordance with the directive must be reported by DOD personnel to the appropriate DOD approval authority and DOD personnel must await authorization before taking part in negotiations.

4. Responsibility for Remaining Within Scope of Authority. DOD personnel authorized to conduct negotiations are responsible for ensuring that U.S. positions and proposals remain within existing authorizations and instructions and that no agreement is made beyond that authorized without clearance from the original approving office.

5. Lead Counsel. The DOD General Counsel shall act as lead counsel for the Department in all international negotiations conducted by Office of the Secretary of

Defense (OSD) components. This responsibility may be delegated on a case-by-case basis to a DOD component's General Counsel or Staff Judge Advocate.

6. Substantive Amendments. Negotiation and conclusion of substantive amendments to an international agreement must be approved by the same DOD official who approved the original amendment unless the authority was expressly delegated.

7. DOD Approval to Conclude. Conclusion of an international agreement requires the prior written approval of the appropriate DOD approval authority. Authority to conclude an agreement may be granted by the DOD approval authority at the same time authority to negotiate the agreement is granted, or may be withheld and granted later.

8. Other Approvals Required. Notwithstanding delegation of authority made in Section 13 of the directive; international agreements "having policy significance," as described in the directive, shall be approved by the Office of the Under Secretary of Defense (Policy) (OUSD(P)) before negotiation and again before conclusion. Also, no international agreement relying on the authority of 10 U.S.C. Section 2304(c)(4) (the international agreement exception) for use of other than competitive contracting procedures shall be negotiated or concluded without prior approval of the Under Secretary of Defense (Acquisition, Technology & Logistics) (USD(AT&L)). Furthermore, no international agreement shall be negotiated or concluded without the concurrence of the Under Secretary of Defense (Comptroller) (USD(C)). Finally, no international agreement whose implementation requires enactment of new legislative authority shall be concluded without the prior approval of DOD General Counsel.

9. Review by DOD General Counsel. Implementing arrangements, annexes, project arrangements, and other such subsidiary arrangements shall be reviewed by DOD General Counsel, unless the DOD component has been delegated authority to negotiate and conclude, in which case legal review by the responsible DOD component shall determine whether the proposed arrangement is within the scope of the master or umbrella agreement.

10. Exception for DOD Personnel at U.S. Diplomatic Missions. The above requirements do not apply to DOD personnel assigned to a U.S. diplomatic mission when the mission has received negotiation authorization from the DOS.

11. Use and Status of English Language. If an international agreement is concluded both in English and foreign language text, the agreement must either provide that the English text prevails in the event of conflict or that both texts are equally authentic. In the latter event, the various texts of the agreement must, prior to signature, be certified by a qualified USG translator as being in conformity with each other and having the same meaning in all substantive respects.

12. Document Formalities. International agreements shall include the date, place of signature, typed name, and title of each signatory. In addition to the above, amendments will include the title and date of the agreement being amended.

13. General Counsel or Staff Judge Advocate Approval. The concurrence of the DOD component's General Counsel or Staff Judge Advocate is required before tendering a draft agreement to, concluding an agreement with, or making any unilateral commitment to, a foreign government or international organization.

Procedures For Requesting Authority to Negotiate or Conclude an International Agreement (Section 9, DODD 5530.3)

The Heads of DOD components may prescribe summary procedures in lieu of the procedures under Section 9 of DOD 5530.3 for the international agreements for which they have been delegated approval authority. Section 9 procedures require 1) a draft text or outline of the proposed international agreement (or explanation of unavailability), 2) a legal memorandum explaining the Constitutional, statutory, or other legal authority for each proposed obligation of the U.S. in the agreement, as well as addressing other legal considerations, 3) a fiscal memorandum setting forth the estimated cost of each proposed DOD obligation in the agreement, the source of funds to be obligated, or a statement that additional funds shall be requested for a specified fiscal year or years, 4) a technology assessment/control plan in the format described in Enclosure 7 to DODD 5530.3, and 5) for proposed international agreements relating to research, development, or production of defense equipment, or to reciprocal procurement of defense items, an industrial base factors analysis addressing the effect of the proposed international agreement on the defense technology and U.S. industrial base (not listed in Section 9, but required in accordance with 10 U.S.C. Section 2531).

Central Offices of Record (COR)

The CORs must be designated by USD(P) and other DOD components delegated authority to negotiate and conclude international agreements (Section 10, DODD 5530.3). These central offices' responsibilities include maintaining records of requests received, actions taken (including coordination with the DOS or National Security Council), and compiling the negotiating history of each international agreement within its responsibility.

Delegations of Authority (Section 13, DODD 5530.3)

Section 13 delegates authority to approve the negotiation and conclusion of international agreements.

AFI 51-701, implements DODD 5530.3 in the Air Force

Within the categories of international agreements for which the Secretary of the Air Force is delegated approval authority under Section 13 of DODD 5530.3, approval authority is re-delegated to the commanders of major commands and field operating agencies, and heads

of major Air Staff organizations. This re-delegation applies only to agreements dealing with predominantly Air Force matters that are otherwise within the authority or responsibility of such commanders and heads. Notwithstanding this delegation, the Air Force General Counsel (SAF/GC), AF/JAO, or other elements of the Office of the Secretary of the Air Force (OSAF) and the Air Staff, may require coordination or consultation on agreements or classes of agreements. Air Force Instruction 51-701 reiterates in its scope of authority the fundamental provision of DODD 5530.3 that it is procedural only, and substantive legal authority for the obligations proposed to be assumed must be found in Constitutional, statutory, or other legal authority applicable to the subject matter of the proposed agreement. Paragraph 1.1.4 of the instruction provides that the re-delegated approval authority does *not* extend to agreements that:

1. have policy significance;
2. rely on the authority of 10 U.S.C. Section 2304(c)(4);
3. require new legislative authority;
4. obtain foreign operating or military rights;
5. involve release or likely release of classified military information;
6. involve security assistance programs;
7. concern intelligence and related matters;
8. involve coproduction, licensed production, or related standardization matters;
9. involve international military or industrial security under the provisions of DODD 5230.11 (relating to disclosure of classified information); or
10. relate to on-base financial institutions, communications security technology, mapping, charting or geodesy, or to cooperative R&D (except health and medical matters).

Any proposed agreement falling within the foregoing exclusions or outside the categories of agreements to which re-delegated approval authority applies must be forwarded to the appropriate OSAF or Air Staff functional element for coordination with Air Force General Counsel and other elements of the OSAF and the Air Staff.

Summary of Procedural Authority

Procedural authority for the negotiation and conclusion of international agreements by officers and employees of the DOD is governed by the Case Act, State Department Regulations (22 CFR Part 181), DODD 5530.3 and implementing regulations of the Joint Staff, the Military Departments and other DOD agencies.

Under DODD 5530.3, USD(P) is responsible for authorizing the negotiation and conclusion by DOD personnel of all international agreements, unless the directive or other authorizing regulation specifies another DOD official.

Section 13 of DODD 5530.3 delegates to designated organizational elements of DOD the authority to approve the negotiation and conclusion of specified types of international agreements. Approval authority delegated by Section 13 of DODD 5530.3 does not extend, however, to international agreements having policy significance, rely on the authority of 10 U.S.C. Section 2304(c)(4), require enactment of new legislation, or require DOD Comptroller concurrence.

Neither DODD 5530.3 nor its implementing regulations create any substantive legal authority for international agreements. Any request for authority to negotiate and conclude an international agreement must be accompanied by a legal memorandum identifying the Constitutional, statutory, or other legal authority for *each* proposed obligation of the U.S. in the agreement. Under the Case Act, consultation with the Secretary of State is required prior to signing or otherwise concluding an international agreement on behalf of the U.S.

Under State Department Regulations, agencies such as DOD whose responsibilities include the negotiation and conclusion of large numbers of agency-level and implementing arrangements at overseas posts are required to consult with the DOS prior to entry into force only with respect to the more important of such arrangements. Under the Case Act and implementing regulations, any DOD component which concludes an international agreement must transmit the text of the agreement to the DOS not later than 20 days after signature of the agreement.

The Legal Adviser of the DOS, a Deputy Legal Adviser, or the Assistant Legal Adviser for Treaty Affairs, determines whether any undertaking, document, etc. constitutes an international agreement within the meaning of the Case Act. Thus, the criteria for determination of an international agreement set forth in 22 CFR section 181.2 (State Department Regulations) and in DODD 5530.3 may not be used by a DOD component as a basis for not reporting a particular arrangement as an international agreement in accordance with the Case Act and implementing regulations.

SUBSTANTIVE LEGAL AUTHORITY

In addition to being properly authorized in accordance with the procedural authorities discussed above, an officer or employee of DOD undertaking the negotiation and conclusion of an international agreement must ascertain that there is substantive legal authority for each obligation of the U.S. Government in the agreement. This substantive legal authority may not be found in the Case Act, State Department Regulations, DODDs, Instructions or implementing regulations discussed above. It must be found in the Constitutional, statutory, treaty, or other law applicable to the subject matter involved.

U.S. Constitution. Provisions of the U.S. Constitution, standing alone, will not normally provide adequate legal authority for all of the specific U.S. obligations undertaken in an international agreement. Due to the system of checks and balances embodied in the Constitution, the constitutional powers of the President rarely may be applied in isolation of other provisions of the Constitution and the statutes enacted pursuant to the Constitution. Thus, the power of the President as Commander-in-Chief of the armed forces must be read in conjunction with the powers of Congress "to make rules for the government and regulation of the land and naval forces" and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the U.S., or in any Department or Officer thereof" (Article I, Section 8). Further, the constitutional powers of the President do not automatically flow to officers and employees of the Executive Branch, including DOD representatives negotiating and concluding international agreements. Nor will they be authorized to invoke such powers (bearing in mind that the procedures for authorizing the negotiation and conclusion of international agreements confer no substantive legal authority). Accordingly, rather than relying on the Constitution itself, DOD personnel negotiating and concluding international agreements normally must find the required substantive legal authority in the statutes and regulations enacted and promulgated within the framework of the Constitution.

Executive Agreements. Treaties are often implemented by executive agreements. Even if an executive agreement may be fairly characterized as being contemplated by, or in implementation of a treaty, however, the treaty will not usually constitute adequate substantive legal authority for every U.S. obligation contained in the executive agreement. The collective defense obligations of the U.S. under the North Atlantic Treaty, for example, do not provide DOD personnel with legal authority for obligations in executive agreements requiring the expenditure of U.S. funds or the transfer of U.S. property to foreign governments. Indeed, because of the constitutional role of the House of Representatives in the authorization and appropriation of funds, no treaty, standing alone, however explicit in its financial obligations, is adequate legal authority for the expenditure of U.S. funds. Thus, a security assistance obligation of the U.S. undertaken in defense treaties may not be fulfilled unless and until Congress authorizes and appropriates funds for that purpose. Such treaty provisions are not self executing; that is, they do not constitute independent legal authority for the execution of their terms. Most defense treaties have provisions expressly requiring implementation in accordance with "constitutional processes" or subject to U.S. laws or the authorization and appropriation of funds. Any treaty commitment subject to such conditions is, by its own terms, not self executing. Even in the absence of such an express condition, treaty provisions are usually too general in nature to be self executing. Therefore, notwithstanding the applicability or relevance of a treaty to a proposed executive agreement, it normally will be necessary to look to U.S. statutory law to find the full range of legal authority needed to support the specific obligations contained in the proposed executive agreement.

Executive Orders and Regulations. Executive orders and regulations, while providing a source of legal authority for some U.S. obligations in executive agreements, depend upon underlying statutory authority for their efficacy with respect to obligations involving

matters within the domain of Congress. For example, Article IV, Section 3 of the Constitution gives to Congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the U.S." Therefore, obligations in executive agreements involving the provision of U.S. property to foreign governments or international organizations, whether permanently or on a temporary use basis, must be supported by statutory authority. As a general rule, regulations may serve as substantive legal authority for obligations in executive agreements only to the extent the regulations are in implementation of, or are supported by, a statute, or deal with a matter not requiring statutory authority (e.g., ministerial or administrative matters not involving any Congressional prerogatives).

United States Statutes. The above described limitations on the use of the U.S. Constitution, treaties and regulations as substantive legal authority for U.S. obligations in international agreements lead to the same conclusion: normally such authority must be found in U.S. statutory law. Certainly such is the case when dealing with obligations requiring the expenditure of U.S. funds or the provision of U.S. property or services to a foreign government or international organization. When determining the availability of legal authority for such obligations, certain basic principles must be kept in mind:

1. Affirmative authority for each proposed obligation must be found. Lack of specific prohibition does not constitute authority.

2. No U.S. funds may be obligated unless Congress has authorized and appropriated funds for that purpose (31 U.S.C. Section 1341). Accordingly, an international agreement which commits the USG to expenditures, either in the current fiscal year or in future years, for which funds have not yet been authorized and appropriated must be made subject to the availability of appropriated funds. USG commitments to indemnify other parties for contingent and undetermined liabilities may not be made without specific statutory authority, even if the commitment is made "subject to the availability of appropriated funds." *See* 59 Comp. Gen. 369 (1980).

3. Appropriated funds may be used only for the purposes for which they are appropriated (31 U.S.C. Section 1301(a)). DOD funds are authorized and appropriated for DOD missions, not foreign assistance.

4. Such U.S. funds as are available for foreign assistance are normally authorized and appropriated under the Foreign Assistance Act, (22 U.S.C. §§ 2151, *et seq.)* and the Arms Export Control Act (AECA) (22 U.S.C. §§ 2751, *et seq.*).

5. The transfer or other disposition of U.S. property requires Congressional authority (Article IV, § 3, U.S. Constitution).

6. The provision of U.S. property and services to foreign governments and international organizations is governed by the Foreign Assistance Act (FAA), AECA, and other statutes applicable in the particular circumstances, such as the Acquisition and Cross-Servicing Agreements authority (10 U.S.C. Sections 2341-

2350), cooperative military airlift legislation (10 U.S.C. Section 2350c), and foreign excess property legislation (40 U.S.C. Section 704).

7. The acquisition of equipment, supplies and services by the U.S. armed forces from foreign forces must be accomplished in accordance with Title 10, Chapter 137, U.S. Code, the FAR and DFARS, or other statutory authority applicable in the particular circumstances (e.g., 10 U.S.C. Sections 2341-2350).

Statutory Authority Relevant to International Agreements Negotiated and Concluded by DOD Personnel

Bearing in mind the above described general principles applicable to the substantive legal authority required to support U.S. obligations in international agreements, the following are some of the statutory provisions of particular relevance to international agreements negotiated and concluded by DOD personnel. This list is by no means exhaustive.

The Arms Export Control Act (AECA). When deciding whether and under what terms and conditions DOD personnel may include in a proposed international agreement an obligation of the USG to provide property or services to a foreign government or international organization, consideration must first be given to the applicability of the AECA. The AECA prescribes the "normal" rule for such transfers and full cost payment in U.S. dollars, usually in advance. Unless another statutory authority is applicable under the particular circumstances, the AECA applies to any proposed transfer to a foreign government or international organization of DOD property or services (defined as defense articles and defense services in the AECA).

The key features of sales under the AECA are the Foreign Military Sales (FMS). All sales under the AECA are referred to as FMS. Sales are effected with Letters of Offer and Acceptance (LOA). An LOA is a sales agreement, contractual in form, which is not treated as an international agreement for Case Act and DODD 5530.3 purposes. However, an FMS LOA is often used to implement the provisions of an international agreement calling for the transfer of U.S. defense articles or services.

The cornerstone of the AECA is the full cost payment requirement contained in Sections 21 and 22 of the Act (22 U.S.C. Sections 2761, 2762). Section 21 governs sales of defense articles and defense services from DOD stocks. Section 22 applies to sales of defense articles and defense services acquired by contract from a private supplier for that purpose. Under Section 21, the FMS purchaser must commit to pay the full cost to the USG of any services furnished, the actual value of any articles sold from DOD inventory but not intended to be replaced, and the replacement cost of articles sold from DOD inventory which are intended to be replaced. Before DOD may contract to acquire defense articles or services for the purchaser, Section 22 requires the FMS purchaser to commit to pay the full amount of USG procurement costs to assure the USG against any loss and to make funds available in advance to the USG as required to meet payments and other costs arising under the contract.

Section 21(e) also requires for all sales (including Section 22 sales), that FMS purchasers pay a percentage surcharge to cover the full estimated costs of general sales administration by the USG as specified in Section 43(b) and (c) of the AECA. Additionally, they pay a charge to recover a proportionate amount of any nonrecurring costs of research, development and production of major defense equipment (except for equipment wholly funded by FAA 503(a)(3) transfers or AECA Section 23 non-repayable funds), and a charge to cover ordinary inventory losses associated with stock sales of defense articles stored at the expense of the purchaser. Authority is provided in Section 21(e)(2) for reduction or waiver of the charges for nonrecurring cost recoupment.

The requirements of Sections 21 and 22, as well as other provisions of the AECA, are fully specified in the standard terms and conditions of the Letter of Agreement (LOA). To assure the USG against loss, the conditions state, *inter alia*, that stated prices are estimates only based on best available data, that the actual price will be the total cost to the USG, and that the USG may unilaterally notify and bill the purchaser for price increases to cover actual costs as they become known. The FMS purchasers are also required to bear the risk of loss of purchased defense articles, before and after passage of title, and to hold the USG harmless from specified types of losses, including third party claims, irrespective of whom may be at fault.

The AECA is implemented in great detail by DOD directives, regulations, and manuals (principally DOD 5105.38-M, *Security Assistance Management Manual* (SAMM); DODD 7000.14-R, Volume 15; and DODD 2140.2).

While the terms and conditions required by the AECA may seem harsh at first glance, they are in fact fair when one considers that the USG acts on a nonprofit basis for the benefit of the purchaser recovering only its legitimate costs; that the USG therefore has no built-up reserve or contingency fund to cover unforeseen costs or business risks; and that the FMS purchaser receives many benefits not available in the commercial market, such as USG procurement expertise and leverage with U.S. contractors. They also receive lower unit costs from higher volume production as a result of combined USG/FMS buys, independent and objective advice of U.S. military specialists, the protections afforded by standard DOD procurement practices and contract clauses, and avoiding or minimizing the need to maintain special procurement offices in the U.S.

Chapter 6 of the AECA governs leases of defense articles from DOD stocks to foreign countries and international organizations (Sections 61-64; 22 U.S.C. Sections 2796-2796c) and loans of materials, supplies, or equipment to NATO countries and major non-NATO allies. Prior to enactment of Chapter 6, it had been DOD practice to effect leases in appropriate cases under authority of 10 U.S.C. Section 2667. Section 61(c) of the AECA now prohibits such leases under 10 U.S.C. Section 2667.

The SAMM, Chapter 11 implements the leasing authority of the AECA. The approval of the Director, Defense Security Cooperation Agency (DSCA) must be obtained before any DOD component leases a defense article to a foreign country or international organization. DSCA concurrence is also required before indicating to a foreign country or international

organization that a lease is being considered or is an available option. Any request by a DOD component to DSCA for approval of a lease must be accompanied by a determination that the requirements for such a lease set forth in Section 61(a) of the AECA have been met. These include:

1. that there are compelling foreign policy and national security reasons for providing such articles on a lease basis rather than on a sales basis under the AECA;

2. that the articles are not for the time needed for public use;

3. that the effects of the lease on the national technology and industrial base are considered; and

4. that the country agrees to pay all costs incurred by the USG in leasing such articles.

Detailed reasons must be provided to DSCA on why the defense articles should be leased rather than sold.

Examples given in Chapter 11 of the SAMM of circumstances which may justify a lease are when short term use only is required (e.g., testing) or when an urgent foreign requirement may be met by a limited duration lease of an article which cannot be sold because of U.S. defense requirements. Chapter 11 also prescribes the use of a basic lease format which may be changed only with the concurrence of the appropriate DOD component legal office and DSCA approval.

Charges for leases are prescribed by Section 61(a)(4) of the AECA. Payment is in U.S. dollars of all costs incurred by the USG in leasing the articles, including depreciation of the articles while leased, the costs of restoration or replacement if the articles are damaged while leased, and the replacement cost (less any depreciation in value) if the articles are lost or destroyed while leased. These charges need not be made, however, if the lease is entered into for purposes of cooperative research or development, military exercises, or communications or electronics interface projects. The DSCA's express approval is required for use of these exceptions to normal charges in any particular lease. Further, if the article has passed three-quarters of its normal service life, the requirement for reimbursement of depreciation cost may be waived by the Secretary of Defense based on the determination that it is important to the U.S. national security interests to do so.

Section 61(b) of the AECA limits leases to a maximum term of five years, subject to termination by the USG at any time and immediate return of the leased articles. Section 62 requires reports to Congress of leases for one year or longer, not less than 15 or 30 days (depending on intended lessee country) *before* entering into or renewing such a lease.

Under AECA Section 65 (22 U.S.C. § 2796d), the Secretary of Defense may loan to a NATO country or a major non-NATO ally (defined in Section 517 of the Foreign Assistance Act), materials, supplies or equipment for purposes of carrying out cooperative research,

development, testing or evaluation programs. The Military Departments may accept as a loan or gift from such countries materials, supplies or equipment for such purpose.

Under Section 65, a program of testing or evaluation includes testing or evaluation "conducted solely for the purpose of standardization, interchangeability, or technical evaluation if the country to which the materials, supplies, or equipment are loaned agrees to provide the results of the testing or evaluation to the United States without charge." "Loaned" material, supplies or equipment may be expended or otherwise consumed in connection with any testing or evaluation program without a requirement for reimbursement to the U.S. if the success of the test or evaluation is determined to be dependent on the expenditure or consumption.

Section 65(a)(2) requires each loan or gift transaction to be pursuant to written agreement. By memorandum dated 27 November 1990, the Deputy Secretary of Defense delegated to the Secretaries of the Military Departments and Directors of Defense Agencies (with authority to re-delegate not below the Assistant Secretary/Deputy Agency Director level), the authority under Section 65 in accordance with conditions attached thereto. In accordance with the memorandum, DOD components must provide OSD 15 day advance notification of proposed Section 65 agreements. The Principal Deputy Assistant Secretary of Defense (International Programs) memoranda of 12 October 1994, 13 February 1995, and 26 May 1995 apply to proposed loan agreements.

Section 30A (22 U.S.C. Section 2770a) authorizes reciprocal unit exchanges of training and related support with friendly foreign countries or international organizations. The reciprocal training and support must be pursuant to an international agreement and provided within one year. Should the foreign country not provide the training and support within the timeframe, the U.S. must be reimbursed its costs of training and support. The Joint Security Assistance Training (JSAT) Regulation provides detailed implementing instructions and a standard MOA for use.

The Foreign Assistance Act (FAA). The FAA (22 U.S.C. §§ 2151, *et seq.*) governs the provision of economic and military assistance to eligible foreign countries and international organizations.

Prior to FY 1982, defense articles and services were provided as grant aid through the Military Assistance Program (MAP). Effective with the FY 1982 MAP appropriation, FAA Section 503(a)(3) authorized the transfer of MAP funds to the FMS Trust Fund account to be used for payment for purchases of defense articles under Sections 21 and 22 of the AECA. This change had the effect of establishing the foreign military financing program (FMFP) as the sole U.S. financing program for acquisition from the USG of defense articles and services by foreign governments. Congress appropriates funds for the FMFP in the annual Foreign Operations Appropriations Act. Eligible countries and proposed amounts of foreign military financing they are to receive are identified by DSCA and submitted to the DOS for approval before submission to Congress.

International Military Education and Training (IMET) is governed by Chapter 5 of Part II of the FAA (22 U.S.C. Sections 2347-2347e). Section 541 of the FAA (22 U.S.C. Section 2347) authorizes the furnishing of military education and training to military and related civilian personnel of foreign countries, in the U.S. and abroad, through attendance at military educational and training facilities (other than U.S. Service academies) or special courses of instruction at schools and institutions of learning or research, or by observation and orientation visits to military facilities and related activities. International military education and training may be provided on a reimbursable basis or by utilizing U.S. funds authorized and appropriated for that purpose in the annual Foreign Operations Appropriations Act. Eligible countries are generally limited to those not economically independent, and, as in the case of the FMFP, are identified in annual submissions to Congress justifying the authorization and appropriation of IMET funds. Section 546 of the FAA prohibits "granting" IMET to identified high income foreign countries. The administration of the IMET Program is controlled by DSCA. Implementing instructions are contained in the SAMM, Chapter 10.

Professional Military Education (PME) exchanges are authorized by FAA Section 544(a) (22 U.S.C. Section 2347c(a)). Reciprocal one-for-one student exchanges each fiscal year between U.S. PME institutions and comparable institutions of foreign countries and international organizations must be pursuant to an international agreement. The JSAT Regulation provides a standard MOA and implementing guidance, including a list of U.S. PME institutions.

Flight Training Exchanges are authorized by FAA Section 544(b) (22 U.S.C. Section 2347c(b)). Reciprocal one-for-one student exchanges each fiscal year between U.S. flight training schools and programs and comparable foreign country schools and programs must be pursuant to an international agreement.

Authority for transferring excess defense articles (EDA) from existing stocks of the DOD to eligible countries and international organizations is found in Section 516 (22 U.S.C. Section 2321j). Limitation on transfers include that no funds available to the DOD for the procurement of defense equipment may be expended in connection with the transfer, the transfer must not have an adverse impact on U.S. military readiness, and the Congressional committees must be notified in advance of certain proposed transfers. Military Department recommendations for the allocation of EDA are reviewed by an EDA Coordinating Committee comprised of DSCA, OSD and State Department representatives. Once a determination is made to provide EDA to a country, DSCA provides the Congressional notification.

The FAA contains several provisions authorizing the President special discretion or powers in emergencies. Section 506a(1) of the FAA (22 U.S.C. Section 2318) provides that, if the President determines and reports to Congress that an unforeseen emergency exists requiring immediate military assistance to a foreign country or international organization, and the emergency requirement cannot be met under the AECA or any other law, the President may direct the drawdown of defense articles from DOD stocks, defense services of DOD, and military education and training of an aggregate value not to exceed $100

million in any fiscal year. Section 506(a)(2) authorizes an additional $200 million drawdown of defense articles, services, and training for the purposes of international narcotics control, international disaster assistance, antiterrorism assistance, nonproliferation assistance and migration and refugee assistance. Further guidance on Section 506 is contained in SAMM Section 11.4. Section 552 of the FAA (22 U.S.C. Section 2348a) provides additional drawdown authority of $25 million for unforeseen emergencies in any fiscal year.

Section 614 of the FAA (22 U.S.C. Section 2364) provides the President extraordinary authority to deal with emergencies. Pursuant to Section 614(a), the President may:

1. authorize the furnishing of assistance under the FAA without regard to any provisions of the FAA, AECA, any law relating to receipts and credits accruing to the U.S., and any Act authorizing or appropriating funds for the FAA, in furtherance of any of the purposes of the FAA, when he determines and notifies the Speaker of the House and the Chairman of the Senate Foreign Relations Committee "that to do so is important to the security interests of the United States."

2. make sales, extend credit, and issue guaranties under the AECA without regard to any provision of the FAA, AECA, any law relating to receipts and credits accruing to the U.S., and any Act authorizing or appropriating funds for use under the AECA, in furtherance of the purposes of the AECA, when he determines and notifies the Speaker of the House and Chairman of the Senate Foreign Relations Committee "that to do so is vital to the national security interests of the United States."

The exercise of Section 614(a) authority is limited to a total in a fiscal year of $750 million in sales and $250 million of funds made available for use under the FAA or AECA. Under Section 614(c), the President is authorized to use an amount not to exceed $50 million of foreign assistance funds "pursuant to his certification that it is inadvisable to specify the nature of the use of such funds, which certification shall be deemed to be a sufficient voucher for such amounts." None of these special authorities of the President have been delegated. Prior to its amendment in 1980, Section 614(a) applied only to the FAA. In extending its application to the AECA, the Senate Foreign Relations Committee stated (Senate Report No. 96-732 on S.2714, May 15, 1980, p.31):

> While the Committee recognizes that unforeseen, critical circumstances can necessitate the exercise of the very broad waiver authority permitted under this section ... the Committee cautions that prohibitions and limitations written into the affected foreign assistance legislation are not to be taken lightly and the waiver authority permitted by this section should be exercised only when it is 'vital to the security of the United States,' when time constraints prevent the enactment of remedial statutory authority, and after the advice of the relevant committees of the Congress has been solicited and received.

Occasionally, a non-defense agency of a foreign government (e.g., Department of Public Works, civil aviation agency, etc.) will request a DOD component to provide articles or services, directly or through a DOD contract, required for the accomplishment of a particular non-military project (e.g., extension of runway for civil aviation purposes). As stated previously, the AECA does not apply to sales or leases to foreign governments for non-defense purposes. Other statutory authority is required, therefore, to accommodate such a request for assistance. Section 607 of the FAA (22 U.S.C. Section 2357) provides authority for any agency of the USG to furnish services and commodities on an advance-of-funds or reimbursement basis to friendly countries, international organizations, the American Red Cross, and voluntary nonprofit relief agencies registered with and approved by the Agency for International Development. If desired, such services may be provided through a personal services contract with private individuals, rather than using the services of USG personnel. The Agency for International Development (AID) in the DOS has been delegated approval authority for requests for assistance under Section 607. Any DOD component desiring to use Section 607 authority must obtain the approval of AID by submitting a request through DOD/State channels. (Or the foreign government may, and normally should, initiate the request through diplomatic channels.)

Acquisition and Cross-Servicing Agreements (ACSA). Authority for ACSA under 10 U.S.C. Chapter 138, Subchapter I (Sections 2341-2350), formerly referred to as "The NATO Mutual Support Act," provides special authority for acquisitions and transfers of logistic support, supplies, and services. The ACSA authority is implemented by DODD 2010.9, AFPD 25-3, and AFI 25-301.

The term ACSA refers to agreements under the two authorities of Chapter 138, Subchapter I. The first is agreements with NATO countries, NATO subsidiary bodies, eligible foreign countries, the UN, and any regional international organization of which the U.S. is a member, to acquire logistic support, supplies, and services for elements of the armed forces deployed outside the U.S. pursuant to the authority of 10 U.S.C. Section 2341. The second is cross-servicing agreements under 10 U.S.C. Section 2342 by which the U.S. transfers logistic support, supplies, and services to NATO countries, NATO subsidiary bodies, designated foreign countries, the UN, and regional international organizations of which the U.S. is a member, on a reciprocal basis. Acquisitions and transfers may be effected on a reimbursement basis, by replacement-in-kind (RIK) or by exchange of supplies or services of an equal value.

The ACSA authority applies only to "logistic support, supplies, and services" which are defined at 10 U.S.C. Section 2350(1) inclusively as "food, billeting, transportation (including airlift), petroleum, oils, lubricants, clothing, communications services, medical services, ammunition, base operations support (and construction incident to base operations support), storage services, use of facilities, training services, spare parts and components, repair and maintenance services, calibration services, and port services." The term includes temporary use of general purpose vehicles and other nonlethal items of military equipment which are not designated as significant military equipment on the U.S. Munitions List.

The ACSA authority prescribes reciprocal pricing principles for acquisition or transfer of logistic support, supplies, and services on a reimbursement basis (payment in currency). If the foreign country or organization concerned does not agree to the reciprocal pricing principles, the pricing provisions of the AECA apply to U.S. transfers (sales) under the agreement, and any U.S. acquisition under the agreement must be supported by a price analysis by the U.S. forces commander that the price is fair and reasonable. Authority is provided for the reciprocal waiver of indirect costs, administrative surcharges, and contract administration costs, to the extent such costs are not waived by application of the reciprocal pricing principles.

The ACSA authority requires liquidation of credits and liabilities accrued by the U.S. not less often than once every twelve months by direct payment from the recipient to the supplier. U.S. receipts are credited to the applicable appropriations, accounts, and funds of DOD.

Provision of POL and Related Services to Foreign Military Aircraft and Vessels. Various statutes provide authority for the sale of fuel, oil, supplies, and services to foreign military aircraft transiting airbases operated by U.S. forces, i.e., 49 U.S.C. Section 44502(d); 10 U.S.C. Sections 2208(h), 4626, 4629, 7227, 9626 and 9629. Section 44502(d) of Title 49 only applies when sale of fuel is necessary because of an emergency. In 2008, Section 9626 of Title 10 of the U.S. Code was amended to authorize the Secretary of the Air Force to provide "routine airport services" and miscellaneous supplies to military and other state aircraft of a foreign country on a reimbursable basis. The statute further authorizes the provision of routine airport services at no cost to the foreign country if such services are provided by Air Force personnel and equipment without direct cost to the Air Force, or where such services are provided under an agreement with the foreign country that provides for reciprocal furnishing of services at no cost. An interim change to AFI 10-1801, *Foreign Governmental Aircraft Landings at United States Air Force Airfields*, implemented this authority by defining "routine airport services" and establishing guidelines for implementing the authority. These statutes constitute separate legal authority that, within the scope of their applicability (i.e., support of transiting aircraft and vessels), may be used in lieu of the ACSA authority and AECA.

Reciprocal International Courtesies. Chapter 4 of DOD 7000.14-R Volume 11A, implements 31 U.S.C. Section 9701 and establishes the general principle that a charge shall be imposed to recover the full cost to the USG of rendering a service to another party, or the fair market value of such service, whichever is higher. Chapter 4, Section 040203.B. implements the authority in 10 U.S.C. Section 2350g for waiver or reduction of charges when appropriate as a courtesy to a foreign country or international organization, or comparable fees are set on a reciprocal basis with a foreign country. Key aspects are:

> Statutory Basis. Section 2350g provides that the Secretary of Defense may accept from a foreign country for the support of U.S. armed forces in an area of that country, "(1) real property or the use of real property and services and supplies for the United States or for the use of the United States in accordance with a mutual defense agreement or occupational arrangement; and (2) services furnished as

reciprocal international courtesies or as services customarily made available without charge."

Accept and Provide. Authority to accept services on a reciprocal basis necessarily includes authority to provide services on a reciprocal basis; otherwise reciprocity is not possible.

Limit. "International courtesies" do not authorize the provision of significant services on a non-reimbursable basis.

STANAG and NATO Cross-Servicing. Enclosure 2 of DODD 5530.3, in defining an international agreement, states that Standardization Agreements (STANAGs, QSTAGs, ASCC Air Standards, and NAVSTAGs) record the adoption of like or similar military equipment, ammunition, supplies, and stores, or provide operational, logistic, and administrative procedures. An example of such a STANAG is STANAG 3113, which establishes standard procedures for the provision of services to visiting personnel and military aircraft of NATO nations at military airfields operated by other NATO member forces.

United States signature and ratification of a STANAG does not dispense with the need to find U.S. statutory authority to implement the specific provisions of the STANAG. All STANAGs are subject to implementation in accordance with the laws of the parties concerned in a particular transaction. Ideally, any inconsistency between a STANAG and the laws of a party thereto should be reflected in a reservation to the signature of that party to the STANAG. In the case of U.S. forces, however, notwithstanding the absence of a U.S. reservation, any provision of U.S. services or property to foreign forces under the terms of the STANAG must be effected in accordance with applicable U.S. statutory authority.

Most cross-servicing provisions of STANAGs may be given effect by means of bilateral support agreements and implementing arrangements concluded under the ACSA authority, 10 U.S.C. Section 9626, the authority to sell POL and related services cited above, or the "reciprocal international courtesies" authority. If none of these authorities are applicable in a particular case, FMS may be the only alternative.

Cooperative Airlift Agreements. Section 2350c of Title 10 of the U.S. Code authorizes the Secretary of Defense, after consultation with the Secretary of State, to enter into cooperative military airlift agreements with allied countries for the reciprocal transportation of the personnel and cargo of the military forces of the parties on aircraft operated by or for such forces. The statute requires:

1. that such transportation be reimbursed at the same rate by both parties and in an amount not less than the rate charged to U.S. forces under 10 U.S.C. Section 2208(h);

2. that accrued credits and liabilities be liquidated not less often than once every twelve months;

3. that, during peacetime, only military airlift capacity in excess of the providing party's requirements may be made available, and no airlift capacity may be created solely to accommodate requirements of the receiving party; and

4. the transportation on DOD aircraft of any defense articles purchased by a foreign country under the AECA (FMS or commercial), for the purpose of delivery of such articles, must be paid for at a rate equal to the full cost FMS rate required by Section 21(a)(1) of the AECA.

The statute also authorizes DOD to enter into nonreciprocal military airlift agreements with NATO subsidiary bodies (e.g., SHAPE or other NATO military headquarters) for the transportation of the personnel and cargo of the subsidiary bodies on aircraft operated by or for the U.S. forces, subject to such terms as the Secretary of Defense considers appropriate.

Custodial Transfers. Temporary custodial transfers of Air Force equipment to foreign governments or international organizations have been authorized under the provisions of Title 10, U.S.C. which authorize the Secretary of the Air Force to conduct the affairs of the Department of the Air Force and the custody and accounting of Air Force property (10 U.S.C. Sections 8013, 9831, 9832). Such transfers must take place pursuant to agreements which reflect that the equipment will be operated and maintained in direct support of U.S. Air Force (USAF) missions.

Under a custodial arrangement, the U.S. equipment must be located in the same place and used for the same U.S. military mission as it would be if U.S. personnel were there to operate and maintain it. The net effect is a substitution of foreign personnel for U.S. personnel to operate and maintain U.S. equipment for the accomplishment of U.S. military missions which would otherwise have to be performed by U.S. personnel. It is similar to "contracting out," with the provision of government-furnished equipment to the contractor (i.e., the foreign government). Such arrangements save U.S. manpower as well as personnel costs and a share of other O&M costs.

Custodial transfers may not be made for the purpose of assisting or supporting the requirements of a foreign government or international organization, no matter how much the USG may indirectly benefit (e.g., improved relations with Allies, interoperability, stronger NATO, etc.).

Custodial transfers are not "leases" within the meaning of Section 61 of the AECA (discussed previously) since their purpose is to accomplish U.S. military missions rather than provide benefits or assistance to the foreign custodian. In such circumstances, Section 61 of the AECA is not applicable by its own terms, because the equipment is still needed for public (i.e., U.S. military) use and thus does not fall within the criteria prescribed therein.

Multinational Exercises. Military exercises in which the forces of two or more nations participate may be divided into two categories: training exercises and combined exercises.

Training Exercises. A training exercise is a joint exercise conducted solely or primarily for the purpose of instructing foreign forces participating in the exercise. Under the AECA the foreign forces participating in a training exercise must bear their own costs of participation and pay under FMS the cost of U.S. material support, training services, and all other costs of U.S. participation except those, if any, which are not part of the cost of training services or other U.S. support and would have been incurred in the absence of foreign participation.

Combined Exercises. A combined exercise is an exercise conducted to test and evaluate mutual capabilities of the participants. Its purpose is not to provide instruction or otherwise impart military skills from one participant to another, but to mutually practice, test and evaluate the capabilities of all the participants to perform their respective wartime missions. In a combined exercise the forces of each participating nation, including U.S. forces, pay their own costs of participation. Any U.S. support provided to foreign forces in a combined exercise (e.g., fuel, munitions, supplies) must be paid for by the foreign forces under an FMS case (or reimbursed under other applicable authority, such as the ACSA authority or statutory authority pertaining to fuels).

Section 2010 of Title 10, U.S. Code, authorizes the Secretary of Defense, after consulting the Secretary of State, to pay the incremental expenses of a developing country that are incurred as the direct result of participation in a bilateral or multilateral exercise if the exercise is undertaken primarily to enhance the security interests of the U.S. and the Secretary of Defense determines that the participation by such country is necessary to the achievement of the fundamental objectives of the exercise which cannot be achieved without the U.S. payment of the incremental expenses. Section 2011 of Title 10 authorizes the commander of the special operations command and the commander of any unified or specified command to pay the incremental expenses incurred by a friendly developed country in conjunction with the training.

Joint Use Arrangements. Joint use arrangements with foreign forces are a well-established means of accomplishing U.S. military missions. Under such arrangements, each force contributes to the accomplishment of common mission requirements in order to maximize utilization of resources while reducing costs.

Example: Assume that U.S. forces stationed in a foreign country have a requirement for a radar station. Host nation forces also require such a station. Rather than each force bearing the full burden of constructing, equipping, manning, and maintaining its own radar station, the two forces agree to enter into a joint use arrangement for a single facility to meet both their requirements. An agreement is concluded under which each force's financial contribution to the cost of establishment, operation and maintenance of the facility is proportional to its use of the facility. If equal usage is contemplated, cost-sharing is also equal. To minimize reimbursements between the parties and to facilitate the accomplishment of required tasks, the agreement assigns functional responsibilities to each party. The U.S. forces provide the radar and related technical equipment while host nation forces accomplish the required

construction and provide base support equipment. Each party bears the costs of its assigned responsibilities and retains title to equipment and other property provided by it. The facility is jointly manned, although not necessarily in equal numbers of personnel. Recurring operation and maintenance costs are allocated between the parties in a manner designed to balance the books. That is, if all other costs are equally shared in an equal use arrangement, O&M costs also will be equally shared. If one party's share of establishment and manning costs is greater than the other's, however, the latter absorbs a higher proportion of O&M costs to balance the books.

Statutory authority for joint use arrangements is found in provisions of Title 10, U.S. Code which authorize the conduct of Air Force missions (10 U.S.C. Sections 8013, 9831, 9832). Accordingly, all expenditures of U.S. funds and use of U.S. property in such an arrangement must be proportional and directly related to the accomplishment of U.S. military missions (not assistance to foreign forces).

Communications Agreements. Section 2350f of Title 10 authorizes the Secretary of Defense, with the approval of the Secretary of State, to enter into a bilateral arrangement with any allied country (defined as NATO countries, Australia, New Zealand, Japan or the Republic of Korea, or any country so designated for purposes of the section by the Secretary of Defense, with concurrence of the Secretary of State), or a multilateral arrangement with allied countries, allied international organizations, or NATO, "under which, in return for being provided communications support and related supplies and services, the United States would agree to provide ... an equivalent value of communications support and related supplies and services."

In order to accommodate the transmission of classified information between U.S. forces and allied forces, it is sometimes necessary to make available to allied forces the U.S. communication security (COMSEC) equipment required to transmit and/or receive such information. The question then arises as to the proper legal authority for transfer of the COMSEC equipment to the foreign government. In addition to the FAA and the AECA, in appropriate circumstances 10 U.S.C. Section 421 (which provides that the Secretary of Defense may use funds available to DOD for intelligence and communications purposes "to pay for the expenses of arrangements with foreign countries for cryptologic support") provides legal authority for temporary transfers of COMSEC equipment to foreign governments. (*See* DODD C-5200.5).

War Reserve Material (WRM). WRM transfers to foreign governments and international organizations are restricted by Section 514 of the Foreign Assistance Act (FAA) and 10 U.S.C. Section 975. Section 514 of the FAA limits the establishment of overseas stockpiles of WRM reserved or earmarked for the use of foreign forces. Section 514 requires that transfers of WRM to foreign countries be effected only pursuant to authority contained in the FAA, AECA, or subsequent corresponding legislation. The provisions of 10 U.S.C. Section 2390 govern WRM, which is reserved for use of U.S. forces. It provides that, except for sales of WRM which has been designated for replacement, substitution, or elimination, or which has been designated for sale to provide funds to procure higher priority stocks, the

sale of U.S.-reserved WRM to non-NATO countries is prohibited unless the President determines that there is an international crisis affecting the national security of the U.S. and reports to Congress within 60 days plans to replace or replenish the WRM so sold.

Foreign Excess Property. The provisions of 40 U.S.C. Section 704 govern disposal of foreign excess property. After DOD property located in a foreign country has been screened and determined to be excess in accordance with the defense disposal manual it may be disposed of, generally by sale, but also for substantial benefits or discharge of claims when determined by the Secretary of Defense that it is in the interest of the U.S. to do so. Foreign excess property which has no commercial value, or the estimated cost of care and handling of which would exceed the estimated proceeds from its sale, may be authorized to be abandoned, destroyed, or donated.

Latin American Cooperation. Title 10 U.S.C. Section 1050 authorizes the Secretary of a Military Department to pay the "travel, subsistence and special compensation of officers and students of Latin American countries and other expenses that the Secretary considers necessary for Latin American cooperation." While the statute clearly authorizes payment from DOD funds of travel, subsistence and related expenses of Latin American officers and students visiting U.S. military installations, it should not be construed as authorizing the provision at DOD expense of training or other defense services or articles to such persons. The Air Force implementing regulation is AFI 16-102.

Aviation Leadership Program. Chapter 905 of Title 10 (10 U.S.C. Sections 9381-9383) authorizes the Secretary of the Air Force, under regulations prescribed by the Secretary of Defense, to provide undergraduate pilot training and necessary related training to personnel of the air forces of friendly, less-developed foreign nations. Department of Defense Directive 2010.12 establishes policy and assigns responsibilities in implementation of the statute. Air Force Instruction 16-108 provides guidance for managing and administering the program.

Inter-American Air Forces Academy (IAAFA). Pursuant to 10 U.S.C. Section 9415, the Secretary of the Air Force is authorized to operate IAAFA for the purposes of providing military education and training to military personnel of Central and South American countries, and other countries eligible for assistance under Chapter 5, Part II of the FAA (IMET). The fixed costs of operating and maintaining IAAFA may be paid by Air Force O&M appropriations. All other costs are reimbursable (e.g., IMET, FMS case).

Personnel Exchange Programs. Under these programs, equally qualified U.S. and foreign military and civilian personnel are exchanged to serve in regular billets or positions of the other force. Authority for these personnel exchange programs is found at 10 U.S.C. Section 168 note. The exchange programs generally fall into four categories: Military Personnel, Engineer and Scientist, Administrative and Professional, and Defense Intelligence Personnel. Historically, under each program an agreement was concluded between the U.S. military service or other DOD component and a foreign counterpart in accordance with DODD 5530.3 establishing ground rules for the exchanges and setting forth the rights and responsibilities of exchange personnel. Department of Defense Directive 5230.20 provides

policies and responsibilities on assignment of foreign nationals to DOD components. The Office of the Under Secretary of Defense for Policy has recently provided standardized agreements for each category to be concluded at the DOD level, in most cases by the component which seeks to establish the initial exchange program with its foreign counterpart.

The establishment of personnel exchange programs with the armed forces of foreign governments is a long-standing practice of all the U.S. military services. Originally designed only to include the exchange of officers, the program has now expanded to include non-commissioned officers as well. These programs are designed to foster mutual understanding between U.S. and friendly foreign forces, and to familiarize each force with the organization, administration and operations of the other.

The DOD component exchanges engineers or scientists (usually civilians) with a friendly foreign counterpart agency to fill positions in research and development (R&D) facilities of the parties. Department of Defense personnel may be assigned to positions in private industry that support the defense ministry of the host foreign government.

In this instance, the DOD component exchanges military or civilian employees who perform professional administrative, logistics, health, financial, planning, or other support functions with an element of the foreign government's defense ministry.

This program involves the exchange of defense intelligence professionals, military and civilian, between DOD components and their foreign counterparts. The intent is to provide on-site working assignments to selected career intelligence personnel.

Cooperative Research, Development, Test, Evaluation (RDT&E), and Production Agreements. These agreements take several forms. As noted above, one such form is the engineer and scientist exchange agreement. More common forms are specific RDT&E and production project or umbrella agreements, master exchange or standardization agreements, and data exchange agreements. Approval authority for negotiation and conclusion of cooperative RDT&E agreements is USD(AT&L) (DODD 5530.3 Section 13.6). Streamlined procedures to be used for requesting such approval is found in Chapter 11 of the Defense Acquisition Guidebook and permitted by DOD Instruction 5000.2, "Operation of the Defense Acquisition System." Under 10 U.S.C. Section 2531, in negotiating, renegotiating or implementing international agreements relating to R&D or production of defense equipment, or reciprocal procurement of defense items, the Secretary of Defense shall solicit the views of the Secretary of Commerce with respect to the commercial implications of such agreement and its potential effects on the international competitive position of U.S. industry.

Specific RDT&E and Production Project or Umbrella Agreements are agreements between DOD or a component thereof and a foreign defense ministry/department or component thereof for the joint accomplishment of a specific RDT&E and production project or program of mutual technical interest, to be accomplished with equitable contributions in cash or kind, for the purposes of avoidance of wasteful, duplicative R&D efforts and

possible acquisition of standardized or interoperable defense items. Each party to such an agreement has an independent requirement for the accomplishment of the same RDT&E effort. By sharing work, data, and costs, each party greatly reduces the effort and costs that each would otherwise have to bear if the RDT&E project were accomplished individually.

Since each party contributes manpower, data, and funds to the accomplishment of the common requirement, it is neither necessary nor appropriate to treat the program as a procurement of services or articles by one party from the other. An agreement for the joint conduct of a cooperative RDT&E project, including obligations for the sharing of costs and the provision to the project of necessary equipment and facilities, meets the requirements of 31 U.S.C. Section 1501(a) for documentary evidence of financial obligations of the U.S., in that it constitutes "a binding agreement in writing between the parties thereto, including Government agencies, in a manner and form and for a purpose authorized by law." In a cooperative RDT&E project, each party is expending funds and using its property in pursuit of its own requirement. The relationship is one of partners rather than buyer and seller. Such cooperative R&D programs, structured as described above, do not entail a net outflow of value from the USG to the foreign participant which could constitute security assistance in violation of the FAA or AECA.

Section 27 of the AECA (22 U.S.C. Section 2767) specifically authorizes entering into cooperative project agreements with NATO, NATO countries, and specific friendly foreign countries, based on identification of the countries by DOD in reports submitted to the Congressional committees. A "cooperative project" is defined as a jointly managed arrangement described in a written agreement to further the objectives of rationalization, standardization, and interoperability of armed forces of NATO countries or to improve the conventional defense capabilities of the U.S. and other participants, which provides for sharing of the costs of RDT&E or joint production of defense articles, concurrent production of jointly developed articles, a procurement by the U.S. of a defense article or service from NATO, its subsidiary bodies, or a member country. The agreement must provide that the U.S. and each participant contribute its equitable share of the full cost of the project and will receive an equitable share of the results. The full costs of the project include overhead costs, administrative costs, and the costs of claims. The participants may contribute their shares in funds or defense articles and services needed for the cooperative project. Not less than 30 days before the agreement is signed, a certificate must be transmitted to the Speaker of the House and the Chairmen of the Committees on Foreign Relations and Armed Services of the Senate.

When the U.S. will contract on behalf of the other participants to a Section 27 cooperative project, 10 U.S.C. Section 2350b is applicable. It provides authority for the Secretary of Defense, when entering into contracts *outside* the U.S., to waive with respect to any such contract or subcontract the application of any provision of law other than a provision of the AECA or 10 U.S.C. Section 2304 (CICA) that specifically prescribes procedures to be followed in the formation of contracts, terms and conditions to be included in contracts, requirements for preferences to be given for goods grown, produced or manufactured in the U.S., or requirements regulating the performance of contracts. It further provides that a participant may contract on behalf of the U.S. so long as the contract is awarded on a

competitive basis and U.S. sources are not precluded from competing under the contract. In carrying out a cooperative project, the Secretary of Defense may agree to the disposal of property that is jointly acquired without regard to any laws of the U.S. applicable to the disposal of property. Section 2350i of Title 10, provides related authority for contributions received by the U.S. from a foreign country or NATO to meet costs of cooperative projects to be credited to the applicable account of the military department.

Prior to Section 27, there was no explicit statutory authority to conduct cooperative production. Section 27 is now the appropriate authority for the conduct of a program that contemplates cooperative RDT&E and/or joint production. Often these programs are structured as umbrella agreements to cover the entire scope of effort with supplemental agreements to commit to each phase of the program.

In accordance with section 2350a of Title 10, cooperative R&D projects may be established pursuant to a formal agreement which provides for the costs of the project (including the costs of claims) to be shared on an equitable basis. A foreign participant may not use any U.S. military or economic assistance grant loan or other funds for its contribution. Cooperative R&D programs not conducted under AECA Section 27 or 10 U.S.C. Section 2350b, may be conducted under the "general" R&D authority of 10 U.S.C. section 2358.

Data Exchange Agreements. These are agreements between DOD or a component thereof and a foreign defense ministry/department or component thereof for the exchange of mutually beneficial information in a specific technical area to meet common R&D requirements.

Exchanges of information under such agreements are made only within the scope of the specific project and only to the extent authorized by the participants' national laws, regulations, and policies, including national disclosure policy. Release of manufacturing or production data is outside the scope of the agreements and not authorized.

Data exchange agreements also provide that exchanges will be conducted on a reciprocal basis so that, overall, the value of information received by each government from the other will be essentially equal. No USG material or equipment may be provided to a foreign government solely on the basis of a data exchange agreement (i.e., an AECA lease or loan or FMS LOA is required).

The authority for data exchange agreements is found in the general R&D statute referred to earlier (10 U.S.C. section 2358). Since this statute authorizes only R&D projects necessary to the department, the above described limitations are necessary to keep data exchange programs within statutory authority. Otherwise, data may be provided to a foreign government only under FMS, notwithstanding the receipt of benefits such as standardization, interoperability, closer alliances, enhanced free world security, etc. Master Data Exchange Agreements require implementation by specific data exchange annex meeting the criteria described above.

Offset policy. Cooperative RDT&E or production agreements must be in compliance with 10 U.S.C. Section 2532 concerning offset policy. In accordance with Section 2532(a)

requirements, the President issued his policy on offsets April 20, 1990, which is set out as a note to 50 App. U.S.C. Section 2099.

REFERENCES

1. The Vienna Convention on the Law of Treaties, adopted 23 May 1969 (entry into force, 27 January 1980), UN Doc A/Conf 39/28, UKTS 58 (1980), 8 ILM 679
2. The Case Act, 1 U.S.C. § 112b
3. 10 U.S.C. §§ 421, 975, 1050, 2010, 2201-2222, 2304, 2306, 2313, 2341-2350, 2350a, 2350c, 2350f, 2341-2350c, 2358, 2390, 2531, 2539b, 2667, 2675, 4626, 4629, 7227, 8013, 9381-9383, 9415, 9626, 9629, 9831 and 9832
4. Foreign Assistance Act, 22 U.S.C. §§ 2151, *et seq*.
5. Arms Export Control Act, 22 U.S.C. §§ 2751, *et seq*.
6. 31 U.S.C. §§ 1301(a), 1341, 1501(a) and 9701
7. 40 U.S.C. § 704
8. 41 U.S.C. § 22
9. 49 U.S.C. § 44502(d)
10. 59 Comp. Gen. 369 (1980)
11. 50 App. U.S.C. § 2099
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13. Defense Federal Acquisition Regulation Supplement, 48 C.F.R. Chapter 2, 13 December 2000
14. Coordination, Reporting and Publication of International Agreements, 22 C.F.R. Part 181, 1 April 2001
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16. DODD 2010.9, *Acquisition and Cross-Servicing Agreements*, 28 April 2003
17. DODD 2010.12, *Aviation Leadership Program (ALP)*, 23 September 1994
18. DODD 2140.2, *Recoupment of Non-recurring Costs (NC) on Sale or Licensing of U.S. Items*, 13 January 1993
19. DOD 5105.38-M, *Security Assistance Management Manual (SAMM)*
20. DODD 5230.11 *Disclosure of Classified Military Information to Foreign Governments and International Organizations*, 16 June 1992
21. DODD C-5200.5, *Communications Security (COMSEC)*, 21 April 1990
22. DODD 5530.3, *International Agreements*, 11 June 1987 (incorporating Change 1, 18 February 1991)[279]
23. DOD 7000.14-R, Volume 15, *Financial Management Regulation*
24. Department of State, Volume 11 Foreign Affairs Manual, Chapter 700 Treaties and Other International Agreements
25. AFPD 25-3, *NATO and Allied Logistics Support*, 2 March 1993
26. AFI 25-301, *Acquisition and Cross-Servicing Agreement (ACSA) Between The United States Air Force And Other Allied And Friendly Forces*, 26 October 2001
27. AFI 51-701 *Negotiating, Concluding, Reporting and Maintaining International Agreements*, 6 May 1994

[279] As of 3 Aug 09, DODD 5530.3 is under revision by the Department of Defense Office of General Counsel. Please check for an updated version of this reference.

28. S. Rep. No. 795, 96th Cong., 2d Sess. 7-9, reprinted in 1980 U.S. Code Cong. & Admin. News, 2420, 2427-8
29. S. Rep. No. 892, 96th Cong., 2d. Sess. 8-10, reprinted in 1980 U.S. Code Cong. & Admin. News, 2430, 2437-9
30. Principal Deputy Assistant Secretary of Defense (International Programs) (PDASD(IP)) memoranda of 12 October 1994, 13 February 1995, and 26 May 1995
31. Letter from the DOD Associate General Counsel (International Affairs) to the Assistant Legal Adviser for Treaty Affairs, Department of State, dated 27 April 1981

CHAPTER 8

STATUS OF FORCES AGREEMENTS

BACKGROUND

The sending of U.S. forces abroad to further national security and foreign policy objectives has profound implications under U.S. and international law and raises the basic issue of the status, rights, privileges and immunities of that force, its members, and dependents.

Since the emergence of the territorial state, states have claimed jurisdiction with respect to conduct taking place within their territory. "A sovereign state," noted the U.S. Supreme Court in a *per curiam* decision in *Wilson v. Girard*, 354 U.S. 524 (1957), "has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction." This territorial jurisdiction extends to foreigners. The soundness of this view becomes evident when one considers the consequences of a rule of law that would make foreigners immune from local law. The general rule is that foreign military personnel and their dependents, while stationed within the territory of another country, are fully subject to the law of that country unless expressly or implicitly exempted by the host country through domestic legislation, agreement with the sending State, or by operation of customary international law.

A customary exception, somewhat misunderstood, is the immunity of a military force temporarily passing through the territory of another state in peacetime. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812) case is widely cited for this proposition. The specific issue in that case involved the plaintiff's claim to a French warship in a U.S. port, but in dictum, Chief Justice John Marshall addressed concerns about jurisdiction over foreign military personnel. He observed that, "the grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops, during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require." But it should be noted that Marshall was speaking of troops passing through foreign territory with flags flying and drums rolling, and his opinion did not exclude the possibility that a state might condition its consent to passage on submission to its jurisdiction. The state practice in his day was to permit the transit of such forces without condition. Therefore, Marshall's dictum was not an exception to the general rule but an expression of it. Consequently, Restatement of the Law (Third), The Foreign Relations Law of the United States (1986), Section 461, comment f, correctly summarizes the rule: "Foreign military forces present in a state's territory with the consent of that state . . . are subject to the law of the receiving state except as otherwise agreed between the two states."

After World War II, negotiation of a status of forces agreement (SOFA) became imperative because no exception to the general rule could be relied upon. Forces were to be

permanently stationed overseas in significant numbers. Issues in addition to criminal jurisdiction had to be addressed and resolved, such as access, claims, customs and taxation, and labor. In the late 1940s and early 1950s, the NATO SOFA was concluded as well as bilateral SOFAs with Japan, Korea, and the Philippines. The Department of State (DOS) took the position during the 1953 Senate hearings on the NATO SOFA that there existed no implied immunity from local law absent an international agreement to that effect.

PURPOSE OF SOFAs

Status of forces agreements are not basing or access agreements. They define the status of U.S. forces in the territory of friendly states and do not themselves authorize the presence or activities of those forces. However, it is common to address both status and access issues in single broad international agreements and it is common to refer to these agreements as "SOFAs."

Permanently stationing U.S. forces abroad in peacetime under the general rule of international law thereby subjecting them fully to host nation jurisdiction is not acceptable for political reasons, because of the need to exercise discipline over the force and to ensure their fair treatment. Consequently, it has been a long-standing U.S. policy to seek broad relief from host nation jurisdiction through the mechanism of a SOFA. The purpose is not to immunize the force from criminal sanctions, but to apply military discipline within a U.S. judicial system whereby similar standards are made applicable on a worldwide basis.

The purpose of a SOFA is to establish a mechanism for sharing the sovereign prerogative between the receiving and the sending state. It is intended to strike a balance between the rights and obligations of each commensurate with the interests and needs of each. No SOFA, once concluded, will function well unless all parties understand the reason for sharing and believe their interests have been properly balanced. An ancillary purpose of a SOFA is to resolve as many issues as possible prior to the arrival of a force. It establishes a smooth working relationship, thereby reducing the need for dispute resolution. Leaving too many issues unresolved in a SOFA is an invitation to discord.

The U.S. enters into SOFAs to define the rights, immunities, and responsibilities of the force, its members and dependents focusing on two broad areas: criminal jurisdiction and civil law relief. Criminal jurisdiction establishes the basic principles for sharing or receiving authority to exercise exclusive or primary rights of jurisdiction. Civil law relief addresses, for example, exemption from income tax, duties on importation of household goods and privately owned vehicles, and work permits.

GEOGRAPHICAL APPLICATION

The NATO SOFA (and the Partnership for Peace SOFA that incorporates the NATO SOFA by reference) is the only multilateral SOFA to which the U.S. is a party. Since the NATO SOFA applies within the territory of all of its parties, the NATO SOFA applies in the U.S. and governs the activities of foreign NATO forces here in the U.S. As such, it is the only reciprocal SOFA to which the U.S. is a party and, to give it legal effect, is a formal treaty

entered into with the advice and consent of the Senate. Treaties are the supreme law of the land in the U.S. in accord with Article VI, U.S. Constitution. All other SOFAs to which the U.S. is a party are bilateral and non-reciprocal (i.e., they do not apply in the U.S.). For example, the bilateral and multilateral (with Germany and other sending states) supplements to the NATO SOFA that were completed to address deficiencies in the NATO SOFA are non-reciprocal. They are, for the U.S., executive agreements and not treaties.

TYPES OF STATUS ARRANGEMENTS

In short, there are two basic types of status that the U.S. can seek for its military forces abroad. First is a status equivalent to that of administrative and technical (A&T) staff of an embassy under the Vienna Convention on Diplomatic Relations (commonly referred to as A&T status). Second is something less than A&T status and results in some form of shared criminal jurisdiction and some limited protection from civil liabilities. One of the many possible iterations of this second type of status is what is found in the NATO SOFA. Which arrangement is sought, A&T or something less than A&T, depends upon various factors such as the nature and system of jurisprudence in the receiving State, the duration of the military activity within the host country, the maturity of the relationship between the sending and receiving states, and the prevailing political situation in the host country. Some SOFAs are self-contained in a separate document, while others are integrated with other matters in a base rights or access agreement.

Commonly, the U.S. seeks A&T status. This status is appropriate in a number of situations, such as when U.S. forces are sent abroad to participate in joint military exercises or humanitarian relief efforts lasting not more than a few days. It is also appropriate when the presence involves only a few persons on a permanent basis, such as establishing a regional Defense Contract Management Area Office or a Medical Research Unit and a SOFA does not otherwise exist. Equivalent A&T status may be obtained by a simple exchange of diplomatic notes. This A&T status may be granted in the context of the overall agreement authorizing the activity itself. Seeking A&T status for such activities is not extraordinary and because of its frequency, the DOS has granted blanket authority to U.S. embassies worldwide to negotiate and conclude them. See DOS Action Memorandum, Circular 175, 4 November 1981.

In March 2000, for U.S. Embassies in the Western Hemispheric Region, the DOS granted blanket authority to obtain through an exchange of diplomatic notes equivalent A&T status. This template also addresses additional matters critical to U.S. forces operating overseas and which are contained in most recent exchanges of diplomatic notes and other defense agreements dealing with status of forces and access.[280]

The granting of equivalent A&T status means that the personnel concerned will be accorded the immunities provided for in the Vienna Convention on Diplomatic Relations to persons of comparable rank. The most important of these are full immunity from the criminal jurisdiction of the receiving state and immunity from civil jurisdiction to the extent that the

[280] See DOS Action Memorandum, Circular 175 of 3 March 2000.

act or omission giving rise to the action was done in the performance of official duty. Also granted is protection from arrest or detention, inviolability of personal residence and correspondence, and exemption from all duties and taxes.

More detailed agreements are usually reserved for circumstances in which military bases and installations are made available for use by the U.S. and the numbers of U.S. personnel and dependents present in the host country require the full range of support commonly provided. It is in these circumstances when the second type of status, something less than A&T, is provided.

CONTENT OF SOFAs

In circumstances where there is less than A&T status, different substantive areas may or may not be addressed. What is provided below is the content, by topic and sub-topic, of potential issues that may be addressed in a SOFA or agreements that supplement or implement SOFAs. The list is not exhaustive and is intended to give the reader a sense of the subject matter that may be addressed in a SOFA. The texts of SOFAs can be as short as a few pages, as with diplomatic notes addressed above, or, as in the case of the German Supplementary Agreement to the NATO SOFA, several hundred pages.

Definitions

1. U.S. armed forces
2. Members of the force
3. Members of the civilian component
4. Dependents
5. Contractors
6. Contractor employees

Respect for Law and Sovereignty

1. Duty to respect law and sovereignty
2. Duty to abstain from any inconsistent political activity
3. Duty of the sending State to take necessary measures to that end

Entry and Departure Procedures

1. Host nation immigration requirements vary between nations. However, it is generally accepted under most SOFAs that active duty members of the force are

exempted from passport and visa requirements (need only military identification (ID) card and collective or individual movement order).

2. Similarly, crews of visiting ships and aircraft need only their ID card and orders.

3. Members of the civilian component will normally be subject to immigration control and will require a passport and, depending on the country, applicable visas.

4. Other topics include: extent of applicability of immigration and emigration inspection, exemption from laws and regulations on the registration and control of aliens, exemption from work permit requirements if employed by the force in other than a local national position, non-acquisition of any right of permanent residence or domicile, handling request from host country for removal of an individual, and procedures to retire or separate in the host country.

Wearing of the Uniform

1. When and where permitted

2. Application of U.S. law and service regulations

3. When on or off a facility or installation which may be distinguished from being on or off duty

Carrying of Arms

1. When and where permitted

2. Members of the force may possess and carry arms while on duty if authorized to do so by their orders.

3. Other topics include sending State to give sympathetic consideration to requests by host nations. Typical host nation requests may include , advance notice to host if arms taken off military facility and conditions for carrying arms in limited circumstances off military facility (such as escort of convoy). U.S. commander's force protection authority and their authority on/off installations may be addressed.

Driving Licenses and Registration

This subject is normally worked through bilateral arrangements between the host nation and the sending State and will normally distinguish between the requirements of service vehicles versus privately owned vehicles. These SOFA arrangements will likely address: the allowance of U.S. forces issued licenses for those operating U.S. service vehicles and privately owned vehicles; requirements for registration or licensing of U.S. vehicles; acceptance of U.S. issued licenses to operate privately owned vehicle or for the receiving

State to issue license without test or fee; local registration of privately owned vehicle and payment of fee for cost of registration.

The Division of Criminal Jurisdiction

See the chapter titles "Foreign Criminal Jurisdiction" in this guide.

Civil Jurisdiction

1. Immunity or limited protections for matters arising out of the performance of official duty; application of appropriate SOFA claims procedures; enforceability of judgments and actions against the U.S. Government

2. Other topics: U.S. Department of Justice (DOJ) does not waive its defense of sovereign immunity (but may not always assert it – depends on the facts of each case)

Arrest and Service of Process

Procedures for arrest and service of process in criminal and civil matters within the military facility are normally coordinated with host nation authorities to ensure an orderly process of notification while minimizing disruption to operations.

Claims

1. Types of government-to-government claims waived and procedures for handing those claims not waived

2. Formula for adjudication and payment of all other claims (except contractual or combat related) caused by the act or omission of U.S. personnel or by an individual for which the U.S. Force is responsible (either the U.S. adjudicates and pays in full or host nation adjudicates and cost shares the payment)

3. Other topics: recognition of U.S. ex gratia claims procedures and establishing time limits on claims submissions

Duties, Taxes and Other Charges

1. Importation, exportation and local purchase exemption from duties and taxes for U.S. material, equipment, supplies, provisions and other property for the exclusive use by the U.S. Force (also relief for contractor acting by or on behalf of U.S.)

2. Official vehicles, vessels and aircraft exempt from over flight and air navigation, landing and parking, light and harbor fees, road tolls and other similar charges (reasonable charges for services requested and received, such as for de-icing or fuel, will be paid)

3. Other topics: customs control procedures to include procedures for transfer to others, and possible contractor income tax and licensing relief

Importation, Exportation, Use and Exemptions for Personal Property

1. Exemptions for household goods and privately owned vehicles

2. Exemptions for reasonable quantities for personal use during assigned tour

3. Other topics: limitation on the number of tax-free imported privately owned vehicles, procedures for transfer to others, procedures for inspection of household goods, and cooperation between the parties to prevent abuses

Personal Tax Exemption

1. Exemption from receiving State from personal income tax on the salary and emoluments paid as members of the force of the sending State or any other tax based on legal residence or domicile

2. Other topics: condition for loss of exemption and whether filing is required and programs to allow entitled personnel to make personal purchases free of host nation value added tax

Provisioning of the Force and Morale, Welfare and Recreation (MWR)

1. Authorization to establish commissaries, exchanges, sales and service activities, MWR facilities, and designation of authorized users

2. Other topics: circumstances when retirees, personnel on leave in host country, third country and local nationals may be authorized users; rules and procedures for contracting with local commercial interests and concessionaires

Health Care

1. Basis for access to host nation health care

2. Other topics: host nation desire to regulate U.S. medical care, and procedures for autopsies

Postal Services

1. Authorization to establish a military post office

2. Other topics: U.S. to operate under U.S. laws and regulations, customs control procedures, procedure for host to inspect (or not inspect) private mail, and any special use permitted (e.g., by retirees)

Use of Transportation

1. Privately owned vehicles exempt from road tolls

2. U.S. personnel and dependents exempt from travel tax on airline tickets and departure fees from airports

Use of Currency and Banking Facilities

1. Authorization to contract for military banking services

2. Relaxation of currency control restrictions and permission of military banks to convert currency of both parties and third countries for official purposes and for needs of U.S. personnel and dependents

3. Military banks authorized to provide full-range of services.

4. Other topics: contracting process accomplished in accordance with U.S. law and regulation, circumstances permitting host country to reject a bank selected through U.S. contracting process (e.g., limited to security reasons), host licensing of military bank (pro forma/one-time), procedures for military bank to acquire host country currency (e.g., from national bank and rate of exchange)

Contractors and Contractor Employees

1. Definition of who qualifies

2. Identify specific rights and privileges to be accorded U.S. contractor.

3. Identify any customs relief for contractor organizations

4. Other topics: relief from work permit requirement, local national hiring obligations, dual nationality treatment, third country nationals, and waiver of visa requirement (or expedited procedures); authorization for individual logistic support for contractor employees; status of special technical representatives working at sensitive locations (intelligence work)

Local Procurement

1. Right to accomplish in accordance with U.S. law and regulation

2. Other topics: commitment to use local contractors to maximum extent practicable on a competitive basis

Local Construction

1. Rules and procedures governing residual value

2. Rules pertaining to indirect contracting through designated host nation major construction and design agents; making suitable arrangements for host nation and U.S. design and building requirements.

Utilization of Local Labor

1. Accept local labor standards

2. Applicability of local labor laws, rules, regulations, and protections of workers (including court decisions or rulings) provided for in domestic legislation

3. Other topics: preferential local hiring if and as permitted by U.S. law, dual nationality treatment, process for allowing strikes, dispute resolution mechanisms, and wage-setting procedures

Dispute Resolution

Procedures for dispute resolution (via a joint commission or through diplomatic channels).

Governing Agreements

1. Preserving prior agreements not inconsistent with SOFAs

2. Procedures for review and termination or modification of prior agreements

Duration and Termination

1. Duration period and termination procedures. (Ratified (if treaty) or accepted (if executive agreement) in accord with respective constitutional processes)

2. Date of entry into force or effect or event bringing into force or effect (exchange of instruments)

3. Other topics: authorization statement and signatures, language or languages recognized by the agreement and if provisions conflict, which language prevails if any, provision for amending or suspending (special provisions in the event of armed conflict)

COMMON PITFALLS

There are two main problems that must be addressed.

1. Deploying without addressing the issue of SOFA coverage. This issue should always be raised and elevated up the chain of command for an appropriate decision. Senior Department of Defense officials may decide to conduct an activity overseas without SOFA coverage for policy reasons. Commanders and judge advocates in the field should not be making such determinations.

2. Negotiating. Negotiating SOFAs or SOFA issues is always a "policy significant matter," which only Washington level DOD and State Department personnel may authorize. There exists no delegation of procedural authority to the field in this regard. AFI 51-701. Consequently, all identified SOFA issues requiring negotiation must be elevated to authorities in Washington.

CONCLUSION

This broad survey is not exhaustive but is intended as a general overview and introduction to the subject of SOFAs. Many issues have only been lightly touched upon and other issues not discussed at all. Additional questions of interest might include negotiating SOFAs, treatment in U.S. law of SOFAs that are treaties and those that are executive agreements, the impact of the European Union or other similar regional authorities on SOFAs among or with their member States, and the relationship of subsequent inconsistent national legislation on SOFA obligations.

Nevertheless, from this short presentation, it should be evident that the issues are many, the scope of SOFA coverage varies (or there may be none at all) and a full range of legal skills is required. Creativity and hard work will be necessary to resolve often difficult and complex matters. Attention to precedent and U.S. worldwide practice is essential lest what may appear at the moment to be a victory becomes a burden and loss of privileges by U.S. personnel and dependents around the world. Communications today are too rapid and resolution of issues too transparent for other nations not to learn of actions taken and to seek to use that information to their benefit.

A particular SOFA might not address an issue you believe so obvious that it should have been addressed. In point of fact, the parties may have sought to address it but agreement on language proved too difficult. Whether seeking to resolve a criminal jurisdiction, customs or tax matter, judge advocates should --keeping in mind U.S. policies such as maximizing U.S. criminal jurisdiction -- strive to achieve those ends. SOFAs establish a framework in which the interests of the parties are balanced to the extent possible in a pre-determined way so as to minimize future conflicts between them. Although essential, SOFAs will not provide the answer to every question. Even in those circumstances where the SOFA does not answer the question, our effort remains consistent with established policy and worldwide practice.

Lastly, for an updated list of current unclassified SOFA, or to see if a SOFA exists between the U.S. and a specific country, go to https://aflsa.jag.af.mil/php/agmts/agmts.php.

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9. Agreement Among the States Parties to the North Atlantic Treaty Participating in the Partnership for Peace Regarding the Status of Their Forces, 19 June 1995, T.I.A.S. 12666 (entry into force 13 January 1996, for U.S. same date)
10. Whiteman, 6 Digest of International Law, section 15 (1968)
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13. Hearings Before the Committee on Foreign Relations on the Status of North Atlantic Organization, Armed Forces and Military Headquarters, 83rd Cong., 1st Sess (1953)
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18. DODD 5525.1, *Status of Forces Polices and Information*, 7 August 1979, Change 1, 4 September 1985, Change 2, 7 February 1997
19. AFI 51-701 *Negotiating, Concluding, Reporting, And Maintaining International Agreements*, 6 May 1994


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被告人席
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証人席
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CHAPTER 9

FOREIGN CRIMINAL JURISDICTION

BACKGROUND

Foreign criminal jurisdiction (FCJ) issues arise when U.S. Force personnel and their dependents run afoul of a host nation criminal law while stationed or deployed overseas. U.S. Congress has exhibited a keen interest in ensuring that the rights of the U.S. and its forces are protected in matters involving foreign criminal jurisdiction and that the U.S. forces maximize the opportunity to exercise jurisdiction over cases of misconduct alleged against U.S. service personnel. Despite this policy, the U.S. does not have agreements addressing FCJ with every host nation where we operate. If there is no such agreement in place, U.S. Force personnel have no more protection than common tourists. Such a situation can possibly be addressed in long range planning, but only if started early and done in full coordination with Washington DC agencies. Consult HQ USAF/JAO for details and recognize that extensive exercise planning may be for naught if at the last moment these personnel status issues have not been addressed.

Following World War II, sending states began to permanently station forces in host countries or to send them there temporarily for various short-term missions (e.g., humanitarian relief, disaster assistance, training, etc.). Because customary international law did not address the status of these forces, it has become necessary to address their status either through status of forces agreements (SOFAs) or other international agreements such as an exchange of diplomatic notes. See chapter eight, Status of Forces Agreements, for discussions on SOFAs outside of the context of FCJ.

U.S. POLICY CONCERNING FOREIGN CRIMINAL JURISDICTION

When the receiving state exercises criminal jurisdiction, because of a shared jurisdiction formula or in absence of a status arrangement altogether, it creates a situation where U.S. force personnel and their dependents are subject to unfamiliar laws and procedures of another country. This can affect morale and be extraordinarily time consuming for the Command. As a judge advocate, you can do much to reduce or eliminate these undesirable effects. Recognize also that the exercise of host nation criminal jurisdiction may also limit the commander's disciplinary powers over the force. Because of this, Department of Defense (DOD) policy is to maximize U.S. jurisdiction, which in turn maximizes the commander's disciplinary authority. If efforts to obtain jurisdiction are unsuccessful, then DOD policy is to protect, to the maximum extent possible, the rights of U.S. personnel and dependents who become subject to foreign proceedings or imprisonment. This policy originated from the U.S. Senate's advice and consent to ratification of the NATO SOFA in 1953.

As a judge advocate, you can expect to do your part in cultivating friendly relations with host nation officials as a way of helping maximize U.S. jurisdiction. This may mean periodic visits to prosecutors, inviting officials to your location for Law Day ceremonies, attending mutual sports activities, seeking permission from the appropriate source to purchase a gift for the New Year holiday, etc. AFJI 51-706 requires that "[c]onstant efforts will be made to establish relationships with host country authorities that will maximize U.S. jurisdiction to the extent permitted by applicable agreements." You will find your ability to deal with foreign officials expands considerably if you make the effort to learn the host country language. If you are very fortunate, you may even have a host country legal advisor on whom you can rely. There may be exceptional cases where it is not appropriate for U.S. authorities to seek jurisdiction. However, these cases are rare indeed and non-existent when dealing with official duty cases, when in many instances, the U.S. will have the primary right to exercise jurisdiction. If in any doubt whatsoever, contact your higher headquarters staff judge advocate immediately.

ROLE OF THE DESIGNATED COMMANDING OFFICER (DCO) AND COUNTRY REPRESENTATIVE

DCO Responsibilities

Pursuant to AFJI 51-706, the DCO in each foreign country has overall responsibility for implementing status of forces policies and procedures. That includes securing waivers of custody and jurisdiction, responsibility for preparing country law studies, maintaining liaison with appropriate host nation legal authorities and U.S. diplomatic missions, providing for trial observers, and initiating requests for Department of State intervention as necessary.

U.S. Country Representatives

The DCO may appoint a senior U.S. officer as the U.S. Country Representative (USCR) for each of his/her countries of responsibility. The USCR will serve as the single point of contact with the host country and the U.S. diplomatic mission regarding FCJ matters. Unless authority is delegated to the USCR, the DCO retains responsibility in deciding whether or not to request formal U.S. State Department action to intervene in any particular case. When a DCO appoints a USCR, a copy of the memorandum of appointment should be sent to the unified commander and each of the component commanders responsible for their respective branch of Service in that country.

Country Liaison Agents

In host nations where there is not a DCO, component commanders may appoint a senior commander to act as the country liaison agent for their respective branch of Service. Unless otherwise directed by the DCO or USCR, country liaison agents will act as the central point of contact (POC) between units and personnel of their Service and the USCR and other U.S. authorities regarding the exercise of FCJ.

SOURCE AND TYPES OF JURISDICTIONAL ARRANGEMENTS

The right to exercise criminal and disciplinary jurisdiction overseas in most cases depends on the legal status of the accused. Ordinarily, U.S. force personnel and dependents are present in the foreign country pursuant either to a United Nations (UN) mandate or a status arrangement between the sending and receiving State.

UN MANDATE

UN Missions

If the accused is part of a UN mission, the member's status may be governed by UN arrangements, most likely provided for through the granting of "expert on mission status" or through a "status of mission agreement" with a host nation.

Expert on Mission Status

Expert on mission status provides a quasi-diplomatic status that includes full immunity from criminal process and the requirement for immediate release by any host government authority that detains the person. The status can only be conveyed by the UN. The legal authority for this status comes from Article VI of the 1946 Convention on Privileges and Immunities of the United Nations. If the accused has "expert on mission" status, there will be no foreign criminal jurisdiction issue as the host government, or receiving state, will have no legal authority to exercise jurisdiction. Although rarely done, it is possible that the UN could waive, in consultation with the UN member state to which the person belongs, the protected status to allow host nation authorities to exercise jurisdiction.

Status of Mission Agreement (SOMA)

SOMAs are relevant to consent based UN operations under Chapter VI of the UN Charter. The model UN SOMA is similar to the NATO SOFA in the topics addressed. However, unlike the NATO SOFA, the UN SOMA provides criminal jurisdiction for sending states in all cases.

U.S. - HOST MISSIONS

The status of the force is determined by an agreement between the governments. This agreement may be a SOFA, visiting forces agreement (VFA), defense cooperation agreement (DCA), an exchange of diplomatic notes, or any other form of international agreement. Status arrangements establish rights, privileges and responsibilities of the sending and receiving states, as well as the individual force members and, as required, their dependents. The status arrangements can be broadly divided between situations where Administrative and Technical (A&T) status is granted, and where jurisdiction is shared between the U.S. and the host.

A&T Status

Some status arrangements convey the equivalent of A&T status, that is, immunity akin to that enjoyed by members of an embassy's administrative and technical staff. Under the 1961 Vienna Convention on Diplomatic Relations, A&T status provides full immunity for criminal acts and limited civil and administrative immunity for civil acts done in the performance of official duties. If A&T status applies, there will be no exercise of foreign criminal jurisdiction by the receiving state because it will have no authority to exercise jurisdiction. However, a sending State may grant a waiver request from the receiving State. Waivers are rare and must be expressly granted.

Shared Jurisdiction

Although the terms of status arrangements vary from agreement to agreement, the model for any shared jurisdiction framework involving the long-term presence of forces is the NATO SOFA. The NATO SOFA is among the earliest entered into by the U.S. and it remains, along with its bilateral and multilateral supplements, the primary blueprint for subsequent full scale U.S. status arrangements worldwide.

THE NATO SOFA

The NATO SOFA criminal jurisdiction formula provides for both exclusive and concurrent criminal jurisdiction.

Exclusive Criminal Jurisdiction

Each state has exclusive jurisdiction over those crimes that violate only its laws. Typically, these laws relate to the counterfeiting, security, immigration and espionage statutes of each country. However, they can also include general laws unique to a country. Classic examples are Greek and Turkish insult laws. For example, if a member of the U.S. force is charged with defaming the memory of Ataturk while in Turkey, the Turkish Government will have exclusive jurisdiction. Similarly, if a U.S. member goes AWOL or deserts, the U.S. would have exclusive jurisdiction over those offenses as they would violate only U.S. law, pursuant to the Uniform Code of Military Justice (UCMJ).

Concurrent Criminal Jurisdiction

When the offense violates the laws of both the sending and receiving States, both nations have jurisdiction over the case. Thus, it is necessary to determine which State will have the primary right to exercise jurisdiction. The primary right includes the right to proceed and, if exercised, will subordinate the right of the other State. Keep in mind that the NATO SOFA addresses the "primary right" to exercise jurisdiction. It is important to distinguish this from any concept that there is both primary and secondary jurisdiction. We have been careful to point out that the exercise of criminal jurisdiction may include a decision by authorities not to take any action in a case. We claim that decision is an exercise of jurisdiction. The decision not to proceed with criminal action however should not give rise

to any "secondary" jurisdiction or the right of the receiving State to take criminal action in the absence of our own. It is the U.S. position that the receiving State does not have a right to exercise jurisdiction in such cases absent a waiver by the sending State.

Receiving State has Primary Right

Under the NATO SOFA formula, the general rule is the receiving State has the primary right to exercise jurisdiction when there is concurrent jurisdiction. There are two exceptions to this rule. The exceptions give the sending State the primary right to exercise jurisdiction.

Two Exceptions Giving Sending State the Primary Right to Exercise Jurisdiction

The first exception is "inter se" cases. These are cases in which a member of the force or civilian component (note dependents are not included in the category of perpetrator) commit an offense solely against the property or security of the sending State, or commit an offense solely against the person or property of another member of the force or civilian component of the sending State or a dependent. The second exception is for official duty cases. These are cases when an offense arises out of an act or omission done in the performance of official duty.

First Exception - Inter Se Cases. This exception gives to the receiving State the primary right to exercise jurisdiction. It mainly involves circumstances where the receiving State has a minimal interest in offenses committed by sending State military or civilian component members as the main interest is contained with the sending State. Therefore, the sending state should have the primary right to exercise jurisdiction. This exception applies only where the sending State, its personnel, including dependents, or its interests, are the sole victims. It does not apply to offenses against a receiving State victim. It also applies, under the NATO SOFA model, only when a sending State military or civilian component member commits the offense. As noted above, dependents may be victims but cannot be wrongdoers in inter se situations. Creative judge advocates have maximized jurisdiction in various ways by narrowly defining the scope and impact of inter se criminal acts, including severing offenses based on the identity of the victim or arguing that the impact of the most serious offenses is *inter se* and any other violations of host law are de minimis at best and should be disregarded. See SNEE AND PYE, p. 57. Expect difficulties when the dependent victim is a citizen of the receiving state.

Second Exception - Official Duty Cases. The sending state also has the primary right to exercise jurisdiction over offenses arising out of an act or omission done in the performance of official duty. This derives from the principle that official activities of the sovereign must not be subject to determination or judgment by another sovereign. The sovereign on whose behalf the duty was performed should be the sole arbiter of alleged offenses committed by those acting in an official capacity. The U.S. vigorously defends the concept of official duty and asserts the primary right to exercise jurisdiction in these cases. Moreover, the practice under the NATO SOFA model is that the sending State alone decides whether an act arose out of official duty. This decision is communicated to the receiving State through the issuance of an "official duty certificate" or by an embassy diplomatic note. Normally,

receiving States accept such certificates on their face. The official duty exception applies only to official actions of military members and civilian employees (jurisdiction over civilians is discussed below). It does not apply to dependents because they do not act in an official capacity. Consistent with U.S. policy to maximize jurisdiction, official duty certificates must be issued in all appropriate circumstances.

Waivers of Jurisdiction

The jurisdictional formula under the NATO SOFA model has some flexibility. It includes a means for the parties to alter the allocation formula on an ad hoc basis by allowing either party to waive its primary right to exercise jurisdiction. The U.S., when acting as the sending State, rarely waives its primary right to exercise jurisdiction. This is largely because it's primary right to exercise jurisdiction is already narrowly limited to cases (inter se and official duty) when it always has important prosecution interests. CAVEAT: Never waive an official duty case!

Consistent with U.S. policy to maximize jurisdiction, judge advocates should try to maximize waivers of receiving state jurisdiction. The U.S. military's experience is that many receiving states will usually cede primary jurisdiction unless there is a particularly important reason not to. In fact, standing waivers for certain categories of offenses have been negotiated with receiving states. However, some states jealously guard their jurisdiction and grant few waiver requests.

Military authorities overseas are not authorized to grant a waiver of U.S. jurisdiction in inter se cases without prior approval of The Judge Advocate General of the accused's service. AFJI 51-706, para. 1-7c. The President is the approval authority for waiver of jurisdiction in official duty cases. The authority to deny a waiver request of U.S. jurisdiction from a receiving state rests with the DCO for that receiving State. While this policy does not mean that waivers are never appropriate or that the U.S. must always secure a waiver of foreign jurisdiction, in practice, the maxim "maximize jurisdiction" is the SJA's primary guidance. AFJI 51-706, para. 1-7a.

JURISDICTION OVER CIVILIANS AND DEPENDENTS

Jurisdiction over U.S. civilians and dependents abroad presents unique challenges for two reasons. First, SOFA language appears narrowly drawn and may only authorize sending State jurisdiction when the accused is a person "subject to the military law of the sending state." This phrase is used in the NATO SOFA, at article VII, paragraph 1(a). At the time the NATO SOFA entered into force, U.S. military law applied to civilian employees and dependents accompanying the force. However, in 1957, the U.S. Supreme Court held that civilians could not be tried by court-martial in time of peace. *Reid v. Covert*, 354 US 1 (1957). Thus, the SOFA language "subject to the military law of the sending state" could serve to thwart U.S. efforts to obtain jurisdiction. It can successfully be argued that "military law" includes not only the UCMJ, but also all U.S. federal law that a force takes with it when it goes abroad. Further, Article VII, paragraph 1a gives the military authorities of the sending State the right to exercise all criminal and "disciplinary" jurisdiction conferred on them by

the law of the sending State. U.S. civilian employees and dependents may well be subject to the command's disciplinary authority that in appropriate cases would satisfy the interest of justice. SJA's should be creative in this regard.

Jurisdiction over U.S. civilians and dependents is also difficult because of the lack of extraterritorial effect of many federal criminal statutes. Without a federal criminal statute applicable to such persons abroad it is difficult to argue for the right to exercise jurisdiction. Still, it may be possible to deal with alleged misconduct administratively (see infra). Where a federal criminal statute has extraterritorial application, prosecution in U.S. federal courts becomes a possibility. Lack of federal criminal statutes with extraterritorial application, creates "jurisdictional gaps." In 2000, new legislation, called the Military Extraterritorial Jurisdiction Act (MEJA) was enacted to close that gap. That law has now been implemented and it should be considered in accordance with its promulgating instruction, DODI 5525.11, by commanders and judge advocates.

Current Practices

The U.S. may decide to ask the local foreign authorities to refrain from exercising jurisdiction or, alternatively, to waive jurisdiction.

Request to Refrain. In many cases, such as shoplifting at the Base Exchange, the U.S. has limited federal criminal statute application overseas. But AFJI 51-706, paragraph 1-7b(1), still gives base commanders some flexibility. "In all cases in which the local commanders determine that suitable corrective action can be taken under existing administrative regulations, they may request the local foreign authorities to refrain from exercising their jurisdiction." In a strict legal sense, this is not a waiver request because the U.S. has limited criminal law applicable to the situation which would permit it to exercise criminal jurisdiction. A request that the host government refrain in its prosecution is intended to be a deferral of its right in lieu of U.S. administrative (rather than criminal) action. However, in more serious cases such as child neglect or abuse, where limited U.S. federal statutes applies overseas, U.S. commanders may have little alternative. Absent MEJA application or prosecution pursuant to Article 22, UCMJ, either allow the local foreign authorities to proceed with a prosecution without seeking their deferral, or if the foreign authorities are not interested in the case, return the civilian to the U.S.

Waiver Request. Only in those cases where there is a U.S. Code, Title 18 offense that has extraterritorial application, can U.S. military authorities seek a host nation waiver and coordinate with the Department of Justice (DOJ) for a DOJ criminal prosecution in U.S. federal court. See Appendix A for list.

MEJA

On November 22, 2000, the President signed into law the MEJA, codified at 18 U.S.C. §§ 3261, *et seq*. This act amended Title 18 by adding sections 3261-67 to expand federal overseas jurisdiction to include anyone employed by, or accompanying the armed forces outside the U.S. who engages in conduct that would constitute an offense punishable by

imprisonment for more than one year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the U.S. This law not only extends federal jurisdiction to DOD civilians and civilians who accompany the force outside the U.S., but also, under certain circumstances, to military members.

The MEJA preserves the authority under Title 10 to prosecute military members under the UCMJ, while providing authority under Title 18 to prosecute members of the armed forces who are no longer subject to the Code, but who were on active duty at the time the alleged acts were committed. Although the Act does not apply if a foreign government has or is prosecuting the person for the same conduct, it allows U.S. authorities to assert U.S. primary right jurisdiction and request waivers in an expanded number of cases. The legislation requires the Secretary of Defense (SECDEF) to issue uniform DOD regulations, which it has now done in DODI 5525.11, governing the apprehension, detention, and removal of persons committing offenses punishable under the expanded Title 18 jurisdiction. See Appendix B to this chapter for a summary of the MEJA.

RECEIVING STATE EXERCISE OF JURISDICTION - PROCEDURAL PROTECTIONS

Despite best efforts, there are occasions when the receiving state will not yield the primary right to exercise jurisdiction or the receiving State has exclusive jurisdiction and insists on prosecuting U.S. members. When this happens, the chief concern of the U.S. is that its personnel and dependents be accorded minimum due process guarantees in the foreign courts. Following are some of the protections afforded U.S. personnel pursuant to the FCJ program administered under AFJI 51-706:

Military Legal Advisors

All U.S. military personnel facing foreign criminal charges are entitled to the assignment, at their request, of a military legal advisor (MLA). The MLA typically is a judge advocate from an area defense counsel office. The MLA is not the accused's defense lawyer in the foreign court; MLAs may not appear in his or her client's behalf before any foreign tribunal. The MLA's chief functions are to assist the accused's foreign lawyer, to advise the accused of rights under the applicable status arrangement and other international agreements, and to advise the accused regarding any ancillary action the Air Force may be taking as a result of the foreign criminal action. The MLA has an attorney-client relationship with the accused. See AFI 51-703.

Payment of Counsel Fees

Any military member, civilian employee, or dependent charged with a foreign criminal offense is eligible for payment of counsel fees, the posting of bail and other appropriate trial expenses. These are paid from appropriated funds of the service to which the accused belongs. AFJI 51-706, para. 2-9. Statutory authority for this is found in 10 U.S.C. 1037. For the Air Force, funds are chargeable to the base for operation and maintenance purposes (O&M) or research and development (R&D) as applicable. AFJI 51-706, para. 2-9a. To initiate payment, the accused must apply through the local commander to the general

court-martial convening authority (GCMCA). AFJI 51-706, para. 2-3a. Reasonable fees are paid only for the services of attorneys licensed and qualified to practice in the local jurisdiction. The GCMCA has considerable discretion to approve fees in cases considered "to have a significant impact on the relations of U.S. forces with the host country, or involve any other particular U.S. interest." Criteria for the provision of counsel fees and trial expenses is set forth in AFJI 51-706, paragraph 2-4. However, no use of these funds is authorized to pay fines or judgments imposed, nor will they be used to provide legal representation to indirect hire or contractor employees or their dependents.

Trial Observers

Trial observers are appointed to ensure that foreign court proceedings provide minimum due process and fair trial rights to U.S. personnel and dependents appearing before them. The DCO or USCR submits a list of qualified persons to serve as U.S. trial observers at trials before courts of each country to the Chief of Mission who appoints the observer for each trial from that list. AFJI 51-706, paragraph 1-8 specifies that trial observers will usually be a U.S. judge advocate, though trials involving minor offenses may have U.S. military non-lawyers as observers. In order to assist the DCO in carrying out his or her responsibility, the trial observer must determine, "in the light of legal procedures of the host country, whether a substantial possibility exists that the accused will not receive a fair trial." AFJI 51-706, para. 1-7a(2). Recognizing that laws vary from country to country, AFJI 51-706, paragraph 1-8e cautions that a trial will not be considered unfair solely because it is not identical to trials held in the U.S. The trial observer must use his or her best judgment and knowledge of U.S. and foreign law to assess whether the procedures the host nation's court uses are fundamentally fair. To assist the trial observer in this task, AFJI 51-706 provides at Appendix D a list of "fair trial" safeguards applicable in U.S. criminal trials. Also, article VII, paragraph 9, of the NATO SOFA lists the fair trail guarantees that are afforded each member of, or person accompanying, the sending State force. Finally, the trial observer's report is only a recommendation to assist the DCO in making the initial determination whether there were any failures to comply with the procedural safeguards and whether the accused received a fair trial. A final determination is made in Washington DC. See paragraph titled Reports below.

Pretrial Custody

Some FCJ cases are serious enough to merit pretrial confinement of the accused pending either a custody hearing or the trial itself. In such cases, it is U.S. policy to seek the release of Air Force personnel and dependents from foreign confinement. AFJI 51-706, para. 1-7a and AFI 51-703, para. 1. The primary means to secure release is through exercise of U.S. custody rights pursuant to the status arrangement. Many receiving states have formally agreed to allow the U.S. forces to retain custody over an accused pending completion of the judicial process. Others will allow it on an ad hoc basis. In either case, the U.S. may be able to secure release by offering to take control of the person as a substitute. However, the U.S. always retains an independent decision-making authority as to whether confinement of the accused for which it has accepted custody is appropriate. If the SJA is unable to secure release of the accused through transfer of custody, the U.S. may offer to post bail as a last

resort. AFJI 51-706, para. 2-5. When the U.S. posts bail, however, it offers the host country no other assurances.

Prison Visits

AFJI 51-706 gives DCOs responsibility to ensure that confined U.S. personnel receive "the same or similar treatment, rights, privileges and protections of personnel confined in U.S. military facilities." There are two chief aspects of the DCO's responsibility. First, is the need to ensure that a physical examination of the member is conducted within 48 hours, if possible, before he is placed in confinement. If an exam cannot be performed before confinement, then it must be performed at the "earliest possible time subsequent to confinement." AFJI 51-706, para. 3-4a. The second responsibility is to provide continual visits to confined U.S. personnel and dependents at least every 30 days, or more frequently if prison conditions or circumstances of the prisoner warrant. The individual's commander (or representative) is obligated to personally conduct the visit "if feasible." AFJI 51-706, para. 3-4b. Typically, a judge advocate will visit the prisoner on behalf of the commander, along with a medical officer and chaplain.

Prisoner Transfer

The U.S. is a party to a number of bilateral and multilateral international agreements allowing prisoners who are nationals of signatory nations to transfer to prisons within their own country. These agreements apply to U.S. forces and dependents serving sentences in foreign prisons who want to transfer to a U.S. prison. 10 U.S.C. 955 (1988). To qualify for a transfer, usually there must be at least six months remaining to be served on the sentence and all appeals must be exhausted. MLAs or judge advocates visiting prisoners are generally responsible for informing their clients of this program. The transfer process begins with a request by a prisoner in a foreign prison to be moved to a U.S. prison. This application is then investigated by the Department of Justice (DOJ) in a hearing within the receiving state. 18 U.S.C. 4108(a). The prisoner is entitled to counsel, who may be a military judge advocate if requested and available. The presiding official will generally be a U.S. magistrate. The purpose of the hearing is to verify the prisoner's informed consent to be transferred. Once verified, it is irrevocable.

MILITARY ADMINISTRATIVE ACTIONS

When U.S. personnel are facing foreign criminal charges, a number of Air Force administrative actions may follow.

International Legal Hold

International hold is the way commanders try to prevent the departure of a military member, civilian employee or dependents facing foreign criminal charges prior to final disposition of those charges by the host country. The commander orders the military member not to depart the country and ensures that the military member, civilian employees

or dependents are not provided U.S. funded transportation out of the country. AFI 51-703 sets out requirements for international hold and the actions that must be taken to effect it.

Mutual Legal Assistance

The NATO SOFA, as well as most other status arrangements, obligates sending and receiving States to provide each other mutual legal assistance in the investigation and prosecution of offenses. Similar obligations require sending and receiving States to "assist each other in the arrest of members of a force or civilian component or their dependents . . . and in handing them over to the authority which is to exercise jurisdiction." NATO SOFA, art. VII, para. 5(a). The U.S. relies on this obligation to affect apprehension of suspects outside its arrest jurisdiction in host countries or to obtain assistance with evidence production at courts-martial. Similarly, the receiving state relies on U.S. cooperation in transferring custody of U.S. personnel to them or producing information or evidence to support their prosecution.

Expiration of Enlistment

When enlisted personnel are pending foreign criminal charges, it is important to check the date the member's enlistment will expire. Airmen who are not in foreign confinement while awaiting disposition of foreign criminal charges may be retained beyond their expiration of term of service (ETS) only with their consent. AFI 36-3208, para. 2.7. If an Airman voluntary extends his or her enlistment, the Air Force may continue custody while charges are pending. If the Airman does not wish to extend enlistment, then the host country must be advised that the U.S. will lose control of the member and the host country must be given an opportunity to take the Airman into its custody. All enlisted airmen must be given an opportunity to consult with the area defense counsel before making this decision. Once convicted and confined in a foreign prison, consent is no longer required to extend enlistments, the time period is tolled. Enlisted members are not discharged or separated from the service until their term of imprisonment is completed and they are returned to the U.S. AFJI 51-706, para. 3-8. This does not, however, prevent the member's commander from initiating administrative discharge action against him or her based on the foreign conviction or any other reason. Only the execution of an approved discharge will be delayed pending the member's release and return. AFI 36-3208, ch. 5, sect H.

Return of Member for Foreign Trial

The U.S. is obligated under the NATO SOFA and most other status arrangements to surrender U.S. personnel to receiving states in which they face criminal charges. This obligation has been challenged by U.S. military members who, having departed the receiving state, did not want to return to face those foreign charges. In every case, federal courts have held that the U.S. armed forces could return their members for this purpose. A common prerequisite, however, is the existence of a status of forces obligation to do so and the proper assignment of jurisdiction to the receiving State. Extradition process is not relevant when SOFA obligations exist. However, absent such obligations, extradition may become material.

REPORTS REQUIRED

Because of the importance of ensuring U.S. military personnel, civilian employees and dependents receive minimum due process and fair trial guarantees while in a foreign territory, it is important to keep the chain of command and other interested offices informed about FCJ cases. Several mandatory reports accomplish this.

Serious Incident Reports

These reports are submitted to the appropriate service TJAG with information copies to other offices as specified in the Instruction. Serious incident reports are submitted immediately by electronic means. AFI 51-706, para. 4-8. These reports are required in any case involving one or more of the following:

1. U.S. personnel placed in pretrial confinement by foreign authorities;

2. U.S. personnel actually or allegedly mistreated by foreign authorities;

3. Actual or probable publicity adverse to the U.S.;

4. Congressional or other domestic or foreign public interest is likely to be aroused;

5. A jurisdictional issue has arisen; or

6. The death of a foreign national is involved or capital punishment might be imposed.

It is also wise to submit reports whenever an Air Force officer or senior NCO is the subject of a criminal case. Timely and complete supplemental reports are also required as significant developments occur. There now exists an FCJ database located on the Air Force TJAG web page under the "reports" section at https://aflsa.jag.af.mil

Trial Observer Reports

Trial observer reports are to be forwarded immediately upon completion of each hearing at the trial court level and for hearings on appeal. They are sent to the USCR and/or DCO, who in turn is required to forward them to the TJAG of the accused's service. AFJI 51-706, para. 4-3c. Format for trial observer reports is set forth in AFJI 51-706, paragraph 4-6.

Monthly Confinement Report

AFJI 51-706, paragraph 4-3d requires monthly visitation reports be sent to the USCR/DCO no later than ten workdays following the visit. Paragraph 3-4c lists the information these reports should include. Any confinement visitation report that indicates adverse treatment or confinement conditions must be forwarded to TJAG of the service concerned as set forth in paragraphs 4-3d and 3-4d. If visits occur more often than monthly, then a report is sent within ten days of each visit.

Semi-annual Confinement Reports

AFJI 51-706 requires submission of confinement reports twice a year for the periods of 1 December through 31 May and 1 June through 30 November. Paragraph 4-5a and 4-5b outline the information required and the proper format.

Annual FCJ Report

AFJI 51-706 requires submission of an annual report on the exercise of foreign jurisdiction sent through the DCO to TJAG of the service concerned no later than 15 days following the last day of the reporting period (para. 4-3a). The report is to cover the period of 1 December through 30 November (para. 4-4a). The report must include a summary of all cases during the reporting period listed on DD Form 838, a statement indicating impact that local jurisdictional arrangements had upon mission accomplishment during the reporting period, a statistical summary of expenditures made for counsel fees, court costs and bail, and a summary of the prison visitation program. AFJI 51-706, para. 4-4 b(1), (2) and (3).

JURISDICTION OF SERVICE COURTS OF FRIENDLY FOREIGN FORCES IN U.S.

Because there are foreign forces temporarily stationed in the U.S., judge advocates may need to advise commanders on FCJ issues from a receiving state's perspective. Absent an international agreement to the contrary, foreign forces in the U.S. are subject to U.S. criminal jurisdiction. If the foreign force is from a state party to the NATO SOFA, or has otherwise been designated as a friendly foreign state pursuant to 22 U.S.C. 706 (implemented by AFI 51-705, Attachment 1, para. A1.3), it is authorized, under appropriate circumstances as set forth in the instruction, to exercise criminal jurisdiction over its members in the U.S. If the foreign force is from a country that has not been so designated, it must obtain U.S. Presidential designation pursuant to 22 U.S.C. 706, before it can convene a service court over its members in the U.S.

REFERENCES

1. 1946 Convention on Privileges and Immunities of the United Nations, adopted 13 February 1946, 1 U.N.T.S. 16, 21 U.S.T. 1418, T.I.A.S. 6900, (entry into force 17 September 1946, for U.S. 29 April 1970)
2. Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Forces, 19 June 1951, 4 U.S.T. 1792, T.I.A.S. 2846, 199 U.N.T.S. 67 (entry into force 23 August 1953)
3. Vienna Convention on Diplomatic Relations, 18 April 1961, 22 U.S.T. 3227, T.I.A.S. 7502, 500 U.N.T.S. 95 (entry into force 24 April 1964, for U.S. 13 December 1972)
4. United Nations Convention on Safety of United Nations and Associated Personnel, opened for signature 9 December 1994, 34 I.L.M. 482 (entry into force 15 January 1999, transmitted by U.S. President to the Senate, December 2000)
5. 10 U.S.C. 955, Prisoners Transferred to or from Foreign Countries
6. 10 U.S.C.1037, Counsel Before Foreign Judicial Tribunals and Administrative Agencies; Court Costs and Bail
7. Military Extraterritorial Jurisdiction Act (MEJA), 18 U.S.C. §§ 3261, *et seq*.
8. Uniform Code of Military Justice (UCMJ), 10 U.S.C. Chapter 47
9. 18 U.S.C. § 4108, Verification of Consent of Offender to Transfer to the United States
10. 22 U.S.C. §§ 701, *et seq*. Service Courts of Friendly Foreign Forces
11. Presidential Proclamation (re Australia), No. 3681, 10 October 1965
12. *Reid v. Covert*, 354 US 1 (1957)
13. *Wilson v. Girard*, 354 US 524 (1957)
14. DODD 5525.1, *Status of Forces Policy and Information*, 7 August 1979, Change 1, 4 September 1985, Change 2, 7 February 1997
15. AFI 36-3208, *Administrative Separation of Airmen*, 9 July 2004
16. AFI 51-703, *Foreign Criminal Jurisdiction*, 6 May 1994
17. AFI 51-705, *Jurisdiction of Service Courts of Friendly Foreign Forces in the United States*, 31 March 1994
18. AFJI 51-706, *Status of Forces Policies, Procedures, and Information* (the tri-service regulation formerly numbered, AR 27-50, SECNAVINST 5820.4G, AFR 110-12, 14 January 1990
19. JOSEPH M. SNEE AND A. KENNETH PYE, STATUS OF FORCES AGREEMENTS AND CRIMINAL JURISDICTION (Oceana Publications, Inc., New York) 1957

Appendices:

A. Title 18 Extraterritorial Criminal Offenses

B. Military Extraterritorial Jurisdiction Act (MEJA)

APPENDIX A TITLE 18 EXTRATERRITORIAL CRIMINAL OFFENSES

This is a partial list of potential offenses. Look for offenses that apply to all persons wherever they may be, or to U.S. government employees.

BRIBERY (18 U.S.C. § 201) of public officials (e.g., U.S. government officers and employees acting on behalf of the U.S. government)

CLAIMS (18 U.S.C. § 285) taking, using papers relative to a claim; conspiracy to defraud (18 U.S.C. 286), filing false or fictitious claims to U.S. military authorities (18 U.S.C. 297)

CONSPIRACY (18 U.S.C. § 371) to commit an offense against the U.S. or defraud U.S.

CONTEMPT (18 U.S.C. § 402) any person who disregards a U.S. court order or process

COUNTERFEITING (18 U.S.C. §§ 471, *et seq*.) of U.S. currency, obligations, securities, customs documents, letters of patent, military or official passes, postage stamps, court seals, ship's papers, transportation requests

DIPLOMATIC CORRESPONDENCE (18 U.S.C. § 953) pass to unauthorized person by a U.S. employee

DISPERSING OFFICER FAILURE TO PAY LAWFUL AMOUNT (18 U.S.C. §§ 648, *et seq*.)

EMBEZZLEMENT OR THEFT (18 U.S.C. § 641) of public money, property or record

EXTORTION (18 U.S.C. § 872) by a U.S. government officer or employee

FALSE PERSONIFICATION (18 U.S.C. §§ 911, *et seq*.) of U.S. citizen, officer or employee of the U.S. government, foreign diplomat, Red Cross member

FALSE STATEMENTS (18 U.S.C. §§ 1016, *et seq*.) by officers of the U.S. respecting oaths, official certificates and writings

FIREARMS (18 U.S.C. §§ 922, *et seq*.) from any person not licensed, to manufacture, license, import, sell, deliver, conceal, barter, dispose of

KICKBACKS (18 U.S.C. § 874)

MAILING THREATENING COMMUNICATIONS FROM A FOREIGN COUNTRY (18 U.S.C. § 877) to any person within the U.S.

MALICIOUS MISCHIEF (18 U.S.C. §§ 1361, *et seq*.) willfully injures or commits any depredation against government property or contracts

MURDER OF U.S. NATIONAL ABROAD (18 U.S.C. § 1119)

OBSCENITY (18 U.S.C. §§ 1463, *et seq*.) deposits for mailing, broadcasts

OBSTRUCTION OF JUSTICE (18 U.S.C. §§ 1501, *et seq*.) obstructs or assaults a process server, corrupts any court or juror, obstructs civil proceedings before any U.S. department or agency, obstructs a U.S. court order, obstructs a criminal investigation, tampers with a witness or informant

PASSPORT (18 U.S.C. §§ 1541, *et seq*.) false statement to obtain, falsely uses, misuses, forges, falsely obtains a visa

PERJURY (18 U.S.C. § 1621)

PIRACY (18 U.S.C. §§ 1651, *et seq*.)

PHOTOGRAPHING AND SKETCHING DEFENSE INSTALLATION (18 U.S.C. § 795)

POSTAL (18 U.S.C. §§ 1692, *et seq*.) obstructs the mail, destroys letter boxes or mail, injures mail bags, steals, ships unauthorized items (firearms, obscene material, plants, flammable), misuses franking privileges, improper use of stamps

PRESIDENT AND OTHER SENIOR OFFICIALS (18 U.S.C. § 1751) assassination, kidnapping, assault

PROPERTY OF U.S. (18 U.S.C. §§ 2112, *et seq*.) robs or attempts to rob a person having control over personal property belonging to the U.S. government

PUBLIC OFFICIALS AND EMPLOYEES (18 U.S.C. §§ 1901, *et seq*.) discloses classified information

PUBLIC RECORDS (18 U.S.C. § 2071) conceals, destroys, mutilates, obliterates

SABOTAGE (18 U.S.C. §§ 2152, *et seq*.)

SEXUAL EXPLOITATION OF CHILDREN (18 U.S.C. § 2251)

TREASON (18 U.S.C. §§ 2381, *et seq*.)

APPENDIX B

MILITARY EXTRATERRITORIAL JURISDICTION ACT (MEJA)

BACKGROUND

The Military Extraterritorial Jurisdiction Act of 2000 (MEJA) was passed by Congress to ensure that "gaps" in the United States' criminal jurisdiction abroad were addressed. Since the 1957 U.S. Supreme Court decision in *Reid v. Covert*, 354 US 1 (1957), the military has been prohibited from prosecuting, by courts-martial, civilians accompanying the Armed Forces overseas in peacetime who commit criminal offenses. Many federal criminal statutes lack extraterritorial application, including rape, robbery, burglary, and child sexual abuse. In addition, many foreign countries decline to prosecute crimes committed within their nation by a U.S. national where the victim is another U.S. national or the U.S. government. Furthermore, military members who commit crimes while overseas, but whose crimes are not discovered or fully investigated prior to their discharge from the Armed Forces are no longer subject to court-martial jurisdiction. Specifically, MEJA now allows for federal prosecution of crimes committed abroad by certain members of the military, former military members and civilians employed by and accompanying the armed forces overseas.

DISCUSSION

Offenses. MEJA establishes federal jurisdiction for crimes committed by civilians "employed by or accompanying the Armed Forces" outside the U.S. and certain members of the military for conduct that would constitute an offense punishable by imprisonment for more than one year if it had been committed within the special maritime and territorial jurisdiction of the U.S. The MEJA is codified at 18 U.S.C. 3261-3267.

Definitions. A civilian "employed by the Armed Forces outside the U.S." includes Department of Defense (DOD) civilian employees, nonappropriated fund employees, DOD contractors, and subcontractors at any tier who are present or residing outside the U.S. in connection with such employment, and not a national of or ordinarily resident in the host nation. A civilian "accompanying the Armed Forces outside the U.S." is a dependent of a member of the Armed Forces, civilian employee or DOD contractor, at any tier that is residing with such member, civilian employee, contractor or contractor employee outside the U.S., and not a national of or ordinarily resident in the host nation.

Limitations on Actions. Generally, no prosecution can be commenced under the MEJA if a foreign government, in accordance with jurisdiction recognized by the U.S., has or is prosecuting the person for the same offense. MEJA does not prevent a court-martial or other military tribunal of its concurrent jurisdiction respecting offenders and offenses that by law may be tried by such tribunals.

Military Members. MEJA allows the prosecution of former military members who are no longer subject to the Uniform Code of Military Justice, but who were on active duty at the

time the alleged acts were committed. MEJA will also apply to active-duty service members who are accused of committing a MEJA offense with one or more civilians as who are also accused.

Arrest and Delivery. MEJA gives the SECDEF the authority to designate any person serving in a law enforcement position in the DOD to arrest a person outside the U.S. if there is probable cause to believe they committed a MEJA offense and if it is in accordance with applicable international agreements. Persons arrested under this Act must be delivered "as soon as practicable" to the custody of civilian law enforcement authorities of the U.S. for removal to the U.S. for judicial proceedings. If the host nation requests delivery of the person for trial in the host nation, the persons designated by the SECDEF may deliver the person to the foreign country if authorized by treaty or other international agreement. The SECDEF will determine which foreign country officials are appropriate for such delivery.

Limits on Removal from Foreign Territory. Removal from a foreign State is authorized under MEJA if a federal magistrate judge simply orders the person removed to the U.S., or orders their removal to the U.S.:

1. For a detention hearing,
2. When detention is ordered, or
3. If the person does not waive a preliminary examination under the Federal Rules of Criminal Procedure.

MEJA also allows the SECDEF to determine that military necessity requires removal to the nearest U.S. military installation outside the U.S. which is adequate to detain the person and facilitate the initial appearance.

Initial Proceedings. A federal magistrate judge may conduct the initial appearance for those not delivered to foreign authorities by telephonic means in order to allow defendants to remain in the country where they are arrested. This will avoid unnecessary delay and allow the Federal magistrate judge to determine if there is probable cause for a MEJA offense. Detention hearings, if the defendant requests one, may also be conducted by telephonic means with a Federal magistrate judge.

Regulations. The MEJA Working Group, in accordance with the Act, is writing a draft of the proposed DOD regulation that will govern the apprehension, detention, delivery, and removal of persons subject to the new law.

CHAPTER 10

ACQUISITION AND CROSS-SERVICING AGREEMENTS

BACKGROUND

Acquisition and Cross-Servicing Agreements (ACSAs) are bilateral, international agreements to acquire and transfer logistics support, supplies, and services (LSSS) between the U.S. military and allied or friendly foreign forces and international organizations. The ACSA authority is found in 10 U.S.C. Sections 2341-2350, and implemented by DODD 2010.9, CJCSI 2120.01A, AFI 25-301 and DOD 7000.14-R, *DOD Financial Management Regulation (FMR)*, Volume 11A, Chapter 1 and Chapter 8. This Chapter provides an overview of ACSA requirements and is not a substitute for a detailed reading of the applicable statutory authority and regulations.

According to AFI 25-301, "ACSA is an 'additional' transaction authority intended to supplement, not replace, existing authorities and their implementing programs. Support for ACSAs should be reserved for critical support areas involving U.S. Forces where another existing program or authority does not allow for the specific logistics exchange, or where time constraints preclude the use of an existing authority. Peacetime use of ACSA may be pursued when other legal authorities or international military programs are not applicable or time constraints preclude their use. In most cases, ACSA will be used to facilitate support transactions of temporary or short duration or in isolated situations during crisis/contingency operations. The primary advantages of using an ACSA are flexibility and speed in acquiring or transferring LSSS. That is why ACSAs are most suited to meet unforeseen or exigent circumstances, and why they are used during wartime, combined exercises, training, deployments, contingency operations, and humanitarian, foreign disaster foreign disaster relief or United Nations peace operations.

TYPES OF ACSAs

The ACSA authority in Title 10 of the United States Code provides two legal authorities: an acquisition-only authority and a cross-servicing authority, which includes an acquisition authority and a transfer authority.

Acquisition-Only Authority

The acquisition-only authority (10 U.S.C. § 2341) provides authority to acquire logistic support, supplies, and services for elements of the armed forces deployed outside the United States from the governments of NATO members, NATO and its subsidiary bodies,

the United Nations Organization, any regional organization , and any other countries which meet one or more of the following criteria:

1. Has a defense alliance with the United States;

2. Permits the stationing of members of the United States armed forces in such country or the home porting of naval vessels of the United States in such country;

3. Has agreed to pre-position materiel of the United States in such country; or

4. Serves as the host country to military exercises which include elements of the armed forces, or permits other military operations by the armed forces in such country.

The authority stemming from this section is not reciprocal and does not require an approved cross-servicing agreement in place. Many clauses from the Federal Acquisition Regulations (FAR) that would otherwise be required for commercial contracts are waived pursuant to 10 U.S.C. § 2343, such as the requirement for obtaining full and open competition, the prohibition against using cost-plus-percentage-of-cost type contracts, and the requirement for a warranty stating no commission or fee was paid to obtain the contract.

Cross-Servicing Authority

Section 2342 of Title 10 of the U.S. Code authorizes the Department of Defense, upon coordination with the Secretary of State, to enter into reciprocal agreements with foreign countries and regional and international organizations for the provision of LSSS. A current listing of these agreements, and countries and organizations eligible to negotiate them is maintained by the Director for Logistics, the Joint Staff (J-4), and can be viewed on the J-4 website on the SIPRNET.

LIMITATION ON USE OF ACSAs

Transactions under an ACSA authority are limited to LSSS. The definition of LSSS in 10 U.S.C. § 2350(1) is "food, water, billeting, transportation (including airlift), petroleum, oils, lubricants, clothing, communications services, medical services, ammunition, base operations support (and construction incident to base operations support), storage services, use of facilities, training services, spare parts and components, repair and maintenance services, calibration services, and port services. Such term includes temporary use of general purpose vehicles and other non-lethal items of military equipment which are not designated as significant military equipment on the United States Munitions List promulgated pursuant to section 38(a)(1) of the Arms Export Control Act."

Items that may **not** be acquired or transferred under ACSA authority pursuant to DODD 2010.9 Section 4.5 include weapons systems; the initial quantities of replacement and spare parts for major end items of equipment covered by tables of organization and equipment,

tables of allowances and distribution, or equivalent documents; and major end items of equipment. Specific items that may not be acquired or transferred under ACSA authority include guided missiles; naval mines and torpedoes; nuclear ammunition and included items such as warheads, warhead sections, projectiles, demolition munitions, and training ammunition; cartridge and propellant-actuated devices; chaff and chaff dispensers; guidance kits for bombs or other ammunition; and chemical ammunition (other than riot control agents).

An exception, to the general rule regarding weapons systems and major end items of equipment, exists in the 2007 National Defense Authorization Act (NDAA), P.L. 109-364, §1202, as amended. It is temporary authority to use acquisition and cross-servicing agreements to provide use of certain military equipment for no more than a year to military forces of a nation participating in combined operations with the U.S. in Iraq or Afghanistan or as part of a peacekeeping operation under the Charter of the United Nations or another international agreement. The equipment may be used only for personnel protection or to aid in the personnel survivability of those forces. The covered military equipment is items designated as "Significant Military Equipment" in Categories I (Firearms, Close Assault Weapons and Combat Shotguns), II (Guns and Armament), III (Ammunition/Ordnance), VII (Tanks and Military Vehicles), XI (Military Electronics), and XIII (Auxiliary Military Equipment) of the United States Munitions List. Section 1204 of the 2009 NDAA, P.L. 110-417, extends this authority until 30 September 2011. Requirements for the use of this authority include that U.S. forces in the combined operation have no unfilled requirements for that equipment and that the Secretary of Defense, with the concurrence of the Secretary of State, determines that it is in the national security interest of the U.S. to provide for the use of such equipment.

ACSA PROCESS

Air Force organizations should follow the process set out in AFI 25-301. Joint Staff, Combatant Commands, and Defense agencies reporting through the Chairman of the Joint Chiefs of Staff should follow the procedures set out in CJCSI 2120.01A.

Where an ACSA exists, in general terms, the ACSA process is:

1. Air Force (or allied) unit identifies a need to acquire military logistics support in the location of its deployed/forward operation.

2. ACSA may be used to fill any shortfalls in support, supplies and services that cannot readily be met from U.S. sources. If a delay would negatively impact the mission, then the U.S. source is not readily available.

3. Deployed unit discusses and negotiates requirements with host nation military representatives to determine availability of support.

4. Host nation military determines reciprocal pricing for the support it makes available.

5. Air Force (or allied) unit itemizes support items/categories in the ACSA order and signs formal request; host nation military reviews the support and provides signature accepting the order.

6. A signed ACSA order represents a binding commitment upon both parties' military forces to provide and reimburse for logistics support and services.

Repayment of ACSA Obligations

Under 10 U.S.C. § 2344, payments for LSSS may be made by payment in cash, by replacement-in-kind, or equal value exchange. Credits and liabilities accrued for LSSSS under the ACSA must be liquidated not less than once every 12 months by direct payments pursuant to 10 U.S.C. § 2345.

Payment-In-Cash (PIC)

Payment-in-cash requires that the receiving defense department reimburse the providing defense department the full value of the LSSS in currency. For example, if the DOD provides $10,000 worth of rations to a foreign defense department, they reimburse us with $10,000 in currency. As set out in the FMR, Volume 11A, Section 080202.A, bills for incurred costs generally are to be rendered on a 30-day cycle and shall be paid within 30 days from the date of the bill.

Replacement-In-Kind (RIK)

Replacement-in-kind allows the party receiving supplies or services under the ACSA to reconcile their obligation via the provision or supplies and services of an identical or substantially identical nature to the ones received. As an example, a country may provide rations to the United States during a training exercise with the proviso that the United States will provide the same amount of rations during a future exercise. In accordance with the FMR, Volume 11A, Section 080202.B, the replacement must occur within one year of the initial provision of the LSSS.

Equal Value Exchange (EVE)

Equal value exchange enables the party receiving supplies or services under the ACSA to reconcile their obligation via the provision of supplies or services that are considered by both parties to be of an equal value to those received. As an example, a country may provide $10,000 worth of rations to the United States during a training exercise in exchange for the United States providing $10,000 worth of ammunition. In accordance with the FMR, Volume 11A, Section 080202.B, the replacement must occur within one year of the initial provision of the LSSS.

Note that while acquisition-only authority is non-reciprocal, this does not prevent the eligible foreign entity being repaid using <u>any</u> of the three ACSA payment methods.

Section 2344 of Title 10, U.S. code authorizes two methods for pricing reimbursable transactions: Reciprocal Pricing Principles or Non-Reciprocal Pricing Principles. The method to be used depends on whether agreement on reciprocal pricing exists. Section 0806 of the FMR provides guidance on pricing ACSA transactions.

The limits on the total amounts of liabilities the United States may accrue under ACSAs with countries per fiscal year, except during a period of active hostilities, are set out in 10 U.S.C. § 2347. The combatant commanders and their Service component or sub-unified commands may coordinate in advance the level and type of LSSS to be acquired or transferred to a given country or eligible international organization.

SPECIFIC TRANSACTIONS UNDER ACSAs

Construction

There is no explicit monetary limitation on how much construction incident to base operation support (BOS) can be provided by a foreign country to U.S. forces pursuant to an ACSA transaction. However, CJCSI 2120.01A (Appendix A, Enclosure A) provides examples and guidance on what is permissible LSSS. "Under Base Operation Support," the instruction limits construction activity under an ACSA to "minor construction (construction under 10 U.S.C. 2854, 2805, and 2803)." Those sections provide for:

1. 10 U.S.C. § 2854. Restoration or Replacement of Damaged or Destroyed Facilities.

2. 10 U.S.C. § 2805. Unspecified Minor Military Construction.

3. 10 U.S.C. § 2803. Emergency Construction.

Re-Supply

In accordance with 10 U.S.C. § 2342, the ACSA authority cannot be used to procure goods or services "reasonably available" from U.S. commercial sources. Section 4.4 of DODD 2010.9 provides that consistent with this statutory limitation, the "DOD Components may use the ACSA authorities to facilitate routine mutual logistics support during training, exercises, and military operations, or to permit better use of host-nation resources for recurring logistics support requirements of deployed U.S. Armed Forces during operations." When U.S. sources are not reasonably available to meet mission requirements and the host unit can readily provide the needed support at less than the cost of contracting, then ACSA may be the preferred option. To be reasonably available, the source should be timely enough to meet mission requirements.

Loaning Equipment

The term "transfer" under the ACSA authority is defined at 10 U.S.C. § 2350(4) to include "leasing, loaning, or otherwise temporarily providing" LSSS. Under FMF, Volume 11A,

Section 0806, the guidance on pricing such support or services is in Volume 11A, Chapter 1, of the FMR. The specific guidance is at Section 010203.I.

JUDGE ADVOCATE RESPONSIBILITIES

Section 3.9 of AFI 25-301 allocates specific responsibilities to judge advocates:

> **3.9. Judge Advocates (JA).** The MAJCOM/JA and appropriate unified command equivalent provide a valuable source of knowledge and experience in dealing with international issues. All IAs [Implementing Arrangements], IIs [Implementing Instructions], and issues ***WILL*** be coordinated with the appropriate level JA to ensure all legal concerns are addressed.
>
> 3.9.1. MAJCOM/JA legal issues involving ACSAs should either be forwarded by the MAJCOM to the appropriate unified command legal office for resolution or should be forwarded via chain-of-command to HQ USAF/JAO, which in turn will liaison with SAF/GCI.
>
> 3.9.2. The MAJCOM/JA will provide a legal memorandum for all specific IAs negotiated at the MAJCOM level per the requirements of AFI 51-701, *Negotiating, Concluding, Reporting, and Maintaining International Agreements.*
>
> 3.9.3. The MAJCOM/JA, or designated ACSA JA POC, will attend the MAJCOM semiannual ACSA Reconciliation Meeting.

Before providing advice on ACSAs, be aware that there are various statutory authorities for transferring defense articles and defense services to foreign governments and international organizations; the ACSA authority just one of them.

REFERENCES

1. 22 U.S.C. §§ 2341-2350
2. DODD 2010.9, *Acquisition and Cross-Servicing Agreements*, 28 April 2003
3. DOD 7000.14-R, *DOD Financial Management Regulation (FMR)*, Volume 11A, Chapters 1 and 8
4. CJCSI 2120.01A, *Acquisition and Cross-Servicing Agreements*, 27 November 2006, current as of 5 December 2008
5. AFI 25-301, *Acquisition and Cross-Servicing Agreements (ACSA) between the United States Air Force and other Allied and Friendly Forces*, 26 October 2001
6. 2007 National Defense Authorization Act (NDAA), P.L. 109-364, §1202, as amended


UNHCR
The UN Refugee Agency
PO NO.: 3381
CONSIGNEE: UNHCR
DUBAI, U.A.E.
FREIGHT EMERGENCY

CHAPTER 11

INTERNATIONAL ORGANIZATIONS

BACKGROUND

International organizations are defined as organizations with global influence and global mandates, and are typically funded by contributions from national governments. Examples include the International Committee of the Red Cross (ICRC), the International Organization for Migration, and United Nation agencies. The growth in numbers, diverse areas of involvement, and myriad legal issues make the field of international organizations a dynamic one. As we move into the 21st Century, the international community is moving from an era of institution building to an era where international organizations are rule-makers. There are two basic kinds of international organizations: governmental and nongovernmental, the latter frequently referred to as NGOs. The following chart indicates the trend in numbers:

For the Period	Governmental	NGO
1864 - 1941	41	467
During WW II	86	1138
Since WW II – 1980	280	2470
Estimated 2000	635	6000

Governmental international organizations are created by states through an international agreement which serves as its charter, has membership of two or more states, and operates under public international law and not national law. Nongovernmental organizations are formally defined as transnational organizations of private citizens that maintain a consultative status with the Economic and Social Council of the United Nations (UN). Nongovernmental organizations are private entities (for example, a coalition of like-minded individuals, multi-national private associations, or corporations), operate under private international law and not public international law, and typically have an international aim with membership from two or more countries.

In addition to categorizing international organizations as either governmental or NGO, they may also be categorized as universal or closed, as well as technical or non-technical. A universal organization accepts heterogeneity as necessary to achieve its purpose and seeks members from all nations. The first such universal governmental international organization was the League of Nations. The UN is also a universal governmental international organization whereas the ICRC would be an example of a universal NGO. A closed

organization seeks homogeneity and limits its membership based upon (a) regional focus, (b) a common background, or (c) function. An example of a closed governmental international organization for each would be (a) Association of Southeast Asian Nations (ASEAN), (b) the British Commonwealth, and (c) Organization of Petroleum Exporting Countries (OPEC). An example of a closed NGO for each would be (a) Inter-American Bar Association (IABA), (b) Doctors without Borders, and (c) Amnesty International, or (d) Human Rights Watch.

Some international organizations have particular technical specializations. Technical governmental organizations include the International Civil Aviation Organization (ICAO), International Sea Bed Authority, and World Trade Organization (WTO). Technical NGOs include, for example, the International Center for Settlement of Disputes (ICSID) or the American Arbitral Association. Some technical organizations, such as the European Economic Community (EEC), have evolved into more general international organizations (now the European Union, with functional responsibility beyond the economic realm).

Because of the ever-expanding nontraditional missions performed by the DOD and allied forces, it is inevitable that Air Force legal personnel will deal with representatives of various international organizations. A wide variety of international organizations, both governmental and NGO, could be involved in any given mission, such as the UN (UN peacekeeping forces; UN relief agencies or the UN High Commissioner for Refugees (UNHCR)); North Atlantic Treaty Organization (NATO); ICRC; Human Rights Watch; Organization for Security and Cooperation Europe (OSCE); and the European Union (EU). This chapter provides a brief overview of the theory of international organizations, key legal issues, and a general introduction to the more prevalent international organizations that may be encountered in the course of international contingency operations.

THEORY OF GOVERNMENTAL INTERNATIONAL ORGANIZATIONS

It is important to understand the basic theory underlying international organization in order to appreciate the true magnitude of their influence in contingency operations. International organizations challenge two basic principles of international law: 1) the principle of sovereignty, and; 2) the principle of non-interference in the domestic affairs of states.

One theory of international organizations is that they are merely state-created entities and are intended to make the state function more efficiently – a theory known as the International Regime Theory. The International Regime Theory holds that only states are sovereign, international organizations are creations of states, they do the bidding of states and that international order rests solidly on the nation state. The second view is that international organizations are a step toward unified government which can exercise sovereignty over states (for example, the EU) – a theory known as the International Organization Theory. The International Organization Theory holds that international organizations can acquire a character of their own, can act independently of the states which created it, and can make rules that bind states. Depending upon the states and organizations involved, there is an element of accuracy in both theories.

Air Force legal personnel should also be aware of other potential complexities caused by the presence of international organizations. International organization involvement may cause some states to disengage from intervention in an international crisis, thereby worsening the problem. Other international organizations might be at risk of being philosophically "captured" or influenced by a group of states and used for narrow national policy interests rather than those of the broader international community. Active international organizations might also pose a "moral hazard," reducing the incentive or initiative of states to act on their responsibilities. In any case, involvement of international organizations makes the international environment more complex and more challenging.

LEGAL ISSUES OF GOVERNMENTAL INTERNATIONAL ORGANIZATIONS

When dealing with international organizations there are two fundamental legal questions that should be considered. Those two basic questions are: first, does the international organization possess juridical personality? Second, does it possess privileges and immunities?

Juridical personality concerns the legal capacity of the international organization to act apart from its members in a legally binding manner. Can the international organization sue or be sued, hold property in its name, enter into contracts, acquire rights and obligations, and administer a civil service? These rights are acquired by the international organization from states, either through the charter or international agreement which creates it, or through a subsequent grant of power by the member states through some act. For example, in the *Reparations Case*, the International Court of Justice (ICJ), the judicial arm of the UN, rendered an advisory opinion as to whether the UN possessed juridical personality allowing it to recover for the death of its envoy, Count Bernadotte, to Palestine in 1948 (see *Reparations for Injuries Suffered in the Service of the United Nations*, ICJ Advisory Opinion, 1949). The ICJ concluded the UN had legal personality. In modern public international law, international organizations are different from states. They are not sovereign and they are not equal to states. Their authority is limited by what states have given them.

Privileges and immunities of the organization and its officials and administrative staff are likewise governed by grant through international agreement by member states. By comparison, Articles 104 and 105 of the UN Charter, along with the Convention on Privileges and Immunities of the United Nations, extend privileges and immunities to UN officials. Those privileges and immunities are further extended to international organizations in U.S. law at 22 U.S.C. 288a (International Organizations Immunities Act). It should be noted that privileges and immunities granted to officers of an international organization differ in two important respects from privileges and immunities enjoyed by national officials under the Vienna Convention on Diplomatic Relations. First, privileges and immunities of international organization officials are universal; that is, they can provide immunity even from one's own national government. Second, international organizations, unlike states, lack reciprocity as an enforcement mechanism, and must instead rely on their member states for enforcement of these privileges and immunities provisions or addressing violations by another state. However, the UN possesses international legal personality and is the only organization that could credibly make a claim

to constitute a personified community and demand performance of obligations by both members *and* non-members.

KEY INTERNATIONAL ORGANIZATIONS

The remainder of this chapter provides an introduction to the following key international organizations:

1. The United Nations
2. North Atlantic Treaty Organization
3. Organization of American States
4. Organization for Security and Cooperation in Europe
5. Council of Europe and European Court of Human Rights
6. European Union
7. Association of South East Asian Nations
8. International Committee of the Red Cross

THE UNITED NATIONS (UN)

The United Nations was established on 24 October 1945 by 51 countries committed to preserving peace through international cooperation and collective security. Today, nearly every nation in the world belongs to the UN: membership now totals 192 countries.

When states become Members of the United Nations, they agree to accept the obligations of the UN Charter, an international treaty that sets out basic principles of international relations. According to the UN Charter, the UN has four purposes: to maintain international peace and security, to develop friendly relations among nations, to cooperate in solving international problems and in promoting respect for human rights, and to be a center for harmonizing the actions of nations. The UN provides the means to help resolve international conflict and formulate policies on matters affecting all nations.

Main Organs of the UN

The United Nations has six main organs. Five of them - the UN General Assembly, the UN Security Council, the UN Economic and Social Council, the UN Trusteeship Council and the UN Secretariat - are based at UN Headquarters in New York. The sixth, the International Court of Justice, is located at The Hague, The Netherlands.

The UN General Assembly. All UN Member states are represented in the UN General Assembly – a kind of parliament of nations which meets to consider the world's most

pressing problems. Each member state has one vote. Decisions on "important matters," such as international peace and security, admitting new members, the UN budget and the budget for peacekeeping, are decided by two-thirds majority. Simple majority decides other matters. In recent years, a special effort has been made to reach decisions through consensus, rather than by taking a formal vote. The UN General Assembly cannot force action by any state, but its recommendations are an important indication of world opinion and represent the moral authority of the community of nations. When the UN General Assembly is not meeting, its work is carried out by its six main committees, other subsidiary bodies and the UN Secretariat. The Sixth Committee works legal issues.

The UN Security Council. The UN Charter gives the UN Security Council primary responsibility for maintaining international peace and security. The UN Security Council may convene at any time whenever peace is threatened. Under the UN Charter, all member states are obligated to carry out the UN Security Council's decisions. There are 15 UN Security Council members. Five of these (China, France, the Russian Federation, the United Kingdom and the United States) are permanent members (sometimes referred to as the P5). The other ten are elected by the UN General Assembly for two-year terms. Member states have discussed making changes in UN Security Council membership to reflect today's political and economic realities. However, the P5 are satisfied with the current makeup of the Security Council. Decisions of the UN Security Council require nine yes votes. Except for votes on procedural questions, a decision cannot be taken if there is a no vote, or veto, by a permanent member. When the UN Security Council considers a threat to international peace and security, it first explores ways to settle the dispute peacefully. It may suggest principles for a settlement or undertake mediation. In the event of armed conflict, the UN Security Council tries to secure a cease-fire. It may send a peacekeeping mission to help the parties maintain the truce and to keep opposing forces apart, which are known as "peacekeeping operations" under Chapter VI of the Charter of the United Nations. The UN Security Council can also take measures to enforce its decisions. For example, it can impose economic sanctions or order an arms embargo. On rare occasions, the UN Security Council has authorized member states to use "all necessary means," including military action, to see that its decisions are carried out. Such missions are referred to as "peace enforcement operations" under Chapter VII of the United Nations Charter. United Nations Security Council resolutions are binding on all UN members under articles 25 and 103 of the UN Charter. United Nations Security Council resolutions may also bind non-members as customary international law. The UN Economic and Social Council (ECOSOC), under the overall authority of the UN General Assembly, coordinates the economic and social work of the United Nations and the UN family of specialized agencies. As the central forum for discussing international economic and social issues and for formulating policy recommendations, ECOSOC plays a key role in fostering international cooperation for development. It also consults with NGOs, thereby maintaining a vital link between the United Nations and civil society, and has expanded its discussions to include humanitarian themes. The ECOSOC's subsidiary bodies meet regularly and report back to it. For example, the UN Human Rights Council (UNHRC) (successor to the UN Commission on Human Rights (UNCHR)), monitors the observance of human rights throughout the world. Other bodies focus on such issues as social development, the status of women, crime prevention, narcotic drugs, and environmental protection.

The ICJ, also known as the World Court, is the main judicial organ of the UN. Consisting of 15 judges elected by the UN General Assembly and the UN Security Council, the Court decides disputes between countries. Participation by states in a proceeding is voluntary, but if a state agrees to participate, it is obligated to comply with the Court's decision. The Court also provides advisory opinions to the UN General Assembly, the UN Security Council, and the specialized agencies of the United Nations upon request. The United States, following an unfavorable decision on Nicaragua in 1984-1986, no longer recognizes the jurisdiction of the ICJ over disputes involving the United States.

The UN Secretariat. The UN Secretariat carries out the substantive and administrative work of the United Nations as directed by the UN General Assembly, the UN Security Council, and the other organs. At its head is the UN Secretary-General, who provides overall administrative guidance.

The UN System

The International Monetary Fund (IMF), the World Bank group, and 12 other independent organizations known as "specialized agencies" are linked to the UN through cooperative agreements. These agencies, among them the World Health Organization (WHO) and ICAO, are autonomous bodies created by intergovernmental agreement. They have wide-ranging international responsibilities in economic, social, cultural, educational, health, and related fields. Some of them, like the International Labor Organization (ILO) and the Universal Postal Union (UPU), are older than the UN itself. In addition, a number of UN offices, programs, and funds – such as the UNHRC, the UN Development Program (UNDP), and the UN Children's Fund (UNICEF) – work to improve the economic and social condition of people around the world. These bodies report to the UN General Assembly or ECOSOC. All these organizations have their own governing bodies, budgets and secretariats. Together with the United Nations, they are known as the UN family, or the UN system. They provide an increasingly coordinated yet diverse program of action.

UN Role in Preserving World Peace

Under the UN Charter, member states agree to settle disputes by peaceful means and refrain from threatening or using force against other states. Over the years, the United Nations has played a major role in helping defuse international crises and in resolving protracted conflicts. It has undertaken complex operations involving peacemaking, peacekeeping and humanitarian assistance. It has worked to prevent conflicts from breaking out. And in post-conflict situations, it has increasingly undertaken coordinated action to address the root causes of war and lay the foundation for durable peace. UN efforts have produced dramatic results. The United Nations helped defuse the Cuban missile crisis in 1962 and the Middle East crisis in 1973. In 1988, a UN-sponsored peace settlement ended the Iran-Iraq war, and in the following year UN-sponsored negotiations led to the withdrawal of Soviet troops from Afghanistan. In the 1990s, the United Nations was instrumental in restoring sovereignty to Kuwait, and played a major role in ending civil wars in Cambodia, El Salvador, Guatemala, and Mozambique, restoring the

democratically elected government in Haiti, and resolving or containing conflict in various other countries.

UN Peacemaking

UN peacemaking brings hostile parties to agreement through diplomatic means. The UN Security Council, in efforts to maintain international peace and security, may recommend ways to avoid conflict or restore peace - through negotiation or recourse to the ICJ. The UN Secretary-General plays an important role in peacemaking. The UN Secretary-General may bring to the attention of the UN Security Council any matter which appears to threaten international peace and security; may use "good offices" to carry out mediation; or exercise "quiet diplomacy" behind the scenes, either personally or through special envoys. The UN Secretary-General also undertakes "preventive diplomacy" aimed at resolving disputes before they escalate. The UN Secretary-General may also send a fact-finding mission, support regional peacemaking efforts or set up a local UN political office to help build trust between the parties in conflict.

UN Peace-building

The United Nations is increasingly undertaking activities that focus on the underlying causes of violence. Development assistance is a key element of peace-building. In cooperation with UN agencies, and with the participation of donor countries, host governments and NGOs, the United Nations works to support good governance, civil law and order, elections, and human rights in countries struggling to deal with the aftermath of conflict. At the same time, it helps these countries rebuild administrative, health, educational, and other services disrupted by conflict. Some of these activities, such as the UN's supervision of the 1989 elections in Namibia, mine-clearance programs in Mozambique, and police training in Haiti, take place within the framework of a UN peacekeeping operation and may continue when the operation withdraws. Others are requested by governments, as in Liberia where the United Nations has opened a peace-building support office, in Cambodia where the United Nations maintains a human rights office, or in Guatemala where the United Nations is helping to implement peace agreements that affect virtually all aspects of national life.

UN Peacekeeping and Peace Enforcement

The UN Security Council sets up UN peacekeeping operations and defines their scope and mandate in efforts to maintain peace and international security. Most operations involve military duties, such as observing a cease-fire or establishing a buffer zone while negotiators seek a long-term solution. Others may require civilian police or incorporate civilian personnel who help organize elections or monitor human rights. Some operations, like the one in the Former Yugoslav Republic of Macedonia, have been deployed as a means to help prevent the outbreak of hostilities. Operations have also been deployed to monitor peace agreements in cooperation with peacekeeping forces of regional organizations. Peacekeeping operations may last for a few months or continue for many years. The United Nations' operation at the cease-fire line between India and Pakistan in the State of Jammu

and Kashmir, for example, was established in 1949, and UN peacekeepers have been in Cyprus since 1964. In contrast, the United Nations was able to complete its 1994 mission in the Aouzou Strip between Libya and Chad in a little over a month. In conditions where armed conflict describes the situation, peace enforcement may require the use of armed force to separate combatants, create a cease-fire that does not exist, apply forceful actions to reinstate a failed case-fire, or establish safe havens for victims of the hostilities. Many times peace enforcers are not welcomed by the belligerents, as there is a greater likelihood that the enforcement force may have to resort to the use of arms against the belligerents to impose peace. An international mandate is normally necessary to legitimize the application of a peace enforcement force, in an ultimate effort to achieve settlement between the belligerents.

UN Role in Disarmament

Halting the spread of arms, and reducing and eventually eliminating all weapons of mass destruction are major goals of the United Nations. The United Nations has been an ongoing forum for disarmament negotiations, making recommendations, and initiating studies. It supports multilateral negotiations in the Conference on Disarmament and in other international forums. These negotiations have produced such agreements as the Nuclear Non-Proliferation Treaty (1968), the Comprehensive Nuclear-Test-Ban Treaty (1996) and the treaties establishing nuclear-free zones. Other treaties prohibit the development, production and stockpiling of chemical weapons (1993) and bacteriological weapons (1972), ban nuclear weapons from the seabed and ocean floor (1971), and outer space (1967). The Vienna-based International Atomic Energy Agency (IAEA), through a system of safeguards agreements, also ensures that nuclear materials and equipment intended for peaceful uses are not diverted to military purposes. See separate chapter in this text entitled Law of Armed Conflict for further discussion and full citations of these international agreements.

UN Role in Human Rights

Through the United Nations' efforts, governments have concluded hundreds of multilateral agreements that make the world a safer, healthier place with greater opportunity and justice for citizens. This comprehensive body of international law and human rights legislation is one of the United Nations' great achievements. The Universal Declaration of Human Rights, proclaimed by the UN General Assembly in 1948, sets out basic rights and freedoms to which all women and men are entitled -- among them the right to life, liberty and nationality, to freedom of thought, conscience and religion, to work, to be educated, and to take part in government. These rights are legally binding by virtue of two International Covenants, to which most states are parties. One Covenant deals with economic, social and cultural rights and the other with civil and political rights. Together with the Declaration, they constitute the International Bill of Human Rights. The Declaration laid the groundwork for more than 80 conventions and declarations on human rights, including conventions to eliminate racial discrimination and discrimination against women; conventions on the rights of the child, the status of refugees, and the prevention of genocide; and declarations on self-determination, enforced disappearances, and the right to development.

The UN High Commissioner for Human Rights, who coordinates all UN human rights activities, works with governments to improve their observance of human rights, seeks to prevent violations and investigates abuses. The UN Commission on Human Rights, an intergovernmental body, holds public meetings to review the human rights performance of states. It also appoints independent experts – "special rapporteurs" – to report on specific human rights abuses or to examine human rights in specific countries. UN human rights bodies are involved in early warning and conflict prevention as well as in efforts to address root causes of conflict. A number of UN peacekeeping operations therefore have a human rights component. See also the separate chapter in this text entitled International Human Rights (including full citation for the Universal Declaration of Human Rights).

UN Role in Providing Accountability for Violations of Human Rights and Law of War

Violations of humanitarian law during the fighting in the former Yugoslavia led the UN Security Council in 1993 to establish an international tribunal to try persons accused of war crimes in that conflict, the International Criminal Tribunal for the Former Yugoslavia (ICTY). In 1994, the UN Security Council set up a second tribunal to hear cases involving accusations of genocide in Rwanda (the International Criminal Tribunal for Rwanda (ICTR)). These tribunals have brought several defendants to trial. The ICTR in 1998 handed down the first-ever verdict by an international court on the crime of genocide, as well as the first-ever sentence for that crime. The ICTY is also investigating crimes committed during the conflict in Kosovo.

A key UN goal -- an international mechanism to impose accountability in the most serious cases of war crimes and crimes against humanity -- was realized in 1998 when governments agreed to establish an International Criminal Court (ICC). The ICC provides a comprehensive means for punishing perpetrators of genocide, other crimes against humanity, and war crimes. In voting to set up the ICC, the international community made it clear that impunity was no longer possible for those who commit atrocities.

However, some states, like the United States, remain concerned over a lack of accountability for state-sponsored or state-committed atrocities -- an issue tied to the theory of international organizations discussed above. At the other end of U.S. concerns with the ICC has been the belief that the Court could be used as a stage for political prosecutions. The U.S. therefore established a number of bilateral immunity agreements under Article 98 of the Rome Statute of the International Criminal Court (also known as "Article 98 Agreements"). These Agreements provide that neither party to the accord would bring the other's current or former government officials, military or other personnel before the jurisdiction of the Court. Although the U.S. is not a signatory to the Rome Statute, it has utilized Article 98 Agreements as one method to ensure the protection of U.S. persons from ICC jurisdiction, in addition to passing the American Service Members' Protection Act (22 U.S.C. §§ 7421, *et seq*.) to ensure that service members are not subject to the jurisdiction of the ICC for their participation in any military operations. See also the separate chapter entitled War Crimes and Aerospace Operations for further discussion and full citations of the statutes of the ICTY, ICTR, and ICC.

UN Role in Codifying and Developing International Law

The UN Charter specifically calls on the United Nations to undertake the progressive codification and development of international law. The conventions, treaties and standards resulting from this work have provided a framework for promoting international peace and security and economic and social development. States that ratify these conventions are legally bound by them. The International Law Commission (ILC) prepares drafts on topics of international law that can then be incorporated into conventions and opened for ratification by states. Some of these conventions form the basis for law governing relations among states, such as the convention on diplomatic relations. Other conventions have focused on particular subjects, such as the development of international environmental law or treaties to prevent drug trafficking. In a recent effort to combat terrorism, the United Nations and its specialized agencies have developed international agreements that constitute the basic legal weapons to combat terrorism.

UN Role in Providing Humanitarian Assistance

In efforts to prevent human rights violations in the midst of crisis, the UNHRC has played an increasingly active role in the UN response to emergencies. The UN coordinates its response to humanitarian crises through a committee of all the key humanitarian bodies, chaired by the UN Emergency Relief Coordinator. Members include the UN Children's Fund (UNICEF), the UN Development Program (UNDP), the World Food Program (WFP), and the UNHRC. Other UN agencies are also represented, as are the major non-governmental and intergovernmental humanitarian organizations, such as the Red Cross. Disaster prevention and preparedness are also considered UN humanitarian action. When disasters occur, UNDP coordinates relief work at the local level. UNDP also helps ensure that emergency relief contributes to recovery and longer-term development. In countries undergoing extended emergencies or recovering from conflict, humanitarian assistance is increasingly seen as part of an overall peace-building effort along with developmental, political, and financial assistance.

NORTH ATLANTIC TREATY ORGANIZATION (NATO)

The North Atlantic Treaty, signed in Washington on 4 April 1949, created an alliance of ten European and two North American independent nations committed to each other's mutual defense. Membership was expanded in 1952, 1955, 1982, 1999, 2004 and 2009. The 28 NATO members are Albania, Belgium, Bulgaria, Canada, Croatia, the Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Turkey, the United Kingdom and the U.S. The North Atlantic Treaty, itself a very simple document, conforms to the spirit of the UN Charter and derives its legitimacy from the UN Charter. In the treaty, member countries commit themselves to maintaining and developing their defense capabilities, individually and collectively, providing the basis for collective defense planning. Article 5 of the treaty refers to the right to collective self-defense as laid down by the UN Charter. It states that an armed attack on one or more members of NATO will be deemed an attack against them all. The just exercise by NATO

of its authority under Article 5 occurred subsequent to the terrorist attacks at the World Trade Center in New York and the Pentagon in Washington, D.C.

Over the past decade, NATO's role has shifted from Article 5 collective defense to what has been called non-Article 5 "collective security" in support of regional international security interests. Since 1992, NATO has provided support for peacekeeping activities sanctioned by, or under the auspices of, the UN and the OSCE. For example, NATO played a major role in both consensual and non-consensual peace operations in the former Yugoslavia during 1994-1998. Prior to 2001, its most significant non-Article 5 operation was the 1999 Kosovo air campaign based generally on the principle of humanitarian intervention. In the post-2001 timeframe, NATO's assumption of the UN mission in Afghanistan, the International Security Assistance Force, is arguably NATO's most ambitious and far-reaching operation in the history of the Alliance.

Like the UN Security Council, NATO speaks through an executive body called the North Atlantic Council (NAC). The NAC, chaired by the NATO Secretary General, exercises effective political authority for the member countries, which are represented by Permanent Representatives with ambassadorial rank. Political decisions are communicated through NAC resolutions. The Defense Planning Committee (DPC), comprised of the Permanent Representatives, provides guidance to NATO's military authorities. The NATO Military Committee (MC) is subordinate to both the NAC and DPC, but has a special status as the senior military authority in NATO. Its principal role is to consider the contribution that military force can provide to the political objective, and to provide direction to the major NATO Commanders and advice on military policy and strategy to the NAC and DPC.

Of particular interest to judge advocates providing advice on NATO matters are such topics as logistical support to other NATO members, NATO financing for construction projects, NATO headquarters agreements, the interface between NATO and the European Union (see below), the manner in which NATO decisions are made, NATO standardization agreements (STANAGs), NATO's relationship to Partnership for Peace (PfP) countries, NATO exercises, NATO ROE (see separate chapter entitled Rules of Engagement), and NATO command relationships.

ORGANIZATION OF AMERICAN STATES (OAS)

Made up of 35 member states, the OAS is the Western Hemisphere's premier political forum for multinational dialogue and action. Although not a military alliance, it is an important force for peace in the hemisphere. The current OAS membership includes: (original) Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, the United States, Uruguay, Venezuela, (subsequent) Barbados, Trinidad and Tobago, Jamaica, Grenada, Suriname, Dominica, Saint Lucia, Antigua and Barbuda, Saint Vincent and the Grenadines, the Bahamas, St. Kitts and Nevis, Canada, Belize, and Guyana.

Also under the OAS umbrella are several specialized organizations: the Inter-American Children's Institute; the Inter-American Commission of Women; the Pan American Institute

of Geography and History; the Inter-American Indian Institute; the Inter-American Institute for Cooperation on Agriculture; and the Pan-American Health Organization.

ORGANIZATION FOR SECURITY AND COOPERATION IN EUROPE (OSCE)

The OSCE is a regional security organization whose 56 participating states are from Europe, Central Asia, and North America. The OSCE has been established as a primary instrument for early warning, conflict prevention, crisis management, and post-conflict rehabilitation under Chapter VIII of the UN Charter. The OSCE approach to security is comprehensive and cooperative. It addresses a wide range of security-related issues including arms control, preventive diplomacy, confidence-building and security-building measures, human rights, election monitoring, and economic and environmental security. All OSCE participating states have equal status, and decisions are based on consensus.

OSCE's missions in the former Federal Republic of Yugoslavia (FRY) are good examples of its operations. The current OSCE Mission in Kosovo was established as part of the United Nations Interim Administrative Mission in Kosovo (UNMIK). It is the third OSCE mission to be deployed in the FRY since 1992. Notably, from October 1998 until March 1999 (when Operation Allied Force commenced), the OSCE's Kosovo Verification Mission (KVM) was deployed to verify FRY compliance with UN Security Council Resolution 1160 and 1199, to verify the cease-fire, and to monitor the movement of forces. Today, as part of UNMIK, the OSCE works closely with KFOR as well as with various international organizations such as the UNHRC, the Council of Europe and the European Union.

COUNCIL OF EUROPE AND THE EUROPEAN COURT OF HUMAN RIGHTS

The Council of Europe (COE) is an intergovernmental organization focused on the protection of human rights, promotion of awareness of European cultural identity and diversity, judicial cooperation, and the seeking of solutions to problems facing European society. It does not, however, address matters related to economics or defense. The European Court of Human Rights (ECHR) is an organization of the COE. Located in Strasbourg, the COE is distinct from the EU, but its membership includes 47 European states. Approximately 350 NGOs have consultative status with the COE. The United States, Japan, Canada, and Mexico have observer status.

One of the principal initiatives of the COE is the abolition of the death penalty. Article 1 of Protocol No. 6 to the European Human Rights Convention provides that "The death penalty shall be abolished. No one shall be condemned to such penalty or executed." This article, and ECHR opinions applying the provision, pose an obstacle to extradition and U.S. prosecution in the event U.S. military members or persons subject to the UCMJ or the Military Extraterritorial Jurisdiction Act of 2000 (MEJA) commit offenses for which the punishment could include the death penalty. It also impacts the ability of the United States to secure custody of terrorists possibly involved in terrorist acts against U.S. persons or property. See also the chapter entitled Foreign Criminal Jurisdiction for further discussion and full citation of the MEJA.

EUROPEAN UNION (EU)

The EU is the result of a process of cooperation and integration which began in 1951 between six countries (Belgium, Germany, France, Italy, Luxembourg and the Netherlands). After nearly fifty years, with six waves of accessions (1973: Denmark, Ireland and the United Kingdom; 1981: Greece; 1986: Spain and Portugal; 1995: Austria, Finland and Sweden; 2004: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia; and 2007: Bulgaria and Romania), the EU today has twenty-seven member states.

Objectives. The EU's purpose is to organize relations between the member states and between their people in a coherent manner and on the basis of solidarity. The main objectives are as follows:

1. To promote economic and social progress (the single market was established in 1993; the single currency was launched in 1999).

2. To assert the identity of the European Union on the international scene (through European humanitarian aid to non-EU countries, common foreign and security policy, action in international crises, common positions within international organizations).

3. To introduce European citizenship (which does not replace national citizenship but complements it and confers a number of civil and politic rights on European citizens).

4. To develop an area of freedom, security and justice (linked to the operation of the internal market and more particularly the freedom of movement of persons).

5. To maintain and build on established EU law (all the legislation adopted by the European institutions, together with the founding treaties).

Institutions. There are five institutions which comprise the EU:

1. European Parliament (elected by the people of the member states)

2. European Council (representing the governments of the member states)

3. European Commission (the executive and the body having the right to initiate legislation)

4. European Court of Justice (ensuring compliance with the law)

5. European Court of Auditors (responsible for auditing the accounts)

Supporting Bodies. The five EU institutions are supported by other bodies, including:

1. Economic and Social Committee

2. Committee of the Regions (advisory bodies which help to ensure that the positions of the EU's various economic and social categories and regions respectively are taken into account)

3. European Ombudsman (dealing with complaints from citizens concerning misadministration at the European level)

4. European Investment Bank (the EU's financial institution) and

5. European Central Bank (responsible for monetary policy in the Euro currency area)

Challenges. A broad range of EU laws have the potential to change the manner in which we operate in Europe and impact on our SOFA rights. NATO allies, who are also EU members, are implementing mandatory EU regulations and directives into their domestic laws. In other cases, EU laws have a direct effect on member states without any domestic action on their part. EU law is not always consistent with NATO SOFA rights, and the resulting conflict of laws has created interesting and complex international law questions. EU laws have impacted operations in the areas of training, labor law, data protection, logistical support, and taxation. Additionally, as the EU expands its reach beyond its economic charter into the defense arena, EU-NATO relational issues will likely arise.

ASSOCIATION OF SOUTHEAST ASIAN NATIONS (ASEAN)

ASEAN was founded for the purpose of cooperation in securing the region's peace, stability and development. On 8 August 1967 five countries, Indonesia, Malaysia, the Philippines, Singapore and Thailand, signed the ASEAN Declaration bringing the organization into being. Now ten countries are members with the addition in 1984 of Brunei, 1995 of Vietnam, 1997 of Laos and Myanmar, and 1999 of Cambodia.

Over the years political and security cooperation has assumed increasing importance on ASEAN's agenda. Among the more important accords adopted by ASEAN are the 1971 declaration designating Southeast Asia as a Zone of Peace, Freedom and Neutrality (ZOPFAN), the 1976 Treaty of Amity and Cooperation in Southeast Asia and the Declaration of ASEAN Concord, and the 1995 Southeast Asia Nuclear Weapon-Free Zone Treaty. With the establishment of the ASEAN Regional Forum (ARF), ASEAN created a major consultation process and confidence-building mechanism for peace and stability in the Asia-Pacific Region. Besides the ten ASEAN countries, ARF membership includes ten dialogue partners (Australia, Canada, China, EU, India, Japan, Republic of Korea, New Zealand, Russian Federation, and the United States).

INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC)

Established in 1863, the ICRC is an impartial, neutral, and independent NGO whose purpose is exclusively humanitarian -- to protect the lives and dignity of victims of war and internal violence and to provide them with assistance. The ICRC is a unique NGO in that nation states have invested it with a special responsibility for the 1949 Geneva Conventions and its Additional Protocols. It directs and coordinates the international relief activities conducted in situations of conflict. It also endeavors to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles. The ICRC however, should not be confused with national Red Cross societies, such as the American Red Cross, which are typically governmental organizations. Together, however, the ICRC and the league of national Red Cross societies comprise the Red Cross movement.

The ICRC is mentioned several times in the instruments of international humanitarian (Geneva Conventions) law. Its work is therefore defined by multinational binding agreements to which states have subscribed. In international armed conflicts the ICRC action is based on the four 1949 Geneva Conventions and their Additional Protocols, which recognize its right to conduct certain activities such as bringing relief to wounded, sick, or shipwrecked military personnel; visiting prisoners of war; taking action on behalf of the civilian population; and ensuring that protected persons are treated according to law. In internal armed conflicts, the ICRC bases its action on Common Article 3 to the Geneva Conventions and on Additional Protocol II. These provisions recognize its right to offer its services to parties to the conflict, undertake relief operations, and visit persons detained in connection with the armed conflict. See also the chapter entitled Law of Armed Conflict for Airmen for further discussion and full citations of the 1949 Geneva Conventions and Additional Protocols.

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CHAPTER 12

HUMAN RIGHTS LAW

BACKGROUND

Human rights law refers to a broad category of law that focuses on the life and dignity of human beings. In contrast with most international law, international human rights law protects persons as individuals rather than as subjects of sovereign states.

When conducting operations the key human rights law questions for judge advocates are:

1. Does human rights law apply to this operation?

2. If so, which human rights laws apply?

3. What are the USAF's obligations to prevent or punish human rights violations while on operations?

4. If we are working in a coalition or with a host nation, are there additional human rights law issues that may affect USAF operations?

APPLICATION OF HUMAN RIGHTS LAW TO OPERATIONS

The United States considers human rights law and the law of armed conflict (LOAC) to be separate systems of protection. Human rights laws regulate the relationship between a state and individuals under their jurisdiction. In contrast, LOAC regulates wartime relations between belligerents and civilians as well as protected persons, usually not one's own citizens or nationals. LOAC includes very restrictive triggering mechanisms which limit its application to specific circumstances.[281] As such, LOAC is *lex specialis* to situations of armed conflict.[282] Consequently, when LOAC applies, human rights law does not.[283]

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[281] *See e.g.* Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2. *See also*, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ REP. 226, para.25 (July 8).

[282] Christopher Greenwood, *Rights at the Frontier - Protecting the Individual in Time of War*, *in* LAW AT THE CENTRE, THE INSTITUTE OF ADVANCED LEGAL STUDIES AT FIFTY (1999).

[283] Some scholars and states do not share the U.S. view and consider the application of human rights law and LOAC as overlapping. Their view is that human rights law creates rights and duties beyond national borders between states and alien individuals during periods of armed conflict as well as peace. Further some States in Asia and the Islamic world question the universality of human rights as a neo-colonialist attitude of northern states. *See* DARREN J. O'BYRNE, HUMAN RIGHTS: AN INTRODUCTION 52-55 (2003) (discussing Marxist, Confucian, and Islamic attitudes toward concepts of universal human rights).

However, the application of LOAC in lieu of human rights law does not mean that the life and dignity of human beings are not protected during armed conflict. Common Article 3 to the Geneva Conventions sets out minimum standards for humane treatment that apply in all armed conflicts including prohibitions on cruel treatment, torture, and humiliating and degrading treatment. In addition, certain categories of persons are entitled to higher standards of treatment (see Chapter on Law of Armed Conflict). The USAF applies these standards across the spectrum of conflict.[284]

CONTENT OF HUMAN RIGHTS LAW

On operations where LOAC does not apply as a matter of law, human rights law applies.[285] Human rights law is found in customary international law (CIL) and in treaty law.[286] It is important to identify the source of the law as this directly affects the scope of its application.

If a specific human right falls within the category of CIL, it is a fundamental human right. As such, it is binding on U.S. forces at all times, including when overseas. This is because CIL is considered part of U.S. law,[287] and customary human rights law operates to regulate the way state actors (in this case the USAF) treat all persons.[288]

In contrast, human rights law established by treaty generally only binds the state in relation to persons under its jurisdiction. Therefore human rights obligations from treaty law usually only apply within CONUS.

Customary Law Obligations

There is no definitive "source list" of those human rights considered by the United States to be CIL. The best source is the Restatement (Third) of Foreign Relations Law of the United States (2003).[289] According to the Restatement, the United States accepts the position that certain fundamental human rights fall within the category of CIL, and a state violates international law when, as a matter of policy, it practices, encourages, or condones any of the following:

1. Genocide,

2. Slavery,

3. Murder or causing the disappearance of individuals,

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[284] See DODD 2311.01E and CJCSI 5810.01C.
[285] Note that where LOAC is applied on an operation as a matter of policy rather than law (IAW DODD 2311.01E and CJCSI 5810.01C), human rights law would still apply.
[286] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, at § 701 (2003) [hereinafter RESTATEMENT].
[287] *See* the *Paquete Habana The Lola*, 175 U.S. 677 (1900); *see also* RESTATEMENT, *supra* note 7 at § 111.
[288] RESTATEMENT, s*upra* note 7, at §701.
[289] *Id*. at §702.

4. Torture or other cruel, inhuman, or degrading treatment or punishment,

5. Prolonged arbitrary detention,

6. Systematic racial discrimination,

7. Consistent patterns of gross violations of internationally recognized human rights.

Treaty Law Obligations

The original focus of human rights law was to protect individuals from the harmful acts of their own government.[290] Consequently human rights treaties apply to persons living in the territory of the United States, and not more broadly to any person with whom agents of our government deal in the international community.[291] This is referred to as "non-extraterritoriality."[292] This is a critical difference to the CIL human rights obligations discussed above.

Further, within CONUS, while part of the "supreme law of the land,"[293] some treaties entered into by the United States are not enforceable in U.S. courts unless there is subsequent legislation or executive order to execute the obligations created by the treaty. The U.S. position is that "the intention of the United States determines whether an agreement is to be self-executing or should await implementing legislation."[294] Where there is implementing legislation, it is the legislation or executive order, and not the treaty provision, which is given effect by U.S. courts, and therefore defines the scope of U.S. obligations under our law.[295]

Where a treaty has no implementing legislation, and is not explicitly self-executing, the obligation of the United States is less clear and advice on specific issues should be sought from higher command.

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[290] *See* RESTATEMENT, *supra* note 7 and accompanying text.

[291] While the actual language used in the scope provisions of such treaties usually makes such treaties applicable to "all individuals subject to [a state's] jurisdiction" the United States interprets such scope provisions as referring to the United States and its territories and possessions, and not any area under the functional control of United States armed forces. *See* RESTATEMENT, *supra* note 7, at §322(2) and Reporters' Note 3; *see also* CLAIBORNE PELL REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. COC. NO. 102-23 (Cost Estimate) (This Congressional Budget Office Report indicated that the Covenant was designed to guarantee rights and protections to people living within the territory of the nations that ratified it)

[292] *See* Theodore Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT'L L. 78-82 (1995).

[293] U.S. CONST. art VI. According to the Restatement, "international agreements are law of the United States and supreme over the law of the several states." RESTATEMENT, s*upra* note 7, at §111.

[294] *See* RESTATEMENT, *supra* note 7, at § 131. Also *see Sei Fujii v. California* 38 Cal.2d, 718, 242 P.2d 617 (1952). The court stated, "The provisions in the [C]harter pledging cooperation in promoting observance of fundamental freedoms lack the mandatory quality and definiteness which would indicate an intent to create justiciable rights in private person immediately upon ratification." 242 P.2d at 621-22.

[295] For example the Supreme Court of the United States considered that the determination of refugee status for individuals fleeing Haiti was dictated not pursuant to the Refugee Protocol standing alone, but by the implementing legislation for that treaty – the Refugee Act. *United States v. Haitian Centers Council, Inc.* 113 S.Ct. 2549 (1993).

The major human rights treaties for the United States are:

1. *International Covenant on Civil and Political Rights (ICCPR) (1966)* - United States ratified in 1992 but is not a party to the two optional Protocols. The United States, upon ratification, noted explicitly that the treaty is not self-executing. There is no specific implementing legislation.

2. *Convention on the Prevention and Punishment of the Crime of Genocide (1948)* - United States ratified in 1986. This treaty is implemented by the Genocide Convention Implementation Act of 1987.[296]

3. *Convention against Torture and Other Cruel, Inhuman, and Degrading Treatment (1984)* - United States ratified in 1994. The treaty is implemented by the Torture Victim Protection Act of 1991.[297]

4. *Convention on the Elimination of All Forms of Racial Discrimination (1965)* - United States ratified in 1994. There is no single statute that implements this treaty, but U.S. obligations are implemented through the United States Constitution which provides that all persons are equal before the law and are equally entitled to constitutional protection.[298]

Enforcement

The Alien Tort Statute[299] provides jurisdiction for U.S. district courts to hear "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[300] In *Filartiga v. Peña-Irala*, the Second Circuit recognized a right to be free from torture actionable under the statute.[301] The court's analysis included a detailed exploration of CIL and the level of proof required to establish an actionable provision of CIL. However in 2004, the United States Supreme Court addressed the Alien Tort Statute in *Sosa v. Alvarez-Machain*.[302] Refining and tightening the standard for establishing torts "in violation of the law of nations," the Court characterized the statute essentially as a jurisdictional statute.[303] The Court declined to go so far as categorically requiring separate legislation to establish causes of action under the statute; however, the Court set a very high burden of proof to establish actionable causes.

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[296] Genocide Convention Implementation Act of 1987, 18 U.S.C. §§ 1091-93 (2000).
[297] Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992), reprinted in U.S.C. § 1350 (2000).
[298] *See* Periodic Report of the United States of America to the U. N. Committee on the Elimination of Racial Discrimination Concerning the International Convention on the Elimination of all forms of Racial Discrimination, April 2007.
[299] 28 U.S.C. § 1350 (2004).
[300] *Id.*
[301] 630 F 2d 876 (2d Cir. 1980).
[302] 542 U.S. 692 (2004).
[303] *Id.*

USAF OBLIGATIONS TO PREVENT OR PUNISH HUMAN RIGHTS VIOLATIONS WHILE ON OPERATIONS

The scope of U.S. obligations to actively protect fundamental human rights rests with the President of the United States and the Secretary of Defense, and will be reflected in the rules of engagement (ROE). Whether this authorization or obligation is granted depends on a variety of factors, including the nature of the operation, the expected likelihood of serious violations, and the existence of viable host nation law enforcement authority. However, it is a common provision of ROE for peace operations that U.S. forces may prevent, by force if necessary, violations of fundamental human rights. Generally, ROE authorize U.S. forces to prevent crimes that constitute grave breaches of Common Article 3 of the Geneva Conventions.

Potential responses to observed violations of fundamental human rights include reporting through command channels, informing Department of State personnel in the country, increased training of host nation forces in how to respond to violations, documenting incidents and notifying host nation authorities, and finally, intervening to prevent the violation. The greater the dependability and reliability of the host nation law enforcement authorities, the less likely it is U.S. forces will have to intervene. However, when preparing to conduct an operation, judge advocates should recognize the need to seek guidance, in the form of the mission statement or ROE, on how U.S. forces should react to such situations.

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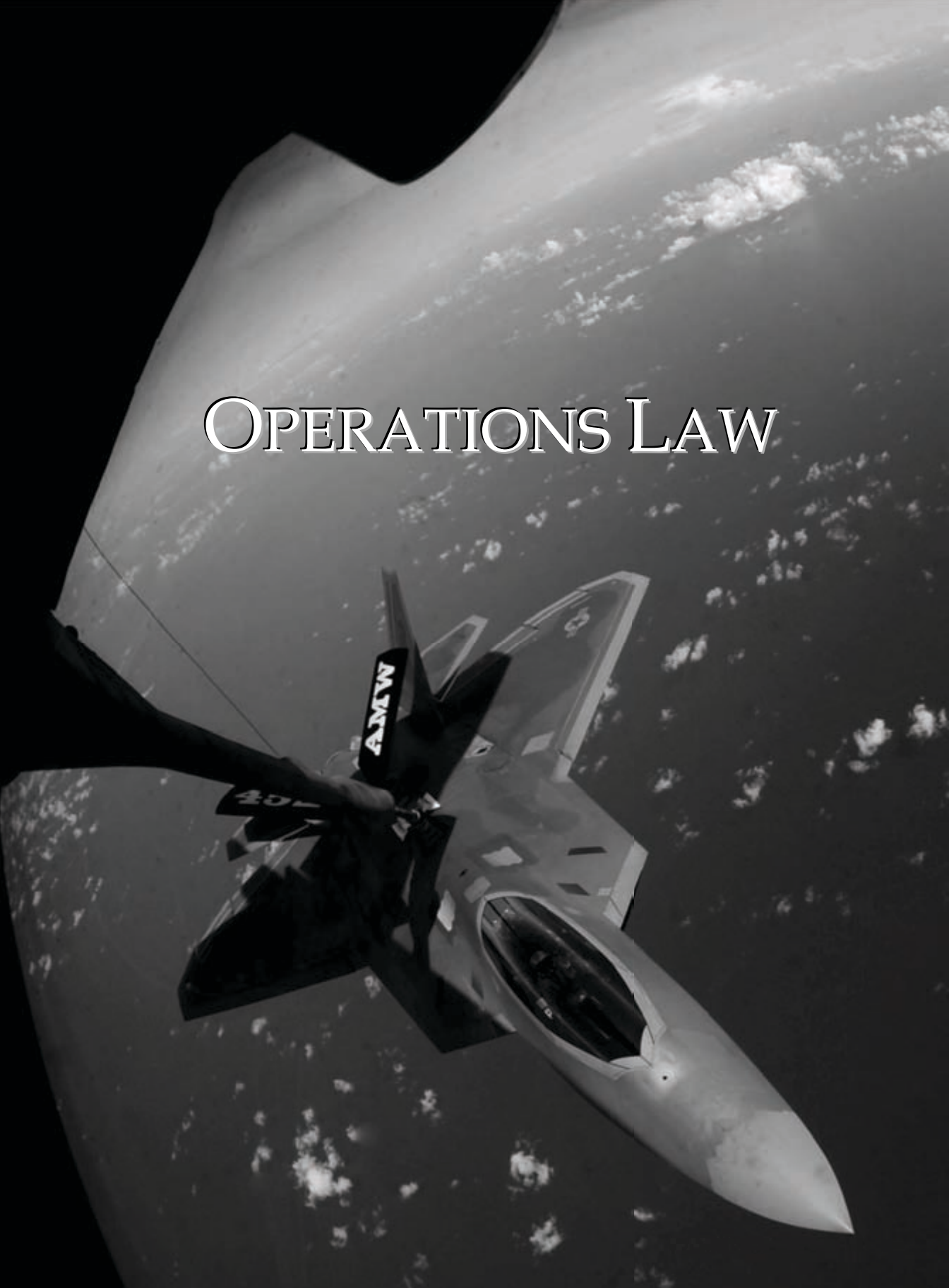
Operations Law



CHAPTER 13

THE OPERATIONAL CHAIN OF COMMAND AND COMMAND SUCCESSION

BACKGROUND

Command is central to all military action, and unity of command is central to unity of effort. Inherent in command is the authority that a military commander lawfully exercises over subordinates. Appointment or assumption to command confers authority to assign missions and to demand accountability for mission accomplishment. Command authority, however, is never absolute. Limits on command authority exist in the establishing authority, directives, and law. JP 0-2. Military officers succeed to command either by appointment by a higher authority or assumption based on seniority by rank and grade.

Military organizations with operational missions must have a military commander who is integrated into the operational chain of command in order to ensure unity of command. Unity of command is the interlocking web of responsibility, which is a foundation for trust, coordination, and the teamwork necessary for unified military action. It requires clear delineation of responsibility among commanders up, down, and laterally. JP 0-2.

A working understanding of command terminology is essential to understanding the relationships among components and the responsibilities inherent in organizations. The operational chain of command is actually the combat chain of command. JP 1-02, *Department of Defense Dictionary of Military and Associated Terms,* 17 October 2008, separately defines operation as, "the process of carrying on combat . . ." and chain of command as, "[t]he succession of commanding officers from a superior to a subordinate through which command is exercised." JP 1-02 also defines command as, "The authority that a commander . . . lawfully exercises over subordinates by virtue of rank or assignment."

The operational chain of command does not directly involve such matters as administration, individual and unit training, personnel management, and logistics. JP 1-02. The Services organize, train and equip their organizations (units) and generally present those organizations, complete with unit commanders and subordinate organizational structure and subordinate commanders, for operational use by the combatant commands. *See*, AFDD 1, Chapter 4, and AFDD 2, Chapter 3.

There are several types of command authorities and relationships defining who can do what to whom. Command authority is not complex in the everyday life of an Air Force unit, but when that unit becomes part of an aerospace expeditionary force (AEF), deployed to a combatant command's theater of operations, command authority becomes complex. Deployment to participate in a multinational coalition compounds the complexity.

CONSTITUTIONAL AND STATUTORY AUTHORITY

Command Authority. Article II, § 2 of the United States Constitution provides the original source of command authority to the President as Commander-in-Chief. Command is the authority that a commander in the armed forces lawfully exercises over subordinates by virtue of rank or assignment. Command includes the authority and responsibility for effectively using available resources and for planning the employment of, organizing, directing, coordinating, and controlling military forces for the accomplishment of assigned missions. It also includes responsibility for the health, welfare, morale, and discipline of assigned personnel. JP 1-02.

THE CONCEPT OF COMMAND BY UNIFORMED MILITARY PERSONNEL

The concept of command carries dual function: (1) legal authority over people, including power to discipline, and (2) legal responsibility for the mission and resources. Command devolves upon an individual, not a staff. Command is exercised by virtue of the office and the special assignment of officers holding military grades who are eligible by law to command. A commander exercises control through subordinate commanders. Staff, including vice and deputy commanders, have no command functions. They assist the commander by planning, investigating, and providing recommendations regarding the execution of command responsibilities. Though some command duties may be delegated, the responsibilities of command may never be delegated.

Chain of Command

Unless otherwise directed by the President, the chain of command runs from the President to the Secretary of Defense to the commander of the combatant command. 10 U.S.C. 162 (b). Of note, the President may direct that communications between the President or Secretary of Defense and commanders of unified and specified combatant commands be transmitted through the Chairman of the Joint Chiefs of Staff (CJCS). 10 U.S.C. 163(a). The Secretary of Defense may assign to the CJCS oversight responsibility for activities of combatant commands. This assignment, however, does not confer command authority on the CJCS or alter the responsibility of combatant commanders under 10 U.S.C. 164. 10 U.S.C. 163(b).

The CJCS functions within the chain of command by transmitting communications to the commander of the combatant commands from the President and the Secretary of Defense. Service chiefs are responsible to the secretary of the military department for management of the services. Subordinate command authority may be conferred by statute, delegation, or assumption.

Command and Staff. Commanders exercise control through their staffs and through their subordinate commanders. Staff members assist the commander as directed. Vice commanders and deputy commanders are staff officers. Delegation of command duties is generally authorized. Commanders should delegate administrative duties to members of their staff and subordinate commanders to the fullest extent possible. The commander can also designate subordinates, including civilians, who are authorized to sign or act in the

commander's name. However, commanders must not delegate duties restricted to commanders by law or by direction of higher headquarters (for example, Uniform Code of Military Justice (UCMJ) authority) or duties that are too important to delegate. *See* AFI 51-604, para 6 and JP 0-2, Chapter III, para 1.b.

Organization

The President, through the Secretary of Defense, with the advice and assistance of the CJCS, establishes unified and specified combatant commands and prescribes the force structure of those commands. 10 U.S.C. 161(a). Under the direction of the Secretary of Defense, secretaries of the military departments are directed to assign all forces under their jurisdiction, except as specified, to unified and specified combatant commands or to the U.S. element of North American Aerospace Defense Command (NORAD) to perform missions assigned to those commands. 10 U.S.C. 162(a). Secretaries of military departments, subject to the authority, direction, and control of the Secretary of Defense and combatant commanders, are responsible for the administration and support of forces assigned to a combatant command. 10 U.S.C. 165.

The unified command structure is flexible and changes as required to accommodate the evolving U.S. national security needs. The classified *Unified Command Plan* establishes the various combatant commands, identifies geographic areas of responsibility, assigns primary tasks, defines the authority of the commanders, establishes command relationships, and gives guidance on the exercise of combatant command (COCOM).

Combatant Commander Responsibility and Command Authority

Combatant commanders are responsible to the President and the Secretary of Defense for the performance of assigned missions. Combatant commanders are directly responsible to the Secretary of Defense for the preparedness of the command to carry out assigned missions. 10 U.S.C. 164(b). Unless otherwise directed by the President or Secretary of Defense, combatant commanders possess the authority, direction, and control to discharge the following command functions over commands and assigned forces:

1. Give authoritative direction to subordinate commands and forces for missions, including all aspects of military operations, joint training and logistics;

2. Prescribe the chain of command to commands and assigned forces;

3. Organize commands and forces within that command necessary to implement assigned missions;

4. Employ forces within that command;

5. Assign command functions to subordinate commanders;

6. Coordinate and approve those aspects of administration and support (including

control of resources and equipment, internal organization, and training) and discipline necessary to carry out assigned missions;

7. Select subordinate commanders and command staff, suspend subordinates and convene courts-martial.

The chain of command for purposes other than the operational direction of the combatant commands runs from the President to the Secretary of Defense to the secretaries of the military departments to the commanders of military Service forces. Authority for the Secretary of the Air Force to organize Service forces and appoint commanders is found at 10 U.S.C. 8013 and 10 U.S.C. 8074.

Relationship between Air Force and Combatant Commands

*Background***.** The Secretary of the Air Force has authority under 10 U.S.C. 8013 to organize Air Force forces and to "carry out the functions of the Department of the Air Force so as to fulfill (to the maximum extent practicable) the current and future operational requirements of the unified and specified combatant commands." More specific authority to establish commands within the Air Force is found at 10 U.S.C. 8074, which provides:

> Except as otherwise prescribed by law or by the Secretary of Defense, the Air Force shall be divided into such organizations as the Secretary of the Air Force may prescribe …. For Air Force purposes, the United States, its Territories, its possessions, and other places in which the Air Force is stationed or is operating, may be divided into such areas as directed by the Secretary. Officers of the Air Force may be assigned to command Air Force activities, installations, and personnel in those areas. In the discharge of the Air Force functions or other functions authorized by law, officers so assigned have the duties and powers prescribed by the Secretary.

*Assignment of Forces***.** The Goldwater-Nichols Act requires that forces under the jurisdiction of the Service secretaries be assigned to the combatant commands, with the exception of forces assigned to perform the mission of the military department, (e.g., organize, train, equip, etc.) or NORAD. 10 U.S.C. 162. In addition, forces within a combatant command's geographic area of responsibility normally fall under the command of the combatant commander, except as otherwise directed by the Secretary of Defense. *See Unified Command Plan* and the *Global Force Management Guidance* (both memoranda are classified). The operational command relationships between Air Force organizations and commanders and the combatant commands are set forth in Section II of the Global Force Management Implementation Guidance. Air Force forces may only be transferred to a different combatant command by authority of the Secretary of Defense under procedures prescribed by the Secretary and approved by the President. 10 U.S.C. 162.

*Retained Structure and Responsibility***.** Regardless of how an Air Force organization is assigned or attached to a combatant command or joint force, an Air Force-created organization normally retains its commander and its structure as established by the Air

Force. The Air Force commander has administrative control (ADCON) (see below for detailed discussion of this term) from the Air Force and whatever elements of operational command authority are delegated by the joint force chain of command. While the combatant commander or the joint force commander (if delegated) has the power to change the command or organization of assigned or attached Air Force organizations, joint doctrine favors leaving the organization intact and under its established command. In order to establish unity of administrative command for all Air Force forces in a joint command, one Air Force officer will be designated as the Commander of Air Force Forces (COMAFFOR).

The Military Departments, Services, and Forces

The authority vested in the secretaries of the military departments in the performance of their role to organize, train, equip, and provide forces runs from the President through the Secretary of Defense (SECDEF) to the Service secretaries. Then, to the degree established by the secretaries or specified in law, this authority runs through the service chiefs to the service component commanders (CDRs) assigned to the combatant commanders (CCDRs). As such, ADCON provides for the preparation of military forces and their administration and support, unless such responsibilities are specifically assigned by the SECDEF to another DOD component.

The secretaries of the military departments are responsible for the administration and support of service forces. They fulfill their responsibilities by exercising ADCON through the CDRs of the service component commands assigned to combatant commands and through the service chiefs (as determined by the secretaries) for forces not assigned to the combatant commands. The responsibilities and authority exercised by the secretaries of the military departments are subject by law to the authority provided to the CCDRs in their exercise of COCOM.

Each of the secretaries of the military departments, coordinating as appropriate with the other department secretaries and with the CCDRs, has the responsibility for organizing, training, equipping, and providing forces to fulfill specific roles and for administering and supporting these forces.

Commanders of forces are responsible to their respective service chiefs for the administration, training, and readiness of their unit(s). Commanders of forces assigned to the combatant commands are under the authority, direction, and control of (and are responsible to) their CCDR to carry out assigned operational missions, joint training and exercises, and logistics. (JP 1, p. II-6)

TYPES OF COMMAND AUTHORITY. Command authority is described in terms of four forms of command relationships stemming from "warfighting" authority, combatant command (COCOM), operational control (OPCON), tactical control (TACON) and Support. The three other types of authority are ADCON, Coordinating and Direct Liaison Authorized (DIRLAUTH). JP 0-2, AFDD 1. These terms are further defined as follows:

Command Relationships

The interrelated responsibilities between commanders, as well as the operational authority exercised by commanders in the chain of command; defined further as combatant command (command authority), operational control, tactical control, or support. JP 1-02.

Operational Authority

That authority exercised by a commander in the chain of command, defined further as combatant command (command authority), operational control, tactical control, or a support relationship. JP 1-02.

Combatant Command Authority (COCOM)

Combatant command authority over assigned forces, is vested *only* in the commanders of the combatant commands by 10 U.S.C. 164 or as directed by the President in the *Unified Command Plan*. Combatant command authority gives combatant commanders authority to perform command functions over assigned forces that involve organizing and employing command forces, assigning tasks, and giving authoritative direction over all aspects of military operations, including joint training and logistics necessary to accomplish their assigned missions. Combatant command authority cannot be delegated or transferred. JP 0-2, JP 1-02, AFDD 2. Combatant command authority enables the combatant commanders to do all things necessary to carry out National Command Authority (NCA) directed operations. JP 0-2 contains an expanded description of COCOM authority, including an explanation of the combatant commander's directive authority for matters related to the Services' continuing responsibility for logistics support.

Operational Control (OPCON)

Operational Control is the command authority involving organizing and employing forces, assigning tasks, designating objectives, and giving authoritative direction necessary to accomplish the mission. JP 0-2. Ultimately, OPCON provides the commander the authority to accomplish the assigned operational mission. Operational Control is inherent in COCOM and derives from the combatant commander. Operational Control may be delegated or transferred within a combatant command by the combatant commander or between combatant commands only by order of the Secretary of Defense.

Operational Control includes authoritative direction over all aspects of military operations and joint training necessary to accomplish missions assigned to the command. Operational Control may be exercised by commanders at any echelon at or below the level of combatant command. JP 0-2, JP 1-02, AFDD 2. JP 0-2 contains an expanded description of OPCON authority, including exercising or delegating OPCON or TACON, designating coordinating authority, prescribing the chain of command and organizing commands and forces within the command, and employing forces. Operational Control does not include the following elements of COCOM, which must be specifically delegated by the combatant commander:

authoritative direction for logistics or matters of administration, discipline, internal organization, and unit training. JP 0-2.

Tactical Control (TACON)

Inherent in OPCON, TACON is command authority over assigned or attached forces or commands that is limited to the detailed and usually local direction and control of movements or maneuvers necessary to accomplish assigned missions or tasks. Tactical Control is transferable command authority that may be exercised at any level at or below combatant command. The Secretary of Defense must authorize the transfer of TACON between combatant commands. JP 0-2, JP 1-02, AFDD 2. Tactical Control does not provide organizational authority or directive authority for administrative and logistics support. The commander exercising TACON is responsible for ensuring communications with the controlled unit. AFDD 1.

Support

Support is a command authority established when one organization should aid, protect, complement, or sustain another force. JP 0-2. Support authority is exercised by commanders at any level at or below the combatant command, including when the NCA designate a support relationship between combatant commanders (e.g., airlift support by U.S. Transportation Command (USTRANSCOM) to a geographic combatant command) or when a combatant commander designates a support relationship within the combatant command (e.g., joint force special operations component commander (JFSOCC) operation in support of the joint force air component commander (JFACC) strategic attack function). An establishing directive normally defines the nature and purpose of the support relationship. JP 0-2. The supported commander has the authority to direct missions or objectives of the supporting effort, but no authority to position supporting units (in contrast with TACON). AFDD 1. See, JP 0-2 for a description of four categories of support: general, mutual, direct, and close.

Other Authorities

Administrative Control (ADCON). 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. JP 1-02. Administrative Control authority flows from a Service secretary to subordinate Service commanders and may never be delegated to a sister Service. 10. U.S.C. 8013. Administrative Control is often referred to as organize, train and equip (OT&E) authority.

Administrative Control is synonymous with administration and support responsibilities identified in Title 10, U.S.C. This is the authority necessary to fulfill military department statutory responsibilities for administration and support. Administrative Control may be delegated to and exercised by CDRs of Service forces assigned to a CCDR at any echelon at

or below the level of Service component command. ADCON is subject to the command authority of CCDRs. Administrative Control may be delegated to and exercised by CDRs of Service commands assigned within Service authorities. 10 U.S.C. 165, JP 0-2, JP 1-02, AFDD 2. Service CDRs exercising ADCON will not usurp the authorities assigned by a combatant command commander having COCOM over CDRs of assigned Service forces. JP 1, p. IV-13.

ADCON for Air Reserve Component. Because there are unique administrative responsibilities associated with the Reserve Component, the Air National Guard and Air Force Reserve Command retain certain ADCON responsibilities, such as activation and partial mobilization. Air Force Doctrine Document 2 sets forth specified ADCON responsibilities of the COMAFFOR for attached Air National Guard and Air Force Reserve Command units.

Coordinating Authority. Coordinating authority is the authority of a commander or individual to coordinate specific functions and activities involving forces of two or more Military Departments or two or more forces of the same Service. It is a consultation relationship between commanders, as specified in an establishing directive, rather than a directive authority through which command may be exercised. JP 0-2. Commanders or individuals may exercise coordinating authority at any echelon at or below the level of combatant command. Coordinating authority is the authority delegated to a CDR or individual for coordinating specific functions and activities involving forces of two or more military departments, two or more joint force components, or two or more forces of the same Service (e.g., joint security coordinator exercises coordinating authority for joint security area operations among the component CDRs).

Coordinating authority may be granted and modified through a memorandum of agreement to provide unity of command and unity of effort for operations involving reserve component (RC) and active component (AC) forces engaged in interagency activities. The CDR or authorized agency representative has the authority to require consultation between the agencies involved but does not have the authority to compel agreement. The common task to be coordinated will be specified in the establishing directive without disturbing the normal organizational relationships in other matters. Coordinating authority is a consultation relationship between CDRs, not an authority by which command may be exercised. It is more applicable to planning and similar activities than to operations. Coordinating authority is not in any way tied to force assignment. Assignment of coordinating authority is based on the missions and capabilities of the commands or organizations involved. JP 1, p. IV-13.

Direct Liaison Authorized (DIRLAUTH). Direct liaison authority is the authority granted by a commander to a subordinate to directly consult or coordinate an action with a command or agency within or outside of the granting command. It is not an authority through which command may be exercised. JP 0-2.

*Assignment and Transfer of Forces***.** The deployment order, signed by the Secretary of Defense, is the primary instrument for transferring forces and establishing support relationships between the combatant commands. When forces are transferred between

commands, command relationships do not automatically transfer with those forces. The command authority a gaining commander will exercise and a losing commander will relinquish must be specified. JP 0-2.

Types of Forces and Related Authority

*Assigned Forces***.** All Service forces, except those specified in 10 U.S.C. 162, are assigned to combatant commands by the Secretary of Defense's *Forces for Unified Commands,* which is incorporated into the Global Force Management Implementation Guidance. A force assigned or attached to a combatant command may be transferred from that command only as directed by the Secretary of Defense. JP 0-2. The combatant commander normally exercises OPCON over forces assigned or attached by the NCA. JTF commanders are normally given OPCON of assigned or attached forces by the JTF establishing authority or superior commander. JP 0-2. The JFACC normally exercises OPCON over Service forces and TACON over other forces made available to the functional component for tasking. JP 0-2. The COMAFFOR normally exercises ADCON over assigned forces and may share certain aspects of ADCON over attached forces, although the scope of ADCON may vary (e.g., ANG Bureau may retain some ADCON responsibilities during expeditionary operations).

*Attached Forces***.** Forces are normally attached when their transfer will be temporary. Within combatant commands, establishing authorities for subordinate unified commands or joint task forces may direct the assignment or attachment of their forces to those subordinate commands as appropriate. JP 0-2. The COMAFFOR normally exercises ADCON over attached forces. AFDD 2.

Supporting Forces. Forces conducting operations in support of a combatant command, but bedded down in another combatant command's AOR-or-CONUS should be OPCON to the supported combatant command charged with the operational mission, but they usually remain ADCON to the bed-down or CONUS theater commander. For example, when B-2's launch and recover from CONUS, the commander with responsibility for the operational mission should have OPCON while ADCON remains with the home unit (i.e., Air Combat Command). AFDD 2.

*Reachback Forces***.** Support from forces that are not physically located within the theater is most often provided through TACON or support relationships. Tactical Control is the preferred method when the forces can be dedicated to the COMAFFOR, while support relationships are used when the unit cannot be dedicated. AFDD 2. For example, these command relationships apply to functional forces with global missions (e.g., mobility and space forces). More commonly this is referred to as distributed operations.

*Transient Forces***.** Forces transiting a particular geographic area of responsibility do not fall under the chain of command of that particular combatant command solely by their movement within the combatant command's area of responsibility. They are, however, subject to the ADCON authority of the COMAFFOR for local force protection and administrative reporting requirements. AFDD 2. Combatant commanders, through their

functional component commanders, exercise TACON (for force protection) over all DOD personnel assigned, temporarily assigned to, transiting through, or training in the combatant commander's AOR. DODD 2000.12, *DOD Antiterrorism/Force Protection (AT/FP) Program,* 13 April 1999.

DERIVATION OF AUTHORITY FOR THE JOINT AIR FORCE AIR COMPONENT COMMANDER

Key Terms and Concepts

Joint Force. A joint force is a force composed of significant elements, assigned or attached, of two or more military departments, operating under a single joint force commander. JP 1-02. Joint forces are established at three levels: unified commands, subordinate unified commands, and joint task forces. 10 U.S.C. 161, JP 0-2. All joint forces include Service component commands that provide administrative and logistics support for joint forces.

Change of Operational Control (CHOP). Change of operational control occurs at the date and time at which a force or unit is reassigned or attached from one commander to another. The gaining commander will exercise OPCON over that force or unit. JP 1-02.

Joint Force Commander (JFC). A joint force commander is a combatant commander, subunified commander, or joint task force commander authorized to exercise COCOM or operational control over a joint force. JP 1-02. The JFCs traditionally exercise OPCON of assigned and attached Air Force forces through the JFACC. AFDD 1.

Joint Force Air Component Commander (JFACC). The JFACC derives authority from the JFC, who possesses authority to exercise operational control, assign missions, direct coordination among subordinate commanders, and redirect and organize forces. The JFC normally designates the JFACC, whose responsibilities are assigned by the JFC and include, but are not limited to, planning, coordination, allocation, and tasking, based upon the JFC's priorities. The JFACC will recommend to the JFC a plan for air sorties, apportioned to missions and geographic areas, after coordinating with Service component commanders and other assigned or supported commanders. The JFACC is normally the component commander with the preponderance of aerospace assets and the capability to plan, task, and control joint aerospace operations. JP 0-2, JP 1-02, AFDD 2.

The JFACC is a joint component commander, similar to the joint force land component commander (JFLCC), joint force maritime component commander (JFMCC) and joint force special operations component commander (JFSOCC). The JFACC is not the same as the Air Force Service component commander (COMAFFOR), although the same officer may wear both hats. (NOTE: A joint force contains Service as well as joint components because of logistics and training responsibilities, even when operations are conducted through functional components such as the JFACC. JP 0-2.) The JFC's command and control, through the JFACC, of Service tactical and operational assets generally allows those assets to function as they were designed. The intent is to satisfy the needs of the JFC and maintain the tactical and operational integrity of the particular Service organizations. JP 0-2.

A JFACC exercises TACON authority when they produce air tasking orders (ATO) that task other component air assets to conduct joint missions. For example, in most situations involving a Marine air-ground task force (MAGTF), the MAGTF commander retains OPCON of organic Marine air assets during sustained air-ground operations. During joint operations MAGTF air assets will normally support the MAGTF mission. The MAGTF commander, however, will make sorties available to the JFC for a JFACC tasking, air defense, long range interdiction and long range reconnaissance. Sorties in excess of the MAGTF direct support requirement will be allocated to the JFC for JFACC tasking for support of other joint force components or the joint force as a whole. Even so, the combatant commander or JFC, while exercising OPCON, still possesses the authority to assign missions and redirect MAGTF sorties for higher priority joint missions. JP 0-2.

Combined Forces Air Component Commander (CFACC), also referred to as Combined Joint Force Air Component Commander (CJFACC). Exercises JFACC authority for a multinational (coalition) and joint force.

JFACC - COMAFFOR RELATIONSHIP

As mentioned above, the same general officer frequently wears the JFACC hat and the COMAFFOR hat. However, the roles for each are different. The general officer must be aware of whether he or she is functioning as a JFACC or a COMAFFOR (as commander of the Air Force component command, he or she oversees administration and support of Air Force forces) at any particular time when assigned both roles. The joint air operations center (JAOC) legal advisor supports the JFACC role. The JFACC's responsibilities will include: planning, coordination, allocation of forces, tasking of forces, and recommending air sorties to the JFC. JP 1-02. The COMAFFOR exercises ADCON, including logistics and administrative support, of all assigned forces as well as over attached forces with some limited exceptions. AFDD 2. Review the *Joint Air Operations* chapter for a detailed discussion of the legal issues affecting the JAOC, and the role of the legal adviser.

NOTE: A combatant commander still exercises approval authority over service logistic programs such as base closings and adjustments, force bed-downs and other matters within the command's area of responsibility that will have significant effects on operational capability or sustainability. JP 0-2, JP 1-02.

COMMAND DISCIPLINE AND PERSONNEL ADMINISTRATION

Responsibility

Joint Force Commander. The JFC is responsible for the discipline and administration of military personnel assigned to the joint organization. In addition to the administration and disciplinary authority exercised by subordinate JFCs, a CCDR may prescribe procedures by which the senior officer of a Service assigned to the headquarters element of a joint organization may exercise administrative and non-judicial punishment authority over personnel of the same Service assigned to the same joint organization.

Service Component Commander. Each service component in a combatant command is responsible for the internal administration and discipline of their component forces, subject to regulations and directives established by the CCDR. The JFC exercises disciplinary authority by law, regulations, and superior authority in the chain of command.

Method of Coordination. The JFC normally exercises administrative and disciplinary authority through the service component CDRs to the extent practicable. However, when impracticable, the JFC may establish joint agencies responsible directly to the JFC to advise or make recommendations on matters placed within their jurisdiction or, if necessary, to carry out the directives of a superior authority. A joint military police force is an example of such an agency. (JP 1, p. V-20)

Uniform Code of Military Justice

The UCMJ provides the basic law for discipline of the armed forces. The Manual for Courts-Martial (MCM), prescribes the rules and procedures governing military justice. Pursuant to the authority vested in the President under Article 22(a), UCMJ, and in Rules for Courts-Martial (RCM) 201(e)(2)(A) of the MCM (as amended), CCDRs are given courts-martial jurisdiction over members of any of the armed forces. Pursuant to Article 23(a)(6), UCMJ, subordinate JFCs of a detached command or unit have special courts-martial convening authority. Under RCM 201(e)(2)(C), CCDRs may expressly authorize subordinate JFCs who are authorized to convene special and summary courts-martial to convene such courts-martial for the trial of members of other armed forces. (JP 1, p. V-21)

Rules and Regulations

Rules and regulations implementing the UCMJ and MCM are, for the most part, of single-Service origin. In a joint force, however, the JFC should publish rules and regulations that establish uniform policies applicable to all Services' personnel within the joint organization where appropriate. For example, joint rules and regulations should be published to address hours and areas authorized for liberty, apprehension of service personnel, black market, combating trafficking in persons, sexual assault prevention and response policies, currency control regulations and any other matters that the JFC deems appropriate. JP 1, p. V-21.

Jurisdiction

More than one Service involved. Matters that involve more than one Service and that are within the jurisdiction of the JFC may be handled either by the JFC or by the appropriate Service component CDR.

One Service involved. Matters that involve only one Service should be handled by the Service component CDR, subject to Service regulations. A service member is vested with a hierarchy of rights. From greatest to least, these are: the United States Constitution, the UCMJ, departmental regulations, service regulations, and the common law. A JFC must ensure that an accused service member's rights are not violated. JP 1, p. V-21.

Trial and Punishment

Convening Courts-Martial. General courts-martial may be convened by the CCDR. An accused may be tried by any courts-martial convened by a member of a different military service when the courts-martial is convened by a JFC who has been specifically empowered by statute, the President, the SECDEF, or a superior CDR under the provisions of RCM (201(e)(2) of the MCM) to refer such cases for trial by courts-martial.

Post-trial and Appellate Processing. When a court-martial is convened by a JFC, the convening authority may take action on the sentence and the findings as authorized by the UCMJ and MCM. If the convening authority is unable to take action, the case will be forwarded to an officer exercising general court-martial jurisdiction. Following convening authority action, the review and appeals procedures applicable to the accused's Service will be followed. JP 1.

Command Authority over Personnel

Active Duty Forces. The commander's authority over military members extends to the conduct of the members whether on or off the installation. The commander exercises authority by virtue of his or her status as a superior commissioned officer. Enlisted members take an oath upon enlistment to obey the lawful orders of those officers appointed over the member. Articles 89, 90, and 92 of the UCMJ include prohibitions of disrespect towards, or the failure to obey, superior officers.

Reserve Component. Commanders always have administrative authority to hold reservists accountable for misconduct occurring on or off duty, irrespective of their military status when the misconduct occurred. Commanders have UCMJ authority over reservists only when in military status.

Civilians. Commanders have a range of authority over civilian employees. The commander can give promotions and bonuses, as well as impose sanctions. However, the commander has less authority over non-employee civilians on base. As "mayor" of the base, the installation commander has authority to maintain order and discipline and to protect federal resources. As a practical matter, this authority may be limited to detaining individuals for civilian law enforcement officials and barring them from the installation. The installation commander may bar an individual from the base for misconduct but must follow certain procedural requirements. The commander has virtually no authority over civilians off base; however, misconduct off-base in certain circumstances by a civilian employee may form the basis for a civilian personnel action.

Deployed Civilians. On 17 October 2006, Congress amended UCMJ jurisdiction to include DOD civilians and contractors serving with or accompanying U.S. armed forces during contingency operations.

On 10 March 2008, SECDEF provided guidance to general court-martial convening authorities (GCMCAs) and COCOMS on exercising UCMJ authority over persons serving

with or accompanying the Armed Forces. Commanders possessing GCMCA and assigned or attached to a geographic COCOM may court-martial and impose nonjudicial punishment (NJP) on civilians for offenses committed within their AOR. However, prior to preferral of charges or imposition of NJP, the Department of Justice (DOJ) must be notified of the alleged criminal misconduct. Commanders may neither prefer court-martial charges nor impose NJP until the COCOM notification process has been completed, nor may charges be preferred if DOJ provides notice that it intends to pursue federal prosecution by a U.S. Attorney. Law enforcement, criminal investigations, and other military justice procedures prior to preferral of charges should continue during the notification process.

Command Law Enforcement Authority Overseas. Commanders have authority to cause an inquiry or investigation to be conducted for any crimes allegedly committed by persons subject to UCMJ or persons (such as military dependents) subject to the Military Extraterritorial Jurisdiction Act (MEJA). Military law enforcement officers and criminal investigators are authorized to apprehend persons subject to UCMJ jurisdiction, and arrest and temporarily detain persons subject to MEJA jurisdiction, when there is *probable cause* that an offense has been committed and that the person committed it. All commissioned, warrant, petty and noncommissioned officers on active duty may apprehend offenders subject to UCMJ jurisdiction. Any person authorized to make an apprehension may use such force and means as are reasonable under the circumstances to apprehend.

COMMAND SUCCESSION

According to AFI 51-604, command is exercised by virtue of office. An officer may command an organization to which he or she is assigned or attached, in which he or she is present for duty, and for which he or she is otherwise eligible and authorized to command. An officer succeeds to command in one of two ways: by appointment or assumption. Command succession is announced by publishing orders. Air Force Form 35, *Request and Authorization for Assumption of/Appointment to Command,* may be used to publish command orders for commanders of Air Force organizations.

Appointment to command is an order from a higher authority directing an eligible officer to take command of an organization. To be appointed to command, an officer must be equal or senior in grade to every other officer who is eligible to command in that organization. Seniority by date of rank is not necessary. AFI 51-604, para 2.5.

Assumption of command is the unilateral act of taking command by the senior officer in an organization who is present for duty and eligible to command. However, the senior officer may not assume command if an eligible officer of equal grade is already in command by virtue of an appointment. Also, both grade and rank are factors for assumptions of command: an officer may not assume command if an eligible officer of equal grade and higher rank is assigned to the unit. AFI 51-604, para 2.4.

A temporary appointment or assumption can be used when the permanent commander is temporarily absent or disabled. Upon returning, the permanent commander automatically retakes command and the temporary commander returns to staff officer status. Absence or

disability for short periods does not incapacitate a commander or authorize another to assume command. AFI 51-604, para 3.

A commander must be in reasonable communication with the commander's staff and subordinate commanders to be "present for duty" and thereby eligible to command. Physical presence or constant communication is not required. AFI 51-604, para 3.4.

In addition to the traditional principles governing appointment to and assumption of command as established by law, regulation, custom, and policy, a basic responsibility exists for all officers to assume command temporarily in an emergency or when essential to good order and discipline. AFI 51-604, para 1.3.

SPECIAL RULES AND LIMITATIONS TO COMMAND (AFI 51-604):

Limitations

1. There is no title or position of "acting commander." The term is not authorized.

2. Officers assigned to HQ USAF cannot assume command of personnel, unless directed to do so by competent authority.

3. No officer may command another officer of higher grade who is present for duty and otherwise eligible to command.

4. Enlisted members cannot exercise command.

5. No commander may appoint his own successor.

6. Chaplains cannot exercise command, although they do have the authority to give lawful orders and exercise functions of operational supervision, control, and direction.

7. Students cannot command an Air Force school or similar organization.

8. Judge Advocates may only exercise command if expressly authorized by The Judge Advocate General, or as the senior ranking member among a group of prisoners of war, or under emergency field conditions.

9. Flying organizations may only be commanded by Line of the Air Force crewmembers occupying active flying positions, except that officers from other military departments who have USAF-equivalent crewmember ratings or certifications can command consolidated flying training organizations in accordance with appropriate inter-service agreements.

10. Certain types of organizations, such as air base wings or groups, which have multiple missions that include responsibility for controlling or directing flying

activities, are considered non-flying units and may be commanded by non-rated officers.

11. Only Reserve Component officers on extended active duty orders can command organizations of the Regular Air Force. Extended active duty is defined as a period of 90 days or more during which the officer is on active duty (other than for training) orders. The COMAFFOR or delegee may authorize Reserve Component officers not on extended active duty to command Regular Air Force units operating under the COMAFFOR's authority, though the COMAFFOR may delegate this authority no lower than the commanders of aerospace expeditionary wings for expeditionary units operating under the COMAFFOR's authority.

12. Regular officers and Reserve officers on extended active duty cannot command organizations of the Air Force Reserve unless approved by HQ USAF/RE.

13. Only officers designated as a medical, dental, veterinary, medical service, or biomedical sciences officer, or as a nurse may command organizations and installations whose primary mission involves health care or the health profession.

14. Officers quartered on an installation, but assigned to another organization not charged with operating that installation, cannot assume command of the installation by virtue of seniority.

15. Civilians may lead a unit, hold supervisory positions, and provide supervision to military and civilian personnel in a unit. They cannot assume military command or exercise command over military members within the unit. Except as required by law (e.g., the Uniform Code of Military Justice), a civilian leader of a unit is authorized to perform all functions normally requiring action by the respective unit commander. When a civilian is designated to lead a unit, that individual will be the director of that unit. Units lead by directors will not have commanders, and members of the unit or subordinate units may not assume command of the unit. However, alternative arrangements for functions for which the law requires a commander will be established by competent command authority, either by attaching military members for these limited purposes to a unit led by a commander, or by accomplishing these functions at a command level above the unit. Because members of the unit may not assume command, individuals should be designated in advance to perform the duties of civilian leaders should they become unable to perform those duties.

16. A frocked officer may only assume or be appointed to command based on his or her permanent grade and not the frocked grade. Similarly, a frocked officer serving in command is subject to the limitation that he or she cannot command another officer who is superior in permanent grade to the frocked officer.

Three- and Four-Star Rules

General officers serving in three- and four-star grades may be assigned to a position as the commander of a command directly subordinate to the commander of a combatant command, or, in the case of a position that is designated under 10 U.S.C. 601 as a position of importance and responsibility, may be recommended to the President for assignment to that position only with the concurrence of the commander of the combatant command and in accordance with procedures established by the SECDEF. In addition, three- and four-star general officers in commander positions must remain in command unless relieved by superior competent authority because these officers retain their grade only while serving in a position designated by the President to be a position of special importance and responsibility under 10 U.S.C. 601. AFI 51-604, para 4.1.

For the Air Force, succession to the position of Chief of Staff (CSAF) if the incumbent is absent or disabled is set out in 10 U.S.C. 8034. The Vice Chief of Staff shall perform the duties of the CSAF if the CSAF is absent, disabled or the position is vacant. If the Vice Chief of Staff's position is vacant, or he is absent or disabled, "unless the President directs otherwise, the most senior officer of the Air Force in the Air Staff who is not absent or disabled and who is not restricted in performance of duty shall perform the duties of Chief of Staff" until a permanent successor is appointed or the absence or the disability ceases. 10 U.S.C. 8034(d)(2). Succession is limited to officers on the Air Staff, and is based on grade and rank in grade, not by position. Officers assigned to the Secretary of the Air Force are not in the line of succession. Officers who are "restricted in performance of duty" include those mentioned in the previous section of this chapter. The Air Force may set out a formal plan of succession. The plan can serve to be a restriction on the ability of categories of officers on the Air Staff to succeed to the CSAF position (by including language in the plan limiting the nominated officers from performing those CSAF duties).

Air National Guard

While in state status (Title 32), the Air National Guard chain of command flows from their state Governor to The Adjutant General and on down to commanders of subordinate organizations. When called to active federal duty under Title 10, Air National Guard organizations and/or members are integrated into the Air National Guard of the United States (ANGUS), the existing federal chain of command, and are gained by the appropriate combatant command. Reserve component officers may exercise command of Regular Air Force units while on extended active duty (EAD) orders that will include a period of 90 days or more. Regular officers and Reserve officer on EAD need special approval to command organizations of the Guard or Reserve. AFMD 10.

NORTH ATLANTIC TREATY ORGANIZATION (NATO) and COALITION AIR OPERATIONS.

As detailed in the next section, the assignment of forces to NATO by individual nations only includes operational command or operational control, and the NATO definition of OPCON more closely resembles the U.S. definition of TACON. The President does not

relinquish command authority over U.S. forces that are assigned to coalition air operations. On a case-by-case basis, the President will consider placing appropriate U.S. forces under operational control of an authorized UN commander who, however, cannot change the mission or deploy U.S. forces outside the area of responsibility agreed to by the President. JP 0-2, JP 3-16. In many instances, the U.S. commanders will wear multinational hats. For example, in Operation ALLIED FORCE, the JFACC functioned in three roles. He functioned as the NATO air commander, the JFACC, and COMAFFOR. Coordinating authority and DIRLAUTH may become especially important alternatives to the use of traditional command authorities when it comes to accomplishing a multinational mission.

NATO Operations

AAP-6 (V) is a NATO glossary of terms compiled by direction of the NATO Military Committee. The purpose of AAP-6 (V) is to standardize terminology used throughout NATO. AAP-6 (V) is established as the authoritative NATO terminology reference. Member nations agree to use the terms and definitions published therein. NATO Standardization Agreement (STANAG) 3860, AFDD 1-2.

NATO Terms

Full Command: Full command is the military authority and responsibility of a superior officer to issue orders to subordinates. It covers every aspect of military operations and administration. Full command exists only within national military services. No NATO commander has full command over the forces that are assigned to him. The assignment of forces to NATO by individual nations only includes operational command (OPCOM) or operational control (OPCON). AAP-6 (V) modified version 01, page 2-F-6.

Operational Command (OPCOM): This is the authority granted to a commander to assign missions or tasks to subordinate commanders, to deploy units, to reassign forces and to retain or delegate operational and/or tactical control. No responsibility for administration or logistics is included in OPCOM. AAP-6 (V) modified version 01, page 2-0-2. NATO OPCOM is generally equivalent to U.S. OPCON.

Control: Control is that authority exercised by a commander over part of the activities of subordinate organizations or other organizations not normally under his command, including responsibility for implementing orders or directives. All or part of "control" may be transferred or delegated. AAP-6 (V) modified version 01, page 2-C- 11.

Operational Control (OPCON): OPCON is the authority delegated to a commander to direct assigned forces to accomplish specific missions or tasks, usually limited by function, time or location, and to deploy units and retain or assign tactical control of those units. It does not include the authority to assign separate missions to components of concerned units or administrative or logistics control. AAP-6 (V) modified version 01, page 2-0-3. NOTE: The U.S. and NATO definitions of OPCON should not be confused or interchanged. The NATO definition of OPCON more closely resembles the U.S. definition of TACON. JP 0-2.

Tactical Control (TACON): TACON is the detailed and usually local direction and control of movements or maneuvers to accomplish assigned missions or tasks. AAP-6 (V) modified version 01, page 2-T- 1.

Administrative Control: Administrative control is the direction or exercise of authority over subordinate or other organizations regarding administrative matters such as personnel management, supply, services, and other matters not included in operational missions of subordinate or other organizations. AAP-6 (V) modified version 01, page 2-A-2.

REFERENCES

1. Article II, § 2, U.S. Constitution
2. 10 U.S.C. § 101, 101 (b)(7) and (8)
3. 10 U.S.C. §161-165
4. 10 U.S.C. § 601
5. 10 U.S.C. § 750
6. 10 U.S.C. § 777
7. 10 U.S.C. § 889, 890, and 892 (UCMJ arts 89, 90, 92)
8. 10 U.S.C. § 3581
9. 10 U.S.C. § 8013(b)
10. 10 U.S.C. § 8034
11. 10 U.S.C. § 8067
12. 10 U.S.C. § 8579
13. 10 U.S.C. § 8074
14. 50 U.S.C. § 401
15. White House Memorandum, *Unified Command Plan*, 17 December 08 (S)
16. DODD 5100.1, *Functions of the Department of Defense and Its Major Components*, 1 August 2002
17. JP 0-2, *Unified Action Armed Forces (UNAAF),* 24 February 1995
18. JP 1, *Doctrine for the Armed Forces of the United States,* 24 May 2007
19. JP 1-02, *DOD Dictionary of Military and Associated Terms,* 17 October 2008
20. JP 3-0, *Doctrine for Joint Operations,* September 2006
21. JP 3-16, *Joint Doctrine for Multinational Operations,* 5 April 2000
22. JP 3-30, *Command and Control for Joint Operations,* June 2003
23. AFDD 1, *Air Force Basic Doctrine,* 1 September 1997
24. AFDD 2, *Operations and Organization,* 3 April 2007
25. AFDD 2-1, *Air Warfare,* 22 January 2000
26. AFDD 2-8, *Command and Control,* 1 June 2007
27. AFI 33-328, *Administrative Orders,* 16 January 2007
28. AFI 38-101, *Air Force Organization*, 4 April 2006 as amended
29. AFI 51-604, *Appointment to and Assumption of Command*, 4 April 2006
30. NATO Standardization Agreement (STANAG) 3860

CHAPTER 14

AIR FORCE INTELLIGENCE LAW (INTELLIGENCE OVERSIGHT)

BACKGROUND

During the 1970s, Congress determined that United States (U.S.) citizens had been subjected to deliberate surveillance simply because of political beliefs, regardless of whether or not they posed an actual threat to U.S. national security. As such, restrictions were placed on surveillance of U.S. persons, information already in intelligence files was directed to be destroyed, and a structure to regulate future intelligence collection was implemented. The Department of Defense (DOD) Intelligence Oversight program ensures that all DOD intelligence, counterintelligence, and intelligence related activities are conducted in accordance with applicable U.S. law, Presidential Executive Orders, and DOD directives and regulations. The program is designed to ensure that the DOD can conduct its intelligence and counterintelligence missions while protecting the statutory and constitutional rights of U.S. persons.

President Ford issued the first of a series of Executive Orders (EOs) placing significant controls on the conduct of all intelligence activities. Executive Order 12333, signed by President Reagan in 1981, serves as the cornerstone of this series of EOs. Executive Order 12333 extended the powers and responsibilities of U.S. intelligence agencies and directed the leaders of U.S. federal agencies to co-operate fully with requests for information received from the Central Intelligence Agency. Perhaps more significantly, EO 12333 provides circumstances under which intelligence community entities are authorized to collect, retain, or disseminate information concerning U.S. persons. Executive Order 12333 was amended by EO 13470, signed by President Bush on 30 July 2008, and serves to delineate the roles and responsibilities of the Director of National Intelligence (DNI).

INTELLIGENCE OVERSIGHT WITHIN THE AIR FORCE

Conduct of Intelligence Activities

Information concerning capabilities, intentions and activities of foreign governments is essential for national defense purposes and to conduct international diplomacy. The methods used to acquire such information must comply with the U.S. Constitution, other applicable law, regulation and policy. Intelligence oversight is intended to ensure that the rights of U.S. citizens are protected during the process of obtaining intelligence information necessary to protect U.S. national security. Information may only be collected about a U.S. person if such collection is deemed necessary by appropriate authority to accomplish a duly authorized or assigned mission of an intelligence component, and the type of information to be collected falls within one of thirteen categories specified in DOD 5240.1-R, *Procedures Governing the Activities of DOD Intelligence Components that Affect United States Persons*,

Chapter 2. Even open source information (*e.g.*, that contained in a newspaper) concerning U.S. persons can only be collected for intelligence purposes pursuant to an authorized mission. Intelligence components collecting such information must also comply with the requirements of the Privacy Act, 5 U.S.C. 552a.

Scope

The intelligence oversight program applies to all Air Force active duty, Air Force Reserve Command, and Air National Guard (ANG) (when performing a federal function) intelligence units, staff organizations, and non-intelligence organizations that perform intelligence-related activities that could collect, analyze, process, retain, or disseminate information on U.S. persons, and those who exercise command over these units and organizations. It applies to all military and civilian personnel—to include host nation employees—assigned or attached to those units on a permanent or temporary basis, regardless of specialty or job function. It also applies to contractors or consultants if they are involved in activities subject to the procedures in DOD 5240.1-R. It applies to Traditional Reservists, Air Reserve Technicians, Individual Mobilization Augmentees, and other Air Force Reserve Command members assigned or attached to intelligence units and staffs or performing intelligence related activities. It applies to all ANG members in a Title 10 or Title 32 status assigned or attached to intelligence units or staffs or performing intelligence-related activities.

The intelligence oversight program rules also apply to non-intelligence units and staffs when they are assigned an intelligence mission, and to personnel doing intelligence work as an additional duty, even if those personnel are not assigned or attached to an intelligence unit or staff. The Senior Intelligence Officer of the major command (MAJCOM), field operating agency (FOA), or ANG determines applicability. Additionally, the rules apply to Air Force units and staffs that conduct information operations activities who are components of intelligence organizations. The program also applies to all intelligence personnel who support information operations activities with products or services. Non-intelligence units or staffs running systems that acquire and disseminate commercial satellite products to intelligence units and staffs must also adhere to the Intelligence Oversight program rules.

Intelligence Oversight Panel

The Air Force intelligence oversight panel (IOP) provides review and guidance on all Air Force intelligence activities. The IOP reviews the legality and propriety of Air Force intelligence activities, the adequacy of guidance for Air Force intelligence unit and staff intelligence oversight programs, and the state of intelligence oversight activities, taking or recommending necessary actions, as appropriate. The IOP members are the Air Force Inspector General (SAF/IG), The Air Force General Counsel (SAF/GC), and the Deputy Chief of Staff, Intelligence, Surveillance and Reconnaissance (HAF/A2).

SAF/IG and SAF/GC Roles in Intelligence Oversight

SAF/IG is tasked with developing practices and procedures for monitoring and reporting to the Assistant to the Secretary of Defense for Intelligence Oversight (ATSD/IO) any Air Force intelligence activities that may raise questions of legality or propriety. The SAF/IG is required to send quarterly reports to the ATSD/IO concerning oversight inspection activity. SAF/IG reviews Air Force Inspection Agency, MAJCOM, and FOA Inspector General reports of Intelligence Oversight activities and chairs the IOP.

In addition to serving as the senior voting member of the IOP, SAF/GC is tasked with providing advice regarding the legality or propriety of activities of Air Force intelligence components. Intelligence oversight issues that cannot be resolved by an Air Force legal office or judge advocate personnel advising an Air Force intelligence component must be referred to SAF/GC. The Air Force Intelligence, Surveillance and Reconnaissance Agency (AFISRA) staff judge advocate can also be contacted for assistance regarding intelligence oversight matters.

The SAF/GC and SAF/IG share responsibility for assessing and reporting intelligence-related Air Force activities that may violate law, policy, intelligence oversight directives, or regulations to higher authorities.

LAW ENFORCEMENT

The rules governing the collection of intelligence information do not generally apply to non-intelligence information collected pursuant to a criminal investigation conducted by law enforcement entities such as the Air Force Office of Special Investigations (AFOSI) or Security Forces. Law enforcement agencies acquire and retain a significant amount of non-intelligence information on U.S. persons and others. The rules regarding the acquisition and retention of this type of information are contained in DODD 5200.27, *Acquisition of Information Concerning Persons and Organizations not Affiliated with the Department of Defense*, and AFI 71-101, Volume 1, *Criminal Investigations*.

REPORTING QUESTIONABLE ACTIVITIES

Air Force agencies, units, and personnel must report any conduct that constitutes, or is related to, an intelligence activity that may violate law, any EO or Presidential directive, applicable DOD regulations or policies, AFIs, and any other AF regulatory or policy documents. Use of the supervisory chain or chain of command is encouraged when reporting possible violations. However, reports may be made directly to SAF/GC, SAF/IG, The Office of the Secretary of Defense General Counsel OSD/GC or ATSD/ (IO). See para 7.1 of AFI 14-104, Oversight of Intelligence Activities.

THE ROLE OF JUDGE ADVOCATES IN INTELLIGENCE OVERSIGHT

With the rapid evolution of powerful and widely available systems comes the need for increased intelligence oversight vigilance. Anyone with a computer and an Internet

connection has the ability to access considerable information on U.S. persons. As such, the legal office with primary responsibility for intelligence oversight, SAF/GC, relies on uniformed judge advocates to provide legal oversight at all echelons throughout the Air Force.

While not all judge advocates are expected to be experts in the field of intelligence oversight, they must at a minimum be sensitive to intelligence oversight issues. More specifically, though most judge advocates are not intelligence oversight monitors *per se (*that is primarily a SAF/IG function), legal personnel must have familiarity with intelligence oversight rules, be ready to provide basic legal advice to intelligence personnel at their unit, be sensitive to Internet use by local personnel and the attendant possibility for intelligence oversight violations of such activity, coordinate reporting of questionable activity through proper channels, and serve as a resource for intelligence oversight information and assistance.

Issues of particular sensitivity for judge advocates include: application of the rules to emerging technologies; off duty intelligence activities (activities that may be acceptable from government computers may violate intelligence oversight rules if conducted from personal computers, since such use can mask the government character of the action); and collection activities beyond the official mission of the particular organization or individual.

Again, the AFISRA Staff Judge Advocate can be contacted for assistance regarding intelligence oversight matters.

SOURCE DOCUMENTS FOR INTELLIGENCE OVERSIGHT

EO 12333, *United States Intelligence Activities*

Part 1 of this EO defines the goals, direction, duties, and responsibilities of intelligence agencies. Part 2 provides circumstances under which intelligence community agencies are authorized to collect, retain, or disseminate information concerning U.S. persons. An important restriction contained in EO 12333 is that all agencies must use the least intrusive collection techniques feasible. To be effective, many intelligence activities must be conducted in secrecy, and many of the methods used may be considered to be intrusive on individual freedoms and privacy. Intelligence agencies are cautioned to resort to secretive, intrusive investigative techniques to collect information within the United States or about a U.S. person anywhere only when it is not feasible to collect the information from publicly available sources or with the consent of the U.S. person concerned.

EO 13470, Further Amendments to Executive Order 12333, United States Intelligence Activities

As the name suggest, this EO amends EO 12333 and replaces Part 1 in its entirety. It principally serves to define the goals, direction, duties, and responsibilities of intelligence agencies, and specifically delineates the roles and responsibilities of the DNI.

EO 12863, *President's Foreign Intelligence Advisory Board*

This EO, in part, issued a new EO which renamed the President's Foreign Intelligence Advisory Board (PFIAB) as the President's Intelligence Advisory Board (PIAB) and moved the Intelligence Oversight Board (IOB) under the PIAB as a subcommittee. The IOB is charged with reporting intelligence activities to the President which the IOB believes may be unlawful or contrary to EO.

The Foreign Intelligence Surveillance Act of 1978 (FISA) (50 U.S.C. 1801-1811)

FISA provides additional restrictions on intelligence gathering activities, requiring court approval for national security wiretaps. The act was later amended to provide procedures governing physical searches and pen register/trap and trace devices (50 U.S.C. 1841-1846).

The Intelligence Oversight Act of 1980 (50 U.S.C. 413)

The Intelligence Oversight Act established a series of Congressional reporting requirements governing intelligence agency activities.

DODD 5240.01, *DOD Intelligence Activities*

This publication, together with DOD 5240.1-R described below, implements within the DOD the requirements of EO 12333, assigning the ATSD/IO duties as the DOD liaison with the IOB and as the oversight authority for the individual services as they carry out their responsibilities under DOD oversight directives. Specifically, paragraph 4.6 prohibits DOD intelligence components from requesting that any person or entity undertake unauthorized or prohibited activities. Moreover, in accordance with paragraph 4.7, DOD intelligence personnel shall report all intelligence activities that may violate a law, EO, directive, or applicable DOD policy to the Inspector General, General Counsel , or ATSD/IO. It should also be noted that this reporting requirement is not limited to intelligence collection violations *per se*, but relates to any violation of law, EO or directive which is related to intelligence activities.

DOD Regulation 5240.1-R, *Activities of DOD Intelligence Components That Affect United States Persons*

This regulation establishes procedures enabling DOD intelligence components to accomplish authorized functions while at the same time protecting the constitutional rights of U.S. persons. DOD 5240.1-R is the authoritative guidance used by DOD intelligence agencies when making decisions to collect, retain, or disseminate any information concerning U.S. persons. This regulation provides detailed implementation of DOD policy on intelligence oversight, placing special emphasis on the protection of the constitutional rights and individual privacy of U.S. persons. DOD 5240.1-R requires quarterly reporting by each Service's inspector general and general counsel, and establishes requirements for familiarity training for all DOD intelligence component employees. Under the authority of this DOD regulation, as specifically outlined in AFI 14-104 discussed below, SAF/IG

conducts inspections of USAF intelligence and counterintelligence activities for improprieties and submits quarterly reports to the ATSD/IO. This regulation contains fifteen general intelligence oversight procedures outlined below:

> ***Procedure 1*** defines the applicability and scope of the Intelligence Oversight Program (*i.e.*, DOD intelligence components only).
>
> ***Procedures 2-4*** provide tightly limited authority for intelligence components to collect, retain, and disseminate information concerning U.S. persons.
>
> ***Procedures 5-10*** provide guidance with respect to the use of certain collection techniques to obtain information for foreign intelligence and counterintelligence purposes.
>
> ***Procedures 11-15*** govern the responsibilities associated with contracting for services, assisting civilian law enforcement authorities, experimenting on human subjects, overseeing the conduct of DOD intelligence personnel, and investigating and reporting possible violations of intelligence oversight procedures.

AFI 14-104, *Oversight of Intelligence Activities*

This instruction provides guidance on the scope and applicability of the Air Force Intelligence Oversight Program. It also provides guidance on intelligence oversight training and inspection requirements, establishes requirements to report questionable activity through the chain of command, SAF/IG, SAF/GC, or ATSD/IO, and specifies inputs required for the quarterly reports. This AFI outlines the three-step process for lawful collection against a U.S. person:

> ***Step 1:*** Any collection, retention and/or dissemination of U.S. person information must be based on a proper function/mission assigned to the component;
>
> ***Step 2:*** Collection must fall within one of 13 categories of information authorized by DOD 5240.1-R, Procedure 2;
>
> ***Step 3:*** Collection must be approved by the appropriate senior official.

DOD Office of General Counsel Memorandum, "Principles Governing the Collection of Internet Addresses by DOD Intelligence and Counterintelligence Components," 06 February 2001

This policy letter provides guidance to assist in applying intelligence oversight principles to use of the Internet, specifically regarding when Internet Protocol (IP) addresses, e-mail addresses and Uniform Resource Locators (URLs) should be treated as identifying U.S. persons for the purposes of intelligence oversight compliance.

DEFINITION OF IMPORTANT TERMS

Air Force Intelligence Component

All personnel and activities of the organization of the AF Deputy Chief of Staff, Intelligence, Surveillance, and Reconnaissance, counterintelligence units of the Air Force Office of Special Investigations, Air Force Intelligence Analysis Agency, and other organizations, to include AFISRA, staffs, and offices when used for foreign intelligence or counterintelligence activities to which EO 12333 (part 2) applies.

Intelligence Activities

All activities that DOD intelligence components are authorized to undertake pursuant to EO 12333. Executive Order 12333 assigns the Services' intelligence components responsibility for: 1) collection, production, dissemination of military and military related foreign intelligence and counterintelligence, and information on the foreign aspects of narcotics production and trafficking, and 2) monitoring of the development, procurement and management of tactical intelligence systems and equipment and conducting related research, development, and test and evaluation activities.

Non-U.S. person

A corporation or corporate subsidiary incorporated abroad, even if partially or wholly owned by a corporation incorporated in the U.S., is not a U.S. person. A person or organization outside the U.S. is presumed not to be a U.S. person unless specific information to the contrary is obtained. An alien in the U.S. is presumed not to be a U.S. person unless specific information to the contrary is obtained.

Questionable activity

Procedure 15 of DOD 5240.1-R defines "questionable activity" as any conduct that constitutes, or is related to, an intelligence activity that may violate the law, any EO or Presidential directive, including EO 12333 or applicable DOD policy, and directs that all DOD intelligence personnel must report any questionable activity to the general counsel or inspector general for their particular DOD intelligence component, the Office of the Secretary of Defense General Counsel (OSD/GC), or to ATSD/IO.

"U.S. person"

A U.S. citizen, an alien known by the DOD intelligence component concerned to be a permanent resident alien, an unincorporated association substantially composed of U.S. citizens or permanent resident aliens, or a corporation incorporated in the U.S., unless it is directed and controlled by a foreign government or governments.

REFERENCES

1. U.S. Constitution, Amendment IV
2. Privacy Act, 5 U.S.C. § 552a
3. Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-1845
4. Intelligence Oversight Act, 50 U.S.C. § 413
5. Executive Order 12333, *United States Intelligence Activities*, amended 30 July 2008.
6. Executive Order 12863, *President's Foreign Intelligence Advisory Board*, 58 Fed. Reg. 48441, 13 September 1993
7. DODD 5240.01, *DOD Intelligence Activities*, 27 August 2007
8. DOD 5240.1-R, *Procedures Governing the Activities of DOD Intelligence Components that Affect United States Persons*, 1 December 1982
9. DODD 5200.27, *Acquisition of Information Concerning Persons and Organizations not Affiliated with the Department of Defense*, 7 January, 1980
10. AFI 14-104, *Oversight of Intelligence Activities*, 16 April 2007
11. AFI 71-101, Volume 1, *Criminal Investigations,* 1 December 1999 as amended
12. DOD Office of General Counsel Memorandum, "Principles Governing the Collection of Internet Addresses by DOD Intelligence and Counterintelligence Components," 06 February 2001 www.fas.org/irp/agency/dod/addresses.pdf
13. ATSD-IO web site: http://www.defenselink.mil/atsdio/

CHAPTER 15

RULES OF ENGAGEMENT

BACKGROUND

> Joint Publication (JP) 1-02 defines Rules of Engagement (ROE) as "directives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered."

The NATO ROE present a similar, more detailed definition:

> Rules of Engagement are directives to military forces (including individuals) that define the circumstances, degree, and manner in which force, or actions which might be construed as provocative, may, or may not, be applied. ROE are not used to assign tasks or give tactical instructions. *NATO Rules of Engagement*

Rules of engagement are restrictions a State places on its military forces regulating when, where, how, why, those forces accomplish a mission and, in some cases, against whom commanders and their troops may use force. Each State issues ROE to its military personnel based upon an interpretation of its obligations under domestic and international law, national policy interests, and military goals and capabilities.

The phrase "rules of engagement" is frequently used informally to describe command guidance on procedures and processes not relating to the use of force, such as guidance on content and colors for briefing slides or making coffee in an operations center. Conversely, it is important that judge advocates are aware that documents other than those titled "ROE" also contain directives concerning the use of force. Judge advocates should review all guidance applying to a given operation for provisions directly or indirectly affecting the use of force, while using the term carefully in their interaction with others.

PURPOSES OF ROE

As a theoretical construct, ROE represent the intersection of political, military, and legal purposes.

Political Purposes

Joint Publication 5-00.2 states that "ROE are a reflection of the political will of the government. Missions cannot be completed successfully without the popular support of the American people and their elected representatives." Rules of engagement ensure that

national policies and objectives are reflected in the action of commanders in the field, particularly under circumstances in which communication with higher authority is difficult or impossible. Rules of Engagement provide guidance from the President and the Secretary of Defense (SECDEF) to military units on the use of force. To further national political and diplomatic interests, ROE may restrict certain targets or use of particular weapons so as not to needlessly antagonize the enemy, diminish public opinion, or destroy infrastructure that would make post- conflict reconstruction more difficult.

Political concerns affecting ROE also have an international dimension. International diplomatic relations and public opinion factor into U.S. national strategy and policy. Within multinational military coalitions, each state's forces must operate within its own domestic political and legal landscape, as well as its interpretation of its international legal commitments. Compounding this complexity are relationships with host nations where operations are conducted or supported. These international issues combine to help shape U.S. military strategy and policy and, in turn, U.S. ROE.

Military Purposes

In addition to addressing political imperatives, ROE assist commanders to accomplish assigned missions. JP 5-00.2 states:

> Properly drafted ROE help accomplish the mission by ensuring the use of force in such a way that it will be used only in a manner consistent with the overall military objective. They must implement the inherent right of self-defense and they support mission accomplishment. ROE can assist the commander by preventing the unintended start of hostilities prior to achieving a desired readiness posture; by establishing economy of force considerations during hostilities; and by protecting from destruction enemy infrastructure that may prove logistically important at a later date.

ROE also act as a control mechanism for the transition from peacetime to combat operations or in ambiguous mission environments. ROE provide limits on operations to ensure friendly forces do not overextend or trigger ill-advised escalation with which friendly forces are not prepared to contend. ROE ensure that all subordinate forces stay within the mission's political mandate, and direct forces to act in a well-disciplined manner toward the civilian population. ROE also establish positive controls to prevent fratricide.

Legal Purposes

ROE provide constraints on a force's actions consistent with both domestic and international law. Since ROE are rules we impose on ourselves, they are a primary means for ensuring that all our forces scrupulously comply with the law of armed conflict (LOAC). Nevertheless, ROE are not as comprehensive as LOAC, nor does the absence of a limiting ROE excuse a LOAC violation. Policy constraints imposed by the mission mandate, concerns for coalition cohesion, or the needs of political policy can impose greater restrictions on commanders than LOAC.

Commanders routinely issue ROE to reinforce LOAC principles, such as prohibitions on the destruction of religious or cultural property, or minimization of injury to civilians and civilian property. Such ROE provide an important mechanism to assist commanders in fulfilling their LOAC obligation to "prevent and suppress breaches" of LOAC.

SOURCES OF ROE.

Standing ROE

Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3121.01B, *Standing Rules of Engagement/Rules for the Use of Force for U.S. Forces,* is the basic ROE document for all U.S. forces during military attacks on the U.S. and during all military operations, contingencies, and terrorist attacks outside the territory of the U.S. not of purely a law enforcement or security nature. Unless otherwise approved by the President or SECDEF, all ROE promulgated by U.S. forces must comply with SROE/SRUF. Detailed discussion of this document is provided in a separate section, below.

NATO Rules of Engagement (MC 362, Enclosure 1)

This is the basic ROE document for all forces participating in "NATO/NATO-led military operations."

Mission-Specific ROE

Rules of Engagement specifically tailored to a particular mission are almost always included as an annex to the operational plan (OPLAN) or operational order (OPORD). The ROE contained in OPLANS or OPORDS can be modified by reissuing the entire document, issuing regular changes to the document, or by interim change messages from higher headquarters.

Other documents that restrict the use of force

In addition to the ROE, judge advocates must be aware of other documents that may reissue, complement and/or amplify the ROE.

Special Instructions (SPINS), are periodically issued by the Joint or Combined Air Component Commander (JFACC or CFACC) via the Joint or Combined Air Operations Center (JAOC or CAOC) and usually have several sections that concern the use of force. The SPINS are produced at regular intervals by the Combat Plans division of the JAOC based on inputs from all JAOC functional teams. Most SPINS have an ROE subsection, which contains a copy of relevant provisions of the applicable ROE together with any amplification the JFACC deems necessary for complex ROE provisions from higher echelons of command, and air component guidelines for the application of force. Other sections to carefully examine include the "Search and Rescue" subsection which may contain ROE-like guidance for combat search and rescue (CSAR) operations. The "Communications" section may contain restrictions on the use of force without a specific

communications capability (*e.g.*, JAOC, Airborne Warning and Control System (AWACS) aircraft, or Joint Terminal Attack Controllers (JTAC), *etc.*).

Some JFACCs may issue a separate communications plan, rather than including this information in SPINS, which often contains a command and control section generally covering airborne and ground-based communications procedures. This section may contain provisions concerning positive control of close-air support or air-to-air missions.

The airspace control order (ACO), produced and periodically reissued by the Airspace Management team of the JAOC, may contain ROE-like provisions, such as restrictions on when aircrew may turn their MASTER ARM switches on or where they may jettison fuel tanks and ordnance. The daily air tasking order (ATO), produced by the Combat Plans division of the JAOC, may contain late-breaking, airframe-specific, or individual target-specific ROE restrictions, normally referenced on the cover page or ATO banner. These can involve restrictions based on new intelligence or emergent surface-to-air threats.

SOURCE DOCUMENTS FOR THE DEVELOPMENT OF ROE

The following documents may be used as sources for the development of mission specific ROE.

United Nations (UN) Documents

1. UN Security Council resolutions
2. UN Secretary-General's mission-specific terms of reference
3. UN Force Commander's regulations
4. Status of mission agreement (SOMA)/UN Model SOMA
5. *UN Guidelines for the development of Rules of Engagement (ROE) for United Nations Peacekeeping Operations, 1 U.N. Doc. MD/FGS/0220.001, May 2002*

NATO documents

1. North Atlantic Council (NAC) resolutions
2. NATO Military Committee planning elements or guidance

Other Sources

1. Status of forces agreements (SOFAs), infrastructure or facilities agreements, mutual defense cooperation agreements (MDCAs) (e.g., restrictions on numbers and types of flights)
2. Host nation domestic law and treaty obligations (e.g., Ottawa Convention)

3. U.S. domestic law or treaty obligations

THE U.S. STANDING RULES OF ENGAGEMENT

The SROE/SRUF is the key document for the application of U.S. military force. Since 2005, the SRUF have been combined with the SROE into a single SROE/SRUF instruction as a means to centralize the fundamental rules applying to the use of force by U.S. military personnel worldwide.

SROE/SRUF Structure

The current SROE/SRUF basic instruction (pages 1-4) and some of its enclosures are unclassified and contain basic ROE (Enclosure A) and RUF (Enclosure L) principles. The text of Enclosures A and L include no classified material, thereby allowing broad dissemination within U.S. forces and sharing with allies and coalition partners. Enclosures A and L are supplemented by a number of classified appendices and other enclosures addressing specific mission areas.

A. Standing Rules of Engagement for U.S. Forces

Appendix A—Self Defense Policy and Procedures

B. Maritime Operations

Appendix A—Defense of U.S. Nationals and their Property at Sea

Appendix B—Recovery of U.S. Government Property at Sea

Appendix C—Protection and Disposition of Foreign Nationals In the Control of U.S. Forces

C. Air Operations

D. Land Operations

E. Space Operations

F. Information Operations

G. Noncombatant Evacuation Operations

H. Counterdrug Support Operations Outside U.S. Territory

I. Supplemental Measures

Appendix A—General Supplemental Measures

Appendix B—Supplemental Measures for Maritime Operations

Appendix C—Supplemental Measures for Air Operations

Appendix D—Supplemental Measures for Land Operations

Appendix E—Supplemental Measures for Space Operations

Appendix F—Message Formats and Examples

J. Rules of Engagement Process

K. ROE References

L. Standing Rules for the Use of Force for U.S. Forces

M. Maritime Operations Within U.S. Territory

N. Land Contingency and Security-Related Operations Within U.S. Territory

O. Counterdrug Support Operations Within U.S. Territory

P. RUF Message Process

Q. RUF References

GENERAL PRINCIPLES CONTAINED IN THE SROE

Applicability

The SROE apply to all "military operations and contingencies and routine Military Department functions occurring outside U.S. territory . . . and U.S. territorial seas," as well as "air and maritime homeland defense missions" inside the U.S. territory and territorial seas. SROE/SRUF, para. 3a. The SRUF apply to "DOD civil support . . . and routine Military Department Functions . . . within U.S. territory or U.S. territorial seas," as well as land homeland defense missions within U.S. territory . . ." SROE/SRUF, para. 3b. The SRUF also apply to "DOD forces, civilians, and contractors performing law enforcement and security duties at all DOD installations (and off installations while conducting official DOD security functions), within or outside U.S. territory, unless otherwise directed by SECDEF." SROE/SRUF, para. 3b.

Responsibilities

The SECDEF approves SROE, as with any ROE for U.S. forces, and authorizes supplemental measures for major operations and certain mission types. The Joint Chiefs of Staff Operations Division (J-3) is responsible for maintenance and dissemination of the SROE. Combatant commanders can issue theater-specific and operation-specific ROE (with

SECDEF approval, as required), authorize some specific supplemental measures, and ensure SROE implementation by subordinate echelons. Commanders at every echelon must ensure that any mission ROE they issue comply with the SROE/SRUF, "ROE/RUF of senior commanders, the Law of Armed Conflict, applicable international and domestic law."

Interpretation

The SROE are permissive, meaning commanders may use "any lawful weapon or tactic available for mission accomplishment" unless otherwise directed by SECDEF. SROE/SRUF, para. 6. However, the SRUF are not permissive, but require SECDEF approval of any weapon or tactic used.

Multinational Operations

When U.S. forces are under the operational or tactical control of a multinational force, U.S. forces operate under the multinational force ROE for mission accomplishment, if ordered to do so by SECDEF. SROE/SRUF, Encl. A, para. 1f. United States forces always operate under self-defense ROE as set forth in the SROE, Enclosure A, unless otherwise ordered by SECDEF. When operating with a multinational force but under U.S. operational control (OPCON) or tactical control (TACON), U.S. forces should attempt to create common ROE with other national forces. If not possible, U.S. forces will inform the multinational forces that U.S. forces will operate under the SROE. Only the President or SECDEF can authorize U.S. forces to engage in collective self-defense of multinational or coalition forces, civilians, or property. SROE/SRUF, Enclosure A, para 3c.

Self-defense

The concept of self-defense is fundamental in the SROE: "These rules do not limit a commander's inherent authority and obligation to use all necessary means available and to take all appropriate actions in self-defense of the commander's unit and other U.S. forces in the vicinity." SROE, Enclosures A and L.

Inherent Right and Obligation of Self-Defense

Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Military members may act in individual self-defense unless otherwise directed by a unit commander. To balance this command-driven approach to self-defense with the safety and security of individual troops, the commander's right and obligation of unit self-defense under the SROE/SRUF includes not circumscribing individual self-defense recklessly or without following the SROE/SRUF ROE. SROE, Enclosure A, para. 3a.

National Self-Defense

The SROE define national self-defense as defense of the U.S., U.S. forces, and under some circumstances U.S. nationals, property, and commercial interests. SROE, Enclosure A, para. 3b.

Collective Self-Defense

If authorized by the President or SECDEF, U.S. forces may use force to protect designated non-U.S. persons or property from hostile acts or demonstrated hostile intent. SROE, Enclosure A, para. 3c.

Elements of Self-Defense

Use of force in self-defense must be necessary and proportionate.

Necessity: The requirement for military necessity is expressed in the SROE by the requirement that a hostile act is committed or hostile intent is demonstrated against U.S. forces or other designated persons or property. SROE/SRUF, Encl. A, para. 4a(2).

Proportionality: In self-defense, U.S. forces may only use that amount of force necessary to decisively counter a hostile act or demonstrated hostile intent and ensure the continued safety of U.S. forces or other designated persons and property. SROE/SRUF, Encl. A, para. 4a(3). The force used must be reasonable in intensity, duration, and magnitude to the threat based on all facts known to the commander at the time.

Common Terms used in ROE

Hostile act: Force used against U.S. forces, designated persons and property, or intended to impede the mission of U.S. forces. SROE/SRUF, Encl. A, para. 3e.

Hostile intent: "The threat of imminent use of force against the United States, U.S. forces or other designated persons or property." SROE/SRUF, Encl. A, para 3f. *Pursuit:* U.S. forces may "pursue and engage" forces that have committed a hostile act or demonstrated hostile intent, as long as those forces continue to engage in such behavior. SROE/SRUF, Enclosure A, para. 4b.

Imminent Use of Force: The SROE/SRUF state that determining the imminence of a threat of force "will be based on an assessment of all facts and circumstances known to U.S. forces at the time and may be made at any level." SROE/SRUF, Encl. A, para 3g. The SROE/SRUF also express the U.S. policy that "imminent does not necessarily mean immediate or instantaneous." *Id.*

Declared Hostile Force: Forces, organizations, and individuals can be declared hostile by the President, the SECDEF, or their designee. United States forces may engage positively identified declared hostiles in accordance with ROE for mission accomplishment, not self-

defense ROE. Operational or mission-specific ROE provide detail on who may engage declared hostiles, as well as when, where, and how to engage them. See SROE/SRUF, Encl. A, App. A, para. 3, for more information on the policy and procedures for declaring forces hostile.

MULTINATIONAL CONSIDERATIONS

Not all States use ROE in the same manner as the United States and some States do not operate under ROE at all. United States commanders and judge advocates involved in developing or executing ROE for coalition operations must account for these differences in all operational planning and training to ensure at least a common understanding of the rules affecting the use of force of each participating nation or organization. For further information see Chapter 20, Multinational Air Operations.

FUNCTIONAL ENCLOSURES

In addition to the unclassified and classified sections of the SROE that provide general guidance on self-defense and applicability, the SROE also contain functional enclosures, as listed below.

Supplemental Measures (Enclosure I)

In addition to the basic and functional SROE, commanders may obtain additional authority or restraints for specific missions. To standardize requests for supplemental ROE, the SROE contains a large number of pre-numbered and pre-formatted supplemental measures that are most likely to be requested by commanders. Supplemental ROE are designed to limit or grant authority for mission accomplishment purposes—like the rest of the SROE, they are not intended to limit a commander's inherent right and obligation to engage in self-defense. Finally, they enable subordinate commanders to request additional measures or clarification.

The ROE Process (Enclosure J)

Enclosure J of the SROE/SRUF discusses the ROE process, including incorporating ROE development and dissemination into the operational planning process, as well as drafting and cataloguing requests for implementing supplemental ROE. Predefined supplemental measures not specifically requiring Presidential, SECDEF, or combatant commander approval may be incorporated into combatant command or operation-specific ROE promulgated in accordance with the SROE/SRUF. Enclosure J, para. 2a(4) points out the "significant role" of the staff judge advocate, along with operations and planning personnel, "in developing and integrating ROE into operational planning."

ROE References (Enclosure K)

This section includes a compendium of CJCS, joint, and DOD publications relevant to the ROE process.

SRUF and the RUF Process (Enclosures L-P)

The SRUF are defined in general in the SROE/SRUF, Enclosure L, with further details pertaining to maritime, land, and counterdrug operations set forth in Enclosures M-O, respectively. Enclosure Q lists RUF references.

FUNDAMENTALS OF ROE PLANNING IN AIR OPERATIONS

Good ROE can only be achieved through constant drafting, redrafting, coordination, and planning. Observing some ROE fundamentals during the planning process can, however, help ensure a quality product.

ROE Cell

Commanders should establish an ROE cell as early as possible when planning military operations. In joint planning an ROE planning cell can be established at any echelon (e.g., combatant command, joint task force (JTF) headquarters, JAOC). The ROE cell develops and refines ROE necessary to accomplish the joint planning groups' proposed courses of action. The cell drafts and transmits ROE requests for higher echelon approval and issues ROE authorizations to assigned forces. The ROE cell is usually chaired by a representative from either J-3 (Operations—Combat Operations in a JAOC) or J-5 (Plans—Combat Plans in a JAOC), with a judge advocate as the primary assistant.

ROE as a Process

The ROE development and execution process requires constant review and revision. Most fundamentally, ROE must directly support the commander's operational concept and be an integral part of all planning—from national policy, to the combatant commander's theater OPLAN, and down to individual mission planning.

ROE CONTROL, DISSEMINATION AND TRAINING

ROE Control

Each level of command that issues ROE must have a comprehensive system of ROE quality control. Commanders and their staffs must continuously analyze ROE and recommend modifications required to meet changing operational parameters. The ROE process must anticipate changes in the operational environment and modify supplemental measures to support the assigned mission. Methods must be in place to ensure that only the most current ROE serial is in use throughout the force. To facilitate this, staffs should catalog all supplemental ROE requests and answers, track ROE dissemination messages, and monitor ROE training programs. SROE/SRUF, Encl. J, para. 2b(10).

> Validation of approved ROE and proposed revisions is the responsibility of all echelons—from flying units to JTF headquarters—but the JAOC is the hub of this activity within the air component. Judge advocates serving on the JAOC legal staff

coordinate ROE dissemination with JAs at higher and lower echelons of command. Within the JAOC, JAs have access to air component leadership and to personnel working in all JAOC divisions. In addition, JAOCs employ liaison officers (LNOs) from Air Force units, sister Service units, and allied or coalition forces. These LNOs are an invaluable source of ROE feedback from units executing the entire spectrum of missions. The Army's Battlefield Coordination Detachment (BCD), the Naval and Amphibious Liaison Element (NALE), and the Marine Liaison Officer (MARLO) are excellent sources for checking cohesion of air ROE with that of other joint component commanders.

ROE Dissemination

The SROE contain advice on how to distribute ROE to subordinates and integrate the standing rules into everyday operations. Each echelon of command has an obligation to disseminate baseline ROE, ROE changes, and other guidance to subordinate units, supporting units from other commands and components, and to coalition partners as appropriate. Mission specific ROE will be promulgated by the JFC or geographic combatant commander (GCC). Within the air component, the JFACC will promulgate SPINS which usually reprint relevant parts of the ROE and provide further clarification and amplification. On behalf of the JFACC, the JAOC periodically will "push" ROE changes to subordinate units via message traffic and emails, while also allowing subordinate units to "pull" the guidance from the JAOC web site.

ROE Training

Within the air component, training is conducted by the JAOC continually via a variety of methods, including live training sessions, recorded briefings, and web sites. In addition, operational units conduct ROE training on baseline ROE and SPINS, with an emphasis on guidance of particular relevance to the unit's weapon systems, tactics, and missions. Base-level JAs assist operational squadrons and detachments with ROE training and questions, drawing on the expertise of JAs and other personnel at the JAOC as needed.

REFERENCES

1. CJCSI 3121.01B, *Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces*, 13 June 2005 (S)
2. MC 362/1, *NATO Rules of Engagement*, 2003 (NATO RESTRICTED)
3. JP 1-02, *Dictionary of Military and Associated Terms*, as amended through 17 March 2009 (U)
4. AFDD 2, *Operations and Organization* , 3 April 2007 (U)
5. JP 5-00.2, *Joint Task Force Planning Guidance and Procedures*, 13 January 1999 (U)
6. DODD 2000.1, *Procedures for Handling Requests for Political Asylum and Temporary Refuge*, 3 March 1972 (U)
7. AJP-01(C), *Allied Joint Operations Doctrine*, 21 March 2007

CHAPTER 16

TARGETING AND WEAPONEERING

BACKGROUND

Targeting is the process of selecting and prioritizing targets, then matching appropriate actions to those targets in order to create specific desired effects that achieve objectives, taking into account the operational requirements and capabilities. AFDD 2-1.9.

Targeting is an essential link between national strategy and the tactical application of air, space, and cyberspace power. Strategy allows planners and commanders to choose the best ways to attain desired outcomes and form these into plans, guidance, and objectives that can be used to task specific air and space assets through targeting and the air tasking process. Targeting, in particular, helps translate strategy into distinct actions against targets throughout the battlespace by matching the effect or desired outcome with the available weapon systems. AFDD 2-1.9.

Targeting is a command function and is inherently joint. It requires commander oversight and involvement to ensure proper execution. It is not the exclusive province of one type of specialty or division, such as intelligence or operations, but blends the expertise of many disciplines across the joint force. AFDD 2-1.9.

Targeting occurs at every level of conflict, from strategic to tactical, and it is not solely the domain of airpower, but integrates the full spectrum of joint military capabilities to achieve the commander's objectives. Further, the targeting process is flexible enough to provide solutions in situations ranging from limited-scope, quick-reaction tactical operations to broad multiple-theater campaigns. In the Air Force, the focus is to assist the commander to most effectively and legally employ air, space, and information resources to achieve joint force and national objectives. AFDD 2-1.9.

Weaponeering is one aspect of the targeting process that involves estimating the quantity and type of weapons necessary to achieve a specified level of damage to a given target. AFPAM 14-210, ch. 6, para. 6.1.

TARGETING AND LEGAL CONSIDERATIONS

The law of armed conflict (LOAC) and other legal considerations, such as rules of engagement (ROE), directly affect all phases of targeting and ultimately targeting decisions. Those involved in targeting should have a thorough understanding of these legal considerations and be able to apply them during the targeting process. For further information on general principles of LOAC, see Chapter 2, Law of Armed Conflict for Airmen.

PRINCIPLES OF AERIAL TARGETING

The three fundamental principles of aerial targeting are:

1. There must be a military necessity for the use of force against a target.

2. The use of force must be proportional to the military value of the target.

3. The principle of humanity should be followed to prevent unnecessary suffering as a result of the use of force.

Military Necessity

Is this target a valid military objective? Military necessity acknowledges that attacks can be made against targets, but only targets that are valid military objectives. Combatants are required to distinguish between military objectives and civilians and civilian objects; attacks may not be indiscriminate. The term "military objective" in this context comes from the description in the Additional Protocol to the Geneva Convention that describes military objectives as "those objects by their nature, location, purpose, or use make an effective contribution to military action…." Though the United States is not a signatory to the Additional Protocol, it views this definition as an accurate restatement of customary international law. AFDD 2-1.9, p. 89.

Civilian objects are negatively defined as all objects that are not military objectives. Intentional direct attacks on civilian objects are prohibited. However, this is distinct from the collateral damage that may be caused to civilian objects as a result of an attack on a valid military target. Specific issues associated with certain types of military objectives are discussed below.

Civilian populations may not be intentionally targeted for attack. As it is with civilian objects, however, this is distinct from the incidental injury that may be caused to civilians as a result of an attack on a valid military target. Acts of violence designed to spread terror among the civilian population are prohibited.

Strategic targets may include, for example, reserve forces, military bases, military command and control infrastructure, communications infrastructure, transportation infrastructure, industrial infrastructure, geographic targets (such as choke points) and political targets (such as government agencies that support the war effort).

Operational targets may include air defense systems, ammunition storage areas, lines of communication and mobile forces in transit to the front.

Tactical targets are generally the enemy's forces in the field. Tactical targets in close proximity to our own troops, however, are generally not included in the deliberate targeting process; rather, they are considered close air support (CAS) targets that require the on-scene direction of a forward air controller (FAC).

Proportionality

This principle requires the anticipated loss of civilian life and damage to civilian property incidental to attack not be excessive in relation to the concrete and direct military advantage expected from striking the target. Planners and commanders must weigh the expected military advantages to be gained from affecting a target (kinetic or non-kinetic) against the incidental loss or injury to civilians and the damage or destruction of civilian property. The term "military advantage anticipated" refers to the advantage anticipated from those actions considered as a whole, and not only from isolated or particular actions. A military advantage is not just a tactical gain, but can span the spectrum of tactical, operational, or strategic. In other words, the military benefits to be gained must be considered in the context of the campaign as a whole. AFDD 2-1.9, p. 89.

The principle of proportionality does not per se limit the commander's choice of munitions. Provided that any anticipated collateral damage does not cause "excessive collateral damage" under the proportionality analysis, the use of unguided or large size munitions against enemy combatants or military objectives is not of itself an "indiscriminate attack." In other words, the principle of proportionality does not require the use of precision guided munitions, although other factors may make their use highly desirable.

Unnecessary suffering (Humanity)

This principle requires all feasible precautions, taking into account military and humanitarian considerations, to keep civilian casualties and civilian property damage to a minimum consistent with mission accomplishment and aircrew safety. The decision is made based on the information available at the time. Feasible precautions may include such things as direction of attack, weapon choice, timing of attack (day or night) and warnings prior to attack.

Obligation of defenders. The responsibility to minimize collateral injury to the civilian population not directly involved in the war effort remains one equally shared by the attacker and defender. The nation that uses its civilian population to shield its own military forces violates the law of war at the peril of the civilians behind whom it hides. Thus, if a hospital is being used to hide a legitimate military target, the target may still be destroyed (ordinarily after appropriate warnings). If the enemy positions an anti-aircraft battery upon a dike or rooftop, the battery may still be destroyed. If the enemy locates its headquarters in the center of a city, the headquarters still may be destroyed. If the enemy locates a petrol, oil, and lubricant (POL) storage area near residences, churches or schools, the POL area may still be destroyed. The misuse of civilians and/or civilian objects, however, does not release the attacking forces from either their obligation to protect civilians, or the obligation to minimize incidental injury and collateral damage.

Legal considerations for certain target types

Dual-Use Objects. These are facilities or objects that serve both a military and civilian purpose and may be legitimate military targets. For example, a power grid that supports an

enemy airbase but also supports civilian cities is dual-use, but might be considered a legitimate military target. A target such as this would need to be examined in light of proportionality concerning whether targeting the power grid would cause damage that is excessive in relation to the concrete and direct military advantage expected from striking the target. Typically, dual-use targets require a higher level of approval authority because of the concern for the impact on the civilian population. AFDD 2-1.9, p. 91.

Economic Objects. Historically, these have been factories, workshops, and plants that make an effective (though not necessarily direct) contribution to an adversary's military capability. A more recent and unique example involves the elements of the drug trade in Afghanistan. Members of the Taliban have been utilizing the heroin trade in Afghanistan to generate millions of dollars in revenue which they then use to fund their insurgency, including the purchase of weapons and supplies. In particular, the Taliban commonly operate or control drug labs where there are large amounts of drugs stockpiled and where workers include local villagers and farmers. The U.S. and other members of International Security Assistance Force (ISAF) consider the Taliban-controlled drug labs and drug caches to make an effective contribution to the Taliban's military capability and therefore legitimate targets that may be lawfully targeted by military forces. Like dual-use targets, these types of targets typically require a higher level of approval because of the particular facts and circumstances regarding the nature, location, use, and purpose of the target. AFDD 2-1.9, p. 91.

Lines of Communication. Transportation systems (roadways, bridges, etc.) and communication systems (TV, radio), while civilian in nature, may also be considered legitimate military targets based on their use. Like dual-use and economic objects, these may require higher level of approval based on the particular facts and circumstances regarding nature, location, use, and purpose of the target. AFDD 2-1.9, p. 91.

Dangerous forces. There is no general proscription from attacking strategic targets such as dams, dikes, or even nuclear power plants. However the United States considers and takes appropriate steps to minimize casualties with such targets.

Protection of Medical Units, Hospitals, and Medical Transport. Under the Geneva Conventions, these are not to be attacked. These should be marked by a distinctive medical emblem such as the Red Cross, Red Crescent, Red Crystal, or some other internationally recognized symbol to show that they are for medical use. Known medical facilities and structures will typically be placed in the combatant commander's no-strike list database (discussed below). Medical facilities may not be used to shield legitimate military targets, and doing so does not prevent an attack on the military target. For instance, placing a surface-to-air missile (SAM) system next to a hospital does not prevent an attack on the SAM system. Usually the combatant commander will issue guidance concerning the approval authority for mobile systems placed next to such protected objects when forces considering strikes are not acting in self-defense. AFDD 2-1.9, p. 92.

Protection of Religious, Cultural, and Charitable Buildings and Monuments. Under the Hague Conventions, and customary law, buildings and monuments devoted to religion, art,

charitable purposes, or historical sites are not to be attacked. These should be marked with internationally recognized distinctive emblems (such as the blue shield with two white triangles). Known buildings and monuments devoted to religious, cultural, and charitable purposes will typically be placed in the combatant commander's no-strike list database. Cultural properties are usually considered irreplaceable and the property of all mankind. They may not be used to shield legitimate military targets. For instance, placing a SAM in the ruins of an ancient temple would not prevent an attack on the SAM system. Usually the combatant commander will issue guidance concerning the approval authority for striking mobile systems placed next to such protected buildings or monuments when forces considering strikes are not acting in self-defense. AFDD 2-1.9, p. 92.

Human Shields. Civilians may not be used as human shields to protect military targets from attack. This is true whether the civilians volunteer to act as human shields or not. Further, the use of human shields does not necessarily prevent the military object from being attacked. As directed or time permitting, targets surrounded by human shields will be reviewed by higher authority for policy and legal considerations based on the specific facts. AFDD 2-1.9, p. 90.

RULES OF ENGAGEMENT

Have applicable restrictions or requirements imposed by the ROE been complied with prior to striking a target?

There is usually information in the ROE that is directly applicable to how, when, or under what circumstances targets may be struck. The ROE may contain such information as target approval authorities for certain types or classes of targets (e.g., economic objects, lines of communication), and approval authorities for time-sensitive or high-collateral damage targets. It may also contain information regarding what weapons may be used (like cluster bombs or anti-personnel mines), the conditions for use, and approval authority for their use. AFDD 2-1.9, p. 93.

"ROE-LIKE" RESTRICTIONS IMPACTING TARGETING

Are there any other restrictions that may impact targeting? Restrictions that are not formally issued as ROE may exist in other documents. In theory, these would be explicitly incorporated in the ROE or at least incorporated by reference. In practice, this is not always the case. As such, it is imperative that all personnel involved in targeting work—operators, planners and judge advocates—ensure they are aware of *all* applicable targeting restrictions regardless of how these restrictions are characterized or issued. Some examples are listed below.

Target Lists

The no-strike list (NSL), restricted list (RTL), joint prioritized effects lists (JPEL) and joint prioritized target list (JPTL) are compiled and maintained by the combatant command. An NSL will contain those facilities and structures that are protected under LOAC (churches,

hospitals, etc). The RTL contains facilities and structures for which approval must first be obtained from the establishing authority before striking. These are on the RTL because there is some function or valid military reason for why it should not be struck. Targets on the JPTL may also contain restrictions in the target folders. Although a target itself may be approved for strike and placed on the JPTL, its target folder may restrict specific desired points of impact (DPIs) from being struck or restrict the size or type of munitions that may be used against the target or some of its DPIs. For example, if a target is near a sensitive site, such as a school, the DPIs closest to the school may be restricted entirely or restricted to only certain types of weapons.

Collateral Damage Methodology (CDM)

Historically, various combatant commands have conducted CDM according to their own standards. Joint Chiefs of Staff directives now delineate a coherent five-step process that standardizes DOD CDM practices.

The Joint Air Operations Plan (JAOP)

Many restrictions from the combatant commander, CFC, and the CFACC will be found in sections of the JAOP that set forth standing orders or commander's intent.

Special Instructions

SPINS are periodically issued by the CFACC through the CAOC and usually have several sections that may contain ROE or ROE-like restrictions. Most SPINS have a subsection specifically called "ROE" that may contain ROE changes until a new version or regular changes to the OPORD can be published. This section will also contain any amplification the CFACC deems necessary for complex ROE provisions.

Fragmentary Orders (FRAGO)

Restrictions from the combatant commander impacting targeting may also be published in FRAGOs.

Fire Support Annex

The fire support annex to an OPORD may also contain additional guidance or information concerning targeting.

Coalition Concerns

Coalition forces may have their own set of ROE that may not be the same as U.S. ROE. That may impact whether coalition forces have the authority to strike certain sensitive targets such as leadership, weapons of mass destruction (WMD), etc. or the type of support they are able to provide to U.S. forces striking those targets. U.S. forces operating from coalition bases (e.g., Diego Garcia) may also have restrictions placed on them—and on the targeting they execute—by coalition ROE as well. Close coordination is required with coalition

partners during targeting to facilitate the understanding of their ROE and the limits it may impose on them.

TARGETING AND WEAPONEERING

Legal advisors in the targeting process render independent legal advice to the commander across the full spectrum of operational missions. In particular, judge advocates provide legal counsel to the CFACC and each of the five CAOC divisions. Note that the size and nature of on-going air, space, and cyberspace operations, the tempo of CAOC operations, and the processes used by the divisions will dictate the number of judge advocates assigned to the CAOC. It is important to note that to render timely and accurate legal advice during the planning and execution of air, space, and cyberspace operations, judge advocates require access to the same information that is available to commanders and their staffs. Further, as provided by AFI 13-1AOCV3, para. 8.4. judge advocates are a mandated part of this process.

TYPES OF TARGETING

There are two basic types of targeting processes: deliberate and dynamic. AFDD 2-1.9, p. 8.

Deliberate targeting

Deliberate targeting is the procedure for prosecuting targets that are detected, identified, and developed in sufficient time to schedule actions against them in tasking cycle products such as the air and space tasking order (ATO). Targets prosecuted as part of deliberate targeting are known to exist in an operating area and have missions scheduled against them, or have concepts of operations (CONOPS) developed to prosecute them with pre-planned, on-call missions. Examples may range from targets on joint target lists in the joint air and space operations plan (JAOP) to new targets developed in sufficient time to list in an ATO.

Dynamic targeting

Dynamic targeting is the procedure for prosecuting targets that are not detected, identified, or developed in time to be included in deliberate targeting, and therefore have not had missions scheduled against them. Targets prosecuted as part of dynamic targeting are previously unanticipated, unplanned, or newly detected and are generally of such importance to a component, the CFC, or higher authority that they warrant prosecution within the current execution period. If the target is not critical or time-sensitive enough to warrant prosecution during the current execution period, the target may be developed for prosecution later and become a deliberate target. Analysis of the target may also determine that no action is needed.

Two other targeting concepts are important in understanding the targeting process—target sensitivity versus time sensitivity.

Target Sensitivity

Certain targets require special care or caution in treatment because failure to target them or to target them properly can lead to major adverse consequences. Examples might include leadership targets that must be handled sensitively due to potential political repercussions, targets located in areas with a high risk of collateral civilian damage, or WMD facilities, where improper targeting can lead to major long-term environmental damage. Such targets are often characterized as sensitive in one respect or another, but calling them "sensitive targets" is incorrect, since the sensitivity is attributed to them by the U.S. or its coalition partners, and is not an intrinsic characteristic. Nonetheless, the manner in which they are *targeted* is sensitive and may require coordination with and approval from the CFC or higher authorities. In most cases, it is best to establish criteria for engaging such targets in as much detail as possible during planning, before combat commences.

Time Sensitivity

Time sensitivity is different. Many targets may be fleeting; many may be critical to operations. Those that are both present one of the biggest targeting challenges faced by the joint force. Advances in surveillance technology and weaponry make it possible in some instances to detect, track, and engage high-priority targets in real time, or to thwart emerging enemy actions before they become dangerous to the joint force. Joint doctrine calls the targets prosecuted in this manner "time-sensitive targets" (TST): "those targets requiring immediate response because they pose (or will soon pose) a danger to friendly forces or are highly lucrative, fleeting targets of opportunity." JP 1-02. The prosecution of TSTs is a special form of dynamic targeting. The CFC provides specific guidance and priorities for TSTs within the operational area. Examples might include a weapon of mass destruction (WMD)-capable combat vessel that was just detected approaching the joint force; a sought-after enemy national leader whose location was just identified; an enemy aircraft detected approaching friendly high-value assets, or an intermediate range ballistic missile launch. The CFC designates TSTs. However, there may be other targets requiring "time-sensitive" treatment, which are of concern primarily to the CFC's component commanders (vital to their schemes of maneuver or immediately threatening their forces, for instance) that the CFC may not deem to be TSTs. These targets are prosecuted using the same dynamic targeting methodology as TSTs, even though they may not be designated as such and even though their prosecution may be tasked and tracked by different elements in the combined air and space operations center (CAOC). Nevertheless, the time sensitivity of a target does NOT obviate the need for LOAC analysis. All the principles of aerial targeting—necessity, proportionality, minimizing collateral damage—must still be considered when TSTs are analyzed.

WEAPONEERING

Weaponeering is a part of both the deliberate and dynamic targeting processes where targeteers match the best available weapons to targets in order to best achieve desired effects against specific targets.

Weaponeering considers such things as the desired effects against the target (both direct weapons effects and indirect desired outcomes), target vulnerability, delivery accuracy, and weapon reliability. Targeteers, using the Joint Chiefs of Staff Collateral Damage Estimation (CDE) methodology, quantify the expected results of lethal and non-lethal weapons employment. It does not predict the outcome of every munitions delivery, but represents statistical averages based on modeling, weapons tests, and real-world experience.

Weaponeering is normally done by the CAOC's Intelligence Surveillance Reconnaissance Division (ISRD) targeting team prior to Combat Plan's Division's (CPD) Targeting Effects Team (TET) using methodologies prepared by the joint technical coordinating group for munitions effectiveness and data found in the joint munitions effectiveness manuals (JMEM). During deliberate targeting, the final weaponeering is chosen by the CPD's Master Air Attack Plan (MAAP) Team. During dynamic targeting, the final weaponeering decision is made by COD's Dynamic Targeting Cell in coordination with the CAOC Director. The output of weaponeering is a recommendation of the quantity, type, and mix of lethal and non-lethal weapons needed to achieve desired effects while minimizing collateral damage.

Approved targets are weaponeered to include at least the following:

1. Target identification and description
2. Recommended aim points/Desired Points of Impact (DPIs)
3. Desired level(s) of damage, degradation, or exploitation
4. Weapon system and munitions recommendations
5. Weapon fusing
6. Probability of achieving desired effects
7. Target area terrain, weather, and threat considerations
8. Expected collateral damage

AFDD 2-1.9, p. 38-39.

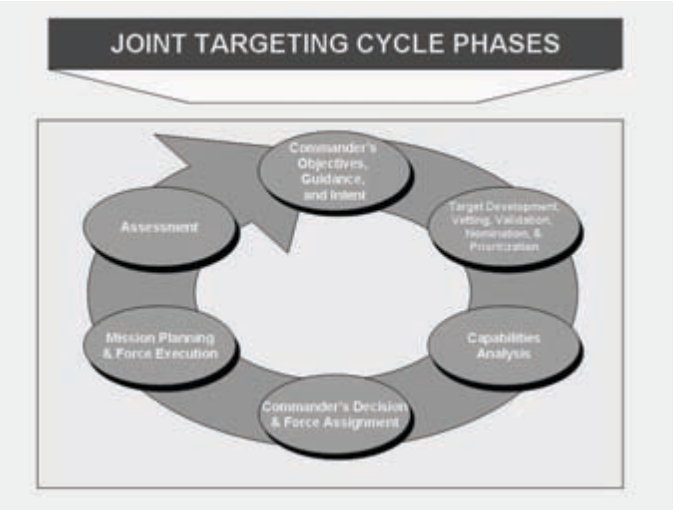
THE DELIBERATE TARGETING PROCESS

The deliberate targeting process consists of the following general phases that begins with defining the CFC's and CFACC's targeting objectives and ends with an assessment of mission impact. The targeting process is a cyclical process—a series of closely-related, interacting, and interdependent functions that dovetail into the planning and tasking processes once air operations begin. Together, these processes must be flexible enough to respond to changes in the battlespace and to changes in priorities.

While targeting discussion is normally framed in the context of an imminent or ongoing conflict, the targeting process also includes activities that start well before any combat operations commence as well as efforts that take place entirely outside the context of any contingency operation.

The basic deliberate targeting process consists of six process stages or "phases":

1. Commander's objectives, guidance and intent.
2. Target development, vetting, validation, nomination, and prioritization.
3. Capabilities analysis.
4. Commander's decision and force assignment.
5. Mission planning and force execution.
6. Assessment.



Commander's objectives, guidance, and intent

This is the most important step in the joint targeting process, because it encapsulates all the national-level guidance into a set of outcomes or end-states which then sets the course for all that follows. AFDD 2-1.9, p. 7.

Objectives and guidance originate at the national level as broad concepts, and are then communicated by the National Command Authorities (NCA) as broad campaign objectives through the Chairman of the Joint Chiefs of Staff (CJCS) directly to the combatant commander. The combatant commander may serve as the CFC for an operation or designate a subordinate unified commander or, more typically, a JTF commander as the

CFC. The CFC, after receiving detailed intelligence analysis of the threat and environment and advice from component commanders, translates the national guidance and provides clear, measurable and attainable objectives to component commanders. These objectives may include an articulation of desired damage levels. The CFC also provides planning and targeting guidance, and apportions the weight of effort to various operations.

The CFACC and his or her staff then devise an air estimate of the situation based on the tasked mission, the CFC's objectives, and guidance. The estimate follows a series of steps to formulate a course of action (COA). When the CFC approves the COA, it becomes the basic concept for joint air and space operations setting forth what will be done. AFI 13-1AOCV3, p. 5.2.

Implementation of the COA is done through the joint air and space operations plan (JAOP) and supporting plans to integrate the efforts of the various component forces. The JAOP identifies and prioritizes targets, synchronizes air operations with the CFC campaign plan, recommends a specific apportionment of assets, sets forth force requirements to achieve objectives, and makes force posture and sustainment recommendations. AFI 13-1AOCV3, p. 27-28.

Doctrine suggests that judge advocates supporting this phase of the process work in the CAOC's Strategy Division. However, as mentioned earlier, the size and nature of air and space operations and the CAOC operations tempo may result in little need for a full-time judge advocate in the Strategy Division. The senior CAOC legal advisor or other judge advocates working in the Combat Plans Division (CPD) or the Combat Operations Division (COD) may be made responsible for supporting the Strategy Division. Regardless, the responsible judge advocate will ensure all proposed strategy is consistent with international law including LOAC, domestic law, ROE, orders from superior headquarters, or the CFACC. The judge advocate will review the JAOP and daily AOD. AFDD 2-4.5, p. 32.

Target development, vetting, validation, nomination, and prioritization

Target development is the systematic examination of potential target systems to determine the type and duration of military action that must be exerted on each target to create the desired outcomes that will in turn achieve the commander's objectives. During combat, target development normally begins 36-40 hours before the effective time of the ATO. Target vetting utilizes the expertise of the national intelligence community to verify the reliability of the intelligence and analysis used to develop the target(s). Target validation determines whether a target remains a viable element of a target system and whether it complies with the LOAC, the ROE, and other targeting restrictions or considerations. Once targets are developed, vetted, and validated, they are nominated for approval and action. As part of this process, they are prioritized relative to all joint targets in a joint integrated prioritized target list (JIPTL), which is submitted to the CFC for approval. AFDD 2-1.9, p. 7.

The judge advocate supporting this phase is a member of the Combat Plans Division (CPD) and works closely with the Intelligence, Surveillance and Reconnaissance Division (ISRD), the Target Effects Team (TET), and the Master Air Attack Plan (MAAP) cell. The judge

advocate's role in this phase of process is to vet and validate targets being developed, usually by reviewing the target folders of proposed targets. Target folders may be hard copy or on computer. Target folders contain imagery from various sources, maps, and intelligence information about the target, including its military purpose and importance, and information regarding any nearby facilities such as churches, museums, or schools. Review of the targeting folder should indicate to the judge advocate whether or not there is a legitimate military purpose to be served by attacking the target. If so, the issue of collateral damage must be addressed. Targeteers can accomplish this by generating a collateral damage estimate and proposed weaponeering solution and including these in the target folder for both judge advocates and MAAP team members to review.

Some aviators and targeteers are not as familiar with LOAC and, as a result, without legal guidance, they may be overly cautious and forego attacks that are legally permitted. For additional considerations in multinational operations, see chapter 19 of this guide.

Capabilities analysis

This portion of the process involves evaluating available military capabilities against desired outcomes to determine the options available to the commander. The CPD's TET and MAAP team working together provide the CAOC Director with apportionment and targeting recommendations based upon the CFC's and CFACC's objectives and allocation as well as the availability of forces and the combat situation.

The judge advocate's role during this phase is the same as that during target development. The judge advocate continues to monitor the nominated targets to ensure no new intelligence has been uncovered or other developments have occurred that would change the legal analysis. Additionally, the ISRD and TET work together to produce collateral damage estimates and weaponeering recommendations which should be reviewed by the judge advocate.

Commander's decision and force assignment

Once the CFC has approved the JIPTL, joint force components prepare tasking orders and release them to executing forces and units. The joint targeting process facilitates creation of tasking orders by providing amplifying information needed for detailed unit-level planning. AFDD 2-1.9, p. 7.

The CPD judge advocate or senior CAOC judge advocate should, when possible, attend the Joint Targeting Board (JTB) meeting, but in any event, must be ready to answer any legal questions the CFC or CFACC has about the targets on JIPTL. Once CFC has approved the JIPTL, judge advocates typically have no other responsibilities during this phase. AFDD 2-4.5, p. 33-35.

Mission planning and force execution

Upon receipt of tasking orders, tasked units perform detailed mission planning and execute their missions. AFDD 2-1.9, p. 7.

Judge advocates supporting this phase are part of the COD and man a position on the CAOC's combat operations floor. Judge advocates are responsible for monitoring on-going operations to ensure compliance with LOAC, ROE, SPINS, and other targeting restrictions. The systems used to monitor on-going operations vary from CAOC to CAOC, but typically permit the judge advocate to monitor communications between the CAOC and other elements of the TACS, such as air support operations centers and joint terminal attack controllers as well as real-time intelligence feeds. The judge advocates monitor systems looking for intelligence, reporting, or changes in asset availability, whether it's an ISRD asset or a strike asset, that affect the legality of target engagement. The COD judge advocate will also provide legal counsel on personnel recovery actions, interpret SPINS and ROE and address any other emergent issues that arise during execution. Lastly, the COD judge advocates are an integral part of the dynamic targeting cell, whose processes are discussed below. AFI 13-1AOCV3, para. 8.4.4. and AFDD 2-4.5, p. 35-36.

Assessment

This phase evaluates the effectiveness of operations and missions and aids in the development of future strategy, guidance, and adaptation to the adversary's actions. AFDD 2-1.9, p. 7.

The judge advocate has little involvement in this phase unless a specific issue has arisen, such as a friendly fire incident, target misidentification, or allegations of LOAC violations. The judge advocate will then help gather and preserve evidence—usually communications—that were generated by the CAOC and elements of the TACS. The CAOC may also facilitate acquiring weapon system videos from the strike aircraft and data from other assets, including ISR assets. The judge advocate should also consult the higher headquarters Staff Judge Advocate (SJA) for policy guidance and supervisory approach to these issues. The level of CAOC judge advocate involvement at this point varies from CAOC to CAOC and will depend in large part on how responsibilities have been shared among the CAOC judge advocates and the component's (AFCENT, AFPAC, AFEUR, AFSOUTH, etc.) judge advocates.

THE DYNAMIC TARGETING PROCESS

"Dynamic targeting" is a term that applies to all targets prosecuted outside of a given day's preplanned ATO targets. Dynamic targeting is different from deliberate targeting in terms of the timing of the steps in the process, but not much different in the substance of the steps. Their nomination, development, execution, and assessment still take place within the larger framework of the targeting and tasking cycles. However, all targets processed during the current execution cycle have one thing in common: they are time-sensitive to some degree or have increased in priority due to battlespace changes. Some are fleeting and require

near-immediate prosecution if they are to be targeted at all. Such targets require a procedure that can be worked through quickly and that facilitates quick transition from receipt of intelligence through targeting solution to action against the target. Recent operations have indicated that this compressed decision cycle is best handled through a specialized sub-process known as the dynamic targeting procedure. Seen from the larger cycle's perspective, dynamic targeting takes place within deliberate targeting phases five (execution planning and force execution phase) and six (assessment phase) of the targeting cycles. AFDD 2-1.9, p. 46.

Some CAOCs have a dedicated dynamic targeting cell to handle the dynamic targeting process. However, there are rarely enough judge advocates to dedicate a judge advocate full time to this cell. More likely, dynamic targeting will be the responsibility of the on-shift COD judge advocate. Additionally, dynamic targeting doctrine, provided below, tends to portray the six targeting phases as separate and distinct. Frequently, they occur in parallel with each dynamic targeting cell member working to resolve their piece of the engagement simultaneously. Further, it's not uncommon for a target to be nominated that has already been found, fixed, and tracked, and for another component's judge advocate to have already vetted and validated the target. Therefore, from the onset of the dynamic targeting process, the COD judge advocate is seeking to validate the target nomination by answering the five questions below, regardless of the targeting phase.

1. Is the target a valid target? Dynamic targets are frequently individuals, although they can be military objects such as scuds or WMD. Therefore, the question of whether a target is valid can frequently be answered by the theater-specific ROE or by analyzing the target using LOAC principles.

2. Has positive identification of the target been established and maintained? Based upon the principle of distinction, most combatant commands have specific requirements for sensors that can establish positive identification. Commonly more than one sensor will be required. It is important for judge advocates to know the source of the PID and that it has been continuously maintained. If PID is lost, it must be regained in accordance with theater PID requirements before the target can be engaged.

3. Are there any restrictions that would limit the ability to strike this target such as ROE, NSL, RTL, etc.? The judge advocate must consult the NSL and RTL to determine whether the nominated target appears on either list. Some CAOCs' systems have databases that generate any conflicts with NSL and RTL once the target has been plotted. However, the databases should not be relied upon; it is a good idea to also review the collateral damage estimate produced by the targeteers during the dynamic targeting process. For example, in Afghanistan, cemeteries often do not to appear on the NSL, but are frequently identified by the targeteers reviewing imagery during the collateral damage estimate.

4. What is the expected collateral damage and does it exceed the expected military advantage? As mentioned above, the targeteers will nearly always generate a

collateral damage estimate. Both targeteers and judge advocates use this estimate to determine the expected strike results versus expected collateral damage and to determine ways to minimize civilian casualties, if possible through weapons choice, delivery parameters, and fusing options. This estimate is also used to determine the appropriate strike approval authority. Higher expected collateral damage generally corresponds to a higher strike approval authority.

5. Has the target nominator received strike approval from the proper authority? Usually captured in the ROE, the judge advocate will determine whether the target nominator has received approval to strike the target from the appropriate strike approval authority. The more sensitive a target is, the higher the strike approval authority will be. Further, during coalition air operations, use of coalition strike assets usually requires approval from that nation's designated strike approval authority.

Dynamic targeting consists of six phases: Find; Fix; Track; Target; Engage; Assess.

Find. The find phase involves the detection of an emerging target that may fit within one of the dynamic targeting categories. The time sensitivity and importance of this emerging target may be initially undetermined. Emerging targets usually require further intelligence and analysis to develop and confirm. Additionally, legal analysis will be completed to determine whether the emerging target complies with LOAC and the ROE. The result of the find phase is a probable target nominated for further investigation and development in the fix phase. AFDD 2-1.9, p. 50.

Fix. The fix phase positively identifies an emerging target as worthy of engagement and determines its position and other data with sufficient reliability to permit engagement. It may begin when the emerging target is detected or after. When the emerging target is detected, sensors are focused on it to confirm its identity and precise location. An estimation of the target's window of vulnerability frames the time required for prosecution and may affect the prioritization of assets. If a target is detected by the aircraft or system that will engage it (for example, by a missile-armed Predator, or a battle management command and control platform such as the joint surveillance target attack radar system (JSTARS)), this may result in the find and fix phases being completed near-simultaneously, without the need for traditional intelligence input. It may also result in the target and engage phases being completed without a lengthy coordination and approval process. The legal analysis during this phase continues to focus on whether the target complies with the LOAC and the ROE. Special attention is given to whether the target has been positively identified (PID) as a military target and its location as required by the LOAC principles of military necessity and distinction. AFDD 2-1.9, p. 50.

Track. The track phase takes a confirmed target and its location, maintains a track on it, and confirms the desired effect against it. Sensors may be coordinated to maintain situational awareness (SA) or track continuity on targets. This phase requires relative reprioritization of intelligence surveillance and reconnaissance (ISR) assets, just as the fix phase may, in order to maintain SA. If track continuity is lost, it will probably be necessary to re-accomplish the fix phase—and possibly the find phase as well. The track phase results in continuous target tracking and maintenance of positive identification on the target; a sensor prioritization scheme (if required); and updates on the target's engagement vulnerability window. The process may also be run partially in reverse in cases where an emerging target is detected and engaged, but once it becomes clear it is a valid target, the sensors detecting it can examine recorded data to track the target back to its point of origin, such as a base camp, and thus potentially eliminate a wider threat or destroy more lucrative targets where only one might have been engaged without the benefit of newer tracking technologies. Such point of origin hunting has proven especially useful during stability and counterinsurgency operations such as those in Iraq. AFDD 2-1.9, p. 51-52.

Target. The target phase takes an identified, classified, located, and prioritized target; finalizes the desired effect and targeting solution against it; and obtains required approval to engage it. If they have not done so already during this phase, COD personnel, in particular the judge advocate, review target restrictions, including collateral damage, ROE, LOAC, the No Strike List, and the Restricted Target List to ensure compliance with all legal requirements. This phase accomplishes the equivalent of the target validation stage of the larger tasking cycle. The COD personnel match available strike assets against desired outcomes, and then determine engagement and weaponeering options. The asset selection for a specific target will be based on many factors, such as the location and operational status of intelligence and strike assets, support asset availability, weather conditions, ROE, target range, the number and type of missions in progress, available fuel and munitions, the adversary threat, and the accuracy of targeting acquisition data. This can be the lengthiest phase due to the large number of requirements that must be satisfied. In many cases,

however, dynamic targeting can be accelerated if target phase actions can be initiated and/or completed in parallel with other phases. AFDD 2-1.9, p. 52.

Engage. In this phase, identification of the target as hostile has been confirmed and engagement is ordered and transmitted to the pilot, aircrew, or operator of the selected weapon system. The engagement orders must be sent to, received by, and understood by the shooter. The engagement should be monitored and managed by the engaging component (for the air and space component, by the CAOC). The desired result of this phase is successful action against the target. AFDD 2-1.9, p. 52.

Assess. In this phase, intelligence assets collect information about the engagement and attempt to determine whether desired effects and objectives were achieved. In cases of the most fleeting targets, quick assessment may be required in order to make expeditious reattack recommendations. AFDD 2-1.9, p. 52-53.

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4. AFI 13-1AOCV3, *Operational Procedures – Air and Space Operations Center*, 1 August 2005
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CHAPTER 17

JOINT OPERATIONS PLANNING

BACKGROUND

Military operations have become highly complex and require each Service to participate to achieve mission success. In order for the Services to work together they must use the same planning system for compatibility. Joint operations planning is the overarching process that guides joint force commanders (JFCs) in developing plans for the employment of military power within the context of national strategic objectives and national military strategy to shape events, meet contingencies, and respond to unforeseen crises. The process is inherent at all levels of command and is established by law and directives.

Joint operations planning integrates military actions with other instruments of national power between the military departments, federal agencies, and multinational partners to achieve a desired end state. It is the method that a commander uses to picture a desired outcome, set out the means to achieve it, and communicate their vision and intent. It includes all activities that are required to accomplish the plan for a specified operation to include mobilization, logistics, deployment, employment, sustainment and redeployment.

Legal advisors within the joint planning process perform a wide variety of planning tasks. They are responsible for assisting the heads of their organizations in carrying out their planning responsibilities by providing them legal advice on the myriad laws, policies, treaties, and agreements that apply to military operations. At all appropriate levels of command and during all stages of operational planning and execution of joint and combined operations, legal advisors will provide advice concerning international law.

This chapter provides an overview of the defense planning system, from the strategic to the air operational level, and describes the legal advisor (LEGAD) responsibilities within those systems. Lastly, this chapter will provide an overview of an operation plan (OPLAN) to assist the review and completion of the legal annex.

OVERVIEW OF JOINT OPERATION PLANNING

Joint planning occurs on a prescribed cycle that complements other Department of Defense (DOD) planning cycles such as budgeting and acquisitioning. It is triggered when the continuous monitoring of global events indicates the need to prepare military options. Joint operation planning is an adaptive, collaborative process that can be iterative to provide actionable direction to commanders and their staffs across multiple echelons of command.

The planning system is designed to flow from the top downward. The responsibility to establish plans for all operations and contingencies extends from the President and

Secretary of Defense (SECDEF), with the advice of the Chairman of the Joint Chiefs of Staff (CJCS), to the combatant commanders (CCDRs) and their subordinate component commanders and JFCs. Planning for joint operations occurs across the full range of military operations and uses two closely related and integrated processes – the Joint Operations Planning and Execution System (JOPES) and the Joint Operations Planning Process (JOPP). Joint planning integrates military power with the other instruments of national power to achieve a specified end state.

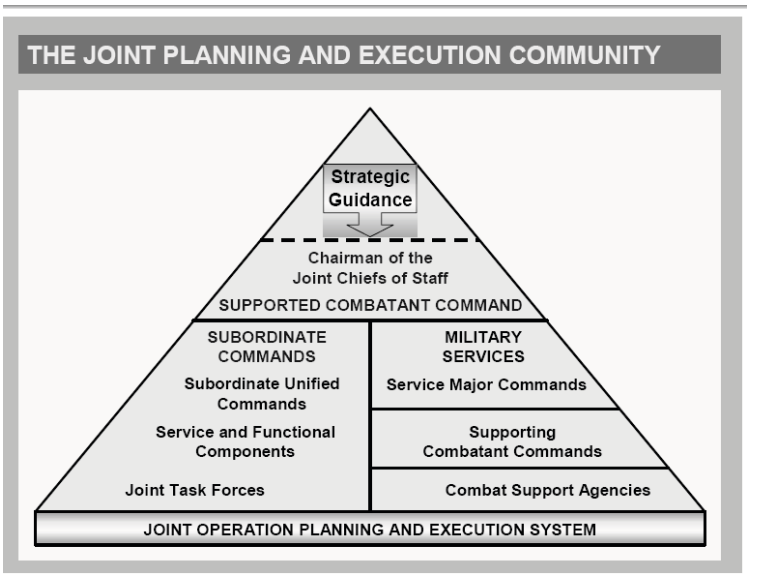


Figure I-2. The Joint Planning and Execution Community

Joint Publication 5-0

Joint Planning and Execution Community

The headquarters, commands, and agencies involved in joint operations planning or committed to conduct military operations are collectively termed the Joint Planning and Execution Community (JPEC). The JPEC consists of the CJCS and other members of the JCS, the Joint Staff, the Services and their major commands, the combatant commands and their subordinate commands, and the combat support agencies. In the planning process, the President and SECDEF issue policy, strategic guidance, and direction.

SECDEF, with the advice and assistance of the CJCS, organizes the JPEC for joint operation planning by establishing supported and supporting command relationships among the combatant commands. A supported commander is identified for each planning task, and supporting CCDRs, Services, and combat support agencies are designated which provides for unity of command in the planning and execution of joint operations and facilitates unity of effort within the JPEC.

The supported command, normally the combatant command and its subordinates are primarily responsible for developing a plan and execution. The individual Service Departments (Air Force, Army and Navy) play support roles to this effort. By law it is the Services' responsibility to recruit, organize, supply, equip, train and maintain forces for the combatant commands and it is the combatant command responsibility to use those forces in action.

Strategic Level Planning

The LEGADs assist their commanders at all levels by helping to interpret policy decisions into legally acceptable plans and orders. Planning at the strategic level usually takes place at the JTF or higher levels of command. The planning process at this level is usually conducted between the President, SECDEF, the CJCS and CCDRs. At the strategic level this planning process is accomplished through four interrelated planning systems: the National Security Council System (NSCS); the Planning, Programming, Budgeting and Execution (PPBE), the Joint Strategic Planning System (JSPS), and the JOPES.

The NSCS provides an interagency framework to establish national strategy and policy objectives for Presidential approval. The system typically includes a hierarchy of interagency committees and working groups. The National Security Council (NSC) prepares national security guidance that, with Presidential approval, implements national security policy. These policy decisions provide the basis for military planning and programming.

The PPBE is the DOD-wide process that acquires and allocates resources to meet the CCDR's operational requirements, the provisioning requirements of the Services and the combat support agencies. Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 8501.01A describes participation by the CJCS, the CCDRs, and the Joint Staff in the PPBE process.

The JSPS is one of the systems used by the CJCS, other members of the JCS and the CCDRs, to accomplish contingency planning and provides military advice to the President and SECDEF through products — such as the National Military Strategy (NMS) and the Joint Strategic Capabilities Plan (JSCP) which provide guidance and instructions on military policy, strategy, plans, forces, resource requirements and allocations essential to successful execution of the NSS and other Presidential directives. They also provide a means to evaluate existing U.S. military capabilities, to assess the adequacy and risks associated with current programs and budgets, and to propose changes for the President's, SECDEF's, and Congressional approval.

Additionally, CJCSI 3100.01A, *Joint Strategic Planning System*, provides further guidance about the JSCP which provides military strategic and operational guidance and direction to CCDRs and Service Chiefs for preparation of OPLANs and security cooperation plans based on current military capabilities. Based on policy guidance and tasks in the CPG, the JSCP is the link between strategic guidance and the joint operation planning activities and products that accomplish that guidance. It is the primary vehicle through which the CJCS exercises responsibility to provide for the preparation of joint operation plans. The JSCP

also lists situations that require plans, tells the CCDRs the types of plans that are required, provides the assumptions that are applicable when writing them, and appropriates forces available to the CCDR for the plan. The SECDEF assigns forces to combatant commands annually in the Forces for the Unified Commands memorandum, temporarily attaches forces by deployment orders, apportions forces in the JSCP for deliberate planning, and allocates forces for Crisis Action Planning (CAP).

The JOPES is the principal system within DOD for translating policy decisions into OPLANs and operation orders (OPORDs) in support of national security objectives. JOPES is primarily a strategic planning system consisting of contingency planning and CAP. Contingency planning and CAP are interrelated and differ for the most part in the amount of available planning time.

PLANNING

The JOPES provides for orderly and coordinated problem solving and decision making. The amount of time available to plan significantly influences the planning process. Therefore, JOPES contemplates two different methods of planning – Contingency Planning and CAP. The process used in both planning efforts is almost identical. The main differences between the two are the amount of time available to plan and the planning product that is produced.

In the joint planning world contingencies are anticipated situations or events that would likely require military involvement. Military forces may be required to respond to natural and man-made disasters, terrorists, military operations by foreign powers, or other situations as directed by the President or SECDEF. Military forces use deliberate and contingency planning to develop plans for a broad range of contingencies based on higher headquarters guidance or planning directives. Contingency planning begins when a planning requirement is identified and continues until the requirement no longer exists. Many LEGADs participate in contingency planning routinely at their installation when they review installation plans for disaster response (earthquake, fire, tornado, aircraft accident, etc.), or operational responses (terrorist attacks, contingencies, etc.).

The JSCP links the JSPS to joint operation planning, identifies broad scenarios for plan development, specifies the type of joint OPLAN required, and provides additional planning guidance as necessary. A CCDR may also initiate contingency planning by preparing plans not specifically assigned but considered necessary to discharge command responsibilities.

Crisis Action Planning involves a crisis which JOPES identifies as an incident or situation involving a threat to the United States, its territories, citizens, military forces, possessions, or vital interests. A crisis typically develops rapidly and creates a condition of such diplomatic, economic, or military importance that the President or SECDEF considers a commitment of U.S. military forces and resources to achieve national objectives. It may occur with little or no warning and may require accelerated decision making. The JOPES provides additional crisis action procedures for the time-sensitive development of OPORDs for the likely use of military forces in response to a crisis. While contingency planning

normally is conducted in anticipation of future events, CAP is based on circumstances that exist at the time planning occurs.

Crisis Action Planning encompasses the activities associated with the time-sensitive development of OPORDs for the deployment, employment, and sustainment of assigned, attached, and allocated forces and resources in response to an actual situation that may result in actual military operations. The time available to plan responses to real-time events may be short. In as little as a few days, commanders and staffs must develop and approve a feasible course of action (COA), publish the plan or order, prepare forces, ensure sufficient communications systems support, and arrange sustainment for the employment of U.S. military forces.

THE PLANNING PROCESS

The joint operation planning process is applied during peacetime to develop joint OPLANs, CONPLANs (with and without Time-Phased Force and Deployment Data (TPFDD)) or supporting plans to support the national military strategy. The planning process is accomplished in phases: initiation, mission analysis, COA development, COA analysis and wargaming, COA comparison, COA approval, concept development, plan development, and plan review.

Initiation

Planning tasks are assigned to supported commanders, forces and resources are apportioned for planning, and planning guidance is issued during this phase. Scenarios for plan development are identified, the type of plan required is specified (i.e., OPLANs, CONPLANs (with or without TPFDDs) or functional plans) and additional planning guidance is provided.

Mission Analysis

The joint force's mission is the task or set of tasks, together with the purpose, that clearly indicates the action to be taken and the reason for doing so. It is also here that the supported commander will specify the military end state to be achieved. This end state normally will represent a point in time and/or circumstance beyond which the President does not require the military to act as the primary actor to achieve the remaining national strategic objectives. (See JP 5-0, Figure III-4 for Mission Analysis Key Steps).

After conducting a mission analysis the staff will create a mission statement that describes the organization's essential tasks and purpose. It is the "who, what, when where and why." The how will be the rest of the plan. Other items that will come out of the mission analysis phase are the commander's intent that clearly and concisely identifies the operations purpose and end state, commander's critical information requirements (CCIRs) that identify critical information that could affect the decision making process, and planning guidance that will help subordinate commands prepare their estimates of feasibility and support.

It is essential that the LEGAD get involved in this step of the planning process. Doing so will ensure that all legal issues that could delay or forestall the operation are resolved early in the planning process. Additionally, the LEGAD's involvement at this developmental stage of the process will allow legal concerns to be addressed within the final planning document and give the LEGAD a good foundational knowledge which will significantly help in the other planning stages.

COA Development

The staff develops COAs to provide options to the commander. A good COA accomplishes the mission within the commander's guidance, positions the joint force for future operations and provides flexibility to meet unforeseen events during execution. It also gives components the maximum latitude for initiative. A COA consists of the following information: what type of military action will occur; why the action is required (purpose); who will take the action; when the action will begin; where the action will occur; and how the action will occur (method of employment of forces). Later the staff will convert the approved COA into a CONOPS.

As COAs are developed, the LEGAD must thoroughly understand the specifics of each iteration. It is likely that each COA may have unique legal issues associated with it that could affect a commander's determination. For instance, COA 1 may involve flying through the airspace of a third country to limit the risk to U.S. forces by bypassing enemy air defenses. COA 2 may include area bombing to suppress those air defenses. COA 3 may involve using special forces to go in on the ground and neutralize the missiles. Each of these will have legal issues associated with them that will require a well thought-out analysis.

COA Analysis and War-gaming

COA analysis identifies advantages and disadvantages of each proposed COA. War-gaming provides a means to analyze potential COAs, improve understanding of operational environments and obtain new information. War-gaming visualizes the flow of operation from start to finish looking at the joint force's and adversary's strengths and weaknesses, and other aspects of operational environments such as weather, topography, and international considerations.

It is during this stage that the LEGAD will determine what, if any, legal issues arise. Critical to this analysis is the need for the LEGAD to have already received training on how each part of the military instrument of power will act in these situations.

COA Comparison

This is an objective process where each COA is compared independently of each other and compared and evaluated against a set of pre-established criteria. The goal is to identify the strengths and weaknesses of each COA so the COA with the highest probability of success

can be selected and further developed. The LEGAD must have a good understanding of the law (including LOAC, ROE and international agreements) during this stage as well.

COA Approval

The staff will brief the commander on the COA comparison, analysis and war-gaming results. This briefing usually takes the form of the commander's estimate and may include the current status of the joint force, and assumptions used in the COA development.

Concept Development

Contingency planning will result in a formal OPLAN being developed. This is not the case in CAP due to the time sensitive nature of the planning effort. Crisis Action Planning will typically lead directly to an Operational Order (OPORD) development. Regardless of whether it is contingency planning or CAP, the staff will expand the approved COA into and OPLAN or OPORD by first developing a Concept of Operations (CONOPs) which will become the cornerstone of the OPORD or OPLAN.

The CONOPs will clearly and concisely express what the commander intends to accomplish; how it will be done using available forces and resources; describe how joint force component and supporting organizations will be integrated, synchronized and phased to accomplish the mission; and include branches and sequels. Many plans require adjustment beyond the initial stages of the operation. Consequently, JFCs build flexibility into their plans by developing *branches* and *sequels* to preserve freedom of action in rapidly changing conditions.

Branches are options that are often built into the basic plan. They typically provide different ways or means to accomplish the existing objective of an ongoing operation. Such branches could change the main and supporting efforts, shift priorities, change command, realign forces, etc.

Sequels anticipate and plan for subsequent operations based on the possible outcomes of the current operation — victory, defeat, or stalemate. For every action or major operation that does not accomplish a strategic or operational objective, there has to be a sequel for each possible outcome, such as "win, lose, or draw."

The CONOPs will be written in enough detail so that subordinate units will understand their missions, tasks and other requirements, and can develop their own plans. It is during the CONOPs phase that the commander will best determine how to move forces to meet planning requirements. This will be accomplished using the TPFDD system which will ensure unit integrity, force mobility, and the ability to rapidly transfer to branches and sequels if required.

During this phase the LEGAD will prepare a legal considerations paragraph to the base plan and will also prepare a legal appendix to the plan. In JOPES, the legal appendix is an attachment to the personnel annex of the plan. The LEGAD will also support the other staff

agencies with their portions of the plan that may have legal implications. It is important to synchronize with the J3 and/or J5 planners who are drafting the ROE portion of the plan. Additionally, the LEGAD must contact the staff agency that is preparing the appendices related to Prisoners of War, Detainees and Civilians; Command and Control (C2); and Personnel Recovery. These appendices may not have legal implications during the planning stage but they will have enormous legal implications during the execution phase.

Plan Development

An approved CONOP is expanded into a complete OPLAN during the plan development phase of contingency planning. Plan development is accomplished by a designated commander, normally a CCDR with the assistance of supporting and subordinate commanders. Forces and resources required to execute the concept of operations are progressively identified, sequenced, and coupled with transportation capabilities to produce a feasible OPLAN. This phase of deliberate planning is heavily dependent on JOPES Automated Data Processing (ADP) to produce the TPFDD.

The LEGAD will review every portion of the plan and, when doing so, will be on the lookout for "mission creep." For instance, if the tasking is to produce a plan to provide foreign disaster assistance in the form of airlift in response to a Department of State (DOS) request, yet the plan indicates that the command will purchase humanitarian supplies, store them on Air Force installations and rotate the supplies, then the command has engaged in "mission creep." Purchasing and storing these types of supplies is a DOS mission.

Plan Review

The CJCS, in coordination with the other members of the JCS, Services, and Defense agencies, assesses and validates joint OPLANs prepared by supported commanders using the criteria of adequacy, feasibility, acceptability, and compliance with joint doctrine. Upon completion of the review, the supported commander is informed that the plan is approved or disapproved. Plans that contain critical shortfalls that are beyond the supported commander's ability to resolve will be approved with these shortfalls identified. In such cases, the supported commander will be provided with guidance regarding specific actions planned or programmed to redress the shortfalls. Approved plans remain until superseded or canceled. Upon notification that a plan has been approved, the supported commander incorporates CJCS-directed changes and directs the completion of supporting plans by supporting subordinate commanders.

TYPES OF JOINT PLANS AND ORDERS

There are a variety of plans and orders that will result from the planning cycle. . The LEGAD should know the type of plan or order that the staff is expected to complete. Each plan or order may have different legal considerations involved. Below is a list of the most common plans and orders.

Base Plan. In JOPES, this is a level 2 planning document that contains paragraphs one through five of the standard OPLAN format, but does not contain annexes.

Concept Plan (CONPLAN) Without a TPFDD. In JOPES, this is a level 3 planning document. A CONPLAN normally does not include the level of detail that will go into an OPLAN. A CONPLAN contains the basic plan, the commander's CONOPS, and those annexes and appendices either required by the JCS or the CCDR.

Concept Plan (CONPLAN) With a TPFDD. In JOPES, this is a level 3 planning document that contains a TPFDD. This plan contains more detailed planning for the phased deployment of forces

OPLAN. In JOPES this is a level 4 planning documents. This is the complete and detailed operational plan that will describe a CONOP and include all required annexes and appendices. It identifies the forces, resources and assets required to execute the plan and will include a movement schedule for forces, resources and assets into the theater.

Supporting Plan. Supporting CCDRs, subordinate JFCs, component commanders, and combat support agencies prepare supporting plans as tasked by the supported commanders in support of their plans. Supporting plans are prepared in OPLAN format and are developed responsively in collaboration with the supported commander's planners. Supporting commanders or agencies may, in turn, assign their subordinates the task of preparing additional supporting plans.

Operation Order (OPORD). An OPORD is a directive issued by a commander to subordinate commanders for the purpose of effecting the coordinated execution of an operation. OPORDs are prepared under joint procedures in prescribed formats during CAP.

Fragmentary Order (FRAGO). A FRAGO is an abbreviated form of an OPORD (verbal, written, or digital), which eliminates the need for restating information contained in a basic OPORD. It is usually issued as needed or on a day-to-day basis.

Warning Order (WARNORD). A WARNORD is a planning directive that initiates the development and evaluation of military COAs by a supported commander and requests that the supported commander submit a commander's estimate.

Planning Order (PLANORD). A PLANORD is a planning directive that provides essential planning guidance and directs the initiation of plan development before the directing authority approves a military COA.

Alert Order (ALERTORD). An ALERTORD is a planning directive that provides essential planning guidance and directs the initiation of plan development after the directing authority approves a military COA. An ALERTORD does not authorize execution of the approved COA.

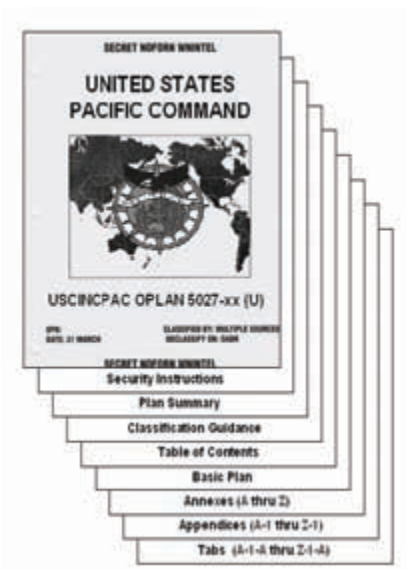
Execute Order (EXORD). An EXORD is a directive to implement an approved military COA. Only the President and the SECDEF have the authority to approve and direct the initiation of military operations. The CJCS, by the authority of and at the direction of the President or SECDEF, may issue an EXORD to initiate military operations. Supported and supporting commanders and subordinate JFCs use an EXORD to implement the approved CONOPS.

Prepare to Deploy Order (PTDO) *and Deployment Order* (DEPORD). The CJCS, by the authority of and at the direction of the President or SECDEF, issues a prepare-to-deploy order (PTDO) or deployment order (DEPORD) to move forces. A PTDO proposes the day on which a deployment operation begins (C-day) and the specific hour on C-day when deployment is to commence (L-hour).

OVERVIEW OF AN OPERATIONAL PLAN

An OPLAN is a complete and detailed plan containing a full description of the concept of operations and all required annexes with associated appendices. It identifies the specific forces, functional support, deployment sequence, and resources required to execute the plan and provide closure estimates for their movement into the theater. This will allow all Services, CCDRs, DOD agencies, supporting commands and agencies to develop plans in the same manner. Use of this standard format is directed by the CJCS and is provided in JOPES Vol II (CJCSM 3122.03) and, for Air Force personnel, in AFMAN 10-401, Vol 2.

As indicated above, the originating CCDR should follow the standard operation plan format in JOPES Vol II; however, with approval from the Joint Staff, they may modify the content to meet specific needs. In turn, each supporting organization must, at a minimum, follow the CCDR's format. The Air Force, in writing AFMAN 10-401, Vol 2, ensured compliance with the standard joint guidance for operation plans; however, it has also added appendices, where needed, to describe Air Force roles and functions.



Structure of a Standard Operation Plan

The genesis for all operation plan formats is JOPES Vol II (CJCSM 3122.03A). Described below are the major portions of every plan. Note that a parallel structure exists between the Plan Summary, Basic Plan, Annexes, Appendices, and Tabs. This will be pointed out throughout this chapter.

Cover. The cover page is unclassified; however, on the top and bottom it indicates the highest classification of the plan (the back cover must also reflect this classification). Also shown on the cover are the Short Title (to whom the plan belongs, what kind of plan, and the plan identification number), which is usually unclassified; the date of the plan; the authority for classification and declassification; any warning notices

(e.g., WINTEL, NOFORN, ROKUS, etc.), and a count of how many copies are provided.

Security Instructions. This is where the planner can find the long title of the plan, providing just enough information to, usually, make this page classified. Additional security information is provided, as is a record of changes.

Plan Summary. It is essentially an executive summary, drawing on and providing the essence of the plan in a few pages. Included are:

1. Purpose statement, indicating what would be the expected results of executing the plan (refer to the JSCP task assignment for the plan);

2. Statement indicating the political, military, legal, and environmental implications of executing the plan;

3. Brief summary of force requirements, deterrent measures, deployment, employment, and supporting and collateral plans;

4. List of assumptions to make planning possible;

5. Items which may impede the accomplishment of the mission/plan;

6. Timetable showing the build-up of forces in the theater;

7. Description of command relationships;

8. Staff estimates on logistics and personnel; and

9. Listing and impact assessment of shortfalls and limiting factors.

Classification Guide. In a tabular format, this page shows the planner the classification of major subjects (e.g., operation code word, concept of operations, date operation begins, etc.) as they progress from the planning phase through the post conflict phase. This is a good starting point for determining basic classification.

Basic Plan. The basic plan, starting on Page 1 but after the above items, is the foundation of the plan. It provides a list of references, including charts, maps, and documents needed to conduct the plan, and a myriad of information, such as:

1. Referral to the TPFDD (Annex A) for tasked organizations;

2. Description of the situation, including enemy and friendly capability, pre-conflict actions, assumptions for planning, and legal considerations;

3. Mission statement indicating what the purpose of the plan is and what is expected to be accomplished on execution;

4. Section on execution, including a concept of operations describing how the plan is expected to unfold; a commander's intent, which will include phasing of the operation and the desired end state; the structure of the OPLAN; deployment/employment requirements; and a task list describing each mission to be performed and by whom;

5. Section containing the essence of administration and logistics and providing a brief concept of logistics and administration support. Logistics and administration support will be expanded further in their respective annexes;

6. Section on command and control, including command relationships; locations, establishment, and reporting of command posts; succession to command; and C4I systems; and

7. List of Annexes that will be used in the plan.

Annexes. With the exception of Annexes X, Y, and Z, each annex is formatted in the same manner. The format of each annex closely follows and illuminates the basic plan. For instance, the major headings of References, Situation, Mission, Execution, Administration and Logistics, and Command and Control are the same as in the basic plan. However, the functional annex amplifies the information in the basic plan. For instance, while the basic plan may provide good insight into the concept of operations for the overall plan (discussing commander's intent, deployment, etc.), the operations annex, located under "Concept of Operations", will go into greater detail. Readiness, alert, and marshalling; aerospace functions; force enhancement operations; ROE; etc. are examples of some of the subjects addressed in further detail in the operations annex. Each annex will end with a list of appendices that further amplify information in the annex.

Appendices. As annexes amplify the information in the basic plan, appendices amplify the information in the annex, providing further detail on specific subjects. Appendices follow the same basic format as the annex and basic plan, containing sections on references, situation, mission, execution, administration and logistics, and C2. Using the operations annex as an example, there are nineteen appendices that must be developed to amplify the contents of this annex. Some examples are: nuclear operations, search and rescue operations, noncombatant evacuation operations, force protection, tactical airlift, and history documentation. An appendix, in turn, may list tabs.

Tabs. Tabs are a further subset of appendices, providing even more detailed information. Tabs can be in narrative form, in which case they will follow the same format as appendices, annexes, and the basic plan, or they can be in tabular form, providing information on items like expected POL consumption, organization charts, etc.

CONDUCTING A LEGAL REVIEW OF THE OPORD OR OPLAN

Once the OPORD or OPLAN is drafted, the LEGAD will need to conduct a legal review of the entire document to ensure its consistency with U.S. domestic law and international law,

especially LOAC. When reviewing the plan, the LEGADs will ensure it addresses the following areas and use a checklist, such as the one attached to this chapter as a guide:

1. Captured weapons, war trophies, documents, equipment;
2. Host Nation support;
3. Acquisitions during combat or military operations;
4. Proper fiscal sources for military action;
5. Nuclear, biological, and chemical weapons;
6. Non-lethal or less-than-lethal technology;
7. Targeting, collateral damage, civilian casualties;
8. Enemy prisoners of war (EPW) and detainees;
9. Displaced civilians;
10. Interaction with nongovernmental organizations or private voluntary organizations;
11. Sites, monuments, or buildings of cultural or religious significance; and
12. Command and control.

The plan may also address judge advocate manning in support of the plan. The LEGAD will need to ensure that the appropriate number of judge advocates and paralegals will be sourced to meet the mission needs. Considerations in this area include whether the plan involves opening new locations, increasing personnel at existing locations, the number of air force personnel at the locations, the mission type, whether there will be an Air Operations Center, the operations tempo (eight or twelve hour shifts), etc. All of this should be coordinated with the Air Component legal office to ensure uniformity.

Preparation of the Legal Appendix

The legal appendix reflects the legal considerations developed during the planning process and outlines the plan for legal support. It is used to describe those considerations in detail; cite applicable references, including inter-service, host nation, and reciprocal support agreements; define key terms; establish coordinating and other administrative instructions; and state policies and procedures for all matters within the judge advocate's area of concern. In addition it will outline judge advocate administrative reporting chains or unique concerns for the plan or that AOR.

The legal appendix will cover military justice and administration of discipline, claims, legal assistance, fiscal law, contracts, environmental law, operational and international law, ROE support and assistance, and general orders.

Normally, the CCDR or the component commander will implement the general order related to the plan. Also, there may be a time when a LEGAD may be called on to draft a general order regulating the activities of both military and civilian personnel serving in the joint operations area. The purpose of such a punitive order is to prohibit or restrict conduct which might damage relations with a host country or undermine the discipline and health of deployed U.S. personnel. Such orders should be tailored to the needs and cultural context of each JTF and, if possible, remain unclassified to enhance their training and deterrent value. Possible topics to be addressed include alcoholic beverages, pornography, gambling, black market activity, privately owned weapons, consumption of local food and beverages, and entry into religious sites.

Preparation of the ROE Appendix

The ROE appendix is the responsibility of the J-3 (Operations), though it will sometimes be written by the J-5 (Plans). Either way, LEGADs will need to be heavily involved in supporting that effort. The ROE appendix reflects the staff's approximation of the ROE estimate needed to achieve the commander's end state. It should be developed in coordination with the other Services involved in the operation to ensure their operational needs are addressed. During the planning process, if supplemental ROE measures are needed they should be requested and authorized in the appropriate ROE message format as outlined in the SROE. Supplemental requests should not be made in the ROE appendix.

PLAN REVIEW CHECKLIST

1. Review relevant guidance

    a. Higher headquarters plan

        1) Identify commander's intent

        2) Authority to act

        3) Role of your unit (supported v. supporting)

        4) Rules of engagement

        5) Command relationships

        6) Legal annex

    b. International agreements and/or treaties

c. Law, regulations, instructions, etc.

2. Identify authority to act

    a. Type of mission (e.g. disaster response, peacekeeping, etc.)

    b. Authority to use force (type, amount, permissive circumstances)

    c. Does host nation limit the type of operation from its land?

3. Identify available funding

    a. Are proper funds being used for the mission?

    b. Do funding sources change based on mission phases (planning v. deployment v. combat operations?)

    c. Does funding need to be identified or requested?

4. Identify individuals' status

    a. U.S. and allied (POWs, Admin & Tech, etc.)

    b. Enemy Forces

    c. Post conflict legal regime (e.g., occupying forces?)

5. Detainment policy

    a. How are enemy forces treated? (POWs? Detainees?)

    b. How are displaced civilians handled?

    c. How are they to be detained?

    d. How are captured weapons, documents, equipment, etc., handled?

    e. What are the "war trophy" policy and/or procedures?

6. Rules of engagement

    a. Have ROE been issued?

    b. If so, review military response against what ROE limit?

        1) Is proposed military response permissible?

2) Do ROE changes need to be requested?

c. Do ROE permit proposed target sets to be engaged in the means and methods proposed?

d. Are there collateral damage concerns?

e. Are coalition forces permitted to engage in collective self-defense? If not, will this impact the plan?

f. Is non-lethal or less-than-lethal technology discussed?

g. Enemy prisoners of war and detainees

7. What are the command relationships?

a. What are administrative control and UCMJ relationships for all USAF troops, to include those working in joint billets in lieu of taskings for other Services?

b. Consider Joint Task Force or JFC structure.

c. Has the JFC established any joint justice policies?

d. Has a general order been issued or does one need to be issued?

e. Who are the convening authorities?

8. Support to coalition forces and, if applicable, host nations

a. International agreements in place?

b. Procedures identified?

c. Allies have requisite status agreements for forward stationing locations?

d. Claims?

9. If anticipated for use, how will nuclear, biological, and chemical weapons be used, handled or responded to?

10. Is there enough detail in the plan that subordinate units can accomplish the mission without further guidance?

11. Does the plan address all of the essential tasks identified for the command to perform?

12. Is there mission creep in the plan?

CONCLUSION

At all appropriate levels of command and during all stages of operational planning and execution of joint and combined operations, LEGADs will provide advice concerning law of war compliance. Doing so ensures that legal issues are addressed early before they might derail the planning process. Early involvement also allows the LEGAD to become engrained with the planning staff. These early efforts will ensure huge dividends later in the planning cycle as the staff will look to the LEGAD as a knowledgeable member of the team who has been involved from the inception as opposed to an outsider who came in at the tail end of the process.

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CHAPTER 18

JOINT AIR OPERATIONS

BACKGROUND

To coordinate aerospace operations, the joint force commander (JFC) will appoint a joint force air component commander (JFACC). The JFC normally designates a JFACC based on the mission, the concept of operations (CONOPS), the missions assigned to subordinate commanders, forces available, duration and nature of joint air operations desired, and the degree of control of joint air operations required. The JFC will normally assign JFACC responsibilities to the component commander having the preponderance of air assets and the ability to effectively plan, task, and control joint air operations. While in some operations the Army possesses the preponderance of air assets, its aviation organizations are not equipped, staffed, or trained to plan, task, and control the full spectrum of joint air operations. Thus, JFACCs are typically selected from the Air Force, Navy, or Marine Corps based on the criteria mentioned above. Moreover, the command and control capabilities provided by the Air Force through the Air and Space Operations Center (AOC) dictate that the JFACC is often selected from the Air Force.

In combined operations (i.e. operations engaged in with coalition partners) the air component's AOC is referred to as a Combined Air and Space Operations Center (CAOC) and the JFACC is designated as the CFACC (combined force air component commander). The AOC is structured to operate as a fully integrated facility and staffed to fulfill all of the JFACC's responsibilities. Depending on the situation or contingency, the JFACC may be sea-based or land-based. The responsibilities are the same, differing only in the scale of the operation.

The AOC is the aerospace operations planning and execution focal point for the JFC and is the location where centralized planning, direction, control, and coordination of aerospace operations occur. Personnel in the AOC are responsible for planning, executing, and assessing aerospace operations and directing changes as the situation dictates. Judge advocates within the AOC provide expertise on domestic, foreign, and international law that directly affects the conduct of aerospace operations. This chapter will discuss the functions of an AOC; provide a short primer on the Air Tasking Cycle; and furnish an overview of a notional AOC organization and duties of the teams within the AOC.

PRIMARY AOC FUNCTIONS

The responsibilities of the JFACC are assigned by the JFC. These may include planning, coordinating, and monitoring joint air operations, and the allocation and tasking of air

component forces based on the JFC's CONOPS and air apportionment decisions. Specific JFACC responsibilities include:

1. Developing a JAOP to best support JFC objectives.

2. Recommending to the JFC apportionment of the joint air effort, after consulting with other component commanders, by either percentage and/or priority that should be devoted to the various air operations for a given period of time.

3. Allocating and tasking air capabilities/forces made available based on the JFC air apportionment.

4. Providing oversight and guidance during execution of joint air operations to include making timely adjustments to taskings of available joint air capabilities/forces. The JFACC will coordinate with the JFC and affected component commanders, as appropriate, when the situation requires changes to planned joint air operations.

5. Coordinating joint air operations with operations of other component commanders and forces assigned to or supporting the JFC. For example, coordination may be required with combat search and rescue (CSAR) operations, information operations (IO), the joint force special operations component commander (JFSOCC), joint force maritime component commander (JFMCC), and the joint force land component commander (JFLCC), for integration, synchronization, and de-confliction.

6. Evaluating the results of joint air operations and forwarding assessments to the JFC to support the overall combat assessment (CA) effort.

7. Performing the duties of the airspace control authority (ACA), to include drafting an airspace control plan (ACP) and coordinating airspace control measures (ACMs), unless a separate ACA is designated.

8. Performing the duties of the area air defense commander (AADC), unless a separate AADC is designated.

9. In concert with the above responsibilities, accomplishing various mission areas to include: counterair; strategic air attack; airborne intelligence, surveillance, and reconnaissance (ISR); air interdiction; intra-theater and inter-theater air mobility; and close air support.

10. Functioning as a support or supporting commander as designated by the JFC.

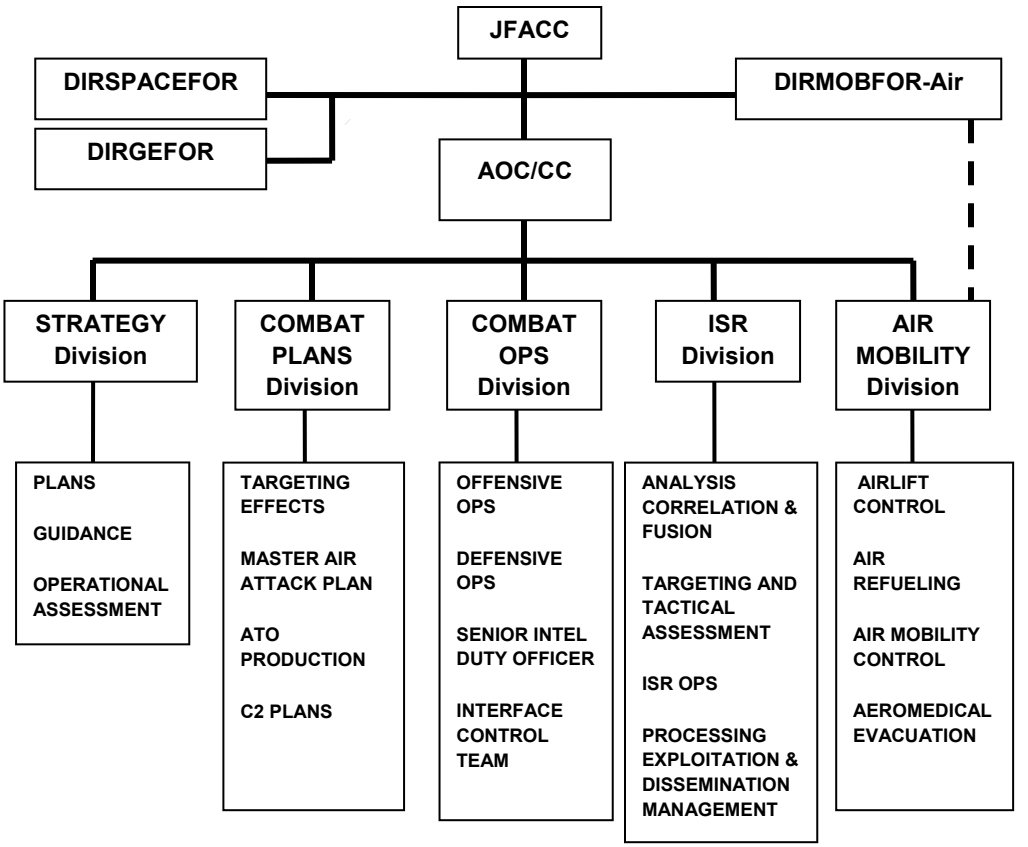
AOC ORGANIZATION

The AOC commander is charged with effectively conducting the daily joint air and space operations based on JFC and JFACC guidance and in coordination with the director of mobility forces (DIRMOBFOR-Air) and the director of space forces (DIRSPACEFOR). While doctrine provides a basic structure for AOC organization, the AOC commander may organize or tailor the AOC for various theater-specific missions to achieve air and space operations objectives. The AOC commander provides guidance and oversight for monitoring, evaluating, and adjusting execution of the Air Tasking Order (ATO) to meet changing theater situations and achieve desired effects in support of the JFACC air battle plan (ABP) and JFC desired effects.

Generally, the AOC integrates equipment and personnel from a component staff. The manning of the AOC is based on a core concept with personnel selected for their air, space, and information operations expertise, as well as knowledge of command and control (C2) concepts and procedures. Personnel are also chosen from functional specialties such as communications, intelligence, and battle management. Additional personnel, usually from all Services and Coalition partners, who are knowledgeable in current capabilities and tactics of each of the aircraft, ISR platforms, space resources and weapons systems being employed, augment as applicable. Augmentees should not be confused with representatives of other component commanders, usually referred to as liaisons. Though liaisons are an integral part of the AOC, they do not work for the JFACC.

The AOC is structured to operate as a fully integrated facility and staffed to fulfill all JFACC responsibilities. JFACC organizations may differ based on the specific area of responsibility (AOR) or joint operations area (JOA) requirements and types of operations. Typically, the AOC organization includes a AOC Commander, five divisions (Strategy; Combat Plans; Combat Operations; ISR; and Air Mobility), and multiple support and specialty teams.

NOTIONAL AOC ORGANIZATION CHART



Strategy Division

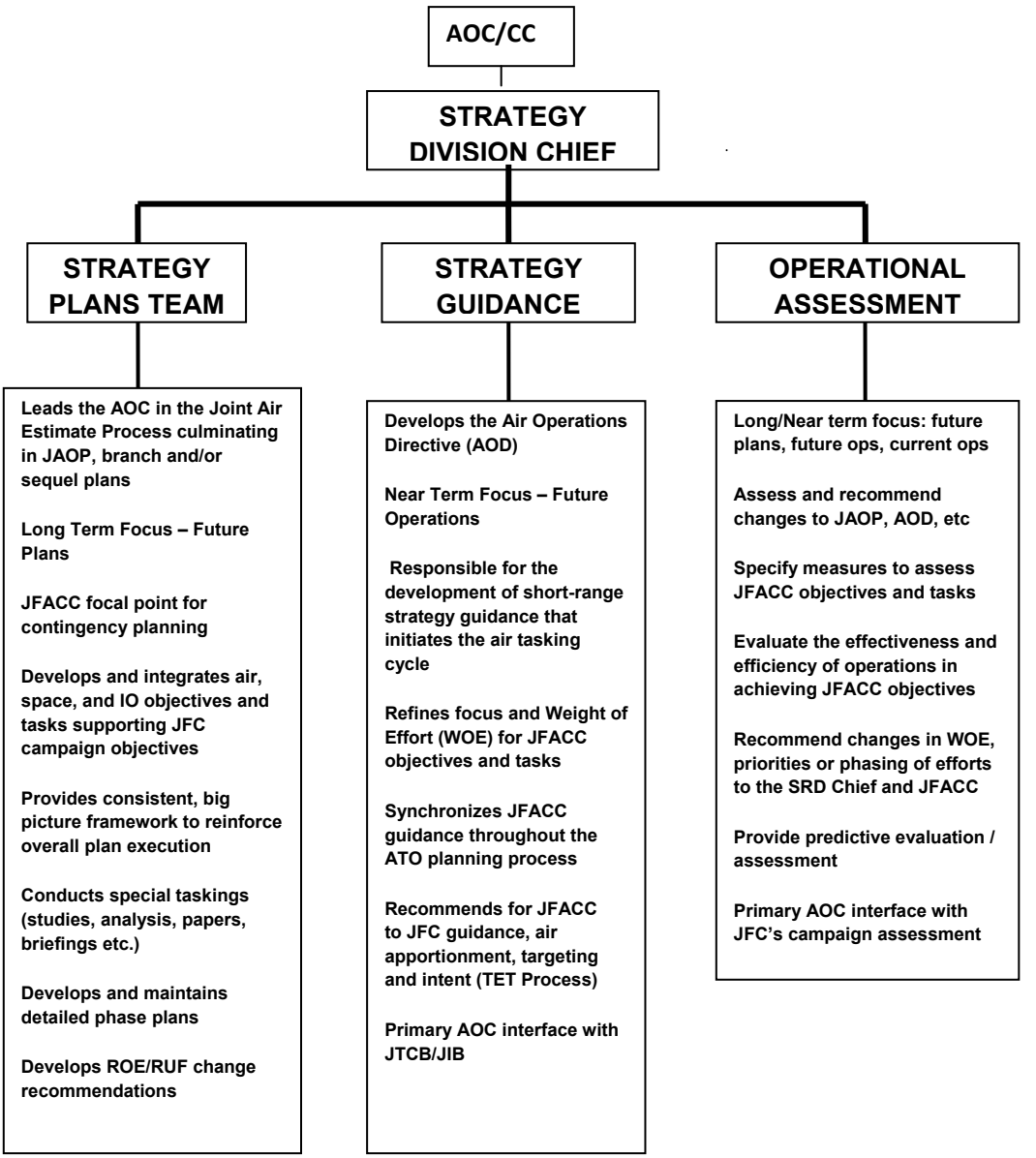
The Strategy Division concentrates on the planning of future aerospace operations to achieve theater objectives by developing, refining, disseminating, and assessing the progress of the JFACC's aerospace strategy and JAOP. The JFACC is normally assigned responsibility for joint aerospace operations planning and develops a JAOP for employing that portion of the air effort made available to him or her to accomplish the objectives assigned by the JFC. The Strategy Division is divided into three core teams: Strategy Plans, Strategy Guidance, and Operational Assessment.

The *Strategy Plans Team* is responsible for the development and maintenance of operational-level, long-range, joint air strategy and associated branch and sequel plans that support the JFC and JFACC objectives. The Strategy Plans Team is responsible for developing the JFACC Estimate, proposed aerospace strategy, and the JAOP.

The *Strategy Guidance Team* is responsible for the AOC's transition from operational-level to tactical-level planning, which culminates in the detailing of daily guidance in the Air Operations Directive (AOD). This team provides short-range guidance from 72 to 48 hours before execution. This guidance is provided through the AOD.

The *Operational Assessment Team* evaluates the products of the other teams to assess the progress of aerospace operations at the operational or campaign level. They assess the progress of each phase toward accomplishment of the JFACC's objectives and tasks. Operational assessment addresses the overall effectiveness and efficiency of the desired aerospace objectives including Battle Damage Assessment (BDA), munitions effectiveness, re-strike options, and the mission. Specific tasks and responsibilities for the three teams comprising the Strategy Division can be found in the diagram below.

Judge Advocate Role. Judge advocates provide advice concerning compliance with the law of war "at all appropriate levels of command and during all states of operational planning and execution of joint and combined operations." As such, JA personnel attached or embedded in the Strategy Division are involved in the planning process from the very beginning, focusing on the "big picture," that is, looking at target sets or systems vice individual targets. Additionally, in most AOCs, the ROE development will reside in the Strategy Division. Although "operators own the ROE" and are responsible for its development, JAGs are heavily involved, especially when changes to existing ROE are sought by the JFACC. Strategy Division JAGs also will likely be the legal representatives to the Information Operations (IO) and Special Technical Operations (STO) cells. These cells usually present unique legal issues and processes requiring strict security.


AOC/CC
STRATEGY DIVISION CHIEF
STRATEGY PLANS TEAM
STRATEGY GUIDANCE
OPERATIONAL ASSESSMENT
Leads the AOC in the Joint Air Estimate Process culminating in JAOP, branch and/or sequel plans
Long Term Focus – Future Plans
JFACC focal point for contingency planning
Develops and integrates air, space, and IO objectives and tasks supporting JFC campaign objectives
Provides consistent, big picture framework to reinforce overall plan execution
Conducts special taskings (studies, analysis, papers, briefings etc.)
Develops and maintains detailed phase plans
Develops ROE/RUF change recommendations
Develops the Air Operations Directive (AOD)
Near Term Focus – Future Operations
Responsible for the development of short-range strategy guidance that initiates the air tasking cycle
Refines focus and Weight of Effort (WOE) for JFACC objectives and tasks
Synchronizes JFACC guidance throughout the ATO planning process
Recommends for JFACC to JFC guidance, air apportionment, targeting and intent (TET Process)
Primary AOC interface with JTCB/JIB
Long/Near term focus: future plans, future ops, current ops
Assess and recommend changes to JAOP, AOD, etc
Specify measures to assess JFACC objectives and tasks
Evaluate the effectiveness and efficiency of operations in achieving JFACC objectives
Recommend changes in WOE, priorities or phasing of efforts to the SRD Chief and JFACC
Provide predictive evaluation / assessment
Primary AOC interface with JFC's campaign assessment

Combat Plans Division

The *Combat Plans Division* (CPD) is directly responsible to the AOC Commander for plans and allocates forces in accordance with guidance issued by the JFC and JFACC. The CPD is divided into four functionally-oriented Core teams: Targeting Effects, Master Air Attack Plan (MAAP), C2 Plans, and ATO/ACO Production.

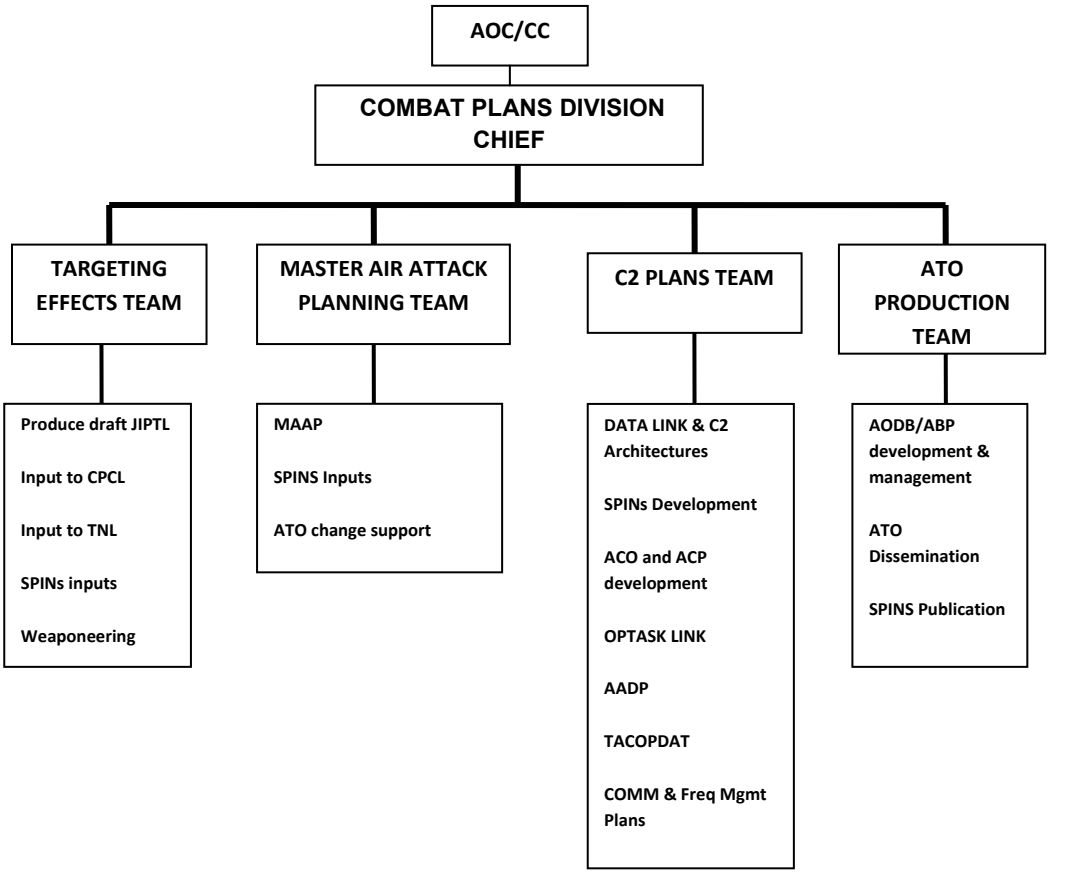
The *Targeting Effects Team* (TET) incorporates all joint force prioritized target selections for a given ATO period into a Joint Integrated Prioritized Target List (JIPTL) to achieve desired kinetic and non-kinetic effects reflected in guidance from the AOD and are linked back to a JFC campaign objective.

The *Master Air Attack Plan* (MAAP) *Team* develops the daily MAAP and transforms it into an electronic format for conversion into the ATO. The MAAP is the JFACC's time-phased air, space, cyber, and information operations scheme of maneuver for a given ATO period and it synthesizes JFACC guidance, desired effects, friendly and enemy capabilities, supported components' schemes of maneuver, and available resources.

The *C2 Plans Team* is composed of airspace management, air defense, C2 architecture, C2 communications planning, air support, and Special Instructions (SPINS) cells. The functions of these cells are directly related to the JFACC's roles as the ACA and AADC The airspace management planning cell which is supported from the AOC airspace specialty team is responsible for developing the ACP, and producing the daily Airspace Control Order (ACO).

The *ATO Production Team* constructs, publishes, and disseminates the daily ATO and applicable SPINS to appropriate JTF forces which tasks JFACC allocated air, space, cyber, and information operations capabilities and assets in accordance with the MAAP. The ATO Production team is staffed by operational experts representing each type of aircraft or system which may be tasked or employed by the JFACC.

Judge Advocate Role. Judge advocate advisors to the CPD ensure a thorough legal analysis is conducted for selected targets, weaponeering, and assignment of forces. In some circumstances, they will work closely with the Intelligence, Surveillance, and Reconnaissance Division (ISRD) targets analysts, TET chief, and MAAP chief in reviewing the choice of tactics for certain sensitive targets. This requires JAGs to participate in the development of the JIPTL and MAAP throughout the ATO cycle. The JAGs assigned to CPD also work with the C2 plans chief to develop the ROE/RUF chapter for the JFACC SPINS. The JAGs assigned to the CPD also provide support to the STO team as needed during planning.



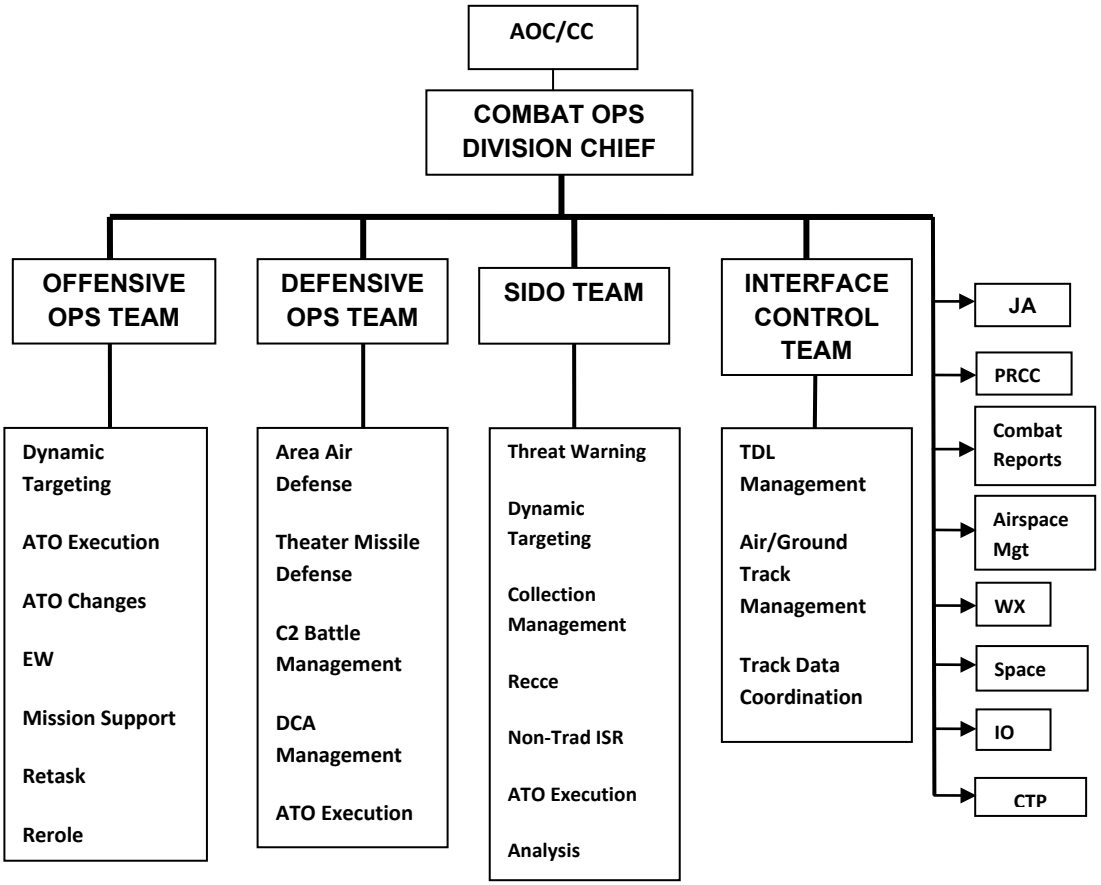
Combat Operations Division

The combat operations division (COD) is charged with effective execution of the current ATO and ACO. The COD accomplishes this through constant monitoring of the operational environment and leveraging subordinate C2 Theater Air Control System (TACS) capabilities within the Theater Air Ground System (TAGS) elements, and other assigned or attached assets. In general, the COD responds to battlefield dynamics by command and control of air and missile defense operations, IO, and by modifying the published ATO and ACO to facilitate changes in mission requirements.

Depending on the situation, the COD is composed of offensive and defensive operations (to include missile defense) teams, the senior intelligence duty officer (SIDO) team (providing ISR operations execution support), interface control team, and numerous specialty teams such as legal, airspace management, weather (WX), personnel recovery coordination cell (PRCC), and various experts from other weapons systems. The COD is also supported by various liaison teams as needed. Examples of these teams are the battlefield coordination detachment (BCD), Army Air and Missile Defense Command (AAMDC), naval and

amphibious liaison element (NALE), special operations liaison element (SOLE), Marine liaison officer (MARLO), Coalition liaison teams, and other governmental agency liaisons.

Judge Advocate Role. Judge advocates advising the COD provide legal counsel on all matters within the purview of that division, including ensuring LOAC and ROE/RUF compliance for dynamic targeting, close air support, and Combat Search and Rescue (CSAR) actions. They also interpret SPINS and the ROE/RUF, and address other emergent legal issues that arise during the execution of the current ATO.



Intelligence, Surveillance, and Reconnaissance Division (ISRD)

The ISRD provides the JFACC, AOC, and subordinate units with predictive and actionable intelligence, ISR operations, and targeting in a manner that drives the air tasking cycle. A common threat and targeting picture is critical to planning and executing theater-wide air, space, cyber, and information operations to accomplish JFACC objectives. The ISRD

provides the means by which the effects of these operations are measured. ISRD personnel direct the AOC's distributed and reach-back ISR processes in order to conduct ISR strategy, intelligence preparation of the operational environment (IPOE), ISR operations, target development, and assessment, which provides the context for understanding the adversary's intentions and supports the achievement of predictive battlespace awareness (PBA).

PBA is the situational awareness needed to develop patterns of behavior, constraints, and opportunities of geography, topography, cultures, environment, forces, and personalities that allow us to predict, misdirect, and pre-empt our adversaries in order to successfully create effects when and where we choose. This knowledge of the operational environment, in concert with C2, enables the JFACC to anticipate future battlespace conditions, establish priorities, exploit emerging opportunities, and act with a degree of speed and certainty not matched by our adversaries.

The ISRD is composed of four core teams: Analysis, Correlation, and Fusion (ACF) Team; Targets/Tactical Assessment (TGT/TA) Team; Intelligence, Surveillance, Reconnaissance Operations (ISR Ops) Team; and the Processing, Exploitation and Dissemination (PED) Team.

The *ACF Team* is comprised of an analytical cell and a unit support cell. The analytical cell may organize into any combination of the following elements: integrated air defense system (IADS); political-military, economic, and command, control, communications (PEC3); ground; naval; SOF; TBM; and weapons of mass effect (WME). The analysis cell is responsible for conducting dynamic IPOE that provides the context for understanding the adversary's capabilities, options, and intentions, and supports the achievement of PBA.

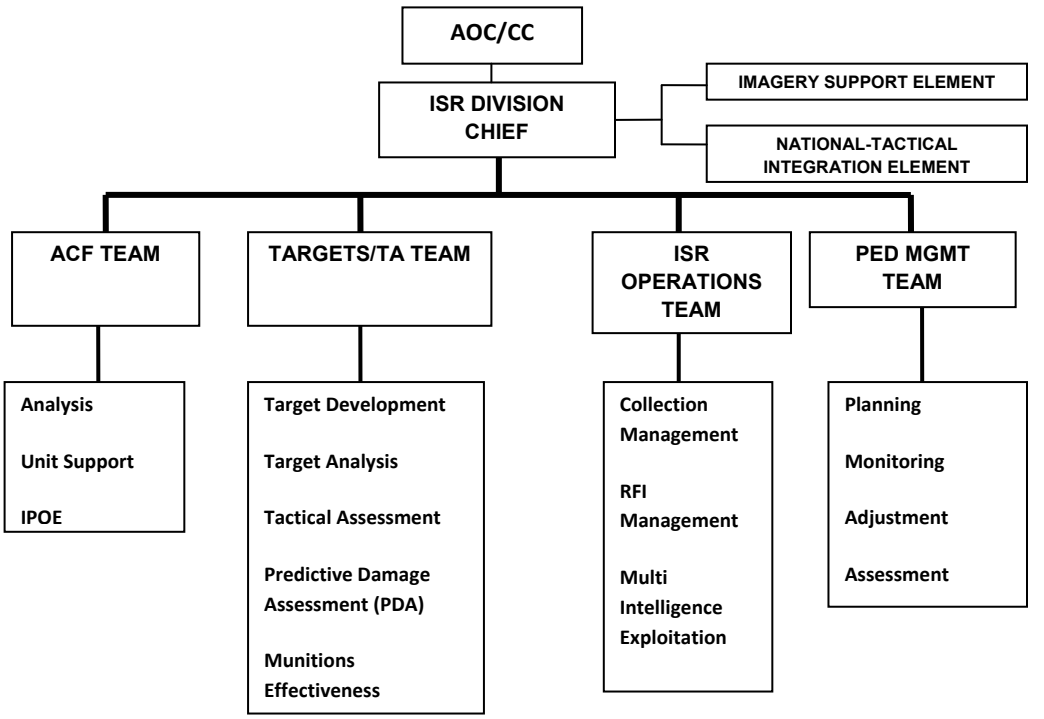
The *Targets/TA Team* includes the Target Development cell and the Tactical Assessment cell. The Target Development cell performs target development and target systems analysis to determine which critical and vulnerable nodes could or should be attacked or affected to achieve objectives. The Tactical Assessment cell provides target status updates and recommendations on re-attack to the target development cell.

The *ISR Operations Team* develops ISR strategy and plans and executes those plans to satisfy theater intelligence requirements. The ISRD chief normally delegates to this team responsibility for synchronizing air component ISR operations with joint or coalition forces. The ISR operations team is comprised of the collection operations management cell, the collection requirements management cell, and the Request for Information (RFI) management cell.

The *PED Management* Team is the ISRD focal point for implementing, coordinating, maintaining, and assessing PED support from units or agencies external to the AOC. The PED management team also assesses the effectiveness of the PED effort. The PED management team coordinates with joint, coalition, component, and national agency intelligence producers in order to facilitate the PED program. Depending on the particular

requirements of the AOR/JOA and the mission, the ISRD Chief may choose to locate PED management functions within the ISR operations team.

Judge Advocate Role. JAGs advising the ISRD provide legal counsel on all matters within the purview of that division, including the legality of collecting, storing, and disseminating information; the currency of information about a target and its location with respect to non-military structures and personnel; the weaponeering or weapon system being used; the likelihood of disproportionate collateral damage; and ROE limitations and restrictions.



Air Mobility Division (AMD)

In coordination with the Director of Mobility Forces-Air (DIRMOBFOR-Air), the AMD plans, coordinates, tasks, and executes the theater air mobility mission. The DIRMOBFOR-Air is responsible for integrating the total air mobility effort for the JFACC and provides support and guidance to the AMD to execute the air mobility mission. The DIRMOBFOR-Air is the JFACC's designated Coordinating Authority for air mobility with all commands and agencies, both internal and external to the joint force. The DIRMOBFOR-Air provides direction to the AMD on all air mobility matters.

The AMD chief ensures the division works as an effective part of the AOC in the air, space, cyber, and information operations planning and execution processes. The AMD is comprised of four core teams: Aeromedical Evacuation Control Team (AECT), Airlift

Control Team (ALCT), Air Refueling Control Team (ARCT), and Air Mobility Control Team (AMCT).

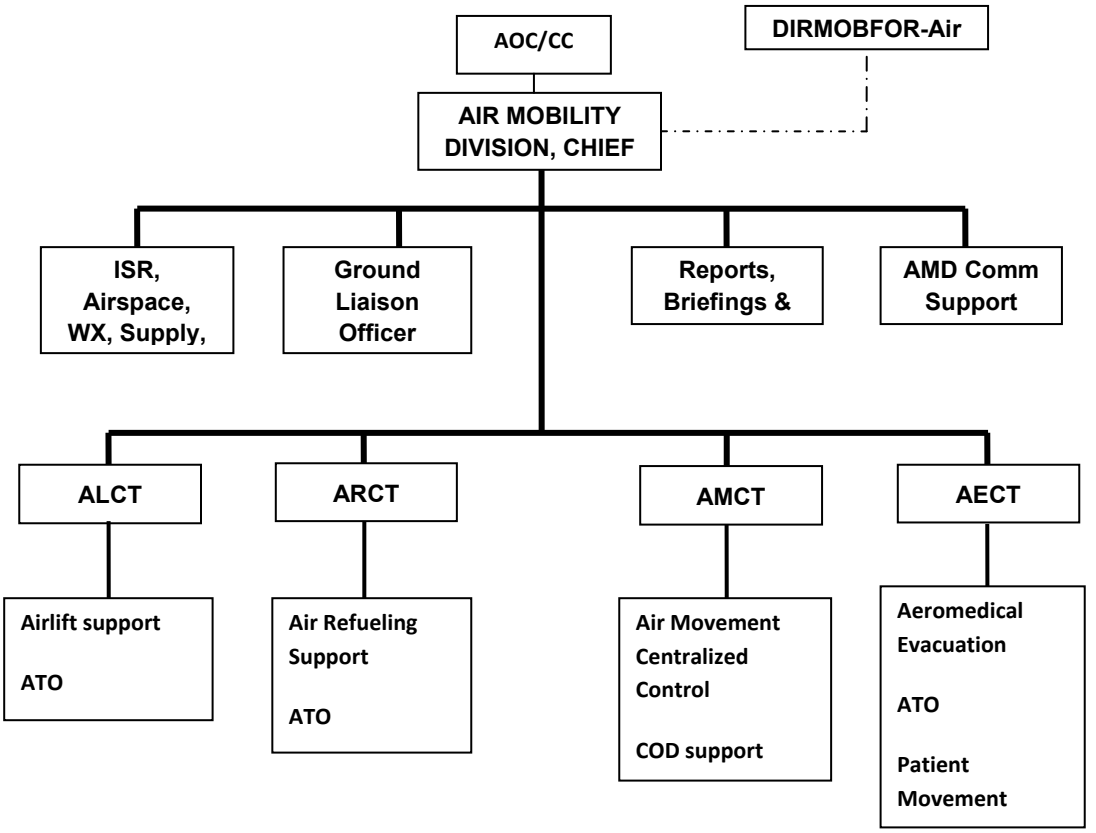
The *Aeromedical Evacuation Control Team* (AECT) is responsible for operational planning, scheduling and executing intra-theater Aeromedical Evacuation (AE) missions. The AECT advises the AMD chief and DIRMOBFOR-Air on AE issues. It provides command and control of all theater assigned or attached AE units and operations within the specified AOR/JOA and assists with inter-theater AE operations arriving, departing or transiting the AOR/JOA.

The *Airlift Control Team* (ALCT) is the source of intratheater airlift expertise within the AMD. The ALCT brings intratheater airlift functional expertise from the theater organizations to plan, coordinate, manage, and execute intratheater airlift operations in the AOR/JOA for the JFACC.

The *Aerial Refueling Control Team* (ARCT) coordinates aerial refueling planning, tasking, and scheduling to support combat air operations or to support a strategic air bridge within the AOR/JOA.

The *Air Mobility Control Team* (AMCT) is the centralized source of Air Mobility Command, Control, and Communication (C3) during mission execution. The DIRMOBFOR-Air uses the AMCT to direct air mobility forces in concert with other aerospace forces. The AMCT de-conflicts all air mobility operations into, out of, and within the area of operations. The AMCT maintains execution process and communications connectivity for tasking, coordinating, and flight following with the AOC Combat Operations Division, subordinate air mobility units, and mission forces.

Judge Advocate Role. In coordination with the JFACC/JA staff, judge advocates advising the AMD provide legal counsel on all matters within the purview of that division including international agreements affecting landing rights, overflight, sovereignty, taxes, customs, aircraft accidents, and civil reserve air fleet (CRAF).



Specialty Functions

Specialty teams provide an AOC with diverse capabilities to help orchestrate theater aerospace power. These capabilities are interwoven into the aerospace assessment, planning, and execution process. Specialty functions include component liaisons, ISR, air defense, space, information operations, weather, and legal.

The AOC incorporates functional leaders to help ensure the best use of like assets. The legal team, for instance, spreads its personnel throughout the AOC under the direction of its team leader, the senior ranking judge advocate. The team leader ensures team members are used effectively throughout the AOC. In addition, the senior ranking judge advocate also serves as the legal advisor to the JFACC.

Support teams provide direct support to the AOC and to operational echelons above and below the AOC. They perform their tasks allowing the core and specialty teams to focus on the aerospace assessment, planning, and execution process. Examples of support teams are intelligence unit support, systems administration, information management, and communications.

CONCLUSION

Successful joint aerospace power employment requires unity of effort, centralized planning, and decentralized execution. The Joint Air Operations Center is the aerospace operations planning and execution focal point for aerospace power. AOC personnel, including the legal team, are responsible for planning, executing, and assessing aerospace operations and directing changes as the situation dictates. Within the AOC, the judge advocate is an essential advisor on the myriad of legal issues associated with aerospace operations.

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CHAPTER 19

MULTINATIONAL AIR OPERATIONS

BACKGROUND

Multinational operations are operations conducted by forces of two or more nations within the structure of a coalition or alliance.[304] While the United States retains the capability to act alone, the 2006 U.S. National Security Strategy states that:

"America will implement its strategies by organizing coalitions, as broad as practicable, of states able and willing to promote a balance of power that favors freedom."

A key role of judge advocates serving on multinational operations is to advise U.S. commanders or multinational force commanders (MNFCs) to whom they are assigned, with a view to assisting them in identifying workable solutions between coalition partners to maintain and promote interoperability and unity of effort required for mission success.

COMMAND AND CONTROL OF MULTINATIONAL OPERATIONS

Nations participating in multinational operations do not relinquish national command of their forces. Forces participating in a multinational operation have at least two distinct chains of command: national and multinational. As Commander-in-Chief, the President always retains national command authority over U.S. forces, and has the authority to terminate U.S. participation in multinational operations at any time.

Command authority for a multinational operation is negotiated between the participating nations and can vary from nation to nation. The command authority vested in an MNFC by participating nations can include operational control (OPCON), tactical control (TACON), designated support relationships, and coordinating authority.

LEGAL SUPPORT OF PARTNER AIR FORCES

Legal Personnel

Some allies with whom the U.S. routinely operates (*e.g.*, Australia, Canada, United Kingdom) maintain legal departments providing national legal representation at

[304] The term "alliance" is used in this context to describe a group of nations working together for a shared military end under a formalized structure such as the North Atlantic Treaty Organization. "Coalition" on the other hand denotes a less rigid structure, again consisting of a group of nations cooperating closely in a mission, but in a less permanent manner.

multinational force headquarters and operations centers. Other states do not employ uniformed military lawyers and paralegals in their military operations at all.

Attorney Role and Position

The role and position of legal staff within a multinational partner's force will invariably differ from that found in U.S. forces. U.S. judge advocates may find their nearest counterpart in a coalition air force is at a different level in the command structure. Counterparts may also be of different rank, or civilian. It is also likely that core tasks performed by U.S. military legal staff (*e.g.*, contract law and fiscal law) will not be handled by the legal staff of a foreign military force.

Paralegals

Foreign military forces generally deploy few, if any, military paralegals. Work routinely accomplished by U.S. military paralegals may be completed by coalition military lawyers themselves, by non-paralegals, or not at all.

LAW OF ARMED CONFLICT (LOAC)

General

Law of armed conflict obligations and policies of each state have a bearing on the missions they may participate in, the weapons that can be employed, and the support that can be provided to other multinational force members engaged in a particular task. While a significant proportion of LOAC is customary international law, and thus applicable to all states, many obligations are created by treaties which may not have been ratified by all multinational force participants. In addition, state parties to treaties may have lodged reservations or declarations of understanding which affect their interpretation of treaty obligations. Further, states may have different interpretations of both treaty and customary international law obligations, and may choose to apply differing standards as a matter of policy.

Legal Basis for Operations

Most states will articulate one or more legal bases for their participation in a particular operation.

Additional Protocol I to the Geneva Conventions (AP I)

While the United States has signed but not ratified AP I, some aspects of the treaty reflect customary international law. The major provisions of AP I that may lead to differences between partner states in a multinational force are:

Article 1, Para 4. The United States objects to the application of LOAC to the "wars of self-determination" described in the article.[305] Perhaps the most significant practical implications relate to the treatment of persons engaged in hostilities. Parties to AP I consider a wider range of persons to be combatants, and thus entitled to belligerent privileges. This potentially allows parties to AP I to lawfully attack a wider range of persons, but also requires such persons to be treated as enemy prisoners of war if captured.

Article 44 – Combatants and Prisoners of War. The United States objects to portions of Article 44, which lowers standards for combatants to distinguish themselves from the civilian population than is required by Article 4, Paragraph 2, of Geneva Convention III.[306] Consequently, parties to AP I may consider certain groups who meet the qualification requirements in Article 43 to be combatants regardless of whether or not they wear a fixed distinctive sign recognizable at a distance. Multinational force legal officers should be consulted for their national interpretation as to which armed groups involved in an international armed conflict are regarded as combatants by their states. This information may be contained in national rules of engagement (ROE) or a national targeting directive. This interpretation may affect whether persons captured by those forces can be handed over to the U.S. and *vice versa*.

Article 55 – Protection of the Natural Environment.[307] It is theoretically possible for an attack that would be lawful under U.S. obligations to be unlawful for parties to AP I due to the expectation of:

"*…widespread, long-term and severe environmental damage.*"[308]

However, such an attack would likely also be prohibited for the United States if it generated excessive collateral damage or otherwise violated U.S. policy.

Article 56 – Protection of Works and Installations Containing Dangerous Forces. The practical implications of this difference are limited, as such targets are likely to be extremely sensitive for all states including the United States. Targets such as dams, dykes and nuclear power plants would likely also be prohibited for the United States if striking such targets generated excessive collateral damage or otherwise violated U.S. policy. Targets of this nature often appear on a joint task force or combatant command no strike list or a restricted target list.

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[305] See President Reagan, Message to the Senate Transmitting a Protocol to the 1949 Geneva Conventions, 29 January 1987, available at http://www.reagan.utexas.edu/archives/speeches/1987/012987B.HTM.

[306] Article 4, Paragraph 2, of Geneva Convention III (GC III) requires members of organized resistance movements to, *inter alia*, have a fixed distinctive sign recognizable at a distance before being entitled to status as a prisoner of war. Article 44 reduces this requirement to carrying arms openly during each military engagement and when engaged in a military deployment preceding an attack.

[307] See United States, Written submission submitted to the ICJ in the *Nuclear Weapons Case*, Advisory Opinion, 8 July 1996.

[308] Note the use of the conjunctive 'and' in this provision. To be strictly prohibited by the convention, the anticipated environmental damage must be widespread, long-term, and severe. Anticipated environmental damage falling short of this standard would nonetheless be considered in the collateral damage assessment.

Additional Protocol II to the Geneva Conventions (AP II)

During a non-international armed conflict, parties to AP II will have legal obligations in addition to those imposed by customary international law. The classification of a situation as an armed conflict invoking AP II obligations is made by each nation. Significant practical issues relate to the treatment of detainees and the prosecution of offences relating to the armed conflict. Countries bound by AP II must ensure that conditions of detention comply with the minimum standards set out in AP II's Article 5, and that the prosecution of any criminal offense related to the conflict is carried out by an independent and impartial court in accordance with the minimum standards set out in Article 6. Further, countries bound by the wording in AP II of the provisions regarding protection of objects containing dangerous forces, cultural objects and places of worship will likely have different obligations.

Detainees

States have different legal obligations and different interpretations of the law affecting the way detainees are classified, how they may be treated while in custody and how to deal with criminal offenses allegedly committed by detainees.

State parties to API are obliged to ensure that their GC III conditions are met if the detainee is transferred, even temporarily, to the custody of another state. Parties to API can only transfer a prisoner to U.S. custody if the United States is applying conditions equivalent to those in GC III.

Detainee issues should be discussed at the earliest opportunity, preferably before the commencement of hostilities. It is important to determine whether other states consider the conflict to be one in which AP I applies. Further, it is important to determine to whom they accord combatant status. If there are differing national policies concerning which groups are to be regarded as combatants and entitled to prisoner of war status, then mutually agreed procedures should be established in relation to the custody, transfer, transportation, supervision and trial of detainees.[309]

Regardless of the category or status of a detainee, U.S. forces are required to properly control, maintain, protect, and account for all detainees in accordance with applicable U.S. domestic law, international law, and policy.[310]

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[309] During Operation IRAQI FREEDOM a trilateral arrangement between the United States, United Kingdom, and Australia established procedures for the transfer of PWs, civilian internees, and civilian detainees. 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 was in the custody of the accepting power; sole responsibility of the detaining power for classification of potential PWs; primary jurisdiction of the detaining power over pre-capture offenses, but with favorable consideration to a request by the accepting power to waive jurisdiction; and costs met by the detaining power.

[310] DODD 2310.01E, *The Department of Defense Detainee Program,* 5 September 2006.

Legal Status of Terrorists

Parties to AP I define combatant in accordance with Articles 43 and 44 of AP I. Persons who plan, train for, or carry out terrorist activities are generally classified as civilians by parties to AP I. Terrorists are not entitled to the belligerent's privilege and any acts of violence committed by them against either combatants or civilians are generally considered criminal offenses. However, as civilians, terrorists lose the protection of the conventions for such time as they take a direct part in hostilities. The term "direct participation in hostilities" is interpreted differently by different states. Accordingly, judge advocates should seek advice on the national interpretation of this term from relevant multinational partners.

WEAPONS

Generally

In addition to the weapon review process undertaken by the United States (see Chapter 2 for a discussion of the weapons review process), AP I Article 35 requires state parties to consider whether the weapons are of a nature to cause superfluous injury or unnecessary suffering, or are intended, or may be expected, to cause widespread, long-term, and severe damage to the natural environmental.

Conventional Weapons Treaty 1980, Protocol III (Incendiary Weapons)

The U.S. ratification of the protocol contains a reservation to Article 2, reserving:

> … the right to use incendiary weapons against military objectives located in concentrations of civilians where it is judged that such use would cause fewer casualties and/or less collateral damage than alternative weapons, but in so doing will take all feasible precautions with a view to limiting the incendiary effects to the military objective and to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.

In recent practice, the United States utilizes relatively few incendiary weapons compared to standard high explosive weapons. Due to the political ramifications of the use of incendiary weapons, U.S. commanders and multinational force authorities will likely consult with their senior national leadership before operations commence if the use of incendiary weapons is planned where multinational force participation or support is required.

White Phosphorous (WP)

One issue currently being debated is how to classify WP munitions used in isolated instances to achieve anti-personnel effects. While the United States does not consider WP to be a chemical or incendiary weapon, some states may. If WP is used within a combined

area of operations as an anti-personnel weapon, then some coalition forces may raise objections to the use, transportation, or storage of WP, even if used for target marking. U.S. commanders and multinational authorities will consult with their senior national leadership before operations commence if multinational force participation or support is required.

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti Personnel Mines 1997 (Ottawa Convention)

For state parties, the possession or use of anti-personnel landmines (APL) as well as assistance, encouragement, or inducement to any other person to possess or use these mines is prohibited. Some weapons presently in the U.S. inventory that will lead to interoperability conflicts include the Artillery Delivered Anti-Personnel Mine (ADAM) and its M731 and M692 projectiles, the BLU-92/B anti-personnel mine sub-munitions of the CBU 78/B and CBU-89/B Gator Mine systems, the M74 APL, the M86 Pursuit Deterrent Munition, the Volcano Multiple Delivery Mine System, and the M18A1 Claymore when used in trip-wire mode. When the United States plans to employ APL, the limitations placed on multinational partners by virtue of the Ottawa Convention must be considered. Parties to the Ottawa Convention may be prohibited from re-fuelling vehicles transporting APL. Also, if joint terminal attack controllers (JTACs) are members of the armed force of a nation which has ratified the Ottawa Convention, that JTAC may not provide targeting information to aid the delivery of APL. Planners serving party states in MNF headquarters may not be able to support staff processes where use of APL is planned. If the use of APL is required or must be included in planning efforts, the operation may need to be entirely planned and executed by U.S. components of the multinational force.

Chemical Weapons Convention 1993

Some nations bound by the Chemical Weapons Convention have differing national interpretations of the convention's obligations, particularly with respect to the use of riot control agents (RCA). Unlike the United States, some states consider RCA to be prohibited in international armed conflict. In contrast, the United States distinguishes between war and military operations other than war and in certain instances, between offensive and defensive use in war. U.S. commanders and multinational authorities will receive guidance from their senior national leadership before operations commence if use of RCA is planned.

Convention on Cluster Munitions 2008 (Oslo Convention)

Parties to the Oslo Convention remain able to engage in military cooperation and operations with non-state parties (such as the United States). However, under the Oslo Convention, these nations may be unable to use, transfer or stockpile cluster munitions, or to expressly request the use of cluster munitions in cases where the choice of munitions used is within their exclusive control. United States commanders and multinational authorities will consult their senior national leadership before operations commence if use of cluster munitions is planned, to determine whether any national restrictions or prohibitions will apply.

OTHER INTERNATIONAL LAW AFFECTING MILITARY OPERATIONS

Human Rights Law

European Convention of Human Rights 1950 (ECHR)

Many European nations are parties to the ECHR. The extent of the applicability of the ECHR and its impact on multinational forces may affect future operations and such matters as whether an individual within the effective control of the armed force of a state party to the ECHR can be transferred to the custody U.S. forces.

International Covenant on Civil and Political Rights (ICCPR)

The United States interprets its obligations under the ICCPR to apply only within U.S. territory. However, the UN Human Rights Committee has consistently held that the ICCPR can have extraterritorial application, clearly demonstrating its understanding that a state's jurisdiction extends beyond its territorial boundaries. It is possible that some multinational partners may determine that the ICCPR should be applied within an area of operations to locations where the state has effective control. For many European States, the ICCPR rights are subsumed by similar ECHR rights, which are enforceable through a private right of action.

Law of the Sea

One hundred and fifty nine states have ratified the United Nations Convention on the Law of the Sea 1982 (UNCLOS). The United States has not ratified UNCLOS, but considers the navigational articles to be generally reflective of customary international law.

Law of the Air

One hundred and ninety states, including the United States, have ratified the Convention on International Civil Aviation 1944 (Chicago Convention). Despite the fact that the Chicago Convention applies only to civil aircraft, the definition of airspace reflects customary international law regarding the lateral extent of airspace. The United States has not set any firm position on the specific altitude that marks the vertical limit of airspace.

Policy Issues

While the United States and other states may concur on the law as to territorial boundaries, policy considerations and ROE may place restrictions on how closely aircraft approach national territorial boundaries. Such restrictions may create additional buffer zones adjacent to territorial boundaries which aircraft may not enter except in emergency. The purpose of such buffer zones may be to reduce tension with a neutral state or to take account of navigational error. States within a combined area of operations may follow differing polices about approach distances to territorial boundaries because of interstate relationship issues. Even if the ROE authorize specific geographic approach limits, local

unit commanders may impose more restrictive limits based on their own risk management strategy. It is important for both legal advisers and operators to confer with respect to any such policy limitations as they can limit the kinds of missions that may be performed by the forces of each coalition partner.

INTERNATIONAL CRIMINAL COURT

Rome Statute of the International Criminal Court 1998 (Rome Statute)

Parties to the Rome Statute are subject to the jurisdiction of the International Criminal Court (ICC). Members of the armed forces of a state party accused of war crimes would normally be tried under the appropriate provisions of their own service disciplinary code or domestic criminal law. The ICC will only exercise jurisdiction where states having jurisdiction themselves are unwilling or unable genuinely to exercise that jurisdiction. It is thus complementary to national jurisdiction and does not have primacy.[311]

The Rome Statute contains a list of war crimes, including offenses committed in international and non-international armed conflict, as well as the crime of genocide and other crimes against humanity. In addition to individual responsibility, a commander is criminally responsible:

"if he or she knows or, owing to the circumstances at the time should have known, that war crimes were being or were about to be committed by forces under effective command and control, and failed to take all necessary and reasonable measures to prevent or repress their commission or to submit the matter to the competent authority for investigation and prosecution."

Therefore, a treaty party national involved in a multinational operation could be held liable for offenses committed by the forces of a multinational force partner, if the criteria for command or individual responsibility are satisfied. This potential liability exists, notwithstanding that the state of the forces committing the offense is not a party to the Rome Statute or does not regard the incident as an offense.

Under Article 89 of the Rome Statute, parties may be required, upon ICC request, to arrest and surrender to the ICC an individual within their territory. It is unclear whether this obligation extends to territory under a state's effective control, such as a military base of a state party in a combined AO in a third party state.

Article 98 of the Rome Statute provides:

"the Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that

[311] This was not the case with the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender."

The United States has entered into over 100 bilateral agreements wherein signatories agree not to surrender U.S. nationals to the ICC. However, there are no Article 98 agreements with a number of regular coalition partners, including the United Kingdom, Canada, and Australia.

APPLICATION OF LAW TO OPERATIONS

Rules of Engagement

Not all states use ROE in the same manner as the United States and some states do not operate under ROE at all. For those states that use them, the ROE for a particular operation are usually generated through interaction between the strategic and operational levels of authority. For some states, seeking an amendment to their ROE can be a cumbersome process, requiring approval at various levels of their national chain of command. This increases the importance of early ROE consultation among multinational legal and command staff. Some interoperability problems can be solved through interpretation of the extant ROE. Rather than seeking a change, the military commander may seek to confirm with higher headquarters that the ROE are to be interpreted in a manner consistent with the planned method of operations.

Release of U.S. ROE

The release of classified information, including ROE, to foreign governments must comply with the procedures in DODD 5230.11.[312] Thus, judge advocates and operational staff should employ processes necessary for the release of ROE at the earliest opportunity. In circumstances where access to U.S. ROE is not granted, there may be other solutions. For example, in operation ENDURING FREEDOM, 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 for U.S. forces to assist Afghan forces in creating Afghan ROE sufficiently similar to U.S. ROE to allow participation in and coordination of operations.

Multinational ROE

Some multinational operations operate under multinational ROE. These ROE often set a baseline for participating nations, with national ROE imposing additional restrictions or caveats. Multinational ROE will apply to U.S. forces for mission accomplishment only if authorized by the Secretary of Defense. Apparent inconsistencies between U.S. ROE and multinational ROE should be submitted through the U.S. chain of command for resolution. In all cases, U.S. commanders retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Even when operating

[312] DODD 5230.11, *Disclosure of Classified Military Information to Foreign Governments and International Organizations*, 16 June 1992.

under multinational ROE, differences can occur between participating states depending upon their interpretation of the ROE. It is imperative that judge advocates always clarify the practical application of the ROE with coalition partners.

Common Issues. Common ROE issues are:

1. Hostile Act/Hostile Intent. These terms, which are commonly used in national and multinational ROE, are defined differently by many states.

2. Use of force for mission accomplishment. It should not be assumed that force can be used to ensure mission accomplishment. For most states, specific authorization is required for the use of force beyond self-defense.

3. Self-Defense. For some states, the use of lethal force in self-defense is limited to the defense of life. Necessary and proportional, but less than lethal force may be used to protect property from loss or destruction. State practice in the use of force to protect property may affect the kinds of roles to which security forces should be assigned. However, ROE that do not authorize the use of lethal force to protect property do not always cause meaningful interoperability problems. Armed attack upon property frequently involves a concomitant threat to life, authorizing the use of proportional force, up to and including lethal force, in self-defense.

An ROE matrix is a useful tool that can be produced by a judge advocate to assist a U.S. commander. A useful checklist for identifying issues concerning ROE is contained in America/Britain/Canada/Australia (ABCA), *Operations Handbook* 13-11, 1 November 2001.

Below is a list of questions judge advocates should seek to answer when analyzing the ROE requirements of an MNF.

ROE Harmonization Checklist

1. Are there generic ROE provisions and definitions to which all multinational force states have agreed?
2. Does each state have a common or clear understanding of the terms used in the ROE?
3. What is the impact of the proposed ROE on the effectiveness and interoperability of each participating state?
4. How does each state disseminate ROE to its units and troops?
5. Have the ROE been distributed to the troops and training conducted prior to deployment?
6. What are the key differences in ROE across the multinational force?
7. Are there national points of contention concerning ROE that the commander must resolve or at least be wary of?
8. Are there ROE on the use of indirect fire agreed upon by all multinational force states?
9. Is there a dichotomy between multinational ROE on the use of indirect fire and national force protection?

Targeting

Target Approval in a Combined Area of Operations. Each multinational force contingent is likely to have different targeting rules as a result of differences in law and/or policy. Commonly, states will differ in the national assessments of particular targets. One method of characterizing these differences is by source: intelligence, law, or policy.

1. Intelligence. Each multinational force contingent may apply their 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. Intelligence differences can be reduced through information sharing, but this is often not permissible due to classification.

2. Law. Differences may occur due to differing treaty obligations, or due to different interpretations of treaty obligations. For example, signatories to AP I may disagree on the definition of a military objective under AP I, Article 52(2).

3. Policy. Some targets may not be politically acceptable to some partners despite their permissibility under international law. These may either be prohibited outright or require national government approval before engagement.

The impact of these differences can be minimized through coordination. Judge advocates involved in targeting learn the impermissible and problematic target types for each multinational state and how these differences may impact each mission. An impermissible target will influence not only a state'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. If the target is impermissible, then that state may also be prohibited from refueling strike aircraft, providing airborne early warning and control, or participating in the planning for the mission.

Where U.S. forces rely on services from a state contingent, it is imperative that solutions are developed early, to preclude mission interference. These may include exclusion from missions involving certain target types, establishing alternative target approval chains to avoid placing staff officers where they would have to step aside and be replaced temporarily during an operation, or simply briefing plans staff in advance of any potential difficulties or sensitivities. For aerial targeting, attendance of multinational force personnel, including legal representatives, at the guidance apportionment and targeting stage of the staff process can minimize coordination difficulties. This is the stage at which strategic aims are broken down into particular targets and multinational force personnel can indicate which targets cause national level concerns. Concern by multinational personnel over a particular target is a good indicator of international sensitivity and may provide valuable cues for either neutralizing the target in a different way or attacking a different target set to achieve the same result.

Exchange and Loan Personnel

Multinational force personnel embedded with U.S. forces usually are required to apply international law as it applies to, and is interpreted by, their nation. Generally, prior to deployment, multinational personnel will be briefed through their own national chain of command on the differences in legal obligation that apply to them.

POLICING WITHIN THE MULTINATIONAL FORCE

Background

U.S. personnel tasked with policing duties on a multi-national force (MNF) base may encounter situations where offenses are committed by personnel from the forces of another state. The legal authority of military police to respond to these situations differs with the circumstances.

General Rule

The powers of military police derive from the domestic law of each state. Outside a state's territory, its forces are entitled to exercise legal authority derived from their own national law solely over their own forces. Thus, as a general rule, in a third-party state the military police of each element in a multinational force do not have the authority to apprehend or arrest members of other forces. This general rule may be altered by international instrument, bilateral or multilateral agreement, or through cross-vesting of police powers under legislation.

Application of Local Law

In relation to military members of another foreign national component, police personnel may exercise any authority granted by local law. For example, if local law allows the use of reasonable force to prevent crime, then this may allow the use of force, including restricting freedom of movement, to prevent a crime. Local law could also be used as the basis to exercise legal authority over members of all component forces, provided component forces are subject to local law. However, the military police would have no greater powers than a citizen of the local state and would not have specific local police powers.

International Instruments

Power to enforce criminal laws within a third-party state against multinational force members could be obtained through a UN Security Council Resolution. A resolution that authorized the use of all necessary measures to restore peace and security would include the authority to arrest persons, including multinational force members, committing offenses against the laws that applied within a third party state.

Agreements

The national command chains of each branch of a multinational force could reach an agreement on joint policing issues, enforceable within each multinational element by national military orders. It would be lawful for each force to issues orders to cooperate with directions given by military police from other contingents in relation to issues like traffic direction and public order.

Power to Temporarily Detain

Given the general lack of legal authority to arrest or to investigate offenses committed by personnel from a MNF contingent, the best approach is for the authorities of that state to deal with the offender. This may require military police from one state to temporarily hold an individual from another state who was committing or about to commit an offense, while waiting for personnel from the relevant multinational contingent to arrive and take control of the matter. The power to temporarily detain may arise from an international instrument as discussed above. Whether a power to temporarily detain can arise from an agreement or through the domestic law of the state of the police member is less certain. Police should

seek the voluntary cooperation of the multinational member before taking any action to exert control over the member's freedom of movement.

Power of Apprehension Under the U.S. Rules for Court-Martial (RCM)

On U.S. territory, military police and security forces have the same powers of apprehension over foreign military personnel as they do over U.S. civilians, subject to any specific SOFA agreement to the contrary. Outside of U.S. territory, including on U.S. bases outside U.S. territory, the authority under the RCM to apprehend is limited to persons subject to the Code. RCM 302. Thus, under the RCM there is no power to apprehend foreign personnel not affiliated with U.S. forces outside U.S. territory.

REFERENCES

1. The 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted 8 June 1977, 1125 U.N.T.S. (1979) 3-608, 16 I.L.M. (1977) 1391-441 (entry into force 7 December 1978, United States not a party)
2. The 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) adopted 8 June 1977, 1125 U.N.T.S. (1979) 609-99, 72 A.J.I.L 457 (1978), 16 I.L.M. (1977) 1442-9 (entry into force 7 December 1978, United States not a party)
3. Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Antipersonnel Mines and on Their Destruction, date of adoption 18 September 1997, 36 I.L.M. (1997) 1507-19 (entry into force 1 March 1999, United States not a party)
4. Convention on Cluster Munitions, date of adoption 30 May 2008 (United States not a party)
5. Rome Statute of the International Criminal Court, 17 July 1998, A/CONF. 183/9 (United States not a party)
6. Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 (as amended by Protocol No. 11) (United States not a party)
7. National Security Strategy of the United States of America, National Security Council (2006)
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10. DODD 3115.09, *DOD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning*, 9 October 2008
11. DODD 5230.11, *Disclosure of Classified Military Information to Foreign Governments and International Organizations*, 16 June 1992
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CHAPTER 20

AIR FORCE SPECIAL OPERATIONS

BACKGROUND

Special Operations (SO) encompasses a broad array of highly specialized missions performed across the spectrum of military operations by highly trained individuals in high risk environments. Special operations forces (SOF) typically operate as small units, relying heavily on individual proficiency in several different combat skills. Special operations are inherently joint, and the judge advocate must possess or acquire a working knowledge of applicable joint doctrine. There are no "SOF legal exceptions," and yet, SOF performs some of the most legally and politically challenging military missions carried out by the Department of Defense (DOD). For this reason, the judge advocate must be involved early in any planning process, exercise or "real world." Even day-to-day fiscal and contracting matters present challenges not seen in other environments. Keep in mind that the United States Special Operations Command (USSOCOM) is the only combatant command for which, by statute, a separate budget proposal requests funding for development and acquisition of special operations-peculiar equipment and acquisition of other material, supplies, or services that are peculiar to special operations activities. Thus, it is critical for the judge advocate to possess a solid understanding of SOF roles, missions and history in order to better evaluate all the various "color of money" issues that come up in garrison and out in the field.

HISTORY

Special operations forces have a rich history dating back to the founding of the American Republic when a small band of irregular soldiers fought a guerrilla style campaign to slow the British forces advancing in South Carolina. The significance of the SOF contributions to the accomplishment of national political and military objectives belies its historically small numbers. Modern SOF traces its origins to the Second World War when a Wall Street lawyer, William J. "Wild Bill" Donovan, convinced President Roosevelt that a small unit of highly trained and motivated people could contribute at a strategic level through sabotage, espionage, unconventional warfare, and propaganda. President Roosevelt authorized Colonel Donovan to create an Office of Strategic Services (OSS), forerunner to both Special Forces and the CIA.

Air Force Special Operations Command (AFSOC) "Air Commandos" also trace their roots to the unconventional air warfare operations of WWII. "Doolittle's Raiders" stunned the Japanese and bolstered American morale following the attack on Pearl Harbor. Launching off an aircraft carrier, stripped down B-25 Mitchell bombers struck targets in Tokyo and then continued on to China where they were aided by indigenous forces and civilians. The

Army Air Corps 1st Commando Group, "Project 9," commanded by Gen Hap Arnold, was used to reopen the Burma Road. The 801st Bombardment Group, "Carpetbaggers," dropped OSS teams, intelligence agents, guerilla warfare teams, supplies, weapons, and munitions to French resistance groups behind enemy lines. Yet, despite their proven capabilities as part of the U.S. military, SOF were largely disbanded following the conclusion of hostilities.

In both the Korean and Vietnam Wars, Air Commandos continued their critical involvement. In Korea, Air Commandos became engaged in the insertion and supply of covert and clandestine operatives behind enemy lines. In Vietnam, Air Commandos continued to perform brilliantly flying and maintaining a dizzying array of aircraft in some of the most daring air missions of the war. Perhaps most notable for its complexity and risk was the legendary raid of the North Vietnamese prison at Son Tay. No less than fifteen aircraft of different types flew undetected through Laos and deep into North Vietnam to a place within 23 miles of Hanoi.

Despite these successes, SOF were dramatically downsized following the Vietnam War. In fact, until the 1980s, the presence of SOF in the U.S. military is a story of surging and downsizing to meet the needs of specific conflicts. However, the failed attempt to rescue American hostages in Tehran, Iran, highlighted shortfalls in interoperability, joint training of air and ground forces and resourcing of SOF. The "Holloway Commission" made a series of recommendations along these lines, but by the mid-1980s, Congress perceived that the military departments had failed to follow through on the proposals. Consequently, in 1986, Congress enacted the Nunn-Cohen Amendment, 10 U.S.C. § 167, establishing the United States Special Operations Command (USSOCOM). USSOCOM is unique among the combatant commands in two key respects. Most notably, USSOCOM is the only such command mandated by Congress. The Department of Defense (DOD) could, in theory, eliminate any of the other combatant commands at its discretion, except USSOCOM. Further, Congress believed that if it created a separate special operations command without separate funding authority, the DOD might undermine Congressional efforts by simply refusing to fund SOF programs. When it created USSOCOM, Congress gave it service-like budget authority with Major Force Program Eleven (MFP-11). These MFP-11 funds provide USSOCOM with the authority and funds to acquire SOF-specific equipment and programs.

SOF COMMAND STRUCTURE

United States Special Operations Command is both a supporting and a supported command: supporting in that it is responsible for providing ready and trained SOF to the geographic Combatant Commander (COCOM); supported in that when directed by the National Command Authorities (NCA), it must be capable of conducting selected SO under its own command. Each service has its own SO command. The service-specific SO commands are responsible for selecting, training and equipping the force and for developing SO doctrine. In addition to the service SO commands, the Joint Special Operations Command (JSOC) is a sub-unified command under USSOCOM. It studies special operations requirements and techniques, ensures interoperability and equipment

standardization, plans and conducts joint SO exercises and training, and develops joint tactics.

COMMAND AND CONTROL

In theater, SOF are assigned under the command and control of the specific COCOM. Each geographic COCOM has a Theater Special Operations Command (TSOC), typically commanded by a two-star general. SOF in theater are normally under the OPCON of the TSOC or, if activated, a Joint Special Operations Task Force (JSOTF).

When tasked with supporting a specific contingency operation, the TSOC may establish a JSOTF. Generally, the JSOTF commander will be the TSOC or service SOF with the largest force presence in the geographic area of responsibility. (If augmented by foreign units, the designation becomes a Combined Joint Special Operations Task Force). A Special Operations Command and Control Element (SOCCE) may be established to synchronize SO with land and maritime operations with conventional units. It collocates with supported conventional forces and can receive operational, intelligence, and target acquisition reports from deployed SOF and provide them to the supported component.

Depending upon the size and scope of the mission, the TSOC may establish a commander for air operations in the form of either a Joint Special Operations Aviation Component (JSOAC) or a Joint Special Operations Aviation Detachment (JSOAD). The JSOAC commander typically works directly for the TSOC commander but may be placed under the JSOTF commander. A JSOAD command falls under either a JSOAC or under the JSOTF. The focus of either arrangement remains to ensure the interoperability of air and ground forces at every stage of operations.

When forward deployed, more than one chain of command will have an interest in discipline issues that may arise with Air Force SOF, including the Air Force Special Operations Command commander, the home unit commander, and the commander of Air Force forces in the forward area. You must be sensitive to the potential for command influence in situations where serious incidents occur overseas because of the multi-command interest.

SPECIAL OPERATIONS MISSIONS

10 U.S.C. 167(j) and JP 3-05 identify the enumerated SO missions and core tasks as:

1. Direct action
2. Strategic or special reconnaissance
3. Unconventional warfare
4. Foreign internal defense

5. Civil affairs
6. Psychological operations
7. Information operations
8. Combating terrorism
9. Humanitarian Assistance
10. Theater search and rescue
11. Counter-proliferation

Direct Action (DA)

These are short duration strikes and other small-scale offensive operations such as raids, ambushes, terminal guidance operations, and recovery operations. A judge advocate must review them and highlight potential statutory, law of armed conflict, regulatory and/or executive policy violations. As with conventional operations, the law of armed conflict relating to the use of force, targeting, chemical weapons, noncombatants, and principles such as military necessity, proportionality and unnecessary suffering apply to SOF missions. Other limitations, usually expressed through rules of engagement (ROE), may also have significant impact on DA as well as other SOF activities.

Strategic or Special Reconnaissance (SR)

These missions are reconnaissance or surveillance actions to obtain or verify, by visual observation or other collection methods, information concerning capabilities, intentions and activities of an actual or potential enemy. Numerous laws and regulations guide intelligence activities - many also impact SR. Judge advocates should be familiar with EO 12333, *U.S. Intelligence Activitie*s and have access to DODD 5240.1, *DOD Intelligence Activities*, 25 April 1988 and DOD Reg. 5240.1R, *Procedures Governing the Activities of DOD Intelligence Components that Affect U.S. Persons*, December 1982. A good resource for human intelligence (HUMINT) operations is the Defense Intelligence Agency's (DIA's) Intelligence Law Handbook. During reconnaissance missions, SOF are particularly concerned about compromise of their mission by noncombatants. Since there is no SOF exception to the law of armed conflict, compromise of a reconnaissance mission does not provide authorization to use deadly force against a noncombatant. It may, however, be permissible to capture and detain, evacuate with, or temporarily incapacitate a noncombatant. If the noncombatant is incapacitated, he or she should be left where he or she can be discovered or where he or she can return from where he or she came.

Unconventional Warfare (UW)

Unconventional Warfare missions entail SOF leading or training non-state paramilitary forces in combat operations. Unconventional Warfare may involve operations that are of long duration, often with friendly indigenous personnel. Those SOF involved in UW may participate in guerrilla warfare, subversion, sabotage, and support to escape and evasion networks. Judge advocates working in this area can expect to be dealing with questions related to the status of U.S. SOF personnel if captured by an unfriendly force or authority.

Foreign Internal Defense (FID)

Special operations forces are called upon to organize, train, advise, and assist host nation (HN) military and paramilitary forces. The goal is to enable HN forces to maintain internal security. Fiscal law can be an important and difficult issue in FID missions. Judge advocates must understand how operations are funded and understand 10 U.S.C. 2011, *Training with Friendly Foreign Forces*, 10 U.S.C. 2010, *Combined Exercises*, and know other means of funding training of foreign forces, such as 10 U.S.C. 166a(a), *CINC Initiative Fund*; 10 U.S.C. 168, *Military to Military Contacts and Comparable Activities*; 10 U.S.C. 1050, *Latin American Cooperation*; and 10 U.S.C. 1051, *Bilateral or Regional Cooperation Programs*. See chapter entitled *Deployed Fiscal Law and Contingency Contracting* for further explanations.

Special operations forces practice wartime missions in exercises with HN forces. The provisions of 10 U.S.C. 2010 allow U.S. forces to pay incremental costs of conducting training with soldiers from other countries. Special operations forces units are also tasked to conduct Joint Combined Exchange Training (JCET) under 10 U.S.C. 2011 with various nations. Combined training, however, is always undertaken primarily to enhance the security interests of the U.S. To comply with 10 U.S.C. 2010 and 2011, participation of the other country's forces must be necessary to achieve the fundamental objectives of the training exercise. Mission planning documents must reflect the requirements. Combined exercises afford SOF an opportunity to train in regions to which they would deploy in times of crisis.

In recognition of the need for SOF to train others to train themselves to accomplish internal defense and UW missions, Congress granted an exception to the rule that operations and maintenance (O&M) funds not be used in training foreign forces. Under 10 U.S.C. 2011, SOF are authorized to expend O&M funds for the costs of training U.S. SOF as well as the additional incremental costs of training the foreign military personnel. The focus of a mission must be on training SOF and not on training received by the HN military forces. Commanders must be able to truthfully articulate this primary purpose to comply with 10 U.S.C. 2011.

Civil Affairs (CA)

The Army is lead service for civil affairs, but each service is required to maintain some organic civil affairs capability. Certainly, within the Air Force, the JAG Corps provides a robust capability to augment the total Air Force contribution to this important work.

Psychological Operations (PSYOP)

The purpose of PSYOP is to influence foreign attitudes and behaviors. This may occur at the strategic, operational, or tactical level. PSYOP must be approved by the NCA, although this authority has been delegated to the Assistant Secretary of Defense for Special Operations and Low Intensity Conflicts (ASD SO/LIC). DOD policy requires review of all PSYOP plans by the DOD General Counsel prior to approval. Consequently, an overall PSYOP campaign will usually be reviewed and approved at echelons well above the level of a unit or joint task force (JTF) judge advocate. In peacetime, PSYOP campaigns must be coordinated with the Department of State (DOS). The primary role of the judge advocate is to provide advice on the implementation of the PSYOP campaign within the guidelines set by the approving authority.

Psychological operations elements may work closely with CA elements. Civil affairs, PSYOP and public affairs can dramatically affect the perceived legitimacy of a given operation. When properly used, PSYOP is an important force multiplier. PSYOP is often the only means of mass communication a commander has with hostile and foreign friendly groups in an area of operations. The use of PSYOP often presents interesting and unique legal issues. These include:

1. *U.S. Citizens*. U.S. policy prohibits conducting PSYOP against U.S. citizens or operations intended to influence U.S. citizens whether within or outside the U.S. Judge advocates must be cognizant of this policy during any operations with PSYOP units.

2. *Truth Projection*. United States forces do not engage in misinformation, but truthful information may be presented in such a way as to present the U.S. perspective. In peacetime, the DOS provides overall direction, coordination, and supervision of U.S. Government (USG) overseas activities. DOS may restrict messages, themes, and activities. New missions, projects, or programs must be coordinated with the U.S. Country Team at the relevant U.S. Embassy. See chapter in this text entitled *Department of State Interface*.

3. *Geneva Conventions and Hague Conventions*. Special operations commanders and judge advocates must carefully review PSYOP plans to ensure they do not employ "treachery" or "perfidy," which are prohibited under the law of armed conflict.

4. *Treaties in Force*. International agreements may limit PSYOP activities. Judge advocates should review SOFAs and other agreements prior to and during PSYOP planning, employment, and deployments.

5. *Use of Public Affairs*. Public affairs channels are open media channels that provide objective reporting. Consequently, they may be used to counter foreign propaganda. Public affairs and PSYOP staffs should coordinate their efforts because PA must remain credible, information passed through PA channels must

not propagandize and should not be of a nature to qualify as propaganda. It must be objective truth.

6. *Domestic Laws*. Psychological operations use computer, audio, and video technology. You must be alert to copyright, fiscal and royalty issues, or ethical limitations on use of PSYOP capability to support political or financial interests of individuals or private groups.

7. *Fiscal Law*. Psychological operations campaigns may include "giveaways," (for example, T-shirts with a printed message) the purchase and distribution of which require careful fiscal law analysis.

8. *General Order and Disciplinary Exceptions*. Psychological operations teams may require exceptions to certain types of restrictions often contained in general orders. For example, PSYOP personnel may have to wear civilian clothing in contravention of a general requirement to remain in uniform at all times.

Information Operations

This subject is discussed in the separate chapter in this text entitled *Information Operations*.

Combating Terrorism (CBT)

Combating terrorism includes anti-terrorism (AT) - defensive measures to reduce vulnerability to terrorist acts, and counter-terrorism (CT) - offensive measures to prevent, deter, and respond to terrorism. When directed by the NCA, SOF may be involved in recovery of hostages or sensitive material from terrorists; attack of terrorist infrastructure; and reduction of vulnerability to terrorism. While AT is the responsibility of all U.S. forces, CT is the dealt with by special mission units (SMU) and legal issues specific to that mission are beyond the scope of this handbook.

Humanitarian Assistance (HA)

The DOS provides HA through economic aid programs. With DOS coordination, the DOD can also provide limited HA. For AFSOF, this generally takes the form of Humanitarian and Civic Assistance (HCA), authorized by 10 U.S.C. 401. HCA comes in three varieties: demining, preplanned HCA, and "de minimis" or "target of opportunity" HCA.

There is oftentimes a nexus between a government's internal security and its ability to provide basic services to its citizens. Thus, insurgencies and organized criminal enterprises tend to be more successful in countries that have governments which will not or cannot support their populaces. By providing HA, the U.S. is able to help developing nations provide services. The result is regional stability, a benefit to U.S. interests. Humanitarian and civic assistance operations often serve as a gateway for U.S. forces into areas where access is otherwise limited because of diplomatic concerns. Additionally, SOF benefit from the training and information gathering opportunities presented by HCA operations. At the

execution level, problems occur when SOF teams fail to realize the scope of the statutory authorization for their particular operation. If a statute authorizes a SOF team to repair a rural clinic, the team may not use operation funds to buy refrigerators, sterilizers, tables and chairs. Stocking a clinic is not repair, and it constitutes foreign aid with no nexus to training or to the improvement of SOF readiness skills. Leaving behind medicine or tools purchased to accomplish HCA would arguably improperly augment DOS funds for foreign aid.

Combat Search and Rescue (CSAR)

Combat search and rescue involves the rescue and recovery of distressed personnel during war or military operations other than war (MOOTW). U.S. Special Operations Command is responsible for the CSAR of its own forces, and, when directed, other friendly forces as well. The AFSOF's ability to conduct operations deep behind enemy lines makes it well suited for CSAR.

One legal issue that often arises in the context of CSAR is the potential use of riot control agents (RCA). The 1993 Chemical Weapons Convention, to which the U.S. is a party, bans RCA as a "method of warfare," but EO 11850 permits the use of RCA in CSAR. The implementation section of the resolution that accompanied the Senate's consent to ratification of the treaty requires that the President not modify EO 11850. S. Exec. Res. 75, Senate Report, S3373, 24 April 1997, Section 2 – condition (26) RCA. The President, in his ratification document, stated, "The U.S. is not restricted by the Chemical Weapons Convention in its use of RCA in various peacetime and peacekeeping operations. These are situations in which the U.S. is not engaged in the use of force of a scope, duration, and intensity that would trigger the laws of war with respect to U.S. forces." Despite CSAR's defensive nature, RCA is arguably a method of war when used in conflict. So even though EO 11850 is valid, the NCA may not approve use of RCA in CSAR during armed conflict where the law of armed conflict is applicable. It may, however, approve its use for CSAR in peacekeeping.

Counter-Proliferation (CP) of Weapons of Mass Destruction (WMD)

Counter-proliferation refers to actions taken to seize, destroy, render safe, capture, or recover WMD. If directed, SOF can conduct direct action, special reconnaissance, counter-terrorism, and information operations to deter and/or prevent the acquisition or use of WMD.

SPECIAL OPERATIONS COLLATERAL ACTIVITIES

In addition to the above primary SOF activities, AFSOF, based upon its inherent capabilities, is particularly suited for other collateral missions.

Coalition Support. Air Force special operations forces may deploy in small groups to accompany coalition forces during deployments or combat operations, to include training coalition partners on tactics and techniques. These forces possess often unique language capabilities and cultural training. Coalition support teams (CST) play a part in ensuring

ROE are understood and followed by coalition members, thus aiding judge advocates in responsibilities for training foreign forces in combined force ROE. Members of CSTs must understand their obligation to document and report any possible violations of the law of armed conflict by the coalition forces they accompany. Although CST may not be able to prevent (nor are they usually required by law or direct command policy to intervene) allied force violations of ROE, the law of armed conflict, or fundamental human rights, they are subject to the UCMJ and may not individually participate in operations that constitute such violations.

Counter-Drug (CD) Operations

Special operations forces participation in CD operations includes measures to detect, monitor and counter the production, trafficking and use of illegal drugs. Outside the continental U.S. (OCONUS), SOF possess the cultural and linguistic capabilities to assist foreign governments with CD efforts. Special operations forces may help U.S. and foreign law enforcement with military applications in CD, such as reconnaissance. In the U.S., SOF are used to train and assist local, state, and federal law enforcement agencies for CD operations.

When evaluating military CD operations, judge advocates must be sensitive to fiscal law issues. Money for CD programs comes primarily from O&M appropriations. However, all O&M fund expenditures for planned CD operations must be backed by a specific statutory authorization. It is not enough that a CD operation represents a "training opportunity," because CD operations often aid foreign governments or augment U.S. law enforcement agency activities, generally a violation of a proper use of O&M funds.

Security Assistance Missions

Special operations forces are often tasked to deploy mobile training teams (MTTs) overseas to conduct security assistance training. The judge advocate must review a proposed mission to ensure it is properly authorized. Typically, a mission is conducted as a Foreign Military Sale (FMS) case under the Arms Export Control Act. The FMS Letter of Offer and Acceptance should set forth the status of team members while they are in country. These personnel will generally receive the same privileges and immunities as those accorded the administrative and technical (A & T) staff of the U.S. Embassy. Security assistance team members may also be considered part of the U.S. security assistance office (SAO) located in the host country.

Because MTTs often operate autonomously in the field, judge advocates should provide guidance regarding human rights and the acceptance of gifts from foreign government personnel. If the MTT deploys to a country experiencing internal armed conflict, members must be trained in the Arms Export Control Act provisions prohibiting U.S. personnel from performing any duties of a combatant nature, including duties related to training and advising, that may result in their becoming involved in combat activities. 22 U.S.C. 2761(c). Furthermore, DOD personnel are prohibited from accompanying host nation forces on actual operations where conflict is imminent. CJCS MSG DTG 1423587 Feb 91.

Special Activities (Covert Operations)

These are activities undertaken to influence political, economic, or military conditions abroad and that are planned and executed so that the role of the USG is not apparent or acknowledged publicly. In such an instance, a SOF commander has an obligation to ask for written orders that specify that his or her unit's mission is being conducted pursuant to a "Presidential Finding."

If a mission is within the special activity definition, it requires Presidential authorization. Through EO 12333, the President limited the kinds of missions he or she will authorize and indicated procedures that will be followed. The President will not authorize any department, agency, or entity of the government to conduct a special activity unless he or she first determines the action is necessary to support identifiable foreign policy objectives of the U.S. and it is important to national security. No covert action may be conducted if it is intended to influence U.S. political processes, public opinion, policies, or media activities. The President will make a written finding that the special activity is justified before it may be conducted. The requirement for a prior written finding may be waived for up to 48 hours if immediate action is required and there is insufficient time to prepare a written finding. A finding may not authorize any action that would violate the Constitution or any U.S. statute. Each finding shall specify each department, agency or entity of the government that is authorized to fund or participate in the special activity. If applicable, each finding will specify whether a third party (someone not part of the USG or subject to government policies and regulations) will be used to fund or participate in the special activity on behalf of the U.S. Anyone participating in a special activity is subject to policies and regulations of the CIA or written policies or regulations adopted by that department.

Non-combatant Evacuation Operations (NEO)

Non-combatant evacuation operations usually occur with little advance warning and SOF are often the most strategically agile forces that can be quickly deployed to the troubled nation. These operations pose challenging legal questions regarding the status of participating individuals. For more information on legal issues in NEOs, see separate chapter in this text entitled Noncombatant Evacuation Operations.

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3. 10 U.S.C. § 168, Military to Military Contacts and Comparable Activities
4. 10 U.S.C. §§ 371-382, Support to Law Enforcement
5. 10 U.S.C. § 401, Humanitarian and Civic Assistance Provided in Conjunction with Military Operations
6. 10 U.S.C. § 1050, Latin American Cooperation
7. 10 U.S.C. § 1051, Bilateral or Regional Cooperation Programs
8. 10 U.S.C. § 2010, Combined Exercises
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USAF

CHAPTER 21

NONCOMBATANT EVACUATION OPERATIONS

BACKGROUND

Noncombatant Evacuation Operations (NEO) are directed by the Department of State (DOS) and supported by the Department of Defense (DOD), or other appropriate authority. Noncombatant evacuation operations are conducted to assist the DOS in evacuating U.S. citizens, DOS, other United States Government (USG) civilian personnel, and designated host nation and third country nationals from areas of danger overseas to safe havens or to the U.S. Noncombatant evacuation operations generally occur in the event of imminent or actual hostilities or civil disturbances overseas, but may also be directed in anticipation of any natural or manmade disasters.

Recent examples of NEOs which occurred prior to hostilities or civil disturbances include:

1. Sierra Leone (Nobel Obelisk): 2510 evacuees, May-June 1997;
2. Albania (Silver Wake): 900 evacuees, March 1997;
3. Liberia (Assured Response): 2780 evacuees, April-August 1996; and
4. Central African Republic (Quick Response): 448 evacuees, May-August 1996.

ROLE OF THE DEPARTMENT OF STATE

During a NEO, the in-country U.S. ambassador is the senior USG authority for the evacuation and, with the approval of the Under Secretary of State for Management, can order the evacuation of USG personnel and dependents. This authority does not allow the ambassador to order the evacuation of military personnel, designated emergency-essential DOD civilians, or private U.S. citizens, but can offer evacuation assistance. For those U.S. citizens that are evacuated, either under mandatory order by the DOS or through evacuation assistance, the U.S. ambassador is ultimately responsible for the successful completion of the NEO and the safety of the evacuees.

ROLE OF THE SECRETARY OF DEFENSE

The Secretary of Defense (SECDEF) plays a supporting role in planning for the protection, evacuation and repatriation of U.S. citizens. The SECDEF advises and assists the Secretary of State and the heads of other federal departments and agencies in planning for the protection, evacuation, and repatriation of U.S. citizens in overseas areas. The Department of Health and Human Services is the lead federal agency for the reception of all evacuees in

the U.S. and their onward movement. The Department of the Army is the DOD executive agent for repatriation of DOD noncombatants.

ROLE OF THE COMBATANT COMMANDERS

Combatant commanders prepare and maintain plans for assisting the DOS in the protection and evacuation of U.S. noncombatants abroad. When a NEO is ordered by the DOS, the combatant commander will assign the NEO mission to either a Service component or establish a joint task force, commanded by a joint force commander (JFC). The JFC is responsible for all phases of the operation to include the intermediate staging base and temporary safe haven. The combatant commander is also responsible for examining all DOS emergency action plans for countries and consular districts in their area of responsibility (AOR) and for areas in which they might participate in NEOs. The criteria they should use are set forth in DODD 3025.14.

MEMORANDUM OF AGREEMENT BETWEEN DOD AND DOS

While DOS retains ultimate responsibility for NEOs under EO 12656, a 14 July 1998 Memorandum of Agreement (MOA) between DOS and DOD further detail their respective roles and responsibilities. Specifically, the MOA details that, "Once the decision has been made to use military personnel and equipment to assist in the implementation of emergency evacuation plans, the military commander is solely responsible for conducting the operations. However, except to the extent delays in communication would make it impossible to do so, the military commander shall conduct those operations in coordination with and under policies established by the Principal U.S. Diplomatic or Consular Representative." According to the MOA, DOS is responsible for "evacuation related costs" and DOD is responsible for "protection related costs."

LEGAL ISSUES INVOLVED DURING A NEO

Noncombatant evacuation operations fall into three categories:

1. Permissive (host country or controlling factions allow departure of U.S. personnel);

2. Non-permissive (host country will not permit U.S. personnel to leave); and

3. Uncertain (intent of the host country toward the departure of U.S. personnel is uncertain).

During non-permissive and uncertain NEOs, states are essentially intruding into the territorial sovereignty of a nation; therefore, there must be a legal basis for the evacuating state's actions. As a general rule, international law prohibits the threat or use of force against the territorial integrity or political independence of any State. While there is no international consensus on the legal basis to use armed forces for the purpose of NEOs, U.S. policy states:

"Pursuant to Executive Order 12656, *Assignment of Emergency Preparedness Responsibilities* (as amended), the DOS is responsible for the protection or evacuation of US citizens and nationals abroad and for safeguarding their overseas property abroad, in consultation with the Secretaries of Defense and Health and Human Services. The US policy has resulted in the *Memorandum of Agreement Between Departments of State and Defense on the Protection and Evacuation of US Citizens and Designated Aliens Abroad…*" (See JP 3-68, Noncombatant Evacuation Operations, 22 January 2007)

Sovereignty

Noncombatant evacuation operations planners need to know the extent of territorial seas and national airspace of the countries in their AOR. Absent the consent of the host government, U.S. forces should respect the territorial boundaries of countries in the ingress and egress routes of the NEO. The U.S. recognizes claims of up to twelve nautical miles from baselines for territorial seas and corresponding national airspace. Most nations, including the U.S., recognize that there is a right of innocent passage through the territorial seas for ships, but there is no such right of innocent passage for aircraft. National airspace is inviolable absent consent from the relevant state. However, airspace and territorial sea boundary limitations are not a consideration for the target nation of a non-permissive NEO. (See the Air and Sea Law chapter for a discussion of maritime zones and their relation to national and international airspace, including navigation and over-flight rights).

Many neutral states that want to be supportive of U.S. NEOs have concerns that permitting over-flight of their territory or permitting the U.S. to establish staging areas in their state may cause them to lose their neutrality *vis-a-vis* the target state. Such action may jeopardize relations between the two countries. Establishing safe havens for NEO evacuees should not, however, cause a state to violate neutrality. A safe haven is a stopover point where evacuees are initially taken once removed from danger before being taken to their ultimate destination.

Law of Armed Conflict

If the use of armed force becomes necessary, U.S. forces should adhere to the law of armed conflict (LOAC), even if it is not clear that the event is an international armed conflict. Department of Defense policy is generally to apply the principles of LOAC to military operations other than war.

Riot Control Agents (RCAs). The use of RCAs, which are otherwise prohibited as a method of warfare, may, according to Executive Order 11850, be used in non-armed conflict and in defensive situations, to include the rescue of hostages. Whether use of RCAs in a NEO is a method of warfare may depend on the circumstances of the NEO. Authorization to use RCAs is found in the rules of engagement (ROE) or can be requested as a supplemental ROE.

ROE/Rules for the Use of Force (RUF). Specific guidance for RUF is found in Enclosure G of the CJCSI 3121.01B. When drafting ROE, the combatant commander will generally

coordinate with the U.S. Marine Corps security guards (who are assigned to the DOS), other embassy security, and host nation security.

Search of Personnel

Generally, in evacuations of U.S. noncombatant personnel, there is no claim of diplomatic immunity from personal or luggage being searched by U.S. military forces. For purposes of force protection, if a commander has a concern regarding the safety of an aircraft, vessel, ground transportation or evacuation force personnel due to the nature of the personnel being evacuated, he or she may order a search of their person and belongings as a condition to evacuation. For U.S. and non-U.S. noncombatants, diplomatic status is not a guarantee to use U.S. transportation. If a foreign diplomat refuses to be searched, then the commander may refuse transportation. However, prior to refusing transportation to an individual claiming diplomatic protection or immunity, it is advisable, if time permits, to raise the issue up the chain of command. Additionally, personal baggage is kept to a minimum and civilians will not be allowed to retain weapons.

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CHAPTER 22

RULE OF LAW OPERATIONS

INTRODUCTION

Many JAG Corps personnel today deploy to what are called "Rule of Law" deployments. Rule of law deployments typically involve joint and interagency personnel, which may present unique environments in which to operate. They frequently have unspecified missions, not necessarily involving the kind of day-to-day details typical of military missions. Often these types of deployments require deployed personnel to assume roles with a great deal of innovation, creativity and energy. Lastly, these deployments generally involve significant interaction with host nation personnel. As a result of all of these factors, the rewards of a rule of law deployment are exceptionally high. Not only can rule of law deployments be personally and professionally rewarding, the strategic implications of establishing the rule of law are immeasurable. The purpose of this chapter is to provide a basic orientation to rule of law deployments and provide valuable references for use on these deployments.

WHAT IS RULE OF LAW

The term "rule of law" is at the same time self-defining and difficult to define. The term is self-defining because most of us have a general sense of what it means to know, respect, and live under the rule of law. The U.S. has a robust legal system that is part of the fabric of our society. In our society, those who obey the law are respected while those who break the law are punished and viewed as poor citizens. This is the essence of the rule of law. In its most common sense definition, rule of law means societal, cultural, and individual respect for laws, an application of the legal system that is fair, just and impartial, and a general sense of the critical importance laws play in supporting our government and promoting our society.

At the same time, rule of law is a difficult term to define because it is open to interpretation. For example, not all legal systems worldwide operate like those in the Unites States – in fact, most do not. Also, in some countries a large section of the populace may not believe in or support a government that enforces the rule of law; therefore, they don't respect either the government or the concept of the rule of law. Lastly, while some individuals in some countries may want to promote the rule of law, they are limited in their ability to do so due to a lack of infrastructure, security or equipment. Thus, the term rule of law means different things in different contexts, and even within those contexts the term has different meanings to different people.

In December 2006, the United States Army published FM 3-24, *Counterinsurgency*. With a forward co-authored by then Lieutenant General Petreaus, FM 3-24 would become the definitive text for subsequent operations in both Iraq and Afghanistan. While FM 3-24 doesn't give a single definition of rule of law, it does list three key aspects of the rule of law. The first is "[a] government that derives its powers from the governed…" Such a government must do all the things one traditionally thinks of a government doing. That is, it must be responsible for the collective security of the people, seek to develop society, and exist in this form at various levels (e.g. local, regional, and national government). The second key aspect of the rule of law is that it includes "[s]ustainable security institutions," which include "police, court, and penal institutions." Critically, the people must view these institutions as fair and impartial. The third and final key aspect of the rule of law is that it includes respect for "[f]undamental human rights."

In October 2008, the Army published FM 3-07, *Stability Operations*. Field Manual 3-07 defines rule of law as "[A] principle under which all persons, institutions, and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and that are consistent with international human rights principles." According to FM 3-07, the rule of law exists when:

1. The state monopolizes the use of force in the resolution of disputes.

2. Individuals are secure in their persons and property.

3. The state is bound by law and does not act arbitrarily.

4. The law can be readily determined and is stable enough to allow individuals to plan their affairs.

5. Individuals have meaningful access to an effective and impartial justice system.

6. The state protects basic human rights and fundamental freedoms.

7. Individuals rely on the existence of justice institutions and the content of law in the conduct of their daily lives.

A few months before FM 3-07 was published, United States Agency for International Development (USAID) in August 2008, published its own guide to the rule of law. According to USAID, "five elements comprise the rule of law," and "each must be present for rule of law to prevail." These five elements are order and security, legitimacy, checks and balances, fairness, and effective application in enforcement. In further defining rule of law USAID drew upon both a United Nations definition and one from the U.S. State Department, both of which are similar to the definitions described in FM 3-24 and FM 3-07. In trying to define rule of law, USAID made an important and critical observation: "The rule of law is not Western, European, or American. It is available to all societies."

This last point is fundamental for judge advocates and paralegals who seek to establish the rule of law in non-western, non-democratic countries like Iraq and Afghanistan. The point is this: the U.S. does not deploy to these locations to bring an *American* rule of law, but, rather, to establish the *universal* rule of law. The U.S. intent is not to revolutionize an inquisitorial system of jurisprudence and replace it with an American, adversarial system. Rather, the intention is to ensure the host nation's own judicial system works like it should. Thus, a robust prosecutorial or defense bar, rights to jury trials and to remain silent, and the oft-demanded "14th Amendment due process" is not the goal. Rather, the goal is to make sure the host nation's system – as it exists at the time of deployments – is efficient, impartial, and, most of all, legitimate in the eyes of the government and the people.

RULE OF LAW'S PLACE IN THE STRATEGIC CONTEXT: STABILITY OPERATIONS AND COUNTERINSURGENCY

This concept of legitimacy raises a second topic. Where does the rule of law fit into the overall strategic context of military operations? Although the traditional spectrum of military operations will always remain the same, two new emerging doctrines have been further developed in the post 9/11 era. These are doctrines for stability operations and counterinsurgency (COIN). Although the written doctrine is new, COIN and stability operations are not. Field Manual 3-07 points out the following: "During the relatively short history of the United States, military forces have fought only eleven wars considered conventional. Of the hundreds of other military operations conducted in those intervening years, most are now considered stability operations, where the majority of effort consisted of stability tasks. Contrary to popular belief, the military history of the United States is one characterized by stability operations, interrupted by distinct episodes of major combat."

Department of Defense Directive (DODD) 3000.05 defines stability operations as, "Military and civilian activities conducted across the spectrum from peace to conflict to establish or maintain order in States and regions." Notably, it is DOD policy that stability operations "be given priority comparable to combat operations." Moreover, DOD considers stability operations to be "a core U.S. military mission." Thus, stability operations are today viewed to be just as important – if not more important - than traditional combat operations.

Written "as a roadmap from conflict to peace," Army FM 3-07 is the definitive text on stability operations. Quoting joint doctrine (specifically Joint Publication 3-0), FM 3-07 gives the following definition of stability operations: "*[Stability operations encompass] various military missions, tasks, and activities conducted outside the United States in coordination with other instruments of national power to maintain or reestablish a safe and secure environment, provide essential governmental services, emergency infrastructure reconstruction, and humanitarian relief…*" (emphasis in original). While this is certainly the basic definition of stability operations, FM 3-07 expands it. In stability operations:

> [T]ime may be the ultimate arbiter of success: time to bring safety and security to an embattled populace; time to provide for the essential, immediate humanitarian needs of the people; time to restore basic public order and a semblance of normalcy to life; and time to rebuild the institutions of government and market economy that

provide the foundations for enduring peace and stability. This is the essence of stability operations.

Stability operations fit into a greater COIN campaign. While noting that COIN operations "generally have been neglected in broader American military doctrine and national security policies since the end of the Vietnam War over 30 years ago," the 2006 Army FM 3-24 became the blue print for Multi-National Force – Iraq (MNF-I). The manual defines a COIN campaign simply as "a mix of offensive, defensive, and stability operations conducted along multiple lines of operations." In this regard, FM 3-24 provides the following figure, which highlights the features of a successful COIN campaign:

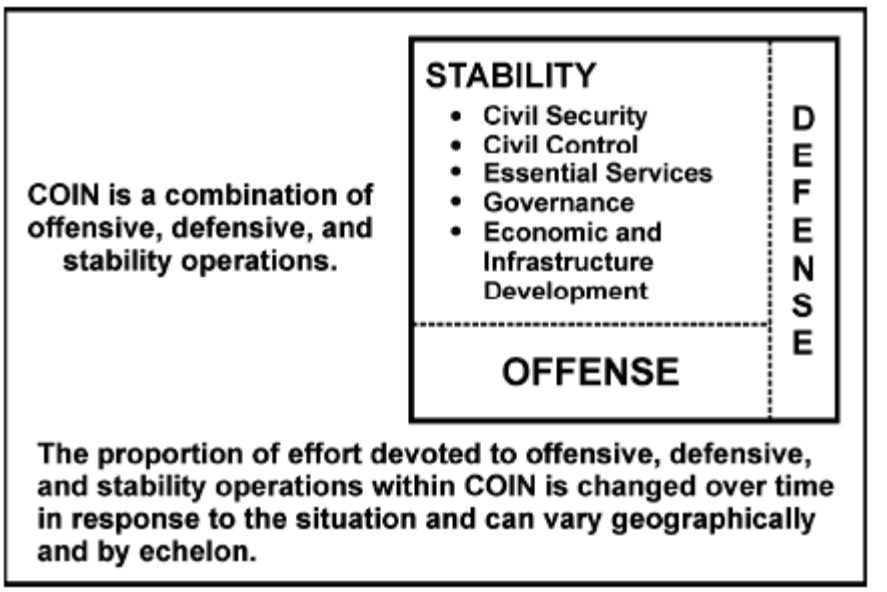

Figure 1-1. Aspects of counterinsurgency operations

In COIN doctrine, the key concept is legitimacy, and the host nation's populace is the center of gravity. Field Manual 3-24 says, "Political power is the central issue in insurgencies and counterinsurgencies; each side aims to get the people to accept its governance or authority as legitimate." To root out insurgents, the government needs the support of the populace and, conversely, the populace needs the confidence that its government can maintain security, essential services, and the fair administration of justice. Therefore, the main goal of a COIN campaign is to both establish a government with all the features of stability, and at the same time create an end-state where the populace views the government as legitimate and those who challenge it as illegitimate.

How does this occur? Field Manual 3-24 says, "Insurgents use all available tools—political (including diplomatic), informational (including appeals to religious, ethnic, or ideological beliefs), military, and economic—to overthrow the existing authority. Counterinsurgents, in turn, use all instruments of national power to sustain the established or emerging

government and reduce the likelihood of another crisis emerging." (parentheses in original) Upon reflection, a simple, but critical observation is obvious: if insurgents use all available tools, including non-military, then the military employing a COIN campaign must also use every available tool to counter the insurgency. "All available tools" includes, of course, traditional military force, but also encompasses a host of other, non-kinetic tools. Field Manual 3-24 sums it up this way: in COIN, the military must "employ a mix of familiar combat tasks and skills more often associated with nonmilitary agencies." Thus, military members "are expected to be nation builders as well as warriors. They must be prepared to help reestablish institutions and local security forces and assist in rebuilding infrastructure and basic services. They must be able to facilitate establishing local governance and the rule of law."

This point on the rule of law is important. Field Manual 3-24 says, "Establishing the rule of law is a key goal and end state in COIN." This is so because:

> The presence of the rule of law is a *major factor* in assuring voluntary acceptance of a government's authority and therefore its legitimacy. A government's respect for preexisting and impersonal legal rules can provide the key to gaining widespread, enduring societal support. Such government respect for rules—ideally ones recorded in a constitution and in laws adopted through a credible, democratic process—is the essence of the rule of law. As such, it is *a powerful potential tool for counterinsurgents*. (emphasis added)

In a COIN campaign, the importance of establishing the rule of law simply cannot be overstated. The bottom-line is this: when a government respects and enforces laws (i.e. when the rule of law is upheld) and when the populace similarly respects laws and sees the legal system working, the government is viewed as legitimate and insurgents are viewed as law breakers. Law and government go hand-in-hand. In contrast, lawlessness, disrespect for laws, or the presence of a legal system that functions poorly demoralizes the populace, encourages support for insurgency, and delegitimizes the government.

This is where judge advocates, paralegals, and rule of law deployments fit into the equation. Because the rule of law is a major factor in COIN doctrine, rule of law deployments have become a critical component of furthering the strategic goal of countering insurgency. Here, judge advocates and paralegals bring much to the table. No one is better equipped to help establish the rule of law than trained lawyers and paralegals. Moreover, not only do they understand laws and legal systems, they also understand judges, law enforcement personnel, prosecutors, and court administrators who are the host nation actors in such a system. Therefore, although they certainly don't accomplish it alone, JAGs are paralegals are uniquely qualified to promote and accomplish the rule of law mission.

KEY PLAYERS IN THE RULE OF LAW MISSION

It is imperative that a JAG or paralegal embarking on a rule of law deployment understand the key players involved. In fact, the JAG or paralegal's first question when approaching a rule of law deployment should be: who else is involved in accomplishing this mission at the deployed location? Rule of law missions are truly joint, interagency, and multi-national endeavors.

First, rule of law deployments are typically to joint organizations. Most Airmen on these missions deploy to organizations led by ground components (US Army and Marine Corps). Stated in operational terms, the lead component will exercise tactical control (TACON).

The JAG Corps of all Services are not the only military personnel involved in the rule of law mission. First, Military Police (MP) and Security Forces (SF) members frequently play leading roles in rule of law missions. Examples of such roles include working detainee operations (e.g., working in a theater internment facility (TIF) or similar confinement facility), arresting and transporting detainees, and coordinating with local police stations at both a local and regional level. Second, more specialized military criminal investigators also work within the DOD rule of law mission. This includes the Air Force Office of Special Investigation (AFOSI), Naval Criminal Investigative Service (NCIS), and Army Criminal Investigation Command (USACIDC). These more experienced federal agents investigate crimes, train host nation investigators, and perform a liaison service with host nation law enforcement. JAGs will find experienced investigators indispensible in accomplishing their own mission. Lastly, Military Civil Affairs (CA) units, which play a critical role in rule of law deployments, are staffed by a variety of different career fields and services.

Next, rule of law deployments almost always involve interagency personnel. This means that many other departments and agencies outside DOD are involved in accomplishing the rule of law mission. These other actors include persons from the Department of State, the Department of Justice, and USAID. Notably, each of these departments and agencies has smaller units within them that address discrete areas of the rule of law mission. Also, while some of these departments and agencies operate in isolation, a JAG or paralegal may deploy to a location or a unit that has all of these agencies plus others present and working together in the same effort. For example, a judge advocate may be assigned to a provincial reconstruction team (PRT) which includes a host of interagency partners working to set government structures back into place. In addition, task forces dealing with detained persons, major crimes, and similar law and order missions will also include actors from these and other departments and agencies.

Rule of law deployments are not only characterized as joint and interagency ventures, they are also multi-national in nature. Attorneys, law enforcement specialists, and diplomats from nations worldwide frequently make huge contributions to rule of law missions with which the United States is involved. For example, when the Law and Order Task Force existed at Multi-National Force – Iraq from 2007 to 2009, it consisted not only of joint and interagency partners from within the U.S. bureaucracy, but also British and Australian law enforcement personnel and Australian lawyers.

In addition to this wide array of personnel, effective rule of law deployments must include host nation personnel. Including local officials is essential to the ultimate goal of COIN and the rule of law missions– to turn everything over to the host nation. Thus, at its best, every rule of law mission will to one degree or another train, equip and enable the host nation to take over the mission.

PRACTICAL ADVICE FOR RULE OF LAW DEPLOYMENTS

Successful rule of law missions require immersion in the culture and every effort to understand it and its legal systems – laws, procedures, and the actors involved. Field Manual 3-24 emphasizes this by saying, "Successful conduct of COIN operations depends on thoroughly understanding the society and culture within which they are being conducted." Field Manual 3-24 says one must understand:

1. Organization of key groups in the society.

2. Relationships and tensions among the groups.

3. Ideologies and narratives that resonate with groups.

4. Values of groups (including tribes) interests, and motivations.

5. Means by which groups (including tribes) communicate.

6. The society's leadership system.

With this in mind, it is important to build relationships with host nation personnel. Accept invitations to break bread, drink the local beverage of choice or enjoy local cultural events. Each of these opportunities allows us to ask questions about local legal systems, background, culture and views. A great deal of mission accomplishment may be made when we talk to people and listen to their stories. Also, often it may be appropriate to bring tokens of U.S. culture such as coins, shirts, cigarettes, or flags. Foreign languages should be no barrier, as most deployments involve extensive use of interpreters who often either live in the culture or grew up there. Interpreters may be a valuable source of understanding and may often teach deployed personnel about the host nation's culture.

Finally, a critical point to keep in mind is that often rule of law deployment missions are vague, with limited guidance. JAGs and paralegals need to temper their own expectations for success. Effecting change (i.e., bringing about the desired end state known as rule of law) is an extremely slow and often painstaking process. Progress is difficult to discern, but extremely rewarding from a long-term perspective.

CONCLUSION

JAGs and paralegals have an important role to play in global efforts to support the rule of law because of their unique understanding of the rule of law and its strategic context in stability and counterinsurgency operations. Success in the rule of law environment requires understanding all the various players, what they bring to the effort, and, most importantly, how they make their various contributions.

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DOD CIVILIAN

CHAPTER 23

CIVILIAN PERSONNEL SUPPORTING MILITARY OPERATIONS

BACKGROUND

Civilians, both Department of Defense (DOD) civilian employees and DOD contractor personnel, have historically played important roles in the conduct of military operations. However, the Global War on Terror (GWOT) changed the landscape of civilians in combat. The GWOT saw unprecedented numbers of civilians deploy, especially DOD contractor personnel, in support of military operations. The Congressional Budget Office reported that at one point during Operation IRAQI FREEDOM, contractor personnel in Iraq outnumbered military members approximately 190,000 to 160,000 respectively.[313] Recognizing this new landscape, Congress amended the Uniform Code of Military Justice (UCMJ) to extend UCMJ jurisdiction over persons serving with or accompanying the U.S. armed forces in the field in times of "declared war or a contingency operation."

This information has been prepared as a guide for judge advocates when advising commanders in an operational environment. The references below are intended to facilitate more in-depth research for issues involving civilians who are deployed with the force. This chapter is broken down into three subchapters - the first dealing with the new UCMJ jurisdiction over civilians, the second dealing with DOD defense contractors, and the third with DOD civilian employees.

SUGGESTIONS TO ANALYZING CIVILIAN ISSUES

Determine the accurate status of the civilian personnel involved. This is critical because different rules may apply depending on the status of the civilian personnel involved (i.e. U.S. citizen, a host nation citizen, or a third country national (TCN), and DOD civilian or contractor personnel).

Obtain a copy of the international agreement (IA) between the host nation and the United States. The IA may be a Status of Forces Agreement (SOFA), a Defense Cooperation Agreement, an Exchange of Notes (EN) or some similar arrangement. The IA will spell out the rights and responsibilities of the civilians with respect to host nation laws and jurisdiction. The following websites may help determine if the U.S. has an IA with a particular country: www.state.gov; aflsa.jag.af.mil/INTERNATIONAL;

www.jagcnet.army.mil/clamo (this webpage also contains country studies, a quick way to learn about a country to which personnel are deploying).

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[313] Peter Grier, *The Christian Science Monitor*, Aug 18, 2008.

Consult applicable Combatant Command (COCOM) directives, guidance, and policies concerning civilian personnel. These documents will provide COCOM's direction regarding most of the issues that will arise during your deployment – e.g. arming civilians, providing medical support to civilians and other topics.

Consult appropriate Air Force Component Command subject matter experts for Air Force and COCOM specific guidance.

UCMJ AUTHORITY OVER CONTINGENCY CONTRACTOR PERSONNEL, DEFENSE CIVILIAN EMPLOYEES, AND OTHER PERSONS SERVING WITH OR ACCOMPANYING ARMED FORCES DURING DECLARED WAR OR CONTINGENCY OPERATIONS

Background

The 2007 National Defense Authorization Act (NDAA) amended UCMJ Art. 2(a)(10) to extend UCMJ jurisdiction over persons serving with or accompanying an armed force in the field during declared war or contingency operations. On 10 March 2008, the Secretary of Defense (SECDEF) issued guidance on the implementation of this expanded UCMJ jurisdiction. The SECDEF Memorandum includes three Attachments. Attachment 1 summarizes the commander's and military law enforcement's authority when a crime is committed within the commander's geographic area of responsibility outside the United States. Attachment 2 sets forth the SECDEF's determination regarding application of the UCMJ to "all disciplinary actions under this UCMJ amendment." Attachment 3 describes the chain of notification procedures for exercising the UCMJ jurisdiction.

SECDEF re-emphasized the commander's authority and responsibility to "respond to an incident, restore safety and order, investigate, apprehend suspected offenders, and otherwise address the immediate needs" of a given situation, including situations where the alleged offender's identity or affiliation is undetermined. *Memorandum at 1-2*. The SECDEF then noted that the "unique nature" of expanded UCMJ jurisdiction over civilians serving with or accompanying the Armed Forces "requires sound management over when, where, and by whom such jurisdiction is exercised," and set forth the process for exercising UCMJ authority over DOD contractor personnel and DOD civilian employees.

Who Can Exercise UCMJ Authority?

Only the SECDEF may exercise UCMJ authority over:

1. Offenses committed within the United States (the states, the District of Columbia, and the commonwealths, territories and possessions of the U.S.);

2. Persons who were not at all times, during the alleged misconduct, located outside the United States; and

3. Persons who are located within the United States when court-martial charges are preferred, or Article 15s are offered.

Geographic combatant commanders (COCOM, e.g. COMCENTCOM) for situations outside SECDEF's authority above. Combatant commanders may withhold UCMJ authority within the combatant command.

General Court-Martial Convening Authority (GCMCA) Commanders (e.g. AFCENT/CC) assigned or attached to COCOM for situations outside SECDEF's authority above. They must provide written notification to the COCOM before exercising UCMJ authority.

All other commanders must forward all available information to the first GCMCA in the chain of command for disposition/consideration under RCM 407.

What UCMJ Authority Can be Exercised?

Authority was granted to exercise court-martial convening authority over DOD contractor personnel and DOD civilian employees.

Authority was also granted to impose nonjudicial punishment over DOD contractor personnel and DOD civilian employees.

NOTE: However, UCMJ authority does not confer the authority for day-to-day supervision/control over DOD contractor personnel; their authority is controlled by the contract.

Procedures

Non-GCMCA commanders - Must forward all available information to the first GCMCA in the chain of command for disposition/consideration under RCM 407.

GCMCA - Must provide written notification to the Combatant Commander before exercising UCMJ authority.

Combatant Commanders - Must notify DOJ, through the DOD, in accordance with Attachment 3 to the Memorandum and DODI 5525.11 to determine whether U.S. federal criminal jurisdiction under the Military Extraterritorial Jurisdiction Act (MEJA) or other federal law applies and will be pursued.

NOTE: Commanders and military criminal investigators at all levels may conduct law enforcement and criminal investigations. Likewise, military criminal investigations may continue as necessary in coordination with DOJ, unless DOJ informs DOD that it will assume sole responsibility for the investigation.

DOJ - Must decide whether or not to exercise jurisdiction within 14 days of formal notification (however, an extension can be requested by Deputy Attorney General).

1. If DOJ elects to exercise jurisdiction under MEJA - DOD's authority is terminated/withheld until the prosecution is either terminated or completed.

2. If DOJ declines jurisdiction under MEJA - DOD may proceed with UCMJ actions.

DEFENSE CONTRACTOR PERSONNEL

Significance

As noted above, contractors are an integral part of U.S. military operations. Nevertheless, our international obligations are clear: contractor personnel accompanying Air Force forces are not combatants and must not be allowed to act as combatants, or directly participate in hostilities, during Air Force operations.

Judge advocates should be sensitive to the often-complicated issues that arise from the increased use of contractor support in deployed locations. Although contractor personnel are subject to the UCMJ, the day-to-day control and supervision of contractor personnel is governed by the terms of the contract and the contracting officer is responsible for the oversight of contract performance. Department of Defense Instruction 3020.41 provides a comprehensive overview of DOD policy, guidance and procedures concerning contractor personnel authorized to accompany the U.S. Armed Forces.

Key Terms and Definitions - *See DODI 3020.41*

Contingency Operation. A contingency operation is a military operation that the SECDEF designates as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the U.S. or against an opposing military force. Alternatively, a military operation that results in the call or order to active duty of members of the armed services.

Contingency Contractor Personnel. Defense contractors and employees of defense contractors and associated subcontractors, including U.S. citizens, U.S. legal aliens, TCNs, and citizens of the host nation (HNs) who are authorized to accompany and work with U.S. military forces in contingency operations or other military operations, or exercises designated by the geographic combatant commander. This includes employees of external support, systems support, and theater support contractors. Such personnel are provided with an appropriate identification card under the Geneva Conventions.

Contractors Deploying with the Force (CDF). A sub-category of "contingency contractor personnel" defined above. These CDF are employees of system support and external support contractors, and associated subcontractors, who are specifically authorized in their contract to deploy through a deployment center or process and provide support to U.S. military forces in contingency operations. They are provided with an appropriate identification card under the Geneva Conventions and usually work for the U.S. military forces under a deployable contract agreement in peacetime and in many cases have a long-

term relationship with a specific unit. These CDF do not include TCN or local national personnel hired in theater using local procurement (e.g., day laborers).

Contract Types. In a deployed environment, contracts can be grouped into three categories. Knowing the type of contract in which a particular employee performs services is important because each type of contract may trigger different sets of rules. The contract category may also determine where the contracting officer is located.

1. Systems Contracts. Contracts awarded and managed usually by the military department or commands responsible for building and buying the weapons or other systems (e.g., contractors working with Predators). Support is often designated as "essential contractor services" under the contract.

2. External Theater Support Contracts. Awarded and managed by commands external to the combatant command or component command (e.g., the AF Contract Augmentation Program (AFCAP) and AFCENT War Reserve Materiel Program). The contractor is expected to provide services at the deployed location that are often is designated as "essential contractor services" under the contract.

3. Theater Support Contracts. Normally awarded and managed by the deployed contracting officers associated with the regional combatant command (e.g., U.S. Central Command). Can be for recurring services such as equipment rental or repair, minor construction, security, intelligence services and one-time delivery of goods and services at the deployed location.

Emergency and Essential Contractor Services. A service provided by a contractor under contract to the DOD to support vital systems in support of military missions considered of utmost importance to the U.S. mobilization and wartime mission. The services, which are designated in the contract, are essential because the DOD Components may not have military or DOD civilians to perform these services immediately or the effectiveness of defense systems or operations may be seriously impaired, and interruption is unacceptable when those services are not immediately available. This category includes most support under external support and systems support contracts as well as some support under theater support contracts.

Letters of Authorization (LOA). The LOA issued to CDFs by a government contracting officer authorizes CDFs to process through a deployment center; to travel to, from, and within the theater of operations; and to identify any additional authorizations, privileges, or Government support provided under the contract.

Pre-Deployment Issues

Because of the nature of the employer-independent contractor relationship, the Air Force is not obligated to provide any services or support to contractor personnel unless specifically stated in the terms of the governing contract.

Medical & Dental Care. According to DODI 3020.37 and 3020.41, contractors are responsible for providing medically and psychologically fit contractor personnel to perform contracted duties. They should also be tested for HIV before deployment if the country of deployment requires it. In addition, contractors may have Panorex or DNA samples taken for identification purposes. Dental x-rays may be substituted when the ability to take Panorex or DNA samples is not available. The Air Force is generally not obligated to perform these evaluations unless stated in the contract. Emergency care by Air Force medical personnel for serious injuries is appropriate, as it would be for any person.

Legal Assistance. Contractor personnel generally will not be eligible to receive legal assistance unless they are eligible for legal assistance due to their entitlements as a person otherwise entitled to receive it under another status (e.g., as a reservist, military retiree, or military family member). Therefore, contractor personnel may wish to consult a privately retained attorney before deployment in order to satisfy their legal needs.

1. If a contractor employee is accompanying the AF outside of the U.S., he or she may receive certain legal assistance when the DOD or the Air Force is obligated by the terms of the contract to provide such assistance as part of logistical support. The specific terms of the contract in question should be reviewed to verify this obligation.

2. If legal assistance is to be provided under the contract, it must be consistent with applicable international agreements or otherwise approved by the host nation government. The assistance must be limited to ministerial services (e.g., notary services); counseling (including the review and discussion of legal correspondence and documents); document preparation (limited to powers of attorney and advanced medical directives); and help retaining a non-government attorney. A contractor who is otherwise entitled to the full range of legal assistance as a dependent, retiree or reservist, should not receive limited services due to their status as a contractor.

Identification Cards. When a contractor processes its personnel for deployment, it must ensure that the personnel receive required identification prior to deployment. Geneva Conventions Identity Card for Persons who accompany the Armed Forces (DD Form 489) identifies one's status as a contractor employee accompanying the US armed forces, and must be issued in accordance with DODI 1000.1. The contractor employee must carry the identification card at all times while in the theater of operations.

Logistical Support. Both DFARS 225.802-70 and DODI 3020.41, para 2.7.4.1., require the contracting officer to verify the logistical and operational support that will be available for deployed contractor personnel at the deployed location.

Contractor Personnel Issues at Deployed Locations

Day-to-Day Supervision and Control. Although UCMJ jurisdiction extends to contractor personnel, commanders do not exercise direct supervision and control over contractor personnel. Commanders do not have the authority to order contractor personnel to deploy, remain in theater, or perform specific missions.

Control of civilian contractor personnel is tied to the terms and conditions of the government contract; therefore, key performance requirements should be reflected in detail in the contract. Contractor personnel shall adhere to all guidance and obey all instructions and general orders issued by the COCOM based upon the needs of mission accomplishment, personal safety, and unit cohesion. DFARS 252.225-7040(d).

The contracting officer or the contracting officer's representative is the designated liaison for implementing contractor performance requirements. However, contractor personnel are not under the direct supervision of the contracting officer or the contracting officer's representatives.

The contracting officer may also direct that the contractor remove from the theater of operations any contractor employee who fails to comply with applicable instructions, orders and directives. Any command-directed repatriation, via the contracting officer, will be at the contractor's expense. DFARS 252.225.7040(h);

Military commanders may limit access to facilities and/or revoke any special status that a contractor's employee has as an individual accompanying the force.

The contracting officer or his or her representative may also direct the contractor to remove from the theater of operations any contractor's employee whose conduct endangers persons or property, or whose continued employment is inconsistent with military security (but see discussion below with respect to host country and third country nationals). In addition, the contracting officer may take action against the contractor for breach of contract, including terminating the contract.

UCMJ Authority over Contractor Personnel for Criminal Activities. As stated earlier in this chapter, UCMJ authority now extends to criminal activities by contractor personnel, including TCNs, who accompany or work with the force during a declared war or a contingency operation. However, JA personnel should understand and comply with the SECDEF guidance outlined earlier in this chapter. Currently, UCMJ authority is limited to commanders who exercise GCMCA. In addition, there are notification and coordination requirements that must be observed. SECDEF Memorandum; DFARS 252.225-7040(e).

Compliance with Local Law. Contractors are required to comply with applicable U.S. and international law. Unless addressed otherwise by the terms of a Status of Forces Agreement or other international agreement, contractor personnel may be subject to the law of the nation in which they are located. This means that contractors need to be prepared to comply with all local tax laws, immigration requirements, customs formalities and duties, environmental rules, bond or insurance requirements, work permits, and transportation or safety codes.

Status of Contractor Personnel. During contingencies that do not constitute international armed conflicts, the status of contractor personnel accompanying the armed forces is entirely determined by host nation law or applicable international agreement. During contingencies that rise to the level of international armed conflicts, contractor personnel have the status of persons "accompanying the armed forces" without being members of the force. They are legally civilians but would be entitled to prisoner of war (POW) status if captured by an adversary. Contractors accompanying the force may be subject to hostile action because of the support they provide in close proximity to combat forces. Commanders should ensure contractor personnel are not used in any manner that would jeopardize their status under international law such as directly participating in hostilities.

Support to Contractors at Deployed Locations. The terms of a particular contract will determine the level of support the Air Force must provide. Contractor personnel should have Letters of Authorization (LOA) or Invitational Travel Orders (ITO), which detail the support that must be provided under the contract to the contractor employees. Some of the more common support issues are:

Medical Support and Evacuation. In DODI 3020.41, paragraph 6.3.8 contains a comprehensive review of the issue.

1. Routine/Primary Care. Deployed contractor personnel generally do not receive routine medical and dental care at military medical treatment facilities unless this support is specifically included in the contract with the government. In the absence of such agreements, contractors should make provisions for their employees' medical and dental care.

2. Resuscitative Care. All contractor personnel engaged in the theater of operations are authorized resuscitative care, stabilization, and hospitalization at level III military treatment facilities, and assistance with patient movement in emergencies where loss of life, limb, or eyesight could occur. Hospitalization will be limited to stabilization and short-term medical treatment with an emphasis on return to duty or placement in the patient movement system.

3. Medical Evacuation. In cases where contingency contractor personnel are evacuated for medical reasons to a medical treatment facility (MTF), normal reimbursement policies will apply for services rendered by the facility. Should contingency contractor personnel require medical evacuation to CONUS, the sending MTF shall assist the contingency contractor personnel in making

arrangements for transfer to a civilian facility of their choice. When U.S. forces provide emergency medical care to TCN and HN personnel hired under theater, systems, or external support contracts, these patients will be evacuated/transported via national means (when possible) to their medical systems.

4. Reimbursement. When the Government provides medical treatment or transportation of contractor personnel, the contractor shall ensure that the Government is reimbursed for any costs associated with such treatment or transportation.

Organizational Clothing & Equipment and Individual Protective Equipment

1. Items of personal clothing and personal care, to include both casual attire and work clothing required by the particular assignment, are the responsibilities of the individual contractor personnel or the contractor. Generally, commanders should not issue military garments (e.g., Airman Battle Uniforms, Gortex jackets, etc.) to contractor personnel.

2. Both DODI 3020.37 and DODI 3020.41 provide that the Government may issue certain items such as chemical protective equipment when the contract requires the Government to issue such items, and as determined by the Component Commander. Commanders should ensure that contractor personnel are trained in the use of any issued personal protective gear. Should commanders issue any type of standard uniform item to contractor personnel, care must be taken to ensure that the contractor personnel are distinguishable from military personnel through the use of distinctively colored patches, armbands, or headgear. The wearing of such equipment by contractor personnel is voluntary, unless required in the contractual agreement.

Force Protection and Weapons Issuance – DFARS 252.225-7040(d); DODI 3020.41

The COCOM may include contractor personnel within its force protection responsibilities if it is in the interests of the Government to provide security because the contractor cannot obtain effective security services; such services are unavailable at a reasonable cost; or, threat conditions necessitate security through military means. The contracting officer shall include in the contract the level of protection to be provided to contingency contractor personnel. In appropriate cases, the geographic combatant commander may provide security through military means, commensurate with the level of security provided DOD civilians. Specific security measures should be tied to the mission and be situation dependent as determined by the geographic combatant commander.

Under limited circumstances, contingency contractor personnel may be armed for individual self-defense using the following procedures:

The COCOM or designee may authorize arming contractor personnel for individual self-defense when the situation warrants and such action is permitted under applicable U.S.,

host nation, and international law, relevant SOFAs or international agreements, or other arrangements with local host nation authorities. In such a case the Government shall provide or ensure weapons familiarization, qualifications, and briefings on the rules regarding the use of force to the contingency contractor personnel.

Acceptance of weapons by contractor personnel can only be on a voluntary basis and only if permitted by the defense contractor and the contract. Contractors who accept weapons should be advised that they may be subject to prosecution by the host nation or to civil suits if they use the weapon. Contractor personnel who wish to be armed can not be otherwise prohibited from possessing weapons under U.S. law. It is the defense contractor's responsibility to ensure the contractor's personnel are not prohibited under U.S. law to possess firearms, including any prohibition required under the Lautenberg Amendment (18 U.S.C. 922).

All applications for arming contingency contractor personnel shall be reviewed on a case-by-case basis by the appropriate staff judge advocate to the geographic combatant commander to ensure there is a legal basis for approval.

Vehicle and Equipment Operation

Deployed contractor personnel may be required or asked under the contract to operate U.S. military, government owned, or government leased equipment or vehicles. Contractor personnel may also be required to obtain local licenses and permits for the country within which they are being deployed (e.g., an Omani driver's license). While operating a military owned or leased vehicle, a contractor employee is subject to the local laws and regulations of the country, area, city, and/or camp in which he or she is deployed. Traffic accidents or violations usually will be handled in accordance with the local laws, the applicable IA, and/or Theater Commander guidance. If contractor personnel do not enjoy special status under the IA, they may be subject to host nation criminal and/or civil liabilities. Therefore, the individual or the contractor may be held liable for damages resulting from negligent or unsafe operation of government military vehicles and equipment.

FEDERAL CIVILIAN EMPLOYEES

Significance

Department of Defense civilian employees who are an integral part of the DOD mission. See *SECDEF Memorandum*. Department of Defense Directive 1404.10, para. 4, simply states that DOD policy is to "[r]ely on a mix of capable military members and DOD civilians to meet DOD global national security mission requirements. DOD civilian employees are an integral part of the Total Force."

Key Terms and Definitions – *see* DODI 1404.10

Department of Defense Civilian Expeditionary Workforce (DOD CEW) consists of employees that are organized, ready, trained, cleared, and equipped in a manner than enhances their availability to mobilize and respond to expeditionary requirements. The DOD CEW consists of the following subcategories:

Emergency Essential (EE) employees are those with a position-based designation to support success of combat operations or the availability of combat-essential systems in accordance with 10 U.S.C. 1580. These employees may be directed to accept deployment requirements of the position. Although DOD will seek volunteers for these EE positions, DOD retains the authority to direct and assign EE employees, either voluntarily, involuntarily, or on an unexpected basis to accomplish the DOD mission.

Non-Combat Essential (NCE) employees are those with a position-based designation to support the expeditionary requirements in other than combat or combat support situations. These employees may be directed to accept deployment requirements of the position. Although DOD will seek volunteers for these NCE positions, DOD retains the authority to direct and assign EE employees, including NCE employees, either voluntarily, involuntarily, or on an unexpected basis to accomplish the DOD mission.

Capability-Based Volunteer (CBV) are those employees who may be asked to volunteer for deployment, to remain behind after other civilians have evacuated, or to backfill other DOD civilians who have deployed to meet expeditionary requirements in order to ensure that critical expeditionary requirements that may fall outside or within the scope of an individual's position are filled.

Capability-Based Former Employee Volunteer Corps are a collective group of former (including retired) DOD civilian employees who have agreed to be listed in a database as individuals who may be interested in returning to Federal service as a time-limited employee to serve expeditionary requirements or who can backfill for those serving other expeditionary requirements. When these individuals are re-employed, they shall be deemed CBV employees.

Pre-Deployment Issues

Medical Screening/Processing. Both EE and NCE must have an annual health assessment for worldwide deployment qualification, and CBV and former DOD employees will have a health assessment as needed to determine whether they meet requirements for a specific deployment. Employees should deploy with a supply of required medications sufficient for the expected deployment period plus 30 days to preclude any adverse impact of pharmaceutical shortages in the theater of operations.

Passports/Visas. The Air Force will provide the DOD CEW with official passports and visas as necessary. DODI 1404.10; AFPAM 10-231, ch. 3, para. 3.4.

Civilian Identification Cards/Tags. Department of Defense CEW employees will be issued CAC and the appropriate Geneva Conventions Identification Card. Medical and religious personnel will be issued the manual DD Form 1934, Geneva Conventions Identity Card for Medical and Religious Personnel Who Serve in or Accompany the Armed Forces, in lieu of the DD Form 489 even if they hold a DD Form 2764 or CAC.

Weapons Certification and Training. As a general rule, civilians should not be issued firearms or be allowed to carry personally owned weapons. Under unique circumstances, the COCOM or the COCOM's designee may issue small arms (generally limited to an M9 pistol) to DOD CEW for their personal self-defense. Before issuing any weapon, the individual is required to comply with military regulations regarding training in the proper use and safe handling of firearms. Acceptance of a firearm is strictly voluntary and may not be made a condition of employment under Air Force policy. Civilians accepting firearms must qualify with the firearm being issued. Because of these stringent authorization and training requirements, the Air Force component commander must decide early in the operation whether civilians should be armed. In addition, the Air Force must ensure that the DOD CEW is not barred from possession of firearms under 18 U.S.C 922 (Lautenberg Amendment). AFI 31-207, ch. 2, para. 2.1.1.2. & 2.3.2; and AFI 36-507, ch. 1, para. 1.3.

Clothing and Equipment Issue

Organizational Clothing. As a general rule, civilian personnel should not wear military uniform items. However, conditions in the field may require that civilian personnel be issued specific items of military clothing or equipment for personal safety or health. Care should be taken to ensure that civilians issued military items can still be distinguished at a reasonable distance from military members wearing similar items of clothing or equipment. Specific guidance regarding civilian employee wear of uniforms in overseas areas is contained in AFI 36-801, Chapter 6.

Individual Protective Equipment. If required, DOD CEW will be provided personal protective gear (e.g., helmets and flak vests). This equipment will be issued only as necessary to perform assigned duties during hostilities, conditions of war, or other crisis situations. Again, efforts should be undertaken to ensure that civilians are distinguishable from military personnel wearing similar items. Maintenance and accountability of EE clothing and equipment is the responsibility of the employee to whom the items were issued. Items of personal clothing and personal care are also the responsibility of the individual. Civilian employees must bring work clothing required by their particular job. AFPAM 10-231, ch. 3, para. 3.9.

Legal Assistance

Legal assistance relating to matters of deployment is available through the installation legal office to Air Force civilians notified of deployment and their families. Legal assistance will be available for the period of deployment and is limited to matters relating to deployment as determined by the installation legal representative. These services normally include such assistance as preparation of wills and powers of attorney. AFI 51-504, ch. 1, para. 1.3.

DOD Civilian Employee Issues at Deployed Locations

Day-to-Day Supervision and Control. During a crisis situation or deployment, civilian employees are under the direct supervision and control of the on-site supervisory chain. Therefore, the on-site supervisory chain will perform the normal supervisory functions regarding detailed employees; for example, those functions related to task assignments and instructions, input to permanent supervisor for annual performance evaluations, initiating and effecting recognition and disciplinary actions, etc.

UCMJ Authority over Contractor Personnel for Criminal Activities. As stated earlier in this chapter, UCMJ authority now extends to criminal activities by contractor personnel who accompany or serve with the force during a declared war or a contingency operation. However, JAGs must understand and comply with the SECDEF guidance outlined earlier in this chapter. The UCMJ authority is limited to commanders who exercise GCMCA. In addition, there are notification and coordination requirements that must be observed.

Compliance with Local Law. The United States will usually have an international agreement or other similar arrangement with the host nation that defines certain rights and responsibilities of U.S. forces, to include accompanying civilians. Under AFPAM 10-231, ch. 6, para. 6.2, JA personnel should be acutely aware of the provisions of the agreements, which may have a significant impact on DOD civilian employees.

Status of DOD Civilian Employees. Under Geneva Convention III, DOD CEW who accompany the armed force without actually being members thereof, are entitled to prisoner of war (POW) status if captured. These protections are accorded to civilians accompanying an armed force if they have received authorization from the armed forces that they accompany and have been provided with the Geneva Conventions Card. AFPAM 10-231, chapter 6, paragraph 6.3.

Common Issues. Pay, Allowances and Taxes During Deployments. All EE employees are required to have direct deposit for their federal civilian pay as a condition of employment. AFPAM 10-231, ch. 4, para. 4.1. Salaries are not tax free while on deployment. This is true even for a deployment to a combat zone where a military member's pay may be exempt from certain taxes. Likewise, salary deductions do not change while on deployment. AFPAM 10-231, ch. 4, para. 4.2. If a civilian employee is in a "missing" status, his or her pay and allowances continue. "Missing" status is defined as missing in action, interned in a foreign country, captured, beleaguered, or besieged by a hostile force, or detained in a foreign country against his or her will.

Premium Pay. Premium pay includes overtime, standby, holiday work, and Sunday work pay. The rules for premium pay entitlements are complex; therefore, the rules that cover each specific situation and category of employee should be confirmed with the home installation civilian personnel office (CPO). See AFPAM 10-231, ch. 4, para. 4.6, for a more detailed explanation on who qualifies for premium pay and on how premium pay is calculated.

Foreign Post Differential *(FPD).* Employees temporarily assigned to work in foreign areas where environmental conditions either differ substantially from CONUS conditions or warrant added compensation as a recruiting and retention incentive are eligible for FPD after being stationed in the area in excess of 41 days. The FPD is exempt from the pay cap and is paid as a percentage of the basic pay rate, not to exceed 25% of basic pay. AFPAM 10-231, ch. 4, para. 4.4.

Danger Pay. Civilian employees receive danger pay while serving at or assigned to foreign areas designated for danger pay by the Secretary of State. The pay is typically authorized at those locations where there is civil insurrection, civil war, terrorism or wartime conditions which threaten physical harm or imminent danger to the health or well being of a majority of employees stationed or detailed to that area. AFPAM 10-231, ch. 4, para. 4.5.

Hours of Work/Tour of Duty. Tour of duty and hours of work are synonymous terms meaning the hours of a day (a daily tour) and the days of an administrative workweek (a weekly tour of duty) that constitute an employee's regularly scheduled administrative work week. The administrative work week constitutes the regularly scheduled hours for which a deployed employee must receive basic and premium pay. The authority for establishing and changing the tours of duty for civilian employees is delegated to the in-theater commander or his representative. The duration of the duty is dependent upon the particular operation and will also be established by the in-theater commander. AFPAM 10-231, ch. 5, para. 5.1.

Leave Accumulation. Any annual leave in excess of the maximum permissible carry over is automatically forfeited at the end of the leave year. Annual leave forfeited during a combat or crisis situation which has been determined by appropriate authority to constitute an exigency of the public business may, however, be temporarily restored. In order to recover the annual leave, the employee must file for carry over or restoration of their leave. Normally, the employee has up to two years to use restored annual leave. Any leave taken after completion of the deployment must be approved by the home station supervisor. AFPAM 10-231, ch. 5, para. 5.3.

On-Call Employees. During crisis situations, the nature of the work may make it necessary to have employees on-call because of emergencies or administrative requirements that might occur outside the established work hours. On-site commanders may designate employees to be available for such a call during off-duty times. Designation of employees for this purpose will follow these guidelines: there should be a definite possibility the services of the designated employee might be required; on-call duties required of the employees will be brought to the attention of all employees concerned; if more than one employee could be used for on-call service, the designation should be made on a rotating basis; on-call duty should not unduly restrict movement. The designation of employees to be on-call or in an alert posture will not, in itself, serve as a basis for additional compensation (e.g., overtime or compensatory time). If an employee is called in, the employee must be compensated for a minimum of two hours. AFPAM 10-231, ch. 5, para. 5.2.

Medical Care. Deployed DOD CEW employees are entitled to full medical care while in-theater, including pharmacy support, equivalent to that given to active duty military. See *DODI 1404.10, para. 4g(3)(d),(e)*.

Department of Defense CEW employees who become ill, contract diseases, or who are injured or wounded while deployed in support of contingency operations are eligible for medical evacuation and health care treatment and services in military treatment facilities (MTFs) at no cost and at the same level and scope as military. Civilians will not be charged personal leave while undergoing treatment for injuries incurred during deployment after they return from deployment.

Deployed DOD CEW employees who are treated in theater continue to be eligible for treatment in an MTF or civilian medical facility for compensable illnesses, diseases, wounds, or injures under the Department of Labor Office of Workers' Compensation Program upon their return at no cost. Employees who are later determined to suffer from compensable illnesses, diseases, wounds, or injuries are also eligible for treatment in an MTG or civilian sector medical facility at no cost.

Federal Employees' Group Life Insurance *(FEGLI).* Department of Defense CEW employees are eligible for coverage under the Federal Employees Group Life Insurance (FEGLI) program. Death benefits (under basic and all forms of optional coverage) are payable regardless of cause of death. AFPAM 10-201, chap. 7, para. 7.4.1.

Retirement Benefits. Survivors of civilians who die while in a deployment status may be entitled to survivor benefits. Benefits payable depend on the retirement system, the amount of creditable service, and the survivor's relationship to the employee. If no survivor annuities are payable, lump sum benefits are paid according to Standard Form 2808, Designation of Beneficiary - Civil Service Retirement System, or Standard Form 3102, Designation of Beneficiary - Federal Employees' Retirement System. Prior to deployment, employees should ensure these designations are current. AFPAM 10-201, chap. 7, para. 7.4.2.

Mortuary Affairs. Civilian employees killed in the line of duty are entitled to many of the same benefits as military casualties. Mortuary benefits for eligible employees include: search, recovery, and identification of remains; next of kin notifications; disposition of remains; removal and preparation of remains; casket; clothing; cremation (if requested); and transportation of remains to permanent duty station or other designated location. AFPAM 10-201, chap. 7, para. 7.6. and AFI 34-242.

REFERENCES

1. Geneva Convention Relative to Treatment of Prisoners of War, adopted 12 August 1949, 6 U.S.T. 3316, 75 U.N.T.S. (1950) 135-285 (entry into force 21 October 1950, for US 2 February 1956)

2. Hague Convention No. IV, Respecting the Laws and Customs of War on Land and Annex Thereto, Oct. 18, 1907, 36 Stat. 2227.2, 2 A.J.I.L. (1908) Supplement 90-117 (entry into force 26 January 1910, for US 27 November 1909)
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6. Secretary of Defense Memorandum, "UCMJ Jurisdiction Over DOD Civilian Employees, DOD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations," 10 March 2008
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18. AFPAM 10-231, *Federal Civilian Deployment Guide*, 1 April 1999
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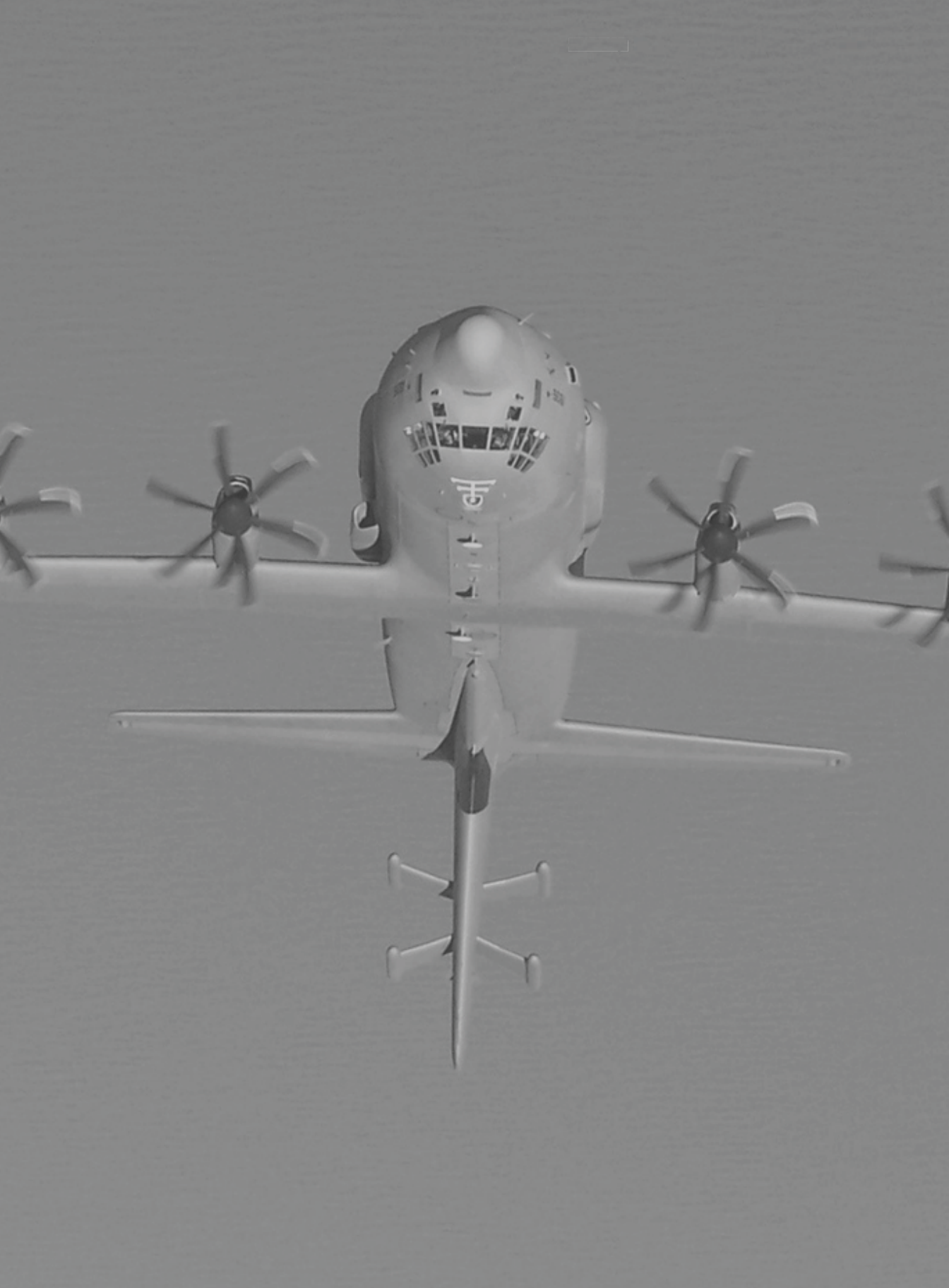
20. AFI 34-242, *Mortuary Affairs Program*, 2 April 2008
21. AFI 36-507, *Mobilization of the Civilian Workforce*, 21 July 1994
22. AFI 36-704, *Discipline and Adverse Actions*, 22 July 1994
23. AFI 36-801, *Uniforms for Civilian Employees*, 9 April 1994, Incorporating Change 1, 6 August 2007
24. AFI 36-3002, *Casualty Services*, 25 July 2005
25. AFI 36-3026 (I), *Identification Cards for Members of the Uniformed Services, Their Family Members, and other Eligible Personnel*, 20 December 2002
26. AFI 36-3103, *Identification Tags*, 1 May 1997
27. AFI 51-504, *Legal Assistance, Notary, and Preventive Law Programs*, 27 October 2003, Incorporating IC-1, 21 October 2008



CHAPTER 24

INFORMATION OPERATIONS

BACKGROUND

The definition of Information Operations (IO) and the way IO capabilities are organized are slightly different in joint doctrine as opposed to Air Force doctrine. After a brief discussion of joint doctrine definitions, this chapter is organized according to Air Force doctrine.

Joint Definition (JP 3-13)

In joint doctrine, IO is the integrated employment of electronic warfare (EW), computer network operations (CNO), psychological operations (PSYOP), military deception (MILDEC), and operations security (OPSEC), in concert with specified supporting and related capabilities, to influence, disrupt, corrupt, or usurp adversarial human and automated decision making while protecting our own. Joint Publication (JP) 3-13 characterizes IO capabilities as core, supporting, and related.

The five core capabilities are: PSYOP, MILDEC, OPSEC, EW, and CNO. These provide the joint force commander with the principal means to influence the adversary and target audiences.

The supporting capabilities include information assurance (IA), physical security, physical attack, counterintelligence, and combat camera. According to JP 3-13, "[t]hese are either directly or indirectly involved in the information environment and contribute to effective IO. They should be integrated and coordinated with the core capabilities, but can also serve other wider purposes."

The related capabilities are public affairs, civil military operations (CMO) and defense support to public diplomacy (DSPD). Defense support to public diplomacy differs from strategic communications as DSPD, along with IA and IO generally, but can provide support to a broader strategic communications program.

Air Force Definition (AFDD 2-5)

In the Air Force view, IO is the integrated employment of the capabilities of influence operations, electronic warfare operations, and network warfare operations, in concert with specified integrated control enablers, to influence, disrupt, corrupt, or usurp adversarial human and automated decision making while protecting our own.

There are three IO capabilities—influence operations, electronic warfare operations, and network warfare operations. The integrated control enablers (ICE) include intelligence, surveillance, and reconnaissance (ISR), network operations (NetOps), predictive battlespace awareness (PBA), and precision navigation and timing (PNT).

The operational activities of network warfare operations are network attack (NetA), network defense (NetD) and network warfare support (NS). According to AFDD 2-5, NS includes collection of network data but only refers to the closely related discipline called network exploitation in connection with intelligence forces.

Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces (SROE) and Information Warfare

The SROE (contained in CJCSI 3121.01B), portions of which are classified SECRET, has an enclosure for Information Operations. In addition to providing separate rules for different IO capabilities, the enclosure also provides templates for requesting appropriate supplemental measures.

The SROE do NOT include guidance on every aspect of information operations; for example, there is no mention of Public Affairs, Strategic Communications, or Civil Military Affairs. The ROE for information operations can and have been modified by the Secretary of Defense in the Joint Operations Planning and Execution System (JOPES) process. Within the ROE, there is a reference to additional regulatory material. It is critical that judge advocates are completely familiar with the SROE, any supplemental measures applicable to the operation, and relevant regulatory references.

INFLUENCE OPERATIONS

Influence Operations are the integrated planning, employment and assessment of military capabilities to achieve desired effects across the cognitive targeting domain in support of operational objectives. Influence Operations activities include MILDEC, PSYOP, public affairs, counterpropaganda, operations security and counterintelligence. AFDD 2-5.

Military Deception (MILDEC)

Military deception includes actions intended to "deliberately mislead adversary military decision makers as to friendly military capabilities, intentions, and operations." JP 3-13.4, at I-1. Military deception can mask, protect, reinforce, exaggerate, minimize, distort or otherwise misrepresent Air Force capabilities, intentions, operations and activities in ways favorable to friendly forces. AFI 10-704.

Legal Considerations. The law of war allows deceptions and ruses; lawful ruses have been a part of military operations for centuries. All MILDEC must comply with Department of Defense policy on relations with the news media and the foreign press. A failure to do so could result in the dissemination of propaganda, which is specifically prohibited.

When advising on MILDEC, judge advocates must be familiar with the distinction in LOAC between *lawful ruses* and *unlawful acts of perfidy*.

Ruse. Ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which do not invite the confidence of an adversary with respect to protection under that law. Lawful MILDEC includes simulated movement of forces, logistics, or reinforcements, and sensor (e.g., IR, electro-optical) countermeasures such as smoke or flares. While superseded, the 2000 SROE provides useful further examples of lawful ruses.

Perfidy. Perfidy is a war crime. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. Examples include using the Red Cross flag to protect a military facility, or disguising a troop convoy to appear to be a column of refugees. As with all military deception operations, caution is required to ensure information operations do not amount to perfidy.

Rules of Engagement and Deception. The SROE contain several provisions on deception operations and they are subject to specific restrictions. Deception planning is highly regulated and very closely held.

Psychological Operations (PSYOP)

Psychological operations are defined as planned operations to convey selected information and indicators to foreign audiences to influence their emotions, motives, objective reasoning, and ultimately the behavior of foreign governments, organizations, groups, and individuals. The purpose of psychological operations is to induce or reinforce foreign attitudes and behavior favorable to the originator's objectives. JP 3-52.

Psychological operations are a vital part of the broad range of U.S. diplomatic, informational, military, and economic activities**.** Psychological operations characteristically are delivered as information for effect, used during peacetime and conflict, to inform and influence. When properly employed, PSYOP can save lives by reducing the adversaries' will to fight. By lowering adversary morale and reducing their efficiency, PSYOP can also discourage aggressive actions and create dissidence and disaffection within their ranks, ultimately inducing surrender.

Legal considerations. The Deputy Secretary of Defense launched a major shift in the policy regime governing PSYOP with the issuance of his 2007 Memorandum on Interactive Internet. Prior to the promulgation of this memo, authority to conduct PSYOPS in peace or war rested solely with the National Command Authority, which had delegated this power to the Assistant Secretary of Defense, Office of Special Operations and Low Intensity Conflict (ASD/SOLIC), maintaining the requirement that the ASD/SOLIC pass actions through the Office of the Secretary of Defense General Counsel's office (OSD/GC) for a legal review. After the issuance of the 2007 memo, the approval authority for some key

initiatives and activities has been placed with geographical combatant commanders and the need for a legal review from OSD/GC was removed in those limited circumstances. The latest information for submission and approval of Joint PSYOP plans is contained in CJCSI 3110.5D (8 November 2007). This instruction has been marked "For Official Use Only," and is available on SIPRNET.

Along with ensuring the adherence to CJCSI 3110.5D, an important JA role in the joint command is to ensure the regulatory approval process is followed. The Smith-Mundt Act, 22 U.S.C. §1461, Pub. L. No. 80-402, 62 Stat. 6 (1948), bans domestic dissemination of propaganda, but on its face, it only applies to State Department activities. Note, however, that when approved, PSYOP assets may be employed in support of DSPD as part of security cooperation initiatives or in support of U.S. embassy PD programs. Much of the operational level IO activity conducted in any theater will be directly linked to PD objectives. DSPD requires coordination with interagency and among DOD components. JP 3-13.

Rules of engagement for PSYOP. The SROE contains provisions dealing with Psychological Operations. These provisions must be read in conjunction with DOD policy, which modifies them.

Public Affairs

Public Affairs (PA) is defined as those public information, command information, and community relations activities directed toward both the external and internal audiences with interest in the Department of Defense. Truth is the foundation of all PA operations. PA is included in IO planning. Public Affairs operations are an important and necessary military capability of influence operations. Although PA operations may provide truth-based information that assists in countering adversary PSYOP, PA personnel do not engage in PSYOP. In the Air Force, Combat Camera is one of many valuable sources for imagery for PA and another method to use to "tell the story" in addition to print, web, video, television, and other media forms.

Legal considerations. The legal issues in PA usually arise from the domestic laws of foreign countries. In some countries, U.S. public affairs products may be banned or broadcasts may be jammed due to limitations on freedom of speech. In other States, domestic laws may criminalize hate speech or incitement (see the U.K. Terrorism Act of 2006 c. 11, 9-12 (Eng.), which contains the crime of "encouragement of terrorism" and applies wholly or partly outside the U.K.)

Counterpropaganda

Counterpropaganda is treated conceptually differently in joint doctrine compared to Air Force doctrine. Air Force Doctrine Document (AFDD) 2-5 lists counterpropaganda operations as a separate discipline, consisting of "activities to identify and counter adversary propaganda and expose adversary attempts to influence friendly populations' and military forces' situational understanding." Joint guidance on counterpropaganda

operations places the counterpropaganda mission with Public Affairs and does not recognize it as a separate capability.

Legal considerations. The legal concerns for counterpropaganda may be identical to those for PSYOP or public affairs. In addition, domestic law of foreign countries against "incitement" and hate speech may be used offensively by the U.S. as the basis to discredit enemy propaganda.

Operations Security (OPSEC)

Operations security is a process of identifying, analyzing and controlling critical information indicating friendly actions associated with military operations and other activities to: Identify those actions that can be observed by adversary intelligence systems; determine what specific indications could be collected, analyzed and interpreted to derive critical information in time to be useful to adversaries; and select and execute measures that eliminate or reduce to an acceptable level the vulnerabilities of friendly actions to adversary exploitation. AFI 10-701.

Legal considerations. Operations security testing is called assessment and this includes electronic systems security assessment (ESSA) and red teaming.[314] The legal regime surrounding ESSA and red teaming is challenging as it potentially involves civilian computer servers and may breach domestic privacy laws. Legal authority for OPSEC testing, also called "white hat" hacking, is permissible using the service provider exception to the wiretap law, 18 USC 2511(2)(a)(i), but specific steps must be taken to ensure compliance. Consult the local status of forces agreement (SOFA) to learn what, if any, restrictions exist on force protection security monitoring overseas. *See also*, Chapter 6, Cyberspace Law.

Counterintelligence (CI)

Counterintelligence is information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations or foreign persons, or international terrorist activities.[315] The Air Force Office of Special Investigations (AFOSI) initiates, conducts, and oversees all Air Force CI investigations, activities, operations, collections, and other related CI capabilities.[316] Air Force Mission Directive 39, AFOSI, 9 January 2006, states AFOSI is the "sole agency for conducting counterintelligence investigations and offensive counterintelligence operations."

The Air Force Office of Special Investigations is also the sole agency within the Air Force authorized to use specialized techniques in counterintelligence activities, or to request other agencies to conduct these techniques in support of the Air Force, as defined in DOD 5240.1-

[314] *See* Table 5.1 AFI 10-701.
[315] AFI 71-101V4.
[316] AFDD 2-5.

R, *Procedures Governing the Activities of DOD Intelligence Components That Affect United States Persons*, 7 December 1982, Procedures 5 through 10.[317]

According to the Executive Order, the Air Force intelligence and counterintelligence components have authority to: "(1) Collect (including through clandestine means), produce, analyze, and disseminate defense and defense-related intelligence and counterintelligence to support departmental requirements, and, as appropriate, national requirements; and authority to conduct counterintelligence activities."[318]

The Air Force Office of Special Investigations is also the only agency in the Air Force with legal authority to investigate computer intrusions. The AFOSI computer crime investigators produce intelligence reports that detail intrusion methods and techniques and attempt to identify known foreign intelligence services, subversives, or terrorist groups attacking DOD computer systems.[319]

In theater, the interface between the component counterintelligence agents, or the joint task forces, if assigned, is the Joint Intelligence Operations Center, DOD Directive O-5240.02 *Counterintelligence*, 20 December 2007.

ELECTRONIC WARFARE

EW is any action involving the use of electromagnetic or directed energy to control the Electromagnetic Spectrum or to attack the enemy. JP 3-13.1. EW is divided into three major subdivisions: electronic attack; electronic protection; and electronic warfare support. AFI 10-706.

Electronic Attack (EA) involves the use of electromagnetic energy, directed energy (DE), or anti-radiation weapons to attack personnel, facilities, or equipment. The primary effects achieved by EA are deception, disruption, denial, degradation and destruction. Creating precise EA effects will also require utilization of a battle management function. This includes spectrum management to ensure electromagnetic spectrum deconfliction in multiple dimensions (e.g. time, altitude and distance). Jamming is a form of EA.

Electronic Protection (EP) involves means taken to protect personnel, facilities, and equipment from the effects of friendly or enemy employment of EA or other EM spectrum capabilities (such as an electromagnetic pulse [EMP]) that have the potential to degrade, neutralize, or destroy friendly combat capability. Examples of EP include: frequency/pulse repetition, frequency agility, and laser eye protection.

[317] AFI 14-104, para 11.
[318] Sec. 1.7. (f)(1) & (2). Exec. Ord. 12333, *United States Intelligence Activities*, 4 Dec 1981, as amended 30 September 2008, 73 Fed. Reg. 45325, 4 August 2008.
[319] Para 1.13.1., AFI 71-101V1, *Criminal Investigations*, 1 December 1999.

Electronic warfare support (ES) involves actions tasked by, or under direct control of, an operational commander to search for, intercept, identify, and locate sources of intentional and unintentional radiated electromagnetic energy for the purpose of immediate threat recognition, targeting, planning, and conduct of future operations.

Legal Considerations. Electronic warfare legal considerations arise from communications statutory law, federal regulations (FCC), DOD restrictions such as the SROE, and international law. Some of the legal issues include:

1. Electronic attack during armed conflict must comply with LOAC. In particular, EA must be directed against military objectives and must not cause excessive collateral damage in light of the military advantage anticipated. *See further* Chapter 2, Law of Armed Conflict. In calculating the collateral damage likely from a planned EA, there is no requirement in international law to speculate on potential indirect effects; only direct effects need be considered,

2. The application of The International Telecommunications Convention which regulates international spectrum allocation and interference and requires special care to be taken to avoid interference with international emergency, safety and distress frequencies,[320]

3. The effect of the UN General Assembly condemnation of peacetime jamming of radio broadcasts in 1950 on the basis that freedom of information is a human right,[321]

4. International prohibition of certain weapons under treaty law, such as the Blinding Laser Treaty,[322]

5. The permissible use of jamming, which is not considered a use of force under the U.N. Charter Article 2(4), and

6. Domestic and international EW health and environmental issues (e.g., personnel exposure to electromagnetic fields, Hazards of Electromagnetic Radiation to Ordnance (HERP), and Hazards of Electromagnetic Radiation to Fuel (HERF)).[323]

This Guide cannot address in detail all of the legal considerations that may arise when conducting EW operations. Further information may be obtained from the references for this Chapter.

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[320] Constitution and Convention of the International Telecommunication Union, with annexes. Done at Geneva December 22, 1992; entered into force July 1, 1994; definitively for the United States October 26, 1997.
[321] GA Res. 424 (V), UN GAOR, 5th Sess., Supp. No. 20, UN Doc. A/1775 **(**1950**).** (Freedom of information is a human right).
[322] Protocol on Blinding Laser Weapons (Protocol IV), Oct. 13, 1995, Art. 1, 35 ILM 1218 (1996).
[323] *See* DOD Directive 3222.3 AFPD 33-5, *DOD Electromagnetic Environmental Effects (E3) Program*, 26 September 2006.

NETWORK WARFARE OPERATIONS

Network warfare operations (NW Ops) are the integration of the military capabilities of network attack (NetA), network defense (NetD), and network warfare support (NS). AFDD 2-5

Network attack (NetA) is the employment of network-based capabilities to destroy, disrupt, corrupt, or usurp information resident in or transiting through networks. Networks include telephony and data services networks.

Network defense (NetD) is the employment of network-based capabilities to defend friendly information resident in or transiting through networks against adversary efforts to destroy, disrupt, corrupt, or usurp it.

Network warfare support (NS) is the collection and production of network related data for immediate decisions involving NW Ops. Network support is critical to NetA and NetD actions to find, fix, track, and assess both adversary and friendly sources of access and vulnerability for the purpose of immediate defense, threat prediction and recognition, targeting, access and technique development, planning, and execution in NW Ops.

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2. Intelligence Community Legal Reference Book, Office of the General Counsel, ODNI, Fall 2007
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6. Deputy Secretary of Defense Memorandum, DTM-08-037, "Policy for Department of Defense (DOD) Interactive Internet Activities," (8 June 2007)
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CHAPTER 25

COMPUTER NETWORK DEFENSE & ENTERPRISE MANAGEMENT

BACKGROUND

The Department of Defense (DOD) is subject to cyber attack as new technology creates increasing vulnerability on the virtual battlefield. Even if not intentionally targeted, DOD personnel and information systems (DOD IS) may nevertheless be affected. Recently, a spate of cyber attacks threatened to degrade the ability to conduct varying missions and has led to a systematic reorganization across the government to reduce these risks and protect the critical national infrastructure.

On 23 June 2009, the Secretary of Defense (SECDEF) directed the establishment of a subordinate unified command designated as U.S. Cyber Command (USCYBERCOM), reporting to U.S. Strategic Command (USSTRATCOM).[324] This SECDEF memorandum reinforces but does not expand USSTRATCOM authorities and defensive military cyberspace operations. USSTRATCOM will disestablish the Joint Task Force-Global Network Operations (JTF-GNO) and Joint Functional Component Command-Network Warfare (JFCC-NW).

In conjunction with the establishment of USCYBERCOM and the development of a new national strategy for cyber-security, the Under Secretary of Defense for Policy will lead a comprehensive review of policy and strategy to develop a unified approach to DOD cyberspace operations. The Chairman of the Joint Chiefs of Staff will direct the issuance of an implementation plan which further delineates USCYBERCOM's new mission, command and control, roles and responsibilities, as well as reporting and support relationships with combatant commands, the U.S. Armed Services, and U.S. Government agencies. The plan will specify accountability measures for the Services and Defense Information Systems Agency (DISA) operating centers.

Based on this new construct of cyber-security, the Commander, USSTRATCOM, will delegate authority to conduct specified cyberspace operations detailed in Section 18.d.(3) of the Unified Command Plan (UCP) to the Commander, USCYBERCOM. When exercising these UCP assigned responsibilities, USCYBERCOM will maintain direct liaison with combatant commanders, Services, and DOD agencies, which remain responsible for compliance with USSTRATCOM's direction, as specified by USCYBERCOM, to protect the military's networks and computers.

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[324]Secretary of Defense (SECDEF) Memorandum, "Establishment of a Subordinate Unified U.S. Cyber Command Under U.S. Strategic Command for Military Cyberspace Operations," 23 June 2009

THE GLOBAL INFORMATION GRID

The Global Information Grid (GIG) is the globally interconnected, end-to-end set of information capabilities, associated processes and personnel used for acquiring, processing, storing, transporting, controlling, and presenting information on demand to joint forces and support personnel. Essentially, the GIG is the DOD's "real property" area of cyberspace, consisting of all departmental computers as well as the information systems which interface with DOD computers. As defined in Joint Publication (JP) 6-0, *Joint Communications System*, the GIG includes all owned and leased communications and computing systems and services, software (including applications), data, security services, and other associated services necessary to achieve IS. It also includes national security systems (NSSs) as defined in section 5142 of the Clinger-Cohen Act of 1996. The GIG supports all DOD, national security, and related intelligence community (IC) missions and functions (strategic, operational, tactical and business), in war and in peace. The GIG provides capabilities from all operating locations (bases, posts, camps, stations, facilities, mobile platforms and deployed sites). Furthermore, the GIG provides interfaces to multinational and non-DOD users and systems. Prior to the standup of USCYBERCOM, JTF-GNO and the sub-unified command held the authority to direct computer security across the GIG.

Department of Defense critical data is located at all levels of security classification. Much of the data concerned is resident on the Nonsecret Internet Protocol Router (NIPR) Network, which is an unclassified system. However, it is possible for adversaries to weave together classified data from threads of unclassified protected information such as personnel rosters, financial reports, and travel itineraries. Classified data resident on the Secret Internet Protocol Router Network (SIPRNET) and other higher level systems is also at risk.

COMPUTER NETWORK DEFENSE

Computer network defense consists of actions taken to protect, monitor, analyze, detect and respond to unauthorized activity within DOD information systems and computer networks. Specifically, this consists of operations conducted in cyberspace as well as other electronic domains, including computers, hardware, servers, and internet service providers to counter malfeasant actors. Among the variety of threats encountered by the DOD are malicious code strikes which may enable an adversary to extract information from DOD IS, as well as malicious codes which are designed to disable, disrupt, or destroy critical DOD IS. These threats originate from a broad array of adversaries ranging from nation states to organized criminal enterprises and independent entities to single actors.

Network operations (NETOPS) are activities conducted to operate and defend the GIG, with the purpose of assured system and network availability, information protection, and information delivery. Unlike military missions with a set end date, the NETOPS mission is perpetual, requiring constant support to be successful. Network operations provide assured network enabled services in support of DOD's full spectrum of war fighting, intelligence, and business missions throughout the GIG. Network operations are closely related to information security (INFOSEC), but the two areas of operations are not identical.

Information security is chiefly concerned with owned resources and protecting against accidents and intentional acts.

Computer network defense has a variety of operational subsets. Defensive information operations are conducted primarily to protect against credible threats. Defense network operations are closely aligned with Signals Intelligence and Offensive Network Operations. Furthermore, computer network defense operations may occur as counter-espionage measures or as counter-attack measures. These operations may also be conducted for intelligence gathering purposes. Consequently, such operations are conducted at the highest security levels.

Defensive Measures

No local commander may order a defense counter-measure outside of the localized computer systems resident in the commander's enclave that are affected by malicious activity. Such measures may only consist of actions which do not have the potential for "third order effects," or other unknown consequences. It is recommended that defensive measures conducted by the local enclave commander include only such action as will block an adversary from entering into the local enclave's IS. This may consist of little more than shutting the system down temporarily until the malicious code can be analyzed. It is currently prohibited for any DOD agency or individual, other than JTF-GNO, USSTRATCOM, or as the President directs, to conduct defensive operations.

All defense measures are classed as Computer Network Defense Response Actions (CND RA). Base level protective measures which include firewalls and system suspension do not require permission from the combatant command. However, any activity conducted outside of a base, wing, or enclave's systems may not be undertaken outside of the command and control of the combatant command force structure. Other issues which are common to DOD IS and should be considered in the operations law context are as follows:

Botnet. Refers to a collection of compromised computers (often referred to as zombie computers) running software, usually installed via drive-by-downloads exploiting Web browser vulnerabilities, worms, trojan horses, or backdoors, under a common command-and-control infrastructure. Botnet herders are individuals who create such programs designed to commandeer individual computers. Department of Defense IS are vulnerable to Botnet attacks.

Denial of Service Attacks. Denial of service attacks are the most crippling type of computer network attack confronting DOD IS. Such attacks are designed to overwhelm DOD IS (or other systems) by flooding the systems with more information than the system can process, resulting in damage ranging from the system shutting down to the destruction of critical hardware.

Hackers. Not all hacking is illegal. Authorized hacking is conducted within the DOD in order to test the security of DOD IS. "White Hat" or "Red Team," hacking which describes such conduct is permissible. However, persons involved in the circumvention of computer

security are not lawfully on the GIG. This primarily concerns unauthorized remote computer break-ins *via* a communication network such as the Internet. When confronted with such activity, the Air Force Office of Special Investigations (AFOSI) or other concerned law enforcement entity such as the Federal Bureau of Investigation must be notified for coordination. As in the case of counter-espionage and counter-attack defense operations, the authority to conduct retributive measures against hackers does not exist at the local enclave or within the military service. Partly this is because such measures may take on the appearance of law enforcement. However, the decisional authority to conduct operations against hackers remains identical to all other operations.

Honeypots. A Honeypot is a website designed to appear and function as a normal website that it mirrors. Honeypots are a viable tool to examine the tactics, techniques, and procedures of malfeasant actors, because the actors assume that their emplacement of malicious code occurs in the *bona fide* site. However, honeypots do not distinguish between malfeasant actors and unsuspecting persons engaged in legitimate activities on the Internet. As a result, were a government agency to create a honeypot, the legal analysis of such a creation must include privacy rights considerations as well as potential government liability for the loss of personal or financial information. The Services and their force structure may not create honeypots. The creation, command, and honeypot control is vested solely within the combatant command force structure.

Telecommuting Policies. A local enclave commander may approve telecommuting policies for personnel assigned to the enclave. However, because of the risk of mal-ware attacks, all personal computers must have the same security levels that are resident on DOD IS. Additionally, from a privacy rights perspective, persons telecommuting from home must be made aware that their personal systems are subject to inspection. Particularly, after a worm or virus attack, either law enforcement or national security interests may override privacy concerns. Any telecommuting agreements should contain language to this effect.

Other Legal Considerations. Defensive operations conducted outside of the GIG may impact private property, such as commercial internet service providers or personal computers. To the extent possible, a Constitutional analysis should be conducted during operational planning, including analysis of the Fifth Amendment Takings-Clause and the privacy rights of U.S. citizens. Other laws which must be considered are listed as follows:

Law	Description	Exception	Application
18 U.S.C. § 1385 "*Posse Comitatus*" Act	Under most circumstances, the U.S. military is prohibited from acting as a domestic police force. Does not apply to the National Guard when such units are under the control of their state governors.	Numerous exceptions exist: -when the President determines an insurrection exists. -in instances of mass domestic violence. - in response to a natural disaster.	Applies territorially only.
John Warner Defense Appropriation Act for Fiscal Year 2007 Pub. L. No. 109-364, 120 Stat. 2083 (2006)	President may employ forces (including National Guard – federalized forces) when they determine state governments are inadequate or unable to respond to a national emergency	This is likely to be rewritten in the future.	Applies territorially only.
Insurrection Act 10 U.S.C. § 331 - 10 U.S.C. § 335	Whenever there is an insurrection in any State against its government, the President can bring into Federal service the militia of other States, in the number requested by that State, and use such of the armed forces as he or she considers necessary to suppress the insurrection. This action may only occur on the request of a state legislature or of its governor if the legislature cannot be convened.	The Act dates to 1806. It was modified in 2006, but may be rewritten in its original form. Pub. L. No. 109-364, 120 Stat. 2083 (2006) as described above is the modifying law.	Applies territorially only.

Law	Description	Exception	Application
18 USC § 1030 Computer Fraud and Abuse Act (CFFA)	Amended by the 2001 Patriot Act. The CFAA is the primary enforcement legal mechanism against hacking and the altering of electronic information.	A communications provider (including the DOD) has the authority to maintain the integrity of its own system.	Extraterritorial enforcement.
18 USC § 1343 Wire Fraud Act	Fraud through the internet prohibited under this act (*e.g.* the taking of identifications through artifice).	Law enforcement (national security).	Extraterritorial enforcement.
18 USC § 2511 Interception and disclosure of communications	Interception and disclosure of wire, oral, or electronic communications. Prohibits intentional interception and/or use of a third party's communications.	Law enforcement (national security).	Extraterritorial enforcement.
18 USC § 2510 Electronic Privacy Act	Protects wire, oral, and electronic communications while in transit. It sets down requirements for search warrants that are more stringent than in other settings. It protects communications held in electronic storage, most notably messages stored on computers. Further, it prohibits the use of pen register and/or trap and trace devices to record dialing, routing, addressing, and signaling information	Law enforcement (national security) However, the Sixth Circuit in *United States v. Warshak* held that electronic mail has the same standard of protection as that enjoyed by U.S. Postal Service mail.	Extraterritorial enforcement.

Law	Description	Exception	Application
	used in the process of transmitting wire or electronic communications without a search warrant.		
18 USC § 2701 Unlawful access to stored communications	Prohibits intentional accesses without authorization to a facility through which an electronic communication service is provided. Also, prohibits the obtaining, altering, or prevention of authorized access to a wire or electronic communication while it is in electronic storage in such system.	Law enforcement (national security).	Extraterritorial enforcement.

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CHAPTER 25

DOMESTIC OPERATIONS AND SUPPORT TO CIVIL AUTHORITIES

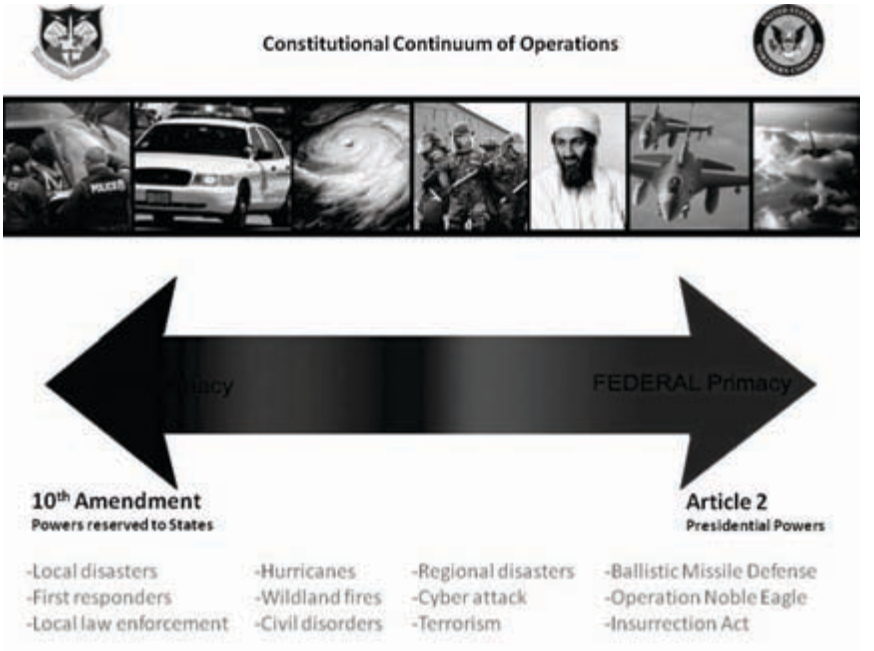
BACKGROUND

Domestic military operations can generally be divided into two distinct missions – "homeland defense" and "defense support to civil authorities" (DSCA). This chapter will analyze the legal authorities governing both missions, focusing specifically on the latter.

The dichotomy between "homeland defense" and "defense support to civil authorities" is useful and sufficient in most cases. For example, active duty support to the Federal Emergency Management Agency (FEMA) in response to a hurricane clearly falls within the DSCA rubric, while a U.S. fighter patrol designed to deter and defeat external attack clearly constitutes a homeland defense mission. However, this may not always prove so neat in practice, especially in the event of large scale and/or geographically distributed terrorist attacks crossing state lines.

While State governments are primarily responsible for responding to natural or man-made disasters under their Tenth Amendment "police powers," the constitutional balance in a post-attack scenario slides towards the President's Article II authorities. Active duty forces may operate for a time in a legal grey area until definitive legal and policy guidance is provided by the President through the Secretary of Defense. See Figure 1. The challenge confronting JAGs and commanders in these scenarios (e.g., when exercising "immediate response" authority) will be to design and execute operations in a manner consistent with our Constitutional structure and the statutory and regulatory authorities.

Figure 1 – The Constitutional Continuum of Operations



Establishment of U.S. Northern Command

The need for a more organized and unified approach to domestic military operations was recognized immediately following the attacks of 11 September 2001. The President directed the establishment of U.S. Northern Command (USNORTHCOM), which reached full operational capability on 11 September 2003. According to its mission statement, USNORTHCOM "anticipates and conducts Homeland Defense and Civil Support operations within the assigned area of responsibility to defend, protect, and secure the United State and its interests." U.S. Northern Command is collocated with the North American Aerospace Defense Command (NORAD) at Peterson Air Force Base in Colorado Springs, CO.

HOMELAND DEFENSE

The homeland defense mission is generally defined as "the protection of U.S. sovereignty, territory, domestic population and critical defense infrastructure against external threats and aggression."

Under Article II of the U.S. Constitution, the President is primarily responsible for homeland defense. Testifying before Congress in 2003, Secretary of Defense Donald Rumsfeld described the homeland defense mission in the following terms: "In extraordinary circumstances, DOD would conduct military missions. Included in this category are cases in which the President, exercising his constitutional authority as

Commander in Chief and Chief Executive, authorizes military action to counter threats within the United States."

One of the clearest and most notable manifestations of the President's authority for homeland defense can be found in the establishment and day-to-day operations of NORAD. The North American Aerospace Defense Command is a bi-national (U.S. and Canadian) command established in 1958 by executive-level agreement (the "NORAD Agreement"). Its missions have traditionally consisted of "aerospace warning" and "aerospace control" for North America. In 2006, the NORAD Agreement was amended to include a third mission – "maritime warning."

1. Aerospace Warning: processing, assessing, and disseminating intelligence and information related to man-made objects in the aerospace domain and the detection, validation, and warning of attack against North America whether by aircraft, missiles or space vehicles.

2. Aerospace Control: providing surveillance and exercising operational control of the airspace of the United States and Canada.

3. Maritime Warning: processing, assessing, and disseminating intelligence and information related to the respective maritime areas and internal waterways of, and the maritime approaches to, the United States and Canada, and warning of maritime threats to, or attacks against North America.

Historically, NORAD's mission focused on countering air and missile threats posed by nation-states (primarily the former Soviet Union). The attacks of 11 September 2001, however, demonstrated the grave threat an air attack posed by non-state terrorist actors. To counter this so-called asymmetric aviation threat, NORAD's mission now includes a system of layered defenses. For example, Operation Noble Eagle (ONE), commenced on 14 September 2001 and enables NORAD to work closely with U.S. and Canadian interagency partners to deter detect and defeat terrorist air attacks.

The successful execution of ONE requires an innovative total force effort. Of the 50,000 ONE sorties flown in the U.S. since 11 September 2001, over 70 percent have been flown by Air National Guard (ANG) members in federal active duty (i.e., Title 10) status. Air National Guard support has been accomplished through the use of so-called "hip-pocket orders." Title 10, United States Code, Section 12301(d) empowers a Secretary of the Air Force (SAF) with the designated authority to order ANG members to federal active duty status. The SAF-designee, however, cannot order an ANG member to active duty unless both the member and the member's Governor agree. Through a series of delegations, the dual-hatted Commander of the U.S. Continental NORAD Region (CONR) and First Air Force (AFNORTH) is a SAF-designee. Over the past several years, the CONR/AFNORTH Commander has entered into nearly two dozen 12301(d) agreements with State Governors. These agreements enable the CONR/AFNORTH Commander to quickly and efficiently—often times at a moment's notice—obtain command and control of ANG members performing NORAD missions.

DEFENSE SUPPORT TO CIVIL AUTHORITIES (DSCA)

Overview

Defense support to civil authorities is the overarching term used for various DOD missions conducted in support of civil authorities, to include support during domestic emergencies (e.g., natural or man-made disasters) and support to law enforcement. Generally, DOD's authority to conduct DSCA derives from the President's Article II authorities and various statutory grants and limitations. Under Joint Publication 3-28, *Civil Support*, civil authorities are defined as, "[t]hose elected and appointed officers and employees who constitute the government of the United States, the governments of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, United States possessions and territories, and political subdivisions thereof."

Defense support to civil authorities is not new – for example, active duty military forces provided civil support during the Chicago Fire of 1871, the Johnstown Flood of 1889, the Galveston Hurricane of 1900, the San Francisco Fire of 1906, and, more recently, during Hurricane Katrina (2005), and Hurricanes Gustav and Ike (2008).

When analyzing specific authorities governing DSCA, commanders and JAGs must begin with certain fundamental Constitutional and statutory principles:

1. The response to natural or man-made disasters begins locally – States, territories and tribal governments maintain primary responsibility for the public health and welfare of the people in their jurisdictions.

2. National Guard units, under the command and control of state Governors acting through The Adjutants General (TAGs), are the primary military responders in domestic operations and emergencies. The involvement of active duty DOD forces in any domestic affair is the exception to the general rule.

3. Under the Stafford Act, federal assistance is generally premised upon a request from the state Governor, except in those cases where the federal government exercises exclusive authority over the area affected. DOD active duty forces will usually be in support of the designated primary federal agency, which is supporting the state.

4. DOD support to civil authorities is tightly controlled by statute and regulation.

Bearing these principles in mind, DODD 3025.15, *Military Assistance to Civil Authorities*, provides a framework for analyzing DSCA requests. Department of Defense DSCA approval authorities (typically, USNORTHCOM or SECDEF through the Chairman of the Joint Chiefs of Staff (CJCS)) must analyze requests in accordance with the following criteria. In some support situations (e.g., Immediate Response Authority), installation commanders and JAGs will need to apply these criteria responding to a request for support before being able to vet it through the appropriate DSCA approval authority:

1. Legality – compliance with the law.

2. Lethality – potential use of lethal force by or against DOD forces.

3. Risk – safety of DOD forces.

4. Cost – who pays.

5. Appropriateness – whether it is in the interest of DOD to provide the requested support.

6. Readiness – impact on DOD's ability to perform its primary mission.

The next two sections analyze specific authorities governing DSCA during *domestic emergencies* (natural or man-made disasters) and *support to law enforcement*.

Domestic Emergencies – Natural or Man-Made Disasters

As noted above, State governments maintain primary authority to respond to natural or man-made disasters in territory under their jurisdiction under the Tenth Amendment of the Constitution. The Stafford Act constitutes the primary legal authority for federal emergency and disaster relief to the states.

Congress' intent in passing the Stafford Act was to provide for an "orderly and continuing means of assistance by the federal government to state and local governments in carrying out their responsibilities to alleviate the suffering and damage which results from disasters." In general, Stafford Act assistance "is rendered upon request from a state governor(s), provided certain conditions are met, primarily that the governor certifies that the state lacks the resources and capabilities to manage the consequences of the event without federal assistance."

Recent examples of federal support under the Stafford Act include responses to flooding in the Midwest (2008) and North Dakota (2009), and Hurricanes Gustav and Ike (2008). Through USNORTHCOM, DOD provided support to FEMA for each of these contingencies.

Stafford Act
The federal government can respond to a disaster or emergency in four ways under the Stafford Act:

1. *Presidential Declaration of a "major disaster"* (42 U.S.C. 5191) – Upon receipt of a request from an affected state governor, the President may declare a "major disaster." A Presidential declaration triggers a comprehensive grant of federal aid for long-term consequence management, and includes, *inter alia*, Presidential authority to direct federal agencies to provide essential assistance to meet immediate threats to life and property, coordinate all disaster relief assistance, and provide temporary

communications services, food, relocation assistance and legal assistance. A "major disaster" includes natural and man-made disasters.

2. *Presidential Declaration of an "emergency"* (42 U.S.C. 5191) – Upon request from an affected Governor, the President may declare an "emergency." The authorities granted to the President following an "emergency" declaration are similar to those granted following a "major disaster" declaration. However, emergency assistance is limited in time and scope and the total assistance may not exceed $5 million for a single emergency, unless the President determines there is a continuing and immediate risk to lives, property, public health or safety, and necessary assistance will not otherwise be provided on a timely basis. An "emergency" includes natural and man-made disasters.

3. *Presidential approval of "emergency work"* (42 U.S.C. 5170b(c)) – Upon request from an affected Governor, the President may direct DOD to provide "emergency work" essential for the preservation of life and property for a maximum of ten days before the declaration of either an "emergency" or a "major disaster."

4. *Presidential Declaration of an "emergency"* (not a "major disaster") involving an area for which the U.S. "*exercises exclusive or preeminent responsibility and authority*" (42 U.S.C. 5191(a)) – The President may direct federal disaster relief without the request on an affected Governor in this scenario. The President exercised this authority in the wake of the bombing of the federal building in Oklahoma City in 1995.

Once a Presidential declaration is made under one of the four mechanisms of the Stafford Act, the federal response is initiated through the appointment of a primary federal agency, typically the Department of Homeland Security, and more specifically FEMA. As detailed in Figure 2 below, the primary federal agency will provide support to the State(s), with DOD assistance, as required. DOD support to the primary federal agency under the Stafford Act will be provided through USNORTHCOM in accordance with the SECDEF approved CJCS 2008 DSCA Execute Order (DSCA EXORD).

Figure 2 – Overview of DOD's Support Role under the Stafford Act through the National Response Framework (CONUS)

Finally, the Stafford Act contains specific guidance providing for immunity from liability for certain actions taken by federal agencies or employees of the federal government. Section 5148 provides:

> The federal government shall not be liable for any claim based upon the exercise or performance of or failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the federal government in carrying out the provisions of this chapter.

The Economy Act

Separate than the authorities under the Stafford Act, the Economy Act authorizes the DOD to provide direct support to other federal agencies. It does not, however, authorize direct support to State or local entities. The Economy Act authorizes support in both non-emergency and emergency situations. Reimbursement of direct costs is required; however, temporary loans of equipment are allowed without reimbursement if the receiving agency agrees to directly pay any operating costs of the equipment while in possession of receiving agency and return the equipment in like condition.

Immediate Response Authority

In most emergencies/disasters, DOD support will be provided under Stafford and Economy Act authorities. This is especially true after a Presidential declaration of a "major disaster" or "emergency" has occurred. However, even under optimal conditions, requests for assistance from the primary federal agency (typically FEMA) can take a day or two before the request is validated/approved, turned into a mission assignment and sourced to USNORTHCOM or Pacific Command (PACOM). This delay is circumvented through the utilization of the Immediate Response Authority (IRA) authorization.

Immediate response authority is defined as "[a]ny form of immediate action … to assist civil authorities or the public to save lives, prevent human suffering, or mitigate great property damage under imminently serious conditions where there *has not been any declaration of major disaster or emergency by the President.*" Immediate response authority is not rooted in statute but is derived from the President's power as Chief Executive and Commander in Chief, and articulated through DOD Directive. At its core, IRA provides installation commanders pre-approval to support civil authorities when time does not permit prior approval from higher headquarters. In such circumstances, it is critical for commanders to work closely with their staff judge advocate.

Immediate response authority is exercised in response to a request from civil authorities—while civil authorities are committing or have committed their resources and still need assistance. In DODD 3025.15, para 4.7 allows the request to be made verbally, but that request must be followed by a written request. Any competent representative of a civil authority may submit a request (e.g., sheriff, mayor, representative, police dispatch center, etc.).

Upon receipt of a request for assistance from a civil authority, installation and higher headquarters commanders must take the following steps in the event support is contemplated:

1. Determine whether time and circumstances permit prior approval from higher headquarters.

2. As soon as practical, report the request through the chain-of-command to the National Military Command Center (NMCC), detailing the nature of the request, any response/support provided, and all other pertinent information. Notification should reach the NMCC "within a few hours of the decision to provide immediate response." Ensure a copy is provided to the geographic combatant commander (i.e., USNORTHCOM or PACOM).

3. Before approving, assess the totality of the request according to the DODD 3025.15 factors discussed previously:

    a. Legality – compliance with the law

    b. Lethality – potential use of lethal force by or against DOD forces

c. Risk – Safety of DOD forces

d. Cost – who pays, impact on DOD budget. Commanders should provide support on a cost-reimbursable basis; however, "[i]mmediate assistance should not be delayed or denied based on the inability of the requestor to reimburse the DOD"

e. Appropriateness – whether it is in the interest of DOD to provide the requested support

f. Readiness – impact on DOD's ability to perform its primary mission

4. Once forces have been employed for 72 hours, "respective military departments will coordinate continued operations with the geographic combatant commander."

Immediate response authority does not constitute an exception to the Posse Comitatus Act. Commanders exercising IRA may not authorize military forces to engage in law enforcement or provide direct support to civilian law enforcement agencies in a manner inconsistent with the Posse Comitatus Act.

Mutual Aid Agreements or Plans

Mutual aid agreements and plans are distinct from IRA. Installation commanders are authorized to enter into these agreements to provide assistance to the civilian community -- specifically, in the areas of mutual fire-fighting support and emergency services. These agreements generally provide for the provision of emergency services under the direct control of the installation to the local community, and vice versa. These agreements are generally reciprocal in nature, and reimbursement is not mandatory. Within their proper scope, mutual aid agreements do not require approval from the Joint Director of Military Support (JDOMS) or the Secretary of Defense.

Support to Law Enforcement

The Posse Comitatus Act of 1878 (PCA) prohibits the direct, active participation of military forces to execute civilian laws. The PCA was enacted in response to the perceived misuse of federal Army forces in the South during Reconstruction after the Civil War. The law has come to symbolize the separation of civilian affairs from military influence. However, it is perhaps the most misunderstood statute in the field of defense support to civil authorities. While the statute is clearly designed to limit military involvement with civilian law enforcement activities, military participation with civilian law enforcement authorities is permissible under one of the numerous PCA exceptions.

The PCA provides, "[w]hoever, 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 for not more than two years, or both." The PCA applies to active duty Army

and Air Force personnel, Reservists in active duty status, and Army and Air National Guard in Title 10 status. The statute does not apply to Army and Air National Guard forces in State active duty or Title 32 status.

The PCA's restrictions generally fall into three broad categories: (1) use of information, (2) use of DOD personnel and (3) use of military equipment and facilities.

Use of Information. In accordance with 10 U.S.C. 371, the Secretary of Defense may provide information collected during the course of military operations to federal, state, and local law enforcement agencies if the information is relevant to a violation of federal or state law. Indeed, DODD 5525.5, *DOD Cooperation with Civilian Law Enforcement Officials*, Enclosure 2, provides that "Military Departments and Defense Agencies are encouraged to provide to Federal, State, or local civilian law enforcement officials any information collected during the normal course of military operations that may be relevant to a violation of any Federal or State law within the jurisdiction of such officials." Enclosure 2, furthermore, authorizes "the needs of civilian law enforcement officials [to] be considered when scheduling routine training missions." While information sharing consistent with the guidance above is authorized and encouraged, there are PCA limitations to this type of support. In particular, the planning or creation of missions or training for the *primary purpose* of aiding civilian law enforcement officials is prohibited.

Use of DOD Personnel. The use of DOD personnel in support of civilian law enforcement personnel is governed by 10 U.S.C. 371-375, decisions from federal case decisions, and DODD 5525.5, Enclosure 4. The federal courts have established three tests to determine whether the use of military personnel violates the PCA – "if any one of these three tests is met, the assistance may be considered a violation of the PCA."

1. Whether the actions of the military personnel are "active" or "passive" – only the "direct, active use of military personnel to enforce the laws is a violation of the PCA."

2. Whether use of military personnel pervades the activities of civilian law enforcement personnel – in order to violate the PCA, "military personnel must subsume the role of civilian law enforcement."

3. Whether the military personnel subjected citizens to exercise of military power that was "regulatory, proscriptive, or compulsory in nature."

In summary, this case law and DODD 5525.5, Enclosure 4, prohibit active duty personnel from providing the following "direct assistance" to civilian law enforcement:

1. Interdiction of a vessel, aircraft, or other similar activity.

2. A search or seizure.

3. An arrest, apprehension, stop and frisk, or similar activity.

4. Use of military personnel for surveillance or pursuit of individuals as undercover agents, informants, investigators, or interrogators.

The PCA and authorities cited above allow the following categories of direct assistance. For a complete list, see DODD 5525.5, Enclosure 4, E.4.1.2.

1. Investigations and other actions related to the enforcement of the Uniform Code of Military Justice (UCMJ).

2. Investigations and other actions that are likely to result in administrative proceedings by DOD, regardless of whether there is a related civil or criminal proceeding.

3. Investigations and other actions related to the commander's inherent authority to maintain law and order on a military installation or facility.

4. Protection of classified military information or equipment.

5. Protection of DOD personnel, DOD equipment, and official guests of DOD.

6. Audits and investigations conducted by, under the direction of, or at the request of IG, DOD, subject to applicable limitations on direct participation in law enforcement activities.

7. Actions taken pursuant to DOD responsibilities under 10 U.S.C. §§331-334 (The Insurrection Act), relating to the use of the military forces with respect to insurgency or domestic violence or conspiracy that hinders the execution of State or Federal law in specified circumstances. Actions under this authority are governed by DOD Directive 3025.12.

In addition to the above, several federal statutes provide express statutory authority to active duty forces to assist officials in executing the laws, subject to applicable limitations. The laws that permit direct military participation in civilian law enforcement, include, but are not limited to the following:

1. Assistance in the case of crimes involving nuclear materials.

2. Protection of the President, Vice President, and other designated dignitaries.

3. Execution of quarantine and certain health laws.

4. Support of territorial governors if a civil disorder occurs.

5. Actions in support of certain customs laws.

According to AFI 10-801, *Assistance to Civilian Law Enforcement Agencies*, at para 2.2, restrictions placed on USAF Military Working Dog Team (MWDT) assistance provided to civilian law enforcement agencies are based upon the type of support requested.

Use of Military Equipment and Facilities. 10 U.S.C. 372 and DODD 5525.5, Enclosure 3 govern the use of military equipment by civilian law enforcement authorities. Enclosure 3 and AFI 10-801 detail the approval authorities for this type of support.

10 U.S.C. 372(a) allows the Secretary of Defense to make available equipment (including associated supplies and spare parts), base facilities, and research facilities to any federal, state, or local civilian law enforcement official for law enforcement purposes, so long as otherwise consistent with applicable law. DODD 5525.5, Enclosure 3 implements this guidance and requires that any support provided be consistent with national security and military preparedness.

AFI 10-801, para 5.2 provides that, "in general, [law enforcement agencies] outside of DOD must reimburse for equipment and services provided" in accordance with the Economy Act (31 U.S.C. 1535).

REFERENCES

1. Posse Comitatus Act - 18 U.S.C. § 1385 (2000)
2. Stafford Act - 42 U.S.C. §§ 5121, *et seq*.
3. Economy Act - 31 U.S.C. §§ 1535, *et seq*.
4. Homeland Security Act of 2002, Pub. L. No. 107-296 (2002)
5. USNORTHCOM, CONPLAN 2502
6. JP 3-27, *Homeland Defense*, 12 July 2007
7. JP 3-28, *Civil Support*, 14 September 2007
8. DODD 3025.1, *Military Support to Civil Authorities (MSCA)*, 15 January 1993
9. DODD 3025.1M, *Manual for Civil Emergencies*, June 1994
10. DODD 3025.12, *Military Assistance for Civil Disturbances (MACDIS)*, 4 February 1994
11. DODD 3025.15, *Military Assistance to Civil Authorities*, 18 February 1997
12. DODD 5200.27, *Acquisition of Information Concerning Persons and Organizations not Affiliated with the Department of Defense*, 7 January 1980
13. DODD 5525.5, *DOD Cooperation with Civilian Law Enforcement Officials*, Change 1, 20 December 1989
14. DODI 6055.6, *DOD Fire and Emergency Services Program*, 21 December 2006
15. AFI 10-801, *Assistance to Civilian Law Enforcement Agencies*, 15 April 1994
16. AFI 10-802, *Military Support to Civil Authorities*, 19 April 2002

Expeditionary Law

CHAPTER 27

MILITARY JUSTICE AND DISCIPLINE IN OPERATIONS

INTRODUCTION

President George Washington, then Colonel and Commander of the Virginia Forces, once stated that "Discipline is the soul of an army. It makes small numbers formidable; procures success to the weak, and esteem to all." The Uniform Code of Military Justice (UCMJ) provides commanders with the authority and tools necessary to address breaches in discipline. As such, while in garrison, the UCMJ and the system of Military Justice it creates are an essential aid to a commander engaged in the process of forging a disciplined, effective fighting force. In the field, the consequences of a lapse in discipline are laid bare, with the negative impact to mission more readily felt, particularly where such lapses threaten the lives of the men and women of the force.

CONSIDERATIONS DURING MOBILITY AND DEPLOYMENT

Essential Legal Resources

Five essential publications to administering military justice in the field include: the Manual for Courts-Martial (MCM); AFI 51-201, *Administration of Military Justice,* 21 December 2007 [hereinafter, AFI 51-201]; AFI 51-202, *Nonjudicial Punishment,* 7 November 2003 [hereinafter AFI 51-202]; *The Military Commander and the Law,* and this publication. Four forms which should be readily available in field conditions include the AF Form 3070, *Record of Nonjudicial Punishment Proceedings;* AF Form 3212, *Record of Supplementary Action Under Article 15, UCMJ*; AF Form 366, *Record of Proceedings of Vacation of Suspended Nonjudicial Punishment;* and DD Form 458, *Charge Sheet.*

Physical Evidence Procedures

Legal personnel should coordinate with security forces, the Air Force Office of Special Investigations (AFOSI), and medical personnel to ensure procedures have been established to handle and evaluate evidence. If possible, the legal team should determine prior to deployment whether provisions will be made for conducting blood alcohol and drug testing of members in the area of responsibility (AOR), and what provisions have been made for scientific analysis of evidence such as illegal substances, fingerprints, and handwriting.

Pre-deployment Briefings and General Orders

Every major combat operation conducted within the last nine years has included the promulgation of a "General Order 1." Usually published by a joint task force commander or combatant commander responsible for an operation, its purpose is to maintain order and discipline among the deployed forces, and to avoid unnecessarily offending certain host nation sensitivities, by outlining prohibitions against specific activities. Of all deployed personnel, judge advocates are expected to be thoroughly familiar with the provisions of the general order for the operation and to provide extensive briefings prior to deployment. They must ensure refresher training on the general order upon arrival in the AOR and at regular intervals throughout the deployment.

Conscientious Objectors (COs)

Members of the Armed Forces who have an honest, sincere, and deeply held objection to participation in war in any form or the bearing of arms by virtue of religious background or other belief system akin to religion may apply for CO status. AFI 36-3204, *Procedures for Applying As a Conscientious Objector,* 15 July 1994. The Air Force recognizes members who qualify as bona fide COs to the extent practicable and equitable. The Air Force does not recognize objection to a particular war as grounds for CO status. The Air Force makes CO classifications and restricts military duties of COs only to the extent that such classifications do not compromise Air Force effectiveness and efficiency.

There are two classes of COs. Class 1-O is for Service members who, by reason of conscientious objection, sincerely object to participation of any kind in war in any form. Class 1-A-O is for Service members who, by reason of conscientious objection, sincerely object to participation as a combatant in war in any form, but whose convictions permit military service in a non-combatant status.

While an applicant's request for CO status is under consideration, the applicant will conform to the normal requirements of military service and satisfactorily perform all assigned duties. Commanders are expected to make every effort to assign applicants to duties that will conflict as little as possible with their asserted beliefs. AFI 36-3204, paragraph 2.3. For example, a military member may claim to be a CO and refuse to deploy. If possible, the commander may deploy someone else in the member's place until the member's status is resolved. Often, this is not possible and the commander must determine whether he or she will order the member to deploy. Commanders may discipline applicants if they violate the UCMJ while awaiting action on their application. AFI 36-3204, paragraph 2.3. For example, if the member is ordered to deploy and refuses to obey the order, disciplinary action may be taken.

COMMAND STRUCTURE

Knowing and understanding the command structure are critical factors to ensuring the validity and effectiveness of military justice actions. Actions undertaken by those without proper authority, or unduly delayed by the failure or inability to determine who has proper

authority over the offending member, can thwart the efficient administration of military justice actions and undermine the good order and discipline they are intended to preserve. Judge advocates, working in close coordination with their servicing manpower personnel experts, must determine and document the command structure of the unit or base to which they are attached during deployment. For military justice purposes, a proper command structure requires a properly created unit, a properly appointed commander, and properly assigned or attached members to the unit.

A Properly Created Unit

Typically, Air Force members in the Expeditionary Air Force construct deploy to provisional units. A provisional unit is temporarily organized to perform a specific task. It is created when a specific organization is required and no organization exists to which personnel may be attached. Provisional units are organized in the same manner as regular units. A provisional unit may be assigned to a higher provisional unit. Provisional units are temporary in nature and personnel are attached rather than assigned. Air Expeditionary Force (AEF) units are a type of provisional unit. Provisional units are usually activated by a MAJCOM, but are attached to the component command supporting the combatant command, not the MAJCOM. Judge advocates should review the order designating and activating the provisional unit with the servicing manpower personnel experts to ensure a unit is properly created. A copy of the order establishing the provisional unit should be available through the local manpower office, through the legal office of the air component to the combatant command, or the combatant command's legal office. AFI 38-101, *Air Force Organization,* 4 April 2006.

A Properly Appointed Commander

All unit commanders are either appointed to or assume command in accordance with AFI 51-604, *Appointment to and Assumption of Command,* 4 April 2006. "G-series orders" (so named because the order number begins with the letter "G," followed by a number) must be prepared for every appointment to or assumption of command. Commanders of provisional units may only be appointed to command, since they are not assigned but merely attached to those units and cannot assume command. Component commanders appoint provisional wing commanders. Provisional wing commanders may appoint subordinate group commanders. Provisional group commanders may appoint subordinate squadron commanders. Every command appointment should be reflected in a G-series order or documented on an AF Form 35, Request for Appointment or Assumption of Command.

A Properly Attached Member

Generally, a member must be assigned or attached to a unit to become subject to the command of the unit commander. If a member's orders do not specify a unit of attachment, the personnel unit of the organization should assign the member a personnel assignment system (PAS) code as soon as possible after arrival. Members can be attached to particular units by being assigned to a properly constituted PAS code.

Reserve and Guard Forces

All Air Force Reserve members are subject to the UCMJ while on active duty orders and during inactive duty training. Air National Guard (ANG) members, however, are subject to the UCMJ only when they are in federal status (Art. 2(a)(3), UCMJ), which requires them to be serving pursuant to Title 10 orders (either active duty for training (ADT), full-time active duty, or mobilized for federal service). Air National Guard members are required to be in federal status when serving outside of the continental U.S. For further discussion of the legal issues affecting Reserve and ANG activities, see the separate chapter titled Air Reserve Component Issues.

ADMINISTRATION OF MILITARY JUSTICE IN THE AOR

The change from peacetime to a deployed setting brings with it a necessary shift in priorities that must be considered in making decisions on military justice matters. When the priority is to preserve a member's war fighting capability, lesser forms of punishment, such as NJP, may be advisable. On the other hand, the need for greater discipline during wartime may require a more stringent response than would be necessary under less compelling circumstances. Each offense must be assessed in relation to the environment in which it is committed. Factors such as the level of conflict, impact on operations, effect on discipline and morale, and international relations implications must be carefully considered. Commanders will expect their judge advocates' legal advice to be tailored to the specific situation in the AOR with an appreciation for the practical as well as the legal aspects of a given situation. Disciplinary decisions may also take into account logistical realities. The location of the commander authorized to take action, the availability of witnesses and evidence, the ability to carry out punishments, and the availability of appropriate personnel, equipment, and the location for conducting a court-martial are all factors to be weighed in determining the most appropriate course of action. The commander needs to understand, however, that judge advocates will support the commander's determination to the fullest extent required to maintain good order and discipline in the commander's organization.

Command Law Enforcement Authority Overseas

Commanders have authority to cause an inquiry or investigation to be conducted of any crime allegedly committed by persons subject to UCMJ or persons (such as military dependents) subject to the Military Extraterritorial Jurisdiction Act (MEJA). Military law enforcement officers and criminal investigators are authorized to apprehend persons subject to UCMJ jurisdiction, and arrest and temporarily detain persons subject to MEJA jurisdiction, when there is *probable cause* to believe that an offense has been committed and that the person committed it. All commissioned, warrant, petty and noncommissioned officers on active duty may apprehend offenders subject to UCMJ jurisdiction. Any person authorized to make an apprehension may use such force and means as are reasonable under the circumstances to apprehend. (*See* M.R.E. 302(b)).

General Order 1 Violations

A General Order 1 (GO-1) is a lawful punitive order promulgated by a general or flag officer (O-7 and above) to all subordinates that prohibits conduct by personnel assigned or attached to that officer's command. Standard prohibitions set forth in general orders prohibit drug and alcohol use, taking of war trophies, gambling, possession of pornography, adopting pets as mascots, engaging in sexual activity, and/or visiting the sleeping quarters of members of the opposite sex. A GO-1 is issued based on a military purpose and necessity to maintain high discipline in an operational AOR, maintain effective and positive host nation relations, and preserve good order and discipline.

Nonjudicial Punishment (NJP) in the AOR

Processing actions may be a bit more complicated in a deployed location, but NJP procedures remain largely unchanged in an AOR. One particular complication may arise in relation to joint commands. A joint force commander has authority to impose NJP on military members assigned or attached to the command, regardless of the commander's parent service, unless such authority is withheld by a superior joint commander. The joint force commander is required to adhere to the offender's parent service regulation when imposing NJP and therefore may allow NJP authority over Air Force members to be exercised by the appropriate Air Force commander as defined in AFI 51-202. Matters that involve more than one service, or that occur outside a military reservation but within the joint force commander's jurisdiction, may be handled either by the joint force commander or, unless withheld by a superior joint force commander, by the service component commander. Matters that involve only one service and occur on a military reservation or within the military jurisdiction of that service component, should normally be handled by the service component commander, subject to service regulations.

If the joint force commander decides to personally initiate NJP proceedings against a military member, the joint force commander should coordinate with the appropriate service component commander before taking action to ensure compliance with Air Force procedures. Under AFI 51-202, the appropriate Air Force commander will immediately notify the servicing Air Force staff judge advocate (SJA). The servicing Air Force SJA will then coordinate with the SJA for the joint force commander. The servicing Air Force SJA will enter the NJP proceedings into the Automated Military Justice Analysis and Management System (AMJAMS) and ensure appropriate personnel and finance actions are taken, including the filing of the action in appropriate personnel records as well as unfavorable information files (UIF) and/or selection records.

Courts-Martial in the AOR

Courts-martial present logistical challenges when conducted in the AOR. The commander may determine that the situation in the AOR makes a court-martial there unreasonable and may have the trial conducted outside of the AOR. Under certain circumstances, however, it may be preferable or necessary (due to the availability of witnesses and/or evidence) to try deployment-related offenses in the AOR. Proximate and visible justice may best serve the

disciplinary interests of the operational command. The decision to conduct a court-martial in the AOR must be carefully considered and closely coordinated with the component command.

COMBAT CRIMINAL LAW ISSUES

Time of War

The existence of a time of war is relevant to many criminal law matters. Certain offenses can only occur in time of war. Other offenses have aggravated punishments, up to and including death, only in time of war. Time of war is an aggravating factor in still other offenses, and triggers courts-martial jurisdiction over civilians who are accompanying the force in the field. Time of war, however, is defined in a variety of ways that depend upon the purpose of the specific article in which the phrase appears, and on the circumstances surrounding the application of the article. The MCM defines "time of war" as "a period of war declared by Congress or the factual determination by the President that the existence of hostilities warrants a finding that time of war exists." This definition applies only to the following portions of the MCM: the aggravating circumstances that must be present to impose the death penalty (R.C.M. 1004(c)(6)), the punitive articles (MCM, Part IV), and nonjudicial punishment (MCM, Part V). It does not apply to statutes of limitations and/or jurisdiction over civilians. The definition of time of war in those cases is described below.

Offenses That Can Only Occur During Time of War

Improper Use of a Countersign. Article 101 prohibits disclosing the parole or countersign to one not entitled to receive it and giving a parole or countersign different from that authorized by the command.

Misconduct as a Prisoner. Article 105 makes it criminal to improve one's position as a prisoner to the detriment of other prisoners and contrary to law, custom or regulation. Article 105 also makes it criminal to maltreat other prisoners if you are in a position of authority over them.

Spying. Article 106 imposes a mandatory death penalty upon a person who is convicted of lurking as a spy or acting as a spy in or about any place, vessel or aircraft within the control or jurisdiction of the armed forces or in or about any shipyard, manufacturing or industrial plant or other place engaged in work in aid of the U.S. war effort.

Offenses That Can Be Punished By Death Only In Time Of War

1. Desertion with intent to remain away permanently, shirk important service, or avoid hazardous duty (Article 85)

2. Assaulting or willfully disobeying a superior commissioned officer (Article 90)

3. Misbehavior of a sentinel or lookout, such as being found drunk or asleep on their post, or leaving it before proper relief (Article 113)

Time of War as an Aggravating Factor

Homicide and rape are both capital offenses in time of war as well as at other times. Rule for Court-Martial 1004 provides that it is an aggravating factor sufficient to justify a death sentence that the rape or homicide was committed in time of war and in a territory in which the U.S. or an ally was then an occupying power or in which U.S. forces were then engaged in active hostilities. The maximum penalty that may be imposed by a court-martial is increased in time of war for drug offenses, malingering, and loitering or wrongfully sitting on a post by sentinel or lookout. The maximum period of confinement may be suspended in time of war for solicitation to desert, mutiny, misbehavior before the enemy, or sedition.

Time of War and Nonjudicial Punishment

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

TIME OF WAR, JURISDICTION, AND STATUTES OF LIMITATION

Jurisdiction

Article 2(a)(10), UCMJ, provides that in time of war, persons "serving with or accompanying an armed force in the field" may be subject to trial by court-martial. In *U.S. v. Averette,* 41 C.M.R. 363 (1970), the Court of Military Appeals (CMA) held that for purposes of providing jurisdiction over persons accompanying the armed forces in the field in time of war, the words "in time of war" mean a war formally declared by Congress.

Jurisdiction over Deployed Civilians

On 17 October 2006, Congress amended UCMJ jurisdiction to include DOD civilians and contractors serving with or accompanying U.S. armed forces during contingency operations. Therefore a time of war is not required for jurisdiction. On 10 March 2008, the Secretary of Defense provided guidance to general court-martial convening authorities (GCMCAs) and combatant commands (COCOMS) on exercising UCMJ authority over persons serving with or accompanying the Armed Forces. Commanders possessing GCMCA and assigned or attached to a geographic COCOM may court-martial and impose NJP on civilians for offenses committed in the AOR. Prior to preferral of charges or imposition of NJP, the Department of Justice (DOJ) must be notified of alleged criminal misconduct. Commanders may *not* prefer court-martial charges nor impose NJP until the COCOM notification process is completed, nor may charges be preferred if DOJ provides notice that it intends to pursue federal prosecution by a U.S. Attorney. Law enforcement,

criminal investigations, and other military justice procedures prior to preferral of charges should continue during the notification process.

Statutes of Limitations

Article 43, UCMJ, extends the statute of limitations for certain offenses committed in time of war. There are no statutes of limitation for the crimes of desertion, absence without leave, aiding the enemy, mutiny, murder, or rape, in time of war and persons accused of these crimes may be tried and punished anytime. Article 43(a), UCMJ. The President or Service Secretary may certify particular offenses that should not go to trial during a time of war if prosecution would be harmful to national security or detrimental to the war effort. In that case, the statute of limitations may be extended to six months after the end of hostilities. Article 43(e), UCMJ. The statute of limitations is also suspended for three years after the end of hostilities for offenses involving fraud, real property, and contracts with the U.S. Article 43(f), UCMJ.

In determining whether time of war exists for statute of limitations purposes, the Court of Appeals for the Armed Forces (CAAF) has held that the conflict in Vietnam, though not formally declared a war by Congress, was a time of war for statute of limitations purposes. *U.S. v. Anderson*, 38 CMR 386 (1968). Military courts have articulated factors they will look to in making such an analysis, including whether there are armed hostilities against an organized enemy and whether legislation, executive orders, or proclamations concerning the hostilities, are indicative of a time of war. *U.S. v. Shell*, 23 CMR 110 (1957); *U.S. v. Bancroft*, 11 CMR 3 (1963). Military courts have also rejected the notion that there is a geographical component to the time of war in the sense that absence from the combat zone at the time of the offense does not prevent the offense from occurring in time of war. *U.S. v. Averette*, 41 CMR 363 (1970).

WARTIME OFFENSES

Certain violations of the UCMJ penalize conduct unique to a combat environment. As previously noted, several offenses may occur only in time of war or have increased punishments in time of war. The following crimes need not occur in time of war to be criminal, but they have elements that may occur only in a wartime situation.

Misbehavior before the enemy (Article 99) is an amalgamation of nine offenses and is meant to cover all offenses of misbehavior before the enemy.

1. An accused is guilty of *running away* if, without authority, he leaves his place of duty to avoid actual or impending combat. He need not actually run, but must only make an unauthorized departure.

2. *Shamefully abandoning, surrendering, or delivering up command* punishes cowardly conduct of commanders who, without justification, give up their commands. Only the utmost necessity or extremity can justify such acts.

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

4. Military members may not *cast away arms or ammunition before the enemy* for any reason. It is immaterial whether the act was to aid themselves in running away, to relieve fatigue, or to show their disgust with the war effort.

5. *Cowardly conduct* consists of an act of cowardice, precipitated by fear, which occurs in the presence of the enemy. The mere display of the natural feeling of apprehension before, or during, battle does not violate this article; the gravamen of this crime is the accused's refusal to perform his duties or abandonment of duties because of fear. *See, Smith*, 7 CMR (ABR 1953), and *Barnett*, 3 CMR 248 (ABR 1951).

6. *Quitting one's place of duty to plunder or pillage* occurs when a person leaves their place of duty with the intent to unlawfully seize public or private property. It is enough that the person quit their duty with the specified purpose; they need not ever actually plunder or pillage to violate this subdivision of the article.

7. *Causing false alarms* includes the giving of false alarms or signals, as well as spreading false or disturbing rumors or reports. It must be proven that a false alarm was issued by the person and that they did so without reasonable justification or excuse.

8. A person *willfully fails to do their utmost to encounter the enemy* when they have a duty to do so and don't do everything they can to encounter, engage, capture, or destroy certain enemy troops, combatants, vessels or aircraft. An example of this offense might be a willful refusal to go on a combat patrol.

9. The *failure to afford relief and assistance* involves situations where friendly troops, vessels or aircraft are engaged in battle and require relief or assistance. The person must be in a position to provide this relief without endangering their own mission and must fail to do so. The person's own specific tasks and mission limit the practicable relief and assistance they can give in a particular battle situation.

The term enemy includes forces of the enemy in time of war, or any hostile body that our forces may be opposing, such as a rebellious mob or a band of renegades, and includes civilians as well as members of military organizations. *U.S. v. Monday,* 36 CMR 711 (ABR 1966), pet. denied, 37 CMR 471 (CMA 1969). To be before, or in the presence of, the enemy, one must stand in close tactical, not physical, proximity to the foe. CAAF has defined the concept as follows, "It may not be possible to carve out a general rule to fit all situations, but if an organization is in a position ready to participate in either an offensive or defensive battle, and its weapons are capable of delivering fire on the enemy within effective range of the enemy weapons, then that unit is before the enemy. *U.S. v. Sperland,* 5 CMR 89, 91 (1952).

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

War Trophies

Military members must, without delay inform and turn over to the proper authorities, all captured or abandoned enemy property. Individuals failing to adhere to this requirement may be punished under Article 103 for:

1. Failing to give notice or turn over property. *U.S. v. Morrison*, 492 F.2d 1219 (1974).

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

3. Engaging in looting or pillaging.

4. Violations of 26 U.S.C. 5844, 5861 (unlawful importation, transfer, and sale of a dangerous firearm) may be charged as a violation of clause three, Article 134, UCMJ.

Private Property

As a general rule, private property may always be requisitioned or destroyed if the military situation requires. The goal during combat is to avoid unnecessary destruction of such property, as well as disciplinary problems, by training airmen in the law regarding private property. This training will aid the commander in accounting for property and in paying proper claims. Wrongful destruction of private property, Article 109, prohibits willful or reckless destruction or damage to private property and carries a maximum punishment of a dishonorable discharge, total forfeitures, and confinement for five years. Wrongful taking of private property, Article 121, does not contain any provisions that apply specifically to wartime situations. The maximum punishment for a violation of this provision is a dishonorable discharge, total forfeitures, and confinement for five years.

OTHER POTENTIAL WARTIME OFFENSES

Mutiny and Sedition

Mutiny and sedition, Article 94, consists of four separate offenses, all of which require the endangerment of established military or civilian authority. Neither mutiny nor sedition has to occur during time of war to be punishable by death. Mutiny requires intent to usurp or override military authority and can be committed by either creating violence or a disturbance or by refusing to obey orders or perform duties. While creating violence or a disturbance can be accomplished either alone or with others, a refusal to obey orders or

perform duties requires a concert of purpose among two or more people to resist lawful military authority. The resistance may be nonviolent or unpremeditated and may consist only of a persistent refusal to obey orders or to perform duties. Sedition is a separate offense and requires a concert of action among two or more people to resist civil authority through violence or disturbance.

Failure to prevent, suppress, or report a mutiny or sedition by someone subject to the UCMJ also constitutes a crime. Failure to prevent these acts requires that the mutiny or sedition took place in the person's presence and that they failed to do their utmost to prevent and suppress the insurrection. If they fail to use the force, to include deadly force, necessary to quell the disturbance under the circumstances, they have failed to do their utmost. Failure to take all reasonable means to inform superiors of an offense of mutiny or sedition, which is reasonable to believe was taking place, is the fourth offense under Article 94. One must take the most expeditious means available to report the crime. Whether the person had reason to believe these acts were occurring is judged by the standard of the response of a reasonable person in similar circumstances.

Subordinate Compelling Surrender (Article 100, UCMJ)

The death penalty can be adjudged for the offense of compelling a commander to surrender, an attempt to compel surrender, and for striking the colors or flag to any enemy without proper authority (Article 100, UCMJ). Compelling surrender involves the commission of an overt act by a person that is intended to, and does, compel the commander of a certain place, vessel, aircraft or other military organization to give it up to the enemy or to abandon it. An attempt is comprised of the same elements, except the act must only "apparently tend" to bring about the compulsion of surrender or abandonment, and the overt act must amount to more than mere preparation. These offenses are similar to mutiny, except that no concert of purpose is required to be found guilty. Striking the colors or the flag requires that the accused make, or be responsible for, some unauthorized offer of surrender to the enemy. The offer to surrender can take any form and need not be communicated to the enemy. Sending a messenger to the enemy with an offer of surrender is sufficient to constitute the offense; it is not necessary for the enemy to receive it.

Improper Use of Countersign (Article 101, UCMJ)

A countersign is a word or procedure used by sentries to identify those who cross friendly lines; the parole is a word to check the countersign and is given only to those who check the guards and the commanders of the guards. Two separate offenses fall within the ambit of Article 101; disclosing the parole or countersign to one not entitled to receive it and giving a parole or countersign different from that authorized. Those authorized to receive the parole and countersign must be determined by the peculiar circumstances and orders under which the accused was acting at a particular time. Revealing these procedures or words is done at one's peril, despite the intent or motive at the time of disclosure. Negligence or inadvertence is no defense to the crime, nor is it excusable that the person did not know the person to whom the countersign or parole was given was not entitled to receive it.

Forcing a Safeguard (Article 102, UCMJ)

A safeguard is a guard detail or written order established by a commander for the protection of enemy and neutral persons, places, or property. The purpose of a safeguard is to pledge the honor of the nation that the person or property will be respected by U.S. forces. A belligerent may not employ a safeguard to protect its own forces. A safeguard may not be established by the posting of guards or off-limits signs unless a commander takes those actions necessary to protect enemy or neutral persons or property. This offense is committed when one violates the safeguard and they knew, or should have known, of its existence. Any trespass of the safeguard violates this article.

Aiding the Enemy (Article 104, UCMJ)

Five separate acts are made punishable by this article: aiding the enemy, attempting to aid the enemy, harboring or protecting the enemy, giving intelligence to the enemy, and communicating with the enemy. Although this article does not prohibit aiding prisoners of war, it does prohibit assisting or attempting to assist the enemy with arms, ammunition, supplies, money, or other things. Harboring or protecting the enemy requires knowing the person being helped is the enemy, and without proper authority, shielding the enemy from injury or other misfortune which in the chance of war may occur. The protection can take any form. Physical assistance and deliberate deception violate the article. One gives intelligence to the enemy by giving information that is true or implies the truth. This is an aggravated form of communicating with the enemy, because the offense implies the information passed has potential value to the opposition. The information need not be entirely accurate, nor must the passing of the information be directly from the person to the enemy; however, the person must have actual knowledge of their acts.

The final offense under this article is communication with the enemy. Any form of unauthorized communication, correspondence, or intercourse with the enemy is prohibited, irrespective of the intent. The content or form of the communication is irrelevant, as long as the person is actually aware that they are communicating with the enemy. Completion of the offense does not depend on the enemy's use of the information or a return communication from the enemy; the offense is complete once the correspondence is issued—either directly or indirectly. This article applies to all persons, whether or not they are otherwise subject to military law. Citizens of neutral powers, residents in or visiting invaded or occupied territory can claim no immunity from the customary laws of war relating to communication with the enemy. A prisoner of war may also violate this article by engaging in unauthorized communications with the enemy.

Spying (Article 106, UCMJ). This offense makes it a crime, in time of war, to lurk or act clandestinely or under false pretenses in an area in which people are working to aid the U.S. war effort in order to obtain information with the intent to convey it to the enemy. The accused must have intended to convey information to the enemy, but not that they actually received information or conveyed it to the enemy. Anyone, military or civilian, may be tried for spying, unless they fall into the following categories.

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

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

3. Persons living in occupied territory who report on friendly activities without lurking, and without acting clandestinely or under false pretenses. Such individuals may be guilty of aiding the enemy, however.

Misbehavior of a Sentinel (Article 113, UCMJ)

A sentinel who is found drunk or asleep on his post, or who leaves his post before being properly relieved, may suffer the death penalty if the offense is committed in time of war. One is drunk when intoxicated sufficiently to "impair the rational and full exercise of the mental or physical faculties." The definition of asleep requires impairment of the sentinel's mental and physical condition, sufficient enough that, although not completely comatose, they are unable to fully exercise their faculties. The sentinel's post is the area at which they are required to perform their duties. Straying from this area slightly does not amount to an offense, unless the departure would prevent the sentinel from fully executing their mission. A sentinel is posted when ordered to begin duties. No formal order or ceremony is needed; it is enough that routine or standard operating procedure require the individual to be on post at a particular time. The term applies equally in garrison, in the field, or in combat when listening posts, observation posts, forward security, and other warning devices are used.

Malingering (Article 115, UCMJ)

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

Offenses by a Sentinel (Article 134, UCMJ)

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

Straggling (Article 134, UCMJ)

Straggling applies in peacetime and combat to airmen who, while accompanying their organization on a march, maneuver, or similar exercise wander away, stray, or become separated from their unit. The specification must include the specific mission or maneuver.

DEPLOYED MEMBERS PROSECUTED BY THE HOST NATION

Air Force policy is to seek the release from foreign custody of personnel charged with criminal offenses under foreign laws. AFI 51-703, *Foreign Criminal Jurisdiction*, outlines the requirements where USAF members are prosecuted by a foreign country.

REFERENCES

1. Article II, § 2, U.S. Constitution
2. 10 U.S.C. §§ 801, *et seq.* (UCMJ)
3. Manual for Courts-Martial (MCM)
4. Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. §§ 3261, *et seq.* (MEJA)
5. AFI 36-3204, *Procedures for Applying As a Conscientious Objector,* 15 July 1994
6. AFI 38-101, *Air Force Organization,* 4 April 2006
7. AFI 51-201, *Administration of Military Justice,* 21 December 2007
8. AFI 51-202, *Nonjudicial Punishment,* 7 November 2003
9. AFI 51-604, *Appointment to and Assumption of Command,* 4 April 2006
10. AFI 51-703, *Foreign Criminal Jurisdiction*, 6 May 1994
11. DODI 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 March 2005
12. DODI 3020.41, *Contractors Accompanying the Forces*, 3 October 2005
13. Secretary of Defense Memorandum, "UCMJ Jurisdiction Over DOD Civilian Employees, DOD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations," 10 March 2008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CHAPTER 28

AEROSPACE ACCIDENT INVESTIGATIONS

BACKGROUND

The day-to-day aerospace activities conducted by Air Force personnel are inherently dangerous. Although great strides have been made over the past decades to minimize aircraft accidents, the Air Force loses aircraft to accidents in training and operations every year. Judge advocates and paralegals should become thoroughly familiar with the statutory guidance and regulatory procedures for conducting aerospace (aircraft, missile, and space) accident investigations.

Department of Defense Instruction (DODI) 6055.07, *Accident Investigation, Reporting and Record Keeping*, provides overall guidance for investigating accidents within the Department of Defense (DOD). Air Force Instruction (AFI) 91-204, *Safety Investigations and Reports*, implements DOD guidance for conducting safety investigations, and AFI 51-503, *Aerospace Accident Investigations*, implements DOD guidance for conducting accident investigations.

Safety and accident investigations are separate and independent investigations. Nonetheless, at the conclusion of the safety investigation certain factual information and documents are transferred to the accident investigation. Both investigations issue a final report describing the facts, circumstances, and causes of the accident. However, certain portions of the safety report are privileged and therefore protected from public release. Conversely, the accident report is fully releasable to the public and is provided to the next of kin (NoK) of personnel seriously injured or killed in the mishap.

INITIAL DISASTER RESPONSE

In accordance with AFI 10-2501, *Air Force Emergency Management (EM) Program Planning and Operations*, whenever an aerospace accident (involving aircraft, unmanned aerial vehicles, remotely piloted vehicles, missiles, and space assets) occurs, the nearest U.S. military installation or base immediately responds to the scene of the accident with a designated emergency support function (ESF). The ESF consists of fire fighters, security, medical and explosive ordnance disposal (EOD) personnel, as well as civil engineers, bioenvironmental, legal, and public affairs personnel. The primary purposes of the ESF are fire suppression, recovery and treatment of the injured, locating and recovering remains, securing the mishap site, making the site safe from ordnance and munitions, securing classified equipment and documents, and containing any environmental contamination (e.g., fuel, hydrazine spills). The incident commander[325] assumes control of the mishap site after it is

[325] The Air Force Incident Management System has replaced the term "on-scene commander" with "incident commander" to be consistent with National Incident Management System and National Response Plan

declared safe by the fire chief. The incident commander is responsible for all activities (security, medical, evidence preservation, logistics support, transportation, billeting, etc.) at the mishap site. The wing responding to the mishap also convenes an interim safety board (ISB).

TYPES OF BOARDS AND PURPOSE

Interim Safety Board (ISB). The purpose of an interim safety board is to gather and preserve perishable evidence at the mishap site immediately following the accident, make an initial determination of the accident classification, conduct initial interviews of transient and key witnesses, and photograph the accident site, wreckage, and human remains, if any, before they are disturbed. The ISB obtains fluid samples from the aircraft; recovers the flight data recorder, cockpit voice recorder, and other air traffic control and radar tapes onboard the aircraft; accomplishes toxicological testing of the mishap flight crew; and prepares for the arrival of the permanent safety investigation board. Additionally, the ISB gathers evidence relating to the mishap flight, such as pilot's records, aircraft maintenance records, weather briefings, etc.

Safety Investigation Board (SIB). The purpose of an SIB is to determine the cause of a mishap in order to take preventive actions to preclude its reoccurrence. Safety investigation board reports are used for mishap prevention; they may not be used for punitive, disciplinary, or adverse administrative actions, or to determine financial liability, adjudicate claims, or support civil litigation. In many cases, the SIB may offer confidentiality to witnesses in order to encourage cooperation, and testimony provided under a promise of confidentiality is privileged. Privileged testimony is not provided to the AIB. However, the SIB does provide the AIB names and contact information of every person interviewed.

Accident Investigation Board (AIB). The purpose of an AIB is to provide a publicly releasable report on the facts surrounding the accident and to include a statement of opinion as to the cause of the accident. Accident investigation reports can be used for claims, litigation, disciplinary and administrative proceedings, and for other purposes.

ACCIDENT CLASSIFICATIONS (defined in DODI 6055.07)

Class A Accidents

All DOD accidents involving a fatality, permanent total disability, destruction of a DOD aircraft, or total cost of damages to Government and other property of $1 million or more.

Class B Accidents

All DOD accidents involving a permanent partial disability, inpatient hospitalization of three or more personnel, or total mishap costs of $200,000 but less than $1 million.

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terminology. Nonetheless, the term "on-scene commander" is still occasionally used in certain publications or by members in the field.

Class C Accidents

All DOD accidents involving an injury resulting in a lost workday beyond the day it occurred, occupational illness causing loss of time from work at any time, or total mishap costs of $20,000, but less than $200,000.

INVESTIGATION REQUIREMENTS

Safety Investigations

A safety investigation is conducted for each accident classification. A formal, two-part SIB report is issued for Class A and Class B accidents, with some minor exceptions. Safety investigation board reports contain factual information and privileged safety information: for Class A and Class B accidents, the factual information is in Part I of the report and privileged safety information is in Part II of the report. For Class C accidents, a message report is typically generated containing both factual and privileged safety information. Safety investigations are not conducted for combat losses; however, a recent revision of DODI 6055.07 makes it more likely that an SIB will be convened following a friendly fire incident.

Accident Investigations

Accident investigations are conducted for most Class A accidents, accidents in which high public interest is probable, and all friendly fire incidents. A commander has the discretion to conduct an accident investigation for all other classes of mishaps. Accident investigations are not conducted for combat losses, except losses involving friendly fire incidents. A formal accident investigation report, detailing the facts surrounding the mishap and identifying the mishap cause or contributing factors, is produced at the conclusion of the investigation. Even though the damage is assessed over $1 million, thus making it a Class A mishap, an accident investigation is not required if all the following circumstances apply: 1) the aircraft, UAV or space launch vehicle is not totally destroyed; 2) damage is limited to government property only; 3) the accident is not a matter of probable high interest (high-interest mishaps include those that result in death or serious personal injury, significant civilian property damage, or are likely to generate high public, media, or congressional interest); 4) there is no anticipated litigation or disciplinary action; and 5) the mishap does not fall within the definition of friendly fire.

TYPES OF AEROSPACE ACCIDENTS

Friendly Fire Incidents

Definition. The definition of "friendly fire" is a circumstance in which members of a U.S. or friendly military force are mistakenly or accidentally killed or injured in action by U.S. or friendly forces actively engaged with an enemy or who are directing fire at a hostile force or what is thought to be a hostile force. DODI 6055.07, enclosure E2.1.16.

Type of Investigation. For all incidents falling within the definition of friendly fire, the combatant commander shall convene a legal investigation (equivalent to the USAF AIB), to determine the facts of the incident and guide further actions. At the discretion of the combatant commander, the service whose forces suffer the preponderance of loss or injury shall conduct a safety investigation. DODI 6055.07, enclosure E4.7.

Governing Regulation. Unless otherwise agreed, in most instances, the service whose forces suffer the preponderance of loss or injury will conduct a safety investigation at the discretion of the combatant commander. In other instances, after consultation and coordination with the combatant commander, the safety investigation is conducted through the combatant commander's service component. The safety investigation will be conducted in accordance with service rules and any applicable inter-service arrangements or agreements. For mishaps involving other friendly nations, the involved service safety chief consults with the Deputy Under Secretary (Installations and Environment) and the combatant commander to determine what role the other involved nations will play in the investigation. In those circumstances where the only forces lost or injured are those of other friendly nations, the service conducting the safety investigation will be determined at the discretion of the combatant commander. The combatant commander, in consultation with the involved service component commander, shall determine which service regulation governing legal investigations (AIBs in the Air Force) will be followed.

Combat Losses. Personal injury, death, or property damage caused by direct action of an enemy or hostile force is not a reportable incident and neither an SIB nor an AIB is conducted.

Accidents Involving U.S. Military Joint Service Operations

Governing Directive. For multi-service or joint operational mishaps only involving U.S. assets, the Memorandum of Understanding for Safety Investigation and Reporting of Joint Service Mishaps, 24 May 2001 will be followed. The Safety Chiefs of Army, Navy, Air Force, Marine Corps and Coast Guard signed this memorandum of understanding (MOU).

Joint Service Participation. The Chiefs of Safety of the services involved in the mishap will determine who will convene the safety investigation (unless otherwise agreed, the service that sustains the greatest loss or is most directly involved in the incident). The investigation will follow the service regulations of the convening authority. All involved services will have representatives on the SIB. Although not covered in the MOU, if the Air Force convenes the joint service safety investigation, there will also be an AIB, with representatives of the other involved services invited to participate. If another service convenes the joint service safety investigation, then the Air Force will request representation on the other service's legal investigation (Army Collateral Investigation under AR 15-6 and Navy JAGMAN Investigation under JAG 5800.7d.)

Accidents Involving U.S. Military and NATO Assets within NATO Jurisdiction

Governing Directive. For aerospace accidents involving the equipment, facilities, or personnel of the U.S. and another NATO nation, within NATO jurisdiction, NATO standardization agreement (STANAG) 3531 and NATO AS 85/2A will govern the safety investigation of these accidents. The investigation under NATO STANAG 3531 is in addition to, and separate from, any follow-on Air Force safety or accident investigation.

Joint-Nation Participation. While the nation of occurrence (place of accident) is ultimately responsible for investigating aerospace accidents which occur on or above its territory, the investigation will normally be delegated to the military authorities of the operating nations (nations which own the involved aerospace assets) when the accident involves the assets of two or more nations. A safety investigation committee will be composed of representatives of the involved nations (nation of occurrence and operating nations), with the involved nations providing the nucleus of the safety investigation committee. The committee will work under the direction of a unified coordinating group, consisting of the senior member from each involved nation. The safety investigation committee will issue a safety investigation report (SIR). The SIR does not contain privileged safety information as defined under AFI 91-204.

SIB and AIB Investigations. Generally a privileged SIB will be conducted following the release of the SIR, when the accident involves USAF assets. If the incident is a Class A accident, there will also be an AIB.

Accidents Involving U.S. Military and NATO Assets outside NATO Jurisdiction

Governing Directive. One must look to the provisions of any applicable memorandum of agreement (MOA), MOU, treaty provisions, or other directives governing the military exercise or activity in which the aerospace assets were involved or participating.

Joint Service Participation. Contact HAF/JAO, Air Force Safety Center (AFSC), and AFLOA/JACC for further guidance.

Accidents Involving U.S. Military and Civil Aircraft outside of U.S. Jurisdiction

Governing Regulation. Accidents between Air Force and civil aircraft occurring outside of U.S. jurisdiction will be investigated under the provisions of Annex 13 to the Convention on International Civil Aviation (ICAO).

Joint Service Participation. Contact HAF/JAO, AFSC, and AFLOA/JACC for further guidance.

Accidents Involving U.S. Military and Civil Aircraft within U.S. Jurisdiction

Governing Regulation. The National Transportation Safety Board (NTSB) has primary jurisdiction to investigate accidents between U.S. military and civil aircraft occurring within

U.S. jurisdiction. AFI 91-206(I), Participation in a Military or Civil Aircraft Accident Investigation, governs the relationship between the Army, Navy, Air Force, Coast Guard, and the NTSB.

Joint Service Participation. The NTSB will convene the investigation and appoint an Investigator-In-Charge to head the NTSB investigation. The NTSB will invite representatives of the military service involved in the mishap to serve as a party to the NTSB investigation. Concurrent with the NTSB investigation, a SIB will be convened. The SIB will be independent of the NTSB investigation. The NTSB has priority over access to the mishap site, evidence, documents, and witnesses involved in the mishap. Based upon the nature of the mishap, the SIB convening authority will determine whether or not to convene an AIB.

Accidents Involving Foreign Aerospace Assets Alone Within U.S. Jurisdiction

Governing Regulation. One must look to the provisions of any applicable MOA, MOU, treaty provisions, or other directives governing the foreign military's activity within the United States at the time of the accident. Contact HAF/JAO for further guidance.

Joint Service Participation. The foreign nation's military authorities shall be responsible for all measures to be taken in the event of an aerospace accident that involves only the foreign nation's aerospace assets. Upon request of the foreign nation, however, the Air Force will normally provide a representative to its investigation board. The AFSC will also coordinate and provide support to the foreign nation's investigation. An English translation of the investigation report will be provided to the U.S. host installation safety office. If USAF assets are also involved in the accident, AFSC will determine the extent of Air Force participation in the foreign nation's investigation, if not otherwise covered in the applicable MOA, MOU, or directive.

BOARD CONVENING AUTHORITY

Interim Safety Board

The wing, group or senior commander of the military installation, base, or forward operating base that provided the Emergency Support Function Response to the accident site will generally convene the interim safety board.

Safety Investigations

The major command (MAJCOM) commander of the organization accountable for the mishap is responsible for convening the safety investigation. The Air Force Chief of Safety (AF/SE) may convene a safety investigation. For flight mishaps, accountability is normally assigned to the organization credited with the aircraft's flying hours at the time of the mishap. Non-flight mishaps are assigned to the organization owning the damaged Air Force equipment or injured personnel. If two or more MAJCOMs have assets involved in the mishap, the command that initiated or sustained the highest level of loss in the mishap

will normally convene the safety investigation. For Air Force Reserve Command (AFRC) or Air National Guard (ANG) mishaps, the gaining MAJCOM traditionally convenes the safety investigation. The SIB convening authority for all on-duty Class A mishaps is the MAJCOM commander (this duty cannot be delegated). All other mishaps can be delegated to an appropriate level of command.

Accident Investigations

The same MAJCOM which convened or would have convened the preceding safety investigation under AFI 91-204 convenes the accident investigation. This includes AFRC and ANG mishaps. The AIB convening authority for all on-duty Class A mishaps is the MAJCOM commander unless delegated to the vice commander.

BOARD COMPOSITION AND QUALIFICATIONS

Interim Safety Board

The interim safety board generally mirrors the composition of the permanent safety investigation board. There will always be a Board President, Investigating Officer, Pilot member, Flight Surgeon, and Maintenance member. Their qualifications are dependent on the availability of personnel at the installation responding to the accident. The Board President will generally be the Operations Group Commander; the Investigating Officer will generally be a Wing Flight Safety Officer; the Pilot member will generally be a Squadron Flight Safety Officer; and the Flight Surgeon and Maintenance member will generally be from the local Wing or Squadron.

Safety Investigation Boards

An SIB for Class A mishaps consists of a board president, investigating officer, pilot member, flight surgeon, maintenance member, and an Air Force Safety Center representative and recorder. Other technical advisors, such as those from the aircraft manufacturer and human factors experts, are assigned as necessary. The board president is typically a rated 0-6 or 0-5 from outside the mishap wing and a graduate of the AFSC Board President Course. If the mishap involves a fatality, the board president must be a rated general officer or general officer select. The investigating officer must be rated with experience in the mishap aircraft and a graduate of the Flight Safety Officer Course or Aircraft Mishap Investigation Course. The pilot member must be current and qualified in the mishap aircraft. The maintenance member must be a graduate of the Aircraft Maintenance Investigation Course or the Jet Engine Mishap Investigation Course, with at least two years experience with the mishap aircraft. The medical officer must be a flight surgeon or be qualified in aerospace medicine. The AFSC representative must be qualified in safety investigation process and procedures. The recorder is the administrative manager for the Board.

Accident Investigation Boards

An AIB for Class A mishaps generally reflects the same composition and qualifications of the preceding SIB, with some exceptions: There is no AFSC representative or investigating officer appointed to the AIB. Instead, a legal advisor is appointed to the board. The legal advisor will generally be a second tour company grade officer and a graduate of the AIB Legal Advisor Course or the Aircraft Accident Investigation Course (AAIC). Other technical advisors are assigned as necessary. For non-fatality mishaps the AIB president is traditionally a rated O-6 or 0-5. General officers or general officer selects serve as AIB presidents for fatality mishap investigations. Pursuant to 10 U.S.C. 2255, the majority of AIB members must come from outside the mishap squadron, otherwise the Secretary of the Air Force must report the matter to Congress. Accident investigation board members must not have access to privileged safety information from the preceding SIB, nor may any AIB member be currently performing full-time safety duties.

TIME STANDARDS FOR INVESTIGATION

The SIB is expected to complete its investigation within 30 days of the mishap. The AIB is expected to complete its investigation within 30 days following receipt of non-privileged evidence (Part I) of the preceding SIB Report. Extensions can be granted to each board for good cause, with the approval of the convening authority.

HOST INSTALLATION SUPPORT

The commander of the host installation (the Air Force installation nearest to the mishap site) or designee will provide in-house administrative and logistical support to both the SIB and AIB. This will generally include office space, computer support, communications, billeting, transportation, transcription personnel and equipment, reproduction, data fax, and other needed administrative support. The host installation, with the approval of and in concert with the SIB President, will also remove the wreckage from the mishap site and store the wreckage in a secure location on the installation. The host installation staff judge advocate (SJA) will also assist the boards to arrange appearance at witness interviews by civilian employees and foreign nationals employed on the base.

FUNDING OF INVESTIGATION BOARDS

Temporary Duty (TDY) Travel

Each command funds the TDY travel of its assigned personnel who are appointed as Air Force SIB members. See AFI 65-601, Volume 1, para 7.14. However, the convening authority's command funds the TDY travel of Air Force AIB members or members from another service appointed to the SIB or AIB. For joint service boards, each service funds its own members.

Other Costs

The convening authority funds additional SIB and AIB expenses to include: leasing vehicles or special equipment, leasing communications, other contractual services, and the costs associated with the removal and storage of wreckage.

Host Installation Support

The host installation funds all in-house support (except billeting) even if the host installation is not assigned to the convening authority's MAJCOM. In-house support includes administrative and computer support and equipment, work areas and office space, reproduction, and graphics.

Clean up and Restoration Costs

The MAJCOM or ANG command that possesses the mishap aircraft is responsible for all costs associated with the crash site clean-up and environmental restoration.

CONDUCTING THE INVESTIGATION

General Guidelines

The SIB routinely takes precedence over the AIB. Although the AIB will generally be appointed concurrently or within a few days after convening the SIB, the AIB cannot begin its investigation until the SIB has released the wreckage, witnesses, and documents relating to the accident. Great care must be taken to prevent the AIB from inadvertently receiving privileged safety information from the SIB. Any contact between the two boards should be limited to only administrative matters such as coordination on the status of the ongoing investigation and the timing of the release of witnesses and non-privileged documents (Part I) to the AIB.

Interim Safety Investigation

The Interim Safety Board concludes its activities upon arrival of the permanent SIB and the transfer of information and documents to the SIB investigators.

Safety Investigation

The safety investigation process can be subjectively divided into three phases.

> Phase 1 (Days 1-10) is concentrated on gathering all the evidence to determine what happened.
>
> Phase II (Days 11-20) is concentrated on analyzing all the evidence to determine why it happened.

Phase III (Days 21-30) is concentrated on writing the SIB report, preparing the briefing to the convening authority, and drafting the final message report.

The activities within each phase are not necessarily separate and distinct from the other phases but are routinely commingled with activities in the other phases.

Following inspection of the wreckage, various key components are routinely shipped to Air Force depots, laboratories, and contractor facilities for tear-down analyses. Maintenance, flight, and training records are reviewed for any discrepancies. The flight data recorder, cockpit voice recorder, heads-up display (HUD) tapes, radar, and air traffic control tapes are reviewed and transcribed. Witnesses are interviewed, flight simulations are conducted, and animations are created, as appropriate. Fuel and oil analyses are conducted and medical, toxicological, and autopsy reports are reviewed. After all these documents have been reviewed, a detailed analysis is conducted by the SIB to determine why the mishap occurred and to develop causal findings and recommendations.

At the conclusion of the SIB, all the non-privileged documents, reports, photographs, witness interview transcripts, and witness lists are turned over to the AIB for its use, regardless of whether the SIB included it in Part I. Earlier release of these documents and witness lists can be made at the discretion of the SIB. Privileged safety information and documents are not released to the AIB or to any party outside of Air Force safety.

Accident Investigation

Although the AIB is convened at the same time as the SIB, the AIB normally does not commence until it receives Part I (non-privileged information and documents) and the witness list from the SIB. Prior to receipt of Part I, the AIB conducts its internal organization and arranges for logistical and administrative support. In the case of a fatality, at the direction of the convening authority, the AIB President must travel to the mishap site within 48 hours of the arrival of the SIB team, to gather information on the status of the search and recovery and investigation process in order to provide an initial early release of information to the NoK families. Following receipt of Part I, the AIB begins a four week schedule, similar to the three phase SIB process, consisting of review and analysis of Part I material, ordering additional testing and analysis of component parts, conducting separate interview of witnesses, and drafting the AIB report, with a statement of opinion on the cause of the crash. The AIB report is not routinely briefed to the convening authority.

WITNESS INTERVIEWS AND CONTRACTOR INPUTS

Rules Governing Categories of Witnesses

Military and DOD civilian employees can be compelled to appear before the SIB and AIB for interviews. Witnesses can also be ordered to bring documents to the interview. If a DOD witness is covered by a local bargaining unit, a union representative may have the right to be present during the AIB interview, but not the SIB interview. Foreign national DOD employees may also have specific rights to representation during an AIB interview,

but not a SIB interview. Contractor witnesses may also have certain rights under their labor management agreement during the AIB interview. Private civilian witnesses cannot be compelled to testify.

Safety Investigations

Interviews conducted by the SIB are informal and not under oath. In Class A aerospace accidents, the SIB President may extend a promise of confidentiality to any witness in order to obtain timely and forthright information from the witness. A promise of confidentiality can also be extended to contractor witnesses, if necessary, in order to obtain required information or documents. All witness interviews conducted under a promise of confidentiality are privileged and are protected from release to the public. Privileged witness interviews may not be used in any type of civil, criminal, or other adverse administrative proceedings against the individual.

Accident Investigations

The AIB must conduct all interviews under oath and may not give promises of confidentiality to any witness. Since SIB witness interviews conducted under a promise of confidentiality are privileged, the AIB must re-interview these witnesses if it needs their testimony. Even if an SIB witness provided information without receiving a promise of confidentiality, the AIB must have that witness adopt under oath the testimony provided the SIB. During the interview, witnesses can provide the same information to the AIB as they did to the SIB. However, the AIB cannot request, nor can the witness disclose, what questions were asked, and what responses were given, during the SIB interview. Care must be taken before the interview to explain these requirements to the witness. Whenever a witness is, or becomes a suspect, he or she must also be advised of his or her rights under Article 31, Uniform Code of Military Justice (UCMJ), or the 5th Amendment of the U.S. Constitution, as appropriate.

COCKPIT VOICE RECORDING (CVR)

Cockpit voice recordings are factual and are routinely reviewed by both the SIB and AIB. The tapes are transcribed by the SIB and placed in Part I of the SIB Report. Both the tapes and the transcripts are turned over to the AIB and the transcripts are included in the AIB Report. The tapes themselves shall not be released to the public unless required to be released under DOD 5400.7/AF Supplement and in accordance with third party privacy concerns. Following completion of the SIB and AIB, copies of CVR tapes are sent to the convening authority's SJA who forwards them to the Mishap Analysis and Animation Facility, Air Force Safety Center, Kirtland AFB, NM for storage.

MILITARY SAFETY PRIVILEGE

Under the legal concept of the military safety privilege, SIB investigators are authorized to grant promises of confidentiality to key witnesses and contractors to encourage frank, open, and timely communications to the SIB. The promise is two-fold: the statement or

information will not be released outside of DOD safety channels, and the statements or information cannot be used against the witness in any type of adverse administrative, civil or criminal proceeding. In addition, the internal deliberations of the SIB members and advisors, their analyses, conclusions, and recommendations, and the life science report also fall under the military safety privilege and cannot be released to the public. All privileged safety material is placed in Part II of a formal SIB Report (generally Class A and Class B mishaps) and is not provided to the AIB. The federal courts have strongly supported protection of the military safety privilege from disclosure in either civil discovery or under the Freedom of Information Act (FOIA). *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir., 1963), cert. denied, 375 U.S. 896 (1963); *United States v. Weber Aircraft Corporation*, 465 U.S. 792 (1984).

There are some limited exceptions to the non-release of privileged safety information. If a witness who has been promised confidentiality provides false testimony, or a witness or party is involved in investigative misconduct or fraud, his or her confidential testimony can be used to investigate and prove the fraud or misconduct. Confidential testimony can also be released under a protective order to comply with a valid court order on behalf of a defendant in a criminal action, based upon either the Jencks Act or *Brady v. Maryland*, 373 U.S. 83 (1963). Any release of privileged safety material, however, must first be authorized by the Secretary of the Air Force, following consultations with the other services and DOD.

DRAFTING THE REPORT

Safety Investigation Board Report

Formal Class A SIB Reports are divided into two parts: Part I (Tabs A-S) contains all the non-privileged, factual information and documents gathered during the investigation, including flight records, maintenance records, training records, technical and engineering evaluations, weight and balance clearance forms, air traffic control transcripts, cockpit voice recorder transcripts, including statements of damage, diagrams, and photographs. Part II (Tabs T-Z) contains privileged safety information, including a narrative description of the mishap sequence; investigation and analysis; findings, causes, and recommendations; confidential witness statements; confidential technical analyses; a life science report; and the SIB proceedings. In addition to the formal SIB Report, a privileged final message report is drafted containing a privileged analysis of the accident and the findings, causes, and recommendations of the SIB. Class C mishaps are generally reported by message only but contain both privileged and non-privileged information.

Accident Investigation Board Report

Part I of the SIB Report (Tabs A-S) is fully incorporated into Tabs A-S of the AIB. The remaining tabs contain the sworn witness statements, weather observations, additional flight and maintenance records, statements of injury or death, additional photographs and diagrams, and extracts of applicable directives and regulations. A one-page Executive Summary is prepared which details both a short summary of facts and a cause and/or substantially contributing factors determination. This is followed by a Summary of Facts,

which is a narrative description of the entire sequence of events from the start of the mission to final impact. This is followed by a Statement of Opinion of the AIB President setting forth his or her full opinion on the cause of the mishap and/or substantially contributing factors.

DETERMINATION OF CAUSAL FINDINGS AND RECOMMENDATIONS

Safety Investigation Findings

The SIB findings represent the SIB's conclusions of the major events in the mishap sequence following its analysis of the facts of the accident. The findings are based on the weight of the evidence, coupled with the professional knowledge and good judgment of the SIB members. Not all findings are causal. Causal findings are those findings that singularly or in combination with other causes resulted in the damage or injury. There are no legal or statutory criteria for determining causal findings; however, the SIB must use the reasonable person concept when determining a cause. Recommendations to prevent recurrence of a similar accident are also contained within the SIB Report.

Accident Investigation Findings

A Statement of Opinion presents the AIB president's personal opinion regarding the cause or causes of the accident, and/or any substantially contributing factors. The cause of the accident must be based upon clear and convincing evidence, which enables the accident investigator to reach a conclusion without serious or substantial doubt, and is supported by evidence showing that it is highly probable that the conclusion is correct. If a cause cannot be determined then the AIB President must state those factors that substantially contributed to the accident. The AIB President may also state substantially contributing factors in addition to a cause or causes of the mishap. Substantially contributing factors must be supported by a preponderance of the evidence, or in other words, must be supported by the greater weight of credible evidence. No recommendations and no dissenting opinions are provided in the AIB Report.

PROCESSING AND APPROVAL OF REPORT

Safety Investigation Board Report

Once the SIB Report is complete, it is personally briefed to the convening authority, usually the MAJCOM/CC. There are no intermediate command reviews or briefings on the results of the SIB, although the convening authority may permit the numbered air force (NAF) commander (or, in the case of an Air National Guard mishap, the State Adjutant General or respective ANG commander) experiencing the mishap to receive an information only briefing prior to the convening authority's briefing. The NAF commander may invite the mishap wing commander to attend the NAF briefing as an observer. Following the briefing to the MAJCOM/CC, the convening authority has ten days to concur with the report as written, concur with comments, or direct the SIB to complete further investigation. This is followed by the issuance of an SIB final message to all appropriate levels of command

worldwide requesting comments on the report within thirty days. The AFSC evaluates all comments or endorsements and then prepares a Memorandum of Final Evaluation (MOFE) for the Chief of Safety. Once the Chief of Safety issues the MOFE, it becomes the final official Air Force position on the findings, causes, and recommendations. All recommendations validated by the Chief of Safety become directed actions that are assigned to the appropriate action agencies for implementation.

Accident Investigation Board Report

Once the AIB Report is completed, it is forwarded to the convening authority's SJA who will send it to the convening authority's staff for review and comment. All substantive comments will then be transmitted to the AIB President for consideration. The AIB President can elect to continue the investigation, modify the report, or make no changes. Following this action, the convening authority's SJA will conduct a final legal review to ensure that the report meets all statutory and regulatory requirements and make a recommendation to the convening authority to approve the report as written, approve with appended comments, or return the report to the AIB for further action. The AIB report is not personally briefed to the convening authority, unless specifically requested. If a formal briefing is requested, an informational briefing will first be given to the NAF commander, who may forward any written comments to the convening authority. Approval of the AIB Report does not constitute agreement or disagreement with the Statement of Opinion of the AIB President. Following approval of the report, it can be released to the NoK families, Congress, the media, and the public, as appropriate.

RELEASABILITY OF REPORT

Safety Investigation Board Report

The SIB report cannot be released outside of DOD safety channels. If, however, a FOIA request is made for the SIB report, only non-privileged portions (primarily Part I) can be released.

Accident Investigation Board Report

The AIB report is fully releasable to the public.

EARLY RELEASE OF INFORMATION

Routine Releases

10 U.S.C. 2254(b) prohibits any release of accident investigation information by or through officials with responsibility for, or who are conducting, the safety investigation. Upon request, and prior to the completion of the AIB, the convening authority may authorize the public disclosure of unclassified tapes, scientific reports and other factual information regarding the accident as long as the release will not undermine the ongoing safety or legal investigations, or compromise national security. Release of non-investigatory information

(e.g. search and rescue, recovery of remains, salvage operations) can be made by the appropriate command or public affairs office (PA) at any time.

Releases in High Interest Mishaps

In high interest mishaps (those involving death; serious personal injury; significant civilian property damage; or high public, media, or congressional interest), any release of investigation status or factual information on the accident (other than the initial PA release), requires prior notification to the NoK or seriously injured personnel. Such releases are coordinated through the convening authority's PA and SJA; approved by the convening authority; and reviewed by AFLOA/JACC and The Judge Advocate General, Air Force Chief of Staff, and Secretary of the Air Force before being provided to the NoK through their family liaison officer, who is appointed by the mishap wing or installation commander.

DISTRIBUTION OF AIB REPORT

NOK Briefings

In all cases involving fatalities and serious personal injuries, the NoK families will receive a personal briefing by the AIB President on the results of the investigation. The family will also be given a copy of the AIB Report. In the case of multiple deaths or injured parties, additional NoK briefing officers may be appointed to carry out this function. The NoK family briefings will take place before public release of the report.

Public Release

Following the NoK family briefings, or, if there are no deaths or serious personal injuries involved in the mishap, the AIB Report will be released to the public, either by a press release or a formal press conference, after approval by the convening authority. Prior to the public release, a copy of the Summary of Facts and Statement of Opinion will be provided to appropriate Air Force offices, to include the mishap wing commander and intermediate commander, for internal review.

POST INVESTIGATION MATTERS

Collateral Evidence

All non-privileged collateral evidence gathered during both the SIB and AIB and not incorporated into the AIB Report will then be forwarded to the convening authority's SJA for storage with the original AIB Report. The CVR tape is sent to AFSC/SEFE for storage. The AIB Report and collateral evidence is held for a period of three years in the SJA's office. After three years, unless AFLOA/JACC mandates otherwise due to ongoing claims and/or litigation, the original AIB Report is retired to the National Records Center where it is stored for an additional twenty-two years and then destroyed. All original records (e.g., medical, personnel, maintenance records, etc.) that are part of the collateral evidence are

returned to the originating custodial office for appropriate disposition. All other documents are destroyed in place.

Wreckage Disposition

Wreckage from Class A mishaps investigated by an AIB must continue to be stored by the host installation until formal release. The wreckage release authority is normally AFLOA/JACC. The convening authority's SJA may also release wreckage from legal hold once an abbreviated AIB report has been approved. The convening authority's SJA must notify AFLOA/JACC in writing when releasing wreckage from legal hold. Since this wreckage is potential evidence in any subsequent claims or civil litigation, release from legal hold by AFLOA/JACC is considered on a case-by-case basis. A release from legal hold must also be obtained prior to repair of an aircraft involved in a Class A mishap investigated by an AIB. AFI 51-503 discusses the procedures for release of wreckage.

REFERENCES

1. Convention on International Civil Aviation, 7 December 1944, 61 Stat. 1180, T.I.A.S. 1591, 15 U.N.T.S. 295 (entry in force 4 April 1947, for U.S. same date)
2. NATO Standardization Agreement (STANAG) 3102, *Flight Safety Cooperation*, 5 June 1990
3. NATO Standardization Agreement (STANAG) 3531, *Safety Investigation and Reporting of Accidents/Incidents Involving Military Aircraft and/or Missiles, (Edition 6)*, 4 October 1991
4. NATO Air Standard 85/2A, *Investigation of Aircraft/Missile Accidents/Incidents*
5. U.S. Constitution, Amendment V
6. Uniform Code of Military Justice (UCMJ), 10 U.S.C. Chapter 47
7. Jencks Act, 18 U.S.C. 3500
8. 10 U.S.C. § 2254, Treatment of Reports of Aircraft Accident Investigations, 17 October 1998
9. 10 U.S.C. § 2255, Aircraft Accident Investigation Boards: Composition Requirements, 23 September 1996
10. DODI 6055.07, *Accident Investigation, Reporting, and Record Keeping*, 3 October 2000
11. Memorandum of Understanding for Safety Investigation and Reporting of Joint Service Mishaps, 24 May 2001
12. AFI 10-2501, *Air Force Emergency Management (EM) Program Planning and Operations*, 24 January 2007
13. AFI 91-204, *Safety Investigations and Reports*, 24 September 2008
14. AFMAN 32-4004, *Emergency Response Operations*, 1 December 1995
15. AFI 34-1101, *Assistance to Survivors of Persons Involved in Air Force Aviation Mishaps*, 1 October 2001
16. AFI 51-503, *Aerospace Accident Investigations*, 16 July 2004
17. AFI 65-601, Volume 1, *Budget Guidance and Procedures*, 3 March
18. AFI 91-204, *Safety Investigations and Reports*, 24 September 2008
19. AFI 91-206(I), *Participation in a Military or Civil Aircraft Accident Safety Investigation*, 8 July 2004
20. *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir., 1963), cert. denied, 375 U.S. 896 (1963)
21. *United States v. Weber Aircraft Corporation*, 465 U.S. 792 (1984)
22. *Brady v. Maryland*, 373 U.S. 83 (1963)

CHAPTER 29

LEGAL READINESS

BACKGROUND

The Air Force JAG Corps Mission is to "deliver professional, candid, independent counsel and full-spectrum legal capabilities to command and the war fighter." A core element of the JAG Corps mission is ensuring the operational readiness of Air Force personnel and the legal capabilities available to support military operations. This is done, in part, by achieving the legal readiness of all airmen.

To recognize the services expected of judge advocates, one must understand the term "legal readiness." Legal readiness is the degree to which Air Force members are ready to deploy in both *personal* and *mission* capacities.

Personal: On a personal level, legal readiness involves awareness of the personal legal issues that may arise during pre-deployment preparation or a deployment, along with the remedies available to mitigate any adverse effects. Examples include challenges with real property leases, family law obligations, estate planning, and impacts to civilian employment for reserve members.

Mission: On an operational level, legal readiness involves the ability of individuals and their organizations to deal with the military-legal aspects of the operational environment. Examples include the ability to understand and effectively apply domestic and international law, treaties and international conventions, the law of armed conflict and other operational laws, and status of forces agreements (including foreign criminal jurisdiction).

Legal readiness results from the full range of services that legal professionals provide. It extends from legal assistance provided to Air Force members and their families to the legal advice provided to military decision-makers at all levels.

LEGAL READINESS PROGRAM AND RESPONSIBILITIES

In order to obtain legal readiness of a supported population, the servicing staff judge advocate (SJA) should develop and implement a legal readiness program that tailors available legal services to satisfy the requirements of the supported population and that satisfies the requirements of AFPD 51-5 and AFI 10-403. SJAs should appoint a readiness officer to manage the program.

As part of the program, the initial step for a JA office might be to identify their legal readiness clients. Legal offices will use both a unit type code's (UTC's) availability and AEF identity (i.e., location within the AEF construct), to determine a UTC's legal readiness requirement. Individuals who are tasked to deploy and those who are most likely to deploy are the primary focus of the legal readiness program and are identified to ensure their individual legal needs are addressed prior to a deployment.

Legal Readiness Clients

Each location's servicing JA activity has three primary legal readiness client groups: personnel tasked to deploy, residual capabilities that are available to deploy, and residual capabilities designated to support home station operations.

The first group, personnel who are tasked to deploy, are those who have a verifiable deployment commitment at a forward operating location or at another installation. This group also includes units containing specialties that have a high potential to deploy frequently or on very short notice (e.g., aircrew, security forces, combat controllers). Legal offices coordinate with commanders and unit deployment monitors (UDMs) of these units to determine if members of those units are effectively tasked to deploy due to their specialty. Each location's servicing JA office should personally contact all designated individuals in this group and brief them on the required legal readiness information elements within 60 days of the date required in-place (DRI).

Personal contact means individual contact with each member by a judge advocate, civilian attorney, or a qualified NCO serving as a paralegal craftsman, superintendent, or manager in a setting that facilitates interaction between the two. Although one-on-one contacts are the ideal, this is not required. For example, briefing a "classroom-sized" group allows the desired level of personal contact. By contrast, a mass briefing of a large group during a commander's call does not provide sufficient interaction.

The second group includes personnel who are available to deploy during an on-call/deployment eligibility period and have not yet been tasked to deploy, but are the most likely to deploy. Personnel in this category will be contacted directly. Direct contact means contact by a direct and quantifiable method within 60 days prior to the start of an on-call/deployment eligibility period. "Direct and quantifiable" means that it is possible to determine which people have been contacted. Examples include electronic messages sent directly to each individual, online training that requires registration, or commander's calls, mass briefings, or unit training sessions where attendance is taken.

The third group includes personnel who cannot deploy for various reasons (e.g., they are on a medical profile) and are therefore unlikely or unable to deploy. JA activities should contact each member via the direct contact method *as time and resources permit* and brief them on the required legal readiness information elements.

Legal Readiness Client	**Contact Requirement**
All personnel TASKED to deploy	Personal contact with each member within 60 days of the DRI
All personnel AVAILABLE to deploy	Direct and quantifiable contact with each member within 60 days prior to beginning of each on-call/availability period
All residual personnel UNLIKELY to deploy	Direct contact with each member as time and resources permit

The Personnel Deployment Function (PDF)

In addition to identifying legal readiness clients, judge advocates provide legal services to commanders and other deploying personnel as outlined in AFI 10-403, paragraph 1.5.20. The officer who manages the readiness program should designate legal representatives to serve as members of the personnel deployment function (PDF - a.k.a., the mobility line). The PDF is established by the Installation Deployment Officer to provide personnel program support to individuals selected to deploy during contingency, wartime, exercise and emergency operations.

Pre-Mobility Line. Judge advocates must have the appropriate training and equipment necessary to support the deployment process, whether as part of the PDF or supporting personnel who report to the installation legal office for services. Each legal representative assigned to support the PDF must be familiar with the overall purpose of the PDF and ensure the legal station is properly stocked with supplies and reference materials. The legal station should be equipped with blank power of attorney forms, blank will forms (if permitted by state law), a notary log, notary seal or stamp, a computer (with appropriate power of attorney, will and CD ROM capability) and printer or local area network connection. Judge advocates should learn as much information about the deployed location as possible to identify what legal services may be present and must be prepared to assist deploying members or advise commanders on the following legal issues:

1. Jury Duty (AFI 51-301);

2. Conscientious Objectors (AFI 36-3204);

3. Refusal of Medical Requirements (e.g., Anthrax, DNA samples);

4. Civil Court Actions (e.g., continuances for divorce, adoption, civil suits);

5. Criminal Actions (e.g., continuances for traffic offenses);

6. Quality Force Management Actions (e.g., Control Roster, Unfavorable Information Files, Nonjudicial Punishment);

7. Authority to Negotiate International Agreements (e.g., Who can bind the U.S.?);

8. Contracting Authority (e.g., Who can obligate the U.S.?);

9. Deployed Military Justice (e.g., General Order Number 1, Joint Justice); and

10. Claims Issues (e.g., What is the limit of "reasonable" personal property at a deployed location?)

Manning the Mobility Line. The PDF legal representative may be a judge advocate or a paralegal with a judge advocate on call. Judge advocates must recognize that the mobility processing line is not the best environment for making informed, appropriate choices concerning wills, guardians, and other personal matters. Accordingly, judge advocates should serve their clients prior to manning the PDF if possible. The provision of legal services at the mobility processing area should be reserved for emergencies.

Individuals should be counseled concerning powers of attorney, wills, and other matters that may impact them during the deployment. A method should be established to deliver documents prepared at the mobility processing line to appropriate individuals. Adequate facilities should be readily available to address privacy and confidentiality concerns. The legal representative should notify the PDF officer in charge (OIC) if deploying personnel have legal problems that may be affected or aggravated by the deployment. The OIC will then inform the member's unit of any problems that warrant follow-up action in the member's absence (e.g., Servicemember Civil Relief Act (SCRA) issues). Legal services should be documented to permit trend analysis of the nature and scope of services performed on the mobility line in relation to pre-deployment preparation measures.

PERSONAL READINESS

As part of the Legal Readiness Program, legal offices should be aggressive in sponsoring preventive law programs to educate airmen and their families of the legal issues they may face during a deployment. If effective, the program should highlight the potential pitfalls and direct airmen to appropriate courses of action to protect themselves from such concerns. Potential topics to be covered can include, but should not be limited to:

1. Eligibility for legal assistance services;

2. Procedures, times, contact information and the scope of legal assistance;

3. SGLI designation;

4. Family Care Plans;

5. Wills;

6. Powers of Attorney;

7. Claims information concerning the loss, damage, destruction, or theft of personal property while deployed;

8. Servicemember Civil Relief Act – SCRA (particularly for deploying Reservists);

9. Uniformed Service Employment and Reemployment Rights Act – USERRA (particularly for deploying Reservists); and

10. Consumer law issues.

Other topic areas appropriate for consideration are identified in the Legal Assistance chapter of this guide.

MISSION READINESS

The mission readiness aspect to a Legal Readiness Program requires that judge advocates be able to advise deploying airmen and commanders on the military-legal environment they are going to operate within. This includes the applicable laws (both domestic and international), policies, and other guidance that restricts or permits activities.

Specifically, judge advocate personnel should be prepared to provide briefings on:

1. The law of armed conflict (LOAC);
2. Rules of engagement (ROE);
3. Rules for the use of force (RUF);
4. Applicable status of forces agreements (SOFA);
5. Area or country law studies;
6. Command and control relationships; and
7. Other matters relevant to the deployment location.

Be mindful that some of this information is classified (e.g., theater-specific ROE, some SOFAs) and requires special handling and storage considerations.

Also, a judge advocate must be cognizant of individual training requirements that fall under the mission readiness prong of legal readiness. Most notably is the requirement for recurring LOAC training and the reporting requirements under AFI 51-401, but other requirements may exist depending on the location where the member is deploying.

REFERENCES

1. JP 1-04, *Legal Support to Military Operations*, 1 March 2007
2. AFI 10-403, *Deployment Planning and Execution*, 13 January 2008
3. AFI 10-402, *Volume 1, Mobilization Planning and Personnel Readiness*, 9 August 2007
4. AFI 51-401, *Training and Reporting to Ensure Compliance with the Law of Armed Conflict*, 19 July 1994
5. AFPD 51-5, *Military Legal Affairs*, 27 September 1993
6. TJAG Policy Memorandum OR- 3 , *Legal Readiness*, 17 August 2005

CHAPTER 30

DEPLOYED FISCAL LAW AND CONTINGENCY CONTRACTING

BACKGROUND

Few legal issues directly impact the war fighting mission more than contracting and fiscal law. Airmen require proper training, equipment, living and work facilities, meals, and transportation to and from an area of operations. Contracting and fiscal law plays a substantial role in regulating how the Air Force acquires all of these items or services to accomplish the mission, and ultimately whether an operation is a success or failure.

Contract and fiscal law not only applies to how U.S. forces are trained and equipped. Allies frequently request supplies or services from U.S. Forces in a contingency environment. Commanders want to help coalition partners accomplish their mission in support of U.S. forces, which includes giving the coalition forces the requested supplies and services they need. A critical role of the judge advocate is to navigate the complex legal and regulatory frame work to offer the commander options that accomplish the mission while complying with the law and determining a legal way to acquire the supplies necessary, using the proper types of funds.

Because of the complexity of the law in this area, judge advocates in today's deployed environment must have a basic knowledge of contract and fiscal law. In executing the mission, commanders need to build facilities, purchase supplies, and pay for services. Deployed commanders may have limited background dealing with the applicable rules and regulations. As a consequence, they typically focus on results and not on the details such as which "pot of money" is used. Additionally, at many deployed locations, airmen and NCOs serve as warranted contracting officers deployed with little or no fiscal experience and only a cursory knowledge of how contracts are funded. Taking the time to explain contract and fiscal law to clients will help them better understand the important principles involved and reinforce that judge advocates are not an obstacle to getting the job done, but rather assist in mission accomplishment within the law.

If the opportunity exists before a deployment, judge advocates should get involved with the operation planners and determine the kinds of activities expected to be conducted. If the unit is sending an advance team or survey team, try to become part of it. If that is not possible, make sure that the team is briefed on permissible support purchases under the law. Judge advocates should get to know the contingency contracting officer (CCO), the financial management (FM) officer, and civil engineer personnel during a deployment as these offices will interact with the JA repeatedly. In fiscal and contracting matters, judge advocates are advised to maintain good records that will demonstrate to reviewing

authorities or auditors why and on what legal authority the action was based. On many occasions, the best documentation is a legal review. How the military spends funds appropriated by Congress is ALWAYS at issue. The fundamental duty of a judge advocate is to ensure that the expenditure of funds is justifiable, properly documented, and can withstand scrutiny from Congressional or other inquires.

This chapter only scratches the surface of fiscal and contract issues. Unfortunately for judge advocates, fiscal law authorities sometimes contain ambiguous language, which can lead to differing interpretations. Thorough research and, in many circumstances, advice from supervisory judge advocates or higher headquarters will be necessary to determine the proper solution.

Much of fiscal law as described in this chapter only applies to "appropriated funds." Appropriated funds come to DOD from Congress through an Appropriation Act. An appropriation is a statutory authorization "to incur obligations and make payments out of the Treasury for specified purposes." *See* A Glossary of Terms Used in the Federal Budget Process, p.16, GAO/AFMD-2.1.1 (Jan. 1993). Nonappropriated funds (NAF) are funds lawfully acquired by other means. Examples of NAF funds include money-generating entities such as the bowling alley or other MWR activities.

FISCAL LAW

Constitutional Fiscal Law Controls

The foundation of fiscal law is based in the U.S. Constitution, Article I, section 9, clause 7 of the Constitution: "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law…." Explicitly, the Constitution requires positive authorization from Congress before expenditures can be made from the Treasury. The basic fiscal law rule, as stated by the Supreme Court, is "that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress." *United States v. MacCollom*, 426 U.S. 317 (1976). But this rule can be misunderstood by commanders, who may believe "if it's not specifically prohibited, you can do it."

Congressional Fiscal Law Controls

Congress maintains a measure of control over how the executive branch spends the money given by Congress. Hence, in addition to the Constitutional mandate in *MacCollom*, the expenditure of appropriate funds is also controlled by statute. For example, 31 U.S.C. 1301(a) directs that "appropriations shall be applied only to objects for which the appropriations were made except as otherwise provided by law." Spending appropriated funds for other than their intended purpose is a violation of law, commonly called an Anti-Deficiency Act violation.

The "Big Three" fiscal law limitations Congress places on the Department of Defense (DOD) regarding the obligation and expenditure of appropriated funds are referred to as the

"Purpose, Time, and Amount" rules (PTA). In general, funds may only be used for the right purpose (P), at the right time (T), and may not exceed the amounts currently available (A).

Purpose

"Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." 31 U.S.C. 1301(a). In Appropriation Acts, Congress provides funds in separate provisions for different purposes to each of the military departments. Each of these different provisions can be referred to as "pots" of money. Some of these pots of money are very specific regarding how Congress wants it to be spent. Instructions on how to spend these pots are either placed directly into the Appropriation Act or in additional legislation. There are many pots of money appropriated by Congress. However, the typical categories of money that may be at issue during a contingency deployment include:

1. Operations and maintenance (O&M)

2. Construction

3. Other procurement

Operations and Maintenance (O&M)

The "Operations and Maintenance" pot is the best example of an appropriation with broad statutory language. The typical language appropriating O&M for DOD components include "[f]or expenses, not otherwise provided for, necessary for the operation and maintenance of the Air Force…" O&M is the primary source of funds used during military operations. The purpose of O&M funds is to pay for day-to-day expenses that are "necessary and incident" to military operations. Hence, the appropriation provides for great flexibility in accomplishing the objectives of the DOD and its components.

Because of the broad language in legislation appropriating O&M and other pots of money, the general accounting office (GAO) has provided helpful guidance for judge advocates in determining whether a proposed expense is being charged against the correct pot of money (for the right purpose). The GAO has developed a three-pronged test, commonly referred to as the "necessary expense" doctrine. 63 Comp. Gen. 422, 427-428 (1984).

1. The expenditure must not be otherwise provided for; i.e., it must not fall within the scope of some other appropriation;

2. The expenditure must not be prohibited by law; and

3. The expenditure must be "reasonably related" to the purpose of the appropriation.

Construction

Specified military construction. Military construction funding presents many issues for the deployed judge advocate. Generally, there are two types of construction funds. First, there is "specified" military construction. The Sectary of Defense (SECDEF) and the Secretaries of the military departments may carry out military construction projects that are specifically authorized by law. 10 U.S.C. 2802. Specified military construction funds are specifically authorized by Congress in the annual Military Construction Authorization Act or the National Defense Authorization Act. The conference report accompanying the Military Construction Authorization Act provides line-item authorizations by project and is depicted in a manner demonstrated below.

MILITARY CONSTRUCTION (MILCON)

Account	State	Location	Project Title	Amount (in thousands)	Member
Army	Alabama	Anniston Army Depot	Industrial Wastewater Treatment Plant	$26,000	The President/Mr. Rogers, M. (AL)/Mr. Sessions/Mr. Shelby

Dealing with specified military construction funds usually presents few issues for deployed judge advocates. Either the construction project is specifically authorized by Congress or not. If a project is not specifically authorized, judge advocates and commanders may look to unspecified minor military construction, or other authority, as an alternative.

Unspecified Minor Military Construction (UMMC). Unlike specified military construction funds, UMMC funds do not specifically tell commanders what individual construction projects can be funded. The benefit of UMMC is that commanders can fund construction projects without receiving specific approval from Congress, or undergoing the burdensome pre-planned budgeting process. UMMC funds allow commanders to approve military construction projects quickly, for unexpected and minor projects needed for mission accomplishment.

Generally, all projects exceeding $2 million must use specified MILCON appropriated by Congress for the projects. For projects less than $2 million, commanders may use UMMC funds. 10 U.S.C. 2805. Two types of UMMC funding are authorized: unspecified military construction and operations and maintenance.

Using Unspecified Military Construction (MILCON) Funds, 10 U.S.C. 2805(a). Each service has an annual MILCON "pot" to use for UMMC projects. Congress appropriates "Unspecified Minor Construction" along with specified construction funds as part of the lump-sum military construction appropriation for each individual service. Of the lump-sum military

construction appropriation, the conference report accompanying the Military Construction Appropriations Act identifies the amount available for unspecified minor construction.

Each project must have an "approved cost" equal to or less than $2 million. However, the maximum is raised to $3 million for a project "intended solely to correct a deficiency that is life-threatening, health-threatening, or safety-threatening." 10 U.S.C. 2805(a)(1). Military construction funds are used to create enduring improvements and structures to be used during future operations (e.g., assault landing strips, roads, hangers, and barracks). Only "funded" costs must be considered in determining whether a project meets a funding threshold. Funded costs include "out of pocket" expenses such as materials, supplies, services, installed equipment, transportation, travel and per diem costs for troop labor, equipment use costs, and site preparation. Unfunded costs are separately accounted for and don't count toward funding thresholds; they include military personnel pay and allowances, equipment depreciation, and some planning and design costs.

Using Operations & Maintenance (O&M) funds, 10 U.S.C. 2805(c). As discussed above, the "necessary expense" doctrine follows statutory law that expressly prohibits using funds in one pot that "fall within the scope of some other appropriation." A clear example of this prohibition is the use of O&M for construction. However, Congress has expressly provided for an exception to this rule. 10 U.S.C. 2805(c) allows the use of O&M for minor construction projects that do not exceed $750,000 per project. This statutory threshold amount is further raised to $1.5 million if the project is "intended solely to correct a deficiency that is life-threatening, health-threatening, or safety-threatening." 10 U.S.C. 2805(c)(1). The Air Force requires prior approval at the Air Force Secretariat level for projects using the Life, Health, and Safety exception for projects between $750,000 and $1.5 million. AFI 32-1032, para. 5.1.2.1 and AFI 65-601, Vol. 1, para. 9-10.

Project Splitting or "Incrementation" – A Judge Advocate's Nemesis. The most significant and common issue related to using O&M funds for a military construction project is "project splitting." A project splitting analysis can be complex and confusing. To begin the analysis, judge advocates should first understand basic concepts and definitions used in analyzing construction funding. Each *individual military construction project* must remain below the statutory threshold of $750,000 if using O&M funds. For judge advocates providing legal advice, two questions need to be answered. First, what are considered "*construction*" costs that must be aggregated against the statutory threshold? Second, what is the *scope* of each individual military construction project?

The term "military construction," as used in 10 U.S.C. 2801(a), includes any "construction, development, conversion, or extension of any kind carried out with respect to a military installation, whether to satisfy temporary or permanent requirements." Military installation means a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of the Secretary of a military department or the SECDEF. Furthermore, the Air Force's definition is extremely broad. Air Force Instruction 32-1032, *Planning and Programming Appropriated Funded Maintenance, Repair, and Construction Projects*, provides exhaustive criteria in determining whether or not anticipated work must be

considered construction. See paragraphs 4.1.2.2 and Chapter 5, *Unspecified Minor Military Construction.* Because of the Air Force's broad interpretation, if there is a substantial question regarding whether or not work should be considered construction, err on the conservative side – consider the work construction. After determining that certain work is construction, the *scope* of the construction project must be determined.

Maintenance (recurrent work to prevent deterioration) and repair (restoration for use for a designated purpose) are not considered construction. Any work that can be lawfully categorized as maintenance or repair need not be aggregated in determining whether a certain project is below the statutory threshold. It is always appropriate to use O&M funds for maintenance and repair expenses. Additionally, those costs may be "apportioned" from any related military construction costs. For current DOD guidance, *See,* USD(C) Memorandum, *Definition for Repair and Maintenance*, 2 July 1997 and AFI 32-1032, Chapter 4.

A military construction "project" is defined by 10 U.S.C. 2801(b). The term includes "all military construction work . . . necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility . . . " Under 10 U.S.C. 2801(c)(1) "facility" is defined as "a building, structure, or other improvement to real property." The Army's defines facility as "any interest in land, structure, or *complex of structures* together with any supporting road and utility improvements necessary to support the functions of an Army activity or mission." DA PAM 420-1-2, Glossary. See also DOD Financial Management Regulation (FMR), DOD Reg. 7000.14-R, Volume 3, chapter 17, paragraph 170102.L(4) *Scope of a Military Construction Project.*

As stated above, project splitting or "incrementation" is strictly prohibited. Construction projects can not be split into increments in order to circumvent the statutory threshold of $750,000, approval authorities, reporting requirements, or programming policy. AFI 32-1021, para. 4.2. In determining whether two projects are being improperly "split," judge advocates should undergo a two-step analysis to determine whether all of the proposed work is needed in order to have a "complete and usable facility" or a "complete and usable improvement to an existing facility."

Step One: Is the construction work "interdependent" with regard to function?

For this analysis, it is essential that the facility requirement be fully defined. Is one construction project "interdependent" on the other to make one "complete and usable facility?" A simple example is a building and its parking lot. Planners shouldn't consider these as two separate projects for funding purposes. The building requires the parking lot in order to be "complete and usable."

The analysis can become more complex. If a maintenance building is being constructed, should a garage or vehicle maintenance bays being built adjacent be included as the same "military construction project?" If so, the maintenance building, garage, and bays should all be aggregated for the purposes of determining the total construction costs. However, it could be argued that the maintenance building, garage, and bays are each "complete and usable."

Step Two: Are the construction projects "interdependent" with regard to overall government requirements?

The analysis for this step can be much more complex and confusing. The Government Accountability Office (GAO) has provided opinions related to this aspect of project splitting. According to the GAO, the project splitting analysis does not end once an agency determines two projects are not "interdependent" with regard to function, or, in other words, complete and usable as stand-alone facilities.

In the opinion *The Hon. Michael B. Donley*, B-234326, 1991 U.S. Comp. Gen. LEXIS 1564 (24 December 1991), Congress asked the GAO to investigate whether the purchase of 12 trailers by the Air Force, through two separate contracts, was project splitting. In that case, the GAO articulated that the key factor in project splitting cases is a determination of whether a single building, structure, or other improvement could not "satisfy the need that justified carrying out the construction project." As a consequence, a determination of whether facilities are "interdependent" with regard to function is only the first step in determining the scope of a single military construction project.

The overall government requirement in *Donley* was 12 trailers. The Air Force purchased the 12 trailers via two separate contracts. The total cost of the two contracts, if aggregated, would be more than the statutory threshold at the time. Separately, the costs were below the threshold. In evaluating the acquisition, the GAO found that the seven trailers purchased in the first contract were "interdependent" with the five trailers in the second contract. The key question by the GAO was: what were the *agency requirements at the time of acquisition* that "justified carrying out the construction project?" This is the second question that must be examined in defining a "complete and usable" facility.

The GAO articulated this second step, acknowledging that each individual trailer was "complete and usable" under step one of the project splitting analysis. Rather than merely looking at whether each individual trailer was complete and usable, the GAO examined the purpose for which all of the trailers were purchased. In this case, the Air Force's ultimate requirement was for 12 trailers to house 48 personnel. That requirement was part of the GAO's determination of the scope of the "facility" in this case. In reporting to Congress that the Air Force improperly split this military construction project into two contracts, the GAO reasoned that "[t]o view each trailer as a 'complete and usable facility' in this case ignores the Air Force's need for which the contracts were awarded."

The GAO reached similar conclusions in decisions involving the U.S. Army. In *The Hon. Bill Alexander*, B-213137, 63 Comp. Gen. 422 (June 22, 1984), the GAO reviewed the Army's construction of an airfield in Honduras. Focusing on the ultimate requirement "that justified carrying out the construction project," the GAO did not evaluate each building the Army constructed in determining a "complete and usable facility." In evaluating the requirement as a whole, the GAO concluded that "we noted that the Army's construction of separate facilities such as a runway, control tower, and hanger constituted a single project to produce a complete and usable new airfield." The GAO concluded that, while individual buildings may be complete and usable, determination of a complete and usable *facility*

within the meaning of 10 U.S.C. 2801(b) has a much broader analysis. This analysis includes the intent of the agency in building the structure, to include the ultimate requirement the construction was meant to fulfill. *See also* B-159451 (Sep. 3, 1969) determining that the construction and renovation of a number of separate facilities at the Grand Hotel in Nha Trang, Vietnam, constituted a single project to produce a complete and usable Field Force I headquarters. Thus, when multiple interrelated buildings, structures, or other improvements are being constructed to meet a need for a single "complete and usable" facility, they typically will constitute one construction project.

Alternative Military Construction Funding Sources. In addition to the two primary construction authorities (specified and unspecified MILCON), there are other important authorities to be aware of in advising on construction projects in the deployed environment.

Emergency Construction, 10 U.S.C. 2803. The Secretaries of the military departments may use unobligated MILCON to fund a project not otherwise authorized, if it is vital to the national security or to the protection of health, safety, or the environment, and is so urgent that it can't wait until the next MILCON authorization act. This requires notice to Congress and a 21-day waiting period applies (7-day waiting period if notice is given by electronic means). AFI 65-601, vol. 1, para. 9.12.3; ; *see also* DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17.

Contingency Construction, 10 U.S.C. 2804. The SECDEF may authorize MILCON when waiting for the next MILCON authorization act would be "inconsistent with national security or national interest." The expenditure must be "within the amount appropriated for such purpose." The expenditure must be reported to Congress and there is a 14-day waiting period (7-day waiting period if notice is given by electronic means). AFI 32-1021, para. 5.2.3.1; DOD Dir. 4270.5; DOD Reg. 7000.14-R, vol. 3, chs. 7 and 17. This funding authority is normally used on extraordinary projects that develop unexpectedly. However, it may not be used for projects denied authorization in previous Military Construction Appropriations Acts. Legislative History. H.R. Rep. No. 97-612 (1982);

Construction Authority in the Event of a Declaration of War or National Emergency, 10 U.S.C. 2808. Upon a "declaration of war" or Presidential declaration of national emergency, the SECDEF may authorize the expenditure of MILCON "necessary to support" the armed forces. This permits the use of unobligated MILCON, including family housing funds. This also requires a report to Congress, but there is no waiting period. 10 U.S.C. 2808; DOD Dir. 4270.5; AFI 32-1021, para. 5.2.4; AFI 65-601, vol. 1, para. 9.12.5.

Emergency and Extraordinary Expenses, 10 U.S.C. 127. Although this isn't a "construction" statute, its language may be available for emergency or contingency construction. It provides resources to the Secretaries of the military departments for unanticipated emergencies or extraordinary expenses, including unanticipated, short-notice construction. If the costs exceed $500,000, the Secretary concerned must notify Congress. The Secretary of the Navy used this authority in the days immediately following the Cavelese mishap to pay some of the expenses of the next-of-kin.

"OTHER PROCUREMENT" FUNDS

Major "end items" or investment purchases must be purchased with "Procurement funds." These are durable items expected to last, or hold value, beyond the fiscal year of purchase. Investments must be purchased with procurement funds. The opposite of investment items are expenses. "Expenses" must be funded using O&M.

Expense/Investment Threshold

"Expenses" are costs of resources consumed in operating and maintaining the Department of Defense. Expenses can be thought of as consumables. These are often recurring expenses related to the day-to-day operation of military facilities. The FMR provides the following examples:

1. Labor of civilian, military, or contractor personnel;

2. Rental charges for equipment and facilities;

3. Food, clothing, and fuel;

4. Supplies and materials designated for supply management of the Defense Working Capital Funds; and

5. Maintenance, repair, overhaul, rework of equipment.

Conversely, "investments" are "costs to acquire capital assets," (DOD FMR, vol. 2A, ch. 1, para. 010201.D.2.), or assets which will benefit both current and future periods and generally have a long life span. Investments are normally financed with procurement appropriations. Examples of "capital assets" can include "real property and equipment." The FMR definition of what is an investment item is expansive. *See* DOD FMR, vol. 2A, ch. 1, para. 010201.D.2(a)-(f) and D.3(a)-(k).

However, there is a major exception permitting certain purchases of investments with O&M funds. In each year's Defense Appropriation Act, Congress traditionally permits DOD to utilize its O&M appropriations to purchase investment items with a cost less than $250,000. In section 9311 of the Supplemental Appropriations Act for Fiscal Year 2008, Congress permitted the SECDEF to increase that unit cost threshold to $500,000, provided the "action is necessary to meet the operational requirements of a Commander of a Combatant Command engaged in contingency operations overseas." By Memorandum dated 5 February 2009, the Deputy SECDEF provided the increased unit cost threshold to the Commander, United States Central Command, for operations IRAQI FREEDOM and ENDURING FREEDOM.

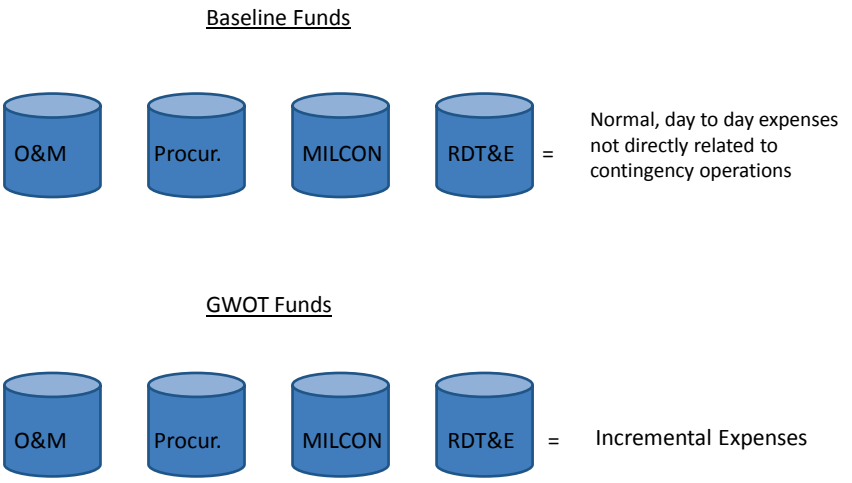
Contingency Funding (GWOT funds)

Congress appropriates funds for the DOD specifically for the purpose of prosecuting designated on going contingency operations. Since 2001, these appropriations are commonly called "GWOT" funds. These GWOT funds are typically misunderstood by most military commanders, contracting officers, and judge advocates. It is important to understand that "GWOT" is not a separate pot of money, but rather a special *type* of funding requested by DOD and provided by Congress for contingency operations.

An important distinction must be made between ordinary, day-to-day funds received in normal appropriations (baseline) and GWOT funds. GWOT funds are to be used for "incremental expenses" according to the GAO. Congress defined the difference between baseline and incremental expenses associated with ongoing contingency operations in the Omnibus and Reconciliation Act of 1990 (Omnibus Act), 101 P.L. 508, 13101. In that law, Congress defined an incremental expense as "costs associated with the increase in operations in the Middle East and do not include costs that would be experienced by the Department of Defense as part of its normal operations absent Operation Desert Shield." Congress articulated a "but for" test in determining what is an incremental expense. Therefore, the question becomes: Is the expense directly attributable to ongoing contingency operations? If so, the cost is an incremental expense, appropriate for GWOT funds.

The DOD Financial Management Regulation (FMR) and Government Accountability Office (GAO) opinions mirror this distinction by Congress. DOD FMR 7000.14-R, Volume 12, Chapter 23, provides guidance on the use of contingency funds for incremental expenses. Paragraph 230107 explains that "the funding derived from a contingency transfer account is available only for those *incremental* costs incurred in direct support of a contingency operation" (emphasis added). Like the Omnibus Act, the FMR identifies "baseline" funds as day-to-day expenses "that are not directly related to the incremental cost of the contingency." *See also* DOD FMR, V 12, Ch. 23, paragraph 2309.

Thus, there are two different "types" of pots of money. Installation O&M funds (the "pot") can be either GWOT or "baseline," depending on how they were appropriated. For example, the Air Force Expeditionary Center at Fort Dix may have a requirement to build an addition to its school house in order to accommodate more students. Assume there are more students because of a greater number of deployments to support contingency operations. The installation can use GWOT O&M (if the construction is under $750,000) because the expense would be an "incremental" cost directly attributable to ongoing contingency operations. In addition to O&M, there is also GWOT appropriations for every pot normally provided by congress (i.e. GWOT Military personnel, GWOT construction…).



Time

There are two rules governing time. The first is the "Period of Availability" Rule: "An appropriation is available for obligation for a definite period of time. It must be obligated during this period of availability, or the authority to obligate expires." 31 U.S.C. 1552. Different types of funds have different periods of availability. O&M funds are one-year funds, MILCON funds are five-year funds, and Procurement funds are three-year funds (the fiscal year (FY) runs from 1 October to 30 September). The vast majority of expenses are paid for with Current Year funds, and after their period of availability has passed Current Year funds become Expired Funds. Expired Funds remain available to adjust old obligations, but they cannot be used to fund new ones. 31 U.S.C. 1553(a). After five years from the end of the period when a fund was considered current it becomes a Closed Fund. Closed Funds cannot be used for any purpose.

The second rule is the "Bona Fide Needs" (BFN) rule: "[A]n appropriation …is available only for payment of expenses properly incurred during the period of availability." 31 U.S.C. 1502(a). Generally, supplies are the BFN of the FY in which they are used. Severable services (those that can be divided into discrete periods) are the BFN of the FY in which they are performed; non-severable services or construction are the BFN of the FY in which work begins.

There are important exceptions to the BFN rule. (*See generally*, DFAS-IN 37-1, paragraph 9-5c). Supplies ordered near the end of the FY may be funded with current funds, even if

they will not be delivered until the next year, due to normal lead time needed for ordering and delivery. Purchasing items for which there is no present need just because funds are available (typically at FY end) is strictly prohibited; however, authorized stock levels may always be maintained regardless of when supplies will actually be used. Certain maintenance contracts (tools, equipment, facilities) and leases (real and personal property) may be issued for any 12-month period at any time during the FY and be funded entirely with current funds. 10 U.S.C. 2410a. Non-severable services or construction contracts awarded near the end of the FY may be funded with current FY funds, even though work may continue into, or may not even begin, until the next FY.

Amount

Finally, the last remaining aspect of the Purpose, Time and Amount analysis is "Amount." This rule requires that there be an available appropriation to support every obligation and expenditure. 31 U.S.C. 1341-42, 1511-19, the Anti-Deficiency Act (ADA). The ADA generally prohibits obligation or expenditure of appropriated funds in advance of or in excess of an appropriation. Criminal sanctions for violations are possible. An important exception is the *Feed and Forage Act*, which allows the DOD to contract for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies for the current FY without an appropriation. 41 U.S.C. 11 and 11a. Always check with the FM officer (comptroller) to determine if sufficient amounts of the "right" funds are available.

FISCAL LAW ISSUES IN MILITARY OPERATIONS

Other than military construction issues, there are two areas where most fiscal law problems arise during overseas operations: (1) training and equipping of foreign forces; and (2) humanitarian assistance (HA). The Comptroller General provided a good analysis regarding DOD funding the training and equipping of foreign forces and HA in the opinion, *The Honorable Bill Alexander*, B-213137, January 30, 1986 (unpublished). The opinion dealt with training exercises, but remains viable and valuable precedent for resolving these common issues.

Training, Contact Programs, and Conferences with Foreign Forces

As previously stated, a basic tenet of fiscal law is that a "general" appropriation can not fund a purpose for which Congress has made a specific appropriation. While, conceptually, assistance to foreign forces may at times seem "necessary and incident" to our military operations, the Comptroller General has determined that this is not a proper purpose of O&M funds. Generally, the duty to train and provide assistance to foreign countries rests with the Department of State (DOS) under title 22 of the U.S. Code. Funds for foreign assistance activities are specifically provided by the Congress in annual appropriations acts to the DOS. This foreign assistance authority consists of funds for health, education, and development programs under the Foreign Assistance Act.

Thus, providing assistance to foreign countries is "provided for" by a more specific appropriation to the DOS. Therefore, using O&M for this purpose fails the first prong of the "necessary expense" test. The GAO reinforced this in *The Honorable Bill Alexander*: "it is

our opinion that DOD's operation and maintenance funds may not be used to finance such activities in light of the availability of other appropriations specifically provided therefore." There are two exceptions.

One exception is for minor amounts of "interoperability, safety, and familiarization training," so long as the training does not rise to the "level of formal training comparable to that normally provided by security assistance." Whether training of foreign forces is "incidental" to the operation is not the key; what is key is whether or not it is "training"; O&M funds may be used only for "minor amounts of interoperability and safety instruction." 63 Comp. Gen. 422 at 441 (1984). The primary training benefit must be for U.S. forces.

The second exception is for joint combined exchange training (JCETs) conducted by special operations forces (SOF) (including civil affairs and psychological operations forces) training with "friendly foreign forces." This is authorized because it is part of the SOF mission to train foreign forces. So, again, the primary benefit must be for the U.S. forces. 10 U.S.C. 2011. The SECDEF must annually report to Congress all special forces training, including its relationship to other overseas training programs. No additional O&M funds are authorized/appropriated. The statute (sometimes referred to as the "SOF Exception") authorizes the United States Special Operations Command (USSOCOM) commander, or the commander of any other unified or specified command, to pay or authorize payment for certain expenses. These include the expenses of training U.S. SOF personnel during combined exercises, the expenses of deploying the U.S. SOF for the training, and associated "incremental expenses" ("reasonable and proper costs of rations, fuel, training ammunition, transportation, and other goods and services consumed by each country, except that the term does not include pay, allowances, and other normal costs of such country's personnel,") of a "friendly developing country." 10 U.S.C. 2011(d)(2).

Additional Training, Conferences, and Combined Exercises Statutes

Military-to-Military Contacts and Comparable Activities, 10 U.S.C. 168. This is the "military-to-military contact" statute. It authorizes the SECDEF to provide funds to the commanders of unified combatant commands to encourage a democratic orientation of defense establishments and military forces of other countries. The statute authorizes a wide range of activities, including traveling contact teams, military liaison teams, reciprocal exchanges of personnel, seminars and conferences, and distribution of publications. Funds are in addition to those that are otherwise available for those activities; however, Section 168 funds may not be used for activities for which funding was sought but not authorized. The Secretary of State has to approve any activity with a foreign country, and only foreign countries approved for Foreign Assistance Act funding are eligible for Section 168 activities.

Latin American Cooperation (LATAM COOP), 10 U.S.C. 1050. The LATAM COOP statute provides an extremely broad, although geographically limited, authority. The entire statute reads: "The Secretary of a military department may pay the travel, subsistence, and special compensation of officers and students of Latin American countries and other expenses that the Secretary considers necessary for Latin American cooperation." *Bilateral or Regional Cooperation Programs,* 10 U.S.C. 1051. This is an additional statute that may provide some

assistance in preparing for combined exercises. It authorizes payment of personnel expenses of defense personnel of developing countries. While the statute does not address the payment of exercise-related training expenses, it does authorize the SECDEF to pay for such personnel to attend a bilateral or regional conference, seminar, or similar meeting if the Secretary feels such attendance would be in the United States' national security interests. Additionally, the Secretary may pay "such other expenses in connection with any such conference, seminar, or similar meeting as the Secretary considers in the national security interests of the United States." 10 U.S.C. 1051(c).

Participation of Developing Countries in Combined Exercises, 10 U.S.C. 2010. This establishes what is often termed the "Developing Countries Combined Exercise Program," or DCCEP. The statute authorizes the SECDEF, after coordination with the Secretary of State, to pay the "incremental expenses" incurred by a developing country as the "direct result" of participating in a bilateral or multilateral military exercise. The exercise must be undertaken primarily to enhance U.S. security interests and the SECDEF must determine that the developing country's participation is "necessary to the achievement of the fundamental objectives of the exercise" and that the country cannot participate without U.S. assistance. By 1 March of each year, the SECDEF has to submit a report to Congress listing the benefited countries and the amounts expended.

Expanded IMET (International Military Education and Training) Program, 22 U.S.C. 2347. The purpose of the Expanded IMET is to promote responsible defense resource management, the principle of civilian control over the military, counter-narcotics law enforcement, or military justice systems that protect human rights.

Demilitarization of the Independent States of the Former Soviet Union, 22 U.S.C. 5901. It is in the U.S. national security interest to facilitate the destruction of, and prevent the proliferation of, nuclear, chemical, biological, and other weapons of mass destruction; and to support the demilitarization of the independent states; and to expand military-to-military contacts (Nunn-Lugar Program).

Combatant Commander Initiative Funds (CCIF), 10 U.S.C. 166a. The Chairman of the Joint Chiefs of Staff controls these funds. They are allocated to the combatant commands to supplement other appropriations. The total amount is usually only $25 million per year ($50 million for FY 09), so its use is limited. The highest priority is given to activities that enhance war fighting capability, readiness, sustainability, and reduce the threat to, or otherwise increase, U.S. national security. CJCSI 7401.02C. The authorized uses are:

1. Force training.
2. Contingencies.
3. Selected operations.
4. Command and control.

5. Joint exercises (including activities of participating foreign countries).

6. Humanitarian and civic assistance, to include urgent and unanticipated humanitarian relief and reconstruction assistance.

7. Military education and training to military and related civilian personnel of foreign countries (including transportation, translation, and administrative expenses).

8. Personnel expenses of defense personnel for bilateral or regional cooperation programs.

9. Force protection.

10. Joint warfighting capabilities

SUPPORTING AND EQUIPPING FOREIGN MILITARY FORCES

In addition to providing training, the general prohibition on providing assistance to foreign countries applies to supporting and equipping them as well. There is a critical distinction between providing supplies and services to a foreign country (Security Assistance pursuant to Title 22, U.S.C.) and providing supplies and services to U.S. Forces that may have an incidental benefit to a foreign country. This concept is critical because, for the most part, the Security Assistance program governs the transfer of any items or services to another country that will primarily benefit that country. If, however, we are the primary beneficiaries and a foreign country receives only minor and incidental benefits, we may be able to construct or provide the items or services, subject to the limitations set out below.

United States armed forces are typically deployed in austere areas, in countries that do not have the same military capacity as the United States. Generally, U.S. forces are very well equipped compared to some coalition and Host-Nation forces. As a consequence, often times foreign militaries request equipment or support services. These requests range from providing food to sophisticated air navigation equipment. Although the role of DOD has changed significantly over the past decade, the general rule remains: logistical support and equipping foreign military forces falls with the authority of the Department of State. This general rules applies to all transactions where the services or equipment are provided to a foreign country (either sold or given for free). There must be positive (explicit) authority that authorizes the DOD to give, or sell, supplies or services to another nation. Thus, the starting point for any analysis is that support for or to equip a foreign force, is prohibited unless there is positive statutory authority authorizing a certain transaction. Positive authority traditionally can be found via a statute, but sometimes comes from international agreements such as an Acquisition and Cross-Servicing Agreement.

Acquisition and Cross-Servicing Agreements (ACSAs), 10 U.S.C. 2341-2350

One exception to the general rule stated above is an ACSA. These agreements provide great flexibility for the U.S. to provide, or to receive, logistics support, supplies, and services to or from coalition or other forces. An ACSA is an international agreement between the U.S. and a foreign country. The agreement allows the U.S. to provide certain logistical support in exchange for cash, an even value exchange, or replacement in kind. An ACSA is not an authority that allows the U.S. to provide supplies or services for free. "ACSA orders" are placed by the receiving country when needed, using the over-arching ACSA as authority.

The ACSA legislation permits the SECDEF to enter into ACSA with NATO, NATO subsidiary bodies, the UN, regional international organizations of which the U.S. is a member, and other eligible countries for: "logistic support, supplies, and services for elements of the armed forces deployed outside the United States." 10 U.S.C. 2341. The SECDEF can also enter into ACSA with governments not a member of NATO for armed forces elements deployed (or to be deployed) outside the United States, if the government meets any of four conditions:

1. It has a defense alliance with the U.S.;

2. It permits the stationing of members of the [United States] armed forces or the home porting of U.S. naval vessels in such country;

3. It has agreed to preposition U.S. materiel in such country; or

4. It serves as the host country to military exercises, which include elements of the armed forces or permits other military operations by the armed forces in such country.

The statutes also contain dollar limitations on amounts that may be obligated or accrued by the United States "except during a period of active hostilities involving the armed forces." 10 U.S.C. 2347. However, when the armed forces are involved in a contingency operation or in a non-combat operation (including an operation in support of the provision of humanitarian or foreign disaster assistance or in support of peacekeeping operations under either Chapter VI or VII of the UN Charter), most of these dollar limitations are waived for the purpose and duration of that operation. The SECDEF must submit an annual report (before 15 January) of all non-NATO ACSAs.

Transferring Significant Military Equipment (SME) via ACSA. The FY 2009 National Defense Authorization Act (NDAA), P.L. 109-364, §1202 provides "[t]emporary authority to use acquisition and cross-servicing agreements to lend certain military equipment to foreign forces in Iraq and Afghanistan for personnel protection and survivability." This authority allows for specific categories of equipment identified as SME on the U.S. Munitions List for coalition forces for not longer than one year. The categories of equipment allowed are Categories I (firearms), II (artillery projectors), III (ammunitions), VII (tanks and military vehicles, which includes armored HMMWVs), XI (military electronics), and XIII (auxiliary

military equipment). There can be no adverse impact on U.S. forces, and the transfer is in our best interest. The authority requires Secretary of State coordination.

In addition to international agreements, Congress authorizes DOD to train and equip foreign militaries through legislation. Many of these legislative authorities for OIF and OEF are contained in annual Authorization or Appropriation Acts.

Global Lift and Sustain, 10 U.S.C. 127d

This statute authorizes the SECDEF, with Secretary of State concurrence, to provide logistic support, supplies, and services (LSSS) to allied forces participating in combined operations with U.S. forces. The authority to provide LSSS includes air and sea-lift. This authority is subject to the Arms Export and Control Act and the definition of LSSS under the ACSA statute (10 U.S.C. 2350). The combined operations must be during active hostilities or contingency operations (including UN Chapter VI or VII operations), and the allies must be essential to success of the combined operations and unable to participate without U.S. support. There is a cap on LSSS under 10 U.S.C. 127d of $100 million per FY, and there is a further limitation of $5 million per FY on any funds under this authority used solely for interoperability of the logistics support systems used by military forces in a joint operation with the U.S. An annual report to Congress is required.

Coalition Support Funds

Section 1233 of the FY 2008 Appropriation Act authorized the SECDEF to reimburse any "key cooperating nation" for logistical and military support provided by that nation to, or in connection with, U.S. military operations in OIF or OEF. These payments are made to cooperating nations in amounts as determined by the SECDEF. Reimbursing coalition partners helps to ensure their contributions yield the maximum benefit to the overall operations of U.S. military forces fighting terrorism worldwide. Reimbursing coalition contributions is critical to enabling forces from these countries to remain in theater and provide direct support to U.S. military operations. The FY 08 Defense Appropriation Act authorized the expenditure of up to $1.2 Billion of Defense-wide O&M for this fund, available until expended. The SECDEF must notify Congress 15 days before making a reimbursement and must submit quarterly reports to Congress.

Iraq Security Forces Fund/ Afghanistan Security Forces Fund

Section 1512 of the FY 2008 National Defense Authorization Act (NDAA) authorized the SECDEF to provide certain support to the Iraqi security forces. Total authorizations for FYs 08 and 09 total $5.5 Billion. These authorizations are provided "notwithstanding any other provision of law." This authority allows DOD to provide equipment, supplies, services, training, facility and infrastructure repair, renovation, and construction, and contains relatively few restrictions compared to other appropriations. Multi-National Security Transition Command-Iraq (MNSTC-I) controls and administers this fund. The Air Force component to MNSTC-I is the Coalition Air Force Transition Team (CAFTT) whose primary mission is to develop an Iraqi Air Force.

Section 1513 of the FY 2008 NDAA authorized the SECDEF to provide certain support to the Afghan security forces. Total authorizations for FYs 08 and 09 total $6 Billion. The provisions of Section 1513 are basically the same as those of Section 1512. The Combined Security Transition Command-Afghanistan (CSTC-A) controls and administers this fund in Afghanistan. The Air Force component to CSTC-A is the Combined Air Power Transition Force (CAPTF) whose primary mission is to develop, train and mentor the Afghan National Army Air Corps.

1206 'Train and Equip' Authority

Section 1206 of the 2006 NDAA, as amended by Section 1206 of the 2009 NDAA, provides DOD with the authority to "build the capacity" of foreign military forces in support of GWOT. This authority is limited to expenses that build a country's capacity to conduct counterterrorism operations, participate in or support military and stability operations in which the U.S. is participating, or build the capacity of a country's maritime forces to combat terrorism. This authority does not provide for additional funds, but allows DOD to use its O&M pot to train and equip foreign militaries. The 2009 NDAA extends this temporary authority through 30 September 2011 and increases the amount of DOD O&M that can be used to $350 million per fiscal year.

1207 'Reconstruction, Security, or Stability' Authority

Section 1207 of the 2006 NDAA, as amended by Section 1207 of the 2009 NDAA, allows the SECDEF to spend up to $100 million to provide services to, and transfer defense articles and funds to, the Secretary of State for the purposes of facilitating the provision by the Secretary of State of reconstruction, security, or stabilization assistance to a foreign country. Section 1207 authority requires that any services, defense articles, or funds provided or transferred to the Secretary of State comply with the authorities and limitations of the Foreign Assistance Act of 1961, the Arms Export Control Act, or any law making appropriations to carry out such act.

Examples of 1207 authority include:

1. A $25 million Somalia Reconciliation and Stabilization Program

2. A $20 million Haiti Stabilization Initiative in Cite Soleil

3. A $17 million multi-year, interagency diplomacy, development, and defense Southeast Asia Tri-border Initiative to deter terrorist recruitment and deny terrorists sanctuary in Indonesia, Malaysia, and the Philippines.

BUILD THE CAPACITY OF THE PAKISTAN FRONTIER CORPS.

Section 1206 of the 2008 NDAA, as amended by Section 1201 of the 2009 NDAA, authorizes the DOD to use up to $75 million of Defense-wide O&M for fiscal year 2008 to provide the assistance to build the capacity of the Pakistan Frontier Corps.

PROVISION OF AIR FORCE SUPPORT AND SERVICES TO FOREIGN MILITARY AND STATE AIRCRAFT.

Section 1031 of the 2009 NDAA authorizes the Air Force to provide logistical support to military and state aircraft of a foreign nation on a reimbursable basis and non-reimbursable basis. Non-reimbursable logistical support includes "routine airport services," including landing and takeoff assistance, use of runways, parking and servicing, and loading and unloading of baggage and cargo. Reimbursable support can be billed directly to the foreign country. The authority granted under this provision **is not contingent on whether an ACSA agreement exists** with a particular country. Implemented by IC-1 to AFI 10-1801, *Foreign Governmental Aircraft Landings at United States Air Force Airfields,* 27 January 2009, paragraph 8.1.

Presidential Drawdowns of Defense Articles, Defense Services, and Military Education and Training, 22 U.S.C. 2318

If the President determines that an unforeseen emergency requires immediate military assistance to a foreign country or international organization and Security Assistance can not meet the requirements, or it is in the national interest of the United States to provide the article, services and/or training for international narcotics control, international disaster assistance, migration and refugee assistance or Southeast Asian prisoner of war and missing in action efforts, the President may direct the drawdown of those items from current DOD stocks (this is not a supplementation of an appropriation with additional funds from Congress, but a redirection of already appropriated funds or purchased items to another authorized purpose). The aggregate value may not exceed $110 million in any year.

Excess Defense Articles, 22 U.S.C. 2321(j)

The President may transfer excess defense articles to a foreign nation under certain circumstances as long as doing so does not have an adverse impact on military readiness, national technology, and the industrial base. Priority should be given to NATO countries and non-NATO allies on the southern and southeastern flank of NATO. If the articles are significant military equipment (defined in 22 U.S.C. 2794 (9)) or valued at more than $7 million, the transfer can not occur until 30 days after congressional notification.

Peacekeeping Operations (PKO), 22 U.S.C. 2348

This authority is distinct from the United Nations Participation Act as the intended activities to benefit from these funds are not UN mandated and not funded by UN assessments (some PKOs are, of course, authorized by UN mandate). The statute provides

financial resources, equipment and supplies, and services to peacekeeping forces and contains its own drawdown provision. 22 U.S.C. 2348(c). Examples include:

1. African Crisis Response Force Initiative (ACRI)

2. Multinational Force and Observers (MFO) (22 U.S.C. §§ 3422, *et seq.*), an independent international body supervising Egyptian and Israeli forces in the Sinai

3. Organization for Security and Cooperation in Europe (OSCE) for Bosnia and Croatia, and for Kosovo

4. Maintaining a multinational force in Haiti

HUMANITARIAN ASSISTANCE

Immediate Foreign Disaster Relief

DOD Directive 5100.46 outlines various responsibilities for DOD components in undertaking foreign disaster relief operations in response to a Department of State request. The purpose of the relief is for prompt aid that can be used to alleviate the suffering of foreign disaster victims because of a foreign disaster. The directive outlines the procedural steps that need to be taken in order to give the relief. However, paragraph 4.3 provides that the directive does not prevent "a military commander at the immediate scene of a foreign disaster from undertaking prompt relief operations when time is of the essence and when humanitarian considerations make it advisable to do so."

Overseas Humanitarian, Disaster, and Civic Assistance

Performing Humanitarian Assistance (HA) activities is not the traditional job of the DOD. Traditionally, HA is considered security assistance within the realm of the Department of State. However, recognizing that the need exists, in 1986 Congress enacted DOD's first statutory authority for HA in 10 U.S.C. 401. Since that time, Congress has added a series of interrelated statutes, now known collectively as "Overseas Humanitarian, Disaster, and Civic Assistance" and abbreviated as OHDACA. Those statutes include 10 U.S.C. 402, 404, 407, 2557, and 2561. Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009 110 PL 329 (30 September 2008).

The Department of Defense conducts humanitarian assistance missions under the OHDACA program for the statutory purposes of training military personnel, serving the political interests of the host nation and United States, and providing humanitarian relief to foreign civilians.

10 U.S.C. 402. Transportation of humanitarian relief supplies to foreign countries. The SECDEF may transport to any country, without charge, supplies from a Non-Governmental Organization (NGO) which are intended for humanitarian assistance on a space available basis, provided that:

1. The transportation of such supplies is consistent with the foreign policy of the United States;

2. The supplies to be transported are suitable for humanitarian purposes and are in usable condition;

3. There is a legitimate humanitarian need for such supplies by the people or entity for whom they are intended;

4. The supplies will in fact be used for humanitarian purposes; and

5. Adequate arrangements have been made for the distribution or use of such supplies in the destination country.

The organization requesting the transportation is responsible to ensure the supplies are suitable for transport. Supplies transported under this section may be distributed by an agency of the United States Government, a foreign government, an international organization, or a private nonprofit relief organization. Supplies transported under this section may not be distributed, directly or indirectly, to any individual, group, or organization engaged in a military or paramilitary activity.

10 U.S.C. 404. Foreign disaster assistance. The President may direct the SECDEF to provide disaster assistance outside the United States to respond to manmade or natural disasters when necessary to prevent loss of lives or serious harm to the environment. Executive Order 12966, 60 Fed. Reg. 36949, delegates this authority to the SECDEF. EO 12966 states that the SECDEF shall provide disaster assistance only:

1. At the direction of the President;

2. With the concurrence of the Secretary of State; or

3. In emergency situations in order to save human lives, where there is not sufficient time to seek the prior initial concurrence of the Secretary of State, in which case the SECDEF shall advise, and seek the concurrence of, the Secretary of State as soon as practicable thereafter

10 U.S.C. 407. Humanitarian demining assistance. This statute authorizes U.S. armed forces to assist countries in relieving the suffering caused by uncleared landmines and other explosive remnants of war (ERW). U.S. forces can provide training in the procedures of landmine clearance, mine risk education, victims' assistance, and the development of necessary leadership and organization skills to conduct a program. However, no member of the U.S. armed forces, while providing assistance for detection and clearing of landmines, shall engage in the physical detection, lifting, or destruction of landmines or other ERW (unless the member does so for the concurrent purpose of supporting a U.S. military operation) or provide such assistance as part of a military operation that does not involve the U.S. armed forces.

10 U.S.C. 2557. Excess nonlethal supplies: availability for homeless veteran initiatives and humanitarian relief. The SECDEF may make available for humanitarian relief purposes any nonlethal excess supplies of the Department of Defense. Excess supplies made available for humanitarian relief purposes under this section shall be transferred to the Secretary of State, who shall be responsible for the distribution of such supplies. The term "nonlethal excess supplies" means property, other than real property, of the Department of Defense that is excess property that is not a weapon, ammunition, or other equipment or material that is designed to inflict serious bodily harm or death.

10 U.S.C. 2561. Humanitarian assistance. Funds authorized to be appropriated to the Department of Defense for a fiscal year for humanitarian assistance shall be used for the purpose of providing transportation of humanitarian relief and for other humanitarian purposes worldwide. The SECDEF may use the authority to transport supplies intended for use to respond to, or mitigate the effects of, an event or condition, such as an oil spill, that threatens serious harm to the environment, but only if other sources to provide such transportation are not readily available. This authority applies worldwide and is only for U.S. procured relief (versus NGO, which is addressed in 10 U.S.C. 402). There is no requirement that the activity promotes operational readiness of U.S. forces

Humanitarian and Civil Assistance (HCA), 10 U.S.C. 401

The Secretary of a military department may carry out humanitarian and civic assistance activities in conjunction with authorized military operations of the armed forces in a country if the Secretary concerned determines that the activities will promote the security interests of both the United States and the country in which the activities are to be carried out. The Secretary must also determine that the activity promotes the specific operational readiness skills of the members of the armed forces who participate in the activities.

There are two types of HCA activities.

Pre-planned HCA. Humanitarian and civic assistance provided in conjunction with military operations. Under 10 U.S.C. 401 the Secretary of a military department is authorized to carry out humanitarian and civic assistance activities *in conjunction with authorized military operations* of the armed forces in a country if the Secretary concerned determines that the activities will promote: 1) The security interests of both the United States and the country in which the activities are to be carried out; and 2) The specific operational readiness skills of the members of the armed forces who participate in the activities. Provided that:

1. Humanitarian and civic assistance activities carried out under this section shall complement, and may not duplicate, any other form of social or economic assistance which may be provided to the country concerned by any other department or agency of the United States.

2. Such activities shall serve the basic economic and social needs of the people of the country concerned.

3. Humanitarian and civic assistance may not be provided under this section (directly or indirectly) to any individual, group, or organization engaged in military or paramilitary activity.

4. Must be paid out of funds budgeted for HCA as part of the service O&M appropriations.

An "HCA activity" is defined by 10 U.S.C. 401 and DODI 2205.02 as:

1. Medical, surgical, dental, and veterinary care provided in rural or underserved areas of a country, including education, training, and technical assistance related to the care provided;

2. Construction of rudimentary surface transportation systems;

3. Well drilling and construction of basic sanitation facilities; and

4. Rudimentary construction and repair of public facilities.

"Minimal Cost" HCA 10 U.S.C. 401(c)(4); DODI 2205.02. This authority provides authority for commanders to react to HCA "targets of opportunity" *during the course of a military operation*. It doesn't create the authority to create a mission or operation to conduct minimal cost HCA. Minimal cost HCA activities must be very limited in scope and incur "minimal expenditures for incidental costs." All material and supply costs incurred in executing a Minimal Cost HCA are funded from the unit's O&M account because the unit uses its resources currently on-hand. DODI 2205.02 (Glossary) provides two examples of Minimal Cost HCA:

1. A unit doctor's examination of villagers for a few hours, with the administration of several shots and the issuance of some medicine, but not the deployment of a medical team for the purpose of providing mass inoculations to the local populace.

2. The opening of an access road through trees and underbrush for several hundred yards, but not the asphalting of a roadway.

ADDITIONAL HUMANITARIAN ASSISTANCE PROVISION (CERP)

The Commander's Emergency Response Program (CERP) was originally funded with seized Iraqi assets. The Coalitional Provisional Authority (CPA) accounted for the seized Iraqi funds, administered and distributed the funds to U.S. Commanders in Iraq for "reconstruction assistance" to the Iraqi people. Congress authorized $1.5 Billion from Defense-wide O&M for CERP for FY09. Section 1214, 2009 NDAA.

The CERP is designed to enable local commanders in Iraq and Afghanistan to respond to urgent humanitarian relief and reconstruction requirements within their areas of responsibility by carrying out programs that will immediately assist the indigenous population. Also, as used here, urgent is defined as any chronic or acute inadequacy of an

essential good or service that, in the judgment of a local commander, calls for immediate action. In addition, the CERP is intended to be used for small-scale projects that, optimally, can be sustained by the local population or government. Small-scale would generally be considered less than $500,000 per project. Memorandum, Under SECDEF Comptroller, Subject: Commander's Emergency Response Program (CERP) Guidance, December 18, 2008. *See also* DOD Financial Management Regulation, vol. 12, ch. 27, para. 270104 (Jan 2009).

The CERP may be used to assist the Iraqi and Afghan people in the following representative areas:

1. Water and sanitation.
2. Food production and distribution.
3. Agriculture/Irrigation (including canal clean-up).
4. Electricity.
5. Healthcare.
6. Education.
7. Telecommunications.
8. Economic, financial, and management improvements.
9. Transportation.
10. Rule of law and governance.
11. Civic cleanup activities.
12. Civic support vehicles.
13. Repair of civic and cultural facilities.
14. Battle Damage/Repair.
15. Condolence payments.
16. Hero Payments.
17. Former Detainee Payments.
18. Protective measures.

19. Other urgent humanitarian or reconstruction projects.

20. Temporary contract guards for critical infrastructure.

DEPLOYMENT CONTRACTING AND ACQUISITION

Having discussed the law applicable to the obligation of funds during an overseas deployment, this chapter now examines just how U.S. Armed Forces obtain various services, supplies, facilities, and equipment needed. In recent years, the way in which the DOD (and in particular the Air Force) contracts for supplies and services has been in the Congressional spotlight. Over the past few years, several military and civilian contracting officers have been accused of personally benefitting from awarding contracts to particular contractors. Some have taken bribes and some inappropriately obtained post-government employment. Regardless, contracting personnel must benefit from good counsel, especially in a deployed environment.

On a good note, contracting procedures in deployed areas differ little from the procedures in the U.S.. However, what makes being a judge advocate a challenge is the pace of the workload, the experience (or inexperience) of the contracting officers, and the demand to "speed up" the process or cut corners because of the ongoing operation.

Contracting can be an effective force multiplier of combat service support for deployed forces. Contingency contracting requires an understanding of the legal aspects, funding issues, duties, and responsibilities of procurement personnel, their relationship with support staff, and requirements in deployment preparation. The ability to work with people who have vastly different cultures, backgrounds, perspectives, and, most importantly, business practices is another aspect of contingency contracting that will have considerable impact upon successful support of a joint operation. JP 1-06, Appendix G, *Contingency Contracting*.

Contract Authority

Only authorized personnel may enter into contracts on behalf of the United States. Contract authority flows from the Secretary of the Air Force (SECAF) to Heads of Contracting Activities (HCAs) to contracting officers (COs). Commanders of major commands (MAJCOM/CCs) are HCAs. In Joint Chiefs of Staff-declared contingencies, the commander of the Air Force unified component command in the area of responsibility (AOR) is an HCA. Contracting officers are appointed via a Certificate of Appointment (also known as a warrant). The warrant specifies any limits on the CO's authority. When COs deploy, they take their warrants (and their contract authority) with them, even though they are under functional control of the wing commander or some other deployed commander. CCOs must be warranted COs, specially trained and certified as CCOs, and should be active duty military members.

Exhausting Other Means

Before a CCO may purchase supplies and/or services, he or she must ensure that requesting officials have tasked the established logistics supply pipeline and that the supply pipeline cannot provide the required supplies or services in a timely fashion. If we do not have the needed supply and/or service, then the CCO must exhaust the following.

Inter-Service Support Agreements. A sister service may be able to provide the logistic and/or administrative support.

Other Required Government Sources. Parts 8 of the (Federal Acquisition Regulation) FAR and DFARS require that sources for supplies and services throughout the Government and the Department of Defense be utilized. For example, The Economy Act, 31 U.S.C. 1535, allows Executive agencies to transfer funds to other Executive agencies, and to obtain goods and services provided from existing stocks or by contracts. Also, on a deployment the Air Force could have construction performed by the Army Corps of Engineers. Procedural requirements are established in FAR Subpart 17.5 and DFARS Subpart 217.5.

Host Nation Support. Many times the host nation has agreed to supply items for the operation. Support items under these agreements may include billeting, food, water, fuel, transportation, and utilities.

Contingency (Coalition) Partners. Allied forces/Contingency partners may have agreed to provide supplies or services pursuant to an Implementing Arrangement to an Acquisition and Cross-Servicing Agreement (ACSA). An MOU or protocol to the Implementing Arrangement may have been executed for the contingency.

LOGCAP/AFCAP Contract. The LOGCAP is the (U.S. Army) Logistics Civil Augmentation Program and AFCAP is the Air Force Civil Augmentation Program. The LOGCAP/AFCAP contract provides for a civilian contractor to provide logistics support to a deployed force anywhere in the world. The LOGCAP has been used in areas as diverse as Somalia, Haiti, Rwanda, and the Balkans. Both programs may only be used to provide services, not construction. On 7 March 2006, the Office of the General Counsel, DOD, wrote a memorandum, Subject: LOGCAP Funding Limitations, that opined that placing a task order under a LOGCAP contract to construct a facility would be an improper use of the contract since the work to be done would not be a service, but rather construction.

TYPES OF CONTRACTS

Once other means of acquiring the supplies and/or services have been exhausted, the CCO now can consider local purchasing. The first step is to decide what type of contract to utilize. Below are the various types:

Firm Fixed Price

This is the primary type of contract used during a contingency operation. Since the price is firm and fixed, the contractor has the risk of contract completion, but also has an incentive to perform efficiently and economically. FAR 16.202.

Requirements

This type provides for purchasing all requirements or services from one contractor so that maximum and minimum order amounts are established in the contract. The contractor is not obligated to fill orders beyond the established maximum. FAR 16.503.

Indefinite Quantity

This contract provides for an indefinite quantity (within stated limits) of specific services or supplies to be furnished within a fixed period; deliveries are scheduled by placing orders with the contractor. It is used when the agency cannot determine, above a stated minimum, the precise quantities of services or supplies that it will need; however, the agency must not commit itself for more than a minimum quantity. The agency may place several indefinite quantity contracts with several contractors in order to maintain sufficient sources if one or more contractors are unable to deliver. FAR 16.504.

Time and Materials

This acquires services or supplies on the basis of direct labor hours at specified fixed hourly rates (including wages, overhead, profit, and material at cost, which may include material handling costs). This may be the only effective contracting mechanism when large amounts of repair, maintenance, or overhaul work have to be performed in emergency situations; however, it can be used only when it is not possible, at the time of placing the contract, to estimate accurately the extent or duration of the work, or anticipate costs with any reasonable degree of confidence. FAR 16.601.

COMPETITION REQUIREMENTS

With the best type of contract identified, the CCO now can choose a supplier. The fundamental rule of law for government contracting is full and open competition that affords all responsible sources an opportunity to compete. This is embodied in the Competition in Contracting Act (CICA), 10 U.S.C. 2304. While there is no automatic exception for contracting operations during deployments, CICA does not apply to simplified acquisitions. FAR 6.001(a) (discussed below). However, the CCO is still required to take certain steps to insure that the government's interests are protected, consistent with the circumstances.

Generally, open competition results in a long lead time in order to procure needed items or services. There is a 45-day minimum procurement administrative lead time (PALT) for solicitations to be issued and contracts to be awarded. Notices of proposed acquisitions have to be published for 15 days and offerors must have a minimum of 30 days to submit

bids or proposals. There is no automatic deployment contracting exception to the 45-day PALT. Additional time will be needed to define requirements, prepare solicitation documents, evaluate offers, award the contract, and allow for delivery of services or performance of services.

There are seven statutory exceptions to the full and open competition rule. The following five are the ones that would apply to an overseas deployment:

1. Only one or few responsible sources and no other supplies or services, will satisfy agency requirements. For example, only the host nation has compatible parts for a system. 10 U.S.C. 2304(c)(1); 41 U.S.C. 253(c)(1); FAR 6.302-1.

2. Unusual and compelling urgency such that the agency would be seriously injured unless the agency can limit the number of sources from which it solicits offers. The CCO may limit the number of sources to those who are able to meet the requirements in the limited time available, and the agency may dispense with the publication periods (the 45-day PALT) if the government would be seriously injured by the delay. 10 U.S.C. 2304(c)(2); 41 U.S.C. 253(c)(2); FAR 6.302-2.

3. International agreements may sometimes preclude open and fair competition (e.g., an IA may limit sources of supplies and services to those found in the host nation). 10 U.S.C. 2304(c)(4); 41 U.S.C. 253(c)(4); FAR 6.302-4.

4. National Security. 10 U.S.C. 2304(c)(6); 41 U.S.C. 253(c)(6); FAR 6.302-6.

5. Public interest, but can only be invoked by the head of the agency. 10 U.S.C. 2304(c)(7); 41 U.S.C. 253(c)(7); FAR 6.302-7.

Each exception action requires a Justification and Approval (J&A) document. FAR 6.303, 6.304. For the international agreement exception, the Air Force requires an International Agreement Competitive Restrictions (IACR) document. AFFARS 5306.302-4. The approval levels for these exceptions (except Public Interest) are delegated as follows:

1. Under $550,000: the CO or CCO.

2. $550,000 to $11.5 million: the procuring activity competition advocate.

3. For a proposed contract over $11.5 million but not exceeding $57 million, or, for DOD, NASA, and the Coast Guard, not exceeding $78.5 million, by the head of the procuring activity, or a designee who --

    a. If a member of the armed forces, is a general or flag officer; or

    b. If a civilian, is serving in a position in grade above GS-15 under the General Schedule (or in a comparable or higher position under another schedule).

4. For a proposed contract over $57 million, or, for DOD, NASA, and the Coast Guard, over $78.5 million, by the senior procurement executive of the agency designated pursuant to the OFPP Act (41 U.S.C. 414(3)) in accordance with agency procedures.

Often times, judge advocates assist contracting officers with drafting J&As. Many of the issues associated with J&As are non-legal. **One of a judge advocate's biggest contributions is to ensure that the justification for a sole source is adequately detailed in the J&A.** If a J&A needs to be entirely rewritten, let the CO know and suggest ways to fix it. This will make for a better product in the future and in most cases COs appreciate the mentorship.

METHODS OF ACQUISITION

There are a number of methods of acquisition. Only those appropriate for or common to deployments will be discussed.

Sealed Bidding

This type of contracting is rarely, if ever, used. Contract award under sealed bidding is based only upon price and price-related factors, and the contract is awarded to the lowest responsive, responsible bidder. It requires the use of sealed bids if four conditions in the CICA are present.

1. Time permits for the solicitation, submission, and evaluation of sealed bids;

2. The award will be made on the basis of price and other price related factors;

3. It is not necessary to conduct discussions with the responding offerors about their bids; and

4. There is a reasonable expectation of receiving more than one sealed bid. FAR 6.401(a); FAR Part 14.

Negotiations

On deployments, because sealed bidding often is rarely appropriate, CCOs may negotiate with offerors (a process sometimes called competitive proposal procedures). 10 U.S.C. 2304(a)(2)(B). Negotiations allow the agency to use a "best value" basis for awarding a contract and pay more in order to obtain a better service or product. The contract is awarded based upon stated evaluation criteria (one of which must be cost) and is awarded to the responsible offeror whose proposal offers either the lowest cost, technically acceptable solution to the agency's requirements (LPTA), or the offeror whose proposal represents the best value. FAR Part 15.

Offers are solicited by either a Request for Proposals (RFP) or a Request for Quotations (RFQ). Although negotiated contracting permits greater discretion in the selection of a source, substantial time may be required to obtain and evaluate all information relevant to

the criteria that apply to negotiations. This method is commonly used during deployments for amounts above those applicable to the "Simplified Acquisition Procedures" described in the next paragraph.

Simplified Acquisition Procedures (SAP)

Simplified acquisition procedures are used almost exclusively to obtain nonpersonal services, supplies, or construction that are not estimated to exceed $100,000, except for acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack (41 U.S.C. 428a), the term means--

1. $250,000 for any contract to be awarded and performed, or purchase to be made, inside the United States; and

2. $1 million for any contract to be awarded and performed, or purchase to be made, outside the United States

The SAP threshold is further raised to $5.5 million (within the U.S.) and $11 million (outside the U.S. in support of a contingency operations) under the commercial item test program (FAR 13.5) if the acquisition is for a "commercial item" as defined by FAR 2-101.

A major advantage of SAP is that the CCO may use the simplified acquisition method that is the most suitable, efficient, and economical. FAR 13.003(h). Simplified acquisitions do not require full and open competition. Simplified acquisitions include: purchase orders, international merchant purchase authorization cards (IMPAC) (explained below), blanket purchase agreements, and imprest funds.

Purchase Orders

Standard Form 44, FAR 13.302; DFARS Subpart 213.5; AFFARS Subpart 5313.302. CCOs may use the SF 44 to purchase aviation fuel and oil or for any purchase in support of the contingency up to the simplified acquisition threshold. DFARS 213.505-3. You may also use SF 1449, Solicitation/Contract/Order for Commercial Items. The DD Form 1155, Order for Supplies or Services is multipurpose and can be used to place orders against blanket purchase agreements (BPAs).

Government wide commercial purchase card

FAR 13.301. Government credit card/micropurchase program. Because this method is often not feasible in developing countries or when a country's basic services are no longer functioning, use should be limited to CCO. The Government wide commercial purchase card may be used to (1) make micro-purchases; (2) place a task or delivery order (if authorized in the basic contract, basic ordering agreement, or blanket purchase agreement); or (3) make payments when the contractor agrees to accept payment by the card. FAR

13.301(c). "Micro-purchase threshold" means $3,000, except in the following circumstances—

1. For acquisitions of construction subject to the Davis-Bacon Act the threshold is $2,000;

2. For acquisitions of services subject to the Service Contract Act the threshold is $2,500; and

3. For acquisitions of supplies or services that are to be used to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack, as described in FAR 13.201(g)(1) the threshold is:

    a. $15,000 in the case of any contract to be awarded and performed, or purchase to be made, inside the United States; and

    b. $25,000 in the case of any contract to be awarded and performed, or purchase to be made, outside the United States.

FAR 2.101

Blanket Purchase Agreements (BPAs)

FAR 13.303; AFFARS Subpart 5313.303. A BPA is not a contract but rather akin to setting up a "charge account" with a provider of services or supplies. BPAs are commonly used to procure billeting, meal services, and other supplies and services of a recurring, yet indeterminate, nature.

Imprest Funds

FAR 13.305; DFARS Subpart 213.305; AFFARS Subpart 5313.305; DODR 7000.14-R, Volume 5, paragraphs 020901 to 020908. An imprest fund is a petty cash fund for small transactions. Commanders may use imprest funds on a very limited basis, and must comply with DOD 7000.14-R, *DOD Financial Management Regulation, Volume 5, Disbursing Policy and Procedures* and The Treasury Financial Manual, Volume I, Part 4, Chapter 3000. DFAR 213.305-3(d)(i)(A) and (B).

As indicated above, SAPs have relaxed competition requirements. For acquisitions of micro purchases only one oral quotation is required if the contracting officer finds the price to be fair and reasonable. Micro-purchases must be distributed equitably among qualified sources, and, if practical, a quotation must be solicited from other than the previous supplier before placing a repeat order. FAR 13.202. From over the micro purchase maximum to the applicable SAP ceiling, the CCO shall solicit quotes to the maximum extent practical. FAR 13.106-1. Solicitation of at least three sources is normally appropriate, including at least two sources not included in the previous solicitation where possible. FAR 13.104(b). The nature of the requirement, urgency, dollar value, and past experience will be

relevant to the determination of how many sources to solicit in each case. Solicitation of only one source is permitted if the CCO determines that only one source is "reasonably available" under the existing circumstances. Incumbent contractors cannot be excluded without good reason. *J. Sledge Janitorial Service*, B-241-843, Feb 27, 1991, 91-1 CPD, para 225. Publication of notices soliciting the contract may be waived if the contracting officer determines that an exception under 5.202 applies. FAR 5.202(12) and (13).

Most purchases the CCO will make at an operational site should be simplified acquisitions. However, many CCOs may be reluctant because they are unfamiliar with the SAP procedures. It is common for deployed CCOs to undergo the rigorous administrative burden of an invitation for bids or requests for proposals simply because they do not know SAP is available. Part of the reason for this may be that SAP thresholds increase greatly in a deployed environment overseas (up to $11 million for commercial items) versus the standard threshold in the U.S. of $100,000.

RATIFICATION OF UNAUTHORIZED COMMITMENTS MADE BY UNAUTHORIZED PERSONS

During a deployment, especially if regular procedures have not been established, commanders and other individuals may commit to certain obligations because they feel that they have the authority to do so. Also, personnel may retain leased equipment or vehicles beyond the terms of the contract, effectively exercising options for continued performance. Regardless of the fact that they have no authority, the United States may be legally obligated to comply with the terms of the contract, or exercise an option already committed to. This requires an official with authority to ratify the unauthorized commitment.

The CCOs have the authority to ratify unauthorized commitments if seven conditions exist. FAR 1.602-3; AFFARS 5301.602-3. Generally, in order for an official to ratify an unauthorized commitment, the CCO must determine the following:

1. Supplies or services have been provided to and accepted by the Government, or the Government otherwise has obtained or will obtain a benefit resulting from performance of the unauthorized commitment;

2. The ratifying official has the authority to enter into a contractual commitment;

3. The resulting contract would otherwise have been proper if made by an appropriate contracting officer;

4. The contracting officer reviewing the unauthorized commitment determines the price to be fair and reasonable;

5. The contracting officer recommends payment and legal counsel concurs in the recommendation, unless agency procedures expressly do not require such concurrence;

6. Funds are available and were available at the time the unauthorized commitment was made; and

7. The ratification is in accordance with any other limitations prescribed under agency procedures.

Generally, the HCA will have certain ratification authority delegated to him or her. AFFARS 5301.602-3. Approval authority for ratifications:

1. The HCA acts on all actions equal to or greater than $30,000.

2. The chief of the contracting office acts on all actions less than $30,000.

LAST RESORT METHOD OF ACQUISITION

If all else fails, the Law of Armed Conflict allows the taking of supplies (and sometimes services) under certain circumstances. Hague Convention Annex Reg., Arts. 23, 42, 53; Geneva Convention Relative to the Treatment of Prisoners of War, Art. 49; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Art. 51. However, these provisions are outside proper logistics and acquisitions procedures and extreme care should be taken before seizing any property under the Law of Armed Conflict.

REFERENCES

1. 10 U.S.C. § 127 Emergency and extraordinary expenses
2. 10 U.S.C. § 166a Combatant Commander Initiative Funds
3. 10 U.S.C. § 168 Military-to-military contacts and comparable activities
4. 10 U.S.C. § 401 Humanitarian and civic assistance provided in conjunction with military operations
5. 10 U.S.C. § 402 Transportation of humanitarian relief supplies to foreign countries
6. 10 U.S.C. § 404 Foreign disaster assistance
7. 10 U.S.C. § 407 Humanitarian demining assistance
8. 10 U.S.C. § 1050 Latin American cooperation: payment of personnel expenses
9. 10 U.S.C. § 1051 Bilateral or regional cooperation programs
10. 10 U.S.C. § 2010 Participation of developing countries in combined exercises
11. 10 U.S.C. § 2011 Special operations forces: training with friendly foreign forces
12. 10 U.S.C. §§ 2341 Authority to acquire logistic support, supplies, and services for elements of the armed forces deployed outside the United States
13. 10 U.S.C. § 2410a Contracts for periods crossing fiscal years: severable service contracts; leases of real or personal property
14. 10 U.S.C. § 2557 Excess nonlethal supplies: availability for humanitarian relief
15. 10 U.S.C. § 2561 Humanitarian assistance
16. 10 U.S.C. § 2801 Military construction
17. 10 U.S.C. § 2802 Military construction projects
18. 10 U.S.C. § 2803 Emergency construction
19. 10 U.S.C. § 2804 Contingency construction
20. 10 U.S.C. § 2805 Unspecified minor construction

21. 10 U.S.C. § 2808 Construction authority in the event of a declaration of war or national emergency
22. 10 U.S.C. § 2811 Repair of facilities
23. 10 U.S.C. § 2854 Restoration or replacement of damaged or destroyed facilities
24. 22 U.S.C. § 1928 North Atlantic Treaty Organization
25. 22 U.S.C. § 2318 Special authority (drawdown authority)
26. 22 U.S.C. § 2321j Authority to transfer excess defense articles
27. 22 U.S.C. § 2347 International Military Education and Training
28. 22 U.S.C. § 2348 Peacekeeping Operations
29. 22 U.S.C. § 2761 Sales from stocks (Foreign Military Sales Program)
30. 22 U.S.C. § 2763 Credit sales (Foreign Military Financing Program)
31. 22 U.S.C. § 5901 Demilitarization of independent states of former Soviet Union
32. 31 U.S.C. § 1301 Purpose Statute
33. 31 U.S.C. § 1341 Limitations on expending and obligating amounts
34. 31 U.S.C. § 1342 Limitation on voluntary services
35. 31 U.S.C. § 1502 Balances available
36. 31 U.S.C. §§ 1511-1517 Obligations and expenditures
37. 31 U.S.C. §1552 Procedure for appropriation accounts available for definite periods
38. 31 U.S.C. §1553 Availability of appropriation accounts to pay obligations
39. 41 U.S.C. § 11 Available Appropriations
40. DOD 7000.14-R, *Financial Management Regulations*
41. DODD 2010.9, *Acquisition and Cross-Servicing Agreements*, 28 April 2003
42. DODD 4270.5, *Military Construction*, 12 February 2005
43. DODI 2205.02, *Humanitarian and Civic Assistance (HCA) Activities*, 2 December 2008
44. DODI 2205.3, *Implementing Procedures for the Humanitarian and Civic Assistance (HCA) Program*, 27 January 1995
45. DODI 3020.41, *Contractor Personnel Authorized to Accompany U.S. Armed Forces*, 3 October 2005
46. JP 3-29, *Foreign Humanitarian Assistance*, 17 March 2009
47. CJCSI 2120.01A, *Acquisition and Cross-Servicing Agreements,* 27 November 2006
48. CJCSI 7401.02D, *Combatant Commander Initiative Fund*, 30 September 2008
49. CJCSI 4600.02 *Exercise-Related Construction Program Management*, 31 October 2008
50. USCENTCOM Regulation 700-1, *Multinational logistics Support Between the United States and Governments of Countries within the USCENTCOM Area of Responsibility*, 19 April 2006
51. AFI 25-301, *Acquisition and Cross-Servicing Agreements Between the United States Air Force and Other Allied and Friendly Forces,* 26 October 01
52. AFI 32-1021, *Planning and Programming Military Construction Projects,* 24 January 2003
53. AFI 32-1032, *Planning and Programming Appropriated Funded Maintenance, Repair, and Construction Projects*, 15 October 2003
54. AFI 65-601, Vol 1, *Budget Guidance and Procedures*, 3 March 2005
55. AFI 65-608, *Antideficiency Act Violations*, 18 March 2005
56. *Principles of Federal Appropriations Law,* U.S. Government Accountability Office, Volume II, Third Edition, Chapter 6 (February 2006)

CHAPTER 31

SALE, TRANSFER, AND DISPOSAL OF DEFENSE ARTICLES AND DEFENSE SERVICES

BACKGROUND

In its section on fiscal law, Chapter 30 of this book addressed multiple areas in which the United States transfers defense articles (i.e., personal property) and services to foreign governments or individuals. This chapter fills in gaps necessarily left open in that chapter and provides further detail in several areas it discussed. (Please note that this chapter does not cover the transfer of defense articles or services under Acquisition and Cross-Servicing Agreements (ACSAs). Chapter 10 of this book addresses that topic.)

When evaluating a commander's proposal to transfer articles or services to another entity, a uniformed attorney must tread cautiously. Legal reviews in most areas of law proceed on the presumption that if there is no statutory or regulatory impediment to a course of action, that course is legal. When the issue is the transfer of goods or services, this presumption is reversed.

The Constitution contains two clauses that, together, provide the starting point for analysis in this area. Article I, § 9, Cl. 7 states that, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ." The Supreme Court has interpreted this to mean that "[T]he expenditure of public funds is proper only when authorized by Congress"; "[it is not the case] that public funds may be expended unless prohibited by Congress." *United States v. MacCollom*, 426 U.S. 317, 321 (1976). Coupled with Article IV, § 3, Cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the . . . Property belonging to the United States . . . ."), this means a JAG must identify affirmative federal law specifically authorizing any proposed transfer before recommending his commander release the articles or perform the services in question.

The remainder of this chapter discusses the two primary pieces of legislation that authorize transfer under the rubric of security assistance, as well as the system the Department of Defense (DOD) has established for military activities to transfer excess property to non-DOD entities in compliance with controlling statutory authority.

SECURITY ASSISTANCE

Security Assistance is a group of programs, authorized by law that allows the transfer of military articles and services to friendly foreign governments. (DOD 5100.38-M, *Security Assistance Management Manual*, Section C.1.1 lists the major Security Assistance programs

and identifies whether the DOD or the Department of State (DOS) administers the program.) Security Assistance programs support U.S. national security and foreign policy objectives by increasing the ability of friends and allies to deter and defend against possible aggression, promote the sharing of common defense burdens, and help foster regional stability.

Security Assistance authorizations and appropriations are provided primarily under three public laws: the Arms Export Control Act (AECA) (22 U.S.C. §§ 2751, *et seq.*); the Foreign Assistance Act (FAA) (22 U.S.C. §§ 2151, *et seq.*); and annual appropriations acts for Foreign Operations, Export Financing and Related Programs. Title 22 of the United States Code, "Foreign Relations and Intercourse", which contains both the AECA and the FAA, is primarily DOS statutes; statutes specifically applicable to the DOD are found in Title 10, "Armed Forces."

The Secretary of State is responsible for continuous supervision and general direction of the Security Assistance program. The Secretary of Defense establishes military requirements and implements programs to transfer defense articles and services to eligible foreign countries and international organizations. Within the DOD, the principal planning agencies for Security Assistance are the Defense Security Cooperation Agency (DSCA), the Combatant Commands, the Joint Staff, the Security Cooperation Organizations (SCOs), and the Military Department (MILDEP) international lawyers and organizations. This information is critical for the deployed JAG. It means that it is very unlikely that a JAG in the field will ever be the only attorney advising on a security assistance issue. Rather, by the time a deployed JAG becomes involved with security assistance, he will have a wealth of experience and issue-specific knowledge to draw from as he gives counsel, usually in the final stages of the process of transferring the items or services.

The Arms Export Control Act (AECA)

The AECA authorizes the sale of defense services and the sale and lease of defense articles to eligible foreign governments and international organizations. The cornerstone of the AECA is the requirement for full cost payment in U.S. dollars contained in Sections 21 and 22 of the Act (22 U.S.C. 2761 and 2762). This authority for U.S. Government sale of defense articles and services is referred to as Foreign Military Sales (FMS). It is the principal means by which the United States provides security assistance to eligible foreign governments and international organizations. Unless another statutory authority is applicable under the particular circumstances *(see, e.g.,* the Foreign Assistance Act discussion below), the AECA applies to any proposed transfer to a foreign government or international organization of defense articles or services, requiring the foreign recipient to pay the United States for what it receives.

The document by which the U.S. government offers to sell to a foreign government or international organization pursuant to the AECA is a Letter of Offer and Acceptance (LOA). The LOA terms and conditions also describe how FMS items may be used.

AECA efforts will generally take place primarily at service or COCOM headquarters, with Department of State coordination; the deployed JAG will rarely be involved in the process beyond coordinating the execution of a well-defined plan.

The Foreign Assistance Act (FAA)

The FAA is a group of statutes that authorize the United States to transfer goods or services to foreign nations, often at no cost to the foreign nation. Part I of the FAA, 22 U.S.C. §§ 2151 – 2296f, addresses international development efforts overseen by the DOS. Part II, 22 U.S.C. §§ 2301 – 2349bb, includes military assistance and DOD administered programs. Part III of the FAA, 22 U.S.C. §§ 2351 – 2427, contains the general provisions that apply to Parts I and II.

The international military education and training (IMET) program and expanded IMET (e-IMET) are authorized under FAA §§2347 – 2347h. Section 2321j of the FAA authorizes the transfer of excess defense articles in furtherance of Congress's overall security assistance program as expressed in the annual congressional presentation documents for military assistance. Similarly, section 2318 authorizes the President to "draw down" DOD and other government agencies' stocks, articles, services, and training in specified amounts during certain emergencies.

TRANSFER OF EXCESS PROPERTY

In addition to the FAA provision for transferring excess defense articles to foreign governments, Title 40 of the United States Code provides authority for transferring excess property outside of the context of security assistance.

Units deployed OCONUS, and sometimes units participating in CONUS operations (e.g., disaster relief efforts), will often be faced with questions of whether and how to transfer material deemed excess to the unit's requirements. The Department of Defense has established systems to ensure that property deemed excess by one unit can be reutilized by other DOD units or activities; failing this, U.S. policy is that the property will be used by other federal, state, or local governments.

CONUS Transfers

Within the continental United States, the General Services Administration (GSA) is primarily responsible for overseeing the reutilization, transfer, and donation of excess federal property. The Department of Defense works with GSA through the Defense Logistics Agency's (DLA's) Defense Reutilization and Marketing Service (DRMS) to effect these transactions. DRMS oversees local Defense Reutilization Management Offices (DRMOs) that make the process relatively simple and efficient for DOD units or activities.

The Stafford Act and other statutes authorize the use of DOD contracts, as well as the donation and sale of excess DOD property within the continental United States, to non-DOD federal agencies, as well as to state and local governments.

DOD 4160.21-M, *Defense Materiel Disposition Manual*, particularly chapters 5 and 6, covers the process of CONUS transfer of excess property in great detail. An additional resource for the operational JAG is the DLA Office of General Counsel, contact information for which is available in the FLITE roster.

OCONUS Transfers

Frequently, a unit deployed OCONUS will find itself in a situation where retaining or transporting personal property is cumbersome, unduly expensive or time-consuming, or even detrimental to the unit's mission. This can happen when a unit moves forward from one deployed location to another or when the unit redeploys to its home station.

DOD 4160.21-M, chapters 8 and 9, covers the disposition of OCONUS excess property, generally referred to as "foreign excess personal property" (FEPP). In order that the foreign policy of the United States may be effectively served in foreign countries, foreign excess disposal programs shall be developed and conducted with the coordination and approval of the U.S. diplomatic mission in the country concerned. Accordingly, DOD components or their representatives shall maintain close liaison and cooperate with the U.S. diplomatic representatives and consular offices in the country concerned in order to receive necessary approvals, recommendations, and suggestions from the local U.S. DOS representatives. The Air Force JAG, however, will still interface primarily with DRMS through the local overseas DRMO for all FEPP dispositions. The DRMS, in turn, coordinates efforts with the appropriate COCOM or service headquarters and the Department of State.

The Secretary of Defense, under 40 U.S.C. § 704, may authorize the abandonment, destruction, or donation of FEPP if the property has no commercial value or if estimated costs of care and handling exceed the estimated proceeds from sale. Chapter 8 of DOD 4160.21-M sets forth a formula for economic analysis which, when certain conditions are satisfied, permits the in-place abandonment or destruction of certain types of FEPP. Essentially, the formula evaluates whether there is a positive net sale value for any item (accounting for transportation and other logistics costs associated with the sale), and whether that net sale value exceeds the anticipated cost of abandonment or destruction.

As with property disposition under the auspices of security assistance, the unit-level JAG will seldom, if ever, work alone in facilitating the disposition of excess property. Instead, the JAG's role will be coordinating with the appropriate headquarters element and DLA (DRMS) representatives to ensure compliance with the significant amount of statutory, regulatory, and situation-unique policy guidance that controls the disposition of excess property.

REFERENCES

1. U.S. Constitution, Article I, § 9, Cl. 7; also Article IV, § 3, Cl. 2
2. Charter of the United Nations with the Statue of the International Court of Justice annexed thereto, 26 June 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, (as amended, Dec. 17, 1963, 16 U.S.T. 1134; T.I.A.S. 5857; 557 U.N.T.S. 143 20 December 1965, 19 U.S.T. 5450; T.I.A.S. 6529 and 20 December 1971, 24 U.S.T. 2225; T.I.A.S. 7739) (entry into force 24 October 1945, for U.S. same date)
3. Arms Export Control Act, 22 U.S.C. §§ 2751, *et seq*.
4. Foreign Assistance Act, 22 U.S.C. §§ 2151, *et seq*.
5. Federal Property & Administrative Services Act, 40 U.S.C. §§ 521, *et seq*.
6. 40 U.S.C. § 704
7. The Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121, *et seq*.
8. DOD 7000.14-R, *Department of Defense Financial Management Regulation (Volume 15, Security Assistance Policy & Procedures)*, March 2009
9. DOD 4160.21-M, *Defense Materiel Disposition Manual*, 18 August 1997
10. DOD 5105.38-M, *Security Assistance Management Manual (SAMM)*, 3 October 2003
11. AFMAN 16-101, *International Affairs and Security Assistance Management*, 20 June 2003

CHAPTER 32

ENVIRONMENTAL LAW FOR OVERSEAS OPERATIONS

BACKGROUND

Addressing environmental law issues during an overseas operational deployment is fundamentally different than practicing environmental law in the United States or at overseas installations. In the United States, environmental activities are governed by an extensive framework of federal, state, and local laws and regulations. At overseas installations, numerous Department of Defense (DOD) and Air Force instructions and policies, including country-specific final governing standards (FGS) or the overseas environmental baseline guidance document (OEBGD), establish most environmental requirements. However, very few environmental requirements apply to deployed operations outside an established DOD installation. The challenge is to know which laws apply and which ones do not, while being able to explain credibly to commanders how environmental stewardship enhances mission effectiveness.

ENVIRONMENTAL ANNEX TO OPLAN OR OPORD

Given the lack of environmental requirements applicable to overseas, off-installation operations, the single most important document regarding environmental compliance is likely to be the environmental annex to the operation plan (OPLAN) or operation order (OPORD). Typically, the environmental annex is located at Annex L and is a concise overview of how the command will address environmental issues. Joint Publication (JP) 3-34, Joint Engineer Operations, provides guidance on issues that are usually included in an environmental annex.[326] Generally, an environmental annex will:

1. List applicable treaties, laws, regulations, and policies. A deployed JAG should pay particular attention to country-specific treaties or policies that address environmental concerns;

2. Establish formal relationships and coordination procedures among those having a role in environmental issues;

3. Develop a concept of operations that describes how the command will address environmental considerations. For example, the annex may address existing conditions, the water supply, the disposal of waste water, the disposal of solid and hazardous waste and the protection of natural and cultural resources; and

[326] Joint Publication 3-34, *Joint Engineer Operations*, 12 February 2007, Appendix D.

4. List limiting factors that may affect the command's ability to execute its environmental plans.

An OPLAN or an OPORD with a comprehensive environmental annex is an excellent resource for deployed JAGs addressing environmental issues. However, environmental provisions in OPLANs and OPORDs are often generally contingent upon mission needs. Joint Publication 3-0, Joint Operations, emphasizes environmental stewardship, but also recognizes the operational realities of a deployed setting. For example, JP 3-0 states that joint force commanders (JFCs) are responsible for "demonstrating proactive environmental leadership during all phases of joint operations across the range of military operations."[327] The publication also requires that JFCs are to "[Ensure] compliance, *as far as practicable within the confines of mission accomplishment*, with all applicable environmental laws and agreements, including those of the [host nation (HN)]. The goal of compliance is to minimize potential adverse impacts on human health and the environment while maximizing readiness and operational effectiveness. [emphasis added]."

As expected during an operation, the main focus is mission accomplishment. However, accomplishing the mission and protecting the environment are not mutually exclusive, and environmental stewardship may enhance mission goals. By being able to explain how environmental considerations further mission objectives, judge advocates and paralegals can contribute to ultimate mission success. When evaluating environmental issues, commanders should consider the effect their actions have on:

1. *Health of military members, both long-term and short-term*. It should be no surprise that poor environmental practices can directly affect the health of military members and their ability to perform duties;

2. *Community or diplomatic relations*. Increasingly, mission success depends on the support of the local populace and the host nation. A robust environmental program can foster these relationships in a positive way;

3. *Impeding current and future operations*. Commanders should evaluate whether their environmental conduct may discourage other nations from supporting the United States in future operations or contingencies;

4. *Generating domestic and international criticism*. Poor environmental practices may undermine support for DOD or its operations; and

5. *Financial Cost*. Poor environmental practices may result in the United States paying for cleanups to protect service members, paying to satisfy claims under the Foreign Claims Act, paying to fulfill obligations with the host nation, or paying to secure the support of the local population.

[327] JP 3-0, p. III-32, para 7.d.(3)(a).

THINGS TO KNOW DURING A DEPLOYMENT

Ideally, the environmental annex to an OPLAN or OPORD should contain all applicable environmental requirements; however, that cannot be guaranteed. Regardless of the quality of the annex, there are a few requirements that should be known during a deployment because of their potential to directly affect military operations.

Treaties or International Agreements

It is important to know whether there are any treaties or international agreements governing the environmental responsibilities of the United States in the host nation. Personnel working issues in this area need to be aware of any such agreements and of any environmental terms which might not be reflected in the environmental annex.[328]

Basel Convention

Although the United States has not ratified the convention, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (the Basel Convention) may present challenges during a deployment. The Basel Convention prohibits the shipment of hazardous waste from a member nation to a non-member nation unless a special agreement has been negotiated.[329] The purpose of the convention is to encourage the disposal of waste within the nation of origin. Deployed personnel should verify whether the host nation or any country used as a transit point for hazardous waste is a member of the Basel Convention. If so, the Basel Convention may restrict the military's ability to ship hazardous waste from or through the country. During Operation Joint Endeavor, for example, Croatia (a member nation) prevented the U.S. military from shipping hazardous waste via a commercial carrier from Bosnia-Herzegovina (a non-member nation).[330] Croatia would not allow the shipment of hazardous waste until agreements were obtained from the transit countries (Austria and Hungary) and the destination country (Germany).

Environmental Modification (ENMOD) Convention.[331]

Although the United States has ratified the convention, it is unlikely that the ENMOD convention will affect a military operation because of the extremely high threshold for prohibited activities. The convention prohibits the military or hostile use of environmental modification techniques to cause widespread, long-lasting or severe destruction to member nations. Environmental modification techniques are defined as changing the dynamics, composition, or structure of the Earth by deliberately manipulating its natural processes.

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[328] For a list of treaties in force, see the following U.S. Department of State website, http://www.state.gov/s/l/treaty/treaties/2007/ (last visited 20 March 2009).

[6] Basel Convention at Article 11.

[330] See JAGs Deployed: Environmental Law Issues, 42 A.F. L. Rev. 19, 34 (1997).

[331] Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, May 18, 1977.

Examples include weather-pattern alteration, earthquake modification, and ocean-current modification.

Environmental Baseline Surveys (EBS)

U.S. forces should document existing environmental conditions at the start of an operation. During operation Joint Endeavor, efforts by unit commanders in taking photographs and otherwise documenting the condition of the land under their control greatly facilitated the processing a myriad of claims and helped protect U.S. interests.[332] See United States Air Forces in Europe Instruction 32-7068, *EBS for Deployed Operations*, 16 March 2004 for a useful checklist for service members conducting an EBS.

Host Nation Laws

Laws of the host nation may apply to U.S. forces. Deployed personnel should consult early in an operation with their higher headquarters and with the appropriate unified command to determine DOD's position on the applicability of host nation laws.

Use of Herbicides

The United States has renounced "first use of herbicides in war except, under regulations applicable to their domestic use, for control of vegetation within U.S. bases and installations or around immediate defensive perimeters."[333]

Petroleum Spills

Petroleum spills account for the great majority of environmental issues at deployed locations. Therefore, deployed personnel should be ready to provide advice on spills. If the guidance in the environmental annex to the OPORD or OPLAN is limited or unworkable in a particular situation, there are a few basic steps that can be taken to reduce risk. First, contain the spill. Second, the spilled substance, along with contaminated soils, should be appropriately treated. Engineers may accomplish this by scooping the area with a loader and loading the polluted material into drums. In the case of spilled fuel or oils, particularly in the CENTCOM AOR, most spills of petroleum can be taken to remote areas where the contaminated soils are spread on the ground, preferably on ground lined with impermeable barriers, then allowed to aerate in the sun. Periodically, these soils are turned so that the sun naturally treats the petroleum in a relatively short time. For spills that cannot be remediated, engineers may consider paving over the area to eliminate the immediate exposure of people to the spilled material.

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[332] Major Richard M. Whitaker, *Environmental Aspects of Overseas Operations: An Update*, 1997 Army Law 17, 25.
[333] Executive Order 11850. See also is implemented by CJCSI 3110.07C, *Guidance Concerning Chemical, Biological, Radiological, and Nuclear Defense and Employment of Riot Control Agents and Herbicides* (S), 22 November 2006, a classified publication that provides detailed guidance on approval authorities and procedures to request the use of herbicides.

EXEMPTIONS FOR OVERSEAS OPERATIONS

Just as it is important to know which laws apply to overseas operations, it is equally important to know which do not apply.

Domestic Laws

As a general rule, U.S. domestic environmental laws do not apply to overseas operations. DOD has recently addressed the extraterritorial application of key environmental statutes and has adopted the following positions:[334]

1. National Environmental Policy Act (NEPA) applies within the United States and its territorial waters;

2. Section 7 of the Endangered Species Act applies within the United States and its territorial waters;

3. Prohibition of unauthorized taking of endangered species under section 9 of the Endangered Species Act applies within the United States, its territorial waters and international waters, and as a matter of policy within the U.S. Exclusive Economic Zone;

4. The Marine Mammal Protection Act's prohibition of unauthorized takings of marine mammals applies within the United States territorial waters, the U.S. Exclusive Economic Zone and international waters.

Environmental Planning

Although DOD has taken the position that NEPA does not apply to federal actions outside the United States and its territorial waters, Executive Order 12114 requires federal agencies, in some circumstances, to evaluate actions that may cause significant harm to the environment outside the United States. DOD Directive 6050.7 implements EO 12114.

Final Governing Standards (FGS)/Overseas Environmental Baseline Guidance Document (OEBGD).

Department of Defense Instruction 4715.5, *Management of Environmental Compliance at Overseas Locations*, establishes the DOD environmental compliance program for overseas installations and calls for establishing environmental compliance standards for DOD installations in foreign countries. These compliance standards are either country-specific FGSs or the OEBGD for countries without FGSs.

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[334] Letter from Roy G. Wuchitech, Deputy General Counsel, Environment and Installations, Department of Defense, *Extraterritorial Applicability of the National Environmental Policy Act, 42 U.S.C. § 4321 et seq., Endangered Species Act, 16 U.S.C. § 1531 et seq., and Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1631 et seq.*, (21 May 2008)

However, DODI 4715.5, and consequently the FGS and OEBGD, do not apply to off-installation, operational or training deployments. The DOD has not established standing environmental compliance standards that are applicable to overseas, off-installation operations.

CONCLUSION

During overseas operations, the DOD's goal for environmental compliance is to ensure "compliance, as far as practicable within the confines of mission accomplishment, with all applicable environmental laws and agreements, including those of the [host nation]. The goal of compliance is to minimize potential adverse impacts on human health and the environment while maximizing readiness and operational effectiveness...."[335]

As commanders have considerable flexibility on how to accomplish DOD's goal, it becomes even more critical that they receive sound, practical legal advice on environmental issues. One significant contribution a deployed JAG may provide is to know which laws apply; however, to be effective, the JAG must also be able to explain credibly how environmental stewardship enhances mission effectiveness, thus allowing commanders to make informed decisions on the environmental issues confronting them.

REFERENCES

1. Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and Their Disposal, 22 March 1989
2. DOD 4715.05-G, *Overseas Environmental Baseline Guidance Document*, 1 May 2007
3. DODI 4715.5, *Management of Environmental Compliance at Overseas Installations*, 22 April 1996
4. DODI 4715.8, *Environmental Remediation for DOD Activities Overseas*, 2 February 1998
5. DODD 6050.7, *Environmental Effects Abroad of Major DOD Actions*, 31 March 1979
6. DODD 5530.3, *International Agreements*, 11 June 1987
7. Executive Order No. 12114, *Environmental effects abroad of major federal actions;* 4 January 1979
8. Executive Order No. 11850, *Renunciation of certain uses in war of chemical herbicides and riot control agents*; 8 April 1975
9. JP 3-34, *Joint Engineer Operations*, 12 February 2007
10. Annex L to USCINCEUR Standard Plan 4000 (U), *Environmental Considerations* (U)
11. AFH 10-222, Volume 4, *Environmental Guide for Contingency Ops Overseas*, 1 March 2007
12. AFI 32-7006, *Environmental Program in Foreign Countries*, 26 April 1994
13. United States Air Forces in Europe Instruction 32-7068, *Environmental Baseline Surveys for Deployed Operations*, 16 March 2004

[335] JP 3-0 p. III-33, para 7.d.(3)(d).

CHAPTER 33

FOREIGN, INTERNATIONAL, AND PERSONNEL CLAIMS

SINGLE SERVICE CLAIMS RESPONSIBILITY (SSCR)

As a general rule, commands are responsible for settling tort claims arising from their own activities and, in practice under this rule, claims are normally settled by the service branch responsible for generating them. However, a broad exception to this rule and practice is the single service claims responsibility (SSCR). Under DODI 5515.08, General Counsel for the Department of Defense (DOD/GC) has assigned certain countries to the Military Departments of the Army, Navy, and Air Force and made these Departments exclusively responsible for the claims referenced by the Instruction that arise within their set of assigned countries.

Although commanders of Geographic Combatant Commands (through the Chairman of the Joint Chiefs of Staff) may assign "interim responsibility" for adjudicating claims in countries where such assignments have not been made, they must immediately seek confirmation and approval of such assignments from DOD/GC. Admiralty claims are not covered by SSCR assignments unless such claims fall under a specific agreement (e.g., admiralty claims with personal injury under the North Atlantic Treaty Organization Status of Forces Agreement (NATO SOFA)). If another service has SSCR, the Air Force has no fiscal authority to pay a claim. Without regard to SSCR, the Navy may pay a claim in an Army or Air Force-assigned country, but only under limited circumstances when the claim is generated by Naval Forces Afloat outside the scope of duty in a foreign port and payable for less than $2,500.

SOLATIUM (plural, SOLATIA)

A solatium payment is a nominal payment made immediately to a victim or victim's family to express sympathy – *when the local custom for solatium exists*. A solatium payment is not compensation (it is not deducted from the award of any payable claim) and is not paid with appropriated claims funds. These nominal amounts are typically paid from operations and maintenance funds and generally limited by military regulation in the few countries where customarily paid.

Any solatium payments under consideration outside certain countries in the Far East (Japan, Korea, and Thailand) merit careful evaluation, as the risks of being misunderstood, inviting victim or national backlash, and/or increasing long-term claim costs to the U.S. are notable where no *bona fide* custom exists. Although solatium payments were made in Iraq between mid-2003 and early 2005 and have been made in Afghanistan since late 2005 in order to express sympathy in cases involving death, injury, or property damage by U.S. or

coalition forces during combat, payments made in these combat contexts might be better deserving of a different name. As customs are usually established over time and have their legitimacy in the depth of their acceptance, the relatively short payment period in Iraq suggests premature recognition of a custom. Proper inquiry into a custom may admittedly prove difficult in a combat environment and thus be forgivable if premature. However, in peacetime, the custom should not be acknowledged until proper inquiry establishes it as a matter beyond reasonable dispute.

Concern must also be shown for actual amounts provided. In Afghanistan, for example, which faces significant economic development issues, the maximum "token" payment of solatium in death cases (100,000 Afghani) is currently twice as high as the maximum available in death cases (100,000 Yen) in industrialized Japan. While this incongruent treatment can be justified, in part on policy grounds, the Foreign Claims Act (FCA) provides greater relief in Japan than in Afghanistan due to the presence of armed conflict in Afghanistan. Judge advocate personnel still need to be wary of the leap that the so-called "token" payment range in Afghanistan now represents the new minimum standard of "nominal" applicable elsewhere. Inquiry should focus on factors specific to the affected country.

If a custom exists, it should either be expressed in law or well-understood in the society and capable of being articulated by more than just native legal professionals. Even if not expressed in law, does the law reference any civil or criminal benefits or consequences tied to respect, or lack of respect, for the custom? Do public and private transportation services, within a few hours or days of an accident, swiftly make *non-compensatory*, sympathy payments to victims, and if so, in what form and amounts? Are these payments ever recorded in any way? **Consult AFLOA/JACC before paying solatia in any country not explicitly named above.** Since solatium payments are not subject to SSCR, report as well such payments made by the other services, so that AFLOA/JACC can consult with these services for consistency in payments.

CLAIMS ARISING FROM COMBAT

Claims arising from combat activities, whether causing intentional damage or collateral damage, are not payable. Keep in mind that combat activities may include peacekeeping. However, claims may be paid when there is an accident or malfunction incident to the operation of an aircraft (including its airborne ordnance) indirectly related to combat and occurring while preparing for, going to, or returning from a combat mission. A mistake in bombing a target is not an "accident or malfunction." Just because a claim arises in a combat area, does not necessarily mean it arises from combat. During operation Desert Storm, the Air Force paid claims arising from traffic accidents in rear areas in Saudi Arabia. In the face of insurgent warfare in Iraq, the Army investigates claims on a case-by-case basis to determine their relation to combat.

CLAIMS ARISING IN FOREIGN COUNTRIES

The International Agreement Claims Act (IACA) and FCA are both potentially available to pay valid tort claims arising abroad. However, because the Acts are mutually exclusive and the IACA takes precedence over the FCA, an understanding of the two Acts is imperative.

International Agreement Claims Act (10 U.S.C. 2734a)

The IACA is an implementing Act that allows for payment of claims arising under certain international agreements. For a claim to be payable under the IACA: 1) the U.S. must be a party to the international agreement; 2) the claim must have arisen out of an act or omission of U.S. military or civilian personnel acting in the performance of official duty (or out of an act or omission for which the U.S. Armed Forces is legally responsible under host nation law); and 3) the claim must be subject to pro rata cost-sharing under the agreement.

Article VIII, Paragraph 5(e)(i) of the NATO SOFA provides an example of cost-sharing: "Where one sending State alone is responsible [for the claim], the amount awarded or adjudged shall be distributed in the proportion of 25[%] chargeable to the receiving State and 75[%] chargeable to the sending State." Under this Article, if a U.S. service member sent to the United Kingdom (U.K.) causes personal injury and/or property damage in the U.K. and the U.K. Ministry of Defense settles the tort claim for 100 GBP (£), the U.K. would pay the full £100 but then be reimbursed £75 by the U.S. In this way, both nations share in the cost of the claim.

For the IACA to apply, the international agreement must clearly express the cost-sharing arrangement governing the claim. Cost-sharing percentages vary depending upon the nation with which the agreement was negotiated (the Iceland-U.S. formula is 15%/85%) and the number of governments responsible for the damages caused.

If a receiving State pays a claim under a cost-sharing agreement and submits a bill to the U.S., the military office responsible for paying the bill on behalf of the U.S. may object to the bill on two grounds. It may object if the claim was not cognizable under the agreement (for example, the claim had been waived under the terms of the agreement). It may also object if the receiving state applied more burdensome standards to U.S. forces than it applies to its own forces under similar circumstances. For purposes of consistency in host nation relations, SSCR has been assigned in all countries where the U.S. has cost-sharing agreements.

Foreign Claims Act (10 U.S.C. 2734)

The FCA is an *ex gratia* payment statute that provides possible relief in all cases where the IACA is inapplicable. As stated in the statute, the purpose of the FCA is "to promote and maintain friendly relations through the prompt settlement of meritorious claims" based on "such regulations as the Secretary may prescribe." Air Force Instruction 51-501, Chapter 4C, governs adjudication of all FCA claims for which the Air Force is responsible.

The following circumstances broadly capture when the FCA will apply:

1. No international agreement exists between the U.S. and receiving State governing claims;

2. An international agreement exists between the U.S. and receiving State, but it is either silent on the matter of claims, or it references claims without articulating a cost-sharing arrangement;

3. An international agreement exists between the U.S. and receiving State that contains a cost-sharing arrangement, but the claimant is not a proper third party under the agreement or the claim arose from an act or omission *outside* the performance of official duty, which includes both lawful actions wholly unrelated to duty as well as criminal acts.

As indicated above, there will be times when an FCA claim will arise under an (non-cost-sharing) agreement containing some claim provisions. In such cases, the FCA claim must still be adjudicated consistent with the agreement. If a claim is payable under the FCA but has been waived by international agreement, the U.S. has no fiscal obligation, and the Foreign Claims Commission (FCC) has no fiscal authority to pay the claim. Under the FCA, settlement authority for all claims under Air Force responsibility resides exclusively in FCC. Service personnel from one service branch may serve as FCC for another service branch only with the concurrence of the Chiefs of the two affected claims services.

Foreign Claims Act claims are generally filed in writing, but may be filed orally if, in fact, oral filing is the established local custom. If an FCA claim is filed orally, it should be immediately reduced to writing by JA personnel accepting the claim.

The FCA is available solely to foreign inhabitants. Foreign inhabitants include persons or commercial entities whose usual place of abode is in a foreign country (*any* foreign country, not necessarily the country where the claim arose), foreign governments, and their political subdivisions. If the claimant is not a foreign inhabitant but a U.S. citizen with an actual or constructive place of abode in the U.S. (e.g., tourists, military members, federal civilian employees, dependents thereof), "in-scope" claims can be settled under the Military Claims Act (MCA). The FCA, like the MCA, also allows settlement authorities to pay for damages caused by the noncombat activities of the U.S. Armed Forces.

Claims under the FCA are adjudicated under the law, standards, and customs in effect in the country where the incident occurred. However, in contrast to IACA claims where host nation law is normally applicable in every detail, the language of AFI 51-501 controls if there is a conflict between host nation law and AFI 51-501 on an FCA claim. Regardless of host nation law, AFI 51-501 makes all FCA claims subject to U.S. causation analysis and not subject to joint and several liability.

The Air Force requires that all FCA claims be adjudicated, and all meritorious FCA claims be paid, using foreign currency. In the absence of special circumstances, claims are paid in the currency of the country where the incident arose.

Although the pool of potential FCA claimants is immense and payment grounds are ample, numerous payment exceptions are also listed in AFI 51-501. Some of the most common in deployments include:

1. The claim has been waived by international agreement.

2. The claim arose from a contractual transaction or is based on the negligence of an independent contractor.

3. The claim is for rent, damage, or other payments involving the regular acquisition, possession, or disposition of real property by or for the U.S.

4. The claim is from foreign military personnel seeking damages for personal injury incurred incident to service or pursuant to combined military operations.

While clearly valuable as an overview, the information provided in this chapter is no substitute to a full review of AFI 51-501, especially in relation to payment exceptions.

Proper analysis under the FCA answers five questions:

1. What happened factually?

2. What does local law say about redressing the matter?

3. Regardless of what local law says, how is local law actually applied?

4. How, in particular, is local law applied to members of the receiving State's armed forces (or police forces)?

5. Notwithstanding local law or its application, does the AFI prohibit payment for some other reason that is not expressly contrary to the language of an applicable international agreement?

The FCA has a two-year statute of limitations and prohibits subrogation payments. If the claimant received insurance proceeds as a result of property damage or personal injuries suffered, those proceeds are not deducted from claimant's recovery unless the insurance was purchased by the U.S. or a U.S. employee. A verdict in a foreign court against a U.S. military member or civilian employee is also not binding upon the FCC as to the value of a claim, though it is a factor to carefully consider.

Lastly, a claimant has no statutory right to appeal an FCA denial, and no requirement exists for an FCC to reconsider an FCA denial. A claimant may request reconsideration, however,

and an FCC should reconsider a denial if the claimant presents new and material evidence or if there was an obvious error in the original decision.

PERSONNEL CLAIMS

The Military Personnel and Civilian Employees Claims Act (PCA) authorizes payment for claims for loss, damage, or destruction of personal property owned by military personnel and civilian employees of the Department of Defense. The PCA applies worldwide, and with respect to deployed personnel, covers only those personal property losses that are incident to service and which involve property that is considered reasonable or useful under the circumstances of the deployment.

Payable Claims

Common PCA claims that may arise during a deployment situation include (these are not necessarily payable) loss, damage, or destruction of:

1. personal equipment and clothing during transportation to the deployed location.

2. personal property from assigned quarters or duty locations arising from theft, vandalism, or other unusual occurrences (such as severe weather).

3. personal property as a result of an emergency evacuation.

4. personal property due to terrorism directed against the U.S.

5. clothing and articles worn while performing non-routine duties.

6. of equipment and other articles purchased and provided by the Government.

7. personally procured property or supplies the claimant wants to use vice equipment purchased/issued by the Government.

8. personal equipment or supplies not authorized by the deployed commander.

Limitations on Payment

Air Force Instruction 51-502, Chapter 2 and Chapter 3, set out the limitations on payment. No claim may be approved under the PCA if the claimant's negligence caused or contributed to the loss, damage, or destruction of the personal property. This limitation also applies if the loss, damage, or destruction was caused by the negligent or wrongful act of the claimant's agent. Claims for loss, damage, or destruction of personal property must be made within two years of the incident. The two-year limitation period may be extended if the claimant shows good cause for delaying filing the claim and if the two-year period began either within two years before the U.S. enters a war or armed conflict or during a war or an armed conflict involving U.S. Any extension of the two-year period expires two years after the end of the U.S. participation in the armed conflict, the end of any period of

captivity, or the date the good cause for delaying filing the claim ceased to exist, whichever is earliest. From a practical standpoint, the time that a member's good cause for extending the limitation period would usually end when he or she ceases participation in the war or armed conflict.

Payment is also limited to property that is deemed reasonable and useful to the member's duties under the circumstances. For example, property held illegally (such as war trophies) or in violation of a directive or lawful general order (such as alcohol or sexually explicit materials within certain regions) is not payable. Large amounts of precious metals, jewelry, and other expensive materials purchased at the deployed location for the member's personal use or as gifts also may not be payable. Settlement authorities consider all the surrounding circumstances in determining whether possession of the items in question was reasonable.

Claims for loss, damage, or destruction of clothing and uniform items that result from the military member's routinely assigned duties are not payable. For example, a civil engineering squadron member's claim for clothing damaged while performing routinely assigned construction is not payable. However, an administrative specialist claim's for uniform damage while filling sandbags in an emergency situation may be payable. Before adjudicating uniform claims, consult AFMAN 23-110, Vol 1, Part 3, Chap 2, para 2.75 to determine if payment is appropriate under this provision. If a uniform claim is not payable under the PCA, units should also consider whether the circumstances warrant a supplemental uniform allowance under AFI 36-3014.

Settlement Authority

Claims under PCA are filed with and adjudicated by the Air Force Claims Service Center (AFCSC). They can be filed on-line at https://claims.jag.af.mil. Claimants or legal offices can call 24/7 to DSN 986-8044 or toll-free 1-877-754-1212 with questions. The PCA claims of other military service personnel (i.e., Army, Navy, Marine Corps, and Coast Guard) should be sent to that member's military service. Deployed judge advocates and paralegals should refer sister service claimants to their service's claims division. The AFCSC's website has centralized points of contact for all the services.

PRACTICAL MATTERS

Generally, gaining commands for a deployment will give their JA personnel some direction concerning claims. Consequently, processing claims may be different for each deployment. For example, gaining commands must advise on how to keep track of claims filed and paid (hand-log or AFCIMS) and provide a fund-cite for payment vouchers to any FCC appointed under its authority.

Obviously, some foreign claimants will not speak English, and many will not know our claims system. While one cannot solicit claims, one can explain the filing process and even go to the extent of letting local inhabitants know exercises are to be conducted in their area. In cases where claimants do not speak English, host country law enforcement or perhaps

even the American Embassy may provide an interpreter, if your command has not already provided one. In some countries, it may be more efficient to respond to the scene with cash and settle claims immediately (one will need to investigate local custom and finance office capabilities first).

For claims arising from the performance of official duty under a cost-sharing international agreement (SOFA), receiving State claims authorities, not U.S. military claims authorities, must settle the claim. It is a host nation prerogative. If the claim is filed with U.S. forces, it must be forwarded to the appropriate receiving State claims authorities. If an incident occurs some distance away from one's deployed location, someone will have to make a judgment call about how much information is needed to determine if the claim is payable, and if so, how one will get the money or a check to the claimant. If the claim clearly arises from combat, there is also no need to subject oneself to danger to investigate.

Advance Payments

Advance payments are a helpful means of reducing tensions arising from legitimate claims when available and justifiable. Indeed, it is especially unfortunate whenever pressure from interagency sources arises to recognize an inadequately established or non-existent solatia custom when the option to make an advance payment remained readily available.

Advance payments are available under the MCA and FCA (not the Federal Tort Claims Act (FTCA) or IACA) if the claimant requests it, the claimant appears to have a valid claim that will exceed the amount of the advance payment, and circumstances demonstrate an immediate need for food, shelter, medical or burial expenses, or other necessities. With a commercial enterprise, the need may be to prevent severe financial loss or potential bankruptcy. If the need is probable, and tensions are rising due to claimant's ignorance of this option, it is not inappropriate to invite claimant to demonstrate his genuine immediate needs for consideration by the FCC. However, to accept advance payment, claimant must sign a written agreement in which he promises to refund the advance payment if no claim is filed or it exceeds the final approved claim payout. Below is a basic Advance Payment Agreement.

ADVANCE PAYMENT AGREEMENT

I, _____ (*name*) of _____
_____(*address*)agre
e to accept the sum of $_____ (*amount in foreign currency if paying under the FCA*) as an advance payment under the provisions of 10 U.S.C. 2736, in partial settlement of, and to alleviate hardships for death, personal injury or property damage incurred as a result of an incident on _____ (*date*), arising out of _____
_____
.

I understand that this payment is made in advance of an administrative settlement of a claim under the provisions of the (*Military Claims Act, Title 10, United States Code, Section 2733*) (*Foreign Claims Act, Title 10, United States Code, Section 2734*) (*National Guard Claims Act, Title 32, United States Code, Section 715*). I intend to file a claim with the U.S. Air Force for the above damages or injuries as soon as I know the extent and amount. The amount of this advance payment will be deducted from the award in final settlement of my claim.

If the final award is less than the advance payment received, I agree to refund to the U.S. Air Force the portion of the advance payment in excess of the final award. If no award is made or no claim is filed within the statutory period, I agree to refund the entire advance payment.

I understand this advance payment is not an admission by the United States of liability for the above incident.

CLAIMANT:

_____ (*signature*) _____ (*date*)

_____ (*printed name*)

_____ (*address*)

WITNESS:

_____ (*signature*) _____ (*date*)

_____ (*printed name*)

_____ (*address*)

REFERENCES

1. Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Forces, 19 June 1951, 4 U.S.T. 1792, T.I.A.S. 2846, 199 U.N.T.S. 67 (entry into force 23 August 1953, for U.S. same date)
2. Agreement Among the States Parties to the North Atlantic Treaty Participating in the Partnership for Peace Regarding the Status of Their Forces, 19 June 1995, T.I.A.S. 12666 (entry into force 13 January 1996, for U.S. same date)
3. Military Claims Act, 10 U.S.C. § 2733
4. Foreign Claims Act, 10 U.S.C. § 2734
5. International Agreement Claims Act, 10 U.S.C. § 2734a
6. Advance Payments Act, 10 U.S.C. § 2736
7. Use of Government Property Claims Act, 10 U.S.C. § 2737
8. Military Personnel and Civilian Employees' Claims Act, 31 U.S.C. § 3721, 1996
9. DODI 5515.08, *Assignment of Claims Responsibility*, 11 November 2006
10. AFI 51-501, *Tort Claims*, 15 December 2005
11. Tort Claims Field Support Center Action Officer Handbook (available at https://aflsa.jag.af.mil/cc/field_support.htm under Tort Claims Field Support Center "Resources" or https://aflsa.jag.af.mil/AF/lynx/jact/ under Fields of Practice "Tort Claims Field Support Center"
12. AFI 51-502, *Personnel and Government Recovery Claims*, 1 March 1997

CHAPTER 34

LEGAL ASSISTANCE IN OPERATIONS

BACKGROUND

Legal assistance is provided to military members to ensure that legal concerns do not adversely affect command effectiveness or mission readiness. Legal assistance is a critical component in the maintenance of members' readiness, welfare, and morale. A successful legal assistance program at an operational location is necessary to ensure members maintain legal readiness, which contributes to mission readiness. Equally important to the deployed Airman's peace of mind are the legal assistance services provided for family members left behind at the home station. Success of both programs will be measured by client satisfaction and ultimately mission accomplishment.

The extent of the legal assistance services deployed judge advocates are able to provide will depend on the priorities of the operation, legal manpower, and equipment resources. For example, the solo judge advocate or paralegal manning a crisis action team will probably be unable to render much legal assistance. Likewise, members involved in a crisis situation will probably defer seeking legal assistance until the heat of an operation cools. Nevertheless, judge advocates should develop a workable back-up plan for these situations such as telephone referral services to a supporting legal assistance program. Similarly, a judge advocate might take advantage of slow time and prepare handouts to post in a base common area or hang on a base intranet page. Keeping up-to-date and useful information readily available may help to reduce client stress waiting to schedule a legal assistance appointment during operationally busy times. A deployed judge advocate should even be prepared to render on-the-spot assistance in a non-traditional office setting, such as the dining facility. Flexibility and creativity are key success factors in a high intensity operation.

Deployed staff judge advocates, in coordination with the supervising staff judge advocate, should consider establishing the scope of legal services to be provided early on in the operation. Traditionally, procedures for office administration to include office hours of operation, appointment/walk-in policy, referrals, conflicts, protecting confidentiality, and procedures for handling emergencies will need to be established. Judge advocates should prioritize limited resources according to the commander's and the mission's needs. Stay within Air Force guidelines when it comes to legal assistance. Judge advocates should endeavor to guard against the inclination to be everything to everyone. This situation can quickly happen in a deployed setting where lonely people may look for someone who will listen to their problems. Judge advocates can render effective legal assistance services without becoming the client's mental health provider or sounding board. In the appropriate circumstance, refer a client to the appropriate office for counseling services as

the situation warrants. In some situations there will be limited other resources placing the judge advocate in an often difficult position of wanting to help. The danger of trying to assist everyone is the increased potential to unwittingly establishing the expectation of an attorney-client relationship on matters outside the scope of legal assistance. When consistent with the rules of professional responsibility, a judge advocate should encourage unit supervisory involvement for members' non-legal personal problems that interfere with mission readiness.

SCOPE OF LEGAL ASSISTANCE

Legal assistance consists of providing advice on personal civil legal matters to eligible beneficiaries for the purpose of sustaining command effectiveness and readiness that is critical in a deployed environment. The deployed judge advocate may find it necessary to triage or prioritize clients by assisting those with the most serious concerns up front. However, the deployed judge advocate or paralegal should be cognizant of which client issues fall within the scope of legal assistance and which do not. The scope of legal assistance does not change in a deployed environment.

Within Scope

The following matters are within the scope of legal assistance: (1) wills, advance medical directives, powers of attorney (POAs), and notaries; (2) issues that give rise to protections in the Servicemembers Civil Relief Act (SCRA) and Uniformed Services Employment and Reemployment Rights Act; (3) casualty affairs; (4) landlord-tenant and lease termination; (5) taxation; (6) domestic relations, including personal financial responsibilities, involuntary allotments, divorce, child support, and child custody matters; (7) consumer affairs, and; (8) other issues deemed connected with personal civil legal affairs by: The Judge Advocate General (TJAG), major command (MAJCOM) staff judge advocates (SJAs), numbered Air Force (NAF) SJAs, or base SJAs.

Outside Scope

The following matters are outside the scope of legal assistance: (1) business or commercial enterprises; (2) criminal issues; (3) standards of ethical conduct; (4) law of armed conflict (LOAC) issues; (5) official matters in which the Air Force has an interest; (6) legal concerns or issues raised on behalf of third parties; (7) representation of a client in a civilian court or administrative proceeding; and (8) drafting or detailed reviewing of real estate sales transactions, separation agreements, divorce decrees, or *inter vivos* trusts, unless the SJA determines you have the expertise to do so. Do not enter into an attorney-client relationship regarding these matters.

Eligibility for Legal Assistance Services in Operations

Personnel eligible for legal assistance include: (1) active duty members, including reservists and guardsmen on federal active duty under Title 10 U.S.C., and their family members who are entitled to an identification card; (2) Air Reserve Component members performing

Active Guard/Reserve (AGR) tours, including those under 10 U.S.C. 10211, 10 U.S.C. 12310, or 32 U.S.C. 502(f); (3) civilian employees and civilian contractor personnel deploying to or in a theater of operations (limited to preparation of wills and POAs); (4) civilian employees serving with, employed by, or accompanying DOD personnel or the armed forces outside the US, Puerto Rico, Guam, and the Virgin Islands, and their dependents residing with them; and (5) other persons subject to the UCMJ outside the US, and their family members residing with them who are entitled to an identification card. Additionally, Reservists and National Guard members not on Title 10 U.S.C. status, who are subject to federal mobilization in an inactive status, are eligible for mobilization/deployment related legal assistance for wills and powers of attorney (POA). Note that only those categories of eligible personnel relevant to the deployed environment are mentioned here. Air Force Instruction 51-504, *Legal Assistance, Notary, and Preventive Law Programs*, 27 Oct 03, contains a complete list of personnel eligible for legal assistance.

WILLS, ADVANCE MEDICAL DIRECTIVES (LIVING WILLS), POA, AND NOTARY SERVICES

Drafting Libraries (DL) Wills Software

The Air Force, Navy, Marines and Army have each adopted the DL Wills program as their standard will-producing software. Most established deployed legal offices already have DL Wills software installed on the office computer. The judge advocate who deploys with an equipment kit, should ensure the DL Wills current software is included on the laptop prior to deployment. DL Wills prepares simple and complex wills for persons of any marital status. The program also prepares living wills and health care documents, powers of attorney (POAs), asset summaries and execution checklists. While DL Wills creates POAs, many attorneys and paralegals prefer to use the various POA forms contained in WebLIONS. WebLIONS is accessible via the internet through the FLITE homepage.

Military Testamentary Instrument

United States Code, 10 U.S.C. 1044d, recognizes the legitimacy of the military testamentary instrument (MTI), in effect, a last will and testament. Under 10 U.S.C. 1044d, the MTI is exempt from state requirements of form, formality, or recording when executed in conformance with the procedural requirements of the federal statute. Wills executed in accordance with this procedure must be recognized in any state when presented for probate. See DODD 1350.4, *Legal Assistance Matters*, 28 April 2001, and AFI 51-504 for guidance.

Powers of Attorney (POA) and Living Wills

A special POA grants limited authority to accomplish specific transactions; e.g., buying or selling real estate, purchasing or selling a car, and shipping or storing household goods. A general POA gives comprehensive authority over virtually all legal (and probably non-legal) affairs. In addition, POAs may be either durable or non-durable. A durable POA takes effect upon, or is still effective notwithstanding a person's medical incapacity and

designates another person to make decisions on behalf of the incapacitated person. Unless language is included which creates a durable POA, the power granted will cease upon the grantor's incapacity. Duration is limited by the person giving the POA or to a reasonable time within which to accomplish the transaction, usually not more than 1 year. Military POAs are those notarized by judge advocates, civilian attorneys serving as legal assistance officers, and other members designated to have notarial powers. Military POAs are exempt from any requirement of form, substance, formality or recording that is required for POAs under state law, and shall be given the same legal effect as POAs prepared and executed in accordance with state law. Similarly, 10 U.S.C. 1044c provides that military medical directives (also known as living wills) are exempt from any requirement of form, substance, formality or recording required under state law, and are to be given the same legal effect as an advance medical directive conforming to that state's laws. The provisions of 10 U.S.C. 1044c do not make military medical directives enforceable in states that otherwise do not recognize them.

Notary Procedures and Guidelines

Judge advocates, civilian attorneys, and paralegals notarizing documents pursuant to 10 U.S.C. 1044a should comply with the following requirements: (1) when signing, specify date and location and list title and office; (2) cite on the document the authority of 10 U.S.C. 1044a, including the identifiers "U.S. Air Force" ,"Judge Advocate," or "legal assistance officer" through use of a raised seal or inked stamp; (3) verify the identity of each person whose signature is to be notarized (usually with an ID card); (4) administer an oath for any sworn document; and, (5) maintain a personal notary log, which includes each signer's name and signature, type of document, date, and location, and the notary log must remain with the individual notary. Military notaries should not: (1) accept any fees for the performance of a notarial act; (2) certify an incomplete document; or (3) certify a copy of any document as a true and accurate copy (only the custodian of the document may certify it as a true and accurate copy).

Military Notaries

Under 10 U.S.C. 1044a, the following individuals have the general powers of a notary public for notary acts executed for eligible legal assistance beneficiaries: (1) all judge advocates, including reserve judge advocates whether or not in a duty status; (2) civilian attorneys serving as legal assistance officers; (4) adjutants, assistant adjutants, and personnel adjutants, including reserve members on active duty or performing inactive duty training; (5) enlisted paralegals, E-3 or higher, on active duty or performing inactive duty training; (6) officers or senior noncommissioned officers (NCOs) (master sergeants and above) stationed at geographically separated units (GSUs) or remote locations where no judge advocate or paralegal notary is assigned, who have been designated in writing by the GSU's servicing general court-martial convening authority SJA; and (7) at locations outside the U.S., civilian Air Force employees appointed by the SJA servicing the base to serve as notaries under 10 U.S.C. 1044a(b)(5).

SERVICEMEMBERS CIVIL RELIEF ACT (SCRA)

President George W. Bush signed the SCRA into law (Public Law 108-189) on 19 December 2003. Codified in the United States Code, the SCRA is found at 50 U.S.C. App. §§ 501-596. The new statute completely supersedes the Soldiers' and Sailors' Civil Relief Act (SSCRA) of 1940. In several key areas, the SCRA strengthens the rights and protections afforded to persons in military service, and in some cases their family members. The SCRA also clarifies the benefits continued from the SSCRA. The SCRA provides a wide range of civil protection for individuals entering, called to, or on active duty in the military service to enable them to devote full attention to duty, including Reservists and National Guard members. The protections generally begin on the date orders are received and terminate within 90 to 180 days after the date of discharge from active duty. Note that the SCRA does not apply to criminal matters.

The most commonly used SCRA provisions address the following: (1) stay of civil court proceedings or protection against default judgments when the requirements of military service prevent the member from asserting or protecting a legal right; (2) residential or auto lease termination; (3) reduction of interest rates on pre-service obligations if the ability to make payments is materially affected by military service; (4) certain protections involving installment contracts entered into prior to entering active duty; and (5) taxation issues.

Judge advocates should not directly contact a court to assert a stay. Some states may consider such stay requests by attorneys to be an appearance, which precludes the client from reopening a default judgment under section 521 of SCRA, if the stay request is denied. The better course of action is to assist the client in drafting the stay request and include a statement from the service member's commander establishing that the service member is unable to attend the proceeding due to military service and that leave is not authorized. Reasons should clearly outline the duties to which the Airman must attend and why he or she cannot take leave.

UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1994 (USERRA)

The Uniformed Services Employment And Reemployment Rights Act Of 1994 (USERRA), (38 U.S.C. §§ 4301, *et seq*.) gives members and former service members (active and reserves) the right to return to a civilian job held before military service. Reserve component members have the right to be restored to their former civilian job or one of similar status, seniority and pay, unless the position was abolished during their absence. The USERRA applies to all private employers, state governments, and all branches of the federal government. To be eligible for restoration, a member must meet certain requirements, including but not limited to: (1) the civilian employment was not temporary; (2) the employer had advance notice of the employee's service; (3) the employee's absence was necessitated by service in the uniformed services; (4) the employee has five years or less of cumulative service in the uniformed services in his or her employment relationship with a particular employer (many exceptions exist for this requirement); (5) the employee timely returns to work or applies for reemployment (timelines vary based on length of service); (6)

the employee has not been separated from service with a disqualifying discharge or under other than honorable conditions. If the member sustains a service-connected disability and cannot perform the duties of the former position, the employer must make reasonable efforts to accommodate the disability and help the employee to become qualified for an earnest comparable job.

The US Department of Labor is responsible for investigating reemployment issues through the Veterans' Employment and Training Service (VETS) which provides assistance to all persons having claims under USERRA. More information is available from the Department of Labor at http://www.dol.gov/VETS/. In addition, the DOD organization, Employer Support of the Guard and Reserve (ESGR), ((800) 336-4590, http://www.esgr.org/site/) provides ombudsmen who mediate reemployment issues between military members and their civilian employers. Legal assistance attorneys should not contact servicemembers' employers concerning relief under USERRA. This action could cause the servicemember to forfeit assistance from VETS. Instead, legal assistance attorneys should refer servicemembers experiencing employment problems to VETS or ESGR.

CASUALTY AFFAIRS

Depending upon the circumstances, many issues can arise from the death of an Airman to include reporting the casualty, notifying the next of kin, appointment of a summary court officer (SCO), providing legal advice to the SCO, disposition of the remains (including a possible autopsy), advising the next of kin concerning their legal rights, maximization of survivor benefits, probate issues, and conducting line of duty investigations. For assistance in navigating survivor benefits, contact AFPC/JA at DSN 665-2761. A judge advocate should be prepared to assist the next of kin, the commander, and the designated SCO.

Judge advocates may also be involved in assisting the next of kin of airmen missing in action or taken prisoner. The Secretary of the military department concerned has authority to initiate or increase an allotment on behalf of family members in certain cases and if circumstances merit. Coordination with the personnel office, often called PERSCO and the local finance officer on matters involving missing airmen or those taken prisoner is important.

INVOLUNTARY ALLOTMENT ISSUES

Department of Defense policy expects military members to pay their just financial obligations in a proper and timely manner. Creditors whose efforts to collect a debt have failed and who have been awarded a civil judgment against a member may seek enforcement of the judgment by applying through DFAS-CL/L for an involuntary allotment of a maximum of twenty-five percent (25%) of the member's disposable pay. Applications which pass a DFASCL/L legal review and determination that the procedural requirements of SCRA, 50 U.S.C. appendix, section 521, were complied with are forwarded normally to the member's deployed commander through the home station commander. The deployed commander should inform the member of the right to either consent or contest the involuntary allotment. If the member contests the allotment on the basis of

exigencies of military duty, the commander has the responsibility to make the determination of whether exigencies of military duty caused the absence of the member from appearing in a judicial proceeding. Note that a commander may extend the member's time to respond for good cause; i.e., deployed or assigned outside the US. The DFASCL/L review process generally takes 90 to 120 days to complete.

FAMILY LAW

Domestic Relations

Distance doesn't always make the heart grow fonder. The deployed judge advocate will frequently encounter questions concerning marriage, annulment, paternity, child custody, nonsupport, legal separation, and divorce. While domestic relations are governed primarily by state law, be sure to consider federal SCRA protections that may apply.

Child Support and Alimony

United States Code, 42 U.S.C. 659, authorizes the garnishment of the pay of active, reserve, and retired members of the military and the pay of civilian employees of the Federal government for child and or spousal support payment. In order to implement a garnishment or wage attachment against a member of the military or a DOD civilian employee, an income withholding order, or similar process, must be served upon DFAS. The order submitted cannot be the divorce decree or other order that directs the debtor to make the payment. Rather, the order must direct the government, as the employer, to withhold moneys and remit payments to satisfy the support obligation. Questions concerning involuntary allotments, child support and alimony can be directed to:

DFAS-CL/LPO Box 998002
Cleveland, Ohio 44199-8002
(216) 522-5301 (Customer Service) http://www.dfas.mil/garnishment/military.html

TAX ASSISTANCE

The deployed staff judge advocate should coordinate with the deployed supervisory judge advocate and the judge advocate's chain of command regarding whether mission constraints and available resources permit operating a full or partial service tax program. Members deployed outside of the US will qualify for some type of a filing extension and will be able to prepare their tax return at their home station. However, many airmen anticipating refunds will want to file their tax returns as soon as possible. Offering some of the following tax assistance services can be a real morale booster: (1) self-service tax center offering preparation software, selected publications and forms, and Internet access; (2) publication of special tax rules specific to your operation, tax tips, and helpful web site addresses; e.g., forms and publications are available at www.irs.gov; and, (3) electronic filing services from a servicing legal office; i.e., preparation, uploading and transmission of electronic returns to the IRS. Be aware that operation of electronic filing services can be

technically challenging and time consuming in a deployed setting as service members rotate to their home stations, especially for the novice tax preparer.

CONSUMER LAW

The Federal Trade Commission's (FTC's) Bureau of Consumer Protection's mandate is to protect consumers against fraud, deception, and unfair business practices in the marketplace. The Bureau enforces a variety of consumer protection laws enacted by Congress, as well as trade regulation rules issued by the Commission. Counselors respond to consumer complaints and inquiries received by telephone, mail, and e-mail. To contact the Bureau, telephone 1-877-FTC-HELP (1-877-382-4357). Victims can file consumer law complaints online at http://www.ftc.gov/bcp/index/shtml.

The *Consumer Action Handbook*, published by the Federal Citizen Information Center, lists federal, state, and local government offices with consumer related responsibilities. The handbook also includes Better Business Bureaus, and consumer contacts with corporations and trade associations, as well as provides instructions on how to file a complaint. The handbook is available online at http://www.consumeraction.gov/.

Consumer Sentinel

This computerized consumer fraud database operated by the FTC uses the Internet to provide secure access to millions of consumer complaints for federal, state, and local law enforcement organizations, as well as select international law enforcement authorities. The controlled access database includes consumer complaints in areas such as telemarketing, credit scams, work-at-home schemes, identity theft, and Internet complaints derived from complaints filed directly with the FTC and shared by other data contributors, both public and private. The site also provides other information useful for investigations and prosecutions. The Consumer Sentinel contains an Air Force specific site where Air Force members may file complaints and which Air Force law enforcement agencies may access, providing information on companies that generate complaints from servicemembers where they live. The public website may be accessed at http://www.ftc.gov/sentinel/. The Air Force site may be accessed at http://www.ftc.gov/sentinel/military/index.shtml.

Identity Theft

Identity theft is the taking of a person's identity to obtain credit, credit cards from banks and retailers, steal money from the victim's existing accounts, apply for loans, establish accounts with utility companies, rent an apartment, file bankruptcy, or obtain a job using the victim's name. The impersonator steals thousands of dollars in the victim's name without the victim even knowing about it for months or even years. Criminals have also used victims' identities during the commission of crimes ranging from traffic infractions to felonies.

Victims of identity theft face multiple hurdles in preventing further misuse of their identifying information and in correcting damage to their credit histories, reputations, and

lives by identity thieves. Victims often spend many hours just figuring out whom to contact, the potential scope of the damage, and what to do about it. The legal assistance attorney can provide an invaluable service to clients/victims by informing them of the first four steps to take, as recommended by the FTC.

First, contact the fraud departments of each of the three major credit bureaus:

1. Equifax: 1-800-525-6285, http://www.equifax.com

2. Experian: 1-888-397-3742, http://www.experian.com

3. TransUnion: 1-800-680-7289, http://www.transunion.com

Second, contact the security or fraud department of each company for any accounts that have been tampered with or opened fraudulently.

Third, file a report with the local police and/or the police in the community where the identity theft took place.

Fourth, victims should file a complaint with the FTC by contacting the FTC's Identity Theft Hotline toll-free at 1-877-438-4338; by mail: Identity Theft Clearinghouse, FTC, 600 Pennsylvania Avenue, NW, Washington DC 20508; or online at www.ftc.gov/idtheft. The FTC collects this information in a secure consumer fraud database and may share it with other law enforcement agencies. Although the FTC does not have the authority to bring criminal cases, the Commission helps victims by providing them with information to help resolve the financial and other problems they confront. The FTC also may refer victim complaints to other appropriate government agencies and private organizations for action/assistance.

PROFESSIONAL RESPONSIBILITY

Keep in mind that information received from a client during legal assistance and documents relating to the client are legally confidential and privileged. Privileged information may be released only with the client's express permission; pursuant to a court order; or as otherwise permitted by the Air Force Rules of Professional Conduct and applicable state bar rules. Disclosure may not be lawfully ordered by any superior military authority. Judge advocates should be judicious in entering attorney-client relationships. They should ensure that legal assistance does not cause a conflict which prevents fulfilling their primary role as an SJA or command legal advisor and representing the interests of the Air Force.

PREVENTIVE LAW PROGRAM IN THEATER

An in-theater preventive law program saves time, effort, and expense by decreasing the legal assistance workload. Areas should be addressed that will not only be of interest to members, but will help them avoid legal pitfalls. Here are some ideas that can be implemented at almost any location:

1. Make handouts on frequently asked questions available at other locations where members have reading time such as the gym or medical facility.

2. Routinely publish articles in the installation newspaper, distribute via electronic mail, or publish on unit bulletin boards.

3. Conduct briefings at commander and first sergeant seminars, commanders' calls, and newcomers' orientation. Educate commanders and staff agencies on the full range of deployed legal services provided.

4. Present legal training workshops for law enforcement personnel. The program can include information on all legal matters, not just legal assistance issues.

REFERENCES

1. 10 U.S.C. § 1044, Legal assistance
2. 10 U.S.C. § 1044a, Authority to act as notary
3. 10 U.S.C. § 1044b, Military powers of attorney
4. 10 U.S.C. § 1044c, Advance medical directives of members and dependents
5. 10 U.S.C. § 1044d, Military testamentary instruments
6. 38 U.S.C. § 4301, Uniformed Services Employment and Reemployment Rights Act
7. 42 U.S.C. § 659, Consent by the United States to income withholding, etc.
8. 50 App. U.S.C. §§ 501-596 (2003), Servicemembers Civil Relief Act,
9. DODD 1350.4, *Legal Assistance Matters*, 28 April 2001
10. AFI 51-504, *Legal Assistance, Notary, and Preventive Law Programs*, 27 October 2003
11. AFI 36-3002, *Casualty Services*, 25 July 2005
12. AFI 36-809, *Civilian Survivor Assistance*, 1 July 2003
13. AFI 34-244, *Disposition of Personal Property and Effects*, 2 March 2001
14. Air Force Rules of Professional Conduct, available on the TJAG homepage at: https://aflsa.jag.af.mil/


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CHAPTER 35

POLITICAL ASYLUM AND TEMPORARY REFUGE

BACKGROUND

Air Force Judge Advocate General's Corps personnel may be presented with a request for, or information pertaining to, political asylum and temporary refuge. These requests require rapid initial action and may be politically sensitive, therefore it is essential that U.S.AF JAGs and paralegals understand the rules and procedures involved in handling these requests and the context in which they arise. Therefore, a short summary of the applicable international and United States immigration law will be discussed before addressing Department of Defense (DOD) regulations.

APPLICABLE INTERNATIONAL LAW

Refugees

The United Nations (UN) is concerned with the plight of refugees fleeing from oppression. The right to seek asylum was included among the enumerated rights of the Universal Declaration of Human Rights approved by the UN General Assembly in 1948. However, the declaration did not obligate states to grant asylum; Under generally accepted principles of international law each sovereign state has the exclusive control of its borders and the right to decide who will be admitted within them.

The UN Convention Relating to the Status of Refugees of 1951, while recognizing that granting asylum may place a heavy burden on states, sought to provide refugees with fundamental rights and freedoms. The UN Protocol Relating to the Status of Refugees of 1967 modified the definition of refugee contained in the 1951 Convention by removing an arbitrary cut-off date for eligibility to be considered a refugee. It otherwise incorporated by reference the entire text of the 1951 Convention. The United States did not join the 1951 Convention, but became a party to its terms when it joined the 1967 Protocol.

Refugee Defined

Under both the 1951 Convention and the 1967 Protocol, a "refugee" is defined as any person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his formal habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Prohibition of Expulsion or Return ("Refoulement")

The 1951 Convention sets forth the principle of non-refoulement. It prohibits signatories from returning refugees to a country where their lives or freedoms will be threatened due to their race, religion, nationality, membership in a particular social group, or possession of a certain political opinion. This benefit may not be claimed by refugees who are either regarded as a danger to the security of the country they are in or who have been convicted of a particularly serious crime and therefore pose a danger to the community.

U.S. IMMIGRATION LAW

Background

The U.S. Congress, by constitutional mandate, regulates the nation's immigration policy through the Immigration and Nationality Act (INA). Day-to-day administration of immigration, including processing applications for refugee status and asylum, is primarily the responsibility of the U.S. Customs and Immigration Service (USCIS) under the Department of Homeland Security.[336] The Department of Justice plays a significant role in adjudicating immigration matters that come before the Executive Office for Immigration Review (EOIR) and the Board of Immigration Appeals (BIA).[337] The Department of State, through its Bureau of Consular Affairs, plays a significant role overseas, including conducting initial screening of aliens wishing to enter the United States and through the consideration of visas applications.

Refugees and Asylum

Prior to the Refugee Act of 1980, the United States had no firm definition of refugee in its domestic law. The Refugee Act of 1980 amended the INA by establishing a comprehensive refugee policy and including a definition of refugee consistent with the 1951 Convention and the 1967 Protocol. In order to meet the Act's definition of refugee, the following elements must be met:

1. The noncitizen must be outside any country of such person's nationality or last habitual residence;

2. The noncitizen must have been persecuted or have a fear of persecution;

3. The fear must be well-founded;

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[336] The Homeland Security Act of 2002 transferred what was then known as the Immigration and Naturalization Service (INS) from the Department of Justice (DOJ) to the Department of Homeland Security (DHS), and the service was renamed the U.CIS. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002). The U.S. Immigration and Customs Enforcement (ICE) was also established as a separate component under the DHS.

[337] *See* 8 U.S.C. § 1103; RUTH E. WASEM, U.S. IMMIGRATION POLICY ON ASYLUM SEEKERS 13 (Cong. Research Serv. Rep. No. R13262125, 2007); CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE § 1.02[2] (2009).

4. The fear of persecution must be based on race, religion, nationality, membership in a particular social group, or political opinion; and

5. Due to this persecution or well-founded fear of persecution, the individual must be unwilling to return to his/her country of nationality or last habitual residence.

Refugees may be permitted to enter the United States, or, if already present, to remain in the United States, through a variety of methods. Refugees abroad can apply for admission to the United States against categories and quotas fixed by the President after consultation with Congress. Refugees at the border or within the United States can request refugee status, designated as "asylum." Noncitizens at the border or within the United States who do not qualify for asylum may nonetheless seek restriction on removal to a country where they could face persecution. Unlike asylees or individuals admitted under quota, restriction on removal is a temporary status that does not come with the option of applying for permanent residency. If the likelihood of persecution ends, the restriction on removal can be lifted.

Asylum at Overseas Embassies and Installations

The United States generally does not grant asylum at its embassies or other installations within the territorial jurisdiction of a foreign state. There are two primary reasons for the U.S. practice of declining to grant asylum at its embassies. First, a U.S. Embassy in foreign state territory is not U.S. territory, nor is it within the territorial jurisdiction of the United States. Second, the granting of asylum is not recognized as a diplomatic function under customary international law or the UN Vienna Convention on Diplomatic Relations.[338] To use our embassies as havens for asylum of host country nationals might invite charges that we are violating article 41 of the Vienna Convention, which prohibits diplomatic personnel from interfering in the internal affairs of the host country and from using embassy premises in any way incompatible with the functions of the mission as set out in the treaty. U.S. Embassies are authorized to grant temporary refuge for humanitarian reasons in extreme or exceptional circumstances when the life or safety of a person is put in immediate danger, such as pursuit by a mob. Any decision to grant temporary refuge must be made by the senior U.S. official present at the embassy.

U.S. Interdiction Policy

In an effort to limit massive immigrations from Haiti and Cuba, the President issued Executive Order (EO) 12324 directing the Secretary of State to enter into agreements with foreign governments to prevent illegal immigration to the United States. Pursuant to this order, the Secretary of State reached an agreement with Haiti to permit the U.S. Coast Guard to board Haitian vessels on the high seas to prevent illegal migration to the United States. The U.S.-Haiti Interdiction Agreement provided that the U.S. Coast Guard would not return any passenger that would be subject to persecution in Haiti. Deteriorating conditions at Guantanamo Naval Base led the President to issue EO 12807, also known as

[338] *See* Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

the "Kennebunkport Order," in 1992.[339] That order, continued under the Clinton administration, required the U.S. Coast Guard to intercept vessels illegally transporting migrants from Haiti to the United States and to return them to Haiti without determining their refugee status. The U.S. Supreme Court in *Sale v. Haitian Centers Council* upheld this executive order by 8-1 vote, finding that neither the INA nor the principles of non-refoulment contained in article 33 of the 1951 Convention extended to the United States in operations conducted on the high seas. [340]

DEPARTMENT OF DEFENSE PRACTICE

Background

DOD defines and employs the two terms "political asylum" and "temporary refuge" to distinguish between (1) the protection given to foreign nationals who fear persecution for the reasons set forth in the 1951 Convention and the protection given to foreign nationals whose life and safety are in imminent danger; and (2) the protections afforded based on where the refugee is found. The two terms are defined as follows:

Political Asylum. Protection and sanctuary granted by the United States Government within its territorial jurisdiction or on the high seas to a foreign national who applies for such protection because of persecution or fear of persecution based on race, religion, nationality, membership in a particular social group, or political opinion.

Temporary Refuge. Protection afforded for humanitarian reasons to a foreign national in a DOD shore installation, facility, or military vessel within the territorial jurisdiction of a foreign nation or on the high seas, under conditions of urgency in order to secure the life or safety of that person against imminent danger, such as pursuit by a mob.

Procedures.

In Territory under Exclusive U.S. Jurisdiction and the High Seas. When the senior Air Force commander or a member of the commander's staff, or the commander of a U.S. Air Force aircraft receives a request for political asylum from a foreign national, the commander must: (1) notify the servicing Air Force Office of Special Investigations (AFOSI); (2) notify the nearest office of the U.S. Customs and Immigration Service (USCIS); (3) report the request (see "reporting" below) and (4) protect the applicant, pending transfer to the USCIS. This protection is subject to the superior authority of a local, state, or federal law enforcement agency. Applicants for political asylum or temporary refuge will be surrendered to foreign jurisdiction only at the personal direction of the Secretary of the Military Department or the Director of the Defense Agency concerned.

In Territory Under Foreign Jurisdiction (Including Foreign Territorial Seas). It is the general policy of the United States not to grant political asylum at its units or installations within the territorial jurisdiction of a foreign country. Foreign nationals requesting political

[339] Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (24 May 1992).
[340] *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993).

asylum in a location under the territorial jurisdiction of a foreign country will be advised to apply in person at the nearest American Embassy or Consulate. The senior Air Force commander or designated representative of an installation or facility, or the commander of an Air Force aircraft, may grant temporary refuge to a foreign national if there is an apparent need to protect them against an imminent danger to life or safety.[341] Commanders granting temporary refuge must: (1) notify the servicing AFOSI; (2) protect the foreign national; and (3) report (see "reporting" below). Temporary refuge will be terminated only when directed by higher authority through the Secretary of the Military Department or the Director of the Defense Agency concerned. The person whose temporary refuge has been terminated will only be released to the protection of the authorities designated in the message authorizing release.

Reporting. Any request for political asylum or temporary refuge received by Air Force personnel must be reported by an IMMEDIATE precedence message to the Air Force Service Watch Cell (AFSWC).[342] Include as much of the information requested in attachment 2 of AFI 51-704 as is available. Send information copies to AF/JAO; SECSTATE (CONUS) or the appropriate American Embassy or Consular Office (overseas); the combatant command, major command, and each intermediate command; the Defense Intelligence Agency (DIA); and AF/A2.[343] The AFSWC will make further notifications required by DODD 2000.11 and AFI 51-704.

Release of Information. All requests for information received by Air Force personnel should be referred through command channels. Do not release information concerning requests for political asylum or temporary refuge, or even that a request has been made, to the public or media without prior approval of the Assistant Secretary of Defense for Public Affairs.

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[341] AFI 51-704, para. 2; *see also* DODD 2000.11, para. 4.1.5.1.1.1. If an Air Force member or employee serving under the chief of a diplomatic mission receives a request for political asylum or temporary refuge, that person must handle the request according to instructions issued by that mission. AFI 51-704, para. 1.2.1; *see also* DODD 2000.11, para. 4.2.1.3.

[342] AFI 51-704, para. 3. The AFSWC is the successor organization to the Air Force Operations Support Center cited in the AFI. AFI 10-206, *Operations Reporting*, 15 October 20 08, Rule 7A, provides reporting guidance to the AFSWC for asylum requests.

[343] The responsibilities of the 696 Intelligence Group cited in AFI 51-704 now fall under DIA and AF/A2 is the successor organization to AF/IN.

REFERENCES

1. U.S. CONST. art. I, § 8, cl. 4
2. Immigration and Naturalization Act, 8 U.S.C. §§ 1101-1189
3. Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980)
4. The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980)
5. Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150 (entry into force 22 April 1954; the United States is not a party)
6. Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150.
7. United Nations Protocol Relating to the Status of Refugees, 31 January 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entry into force 4 October 1967; for the United States 1 November 1968).
8. Vienna Convention on Diplomatic Relations, 18 April 1961, 22 U.S.T. 3227, T.I.A.S. 7502, 500 U.N.T.S. 95 (Entry into force 24 April 1964; for the United States 13 December 1972).
9. Immigration and Nationality Act, 8 U.S.C. §§ 1101, *et seq*.
10. DODD 2000.11, *Procedures for Handling Requests for Political Asylum and Temporary Refuge*, 3 March 1972 (through change 1, 17 May 1973)
11. AFI 51-704, *Handling Requests for Political Asylum and Temporary Refuge*, 19 July1994


JIMENEZ

CHAPTER 36

REPORTS

BACKGROUND

The following periodic or episodic reports pertain to operations or international law:

1. Report of Actual or Suspected Violations of the Law of Armed Conflict (LOAC).

2. Exercise of Criminal Jurisdiction by Foreign Tribunals over U.S. Personnel.

3. Individual Case Report – Exercise of Criminal Jurisdiction by Foreign Tribunals over U.S. Personnel.

4. Report of Visit – U.S. Personnel in Foreign Penal Institutions (commonly termed the "Monthly Visitation Report").

5. Report of U.S. Personnel in Post-trial Confinement in Foreign Penal Institutions (commonly termed the "Confinement Report").

6. Serious or Unusual Incident Report.

7. Trial Observer Report and Trial Observer Report on Appeal.

8. Report of Conclusion of International Agreement.

9. Report of Questionable Activities.

10. Report of Receipt of a Request from a Foreign National for Political Asylum or Temporary Refuge.

11. Report by Training Assistance Team Members of Human Rights Violation.

Legal staffs at all levels must be familiar with these reporting requirements. The listed reporting requirements are discussed below. See also separate chapters in this text entitled War Crimes in Aerospace Operations (for item 1), Status of Forces Agreements and Other Defense Cooperative Agreements Affecting the Air Force (for items 2-7), International Agreements (item 8), Air Force Intelligence Law (for item 9), Political Asylum and Temporary Refuge (item 10) and International Human Rights (item 11).

DESCRIPTION OF REPORTS

Report of Actual or Suspected Violations of LOAC

This report is required upon the occurrence of a "reportable incident." A "reportable incident" is "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." DODD 2311.01E.

All military and U.S. civilian employees, contractor personnel, and subcontractors assigned to or accompanying a Department of Defense (DOD) component shall report reportable incidents through their chain of command. Such reports may be made through other channels, such as the military police, a judge advocate, or an inspector general. Reports made to officials other than those specified shall, nonetheless, be accepted and immediately forwarded through the recipient's chain of command. DODD 2311.01E.

The commander of any unit that obtains information about a reportable incident shall immediately report the incident through the applicable operational command and the applicable military Department. Reporting requirements are concurrent. The initial report shall be made through the most expeditious means available. DODD 2311.01E.

The combatant commander shall report, by the most expeditious means available, all reportable incidents to the Chairman of the Joint Chiefs of Staff, the Secretary of Defense, and the Secretary of the Army, who has been assigned DOD responsibility for reporting. DODD 2311.01E. Further reporting may be required if the incident falls or is suspected to fall within the definition of "friendly fire" (see DODI 6055.07).

Law of Armed Conflict reporting requirements and procedures are commonly restated in combatant command directives and subordinate command regulations. Note that these reporting requirements are a personal responsibility. See also AFI 51-401.

Report of the Exercise of Criminal Jurisdiction by Foreign Tribunals over U.S. Personnel

This is an annual report (DD Form 838) covering the period 1 December through 30 November. DODD 5525.1 and AFJI 51-706 (also published as Army Regulation 27-50). It is a statistical summary of all cases involving criminal jurisdiction over U.S. personnel (excluding minor traffic offenses and other minor offenses, in which confinement is not an authorized punishment but which may result only in an administrative-type fine). If an individual is charged with multiple offenses, the report will only include the most serious offense. The report is sent through the designated commanding officer (DCO) for each country to The Judge Advocate General (TJAG) of the service concerned no later than 15 workdays following the last day of the period covered by the report. The DCOs for a particular country (or Defense Attaché performing the duties of the DCO) are identified in AFJI 51-706, paragraph 1.5 and Annex C. Negative reports are required. Accompanying the report will be:

1. A separate statement personally signed by the proper U.S. military authority in each country, indicating the impact that local jurisdictional arrangements have had upon mission accomplishment and the morale and discipline of forces during the reporting period;

2. A statistical summary, by country, of the number of civil and criminal cases in which counsel fees were paid and the total amount expended, court costs were paid and the total amount expended, bail was provided and the total amount posted, bail was provided and the total amount forfeited, bail forfeited was recovered from the individual for whom it was posted and the total amount recovered; and

3. A summary of the results of the prison visitation program and particular actions taken by the appropriate U.S. military authority in cases of discrepancies under paras. 3-4 and 3-6 of AFJI 51-706.

The reporting process may be implemented by combatant command directives and subordinate command regulations.

Individual Case Report-Exercise of Criminal Jurisdiction by Foreign Tribunals over U.S. Personnel

When a foreign government exercises criminal jurisdiction over U.S. military personnel, civilian employees, or dependents, an initial written report will be sent to TJAG of the service concerned. This report is not required for minor offenses. Existing reporting procedures may be used for such a report. Initial reports will be followed by timely supplemental reports of additional information. Information submitted on the serious incident report (SIR) need not be reported under this provision. DODD 5525.1 and AFJI 51-706, para. 4-9.

Report of Visit to U.S. Personnel in Foreign Penal Institutions (Commonly Termed the "Monthly Visitation Report")

This is required monthly. A DD Form 1602 will be prepared for each prisoner visited. The report will be sent to the DCO not later than 10 workdays following the visit. All reports indicating adverse confinement conditions will be forwarded to TJAG of the service concerned. DODD 5525.1 and AFJI 51-706, para. 4-7.

Report of U.S. Personnel in Post-Trial Confinement in Foreign Penal Institutions (Commonly Termed the "Confinement Report")

This report is prepared quarterly for the periods ending 30 November, 28 February, 31 May, and 31 August. Reports are sent to TJAG of the service concerned on the second day following the end of the reporting period. An information copy will be furnished to the chief of the diplomatic mission of the country concerned. Submission of the report will not be delayed because case data are not available as of the last day of the reporting period;

however, the report will reflect that the data is incomplete. Information required in the report is listed in AFJI 51-706, para 4-5.

Serious or Unusual Incident Report

Serious or unusual incidents will be reported to TJAG of the service concerned without delay by electronic means. Reports of serious or unusual incidents will include any case in which one or more of the following conditions exist: a person covered by AFJI 51-706 is placed in pretrial confinement or is actually or allegedly mistreated by foreign authorities; actual or probable publicity adverse to the U.S. is involved; Congressional or other domestic or foreign public interest is likely to arise; a jurisdictional question has arisen; the death of a foreign national is involved; capital punishment might be imposed. Initial reports will be followed by timely and complete supplemental reports. DODD 5525.1 and AFJI 51-706, para. 4-8.

Trial Observer Report and Trial Observer Report on Appeal

Trial observers shall attend and prepare formal reports in all cases of trials of United States personnel by foreign courts or tribunals, except for minor offenses. The following offenses will not be considered minor: (1) An offense that results in serious personal injury or extensive property damage; (2) A conviction that would normally result in a sentence to confinement, whether or not suspended. When trial observers are precluded from attending a trial, they will obtain necessary information to file their report from interviews with defense counsel, interpreters, and other available sources. Matters to be included in the report may be found at AFJI 51-706, para 4-6.

Reports will be submitted to the DCO through such agencies as the DCO may prescribe. An observer report will be forwarded immediately upon the completion of the trial in the lower court. The observer's report will not be delayed because of the possibility of a new trial, rehearing, or appeal. Copies will also be forwarded to the geographic combatant commander, if any, and to the chief of the diplomatic mission.

The DCO will forward these reports to TJAG of the accused's service. If the DCO believes that procedural safeguards were disregarded or the accused did not receive a fair trial, such reports will be sent via the geographic combatant commander. Comments of the appropriate service commander may be added prior to forwarding to TJAG of the service concerned. DODD 5525.1 and AFJI 51-706.

Report of Conclusion of International Agreement

This report is required when an international agreement has been concluded. Each organizational element of the Air Force that concludes an international agreement must send the original or certified copies (or both) of the international agreement, in time to arrive at the Office of the Assistant Legal Adviser for Treaty Affairs, Department of State, not later than 20 calendar days after signature of the agreement. *EXCEPTION:* Submit international intelligence agreements in time to arrive at Defense Intelligence Agency (DIA)

or National Security Agency (NSA), as appropriate, not later than 15 calendar days after signature of the agreements.

Copies of the agreements are to be sent to the following addressees:

1. Department of State, Attn Assistant Legal Adviser, Treaty Affairs, Washington DC, USA, 20520. (The original and one certified copy, or two certified copies)

2. DOD General Counsel. (Two certified copies)

3. Office of the General Counsel, Secretary of the Air Force (SAF/GCI). (One certified copy)

4. Operations and International Law Division, Office of The Judge Advocate General (AF/JAO). (One certified copy)

5. Any other offices required by relevant command directives or deemed appropriate by the component Air Force commands or their designee.

Report of Questionable Activities

This report is required upon the occurrence of a "questionable activity." A "questionable activity" is conduct relating to an intelligence activity that may violate the law, any executive order or Presidential directive, including EO 12333, or applicable DOD policy, including DOD 5240.1-R, and/or other Air Force policy documents and instructions. Such a violation is not a "questionable activity" in this context unless there is some nexus between the activity and an intelligence function. The SAF/GC can provide assistance in making such determinations.

Air Force agencies, units, and personnel must report questionable activities to the SAF/GC, SAF/IG, the DOD General Counsel or Assistant to the Secretary of Defense for Intelligence Oversight. Use of the supervisory chain or chain of command is encouraged to facilitate such reports where feasible. Such reports will be expeditiously provided to the inspector general at the first level at which an inspector general is assigned and not associated with the questionable activity, with copies to the staff judge advocate and, unless the inspector general determines such reporting would not be appropriate, to senior intelligence officers at the same level. This report must be made regardless of whether a criminal or other investigation has been initiated.

Conduct all inquiries as quickly as possible and forward the results through command channels to SAF/IG. Officials responsible for inquiries may obtain additional assistance from within the component concerned or from other DOD components, when necessary, to complete inquiries in a timely manner.

The SAF/IG and SAF/GC must have all information necessary to evaluate questionable activity for compliance with law or policy, regardless of classification or compartmentation. AFI 14-401.

Report of Receipt of a Request from a Foreign National for Political Asylum or Temporary Refuge

This report is required upon the receipt of a request or an indication that a request for political asylum is imminent. Call or send an IMMEDIATE precedence message to the Air Force Service Watch Center containing as much of the information requested in Attachment 2 of AFI 51-704 as possible. Do not delay the notification to get additional information, but send any additional information in later messages.

Confirm telephone calls with an IMMEDIATE precedence message as soon as possible. Send information copies of the message to: AF/JAO; the relevant combatant command; Defense Intelligence Authority; AF/A2; in CONUS, to the Secretary of State; overseas, to the appropriate American embassy or consular office.

Report by Training Assistance Team Members of Human Rights Violation

This report is required when a Training Assistance Team member encounters "prohibited acts." Prohibited acts are:

1. Violence to life and person-in particular, murder, mutilation, cruel treatment, and torture.

2. Taking of hostages.

3. Outrages upon personal dignity-in particular, humiliating and degrading treatment.

4. Passing of sentences and carrying out of executions without previous judgment by a regularly constituted court, affording all the judicial guarantees that are recognized as indispensable by civilized people. AFI 16-105.

Team members are required to disengage from the activity, leave the area if possible, and report the incidents immediately to the proper in-country U.S. authorities. The country team will identify proper U.S. authorities during the team's initial briefing. Team members will not discuss such matters with non-U.S. Government authorities such as journalists or civilian contractors. AFI 16-105.

REFERENCES

1. Executive Order 12333, *U.S. Intelligence Activities*, 46 F.R. 59941, as amended by Executive Order 13284, 23 January 2003, and Executive Order 13355, 27 August 2004
2. DODD 2311.01E, *Department of Defense Law of War Program*, 9 May 2006
3. DOD 5240.1-R, *Procedures Governing the Activities of DOD Intelligence Components that Affect United States Persons*, 11 December 1982
4. DODD 5525.1, *Status of Forces Policies and Information*, 7 August 1979, through change 2, 2 July 1997
5. DODD 5530.3, *International Agreements*, 11 June 1987, through Change 1, 18 February 1991
6. AFI 14-104, *Oversight of Intelligence Activities*, 16 April 2007
7. AFJI 16-105, *Joint Security Assistance Training (JSAT)*, 5 June 2000
8. AFI 51-401, *Training and Reporting to Ensure Compliance with the Law of Armed Conflict*, 19 July 1994, through interim change 1, 17 December 2008
9. AFI 51-701, *Negotiating, Concluding, Reporting, and Maintaining International Agreements*, 6 May 1994
10. AFI 51-704, *Handling Requests for Political Asylum and Temporary Refuge*, 19 July 1994
11. AFJI 51-706, *Status of Forces Policies, Procedures and Information*, 15 December 1989

CHAPTER 37

REPORTS OF SURVEY

BACKGROUND

The report of survey (ROS) (or financial liability investigation) is an official report of the facts and circumstances supporting the assessment of financial liability for the loss, damage, or destruction of government property, and serves as the basis for the government's claim for restitution or adjustment to an organization's listing of accountable equipment. It is not a punitive program. Rather, commanders should consider other administrative, nonjudicial, or judicial sanctions if damage or loss of property involves acts of misconduct.

ASSESSMENT OF FINANCIAL LIABILITY

Financial liability shall be assessed as follows under AFMAN 23-220, paragraph 1.5:

1. *Personal Arms or Equipment* - The full amount of the loss or damage to personal arms or equipment.

2. *Items of Military Supply* - The full amount of damage to, or value of, lost or damaged items of military supply.

3. *Government Housing* - The full amount of loss or damage to Government housing that was proximately caused by gross negligence. Up to one month's basic pay for simple negligence.

4. *Other Cases* - In all other cases, up to the full amount of the loss, damage, or destruction of Government property, but in no case more than one month's regular military compensation as defined by 37 U.S.C. § 101(25) in the case of military members and one-twelfth of the annual pay in the case of civilian employees. For Reserve component personnel, one month's regular military compensation refers to the amount that would be received by the service member if on active duty.

MEMBER'S LIABILITY

All members can be held liable for the loss, damage, or destruction of government property proximately caused by their negligence, willful misconduct, or deliberate unauthorized use. Liability is based upon the preponderance of the evidence. Financial liability cannot be assessed unless, after considering all relevant factors, it appears more likely than not that an

individual's actions, or failure to act, constituted negligence, willful misconduct, or deliberate unauthorized use, and proximately caused the loss, damage, or destruction.

Exception: Air Force vehicle loss or damage is subject to a gross negligence standard. Air Force non-appropriated fund instrumentalities (for NAFI-assigned or employed personnel on duty) and other services' vehicle loss or damage are subject to the normal negligence standard.

Definitions

Proximate cause: Defined as that which in a natural and continuous sequence, unbroken by a new cause, produces the loss or damage, and without which the loss or damage would not have occurred. It is further defined as the primary moving cause, or the predominant cause, from which the injury follows as a natural, direct, and immediate consequence, and without which the loss or damage would not have occurred.

Negligence: The failure to act as a reasonably prudent person would have acted under similar circumstances. Failure to comply with existing laws or regulations may be considered as evidence of negligence.

*Gross negligence: A*n extreme departure from the course of action to be expected of a reasonably prudent person, all circumstances being considered, and is characterized by a reckless, deliberate, or wanton disregard of foreseeable consequences.

Collective Liability: If the loss, damage, or destruction of government property resulted from negligence, willful misconduct, or deliberate unauthorized use of two or more persons, they are held jointly and severally liable for the amount of the loss to the government, up to one month's pay. Because the government cannot collect more than the total amount of the loss to the government, the approving authority determines the amount to be collected from each person.

JOINTLY OPERATED ACTIVITIES

If an installation or activity is operated jointly by the Air Force and Army or Navy, the service component possessing the lost or damaged property is responsible for processing a ROS according to its regulations, regardless of which service commands the installation. Air Force members or employees held liable for loss of, or damage to, another Department of Defense (DOD) component's property are subject to the ROS procedures of the other component. Collection from members is made under provisions of the DOD 7000.14-R, Vol. 5, Ch. 30.

ROS APPLICATION AND PROCESSING

Mandatory ROS

Per AFMAN 23-220 paragraph 3.1 and DOD 7000.14-R, Vol. 12, Ch. 7:

1. Loss, damage, destruction or theft of: Government-owned equipment with an initial acquisition cost of $5,000 or greater; Leased (capital lease) property; Real property.

2. Controlled or sensitive items, weapons, or classified items which have been damaged, or destroyed, unless exempted.

3. There is evidence of abuse, gross negligence, willful misconduct, or deliberate unauthorized use, fraud, theft, or if negligence or abuse is suspected in the case of supply system stocks or property book items.

4. Negligence is evident in the loss of hand tools regardless of dollar value unless voluntary monetary reimbursement or replacement in kind is offered and accepted.

5. Hand tools or other pilferable items over $100 unit cost or $500 total cost are lost.*

6. Supply system stock records are adjusted in excess of $2,500 for pilferable items.

7. Supply system stock records are adjusted in excess of $16,000 for uncontrolled or non-pilferable items.*

8. Supply system stock record adjustments exceed $50,000.

9. Ammunition losses, as addressed in paragraph 7.11 of AFI 21-201, Conventional Munitions Maintenance Management.

10. Bulk petroleum losses exceed authorized allowances.

11. The initial investigation does not identify the cause of the discrepancy in the supply system or property account and the discrepancy meets the requirement for a ROS.

12. Contractor-held property is lost, damaged, or destroyed by Air Force military or civilian personnel.

13. Air Force property is lost or damaged while being carried by a government aircraft or vessel.

14. Requested by an accountable officer.

15. Public funds are lost (if over $750, per DOD 7000.14-R, Vol. 12, Ch. 7).

16. Items are lost, damaged, or destroyed after they have been removed from an aircraft damaged in authorized operations.

17. Repetitive cases of loss, damage, or destruction occur, even though any one by itself would not warrant the processing of a ROS.

18. Air Force property is lost, damaged or destroyed while under the control of a non-appropriated fund (NAF) instrumentality; however, coordination with the NAF activity is essential because items procured with NAF funds are processed differently than those procured with Operations and Maintenance (O&M) funds.

*May not be mandatory in revised AFMAN 23-220.

Deployments

A ROS is generally not prepared for loss, damage, or destruction of major weapons, such as aircraft and missiles, including components and attached equipment, used in authorized operations. Once a deployment is ordered, all vehicles that make up the augmented deployable unit in a convoy are considered an integral part of the weapon system. Therefore, from generation through deployment to redeployment and recovery, the entire convoy, except for individual equipment, is exempt from ROS procedures. Property lost as a result of combat operations (e.g., under fire, direction to abandon), is accounted for per AFMAN 23-110, Vol. 1, Part 1, Ch. 10 and 11.[344]

ROS Processing Procedures[345]

When property is lost, damaged or destroyed, the organization that has possession of the property will initiate the ROS and the appointing authority (typically the unit commander) will appoint an investigating officer who will determine the facts in the case. The appointing authority must be designated in writing by the approving authority. Normally the approving authority is the wing or installation commander. More than one appointing authority may be designated.

The investigating officer (IO) must have no interest in the accountability of the property. The IO, if feasible, will be senior in rank to the person being investigated and be from a different unit. The IO will be an officer, E-7 or above, or civilian employee in grades GS-7, WG-9, WL-5 or WS-1 or above. The completion of the investigation becomes a primary duty and the officer will be relieved of other duties that would interfere with the investigation.

The IO will, at a minimum, answer the following questions: what happened, how, where, and when; who was involved; and was there any evidence of negligence, misconduct, or deliberate unauthorized use or disposition of the property? The IO will make findings and recommendations on the issue of liability of the person involved. The IO then refers the

[344] AFMAN 23-110, paras, 3.3.8 and 3.3.9
[345] AFMAN 23-220, Chapter 4

ROS to the accountable officer so that the records may be adjusted. Note that this action will not be affected by the action taken by the approving or appellate authority; therefore, the accountable records are adjusted as soon as possible. The IO will allow the person involved to review the case and provide verbal or written information to refute the findings and recommendation.

The ROS is then transmitted to the appointing authority for assignment of financial responsibility against the individual charged or to relieve him or her of financial responsibility. If financial responsibility is to be assessed, the ROS will be referred to the legal office for review. If the investigating officer has not performed a thorough job, the ROS should be returned for correction. In some cases, the appointing authority may appoint a financial liability officer to re-investigate the case. This is a second investigation and is performed when it is necessary to reevaluate the initial investigation or because of the complicated nature of the case. In most cases, a financial liability officer should not be required if the investigating officer completes a proper investigation.

In unusual cases, the approving authority may appoint a financial liability board to evaluate the findings of the appointing authority and the financial liability officer. Upon conclusion of these actions, the approving authority reviews the ROS and assigns financial responsibility or relieves the individual of responsibility. Afterward, the ROS is submitted for acknowledgement by the individual charged. He or she is then advised that the ROS action may be appealed to the next level in the chain of command above the person who assigned the financial liability assessment.

REFERENCES

1. DOD 7000.14-R, Vol. 12, Ch. 7, *Financial Liability for Government Property Lost, Damaged, Destroyed, or Stolen*, March 2007
2. DFAS-IN Regulation 37-1, *Finance and Accounting Policy Implementation*
3. DA PAM 735-5, *Financial Liability Officer's Guide*, 9 April 2007
4. AFMAN 23-220, *Reports of Survey for Air Force Property*, 1 July 1996 (revision planned in 2009)
5. AFI 34-202, *Protecting Nonappropriated Fund Assets*, 27 August 2004, Chapter 6
6. AR 600-4, *Remission or Cancellation of Indebtedness for Enlisted Members*, 1 April 1998
7. AR 735-5, *Policies and Procedures for Property Accountability*, 28 February 2005

CHAPTER 38

DEPARTMENT OF STATE – DEPARTMENT OF DEFENSE INTERFACE OVERSEAS

BACKGROUND

An appreciation of the skills and resources of U.S. embassies and Department of State (DOS) agencies abroad and an understanding of how they interact with the Department of Defense (DOD), non-governmental organizations (NGOs), international organizations, and regional organizations can be critical to the mission. Interaction is usually effected within the U.S. Government (USG) through what is loosely called the interagency process. Therefore, judge advocates will encounter many U.S. agencies working together to achieve U.S. objectives, each using the other for varying degrees of advantage and unity of purpose.

To comprehend the USG interagency structure, it is helpful to start with the U.S. Embassy (often referred to as AMEMB in message traffic). It is an immensely influential organization and has ultimate control over all U.S. agencies with the exception of armed forces assigned to a combatant commander. The Embassy advocates U.S. policy interests, reports to Washington, and protects the welfare of U.S. citizens (often referred to as AMCITS). Branches known as consulates may be located somewhere outside the country capital with more limited responsibilities than embassies. Embassy premises, also known as the "mission," are inviolable under international law. Most Embassy officials and staff will have varying degrees of immunity from the host country's criminal, civil, and administrative jurisdiction. See chapter on *Status of Forces Agreements* (SOFAs) and, in particular, discussion on administrative and technical (A&T) status under the Vienna Convention on Diplomatic Relations.

Embassy officials play a central role in most international agreement negotiations and disputes involving significant military issues. Personnel of importance to the mission are the ambassador, the political/military counselor, public affairs counselor, regional security officer (RSO), possibly the refugee coordinator, and various local national employees who are experts in their fields. Consular officers are very helpful during noncombatant evacuation operations (NEOs), disaster relief, foreign criminal jurisdiction cases of unusual importance, and a host of matters related to passports, visas, and immigration. Embassy officials and employees of non-DOD agencies can be of great assistance, depending upon the issue. A sense of united purpose will not always be self-evident. Judge advocates should expect different means and methods for achieving broader, more politically oriented objectives. Note that many embassy staffers have law degrees and legal backgrounds, but most are not working in attorney positions. If a judge advocate needs to work with a legal representative of the Embassy or the State Department the judge advocate should be sure to clarify that the person with whom they work is in fact a practicing attorney in good standing.

EMBASSY OFFICIALS AND ELEMENTS

Typical issues that may require interaction and coordination with the Embassy include overflight rights, landing fees, sovereign aspects of aircraft, country clearances, interfacing with host nation officials on customs and immigration issues affecting operations, carrying weapons, importing ammunition, and interpreting aspects of U.S. and host nation agreements, host country rules, and host nation law. These and other issues may similarly require coordination with the Embassy and a deployed judge advocate's supervisory judge advocate in the deployed environment, as well as the Air Force Forces (AFFOR) judge advocates supporting the AFFOR commander. These arise in the areas of foreign criminal jurisdiction, claims, provisioning, licensing, postal services, Morale, Welfare, and Recreation (MWR) activities, and in many similar base support type issues. Important embassy personnel are discussed below. Judge advocates should know the functions of these people and get to know the people in those functions as soon as practicable. An orientation visit to the U.S. Embassy early on can be very beneficial throughout a judge advocate's deployment or forward-basing assignment.

Ambassador

Also known as the Chief of Mission (COM), the ambassador is the President's personal representative, managing all embassy operations and coordinating the activities of in-country USG agencies. The ambassador is in charge of all USG elements in-country except for those military forces under command of the relevant combatant commander. The relationship between the combatant commander and the ambassador eludes precise definition and requires careful understanding. This is particularly true regarding discipline issues involving U.S. military personnel. The ambassador should not make recommendations and has no role in the military justice decisions affecting military personnel under the command of combatant commanders. Disciplinary matters for USAF personnel who may be assigned to the ambassador, such as in the defense attaché office are normally handled by the member's Air Force element commander, or a similar centralized USAF organization formally delegated the authority and tasked with administering such matters. One such organization is the Air Force District of Washington.

The ambassador integrates the programs and resources of all USG agencies represented on the country team, a de facto coordinating mechanism that can be tailored to each crisis as it arises, based upon the substance of the problem and with little need for written rules. See the discussion of the country team below. The ambassador will interact daily with the strategic level planners and decision makers of the DOS. Additionally, the ambassador functions at both the operational and tactical levels where recommendations and considerations for crisis action planning are provided directly to the combatant commander or the commander of a joint task force.

Deputy Chief of Mission

The role of Deputy Chief of Mission (DCM), the mission's second in charge, is critical to the diplomatic and operational structure of any Embassy. The ambassador may also give the DCM a portfolio of issues to work. When the ambassador is traveling outside the country or there is no ambassador appointed, the DCM takes over and he or she may also be known as the chargé d'affaires (Chargé for short). A chargé d'affaires may also be appointed head of mission in cases when only tenuous diplomatic relations exist between the United States and the receiving state.

Political Counselor (or Political-Military Counselor)

Among other responsibilities, the head of the Political Section (sometimes known as the POLMIL officer) is tasked with evaluating and reporting host country political and military developments. This official is familiar with the U.S. military and can be the most effective conduit to the ambassador.

The POLMIL counselor should not be confused with a political advisor (POLAD). A POLAD is a senior State Department officer (flag-rank equivalent) detailed as personal advisors to leading U.S. military commanders to provide policy support regarding the diplomatic and political aspects of the commanders' military responsibilities. There are approximately 20 POLADs assigned to U.S. and NATO military organizations.

Defense Attaché Office (DAO)

Service attachés comprise the DAO. The Defense Attaché (DATT) normally is the senior service attaché assigned to the Embassy. Defense attachés are funded and rated by the Defense Intelligence Agency, but they keep the combatant commander informed of their activities. The attachés are valuable liaisons to their host nation counterparts. They serve the ambassador and coordinate with, and represent, their respective Military Departments on service matters.

Security Assistance Office (SAO)

This office is separate from the DAO and performs a distinctly different function. The SAO members serve under the direction and supervision of the ambassador and under the command of the combatant commander. Specific SAO and combatant commander relationships are many and varied, but generally can be classified as either "operational" or "administrative." Often, the Chief, SAO, will be appointed as the U.S. Defense Representative (USDR). As the USDR, the SAO may be tasked with such matters as representing and acting as the single point of contact for the combatant commander and subordinate commanders in bilateral military agreements between the U.S. and the local government, undertaking antiterrorism or force protection (AT/FP) responsibilities, and many other tasks depending on the crisis at hand.

The operational relationships between the combatant commander and SAO will depend upon the scope of DOD and combatant commander military-to-military activities with the SAO's host country. Note: The combatant commander is responsible for AT/FP for forces under his or her purview and the chief of mission is responsible for all other U.S. nationals in-country. Specific responsibility is delineated in a memorandum of understanding between the combatant commander and COM and the rules may vary substantially by country. The SAO generally will have AT/FP responsibility for DOD personnel in-country for security assistance purposes that are not under the authority of the combatant commander. This includes the SAO staff, Mobile Training Teams, Technical Assistance Field Teams, and other SA personnel temporarily assigned. If collaterally assigned as the USDR, the Chief SAO carries out AT/FP responsibilities assigned by the combatant commander for those DOD non-combatant organizations and personnel located in the host country. In both instances, the SAO works closely with the Embassy's regional security officer.

The SAOs play key roles in support of DOD and combatant commander activities conducted in and with their host country. These types of contacts include what are still called CIF (Commander's Initiative Funds) activities. These funds are also referred to as "funding for combating terrorism readiness initiatives." The CIFs are utilized to support joint exercises, selected operations, humanitarian and civil assistance, military education and training, as well as force protection. In addition, there are also Military-to-Military Contacts (often referred to as Mil to Mil) under 10 U.S.C 168. Military-to-military may involve military liaison teams, military to military exchanges, and seminars and conferences. More on Security Assistance appears in the chapter that deals with *International Agreements*.

Other Officers

Consular Officer. This officer heads the Consular Section of the Embassy or detached and separately located consulate which provides a variety of public services related to travel documents, such as visas and passports. This section handles the protection, welfare, and property of U.S. citizens visiting or living in that country. It also supervises the signing of notarials, public documents, and quasi-legal services for Americans; and carries out special services for other USG agencies. The consular officer is a key official in NEOs. See separate chapter entitled *Noncombatant Evacuation Operations*.

Public Affairs Officer (PAO). This officer is the equivalent of a military PAO in many respects, and is very helpful with interaction with media. The Embassy PAO helps achieve U.S. foreign policy objectives through information and cultural programs. He or she works actively with the host nation media, providing information on U.S. policy and actions, and reporting back to the U.S. host nation viewpoints and commentary. The PAOs are especially useful during humanitarian assistance operations and NEOs. During these events, it is vital that the Embassy and the military speak with one voice.

Regional Security Officer (RSO). The RSO supervises the Marine security guard detachment and the contract guards. The RSO is also a liaison with local police and an expert on force

protection in likely host nation situations – and therefore is a valuable point of contact. The RSO sets security standards for the Embassy and for the off-site location of embassy personnel and personnel for which the Embassy is responsible.

Refugee Coordinator. If stationed at the Embassy, this official will be especially helpful in dealing with non-governmental organizations (NGOs) and private voluntary organizations (PVOs) that may be involved in the crisis at hand. This person monitors the activities of various refugee agencies, such as the United Nations High Commission on Refugees (UNHCR) and the International Committee for the Red Cross (ICRC). See also the chapter on *Political Asylum and Temporary Refuge*.

Legal Attaché (LEGAT). A LEGAT is a Federal Bureau of Investigations (FBI) agent in U.S. embassies or smaller sub-offices in 75 key cities around the globe, providing coverage for more than 200 countries, territories, and islands. Each office is established through mutual agreement with the host country. They have no law enforcement function in the country where assigned but provide a conduit into the FBI, other federal law enforcement agencies, Interpol, foreign police and security officers in Washington, and national and international law enforcement associations.

Country Team

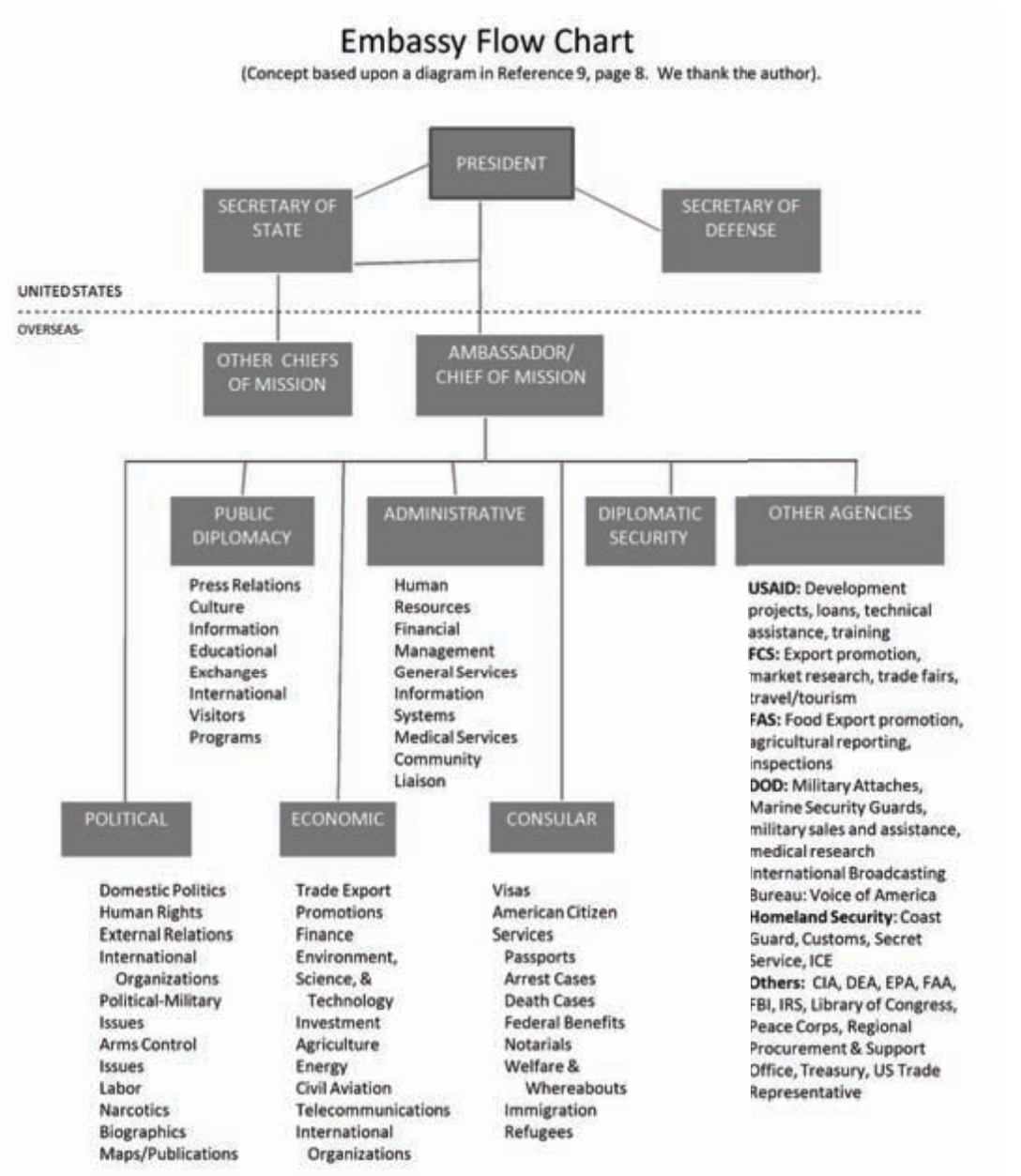
The country team is the principal means by which a diplomatic mission comes together as a cooperative, coordinated, and well-informed staff. Its composition is a function of many factors and is established at the discretion of the COM, but typical membership usually includes the ambassador, who serves as its head, the deputy chief of mission (DCM), the chiefs of the political and economic sections, the security assistance organization (SAO) (also known in some countries as the Office of Defense Cooperation (ODC) or joint United States military advisory/assistance group (JUSMAG)), the defense attaché office (DAO), and the U.S. Agency for International Development (USAID). Where there is a significant U.S. military presence, the senior U.S. commander is often a member.

The country team analyzes situations and formulates plans and strategies for executing U.S. foreign policy in-country. It also recommends policy to Washington. It provides the foundation for rapid interagency consultation, coordination, and action on recommendations from the field and effective execution of U.S. missions, programs, and policies. The relationship with military chains of command may be ad hoc. Unity of effort will be paramount. The country team concept encourages agencies to coordinate their plans and operations and keep one another and the COM informed of their activities.

U.S. Agency for International Development (USAID)

The majority of U.S. foreign economic and humanitarian assistance is managed by USAID. The USAID staff may be especially helpful in post conflict situations where part of the mission execution order is to restore law and order. For example, USAID may provide funds for the retraining of judges, prosecutors, and other judicial personnel, renovating courts, and funding police training. The USAID Administrator is usually designated as the

USG humanitarian assistance coordinator for emergency response. The Administrator is the most important person to deal with in attempting to fully coordinate a civil-military operations center (CMOC), discussed below. International organizations and NGOs appreciate the importance, especially economically, of the USAID Administrator. See also chapter entitled *Deployed Fiscal Law and Contingency Contracting*.



AIR OPERATIONS

Sovereignty over Aircraft

United States military aircraft are sovereign instrumentalities. When cleared to overfly or land in foreign territory, it is U.S. policy to assert that military aircraft are entitled to the privileges and immunities which are customarily accorded warships. United States military aircraft remain under exclusive U.S. jurisdiction, immune from foreign legal enforcement measures applicable to civil aircraft. Privileges and immunities include, in the absence of stipulations to the contrary, exemption from duties and taxation; immunity from search, seizure, and inspections (including customs and safety inspections); or other exercise of jurisdiction by the host nation over the aircraft, personnel, equipment, or cargo on board. Department of Defense aircraft commanders will not authorize search, seizure, inspection, or similar exercises of jurisdiction by foreign authorities. There is a new genre of "inspections" often referred to as "bio-security" to prevent the spread of harmful biological agents and pests to new areas. These inspections are not exceptions to the immunities discussed above and should not be authorized unless there is a specific agreement, between the United States and the host nation which provides differently.

With respect to foreign state aircraft (military or non-military) visiting the U.S., the U.S. practice is that U.S. authorities do not board or inspect without the consent of the commander of the aircraft. Should extraordinary circumstances arise in which boarding and inspection is necessary and consent to board the aircraft is refused, the aircraft will be required to depart the country immediately. Judge advocates should beware of occasional instances where representatives of U.S. agencies have not strictly adhered to these rules with regard to foreign military aircraft landing in the U.S.

Aircraft and Aircrew Clearances

Foreign clearance of U.S. international air operations is obtained through U.S. officials. Aircrews performing only aircrew duties do not require personnel clearance (special area, theater, or country). Overflight issues should be settled with the host nation, preferably, by an international agreement or an exchange of diplomatic notes; however, crew members performing additional official duties in a capacity other than as members of an aircrew must secure clearance in accordance with the appropriate country section of the DOD Foreign Clearance Guide.

Aircraft and aircrew clearance requests must contain the information listed on the individual country pages in the DOD Foreign Clearance Guide. The appropriate combatant commanders will be included as information addressees on all aircraft diplomatic clearance requests that involve distinguished visitor (DV) travel as either a passenger or crewmember. If the mission is operating under a blanket diplomatic clearance or when no diplomatic clearance is required, an advisory message with DV information will be sent to the area combatant commander before the mission operation. The provisions of the DOD Foreign Clearance Guide apply to DOD personnel who are U.S. citizens. In instances where U.S. military activities propose to use third nation personnel as crewmembers for missions

where blanket clearances exist or no clearance is required, the military activity must first obtain approval of the American Embassy or DAO in the country concerned (see paragraphs dealing with personnel clearances below for clearances of non-aircrew; see also discussion below under Personnel Clearances).

Payment of Fees

Overflight or Air Navigation Fees. United States policy, based upon international custom and practice, is that state aircraft operated in or through the airspace of another state will not pay overflight or air navigation fees. The USG applies this policy to all military and other government aircraft owned and operated by the USG. The USG does not impose such fees on foreign state aircraft visiting or transiting the U.S.

Landing Fees. United States policy is that flights of aircraft operated by sovereign states in another state will not be required to pay landing or parking fees (or other use fees) at government airports. Such aircraft will pay reasonable charges for services requested and received whether at governmental or non-governmental airports. Implicit in this position is a willingness to pay landing and parking fees at commercial airports, if required to do so. Aircraft operating pursuant to the terms of a specific bilateral or multilateral agreement will be governed by the terms of that agreement. Levying these fees against another government is generally viewed as akin to the imposition of a tax. Under international custom and practice, states do not impose taxes upon one another. Whether a particular airport is governmental or commercial is a matter determined by a DOS/DOD interagency working group. The designations are reported in the DOD Foreign Clearance Guide.

Department of Defense Contract Aircraft

The normal practice of the USG is not to designate DOD contract aircraft as state aircraft. Therefore DOD contract aircraft are subject to the regime applicable to international civil aviation. However, many SOFAs, base rights, and other agreements grant DOD contract aircraft the same rights of access, exit, and freedom from landing fees and similar charges, enjoyed by U.S. military aircraft. These agreements do not have the effect of declaring DOD contract aircraft to be military aircraft or any form of state aircraft.

In certain circumstances, the DOS political-military advisor may declare contract aircraft as a state aircraft. If the aircraft is engaged in a humanitarian or other mission using civilian aircraft solely dedicated for use by or on behalf of USG and there is a compelling anti-terrorism or force protection issue, DOS might be prepared to declare it a state aircraft. Judge advocates should remember, however, that although DOS may be prepared to so designate aircraft, the receiving state may be unwilling to allow entry into its airspace with that condition.

OTHER LEGAL ISSUES

Personnel Clearances

The DOD Foreign Clearance Guide answers most questions pertaining to clearances for DOD personnel and non-DOD personnel traveling under DOD sponsorship. Generally, standard requirements do not apply to travel by personnel in unified or overseas service commands to units of those commands, intra-theater troop movements, personnel deploying to support formally-approved exercises, personnel on leave and aircrew who perform aircrew duties exclusively (see paragraph dealing with aircrew clearances above). Exceptions may apply to general officers and Senior Executive Service (SES) employees. The Personnel Clearances Section of the DOD Foreign Clearance Guide should be consulted for the country in question and all intervening stops.

There are three categories of travel clearance to be aware of: special area, theater, and country. Ensuring the traveler has the appropriate travel clearance is the responsibility of the traveler, his or her unit, and the clearance granting authority. All official travelers must obtain one or more of these clearances. Again, individual country pages in the DOD Foreign Clearance Guide will specify these requirements. The DOD policy is that the number of visits and visitors to overseas areas shall be minimal, and be made only when their purpose cannot be satisfied by other means. Visits shall be arranged with a minimum requirement on equipment, facilities, time, services of installations, and personnel being visited. When practicable, trips to the same general area and in the same general period shall be consolidated.

Special Areas. The DOS and the Office of the Under Secretary of Defense for Policy (OUSD(P)) designate certain countries as "Special Areas." Requests for special area clearance (or notification) should be submitted when necessary concurrently with country and theater clearance. See the DOD Foreign Clearance Guide for a current list of countries that require special area clearances.

Country Clearance. This is clearance required from the U.S. Embassy through the defense attaché's office, the office of military/defense cooperation, also known as the ODC, and the military advisory and assistance group (MAAG), etc., as appropriate.

Theater Clearance. This type of clearance is required for visits to overseas military activities on matters pertaining to the mission of the combatant command. Clearance is granted by the combatant command or may be delegated to the component commands, subordinate commands, special agencies, or units to be visited. Clearances may be required or assumed. Special rules may apply and are listed on the individual country pages in the DOD Foreign Clearance Guide. The DOD Foreign Clearance Guide also contains medical requirements and special service requirements such as those that may pertain to contact with foreign representatives, force protection, etc.

Weapons

Deployment orders address the issue of weapons. In the NATO SOFA, and therefore the Partnership for Peace SOFA (see chapter entitled *Status of Forces Agreements* (SOFAs) for full citations), the general rule is: members of a force may possess and carry arms, on condition that they are authorized to do so by their orders. Authorities of the sending state give "sympathetic consideration" to requests from the receiving state concerning this matter. It is likely that U.S. forces have the right to police within the installation where the forces have been allowed to operate. However, carrying weapons may be a point of sensitivity for the host nation, especially if U.S. forces are operating from a base where the receiving state also operates. Generally, outside of the installation where the U.S. operates, police authority is the province of receiving state authorities unless there is an agreement modifying that rule. Weapons are permissible aboard U.S. military aircraft if the proper U.S. authority has so authorized, but may not be taken off the aircraft without the appropriate agreement with the receiving state authority.

Customs and Immigration

Customs and immigration (entry) requirements are controlled by host nation laws unless there is an international agreement affecting these matters. Most SOFAs have provisions for expedited entry, without passports or visa requirements, for military personnel and for waiver of import and export duties, among other matters. In addition, there often is a supplemental agreement to the SOFA that provides further detailed exemptions and authorizations, such as for civilian contractors. There may also be a number of bilateral agreements with the host nation on specific matters, such as tax relief, military postal operations, or others.

DEALING WITH FOREIGN OFFICIALS

United States military personnel are often required to coordinate with host nation officials in order to accomplish their military missions. This can involve local national officials on relatively minor matters, or it may require interface with national level host nation officials. National level contacts are normally conducted by the U.S. Embassy. However, even seemingly minor interactions with local level officials may establish precedents that higher authorities would not want. Care should be taken to ensure compliance with U.S. policies and agreements for the country involved. It is always a good idea to establish a Liaison Officer (LNO) at the Embassy in each country that an operation may affect. By way of illustration, the arrangements adopted in a number of countries are detailed below.

In Australia, official government-to-government contact is handled through the U.S. Embassy in Canberra. When it is necessary to engage Australian officials, contact should be made with the Defense Attaché's Office (DAO) or the Office of the Staff Judge Advocate for the 337th Air Support Flight (337 ASUF/JA). The Defense Attaché is the senior U.S. military officer in Australia and his office represents U.S.PACOM in relations with the government of Australia. The 337 ASUF/JA is the office responsible for administering and

supervising the application of the SOFA between the United States and Australia for all the services.

In Japan, the Commander, 5th Air Force is dual-hatted as Commander, U.S. Forces Japan (COMUSFJ). As COMUSFJ, this position is the principal point of contact between the Government of Japan and U.S. forces in Japan, as well as the principal U.S. military contact with the U.S. Embassy and other USG agencies in Japan. Weekly meetings of the Joint Committee are the principle forum for the conduct of routine business.

In Korea, the Commander, U.S. Forces Korea, USFK, conducts all relations above the installation level with the Government of Korea. Monthly meetings of the US-ROK Joint Committee are the forum where most routine business is conducted.

In Germany, official interface with the German (Federal) Government is mainly governed by the Federal Republic of Germany Supplementary Agreement to the NATO SOFA. As a rule official contact is made through the U.S. Embassy at Berlin. Various sending states working groups have been established to deal with particular issues, e.g., accommodations, environment, construction, indirect contracting, labor, hazardous cargo, customs, technical expert issues, and others.

In Spain, all official interface with the Spanish Ministry of Defense (MOD) or Spanish military officials above base-level is conducted through the U.S.-Spain Permanent Committee in Madrid.

In Greece, all official interface with the Greek Ministries of Foreign Affairs and Defense above base-level is conducted through the U.S.-Greek Joint Commission in Athens.

In Italy, official government-to-government contact is handled via the U.S. Embassy in Rome. Commanders and judge advocates should contact, as appropriate, the Office of Defense Cooperation (ODC) and the U.S. Sending State Office for Italy (USSSO). The USSSO works for and reports to European Command (EUCOM-ECJ4) and oversees all matters related to permanent or contingency basing of U.S. Forces in Italy. The latter is a multiservice legal office working under the technical supervision of EUCOM JA (ECJA) and is the office responsible for administering and supervising the application of the NATO SOFA and other international agreements in Italy.

In the Netherlands, contact with the Dutch government is generally directly with the authorities. On occasion the matter is raised with the Dutch MOD especially if the issue involves the payment of fees and the U.S. force is seeking the Dutch government to bear the cost.

In Norway, there are no formal Norwegian rules governing interface between U.S. and Norwegian government officials. When it is necessary to engage Norwegian officials on any substantive matter of importance, questions or concerns are addressed directly to the Norwegian MOD via their legal counsel.

In Turkey, the Defense and Economic Cooperation Agreement, or DECA, governs official interface between the U.S. Forces and the Turkish General Staff (TGS). Article III to Annex Five to Supplementary Agreement Three of the DECA, states that the Chief, Office of Defense Cooperation Turkey is the single point of contact with the Turkish General Staff regarding all U.S. military organizations and activities in Turkey. Information required to be provided to the TGS will be provided through the ODC. Of course, at the installation level, the U.S. commander is expected to have close ties with his or her Turkish counterpart, and they are frequently able to solve myriad issues at their level. However, all communication above that level is conducted by the ODC.

In the UK, interface with the UK MOD is directly to an Assistant Director of the Air Staff. However, military issues involving other UK departments (e.g., Customs & Excise, Ministry of Agriculture Fisheries and Food) will frequently be directly to those departments while in coordination with MOD.

NON-GOVERNMENTAL ORGANIZATIONS (NGOS) AND PRIVATE VOLUNTEER ORGANIZATIONS (PVOS)

During complex humanitarian emergencies, both United Nations (UN) and non-UN international organizations, public and private, have typically been working in the affected area for months or even years. They may be an invaluable source of information. These organizations behave quite independently.

Once in the field, a judge advocate may find an organization called the humanitarian operations center (HOC). The HOC is primarily an international and interagency policy making and coordinating body that seeks to achieve unity of effort among all participants in a large humanitarian operation. Another organization is the civil-military operations center, or CMOC. The CMOCs are flexible in size and composition. A commander at any echelon may establish a CMOC to facilitate coordination with other agencies, departments, organizations, and the receiving state government. The way a commander makes use of a CMOC depends on the situation. Commanders have used CMOCs to reach out to receiving state nationals as well as to NGOs and PVOs. The CMOCs can serve as a forum for airing problems as well as a vehicle for shaping expectations regarding what forces in the field realistically can and cannot do. As a legal professional, a judge advocate may be called upon to act as a liaison with a HOC or CMOC and to deal with UN agencies, international police task force headquarters, and local judicial authorities. A judge advocate may also be asked to draft important agreements with the understanding that such agreements may be negotiated or concluded only with proper authority.

REFERENCES

1. Vienna Convention on Diplomatic Relations, open for signature 18 April 1961, 23 U.S.T. 3227, T.I.A.S. 7502, 500 U.N.T.S. 95 (entry into force 24 April 1964 for U.S. 13 December 1972)
2. Vienna Convention on Consular Relations, adopted 24 April 1963, 21 U.S.T. 77; T.I.A.S. 6820; 596 U.N.T.S. 487 (entry into force 19 March 1967, for U.S. 24 December 1969)
3. Goldwater-Nichols Department of Defense Reorganization Act of 1986, P.L. 99-433 (1986) (codified in Title 10, U.S. Code)
4. DOD 4500.54-G, *Foreign Clearance Guide* (find at https://www.fcg.pentagon.mil/
5. JP 3-57, *Civil Military Operations*, 8 July 2008
6. JP 3-08, *Interagency, Intergovernmental Organization, and Nongovernmental Organization Coordination During Joint Operations, Vol I*, 17 March 2006
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CHAPTER 39

AIR RESERVE COMPONENT ISSUES

BACKGROUND

The Air Force Reserve and Air National Guard of the U.S. (ANGUS) make up the Air Reserve Component (ARC) and are an integral part of the Air Force total force. The Air National Guard (ANG) is the state or territorial militia. The ARC is a major participant in Air Expeditionary Wings (AEWs) and is frequently deployed in support of training and contingency missions. As a result, a deployed judge advocate must understand the structure of the ARC and some of the unique legal issues that may arise with ARC forces.

STRUCTURE OF THE AIR RESERVE COMPONENT

There are several different components of the ARC. In any deployed situation, only members of the Selected Reserve would be involved. The Selected Reserve includes Category A Unit Reservists, Category B Individual Mobilization Augmentees (IMA), and the Air National Guard of the United States (ANGUS). Category A reservists belong to organized reserve units and generally (but not always) train and mobilize as a unit. Category B (IMA) reservists, in contrast, train with active duty Air Force units. Their role is to individually augment or backup active duty forces during war or national emergency. It is important to distinguish between the ANGUS and the ANG. The ANG is the modern form of the citizen militia. The ANG and ANGUS are two completely separate legal organizations composed of identical personnel. Members can only serve in one of these two organizations at any given time.

The ANG is the state or territorial militia, made up of federally recognized units in all states, the District of Columbia and the territories of Guam, Puerto Rico, and the Virgin Islands. Air National Guard members perform training duty under Title 32 and can only perform Title 32 duty in the U.S. Each state ANG is available to the governor of that state for purposes ranging from counter-narcotic operations and state natural disaster assistance to quelling a domestic insurrection.

The ANGUS is an organization separate from the ANG, all of whose members are members of the ANG, and is a reserve component of the USAF. It consists of federally recognized units and their members who are activated or mobilized. Air National Guard members become members of the ANGUS when they enter Title 10 active duty status by various methods of activation or mobilization. For members of the ANG to be able to perform duty overseas, they must first become part of the ANGUS under one of the several ways ANG members are brought onto active duty (discussed below). The ANGUS members only

perform duty under Title 10. As a reserve component of the Air Force, the ANGUS is a full partner in the defense of the U.S. and the worldwide projection of U.S. military strength.

MOBILIZATION AND ACTIVATION OF AIR RESERVE COMPONENT MEMBERS

Members of the ARC are brought onto active duty by various methods, depending on the number of people needed, the length of the tour, whether entry onto active duty is voluntary or involuntary, and the nature of the operation to be supported (i.e., declared war, national emergency, operational augmentation, etc.).

Full Mobilization

10 U.S.C. 12301(a). During time of war or national emergency declared by Congress, any unit and any member not assigned to a unit organized to serve as a unit may be involuntarily ordered to active duty for the duration of the war and for six months thereafter. No limit exists for the number of members that can be activated. Activated members become part of the regular Air Force.

Partial Mobilization

10 U.S.C. 12302(a). During a time of national emergency declared by the President, any unit and any member not assigned to a unit organized to serve as a unit may be involuntarily ordered to active duty for up to 24 months. The number of members activated at one time is limited to less than one million.

Presidential Reserve Call-Up (PRC) (10 U.S.C § 12304 (a) & (b))

The President may augment the active duty force for : (1) any operational mission; or (2) to provide assistance in responding to an emergency involving the use or threatened use of a weapon of mass destruction, or a terrorist attack or threatened terrorist attack in the United States that results, or could result, in significant loss of life or property. When augmenting the active duty force, any unit, any member not assigned to a unit organized to serve as a unit, and certain members of the Individual Ready Reserve (IRR) may be involuntarily ordered to active duty for up to 365 days, though the length of the tour could be for less time. The number of members activated at one time under PRC is limited to less than 200,000, of whom not more than 30,000 may be members of the IRR. 10 U.S.C. § 12304. The IRR is a manpower pool consisting of individuals who have had some training, who have served previously in the Active Component or in the Selected Reserve, and have some period of their military service obligation remaining.

15-Day Call-Up

10 U.S.C. § 12301(b). A designee of the Secretary of the Air Force (SECAF) may order any unit and any member not assigned to a unit organized to serve as a unit to active duty involuntarily (but with the consent of the governor for ANG units and personnel) for no more than 15 days per year. There is no statutory numerical limit on this provision. It is

rarely used and appears to be related to involuntary activation to satisfy annual training requirements.

Volunteers

10 U.S.C. § 12301(d). Any ARC member may be ordered to active duty or retained on active duty with his or her consent (and, for ANG members, that of the governor or commanding general for territories and the District of Columbia). There is no statutory limitation on the number of members who may be serving as volunteers on active duty at any one time. In the absence of Presidential or Congressional action ordering reservists to active duty involuntarily, the overwhelming majority of active duty service performed by reservists is voluntary, i.e., these reservists volunteer to be placed on active duty orders. Once placed on such orders, a reservist remains on active duty (largely indistinguishable from a regular USAF member) until released (the orders terminate or the reservist is otherwise released by proper authority).

STOP-LOSS DURING ACTIVATION OF AIR RESERVE COMPONENTS

Whenever reservists are serving on active duty under the authority of 10 U.S.C. § 12304 (Presidential Reserve Callup Authority), § 12302 (Partial Mobilization), or § 12301 (Full Mobilization), the President may exercise authority to suspend laws relating to promotion, retirement, or separation of any member of the armed forces determined to be essential to the national security of the U.S. ("laws relating to promotion" broadly includes, among others, grade tables, current general or flag officer authorizations, and E8/E9 limits). Any suspension under this "stop-loss" authority will terminate when reservists recalled under sections 12304, 12302, or 12301 are released from active duty, or when the President determines that the circumstances for ordering reservists to active duty no longer exist, whichever is earlier. 10 U.S.C. § 12305.

OPERATIONAL CONTROL (OPCON) AND ADMINISTRATIVE CONTROL (ADCON) OF ACTIVATED OR MOBILIZED AIR RESERVE COMPONENTS

There is no distinction between regular Air Force unit personnel and ARC forces assigned or attached to a combatant commander for purposes of operational control (OPCON). The combatant commander will normally delegate OPCON of all assigned and attached Air Force forces to the Commander of Air Force Forces (COMAFFOR). AFDD 2, *Operations and Organization,* 3 April 2007, p.37; *see also*, AFI 38-101, para. 4.2.10.1. The level of administrative control (ADCON) exercised over ARC forces by a COMAFFOR (or other commander) through the service's ADCON authority depends on the statutory authority under which ARC members are brought onto active duty. Due to overlapping areas of ADCON among commanders, it is important that written orders clearly delineate the commander's ADCON authority and responsibility. AFDD 2 *Operations and Organization,* 3 April 2007, p. 39.

Operational control is the authority exercised by a commander over all aspects of military operations and joint training necessary to accomplish missions assigned to the command. It

primarily focuses on warfighting tasks and includes: organizing and employing forces to engage an adversary; assigning tasks and designating military objectives; and developing and executing an overall aerospace strategy in conjunction with superior commanders. Operational control does not, in and of itself, include authoritative direction for logistics or matters of administration, discipline, internal organization or unit training. Operational control flows from the National Command Authorities through the combatant commanders to subordinate warfighting organizations, such as joint task forces or functional component commanders. JP1-02 p 286; *See also,* AFDD 2, *Operations and Organization,* 3 April 2007, Chapters 3-4.

Administrative Control is the authority exercised over subordinate organizations regarding administration and support -- normally a service responsibility (although combatant commanders do possess some administrative authority). Administrative control includes: organization of forces; personnel management; control of resources and logistics; training, readiness, mobilization, and discipline. Administrative control flows from the National Command Authorities to the SECAF, through the Chief of Staff of the Air Force, to Major Commands and Numbered Air Forces to a unit. A commander exercises complete ADCON over all assigned forces and specified ADCON over all attached Air Forces. For attached forces, complete ADCON generally remains with the commander to whom they are assigned. JP1-02 p.11; AFDD 2 *Operations and Organization,* 3 April 2007, pgs 36-38.

When ANG members enter Title 10 active duty, they are relieved of duty with their state ANG units and become part of the ANGUS, assigned directly to the Air National Guard Readiness Center (ANGRC) or to a subordinate ANGRC unit created for the purpose of deploying forces in support of an active duty mission. The Commander, ANGRC, as head of the ANGUS, exercises complete ADCON over all units and members in Title 10 status (except those brought on active duty through full mobilization) by virtue of the fact that they are assigned to ANGRC. The ANGRC Commander makes forces available to a supported active duty commander by attaching them to the gaining organization within the area of responsibility (AOR). Similarly, the Commander of the Air Force Reserve Command (AFRC/CC) retains complete ADCON over all AFRC members activated for use in contingencies or other USAF operations (except for those units and members brought on active duty through full mobilization).

AFDD 2 *Operations and Organization,* 3 April 2007 provides authoritative guidance for organizing Air Force forces for operational employment. This directive establishes the COMAFFOR as the principal USAF commander supporting an operational mission. To support the operational mission, the COMAFFOR uses assigned forces, such as subordinate wings, and forces that are attached by other USAF organizations. The COMAFFOR exercises complete ADCON over assigned forces and specified ADCON over attached forces. The specified ADCON exercised by the COMAFFOR over attached forces includes the following responsibilities: designating specific units for operational use; organizing, training, equipping, and sustaining forces for in-theater missions; providing force protection; and maintaining discipline. For ARC forces, the ANGRC and AFRC retain all other ADCON responsibilities, such as Reserve Component activation, inactivation, partial mobilization, and length of tour. Additionally, inter-theater forces, such as inter-theater

airlift and forces transiting another COMAFFOR's AOR, will be subject to the ADCON authority of the respective COMAFFOR while transiting that COMAFFOR's AOR, but only for administrative reporting and force protection requirements. AFDD 2, Appendix B, *Reserve Component Implementation.*

G-Series orders are used to stand up, inactivate, attach, and redesignate units. They are also used to appoint commanders of those units and identify specified ADCON given to the commander. When deploying forces, ANGRC and AFRC create detachments through the use of G-Series orders and designate commanders of those detachments (using an AF Form 35). As with deploying active duty units, when an ARC unit is deployed in support of a contingency, there will be a G-Series order establishing the unit and attaching it to an active duty unit under the COMAFFOR. The G-Series order is prepared by the major command (MAJCOM) of the service component. Subordinate units, normally beginning at the numbered air force (NAF) level, are directed to appoint commanders of the expeditionary units using an AF Form 35. Note that most commanders of expeditionary units must be appointed since they cannot assume command because they are only attached, not permanently assigned, to that unit.

As an example, during Operation ALLIED FORCE, ANGRC created Detachment 15 (Det 15) and appointed a Commander. Elements of three ANG A-10 units were assigned to Det 15. The G-Series order, prepared by HQ USAFE, attached Det 15 to the 52nd Expeditionary Operations Group (52 EOG), an operational unit established by USAFE under the 52nd Fighter Wing (52 FW) at Spangdahlem AB, Germany. The ANGRC detachment commander was also appointed commander of 52 EOG. The result was that the single commander had ADCON in his role as ANGRC Det 15 commander, and specified ADCON in his role as 52 EOG/CC. If less than a full unit deployed, the deploying forces could be attached to an expeditionary unit with an active duty commander exercising specified ADCON over the ARC forces.

Deployed ARC members are commanded by two individuals: (1) the commander of the unit to which they are assigned and (2) the commander of the unit to which they are attached while activated or mobilized. Disciplinary authority is shared concurrently between the commander of an ARC member's unit of assignment (complete ADCON) and the commander of the member's unit of attachment (specified ADCON). Coordination is therefore required between the two commanders concerning which commander will take disciplinary action. See AFI 51-202, para. 3.7. (prior coordination with parent organization commander is required for nonjudicial punishment (NJP) of attached ARC forces).

COMMAND OF "REGULAR" ACTIVE DUTY UNITS AND MEMBERS BY ARC PERSONNEL

Any active duty organization, preexisting or newly created, to which Air Force component members are attached, is considered to be a regular Air Force unit. However, ARC officers cannot command regular Air Force units except in two situations. The first situation is when they are on extended active duty (EAD) for 90 days or more. AFI 51-604, para. 4.2.8. The second situation is when COMAFFOR authorizes ARC officers not on EAD to

command regular Air Force units operating under COMAFFOR's authority. This delegation of authority is to no lower than the commander of an AEW for forces operating under the AEW. AFI 51-604, para. 4.2.8.1. If an ARC officer is appointed to command a regular Air Force unit, the ARC commander has disciplinary authority, under specified ADCON over the regular Air Force and all other members attached to their unit, as part of their command authority.

The length of the tour specified in the ARC officer's individual orders determines whether the ARC officer is on EAD for purposes of command over regular Air Force units and personnel. As long as the orders bringing ARC officers onto active duty are for 90 days or more, they are eligible to command. AFI 51-604 at paragraph 4.2.8. This eligibility to command begins on the first day of the active duty period. OPJAGAF 1998/117, 17 November 1998. If the tour of an ARC commander originally brought onto active duty for more than 90 days would later be shortened to less than 90 days, all command actions taken since their first day of command are unaffected by the change in the length of the individual tour. AFI 51-604, para. 4.2.8. Reserve officers restricted from command, as discussed above, retain the power to give lawful orders and exercise all other normal incidents of officership.

INTERNATIONAL AGREEMENTS BY AIR RESERVE COMPONENTS

The ANG in their state militia capacity (Title 32) and the National Guard Bureau (the liaison organization for the Departments of the Army and the Air Force) have no authority to negotiate and conclude international agreements. When the ANGUS deploys overseas in Title 10 status under the ANGRC, the ANGRC is a field operating agency (FOA) of the Air Force and the AFRC is a MAJCOM. Under AFI 51-701, para. 1.1.4, MAJCOMs and FOAs are delegated limited authority to negotiate and conclude international agreements. However, it should be stressed that, notwithstanding a delegation of authority, any organization, unit or agency of the Air Force seeking to exercise such authority is instructed to do so by coordinating with interested parties. DODD 5530.3 and AFI 51-701. Therefore, the AFRC and ANGRC should exercise this authority only in coordination with the Air Force theater commander (i.e., USAFE, PACAF, and AFSOUTH). They should also discuss with AF/JAO.

MILITARY JUSTICE MATTERS INVOLVING AIR RESERVE COMPONENT MEMBERS

Jurisdiction

Members of the Air Force Reserve are subject to disciplinary action under the Uniform Code of Military Justice (UCMJ) when serving on active duty and inactive duty for training. Members of the ANGUS are subject to the UCMJ when serving in Title 10 active duty status. UCMJ Art. 2(a)(3); R.C.M. Rule 202 at Discussion (1) & (5) and AFI 51-201, para. 2.9.1. This jurisdiction begins at 0001 on the "reporting date" of the orders placing the member of the Reserves or ANGUS on active duty. These orders are self-executing and duty hours and traveling times are irrelevant. (*But see*, *United States. v. Phillips*, 58 M.J. 217

(2003), where the Court of Appeals for the Armed Forces found UCMJ jurisdiction over an Air Force reservist for criminal acts committed on the travel day prior to the commencement of her active duty orders). For Air Force reservists serving on inactive duty for training, this jurisdiction begins and ends with each duty period, which is four hours in length. AFMAN 36-8001, para. 4.9.

Retaining ARC Members on Active Duty for Disciplinary Reasons

If a member of the Reserves or ANGUS commits an offense under the UCMJ while on active duty, he or she can be involuntarily retained on active duty pending trial by special or general court-martial. AFMAN 36-8001, para. 1.8; R.C.M. Rule 202 at Discussion para. (5) and AFI 51-201, para. 2.9.2. The member cannot be retained on active duty for summary court-martial or NJP. R.C.M. Rule 204 (b)(2).

Recalling ARC Members to Active Duty for Disciplinary Reasons

If a member of the Reserves or ANGUS is no longer on active duty when a UCMJ offense is discovered, he or she can be involuntarily recalled to active duty as necessary for an Article 32 investigation, special or general court-martial, or both, unless the member's military status has been completely terminated (i.e., discharge). UCMJ, Art 2 (d); R.C.M. Rule 204(b); AFI 51-201, para. 2.9.2. A member of the Reserves or ANGUS may not be recalled to active duty solely to impose NJP, or for trial by summary court-martial, although MAJCOM commanders or equivalents may grant waivers to this restriction in appropriate cases. AFI 51-201, para. 2.9.3. Nonjudicial Punishment or summary court-martial may be initiated, however, during an Air Force Reserve member's next period of active duty or inactive duty for training. AFI 51-201, para. 2.9.3. See also the discussion of Military Extraterritorial Jurisdiction Act (MEJA), AFI 51-210, para. 2.7.3.

Recall Authority

An ARC member can be recalled to active duty for committing a UCMJ offense while on active duty or inactive duty for training by the following:

1. The General Court-Martial Convening Authority (GCMCA) for the regular component unit to which the member is attached for training purposes;

2. The GCMCA for the regular component unit in which the member performed duty when the offense occurred;

3. The GCMCA of the regular component host unit, as designated in the applicable host-tenant support agreement, or as otherwise specified in AFI 25-201, if the member is assigned to a reserve component unit for training purposes, or was attached to such a unit when the offense occurred; or

4. AFRC/CC, 4 AF/CC, 10 AF/CC, or 22 AF/CC for members assigned or attached to their respective commands. AFI 51-201, para. 2.9.4.

Limitations on Confinement or Restrictions of Liberty for Recalled ARC Member

An ARC member recalled to active duty for court-martial may not be sentenced to confinement or be required to serve a punishment consisting of any restriction on liberty during the recall period of duty without authorization from the Secretary of the Air Force (SECAF). UCMJ Art. 2(d)(5); AFI 51-201, para. 2.9.5. Requirements for a request to the SECAF are contained in AFI 51-201, paragraph 2.9.5. Unless SECAF's approval is obtained, punishment of restriction to specified limits may be imposed only during periods of inactive duty for training or during active duty ordered for routine (non-disciplinary) purposes. AFI 51-201, para. 2.9.5.

LINE OF DUTY (MISCONDUCT) DETERMINATIONS FOR AIR RESERVE COMPONENT MEMBERS

Since most ARC members only serve on active duty for limited periods, it is important to be aware of the need for line of duty (LOD) determinations involving ARC members. Line of duty determinations play a key role in establishing an ARC member's eligibility for military medical/dental care and possible incapacitation pay and allowances. 37 U.S.C. § 204(g); AFI 36-2910, para. 1.2.6 and 1.2.7. Air Reserve Component members are not entitled to pay and allowances, medical benefits, or incapacitation pay if it is determined that an injury, illness, or disease is the result of the member's gross negligence or misconduct. 10 U.S.C. § 1074a (c), 10 U.S.C. 1207 and 37 U.S.C. § 204(i)(3). Even if an LOD determination is to be conducted by an ARC member's parent unit, it is important that the unit to which the ARC member was attached at the time of the incident, coordinate with the parent unit, to ensure that the parent unit receives complete information for the LOD determination.

Line of Duty determinations are needed for ARC members who die or incur/aggravate an injury, illness, or disease while performing active duty, active duty for training, inactive duty for training, or traveling directly to or from the place where the members perform their duty. AFI 36-2910, para. 1.4.2. An LOD determination is necessary any time a member of the ARC has a disease or injury which requires medical treatment, regardless of the ability to perform military duties. AFI 36-2910, para. 1.5.4. In addition, an LOD should be performed if it is likely that the ARC member will apply for incapacitation pay.

The medical officer or facility may make an administrative determination to document an ARC member's medical condition that is considered existing prior to service (EPTS) and not service aggravated or a minor in-line-of-duty condition if there is no likelihood of permanent disability, hospitalization, continuing medical treatment, or a request for incapacitation pay. The military medical officer makes an administrative determination by finding the member's condition to be in line of duty and noting this in the member's medical record. If an administrative determination is made, no further action is required. AFI 36-2910, para. 3.4.2.

An informal LOD, AF Form 348, rather than an administrative LOD, must be initiated in the following cases:

1. When there is a likelihood an ARC member may apply for incapacitation pay;

2. When the case involves service-aggravated EPTS medical conditions;

3. When the medical condition involves a disease process such as coronary artery disease, cancer, diabetes mellitus, etc.;

4. All cardiac conditions, including heart attacks, rhythm disturbances, etc.;

5. When the member has been hospitalized; or

6. When the member requires continuing medical treatment or treatment in a civilian hospital. AFI 26-2910, para. 3.4.2.1.

At the request of an ARC member's commander, an appointing authority may issue an interim LOD determination if an LOD determination cannot be finalized within 7 days of notification and it is possible that the member requires continuing medical care or is entitled to incapacitation benefits. AFI 36-2910, para. 2.5.1. An interim LOD determination should not be made if there is clear and convincing evidence showing an EPTS condition or it appears that misconduct was the proximate cause of the illness, injury, or disease. AFI 26-2910, para. 3.5.1.

A formal LOD is required to support a determination of "Not in Line of Duty." Also, the immediate commander will recommend a formal determination when the member's illness, injury, disease, or death apparently occurred: (1) under strange or doubtful circumstances, or due to the member's misconduct or willful neglect; (2) while the member was absent without authority; or (3) under circumstances the commander believes should be fully investigated. AFI 3.5.3.1 See Tables 3.1 – 3.4 in AFI 36-2910 to determine who is the Immediate Commander, Appointing Authority, Reviewing Authority, and Approving Authority for ARC members.

EMPLOYMENT AND REEMPLOYMENT RIGHTS OF AIR RESERVE COMPONENT MEMBERS

Members of the ARC are provided certain rights and protections regarding their civilian employers under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4301-4333. While the majority of legal issues related to USERRA involve reemployment rights, it is possible that USERRA-related issues will arise on deployment, for example, a member may learn that he or she has been terminated by his or her civilian employer while deployed on active duty. The following is a brief guide to USERRA-related issues that may arise. USERRA is a very powerful legal tool to protect the jobs and employment benefits of reservists who perform military duty, offering Department

of Labor, Merit Systems Protection Board, or state/federal court enforcement. More information regarding USERRA can be found at www.esgr.org.

Reemployment Rights

38 U.S.C. § 4312(a) & (b). Members of the ARC who are absent from their civilian jobs due to military service are generally entitled to reemployment, provided the cumulative length of the absence and all previous absences from that employer by reason of military service do not exceed five years. 38 U.S.C. § 4312 (a)(2). It is also necessary that the employer has been given written or oral advance notice of the absence by the employee or by an appropriate officer of the ARC. However, no advance notice is required if military necessity prevents giving notice, or the giving of notice is otherwise impossible or unreasonable.

Time Limits on Reporting Back to Work (38 U.S.C. § 4312(e))

Generally, to be eligible for reemployment rights under USERRA, a member of the ARC must apply for reemployment within the following time periods after being released from military service:

Service of 1 to 30 days: Beginning of next scheduled workday

Service of 31 to 180 days: No later than 14 days from redeployment

Service of 180 or more days: No later than 90 days from redeployment

The deadlines are extended for persons hospitalized or convalescing because of a disability incurred or aggravated during the period of military service.

Protection from Discharge (38 U.S.C. § 4316(c))

Upon reemployment with their employers, ARC members are protected from discharge without cause for one year after the date of reemployment if the person's period of military service was for more than six months (181 days or more), or for six months after the date of reemployment if the person's period of service was between 31 and 180 days. Persons serving for 30 or fewer days are not protected from discharge without cause. However, they are protected from discrimination because of military service or obligation.

Protection from Discrimination and Reprisals

An employer may not deny reemployment, retention in employment, promotion, or any benefit of employment due to membership in the ARC. 38 U.S.C. 4311(a). Additionally, an employer may not discriminate in employment, nor may they take any adverse employment action against an employee who has exercised a right provided for in USERRA. 38 U.S.C. 4311(b).

Retention of Benefits

While serving in the armed forces, a member of the ARC is entitled to retain certain benefits from their civilian employers. For example, USERRA provides for health benefit continuation for persons who are absent from work to serve in the military, even when their employers are not covered by the Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985 (employers with fewer than 20 employees are exempt from COBRA). 38 U.S.C. § 4317(a)(1). If a person's health plan coverage would terminate because of an absence due to military service, the person may elect to continue the health plan coverage for up to 18 months after the absence begins, or for the period of service (plus the time allowed to apply for reemployment), whichever is shorter. The person cannot be required to pay more than 102 percent of the full premium for the coverage. If military service is for 30 or fewer days, the person cannot be required to pay more than the normal employee share of any premium.

Loss of USERRA Benefits

Members of the ARC lose this entitlement to the benefits of USERRA if their military service terminates due to (1) separation with a dishonorable or bad conduct discharge, (2) separation and discharge under other than honorable conditions, (3) dismissal of a commissioned officer in certain situations involving court-martial or by order of the President in time of war, or (4) being dropped from the rolls due to being absent without authority for more than three months or due to being imprisoned by a civilian court. 38 U.S.C. § 4304.

REFERENCES

1. Uniform Code of Military Justice (UCMJ), 10 U.S.C. Chapter 47
2. 10 U.S.C. §§ 12301(a), 12301(b), 12301(d), 12302(a), 12304 and 12305
3. 37 U.S.C. § 204
4. Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§ 4301-4333
5. DODD 5530.3, *International Agreements*, 11 June 1987
6. AFDD 2, *Organization and Employment of Aerospace Power*, 17 February 2000 (http://www.doctrine.af.mil/Main.asp)
7. AFPD 10-3, *Air Reserve Component Forces*, 2 May 1994
8. AFI 25-201, *Support Agreement Procedures*, 1 December 1996
9. AFI 36-2910, *Line of Duty (Misconduct) Determination*, 4 October 2002
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CHAPTER 40

EXERCISES, EXPERIMENTS, WARGAMES, AND LESSONS LEARNED

BACKGROUND

Air Force mission success depends on readiness to perform assigned tasks satisfying Combatant Commander requirements. It is a service responsibility to "organize, train, and equip" forces for joint operations. Readiness is ensured by training, exercising, inspecting and evaluating mission essential tasks lists (METLs). Exercises, Experiments, Wargames (EEWs), and a collection of lessons learned all serve a function in ensuring readiness. In this light, JAG Corps personnel perform an important role, not only as legal advisors in the planning and support of such activities, but also as active participants in the EEWs themselves. The purpose of this chapter is to provide an orientation on EEWs and lessons learned from the perspective of JAG Corps personnel as potential subject matter planners and participants.

EXERCISE GUIDANCE

To the extent these activities are Air Force specific, the requirements for EEWs are laid out in Air Force Policy Directives and Instructions, primarily under the Operations series (i.e., AFI 10-XXX). It is important to check for major command (MAJCOM) or local supplements. For joint EEWs and lessons learned, the guidance is found primarily in Chairman, Joint Chiefs of Staff Instructions (CJCSIs). An excellent, comprehensive resource for this information is the Joint Doctrine Education and Information System (JDEIS) which can be accessed at https://jdeis.js.mil/.

TERMINOLOGY

Exercise. A military maneuver or simulated wartime operation involving planning, preparation, and execution. It is carried out for the purpose of training and evaluation.

Key Exercise. A major exercise which has the potential to impact Air Force doctrine, force structure and employment concepts and is published in the Air Force Key Exercise/Experiment and Wargame Events Schedule (AFKEWES).

Experiment. A technology transition mechanism used to develop and assess concept-based hypotheses to identify and recommend the best value-added solutions for changes in doctrine, organizational structure, training, material, leadership and education, people, and facilities required to achieve significant advances in future joint operational capabilities.

Wargame. A simulation, by whatever means, of a military operation involving two or more opposing forces, using rules, data, and procedures designed to depict an actual or assumed real-life situation.

Title 10 Wargame. A Service sponsored wargame, generally supported by participants from Joint Staffs, the Services and other organizations, which is used to explore futuristic issues impacting doctrine, force structure, and/or employment concepts.

Participants

Sponsoring Commander. The Chairman of the Joint Chiefs of Staff (CJCS), the Chief of Staff of the Air Force, the geographic or functional Combatant Commander, the MAJCOM commander, or any commander at any echelon who requests the exercise. This is the commander and staff that initially sets the basic exercise objectives and chooses the primary training audience.

Training audience or "Blue Forces." The people you want to train and exercise. Make sure that JA is explicitly included in the training audience.

Control Group or "White Cell." The people who run the scenario and play the roles of all people outside the training audience (e.g., DOD, IntraAgency, Combatant Commander, allies). They are charged with keeping the exercise on track and ensuring the training objectives are met. Good legal exercise play will require one or more JA representatives to serve on the White Cell.

Opposition Forces (OPFOR) or "Red Team." The part of the control group dedicated exclusively to playing the enemy. Often they are separate from the White Cell and are not privy to information on the scenario and inputs. The White Cell judge advocate may want to provide some "legal ammunition" to the Red Team to elicit a response from the training audience.

Evaluators. Although most exercises are "no fault," some may include evaluations of all or part of the training audience. There can be JA evaluators.

Observers. The bigger the exercise and the more convenient the location, the larger the number of observers. They can come from other Air Force units, sister services, other U.S. Government agencies, or allied armed forces. Higher echelons often send JA observers to big or important exercises. Even if all the JA billets are filled, you can sometimes get additional judge advocates or paralegals meaningful exercise experience by sending them as observers.

EXERCISE PLANNING CYCLE

A well-executed exercise is both realistic and seamless. The amount of manpower, time, and resources required to execute an effective exercise is substantial.

As a general rule, if you want to get meaningful training for the people within your functional specialty, you need to put substantial effort into planning exercise play involving your function. This is especially true for judge advocates and paralegals. Since our activities cut across all other functions, it is impossible to achieve effective JA exercise training without detailed coordination and advance planning.

Depending on its size and sophistication, the planning life-cycle for a typical exercise involves several events:

1. Initial Planning Conference. This first event generally develops detailed exercise objectives from the often vague objectives provided by the sponsoring commander. This is also when the scenario begins to be developed. It's a very good idea to get a judge advocate or paralegal involved at this initial conference to "lay down a marker" for JA participation.

2. Main Planning Conference. This is where most of the major decisions on objectives, players, scenario, and controllers get made. It is essential to attend and participate in this conference if you want to get meaningful JA exercise play.

3. Master Scenario Event List (MSEL, pronounced "measle") Conference. The MSEL Conference is where the real nitty-gritty detail of an exercise is accomplished. This is when a minute-by-minute script of scenario development and control group inputs is assembled. It is critical that either a judge advocate or paralegal attend this meeting or send detailed legal MSELs with a member from your unit. The MSEL Conference is the linchpin for ensuring meaningful functional specialty involvement in the exercise.

4. COSIN (pronounced "cousin") Conference. For especially big, complex, or high-visibility exercises, there will sometimes be a special conference to produce Control Staff (White Cell) Instructions (COSIN). Since each functional specialty that wants meaningful exercise play should be represented on the White Cell, this is an important event to attend.

5. Final Planning Conference. This is the conference where all the loose ends are tied up and all last minute details are worked out for the exercise. Although some late-breaking significant changes can be made at this conference, it's usually not the most important pre-exercise event.

EXERCISE FUNDAMENTALS

The variety in size, duration, subject matter, and training audience of military exercises is almost infinite--exercises include local squadron mobility or wing command post exercises up through large-scale joint and combined exercises like TEAM SPIRIT and BRIGHT STAR or flying exercises like RED FLAG.

Doctrinal Tenets.

According to CJCSI 3500.01E, the six basic tenets of effective joint training--including exercises--are:

1. Rely on joint doctrine. Stick to the basic rules so we all play from the same music. This goes for Air Force-only exercises, too.

2. Commanders are the primary trainers. Commanders are responsible for the readiness of their assigned forces. No one knows the needs of a unit better than its commander.

3. Focus on assigned missions. Prepare efficiently by training for the real-world tasks you've been assigned. Time, manpower, and resources are short, so use them wisely.

4. Train the way you intend to fight. Practice what you need to know and do under combat conditions. The time to learn is not when the bullets are flying.

5. Centralize your planning, decentralize your execution. Determine centrally what objectives to train to, then let subordinate commanders develop training appropriate to their units' needs.

6. Link training to Readiness Assessment. Commanders and their staff will use joint training assessment data to support their readiness assessment for the Department of Defense Readiness Reporting System (DRRS) program. Once training assessments are approved in the Joint Training Information Management System (JTIMS), the assessments are then provided to DRRS and made available to support overall readiness assessment.

Air Force Exercise Planning Guidelines.

The basic Air Force instruction on exercise planning, AFI 10-204, *Readiness Exercises and After Action Reporting*, gives some good general guidelines for planning and execution of exercises for Air Force units at all echelons. These guidelines include:

1. Prioritize time and resources. The pecking order for exercises is fairly straightforward: Joint Chief of Staff (JCS), Combatant Commander, Air Force, other services, other defense agencies, MAJCOMS.

2. "No-fault" conditions. In most circumstances, exercises should be "no-fault," meaning no ranking or grading of units. This minimizes the "gaming" effect that haunts Operational Readiness Inspections (ORIs) and other evaluations and allows the commander to identify and correct readiness deficiencies.

3. Train the way we fight. Use real-world conditions as much as possible, minimize artificialities, and don't wish away operational constraints like force security and logistics support.

4. Coordinate with other exercises. To the greatest extent possible, always seek to coordinate or "piggyback" MAJCOM, numbered air force (NAF), or even unit exercises with other exercises mandated by higher echelons (e.g., JCS, Combatant Commanders, or Air Force exercises). This gives added realism and minimizes stretching scarce manpower and resources too thin.

5. Make it relevant. There is no use practicing skills that are not needed for assigned missions. Ensure skills across the full spectrum of possible mission taskings are exercised regularly.

6. Train to objectives. Plan the mission-related objectives we want to achieve for every exercise and ensure that scenarios, inputs, and player participation are related to achieving those objectives.

Wing Level Exercise Training

The vast majority of exercise training occurs at the wing level. Every Air Force wing has a wing exercise plan and an office responsible for administering a wing exercise program (typically XP). Major attack responses, environmental emergencies, aircraft crashes, natural disaster responses, flying operations, hostage or terrorist events require meaningful JA involvement. Naturally, exercises involving such activity provide valuable opportunities for training. These local exercises represent a low-threat environment where young judge advocates and paralegals can be allowed to shine or fail without fear. These local exercises also provide a chance for JA staff to practice procedures and work with deployment equipment before deploying. Having a judge advocate actively involved with the base exercise planning team will allow maximum quality training opportunities for the JA staff.

Combined/Multinational Exercises

There are numerous legal issues in combined and multinational exercises, primarily fiscal law restrictions on security assistance. These are an important consideration in exercise planning, but are dealt with in other chapters of this handbook.

Exercising with forces from other nations is very rewarding but at the same time can be very challenging. Exercises with near-peer military forces within long-standing alliances--NATO is the most obvious example--will of course be much easier to plan and execute than exercises with less capable forces from nations with whom the U.S. does not have a standing defense relationship. Chairman of the Joint Chiefs of Staff Instruction 3500.01E recommends some fundamental considerations that can reduce problems and increase multinational cohesion during the exercise:

1. Optimize contribution. Seek to optimize the contributions of foreign forces within the political or military constraints placed on their participation. If foreign personnel do not feel they have been adequately utilized or challenged, they will not value exercise training and will probably not return in the future. Exercising with foreign legal personnel is a unique opportunity to explore comparative law issues and differing interpretations of international law.

2. Match exercise taskings with capabilities. Over-tasking or under-tasking foreign exercise participants will be at best a waste of their time and at worst an insult. It may take significant effort and flexibility to find roles and missions for less well-trained or capable forces, but it will be worth it in the end.

3. Use of Training Assistance Resources. Use existing military training assistance resources to improve the exercise participation and contribution of foreign forces. The Office of Defense Cooperation (ODC) or Defense Attachés Office in U.S. embassies are an invaluable resource for information on foreign force capabilities and honest assessments of what can be expected from the participants during multinational exercises.

4. Establish a common frame of reference with participating foreign personnel. Take the time to establish common understanding of the basics of your objectives and tasks. Developing a common dictionary and acronym list may help avoid confusion.

5. Address classification issues. Classification is a major obstacle to effective interaction at exercises. Keep information at the lowest level of classification possible (ideally unclassified), research in advance what documents or publications are classified, and work to avoid making foreign counterparts feel excluded.

AIR FORCE LEGAL SUPPORT FOR EXERCISES

Exercise Requirements

The amount of legal support required to support an exercise is proportional to the size, duration, location and scope of the exercise. Large-scale exercises that are designed to test the feasibility of an existing deliberate plan may require legal capabilities to deploy to a forward operating location (FOL). Even if the exercise does not task personnel to deploy to a FOL, legal activities within the exercise should be viewed as opportunities to test the readiness of the legal staff and their equipment to support their assigned mission.

The legal support requirements for an exercise are determined during the exercise planning cycle. All legal support requirements (personnel and equipment) are best satisfied if objectively determined early in the exercise planning cycle. As the exercise planning progresses, it is very difficult, though not impossible, to add additional legal support requirements. If there is to be an exercise of legal capabilities, a legal representative will most likely need to be on the Control Group as well. However, large-scale exercises,

especially CJCS funded exercises, involve a significant amount of planning and coordination across many agencies and JA will have a function in the planning phase if nothing else.

If the exercise is designed to test the feasibility or concept of operations for a deliberate plan, the supported Air Component should review the deliberate plan's time phased force deployment data (TPFDD), if applicable, to determine what legal capabilities have been previously designated to support the plan. Every effort should be made to task legal activities that have an actual deployment tasking for the specified location or similar location within the area of responsibility (AOR). The "train as you would fight" view is personified through objective sourcing of exercise requirements.

One of the principles of effective exercise planning is employing deliberate plan taskings as they would be executed and sourcing the legal activities that actually reside in a deliberate plan's TPFDD. In the past, personnel were "chosen" using various methods and were tasked to fill exercise requirements. Filling requirements using volunteers does little to test the feasibility of a plan or the readiness of a legal activity to support its deployment requirements. Restricting exercise sourcing to legal activities with specific deliberate plan taskings permits the functional area manager to test a legal activity's ability to support a deployment tasking vis-à-vis an individual's ability to deploy.

When the legal support requirements have been determined and validated by the Air Component, the requirements are forwarded through planning channels to the MAJCOM functional area manager for sourcing. The exercise taskings are then sent to each host wing and the tasked legal activity is notified of the requirement. Any exercise, especially those conducted at short tour areas and FOLs without a major Air Force presence during peacetime, provide an invaluable opportunity to view the capabilities of the location and verify the accuracy of the base support plan. Judge advocate personnel are strongly encouraged to conduct a site survey of each FOL in conjunction with exercise deployments to validate the requirements and capabilities of the location and to develop a plan for the most effective use of the location's resources.

POST EXERCISE - AFTER ACTION REPORTS

Military exercises are designed to enhance the readiness of all participating forces through a structured evaluation of new or existing tactics, techniques, capabilities, and procedures. Significant investments in fiscal, manpower, and equipment resources are needed to properly evaluate the force. Therefore, DOD agencies ensure the results of major exercises are documented, consolidated, and available for future review, through a formal after-action reporting system (AARS). An AARS is a mechanism used by many Defense agencies within DOD to memorialize the results, both positive and negative, of each major exercise. The same system can also used for real world deployments.

Air Force After-Action Reports (AARs)

After Action Reporting (AAR) Procedures. These procedures consolidate and summarize observations and lessons identified. The AARs submitted for operations (not supported by a continuing AEF), contingencies, and exercises are sent NLT 30 days after the end of the event unless otherwise directed.

Air Force Joint Lessons Learned Information System (AF-JLLIS)

The AF-JLLIS is the Air Force system for the management of all Air Force observations, lessons, and AARs. The AF-JLLIS is a web-based system that implements the requirements for the Joint Lessons Learned Program (JLLP). The AF/A9L is the OPR for the AF-JLLIS. The primary method for submitting observations and AARs is via AF-JLLIS. Organizations or individuals should use this method whenever possible to submit individual lessons or AARs to their appropriate lessons learned office (normally the A9L for that MAJCOM or NAF), or direct to HAF/A9L where appropriate. When submitted via AF-JLLIS, AARs go to AF/A9L who in turn forwards them to the appropriate NAF or MAJCOM for action. The intent is for inputs to be validated at the appropriate level of the submitting organization's chain of command—the lessons learned process is not intended to be used to bypass the chain of command when submitting lessons. An AAR summary template is available on the AF-JLLIS website. Access to AF-JLLIS is at: NIPRNET-- https://www.jllis.mil/usaf, and SIPRNET -- http://www.jllis.smil.mil/usaf. NOTE: Jag Corps Personnel SHOULD NOT submit information via the AF-JLLIS system without coordinating with their operational and functional (JA) chain of command.

TJAGC After Action Reporting System

The Judge Advocate General's Policy Memorandum OR-01, *Legal Readiness*, although still in draft form, calls for JAG Corps AARs to be filed electronically though FLITE and for the system to be monitored and maintained by the Air Force JAG School. Although policy memo OR-01 is still unsigned, its provisions regarding AARs went into practice in 2008. The procedures of the process are the same in that all judge advocate personnel who participate in a major exercise or deploy to an operation location are required to submit an AAR within 30 days of redeploying/exercise completion. The reports are consolidated and serve as the basis for AF/JAO to draw legal lessons learned that provide information for senior JAGC members and all JA personnel. The online form asks specific, guided questions and can be located at https://aflsa.jag.af.mil/apps/aar/.

Joint After-Action Report (JAAR)

A JAAR is the tool used by combatant commanders, services, or other Defense agencies to report significant lessons learned (before, during, and after an event) or any significant issues and observations during an exercise or operation.

Joint Lessons Learned Information System (JLLIS)

The JLLIS is the DOD system of record for the Joint Lessons Learned Program. The JLLIS provides one interoperable lessons learned information system for the Department of Defense and for USG organizations that are involved in joint operations or supported by military operations. Joint After Action Reports are reported through and memorialized by the JLLIS.

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CHAPTER 41

OPERATIONAL EMPLOYMENT OF JAG CORPS PERSONNEL

BACKGROUND

The National Military Strategy (NMS) requires the Air Force to be prepared to support military operations across the spectrum of conflict, from humanitarian and disaster relief to major theater wars. The NMS articulates the Chairman of the Joint Chiefs of Staff's (CJCS) recommendations on how the United States should employ the military element of power in support of the President's National Security Strategy. It defines the national military objectives, establishes the strategy to accomplish these objectives, and addresses the military capabilities required to execute the strategy.

Air Force legal support is essential to ensure successful combined and joint air and space operations. In the Air Force, legal support consists of judge advocates, paralegals, and civilian employees who provide legal services to commanders on the legal aspects of military operations. Air Force legal personnel support operations through legal activities at the home station, at forward operating locations, or through reach-back advice through specialist field support centers. The legal support staff helps the commander accomplish the mission in a lawful manner, by providing legal counsel on issues as diverse as fiscal and contract law, domestic operations, environmental law, and the lawful use of force under international law during the full spectrum of combat operations.

The role of legal support is to determine the facts, research the law, identify options, assess risks, and then provide timely advice to commanders. The advice enables commanders to make better-informed decisions and take actions based on their knowledge, experience, and judgment. In order to ensure commanders receive clear, sound, and impartial legal counsel, Congress took certain steps to ensure judge advocates were free to give frank and open advice to their commanders. The principal means for achieving this goal is Article 6 of the UCMJ which states that the "assignment for duty of judge advocates … shall be made upon recommendation of the Judge Advocate General …." As a result, the assignment authority for all judge advocate assignments, including deployments, is The Judge Advocate General. In addition, 10 USC § 8087 gives The Judge Advocate General authority to "direct the officers of the Air Force designated as judge advocates in the performance of their duties."

By law, all service military forces (except as otherwise noted in 10 U.S.C. 162) are assigned to combatant commands by the Secretary of Defense (SECDEF) through the Forces for Unified Commands memorandum, a classified document. To meet Combatant Commander (CCDR) requirements across the entire range of military operations, the Department of Defense (DOD) implemented the Global Force Management (GFM) system. The Judge Advocate General's Corps (TJAGC) supports this GFM system through the Air

Force's Global Air and Space Expeditionary Force (AEF) construct. Legal activities are configured to provide expeditionary legal services at each level of the expeditionary organizational structure. The legal support staff provides legal services to support missions defined by the supported commander. These forces may deploy as part of an Air and Space Expeditionary Task Force (AETF) commanded by the Commander, Air Force Forces (COMAFFOR), in an air and space operations center (AOC), or in other combined or joint expeditionary organizations.

This chapter discusses the configuration and presentation of Air Force legal capabilities and discusses the functional concepts applied to organize, train, and equip the appropriate amount and types of forces necessary to provide legal support to the full range of military operations.

THE FUNCTIONAL AREA MANAGER

In accordance with AFI 10-401, each functional area (*e.g.*, JA) designates Functional Area Managers (FAMs) that are responsible for managing all deployable capabilities that are available to support military operations. The FAM is the individual accountable for the management and oversight of all personnel and equipment within a specific functional area to support operational planning and execution. Responsibilities may include:

1. Developing and reviewing policy; developing, managing, and maintaining Unit Type Codes (UTCs);

2. Developing criteria for and monitoring readiness reporting; and

3. Force posturing, analysis, and execution activities which are crucial to the management and execution of Air Force readiness programs.

Within the planning and execution process, FAMs are found at the Air Staff, major command (MAJCOM), component headquarters, direct reporting units (DRUs), and field operating agencies (FOAs). All FAMs are concerned with the same broad planning areas; however, the specific activities accomplished at each level are considerably different. Legal personnel should contact the appropriate TJAGC FAM to determine the sum of their deployment taskings, resolve any issues regarding such taskings, and identify any issues that affect their readiness status and ability to support deployment taskings. In addition to the duties listed below, FAMs perform tasks as set forth in AFI 10-401, chapter 12.

Air Staff

The Air Staff FAMs represent the highest level of functional management responsibility. These individuals are responsible for all wartime planning policies and procedures that affect the entire functional area. They oversee all aspects of the planning process and must fully understand the responsibilities of both the supported and supporting command functional planners. The Judge Advocate General (TJAG) has designated USAF/JAX as the Headquarters Air Force (HAF) FAM for the JA functional area. The HAF FAM acts as a

central coordinator of the actions of their MAJCOM counterparts to ensure their applicable functional area UTCs are postured, coded, and aligned in UTC availability in accordance with current Air Force policy and instructions. The HAF FAM updates their Functional Area Prioritization and Sequencing Guidance prior to the start of each AEF Schedule. In coordination with MAJCOMs and AFPC/DPW (Directorate of AEF Operations), HAF FAMs are responsible for ensuring the capabilities represented by their UTCs are correctly balanced across the applicable AEF blocks/pairs and support the functional capabilities identified in the AETF force modules. The HAF FAM will not make changes to the UTC availability but will coordinate with the appropriate MAJCOM and AFPC/DPW to ensure the applicable guidance is correctly applied throughout the functional area. Ultimately, HAF FAMs are responsible for continually evaluating the functional area's ability to perform its primary objective, which is to meet the combatant commander's needs.

MAJCOM/FOA/DRU

Supporting MAJCOM/FOA/DRU and Air Reserve Component (ARC) FAMs play a vital role in the planning and execution process. They are the accountants of the planning process, keeping close track of the availability of forces and equipment and providing UTC availability to MAJCOM/FOA/DRU war planners and AFPC/DPW functional schedulers, as well as tracking readiness status and training levels. They also coordinate with other FAMs on all wartime and exercise matters that affect their functional area. The FAM, working through their MAJCOM/FOA/DRU directorates (or equivalent), and in coordination with subordinate wing and unit commanders, are responsible for determining which units/individuals or types and amount of equipment will be selected to fill deployment requirements.

Component Headquarters

Supported component headquarters FAMs (*e.g.*, AFCENT, AFSOUTH) are an integral part of the contingency and crisis action planning process, maintaining contact with FAMs at all levels to maintain continuity. Their major responsibility lies in the plan development arena, determining the amount and type of legal capabilities required to support each deployed location within their operational plans (OPLANs). Component FAMs must review, understand, and comply with joint and Service planning guidance, providing recommended changes to planning documents and guidance to the responsible Air Staff agency.

Unit Level

At the unit level, the installation deployment officer and the unit deployment managers (UDMs) are responsible for day-to-day management of unit functions. Many of their responsibilities are accomplished with the assistance of other unit agencies such as the logistics, manpower, personnel, or operations plans office. While these individuals perform duties in accordance with AFI 10-403 that are closely related to FAM duties and responsibilities, they are not FAMs.

AIR FORCE LEGAL SUPPORT CAPABILITIES

A legal capability is a prepackaged deployable JA or paralegal resource (manpower or equipment) capable of providing expeditionary legal support services to support military operations at any place, at any time. The JA functional area utilizes a series of UTCs to deploy, employ, and redeploy legal capabilities to support military operations. A UTC is a predefined standardized grouping of manpower and/or equipment to provide a specific wartime capability. UTCs are represented by a five character alphanumeric code. The assignment of a UTC categorizes each type of organization into a class or kind of unit having common characteristics, controlled by the Joint Staff and AF/A5XW. Operations planners use UTCs to document total Air Force manpower and logistics requirements needed to support the national military strategy during operational planning and execution of activities. The UTCs are the primary means for identifying forces described in the Joint Operation Planning and Execution System (JOPES) and Deliberate and Crisis Action Planning and Execution Segments (DCAPES).

Legal capabilities may be categorized as either a functional or multifunctional capability. A functional capability is a UTC that is either exclusively comprised of JA personnel (51Jx or 5J0x1) and/or equipment or has a majority of JA personnel within the UTC. By contrast, a multifunctional UTC contains at least one JA or paralegal (51Jx or 5J0x1) or piece of equipment and does not have a preponderance of JA manpower within the UTC. The JA FAMs control the management, tasking, and configuration of functional UTCs, but the FAM, having the preponderance of capability within a multifunctional UTC, controls the contents and tasking of the multifunctional capability. In many cases, the management of multifunctional UTCs is problematic for JA FAMs because another FAM's actions impact the amount of legal support an activity will provide. Consequently, the existing planning environment forces JA FAMs to manage both functional and multifunctional capabilities.

FUNCTIONAL UTC DEPLOYMENT CAPABILITIES

An AETF encompasses all Air Force forces assigned or attached to a Joint Task Force (JTF) and includes other forces dedicated to the JTF mission. To support Air Force operations, the JA functional area currently utilizes several capabilities (i.e., UTCs) to provide legal support to deploy, employ, and sustain military operations.

XFFJJ – Combat Support JAG (1 pax)

Provides JA legal support capability to an AETF to support TJAG in fulfilling his or her specific responsibilities listed in USAF War Mobilization Plan (WMP)-1, Annexes P and R. Assists and advises COMAFFOR in carrying out obligations and responsibilities under international and domestic law and policy. This UTC may be used to support any force module, to augment existing legal support forces, or to independently support operations. The capability may be sourced to fulfill any AETF or joint legal support requirement, including sustainment. The UTC may be used for active duty, guard, and reserve personnel.

XFFJP – Combat Support Paralegal (1 pax)

Provides paralegal support capability to an AETF to support TJAG in fulfilling his or her specific responsibilities listed in USAF WMP-1, Annexes P and R. Assists and advises COMAFFOR in carrying out obligations and responsibilities under international and domestic law and policy. This UTC may be used to support any force module, to augment existing legal support forces, or to independently support operations. The capability may be sourced to fulfill any AETF or joint legal support requirement, including sustainment. The UTC may be used for active duty, guard, and reserve personnel.

XFFJ8 – Air Operations Support (2 pax)

Provides JA legal support necessary to command, control, plan, coordinate, and execute aerospace operations. This UTC provides the capability to advise the joint force commander (JFC) or joint force air component commander (JFACC) on legal issues involving the law of armed conflict, rules of engagement, targeting, weaponeering, international and host-nation law, information operations, and command relationships. It also provides the capability to advise the COMAFFOR on deployment reception, staging, onward movement and integration, sustainment, and redeployment of assets at support forces.

TRIAL JUDICIARY UTC DEPLOYMENT CAPABILITIES

These capabilities are set forth in multiple UTCs to advertise the ability of TJAGC to posture, source, and deploy an Air Force trial judiciary team to a forward operating location. All Air Force military judges (trial court level), senior trial, senior defense counsel, and area defense counsel are assigned to the Air Force Legal Operations Agency (AFLOA) and are deployed where needed around the globe. Due to the limited quantity, and location of these specialists, the trial judiciary capabilities consist of four independent UTCs. The existing configuration of each UTC provides TJAGC a series of modular UTCs available to assemble a trial team at a forward operating location from multiple origins.

XFFJ1 – Military Judge (1 pax)

Provides military judge capability to support commanders and staff judge advocates in fulfilling their statutory responsibilities under the Uniform Code of Military Justice (Title 10, United States Code) to try personnel by court-martial and meet other needs of military justice administration. This UTC may be tasked by AF/JA as many times as necessary, and it may be used for active duty, guard, and reserve personnel.

XFFJ2 – Senior Trial and Senior Defense Counsel (2 pax)

Provides senior trial and senior defense counsel capability to support commanders and staff judge advocates in fulfilling their statutory responsibilities under the Uniform Code of Military Justice (Title 10, United States Code) to prosecute and defend personnel in trials by court-martial and meet other needs of military justice administration. This UTC may be

tasked by AFLOA as many times as necessary, and it may be used for active duty, guard, and reserve personnel.

XFFJ4 – Court Reporter (1 pax)

Provides court reporter capability to support commanders and staff judge advocates in fulfilling their statutory responsibilities under the Uniform Code of Military Justice (Title 10, United States Code) to try personnel by court-martial and meet other needs of military justice administration. This UTC may be tasked by AFLOA as many times as necessary, and it may be used for active duty, guard, and reserve personnel.

XFFJ5 – Area Defense Counsel with Paralegal (2 pax)

Provides defense counsel support capability to a deployed environment, to support commanders and staff judge advocates in fulfilling their statutory responsibilities under the Uniform Code of Military Justice (Title 10, United States Code) to try personnel by court-martial and meet other needs of military justice administration. This UTC may be tasked by AFLOA as many times as necessary, and it may be used for active duty, guard, and reserve personnel; however, active duty should be sourced first.

MULTIFUNCTIONAL UTC DEPLOYMENT CONCEPT

As previously indicated, multifunctional capabilities are those UTCs where a legal capability (personnel or equipment) is integrated within a larger UTC to form a more robust capability. Legal personnel may be integrated into command and control UTCs with other functional areas to collectively provide a specialized capability for the commander. The UTCs configured to provide such capabilities as Air and Space Operations Centers (AOCs) or COMAFFOR staffs may include several JA personnel to support the entire capability. A challenge in UTC management is determining what multifunctional capabilities include TJAGC personnel and what FAM is responsible for managing the larger capability.

The TJAGC's existing functional capabilities are best utilized and more effectively managed when packaged functionally but deployed using a force module. Multifunctional UTCs work well when sourcing large-scale requirements from one location, but may lose their effectiveness when supporting small-scale operations or exercises. The MAJCOM FAMs carefully review the contents of each functional and multifunctional UTC to ensure they understand the sum of all deployment taskings for the legal activities under their control. Each FAM consolidates tasking information and notifies the legal activities identified to support the capability.

GLOBAL FORCE MANAGEMENT (GFM)

Authority for AEF execution is based on the GFM Allocation Plan (GFMAP) annexes, SECDEF-approved orders, or an individual augmentee directive. Global sourcing of capabilities is executed under the auspices of the Office of the Secretary of Defense (OSD) to provide capabilities from the forces assigned to various combatant commanders (CCDRs)

and Secretary of the Air Force retained forces. Responsibility to prepare force allocation recommendations for conventional forces is assigned to the Commander, US Joint Forces Command (USJFCOM), as the primary conventional joint force provider (except for those forces sourced by US Special Operations Command, US Strategic Command, and US Transportation Command) to the Chairman of the Joint Chiefs of Staff (CJCS). Air Force taskings are sourced in response to GFM allocation recommendations approved by the SECDEF. Each allocation fulfills a specific Request for Forces (RFF) or Request for Capabilities (RFC) in support of CCDR requirements. The primary joint force provider, using Joint Staff, Combatant Command, and Service inputs will develop recommended sourcing solutions and related Service risk to fill the requests. Once SECDEF approves the recommended sourcing solution for the RFF/RFC, an appropriate order will flow to a designated supporting CCDR or Service for execution.

REQUEST FOR FORCES/CAPABILITIES PROCESS

The process is initiated when the CCDR determines a requirement and submits a Request for Forces/Capability (RFF/RFC) to the Joint Staff. The RFF/RFC provides CCDRs with a means to obtain required support not already assigned or allocated to the command. Prior to the CCDR forwarding the request to the Joint Staff, Air Force component headquarters will review all RFFs/RFCs for Air Force capabilities being requested and translate the request into potential UTCs, Air Force Specialty Codes (AFSCs), or the closest Air Force capability. In response to an RFF/RFC, the Joint Staff generates a draft Execute/Deployment Order (EXORD/DEPORD) allocating forces from a force provider to the requesting CCDR for a set period of time and sends the validated RFF/RFC in a Joint Staff Action Package to USJFCOM, copying Headquarters Air Force and supporting combatant commands. Force apportionment, assignment, and allocation processes are defined in the "Global Force Management Guidance" document, and then the force allocation process used to satisfy RFFs and RFCs is endorsed and executed with any additional sourcing guidance by USJFCOM to the Service Components to determine sourcing recommendations and issues. The Air Force recommended sourcing solution is delivered to Air Combat Command, as the Air Force joint force provider to USJFCOM, for final input and to prepare a rotational force schedule, rotational force allocation plan, and military risk assessment for the Joint Staff to submit to SECDEF for approval.

JOINT EXPEDITIONARY TASKINGS

If a standard force solution (*i.e.*, a mission ready, joint capable force, executing its core mission) cannot be made, the joint force provider may recommend a non-standard force solution. While the Joint Staff has defined three categories of non-standard force solutions, the Air Force collectively refers to its contribution to these as a Joint Expeditionary Tasking (JET). A JET sourcing solution becomes a factor when the traditional force provider for the requested force or capability cannot fill the requirement. This type of solution will most likely not be requested in either Air Force UTCs or AFSCs, and will require the party requesting to provide the necessary information to convert the requested force, capability, or military occupational specialty (MOS) into capabilities that identify what personnel and

specific training are required to meet the tasking. There are three JET sourcing categories: Joint Force/Capability Solution and Ad Hoc Solution.

Joint Force/Capability Solution

A Service providing a force/capability in place of another Service's core mission; however, the capability is performing its core mission (e.g., RED HORSE unit replacing an Army Combat Engineering – Heavy Battalion or Air Force EOD Detachment replacing an Army EOD Company). This JET solution requires no special training, outside of a functional area, beyond combat skills training.

***Ad Hoc* Solution**

A consolidation of individuals and equipment from various commands or Services forming a deployable/employable entity, properly manned, trained, and equipped to meet the supported CCDR's requirements (e.g., a Provincial Reconstruction Team sourced with both Navy and Air Force personnel).

THE GLOBAL AIR AND SPACE EXPEDITIONARY FORCE CONSTRUCT

The Air Force supports global CCDR requirements through a combination of assigned, attached (rotational), and mobility forces that may be forward deployed, transient, or operating from the home station. Through the AEF, the Air Force establishes a predictable, standardized battle rhythm ensuring rotational forces are properly organized, trained, equipped, and ready to sustain capabilities while rapidly responding to emerging crises. There are three major elements of the AEF structure: readily available force, enabler force, and in-place support.

Readily Available Force

The readily available force is the primary pool from which the Air Force fulfills GFMAP rotational requirements. To meet these requirements, the Air Force aligns its warfighting capabilities into a baseline of ten AEFs (five pairs), each intended to contain an equivalent capability from which to provide forces. During periods of increased requirements, capability areas from these ten AEFs may be aligned within the Global AEF construct to a tempo band that provides a deeper pool of capability (*i.e.*, the ratio of time deployed in support of a contingency versus the time not deployed in support of a contingency). The baseline AEF (Band A) is organized to support a one-to-four ratio. The alternative tempo bands are organized to support an increasing deploy-to-dwell ratio with Bands C, D, and E supporting one-to-three, one-to-two, and one-to-one ratios respectively. Band B (in which TJAGC capabilities were placed at the stand-up of the Global AEF construct), like Band A, supports a one-to-four ratio but with a six month vulnerability period vice four months; the vulnerability periods for Bands C, D, and E are also six months. Two additional tempo bands are designed to support Air Reserve Component (ARC) forces in capability areas that might require mobilization.

Enabler Force

The enabler force includes common user assets, such as global mobility forces, special operations forces and personnel recovery forces, space forces, and other uniquely categorized forces that provide support to authorized organizations within and outside the DOD. Most limited supply/high demand (LS/HD) assets, National Air Mobility System, and Theater Air Control System (TACS) elements are postured as an enabler force and will rotate as operational requirements dictate. Due to their unique nature, these forces cannot be easily aligned in one of the tempo bands because they are considered to be on-call at all times.

In-Place Support

There are three types of in-place support: those forces that almost exclusively employ direct support of a CCDR mission; those that represent the minimum number of requirements to support critical home station operations; and those forces that are primarily intended to perform the Air Force's organize, train, and equip responsibilities. In-place support forces are also included in the AEF tempo bands.

Individuals will be given an AEF Indicator that corresponds to an AEF Block. This provides airmen with a degree of predictability in each GFM cycle, but does not guarantee the airmen/unit normal AEF battle rhythm from one period to the next (*e.g.*, a capability may be postured at a 1:4 tempo for GFM 09, then shift to a 1:3 or 1:2 tempo for GFM 10 based on emerging requirements). Except in cases of reaching forward, individuals will deploy during their associated AEF Block's vulnerability period. Airmen may be tasked to deploy for an extended period beyond the established vulnerability timeframe. Alternate AEF battle rhythms may dictate an accelerated deployment schedule. Additionally, global CCDR requirements may require shifting deploy-to-dwell ratios resulting in modified deployment schedules.

AEF UTC REPORTING TOOL

The AEF UTC Reporting Tool (ART) enables commanders to report the ability of a standard UTC to perform its Mission Capability Statement (MISCAP) anywhere in the world at the time of the assessment and identify capabilities through future AEF rotations. It highlights missing resources and helps to quantify missing requirements for additional justification when submitting budgets. It also provides the ability to evaluate a UTC prior to tasking, picks the UTC with the best capability to meet the tasking, and helps to forecast shortfalls. Within the AEF construct, the UTC assessments are used to determine the most effective force tasking. Effective management of Air Force resources requires accurate information at all levels. For these reasons, integrity in reporting an accurate status is paramount. ART is not a report card, but a method of identifying a UTC's ability to perform its MISCAP and identify shortages of resources.

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CODE OF CONDUCT

FOR MEMBERS OF THE ARMED FORCES OF THE UNITED STATES

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CHAPTER 42

CODE OF CONDUCT

BACKGROUND

All members of the U.S. Armed Forces are expected to be familiar with the Code of Conduct (COC). The COC is a guide designed to assist military personnel in combat or being held as prisoners of war (POWs). For the purposes of this chapter, the term POW is used to include all U.S. personnel captured by an adversary during a conflict or unlawfully detained against their will by enemy state or non-state actors (*e.g.* hostages) and is a tool to inform members of their legal rights and obligations if held as a POW. All members of the U.S. Armed Forces are expected to meet the COC standards. Although the COC is designed for evasion and POW situations, all members of the armed forces subjected to hostile detention should conduct themselves in a manner consistent with the spirit and intent of the COC and in a manner that avoids discrediting themselves or the United States. Department of Defense (DOD) civilians, DOD contractors, and others should be aware of their personal legal status under international law, specifically including the Geneva Conventions.

The Defense Prisoner of War/Missing Personnel Office (DPMO) mission is to lead the national effort to prepare U.S. personnel for possible isolation while pursuing U.S. national objectives abroad, establish the most favorable conditions to recover and reintegrate them, and fully account for those lost during past, present, and future conflicts that the U.S. is a party to. The DPMO also has primary responsibility for COC training. The commanders of combatant commands are to designate the level of COC training that personnel operating in the command's area must have prior to deploying in-theater.

CODE OF CONDUCT PRINCIPLES

The COC consists of six articles. The articles address situations and decision areas that, to some degree, all personnel may encounter. They include information that is useful to U.S. POWs in their efforts to survive and return home with honor. They also help POWs resist a captor's efforts to exploit them. Medical personnel and chaplains are obligated to abide by certain provisions of the COC, while retaining a special status under the Geneva Conventions.

Fighting American (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 I applies to all service members at all times. The past experience of captured Americans indicates that honorable survival in captivity requires each service member to possess a high degree of dedication and motivation. To effectively maintain dedication and motivation, service members must know the advantages of U.S. democratic institutions and concepts. They must have faith that defending the U.S. way of life is a worthy and just cause. They must also maintain faith in and loyalty to their fellow POWs. Absorbing and truly accepting these beliefs enable POWs to survive long and stressful periods of captivity and return to their countries and families with their honor and self-esteem intact.

Never Surrender (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."

The key principle embodied in this article is that members of the armed forces may never surrender voluntarily. Even when members are isolated and no longer able to inflict casualties on the enemy or otherwise defend themselves, it is their duty to evade capture and rejoin the nearest friendly force. *Surrender* is the willful act of giving oneself up to the enemy. In contrast, *Capture* occurs when a member has no means to resist, evasion is impossible, and further fighting would lead to the death of U.S. members with no significant loss to the enemy. Capture dictated by overwhelming enemy strength and the futility of fighting on is not dishonorable. The authority and responsibility of a commander never extends to the surrender of command, even if isolated, cut off, or surrounded, while the unit has a reasonable opportunity to resist, break out, evade, or join friendly forces.

Resist, Escape, and Accept no Favors (Article III)

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

The misfortune of capture does not lessen the duty of a member of the armed forces to continue resisting enemy exploitation by all means available. Unfortunately, compliance with international law cannot be guaranteed by all enemies. Enemy forces may attempt to subject U.S. personnel to harassment, mistreatment, torture, medical neglect, and political indoctrination. Further, enemy forces may attempt to turn prisoners against each other by offering favors or privileges in return for statements or information, or for a pledge not to escape. Notwithstanding the personal risk, U.S. POWs are to follow the lawful guidance of the senior U.S. military personnel present and try to escape if able to do so. The U.S. does not authorize any military member to sign or enter into any parole agreement (parole is a procedure whereby POWs may be released if they agree to certain conditions).

Keeping Faith, Give No Information, Accept Command Structure (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."

In captivity, the military command structure remains intact and officers and enlisted personnel continue to carry out their responsibilities. The responsibility of subordinates to obey the lawful orders of ranking U.S. military personnel remains unchanged in captivity. POWs must organize in a military manner under the senior military POW eligible to command. The senior POW, whether officer or enlisted, shall assume command according to rank without regard to military service. The senior military POW may not evade command responsibility and accountability. When taking command the senior military POW must inform the other POWs and establish a chain of command and command organization. The senior POW must designate a successor to assume command if the senior POW becomes incapacitated or otherwise unable to act. The senior POW represents all POWs in matters of camp administration, health, welfare, and grievances.

Strong command leadership is essential to discipline, camp organization, resistance, and survival. Senior POWs must ensure that POWs maintain personal hygiene, camp sanitation, and care for the sick and wounded. While exercising command, the senior POW must use common sense and factor in the conditions of the camp when establishing the structure and responsibilities of the POW organization. Article 79 of Geneva Convention III states that in POW camps containing only enlisted personnel, a prisoners' representative shall be elected. United States policy provides that the elected representative is only a spokesperson for the senior POWs and may not command, unless the representative selected is also the senior POW.

Maintaining communication between POWs is one of the most important ways that POWs can aid each other. Communication breaks down the barriers of isolation and strengthens a POW's will to resist. Immediately upon capture, each POW shall attempt to communicate with other POWs and participate vigorously as part of the POW organization. Prisoners of war must never inform on other prisoners, or take action that is detrimental to a fellow POW; to do so is despicable and is expressly forbidden. It is also absolutely imperative that POWs do not identify fellow POWs who may have knowledge of value to the enemy and who may therefore be susceptible to coercive interrogation.

Name, Rank, Service Number, Date of Birth (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."

Geneva Convention III and the U.S. military authorize POWs to give their captors their name, rank, service number, and date of birth. The enemy has no right to try to force a POW to provide any additional information. Prisoners of war are authorized to fill out Geneva Convention "Capture Cards," to write letters home, and to communicate with their captors on matters of camp administration and health and welfare issues. All POWs must constantly bear in mind that the enemy may use these sources to obtain military information to further their effort.

A POW must resist, avoid, or evade, even when physically or mentally abused, all enemy efforts to secure statements or actions that may further the enemy's cause. Specifically, POWs must resist giving oral or written confessions, making propaganda recordings, or appealing for U.S. surrender or parole. If they do so, they should make every effort to show to the media that they are doing so under duress. For example, if used in an enemy's visual propaganda recording, they should consider a visual sign of symbolic resistance such as showing the U.S. flag on the arm of uniform if applicable.

They must not engage in self-criticisms, or make oral or written statements or communications on behalf of the enemy or which are harmful to the U.S., its allies, the armed forces, or other POWs.

Prisoners of war must realize that any confession or statement provided to a captor may be used to support a false accusation that the captive is a war criminal rather than a POW. Some countries have made reservations to the Geneva Conventions in which they assert that a war criminal conviction has the effect of depriving the convicted individual of POW status. Those countries may assert that a POW loses protection and the right to repatriation until the individual serves a prison sentence. Military personnel with a moderate to high risk of capture should become familiar with the interrogation process, its phases, and procedures. They should understand the methods and techniques of interrogation, and the interrogator's goals, strengths, and weaknesses.

America, Freedom, Trust in God (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."

Members of the U.S. armed forces are responsible for their actions at all times. Remembering traditional American values help POWs fulfill their responsibilities and survive captivity with honor. The Uniform Code of Military Justice (UCMJ) continues to apply to military members, even when they are in POW status. When POWs are repatriated their actions will be reviewed, both as to the circumstances of their capture and their conduct during detention. The purpose is to recognize meritorious performance and, if necessary, investigate allegations of misconduct. The life of a POW may be very hard, but each POW has a continuing obligation to resist all attempts at indoctrination and remain loyal to the U.S. and its cause. Prisoners of war who stand firm and united against enemy pressures aid one another immeasurably in surviving their ordeal. Prisoners of war should remember that the U.S. and their Services will take care of them and their dependents. Pay and allowances, eligibility and procedures for promotion as well as benefits for dependents continue while they are detained.

No U.S. POW or POW will be forgotten. Every available means will be employed to establish contact with, to support, and obtain the release of all our U.S. POWs.

MEDICAL PERSONNEL AND CHAPLAINS

Medical personnel who are exclusively engaged in the medical services of their armed forces and chaplains who are captured by the enemy are considered "retained personnel" under the Geneva Conventions and are not POWs. This status authorizes them to perform their professional duties (preferably for POWs of their own country), but it does not relieve them from their responsibility to adhere to the provisions of the COC. In order to take advantage of the "retained personnel" status, medical personnel and chaplains must assert their right to this status. Medical personnel and chaplains do not have a duty to escape or to actively aid others in escaping as long as the enemy treats them as "retained personnel." If the captor does not permit medical personnel and chaplains to perform their professional functions, then their responsibilities under the COC are identical to all other POWs.

Regrettably, U.S. experience reflects little compliance with the Geneva Conventions by captors of U.S. medical personnel and chaplains. Accordingly, if other U.S. POWs are subject to maltreatment then medical personnel and chaplains should anticipate receiving the same treatment. All medical personnel and chaplains are accountable for their actions while in enemy hands. Medical personnel may not assume command over non-medical personnel and chaplains may not assume command over any military personnel. Medical personnel and chaplains are authorized to communicate with their captors in connection with their professional responsibilities.

CAPTIVITY AND HOSTILE DETENTION DURING MILITARY OPERATIONS OTHER THAN WAR (MOOTW)

The members of the U.S. military and those accompanying the forces, because of their deployments throughout the world and their participation in military activities other than war, may be detained by unfriendly governments or kidnapped by terrorist groups. U.S. personnel must be aware that the basic protections available to POWs under the Geneva Conventions may not be adhered to during operations other than war. Thus, personnel detained may be subject to the domestic criminal laws of the detaining nation. These personnel should use the COC as a moral guide to assist them to uphold the ideals of DOD policy and survive their ordeal with honor.

The U.S. Government (USG) will make every effort to secure the earliest release of U.S. personnel, whether they are POWs or hostages, but the USG's policy is not to negotiate with terrorists. During captivity, U.S. personnel must take every reasonable step to prevent exploitation of themselves or the USG. They must maintain their military bearing, regardless of the type of detention, or the brutality of their treatment. Captive military personnel should make every effort to remain calm, courteous, and project personal dignity. Discourteous behavior may only serve to provoke increased brutality and harsher treatment from the captors. It may also jeopardize their survival and complicate efforts by the USG to gain their release.

In group detention or hostage situations, military POWs or hostages should organize to the fullest extent possible in a military manner under the senior military member present and

eligible to command. The senior military member is in charge of all military personnel regardless of the pay grade of any USG civilians who are also detained. When military members are confined with civilians, the military members should encourage the civilians to participate in the military organization and accept the authority of the senior military member. Even if the military member is under the direction of a U.S. civilian (e.g., embassy duty) the senior military member is still obligated to establish, as an entity, a military organization and to ensure that the guidelines in support of the DOD policy to survive with honor are not compromised.

GUIDANCE FOR DETENTION BY GOVERNMENTS

Attempting to escape from detention by unfriendly governments is not recommended by DOD policy except under life threatening circumstances. This is because attempted escape, and actual escape, from a government confinement facility will likely constitute a violation of the unfriendly government's criminal law and may subject the escapee to increased criminal prosecution. Escape, however, may become necessary if the conditions of captivity deteriorate to the point that the risks associated with escape are less than the risks of remaining captive. In any event, escape planning should begin at the onset of captivity to ensure that, if escape becomes necessary, the potential for success is maximized.

Military personnel detained by an unfriendly government should immediately and continually ask to see U.S. embassy personnel, or a representative of an allied or neutral government. Prisoners of war and hostages must also resist to the utmost of their ability any request that they divulge classified information to their captors. Furthermore, POWs should always accept release unless doing so requires them to compromise their honor or damages the interests of the USG.

GUIDANCE FOR DETENTION BY TERRORISTS (HOSTAGE)

Capture by terrorists is the least predictable and least structured form of captivity. The motives for terrorist kidnappings range from achieving political goals to gaining financial reward or may be merely a way to vent frustration. Captives may not know their captor's goals and should try to "humanize" themselves as much as possible so that the captors do not think of them as an object (e.g., an Airman), but as a person. In these situations, it helps to have a U.S. civilian passport and to delay identifying oneself as a military member. It is not advisable to deny military membership, but this information should not be volunteered. Terrorist hostages should engage their captors in discussions of family, clothes, sports, hygiene, and food, and should listen patiently as captors discuss their cause or boast. Hostages should not whine or beg, as this may increase abuse, and they should avoid discussing emotional topics such as religion, economics, and politics. Hostages should attempt to leave their fingerprints on surfaces so that searchers can help locate and identify them.

Terrorists may be intensely evil people who would not hesitate to brutalize or kill a captive. Accordingly, captives should make reasonable efforts not to sign propaganda or confessions, but should not hesitate to sign a document if they believe their life is in danger.

Captives may be able to degrade the propaganda value by providing minimal information. Hostages facing torture or death should constantly be thinking of escape and weighing the risks of continued captivity against the likelihood of a successful escape. During rescue attempts hostages should take cover, remain stationary when practicable and not attempt to help rescuers. Hostages may experience rough handling from the rescuers until the rescuers separate the terrorists from the hostages.

CODE OF CONDUCT TRAINING

Department of Defense Instruction 1300.21 is the guidance for conducting COC training. This instruction outlines training for DOD civilians and contractors supporting US military operations. Services must train all personnel to the applicable level of COC training. Training includes the responsibilities of rank, leadership, military bearing, order, discipline, teamwork, and loyalty to the U.S. and to fellow service members. Training must reinforce the idea that capture or detention does not lessen the duty to resist the enemy. It is critical to use qualified instructors and approved materials for COC training. The Secretaries of the service departments shall train all personnel in the applicable level of COC training as identified by the commanders of the combatant commands. Training related to the COC shall be conducted at three levels for the following categories of personnel:

1. Level A. Level A training is designed to achieve a minimum level of understanding for all members of the 1949 Geneva Conventions (usually occurring during entry training).

2. Level B. Level B training is designed to achieve a minimum level of understanding for military service members whose military jobs, specialties, or assignments entail a moderate risk of capture and exploitation. Level B includes ground combat units, security forces in high threat areas, and anyone in the vicinity of the forward edge of the battle area or the forward line of their own troops.

3. Level C. Level C training is designed to achieve a minimum level of understanding for military members whose military jobs, specialties, or assignments entail a significant or high risk of capture and exploitation. Level C includes high ranking personnel and those with access to Top Secret or higher classified information which makes them vulnerable to greater-than-average exploitation efforts by captors. It also includes combat aircrews, special operations forces, and military attaches.

Continuation training for COC is very important to ensure all military members maintain currency and knowledge of the basic COC responsibilities and rights and obligations of members under the Geneva Conventions. Currently, USAF members fulfill Code of Conduct refresher training through AETC's e-learning site, the Advanced Distributed Learning Service (ADLS) computer-based expeditionary training taught in conjunction with the annual SERE training requirements set out in AFI 16-1301, chapter 2. Members whose missions require it, receive more in depth training to comply with combatant command

guidance as determined by their major commands (MAJCOMs) and the Air National Guard.

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2. Geneva Convention for the Amelioration of the Conditions of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, adopted 12 August 1949, 6 U.S.T. 3217, 75 U.N.T.S. (1950) 85-133 (entry into force 21 October 1950, for U.S. 2 February 1956)
3. Geneva Convention Relative to Treatment of Prisoners of War of 12 August 1949, 6 U.S.T. 3316, 75 U.N.T.S. (1950) 135-285 (entry into force 21 October 1950, for U.S. 2 February 1956)
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14. AFI 16-1301, *Survival, Evasion, Resistance, and Escape (SERE) Program*, 6 September 2006
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16. AFI 16-1301 AMC SUP I, *Survival, Evasion, Resistance, and Escape (SERE) Program*, 24 March 2008
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18. Army Pamphlet 360–512/ AFP 34-10, *Code of the U.S. Fighting Force*, 1 June 1988

APPENDIX A – ARTICLES OF THE CODE OF CONDUCT

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 AID OTHERS TO ESCAPE. I WILL ACCEPT NEITHER PAROLE NOR SPECIAL FAVORS FROM THE ENEMY.

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.

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.

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