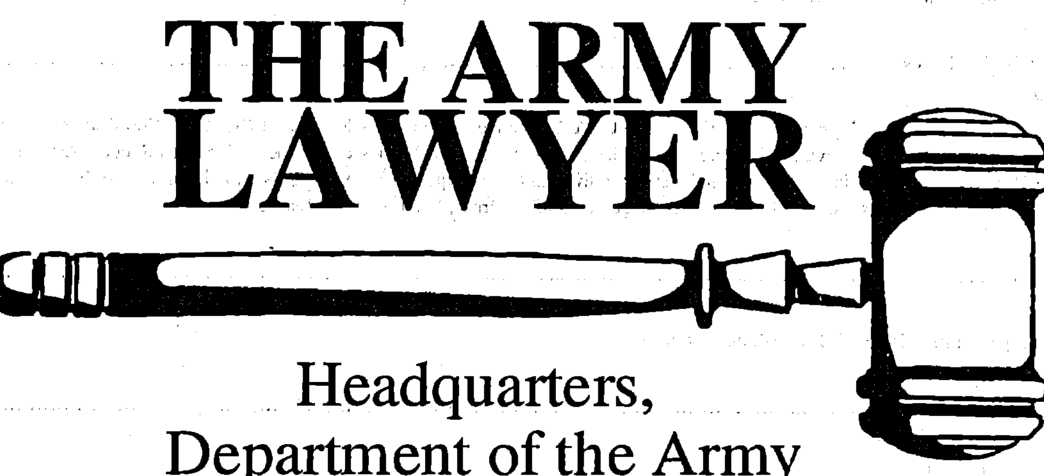


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# Civilian Protection Law in Military Operations: An Essay

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*The rule of law can be wiped out in one misguided, however, well intended generation. And if that should happen, it could take a century of striving and ordeal to restore it, and then only at the cost of the lives of many good men.*

William T. Gossett
President, American Bar Association[1]

## Introduction

*The law of war does not ask the military commander to implement impossible rules. But it does ask him to carry out his mission by weighing the military and humanitarian factors.*

*Law of War Guide for Professional Soldiers*[2]
International Committee of the Red Cross

Commanders report, with increasing frequency, the enormous complications that civilians pose in the conduct of contemporary military operations. The purpose of this essay is to introduce a new approach to analyzing the legal problems generated by the presence of civilians within the military operational context.

Until recently, students of the law of armed conflict divided their discipline into neat categories that closely tracked the Hague[3] and Geneva Conventions[4] and several other law of war treaties. Commentators, military and civilian, spoke in terms of these traditional rules and focused their research, publication, and instruction efforts on this well-defined area of the law.[5]

In the last decade, however, the most frequent application of United States power occurred in diverse operations that repeatedly defied the application of the traditional law of armed conflict. During the course of each of these operations, military lawyers have experienced substantial difficulty finding the overall regime or structure of laws that provides answers for the complex legal issues generated by these "new age and nuanced operations."[6]

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[1] William T. Gossett, Address at the 1969 American Bar Association Annual Meeting, Chicago, Illinois (Aug. 11, 1969).

[2] INTERNATIONAL COMMITTEE OF THE RED CROSS: A GUIDE FOR PROFESSIONAL SOLDIERS, LAW OF WAR, PREPARED FOR ACTION 11 (Donald Dochard ed., 1995).

[3] Of the several Hague Conventions, Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18 1907, 36 Stat. 2277, 205 Consol. T.S. 277 (including the regulations thereto) provide the most meaningful rules and guidance relative to the treatment of civilians during armed conflict [hereinafter Hague IV or HR].

[4] The term "Geneva Conventions" refers to the four conventions of 1949: The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GWS]; The Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GWS Sea]; The Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW]; The Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC].

[5] Until August 1994, the only instruction at the Judge Advocate General's School, United States Army, relative to the treatment of civilians centered exclusively around Hague and Geneva law (with the exception of one course on human rights). The instruction did not pretend to contemplate the use of this law or other rules outside of armed conflict (although it did cover both internal and international armed conflict). In the summer of 1994, The International and Operational Law Department, based on the lessons learned in recent operations, began to study the protection of civilians in Operations Other Than War (OOTW). The term "civilian protection law" was coined in August 1994, and was first introduced to the Forty-Third Judge Advocate Graduate Course (Master of Law program). Thereafter, as a course of instruction, Civilian Protection Law absorbed and replaced the prior course of instruction referred to as the "Civilian's Convention and Occupation Law."

[6] General Gordon Sullivan and Lieutenant Colonel Andrew B. Twomey, *The Challenges of Peace*, PARAMETERS, Autumn 1994, at 11. The authors explain that the Army's newest keystone doctrinal statement, *Field Manual 100-5, Operations*, "includes substantial considerations of nuanced operations," including OOTW. DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS (14 June 1993) [hereinafter FM 100-5].

Among the current terms[7] of choice used to describe these operations is Operations Other Than War (OOTW).[8] The obvious importance of these operations has been demonstrated by how quickly the foregoing term has gained widespread use[9] within not only the United States military community, but also within the wider international military and civilian academic communities.[10]

Despite the importance of OOTW and their frequent occurrence, they do not *yet* fit well into any specific category of either public international law or the traditional law of war.[11] Although military practitioners recognize and acknowledge this condition, those among their ranks involved in OOTW still turn to the only place that years of formal instruction and experience have prepared them to turn; the mandate of *Department of Defense Directive 5100.77* (*DOD Directive 5100.77*). The *DOD Directive 5100.77* requires all United States forces to abide by the "law of war in the conduct of military operations and related activities in armed conflict, however such conflicts are characterized."[12] Although OOTW fall outside of the *Directive*'s mandate,[13] the United States has consistently complied with the Law of War in OOTW to the greatest extent feasible.[14]

The Joint Chiefs of Staff Standing Rules of Engagement (SROE) documents and provides authority for United States OOTW policy.[15] The SROE's unclassified Enclosure A states that "in those circumstances when armed conflict, under international law, does not exist, Law of Armed Conflict principles may nevertheless be applied as a matter of national policy."[16]

[7] A number of terms, such as operations short of war and military operations other than war (MOOTW), competed with OOTW for widespread use. Today, even as OOTW gains ever greater recognition and frequency of use, its future may be threatened. *See* Memorandum, General Hartzog, Commander, United States Army Training and Doctrine Command (TRADOC), subject: Commander TRADOC Philosophy on the Term "Operations Other Than War (OOTW)," (2 Nov. 1995) (General Hartzog states that OOTW, as a term, has "served its purpose." He further states, now that the various operations described collectively as OOTW can be specifically described, "we should begin to retire the term, while maintaining and enlarging the vital lessons learned in specific areas." General Hartzog is careful, however, to note the future importance of the operations themselves, even while stating that we need to describe them with more precision.).

[8] FM 100-5, *supra* note 6, chs. 2 & 13.

[9] In an early draft of this essay, I used the word "acceptance," in lieu of the word "use." After reviewing General Hartzog's memorandum, *supra* note 7, I am persuaded that the issue of the OOTW's acceptance (as a term) has been called into question. The stimulus for this recent attack on the term is based on our warfighting client's belief that terms and phrases that highlight missions and operations that do not employ the high intensity violence of traditional warfare will degrade the future ability of the force to execute its primary charter—to close with and kill the enemy with overwhelming power. Those that frame this objection are careful, however, to note that they object to the term, and not the concept of OOTW.

[10] Operations other than war, as both a term (at least for the present) and a concept, is firmly entrenched in the United States' military doctrine. The Army, for example, has devoted an entire chapter to such operations in its keystone doctrinal manual. *See* FM 100-5, *supra* note 6, ch. 13. Many nations have already published OOTW operational and legal manuals. *See* DEP'T OF ARMY FIELD MANUAL 100-20 (Draft), OPERATIONS OTHER THAN WAR (30 Sep. 1994) [hereinafter FM 100-20 (Draft)]. *See also* THE ARMY FIELD MANUAL, vol. 5, OPERATIONS OTHER THAN WAR, pt. 2 Wider Peacekeeping (1995) (published by the United Kingdom's Director of General Land Warfare) (note that the latest draft version of FM 100-20 is entitled "Stability and Support Operations.").

[11] This is not to say that a number of recent OOTW have not been based on accepted notions of traditional international law. For example, the recent entrance of multi-national forces, under mandates issued by the United Nations, into Haiti, the Former Yugoslavia, and Somalia are based, in part, on tenets of "forcible self-help." This version of self-help stems from the right to use self-help "less than self-defense" to enforce the human rights of the world citizen. The right of a state (or regional/multi-national body) to send an armed force into the territory of another nation in some form of humanitarian intervention is now well entrenched in the customary law. Richard B. Lillich, *Forcible Self-Help Under International Law*, THE NAVAL WAR COLLEGE REVIEW 129-33, 137-38 (1980), *reprinted in* JOHN NORTON MOORE ET AL., NATIONAL SECURITY LAW 131-36 (1990); GERHARD VON GLAHN, LAW AMONG NATIONS 235 (1992) [hereinafter VON GLAHN]. This right is based upon the general recognition that "how a state treats individual human beings, including its own citizens, in respect of their human rights, is not the state's own business alone and therefore exclusively within its domestic jurisdiction, but it is a matter of international concern and a proper subject for regulation by international law." *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. VII, § 701a (1987) [hereinafter RESTATEMENT]. Humanitarian intervention also is firmly entrenched in United States policy and is even regulated by Army regulation. *See* FM 100-20 (Draft), *supra* note 10, at 2-1. The problem is not so much in how such an operation is initially justified. As explained above, the legal aspects of the use of force are fairly well defined. The problem arises in how an armed force conducts itself once in the host nation, when its status is not one of occupant nor tourist, but somewhere between the two.

[12] DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM, D.1., E.1.a.(3) (July 10, 1979) [hereinafter DOD DIR. 5100.77].

[13] *Id.*, at D.1. (specifically stating that its mandate applies only to "armed conflict," as understood and defined within International Law).

[14] *See* INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL'S SCHOOL, UNITED STATES ARMY, THE OPERATIONAL LAW HANDBOOK, 18-6 to 18-9 (June 1995) [hereinafter OPLAW HANDBOOK]. *See also* Memorandum, W. Hays Parks, to The Judge Advocate General of the Army, subject: JUST CAUSE Law of War Obligations Regarding Panamanian Civilian Wounded and Dead (1 Oct. 1990) (explaining that the United States was not obligated under the formal tenets of the Law of War regarding its actions during Operation Just Cause because this action *was not* an international armed conflict—rationale based on the premise that the United States came to the aid of the legitimate government of Panama; accordingly, there was no state versus state conflict (no international armed conflict)). Mr. Parks stated that the United States still complied with the Law of War "to the extent practicable and feasible." *Id.*; *but see United States v. Noriega*, 808 F. Supp. 791, 795 (S.D. Fla. 1992), wherein the court acknowledged the United States' desire to characterize Just Cause as something other than armed conflict but held "[h]owever the government wishes to label it, what occurred in late 1989-early 1990 was clearly an armed conflict within the meaning of article 2" of the four Geneva Conventions.

[15] *See* CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTRUCTION 3121.01, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES (1 Oct. 1994) (classified SECRET document, including an unclassified portion, Enclosure A, intended for wide distribution).

[16] *See id.* para. 1(i).

As before, however, our leadership translates this guidance to mean "to the extent feasible" within the unique operational setting of each individual mission.[17] Although this approach provides a solid starting point, the nuanced nature of OOTW offer multidimensional problems that are not adequately addressed by this law by analogy (to the extent feasible) approach.[18]

In simple terms, the less than perfect fit of the Law of War in the OOTW environment is a problem. This problem is not always solved when judge advocates attempt to apply the less than perfect solution of law by analogy. Yet, for the judge advocate, the ability to efficiently solve problems in the OOTW environment is extremely important, maybe more so than in any other type of operational environment.[19] Recognizing this urgency, judge advocates involved in OOTW have begun to search in new places for solutions to the complex problems generated by OOTW. The after action reports and reviews of recent operations reflect this effort and serve as a valuable resource in charting the way to a more effective practice of operational law.[20]

The operational planners for recent OOTW have reinforced the need for solutions by documenting the essential role that operational lawyers play in both the planning and execution of OOTW.[21] Both the judge advocate and his client understand that OOTW are high stake affairs, which frequently enjoy less than universal international or domestic support. They further understand that OOTW are placed in jeopardy by anything less than consistently exceptional legal support.[22] This vulnerability is magnified by nearly every element of OOTW that require the application of rules and law that are not yet found in (or not yet understood as) conventional doctrine.[23]

Maybe the most important example of this vacuum in conventional doctrine is the body of rules that control the relationship between United States forces and local nationals. In war, the rules controlling this relationship are well established and are among the first subjects that young judge advocates learn.[24] These rules are reproduced in information publications and nu-

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[17] *See id. See also* OPLAW HANDBOOK, *supra* note 14, at 13-6; and Theodor Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT'L L. 78-82 (1995) [hereinafter Meron].

[18] *See* CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, UNITED STATES ARMY, LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995—LESSONS LEARNED FOR JUDGE ADVOCATES 45-56 (1995) [hereinafter CLAMO HAITI REPORT].

[19] Memorandum, Major Robin L. Johnson, Participant—Training and Doctrine Command (TRADOC), Seminar to Design Scenarios for Wargaming Exercises (2-5 May 1995), subject: After Action Report, TRADOC Analysis Center Seminar to Design Scenarios for Wargaming Exercises (11 July 1995) (on file with the International and Operational Law Department, The Judge Advocate General's School). Tasked to draft the after action report for this important doctrinal event, Major Johnson wrote in her concluding remarks:

> This seminar resulted in two rather striking insights from a JAG perspective. First almost all of the legal issues plugged into the events by the Red cell were injected by non-JAG players. Infantrymen, engineers, tankers, etc., were very concerned about our legal authority to perform these types of missions (OOTW) and our legal constraints while executing these missions. I think this comes from a concrete realization that the nature of these operations is a legal one to a great extent. Second, the general consensus of the group as a whole was that units must have JAG support early and often in OOTW. The commander repeatedly stated that he would not do anything in these operations without his JAG at his side. Finally, the group agreed that not only must JAG play be injected into training, that there is no way to play without it.

[20] *See* CLAMO HAITI REPORT, *supra* note 18. The *Haiti Report* is an example of the effort the Army Judge Advocate General's Corps is now making to efficiently capture the lessons of past operations. In compiling the Haiti Report, the CLAMO collected after action reports from numerous sources and conducted interviews with a great number of the principal legal and nonlegal participants. Additionally, the CLAMO has coordinated its efforts with The Judge Advocate General's School to ensure that these lessons and proposed solutions are passed on to the practitioner in the field. For example, in December 1995, members of the International and Operational Law Department traveled to Europe and used the CLAMO Haiti Report, still in its draft form, to conduct a comprehensive five-day seminar, which included briefing judge advocates about the most pressing legal issues that they were likely to encounter during the course of their deployment to Bosnia-Herzegovina and Hungary. In addition, CLAMO products are used as textbooks in several of The School's courses.

[21] DEP'T OF ARMY, FIELD MANUAL 71-100-2, INFANTRY DIVISION OPERATIONS, TACTICS, TECHNIQUES AND PROCEDURES, ch. 6 (1 Aug. 1993). *See also* FM 100-20 (Draft), *supra* note 10, app. B.

[22] *See* FM 100-20 (Draft), *supra* note 10, at 1-15 to 1-17.

[23] *See* CLAMO HAITI REPORT, *supra* note 18, at 45.

[24] *See generally* THE INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL'S SCHOOL, UNITED STATES ARMY, INTERNATIONAL AND OPERATIONAL LAW BASIC COURSE DESKBOOK (1995) [hereinafter BASIC COURSE DESKBOOK]. During the course of a twelve-week period, newly commissioned judge advocates receive detailed instruction on the law of war.

merous training manuals and circulars.[25] Conversely, in OOTW (each having its own unique personality) the rules are not well established or published in any standard informational or training manual.[26] Consequently, military leaders are less clear about the rules and their application to specific events. Obviously, this makes judge advocates and the advice they provide much more important.[27] Unfortunately, the current development of the rules has left even the experts grasping for answers.

In support of the foregoing assertion, I cite the comments of judge advocates, the operational law experts of the United States armed forces. These resourceful professionals have repeatedly conveyed their belief that one of the greatest obstacles in providing good legal support in the OOTW setting is the difficulty of knowing where to look for the relevant law or policy.[28] Instead of relying solely on best guesses and common sense adaptations[29] of the traditional law of war conventions (the practice of law by analogy), these practitioners recognize the need for an approach that provides the military lawyer with a single legal structure which applies to all OOTW.

During war, for example, a judge advocate can simply turn to the analytical structure built into the Hague Conventions and the four Geneva Conventions.[30] The drafters of these bodies of law constructed a well thought out mental flow chart that permits the practitioner to answer legal questions by accessing the flow chart, determining which part of the Law of War applies to a given set of facts, and then applying the applicable law to the

[25] DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (18 July 1956) (with Change 1) [hereinafter FM 27-10]; DEP'T OF ARMY, PAMPHLET 27-161-2, INTERNATIONAL LAW, VOLUME II (23 Oct. 1962) [hereinafter DA PAM 27-161-2]; DEP'T OF ARMY, TRAINING CIRCULAR 27-10-1, SELECTED PROBLEMS IN THE LAW OF WAR (26 June 1979) [hereinafter TC 27-10-1]; DEP'T OF ARMY, TRAINING CIRCULAR 27-10-2, PRISONERS OF WAR (17 Sept. 1991) [hereinafter TC 27-10-2]; and DEP'T OF ARMY, TRAINING CIRCULAR 27-10-3, THE LAW OF WAR (12 April 1985) [hereinafter TC 27-10-3].

[26] *Id.* With the exception of scant guidance found within the five page Appendix B of FM 100-20 (Draft), *supra* note 10, no other Army doctrinal publication delineates the legal restraints of OOTW. Several sources describe, usually in a cursory manner, rules regarding specific types of OOTW, such as Humanitarian and Civic Assistance. *See* DEP'T OF ARMY, FIELD MANUAL 41-10, CIVIL AFFAIRS OPERATIONS 10-18 (11 Jan. 1993). Recent manuals and handbooks have placed greater emphasis on both the law and lawyers in regard to OOTW. For example, the *Joint Task Force Commander's Handbook for Peace Operations* contains an entire chapter entitled "Legal Responsibilities." Even this excellent source, however, talks about little more than status of forces agreements (SOFA), rules of engagement (ROE), and the elevated importance of legal advisors in peace operations. To date, no service specific or joint manual explains, in a systemic and comprehensive fashion, how the rule of law impacts OOTW. *See* THE JOINT WARFIGHTING CENTER, DEPARTMENT OF DEFENSE, JOINT TASK FORCE COMMANDER'S HANDBOOK FOR PEACE OPERATIONS 73-80 (28 Feb. 1995).

[27] CLAMO HAITI REPORT, *supra* note 18, at 35, 37 (explaining the greater role demanded of judge advocates in "drafting and disseminating ROE" in OOTW—the report as a whole constantly reaffirms this reality, as to almost every area of practice).

[28] Lieutenant Colonel K. K. Warner, Staff Judge Advocate, 10th Mountain Division, United States Army, Remarks at The Judge Advocate General's Professional Onsite Training Conference, Washington, D.C. (March 11, 1995). Lieutenant Colonel Warner pointed out that, although his judge advocates were well-trained and executed a well-planned deployment to Haiti during Operation Uphold Democracy, he and his staff experienced frustration when attempting to locate "the exact rules of law that answered the questions posed by the many problems" raised by a civilian intensive operation. Lieutenant Colonel Warner's observation relative to this problem reinforces similar observations of other senior judge advocates voiced in the after action reports or reviews of every recent operation. Lieutenant Colonel Warner made similar comments when interviewed by *The New York Times*. The *Times* asked Colonel Warner about the United States' legal authority for the detention of more than 200 civilians (the *Times* figure of 200 is larger than the actual number of recorded detainees) by "American troops as part of an agreement between former President Jimmy Carter and Haiti's now defunct de facto military government." Lieutenant Colonel Warner relied on United Nations mandate Resolution 940 as the authority for these detentions. Conversely, however, Lieutenant Colonel Warner described the "legal vacuum" in Haiti and the problem of determining which body (or bodies) of law control the actions of American commanders. Larry Ronter, *Legal Vacuum in Haiti is Testing U.S. Policy*, N.Y. TIMES, Nov. 4, 1994, at A32. *See also* F.M. Lorenze, *Law and Anarchy in Somalia*, PARAMETERS, Winter 1993-94. Both here and in the after action report (AAR) prepared by Colonel Lorenze, he describes the countless problems caused by the absence of a clear set of legal rules in numerous operational law areas. Without doubt, the most significant problems caused by the absence of rules revolved around the treatment of host nation civilians. *See generally* Memorandum, F.M. Lorenze, Unified Task Force Staff Judge Advocate, Subject: Operation RESTORE HOPE After Action Report/Lessons Learned (12 Apr. 1993) (on file within the International and Operational Law Department, The Judge Advocate General's School).

[29] In the fast-paced practice of operational law, best guesses and common sense will remain, as they have always been, a measured part of the stock and trade of the good judge advocate. Now, however, this traditional methodology, based on a healthy portion of these two ingredients, is firming up as a formal part of the greater mix of a new method or structure of applicable laws. This new structure of law and policy is the topic of this essay.

[30] The multi-part structure of the Fourth Geneva Convention (GC or Civilian's Convention) serves as an excellent example of the flow chart construction of the Law of War. The practitioner has but to consider the possible application of succeeding parts of that convention to determine the extent of protective provisions available to any particular civilian. *See* GC, *supra* note 4, pts. I, II, and III (part IV deals primarily with civilian internment).

query.[31] Practitioners should be able to access the same type of mental flow chart when dealing with OOTW problems and issues.

In response to the lack of an analytical structure for OOTW and the endless stream of legal issues raised by these new age operations, The Judge Advocate General's School, United States Army, began the development of a new series of courses.[32] These courses direct attention to the myriad of problems judge advocates face when applying domestic, international, and host nation legal regimes within the OOTW context.

### The Civilian Imperative

*We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness.*

Thomas Jefferson
Declaration of Independence, 1776

An example of this new breed of law school instruction is Civilian Protection Law (CPL). The Judge Advocate General's School developed CPL in recognition that military forces will confront civilians in nearly every type of potential military operation. Civilians no longer represent a single aspect of contemporary missions, but rather have become the very object of such missions.[33] The protection of civilians (the preservation of their basic human rights) has been one of the primary justifications for international intervention in nearly every recent major operation.[34]

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[31] For example, within the GC, military practitioners have long been taught that they should access the following mental flow chart when seeking insight into what portions of that convention might serve to provide protections for a particular civilian or group of civilians. *See* BASIC COURSE DESKBOOK, *supra* note 24, at 8-7.

| | | |
|---|---|---|
| Armed Conflict?→ | No:→ | Law of war (LOW) does not apply. |
| Armed Conflict?→ | Yes:→ | LOW applies, but need more information to know what portion of LOW applies. |
| What Type Conflict?→ | Internal:→ | Common article 3 protections apply. |
| | International:→ | Main part of GC applies. |
| If International, What Type of Person?→ | Unprotected:→ | GC, Part II protections only. |
| | Protected:→ | GC, Part III protections. |

[32] These courses are a reflection of a shift by The Judge Advocate General's School and the Army's overall shift away from instruction that is limited to rigid tenets of the traditional law of war. The new courses emphasize the wider and more fluid body of law described as Operational Law. Much has been written on this topic and the effort the Army is now making to ensure the shift is made. *See* Major Mark S. Martins, *Responding to the Challenge of an Enhanced OPLAW Mission: CLAMO Moves Forward with a Full-Time Staff*, ARMY LAW., Aug. 1995, at 3-4. *See also* Lieutenant Colonel Marc Warren, Operational Law—A Concept Matures, 152 MIL. L. REV. (to be published January 1997).

[33] The most telling evidence of the growing importance of civilians during recent and ongoing operations are the numerous efforts to insert techniques and procedures for integrating the "factor of civilians into the commander's planning process." For example, the Special Warfare Center and School recently submitted a proposal to modify the doctrinal planning philosophy of METT-T (mission, enemy, terrain, troops, and time available). The new version, METT-T-C (adding civilians), would require leaders to plan for the numerous civilian-oriented problems typically encountered during OOTW. White Paper, *Civil Affairs: A Function of Command*, 8 SPECIAL WARFARE, THE PROFESSIONAL BULLETIN OF THE JOHN F. KENNEDY SPECIAL WARFARE CENTER AND SCHOOL 20, 23 (July 1995). The Department of Defense has recently taken a number of important steps requiring the integration of "the civilian factor" into the planning and training required for all military operations. Important among these steps is a new directive which enumerates and assigns responsibility for many of the obligations owed to civilian populations during overseas operations. DEP'T OF DEFENSE, DIRECTIVE 2000.13, CIVIL AFFAIRS 4 (June 27, 1994) [hereinafter DOD DIR. 2000.13].

[34] In 1995, the Security Council, in acknowledgment of the Dayton Agreement [hereinafter Dayton Accord], issued Resolution 1031, authorizing a multi-national implementation force (IFOR) "to take all necessary measures to effect the implementation" of Annex 1-A of the Peace Agreement. *See* S.C. Res. 1031, U.N. SCOR, 50th Sess., 3607th mtg., U.N. Doc. S/RES/1031 (1995) [hereinafter Resolution 1031]. Maybe the single most important portion of Annex 1-A is Article II (3), which requires the parties to "provide a safe and secure environment for all persons in their respective jurisdictions, by maintaining civilian law enforcement agencies operating in accordance with internationally recognized standards and with respect for internationally recognized human rights and fundamental freedoms . . . ." Article VI empowers the IFOR to assist the UN and other organizations in "their humanitarian missions," and authorizes it to prevent the interference with the freedom of movement of the civilian populations, refugees, and displaced persons. In a nutshell, Operation Joint Endeavor's mandate was to separate the warring parties, maintain peace, and protect the civilian population, both directly and indirectly.

In 1994, the Security Council of the United Nations authorized the creation of a multi-national force to rid Haiti of an "illegal de facto regime," to stop violations of humanitarian law, and to restore the legitimately elected President (Restore Democracy) to power. *See* S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg., U.N. Doc. S/RES/940 (1994) [hereinafter Resolution 940].

Earlier that same year, President Clinton made the determination that the provision of humanitarian aid to refugees in Rwanda was in the national interests of the United States. *See* Memorandum, President William J. Clinton, to The Secretaries of Defense and State, subject: Determination to Authorize the Furnishing of Supplies and Services in Support of Efforts to Care for Refugees from Rwanda (July 22, 1994). The object of this mission (Operation Provide Hope) was to save civilian lives. *See* William J. Perry, *The Rule of Commensurate Military Force*, DEFENSE 95 (issue 3, 1995).

On 3 December 1992, after determining that the situation in Somalia had become a "major humanitarian calamity," the Security Council adopted Resolution 794, granting the use of all necessary means to establish a secure environment for humanitarian relief operations. *See* Letter from George Bush, President of the United States, to Robert C. Byrd, President pro tempore of the United States Senate (Dec. 10, 1992) (on file with The International and Operational Law Department, The Judge Advocate General's School). In December 1989, President George Bush explained that Operation Just Cause was necessary to, among other things, "defend Democracy in Panama," an action necessary to protect the civilian population from the misdeeds of the de facto government. *See* Letter from George Bush, President of the United States, to Robert C. Byrd, President pro tempore of the Senate (Dec. 21, 1989) (on file with The International and Operational Law Department, The Judge Advocate General's School).

The legitimacy[35] of these important multi-national operations and, in turn, United States national prestige depends upon making the right decisions relative to these civilians. Operational plans must be designed to emphasize "the political purpose and moral dominance of a situation."[36] Because the protection of civilians is at the heart of most OOTW, superfluous civilian injury[37] or destruction of civilian property is, in the short term, nearly always at odds with mission accomplishment.[38] Worse, in the long term, such conduct denies the United States the ability to realize the desired political purposes that serve as the underlying reasons for its involvement in OOTW. Accordingly, the mistreatment of civilians, regardless of the reason, endangers the United States' long-term national security strategy.[39]

The law provides our forces with a surprising degree of latitude in dealing with civilians. The key is to understand the law and to take advantage of the rights that it grants to military forces relative to a civilian population. Also of key importance is a complete understanding and careful observation of the legal restraints that provide protections for civilians. The failure to understand and apply the law, either as a right or a restraint, may imperil our nation's long-term goals.

In a nutshell, commanders must understand three things regarding civilians. First, our leaders must understand the rules that dictate how our troops will treat the civilians within the context of an operation. Second, they should understand the degree of protection that must be provided to protect civilians from their own government and from other civilians. Third, and just as important as the first two considerations, commanders must understand their responsibility to protect their troops *from* civilians. Simple in concept, but complex in application, these three obligations merely define opposite boundaries within which hundreds of complex obligations and legal issues exist.[40]

Today's military leaders understand this aspect of OOTW and have begun the process of integrating civilians into their training activities.[41] They also understand the complexities and seemingly innumerable problems generated by civilian-oriented missions. Modern leaders demand that their soldiers, down to the most junior private, understand and possess the ability to comply with the rules.[42] The only way to make this happen is to continue the integration of these rules into unit training events.

The military legal community is important to this process; judge advocates must recognize and find answers for these sophisticated legal issues.[43] During the course of recent "civilian intense" operations, judge advocates frequently have been called on to serve not only as advisors and trainers but as actors.[44] Regardless of their role, military lawyers must ensure that their supported units realize the nation's commitment to the civilian imperative. They do this by recognizing potential problems and translating the solutions to these problems into advice for military leaders and training for soldiers. Before this can happen, judge advocates must have the tools and preparation to recognize and solve these problems. Civilian Protection Law is such a tool.

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[35] "Legitimacy is often the center of gravity in OOTW. Political, economic, informational, and military actions are all aimed at enhancing one's own legitimacy . . . ." FM 100-20 (Draft), *supra* note 10, at 1-16.

[36] *Id.* at 1-17.

[37] In this context, "injury" includes an entire range of possible mistreatment. This range is defined by both the nature of the mission and the law. The Fourth Geneva Convention provides insight into how pervasive these protections are. For example, article 27 of the Fourth Geneva Convention provides for much more than freedom from physical abuse. It ensures protection for physical, moral, and intellectual integrity; and respect for honor, family rights, and religious convictions.

[38] In describing United States policy regarding compliance with human rights, the United States Army notes that "a nation state that disregards the human rights of individuals makes warfare unnecessarily harsh, increases the resolve of its enemy, and changes the nature of the conflict." FM 100-5, *supra* note 6, at 2-3.

[39] *Id.*

[40] *Id.*

[41] In its race to become trained for possible deployment to Bosnia the 2d Brigade, 1st Armored Division spent seven days of November 1995, at the 44,000 acre training area located in Hohenfels, Germany. Colonel Dean Cash, Commander of the Combined Arms Maneuver Training Center (Hohenfels) stated that 2d Brigade would undergo complex training required for today's "stability operations" (OOTW). He further stated that the training battlefield will "include civilians, news media, displaced persons, belligerents, and others." *See* Jim Tice, *The Busiest Major Command*, ARMY TIMES, Oct. 30, 1995, at 22-23.

[42] *Id.* Colonel Cash also stated (in the context of describing the complexities of dealing with civilians within stability operations) "that it was not unusual during training for him to walk up to a private—not an officer—[and ask him how he would react to specific situations]." He noted that "it's pretty impressive when you hear an eighteen, nineteen, or twenty year old private articulate the rules of engagement, and not just from rote memory, but to a [specific] situation. You walk away wondering just who should be in command here." *Id.*

[43] DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL OPERATIONS, 1, 17, 26 (3 Sept. 1991) [hereinafter FM 27-100].

[44] In past military operations, judge advocates played an important role by advising "the operators." Operations other than war offer the judge advocate (demands of the judge advocate) a more active role than most military legal advisors have experienced in the past. Performance in various positions, like a liaison officer to various nongovernmental and governmental organizations, a member of a human rights investigation team, or an integral player at a joint detention facility, has cast judge advocates in the role of operator. See the detailed descriptions of these jobs in the *Operation Uphold Democracy*. 10TH MOUNTAIN DIVISION, OFFICE OF THE STAFF JUDGE ADVOCATE MULTINATIONAL FORCE HAITI AFTER-ACTION REPORT (Mar. 1995) [hereinafter 10TH MOUNTAIN AAR].

Recognizing the need for these tools and the important nexus between the protection of civilians and operational success,[45] The Judge Advocate General's School began the task of assembling CPL. The professors assigned to this task designed a structure of study that first surveys, subsequently analyzes, and finally solves the sophisticated problems associated with the application of an entire range of protective measures and laws.

Those involved in the ongoing development of CPL are mindful of the increasing involvement of the United States in OOTW.[46] This involvement has, in turn, highlighted our nation's commitment to the protection of the "victims of war" and the enforcement of worldwide humanitarian law and human rights legislation. Those representing the United States in the conduct of foreign relations have repeatedly condemned other nations for violations of international humanitarian law and the growing body of human rights legislation while holding the United States out as a leader in the advancement of these causes.[47]

Much attention has been focused on this area because of the undeniable relationship between the human rights record of the United States and its international prestige. The importance of this relationship is difficult to overstate because of, among other things, the direct impact international prestige has upon national security.[48]

Perhaps one of the best statements of the United States position and the purpose of its resulting conduct in the CPL arena was made six days before our troops arrived in Haiti to conduct Operation Uphold Democracy. Anthony Lake, addressing the Council on Foreign Relations, stated that:

> "the purpose of American power . . . in a radically new international environment . . . comes under many names—democracy, liberty, civility, pluralism—but that has a constant face. It is the face of the tolerant society in which leaders and governments exist not to use or abuse people, but to provide them with freedom and opportunity to preserve individual human dignity . . . ."[49]

Having taken a leadership role in the development of this important movement, the United States must continue to lead.[50] Accordingly, The Judge Advocate General's School has pursued CPL development, scholarship, and application within the context of the diverse multitude of potential OOTW. Students and practitioners are continually reminded that the operations of tomorrow may bear little resemblance to past and present opera-

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[45] The principles and activities of OOTW described in *FM 100-5* reflect the Army's keen understanding of the importance of planning for the civilian element within the operational equation. *See* FM 100-5, *supra* note 6, at 13-3 to 13-8.

[46] Since the cessation of offensive operations in the Persian Gulf War on 28 February 1991, the United States has not participated in a single international armed conflict. Contrast this number with the over forty OOTW the United States has been involved with during the same period. *See* The International and Operational Law Department, The Judge Advocate General's School, United States Army, Operational Law, The Law of Military Operations, Cases and Materials, 9-5 (1995) [hereinafter Operational Law Cases and Materials].

[47] An example of one such United States statement was made by Mr. Warren Zimmerman, when he demanded that the savage treatment of civilians . . . destruction of civic and cultural property . . . ; and unnecessary assaults on the environment [must stop]." Warren Zimmerman, Director of Refugee Programs and the United States Representative to the International Conference for the Protection of War Victims, Geneva, Switzerland (Aug. 30, 1993). Recently, Secretary of State Warren Christopher characterized the United States commitment in this area as "steadfast support for human rights and democracy," further describing "American leadership and engagement [as] essential on the great journey [to a better world]." Warren Christopher, American Strategy for a Peaceful and Prosperous Asia-Pacific, Address before the National Press Club, Washington, D.C. (July 28, 1995), *in* Dep't St. Dispatch., July 31, 1995, at 591, 594.

[48] An impressive array of persons have attempted to explain why the United States' record and involvement in operations to protect the dignity of the world citizen is vital to national security. Among the most persuasive explanations is a four-point address made by Secretary of State Warren Christopher (then serving as Deputy Secretary of State in the Carter Administration) He explained that the United States must act as a leader in this area because:

> 1. United States action in this area serves to stabilize the relationships between nations and serves the ends of peace.
>
> 2. The United States will be more secure in a world where more governments respect the rights of their people—because countries that respect human rights make stronger allies and better friends.
>
> 3. Support for human rights enhances the influence of the United States in important world arenas.
>
> 4. Support for human rights may offer the only long-term solution to one of the most pressing problems on the international agenda—the problem of refugees.

*See* Warren Christopher, *Human Rights and the National Interest*, Department of State, Bureau of Public Affairs, Current Policy No. 206 (1980), *reprinted in* Frank Newman & David Weissbrodt, International Human Rights 503 (1990).

[49] Anthony Lake, The Purpose of American Power, Address Before the Council on Foreign Relations (Sept. 12, 1994), *in* Foreign Policy Bulletin, Nov./Dec. 1994, at 58.

[50] Michael Dobbs, *Holbrook's Parting Shot*, Wash. Post, Mar. 3, 1996, at C-1 (Assistant Secretary of State, Richard Holbrook, opining that the "future of American military operations overseas will be determined by Bosnia" and that the "option of noninvolvement has disappeared").

tions.[51] The challenge and prime directive of CPL is the recognition of this nearly infinite field of application.

## The Components of CPL

Because of the realities outlined above, CPL does not and could not represent any single domestic, international, or host nation code. Instead, it offers an approach to the application of a wide array of existing legal regimes that provide protections for civilians in every conceivable set of circumstances. Civilian Protection Law is made up of a wide array of both customary[52] and conventional legal regimes (treaties and international agreements) and domestic law and policy. Additionally, international human rights law provides the cornerstone of CPL, serving as the starting point for almost any CPL discussion. Finally, host nation law also serves as an important CPL component. The extent of host nation law application is based on canons of public international law and the national policies of the United States, our coalition partners, and the international organizations under whose mandates we act.

Many of these regimes are designed to protect a particular class of civilians in a particular set of circumstances. Some very important portions of CPL apply only during specific types of armed conflict. For example, article 3 common to the four Geneva Conventions of 1949[53] and Protocol II Additional to the Geneva Conventions (1977)[54] provide protection only during noninternational (internal) armed conflict.

The remaining portions of the Geneva Conventions provide protections for civilians during the course of international (state versus state) armed conflicts.[55] With the exception of common article 3, the four conventions of 1949 provide no protections for the victims of noninternational armed conflict.[56] Accordingly, of the 159 articles found within the Geneva Convention, only one article is devoted to protecting civilian persons in noninternational armed conflicts. Given that most of the armed conflicts occurring during this century were internal conflicts[57] and that many OOTW evolve from internal conflicts, the vacuum of regulation in this area is one of the more significant challenges placed upon CPL.

While the presence of armed conflict (either internal or international) is the threshold event that invokes the traditional Law of War, other bodies of law are triggered by a person's status. These regimes typically operate without regard to the state or type of hostilities. They depend only on whether the satisfaction of a specific definitional threshold places a person into a

[51] "A century has passed since 1989." Lieutenant Colonel Rick Machamer, *The Recruits of 2010*, 50 Soldiers 9, Sept. 1995, at 52, quoting Lieutenant General John Miller, Deputy Commander of United States Army Training and Doctrine Command, relative to the dramatic differences between today's missions and those of just a few years ago. The Judge Advocate General' School also offers an elective course described as *Future Wars*, wherein, potential conflicts of the future are described and studied in the context of future political, social, legal, and economic engines. A textbook is available on this subject. *See* David M. Crane, Future Wars, International and Operational Law Department, The Judge Advocate General's School, United States Army (Jan. 1996).

[52] The body of well-defined and universally recognized international law, that may not be incorporated into any treaty or convention. FM 27-10, *supra* note 25, at 4. Customary law has been described as the fundamental rules of international law that possess "unchallenged applicability." L. Oppenheim, International Law, vol. II, Disputes, War and Neutrality 520 (7th ed., H. Lauterpacht, 1955).

[53] Article 3 is one of a small number of identical, introductory articles that are found in each of the four Geneva Conventions. For example, article 3 of the GPW (Prisoners of War Convention) is identical to article 3 of the GC (Civilian's Convention).

[54] The 1977 Protocol Additional to the Geneva Conventions of 1949, and relating to the Protections of Victims of Non-International Armed Conflicts (Protocol II), *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144, Annex I, 16 I.L.M. 1391, 1125 I.L.M. 1391 [hereinafter Protocol II]. Protocol II was negotiated with its sibling protocol, Protocol I, The 1977 Protocol Additional to the Geneva Convention of 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144, Annex 16 I.L.M. 1391, 1125 U.N.T.S. 3 [hereinafter Protocol I]. The United States has not ratified either of the protocols, while 144 nations have ratified Protocol I and 136 nations have ratified protocol II (as of May 31, 1996). *See* Addendum to International Committee of the Red Cross 1994 Annual Report (1996). In 1987, President Reagan decided not to seek ratification of Protocol I, primarily because of objections to articles 1, 43, 35, 39, 44, and 55 and 56. For an excellent point and counter-point discussion of the Protocols *see* Guy B. Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 Va. J. Int'l L. 109 (1985); George H. Aldrich, *Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol I*, 26 Va. J. Int'l L. 693 (1986). At the August 1993 International Conference for the Protection of War Victims, the United States stated that it would initiate a review of its position on Protocol I. This review, at the Department of Defense, is ongoing. *See* International and Operational Law Department, The Judge Advocate General's School, United States Army, Law of War Workshop, Cases and Materials on the Law of War, 9-11 (1995) [hereinafter Law of War Cases and Materials]. *See also* George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 Am. J. Intl. L. 1 (1991).

[55] GC, *supra* note 4, art. 2.

[56] *Id.* art. 3.

[57] *See* Memorandum of Opinion, International Committee of the Red Cross, to Mr. Francis Deng, Special Representative of the Secretary General, United Nations, subject: The ICRC and Internally Displaced Persons (Nov. 1992) reprinted in Int'l Rev. of the Red Cross, Mar.-Apr. 1995, at 181, 185. *See also* Professor Theodor Meron, remarks as Commentator on Panel IV, The Existing Legal Framework: Part II—Protecting the Environment During Non-International Armed Conflicts, Symposium: The Protection of the Environment During Armed Conflict and Other Military Operations, The Naval War College (Sept. 21, 1995). Professor Meron stated that the majority of contemporary conflicts were noninternational in nature. His comments, made in the company of an assembly of international law experts, were accepted without challenge. *See also* International Committee of the Red Cross 1994 Annual Report (1995). The nation by nation report reveals that nearly all current conflicts are internal.

particular status. The 1951 Refugee Convention[58] serves as an example of this type of law by providing specific protections for civilians that fear persecution from their own government.[59] An individual, whose circumstances satisfy the Refugee Convention's definition of a refugee[60] and who does not commit any act that would cause him to lose this status,[61] is entitled to the benefit of the Refugee Convention's protective provisions.[62]

Several important regimes, however, establish rules that provide protection for all civilians in any area that might be affected by military operations. These bodies of law apply without regard to the nature of the conflict (internal versus international) or the specific class of affected civilians. These systems apply regardless of any type of legal prerequisite.[63] Any number of human rights treaties or declarations serve as examples of this type of baseline law.[64] Relative to the military operations of the United States, however, the treaties or declarations of greatest import are those which the United States has either ratified or acknowledged as reflective of customary international law.

In the late 1980s, the United States began what some have called the decade of ratification in an attempt to quickly improve its rather poor record[65] of ratifying human rights legislation.[66] Significant examples of recently ratified treaties include the International Covenant of Civil and Political Rights,[67] the Convention on the Prevention and Punishment of the Crime of Genocide,[68] and the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.[69] Some argue that the ratification of these treaties alters the responsibilities of the United States across the entire operational spectrum.[70] Whether such a dramatic position is merited by the actual provisions of the treaties is a matter for debate.[71]

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[58] Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter the Refugee Convention]. The United States became bound by the substantive provisions of the Refugee Convention when it ratified the Protocol Relating to the Status of Refugees, 4 October 1967, 19 U.S.T. 6257, 606 U.N.T.S. 267 [hereinafter the Refugee Protocol].

[59] *Id.* art. 1.

[60] *Id.*

[61] *Id* art. 1B.(2)

[62] *Id* arts. 3-34.

[63] The only practical requirement for imposing human rights is the presence of some form of state action. Most human rights instruments are based upon an implicit presumption that human beings need protection from the government under whose dominion they find themselves. The historical development of humanitarian and human rights law is based on this assumption. Ancient scholars spoke of the right of one power to intervene in the domestic policies of another power when the second power "practiced atrocities towards his subjects, which no man can approve." HUGO GROTIUS, DE JURE BELLI ESTI PACTIS 438 (Whewell trans. 1853). Even this requirement may not be necessary for the application of the expanded versions of many traditional and new human rights regimes. Modern commentators and recent practices of nations reflect the recognition of these basic rights of man in the absence of any state action whatsoever (as in Operation Restore Hope—Somalia).

[64] The premier example of this type of instrument is the Universal Declaration of Human Rights. G.A. Res. 217 A(III), December 10, 1948, U.N. Doc. A/810, at 71 (1948) [hereinafter Universal Declaration] *reprinted in* OPLAW Handbook, *supra* note 14, ch. 20. The Declaration has been aptly described as having a greater "impact on world public opinion . . . than any other contemporary international instrument, including the Charter of the United Nations." *See* J. HUMPHREY, HUMAN AND THE UNITED NATIONS: A GREAT ADVENTURE 63-77 (1984).

[65] *See* JOHN N. MOORE ET AL., NATIONAL SECURITY LAW 703 (1990).

[66] *See* Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995). Henkin notes the United States' ratification of a number of significant treaties, but then criticizes the United States refusal to admit the full impact of these treaties.

[67] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), Dec. 16, 1966, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, 6 I.L.M. 368, *entered into force for the United States* (with reservations) Sept. 8, 1992 [hereinafter Civil & Political Covenant].

[68] Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 11, 1948, 78 U.N.T.S. 277, *entered into force for the United States* (with reservations) Nov. 25, 1988 [hereinafter Genocide Convention].

[69] Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, G.A. Res. 39-46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51, 23 I.L.M. 1027 (1984) *entered into force for the United States* (with reservations) Sept. 19, 1994 [hereinafter Torture Convention].

[70] *See* Meron, *supra* note 17, at 78-80. *See also* CLAMO HAITI REPORT, *supra* note 18, at 49, citing the human rights groups that mounted a defense for an Army captain who misinterpreted the Civil and Political Covenant to create an affirmative obligation for him to correct human rights violations within a Haitian prison. Lawyers' Committee for Human Rights, Protect or Obey: The United States Army versus CPT Lawrence Rockwood 5 (1995) (reprinting an amicus brief submitted in opposition to a prosecution pretrial motion). *See infra*, V.B. Tier One: Fundamental Human Rights Legislation, for a more detailed discussion of whether (or to what extent) treaties like the Civil and Political Covenant alter the international obligations of the United States.

[71] *See* Henkin, *supra* note 66.

Despite the outcome of this debate, at least two things should be clear. First, military practitioners should be fully conversant with humanitarian and human rights law, to include the distinction between these two types of protective law. Second, they also should fully understand the United States' position relative to the impact of these treaties during overseas military operations. In acknowledgment of these responsibilities, The Judge Advocate General's School now teaches courses designed to introduce the human rights dimension (human rights law) along with traditional law of war (humanitarian law). In the seven years since the ratification of the Genocide Convention (and the four years since the ratification of the Civil and Political Covenant), the School has effectively integrated these treaties and other components of human rights legislation into its curriculum and course materials.[72]

## CPL: Structured for Analysis

To make the process of analysis more efficient, the architects of CPL integrated its primary components into a four-tiered system. The legal practitioner can answer any civilian protection question by starting with the first tier (the first level of protection) and systematically working through all four tiers. This methodology provides a simple road map for the student or practitioner to access the admittedly complex body of law that provides protection for civilians during the course of contemporary military operations. Accordingly, CPL's four-step process brings to OOTW the same type of mental flow chart approach that is already integrated into traditional law of war conventions relative to war.

International customary and conventional law, international human rights legislation, host nation law, and the domestic law and policy of the United States (which frequently requires the application of law from another tier by analogy) make up the four tiers of CPL. The nature and purpose of the operation, the nations involved, the status of the affected civilians, and the policy decisions of our leadership control the application of this law.

A student of CPL can address, if not answer, any question involving the application of the underlying legal regimes of CPL by using the systematic method of analysis offered by the four-tier system. For example, the first tier of protection is made up of those rights and protections to which *all* persons, civilian and otherwise, are entitled. Within this tier, humanitarian declarations, human rights legislation, and the expanded view of article 3,[73] common to the four Geneva Conventions of 1949, provide a minimum baseline of protections that serves as a starting point for CPL application and analysis.

The lessons learned by the United States, its coalition partners, and international organizations during recent stability and support operations such as Operations Uphold Democracy and Joint Endeavor, serve as a valuable resource in the development of the CPL complex. This is because CPL, designed to serve across the entire operational spectrum, is most useful within the OOTW environment.

The Judge Advocate General's School is directly linked to the practitioners in the field[74] and is uniquely poised to take immediate advantage of their experiences. Consequently, participants in the planning and execution of such operations from all four military services, the Coast Guard, and many other federal agencies have contributed to the evolution of CPL and other similar courses.

Like other courses within the international and operational law arena, The Judge Advocate General's School constructed CPL to perform beyond the academic environment. Civilian Protection Law's greatest utility will be tested in the nuanced and diverse operations of the next century. There, students and

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[72] *See* Operational Law Cases and Materials, *supra* note 45, at 8-1, 8-6. *See also* Law of War Cases and Materials, *supra* note 54, ch. 10. *See also* OPLAW Handbook, *supra* note 14, chs. 13, 15, 20, 24, 25, 26.

[73] Common article 3 is intended to provide protection to the victims of noninternational war. Strictly speaking, it was not intended to apply outside of internal conflict. The history of the content of the article, however, provides insight into why many scholars and the International Court of Justice (ICJ) extend these type of protections beyond internal conflict. The language of article 3 originally was intended to serve as a preface to the four Geneva Conventions of 1949. The preface was to serve as a purpose statement for the conventions, setting out the fundamental rights to which all human beings are always entitled. The drafters, however, could not agree on the exact language or usage. Consequently, the preface was never finalized or used. Later, when the discussion turned to protections for persons (not just civilians) within noninternational conflict, the preface proponents caused the insertion of the preface's wording into the noninternational conflict provision, which became article 3. The current expansion of common article 3's scope of application is consistent with the historical purpose of its wording: to set out a baseline of minimum protections to which all peoples are always entitled, despite the type of conflict. *See* Oscar M. Uhler, Commentary IV, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 32-34 (Jean S. Pictet ed., 1958) [hereinafter Pictet IV]. The ICJ made a concise statement of this "expanded view" when it held that article 3 provides the "minimum yardstick" of protections to which all human beings are entitled, in all conflicts. The ICJ also stated that these protections are reflective of customary international law, as they are "elementary considerations of humanity." Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States) 1986 I.C.J. 14 (June 27) *reprinted in* 25 I.L.M. 1023, 1073.

[74] The Judge Advocate General's School, United States Army, offers a masters of law program to career judge advocates from each of the four military services (and judge advocates from other nations). Additionally, the School teaches continuing legal education (CLE) courses to thousands of attorneys each year. Many of the lawyers have just returned from operations in places such as Kuwait, Saudi Arabia, Somalia, Rwanda, the Former Yugoslavia, and Haiti. The CLE courses are available to lawyers from all five services (including the Coast Guard) and legal advisors from many civilian agencies, such as the Department of State and the Central Intelligence Agency. These contacts are invaluable in the accumulation of knowledge and the development of courses, course materials, and textbooks. For a more complete description of the school, its mission, facilities, and courses *see* The Annual Bulletin of The Judge Advocate General's School 1994-1995 (on file with the author and available through The Judge Advocate General's School, United States Army).

practitioners from all military services and the various federal agencies and departments will apply its lessons.

**Four Tiers of Protection**

| **Tier One: Fundamental Human Rights Legislation** |
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| **Tier Two: Host Nation Law** |
| **Tier Three: Convential Law Of War And Humanitarian Law** |
| **Tier Four: Law By Analogy** |

*Introduction to the Tiers: The Mission Statement*

> *None of the political leadership can tell me what they want me to accomplish. That fact, however, does not stop them from continually asking me when I will be done.*[75]

Military practitioners should prepare for every operation with the same basic questions in mind. First, they must determine to what extent civilians might be affected by the operation. They should then determine how this might happen and what aspects of the operation are most likely to generate this impact. As *the* initial consideration, judge advocates should analyze the purpose of the operation (*i.e.*, look at the mission statement).

A problem recognized by a number of senior judge advocates is that the scope of many recent mission statements is less than clear.[76] Some might argue that broad mission statements are frequently necessary because they permit greater flexibility during an operation's execution phase and thereby permit the operation to enjoy unresisted transition. Although this flexibility might serve some undisclosed political reality,[77] it makes the job more difficult for judge advocates.

When attempting to determine what laws apply to American conduct in an area of operations, a specific knowledge of the exact nature of the operation becomes immediately necessary.[78] For example, in the current operations within the Former Yugoslavia, the United States led Implementation Force (IFOR) has struggled with defining the exact parameters of its mission. In a purely legal sense, the Dayton Accord required or authorized (maybe this distinction is where the problem lies) the IFOR to implement the initiatives set out in its Annex 1-A.

Annex 1-A, in turn, requires the IFOR to perform specific civilian-related tasks such as (1) preventing "interference with the movement of civilian population, refugees, and displaced persons, and responding appropriately to deliberate violence to life and person," and (2) ensuring that the parties "provide a safe and secure environment for all persons in their respective jurisdictions, by maintaining civilian law enforcement agencies operating in accordance with internationally recognized standards and with respect for internationally remcognized human rights and fundamental freedoms."[79]

Initially the North Atlantic Treaty Organization, the IFOR, and the United States, realizing the breadth of a mission with such responsibilities, did not formally acknowledge the obligation to execute either of these mission elements.[80] Yet, as the mission matured, leaders began to embrace these type of responsibilities. Performing tasks intended to protect and serve the civilian population, the IFOR performed many jobs technically reserved for the United Nations International Police Task Force.[81]

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[75] This statement is attributed to an anonymous United Nations commander en route to a peace operation. Kenneth Allard, Institute for National Strategic Studies—Somalia Operations: Lessons Learned 21 (1995).

[76] Colonel David Graham made this observation during the 1995 Worldwide Judge Advocate General's Corps Continuing Legal Education Conference. His comments were met with agreement by dozens of his peers. During a recent conversation with the author, Colonel Graham repeated this statement, but noted that a number of recent operations, such as Desert Storm and Provide Comfort, did have clearly defined mission statements. He further noted that the ability to determine the applicable law in the latter category is remarkably easier than in the former category. Telephone interview with Colonel David E. Graham, Chief, International and Operational Law Division, Office of The Judge Advocate General, United States Army, Washington, D.C. (Nov. 2, 1995).

[77] The original "mission of Operation Restore Hope was narrow and clearly defined: to provide security for the delivery of relief supplies." But this initial clarity was lost and mission creep set in. The capture of Chief Warrant Officer Durant was a visible result of this lack of clarity and inability to control the civilian population in Mogadishu. *See* Frederick M. Lorenze, *Rules of Engagement in Somalia: Were They Effective?*, 42 Naval Law Review 62, 63 (1995). *See also* Frederick M. Lorenz, *Forging Rules of Engagement: Lessons Learned in Operation United Shield*, Mil. Rev., Nov./Dec. 1995, at 17.

[78] The importance of clear mandates and missions was pointed out as a "critical" lesson learned from the recent Somalia operations. "A clear mandate shapes not only the mission (the "what") that we perform, but the way we carry it out (the "how"). *See* Allard, *supra* note 75, at 22.

[79] *See* Dayton Accord, *supra* note 34, annex 1A, arts. I, VI.

[80] *See* John Pomfret, *Perry Says NATO Will Not Serve As "Police Force" in Bosnia Mission*, Wash. Post, Jan. 4, 1996, at D-1. *Also see*, Office of Assistant Secretary of Defense (Public Affairs), *Operation Joint Endeavor Fact Sheet*, Dec. 7, 1995), *available at* Internet: http://www.dtic/bosnia/fs/bos-004.html (reporting that the "IFOR will not act as a police force," but noting that IFOR will have authority to detain any persons who interfere with the IFOR mission or those individuals indicted for war crimes, although they "will not track them down").

[81] *See* John Pomfret, *Bosnia's Beat Cops, U.S. MPs Fight Boredom to Keep Peace in Role More Like Police Than Military*, Wash. Post, May 13, 1996, at A-13.

The result of this phenomenon is that the forces on the ground did not have a clear concept of the mission. Fortunately, commanders and their judge advocates have adapted and learned that, in the absence of well-defined mission statements, they must gain insight into the nature of the mission by turning to other sources of information.

This information might become available by answering several important questions that shed light on United States intent regarding any specific operation. Questions that bear answering are: (1) what has the President (or his representatives) said to the American people;[82] (2) if the operation is to be executed pursuant to a United Nations mandate, what does this mandate authorize; and (3) if the operation is based on use of regional organization forces,[83] what statement or directives has such an organization made?

President Clinton's televised address, just three days prior to the arrival of United States Forces in Haiti, serves as an example of how the first question might be answered.[84] His comments created an expectation[85] that United States troops would respect the rights of Haitian nationals and protect them from their own government.[86] The decision to revise the rules of engagement (ROE) on 23 September 1994, just days after the entrance of our forces, highlights the understanding of this expectation.[87]

The images of Haitian civilians being beaten by members of the Haitian Security Force, while United States service members stood by passively (within camera range), seemed at odds with the mission as described in President Clinton's television address.[88] This inconsistency was quickly recognized and resolved by the revised ROE.[89] The new ROE provided soldiers and marines the authority to stop, detain, or use necessary and proportional force to control individuals who threatened civic order, committed a serious criminal act, or threatened protected persons.[90] Significantly, the breadth of this mission, as evidenced by both the President's words and subsequently by the deeds of soldiers, created a condition of "near" occupation[91] where the legal obligation to safeguard the civilian population was arguably greater than in other varieties of OOTW.[92]

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[82] Similar sources are (1) the justifications that the President or his cabinet members provide to Congress for the use of force or deployment of troops and (2) the communications made between the United States and the countries involved in the operation (to include the state where the operation is to unfold).

[83] Regional organizations include the North Atlantic Treaty Organization (NATO), Organization of American States (OAS) and the Organization of African Unity (OAU).

[84] President William J. Clinton, The Situation in Haiti, Televised Address to the American People (Sept. 15, 1994), *in* FOREIGN POLICY BUL., Nov./Dec, 1994, at 11, *reprinted in* WASH. POST, Sept. 16, 1994, at A31.

[85] I was careful to use the word "expectation," in lieu of the word "obligation." Failure to understand this distinction led Captain Lawrence Rockwood, a young counterintelligence officer, assigned to the 10th Mountain Division, to disobey orders and unlawfully enter a Haitian prison. His flawed understanding of the prescriptive nature of the President's words and international law, led to his one-man break-in at the prison. His actions appeared to be based upon a genuine belief that his leaders were failing to execute the President's orders. For an excellent description of the actions taken by Captain Rockwood, and his subsequent court-martial *see* Major Mark S. Martins, *War Crimes During Operations Other Than War: Military Doctrine and Law Fifty Years After Nuremberg—And Beyond (1995)*, 149 MIL. L. REV. 45 (1995); Major Edward J. O'Brien, *The Nuremberg Principles, Command Responsibility, and the Defense of Captain Rockwood*, 149 MIL. L. REV. 275 (1995).

[86] *Id.* at 11-12. President Clinton explained that the de facto leader of Haiti, General Raoul Cedras, had "conducted a reign of terror. Executing children. Raping women. Killing priests." He then went on to explain that the United States Forces would "train a civilian-controlled Haitian security force that will protect the people rather than repress them." *Id.*

[87] *See* Peacetime ROE in effect during civil rights operations in Haiti (printed on ROE Cards dated 23 September 1994), *reprinted in* CLAMO HAITI REPORT, *supra* note 18, app. J.

[88] *See* Kenneth Freed, *Haitian Police Attack Crowds as American Troops Look on; At Least One Is Killed and Dozens Injured as Local Forces Disperse Demonstrators Welcoming Arriving Soldiers; U.S. Policy Leaves Issue of Civil Order to Haitian Authorities*, L.A. TIMES, Sept. 21, 1994, at A1; *See also* Julian Betrame, *U.S. Troops Watch as Haitians Beaten; At Least One Killed*, MONTREAL GAZETTE, Sept. 21, 1994, at A1 (citing spokesman Colonel Barry Willy).

[89] *See id.* at 32-33. *See also* Memorandum, Major Bradley P. Stai, Chief, Civil Law, Office of the Staff Judge Advocate, XVIIIth Airborne Corps and Fort Bragg, AFZA-JA-CV, to Staff Judge Advocate, subject: After Action Report (AAR)—Operation Uphold Democracy (2 Feb. 1995) (copy on file with International and Operational Law Department, The Judge Advocate General's School, United States Army) [hereinafter Stai Memorandum].

[90] *Id.* paras. 5-7.

[91] *See* FM 27-10 *supra* note 25, at 138-40. In *FM 27-10*'s discussion of Occupation Law, Harvard Law School Professor and former ICJ judge Richard Baxter (the author of *FM 27-10*), cites Hague Regulation, article 42 language: "territory is considered occupied when it is actually placed under the authority of the hostile army." HR, *supra* note 3, art. 42. Professor Baxter explains that occupation is a "question of fact," which presupposes a hostile invasion, resisted or unresisted, by which the invader gains firm control of the territory in question and denies the invaded government the opportunity of exercising its authority. Although the United States was not an occupation force, it did gain and then exercise "firm control" over the territory of Haiti and denied (to an extent) the de facto government the ability to control many of the essential functions of government. Having planned for a formal invasion and occupation and then arriving on the scene of a "near occupation," military lawyers found themselves applying analogized tenets of part III, section III, of the fourth Geneva Convention (the occupation provisions) when answering questions regarding the obligations our forces owed Haitian civilians.

[92] *See* FM 100-5, *supra* note 6, ch. 13 (listing thirteen varieties of OOTW).

Operation Restore Hope provides another example of the important relationship between the mission statement and the legal obligation owed to the civilian population. The initial mission statement for Restore Hope articulated in United Nations Resolution 794[93] granted the United States the authority to take "all necessary means" to establish a "secure environment" in which relief efforts could be coordinated. At this point, the obligation to local civilians was clear.[94] The mission was not to assume an active role in protecting the civilians, but instead, to provide security for food and supply transfer. Once the operation was handed over to the United Nations, this mission was permitted to mature and the obligation to civilians became less clear.[95]

Unfortunately, for military commanders and the lawyers that advise them, they must take their missions as they find them. After doing everything that can be done to gain the best possible understanding of the mission's objective, the operational lawyer must then decide what bodies of law should be considered in the articulation of the civilian imperative.

As described earlier, the various laws and policies that regulate the treatment of civilians during military operations are arranged in a four-tier structure within the overall CPL complex. The judge advocate should look to the foregoing considerations and the operational environment and determine if the body of protections in the first tier (fundamental human rights legislation) apply.[96] Thereafter, the judge advocate should move to succeeding tiers and determine their application. Finally, after considering the application of the regimes found within each of the four tiers, the judge advocate must constantly reassess the potential application of this law as the situation changes.

### Tier One: Fundamental Human Rights Legislation

*Sources and Application*

Logically, the first tier should always serve as the military practitioner's point of departure regarding any issue concerning the treatment of civilians in an area of operations. The various declarations, statements, charters, and treaties that collectively compose human rights legislation (the bodies of law that comprise Tier One) are constructed with this baseline application in mind. These regimes represent the evolution of natural or universal law recognized and commented on by leaders and scholars for thousands of years.[97] This body of law serves as the point of departure because it is fundamental that all human beings are inherently entitled to its protections by virtue of the universal laws of nature.

Besides applying to all people, the most critical aspect of these rights is that they are said to be nonderogable, that is, they cannot be suspended under any circumstances.[98] As the "minimum yardstick"[99] of protections to which all persons are entitled, this baseline tier of protections never changes. Consequently, Tier One protections serve as an excellent starting point for lawyers charged with advising commanders and training soldiers.

Although any number of human rights declarations or treaties might serve as a good statement of the basic protections that human rights legislation is intended to provide, the appropriate place to begin any analysis ofTier One protections is article 1 of the United Nations Charter.[100] The third paragraph of article 1 reaffirms two of the four basic goals articulated in the Charter's

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93 S.C. Res. 794, U.N. SCOR, 47th Sess., U.N. Doc. S/RES/794 (1992).

94 *See id.*

95 The United States led force referred to as the Unified Task Force (UNITAF) conducted narrowly prescribed relief operations from 9 December 1992 to 4 May 1993. On 4 May 1993, the UNITAF terminated operations and responsibility for the operation was passed to the United Nations in Somalia (UNOSOM). In March and June of 1993, the United Nations passed resolutions 814 and 837, respectively. These two resolutions dramatically enlarged the scope of UNOSOM.

96 First tier protections represent the baseline treatment to which all persons are entitled. Accordingly, to some extent, the judge advocate will always find that these protections apply. The question will instead revolve around how to implement these protections and who will have responsibility for their implementation. Commanders and their advisors must understand that the United States will not always have a moral or *legal* obligation to establish and maintain these types of rights in every operation in which it plays a part.

97 *See* RESTATEMENT, *supra* note 11, § 701, cmt.

98 Tom J. Farer, *The Hierarchy of Human Rights*, 8 AM. U. J. INT'L L. & POL'Y 115, 115-19 (1992).

99 The ICJ chose this language when explaining its view of the expanded application of the type of protections afforded by article 3, common to the four Geneva Conventions. *See supra* note 73 (the case of *Nicaragua v. United States*).

100 U.N. CHARTER art. 1.

Preamble[101]—to "[promote and encourage] respect for human rights and for the fundamental freedoms for all without discrimination as to race, sex, language, or religion . . . ."

Within the rubric of CPL, this portion of the United Nations mission statement is important because it serves as a statement of the ideals shared by each member state.[102] In the more specific context of an operation sanctioned by United Nations authority, fundamental human rights, as one of the primary purposes of the United Nations, would take on an even more important role. Any act on the part of the United States that detracts from these goals undermines the entire operation, threatens its leadership role within the United Nations, and endangers its national strategy in that particular region.[103]

After considering the importance of the Charter of the United Nations, judge advocates should turn to the primary and most universally regarded statements of human rights. The premier document within this group is the Universal Declaration of Human Rights.[104] The Declaration has frequently been cited as a clear statement of customary international law relative to the basic rights of all men.[105] This is important because the Declaration is not a binding legal instrument. However, because significant portions of the Declaration do reflect customary law,[106] military practitioners must become familiar, at a minimum, with the Declaration principles that the United States recognizes as customary law.[107] These portions of the Declaration have the weight of law and the United States should (and does) strictly comply with the Declaration's prescription, to the extent of these provisions.[108]

To this end, the leadership of the United States has frequently stated that it supports the observance of these rights, concluding that these rights are not derived from either political or military

[101] *Id.* Preamble. The second and third purposes cited within the Preamble are the determination to "reaffirm faith in the fundamental human rights, in the dignity and worth of the human person, in equal rights of men and women . . . ," and "to promote social progress and better standards of life in larger freedom."

[102] It has been frequently argued that a violation of the core rights expressed in the Universal Declaration, *supra* note 64, is a violation of the Charter itself, as the Declaration serves as a more specific expression of the Charter's human rights mandate. *See* RESTATEMENT, *supra* note 11, § 701, rptrs. note.

[103] General Barry R. McCaffrey, former Commander-in-Chief, United States Southern Command (SOUTHCOM), recently stated that as the United States seeks "greater hemispheric integration" within the Americas, human rights and the rule of law will serve as an increasingly important vehicle in the furtherance of its strategy for the hemisphere. He noted that many of the most important SOUTHCOM activities center around operations and programs designed to spread the message of the Universal Declaration throughout the hemisphere. He noted that anything less than a vibrant human rights agenda would degrade every other United States initiative within his area of operations. General Barry R. McCaffrey, *Upbeat Outlook for Southern Neighbors*, 4 DEFENSE 22, 23, 26-27 (1995). During an even more recent statement, General McCaffrey quoted Secretary of Defense William Perry who characterized the strategy for the Americas as "commitment to democracy in the region, including . . . respect for human rights." To this end he explained that SOUTHCOM "is involved in human rights to support international and regional declarations and to comply with military directives and doctrine." General Barry R. McCaffrey, Commander-in-Chief, United States Southern Command, Keynote Address at The Judge Advocate General's School, United States Army, Nuremberg and the Rule of Law, A Fifty-Year Verdict (Conference), Charlottesville, Virginia (Nov. 18, 1995). Last year, SOUTHCOM issued a Human Rights Policy to implement its human rights agenda. General McCaffrey directed that the Universal Declaration of Human Rights be attached to this policy memorandum. The objectives expressed within the policy memorandum include the following: (1) establishing a human rights policy consistent with international and domestic law, (2) encouraging allied governments to adhere to international norms of human rights and assist them in doing so, (3) ensuring that all United States military personnel assigned to or deployed within the SOUTHCOM area of responsibility receive human rights awareness training, and (4) ensuring that all such personnel understand their responsibilities to immediately object to and report all suspected human rights abuses. Policy Memorandum No. 1-95, General Barry R. McCaffrey, Commander-in-Chief, SOUTHCOM, subject: USSOUTHCOM Human Rights Policy (16 June 1995) (on file within the International and Operational Law Department, The Judge Advocate General's School, United States Army) [hereinafter SOUTHCOM Human Rights Policy Memorandum].

[104] Universal Declaration, *supra* note 64.

[105] RICHARD B. LILLICH & FRANK NEWMAN, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY 65-67 (1979); RICHARD B. LILLICH, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE, 117-27 (2d. ed. 1991); Filartiga v. Pena-Irala, 630 F.2d 876, 882-83 (2d Cir. 1980). Other commentators assert that only the primary protections announced within the Declaration represent customary law. These protections include the prohibition of torture, violence to life or limb, a fair and just trial (a fair and public hearing by an impartial tribunal), arbitrary arrest and detention, and right to equal treatment before the law. VON GLAHN, *supra* note 11, at 238.

[106] The right to free education bestowed by article 26 is an obvious example of a portion the Declaration that is clearly not part of the customary law. Universal Declaration, *supra* note 64.

[107] "Only those human rights whose status as customary law is generally accepted and whose scope and content are generally agreed" are considered to be statements of customary law and binding upon the United States. This limited subset of the rights expressed within the Universal Declaration include the prohibition of any "state policy to practice, encourage, or condone" genocide, slavery, murder, torture or cruel, inhuman, or degrading treatment, prolonged arbitrary detention, systematic racial discrimination." RESTATEMENT, *supra* note 11, § 702.

[108] A number of the articles within the Declaration arguably go too far, creating unrealistic protections that nations, including the United States, cannot afford to sustain. It is this body of articles that commentators and governments balk, refusing to accept as representative of customary law. *See* Maurice Craston, *Are There Any Human Rights?*, DAEDALUS, No. 4, 1983, at 1-2.

power, but spring from natural law.[109] Successfully merging its rhetoric with its conduct,[110] the United States has openly criticized those nations that ignore the Declaration's principles,[111] while establishing its own impressive record for compliance. Consequently, the United States is bound to follow the primary principles in the Declaration in more ways than one. It is bound by both customary law and by the political reality of its conduct and rhetoric.

Most general questions regarding how the soldiers, airmen, sailors, and marines of any particular operation should treat civilians can easily be answered by following the tenets found within the Declaration. Service members and their leaders are already well trained and advised relative to the most basic Declaration principles.[112] For example, *Army Regulation 350-41* provides nine basic rules that soldiers must always follow in all military operations. Within the Army, these rules are referred to as the "Soldier's Rules." The common thread that runs through each of these rules is that civilians and other noncombatants are to be treated humanely.[113]

As this essay was being drafted, judge advocates were training the soldiers of the 1st Armored Division and other United States Army Europe (USAREUR) units to observe these same tenets of human rights law during their deployment to Bosnia-Herzegovina and Hungary.[114] These judge advocates have advised their commanders that the minimum humanitarian protections found within common article 3 to the four Geneva Conventions apply to that theater of operations.[115] Recognizing that these protections are consistent with the provisions of the

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[109] President Ronald Reagan stated "the Universal Declaration remains an international standard against which the human rights practices of all governments can be measured." *See* Proclamation of Bill of Rights Day, Human Rights Day and Week, Dec. 9, 1983, *reprinted in* United States Dept. of State, Selected Documents No. 22 (Dec. 1983).

[110] The emphasis placed on human rights enforcement within the areas of responsibility of the regional commanders-in-chief (CINCs) illustrates the United States positive conduct regarding human rights. *See* SOUTHCOM Human Rights Policy Memorandum, *supra* note 103.

[111] *See* President Clinton's Sept. 15th Address, *supra* note 84.

[112] For an example of the maturity of programs that integrate human rights into the mainstream of soldier training, *see* SOUTHCOM Human Rights Policy Memorandum, *supra* note 103.

[113] *See* DEP'T OF ARMY, REG. 350-41, TRAINING IN UNITS, para. 14-3 (19 Mar. 1993) [hereinafter AR 350-41].

[114] *Id.* Soldiers received training based on the nine soldiers' rules described in *AR 350-41.* They also were trained to the standard of the very similar rules enumerated within USAREUR PAMPHLET 350-27, COMBAT CODE OF THE USAREUR SOLDIER (5 June 1984) [hereinafter USAREUR PAM 350-27]; USAREUR PAMPHLET 350-28, TRAINING LAW OF WAR (19 July 1984) [hereinafter USAREUR PAM 350-28]. The *USAREUR Pam 350-27* states the rules as follows:

1. Soldiers do not harm:
   - Captured enemy soldiers or civilian detainees
   - Noncombatant civilians
   - Medical personnel or chaplains
   - Enemy soldiers "out of combat"
2. Soldiers collect and care for enemy wounded and sick.
3. Soldiers respect the medical symbol and do not attack medical facilities or medical vehicles.
4. Soldiers respect protected places.
5. Soldiers do not engage in treacherous acts.
6. Soldiers allow their enemy to surrender.
7. Soldiers do not steal from their enemy or from civilians.
8. Soldiers do not cause unnecessary suffering.
9. Soldiers report violations of the Law of War.
10. Soldiers obey orders and the Law of War.

These rules were modified in recognition that they were formulated for the high intensity armed conflict of a bipolar world. For example, the words "enemy" and "war" were extracted and replaced with suitable OOTW terms. *See* Pre-Deployment Briefing, Office of the Staff Judge Advocate, 1st Armored Division, United States Army, Task Force Eagle (24 Nov. 1995) *reprinted in* 1996 OPERATIONAL LAW MATERIALS, INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL'S SCHOOL [hereinafter OPERATIONAL LAW MATERIALS]. The materials serve as a medium for a standardized briefing that permits civilian person intensive instruction, with specific discussion and teaching objectives directed at (1) "detained persons," and (2) "permissible control of civilians." Other topics within the training medium are directed at specific ROE and use of force issues that also deal with the local civilian population.

[115] *Id.* at 7. Specifically, slide six of the predeployment briefing was used to communicate the following message to soldiers and their leaders:

- Treat all captured and detained persons humanely.
- Respect their persons and property.
- Do not torture: You cannot coerce information.
- Evacuate promptly from hostile fire areas.
- Provide proper medical care, food, clothing, and shelter.
- Report and forward to designated authorities.

Universal Declaration, judge advocates advised compliance with the Declaration.[116] To ensure a complete understanding of Tier One type regimes, judge advocates have received specialized instruction on the Declaration's (and numerous human rights treaties') impact on United States conduct within the Balkan area of operations.[117]

Although this humane treatment mandate is an excellent default setting, it does little to answer the more difficult questions that our military leaders frequently encounter. For example, what type of privacy or political rights do civilians in an overseas area of operations possess? Further, what is the legal extent of the United States obligation to restore and enforce these rights?[118]

More specifically, do these civilians have the right to freedom of movement, the freedom to assemble, the right to bear arms, the freedom of public speech, or the right to seek asylum within other countries (to include the United States)? What about cultural and religious rights and freedoms? May our leaders abridge these rights when the unbridled exercise of such rights might threaten force security, the mission itself, or other members of the host nation's population? What about deprivation of liberty? May United States forces detain, arrest, incarcerate, or even imprison such civilians? If our forces can intrude on these individual freedoms, what limitations are placed on these type of actions?

The broad terminology of the Declaration does not serve the leader well in attempting to answer these more sophisticated questions. For example, the humane treatment mandate runs throughout the Declaration (most plainly described during the first eight articles). Here, the Declaration provides freedom from torture; cruel, inhuman, or degrading treatment;[119] equality before the law and equality of treatment;[120] and the right to life, liberty, and security of person.[121] Next, the Declaration provides freedom from arbitrary arrest and detention.[122] We know how these basic rights have been interpreted through domestic instruments to our citizens, but how do military forces apply these international guarantees to the citizens of nations where our military operations are underway? Additionally, how do these broad protective measures affect the United States obligation regarding the more specific questions posed above.

The bottom line is that international law is not a suicide pact nor even unreasonable. Its observance, for example, does not require a military force on a humanitarian mission within the territory of another nation to immediately take on all the burdens of the host nation government. A clear example of this rule is the United States conduct during Operation Uphold Democracy regarding the arrest and detention of civilian persons. The failure of the Cedras regime to adhere to the minimum human rights associated with the arrest and imprisonment of its nationals served as part of the United Nation's justification for the sanctioning of the operation.[123] Accordingly, the United States desired to correct this condition, starting by conducting its own detention operations in full compliance with international law. The United States did not, however, step into the shoes of the Haitian government, and the United States did not become a guarantor of all the rights that international law requires a government to provide its nationals.

Along this line, the Joint Task Force (JTF) lawyers first noted that the Declaration does not prohibit detention or arrest, but simply protects civilians from the arbitrary application of these

[116] *Id.*

[117] *See* International and Operational Law Department, The Judge Advocate General's School, United States Army, 9th USAREUR Operational Law CLE Text with Seminar Supplement (Dec. 1995) (on file within International and Operational Law Department, The Judge Advocate General's School, United States Army). A team of two International and Operational Law Department professors from The Judge Advocate General's School traveled to Willingen, Germany, and provided a five-day course of instruction from 4 to 8 December 1995 on these very issues.

[118] These questions must be understood and answered in order to provide our leaders with the best courses of action, improve operational plans, answer fiscal law questions regarding what type of money (whose money) will be expended, and to provide effective and relevant training to the soldiers involved in an operation. This last purpose must involve an explanation of why we are involved in the operation, our ultimate goals (the mission statement), and the near-term goals. Providing soldiers with this quantity and quality of information is an important aspect of Law of War training (I include training conducted for OOTW in this category). During the course of Operation Uphold Democracy, at least one soldier, Captain Lawrence Rockwood, did not understand, among other things, how our near-term objectives would ultimately secure long-term objectives that would include more humane treatment of those in Haiti's prison system. *See* Martins, *supra* note 85.

[119] Universal Declaration, *supra* note 64, art. 5.

[120] *Id.* arts. 1, 2, 7, 8.

[121] *Id.* art. 3.

[122] *Id.* arts. 9-11.

[123] Between 16 June 1993 and 31 July 1994, the United Nations Security Council adopted ten resolutions, culminating with Resolution 940. Most of these resolutions took note of the "significant deterioration of the humanitarian situation in Haiti." For a complete listing of these resolutions and a reprinted copy of Resolution 940, *see* CLAMO Haiti Report, *supra* note 18.

forms of liberty denial.[124] The JTF could detain civilians who posed a legitimate threat to the force, its mission, or other Haitian civilians.[125] Consistent with the successful detention operations of Operation Uphold Democracy, the architects of NATO's deployment plan to Bosnia-Herzegovina planned for the detention of civilians who threaten the force or its ability to accomplish its mandated mission. Military leaders and their lawyers have carefully trained the force to detain only when absolutely necessary and to use minimum force during detention operations.[126]

Once detained, these persons become entitled to a baseline of humanitarian and due process protections. These protections include the provision of a clean and safe holding area, rules and conduct that would prevent any form of physical maltreatment, degrading treatment, or intimidation, and rapid judicial review of their individual detention.[127] Operation Uphold Democracy's Joint Detention Facility became "one of the most conspicuous successes" of the operation.[128] The burden associated with fully complying with the letter and spirit of the Universal Declaration permitted the United States to safeguard its force, execute the mission, and reap the benefits of public reports that United States operational efficiency did not come at the expense of the human rights of Haitian nationals.[129]

The Declaration also provides a list of political, religious, cultural, and even economic protections. Significant among these rights is the right to privacy, which includes family and marital rights.[130] These rights are consistent with the considerations for the family found within the fourth Geneva Convention, forbidding the arbitrary interference with the family unit.[131] The Declaration also provides for freedom of movement and residence,[132] peaceful assembly,[133] expression,[134] and religion.[135]

These provisions raise the same question identified above: to what extent are leaders involved in the execution of an OOTW required to establish procedures and institutions to enforce the legal rights of civilian persons within the operational context? Is the obligation one of simple human rights familiarization or is the obligation more affirmative (and expensive) in nature? Given the customary law status of the Declaration's primary provisions and the United States' solid support for these rights, to what extent is the United States bound to ensure the execution of the Declaration's mandate during the course of either war or even more importantly, OOTW?

Stated differently, the question that the military leader faces is not whether civilians in an area of operations should enjoy these basic freedoms, but rather to what extent must the military force create and sustain an environment that fosters these freedoms? The answer depends entirely on the nature of a given operation. The question must be answered anew each time United States forces deploy across another state's border. Yet, despite the mission, the Declaration does not require actions that will

[124] *See Id.*, at 54-56. Common article 3 does not contain a prohibition of arbitrary detention. Instead, its limitation regarding liberty deprivation deals only with the prohibition of extrajudicial sentences. Accordingly, judge advocates involved in Operation Uphold Democracy and other recent operations looked to the customary law and the Universal Declaration of Human Rights as authority in this area. It is contrary to these sources of law and United States policy to arbitrarily detain people. Accordingly, judge advocates, sophisticated in this area of practice, explained to representatives from the International Committee of the Red Cross (ICRC), the distinction between the international law used as guidance, and the international law that actually bound the members of the Combined Joint Task Force (CJTF). Specifically, these judge advocates understood and frequently explained that the third and fourth Geneva Conventions served as procedural guidance, but the Universal Declaration (to the extent it represents customary law) served as binding law.

[125] "The newly arrived military forces (into Haiti) had ample international legal authority to detain such persons." Deployed judge advocates relied upon Security Council Resolution 940 and article 51 of the United Nations Charter. *See* CLAMO HAITI REPORT, *supra* note 18, at 63.

[126] *See* OPERATIONAL LAW MATERIALS, *supra* note 114, at 6-8.

[127] *See* CLAMO HAITI REPORT, *supra* note 18, at 64-65.

[128] *Id.*

[129] Judge advocates within the 10th Mountain Division found that the extension of these rights and protections served as concrete proof of the establishment of institutional enforcement of basic humanitarian considerations. This garnered "good press" by demonstrating to the Haitian people, "the human rights groups, and the International Committed of the Red Cross (ICRC) that the United States led force" was adhering to the Universal Declaration principles. *See* 10TH MOUNTAIN AAR, *supra* note 44, at 7-9.

[130] *Id.* arts. 12, 16.

[131] GC, *supra* note 4, arts. 25, 49, 82.

[132] Universal Declaration, *supra* note 64, art. 13.

[133] *Id.* art. 20.

[134] *Id.* art. 19.

[135] *Id.* art. 18.

jeopardize the security of the force. Nor does it require absurdly burdensome actions that would saddle international intervention forces with the absolute obligation to ensure that no person, group, or organization harms the civilians within an area of operations.[136]

*Non-self Executing Treaties*

Other problems involve the actual application and interpretation of the Universal Declaration's provisions. This problem is related to the application of other components of human rights legislation. For example, how do treaties such as the International Covenant for Civil and Political Rights impact conduct in OOTW? This issue has recently received scholarly attention. Several commentators have argued that these treaties, now ratified by the United States, should play a predominate role in any type of military operation.[137] These scholars argue that the failure to comply with these treaties and the emerging body of customary law they represent rejects the standards set out within the treaties. They point out that such a rejection is contrary to the long-term national goals articulated within any one of our recent (annual) national security strategies.[138] They further argue that rejecting these standards is "of dubious propriety" for it undermines any possible rationale for entering into such a treaty in the first place.[139]

The United States position regarding the application of international human rights law during recent operations has been consistent. Immediately prior to entering Haiti (to execute Operation Uphold Democracy) the United States stated that:

> [i]f it becomes necessary to use force and engage in hostilities, the United States will, upon any engagement of forces, apply all of the provisions of the Geneva Conventions and the customary international law dealing with armed conflict.
>
> Further, the United States will accord prisoner of war treatment to any detained member of the Haitian armed forces. Any member of the U.S. armed forces who is detained by Haitian forces must be accorded prisoner of war treatment.[140]

In making this statement, the United States acknowledged that it would comply with the same "to the extent feasible" application of the Law of War as mandated by *DOD Directive 5100.77*. On the surface, this seems somewhat odd now that the United States has ratified a number of human rights instruments that appear to apply without regard to the nature of a particular conflict, or whether a conflict exists at all (in other words, these type of instruments are perfect for OOTW application). Why does the United States, with an ample supply of round pegs, continue to place what appear to be square pegs in round holes?

To understand this seemingly counterintuitive position, the military lawyer must first understand the subject matter law (in this case a treaty), the environment (political and otherwise), and the mission statement that provides the authority for United States presence in another state's territory (which is usually the case in OOTW).

Taking these matters in order, I will first discuss the subject matter law. In the past, military lawyers studied the traditional law of war treaties and the customary law which regulates warfare. They grew familiar with treaty text (including any reservations or understandings made by the United States as part of its ratification) and the primary commentaries.[141] Relative to human rights treaties, however, the military legal community has not traditionally enjoyed the same degree of familiarity. This is changing as documented in the after action reports of recent operations.[142] Judge advocates and their clients realize that human rights legislation provides a logical set of guidelines for the difficult and complex job of determining what obligations the United States owes to the civilians in an area of an OOTW.

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[136] Contrast this obligation with the higher standard placed on a true occupation force, which has an affirmative duty to provide for the public safety, to maintain order, and to ensure that individual rights are observed. *See generally*, GC, *supra* note 4, at sec. III, pt. III.

[137] *See* Henkin, *supra* note 66.

[138] *See* Meron, *supra* note 17, at 82. Congress requires the President to publish a "National Security Strategy" each year. National Security Act of 1947, 50 U.S.C. § 404a.

[139] *Id.* Meron, *supra* note 17 at 343.

[140] United States Permanent Mission in Geneva, Diplomatic Note to the International Committee of the Red Cross (Sept. 19, 1994) (on file with the International and Operational Law Department, The Judge Advocate General's School).

[141] In the case of the Fourth Geneva Convention, most military practitioners can recite significant portions of what we refer to as "Pictet." *See* Pictet IV, *supra* note 73.

[142] *See* CLAMO HAITI REPORT, *supra* note 18, at 53-54, 71.

This realization generates the further realization that military lawyers must gain the same type of appreciation for these regimes that they already enjoy relative to traditional law of war treaties. Accordingly, they must first master the text of the treaties and then they must determine whether a particular treaty was ratified subject to reservations, or understandings, declarations, or provisos.[143] Military practitioners must know more than what a treaty appears to proclaim in the text. They must understand what conditions on which the United States leveraged its ratification. If a treaty is ratified or acceded to by the United States with a reservation effective under the principles of international law, the reservation becomes part of the treaty and is the law of the United States.[144]

Using the Civil and Political Covenant as an example, the importance of these rules becomes obvious. Prior to the forwarding of the Civil and Political Covenant to the United States Senate for advice and consent, the Committee on Foreign Relations (as is the normal process)[145] considered it and recommended that the Senate give its advice and consent, subject to five reservations, five understandings, four declarations, and one proviso.[146] On 1 June 1992, President Bush ratified the Covenant subject to the same conditions noting, as required by law, that the Senate's advice and consent was subject to a declaration that the United States does not consider the Covenant to be "self-executing." The literal import of this declaration is that "no substantive provisions of the Covenant operate as domestic law unless they are reflected in existing law or future legislation."[147]

The doctrine of self-executing treaties was introduced by the United States Supreme Court[148] in the first half of the nineteenth century. The essence of the doctrine is that no treaty clause gains the benefit of the United States Constitution's[149] promise to make it the supreme law of the land unless such a clause is either self-executing or is already implemented by legislation.[150] The problem arises in attempting to determine which clauses

[143] Not all of the terms used by the United States to express conditional acceptance of a treaty are commonly used by the international community. For instance, the Vienna Convention on the Law of Treaties, the so called "Treaty on Treaties," provides for the use only of "reservations." In defining reservation very broadly, however, the Convention probably encompasses the other conditional terms. Article 2 defines reservations as "unilateral statement[s], however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State." *See* Vienna Convention on the Law of Treaties, May 23, 1969, 8 I.L.M. 679, 1155 U.N.T.S. 331, [hereinafter the Vienna Convention]. Although the United States has not ratified the Vienna Convention, as of 1990, 159 states have and the weight of its authority is such that the United States Department of State routinely refers to it in diplomatic correspondence. *See* ANTHONY D'AMATO, INTERNATIONAL LAW COURSEBOOK 81-83 (1994).

[144] *See* RESTATEMENT, *supra* note 11, § 314.

[145] The entire process starts with the negotiation of a treaty, usually followed by the initialing, which in turn is followed by signature. Initialing, of "ambiguous significance," sometimes is the equivalent of signature, but more frequently is merely a preliminary step taken to stabilize the negotiated text (akin to authentication). Signature normally has no binding effect, and is "ad referendum," *i.e.*, subject to later ratification. Signature does signal a state's intent to seek ratification and to not act contrary to the treaty's purpose. Within the United States, once a treaty is signed, an interagency review process begins which generates reports that may or may not accompany the treaty to the Senate. The official signed text is then forwarded, with a letter of submittal (prepared by the Department of State), which includes a memorandum discussing the treaty in detail, to the President. The President may then forward the treaty to the Senate with a letter of transmittal, which includes the letter of submittal and accompanying memorandum. The transmittal letter contains the President's recommendation relative to ratification, and any reservations, understandings, or declarations that he believes should be made part of the treaty. The Senate Committee on Foreign Relations then considers the treaty and prepares its own report to the Senate for its two-thirds advice and consent vote. If the Senate favorably considers the treaty, it will forward a resolution back to the President expressing a two-thirds vote for ratification and containing any reservations, understandings, or declarations that it desires to have placed in the ratification document. Once the treaty is back in the hands of the President, he may ratify the treaty, but must do so subject to the conditions contained in the Senate resolution. The final step is depositing the treaty with the United Nations and other depositories designated within the treaty. The treaty enters into force in accordance with its own terms. *See* RESTATEMENT, *supra* note 11, §§ 312-314 (describing this process in greater detail).

[146] CLAIBORNE PELL, REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. DOC. NO. 102-23 (1992) [hereinafter PELL REPORT].

[147] *Id.* exec. E.

[148] Foster v. Neilson, 27 U.S. (2 Pet.) 253, 254 (1829). In *Foster*, the Court focused on the Supremacy Clause of the United States Constitution and found that this clause reversed the British practice of not judicially enforcing treaties, until Parliament had enacted municipal laws to give effect to such treaties. The Court found that the Supremacy Clause declares treaties to be the supreme law of the land and directs courts to give them effect without waiting for accompanying legislative enactment. The Court, however, conditioned this rule by stating that only treaties that operate of themselves merit the right to immediate execution. This qualifying language is the source of today's great debate over whether or not treaties are self-executing.

[149] U.S. CONST. art. VI, cl. 2. The historical purpose of the Supremacy Clause was to avoid the violation of treaty obligations by intentionally reversing the British model of "nonself-executing" treaties, making all treaties entered into by the United States immediately enforceable from the moment they become binding.

[150] Military practitioners have long understood this rule as follows:

> Where a treaty is incomplete either because it expressly calls for implementing legislation or because it calls for the performance of a particular affirmative act by the contracting states, which act or acts can only be performed through a legislative act, such a treaty is for obvious reasons not self-executing, and subsequent legislation must be enacted before such a treaty is enforceable . . . . On the other hand, where a treaty is full and complete, it is generally considered to be self-executing . . . ."

DEP'T OF ARMY, PAMPHLET 27-161-1, LAW OF PEACE, vol. I, para. 8-23 (1 Sept. 1979) [hereinafter DA PAM 27-161-1].

are self-executing. Courts have traditionally focused upon the intent of the contracting parties, and over time a set of precedential guidelines have evolved.[151]

The United States position concerning the human rights treaties discussed above is that "the intention of the United States determines whether an agreement is to be self-executing or should await implementing legislation."[152] Thus, the United States submits that its unilateral statement of intent, made through the vehicle of a declaration during the ratification process, determines the intent of the parties. Accordingly, if the United States adds such a declaration to a treaty, the declaration becomes part of the treaty and part of United States law.[153]

The impact of this condition and United States policy reaches beyond possible inconsistency between domestic law and the Covenant's mandate. It reaches the impact that the Covenant might have on the conduct of United States military forces involved in operations beyond our border. Does this mean that in the absence of implementing legislation no part of such a treaty binds the United States in the execution of overseas military missions? No, or at least not exactly. The Department of State's view is that the non-self-executing declaration made pursuant to the Covenant's (or any treaty's) ratification "covers all substantive provisions of the treaty, especially those which might be deemed non-self-executing in the absence of the declaration."[154] According to this view, the United States is bound by treaty terms only to the extent that these terms mirror customary law.

Some experts argue that such a declaration, unilateral in nature, has no effect. Many other experts (outside of the United States government) argue in favor of a middle ground. Instead of the two extreme positions, they argue that each declaration and treaty must be viewed separately. In some cases this analysis will reveal treaties or portions of treaties that obviously require implementing legislation and have no effect prior to the enactment of such legislation.[155] The flip side to this position is that those portions of the Covenant that are basic, not inconsistent with domestic law,[156] and affirmative in nature,[157] are not affected by the non-self-executing provisions.[158] Accordingly, they argue that military practitioners should turn to these basic and reasonable protections, not affected by the non-self-executing limitation, to answer the more sophisticated questions posed during OOTW.

In the final analysis, I am not sure that the actual substantive difference between these positions is as significant as some might argue. Whether military practitioners understand these obligations as binding (self-executing) treaty obligations or as customary law makes little difference to the advice they render to their clients. In either case, a practitioner will advise his client that the well-established portions of such treaties probably reflect customary law and should be observed. The same practitioner also might point out that another reason to observe such fundamental principles is that they also have been codified in treaties which the United States has recently ratified and that these treaties reflect its statecraft, regardless of their customary law status. Despite the rationale, the bottom line for the military commander remains constant.

Military practitioners should be familiar with each of these positions and prepared to explain them to a client who may have recently been assailed by members of the media or non-governmental organizations. Although all recent human rights treaties are limited by non-self-executing declarations, many of the protections provided within these treaties are mirrored by policy

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[151] *See* Frolova v. U.S.S.R., 761 F.2d 370, 373 (7th Cir. 1985). The court resolved the issue of intent by considering (1) the language and purposes of the agreement as a whole, (2) the circumstances surrounding its execution, (3) the nature of the obligations imposed by the agreement, (4) the availability and feasibility of alternative enforcement mechanisms, (5) the implications of permitting a private right of action, and (6) the capability of the judiciary to resolve the dispute.

[152] RESTATEMENT, *supra* note 11, § 131.

[153] *See id.* § 111 cmt.

[154] Telephone Interview (with exchange of facsimile notes), David P. Stewart, Assistant Legal Advisor for Human Rights and Refugees, United States Department of State (Dec. 20, 1995) [hereinafter Second Stewart Interview].

[155] *Id.* at 19. Therefore, no cause of action is created. It is for this purpose that the nonself-executing declaration was recommended and inserted into the advice and consent resolution.

[156] One frequently cited commentator articulates this requirement as follows: "does not cover a subject for which legislative action is required by the Constitution." Riesenfeld, *The Doctrine of Self-executing Treaties and GATT: A Notable German Judgment*, 65 AM. J. INT'L L. 548, 550 (1970).

[157] *Id.* Riesenfeld describes this requirement as follows: "[it] does not leave discretion to the parties in the application of the particular provision." Others have described this requirement in terms of "precatoriness." In other words, precatory treaties are not judicially enforceable. On the other hand, if the provision creates an obligation, instead of merely setting forth aspirations, then it is affirmative, and self-executing. *See* Carlos Manuel Vazquez, *The Four Doctrines of Self-executing Treaties*, 89 AM. J. INT'L L. 695, 712-13.

[158] To many, this limited application of the nonself-executing condition makes sense. One could easily argue that an attempt to create or place a *complete* nonself-executing limitation on a treaty would violate Article VI of the United States Constitution and customary "effect and interpretation" principles for international agreements.

and practice.[159] To this extent, a knowledge of the treaties is essential because it serves as an interpretive medium for the more sophisticated legal issues that revolve around such policy.

*Extraterritoriality*

Military practitioners must also become cognizant of the extent to which any particular human rights treaty applies extraterritorially. In other words, is such a treaty intended only to regulate the conduct of our government towards its own nationals and other persons within our territorial borders or is it intended to have a much broader impact? This broader application would include the conduct of our military forces in OOTW. The general rule is that international agreements bind parties only in respect to conduct within their respective territories.[160] Thus, in the absence of a different intention, manifested within the scope (time and territory) provisions of a human rights treaty, a treaty's mandate would only regulate the conduct of a party relative to people within that party's territory.[161]

This is not to say that the exceptions to this general rule are not notable. For example, the entire body of conventional law referred to as the Law of War applies wherever national combatants find themselves (if the requisite "armed conflict" threshold has been satisfied). In the case of these exceptions, however, the contracting parties have clearly expressed their intent to subject their extraterritorial conduct to regulation.[162]

For human rights treaties, the general rule applies with fewer exceptions because human rights treaties are designed to protect nationals from their own government. Accordingly, these treaties are usually understood by contracting parties to regulate only their internal conduct. Serving as evidence of this domestic orientation, one of the early complaints about the "multitude of provisions" within the United Nations Charter promoting and encouraging human rights was that none required member states to enact and enforce domestic legislation.[163] Additionally, the obvious domestic focus of these treaties is revealed in the numerous articles and debates regarding their ratification.[164]

With the general rule in mind and still using the Civil and Political Covenant as our model, we must consider the language of article 2 (the scope provision) of the Covenant to determine whether it has extraterritorial application. Arguably, article 2 does not limit the Covenant's application to the territory of a party.[165] Instead, it provides that parties undertake "to respect and ensure to all individuals within its territory *and subject to its jurisdiction* the rights recognized in the present Covenant."

A number of commentators interpret the foregoing language to mean "to all individuals within its territory" *and* "to all individuals subject to its jurisdiction."[166] This interpretation would oblige the United States to extend to persons who come in contact with United States extraterritorial authority the protections afforded by the Covenant. Such an obligation would signifi-

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[159] Even a quick glance at the after action reviews and reports from recent operations reveals that all of the protections typically referred to as customary law were taken into account during the planning and execution of these operations. To some degree or another, almost all protections found within the international human rights regime (having customary law recognition or not) were integrated into the planning process of these operations. The State Department is generally of the opinion that almost all the protections found within the Covenant are reflected within applicable United States law or policy. *See* Second Stewart Interview, *supra* note 154.

[160] RESTATEMENT *supra* note 11, § 322(2).

[161] *Id.* (reporter's note 3).

[162] Common articles 2 and 3, to the four Geneva Conventions clearly manifest the intent of the contracting parties to adhere to the conventions wherever their national forces might be located.

[163] VON GLAHN, *supra* note 11, at 237.

[164] *Id.* at 239 The United States' preference for the International Covenant of Civil and Political Rights, over the International Covenant on Economic, Social, and Cultural Rights is an example of the domestic center of gravity of human rights treaties. The United States felt that the economic rights referenced in the former treaty were more aspirational in nature, and should not be understood as binding treaty obligations in regard to their own citizens (the opposite conclusion permits far to great an intrusion on the right of a nation to administer its own social support structure. On the other hand, it felt that "any government [could and should] guarantee political and civil rights to *its citizens*." *Id.*

[165] *See* RESTATEMENT, *supra* note 11, § 322 (reporter's note 3). The note cites the Civil and Political Covenant as an example of a treaty that enjoys extraterritorial application. This view, however, is at odds with the analysis of subsequent portions of the *Restatement*. The part VII, Introductory Note, which introduces the chapters that deal with protection of persons (including human rights), breaks these protections out in a manner that presumes that most human rights treaties are not extraterritorial. The first of these subdivisions deals with "obligations of a state to respect the human rights of all persons subject to its jurisdiction, its own nationals, as well as others." The second subdivision deals with "obligations of a state in respect of nationals of other states as a matter of customary law." This dualism is demonstrative of an important distinction. The first category, regulated by conventional law, protects only a nation's own nationals and those subject to its jurisdiction because they are within its territory. The second category, regulated by customary law, protects nationals of other states that would not find protection under conventional law. This later group of persons would include foreign nationals that find themselves under the authority of a nation, but not within the territory of that nation. *See Id.* pt. VII, Introductory Note.

[166] *Thomas Buergenthal, To Respect and to Ensure: State Obligations and Permissable Derogations, in* THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 72, 74 (Louis Henkin ed., 1981), cited language *reprinted* in Meron, *supra* note 17, at 79. Professor Meron joins Judge Buergenthal in his conclusion that parties to the Covenant are bound beyond their borders to the extent that persons become subject to such a party's jurisdiction.

cantly alter the responsibilities of United States military forces engaged in overseas military operations. Should judge advocates and other practitioners within this area simply accept the opinion of such experts as accurate[167] or should they engage in a search for the real world truth of the "subject to its jurisdiction" language? The answer to this question being obvious,[168] we proceed to the next question: Where should the search begin?

As we continue the analysis we consider, as lawyers frequently do, the language of the law. Article 2 of the Civil and Political Covenant provides the following:

> *Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . . .*

In doing so we find that the conjunction connecting the two elements of article 2 is "and." It is not "or." The drafters did not say that the Covenant's protections extend to all people in your territory *or* subject to your jurisdiction. Instead, they wrote that the protections extend to people that are both in your territory *and* subject to your jurisdiction. This word usage alone is persuasive evidence of the contracting parties' intent.

The documents that serve as evidence of the Covenant's negotiation history also provide a persuasive argument that the Covenant's drafters did not contemplate an instrument that would mandate an extraterritorial obligation. This is true not because of what this record says but because of its silence. The issue of extraterritoriality is not part of the record. The United States Department of State acknowledges that it did not recognize this issue because it reasoned that the two-element trigger of article 2[169] was clear to all parties.[170]

Although there is no mention of extraterritoriality within the negotiating record of the treaty, there is evidence that the United States did not intend (and did not think that other parties intended) for the Covenant to generate obligations that would extend beyond a party's own territory. An example of this evidence is found within the Congressional Budget Office (CBO) Report, which is traditionally supplied to the Committee on Foreign Relations during the United States treaty ratification process.[171]

The CBO Report indicated that the Covenant is "designed to guarantee civil and political rights to persons *within* each country that ratifies it."[172] The report also indicated ratification would not "affect direct spending or receipts," primarily because the rights provided within the treaty are "parallel" to those provided to United States citizens by the Bill of Rights and other civil rights statutes.[173] Accordingly, reasoned the CBO, no new programs or activities would be required to implement the treaty obligations. These entries demonstrate that the Senate provided its advice and consent based on the belief that the Covenant would not affect the fiscal obligations of the United States beyond its borders.[174] In other words, its impact would only reach those within its territory and subject to its jurisdiction.

The foregoing demonstrates that, even in the absence of a formal reservation, understanding, or declaration, the United States ratified this treaty based on the understanding that it would apply only within its own territory. Additionally, other than the broad interpretation of article 2, there is scant evidence within the Covenant that it was intended to apply beyond the borders of state parties. Finally, it is the position and policy of the United States that, as a formal matter,[175] the Covenant does not create any obligations relative to the extraterritorial conduct of this nation.[176]

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[167] Experts within the United States government concede the scholarly credentials of such academics as Meron and Buergenthal. For instance, Mr. David Stewart, Assistant Legal Advisor for Human Rights and Refugees, United States Department of State, described Judge Buergenthal as one of the top experts on the subject of extraterritoriality of treaties. Telephone interview with David Stewart, Legal Advisor, for Human Rights and Refugees, United States Department of State (Dec. 15, 1995) [hereinafter First Stewart Interview].

[168] I say this only after acknowledgment that experts such as Professors Meron, Henkin, and Buergenthal are giants within this field and that their work and opinion is always given significant weight and consideration by the military legal community.

[169] The two elements of article 2 that trigger extraterritoriality are that the individual must be (1) within a state's territory and (2) subject to its jurisdiction.

[170] First Stewart Interview, *supra* note 167.

[171] PELL REPORT, *supra* note 146, § VIII (cost estimate).

[172] *Id.*

[173] *Id.*

[174] *Id.* A review of the entire Report submitted by the Committee on Foreign Relations regarding the Covenant reveals that all the analysis is focused on the impact that the treaty would have within the United States. Not a single entry discussed how the treaty would alter or impact the actions of the United States outside of its own territory.

[175] I used the "as a formal matter" qualifier because the United States has relied on the Covenant in its planning during every recent major military OOTW.

[176] Second Stewart Interview, *supra* note 154.

Having analyzed the first-line question of whether the Covenant is extraterritorial, the judge advocate must advance to the second-line question. That question requires the assumption, for the sake of argument, that the treaty *is* extraterritorial in application. Following this assumption, to whom, in the context of an OOTW, would the United States owe protection? Once again, none of the reservations, understandings, or declarations made by the United States relative to the Covenant and few policy statements and no executive orders or Department of Defense directives offer guidance to answer this question. As a starting point, the military lawyer should realize two things: (1) not all provisions of the Covenant, despite the circumstances, become subject to extraterritorial application and (2) most civilians within the area of an OOTW would not be subject to the Covenant's protections.

There seems to be no debate about whether all provisions of the Covenant apply extraterritorially. Experts agree that it is only the "fundamental" provisions and protections that might be subject to extraterritorial application.[177] In judge advocate parlance, this means "common article 3 type protections." Examples include the right to humane treatment, the prohibition of arbitrary detention, the prohibition of the arbitrary taking of life, the prohibition of arbitrary violence to life and limb, the right to basic medical care.[178]

I might draw debate regarding the second point. The United States, however, cannot be expected to gain "jurisdiction" or control over every national within the area of an OOTW. It cannot become a guarantor for host nation political and civil rights in a humanitarian intervention operation. What it can do, consistent with regional or international organization mandates and its national mission statements, is protect those civilians that actually come under its authority. This means, for instance, that detained civilians would be granted the protections afforded by the fundamental provisions of the Covenant (for example, to be informed of the reason for detention and the right to a hearing), but they would not become entitled to the less than fundamental rights such as the right to compensation if wrongfully detained.

Again, assuming that a treaty, such as the Civil and Political Covenant is indeed extraterritorial, the next and perhaps most difficult question is what circumstances place civilians under the authority of our forces to trigger the "subject to jurisdiction" threshold? In the strictest sense,[179] a state has authority only over its territory and its nationals.[180] But this assumes normal conditions and circumstances. It does not assume that such a state is involved in an extraterritorial military operation where it, by virtue of its mission statement, assumes responsibility for the conduct of events in another nation. The public international law of peace almost never contemplates placing nationals of a host nation under the authority of another state's officials while such nationals are within the host state. Unfortunately for the military lawyer, traditional public international law does not account for the reality of OOTW.

Within the context of the OOTW executed by the United States,[181] a number of circumstances place civilians of the host nation under the authority of the intervention force. Detention is an obvious example, but what about civilians who have been instructed to not commit acts of violence upon one another after being placed on notice that our troops will use force to stop such attacks and to maintain order? Do these circumstances place large numbers of civilians under United States authority? The answer is no. In the absence of an actual occupation or an operation nearly identical to occupation, the type of authority required to create a general obligation to the entire population or a large segment of it does not exist.

The foregoing analysis is based on the idea that "something legal must happen" for a person or group of people to become subject to the jurisdiction of the United States. Typically, when a military force enters territory controlled by another sovereign, the mere entrance of the force does not change the jurisdictional reach of that sovereign.[182] To reverse this general principle, the entering force must literally displace the original sovereign. Anything less than displacement would not subjugate host nationals to the authority of an intervention force to the extent necessary to bestow jurisdiction on the intervention force.

The clearest example of such displacement is found during traditional occupation. Occupation is described as "invasion plus taking firm possession of enemy territory for the purpose of holding it."[183] "Territory is considered occupied when it is actually

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[177] Meron, *supra* note 17.

[178] Mr. Stewart commented that "fundamental provisions include only rights and protections the U.S. is otherwise already bound to provide." Second Stewart Interview, *supra* note 154.

[179] That is, under traditional international law, civilians were subject to jurisdiction when an army of a foreign power was present in another state's territory either by express or implied consent or as an occupation or invasion force.

[180] *See* RESTATEMENT, *supra* note 11, § 206(a).

[181] For a partial listing of the major OOTW executed by the United States *see supra* note 34.

[182] *See* DA PAM 27-161-1, *supra* note 150, para. 11-1.

[183] FM 27-10, *supra* note 25, para. 352.a.

placed under the authority of the hostile army."[184] Under such circumstances, the nationals of an occupied territory would be subject to the occupant's jurisdiction—this is true even when the occupant does not have the right to subjugate the host nation's territory and must continue to recognize the host nation as a sovereign nation with a distinct territory. Therefore, the occupant gains internationally recognized jurisdiction despite the fact that this jurisdicition is wielded over people that do not reside in its territory.[185]

Although occupation rules only apply during armed conflict, one could argue that many recent OOTW have generated conditions that come extremely close to meeting the elements of formal occupation.[186] As a backdrop to this argument, the United States has maintained as a matter of practice, if not policy, that it will not become an occupant in an OOTW. For example, Lieutenant General Henry H. Shelton, Commander of CombinedTask Force 180, repeatedly stated that the force under his command in Haiti was not an occupation force.[187] The last time that the United States acknowledged that it was an occupant was during the immediate aftermath of Operation Desert Storm in regard to portions of southern Iraq.[188]

The United States was not an occupying power in its recent operations in Haiti or Bosnia-Herzegovina because the United States entered these nations as (1) part of a multi-national force, with a mandate handed down from the United Nations, and (2) without completely displacing the recognized government.[189]

Accepting this position, the primary question becomes to what extent, if any, does a humanitarian intervention force (that is not an occupant) gain jurisdiction over local nationals? Extrapolating the elements of occupation, one might argue that host nation nationals become subject to the jurisdiction of the United States where its military forces (1) formally (legally) prevent the de facto government from performing its governmental role, (2) step into that role to, in effect, displace that government, and (3) exercise direct control over local nationals to the extent that such forces claim and wield actual jurisdiction.

Before moving to the next section, it is important to restate that the foregoing analysis is based on two large assumptions, neither of which the Departments of Defense or State formally recognize.[190] The first presumes that the Covenant is extraterritorial and that the second presumes that the presence of the foregoing elements creates the type of jurisdiction referred to within article 2 of the Covenant. Despite the quantum leap represented by these assumptions, it is my view that military practitioners must be aware of these positions if only to explain to commanders why the Covenant or similar conventional human rights law does not apply to OOTW conducted within the territory of other nations.

### Tier Two: Host Nation Law

After considering the type of baseline protections and accompanying limitations represented by the tier one legal regimes, the military leader must be advised in regard to the other bodies of law that he should integrate into his planning and execution phases. Following the sequential four-tier approach that I advocate, the next area of law that military lawyers should analyze is host nation law. A military force operating within another nation is frequently required to recognize host nation law in its treatment of local nationals. Accordingly, an understanding of the international rules that control the application of host nation law is essential.

Those that advise our leaders must remember that the rules that regulate the execution of an OOTW do not enjoy the benefit of clarity. Nowhere is this problem more painfully obvious than in the area of host nation law.[191] This problem has not, however,

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[184] *Id.* para. 351.

[185] *See* GC, *supra* note 4, pt. III, sec. III. This entire portion of the Fourth Convention deals with an occupant's jurisdiction over civilian persons in occupied territory.

[186] Although the United States entered Haiti to begin Operation Uphold Democracy by executing a "semi-permissive" entry, some have argued that the United States occupied a legal status closely akin to formal occupation. Special Advisor to the President on Haiti Lawrence A. Pezzullo recently stated "to this date, Aristide is not running the nation; the U.S. is in effective control of the nation. Not a single ministry in Haiti now operates. We are an army of occupation." Telephone interview with Former Ambassador Lawrence A. Pezzullo, Recent Special Advisor to the President on Haiti (Dec. 15, 1994).

[187] CLAMO Haiti Report, *supra* note 18, at 55, n.171.

[188] Dep't of Defense, Conduct of the Persian Gulf War: Final Report to Congress 610 (1992) [hereinafter DOD Final Report].

[189] In Operation Uphold Democracy, "because the deployment was permissive and did not involve international armed conflict, a body of law applicable to states in wartime did not strictly apply, even though the presence of thousands of armed troops and the displacement of thousands of civilians and noncombatants created compelling analogies to that body of law. The prevailing regime was the international law of peace, and under this regime a sovereign host nation applies its domestic law within its territory." *See* CLAMO Haiti Report, *supra* note 18, at 46 (explaining the United States position regarding the displacement of the Haitian government).

[190] I do not acknowledge the validity of the first assumption and admit the lack of legal authority (except by analogy) or precedent for the second assumption.

[191] This fact has been repeatedly borne out by the after action reports from OOTW. For example, the *CLAMO Haiti Report* states, "United States troops did not fight their way into Haiti and did not capture prisoners of war. Nevertheless, within 72 hours of the United States' arrival in country, the need for a facility to house detained persons became apparent." CLAMO Haiti Report, *supra* note 18, at 63. From the inception, judge advocates realized that because of the nature of the operation, they would have to factor host nation law into the formulation of the rules and methodology that would dictate how their detention facility would operate.

prevented judge advocates in recent operations from realizing the obvious importance of host nation law.[192] Recognition of local legal requirements is necessary because: (1) public international law demands it and (2) frequently the legitimacy of an operation depends on it.[193]

In traditional warfare, the rules that regulate the application of host nation law are straightforward[194] and make sense (at least in terms of their purpose of reducing the suffering of the victims of warfare). In the eyes of the military lawyer, traditional warfare possesses the beauty of simplicity. For example, when a military force invades the territory of another nation, conquers a portion or all of that state, and then exercises the authority of an occupant, the rules are simple. The legal advisor has only to turn to sections III and IV of the Fourth Geneva Convention[195] and to *Field Manual 27-10, The Law of Land Warfare*.[196] Moreover, most commanders already understand these rules.[197]

On the other hand, OOTW deny lawyers and those that they serve the benefit of the traditional rules of conventional warfare. Consider the combined joint task force that plans the "semi-permissive" entry of some nation that has ignored the condemnations and resolutions of the United Nations. Such a nation might easily conclude that fighting coalition forces led by the United States would be a "bad thing."[198] In this case, instead of entering the nation as an invader, the task force might enter with the assent of the de facto government[199] under the label of "intervention force." Although such a force usually has the benefit of this less bellicose label and a peace-oriented mission, determining the exact nature of the status represented by the label is the central problem in determining tier two protections for civilians.

Judge advocates understand that, in the case of any type of military operation, the force that they support enters a nation with a legal status that might exist anywhere along a notional legal spectrum. In simple terms, the right end of that spectrum is represented by invasion followed by occupation. The left end of the spectrum is represented by tourism.[200] Accordingly, our forces enter foreign states with a legal status akin to either invaders or tourists or somewhere between these two positions.

When the entrance can be described as an invasion, the legal obligations and privileges of the invading force are based on a group of very straight-forward rules. As the analysis moves to the left end of the spectrum and the entrance begins to look more like tourism, host nation law becomes increasingly important, and it

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[192] *See* Stai Memorandum, *supra* note 89, at 7-8 (reporting the consistent effort judge advocates made to gain copies of the Haitian Constitution and other significant Haitian statutes and further reporting that one judge advocate even translated several Haitian statutes into English).

[193] Army doctrine describes legitimacy as one of the primary principles of OOTW. The philosophy behind this doctrine is based upon the belief that it is imperative to foster the perception among host nation citizens that the authority of the intervention force and the host government that it supports is "genuine and effective and employs appropriate means for reasonable purposes." FM 100-5, *supra* note 6, at 13-4.

[194] A single glance at *FM 27-10* demonstrates the simplicity of the Law of War. The entire work is contained in a small pamphlet, produced on nine-by-six inch paper, and bound to a thickness of exactly one-half of an inch. FM 27-10, *supra* note 25.

[195] GC, *supra* note 4.

[196] FM 27-10, *supra* note 25.

[197] Having taught in the United States Army's Senior Officer Legal Orientation Course (a week-long precommand course for senior military leaders) for the past two years, my impression is that today's senior officers possess a high degree of sophistication relative to the laws that impact their operations. This is especially true in regard to the Laws of Armed Conflict.

[198] The "good versus bad thing" approach to decision making is one of several possible methods that United Nations negotiators might use when discussing, with that nation's head of state, the different ways that coalition forces might enter a rogue state (or a state with a rogue government). This happens when the negotiators explain that the coalition forces, led by the United States forces, can enter in one of two ways. The first is best categorized as high intensity armed conflict where the head of state is a legitimate military target. The second is described as something like a "permissive" entry and the head of state would not be a target and would have certain privileges while planing eventual departure from power. The first scenario is described as a "bad thing," while the second scenario is described as a "good thing." The foregoing is not an attempt at flippancy, but a straight forward explanation of how permissive entrances occur (resembling what has traditionally been described as "unresisted invasion") and the resultant impact on the application of host nation law. Colin Powell details the use of this approach in his autobiography. He explains that invasion was averted at "H-Hour minus six" (six hours before the planned invasion would have commenced). *See* COLIN POWELL, MY AMERICAN JOURNEY 597-602 (1995). For a description of the overwhelming combat power that the United States planned to release against the Haitian military and police forces, *see The Invasion That Never Was*, ARMY TIMES, Feb. 26, 1996, at 12-14 (describing the incredible combined arms force that was almost released against the Haitian military and police forces, and how the description of these forces convinced the Haitian leadership to consent to a peaceful entry).

[199] *Id.* Powell described how "President Emile Jonassaint (whom the U.S. did not recognize)" and former President Jimmy Carter signed the entrance agreement, with General Raoul Cedras' "ironclad assurance" that he would honor Jonassaint's decision. The agreement is reprinted in the *CLAMO Haiti Report*, at Appendix C [hereinafter Carter-Jonassaint Agreement].

[200] In essence, the category of OOTW referred to as stability operations frequently place our military forces in a law enforcement type role. Yet, they must execute this role without the immunity from local law that traditional armed conflict grants. In many cases, their authority may be analogous to the authority of United States law enforcement officers in the territory of another state. "When operating within another state's territory, it is well settled that law enforcement officers of the United States may exercise their functions only (a) with the consent of the other state . . . and (b) if in compliance with the laws of the other state . . . ." *See* RESTATEMENT, *supra* note 11, §§ 433, 441.

applies absolutely at the far left end of the spectrum. For example, the permissive entry of the 10th Mountain Division into Haiti, to execute Operation Uphold Democracy, probably represents the mid-point along the foregoing spectrum. Although the force entered with permission, it was certainly not a welcomed guest of the de facto government (hence, "semi-permissive" entry). Accordingly, early decisions regarding what could be done to maintain order[201] and protect civilians from other civilians had to be analyzed in terms of the coalition force's legal right to intervene in the matters of a sovereign state.[202]

The weapons search and confiscation policy instituted during the course of Operation Uphold Democracy is a clear example of this type of deference to host nation law.[203] The coalition forces adopted an approach that demonstrated great deference for the Haitian Constitution's guarantee to each Haitian citizen the right to "armed self-defence within the bounds of his domicile."[204]

Another characteristic of OOTW relative to the application of host nation law is their tendency to evolve and transition over time. As these operations mature and stabilize, it is likely that our leadership will desire to grant more deference to the host nation's government and system of law. Thus, the status of our force along the host nation law spectrum can be expected to shift during the course of a single operation.

With the foregoing in mind, it is important to note that public international law assumes a default setting.[205] Historically, customary international law provided that "it is well settled that a foreign army permitted to march through a friendly country, or to be stationed in it, by permission of its government or sovereign, is exempt from the civil and criminal jurisdiction of that place."[206] The modern rule, however, is that, in the absence of some type of immunity, forces that find themselves in another nation's territory must comply with that nation's law.[207] This makes the circumstances that move military forces away from this default setting of extreme importance. Contemporary military commentators assert that United States forces are immune from host nation laws in any one of three possible scenarios:[208]

> (1) immunity is granted in whole or part by international agreement;
>
> (2) United States forces engage in combat with national forces; or
>
> (3) United States forces enter under the auspices of a United Nations sanctioned security enforcement mission.

The exception represented by the first scenario is well recognized and the least problematic form of immunity. Yet, most status of forces and stationing agreements only deal with granting *members of the force* immunity from host nation criminal and civil jurisdiction. Although this type of immunity is important, it is not the variety of immunity that generated headlines during Operation Joint Endeavor. During that operation, commentators, policy makers, and journalists were concerned with the immunity of the intervention (or sending) force nation (not the members of the force). This form of immunity benefits the nation directly,[209] providing it with immunity from laws that protect host nation civilians. For example, under what conditions can commanders of United States forces, deployed to the territory of another nation, disregard the due process protections afforded by the host nation law to its own citizens?

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[201] United Nations Security Council Resolution 940 mandated the use of "all necessary means" to "establish a secure and stable environment." Resolution 940, *supra* note 34. Yet even this frequently cited source of authority was balanced with host nation law. *See* CLAMO HAITI REPORT, *supra* note 18, at 76.

[202] CLAMO HAITI REPORT, *supra* note 18, at 77. Task Force lawyers advised the military leadership that since President Aristide (as well as Lieutenant General Cedras—the de facto leader) had consented to the entry, "Haitian law would seem to bear" on coalition force treatment of Haitian civilians.

[203] *See* 10TH MOUNTAIN AAR, *supra* note 44, at 108.

[204] HAITI CONST. art. 268-1 (1987).

[205] *See* DA PAM 27-161-1, *supra* note 150, at 11-1 (explaining armed forces' legal status while in a foreign nation).

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

[207] Leading commentaries of the nineteenth century described the international immunity of armed forces abroad "as recognized by all civilized nations." VON GLAHN, *supra* note 11, at 225-26; *see also* WILLIAM W. BISHOP, JR. INTERNATIONAL LAW CASES AND MATERIALS 659-61 (3d ed. 1962). This doctrine was referred to as the "Law of the Flag," meaning that the entering force took its law with its flag and claimed immunity from host nation law. Contemporary commentators, including military scholars, recognize the jurisdictional friction between an armed force that enters the territory of another state and the host state. This friction is present even when the entry occurred with the tacit approval of the host state. Accordingly, the United States and most modern powers no longer rely on the Law of the Flag, except as to armed conflict, where Law of the Flag is still in favor. DA PAM 27-161-1, *supra* note 150, at 11-1.

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

[209] This is in contrast to the indirect benefit a sending nation gains from shielding the members of its force from host nation criminal and civil jurisdiction.

Although not as common as a status of forces agreement, the United States has entered into these types of arrangements. The Carter-Jonassaint Agreement[210] for Haiti is an example of such an agreement. The Carter-Jonassaint agreement demonstrated deference for the Haitian government by conditioning its acceptance upon the government's approval.[211] It further demonstrated deference by providing that all multi-national force activities would be coordinated with the "Haitian military high command." This required a number of additional agreements, arrangements, and understandings to define the extent of host nation law application regarding specific events and activities.

The exception represented by the second scenario is probably the most obvious. When engaged in traditional armed conflict with another national power, military forces care little about the domestic law of that nation. For example, during the Persian Gulf War, the coalition invasion force did not bother to stop at Iraqi traffic lights in late February 1991. The invasion force, as any invasion force, was not bound by the domestic law of the invaded nation.[212] This exception is based on the classic application of the Law of the Flag.[213] This concept stands for the proposition that a foreign military power entering a nation through force or by consent is immune from the laws of the receiving state (a version of the same concept that I referred to earlier as the historical rule).[214]

The Law of the Flag has two prongs. The first prong is the combat exception[215] and is exemplified by the lawful disregard for host nation law like that exercised during Desert Storm. This prong is still in favor and represents the state of the law.[216] The second prong, referred to as the consent exception, is described by the excerpt from the United States Supreme Court judgment in *Coleman v. Tennessee* quoted above and it is exemplified by situations that range from the consensual stationing of National Treaty Alliance Organization forces in Germany to the permissive entry of multi-national forces in Haiti. The entire range of the later prong no longer enjoys universal recognition (but to say it is now in disfavor would be an overstatement).[217] International law, however, grants a degree of immunity to specific types of operations within the range of the second prong.

To understand the contemporary status of the Law of the Flag's consent prong, it is helpful to look at the various types of operations within its traditional range. At the far end of this range are those operations that no longer benefit from the theory's grant of immunity. For example, in nations where military forces have entered based on true invitations, and it is clear that the relationship between nations is both mature and normal,[218] there is no automatic immunity based on the permissive nature of the entrance and continued presence. It is to this extent that the consent prong of the law of the flag theory is in disfavor. In these types of situations, the host nation gives up the right to have its laws observed, but only to the extent that it does so in an international agreement (usually referred to as a status of forces agreement).

In deployments where the United States and its coalition partners do not rely on the Law of the Flag, the practitioner should request information regarding international agreements (through appropriate command and technical channels) from the combatant unified command whose area of responsibility includes the deployment site.[219]

At the other end of this range are operations that merit, at a minimum, a healthy argument for immunity. A number of operational entrances into foreign states have been predicated upon

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[210] *Reprinted in* CLAMO HAITI REPORT, *supra* note 18, at 182-83.

[211] *Id.*

[212] This rule is modified slightly once the invasion phase ends and formal occupation begins. An occupant has an obligation to apply the laws of the occupied territory to the extent that these laws do not constitute a threat to its security. *See* GC, *supra* note 4, arts. 64 to 78 (and numerous articles within section IV).

[213] *See* Whitaker, *supra* note 208, at 31.

[214] *Id.* n.34.

[215] *Id.* nn.34, 35.

[216] *See* OPPENHEIM, *supra* note 52, at 437. "In carrying out [the administration of occupied territory], the occupant is totally independent of the constitution and the laws of the territory, since occupation is an aim of warfare and the maintenance and safety of his forces and the purpose of the war, stand in the foreground of his interests . . . ." This must be balanced against the rule cited earlier in note 212.

[217] *See* DA PAM 27-161-1, *supra* note 150, at 11-1.

[218] The relationship is considered "normal" in the sense that some internal problem has not necessitated the entrance of the second nation's military forces.

[219] *See* INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL'S SCHOOL, UNITED STATES ARMY, THE OPERATIONAL LAW HANDBOOK, 3-1 (June 1996) [hereinafter 1996 OPLAW HANDBOOK] (The reader should take note that all earlier references to the Operational Law Handbook were made to the 1995 edition).

an invitation, but an invitation of a different type and quality than discussed above. This type of entrance involves an absence of complete freedom of choice on the part of the host nation (or at least on the part of the *de facto* government of the host nation). In such cases, the scenario is reminiscent of the Law of the Flag's combat prong because the legitimate use of military force or legitimate threat of that force is a critical aspect of the characterization of the entrance. In these types of operations, the application of host nation law will be closely tied to the mission mandate and the specific operational setting. The discussion of these elements takes us to the third type of exception.

The third exception, although based on the United Nations Charter, is a variation of the Law of the Flag's combat exception.[220] "Operations that place a United Nations force in a hostile environment, with a mission that places it at odds with the de facto government, may trigger this exception."[221] Obviously, the key to this exception is the mission mandate. If the mandate requires the force to perform mission tasks that are entirely inconsistent with compliance with host nation law then, to the extent of this inconsistency, the force would seem immunized from that law. This immunity is obvious when the intervention forces contemplate the combat use of air, sea, or land forces under the provisions of the United Nations Charter.[222] Additionally, the same immunity is available to the extent it is necessary when combat is not contemplated.[223]

The use of local property in the current operation in Bosnia-Herzegovina is an example of the third exception. The acquisition rules of the law of war do not apply in that operation because the IFOR is not involved in an international armed conflict. Similarly, many of the issues facing the multi-national forces are not addressed by the status of forces agreement integrated in the Dayton Accord. Thus, neither the first nor the second exception can be relied on to grant immunity for IFOR action that violates traditional host nation property law. Yet, "in some instances, operational necessity forces units to occupy facilities before the owners can be found and notified."[224]

This practice undoubtedly violates local property law and the IFOR avoids the practice unless no other option is available. When such an action is ordered, however, it is not illegal because the IFOR has the limited immunity from host nation law represented by the third exception. As soon as the property owner is found, civil affairs personnel "work with the owner and real estate contractors to arrive at mutually agreed terms for its use."[225]

The bottom line is that judge advocates should understand what events impact the immunity of their force from host nation laws. Additionally, military practitioners should contact the unified or major command to determine the Department of Defense's position regarding the application of host nation law. They must understand that decisions which impact these issues are made at the interagency level between Department of Defense, Department of State, and other critical agencies. Finally, our military leaders must understand that before they seek to alter the status of their force, in regard to host nation law, they must coordinate with the unified command. The Department of Defense frequently must consult with other agencies, such as the Department of State, as a matter of law.[226]

### Tier Three: Conventional Law

After legal advisors consider the first two tiers of protective law, they should then turn their attention to the third tier of protection. This group of protections is perhaps the most familiar to practitioners and contains the protections bestowed by treaty and customary law; domestic and statutory law; and executive orders, departmental directives, and service regulations.

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[220] Whitaker, *supra* note 208, at 31 n.35.

[221] *Id.*

[222] UN CHARTER, Chapter VII, art. 42.

[223] *See* Resolutions 940 and 1031, *supra* note 34. Resolution 940 mandated the multi-national force, led by the United States, to enter Haiti and use all necessary means to force Cedras' departure, return President Aristide to power, and to establish a secure and stable environment. The force was obligated to comply with the protective guarantees that Haitian law provided for its citizens only to the extent that such compliance would not disrupt the accomplishment of these mission imperatives. This is exactly what happened. *See* 10th Mountain AAR, *supra* note 44, at 6-9, 10-11. The same type of approach is being applied by the United States element of the multi-national force executing the mandate of Resolution 1031 and the Dayton Accord.

[224] Lieutenant Colonel E.T. Magdziak & Major Jon D. Bunn, *Civil Affairs In Bosnia: Bridging the Civil/Military Gap*, CHIEF OF STAFF WEEKLY SUMMARY, Apr. 1996, at 40.

[225] *Id.*

[226] For example, before engaging in "formal" discussions regarding the environment with representatives from a host nation, the Department of State must be "consulted." *See* DEP'T OF ARMY, REG. 200-2, ENVIRONMENTAL EFFECTS OF MAJOR DOD ACTIONS, para. 8-3c. (23 Dec. 1988). The authority for the Department of the Army to negotiate and conclude international agreements is set out in *Army Regulation 550-51*. The regulation sets out categories of agreements that the Secretary of the Army has been delegated authority to negotiate and also sets out categories that Army personnel do not have authority to negotiate and conclude. *See* DEP'T OF THE ARMY, REG. 550-51, AUTHORITY AND RESPONSIBILITY FOR NEGOTIATING, CONCLUDING, FORWARDING, AND DEPOSITING OF INTERNATIONAL AGREEMENTS, paras. 5, 6 (1 May 1995) [hereinafter AR 550-51].

Tier three application is largely determined by the circumstances that surround the operation and the particular status of the civilians that may be affected by the operation. Knowledge of the foreign territory in which the operation will be conducted and the different nations involved in the operation is also critical to determining the protections found within this tier. These factors control the application of treaty law.

In short, this tier contains the "hard law" that must be triggered by some event, circumstance, or status to bestow protection on a particular class of persons. Examples include the law of war treaties (triggered by armed conflict), the Refugee Convention and its Protocol,[227] and any number of statutes or executive orders (and their implementing directives and regulations). Unfortunately, a detailed analysis of these regimes exceeds the potential scope of this essay. I will, however, address two of the more pressing issues central to Tier Three application: (1) the article 2 threshold and (2) the extent to which the United States abides by Protocols I and II Additional to The Geneva Conventions.

*The Article 2 Threshold*

The first issue is the ongoing problem of determining the location of the "international armed conflict" threshold in modern military operations. It is only when two nation states are involved in armed conflict that the greater portion of the law of war applies to protect civilians. Despite the obvious importance of this threshold, its exact location on the spectrum of conflict is sometimes elusive.

The problem is bracketed by contemporary operations in which the threshold is either clearly or clearly not satisfied. For example, Operation Desert Storm is an example of when the enforcement of United Nations Security Council resolutions resulted in a contention between states that clearly crossed the armed conflict threshold as described within article 2 common to the four Geneva Conventions.[228]

This type of conflict is generally described as an "article 2 conflict" with the understanding that once the article 2 threshold is crossed, the law of armed conflict in its entirety becomes applicable, not just the four Geneva Conventions.[229] As far as Desert Storm is concerned, there never seemed to have been any real doubt in the minds of the United States policy makers regarding this issue.[230] This may have surprised commentators that had opined that contemporary law of war treaties only bind the conduct of national forces and not international forces (multinational forces that act under the authorization of a United Nations or regional organization mandate).[231]

The majority view, consistent with the United States position, is that international forces (composed of various national elements) are bound to the same extent by the law of war as national forces.[232] We are to look beyond the guise of "international force" to the individual state forces that compose the international force. If an individual state force is involved in a (1) contention (2) with another state (3) where at least one side employs military force[233] (4) in an effort to overpower the other

[227] *See* Refugee Convention and Refugee Protocol, *supra* note 58.

[228] "[T]he present convention shall apply in all cases of declared war or of any other armed conflict, which may arise between two or more of the High Contracting Parties, even if a state of war is not recognized by one of them." *See* Geneva Conventions, *supra* note 4, art. 2.

[229] The Geneva Conventions of 1949 were drafted to serve as just the latest iteration of the ongoing effort to regulate warfare. The Conventions make this point clear in a number of articles that define the relationship between a subject convention and the existing laws of war. *See* GC, *supra* note 4, art. 154. *See also* W. Michael Reisman & James Silk, *Which Law Applies to the Afghan Conflict*, 82 Am. J. Int'l L. 459, 460 (1988). Of this entire body of conventional law, however, the Fourth Geneva Convention (Civilian's Convention) is by far and away the most important.

[230] *See* DOD Final Report, supra note 188, app. O-8 (the Department of Defense reported to Congress that all law of war treaties, to which the United States is a party, were applicable to the Persian Gulf War).

[231] *See* von Glahn, *supra* note 11, at 699-700.

[232] *Id.*

[233] The "use of armed forces" element means that the two states must be involved in some type of hostilities. The official commentary to the First Geneva Convention defines an armed conflict as "any difference arising between two States and leading to the intervention of armed forces." Oscar M. Uhler, Commentary I, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 32 (Jean S. Pictet ed., 1952) [hereinafter Pictet I]. Most commentators assert, however, that there is a minimum degree of intensity required to satisfy this element. Professor Howard S. Levie, Professor Emeritus, St. Louis University Law School and Adjunct Professor of Law, United States Naval War College, suggests that there is a floor below which article 2 is not triggered. He believes that occasional and isolated incidents between nations do not create international armed conflict. Professor Levie gives the 1985 shooting of United States Army Major Author D. Nicholson by the Soviet Union as an example of a scenario where hostilities were so limited that no armed conflict existed between two nation states. Howard S. Levie, *The Status of Belligerent Personnel "Splashed" and Rescued by a Neutral in the Persian Gulf Area*, 31 Va. J. Int'l L. 611, 614, 616 (1991).

state, then the event is an article 2 conflict[234] despite the label[235] used by the state parties for their actions or the reason for the contention. Consequently, the law of war in its entirety becomes applicable. Without doubt, the foregoing elements were each met with the commencement of hostilities in the Persian Gulf.

At the other end of the spectrum, Operation Uphold Democracy represents a case where a multi-national force entered another nation, and although shots were occasionally fired, the article 2 threshold was never crossed[236] because several of the previously mentioned elements were missing. Although several states were involved, one could argue that they were not involved in a "contention," defined as "a violent struggle through the application of armed force."[237] Moreover, it would be difficult to argue that "armed force" was employed with the "intent to overpower" the military forces of any of the involved states.[238]

In the center of the spectrum stands Operation Just Cause, the unilateral United States mission to protect United States nationals, defend Panama's fragile democracy, protect the civilian population, apprehend General Manuel Noriega, and defend the integrity of the Panama Canal Treaty.[239] The United States has steadfastly stated that the Law of War did not apply to Just Cause, because the lawfully constituted government of Panama extended an invitation to the United States to send military forces into Panama to achieve the foregoing goals.[240] Accordingly, reasoned the United States, there was no contention between the United States and Panama because the later desired the former's entrance and assistance.[241] Although the United States was criticized[242] relative to the timing[243] of the "regularly constituted government" of Panama's request for the United States' entrance, the law supports the United States' position.[244]

The three operations discussed above demonstrate the nuanced and complex nature of contemporary military operations. Although an operation may have many of the attributes of armed conflict, the absence of any of the four traditional elements of warfare prevents its characterization as a war (or armed conflict). Stated differently, the absence of any one of the four traditional elements denies a conflict article 2 status. When this happens, the laws of armed conflict, that are the heart of tier three protections, do not apply.

[234] *See* LAW OF WAR CASES AND MATERIALS, *supra* note 54, at 1-8. The majority of commentators define war or armed conflict in terms of the four elements (enumerated in the text) without regard to why the armed contention began or whether or not it is a legal use of force. *See also* OPPENHEIM, *supra* note 52, at 201-03; and VON GLAHN, *supra* note 11, at 669.

[235] Article 2 of the 1949 Geneva Conventions represented a marked change from the earlier 1929 version of the Conventions. The 1929 Conventions had no equivalent provision, based on the belief that parties to a potential conflict would comply with the Hague Convention No. III rule which required a declaration of war (or ultimatum with a conditional declaration of war). Accordingly, there would be no need to guess as to the nature of the conflict. Article 2 changed all of this, removing the argument that in the absence of a formal declaration of war the Conventions did not apply. *See* HOWARD S. LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 9-11 (1976).

[236] *See* Carter-Jonassaint Agreement, *supra* note 199 (the agreement serves as the best evidence that the entrance was permissive and based on the consent of the de facto leadership of Haiti). This agreement, coupled with later national and international pronouncements, is evidence that the international community did not view the multi-national force's entrance and subsequent presence as either armed conflict or occupation. *See* S.C. Res. 944, U.N. SCOR, 49th Sess., 3430th mtg., U.N. Doc. S/RES/944 (1994) (the resolution, drafted and passed after the entrance of the multi-national force, reflects the United Nations' opinion that nothing that these forces had done amounted to an event that would cross the article 2 threshold).

[237] OPPENHEIM, *supra* note 52, at 202.

[238] *See* Warner-NY Times, *supra* note 28 (Lieutenant Colonel Warner, Staff Judge Advocate, 10th Mountain Division, United States Army, characterized Operation Uphold Democracy as "a peace-enforcement mission with a combat flavor.")

[239] *See* Bush Letter to Senate, *supra* note 34; *also see* Fact Sheet for the Honorable Charles B. Rangel, Panama: Issues Relating to the U.S. Invasion, U.S. Gen. Acct. Off., B-242101 (Apr. 24, 1991) [hereinafter GAO Fact Sheet].

[240] *See* Parks Memorandum, *supra* note 14 (Mr. Parks explains that the United States came to the aid of the legitimate government of Panama and was thus not involved in a "contention" with that government).

[241] *Id.* para. 8.

[242] The United States received criticism from a number of sources, most notably the United Nations. On 29 December 1989, the United Nations General Assembly adopted a non-binding draft resolution "to strongly deplore" the United States' "invasion" of Panama. Twenty states voted against the resolution, including Panama. *See* GAO Fact Sheet, *supra* note 239, at 3.

[243] Guillermo Endara was sworn into office on a United States base approximately one hour before the invasion took place. Prior to the invasion, the United States government had officially recognized Eric Arturo Delvalle as the legal president of Panama. Delvalle had been installed by Noriega as president in 1984 but was removed from office in February 1988 by the legislature after he attempted to dismiss Noriega as head of the Panama Defense Forces. *Id.* at 4.

[244] This was the shared opinion of the Departments of Defense and State and stood up to the investigation conducted by the General Accounting Office. *Id.* at 2-4. *But see* United States v. Noriega, 808 F. Supp. 791, 795 (S. D. Fla. 1992); *see also supra* note 14.

### *Application of the Protocols*

The second law of war (tier three) issue faced by the United States is deciding what impact, if any, Protocols I and II[245] should have on military operations. Protocol I (which regulates international armed conflict) and Protocol II (which regulates noninternational armed conflict) were drafted to supplement and update the four Geneva Conventions. Each Protocol contains a significant number of provisions that provide protections and rights for civilians during armed conflict.[246]

The United States signed both Protocols on 12 December 1977[247] but has yet to ratify either treaty.[248] Conversely, the number of other nations that have ratified both Protocols has climbed steadily since they were opened for signature. Currently, 144 nations have ratified Protocol I while 136 nations have ratified Protocol II.[249] As a strict legal matter, the United States is only bound by the provisions of Protocols I and II that reflect customary international law.[250] However, the reality of coalition warfare and OOTW frequently places the United States in a leadership role over national forces supplied by states that are parties to both Protocols. Consequently, United States military planners, lawyers, and leaders must formulate plans that accommodate the international law obligations of these coalition partners.

Both commanders and judge advocates are keenly aware of the significance of international codes regarding coalition warfare. Judge advocates have been charged with the responsibility to bridge the legal gaps that have surfaced during recent operations. Lieutenant General Anthony C. Zinni, United States Marine Corps, recently noted that our leaders routinely rely on judge advocates to interact with their coalition force counterparts to resolve these problems.[251] He stated that the judge advocate's success in this area is "critical to the commander's ability to hold the coalition together."[252] In short, whether the United States has ratified a particular treaty or not, it must have interoperability in regard to how it will treat civilians. This reality places great importance on treaties, such as the Protocols, that enjoy near universal acceptance.

The United States' practice is demonstrated by its conduct in Operation Desert Storm. Although it made a formal statement that it had not ratified Protocol I and was not, therefore, bound by its terms, it reported that the Protocol "nonetheless bear[s] mention."[253] In addition, it actively used provisions, terms, and standards from Protocol I during its analysis of a number of Law of War determinations.[254] It was only when provisions of the Protocol, which "were not codifications of the customary practice of nations" caused results wholly contrary to the intent of the traditional law, that the United States adopted policies that were not in complete accordance with it.[255]

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[245] Protocols I and II, *supra* note 54.

[246] Part IV of Protocol I contains 32 articles devoted solely to the protection of the civilian population. Instead of protecting only those civilians that are in the hands of the enemy state (the primary purpose of the fourth Geneva Convention), several of these articles protect civilians (not in the enemy's control) from attack.

[247] *See* CLAUDE PILLOUD, INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 1554-1555 (Yves Sandoz ed., 1987).

[248] *See* LAW OF WAR CASES AND MATERIALS, *supra* note 54, at 9-11. *See also* Lieutenant Commander James P. Winthrop, Note, *Law of War Treaty Developments*, ARMY LAW., Aug. 1994, at 55-57 (Winthrop reported that the "DOD Law of War Working Group has undertaken the review of Protocol I" and the review process was expected to proceed slowly). As of the date this essay went to print, the working group's review was still underway.

[249] *Id.*

[250] *See* Michael Matheson, then United States Department of State Deputy Legal Advisor, Address Before the Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the Geneva Conventions, *reported in* 2 AM. U.J. INT'L L. & POL'Y 428 (1988) [hereinafter Matheson Report] (Mr. Matheson reported that the United States supports Protocol I articles 5, 10, 11, 12-34, 35 (1) & (2), 37, 38, 44 (portions), 45, 51 (except paragraph 6), 52, 54, 57-60, 62, 63, 70, and 73-89. The United States specifically objects to Protocol I articles 1(4), 35(3), 39(2), 43 and 44 (portions), 47, 55, and 56. The United States considers virtually all of Protocol II and many of the articles within Protocol I (including the articles that it supports) to reflect customary international law). In 1987, President Ronald Reagan recommended to the Senate, within his transmittal letter, that the Senate give its advice and consent to Protocol II. He recommended against the Senate giving its advice and consent for the ratification of Protocol I (because of his concern about extending its application to wars of national liberation, expansive and ambiguous environmental protections, and other concerns). *See* 1996 OPERATIONAL LAW MATERIALS, *supra* note 114.

[251] Lieutenant General Anthony C. Zinni, United States Marine Corps, *The SJA in Future Operations*, MARINE CORPS GAZETTE, Feb. 1996, at 15, 16 (reporting that his own use of judge advocates has elevated them to a level of importance historically reserved exclusively for the operations officer and chief of staff. He cites the judge advocate's knowledge of the highly complex international laws that control OOTW as an example of why they are so important. Additionally, he specifically notes the frequent lack of agreement regarding international codes, and the extreme importance of military practitioners to resolves these differences).

[252] *Id.*

[253] *See* DOD FINAL REPORT, *supra* note 188, at 606.

[254] *Id.* at 614-17, 625.

[255] *Id.*

Along this line, action by the United States which, at least on the surface, appears to violate one or more provisions within Protocol I may *not* necessarily violate customary law or run contrary to the legal obligations of our allies. While an overwhelming majority of nations have now ratified Protocol I, many of these nations took reservations to several of the Protocol's more controversial articles. These are the same articles that trouble the United States and have thus far prevented its ratification of the Protocol. Accordingly, most experts agree that these provisions do not reflect customary law.[256] Moreover, violation of one of these provisions is seldom contrary to the international law obligations of our coalition partners.

Protocol I's civilian population provisions contain some of the more controversial examples of such articles. For example, the United States' Persian Gulf War decision to target facilities, even though military leaders were not "one-hundred percent" certain that these facilities were not dedicated to civilian purposes, would seem to violate article 52(3) of Protocol I.[257] The United States, after gaining the highest degree of verification possible (that the target was of a military nature), did target such facilities.[258] These decisions were not "per se" violative of our coalition partners' law of war obligations under the Protocol. For instance, the United Kingdom made a declaration to article 52 that provides it with an obligation similar to the United States practice.[259]

Finally, in the OOTW environment, where no nation is bound by law of war treaties, the United States frequently applies these treaties by analogy. When it does this, it looks beyond just those treaties that it has ratified; it considers treaties that its coalition partners have ratified and other treaties that serve as guidance regarding a particular issue. The Protocols frequently fall into both categories.[260] This phenomenon takes us to our last tier, law by analogy.

**Tier Four: Law by Analogy**

Judge advocates developed the protective regime found within the fourth tier as a result of OOTW. Because the very definition of these operations is their "other than war" status, rules that govern warfare do not regulate their execution. This absence of regulation creates a vacuum that is not easily filled. In OOTW, starting with Operation Just Cause,[261] and continuing with Operations Restore Hope, Uphold Democracy, and Joint Endeavor, judge advocates have applied an analogized version of the law of war to fill this gap.

As I mentioned in opening this essay, the search for this law currently begins with the Department of Defense's Law of War Program Directive (*DOD Directive 5100.77*).[262] Because of the nuanced and nascent nature of these operations, the search has no end point. The problem has been dealt with differently in every recent operation, because judge advocates have done an extraordinary job of learning from their past mistakes and successes.

When faced with civilians that do not have the benefit of any particular body of law, judge advocates have become increasingly adept at finding portions of the law of war or other domes-

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[256] *See* Matheson Report, *supra* note 250.

[257] "In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used." Protocol I, *supra* note 54, art. 52 (3).

[258] *See* DOD Final Report, *supra* note 188, at 98.

[259] The United Kingdom stated that a specific land area could be a military objective if, "because of its location or other reasons, its total or partial destruction, capture or neutralization in circumstances ruling at the time, offers a definite military advantage." *See* The Henry Dunant Institute, The Laws of Armed Conflict—A Collection of Conventions, Resolutions and Other Documents 714-715 (Schindler & Toman eds., 3d ed. 1988).

[260] *See* Protocol I and II, *reprinted in* Dep't of Army Pamphlet 27-1-1, Protocols to the Geneva Conventions of 12 August 1949 (1 Sept. 1979) [hereinafter DA Pam 27-1-1]. This pamphlet is provided to every judge advocate before he graduates from the Judge Advocate Officer Basic Course (before arriving at their first duty station). Much of the law of war instruction provided during the basic course and other continuing legal education courses revolves around the Protocols.

[261] I cite to Operation Just Cause as the first (well known) contemporary OOTW, instead of 1983's Operation Urgent Fury. Although Urgent Fury is frequently cited as the first OOTW, it actually represented an international armed conflict. Urgent Fury was the United States unilateral operation to remove a Marxist de facto government (the People's Revolutionary Government), and restore the constitutional government to the tiny Caribbean island of Grenada. Although one might point to the ostensible legitimate government of Grenada's request for United States intervention, both the United States and Cuba (the other national force within Grenada) announced that they were not at war. In spite of these arguments, the United States acknowledged that its military forces did engage Cuban forces in combat. It further acknowledged that, as a consequence, "de facto hostilities existed and that the article 2 threshold was satisfied." *See* Memorandum, Hugh J. Clausen, to the Vice Chief of Staff of the Army, subject: Geneva Conventions Status of Enemy Personnel Captured During URGENT FURY (4 Nov. 1983). Operation Urgent Fury is, however, typically referred to as the point of origin for Operational Law (as it is now practiced). *See* OPLAW Handbook, *supra* note 14, at 13-1.

[262] DOD Dir. 5100.77, *supra* note 12. The current version of *Department of Defense Directive 5100.77* is being revised to integrate concepts and realities mandated by the Goldwater-Nichols Act of 1986 and OOTW. The next iteration is expected to become effective in 1996. *See* OPLAW Handbook, *supra* note 14, at 1-1. *See also* 1996 Operational Law Materials, *supra* note 114, at 1.

tic or international codes that, although not technically applicable, serve as guidance. These sources include, but are not limited to, tenets and principles from the law of war, United States statutory and regulatory law, and peacetime treaties. The fit is not always exact, but more often than not, a disciplined review of the international conventional and customary law or any number of bodies of domestic law provide rules that, with moderate adjustment, serve well.

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

When served by superb soldier-lawyers, our leadership lends the rule of law even to those situations where no provision within the traditional law of war or other legal regimes seems appropriate. Recent after action reports demonstrate that even when confronted with near chaos, reliance on law from one of the foregoing three tiers, common sense, and mature leadership have served as adequate substitutes for the clarity of black letter law.

## Conclusion

Before attempting to use the four-tiered structure of CPL, it is important to remember that it is simply a tool which facilitates teaching, training, and analysis. It is not a new body of law, but a structured method of looking at existing law and policy. Civilian Protection Law does not change policy. Instead, it serves as a method of analysis that causes lawyers and leaders to ask questions that will serve them in observing the rule of law.

Obviously, any questions generated by CPL analysis must be answered based upon existing law and policy. Even my inclusion of a particular body of law within CPL's framework does not mean that such law will dictate the conduct of United States forces in any particular future operation. What it might mean is that lawyers grasping for answers in the nuanced and nascent world of OOTW have a place to begin their analysis. It offers a structured medium that makes omitting an important source of law or policy less likely.

Regardless of the approach, all aspects of the law, onerous or not, must be considered. Accordingly, just as any good lawyer must do, the military practitioner must be prepared to perform two primary functions in advising their clients. First, he must inform the client about the existence of all law that might reasonably apply. Second, he must be able to explain why such law does or does not apply, and if applicable, to what extent.

I submit that CPL works because it permits the practitioner to think of relevant law in the context of the law's actual application. To some extent, despite the positive attributes of CPL or any other analytical mechanism, the relative success of military operations will continue to be based on an element of chance. Those involved in the development of CPL recognize this fact, yet they recognize that chance favors the ordered and prepared mind.

## *Criminal Law Note*

### Desertion, Important Service, and the "Virtual" Deployment

#### *Introduction*

In *United States v. Gonzalez*,[1] the United States Court of Appeals for the Armed Forces (CAAF) unanimously affirmed a Desert Storm reservist's conviction for desertion and reemphasized, after a forty year hiatus, important black letter desertion law. The CAAF first clarified that desertion with intent to avoid hazardous duty or important service does not require that the accused's unit actually engage in hazardous duty or important service during his absence or after the absence terminates. The court also held that under the facts of this case, the accused's medical disqualification for deployment did not legally preclude his conviction for desertion.

#### *Procedural History*

Contrary to his pleas at a general court-martial, the accused was found guilty of desertion with intent to avoid hazardous duty or shirk important service and missing movement by design in violation of articles 85 and 87, UCMJ, respectively.[2] The Navy-Marine Court of Military Review (NMCMR) affirmed the findings and sentence except for the language "avoid hazardous duty and/or" in the desertion specification.[3]

On appeal the appellant argued that the NMCMR finding of fact that he was medically disqualified for service in the Gulf legally precluded a finding that the service he shirked was "important." Second, he contended that he did not actually shirk important service because his unit did not actually embark for the Gulf while he was absent.

The CAAF granted review to consider whether the occurrence of hazardous duty or important service is a prerequisite to conviction and whether, in a purely case specific application of the law, the accused's medical condition negated an element of the offense.

#### *Facts*

The appellant, Corporal Enrique Gonzalez, was a Marine Corps reservist called up to support Operation Desert Shield. Upon reporting to his unit in Miami, Florida on 26 November 1990, he alerted his superiors to a urinary tract infection and bladder neck obstruction diagnosed by a civilian physician. After examination, an Air Force physician pronounced Gonzalez fit for duty contingent upon further testing at Camp Lejeune. Significantly, the physician also advised Gonzalez that additional testing was required before a proper diagnosis was possible.

Gonzalez returned to his unit where he was told by the chief hospital corpsman that he was considered fit for duty and was scheduled to deploy with his unit to Saudi Arabia. The chief also acknowledged the physician's order that more tests would be conducted after arrival at Camp Lejeune.

On 28 November 1990, the unit assembled to move to Camp Lejeune. Gonzalez was absent without leave (AWOL) and did not move with his unit. Just under a month later, the appellant surrendered to a Marine Corps office in New York City with a conscientious objector application in hand.[4] His application admitted he had been called to active duty to "travel to Saudi Arabia to participate in an operation which calls for war" and that he "chose to leave Florida."

In late December, he returned to his unit at Camp Lejeune for more medical testing. During January 1991, a medical board found him physically disqualified for duty. This was based on the same urinary tract ailment and the doctor's final recommendation that Gonzalez should never have been activated. The accused did not accompany his unit which finally deployed to Southwest Asia in late January 1991.

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[1] 42 M.J. 469 (1995).

[2] *Id.* at 470. Corporal Gonzalez was sentenced to a dishonorable discharge, confinement for 30 months, total forfeitures, and reduction to E1. The convening authority approved the sentence but suspended 23 months of the confinement. *Id.*

[3] United States v. Gonzalez, 39 M.J. 742 (N.M.C.M.R. 1994), *aff'd* 42 M.J. 469 (1995). The Navy-Marine Court of Military Review (NMCMR) also found the "disjunctive pleading [*i.e.* "and/or"] in this case error," but found it was not fatal because "the object of both intents [*i.e.* hazardous duty or important service] is the same: embarkation to Saudi Arabia." *Id.* at 749.

[4] The accused surrendered the day after Christmas. *Gonzalez*, 42 M.J. at 471.

*Analysis*

Writing for the CAAF, Chief Judge Sullivan set out the elements of desertion under article 85(a)(2): (1) that the accused quit his unit, (2) that the accused did so with the intent to avoid a certain duty or shirk a certain service, (3) that the duty to be performed was hazardous or the service important, (4) that the accused knew that he would be required for such duty or service, and (5) that the accused remained absent until the date alleged.[5]

Against this backdrop the court delineated two significant tests under article 85(a)(2). The first test deals with the third element of article 85(a)(2). "[I]mportant service" means the importance of the service to the military establishment.[6] Whether the service is important is an objective question of fact based on the circumstances surrounding the service to be performed. This objective evaluation is based on evidence of the anticipated or expected military situation in which the duty or service is to be performed.[7]

The second test identified by the CAAF examines the second and fourth elements, that is, the mens rea of the appellant. Whether he intended to avoid a particular service is a subjective question of fact based on direct and circumstantial evidence of his state of mind.[8]

The CAAF then applied the objective test to the question of important service, declaring the law well settled.[9] In the Desert Storm setting, the CAAF had little difficulty deciding that the anticipated service in the Gulf was important.[10] The appellant argued that the finding of medical disqualification legally precluded a finding that the service was important. Without further exposition the CAAF simply stated that the appellant's medical condition and subsequent disqualification did not "per se" characterize embarkation to Operation Desert Shield and Storm as unimportant service.[11] In short, the CAAF determined that the particular ailments of an accused under the objective prong of 85(a)(2) are irrelevant.[12]

The CAAF went on, however, to consider the logical extent of the accused's argument that his medical condition and ultimate medical disqualification per se characterized his duty in the Gulf as unimportant service.[13] Even under a subjective test where "important service" includes the particular ability of a person to perform the "service," the accused's argument fails because the accused in this case deserted when he was still declared fit for deployment. Under either view, at the point that the appellant left his unit, the service to be performed was "important."[14]

The NMCMR was more helpful regarding the appellant's use of a subjective test for important service determinations. "[T]he real question that arises from the appellant's medical disqualification is what effect that fact has on the Government's proof of the third element, *i.e*, that the service *to be performed by the accused* was 'important'. . . [t]he requirement is only to show that, *at the time the absence commenced*, embarkation was reasonably anticipated, imminent, and known by the appellant to be such . . . ."[15]

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[5] UCMJ art. 85 (1988).

[6] *Gonzalez*, 42 M.J. at 473.

[7] *Id.* Neither the CAAF nor the NMCMR identified how this was or should be proved by the government beyond a reasonable doubt.

[8] *Id.*

[9] In support, the CAAF cited *United States v. Boone*, 1 U.S.C.M.A. 381, 3 C.M.R. 115 (1952), and *United States v. Hemp*, 1 U.S.C.M.A. 280, 3 C.M.R. 14 (1952).

[10] The lower court likewise had no difficulty, stating that "[t]he activation was sudden, decisive and extraordinary . . . , clearly to serve the national interest in the Middle East. There is simply no word for such service short of 'important.'" United States v. Gonzalez, 39 M.J. 742, 748 (N.M.C.M.R. 1994), *aff'd* 42 M.J. 469 (1995).

[11] *Gonzalez*, 42 M.J. at 473.

[12] *But see infra* notes 13-14 and accompanying text.

[13] The NMCMR dismissed the finding of hazardous duty because of factual insufficiency. The NMCMR stated, "[N]otwithstanding his status as a rifleman with a TOW company, the mere fact that his company was destined for an area of potential conflict does not prove beyond reasonable doubt that the appellant himself would have been engaged in hazardous duty." *Gonzalez*, 39 M.J. at 747. It seems prudent for counsel to consider hazardous duty as a subset of important service, requiring more refined proof.

[14] The CAAF leaves unanswered the question of what to do with a soldier who is determined unfit for deployment and then deserts. Under the CAAF's objective analysis, this fact makes no difference on the issue of whether the service is important. The answer seems to lie in the subjective test of intent. This would ultimately be a question of fact for the court. Consider an accused declared unfit for deployment who deserts harboring the subjective fear that his unit will send him anyway. This is not an unreasonable reaction in certain perceived command climates. Though the mission and the particular accused's specialty may satisfy the important service prong, they do not determine the intent prong which must be examined from the accused's point of reference. This is particularly intriguing in the setting where the command would never have deployed the accused. The accused would truly be "hoist[ed] with his own pitar." William Shakespeare, *Hamlet*, act 3, sc 4.

[15] *Gonzalez*, 39 M.J. at 748.

The appellant's second and more significant argument was that because his unit did not deploy until after his return to military control in New York City, "he did not, in fact, avoid or shirk [important service] . . . as a consequence of his absence."[16] The accused based his argument on the CAAF's arguably supportive language in *United States v. Shull*[17] where the CAAF, when referring to Shull's multiple motives for leaving his unit said, "[I]t is enough, . . . that . . . a court-martial determine . . . that the duty was imminent, and that as a consequence of his . . . absence the accused in fact avoided it or had a reasonable cause to know that he would do so."[18] The CAAF rejected this argument by stating that whether the unit ever performs the hazardous duty or important service is irrelevant.[19] First, article 85(a)(2) prohibits AWOL with intent to avoid hazardous duty, important service or both. It *does not* require that the unit be *currently* engaged in hazardous duty or important service. The CAAF stated unequivocally that previous interpretations of article 85 did not require actual performance. Thus, the language "to be performed" requires only that the performance of the important service be in the future. "We see no actual performance requirement,"[20] only the requirement of a reasonable expectation by an accused that the service will be performed in the future.[21] The CAAF then dismissed the appellant's view of the *Shull* language with the admonishment that such language cannot be construed in "a vacuum oblivious to its context and experience."[22]

In affirming the lower court, a unanimous CAAF highlighted the black letter law aspects of article 85(a)(2), UCMJ. It is the objective character of the impending service and the subjective intent of the appellant at the time he quits his unit that are controlling. Further, and perhaps most important, whether the unit ever performs the service during the accused's absence or after his return to military control is irrelevant.

*Practice Pointers*

For the practitioner, *Gonzalez* does not represent momentous pronouncements on the law. It is, ultimately, a traditional application of the rules of "short" desertion[23] and important service. Nonetheless, it is an important case given the increasing frequency of United States armed forces' deployments and the increased reliance on the Reserve and National Guard where temptations to "return" to civilian life may be more prevalent.

Trial counsel also should note the importance of the objective test for hazardous duty or important service. Given the myriad force commitments around the world and their on-again, off-again character, counsel must be especially vigilant to the potential violation of this article. In these settings, units prepare for immediate deployments that are canceled midway or farther along in the planning process. If viewed only in terms of simple AWOL, counsel have failed themselves and deprived a commander of a powerful tool.

*Gonzalez* also demonstrates that aggressive counsel on both sides of the bar can explore the limits of "hazardous duty" or "important service." Neither the *Manual for Courts-Martial* (MCM) nor the courts provide criteria to measure or evaluate "service" in a particular case. The MCM lists only examples.[24] Although only discussed in the lower court opinion, the government's proof of imminent hazardous duty was insufficient and speculative.[25] The quality and quantity of evidence needed for important service also remains subject to question. Indeed, citing only the MCM examples, the lower court stated that the term "defies precise definition."[26] For trial counsel, this

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[16] *Gonzalez*, 42 M.J. at 473.

[17] 1 U.S.C.M.A. 177, 2 C.M.R. 83 (1952).

[18] *Gonzalez*, 42 M.J. at 474 n.6.

[19] The CAAF also notes that article 85, as a criminal statute, has a clearly defined and lengthy history. The CAAF cites in support Avins, *A History of Short Desertion*, 13 Mil. L. Rev. 143 (1961), and *Comment, A Further History of Short Desertion*, 17 Mil. L. Rev. 135 (1962). The NMCMR succinctly stated, "[I]t is clear that the unit did not embark for Saudi Arabia during the appellant's absence. Whether they ultimately did deploy is irrelevant." 39 M.J. at 745 n.2.

[20] *Gonzalez*, 42 M.J. at 474.

[21] The NMCMR added some flesh to this position. Desertion "is established the instant the accused quits his unit with the requisite intent and knowledge. The harm done by an accused through the commission of this particular form of desertion—abandoning his unit and his nation when they are most in need of his service—is accomplished at the time he quits the unit. If an intervening event, such as a medical disqualification, occurs to preclude the actual performance of the important service, that fortuitous event does not right the wrong that has been done." *Gonzalez*, 39 M.J. at 748.

[22] The CAAF also distinguished *Shull*, noting that the issue considered in *Shull* dealt with multiple motives for quitting his unit, not whether actual performance of a duty or service was required for conviction.

[23] "Short" desertion is the shorthand reference to desertion with intent to shirk important service and avoid hazardous duty. As its name implies and in contrast to "long desertion" under clause 1 of Art. 85, "short desertion" does not require proof of an intent to remain away permanently.

[24] *See* MANUAL FOR COURTS-MARTIAL, United States, ¶ 9(d)(2)(a) (1995 ed.).

[25] *Gonzalez*, 39 M.J. 747.

[26] *Id.* at 748.

element calls to mind the adage that you can never have enough evidence.[27]

Defense counsel should vigorously contest the government's characterization of hazard or importance. Such an approach may be particularly useful in United Nations peacekeeping operations or emergency domestic relief operations such as Hurricane Andrew Relief in Florida. Hazard and important service are questions of fact. Arguably, proof of increasingly routine and uneventful deployments in support of peacekeeping or humanitarian operations may counter the notion that such duty is important or hazardous.[28] Counsel also might argue that the accused's duties are so removed from or peripheral to the important service that, therefore, the service is not important. This may be particularly useful for soldiers performing support or other rear echelon duties.[29]

Finally, defense counsel, aware that the accused's intent is a subjective question of fact, can perhaps, assuming early access to the client, avoid a "round to the foot" by preventing missteps like a conscientious objector packet full of admissions.

*Gonzalez* is an important case not only because it "clarifies" the meaning of important service but because it comes at a time when deployments are a staple of the military diet. Aware of its holdings, practitioners can better serve their clients. Major Charles N. Pede.

## Legal Assistance Items

The following notes advise legal assistance attorneys of current developments in the law and in legal assistance program policies. You may adopt them for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*; send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

### Tax Notes

#### Update for 1996 Federal Income Tax Returns

Legal assistance attorneys around the world preparing for the 1996 federal income tax filing season may find this update useful in publicizing information of most concern to military taxpayers.[30]

#### Which Form Must Be Used?

The tax form that you should use depends on your filing status, income level, and the type of deductions and credits you claim. The Internal Revenue Service (IRS) has established the following guidelines for choosing tax forms:

*Use Form 1040EZ[31] if you meet the following conditions *during the tax year*: (1) you are single or married filing jointly, (2) you (and your spouse, if married) were under age sixty-five on 1 January 1997, (3) you (and your spouse, if married) were not blind at the end of 1996, (4) you do not claim any dependents, (5) your taxable income is less than $50,000, and (6) your taxable interest income was $400 or less. If you use this form, you may not itemize deductions, claim credits, or take adjustments.

[27] A series of witnesses including commanders and principal staff members are probably critical to the government's success. Additionally, various documents, such as operations orders and perhaps intelligence estimates, may be helpful. Counsel may also find such documents helpful in seeking judicial notice on cetain issues. Finally, counsel should not ignore policy or political announcements in speeches or press conferences that highlight the National Command Authority's perspective on a given operation.

[28] Admittedly, this argument may represent the outer limits of credibility on certain operations. To a unit and its personnel, any deployment for any mission is important. The issue, however, is whether *legally* "the 'something more' [that distinguishes important service from ordinary everyday service of the same kind] is present . . . ." United States v. Merrow, 34 C.M.R 45, 47 (1963) (peacetime antarctic resupply mission). This depends entirely on the circumstances of a particular case. *Id.* While the argument may have limited effect at trial, it may have a more sympathetic audience on appeal.

[29] For an excellent discussion of support personnel and whether their service is "important," *see Merrow*, 34 C.M.R. at 45. A cook on board the United States Coast Guard Cutter Eastwind jumped ship in New Zealand. The vessel was bound for the South Pole on Operation Deep Freeze 62, a resupply mission for the United States Antarctic Research Program. Affirming his conviction and sentence of eighteen months confinement and a bad-conduct discharge, the court said, "the surrounding circumstances differentiate a particular duty and endow it with that "critical quality" which justifies "its characterization as 'important.'" *Id.* at 47, *citing* United States v. Deller, 3 U.S.M.C.A. 409, 12 C.M.R. 165 (1953). Responding to the contention that the accused was merely a cook whose activities were ordinary, everyday service, the court stated, "[T]rue, the accused was a cook with the rank of Seaman Apprentice. Without attempting to ennoble or glamorize the culinary art unnecessarily, there is much in the aphorism, attributed to Napoleon Bonaparte, that 'an army marches on its stomach.' Although of lowly rank and modest responsibility, the accused's duty was closely connected to the general well-being of the officers and men. It is not unreasonable to conclude that such service in connection with Operation Deep Freeze was 'important service.'" *Id.* at 48-49. Depending on the soldier's specialty, and the absence of Napoleon's attention, there is clearly room for argument that certain service is not "important" in the sense contemplated by article 85, UCMJ.

[30] This update will be included in JA 269, *Tax Information Series*, a handbook of tax information flyers published annually in January by The Judge Advocate General's School. This publication contains a series of camera-ready tax information handouts that may be reproduced for local preventive law programs. This update is currently in MS Word and ASCII format on the Bulletin Board of the Legal Automation Army-Wide Systems as JA269.DOC (MS Word) and 269.ASC (ASCII). The 1996 edition of JA 269 will be uploaded before the end of January 1997.

[31] Internal Revenue Serv., Form 1040EZ, Income Tax Return for Single and Joint Filers With No Dependents (1996).

*Use Form 1040A[32] if your taxable income from wages, salaries, tips, interest, and dividends is less than $50,000. If you use this form, you may not itemize deductions. You can claim credits and take adjustments.

*If you intend to itemize deductions, have any capital gains, or have gross income over $50,000, you must use Form 1040.[33]

### *When to File?*

Tax returns must be postmarked by 15 April 1997.[34] If you are living outside the United States and Puerto Rico on 15 April 1997, you have until 16 June 1997 to file your return.[35] If you owe the IRS money, however, you will have to pay interest on the amount you owe from 15 April 1997 until the IRS receives your payment.[36] If you are living outside the United States and Puerto Rico and want to take advantage of this extension, you should indicate on your return or on an attached statement to your return that you were overseas on 15 April 1997.

If you served in a combat zone[37] or a qualified hazardous duty area,[38] you have at least 180 days from the time you left the combat zone to file your return.[39] You also are entitled to this extension if you were deployed outside the United States and away from your normal duty station in support of Operation Joint Endeavor, even if you did not serve in the qualified hazardous duty area. No interest or penalties for failure to file or failure to pay will be assessed during this extension.[40]

If you do not qualify for the overseas or combat zone extensions, you can still obtain extensions. First, you can receive an extension to 15 August 1997 by filing Form 4868 no later than 15 April 1997.[41] Although this gives you an automatic extension to 15 August 1997, you must still pay the amount of taxes due by 15 April 1997. If you do not pay all taxes due by 15 April, you will be subject to a failure to pay penalty and will be charged interest on any taxes not paid.

You also may receive an additional two-month extension to 15 October 1997 by filing Form 2688.[42] This request for an additional extension will be approved only if the taxpayer can show good cause. The taxpayer also will be subject to a failure to pay penalty and interest charges if the taxpayer does not pay his taxes in full by 15 April 1997.

### *What Are the 1996 Tax Rates?*

The tax rates for 1996 remain unchanged and are 15%, 28%, 31%, 36%, and 39.6%. The following tables[43] show the adjusted tax rates by filing status for 1996.

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[32] Internal Revenue Serv., Form 1040A, Income Tax Return for Single and Joint Filers (1996).

[33] Internal Revenue Serv., Form 1040, Income Tax Return for Single and Joint Filers (1996).

[34] I.R.C. §§ 6072, 7502 (RIA 1996).

[35] Treas. Reg. § 1.6081-5 (1990).

[36] I.R.C. § 6601 (RIA 1996).

[37] *Id.* § 112(c)(2) (RIA 1996). The only areas qualifying as combat zones as of 1 October 1996 were the Arabian Peninsula areas, which include the Persian Gulf, the Red Sea, the Gulf of Oman, that portion of the Arabian Sea that lies north of 10 degrees north latitude and west of 68 degrees east longitude, the Gulf of Aden, and the total land areas of Iraq, Kuwait, Saudi Arabia, Oman, Bahrain, Qatar, and the United Arab Emirates (*see* Exec. Order No. 12,744, 1991-1 C.B. 31 (1991)). As of 1 December 1996, the only other combat area during 1996 was Vietnam, which was a combat zone from 1 January 1996 to 30 June 1996 (*see* Exec. Order No. 11,216, 30 Fed. Reg. 5817 (1965) and Exec. Order No. 13,002, 61 Fed. Reg. 24,665 (1996)).

[38] Tax Benefits for Servicemen in Bosnia and Herzegovina, Pub. L. No. 104-117, § 1, 109 Stat. 827 (1996). A qualified hazardous duty area includes Bosnia, Herzegovina, Croatia, and Macedonia.

[39] I.R.C. § 7508 (RIA 1996).

[39] *Id.*

[41] Temp. Treas. Reg. § 6081-4T (1996).

[42] *Id.* § 6081-1 (1989).

[43] Rev. Proc. 95-53, 1995-2 C.B.

*Married Individuals Filing Joint Returns and Surviving Spouses*

| If Taxable Income Is: | The Tax Is: |
|---|---|
| Not Over $40,100 | 15% of the taxable income |
| Over $40,100 but not over $96,900 | $6015 plus 28% of the excess over $40,100 |
| Over $96,900 but not over $147,700 | $21,919 plus 31% of the excess over $96,900 |
| Over $147,700 but not over $263,750 | $37,667 plus 36% of the excess over $147,700 |
| Over $263,750 | $79,445 plus 39.6% of the excess over $263,750 |

*Heads of Household*

| If Taxable Income Is: | The Tax Is: |
|---|---|
| Not Over $32,150 | 15% of the taxable income |
| Over $32,150 but not over $83,050 | $4822.50 plus 28% of the excess over $32,150 |
| Over $83,050 but not over $134,500 | $19,074.50 plus 31% of the excess over $83,050 |
| Over $134,500 but not over $263,750 | $35,024 plus 36% of the excess over $134,500 |
| Over $263,750 | $81,554 plus 39.6% of the excess over $263,750 |

*Unmarried Individuals*
*(Other Than Surviving Spouses and Heads of Households)*

| If Taxable Income Is: | The Tax Is: |
|---|---|
| Not Over $24,000 | 15% of the taxable income |
| Over $24,000 but not over $58,150 | $3600 plus 28% of the excess over $24,000 |
| Over $58,150 but not over $121,300 | $13,162 plus 31% of the excess over $58,150 |
| Over $121,300 but not over $263,750 | $32,738.50 plus 36% of the excess over $121,300 |
| Over $263,750 | $84,020.50 plus 39.6% of the excess over $263,750 |

*Married Individuals Filing Separate Returns*

| If Taxable Income Is: | The Tax Is: |
|---|---|
| Not Over $20,050 | 15% of the taxable income |
| Over $20,050 but not over $48,450 | $3007.50 plus 28% of the excess over $20,050 |
| Over $48,450 but not over $73,850 | $10,959.50 plus 31% of the excess over $48,450 |
| Over $73,850 but not over $131,875 | $18,833.50 plus 36% of the excess over $73,850 |
| Over $131,875 | $39,722.50 plus 39.6% of the excess over $131,875 |

| If Taxable Income Is: | The Tax Is: |
|---|---|
| Not Over $1600 | 15% of the taxable income |
| Over $1600 but not over $3800 | $240 plus 28% of the excess over $1600 |
| Over $3800 but not over $5800 | $856 plus 31% of the the excess over $3800 |
| Over $5800 but not over $7900 | 1476 plus 36% of the excess over $5800 |
| Over $7900 | $2232 plus 39.6% of the excess over $7900 |

*What Are the 1996 Standard Deductions?*

The following table shows the standard deduction[44] amounts for 1996:

| Filing Status | Standard Deduction |
|---|---|
| Joint Returns and Surviving Spouses | $6700 |
| Head of Household | $5900 |
| Unmarried Individuals (other than surviving spouses and heads of household) | $4000 |
| Married Individuals Filing a Separate Return | $3350 |

The IRS allows the elderly and the blind to claim a higher standard deduction.[45] A minor child claimed as a dependent on another taxpayer's return is entitled to a standard deduction, which is limited to the greater of $650 or the child's earned income.[46] Thus, if a minor child did not work and had only investment income, the child would take a standard deduction of $650. On the other hand, if the child worked and had income of $2500, the child would take a standard deduction of $2500. The child's standard deduction would never exceed the standard deduction for a similar taxpayer. Thus, if the child were unmarried and earned $5000, the child would take a standard deduction of $4000 which is the standard deduction for an unmarried individual.

*What Is the 1996 Personal Exemption?*

The personal exemption amount has increased to $2550 for 1996.[47] Social Security numbers are required for dependents born prior to 1 December 1996.[48] The personal exemption begins to phase out at $176,950 for taxpayers filing a joint return, at $147,450 for heads of household, at $117,950 for unmarried taxpayers (other than surviving spouses or heads of household), and at $88,475 for taxpayers who are married and filing separately.[49]

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[44] *Id.*

[45] I.R.C. § 63(c)(3) (RIA 1996).

[46] *Id.* § 63(c)(5).

[47] Rev. Proc. 95-53, 1995-2 C.B.

[48] I.R.C. § 6109 (RIA 1996).

[49] Rev. Proc. 95-53, 1995-2 C.B.

### *Earned Income Credit*

The earned income credit will again be available. Taxpayers will be eligible if their adjusted gross income is less than $9500 and they have no children or $25,078 and they have one child or $28,495 and they have two or more children.[50]

### Selected New Developments

Several important and favorable tax changes have occurred in 1996 that directly benefit military taxpayers. Probably the most significant was the Tax Benefits for Servicemen in Bosnia and Herzegovina.[51] As the title of this bill implies, this legislation was designed to benefit service members serving in the former Yugoslav Republic. Fortunately for service members, the benefits of this bill will potentially affect future deployments. Previously, service members could not take advantage of several key Internal Revenue Code (I.R.C.) provisions, such as § 112 (exclusion of income) and § 7508 (extension of time to file and pay taxes), unless they were stationed in a combat zone. For the area to qualify as a combat zone, I.R.C. § 112 required the President of the United States to designate it a combat zone. Because many recent missions, like Somalia and Haiti, were considered either humanitarian or peace keeping operations, it was politically impossible for the President to declare the area a combat zone. In the future, service members will get the tax breaks previously reserved for combat zones when Congress designates the area a qualified hazardous duty area. Another benefit of this legislation is that officers serving in a combat zone or qualified hazardous duty area may now exclude from earned income up to a maximum of $4104.90 per month in 1996. Officers were previously limited to excluding only $500 when serving in a combat zone.

States can no longer tax "source" income.[52] Certain states were taxing service members' retired pay even though the service member did not live there after retirement. Because a service member was stationed in the state during his career, the state would base the tax on the theory that part of the retirement pay was earned in the state. For example, if a service member was stationed in California for five years during his twenty-year military career, California would seek to tax 25% (5/20) of the service member's retirement pay, regardless of the current geographical location of the service member. Not surprisingly, the state where the service member resides could also tax his retirement pay. Nonetheless, this situation has been resolved and only the state where the service member resides may now tax his retirement pay.

Taxpayers may now receive a credit for unreimbursed adoption expenses.[53] The amount of the credit shall not exceed $5000 ($6000 in the case of a child with special needs). The credit begins to be phased out when a taxpayer's income exceeds $75,000 and is completely phased out when a taxpayer's gross income exceeds $115,000. The credit is allowed in the year after the expense is incurred or in the year the adoption becomes final, whichever is earlier.

Phone numbers are required on information documents provided to taxpayers such as Form 1099s.[54] Unfortunately, the IRS has decided to waive penalties for failure to provide this information on the forms.[55] As a result, this requirement will not be fully enforced until 1997.

One unfavorable portion of the Small Business Job Protection Act of 1996 eliminated the $5000 exclusion of employee death benefits from earned income.[56] Since the United States pays a $6000 death gratuity on the death of a service member, this change directly impacts survivors of military personnel. Nonetheless, survivors of military personnel can still exclude $3000.[57] The elimination of the $5000 exclusion is effective 20 August 1996. Legal assistance attorneys must be careful to determine the date of death of the service member when assisting survivors. If the service member died on or before 20 August 1996, the recipient of the death gratuity can still exclude $5000. If the service member died after 20 August 1996, the recipient of the death gratuity can only exclude $3000.

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[50] *Id.*

[51] Pub. L. No. 104-117, 109 Stat 827 (1996).

[52] Act of Jan. 6, 1996, 4 U.S.C. § 114 (1996).

[53] Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1807, 110 Stat. 1755, 1898 (1996) (codified at I.R.C. § 23).

[54] Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 1201, 110 Stat. 1452, 1469 (1996) (codified as amended in scattered sections of I.R.C.).

[55] I.R.S. Ann. 96-88, 1996-38 I.R.B. (Aug. 27, 1996).

[56] Pub. L. No. 104-188, § 1402, 110 Stat. 1789 (1996) (codified at I.R.C. § 101).

[57] I.R.C. § 134 (RIA 1996); Rev. Rul. 55-506, 1955-2 C.B. 34.

## New Developments for 1997

Several changes passed into law this year do not take effect until 1997.

Beginning in 1997, homemakers will be able to take the full Individual Retirement Arrangement (IRA) deduction, which is $2000.[58] Thus, a married couple will be able to deduct up to $4000 of IRA contributions in 1997, even if only one spouse had income. The amount allowed to be deducted in 1996 and previous years was limited to $2250 when only one spouse had income. Unfortunately, this legislation did not address active duty service members' status as active participants in pension plans. As a result, service members and their spouses continue to be subject to the income limitations regarding the deductibility of IRA contributions. Single service members will begin to lose the ability to deduct their IRA contributions when their gross income exceeds $25,000. They will not be able to deduct any of their IRA contribution when their gross income exceeds $35,000. Married service members and their spouses will begin to lose the ability to deduct their IRA contributions when their gross income exceeds $40,000. They will not be able to deduct any of their IRA contributions when their gross income exceeds $50,000. Nonetheless, married service members with non-wage earning spouses will be able to contribute up to $4000 to IRAs beginning in 1997.

Beginning in 1997, taxpayers may withdraw money from IRAs without penalty when medical expenses exceed 7.5% of a taxpayer's adjusted gross income.[59] The taxpayer may withdraw money from IRAs without penalty if the withdrawal is for medical insurance and the individual receives unemployment compensation for at least twelve weeks. In either case, the taxpayer's withdrawal may still be subject to inclusion in gross income, but no penalty for early withdrawal will be assessed. Finally, beginning in 1997, a terminally ill individual who receives money under a life insurance contract will no longer be subject to taxes on the money received.[60]

[58] Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1427, 110 Stat. 1802 (1996) (codified as amended at I.R.C. § 219).

[59] Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, § 361, 110 Stat 1936, 2070 (1996) (codified as amended at I.R.C. § 72).

[60] *Id.* § 331 (codified as amended at I.R.C. § 101).

# Notes from the Field

## An Overview and Practitioners' Guide to Financial Disclosures

### Introduction

Every year, the federal government requires a large number of its employees to file financial disclosure reports with the goal of identifying potential conflicts of interests between official duties and private financial interests and affiliations.[1] The current financial disclosure requirements are a result of laws[2] "rooted in post-Watergate concepts of 'Government in the Sunshine,' which aims [sic] to promote public confidence in the integrity of Government officials."[3] Pursuant to these laws, the Office of Government Ethics (OGE) implemented a financial disclosure program for executive branch employees.[4]

The OGE regulations establish rules for both public and confidential (nonpublic) financial disclosure reports.[5] The OGE rules require that high level federal officials disclose their personal financial interests publicly, thereby demonstrating that they are able to carry out their duties without compromising the public trust.[6] The OGE rules also require confidential reporting for less senior executive branch personnel in certain designated positions to facilitate internal agency conflict-of-interest reviews.[7] The public disclosures are made on Standard Form 278 (SF 278), Executive Branch Personnel Public Financial Disclosure Report, while the confidential disclosures are made on Office of Government Ethics Form 450 (OGE Form 450), Executive Branch Confidential Financial Disclosure Report.[8]

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[1] *See* Public Financial Disclosure: A Reviewers's Reference, U.S. Office of Government Ethics, 1-1 (1994) [hereinafter Reviewer's Reference]; *see* SF 450 Review Guide, U.S. Office of Government Ethics, Forward (1993) [hereinafter Review Guide]. When passing the Ethics in Government Act (*see infra* note 2), a Senate Report specified five purposes for the public financial disclosure system: (1) to increase public confidence in the government, (2) to demonstrate the high level of integrity of the vast majority of government officials, (3) to deter conflicts of interest from arising, (4) to deter some persons who should not be entering public service from doing so, and (5) to better enable the public to judge the performance of public officials. *See* S. Rep. No. 170, 95th Cong., 2d Sess. 4 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4216, 4237 [hereinafter S. Rep. No. 170].

[2] *See* Reviewer's Reference, *supra* note 1, at 1-6. The two laws that create the statutory framework for financial disclosures are the Ethics in Government Act of 1978, 5 U.S.C. app. § 101 (1996) and the Ethics Reform Act of 1989, Pub. L. No. 101-194, *as amended by* Pub. L. No. 101-280. Prior to the Ethics in Government Act, the three branches of government (executive, legislative, judicial) struggled independently to develop standards of conduct and rules for financial disclosure. In 1965, President Lyndon Johnson issued Executive Order No. 11,222, 5 C.F.R. 735 (1995), *Prescribing Standards of Ethical Conduct for Government Officers and Employees*, that established rules for confidential financial disclosure by officers and designated employees of the executive branch. In 1967, Congress created the House Committee on Standards of Official Conduct, and both Houses of Congress adopted rules requiring disclosure of certain financial information by members and officers of Congress, senatorial candidates, and certain legislative branch employees (*see* Senate Rule XLII, Public Financial Disclosure, *as amended by* S. Res. 110, and House Rule XLIV, Financial Disclosure, *as amended by* H. R. Res. 287. In 1972, Chief Justice Warren Burger stated that the *American Bar Association (ABA) Code of Judicial Conduct*, which required the disclosure of certain financial information, would apply to all federal judges. *See* S. Rep. No. 170, *supra* note 1, at 4239-41. In 1976, the Senate unsuccessfully proposed the Watergate Reorganization and Reform Act of 1976 to establish uniform financial disclosure guidance for all three branches of federal government. *Id.* at 4240. However, Congress resolutely pursued uniform guidance; their efforts resulted in the passage of the Ethics in Government Act. The legislative history to this act found existing financial disclosure requirements inadequate because: (1) they were inconsistent throughout the various branches of government; (2) they exempted some of the highest government officials—for example, the President, the Vice President, and the Justices of the Supreme Court; (3) executive branch disclosures were made to the Chairman of the Civil Service Commission or agency heads, and, therefore, were not public statements; and (4) disclosure requirements for federal judges were limited and unenforceable. *Id.* at 4243-44.

[3] *See* Reviewer's Reference, *supra* note 1, at 1-7.

[4] *See generally* S. Rep. No. 170, *supra* note 1, at 4260. The Ethics in Government Act transferred responsibility for implementation and oversight of financial disclosures from the Civil Service Commission (that formerly had this responsibility pursuant to Executive Order 11,222) to the Office of Government Ethics (OGE). *See also* Reviewer's Reference, *supra* note 1, at 1-6; Review Guide, *supra* note 1, at Forward. The OGE published initial guidance in 1980 at 5 C.F.R. part 734. In 1989, the OGE redesignated these regulations as 5 C.F.R. part 2634. *See* Reviewer's Reference, *supra*.

[5] *See* 5 C.F.R. § 2634.102(b) (1995).

[6] *Id.* § 2634.104(a).

[7] *Id.*

[8] *See* 5 C.F.R. § 2634.601(a) (1995) (requiring the OGE to provide, through the Federal Supply Service of the General Services Administration, the two standard forms). *See also* Review Guide, *supra* note 1 (a detailed guide for reviewers of SF 450). Both forms are also available through the Internet at OGE (visited April, 1996) <http:\\web1.whs.osd.mil\diorhome.htm>.

This article discusses the role of agency officials reviewing these reports and surveys the rules for each report, focusing on the Department of the Army rules.

## The Public Financial Disclosure Report (SF 278)

### *Who Must File*

Only certain federal agency employees need to file a financial disclosure report. Within the Army, *public filers*[9] of SF 278s generally include civilian employees above the grade of GS-15 and soldiers in the pay grade of O-7 (general officer) or higher.[10] Employees in senior positions under a pay system other than the General Schedule, such as the Senior Executive Service or an agency pay schedule, must file when their position's rate of basic pay (not including locality pay) is equivalent to or greater than 120% of the minimum rate of pay for GS-15. Though active duty officers O-7 or above must file, Reserve Component general officers are not required to file an annual SF 278 unless they served 61 days of active duty during the calendar year under orders pursuant to Title 10.[11] Each agency normally maintains a master list of those positions for which reports are required.[12]

### *Time Deadlines for Filing*

Time deadlines differ based on the type of SF 278 report the public filer chooses to submit. Before discussing different types of reports and their timelines, it is important to note that those who fail to file their reports on time face a $200 late filing fee[13] and, possibly, agency disciplinary action.[14] Furthermore, if the failure to file is knowing and willful, the United States Attorney General may bring a civil or criminal action against the employee or soldier.[15]

### *New Entrant Reports*

Usually, an employee must file a new entrant report within thirty days of assuming a position covered by the SF 278 reporting requirement.[16] Two exceptions exist. First, an employee expected to work sixty days or less in any calendar year generally need not file.[17] Second, an official who transfers from one covered position to another covered position need not file unless more than thirty days pass before assumption of the later position.[18] In such cases, the new agency should request a copy of the last SF 278 report filed by the individual to determine any conflicts of interest involving the employee's new duties.[19]

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[9] *See* 5 C.F.R. § 2634.202 (1995) (Section providing a definition of public filer, including other types of persons required to file; *e.g.*, Presidential appointees).

[10] *Id.* § 2634.202(c). Another category of persons who have to file includes the DOD Component Designated Agency Ethics Officials (DAEO). Within the Army, the DAEO is the Army General Counsel. Deputy DAEOs include the The Judge Advocate General (TJAG) and the Chief, Army Standards of Conduct Office, who also is the designated agency official for filing of financial disclosure reports.

[11] *See* Information Paper, Preparation of Public Financial Disclosure Reports (SF 278), Standards of Conduct Office, Office of The Judge Advocate General, Army, DAJA-SC (26 July 1994) (this information paper is intended for newly promoted general officers and appointed members to the Senior Executive Service (SES)) [hereinafter Financial Disclosure Reports].

[12] DEP'T OF DEFENSE, JOINT ETHICS REG. DOD 5500.7R, para. 7-201 (Aug. 1993) [hereinafter JER] (The directors of DOD Component personnel offices are responsible for maintaining these lists and providing copies to the DAEO or DAEO designee by 10 January of each year).

A reporting individual who has more than one immediate supervisor shall submit the SF 278 through both supervisors. The reporting individual may submit a copy of the SF 278 to one supervisor and the original to the other to expedite processing. *See* JER, *supra*, para. 7-205c. Note, some persons have two or more covered positions and may have to file an original SF 278 for each position; especially when there is a different supervisor for each position who, possibly, also may be located in different geographic areas.

[13] *Id.*, para. 7-204g. Within the DOD, a fee is normally not assessed unless the report is filed more than thirty days after the filing date.

[14] *Id.* para. 7-209.

[15] *Id.* The civil penalty shall not exceed $10,000 (*see* 5 U.S.C. app. § 104(a) (1996)) and the criminal penalty may include a fine of up to $250,000 and imprisonment for up to five years (18 U.S.C. §§ 1001, 3571 (1996)). These penalties also apply to knowing and willful falsifications of information required on the SF 278. *Id.*

[16] *Id.* para. 7-203b.

[17] *Id.* All newly appointed United States Army Reserve (USAR) and Army National (ARNG) general officers must file new entrant reports within thirty days of promotion, regardless of whether they are expected to perform more than sixty days of active duty that year. *Id.* This requirement is triggered by the actual promotion date. Frocking does not trigger the requirement. *See* Information Paper, Preparation of Public Financial Disclosures (SF 278), Standards of Conduct Office, Office of The Judge Advocate General, Army, DAJA-SC (6 Dec. 1994) [hereinafter Preparation of Financial Disclosures].

[18] *See* REVIEWER'S REFERENCE, *supra* note 1, at 2-10.

[19] *Id.*

*Incumbent or Annual Reports*

By law, personnel serving in covered positions must file an annual SF 278 covering the previous calendar year anytime after 1 January but not later than 15 May of each year.[20] Within the Army, the deadline for filers is earlier. Army guidelines recommend that filers submit annual reports to their ethics counselors by 15 April of each year to ensure timely review and filing with the Army SOCO.[21] However, the same sixty-day exception discussed for new entrant reports applies to annual reports.[22]

*Termination Reports*

Any person who serves in a covered position must file a termination financial disclosure report within thirty days of leaving the position.[23] The filer must sign and date the report no earlier than fifteen days before the last day of service in the position.[24] The thirty-day period begins on the actual retirement or resignation date, not the date that terminal leave starts.[25] A termination report is not required of a Reserve military officer in the grade of 0-7 or above who did not serve more than sixty days on active duty during the calendar year in which the officer is transferred to the Retired Reserve.[26]

*Nomination Reports*

Any time after public announcement, but within five days after transmittal by the President to the Senate of the nomination of an individual to a civilian Department of Defense (DOD) position that requires the advice and consent of the Senate, the DOD Component Designated Agency Ethics Official (DAEO) shall ensure that the nominee's SF 278 is filed with appropriate authorities.[27] Unless required by the Senate, individuals nominated to positions as military officers do not need to file nomination reports.[28] However, such individuals must file new entrant reports if required.[29]

*Extensions of Time to File*

The DA Standards of Conduct Office may grant an extension not to exceed 45 days[30] of the SF 278 filing deadline for "good cause shown."[31] Both the request and the document granting the extension should be in writing[32] and the request must be

[20] *See* JER, *supra* note 12, para. 7-203c. Reserve Component general officers do not have to file an annual SF 278 unless they have served sixty-one days of active duty during the calendar year under orders issued pursuant to Title 10. This includes Active Duty for Training (ADT), Annual Training (AT), Active Duty for Special Work (ADSW), and mobilizations such as Desert Shield and Desert Storm. It does not include drill weekends, administrative nights, other inactive duty, or active duty pursuant to Title 32. *Id.*; *see also* Preparation of Financial Disclosures, *supra* note 17.

[21] *See* Financial Disclosure Reports, *supra* note 11.

[22] *See* JER, *supra* note 12, para. 7-203c. Thus, an employee who enters a position after 1 November files a new entrant report, but not an annual report the following May.

[23] *Id.* para. 7-203d. Reserve Component general officers are not required to file a termination report upon transferring to the Retired Reserve or otherwise leaving active status, unless they served sixty-one days on active duty during the calendar year in which retirement occurs. *See* Preparation of Financial Disclosures, *supra* note 17.

[24] *See* JER, *supra* note 12, para. 7-203d.

[25] *See* Financial Disclosure Reports, *supra* note 11.

[26] *See* JER, *supra* note 12, para. 7-203d.

[27] *Id.* para. 7-203a(1).

[28] *Id.* para. 7-203a(3).

[29] *Id.*

[30] 5 C.F.R. § 2634.201(f) (1995); JER, *supra* note 12, para. 7-203g. Within the Army, extensions must be requested in advance and in writing to the Office of The Judge Advocate General, Standards of Conduct Office, ATTN: Chief, Standards of Conduct Branch, 2200 Army Pentagon, Washington, D.C. 20310-2200. Such requests may be faxed to DSN 224-5795 with original to follow.

[31] *See* JER, *supra* note 12, para. 7-203g.

[32] *Id.*

made prior to the filing due date.[33] Good cause may include long periods of official travel prior to the due date, significant illness just prior to the due date, or extremely pressing duty assignments.[34]

Extensions also are authorized for persons serving in a combat zone.[35] An individual serving with or in support of the United States armed forces automatically qualifies for a 180-day extension if serving in a combat zone on the applicable due date.[36] This extension supersedes all other extensions.[37] The extension runs from either the last day of the individual's service in the combat zone or the last day of the individual's hospitalization resulting from that service.[38] Filers taking advantage of this extension should prominently mark their SF 278 specifying either their date of departure from the combat zone, the date the combat zone designation expired, or the dates of hospitalization related to service in the zone.[39]

### *Filing Procedures*

The Army Standards of Conduct Office will notify Staff Judge Advocates and other Ethics Counselors of the requirements for filing the SF 278. It is the individual's and the Ethics Counselor's responsibility to insure that all reports are filed on time.[40] Within the Army, the SF 278 is filed in the Army Standards of Conduct Office.[41] Agencies are required, with limited exception, to make the SF 278 reports available to the public.[42]

The DAEO also serves as the reviewing official for SF 278 reports but has authority to delegate that responsibility[43] and to request intermediate reviews.[44] Pursuant to this authority, the Army requires three levels of review: (1) Review by the reporting individual's EC, (2) review by the reporting individual's supervisor, and (3) review by the supervisor's EC. These reviews are accomplished on Department of Army Form (DA Form) 4971-R, Certificate of Preliminary Review of Standard Form 278."[45] This form accompanies the original SF 278.

### *Duties of Supervisor's EC*

The EC must take charge and ensure that persons required to submit reports are given ample time and assistance necessary to complete the SF 278 report. Successful programs require proactive support to filers, the establishment of reporting and review milestones,[46] and aggressive follow-up to ensure that milestones are achieved.

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[33] *Id.*

[34] *See* REVIEWER'S REFERENCE, *supra* note 1, at 2-12.

[35] 5 U.S.C. app. § 101(g)(2)(a) (1996).

[36] *See* REVIEWER'S REFERENCE, *supra* note 1, at 2-13.

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *See* JER, *supra* note 12, para. 7-202. In the Army, higher headquarters is the Standards of Conduct Office. As a practical matter, SJAs and ECs should not wait for this notice before starting their annual ethics chase.

[41] *See* Financial Disclosure Reports, *supra* note 11.

[42] 5 C.F.R. § 2634.603 (1995).

[43] *Id.* § 2634.605(a).

[44] *Id.* § 2634.605(b).

[45] The current version of DA Form 4971-R is dated "NOV 94."

[46] *See* Appendix 1 for a suggested list of installation milestones for filing of the SF 278.

### *Procedural Issues*

The EC must have the essential *tools of review* that enable meaningful scrutiny of financial disclosure reports.[47] These tools include the filer's previous report, if any, so that information may be compared and reconciled;[48] the instructions accompanying the form; a copy of the filer's position description/knowledge of the filer's duties;[49] the federal ethics laws and regulations; financial reference materials concerning financial institutions, corporate affiliations, and mutual funds;[50] the OGE reviewers' reference for the SF 278;[51] and any agency list of contractors, grantees, regulatees, and prohibited companies.[52]

Reviewers must accept SF 278 reports at face value, unless there is an obvious omission or ambiguity, or the EC has independent knowledge of matters outside the report.[53] During review of the report, the EC must ensure that the SF 278 is complete.[54] Ethics Counselors should compare previous reports with current reports.[55] If the report is not complete, the EC may require the reporting individual to submit additional information by a certain date.[56] Upon receipt of the additional information, the EC may amend or revise the report, making appropriate annotations.[57] However, rather than the EC amending or revising the report, the better practice, when feasible, is to have the reporting individual amend the form because he or she is the one signing it. The Ethics Counselor should retain a copy of the SF 278.

### *Substantive Issues*

The EC ensures procedural compliance and reviews the report to identify actual or potential conflicts of interest. Areas of concern include bribery and gratuities,[58] post-employment activities,[59] and official acts affecting financial interests.[60] Conflicts of interest also may arise under employee rules prescribing standards of ethical conduct.[61] The EC should use the following standard when determining whether there are disqualifying financial interests:

> *(1) An employee has a disqualifying financial interest in a particular matter only if there is a close causal link between a particular Government matter in which the employee participates and any effect on the asset or other interest (direct effect) and if there is a real possibility of gain or loss as a result of development in or resolution of that matter (predictable effect). Gain or loss need not be*

[47] *See* Reviewer's Reference, *supra* note 1, at 4-2, 4-4.

[48] The EC and the SJA office, or both, must maintain a copy of previous reports submitted by the filer because filers often fail to keep a copy for themselves. Not only will the previous report be helpful during the current review, providing a copy to the filer in advance may assist the filer with preparation of the report.

[49] For civilians, a description of duties may be obtained from the individual (*e.g.*, their performance evaluation contains a description of duties), their supervisor, or the civilian personnel office. For military officers, a description may be obtained from the officer based on the description contained in their officer evaluation report or officer evaluation support form.

[50] *See* Reviewer's Reference, *supra* note 1, at 4-4.

[51] *Id.*

[52] *Compare generally* Review Guide and Reviewer's Reference, *supra* note 1.

[53] *See* JER, *supra* note 12, para. 7-206b(2).

[54] *Id.* para. 7-206b(1)(a).

[55] *See* Reviewer's Reference, *supra* note 1, at 4-2. All entries from the last report should be carried over or accounted for on the current report.

[56] *See* JER, *supra* note 12, para. 7-206b(3).

[57] *Id.* para. 7-206b(3)(a).

[58] *See* 18 U.S.C. § 201 (1996).

[59] *Id.* § 207.

[60] *Id.* § 208.

[61] *See* Reviewer's Reference, *supra* note 1, at 5-1; 5 C.F.R. § 2635.502 (1995).

*probable. There must be a real, as opposed to a speculative, possibility of a benefit or detriment.*[62]

*(2) One common point of confusion is distinguishing between an asset or other interest and a financial interest in a particular matter under 18 U.S.C. § 208. The financial interest is the possibility of gain or loss (of the value of an asset or other interest) resulting from a particular matter, not the asset or interest itself. Thus, a person could have a large holding but only a relatively small financial interest in the particular matter, because the potential for gain or loss is small.*[63]

Following these guidelines, the EC may take one of three courses of action. First, if the EC agrees with the supervisor that no reported conflict of interest item violates or appears to violate applicable laws and regulations, then the EC completes and signs the applicable section of DA Form 4971, Certificate of Preliminary Review of Standard Form (SF) 278.[64] This form accompanies the SF 278 during the review process.

Second, if the EC agrees with the supervisor as noted above, but finds that there are financial interests in non-federal entities doing or seeking business with the DOD, then the EC may issue a memorandum of caution to the reporting individual.[65] The EC will then forward to the next reviewer a copy of the memorandum, the DA Form 4971, and the SF 278.[66]

Third, if the EC disagrees with the supervisor and finds a violation, or apparent violation, of applicable laws or regulations, then the EC notifies the reporting individual in writing of this preliminary determination and provides the individual an opportunity to respond.[67] If the individual's response results in compliance, then the EC completes the DA Form 4971 and forwards it with the SF 278 to the next reviewer.[68]

However, on the other hand, if the reporting individual fails to comply, then the EC determines what remedial action should be taken to bring the reporting individual into compliance.[69] The EC shall notify the reporting individual in writing that the previous response did not result in compliance, that the individual may seek personal consultation (if practicable), and that further remedial action is required.[70] The notification shall include a date for completion of the action,[71] normally not to exceed three months.[72] The EC also must notify the supervisor of the required remedial action and the date for completion.[73] Appropriate remedial action may include disqualification, divestiture, limitation of duties, transfer or reassignment, resignation, exemption, or the establishment of a qualified blind trust.[74]

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[62] *See* REVIEWER'S REFERENCE, *supra* note 1, at 5-1; *see also* 5 C.F.R. § 2635.402 (1995). Language embodying the *real possibility test* put forth in *United States v. Gorman*, 807 F.2d 1299, 1303 (6th Cir. 1986).

[63] *See* REVIEWER'S REFERENCE, *supra* note 1, at 5-1.

[64] *See generally* JER, *supra* note 12, para. 7-206b(4)(a) (providing authority for ECs to sign an endorsement-type document memorializing their review).

[65] *Id.* para. 7-206b(4)(b).

[66] *Id.*

[67] *Id.* para. 7-206b(5)(a)-(b).

[68] *Id.* para. 7-206b(5)(c).

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.* para. 7-206(7)(a)-(g).

If, after this second notification of non-compliance, the reporting individual performs the remedial action and achieves compliance, the EC appropriately annotates the SF 278 and forwards it with the DA Form 4971 for further review.[75] If steps are not taken to achieve compliance by the date established, the EC shall report the matter through channels to the Army Standards of Conduct Office.[76]

Finally, should an EC suspect a possible criminal violation, the suspected violation must be referred to appropriate investigative units.[77] Further, the matter must be sent to the Department of Justice (DOJ) for a decision on whether to pursue the matter with criminal charges.[78]

*Duties of Reporting Individual's Supervisor*

The reporting individual's supervisor has the same review responsibilities as the reporting individual's EC.[79] As a practical matter, the supervisor usually will not be concerned with technical or procedural errors on the SF 278; rather, the supervisor will focus on potential conflicts of interest, relying on the lawyers (who are usually ECs) to catch those mistakes. The supervisor is normally in the best position to determine potential conflicts of interest because of greater familiarity with the actual job duties performed by the reporting individual.

*Duties of the Supervisor's EC*

The supervisor's EC also has the same review responsibilities as the reporting individual's EC. Although the supervisor's EC is supposed to sign after the supervisor, the supervisor's EC will usually review the SF 278 before the supervisor takes action, thereby helping to ensure that the form has been completed properly and that it contains all required information. After all signatures have been obtained on DA Form 4971 and the SF 278 is complete and ready for filing, the supervisor's EC should provide a copy of both forms to the reporting individual and that individual's EC for their personal files.

*DAEO Review*

The DAEO has sixty days to review the filed reports[80] and the scope of his review is similar to the reviews performed by the ECs.[81] When SF 278s are complete and comply with legal and regulatory requirements, the DAEO signs and dates the reports.[82] When reports are not in compliance, the DAEO seeks additional information and requires remedial action.[83] The SF 278 normally becomes available for public inspection thirty days after the reports are filed.[84]

*Common Errors*

A brief discussion identifying common filing and completion errors will help orient new ECs to the type of attention to detail required by their duties.

1. *Substantive Errors*—The most common substantive errors include:

a. failure to list the underlying assets of an investment or brokerage account that do not meet the 5 C.F.R. part 2634 criteria for an Excepted Investment Fund (EIF);

b. failure to list the specific name of each mutual fund and money market fund, as opposed to just listing the name of the fund family;

[75] *Id.* para. 7-206b(8).

[76] *Id.* para. 7-206b(9).

[77] *See* REVIEWER'S REFERENCE, *supra* note 1, at 5-19.

[78] *Id.* Agencies also must report such referrals to the OGE and may use OGE Form 202, Notice of Conflict of Interest Referral Form.

[79] *See generally* DEP'T OF THE ARMY, DA FORM 4971, CERTIFICATE OF PRELIMINARY REVIEW OF STANDARD FORM 278 (Nov. 1994).

[80] *See* JER, *supra* note 12, para. 7-206c(7).

[81] *Id.* para. 7-206c(1).

[82] *Id.* para. 7-206c(4). Only the head of the DOD Component or the DOD DAEO may certify a nomination report. *See id.* para. 7-207a.

[83] *Id.* para. 7-206c.

[84] *Id.* para. 7-208.

c. failure to identify the name, location, and nature of business of all partnerships, closely held corporations, and similar business ventures;

d. failure to identify type of income from a limited partnership EIF;

e. failure to list non-EIF limited partnership interest investments and transactions on Schedules A and B of the SF 278;

f. failure to state the nature of the partnership's business if not clear from the name of the partnership; and

g. failure to report Schedule B assets producing more than $200 income or capital gains per year on Schedule A.[85]

2. *Administrative Errors*—The most common administrative errors include:

a. using abbreviations and acronyms that do not fully identify the financial interest (this could also result in a substantive conflict by causing a potential conflict to escape ethics counselor and supervisory review);

b. failing to compare the current filing with last year's filing (For example, if an asset has disappeared during the course of the year, it should be listed as a sales transaction on Schedule B. If the asset is not listed, its absence should be explained);

c. omitting the interest rate or term on loans;

d. failing to check the *None* or *Not Applicable* blocks;

e. failing to report the actual dollar amount of the income whenever the *Other* column on Schedule A is used to describe an asset (limited partnership distributions are *other* and, as such, the exact dollar amount of the income must be reported);

f. entering anything other than EIF for mutual funds and failing to check the appropriate block;

g. reporting items that are not required (for example, assets and income from a federal thrift savings plan, income from federal employment, and mortgage liability on a personal non-income producing residence);

h. not signing the original in ink (filer should consider using blue ink to avoid uncertainty about whether the signature is an original or copy); and

i. disclosing mutual fund, bank account, and social security numbers (ECs should remind filers to disclose only required information because the SF 278 is available for public inspection).[86]

**Confidential Financial Disclosure Reports**

The primary difference between the SF 278 report and the OGE Form 450, Executive Branch Confidential Financial Disclosure Report, is that the SF 278 is open for public inspection while the OGE Form 450 is not. Generally, the public is less interested in persons who have to file the OGE Form 450 because they are middle-grade employees whose duties are less likely to affect non-government entities.[87] Also, such employees typically have less extensive holdings than SF 278 filers, who are commonly known as public filers, and, therefore, their required disclosures are not nearly as detailed as those required of SF 278 filers.[88] However, because the duties of middle-grade employees often involve significant discretion in certain sensitive areas, these employees must report their financial interests and outside business activities to their employing agencies to facilitate the review of possible conflicts of interest.[89]

*Who Must File*

No grade limit applies to who must file an OGE Form 450.[90] A confidential report must be filed by special government employees (with exceptions) and when a federal employee in the grade of GS 15 or below, or the rank of 0-6 and below, has the following significant duties (or is detailed to a position with duties involving):

1. Contract administration or procurement.

[85] *See* Preparation of Financial Disclosures, *supra* note 17.

[86] *Id.*

[87] *See* Review Guide, *supra* note 1.

[88] *Id.*

[89] 5 C.F.R. § 2634.901(a) (1995).

[90] *See* Information Paper, Preparation of Confidential Financial Disclosure Reports (SF 450), Standards of Conduct Office, Office of The Judge Advocate General, Army, DAJA-SC (24 Feb. 1995) [hereinafter Confidential Financial Disclosure Report].

2. Administration or monitoring of grants, subsidies, or licenses.

3. Regulation or audit of any non-federal entity.

4. Any activities which will have a direct and substantial economic impact on a non-federal entity. For example, an environmental engineer who monitors permit compliance of on-post contractors.[91] Effective 25 March 1996, DOD employees and uniformed members who have decision-making responsibilities regarding expenditures of less than $2500 per purchase and less than $20,000 cumulatively per year are generally excluded from the requirement to file the OGE Form 450.[92]

5. Confidential or sensitive duties such as those held by employees which, in the judgment of the commander or agency, require the filing of a confidential report to avoid an actual or apparent conflict of interest.

6. Command of an Army installation, base, air station or other similar activity.[93]

The immediate supervisor of the employee or soldier has primary responsibility for determining whether the duties of the position require filing a report.[94] Once it has been determined that a civilian position requires a confidential report, that determination shall be reflected on all job descriptions, job announcements, and job postings.[95] Soldiers required to file confidential reports must indicate this as a performance objective on their evaluation support forms.

*Time Deadlines for Filing*

The Army requires new entrant and annual confidential financial disclosure reports[96] but, unlike the public financial disclosure report system, no termination or nomination reports.

An OGE Form 450 new entrant report is due to the new entrant's supervisor within thirty days of assuming duties in a covered position.[97] Annual reports with information current as of 30 September for that year are due to an EC by 30 November of each year for the preceding twelve months.[98]

When required by duty assignment, by infirmity, or by other good cause affecting the reporting individual, the DOD Component DAEO or designee may grant an extension of the filing deadline not to exceed sixty days for annual reports or ninety days for new entrant reports.[99]

*Filing Procedures*

A reporting individual shall submit the OGE Form 450 through his or her supervisor to the EC.[100] The filer is responsible for marshaling the form through the supervisor and EC to ensure that it is filed by 30 November.[101] Although the regulation places primary responsibility on the filer, ECs also should treat this as a priority.

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[91] *See* JER, *supra* note 12, para 7-300.

[92] *Id.* para. 7-300b(2) (noting that on a case-by-case basis an agency designee may require such an individual to file an OGE Form 450).

[93] *Id.*

[94] *See* Confidential Financial Disclosure Report, *supra* note 91.

[95] *See* JER, *supra* note 12, para. 7-301b(2) (requiring that the directors of personnel offices coordinate with ECs and supervisors to ensure that position or billet descriptions contain a statement that an OGE Form 450 must be filed).

[96] *See* Review Guide, *supra* note 1, at 4.

[97] *See supra* notes 16-19 and accompanying test. *See also supra* Appendix 2 for a list of suggested installation milestones for the filing of the OGE Form 450.

[98] *See* JER, *supra* note 12, para. 7-303b. Note, 5 C.F.R. § 2634.903 (1995) requires reporting individuals to file by October 31; however, the JER grants an automatic thirty day filing extension for all reporting individuals, thereby making the due date 30 November.

[99] *Id.* para. 7-303c.

[100] *Id.* para. 7-305. Unlike the SF 278, only one EC is normally involved in the OGE Form 450 review process—the SF 278 may involve more than one EC because the reporting individual's EC may not be the same as the supervisor's EC (for example, the supervisor of the Commander-in-Chief (CINC), Pacific Forces Command, is not co-located in Hawaii with the CINC, but rather at the Pentagon, thereby necessitating review by two ECs using separate DA Form 4971).

[101] *Id.*

*Duties of the Supervisor*

The supervisor reviews the OGE Form 450 report to ensure that each item is completed and free of actual or apparent conflicts of interest with applicable laws or regulations.[102] Upon completion of the review, the supervisor forwards the report, along with any comments to the local EC, for further review.

*Duties of the EC*

The EC conducts the same review required of the supervisor.[103] The EC should have the following tools available during the review process: the filer's prior year's report; any agency list of contractors, grantees, regulatees, and prohibited companies; the filer's position description; stock guides (for example, Standards & Poor's, Moody's, Dun & Bradstreet); a current list of mutual funds (typically found in the business page of any major newspaper); Title I of the Ethics in Government Act of 1978, as amended; 5 C.F.R. part 2634; the instructions for filing the OGE Form 450; internally produced agency procedures and guidelines; the *Joint Ethics Regulation*, Chapter 7; OGE Form 450; and the *OGE Form 450 Review Guide* produced by the OGE.[104]

Unless the EC has independent knowledge of matters outside the report, the EC must take the information provided on the OGE Form 450 at face value unless there is a patent omission or ambiguity.[105] The EC may require additional information; if so, then the EC must notify the reporting individual and set a date for submission of the required information.[106] Upon receipt of the additional information, the EC may amend or revise the report, making appropriate annotations.[107]

If the EC agrees with the supervisor that no interest violates or appears to violate applicable laws and regulations, then the EC shall sign and date the report.[108] Thereafter, the report will be filed in a central location within the agency, the command, or the activity to which the individual was assigned at the time of filing. Additionally, the report will be safeguarded as required by the provisions of the Privacy Act and exemptions afforded by the Freedom of Information Act.[109]

If the EC agrees with the supervisor but finds that there are financial interests in non-federal entities doing or seeking business with the DOD, then the EC may issue a memorandum of caution to the reporting individual.[110] Under such circumstances, the EC will still sign and date the report.[111]

If, however, the EC disagrees with the supervisor and finds a violation, or apparent violation of applicable laws or regulations, then the EC shall notify the reporting individual in writing of this preliminary determination[112] and provide the individual an opportunity to respond.[113] If the individual's response results in compliance, then the EC shall sign and date the report. If the response fails to establish compliance, then the EC shall determine remedial action[114] to bring the reporting individual into

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[102] *Id.* paras. 7-306a, 7-306b (Such laws and regulations include 18 U.S.C. §§ 208, 1001; the Ethics in Government Act of 1979, 5 U.S.C. app. § 101 (1996); Executive Order No. 12,674 54 Fed. Reg. 15159 (Apr. 12, 1989), *Principles of Ethical Conduct for Government Officers and Employees*; or any other related laws applicable to DOD employees).

[103] *See* JER, *supra*, note 12, para. 7-306c.

[104] *See also* REVIEW GUIDE, *supra* note 1.

[105] See JER, *supra* note 12, para. 7-306c.

[106] *Id.* para. 7-306d.

[107] *Id.* para. 7-306d(1).

[108] *Id.* para. 7-307.

[109] *Id.* para. 7-308 (citing the Privacy Act, 5 U.S.C. § 552a (1996); and the Freedom of Information Act, 5 U.S.C. §§ 552(b)(3)(A)-(B), 552(b)(4), 552(b)(6) (1996)).

[110] *Id.* para. 7-306f.

[111] *Id.*

[112] *Id.* para. 7-306g(1).

[113] *Id.* para. 7-306g(2).

[114] *Id.* para. 7-306I. Remedial action may include divestiture, disqualification, limitation of duties, transfer or reassignment, resignation, exemption, or the establishment of a qualified blind trust.

compliance.[115] The EC must notify the individual in writing that the previous response did not result in compliance, that the individual may seek personal consultation (if practicable), and that he must take certain remedial action.[116] The notification shall include a set date for completion of the action,[117] normally not to exceed ninety days,[118] of which the supervisor must be notified by the EC.[119]

If the reporting individual performs the remedial action and achieves compliance, the EC shall sign and date the OGE Form 450.[120] If steps are not taken to achieve compliance by the date established, the EC shall report the matter to the Army Standards of Conduct Office for appropriate action.[121] Also, knowing and willful failures to file or report required information may result in civil and criminal penalties pursuant to actions brought against the reporting individual by the United States Attorney General.[122]

Not later than 15 December of each year, ECs shall prepare an annual OGE Form 450 filing status report.[123] The report contains the number of individuals required to file and the number of those individuals who have not filed as of 30 November.[124] The report is sent through higher headquarters to the Army Standards of Conduct Office.[125] Until the EC's organization achieves 100% compliance, the EC must file monthly follow-up status reports.[126]

*Completing the Form*

The following are brief comments about important requirements for completing the OGE Form 450. The OGE Form 450 report covers the entire preceding fiscal year and is not limited to assets held as of the reporting date; therefore, filers must report and annotate the disposition of assets sold during the reporting period.

Filers do not have to report bank accounts, certificates of deposit, money market mutual funds, and United States Government bonds or securities. With stock broker accounts containing separate stocks, mutual funds and other investment products, the filer must individually report all of the investment assets. This is true even if the broker has the authority to make trades without the filer's approval or knowledge. Similarly, filers have to report the underlying investment assets in Individual Retirement Accounts (IRA), Keoghs, and 401(k) plans. Merely reporting an IRA account in some financial service company is not sufficient. Just like broker accounts, filers must fully identify the investment assets in these accounts.

Filers must also fully identify an investment in something that is not a publicly traded stock, security, bond, mutual fund, or bank account. For example, with a small family business, the rules require the filer to disclose the nature of the business and its location. Additionally, filers have to disclose the specific address of income producing real estate as well as the outside investments and employment of spouses and dependent children (including the identification of the employer and the nature of the employer's business). Finally, filers must report the name, location, and nature of business of all partnerships and limited partnerships. If a limited partnership is an EIF, then the filer should note that fact; otherwise, the filer must list the investment assets of the partnership.[127]

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[115] *Id.* para. 7-306g(3).

[116] *Id.*

[117] *Id.*

[118] *Id.* para. 7-306h.

[119] *Id.* para. 7-306g.

[120] *Id.* para. 7-306j.

[121] *Id.* para. 7-306k.

[122] *Id.* para. 7-209b.

[123] *Id.* para. 7-309a.

[124] *Id.*

[125] *Id.* para. 7-309b.

[126] *Id.*

[127] *See* JER, *supra* note 12, para. 7-309b.

## *Conclusion*

While the SF 278 report may be considered more important than the OGE Form 450 because it is subject to public scrutiny and only requires filing by high level government employees, both reports must be filed properly and timely to avoid conflicts of interest and preserve government integrity. Monitoring and achieving compliance with these reports is an arduous task. Agency officials and ECs involved in the process must have the tools necessary to perform their job. These tools include not only reference materials, but personal attributes that lead to proactive programs and review procedures devoted to attention to detail. This guide should help practitioners create and maintain successful review programs. Major Alan L. Cook, Officer in Charge, Kaiserslautern Law Center, 21st Theater Army Area Command.

Appendix 1

## SUGGESTED INSTALLATION MILESTONES
## PUBLIC FINANCIAL DISCLOSURE REPORTS (SF 278)

| DATE STATUTORY | DATE RECOMMENDED | ACTION |
| --- | --- | --- |
| | 15 DEC | Initial coordination with personnel offices on positions that require SF 278 filing |
| 10 JAN (JER 7-201b) | | *Personnel Offices* required to submit final list of Positions required to file SF 278 |
| | 21 FEB | Dispatch memo, re: "Filing Requirements," to filers along with SF 278 (DA Form 4971 to ECs/Supervisors) |
| | 01 MAR | Obtain Contractor Lists from Contracting Offices |
| | 01 APR | SF 278 due to EC |
| 15 APR (DAJA-SC *guidance)* | | SF 278 *due to EC* |
| | 08 APR | SF 278 due to filer's supervisor |
| | 22 APR | SF 278 due to supervisor's EC |
| *15 MAY* (JER 7-203c) | | Original SF 278 *due to HQDA (SOCO).* Requests for extensions should have been received by DA SOCO. |
| | 15 JUL | Combined Annual/Termination Reports |

## Appendix 2

### SUGGESTED INSTALLATION MILESTONES
### CONFIDENTIAL FINANCIAL DISCLOSURE REPORTS (OGE Form 450)

| DATE STATUTORY | DATE RECOMMENDED | ACTION |
|---|---|---|
| | 30 JUNE | Obtain Contractor lists from Contracting Offices |
| | 07 SEP | Initial coordination with personnel offices on positions that require OGE Form 450 filing |
| | 15 SEP | Dispatch memo, re: "Filing Requirements," to OGE Form 450 filers |
| 03 OCT(JER 7-301) | | Personnel Offices required to submit final list of Positions required to file OGE Form 450 |
| | 10 OCT | Publish Local Notice on annual requirement to file OGE Form 450 |
| | 31 OCT | OGE Form 450 due to Supervisor |
| 31 OCT(5 C.F.R. 2634.903) | | OGE Form 450 due to EC (note automatic 30 day extension granted by the JER) |
| | 15 NOV | OGE Form 450 due to EC (note that annual ethics training required by JER 11-320 should be completed by this date) |
| 30 NOV(JER 7-303b) | | JER grants automatic 30 day extension for filing with EC |
| 15 DEC (JER 7-309) | | Status Report due to HQDA (SOCO)-EC must file monthly report thereafter until all required filings are made |
| | 15 JUL | New entrant report, if applicable |

# USALSA Report

*United States Army Legal Services Agency*

## *Clerk of Court Notes*

### Rates of Courts-Martial and Nonjudicial Punishment

The rates of courts-martial and nonjudicial punishment for the third quarter of fiscal year 1996 are shown below.

**Rates per Thousand**

Third Quarter Fiscal Year 1996; April-June 1996

| | ARMYWIDE | | CONUS | | EUROPE | | PACIFIC | | OTHER | |
|---|---|---|---|---|---|---|---|---|---|---|
| GCM | 0.39 | (1.57) | 0.38 | (1.52) | 0.45 | (1.80) | 0.50 | (2.01) | 0.45 | (1.78) |
| BCDSPCM | 0.17 | (0.67) | 0.17 | (0.70) | 0.15 | (0.60) | 0.17 | (0.69) | 0.45 | (1.78) |
| SPCM | 0.00 | (0.01) | 0.00 | (0.01) | 0.00 | (0.00) | 0.00 | (0.00) | 0.00 | (0.00) |
| SCM | 0.13 | (0.53) | 0.16 | (0.65) | 0.01 | (0.06) | 0.10 | (0.39) | 0.22 | (0.89) |
| NJP | 18.36 | (73.43) | 19.73 | (78.93) | 15.54 | (62.14) | 17.60 | (70.41) | 17.83 | (71.31) |

Note: Based on average strength of 493,232. Figures in parenthesis are the annualized rates per thousand.

Second Quarter Fiscal Year 1995; January-March 1995

| | ARMYWIDE | | CONUS | | EUROPE | | PACIFIC | | OTHER | |
|---|---|---|---|---|---|---|---|---|---|---|
| GCM | 0.41 | (1.63) | 0.39 | (1.54) | 0.55 | (2.19) | 0.58 | (2.33) | 0.49 | (1.97) |
| BCDSPCM | 0.16 | (0.65) | 0.16 | (0.62) | 0.24 | (0.97) | 0.15 | (0.58) | 0.49 | (1.97) |
| SPCM | 0.02 | (0.07) | 0.02 | (0.07) | 0.03 | (0.13) | 0.00 | (0.00) | 0.00 | (0.00) |
| SCM | 0.11 | (0.44) | 0.13 | (0.51) | 0.10 | (0.39) | 0.04 | (0.17) | 0.00 | (0.00) |
| NJP | 19.12 | (76.47) | 20.17 | (80.68) | 20.02 | (80.08) | 18.26 | (73.05) | 12.83 | (51.31) |

Note: Based on average strength of 528,748. Figures in parenthesis are the annualized rates per thousand.

## *Environmental Law Division Notes*

### Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency, produces *The Environmental Law Division Bulletin (Bulletin)*, which is designed to inform Army environmental law practitioners about current developments in the environmental law arena. The ELD distributes the *Bulletin* electronically, appearing in the Announcements Conference of the Legal Automated Army-Wide Systems (LAAWS) Bulletin Board Service (BBS). The latest issue, volume 4, number 1, dated October 1996, is reproduced below.

### Editor's Note

This edition of the Bulletin includes two attachments. The first is an ELD Bulletin reader survey. Please take a few moments to complete the survey and return it to us. The answers provided will assist us in our continual effort to make the Bulletin a useful addition to your legal resources.

The second attachment is a copy of the letter sent by United States Environmental Protection Agency Administrator, Carol Browner, to the state of Missouri confirming that Resource Conservation and Recovery Act (RCRA) permits are not required for Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) response actions. The letter is the result of a dispute resolution proceeding invoked at the former Weldon Springs Ordnance Works (WSOW) installation in Missouri. The WSOW is a National Priorities List (NPL) site. The Army's position is that all CERCLA response actions, whether at NPL or non-NPL sites, are exempt from permit requirements pursuant to CERCLA § 121(e)(1).[1]

### RCRA Corrective Action and Closure and CERCLA Coordination

On 24 September 1996, at the United States Environmental Protection Agency's (USEPA) National RCRA Program Meeting, Steven A. Herman and Elliott P. Laws signed a memorandum entitled "Coordination Between RCRA (Resource Conservation and Recovery Act) Corrective Action and Closure and CERCLA (Comprehensive Environmental Response, Compensation, and Liability Act) Site Activities." Mr. Herman is the Assistant Administrator, Office of Enforcement and Compliance Assurance, and Mr. Laws is the Assistant Administrator, Office of Solid Waste and Emergency Response. This guidance memorandum addresses three areas: (1) acceptance of decisions made in remedial programs, (2) deferral of activities and coordination between programs, and (3) coordination of specific standards and requirements for closure of RCRA regulated units with other cleanup activities. The stated purpose of the guidance is to assist in eliminating duplication in the cleanup effort, to streamline cleanup processes, and to build effective relationships with states and tribes.

In addition to the guidance offered in the memorandum, the USEPA has two other RCRA and CERCLA integration initiatives intended to supplement this policy. In the first initiative, the USEPA is coordinating with states and federal agencies through the interagency Lead Regulator Workgroup to provide guidance and to identify options for integration and coordination when cleanup authorities overlap at federal facilities. Second, the USEPA requested comment on the integration of RCRA or CERCLA activities in the Advanced Notice of Proposed Rulemaking-Corrective Action for Releases from Solid Waste Management Units at Hazardous Waste Management Facilities.[2]

In the memorandum, the USEPA asserts that cleanups conducted generally under either RCRA or CERCLA will satisfy the substantive requirements of the other program. Site managers are encouraged to defer cleanup requirements from one program to the other, avoiding the duplication of studies and remedial activities. When making the deferral decision, the USEPA stresses that the focus should be on the final results of the remedial activities. Different implementation approaches in programs should not prevent deferral when the fundamental purpose and objectives are the same.

As one method of deferral, the USEPA describes the deletion policy that allows the removal of sites from the National Priority List with deferral of the site cleanup to RCRA corrective action. The USEPA cautions, however, that the deletion policy does not pertain to federal facilities. Instead, interagency agreements may operate to eliminate duplication of effort at federal facilities. The Lead Regulator Workgroup is expected to address the more specific coordination of oversight and the deferral from one program to another at Federal facilities.

Although it is the USEPA's policy to clean up facilities under the RCRA when both the RCRA and the CERCLA apply, the USEPA recognizes that in some circumstances it may be more appropriate for the CERCLA program to take the lead. In these instances, independent RCRA action may not be necessary due to the protection afforded by the CERCLA action. Alternatively, there may not be actual deferral to CERCLA but the RCRA permit may defer to the CERCLA document or incorporate the decision document into the permit.

Coordination between the programs without full deferral is expressed by the USEPA as often the most appropriate solution. The memorandum describes some options for coordination be-

[1] 42 U.S.C. § 9621(e)(1) (1986).

[2] 61 Fed. Reg. 19,432 (1996).

tween programs but again cautions that the options may be different for federal facilities due to the prescriptive requirements of CERCLA § 120.[3] The memorandum promises further guidance on coordination options for federal facilities from the Lead Regulator Workgroup.

The memorandum also considers the difficult issue of coordinating the closure of RCRA units with other cleanup activities. The dual regulatory structure for RCRA closure and other cleanup activities under the CERCLA or the RCRA results in inconsistent cleanup levels applied to site-wide cleanup and the removal and decontamination (clean closure) of a unit on the site. Clean closure standards often are at background levels while other cleanup levels are at higher, risk-based levels. The USEPA announces in this memo a change in policy that, consistent with the use of risk-based standards for cleanup activities, fate and transport models may be used to establish risk-based levels for clean closure standards.

The USEPA plans to publish this policy change on risk-based clean closure in the *Federal Register* and is developing guidance on modeling for the clean closure performance standards. No time frame has been given for publication of the federal facility guidance from the Lead Regulator Workgroup. Major Anderson-Lloyd.

**Did You Know? . . .**
**71% of the Earth's surface is covered by water.**

### Significant Court Ruling on Historic Preservation Requirements

The amount of preservation required under the National Historic Preservation Act (NHPA) was recently the focus of a lawsuit against the Commander, Walter Reed Army Medical Center.[4] The plaintiffs argued that § 110 of the NHPA creates a substantive duty for federal agencies to preserve historic buildings listed on the National Register of Historic Places. The Army responded that the NHPA contains only procedural requirements that apply to federal actions likely to affect historic properties adversely. On 13 September 1996, the United States District Court for the District of Columbia issued an opinion agreeing that § 110 does not establish any preservation requirements independent of those already contemplated in the procedural provisions of the NHPA. The court then ruled that the Army had complied with the procedural preservation mandates by adopting and implementing a Cultural Resource Management Plan. This opinion, the first to squarely address any preservation requirements of § 110, will undoubtedly ignite significant controversy and must be read carefully by Army environmental staff and lawyers to ensure that we continue to preserve our historic buildings and structures in accordance with legal standards.

The plaintiffs in this case, *National Trust*, alleged that Walter Reed, had failed to adequately maintain numerous historic buildings or structures within the National Park Seminary Historic District located at Walter Reed's Forest Glen Annex in Silver Spring, Maryland. The Army acquired the Forest Glen Annex in 1942 and used it mainly as an auxiliary service, support, and research area. In 1967, Walter Reed proposed demolishing the old, costly buildings. This proposal alarmed local citizens who took the necessary steps to have the Forest Glen Historic District placed on the National Registry of Historic Places in 1972. From 1972 until today, Walter Reed gradually stopped using the majority of the historic buildings and periodically considered excessing the property after the Forest Glen Historic District began to consume a disproportionate amount of limited maintenance funds. Meanwhile, the structural integrity of the historic buildings steadily declined due to reduced or deferred maintenance efforts. The plaintiffs brought the lawsuit seeking a judicial order requiring the Army to repair the Forest Glen Historic District to its 1972 condition.

The court, while sympathetic to the plaintiffs' concerns over the fate of Forest Glen, found that § 110 did not contain substantive preservation requirements authorizing it to order the Army to restore the Forest Glen District to a "pre-neglect" condition. The court recognized that the language of § 110(a)(1) superficially appears to direct federal agencies to preserve historic buildings or structures under their control, regardless of cost, but it concluded that the NHPA read as a whole does not.

The NHPA is principally concerned with ensuring that federal agencies follow strict procedures specified in § 106 prior to conducting any "undertaking" that will adversely affect historic properties under their control. The *National Trust* court concluded that neither the language of § 110 nor its legislative history support the interpretation that Congress had established any specific level of preservation that federal agencies must perform. Rather, the court found that § 110 merely represented "an elucidation and extension of the § 106 [procedural] process . . . not its replacement by new and independent substantive obligation of a different kind." The plaintiff's theory of § 110's preservation mandates, would, in effect, "replace the heart and soul of the NHPA, requiring an agency to spend money on historic preservation regardless of whether it was engaged in . . . an undertaking."[5]

Despite the lack of a substantive preservation provision, the court made clear that § 110(a)(2) did require federal agencies to

[3] 42 U.S.C. § 9620 (1992).

[4] Nat'l Trust for Historic Preservation v. Major General Ronald R. Blanck, No. 94-1091, slip op. (D.D.C. Sept. 13, 1996).

[5] *Id.* at 30.

establish a preservation program for the protection of historic properties. Further, such a program must comply with the § 110 guidelines issued by the Secretary of the Interior.[6] The Army regulation on historic preservation implements these guidelines and requires Army installations with historic properties to prepare a Historic Preservation Plan (HPP) to meet the Army's § 110 obligations.[7]

The court reviewed the requirements of AR 420-40 to determine if Walter Reed had adopted such a plan and, moreover, whether the Army had implemented its preservation program concerning the Forest Glen Historic District. The court found Walter Reed had not prepared an HPP until 1992, when it adopted a Cultural Resource Management Plan (CRMP). From 1984 until 1992, Walter Reed was therefore in violation of the NHPA. Once adopted, however, the court concluded that Walter Reed had spent substantial sums of money on repair and preservation activities under the preservation priorities in the CRMP and had continued to seek funding to meet its obligations under the CRMP. Accordingly, because the NHPA did not mandate minimal preservation levels, and the Army had reasonably adhered to its HPP, the court found no authority to order the Army to "turn back the hands of time" for the Forest Glen Historic District.

Army environmental staff and environmental law specialists should not read the opinion in *National Trust* as minimizing the need to preserve federally-owned historic properties. This case highlights that Army installations must adopt historic preservation plans pursuant to AR 420-40 (or CRMPs pursuant to the soon-to-be published AR 200-4, which will supersede AR 420-40) and strive to follow them. This case also informs all federal agencies that successful satisfaction of the procedural mandates of § 106 may be contingent on the maintenance of certain preservation levels. In today's climate of shrinking budgets, historic preservation may sometimes fall below other priorities; however, we should be mindful of the court's closing comments in *National Trust*: "While courts may not be authorized under the NHPA to order a recalcitrant agency to rebuild decaying historic treasures, it is their duty to declare what the agency's statutory obligations are and what the agency's procedural course should be." Major Mayfield.

## Section 7(a)(1) Responsibilities Under the Endangered Species Act

Plaintiffs are continuing to scrutinize federal actions regarding agency responsibilities under § 7(a)(1) of the Endangered Species Act of 1973 (ESA).[8] Section 7(a)(1) of the ESA requires federal agencies to "utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered and threatened species listed pursuant to section [4 of this Act]." The term "conservation" is defined as "the use of all methods and procedures which are necessary to bring any endangered and threatened species [to recovery]."[9]

While the exact force and breadth of § 7(a)(1) remains to be determined, at least one commentator has noted that the action-forcing potential of § 7(a)(1) has remained largely untested. The commentator has also questioned why environmental advocacy groups have not made greater use of § 7(a)(1).[10] However, the desire to determine the action-forcing power of § 7(a)(1) seems to have awakened interest among environmental advocacy groups in several cases.[11] Given this interest and scrutiny, installation environmental law specialists (ELSs) should take care to ensure that installation activities fulfill the mandates of § 7(a)(1). In exercising that care, ELSs should be aware that the courts have found that the mandates of the ESA may have priority over the agencies' primary mission. In one case, the Ninth Circuit Court of Appeals specifically rejected the notion that §7 (a)(1) of the ESA "was not 'intended to frustrate the agencies' accomplishment of their primary mission.'"[12] Rather, the federal agency must accomplish the conservation and recovery responsibility under the ESA but may have "some discretion in ascertaining how best to fulfill the mandate to conserve under § 7(a)(1)."[13]

[6] Guidelines for Federal Agency Responsibilities Under Section 110 of the National Historic Preservation Act, 53 Fed. Reg. 4727 (Feb. 17, 1988).

[7] DEP'T OF ARMY, REG. 420-40, HISTORIC PRESERVATION (15 May 1984) [hereinafter AR 420-40].

[8] Endangered Species Act, 16 U.S.C. § 1536 (1988).

[9] *Id.* § 1532(3).

[10] J.B. Ruhl, *Section 7(a)(1) of the "New Endangered Species Act: Rediscovering and Redefining the Untapped Power of Federal Agencies' Duty to Conserve Species*, 25 ENVTL. L. 1107, 1136 (1995).

[11] *See e.g.*, Concerned Citizens of East Columbus v. Bobby Peters, No. 4:96-CV-144 (M.D. Ga. 1996).

[12] Pyramid Lake Paiute Tribe of Indians v. United States Dep't of Navy, 898 F.2d 1410, 1417 (9th Cir. 1990).

[13] *Id.* at 1418.

An excellent manner to demonstrate the installation's fulfillment of its § 7(a)(1) responsibilities is the completion and implementation of an Endangered Species Management Plan in consultation with the United States Fish and Wildlife Service (FWS).[14] In addition to this, installations should ensure that for every major federal action or construction activity which may affect a listed species, they clearly identify affirmative measures to be taken in conjunction with that activity. These affirmative measures must go beyond mere mitigation measures and should result in the further conservation and recovery of the listed species on the installation. Such measures are advisable given the broad mandates of the § 7(a)(1) responsibility and because the § 7(a)(2) consultation process is not dispositive of whether the § 7(a)(1) responsibility has been met.[15] Major Ayres.

**Did You Know? . . . Usurped and abandoned Red-Cockaded Woodpecker cavities serve as homes to a multitude of animals, including other woodpeckers, western Bluebirds, and even squirrels and Raccoons.**

### Aggressive RCRA § 7003 Guidance Coming

The United States Environmental Protection Agency (USEPA) plans to issue new guidance this fall encouraging the USEPA Regions to increase their use of the Resource Conservation and Recovery Act (RCRA) § 7003 imminent hazard provision.[16] Increased use of § 7003 could be a cause for concern to installations because the imminent and substantial endangerment standard triggering the provision has been interpreted liberally by courts.

Section 7003 authorizes the USEPA to bring suit or take such other action as may be necessary against any person (including past or present generators, transporters, or treatment, storage or disposal owners or operators) "upon receipt of evidence that the past or present handling, storage, treatment, transportation, or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment."[17] Appropriate USEPA action under its § 7003 authority includes injunctions to halt such activity or the issuance of an order, the violation or noncompliance of which could result in penalties up to $5000 per day.

The USEPA's current guidance, issued in 1984, provides that "[n]ecessary evidence [to support a § 7003 administrative order] may be documentary, testimonial, or physical, and may be obtained from a variety of sources including inspections, investigations, or requests for production of documents or other data pursuant to RCRA 3007, 3013, or CERCLA 104."[18] The 1984 guidance describes how only threatened, not actual harm, is required to support a claim of imminent endangerment under the RCRA, and that, while the risk of harm must be imminent, the actual harm test need not be met.[19] A long line of cases liberally construes these concepts.[20]

Because the 1984 guidance is considered by USEPA enforcement officials to be extremely limited in scope, the new USEPA guidance will emphasize more *risk-based* and *creative* uses of § 7003.[21] Installations should watch for issuance of the new policy, and be wary of their USEPA Regions' subsequent *creative* uses of § 7003 authority to compel action under the Regions' discretionary, subjective interpretations of *risk-based*. Captain Anders.

### Enforcement Trend Is Individual Over Corporate Defendants

Earl Devaney, Director of the USEPA Office of Criminal Enforcement, Forensics, and Training, agreed with industry representatives that the trend in environmental criminal enforcement is to prosecute individuals, preferably high-level owners and managers, rather than the corporation itself. Devaney made the statement at an American Bar Association conference on 5 September 1996. "In 1991, eighty percent of the criminal defendants were companies. By 1995, eighty percent were individuals, and twenty percent were companies."[22] Devaney fueled industry claims that the targets of environmental crimes are no more

[14] Dep't of Army, Reg. 200-3, Natural Resources—Land, Forest and Wildlife Management, para. 11-5 (28 Feb. 1995).

[15] The mandatory Section 7(a)(2) consultation process with the FWS or the National Marine Fisheries Service (NMFS) can be a useful tool to help an agency identify its Section 7(a)(1) responsibilities. However, the action agency rather than the FWS or NMFS is ultimately responsible for determining and completing its conservation and recovery responsibilities.

[16] Resource Conservation and Recovery Act, 42 U.S.C. § 6973 (1984).

[17] *Id.*

[18] Final Revised Guidance Memorandum on the Use and Issuance of Administrative Orders Under Section 7003 of the Resource Conservation and Recovery Act, ELI No. AD-607 (Sept. 26, 1984).

[19] *Id.*

[20] *See e.g.*, United States v. Price, 688 F.2d 204, 213 (3d Cir. 1982), United States v. Vertac, 489 F.Supp. 870, 880-81 (E.D. Ark. 1980).

[21] Envtl. Policy Alert, Vol. XIII, No. 16 (July 31, 1996).

[22] Toxics Law Reporter, Vol. 11, No. 15, at 437 (Sept. 11, 1996).

than "good people caught in the regulatory quagmire" when he explained that, rather than target "evil polluters," the USEPA's enforcement efforts are "beginning to look for the polluter in other forms" such as "non-notifiers."[23]

Devaney's confirmation of the USEPA's enforcement shift from corporate to individual liability should be taken seriously by installation environmental program and legal personnel. Following the USEPA's July publication of its fiscal year 1995 Enforcement and Compliance Assurance Accomplishments Report, public and congressional critics chided the USEPA's decreasing civil and administrative enforcement statistics. As these numbers continue to drop, the USEPA's Office of Enforcement and Compliance Assurance will likely become increasingly dependent upon criminal enforcement to illustrate the efficacy of its overall enforcement program. The United States District Court for the Western District of Wisconsin, for example, recently sentenced the owner of an underground petroleum storage tank business to forty-one months in prison without parole for directing employees to dump hazardous waste in violation of the RCRA.[24] A Wisconsin Assistant United States Attorney believes the sentence was the longest in Wisconsin history for an environmental criminal conviction.[25] Captain Anders.

### National Defense Authorization Act for Fiscal Year 1997 Passed

On 23 September 1996, President Clinton signed into law the National Defense Authorization Act for Fiscal Year 1997.[26] The Act appropriates $356,916,000 to the Army for environmental restoration. Further, the Act devolves the Defense Environmental Restoration Account (DERA) to the Services, but maintains the prohibition that DERA funds may only be used to carry out the environmental restoration functions of the Secretaries of the military departments. Funds authorized for DERA shall remain available until they are expended.

The Act also amends the CERCLA in several sections that affect federal facilities. The language "stored for one year or more," has been struck from § 120(h)(4)(A), Identification of Uncontaminated Property.[27] The Act amends the authority to transfer provisions of § 120(h)(3) to allow the Services to transfer property before a remedy is in place and working.[28] The new provision provides that, for National Priority List (NPL) sites, the Administrator of the USEPA, with the concurrence of the governor of the state in which the facility is located, may defer the requirement that the remedy be in place and working prior to property transfer as long as the property is suitable for transfer and there are adequate assurances that the response action will not be compromised. For non-NPL sites, the Governor of the state may act alone in making this determination. A deferral under this subparagraph shall not increase, diminish, or affect the rights or obligations of the federal agency with respect to the transferred property.

The first sentence of the section on the application of state law has been amended to read:

> State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States or facilities that are the subject of a deferral under subsection (h)(3)(C) [Federal Agency Hazardous Waste Compliance Docket] when such facilities are not included on the National Priorities List.[29]

The amendments also allow for the deferral of a federal facility from the NPL where the agency has arranged with the USEPA Administrator or state authorities to respond appropriately under authority other than the CERCLA to a release or threatened release of a hazardous substance.[30] Ms. Fedel.

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[23] *Id.*

[24] U.S. v. Kelly, No. 95-84-C, (W.D. Wis. Aug. 13, 1996).

[25] Toxics Law Reporter, Vol 11, No. 13 (Aug. 28, 1996).

[26] Nat'l Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, 110 Stat. 2422 (1996).

[27] Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9620(h)(4)(A) (1996).

[28] *Id.* § 9620(h)(3).

[29] *Id.* § 9620(a)(b).

[30] *Id.* § 9620(d).

**Did You Know? . . .**
**President Ulysses Grant dedicated two million acres in Wyoming as Yellowstone National Park in 1872.**

**New Natural Resource Damages Executive Order**

On 28 August 1996, President Clinton signed an Executive Order (EO) amending EO 12,580 by delegating new enforcement authorities for natural resource damages (NRDs) to several federal agencies, including the Department of Defense (DOD).[31]

The new EO delegates authority to the Secretary of Defense to issue abatement action orders pursuant to CERCLA § 106(a) where the Secretary determines that there may be an imminent and substantial endangerment to the public health or welfare or to the environment from a release or threat of release affecting either (1) natural resources under the Secretary's trusteeship or (2) a vessel or facility subject to the Secretary's custody, jurisdiction, or control.[32] The EO also delegates this authority to the Secretaries of the Interior, Commerce, Agriculture, and Energy. The Secretaries may only invoke this authority with the concurrence of the USEPA Administrator and only at sites where the USEPA is the lead federal agency for the *oversight* of the response, such as at NPL sites.

The new EO also provides the Secretaries with expanded authority to enter into settlement negotiations for NRD claims pursuant to CERCLA § 122 (except subsection (b)(1)).[33]

[31] Executive Order 13,016, 61 Fed. Reg. 45,871 (1996). *See also*, Executive Order 12,580, 52 Fed. Reg. 2923 (1987), which delegates authorities vested in the President as established by the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 (1986).

[32] Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9606(a) (1986).

[33] *Id.* § 9622.

## ELD Bulletin Reader Survey

The purpose of the ELD Bulletin is to assist environmental law attorneys at our installations and MACOMs by providing timely information on new legal developments, issues, and resources. The ELD welcomes ideas and comments on ways in which we can improve this service. Please take a few moments to complete the following survey;to assist us with this effort. You may return the survey by electronic mail to me at fedelsab@otjag.army.mil, or you may send your response to us via facsimile at (703) 696-2940 or DSN 426-2940. Your response can also be sent via United States Postal Service to:

United States Army Legal Services Agency
Attn: DAJA-EL (Sabrina Fedel)
901 N. Stuart Street, Suite 400
Arlington, VA 22203-1837

Thank you for your assistance and continued support of the ELD Bulletin.

1. What is your level of environmental law experience?

______ < one year

______ One to three years

______ Over three years

Additional comments: ______________________________

______________________________________________

2. What percentage of your job is concentrated in environmental law?

______ < 25%

______ 25%-50%

______ 50%-75%

______ Full time

Additional comments: ______________________________

______________________________________________

3. Do you find that the types of issues covered in the Bulletin articles are helpful to your daily practice?

______ Always

______ Mostly

______ Sometimes

______ Rarely

Additional comments: ______________________________

______________________________________________

______________________________________________

______________________________________________

4. Do you find that the content of Bulletin articles is generally:

______ More informative than you need

______ Not informative enough

______ About right

Additional comments: ____________________

____________________

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____________________

5. Do you find that the articles are well organized and easy to understand?

_____ Always

_____ Mostly

_____ Sometimes

_____ Rarely

Additional comments: ____________________

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6. Do you find that the length of Bulletin articles is generally:

_____ Too long

_____ Too short

_____ About right

Additional comments: ____________________

____________________

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____________________

7. Do you find citations for references sufficient to access additional necessary information?

_____ Yes

_____ No

If not, why? ____________________

____________________

United States Environmental Protection Agency
Washington, D.C. 20460

November 1, 1995

David A. Shorr
Director
Missouri Department of Natural Resources
P.O. Box 176
Jefferson City, MO 65102-0176

RE: *In the matter of The Former Weldon Spring Ordnance Works* Weldon Spring, Missouri Federal Facility Agreement Docket No. VII-90-F-0033

Dear Mr. Shorr:

Thank you for your letter of September 5, 1995, regarding your decision to elevate the above-captioned dispute. Pursuant to the 1990 Federal Facility Agreement (FFA) among the state, the Army, and EPA, this letter is EPA's decision for final resolution of the dispute.

BACKGROUND

On August 9, 1994, Missouri invoked the FFAs dispute resolution procedures regarding the state's authority to require permits for the incinerator, contaminated wastewater treatment, and storm water runoff activities that are described in the draft Final Record of Decision (ROD). On September 7, 1994, the Dispute Resolution Committee elevated the matter to the Senior Executive Committee (SEC). Unable to unanimously resolve the dispute at the SEC level, Bill Rice issued a decision document on August 15, 1995. As provided in the dispute resolution procedures of the FFA, Missouri elected to elevate the Region's decision for resolution.

ANALYSIS

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) § 121(e)(1) provides that no federal, state, or local permit shall be required for the portion of any removal or remedial action conducted entirely on-site. In this case, it is undisputed that the response actions at issue will be constructed entirely within the geographical area considered by the NPL site. Nevertheless, we understand Missouri's position to be that because off-site releases and discharges will occur, the state may seek to require the Army to obtain permits. In a February 1, 1995 brief, your Counsel provided EPA with its legal analysis to defend Missouri's position.

Throughout this dispute, the Army has asserted that permits are not required for the subject activities. Specifically, the Army contends that the CERCLA § 121(e)(1) permit waiver allows lead agencies to commence and continue response actions in accordance with applicable state standards, without subjecting them to the expense and delay associated with applying for, and maintaining, state permits. Furthermore, the Army has stated that it is unwilling to jeopardize its ability to carry out its CERCLA responsibilities by agreeing to apply for a state permit that CERCLA does not require.

The Missouri brief refers to *U.S. v. Colorado*, 990 F.2d 1565, 1582 (10th Cir. 1993), where CERCLA § 121 (e) (1) was held not to bar enforcement of a state's compliance order issued under that state's EPA-authorized hazardous waste law. Missouri concludes from that ruling that CERCLA § 121(e)(1) does not bar Missouri from enforcing its laws through its permitting requirements, including Missouri law authorized by EPA in lieu of RCRA, the Clean Air Act, and the Clean Water Act.

However, *U.S. v. Colorado* addresses only enforcement of state law *outside* the CERCLA process. It does not address the meaning of "on-site" under CERCLA § 121(e)(1), and what permits are required *under CERCLA*.

Similarly, Missouri's brief states that the National Contingency Plan (NCP) definition at 40 CFR § 300.400(e)(2) of what constitutes "on-site" is indeterminate, and that the Court of Appeals for the District of Columbia Circuit has concluded only that the

regulation on its face in not unlawful. *Ohio v. U.S. EPA*, 997 F.2d 1520, 1549 (D.C. Cir. 1993). Missouri contends that what constitutes "on-site" in EPA's view is overbroad and that the response actions under the selected remedy will inevitably result in extended off-site discharges beyond the "on-site" area, and thus require state permits.

Nothing in the statutory language requires that substances discharged or released from response action on-site must remain entirely on-site for the actions to qualify for the permit exemption. EPA has long viewed response actions that may have discharges or releases which subsequently migrate beyond site boundaries as qualifying for the CERCLA § 121(e)(1) exemption. This position was clearly stated in the preamble to the 1988 NCP proposal (see 53 FR at 51407 (December 21, 1988)), when EPA stated that:

> 'On-site' further includes situations where the remedial activity occurs entirely on-site but the effect of such activity cannot be strictly limited to the site. For example, a direct discharge of CERCLA wastewater would be an on-site activity if the receiving water body is in the area of contamination or is in very close proximity to the site, even if the water flows off-site.

This interpretation was not changed in the preamble to the Final NCP, where EPA cites an example of an on-site response action exempt from permit requirements, an incinerator built on upland as a remedy for contamination located in a lowland marshy area. 55 Fed. Reg. 8666, 8689 (March 8, 1990). Moreover, even though the court in *Ohio v. EPA* does not directly reach the current question, it references EPA's incinerator example to show why the NCP definition of on-site is not unreasonable on its face.

Therefore, EPA interprets CERCLA section 121(e)(1) and the corresponding provision of the NCP (300.400(e)(1)) as exempting response action conducted entirely on-site even if the actions involve discharges or emissions that result in some subsequent migration of contaminant beyond the site boundaries. We believe this interpretation best serves the purpose of CERCLA section 121(e)(1); namely, that it avoids redundant procedural permitting steps that could delay cleanups. Furthermore, since some off-site migration is likely to occur in virtually all cases where there is an on-site discharge or emission, adopting the state's interpretation would greatly narrow the kinds of permits to which the exemption applies, a result I do not think is consistent with the intent of Congress. The legislative history of the Superfund Amendments and Reauthorization Act of 1986 shows that an earlier version of the Bill would have required permits to be obtained for on-site actions under certain specified laws, including the Clean Air Act and the Clean Water Act. This requirement was eliminated in the conference committee in favor of a blanket waiver. Since Congress clearly chose to exempt on-site actions from permits specifically under these Acts, an interpretation that effectively required permits under these Acts in most or all cases, would be inconsistent with the intent of Congress.

Last, the brief states that Missouri citizens are entitled to the same notice and opportunity for public hearing and comment on federal activities at the site as Missouri provides for response activities involving the state.

Missouri law may indeed provide different public involvement mechanisms than those provided by CERCLA and the NCP. However, so long as the Army fulfills CERCLA and related federal requirements, the Army will be providing a full and fair opportunity for public participation. For example, the Army has provided the public hearing and comment period at the Proposed Plan stage. Additionally, consistent with EPA' Strategy for hazardous Waste Minimization and Combustion, EPA intends to allow further opportunity for public participation while the incinerator is designed and constructed, including public notice of the trail burn plan and opportunity for local citizens to participate during the risk assessment process.

CONCLUSION

I affirm Region VIIs decision. The incinerator contaminated wastewater treatment, and storm water runoff activities are on-site activities within the meaning of CERCLA § 121(e)(1) and the NCP 40 CFR § 300.400(e), and, therefore state permits are not required. Accordingly, the Draft Final Record of Decision will not require state permits for those activities.

Sincerely

/s/

Carol M. Browner

## *Litigation Division Note*

### Affirmative Litigation in a Time of Diminishing Resources

Over the last two years, the United States Army Claims Service (USARCS) and the Litigation Division (LITDIV) have published a series of Notes in *The Army Lawyer* addressing affirmative tort claims, insurance recoveries, and subsequent litigation.[34] Those notes discuss, *inter alia*, statutory authority, regulatory requirements, and practical considerations for pursuing such claims. After evaluating the LITDIV's affirmative claims workload, two striking facts emerge: (1) we have few such cases (about twenty) and (2) many of those cases were filed only after a "last minute" notice from the field as the statute of limitations was about to expire.[35]

While the affirmative claims mission has been highly successful in the administrative recovery stage,[36] we want to ensure, as fully as possible, that litigation is not being forsaken as an option in appropriate cases. To that end, we wish to emphasize the following:

(1) Early identification of potential claims.

(2) Timely coordination with all concerned (USARCS, LITDIV, and the United States Attorney).

(3) Faithful follow-up every sixty days (at a minimum).

(4) Complete medical billings and records.

Early identification is largely a matter of complete and accurate information flow from the MedicalTreatment Facility (MTF) and the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) fiscal intermediaries. Good working relationships, training, and internal tracking systems all are critical to the recovery mission. Timely coordination will ensure that maximum attention is devoted to evaluating whether intervention[37] or an independent action[38] is feasible in any given case. In our experience, "small" cases are more likely to be pursued when notice is timely and the case is coordinated among decision-makers as early as possible. The requirement for sixty-day follow-up[39] helps ensure accurate monitoring of pending claims. It also facilitates the pursuit of independent action by providing an early means of gauging the likely cooperation of an injured party's counsel. Finally, we cannot overstate the need for complete documentation of all claims.

The LITDIV's goal for affirmative cases is to make the United States Attorney an offer he or she cannot refuse: to present a ready-to-file complaint or motion with all supporting documentation. All that the assigned Assistant United States Attorney would need to do is file it and wait to collect the check.[40] The earlier in the process the LITDIV becomes involved, the greater the likelihood of success.[41] We recommend that, after a good-faith effort to obtain a representation agreement from the injured party's attorney fails, a case otherwise suitable for litigation be referred through the USARCS to the LITDIV or to the United States Attorney, as appropriate, as soon as possible. Again, the sooner the decision-makers are notified of a likely referral for litigation, the better the chances for a successful filing. In short, in a well-developed case, simply filing a complaint in a United States District Court may be all that is necessary to get the attention—and cooperation—of the other parties. As with other matters, LITDIV attorneys are always available for advice and assistance.

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[34] *See* Affirmative Claims Note, *Complying with the Statute of Limitations for Affirmative Claims*, ARMY LAW., Nov. 1994, at 53; Affirmative Claims Note, *Common Errors in Affirmative Claims Files*, ARMY LAW. Dec. 1994, at 51; Litigation Div. Note, *Affirmative Litigation under the Federal Medical Care Recovery Act*, ARMY LAW., Mar. 1995, at 34; Affirmative Claims Note, *Dept. of Justice Annual Report*, ARMY LAW., Aug. 95, at 47; Litigation Div. Note, *Army Medical Doctors as Expert Witnesses in Federal Medical Care Recovery Act Cases*, ARMY LAW., Oct. 1995, at 22.

[35] Occasionally, the LITDIV receives referrals of cases in which the statute already has expired. More frequently, the LITDIV receives cases with complex statute of limitations problems. For example, while preparing this note, we received a Federal Medical Care Recovery Act case worth over $800,000, but with a serious question whether the limitations period had passed. In that case, other agencies were on notice of the claim but they notified the Army only after two years had elapsed. By the time the case was referred for litigation, three years had elapsed.

[36] For Fiscal Year 1995, the USARCS reports medical care recoveries of over $12 million, with over $7 million of that deposited to military treatment facility operations and maintenance accounts. Affirmative Claims Note, *1995 Affirmative Claims Report*, ARMY LAW., Aug. 1996, at 37.

[37] "Intervention" refers to the right of the United States to intervene in "any action or proceeding" brought by an injured party against a tortfeasor. It is accomplished by filing a "complaint in intervention" in an ongoing action. *See* Federal Medical Care Recovery Act, 42 U.S.C. §§ 2651-53 (1994).

[38] "Independent action" refers to our right to initiate legal proceedings against a tortfeasor if such proceedings are not brought by the injured party. We do so by filing an original complaint in an appropriate court. *Id.*

[39] "Follow-up" refers to the duty of the claims or recovery JA asserting the claim to monitor and follow up with the injured party or his/her counsel, and our MTFs, to ensure collection of accurate information about extent of injuries, medical expenses, other potential tortfeasors, and insurance coverage.

[40] In this vein, the LITDIV can sometimes assist in gaining the cooperation of the local United States Attorney in cases where the field claims office encounters reluctance to pursue a case.

[41] Ideally, no later than six months prior to the expiration of the statute of limitations.

We realize that "working up" such claims is labor-intensive. Commanders and their lawyers should recognize, however, that the medical care recovery mission is a multiple money-maker. Not only are a majority of the recoveries returned to the MTFs, *those dollars returned to the MTF are available to fund attorney and support staff positions dedicated to the recovery mission.*[42] Moreover, the Fiscal Year (FY) 1997 Authorization Act amends the Federal Medical Care Recovery Act (FMCRA) to permit recovery of "lost" pay provided to military members unable to perform duties due to the tortious conduct of a third party. The amendment also provides that such recoveries be returned to the appropriation supporting the operation of the installation to which the member was assigned at the time of injury. The potential for funding a larger recovery mission now appears enormous.

In a profession in which much of what we do cannot readily be quantified, money *collected* certainly has as much (and probably more) appeal than, say, money *paid*! Thus, it behooves all involved to "think affirmatively" and prepare cases for early and effective litigation. The return on such an investment can be surprisingly healthy. Lieutenant Colonel Laverdure.

[42] Once deposited to the Operations and Maintenance account of a Medical Treatment Facility, the funds are available to the commander for whatever legitimate O&M use deemed appropriate. Many MTFs already fund such positions; those funding attorney positions do so under agreement with the local staff judge advocate.

# Claims Report

*United States Army Claims Service*

## *Tort Claims Note*

### Investigating a Suicide Case
### Is the Health Care Facility Liable? A Practical Approach

Negligence claims against health care facilities (HCFs) based on suicide attempts are rare but not unknown. The suicide attempt need not succeed for a claimant to file a claim.[1] Most claims are filed under the Federal Tort Claims Act (FTCA),[2] although claims arising abroad have been filed under the Military Claims Act (MCA).[3] The standard of liability is the law of the place where the act or omission occurred.[4] Thus, in the United States, the courts will look generally to state law. Overseas, with respect to civilians treated or requesting treatment at an HCF, federal law applies and *Army Regulation (AR) 40-3, Medical, Dental and Veterinary Services*, controls.

Once a claim is filed alleging failure to reasonably foresee a suicide attempt, the claims investigator should immediately review the circumstances surrounding the attempt. To determine liability, the court must find negligence and the negligence must have been the proximate cause of the injury.[5] Because the courts review all facts and circumstances surrounding treatment, the investigation should begin with the first time the HCF saw the person attempting suicide. The following is a list of areas to investigate concerning the suicide attempt: (1) the first visit and referral, (2) admission, (3) patient history, (4) treatment, and (5) the circumstances shedding light on the foreseeability of the attempt.

[1] *See* Dolihite v. Maughon, 74 F.3d 1027 (11th Cir. 1996). Parents of a person attempting suicide brought suit based on injuries received by their son when he attempted to hang himself and failed. He was left with severe brain injury based on lack of oxygen.

[2] 28 U.S.C. §§ 2671-80, commonly referred to as the Federal Tort Claims Act (FTCA), 60 Stat. 842, *as amended by* Act of July 18, 1966, Pub. L. No. 89-506, 80 Stat. 306; Act of Mar. 16, 1974, Pub. L. No. 93-253, 88 Stat. 50; Act of Dec. 29, 1981, Pub. L. No. 97-124.

[3] 10 U.S.C. § 2733, commonly referred to as the Military Claims Act (MCA), 70A Stat. 153, *as amended by* Acts of Sept. 26, 1968, Pub. L. No. 90-526, 82 Stat. 875; Pub. L. No. 90-526, 82 Stat. 877; Act of July 8, 1974, Pub. L. No. 93-336.

[4] 28 U.S.C. § 1346(b) (1996); DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS, para. 4-4 (1 Aug. 1995). *See also* Smith v. United States, 437 F. Supp. 1004 (E.D. Penn. 1977).

[5] "Under Maine law, as elsewhere, a defendant's negligent conduct is actionable only if it is the legal or proximate cause of harm to another." Clement v. United States, 980 F.2d 48, 533 (1st Cir. 1992).

The first visit is critical because what the hospital knew or should have known about the patient when he or she was first seen can be determinative of liability.[6] What were the circumstances that led to the patient arriving at the HCF? Ask who examined the patient and why. Ask whether that person was a psychiatrist, psychologist, emergency room worker, or nurse. Ask how the patient was referred to the HCF. A patient will generally be referred for evaluation or treatment in one of four ways. Referral will usually be: (1) a self-referral, (2) a referral by another HCF for a psychiatric condition (including contemplating suicide), (3) referral based on another medical complaint (that could have been recognized as contemplating suicide),[7] or (4) an involuntary referral from the military police, a court of competent jurisdiction, or a person authorized to give consent (such as a guardian).

It is important to search for medical records at each place the patient was seen or treated. These records will assist the investigator in determining what was known or should have been known about the patient. Remember that mental health records are routinely kept separate from a patient's operating records. They are held by mental health professionals and must be specifically requested, in writing, with the appropriate release form signed.

After establishing that the patient was seen and the circumstances surrounding the visit, the next area for investigation is whether the patient was admitted or released, and the facts supporting that decision. Once the decision has been made to admit, the inpatient is generally allowed to leave only with the permission of a treating physician, psychiatrist, or nurse. An outpatient voluntarily returning to the HCF is free to leave the facility whenever he or she desires.[8]

If admitted as an inpatient, ask whether the patient was under any additional restrictions and whether he or she was free to move about the HCF. Courts generally hold the HCF to a higher standard if the patient attempts suicide as an inpatient.[9] Even so, circumstances might trigger a lower standard of review, such as when a patient is allowed to leave the HCF at will or on pass. A patient's abuse of privileges unknown to the HCF may be an important factor.[10] The courts are even more reluctant to find a suicide foreseeable when the patient was not an inpatient.[11] This may be true even in what appear to be extreme cases.[12]

What the HCF knew about the patient is critical. At issue is whether this information, if known, would have made a difference to the interviewing psychiatrist, psychologist, or nurse. The

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[6] In *Trapnell v. United States*, 926 F. Supp. 534 (D. Md. 1996), a person committed suicide on the same day he was seen. Though the court did not find liability because he was seen in an outpatient capacity, the result could have been different if the person were an inpatient. The court stated that the general trend of the law is on imposing liability for foreseeable suicides of persons over whom the hospital has custody. The court also noted a trend to rarely impose liability for outpatient suicides.

[7] *See* Frederic v. United States, 246 F. Supp. 368 (D. La. 1965). The United States was found not liable where a veteran threw himself from a window of the VA hospital. In January of 1962, the patient underwent an operation. He was re-admitted in May with stomach a disorder, and a routine psychiatric exam was ordered. He waited two hours and when the doctor did not show, he signed himself out "AMA," against medical advice. He was admitted again on 3 October for stomach and digestive pain. On 13 October he was diagnosed as having some anxiety. On 16 October, he jumped to his death. During his ten-day stay, seven doctors interacted with him and none noted anything more than "a little depressed." The treatment was determined appropriate for this patient. The standard of care was not breached because there were no prior suicide attempts and no basis for removal to a psychiatric suicide ward. Thus, the suicide was not reasonably foreseeable.

[8] In *Dutcher v. United States*, 736 F. Supp 1142 (D.D.C. 1990), the VA hospital did not breach the standard of care required by law when they failed to notify police and the patient's family when the patient left the hospital. The patient was voluntarily admitted and could leave the hospital whenever he desired. However, he had expressed some suicidal intent and suffered from paranoid schizophrenia. No indication of suicide intent or plan was important to the HCFs determination that the patient should not be a restricted inpatient. The patient "checked himself out" of the HCF against medical advice, went home, and shot himself thirty minutes later. The court found for the HCF.

[9] "The Court of Appeals of Maryland has not specifically addressed the liability of a hospital for not admitting a patient who subsequently commits suicide. That court has, however, noted the general trend of the law in imposing liability for foreseeable suicides of persons over whom a hospital has 'custody,' but a corresponding trend to 'rarely impose' liability for outpatient suicides." Trapnell v. United States, 926 F. Supp. 534 (D. Md. 1996). This case involved FTCA claim for a VA physician's failure to hospitalize a patient that committed suicide on the same day he was seen as an outpatient by that physician.

[10] In *Pessagno v. United States*, 751 F. Supp. 149 (S.D. Iowa 1990), a VA hospital was held not liable for a patient's accidental death. Although originally involuntarily admitted twice (once in 1985 and again in 1986), the patient's "progress had advanced to the point where he had obtained ward 'privileges' which allowed him to go to the cafeteria and canteen and move about the hospital grounds unescorted for up to one hour at a time." *Id.* at 150. He was given a pass to go into town. The day before the pass was valid, he left the facility and went into town, where he was struck by a semi-trailer and died.

[11] *Id.*

[12] *See* Gowan v. United States, 601 F. Supp. 1297 (D. Or. 1985). A patient was admitted three times for suicide risk and discharged three times in the same year. His final suicide attempt was five days after his third discharge. He had made three suicidal gestures. He was discharged to live with his mother because during the third inpatient treatment he discovered he could no longer return to his wife's house (divorce was pending). He was evaluated as a suicide risk but he was not considered in imminent jeopardy so he was released to outpatient status. He then attempted to hang himself which caused serious brain damage.

patient's history determines the proper course of treatment and assists the court in evaluating that course of treatment. The earlier the patient's history is reviewed, the better. There may be a history of psychiatric disorder(s). Many of these cases involve paranoid schizophrenics and there may be trends in the patient's life that pointed to suicide.[13] Ironically, however, these trends are usually only well established in a psychiatric post-mortem evaluation.

The HCF begins its evaluation based on the information provided by the patient. However, relying on patient provided information alone is not enough. The HCF has a duty to attempt to verify the information given by the patient. Look to the admission or referral notes of the health care professional that met with the patient. Was this the first visit to an HCF for this type of disorder or had the person been seen before? If the patient has been seen by a health care professional before, the HCF should contact those who previously provided treatment to verify the information given by the patient. Any court will look to determine whether the possibility of a suicide attempt was real and immediate, and, if so, whether the hospital failed to take measures to guard the patient against the suicide attempt.

The manner, the course, and the duration of treatment received are important to investigate. When a course of treatment is suggested and established, it should be followed. Not following a course of treatment or violating internal HCF rules regarding prescribed course of treatment may result in liability.[14]

Check the HCF to determine whether there was a room specifically designated for patients who are a serious risk to themselves or others and whether it should have been used. There should be a hospital protocol describing how to use such a room, or in its absence, whether alternative methods are used, like a 24-hour watch.

The transfer of a patient from one physician to another also calls for a careful review of the prior course of treatment. The court in *Dinnerstein v. United States*[15] found a Department of Veterans Affairs (VA) hospital liable for not recognizing danger signs exhibited by a patient when the patient was transferred from one physician to another. A psychiatrist involuntarily admitted a patient and, after the immediate threat of suicide appeared to have passed, the patient was released. Subsequently, the patient went to the VA hospital and was placed in group therapy. Despite statements by the patient to the VA hospital personnel that he was becoming more and more depressed because of the inadequacy of the group therapy sessions, there were no changes to treatment made by the treating psychiatrist and no consultation with the patient's previous treating psychiatrist (or lack of documentation thereof). The day after the patient explained his feelings to the treating psychiatrist, he went to the seventh floor of the VA hospital and jumped out of an unsecure window to his death.

Psychiatrists can and do prescribe medication for patients. When medications are prescribed to assist the patient in his or her treatment, the potential for liability can exist.[16] The standard required for prescribing medications depends on a variety of factors that relate to the patient. However, the legal standard required for prescribed medications may be as simple as whether the Physician's Desk Reference[17] recommended the type of medication and dosage.[18] It is important to note what medication was prescribed, for what reasons, by whom, and in what amount.

[13] "Schizophrenia is a psychosis that takes place in the presence of a clear sensorium. Frequently, it occurs in young adulthood and those afflicted primarily have disorders of thought content. They have delusional ideas, and they may have disorganized thinking, as well as hallucinations of various types. Paranoid schizophrenia is dominated by paranoia: delusions of persecution, delusions of being influenced by an outside force." Dutcher v. United States, 736 F. Supp. 1142, 1143 (D.D.C. 1990).

[14] In *Smith v. United States*, 437 F. Supp. 1004 (E.D. Pa. 1977), the patient was a veteran who threw himself in front of a train while on unauthorized absence from a VA psychiatric hospital. He was paranoid schizophrenic and had been at various times in his life both an inpatient and an outpatient. He had been diagnosed as impulsive, aggressive, and assaultive. After an aggressive episode, he was placed in a locked ward. Seven days later, despite internal policies, the VA hospital released him from the locked ward, allowed him freedom of movement within hospital grounds, and he escaped. The HCF violated the accepted standard of care in the community at the time, which would have required the patient be free from any impulsive inclinations for two to three weeks before transfer from a locked ward to more open facilities. The HCF also should have conducted a psychiatric evaluation prior to the release of the patient to more open facilities.

[15] 486 F.2d 34 (2d Cir. 1973).

[16] In *Clement v. U.S.*, 980 F.2d 48 (1st Cir. 1992), a veteran killed himself by overdose. He was an outpatient and never expressed any ideation of suicide to any of the doctors that examined him. Unknown to medical authorities, he expressed two suicide gestures to a sibling. The theory of liability was that the abuse of medication was foreseeable. The standard of care was not breached, however, and the court opined that a psychiatrist who prescribes medication for an unconfined patient could be found liable if a fatal overdose could have been anticipated.

[17] The Physician's Desk Reference is a reference created by manufacturers of medications. It lists the type and class of medication, and recommendations for use and potential side effects. Although published by the drug industry, it is an invaluable tool that reflects the results of studies conducted on different drugs and classes of drugs.

[18] *See* Gowan v. United States, 601 F. Supp. 1297 (D. Or. 1985). It was not malpractice to follow the Physician's Desk Reference.

The final area of investigation goes to the issue of foreseeability. The courts will look hard to determine whether the suicide was foreseeable or not. Whether the patient exhibited suicidal tendencies the day of the suicide is important.[19] Look to see how these tendencies were noted. In one case, a patient made two suicide attempts. The first was when he attempted to hang himself in secure confinement, which was noted by a shift worker. The shift worker informed the staff nurse but did not pass the information on to the treating psychiatrist or psychologist. The staff nurse personally noted the information, though not in writing, and never informed anyone else. Two days later, the patient completed his second attempt and the family brought suit.[20]

In conclusion, there is no mathematical or medical certainty to this issue. Psychiatry is both an art and a science. While the psychiatrist, psychologist, or other health care provider must generally rely upon the facts that the patient provides,[21] the courts will look to see whether there were other records available and, if so, whether they were obtained and considered for treatment. Here, as in many cases, the facts determine the outcome. That is why it is so critical to determine what facts were known, when they were known, and by whom. Though this note has not specifically addressed the issue of patients who may be a danger to others, much of the process for evaluation, admission, and treatment would be similar. Major Chandler.[22]

[19] "An injury is reasonably foreseeable when a defendant's negligent conduct 'creates a risk that might reasonably be expected to result in such injury or damage, even though the exact nature of the injury or damage need not, itself, be foreseeable.'" *Clement*, 980 F.2d at 54, *citing* Fowler v. Boise Cascade Corp., 948 F.2d 49, 53 (1st Cir. 1991) and relating its rule to a suicide case.

[20] Dolohite v. Maughon, 74 F.3d 1027 (11th Cir. 1996).

[21] In *Tortuya v. United States*, 1994 WL 519574 (N.D. Cal. 1994), a veteran shot himself with a .22 rifle. The patient was in and out of hospitals for depression and suicidal thoughts, but was always successfully treated with medication. His wife was a nurse and did not notice the looming suicide. The standard of care was not breached because there was no evidence of imminent suicidal behavior. He had acted normally and was to go back to work the next day. Further, medication had resolved the behavior in the past and there was no reason to believe that it would not work again. A psychiatrist's standard of care for treating psychiatric patients on an outpatient basis is set forth in *Bellah v. Greenson*, 81 Cal. App. 3d 614, 146 Cal. Rptr. 535 (1978). "When a patient is under the care of a psychiatrist and the psychiatrist knows that his patient is 'likely to attempt suicide,' the psychiatrist has a duty to take preventative measures." *Id.* "A psychiatrist's duty of care with respect to a patient seen on an outpatient basis is less than his or her duty of care with respect to a hospitalized or institutionalized patient." *Id.*

[22] My thanks to COL Greg Lande, Medical Corps, who provided constructive critique of this note.

# Guard and Reserve Affairs Items

*Guard and Reserve Affairs Division, OTJAG*

## The Judge Advocate General's Reserve Component (On-Site) Continuing Legal Education Program

The following is a current schedule of The Judge Advocate General's Reserve Component (On-Site) Continuing Legal Education Schedule. *Army Regulation 27-1, Judge Advocate Legal Services*, paragraph 10-10a, requires all United States Army Reserve (USAR) judge advocates assigned to Judge Advocate General Service Organization (JAGSO) units or other troop program units to attend On-Site training within their geographic area each year. All other USAR and Army National Guard judge advocates are encouraged to attend On-Site training. Additionally, active duty judge advocates, judge advocates of other services, retired judge advocates, and federal civilian attorneys are cordially invited to attend any On-Site training session. *If you have any questions about this year's continuing legal education program, please contact the local action officer listed below or call Major Juan Rivera, Chief, Unit Liaison and Training Officer, Guard and Reserve Affairs Division, Office of The Judge Advocate General, (804) 972-6380, (800) 552-3978 ext. 380.* Major Rivera.

## 1996-1997 Academic Year On-Site CLE Training

On-Site instruction provides an excellent opportunity to obtain CLE credit as well as updates in various topics of concern to military practitioners. In addition to instruction provided by two professors from The Judge Advocate General's School, United States Army, participants will have the opportunity to obtain career information from the Guard and Reserve Affairs Division, Forces Command, and United States Army Reserve Command. Legal automation instruction provided by the Legal Automation Army-Wide Systems Office (LAAWS) personnel and enlisted training provided by qualified instructors from Fort Jackson will also be available during the On-Sites. Most On-Site locations also supplement these offerings with excellent local instructors or other individuals from within the Department of the Army.

Remember that *Army Regulation 27-1*, paragraph 10-10, requires United States Army Reserve Judge Advocates assigned to JAGSO units or to judge advocate sections organic to other USAR units to attend at least one On-Site conference annually. Individual Mobilization Augmentees, Individual Ready Reserve, Active Army judge advocates, National Guard judge advocates, and Department of Defense civilian attorneys also are strongly encouraged to attend and take advantage of this valuable program.

If you have any questions regarding the On-Site Schedule, contact the local action officer listed below or call the Guard and Reserve Affairs Division at (800) 552-3978, extension 380. You may also contact me on the Internet at *riveraju@otjag.army.mil.* Major Rivera.

## GRA On-Line!

You may contact any member of the GRA team on the Internet at the addresses below.

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Secretary .................................... groganma@otjag.army.mil

# THE JUDGE ADVOCATE GENERAL'S SCHOOL RESERVE COMPONENT (ON-SITE) CONTINUING LEGAL EDUCATION TRAINING SCHEDULE, 1996-1997 ACADEMIC YEAR

| DATE | CITY, HOST UNIT AND TRAINING SITE | AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP | | ACTION OFFICER |
|---|---|---|---|---|
| 4-5 Jan 97 | Long Beach, CA<br>78th MSO<br>Long Beach Renaissance Hotel<br>111 East Ocean Blvd.<br>Long Beach, CA 90802<br>(310) 437-5900 | AC GO<br>RC GO<br>Contract Law<br>Criminal Law<br>GRA Rep | MG K. Gray<br>COL J. DePue<br>MAJ T. Pendolino<br>MAJ S. Henley<br>COL K. Hamack | LTC Andrew Bettwy<br>10541 Calle Lee, Ste 101<br>Los Alamitos, CA 90720<br>(714) 229-3700 |
| 1-2 Feb | Seattle, WA<br>6th MSO<br>University of Washington<br>School of Law, Condon Hall<br>1100 NE Campus Parkway<br>Seattle, WA 22903<br>(206) 543-4500 | AC GO<br>RC GO<br>Criminal Law<br>Int'l-Ops Law<br>GRA Rep | BG W. Huffman<br>COL R. O'Meara<br>LTC L. Morris<br>MAJ S. Morris<br>LTC P. Menk | MAJ Frank Chmelik<br>Chmelik & Associates<br>1500 Railroad Avenue<br>Bellingham, WA 982225<br>(360) 671-1796 |
| 8-9 Feb | Columbus, OH<br>9th MSO<br>Clairon Hotel<br>7007 N High Street<br>Columbus, OH 43085<br>(614) 436-0700 | AC GO<br>RC GO<br>Ad & Civ Law<br>Criminal Law<br>GRA Rep | MG K. Gray<br>COL J. DePue<br>MAJ J. Fenton<br>MAJ N. Allen<br>COL T. Tromey | LTC Timothy J. Donnely<br>9th MSO<br>165 N Yearling Road<br>Whitehall, OH 43213<br>(614) 693-9500 |
| 22-23 Feb | Denver, CO<br>87th MSO | AC GO<br>RC GO<br>Ad & Civ Law<br>Criminal Law<br>GRA Rep | <br>COL J. DePue<br>MAJ S. Castlen<br>MAJ W. Barto<br>COL T. Tromey | LTC David L. Shakes<br>3255 Wade Circle<br>Colorado Springs, CO 80917<br>(719) 596-3326 |
| 22-23 Feb | Indianapolis, IN<br>IN ARNG<br>Indiana National Guard<br>2002 South Holt Road<br>Indianapolis, IN 46241 | AC GO<br>RC GO<br>Ad & Civ Law<br>Int'l-Ops Law<br>GRA Rep | BG W. Huffman<br>COL T. Eres<br>MAJ S. Parke<br>MAJ R. Barfield<br>COL K. Hamack | LTC George Thompson<br>Indiana National Guard<br>2002 South Holt Road<br>Indianapolis, IN 46241<br>(317) 247-3449 |
| 1-2 Mar | Charleston, SC<br>12th LSO | AC GO<br>RC GO<br>Ad & Civ Law<br>Contract Law<br>GRA Rep | BG J. Altenburg<br>COL T. Eres<br>MAJ C. Garcia<br>LTC K. Ellcessor<br>COL K. Hamack | COL Robert S. Carr<br>P.O. Box 835<br>Charleston, SC 29402<br>(803) 727-4523 |
| 8-9 Mar | Washington, DC<br>10th MSO<br>NWC (Arnold Auditorium)<br>Fort Lesley J. McNair<br>Washington, DC 20319 | AC GO<br>RC GO<br>Int'l-Ops Law<br>Criminal Law<br>GRA Rep | BG J. Cooke<br>COL R. O'Meara<br>MAJ M. Newton<br>MAJ C. Pede<br>Dr. M. Foley | CPT Michelle A Lang<br>10th MSO<br>5550 Dower House Road<br>Washington, DC 20315<br>(301) 394-0558/0562 |

# THE JUDGE ADVOCATE GENERAL'S SCHOOL RESERVE COMPONENT (ON-SITE) CONTINUING LEGAL EDUCATION TRAINING SCHEDULE, 1996-1997 ACADEMIC YEAR

| DATE | CITY, HOST UNIT AND TRAINING SITE | AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP | | ACTION OFFICER |
|---|---|---|---|---|
| 15-16 Mar | San Francisco, CA<br>75th LSO | AC GO<br>RC GO<br><br>Criminal Law<br>Contract Law<br>GRA Rep | MG M. Nardotti<br>COLs O'Meara, Eres, & DePue<br>MAJ R. Kohlmann<br>LTC J. Krump<br>COL T. Tromey | LTC Allan D. Hardcastle<br>Babin, Seeger & Hardcastle<br>P.O. Box 11626<br>Santa Rosa, CA 95406<br>(707) 526-7370 |
| 22-23 Mar | Rolling Meadows, IL<br>91st LSO<br>Holiday Inn (Holidome)<br>3405 Algonquin Road<br>Rolling Meadows, IL 60008 | AC GO<br>RC GO<br>Ad & Civ Law<br>Int'l-Ops Law<br>GRA Rep | BG J. Cooke<br>COL R. O'Meara<br>MAJ P. Conrad<br>MAJ M. Mills<br>LTC P. Menk | MAJ Ronald C. Riley<br>P.O. Box 1395<br>Homewood, IL 60430-0395<br>(312) 443-4550 |
| 4-6 Apr | Miami FL<br>174th MSO/FL ARNG<br>Miami Airport Hilton & Towers<br>5101 Blue Lagoon Drive<br>Miami, FL 33126<br>(305)262-1000 | AC GO<br>RC GO<br>Int'l-Ops Law<br>Contract Law<br>GRA Rep | BG J. Altenburg<br>COL R. O'Meara<br>LCDR M. Newcombe<br>MAJ T. Pendolino<br>LTC P. Menk | LTC Henry T. Swann<br>P.O. Box 1008<br>St. Augustine, FL 32085<br>(904) 823-0131 |
| 26-27 Apr | Newport, RI<br>94th RSC<br>Naval Justice School at<br>Naval Education & Tng Ctr<br>360 Eliott Street<br>Newport, RI 02841 | AC GO<br>RC GO<br>Int'l-Ops Law<br>Contract Law<br>GRA Rep | BG J. Cooke<br>COL J. DePue<br>MAJ M. Mills<br>MAJ K. Sommerkamp<br>LTC P. Menk | MAJ Katherine Bigler<br>HQ, 94th RSC<br>ATTN: AFRC-AMA-JA<br>695 Sherman Avenue<br>Fort Devens, MA 01433<br>(508) 796-6332, FAX 2018 |
| 3-4 May | Gulf Shores, AL<br>81st RSC/AL ARNG<br>Gulf St Park Resort Hotel<br>21250 East Beach Blvd.<br>Gulf Shores, AL 36542<br>(334) 948-4853 | AC GO<br>RC GO<br>Criminal Law<br>Contract Law<br>GRA Rep | BG W. Huffman<br>COL T. Eres<br>MAJ D. Wright<br>MAJ W. Meadows<br>Dr. M. Foley | LTC Cary Herin<br>81st RSC<br>255 West Oxmoor Road<br>Birmingham, AL 35209-6383<br>(205) 940-9304 |
| TBD | Des Moines, IA<br>19th TAACOM<br>The Embassy Suites<br>101 E Locust<br>Des Moines, IA 50309<br>(515) 244-1700 | AC GO<br>RC GO<br>Ad & Civ Law<br>Contract Law<br>GRA Rep | TBD<br>COL R. O'Meara<br>MAJ J. Little<br>LTC J. Krump<br>LTC P. Menk | MAJ Patrick J. Reinert<br>P.O. Box 74950<br>Cedar Rapids, IA 52407<br>(319) 363-6333 |

# CLE News

## 1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, United States Army (TJAGSA), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. **If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.**

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are non-unit reservists, through United States Army Personnel Center (ARPERCEN), ATTN: ARPC-ZJA-P, 9700 Page Avenue, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—**181**

Course Name—133d **Contract Attorneys 5F-F10**

Class Number—**133d** Contract Attorneys' Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen showing by-name reservations.

## 2. TJAGSA CLE Course Schedule

**1997**

**January 1997**

7-10 January: USAREUR Tax CLE (5F-F28E).

13-17 January: USAREUR Contract Law CLE (5F-F18E).

19 January-11April: 142d Basic Course (5-2C20).

21-24 January: PACOM Tax CLE (5F-F28P).

22-24 January: 3d RC General Officers Legal Orientation Course (5F-F3).

27-31 January: 26th Operational Law Seminar (5F-F47).

**February 1997**

3-7 February: USAREUR Operational Law CLE (5F-F47).

3-7 February: 140th Senior Officers Legal Orientation Course (5F-F1).

10-14 February: Maxwell AFB Fiscal Law Course (5F-F12A).

10-14 February: 65th Law of War Workshop (5F-F42).

18-21 February: 1st National Security Crimes Course (5F-F30).

24-28 February: 40th Legal Assistance Course (5F-F23).

**March 1997**

3-14 March: 138th Contract Attorneys Course (5F-F10).

17-21 March: 21st Administrative Law for Military InstallationsCourse (5F-F24).

24-28 March: 1st Advanced Contract Law Course (5F-F103).

31 March-4 April: 141st Senior Officers Legal Orientation Course (5F-F1)

**April 1997**

7-18 April: 7th Criminal Law Advocacy Course (5F-F34).

14-17 April: 1997 Reserve Component Judge Advocate Workshop (5F-F56).

21-25 April: 27th Operational Law Seminar (5F-F47).

28 April-2 May: 8th Law for Legal NCOs Course(512-71D/20/30).

28 April-2 May: 47th Fiscal Law Course (5F-F12).

**May 1997**

12-16 May: 48th Fiscal Law Course (5F-F12).

| | |
|---|---|
| 12-30 May: | 40th Military Judges Course (5F-F33). |
| 19-23 May: | 50th Federal Labor Relations Course (5F-F22). |

**June 1997**

| | |
|---|---|
| 2-6 June: | 3d Intelligence Law Workshop (5F-F41). |
| 2-6 June: | 142d Senior Officers Legal Orientation Course (5F-F1). |
| 2 June-11 July: | 4th JA Warrant Officer Basic Course (7A-550A0). |
| 2-13 June: | 2d RC Warrant Officer Basic Course (Phase I) (7A-550A0-RC). |
| 9-13 June: | 27th Staff Judge Advocate Course (5F-F52). |
| 16-27 June: | JAOAC (Phase II) (5F-F55). |
| 16-27 June: | JATT Team Training (5F-F57). |
| 16-27 June: | 2d RC Warrant Officer Basic Course (Phase II) (7A-550A0-RC). |
| 22 June-12 September: | 143d Basic Course (5-27). |
| 30 June-2 July: | 28th Methods of Instruction Course (5F-F70). |

**July 1997**

| | |
|---|---|
| 1-3 July: | Professional Recruiting Training Seminar |
| 7-11 July: | 8th Legal Administrators Course (7A-550A1). |
| 23-25 July: | Career Services Directors Conference |
| 28 July-8 May 1998: | (5-27-C22). 46th Graduate Course (5-27-C22). |
| 28 July- 8 August: | 139th Contract Attorneys Course (5F-F10). |
| 29 July-1 August: | 3d Military Justice Managers Course (5F-F31). |

**August 1997**

| | |
|---|---|
| 4-8 August: | 1st Chief Legal NCO Course (512-71D-CLNCO). |
| 11-15 August: | 8th Senior Legal NCO Management Course (512-71D/40/50). |
| 11-15 August: | 15th Federal Litigation Course (5F-F29). |
| 18-22 August: | 66th Law of War Workshop (5F-F42). |
| 18-22 August: | 143d Senior Officers Legal Orientation Course (5F-F1). |
| 25-29 August: | 28th Operational Law Seminar (5F-F47). |

**September 1997**

| | |
|---|---|
| 3-5 September: | USAREUR Legal Assistance CLE (5F-F23E). |
| 8-10 September: | 3d Procurement Fraud Course (5F-F101). |
| 8-12 September: | USAREUR Administrative Law CLE (5F-F24E). |
| 15-26 September: | 8th Criminal Law Advocacy Course (5F-F34). |

**3. Civilian Sponsored CLE Courses**

**1996**

**December 1996**

| | |
|---|---|
| 6, ICLE | Environmental Law, Atlanta, GA |
| 11, ICLE | 5th Annual ADR Advocacy, Atlanta, GA |
| 12, ICLE | Professionalism, Ethics and Malpractice, Atlanta, GA |
| 13, ICLE | Labor and Employment Law, Atlanta, GA |
| 19, ICLE | Evidentiary Crises, Atlanta, GA |

**1997**

**January 1997**

| | |
|---|---|
| 3-11, VCLE | Sixteenth Institute of Trial Advocacy, Charlottesville, VA |

**For further information on civilian courses in your area, please contact one of the institutions listed below:**

AAJE: American Academy of Judicial Education
1613 15th Street, Suite C
Tuscaloosa, AL 35404
(205) 391-9055

ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS (215) 243-1600

ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990

CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973

CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744 (800) 521-8662.

ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3203
(703) 379-2900

FBA: Federal Bar Association
1815 H Street, NW., Suite 408
Washington, D.C. 20006-3697
(202) 638-0252

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(904) 222-5286

GICLE: The Institute of Continuing Legal Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

GWU: Government Contracts Program
The George Washington University
National Law Center
2020 K Street, N.W., Room 2107
Washington, D.C. 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510 (800) 727-1227.

LSU: Louisiana State University
Center of Continuing Professional Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MICLE: Institute of Continuing Legal Education
1020 Greene Street
Ann Arbor, MI 48109-1444
(313) 764-0533 (800) 922-6516.

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

NCDA: National College of District Attorneys
University of Houston Law Center
4800 Calhoun Street
Houston, TX 77204-6380
(713) 747-NCDA

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(800) 225-6482
(612) 644-0323 in (MN and AK).

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557
(702) 784-6747

NMTLA: New Mexico Trial Lawyers' Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(800) 932-4637 (717) 233-5774

PLI: Practicing Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

UT: The University of Texas School of Law
Office of Continuing Legal Education
727 East 26th Street
Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 22905

**4. Mandatory Continuing Legal Education (MCLE) Jurisdiction and Reporting Dates**

| State | Local Official | CLE Requirements |
|---|---|---|
| Alabama* | Administrative Assistant for Programs<br>AL State Bar<br>415 Dexter Ave.<br>Montgomery, AL 36104<br>(334) 261-6310 | -Twelve hours per year.<br>-Military attorneys are exempt but must declare exemption.<br>-Reporting date: 31 December. |
| Arizona* | Administrator<br>State Bar of AZ<br>111 W. Monroe Ste. 1800 Phoenix, AZ 85003-1742<br>(602) 340-7328 | -Fifteen hours per year; three hours must be in legal ethics.<br>-Reporting date: 15 September. |
| Arkansas* | Director of Professional Programs<br>Supreme Court of AR<br>Justice Building<br>625 Marshall<br>Little Rock, AR 72201<br>(501) 374-1855 | -Twelve hours per year, one hour must be in legal ethics.<br>-Reporting date: 30 June. |
| California* | Director, Office of Certification,<br>The State Bar of CA<br>100 Van Ness Ave.<br>28th Floor<br>San Francisco, CA 94102<br>(415) 241-2117 | -Thirty-six hours over 3 year period. Eight hours must be in legal ethics or law practice management, at least four hours of which must be in legal ethics; one hour must be on prevention, detection and treatment of substance abuse/emotional distress; one hour on elimination of bias in the legal profession.<br>-Full-time U.S. Government employees are exempt from compliance.<br>-Reporting date: 1 February. |
| Colorado* | Executive Director<br>CO Supreme Court<br>Board of CLE & Judicial Education<br>600 17th St., Ste., #520S<br>Denver, CO 80202<br>(303) 893-8094 | -Forty-five hours over three year period; seven hours must be in legal ethics.<br>-Reporting date: Anytime within three-year period. |
| Delaware* | Executive Director<br>Commission on CLE<br>200 W. 9th St., Ste. 330-B<br>Wilmington, DE 19801<br>(302) 658-5856 | -Thirty hours over a two-year period; three hours must be in legal ethics, and a minimum of two hours, and a maximum of six hours, in professionalism.<br>-Reporting date: 31 July. |

| State | Local Official | CLE Requirements |
|---|---|---|
| Florida* | Program Assistant<br>Legal Specialization and Education<br>The FL Bar<br>650 Apalachee Parkway<br>Tallahassee, FL 32399-2300<br>(904) 561-5842 | -Thirty hours over a three year period, two hours must be in legal ethics.<br>-Active duty military attorneys, and out-of-state attorneys are exempt but must declare exemption during reporting period.<br>-Reporting date: Every three years during month designated by the Bar. |
| Georgia* | GA Commission on Continuing Lawyer Competency<br>800 The Hurt Bldg.<br>50 Hurt Plaza<br>Atlanta, GA 30303<br>(404) 527-8715 | -Twelve hours per year, including one hour in legal ethics, one hour professionalism and three hours trial practice.<br>-Out-of-state attorneys exempt.<br>-Reporting date: 31 January |
| Idaho* | Membership Administrator<br>ID State Bar<br>P.O. Box 895<br>Boise, ID 83701-0895<br>(208)334-4500 | -Thirty hours over a three year period; two hours must be in legal ethics.<br>-Reporting date: Every third year determined by year of admission. |
| Indiana* | Executive Director<br>IN Commission for CLE<br>Merchants Plaza, South Tower #1065<br>115 W. Washington St.<br>Indianapolis, IN 46204-3417<br>(317) 232-1943 | -Thirty-six hours over a three year period. (minimum of six hours per year); of which three hours must be legal ethics over three years.<br>-Reporting date: 31 December. |
| Iowa* | Executive Director<br>Commission on Continuing Legal Education<br>State Capitol<br>Des Moines, IA 50319<br>(515) 246-8076 | -Fifteen hours per year; two hours in legal ethics every two years.<br>-Reporting date: 1 March. |
| Kansas* | Executive Director<br>CLE Commission<br>400 S. Kansas Ave., Suite 202<br>Topeka, KS 66603<br>(913) 357-6510 | -Twelve hours per year; two hours must be in legal ethics.<br>Attorneys not practicing in Kansas are exempt.<br>-Reporting date: Thirty days after CLE course. |
| Kentucky* | Director for CLE<br>KY Bar Association<br>514 W. Main St<br>Frankfort, KY 40601-1883<br>(502) 564-3795 | -Twelve and one-half hours per year; two hours must be in legal ethics.<br>-Reporting date: June 30. |
| Louisiana* | MCLE Administrator<br>LA State Bar Association<br>601 St. Charles Ave.<br>New Orleans, LA 70130<br>(504) 566-1600 | -Fifteen hours per year; one hour must be in legal ethics.<br>-Attorneys who reside out-of-state and do not practice in state are exempt.<br>-Reporting date: 31 January. |
| Minnesota* | Director<br>MN State Board of CLE<br>25 Constitution Ave. Ste. 110<br>St. Paul, MN 55155<br>(612) 297-1800 | -Forty-five hours over a three-year period.<br>-Reporting date: 30 August. |
| Mississippi* | CLE Administrator<br>MS Commission on CLE<br>P.O. Box 369<br>Jackson, MS 39205-0369<br>(601) 354-6056 | -Twelve hours per year; one hour must be in legal ethics, professional responsibility, or malpractice prevention.<br>-Military attorneys are exempt, but must declare exemption.<br>-Reporting date: 31 July. |
| Missouri* | Director of Programs<br>P.O. Box 119<br>326 Monroe<br>Jefferson City, MO 65102<br>(573) 635-4128 | -Fifteen hours per year; three hours must be in legal ethics every three years.<br>-Attorneys practicing out-of-state are ex-e empt but must claim exemption.<br>-Reporting date: Report period is 1 July - 30 June. Report must be filed by 31 July. |

| State | Local Official | CLE Requirements |
|---|---|---|
| Montana* | MCLE Administrator<br>MT Board of CLE<br>P.O. Box 577<br>Helena, MT 59624<br>(406) 442-7660, ext. 5 | -Fifteen hours per year.<br>-Reporting date:<br>1 March |
| Nevada* | Executive Director<br>Board of CLE<br>295 Holcomb Ave., Ste. 2<br>Reno, NV 89502<br>(702) 329-4443 | -Twelve hours per year; two hours must be in legal ethics and professional conduct.<br>-Reporting date:<br>1 March. |
| New Hampshire* | Assistant to the NH MCLE Board<br>112 Pleasant St.<br>Concord, NH 03301<br>(603) 224-6942 | -Twelve hours per year; two hours must be in ethics, professionalism, substance abuse, prevention of malpractice or attorney-client disputes; six must come from attendance at live programs out of the office, as a student.<br>-Reporting date:<br>Report period is 1 July - 30 June. Report must be filed by 31 July. |
| New Mexico* | MCLE Administrator<br>P.O. Box 25883<br>Albuquerque, NM 87125<br>(505) 842-6132 | -Fifteen hours per year; one hour must be in legal ethics.<br>-Reporting date:<br>31 March. |
| North Carolina* | Associate Director<br>Board of CLE<br>208 Fayetteville Street Mall<br>P.O. Box 26148<br>Raleigh, NC 27611<br>(919) 733-0123 | -Twelve hours per year; two hours must be in legal ethics; Special three hours (minimum) ethics course every three years; nine of twelve hours per year in practical skills during first three years of admission.<br>-Active duty military attorneys and out-of-state attorneys are exempt, but must declare exemption.<br>-Reporting date:<br>28 February. |
| North Dakota* | Secretary-Treasurer<br>ND CLE Commission<br>P.O. Box 2136<br>Bismarck, ND 58502<br>(701) 255-1404 | -Forty-five hours over three year period; three hours must be in legal ethics.<br>-Reporting date:<br>Reporting period is 1 July - 30 June. Report must be filed by 31 July. |
| Ohio* | Secretary of the Supreme Court<br>Commission on CLE<br>30 E. Broad St.<br>Second Floor<br>Columbus, OH 43266-0419<br>(614) 644-5470 | -Twenty-four hours over two year period; two hours must be in legal ethics and substance abuse.<br>-Active duty military attorneys are exempt.<br>-Reporting date:<br>every two years by 31 January. |
| Oklahoma* | MCLE Administrato<br>OK State Bar<br>P.O. Box 53036<br>Oklahoma City, OK 73152<br>(405) 524-2365 | -Twelve hours per year; one hour must be in legal ethics.<br>-Active duty military attorneys are exempt, but must declare exemption.<br>-Reporting date:<br>15 February. |
| Oregon* | MCLE Administrator<br>OR State Bar<br>5200 SW Meadows Rd.<br>P.O. Box 1689<br>Lake Oswego, OR 97035-0889<br>(503) 620-0222, ext. 368 | -Forty-five hours over three year period; six hours must be in legal ethics.<br>-Reporting date:<br>Every three years from admission; new members must report after first year. |
| Pennsylvania | Administrator<br>PA CLE Board<br>5035 Ritter Rd., Ste. 500<br>P.O. Box 869<br>Mechanicsburg, PA 17055<br>(717) 795-2139 | -Twelve hours per year, one hour must be in legal ethics, professionalism, or substance abuse.<br>-Active duty military attorneys outside the state of PA defer their requirement, but must declare their exemption.<br>-Reporting date:<br>annual deadlines:<br>Group 1-30 Apr<br>Group 2-31 Aug<br>Group 3-31 Dec |

| State | Local Official | CLE Requirements |
|---|---|---|
| Rhode Island* | Executive Director MCLE Commission 250 Benefit St. Providence, RI 02903 (401) 277-4942 | -Ten hours each year; two hours must be in legal ethics. -Active duty military attorneys are exempt, but must declare their exemption. -Reporting date: 30 June. |
| South Carolina* | Executive Director Commission on CLE and Specialization P.O. Box 2138 Columbia, SC 29202 (803) 799-5578 | -Fourteen hours per year; two hours must be in legal ethics/ professional responsibility. -Active duty military attorneys are exempt, but must declare exemption. -Reporting date: 15 January. |
| Tennessee* | Executive Director TN Commission on CLE and Specialization 511 Union St. #1630 Nashville, TN 37219 (615) 741-3096 | -Fifteen hours per year; three hours must be in legal ethics /professionalism. -Nonresidents, not practicing in the state, are exempt. -Reporting date: 1 March. |
| Texas* | Director of MCLE State Bar of TX P.O. Box 13007 Austin, TX 78711-3007 (512) 463-1463, ext. 2106 | -Fifteen hours per year; three hours must be in legal ethics. -Full-time law school faculty are exempt. -Reporting date: Last day of birth month each year. |
| Utah* | MCLE Board Administrator UT Law and Justice Center 645 S. 200 East, Ste. 312 Salt Lake City, UT 84111-3834 (801) 531-9095 | -Twenty-four hours, plus three hours in legal ethics per two year period. -Reporting date: 31 December (end of assigned two-year compliance period. |
| Vermont* | Directors, MCLE Board 109 State St. Montpelier, VT 05609-0702 (802) 828-3281 | -Twenty hours over two year period. -Reporting date: 15 July. |
| Virginia* | Director of MCLE VA State Bar 8th and Main Bldg. 707 E. Main St., Ste. 1500 Richmond, VA 23219 (804) 775-0578 | -Twelve hours per year; two hours must be in legal ethics. -Reporting date: 30 June. |
| Washington* | Executive Secretary WA State Board of CLE 500 Westin Bldg. 2001 6th Ave. Seattle, WA 98121-2599 (206) 727-8202 | -Forty-five hours over a three-year period. -Reporting date: 31 January. |
| West Virginia* | Mandatory CLE Coordinator MCLE Coordinator WV State MCLE Commission 2006 Kanawha Blvd., East Charleston, WV 25311-2204 (304) 558-7992 | -Twenty-four hours over two year period; three hours must be in legal ethics and/or office management. -Active members not practicing in West Virginia are exempt. -Reporting date: Reporting period ends on 30 June every two years. Report must be filed by 31 July. |
| Wisconsin* | Director, Board of Bar Examiners 119 Martin Luther King, Jr., Blvd. Room 405 Madison, WI 53703-3355 (608) 266-9760 | -Thirty hours over two year period; three hours must be in legal ethics. -Active members not practicing in Wisconsin are exempt. -Reporting date: Reporting period ends 31 December every two years. Report must be filed by 1 February. |
| Wyoming* | CLE Program Analyst WY State Board of CLE WY State Bar P.O. Box 109 Cheyenne, WY 82003-0109 (307) 632-9061 | Fifteen hours per-year -Reporting date: 30 January. |

**1. TJAGSA Materials Available Through the Defense Technical Information Center**

Each year The Judge Advocate General's School publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas. The School receives many requests each year for these materials. Because the distribution of these materials is not in the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100 or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms for registration as a user may be requested from: Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218, telephone: commercial (703) 767-9087, DSN 427-9087.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer.* The following TJAGSA publications are available through DTIC. The nine-character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications. These publications are for government use only.

**Contract Law**

AD A301096 Government Contract Law Deskbook, vol. 1, JA-501-1-95 (631 pgs).

AD A301095 Government Contract Law Deskbook, vol. 2, JA-501-2-95 (503 pgs).

AD A265777 Fiscal Law Course Deskbook, JA-506-93(471 pgs).

**Legal Assistance**

AD B092128 USAREUR Legal Assistance Handbook, JAGS-ADA-85-5 (315 pgs).

AD A263082 Real Property Guide—Legal Assistance, JA-261-93 (293 pgs).

AD A305239 Uniformed Services Worldwide Legal Assistance Directory, JA-267-96 (80 pgs).

AD B164534 Notarial Guide, JA-268-92 (136 pgs).

*AD313675 Uniformed Services Former Spouses' Protection Act,JA 274-96 (144 pgs).

AD A282033 Preventive Law, JA-276-94 (221 pgs).

AD A303938 Soldiers' and Sailors' Civil Relief Act Guide, JA-260-96 (172 pgs).

AD A297426 Wills Guide, JA-262-95 (517 pgs).

*AD A308640 Family Law Guide, JA 263-96 (544 pgs).

AD A280725 Office Administration Guide, JA 271-94 (248 pgs).

AD A283734 Consumer Law Guide, JA 265-94 (613 pgs).

AD A289411 Tax Information Series, JA 269-95 (134 pgs).

AD A276984 Deployment Guide, JA-272-94 (452 pgs).

AD A275507 Air Force All States Income Tax Guide, April 1995.

**Administrative and Civil Law**

*AD A310157 Federal Tort Claims Act, JA 241-96 (118 pgs).

AD A301061 Environmental Law Deskbook, JA-234-95 (268 pgs).

AD A311351 Defensive Federal Litigation, JA-200-95 (846 pgs).

AD A255346 Reports of Survey and Line of Duty Determinations, JA-231-92 (89 pgs).

AD A311070 Government Information Practices, JA-235-95 (326 pgs).

AD A259047 AR 15-6 Investigations, JA-281-92 (45 pgs).

**Labor Law**

AD A308341 The Law of Federal Employment, JA-210-96 (330 pgs).

AD A308754 The Law of Federal Labor-Management Relations, JA 11-96 (330 pgs).

**Developments, Doctrine, and Literature**

AD A254610 Military Citation, Fifth Edition, JAGS-DD-92 (18 pgs).

**Criminal Law**

AD A302674 Crimes and Defenses Deskbook, JA-337-94 (297 pgs).

AD A302672 Unauthorized Absences Programmed Text, JA-301-95 (80 pgs).

AD A302445 Nonjudicial Punishment, JA-330-93 (40 pgs).

AD 302312 Senior Officers Legal Orientation, JA-320-95 (297 pgs).

AD A274407 Trial Counsel and Defense Counsel Handbook, JA-310-95 (390 pgs).

AD A274413 United States Attorney Prosecutions, JA-338-93 (194 pgs).

**International and Operational Law**

AD A284967 Operational Law Handbook, JA-422-95 (458 pgs).

**Reserve Affairs**

AD B136361 Reserve Component JAGC Personnel Policies Handbook, JAGS-GRA-89-1 (188 pgs).

**The following United States Army Criminal Investigation Division Command publication also is available through DTIC:**

AD A145966 Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations, USACIDC Pam 195-8 (250 pgs).

* Indicates new publication or revised edition.

**2. Regulations and Pamphlets**

a. *The following provides information on how to obtain* Manuals for Courts-Martial, DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.

(1) The United States Army Publications Distribution Center (USAPDC) at St. Louis, Missouri, stocks and distributes Department of the Army publications and blank forms that have Army-wide use. Contact the USAPDC at the following address:

Commander
U.S. Army Publications
Distribution Center
1655 Woodson Road
St. Louis, MO 63114-6181
Telephone (314) 263-7305, ext. 268

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program*, paragraph 12-7c (28 February 1989), is provided to assist Active, Reserve, and National Guard units.

b. The units below are authorized publications accounts with the USAPDC.

(*1*) *Active Army.*

(a) *Units organized under a Personnel and Administrative Center (PAC).* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their Deputy Chief of Staff for Information Management (DCSIM) or DOIM (Director of Information Management), as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in *DA Pam 25-33, The Standard Army Publications (STARPUBS) Revision of the DA 12-Series Forms, Usage and Procedures (1 June 1988).*

(*b*) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their DCSIM or DOIM, as appropriate, to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(c) *Staff sections of Field Operating Agencies (FOAs), Major Commands (MACOMs), installations, and combat divi-*

*sions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (*b*) above.

(2) *Army Reserve National Guard (ARNG) units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 through their State adjutants general to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(3) *United States Army Reserve (USAR) units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and CONUSA to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

(4) *Reserve Officer Training Corps (ROTC) Elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA Form 12-99 forms through their supporting installation and Training and Doctrine Command (TRADOC) DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the St. Louis USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

Units not described above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-LM, Alexandria, VA 22331-0302.

c. Specific instructions for establishing initial distribution requirements appear in *DA Pam 25-33.*

**If your unit does not have a copy of *DA Pam 25-33*, you may request one by calling the St. Louis USAPDC at (314) 263-7305, extension 268.**

(*1*) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(*2*) Units that require publications that are not on their initial distribution list can requisition publications using the Defense Data Network (DDN), the Telephone Order Publications System (TOPS), the World Wide Web (WWW), or the Bulletin Board Services (BBS).

(*3*) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161. You may reach this office at (703) 487-4684 or 1-800-553-6487.

(*4*) Air Force, Navy, and Marine Corps judge advocates can request up to ten copies of *DA Pams* by writing to USAPDC, 1655 Woodson Road, St. Louis, MO 63114-6181.

**3. The Legal Automation Army-Wide Systems Bulletin Board Service**

a. The Legal Automation Army-Wide Systems (LAAWS) operates an electronic on-line information service (often referred to as a BBS, Bulletin Board Service) primarily dedicated to serving the Army legal community for Army access to the LAAWS On-Line Information Service, while also providing Department of Defense (DOD) wide access. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available on the LAAWS BBS.

b. Access to the LAAWS BBS:

(1) Access to the LAAWS On-Line Information Service (OIS) is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5772, or DSN 656-5772 or by using the Internet Protocol address 160.147.194.11 or Domain Names jagc.army.mil):

(a) Active Army, Reserve, or National Guard (NG) judge advocates,

(b) Active, Reserve, or NG Army Legal Administrators and enlisted personnel (MOS 71D);

(c) Civilian attorneys employed by the Department of the Army,

(d) Civilian legal support staff employed by the Army Judge Advocate General's Corps;

(e) Attorneys (military or civilian) employed by certain supported DOD agencies (e.g., DLA, CHAMPUS, DISA, Headquarters Services Washington),

(f) All DOD personnel dealing with military legal issues;

(g) Individuals with approved, written exceptions to the access policy.

(2) Requests for exceptions to the access policy should be submitted to:

LAAWS Project Office
ATTN: Sysop
9016 Black Rd., Ste. 102
Fort Belvoir, VA 22060

c. Telecommunications setups are as follows:

(1) The telecommunications configuration for terminal mode is: 1200 to 28,800 baud; parity none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100/102 or ANSI terminal emulation. Terminal mode is a text mode which is seen in any communications application other than World Group Manager.

(2) The telecommunications configuration for World Group Manager is:

Modem setup: 1200 to 28,800 baud
(9600 or more recommended)

Novell LAN setup: Server = LAAWSBBS
(Available in NCR only)

TELNET setup: Host = 134.11.74.3
(PC must have Internet capability)

(3) The telecommunications for TELNET/Internet access for users not using World Group Manager is:

IP Address = 160.147.194.11

Host Name = jagc.army.mil

After signing on, the system greets the user with an opening menu. Users need only choose menu options to access and download desired publications. The system will require new users to answer a series of questions which are required for daily use and statistics of the LAAWS OIS. Once users have completed the initial questionnaire, they are required to answer one of two questionnaires to upgrade their access levels. There is one for attorneys and one for legal support staff. Once these questionnaires are fully completed, the user's access is immediately increased. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS OIS.

d. *Instructions for Downloading Files from the LAAWS OIS.*

(*1*) Terminal Users

(a) Log onto the LAAWS OIS using Procomm Plus, Enable, or some other communications application with the communications configuration outlined in paragraph c1 or c3.

(b) If you have never downloaded before, you will need the file decompression utility program that the LAAWS OIS uses to facilitate rapid transfer over the phone lines. This program is known as PKUNZIP. To download it onto your hard drive take the following actions:

(*1*) From the Main (Top) menu, choose "L" for File Libraries. Press Enter.

(*2*) Choose "S" to select a library. Hit Enter.

(*3*) Type "NEWUSERS" to select the NEWUSERS file library. Press Enter.

(*4*) Choose "F" to find the file you are looking for. Press Enter.

(*5*) Choose "F" to sort by file name. Press Enter.

(*6*) Press Enter to start at the beginning of the list, and Enter again to search the current (NEWUSER) library.

(*7*) Scroll down the list until the file you want to download is highlighted (in this case PKZ110.EXE) or press the letter to the left of the file name. If your file is not on the screen, press Control and N together and release them to see the next screen.

(*8*) Once your file is highlighted, press Control and D together to download the highlighted file.

(*9*) You will be given a chance to choose the download protocol. If you are using a 2400 - 4800 baud modem, choose option "1". If you are using a 9600 baud or faster modem, you may choose "Z" for ZMODEM. Your software may not have ZMODEM available to it. If not, you can use YMODEM. If no other options work for you, XMODEM is your last hope.

(*10*) The next step will depend on your software. If you are using a DOS version of Procomm, you will hit the "Page Down" key, then select the protocol again, followed by a file name. Other software varies.

(*11*) Once you have completed all the necessary steps to download, your computer and the BBS take over until the file is on your hard disk. Once the transfer is complete, the software will let you know in its own special way.

(2) Client Server Users.

(a) Log onto the BBS.

(b) Click on the "Files" button.

(c) Click on the button with the picture of the diskettes and a magnifying glass.

(d) You will get a screen to set up the options by which you may scan the file libraries.

(e) Press the "Clear" button.

(f) Scroll down the list of libraries until you see the NEWUSERS library.

(g) Click in the box next to the NEWUSERS library. An "X" should appear.

(h) Click on the "List Files" button.

(i) When the list of files appears, highlight the file you are looking for (in this case PKZ110.EXE).

(j) Click on the "Download" button.

(k) Choose the directory you want the file to be transferred to by clicking on it in the window with the list of directories (this works the same as any other Windows application). Then select "Download Now."

(l) From here your computer takes over.

(m) You can continue working in World Group while the file downloads.

(3) Follow the above list of directions to download any files from the OIS, substituting the appropriate file name where applicable.

e. To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and change into the directory where you downloaded PKZ110.EXE. Then type PKZ110. The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression or decompression utilities used by the LAAWS OIS. You will need to move or copy these files into the DOS directory if you want to use them anywhere outside of the directory you are currently in (unless that happens to be the DOS directory or root directory). Once you have decompressed the PKZ110 file, you can use PKUNZIP by typing PKUNZIP <filename> at the C:\> prompt.

**4. TJAGSA Publications Available Through the LAAWS BBS**

The following is a current list of TJAGSA publications available for downloading from the LAAWS BBS (Note that the date UPLOADED is the month and year the file was made available on the BBS; publication date is available within each publication):

| FILE NAME | UPLOADED | DESCRIPTION |
|---|---|---|
| RESOURCE.ZIP | May 1996 | A Listing of Legal Assistance Resources, May 1996. |
| ALLSTATE.ZIP | January 1996 | 1995 AF All States Income Tax Guide for use with 1994 state income tax returns, April 1996. |
| ALAW.ZIP | June 1990 | *The Army Lawyer/Military Law Review* Database ENABLE 2.15. Updated through the 1989 *The Army Lawyer* Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF. |
| BULLETIN.ZIP | July 1996 | Current list of educational television programs maintained in the video information library at TJAGSA of actual classroom instructions presented at the school in Word 6.0, June 1996. |
| CHILDSPT.ASC | February 1996 | A Guide to Child Support Enforcement Against Military Personnel, February 1996. |
| CHILDSPT.WP5 | February 1996 | A Guide to Child Support Enforcement Against Military Personnel, February 1996. |
| DEPLOY.EXE | March 1995 | Deployment Guide Excerpts. Documents were created in Word Perfect 5.0 and zipped into executable file. |
| FTCA.ZIP | January 1996 | Federal Tort Claims Act, August 1995. |
| FOIA1.ZIP | January 1996 | Freedom of Information Act Guide and Privacy Act Overview, September 1995. |
| FOIA2.ZIP | January 1996 | Freedom of Information Act Guide and Privacy Act Overview, September 1995. |
| FSO 201.ZIP | October 1992 | Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB. |
| JA200.ZIP | January 1996 | Defensive Federal Litigation, August 1995. |
| JA210DOC.ZIP | May 1996 | Law of Federal Employment, May 1996. |
| JA211DOC.ZIP | May 1996 | Law of Federal Labor-Management Relations, May 1996. |
| JA231.ZIP | January 1996 | Reports of Survey and Line of Duty Determinations—Programmed Instruction, September 1992 in ASCII text. |

| FILE NAME | UPLOADED | DESCRIPTION |
| --- | --- | --- |
| JA234.ZIP | January 1996 | Environmental Law Deskbook, Volumes I and II, September 1995. |
| JA235.ZIP | January 1996 | Government Information Practices Federal Tort Claims Act, August 1995. |
| JA241.ZIP | January 1996 | Federal Tort Claims Act, August 1994. |
| JA260.ZIP | August 1996 | Soldiers' & Sailors' Civil Relief Act Guide, January 1996. |
| JA261.ZIP | October 1993 | Legal Assistance Real Property Guide, March 1993. |
| JA262.ZIP | January 1996 | Legal Assistance Wills Guide, June 1995. |
| JA263.ZIP | August 1996 | Family Law Guide, August 1996 |
| JA265A.ZIP | January 1996 | Legal Assistance Con sumer Law Guide—Part I, June 1994. |
| JA265B.ZIP | January 1996 | Legal Assistance Deploy ment Guide, February 1994. |
| JA274.ZIP | August 1996 | Uniformed Services Former Spouses Protec tion Act Outline and References, June 1996. |
| JA275.ZIP | August 1993 | Model Tax Assistance Program, August 1993. |
| JA276.ZIP | January 1996 | Preventive Law Series, December 1992. |
| JA281.ZIP | January 1996 | 15-6 Investigations, November 1992 in ASCII text. |
| JA301.ZIP | January 1996 | Unauthorized Absences Programmed Text, August 1995. |
| JA310.ZIP | January 1996 | Trial Counsel and Defense Counsel Handbook, May 1995. |
| JA320.ZIP | January 1996 | Senior Officer's Legal Orientation Text, Novem- ber 1995. |
| JA330.ZIP | January 1996 | Nonjudicial Punishment Programmed Text, August 1995. |
| JA337.ZIP | January 1996 | Crimes and Defenses Deskbook, July 1994. |
| JA422.ZIP | May 1996 | OpLaw Handbook, June 1996. |
| JA501-1.ZIP | March 1996 | TJAGSA Contract Law Deskbook Volume 1, March 1996. |
| JA501-2.ZIP | March 1996 | TJAGSA Contract Law Deskbook, Volume 2, March 1996. Volume 3, March 1996. |
| JA501-4.ZIP | March 1996 | TJAGSA Contract Law Deskbook, Volume 4, March 1996. |
| JA501-5.ZIP | March 1996 | TJAGSA Contract Law Deskbook,Volume 5, March 1996. |
| JA501-6.ZIP | March 1996 | TJAGSA Contract Law Deskbook, Volume 6, March 1996. |
| JA501-7.ZIP | March 1996 | TJAGSA Contract Law Deskbook, Volume 7, March 1996. |
| JA501-8.ZIP | March 1996 | TJAGSA Contract Law Deskbook, Volume 8, March 1996. |
| JA501-9.ZIP | March 1996 | TJAGSA Contract Law Deskbook, Volume 9, March 1996. |
| JA506.ZIP | January 1996 | Fiscal Law Course Deskbook, May 1996. |
| JA508-1.ZIP | January 1996 | Government Materiel Acquisition Course Deskbook, Part 1, 1994. |
| JA508-2.ZIP | January 1996 | Government Materiel Acquisition Course Deskbook, Part 2, 1994. |
| JA508-3.ZIP | January 1996 | Government Materiel Acquisition Course Deskbook, Part 3, 1994. |

| FILE NAME | UPLOADED | DESCRIPTION |
| --- | --- | --- |
| 1JA509-1.ZIP | January 1996 | Federal Court and Board Litigation Course, Part 1, 1994. |
| 1JA509-2.ZIP | January 1996 | Federal Court and Board Litigation Course, Part 2, 1994. |
| 1JA509-3.ZIP | January 1996 | Federal Court and Board Litigation Course, Part 3, 1994. |
| 1JA509-4.ZIP | January 1996 | Federal Court and Board Litigation Course, Part 4, 1994. |
| 1PFC-1.ZIP | January 1996 | Procurement Fraud Course, March 1995. |
| 1PFC-2.ZIP | January 1996 | Procurement Fraud Course, March 1995. |
| 1PFC-3.ZIP | January 1996 | Procurement Fraud Course, March 1995. |
| JA509-1.ZIP | January 1996 | Contract, Claim, Litigation and Remedies Course Deskbook, Part 1, 1993. |
| JA509-2.ZIP | January 1996 | Contract Claims, Litigation, and Remedies Course Deskbook, Part 2, 1993. |
| JA510-1.ZIP | January 1996 | Sixth Installation Contracting Course, May 1995. |
| JA510-2.ZIP | January 1996 | Sixth Installation Contracting Course, May 1995. |
| JA510-3.ZIP | January 1996 | Sixth Installation Contracting Course, May 1995. |
| JAGBKPT1.ASC | January 1996 | JAG Book, Part 1, November 1994. |
| JAGBKPT2.ASC | January 1996 | JAG Book, Part 2, November 1994. |
| JAGBKPT3.ASC | January 1996 | JAG Book, Part 3, November 1994. |
| JAGBKPT4.ASC | January 1996 | JAG Book, Part 4, November 1994. |
| OPLAW95.ZIP | January 1996 | Operational Law Deskbook 1995. |
| YIR93-1.ZIP | January 1996 | Contract Law Division 1993 Year in Review, Part 1, 1994 Symposium. |
| YIR93-2.ZIP | January 1996 | Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium. |
| YIR93-3.ZIP | January 1996 | Contract Law Division 1993 Year in Review, Part 3, 1994 Symposium. |
| YIR93-4.ZIP | January 1996 | Contract Law Division 1993 Year in Review, Part 4, 1994 Symposium. |
| YIR93.ZIP | January 1996 | Contract Law Division 1993 Year in Review Text, 1994 Symposium. |
| YIR94-1.ZIP | January 1996 | Contract Law Division 1994 Year in Review, Part 1, 1995 Symposium. |
| YIR94-2.ZIP | January 1996 | Contract Law Division 1994 Year in Review, Part 2, 1995 Symposium. |
| YIR94-3.ZIP | January 1996 | Contract Law Division 1994 Year in Review, Part 3, 1995 Symposium. |
| YIR94-4.ZIP | January 1996 | Contract Law Division 1994 Year in Review, Part 4, 1995 Symposium. |
| YIR94-5.ZIP | January 1996 | Contract Law Division 1994 Year in Review, Part 5, 1995 Symposium. |
| YIR94-6.ZIP | January 1996 | Contract Law Division 1994 Year in Review, Part 6, 1995 Symposium. |
| YIR94-7.ZIP | January 1996 | Contract Law Division 1994 Year in Review, Part 7, 1995 Symposium. |
| YIR94-8.ZIP | January 1996 | Contract Law Division 1994 Year in Review, Part 8, 1995 Symposium. |
| YIR95ASC.ZIP | January 1996 | Contract Law Division 1995 Year in Review. |
| YIR95WP5.ZIP | January 1996 | Contract Law Division 1995 Year in Review. |

Reserve and National Guard organizations without organic computer telecommunications capabilities and individual mobilization augmentees (IMA) having bona fide military needs for these publications may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law, Criminal Law, Contract Law, International and Operational Law, or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, VA 22903-1781.

Requests must be accompanied by one 5 ¼ inch or 3 ½ inch blank, formatted diskette for each file. Additionally, requests from IMAs must contain a statement verifying the need for the requested publications (purposes related to their military practice of law).

Questions or suggestions on the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, SGT James Stewart, Commercial (703) 806-5764, DSN 656-5764, or at the following address:

LAAWS Project Office
ATTN: LAAWS BBS SYSOPS
9016 Black Rd, Ste 102
Fort Belvoir, VA 22060-6208

**5. *The Army Lawyer* on the LAAWS BBS**

*The Army Lawyer* is available on the LAAWS BBS. You may access this monthly publication as follows:

a. To access the LAAWS BBS, follow the instructions above in paragraph 3. The following instructions are based on the MicroSoft Windows environment.

(1) Access the LAAWS BBS "Main System Menu" window.

(2) Double click on "Files" button.

(3) At the "Files Libraries" window, click on "File" button (the button with icon of 3" diskettes and magnifying glass).

(4) At the "Find Files" window, click on "Clear," then highlight "Army_Law" (an "X" appears in the box next to "Army_Law"). To see the files in the "Army_Law" library, click on "List Files."

(5) At the "File Listing" window, select one of the files by highlighting the file.

a. Files with an extension of "ZIP" require you to download additional "PK" application files to compress and decompress the subject file, the "ZIP" extension file, before you read it through your word processing application. To download the "PK" files, scroll down the file list to where you see the following:

PKUNZIP.EXE

PKZIP110.EXE

PKZIP.EXE

PKZIPFIX.EXE

b. For each of the "PK" files, execute your download task (follow the instructions on your screen and download each "PK" file into the same directory. *NOTE: All "PK" files and "ZIP" extension files must reside in the same directory after downloading.* For example, if you intend to use a WordPerfect word processing application, select "c:\wp60\wpdocs\ArmyLaw.art" and download all of the "PK" files and the "ZIP" file you have selected. You do not have to download the "PK" each time you download a "ZIP" file, but remember to maintain all "PK" files in one directory. You may reuse them for another downloading if you have them in the same directory.

(6) Click on "Download Now" and wait until the Download Manager icon disappears.

(7) Close out your session on the LAAWS BBS and go to the directory where you downloaded the file by going to the "c:\" prompt.

For example: c:\wp60\wpdocs

Remember: The "PK" files and the "ZIP" extension file(s) must be in the same directory!

(8) Type "dir/w/p" and your files will appear from that directory.

(9) Select a "ZIP" file (to be "unzipped") and type the following at the c:\ prompt:

PKUNZIP APR96.ZIP

At this point, the system will explode the zipped files and they are ready to be retrieved through the Program Manager (your word processing application).

b. Go to the word processing application you are using (WordPerfect, MicroSoft Word, Enable). Using the retrieval process, retrieve the document and convert it from ASCII Text (Standard) to the application of choice (WordPerfect, MicroSoft Word, Enable).

c. Voila! There is your *The Army Lawyer* file.

d. Above in paragraph 3, *Instructions for Downloading Files from the LAAWS OIS* (section d(1) and (2)), are the instructions for both Terminal Users (Procomm, Procomm Plus, Enable, or

some other communications application) and Client Server Users (World Group Manager).

e. Direct written questions or suggestions about these instructions to The Judge Advocate General's School, Literature and Publications Office, ATTN: DDL, Mr. Charles J. Strong, Charlottesville, VA 22903-1781. For additional assistance, contact Mr. Strong, commercial (804) 972-6396, DSN 934-7115, extension 396.

## 6. Articles

The following information may be useful to judge advocates:

Paul Marcus, *Presentin, Back from the [Almost] Dead, The Entrapment Defense*, 47 FLA. L. REV. 205 (1995).

## 7. TJAGSA Information Management Items

a. The TJAGSA Local Area Network (LAN) is now part of the OTJAG Wide Area Network (WAN). The faculty and staff are now accessible from the MILNET and the internet. Addresses for TJAGSA personnel are available by e-mail at tjagsa@otjag.army.mil.

b. Personnel desiring to call TJAGSA via DSN should dial 934-7115. The receptionist will connect you with the appropriate department or directorate. The Judge Advocate General's School also has a toll free number: 1-800-552-3978 [Lieutenant Colonel Godwin (ext. 435)].

## 8. The Army Law Library Service

a. With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures.

b. Law librarians having resources available for redistribution should contact Ms. Nelda Lull, JAGS-DDL, The Judge Advocate General's School, United States Army, 600 Massie Road, Charlottesville, VA 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.

c. The following materials have been declared excess and are available for redistribution. Please contact the library directly at the address provided below:

U.S. Army Missile Command
ATTN: AMSMI-GC-PO
Redstone Arsenal, Alabama 35898
POC Doris Lilliard
COM (205) 876-2252
DSN 746-2252
FAX (205) 876-9438

* Code of Alabama 1975, Volume 1 thru 24 (31 vols.)

* Shepard's Military Justice Citations, 1985

* Shepard's Southern Reporter Citations Volumes 1, 2, 2A, 3, 4, 5, 5A, 6, 6A, 7, 7A, 8, 8A, 9, 9A, 10, 11, 11A, 12, 12A, 13, 14, 15, 15A, 16, 16A, 17, 18, 19, 20, Index (2 sets) (62 vols.)

*United States Law Week, looseleaf, 1 July 58 thru 30 June 89 (58 vols.)

U.S. Army Southern European Task Force
ATTN: AESE-JAO
Unit # 31401, Box 7
POC SSG Darrell Wade
DSN 634-7607

## 9. Miscellaneous

*Soldiers Magazine* tells the Army's story to the soldiers, Department of the Army Civilians, retirees, their families, the media, and the American public. *Soldiers* needs the help of commanders, noncommissioned officers, and public affairs officers at all levels to ensure that all soldiers and civilians receive this publication. It is important to note that units must request *Soldiers Magazine* to receive it. It is part of the "Dash 12" publication series. Unit publication representatives can order the magazine at the unit or through the Internet. If you choose to subscribe by the Internet, first go to the *Soldiers* home page at http:www.redstone.army.mil/soldiers/home.html. Once there, find and click on the "About *Soldiers*" hot link. Click the hot link to the U.S. Army Publication and Printing Command. Complete the necessary form and you are now ready to receive *Soldiers Magazine*, the Army's flagship publication. For individual subscriptions, click on the Government Printing Office hot link. The cost for individual subscriptions is $20 per year.

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