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THE AIR FORCE LAW REVIEW

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Operations Law: An Overview

COLONEL ROBERT L. BRIDGE, USAF (Ret.)

Some 20 years ago, The Judge Advocate General's Department faced a dilemma; how should it meet the obligation to teach the law of war to members of the Air Force, as required by the Geneva Conventions Relative to the Protection of War Victims?¹ This training obligation had existed since the Conventions entered into force,² but the Vietnam conflict raised questions in the minds of many about how effective the Air Force law of war guidance and training programs really were. In fact, the Air Force did not even have a basic statement of its law of war policy. Senator Kennedy highlighted this deficiency when he asked during a Senate debate:

Why is it that the Air Force, for example, refuses to develop a set of rules—a manual for air warfare? The Navy does. The Army does. But the Air Force refuses to do it. They refuse to give instructions to the young men who are going out there [to Vietnam]—to make them sensitive and more cautious to civilian needs.³

These types of questions, which were also raised in the media, combined with the war crimes investigation and court-martial of Lieutenant William Calley and others,⁴ placed mounting political pressure upon the Department of Defense (DOD) and the Department of the Air Force to put teeth into their law of war training requirements. One result was the publication of a DOD Directive on the law of war.⁵ Another was The Judge Advocate General's Department's creation of a first-ever Air Force pamphlet (AFP) on the *Law of Armed Conflict*, AFP 110-31.⁶ The Army

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1. The four Geneva Conventions are: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention (IV) 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.

2. The actual training requirement appears in each of the four Geneva Conventions in very similar language. Article 127 of the Convention (III) Relative to the Treatment of Prisoners of War is representative:

The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principle thereof may become known to all their armed forces and to the entire population.

3. 118 CONG. REC. § 7: 185 (daily ed. May 3, 1972) (statement of Sen. Kennedy).

4. *United States v. Calley*, 26 U.S.C.M.A. 875, 48 C.M.R. 19 (1973); *United States v. Medina*, (Misc. Doc. 71-12), 43 C.M.R. 243 (1971).

5. Department of Defense Directive 5100.77, *DOD Law of War Program* (1974) (revised July 10, 1979).

6. Air Force Pamphlet (AFP) 110-31, *International Law—The Conduct of Armed Conflict and Air Operation* (1976).

and Navy already had quality law of war manuals that provided basic guidance for their members.⁷ The Air Force's counterpart, AFP 110-31, was designed to be and remains the primary reference work for the Air Force judge advocates responsible for interpreting and teaching the law of armed conflict (LOAC). Crafted to take a uniquely Air Force approach, even the term "law of armed conflict" distinguished the pamphlet from Army and Navy law of war policy.⁸ Finally, the DOD law of war policy was implemented by the Air Force by Air Force Regulation 110-32.⁹

In an effort to catch up, a massive effort was mounted during the late seventies to train every Air Force member, including judge advocates, in the law of armed conflict. Nearly one hundred percent of the Air Force personnel received training on the LOAC. To ensure continued education in the future, blocks of instruction were placed in all of the accession training courses, from basic training at Lackland Air Force Base, Texas, to core curriculum at the U.S. Air Force Academy in Colorado Springs, Colorado.

Quite frankly, many of the initial efforts at training the front line personnel met with apathy—or worse. The training was hard for judge advocates to sell; not because line personnel did not want to do what was right; but rather, because they could not easily accept being told how to do their jobs by lawyers. It is very gratifying to say that since then a revolution in thinking has taken place. Today's commanders and front line personnel are more than willing to take their lawyers' advice on a wide range of subjects, not the least of which is how to wage war legally.

Three reasons led to the revolution. First, the world and the Air Force have become so complex that modern commanders have learned more than ever before the value of legal counsel in virtually every action they take. Second, over the past ten years, the leadership of the Department has taken great pains to mold the best possible legal team—in terms of both the caliber of personnel and training—to fill the Air Force's growing need for the very best legal counsel. Finally, Desert Shield and Desert Storm brought home to the American people and the U.S. military, on a scale not previously witnessed, the stark contrast between Iraq's illegal threats and practices and the legal methods of warfare employed by the United States and its coalition partners. From President Bush on down, the United States was committed to full compliance with the Geneva Conventions and the United Nations mandate in its prosecution of the war. As welcome as the revolution is, however, it is not over; much is yet to be done.

At the same time that the lawyer's role in wartime has become more accepted, the role has expanded beyond that of mere teacher and advisor on the law of armed conflict. The term "Operations Law"¹⁰ used now to describe that expanded role and the requisite expertise needed to practice law supporting warfighters. While the origins of the term are somewhat sketchy,¹¹ it provides an apt description of what is arguably the most important and dynamic part of military legal practice.

7. Army Field Manual 27-10, Law of Land Warfare (1956); Navy Warfare Publication (NWP) 9, The Commander's Handbook on the Law of Naval Operations, (1987); NWP 9 adopted by U.S. Marine Corps as Fleet Marine Force Manual (FMFM) 1-10.

8. The phrase was coined to overcome some prevalent, but erroneous, thinking in the early 1970s that the law of war somehow did not apply unless the United States was engaged in a declared war as contemplated in the Constitution. The United States has not declared war since World War II.

9. Air Force Regulation (AFR) 110-32, Training and Reporting to insure Compliance with the Law of Armed Conflict (1976). Other Air Force publications that bear upon the law of armed conflict are: AFR 110-29, Review of Weapons for Legality Under International Law (1981); AFP 110-34, Commander's Handbook on the Law Of Armed Conflict (1980); AFR 125-25, Prisoners of War (1970); and AFR 160-4, Medical Service Under the 1949 Geneva Convention on the Protection of War Victims (1971).

10. Sometimes referred to as operational law.

11. At least one expert in the field has claimed credit for the term. See comments reported in Keever, *Lawyers in the War Room*, 77 A.B.A. J. 52, at 55 (1991).

Just what is operations law? The concept of operations law as a distinct military law discipline is new and no generally accepted definition yet exists. Operations law crosses the lines of many subdisciplines within military law; it is partly practiced in a combat or contingency environment and partly practiced in the international environment. Operations law is more than the traditional law of armed conflict.

Here is a working definition that helps to conceptualize the breadth of the discipline:

Operations law is the domestic, foreign, and international law associated with the planning and execution of military operations in peacetime or hostilities. It includes, but is not limited to, the Law of Armed Conflict, the law relating to security assistance, training, mobilization, pre-deployment preparation, deployment, overseas procurement, the conduct of military combat operations, anti-and counter-terrorist activities, status of forces agreements, operations against hostile forces, and civil affairs operations.

Operations law is that body of law dealing with planning and executing the deployment and employment of U.S. forces in both peacetime and combat military operations. By its nature, it transcends traditional military legal disciplines and incorporates relevant aspects of international law, criminal law, administrative law, acquisition law, and fiscal law. Its function is to enable the judge advocate to provide a wider range of informed legal advice to the commander, thus, contributing in a more positive fashion to the overall success of the mission.

A review of the index to this edition gives an idea of the scope of the discipline. A wide spectrum of domestic law comes into play, including the law governing the call up of the Reserves, fiscal law, the Soldiers and Sailors Civil Relief Act, the Foreign Claims Act, the Foreign Assistance Act, the Arms Export Control Act, the Uniform Code of Military Justice, Posse Comitatus, and various statutory restrictions on DOD acquisition. International law issues include the law of armed conflict, status of forces and base rights agreements, foreign criminal jurisdiction, foreign civil litigation, customs and duties, overflight and landing rights, and United Nations Charter interpretation.

A mind-numbing array of legal specialties seems to be required of the operations lawyer. Although the scope of his practice appears intimidating, in reality the operations lawyer is a generalist in the best sense of the word. His knowledge does not have to plumb the depths of each specialty. As in other broad areas of the law, the key is to be able to discern the issues and know where to find the solutions. The challenge to meet the commander's need for quick, creative solutions in the fast-paced environment of war is complicated by the lack of good research materials on the battlefield. This Operations Law Masters Edition of *The Air Force Law Review* is the beginning of an effort to fill that void. The Department learned many valuable lessons from its participation in Desert Shield and Desert Storm, not the least of which was that a better job needs to be done in preparing Air Force attorneys for the very rigorous demands of the practice of operations law. All of the authors in this issue of the *Law Review* had a direct role in supporting the efforts in the Gulf, either on the ground in the area of responsibility or at their duty stations in the United States or overseas; all are experts in their respective fields. Their effort is to provide helpful, practical advice. This edition coming at this time, is a major step toward preparing judge advocates to perform their role as operations lawyers.

Other help is available or on the way. The Air Force Judge Advocate General School offers an annual Operations Law Course—a one-week total immersion. In the near future, the International and Operations Law Division, with assistance from

other divisions in the Office of The Judge Advocate General, the Air Force Legal Services Agency, and other offices throughout the Department, will publish a deployment guide. It is designed to give practitioners a quick and useable manual with frequently updated references for the most frequently encountered operations law issues. This Masters Operation's Law Edition is an invaluable reference tool; one that is designed to be taken by the judge advocate upon orders to deploy.

A Planning Primer: How to Provide Effective Legal Input into the War Planning and Combat Execution Process

LIEUTENANT COLONEL HARRY L. HEINTZELMAN, IV, USAF
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They say soldiers and lawyers could never thrive both together in one shire.
—Barnabe Rich: *The Anatomy of Ireland*, 1615¹

The presence of one of our regular civilian judge advocates in an army in the field would be a first-class nuisance.
—W. T. Sherman: *Memoirs*, II, 1875²

Pentagon officials say that military lawyers were present in the air campaign's 'Black Hole' planning cell and emphasize that the bombing followed international conventions of war.
—B. Gellman, *Allied Air War Struck Broadly in Iraq*, *Washington Post*, June 23, 1991, A-16

This was the first air campaign in which every target was reviewed by a military lawyer.
—Lieutenant General Chuck Horner, August 20, 1991

I. INTRODUCTION

Deployments of U.S. Armed Forces to conduct overseas combat operations pose a substantial number and broad variety of legal challenges to the lawyers tasked to support them. During Desert Shield and Desert Storm, these challenges ranged from assisting a service member to get married or to seek financial adjustments from his creditors under the Soldiers and Sailors Civil Relief Act to assessing the collateral effects of an attack on a nuclear reactor or a chemical weapons storage bunker under the laws of war. There were interesting collisions of culture that also effected legal decision making. Hopefully without becoming too anecdotal or too narrowly focused, this article will touch upon the general legal issues lawyers should be prepared to confront in future contingencies so as to avoid any return to General Sherman's characterization of the legal profession.

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1. R. HEINL, *DICTIONARY OF MILITARY QUOTATIONS* 168 (1966).

2. *Id.*

Although this discussion will focus on selected challenges lawyers may confront in providing legal advice in the theater of operations, the vital legal work accomplished by attorneys that did not deploy to the combat zone but whose work supports the effective employment of air power cannot be ignored. Without their efforts (or similar efforts in the future), combat operations could not have been (or be) successfully prosecuted.

Judge advocates assigned to the Office of the Legal Counsel to the Chairman of the Joint Chiefs of Staff were involved in all aspects of operational law from articulating a viable legal basis for the deployment of combat forces under international law and providing input to the planning guidance to reviewing the combatant commands rules of engagement and target lists. The Chairman's Legal Counsel and the Department of Defense (DOD) General Counsel worked closely with the White House and other executive departments' and agencies' lawyers on the administration's position up to and following adoption of Congressional resolutions authorizing the President to use force. Another responsibility of the Legal Counsel is to provide input to the DOD General Counsel regarding the applicability, if any of the 1973 War Powers Resolution.³

Attorneys assigned to military installations and civilian attorneys throughout the nation helped deploying service members put their legal affairs in order. Over one hundred thousand wills were written and executed. Thousands of powers of attorney were prepared.

In early September 1990, the Computer Service Division, Office of The Judge Advocate General, identified a need for a self-contained electronic law library to be accessed through the laptop computers deployed to each legal office in the USCENTCOM Area of Responsibility (AOR). Project REFLEX addressed this need by providing a portable electronic data base (11 3.5 inch disks) for rudimentary legal research in the field. The REFLEX system was conceived, designed (with the grant of royalty free licenses to two software programs), produced, and distributed to the Middle East in less than six weeks and at a cost of about \$700.⁴

During contingencies when military airlift is insufficient, U.S. Transportation Command turns to commercial air carriers to provide air transport under commercial contract as part of the Civil Reserve Air Fleet (CRAF).⁵ When operations take CRAF aircraft into areas where insurance coverage has been withdrawn, indemnification for loss must, be provided the carriers. Air Force lawyers at Military Airlift Command (MAC)⁶ had to wrestle with quickly staffing indemnification requests to the Secretary of the Air Force and incorporating these

3. War Powers Resolution, 50 U.S.C. §§ 1541-548 (1973).

4. Colonel Michael D. Wims and his staff obtained the royalty free use of SHEZ, owned by Mr. Jim Derr, a PKPAK/UNPAK software program to unarchive files and Mr. Vernon Bueg's LIST text editing program to display the text of the retrieved documents on the computer screen. Data entry personnel and programmers from the Computer Services Division spent hundreds of off-duty hours scanning the selected legal materials into an electronic format. Briefing by Colonel Michael D. Wims, Chief, Computer Services Division (June 12, 1991) (presented at the Operation Desert Shield/Desert Storm After Action Workshop conducted at Maxwell Air Force Base, Alabama).

5. The Civil Reserve Air Fleet is a program derived from the Department of Transportation's authority to seize commercial transportation assets in time of emergency under the Defense Production Act of 1950, 64 Stat. 798, Pub. L. No. 81-744, as amended. The program obtains advance contractual commitments from U.S. commercial carriers to use their planes, aircrews, and maintenance support. Briefing by Colonel Bryan G. Hawley, Staff Judge Advocate, Military Airlift Command (June 12, 1991) (presented at the Operation Desert Shield/Desert Storm After Action Workshop conducted at Maxwell Air Force Base, Alabama).

6. Military Airlift Command became Air Mobility Command on 1 June 1992.

requests into their carrier contracts.⁷ MAC lawyers had to grapple with a regulatory system that was not designed for the massive amount of airlift involved in Desert Shield when obtaining government provided hull insurance. The FAA Title XIII War Risk Insurance Program for CRAF aircraft they used was designed to ensure just one flight at a time. They also devised a method for the United States to accept donated airlift.⁸

In an acquisition process that took only days to accomplish, acquisition attorneys supported the design, development, and delivery of a 4000 pound bomb, crafted out of an eight-inch howitzer barrel, used to destroy a heavily fortified Iraqi bunker.⁹

These incidents of creative lawyering support the view that wherever a judge advocate is assigned during the course of combat operations, he must be equipped to fully support his commander by anticipating problems and overcoming them with creative solutions. For each of us to truly optimize our ability to provide such operational support, we need to refine our legal thinking, augmenting the knowledge necessary to provide legal support to our client in "garrison" with the information necessary to support an "expeditionary" Air Force.

The bread and butter issues that confront judge advocates on a daily basis in a peacetime environment are not going to go away. We must continue to perform these functions well. However, some of our effort needs to be reallocated to better learning our clients' combat missions. With the recent realignment of operational missions and creation of consolidated wings, we are on a fortuitous position to assimilate this knowledge as new organizational relationships unfold.

Wherever a judge advocate is assigned during contingencies or combat operations, he must be fully equipped to support the commander by anticipating impediments to mission accomplishment. In most cases, an Air Force judge advocate will be working directly or indirectly for the Air Component Commander, who in furtherance of the combatant commander's concept of operations will employ his forces in a manner designed to achieve the planned (plan's) objectives. Because of security considerations, most deploying judge advocates, whether at wing level or higher, may not be privy to more than a portion of the campaign plan. Nevertheless, they should learn as much as possible, from all available sources, about the overall concept of operations.

The purpose of judge advocates in combat operations or contingencies is not to create roadblocks by inappropriately injecting themselves into matters of strategy or policy. This causes operators or support personnel to go to great lengths to avoid the "lawyer." Rather, the judge advocate's charter is to facilitate the effectiveness of the combat force within political and legal limitations imposed on the operation. A combat "JAG's" advice focuses as much on the "do's" of how to vigorously employ lawful force as the "don'ts" imposing legal restraints on combat activities.

The support forces that deploy with an operational unit, to include judge advocates, are war-fighting assets and must be as deployable, as survivable and as thoroughly trained as the operational forces they accompany.¹⁰ Otherwise, they are merely a logistical drain. To optimize our ability to provide legal support, we must become conversant with how offensive operations are planned and exe-

7. Indemnification can be provided by the Secretary of the Air Force under National Defense Contract Authorization, Pub. L. No. 85-804 and Exec. Order No. 10,789. After Action Input from Military Airlift Command, Office of the Judge Advocate (Lt. Col. Lloyd Schneider) (June 1991).

8. Briefing by Colonel Bryan G. Hawley, *supra* note 5.

9. Tom Mathews, *The Secret History of the War*, NEWSWEEK, Mar. 18, 1991, at 32.

10. AFM 1-1, Vol. II, *Basic Aerospace Doctrine of the United States Air Force*, Headquarters U.S. Air Force, Mar. 1992, at 204.

cutted. To appropriate a line from the *Sound of Music*, "Let's start at the very beginning..." in our effort to better understand the planning process and our role in it.

II. BASIC TRAINING

A. Combatant Commands

The 1986 Defense reorganization Act initiated the use of the term "combatant commands" to refer to both unified and specified commands. A unified command is a military organization that is responsible for the planning and execution of military operations within its assigned area of responsibility (AOR) or in support of other combatant commands. It is composed of military personnel from two or more branches of the Armed Forces.¹¹ Specified commands have a broad, continuing mission and are normally composed of forces from a single service. There are currently ten combatant commands—nine unified and one specified. Of these nine unified commands, five have regional responsibilities (U.S. Atlantic Command (USLANTCOM) U.S. Central Command (USCENTCOM) U.S. European Command (USEUCOM), U.S. Pacific Command (USPACOM), and U.S. Southern Command (USSOUTHCOM)) and four have functional responsibilities that require them to provide global, worldwide support (U.S. Space Command (USSPACECOM), U.S. Special Operations Command (USSOCOM), U.S. Strategic Command (USSTRATCOM), and U.S. Transportation Command (USTRANSCOM)). The one remaining specified command is Forces Command (FORSCOM). Composed primarily of U.S. Army forces, its responsibilities include providing combat-ready reinforcements to the various regional commands and the planning such support would entail. FORSCOM is also responsible for the defense of the continental United States.¹²

Unified commanders exercise combatant command (COCOM) over units assigned to them through their component commanders. Unless specifically assigned or attached to a unified command headquarters, elements of a particular service are normally under the command of their service component commander.¹³

The operational chain of command runs from the National Command Authority (NCA)—the President and Secretary of Defense—through the Chairman of the Joint Chiefs of Staff (CJCS) to the Commander in Chief (CINCPAC) of the unified command. The CJCS has no command authority, however. Instead, the Chairman, as the primary military advisor to the NCA, "functions within the chain of command by transmitting communications to the commanders of the combatant commands from the President and the Secretary of Defense."¹⁴

The Departments of the Army, Navy, and Air Force are not in the operational chain of command.¹⁵ These departments are responsible for training, maintaining, and equipping forces assigned to the combatant commands. They

11. Joint Pub. 1-02, *The DOD Dictionary of Military and Associated Terms*, at 340, 384.

12. AFSC Pub. 1-02, *The Joint Staff Officer's Guide 199*, para. 206.

13. *Id.*

14. AFSC Pub. 1, *supra* note 12, para. 201.e.(2).

15. The Reorganization Act of 1958 removed the military departments from the operational chain of command. *Id.* at para. 201.d.(2).

also provide the service component commanders assigned to the combatant commands. Except those service members assigned to carry out service responsibilities such as recruiting, equipping and training, all military personnel were assigned to the combatant commands under the 1986 DOD Reorganization Act.¹⁶

A combined command is a force consisting of combat units from two or more allied nations serving under a single commander. Combined commands normally operate under the aegis of an international agreement concluded between or among the participating nations. SACEUR, NORAD, and Combined Forces Command Korea are examples of combined commands.¹⁷

B. Joint Strategic Planning Process

The Chairman of the Joint Chiefs of Staff considers the national security strategy, articulated by the National Security Council¹⁸ and approved by the President, and devises the national military strategy. The Chairman then breaks the national military strategy down into discrete military objectives and tasks. These missions and goals are then assigned to the combatant commands through the Chairman's Joint Strategic Capabilities Plan (JSCP).¹⁹ The CINCs of the combatant commands use this information detailing their missions, as well as the data provided for planning purposes, in the JSCP, to include the principal combat forces apportioned to them,²⁰ to develop Operation Plans (OPLANS).²¹ An OPLAN details the strategy and methods of operation developed by a combatant command to accomplish its assigned objectives. It also identifies the forces and logistics necessary to successfully execute the plan and it includes a strategic movement plan to project those resources into the theater of operations. If the combatant commander's mission would not unduly tax U.S. logistics or transportation capabilities, a more abbreviated process can be used that results in a Concept Plan (CONPLAN). The CONPLAN normally includes the commander's concept of operations but may omit those annexes outlining support requirements or strategic movement.²²

C. OPLANS

The Joint Operations Planning and Execution System (JOPES) sets out the procedures whereby combatant commands prepare planning documents either through the deliberate planning process or via crisis action planning.²³ The

16. *Id.* at para. 204.e. (2); AFM 1-1, *Basic Aerospace Doctrine of the USAF*, Mar. 1992, para. 1-6a.

17. AFSC Pub.1, *supra* note 12, at para. 209.

18. Created by Congress in 1947, the National Security Council (NSC) is part of the Executive Office of the President of the United States. The NSC serves as an interdepartmental advisory body on defense, foreign policy, and intelligence matters. Council members include the President, Vice President, and the Secretaries of State and Defense. The President calls meetings of the NSC. The National Security Council is supported by a staff headed by the President's National Security Advisor. The staff works with the State and Defense Department and the intelligence agencies to prepare studies and policy papers for the council's action.

19. *Id.* at para. 606.b.

20. The JSCP identifies the combat forces and strategic transportation apportioned to the combatant command. These are called apportioned resources since they represent the combatant commander's share of the total, available U.S. military capability. The forces identified in the JSCP are major combat units such as brigades, divisions, carrier battle groups, or aircraft squadrons and does not identify combat support elements. *Id.* at para. 606.

21. *Id.* at paras. 602-605.

22. *Id.* at para. 606.c(1) and (2).

23. *Id.* at para. 506.

JOPES deliberate planning process details the procedures to be used by the combatant commands, supporting commands, component commands, and logistics commands or agencies to develop plans responsive to their assigned missions when time is not a critical factor. (JOPES has also been adopted, in large part, for use in preparing USAF MAJCOM OPLANS).²⁴ Under the deliberate planning system, the development of an operations plan its coordination among the supporting components and commands, and its evaluation and review by the Joint Staff can take eighteen to twenty-four months to complete.²⁵ JOPES also prescribes standard formats and delineates the minimum content required for each section of the plan.²⁶ (A full appreciation of the extensive planning involved in developing an approved OPLAN can easily be obtained through the perusal of a combatant command OPLAN your unit is tasked to support).

Steps in the Deliberate Planning Process. After the CINC of a combatant command receives the planning task and apportionment of combat forces and strategic lift available to support the mission from the Chairman's Joint Strategic Capabilities Plan, the assigned mission is analyzed. The CINC then develops assumptions regarding matters outside the supported CINC's control that mission accomplishment. Based on these assumptions, tentative courses of action (COA) are formulated that would accomplish the mission. The CINC's staff then studies each course of action, assesses whether resources are available to support the COA, and makes recommendations on which COA can best be supported.²⁷

Using his staff's input, the CINC will select the best COA and approve the Commander's Estimate. The Commander's Estimate summarizes the tasked mission, sets out considerations affecting possible courses of action (e.g., assessments of combat capabilities), compares each of the proposed courses of action, and provides the CINC's rationale for selecting a particular COA.²⁸

The CINC's Strategic Concept, a greatly expanded version of the Commander's Estimate, is assembled and forwarded to the CJCS for review and approval. Simultaneously, copies are sent to the service components and supporting command²⁹ for further plan development.³⁰

Using the information in the CINC's Strategic Concept, the service components begin developing the total package of forces required to support the CINC's concept of operations. Starting with the major combat forces apportioned to the mission, they identify personnel and logistics requirements for combat support and sustainment. The supported CINC then prioritizes these inputs so the strategic transportation of these forces and supplies can be phased into the theater of operations. The overall transportation plan is then repeatedly analyzed and refined until the final Time Phased Force and Deployment Data (TPFDD) is produced.³¹

Information gathered during this planning process is finally assembled into an OPLAN using the JOPES format and distributed.

24. See e.g., AFR 28-3, *USAF Operation Planning Process*, June 30, 1986.

25. The deliberative planning process used during peacetime planning consists of five phases: (1) Initiation, (2) Concept Development, (3) Plan Development, (4) Plan Review, and (5) Development of Supporting (service component) Plans. *Id.* at para. 605, Fig. 6-3.

26. See Joint Pub. 5.02.1, JOPES Volume I, *Deliberate Planning Procedures*.

27. *Id.* at paras. 607-610.

28. *Id.* at para. 611.

29. The unified (or Air Force Major) command tasked with performing a national security mission requiring the development of a CONPLAN is the supported command. Functional or regional commands that support the execution of the CONPLAN are supporting commands.

30. *Id.* at para. 612.

31. *Id.* at paras. 615-619.

Crisis Action Planning is conducted during contingencies or national emergencies when the planning process must be more flexible and responsive to changing events. The procedures in Joint Pub. 5-03.1 (JOPES, Volume I) are used to develop military responses to crises.³²

Following the decision of the NCA to develop possible military solutions to a crisis, the CJCS authorizes the release of a WARNING ORDER. The Warning Order: (1) describes the situation; (2) articulates the mission objectives and assumptions for the supported commander; (3) identifies the relevant OPLAN or CONPLAN that supports mission execution criteria; and (4) allocates the combat forces and strategic transportation assets available to support the mission or requests the CINC's estimate of resource requirements.³³

Just as in the deliberate planning process, the supported CINC develops COAs and obtains input from his components and supporting commands identifying the forces and material necessary to support the proposed COAs. If time allows, the CINC may issue a Commander's Evaluation Request detailing the mission and tentative COAs and tasking subordinate and supporting commands to evaluate and make recommendations concerning the proposed COAs.³⁴

The tasked CINC's recommended COAs are transmitted to the CJCS in the Commander's Estimate. In his role as military advisor to the NCA, the Chairman evaluates the proposed COAs and makes recommendations to the NCA. To facilitate further planning while awaiting an NCA decision, the CJCS may provide additional guidance to the affected commands through a PLANNING ORDER. Among other things, the Planning Order sets a deadline for the supported CINC to submit the OPERATION ORDER (OPORD).³⁵

After the NCA selects a COA and directs execution planning to begin, the CJCS issues an Alert Order advising the supported CINC of the approved COA. The supported CINC then turns the NCA-approved COA into an OPORD. Developing the OPORD encompasses three major tasks: execution planning, force preparation, and setting strategic movement schedules. To the extent existing OPLANS or CONPLANS can be modified or expanded to meet mission requirements, the building of the OPORD is eased.³⁶

The CJCS EXECUTE ORDER memorializes the NCA's approval of the OPORD and the decision to execute it. The Execute Order also establishes the precise timing for the deployment and employment of military force.³⁷

Structure and Contents. Although the JOPES's procedures used for plan development may appear complicated, the structure and format adopted for OPLANS is relatively straight forward. In light of space limitations, only a superficial discussion of the many and varied matters detailed in an OPLAN will be undertaken.³⁸

The plan summary is perhaps the most fruitful source of information regarding the plan's purpose for judge advocates not tasked with the responsibility of reviewing the OPLAN. The plan summary sets out a concise description of the

32. *Id.* at para. 700.

33. *Id.* at para. 702.c.

34. *Id.*

35. *Id.* at para. 702.d.

36. *Id.* at para. 702.e.

37. *Id.* at para. 702.f.

38. For a more detailed discussion of an OPLAN's contents, see Checklist for Compliance with Law of War Requirements of Operations Plans and Concept Plans, prepared by the Hq USMC Law of War Reserve Augmentation Unit, or Operational Law OPLAN Checklist, TJAGSA. Both items are undated.

operation, including the forces to be deployed and the command relationships involved. It also touches upon the operational and legal constraints effecting the accomplishment of the plan's objectives.

The five sections detailing the Basic Plan are much broader in scope: (1) The Situation section sets out the probable preconditions that would exist upon execution of the plan, an assessment of the friendly and hostile forces, and assumptions relied upon in developing the plan. (2) The Mission statement articulates the objectives to be achieved if the plan is executed and the tasks necessary to accomplish them. (3) The Execution paragraph lays out the concept of operations to include a discussion of the weapons systems to be deployed. (4) The Administration and Logistic section details the concept of supporting combat elements tasked with accomplishing the mission. (5) The Command and Signal section delineates command relationships and the means of command and control.

Attached to the Basic Plan are a series of Annexes with appendices that outline all aspects of the plan's operation and execution. However, do not assume all the relevant information on a given topic is collocated. For example, Appendix 4 to Annex B (the Intelligence annex) provides a list of proposed targets to be engaged, while annex C (Operations), Appendix 8, contains the rules of engagement to be used.³⁹

D. Combat Planning in the Theater of Operations

Although an approved OPLAN may have a well developed target list and masterful scheme of maneuver, the successful accomplishment of theater objectives contained in an executed OPLAN or OPOD requires further planning in the theater of operations. In the case of an air component commander, the heart of the campaign planning and execution process is the Tactical Air Control Center (TACC). The TACC, much like the two-faced Roman god Janus,⁴⁰ has two disparate missions, a combat planning function that exclusively focuses on tomorrow's battles and a combat operations function that has its sights on managing and shaping the battles of the moment.

The easiest way to learn how this intricate planning system operates is to trace the development and execution of missions contained in the Air Tasking Order (ATO). Planning for the ATO to be flown starting at 0001 hours on a Wednesday, for example, normally begins two days earlier, on a Monday morning with the Joint Force Air Component Commander's (JFACC) assessment. At this meeting, the JFACC determines how the assets at his disposal will be allocated for Wednesday's missions⁴¹ and provides command guidance on what enemy "centers of gravity"⁴² will be targeted.

Based on the combatant CINC's distribution of air support between the supported land and naval components and the supported components needs, the

39. *Id.*; Joint Pub. 5.02.1, *supra* note 26.

40. Janus was a god with two faces—one face looked into past and the other looked into the future. Romans prayed to Janus at the beginning and conclusion of any important event, especially war. THE WORLD BOOK ENCYCLOPEDIA, Vol. 11, at 31.

41. Because many weapons systems have multiple roles, the JFACC can shift them, for example, from performing aerospace control missions (offensive and defensive counterair) to air interdiction or close air support. See Essays L-Q, AFM I-I, Vol. II.

42. According to General Carl von Clausewitz, a center of gravity is the "hub of all power and movement, on which everything depends." CARL VON CLAUSEWITZ, *On War* 485 (M. Howard & P. Paret ed. and trans. 1984). For further discussion of what "centers of gravity" are see J. SCHNEIDER & LT. COL. L. IZZO, *Clausewitz's Elusive Center of Gravity*, PARAMETERS, 1987 46-57; COL. J. WARDEN, *THE AIR CAMPAIGN: PLANNING FOR COMBAT* (1988.)

Joint Target Nomination Board meets on Monday at noon to consolidate into a single prioritized list those targets nominated for Wednesday's attack by the supported forces. (During Desert Storm, validated targets⁴³ were nominated by ARCENT, NAVCENT (on behalf of Marines afloat), MARCENT, and coalition ground forces and consolidated into the Joint Target List.)

Based on the JFACC's guidance, current intelligence inputs, and data received through the target nomination process, planners⁴⁴ and targeteers in the Guidance, Allocation and Targeting Cell will work all day Monday to develop a Master Attack Plan for 0001-2400 hours Wednesday. The Master Attack Plan sets out the timing and composition of attack packages, the weapons to be deployed, and the targets to be struck.

Monday afternoon and early evening, the proposed Master Attack Plan will be reviewed by the JFACC and may be briefed to the CINC. Once the Master Attack Plan is approved, it is returned to the Guidance, Apportionment and Targeting Cell for the completion of detailed target planning worksheets on each target.

Near dawn on Tuesday morning, the target worksheets are turned over to the Air Tasking Order cell. It is the fraggers' job in the ATO cell to identify and task a particular unit to accomplish each mission set out on a target worksheet. Other elements of the ATO cell are orchestrating the required electronic combat and air refueling support, assigning call signs and rendezvous points, and deconflicting the airspace.⁴⁵ With the assistance of computers, the ATO cell builds the Air Tasking Order in about twelve hours and then transmits it to the squadrons supporting the campaign.⁴⁶ After the squadrons receive the ATO, they break it down, assign the missions to their aircrews, and individual mission planning begins. Once each element of Combat Plans completes its phase of the ATO process, it begins planning again for the next day's ATO.

The Combat Operations section of the TACC directs the "real-time" employment of aerospace assets. At the JFACC's direction, The Combat Operations section would modify ATO taskings and redirect aircraft to exploit evolving opportunities or meet unexpected close air support requirements. Combat Operations is manned by fighter duty officers (FIDOS) who act as a link between the TACC and the bases where their particular weapon system is assigned, Liaison Officers (LNOs) from the services and coalition partners, intelligence and communications personnel. It is assisted by Airborne Command Element (ACE) teams aboard AWACs that direct counterair operations and coordinate the movement of strike packages into hostile airspace.

Understanding how the TACC operates is crucial to providing effective legal support during combat operations. An example from Desert Storm will illustrate why. Early one morning, USCENTAF received a telefacsimile from the International Committee of the Red Cross (ICRC) in Geneva describing the movements of an ICRC convoy from Iran to Baghdad. The convoy was

43. To ensure aerospace assets were not employed against "ghost" targets, the identity and location of a nominated target had to be validated by intelligence sources before the target would be included on the consolidated target list.

44. **Planners** are normally experienced aviators. In the Air Force, they are frequently called "patch guys" because of the distinctive patches they hear from the fighter weapons schools they have attended.

45. **The Air Tasking Order** input for each mission would provide (among other things) a mission **number**, call sign, type of air mission to be flown (including ground and airborne alert), the **number of aircraft** assigned the mission, the number and type of weapons to be employed, target **location** and description, and time on target (TOT). Special instructions regarding the target may also be included.

46. **During Desert Storm**, the daily ATO could be over 300 pages long, providing essential information on between 2000 and 3000 sorties.

scheduled to leave in four hours. Once it was confirmed that the message was a legitimate one, what steps had to be taken to protect the ICRC convoy from inadvertent attack?

The judge advocate handling the problem first went to the map to discern the convoy's route. Second, he reviewed the Master Attack Plan to ascertain what, if any, combat operations were planned in the area of transit. Third, he confirmed his conclusions with a head planner in the "Black Hole." Fourth, he briefed the head of Combat Operations and together they developed measures to protect the convoy from aerial attack. Fifth, he prepared a directive describing the ICRC's convoy, route, transit times, and setting out the measures designed to protect it from inadvertent attack. Sixth, the directive was typed into the CAFMS (Computer Assisted Force Management System). Seventh, the judge advocate briefed the JFACC and provided him the draft copy of the directive to approve. Eighth, with the JFACC's approval he had the TACC briefed and directed the CAFMS operators to transmit the approved message to all units flying under the ATO. Ninth, to be certain the word got out, he then confirmed the message's receipt by two units through the FIDOS. Tenth, he had the message transmitted via radio to the ACE teams so that aircraft already airborne could be briefed as they checked in with the AWACs. As a final step, he briefed USCENTCOM and the other USCENTAF judge advocates on the measures undertaken to protect the convoy from inadvertent attack. This entire process took just over thirty minutes. Later, he requested, through command channels, at least twenty-four hours advance warning of ICRC relief operations.

III. PREPARING FOR THE "WARNING ORDER"

When the circumstances giving rise to OPERATION DESERT SHIELD/DESERT STORM came about there was no "off-the-shelf" reviewed and CJCS approved OPLAN available on which to base combat operations. However, USCINCCENT had completed a fairly detailed concept outline plan and had teased in during Internal Look, an exercise involving CENTCOM's component commands. This plan served as a basis for the subsequent development of OPLANs for Desert Shield/Desert Storm. In such a situation, the responsible combatant commands, in conjunction with their service components, may have to cobble together OPLANs, and such ancillary items as Time Phased Deployment Data to successfully accomplish their missions.

In this situation, there is no time for a judge advocate to acquire the knowledge necessary to be an effective combat JAG. We simply can't wait until the Warning Order is issued to acquire the knowledge on planning, targeting, and rules of engagement issues necessary to fully support a commander during contingency operations or combat. We suggest the following steps "to get out from behind the power curve" and place judge advocates on the inside of the planning process.

A. Step One: Learn your Unit's Players

A recurring theme throughout this article is for the operations lawyer to become a familiar person to those personnel involved in the planning process. Depending on the unit, these people may be located in one or more offices. Generally at the wing level the office symbol for operational plans is DOX and the symbol for logistics plans is LGX. Before you look up these offices in your

base directory and schedule your first visit with the offices performing these functions at your level of command, become more familiar with the details of the Joint Operations Planning and Execution System (JOPES) and the service OPLAN structure. A more detailed explanation of JOPES than this article has attempted to provide can be found in the "Purple Book"—AFSC Pub. 1, *Joint Staff Officer's Guide*, 1991. This book is available through Air University and is important reading. The Air Force implementation of JOPES is Air Force regulation (AFR) 28-3, "USAF Operations Planning Process." Order AFR 28-3 if it is not in your publications library. Armed with this information, a judge advocate can ask intelligent questions regarding the plans currently undergoing development and review, as well as the principal plans his or her unit is tasked to support.

B. Step Two: Learn the Plans Your Unit Supports

Some planners may display a reluctance to provide you unfettered access to classified plans because they may not appreciate your "need to know." Assuming you have the requisite security clearance, your "key" to the planner's safes is contained in directives, publications, and memoranda published by DOD and the Joint Chiefs of Staff. DOD directive 5100.77, "The DOD Law of War Program," provides that all services must ensure their military operations comply with the law of war.⁴⁷ Joint Pub. 5.03.1 (JOPES Volume I), states that in the formal planning process a legal review of the Plan will be done to ensure compliance with domestic and international law. Joint Chiefs of Staff Memoranda require legal advisors to attend planning conferences for joint and combined operations and exercises when rules of engagement and related topics are discussed. Judge advocates also are to deploy to provide immediate legal advice on these issues during joint or combined operations.⁴⁸ Additionally, even though planning may be accomplished at a higher level of command, judge advocates must be prepared to provide the commander legal advice on the local execution and support of the OPLAN.

Once you have gained access to the plans, at a minimum, review the Summary, the Basic Plan, Appendix 4 to Annex B (the targeting appendix), Appendices 1-5 of Annex C, which outline the conduct of specific combat operations, Appendix 8 to Annex C (rules of engagement), Appendix 1 to Annex E (EPW issues) and Appendix 5 to Annex E (the legal appendix) of each plan your unit is tasked to support.

Based on your review of the plans, prepare a chart setting out the following information:

1. The OPLAN Number and Title.
2. The unit tasked, type and number of aircraft, if any.
3. The deployment location (base and country).
4. Is the deployment to a bare base or does it augment forces at a previously established base?

47. DOD Directive 5100.7, *The DOD Law of War Program* (July 10, 1979).

48. Joint Chiefs of Staff Memorandum, MJCS 59-83, *Implementation of the DOD Law of War Program* (June 1 1983) as superseded by Joint Chiefs of Staff Memorandum, MJCS 0124-88, *Implementation of the DOD Law of War Program* (Aug. 4 1988).

5. What organization will provide combat support to the deploying unit? (Will the deploying unit be supported by a combat support element from the same location?)

6. Will 51JX or 5J0X1 from the legal office deploy? How many? Where and when? Are they part of a support element package?

7. What are the equipment and supply needs of the deploying judge advocates and paralegals? (Remember, this could in all likelihood be you!)

In some cases a deployment chart may have been drawn up by your predecessor, review it, instead of making one of your own, to ensure it is still current.⁴⁹ Since this chart was derived from classified information, you must handle it with the same safeguards required for the highest level of classified information it contains. Always be mindful of information security. Most planning documents contain classified information.

Now you have a handle on the current plans that your unit is tasked to support, gather information, e.g., SOFAs, Country Law Studies, Claims Agreements, and even tourist travel information, on the deployment location and countries to be transited during the deployment. This information will be valuable when you are preparing to deploy and later when you need to render accurate legal advice at your deployment location. Finally, once you have become a familiar face in DOX and LGX, arrange with the planners to participate early on in the development and review process of any new plans or modifications to existing plans.

C. Step Three: Know Your Unit's Aircraft and Weapons Systems

Without knowledge of your unit's weapon systems capabilities, as well as knowledge of what other munitions options may be available, it is virtually impossible to provide good legal advice on proportionality issues, rules of engagement, and related matters. The aircraft assigned to your unit have specific capabilities that are unique to that particular weapon system. These include range maneuverability, speed, structural strength, "stealthiness," operating altitude and target acquisition capability. Additionally, there are various types of missiles, bombs, and guns that vary in accuracy, penetrating power, persistence, and blast effect. In most cases, the munitions carried by an aircraft can be modified to make them more effective for a particular mission. You should learn as much as you can about Air Force weapons in general and your unit's weapons in particular. Sources of information range from commercial publications to material found in your intelligence squadron.⁵⁰

Through your efforts to develop an appreciation of what an aircraft and its munitions can accomplish, you develop critical rapport with your aircrews, as well as your unit's maintenance and intelligence personnel. Individuals involved in these areas are justifiably proud of what they do and are glad to tell you about their duties. As you learn more, you become more competent in your operations law work and expand your unit's confidence in you. As they develop trust in

49. TAC/JA Letter 87-53. Deployment Requirements Listing, 27 July 1987.

50. An extremely useful, unclassified, source of information on USAF munitions is the 1990 Weapons File written by MSD/XR. The Weapons File provides general technical information on most air launched weapons.

you, they will come to share their problems with you and seek your advice on operational issues.

D. Step Four: Participate in Exercises

Exercises are where commanders and other operations personnel see you working directly along side them and form an opinion about your seriousness as a combat JAG. Work in an area that maximizes your participation in the mission as an operations lawyer. Working with your unit's Intelligence Section is a good starting point because you gain access to the information you need to resolve operations law issues. Intelligence maintains the current order of battle information, prepares and updates the target folders, tracks missions, debriefs pilots, and receives intelligence information from other units. Volunteer for Intelligence Augmented training sessions to increase your weaponeering and targeting skills. However, make it clear your primary duties and obligations are as a judge advocate and you will help out when your primary duties do not conflict. Do not be afraid to get your hands dirty, but avoid permanent assignments such as a security police augmentee working air base ground defense or supporting maintenance functions such as building drop tanks. Assignments such as these indicate a fundamental misunderstanding of the role a judge advocate plays in wartime. Use the "keys" laid out in this article to find the position from which you can best support your unit's operational mission with your legal advice.

E. Step Five: Get All the Operations Law Training You Can

This is somewhat self explanatory. All the services have excellent courses. These courses are not only valuable for the knowledge they impart, but also the contacts they provide with military attorneys with operational law experience from the other services. Such crosstraining is vital for joint operations too.

IV. RULES OF ENGAGEMENT

Rules of engagement (ROE) are guidance established by, or on behalf of, the national command authority setting out the circumstances under which military personnel may resort to the use of armed force.⁵¹ These rules are designed to regulate the exercise of armed force to ensure its use comports with applicable political and military policies and objectives, as well as domestic and international law.⁵²

Although rules of engagement may share a common JOPES format, ROE are tailored to address the situations military forces are expected to encounter in a given set of circumstances. There are three distinct and separate types of ROE, peacetime, exercise, and combat. Peacetime ROE generally provide guidance for the use of armed force, consistent with international law. A principle tenet of those ROE is the responsibility of the commander to take all necessary and appropriate action for the unit's self defense. Subject to that overriding responsibility, the full range of options are reserved for NCA determination as to appropriate responses to hostile acts or intent. Combat ROE may permit a wider range of military activities and may place limits on the methods and means of

51. Joint Pub. 1-02, *The DOD Dictionary of Military and Associated Terms*; Army Judge Advocate General School, *OPERATIONS LAW HANDBOOK*, at 3-46.

52. *Id.*

warfare. Exercise ROE are a hybrid. They may contain "combat" ROE designed for the exercise scenario, and "real world" ROE for use in the event actual threats to friendly forces occur during the course of the exercise. Because all three types of ROE articulate the "when's" and "how's" commanders or independent military elements may respond with armed force, they reveal sensitive doctrine, operational policies and tactics. Consequently, ROE are almost always classified.⁵³

In light of the sensitivity of the material and the unlimited variety of employment scenarios, we cannot realistically discuss what the rules of engagement should be in each and every case. We can, however, provide some generic guidance on the formulation of ROE. First, before even putting pen to paper, you must know the commander's concept of operations.⁵⁴ The more you learn about the national command authorities' strategic objectives and the combatant commander's concept of operations, the better prepared you will be to support operations planners in the promulgation and review of rules of engagement. The way you best accomplish this is through your active participation in the planning process described above.

Just as war cannot be extracted from the environment in which it is waged, rules of engagement must be tailored to take into account the military posture of the forces utilizing them and the various contingencies they might face. To write effective ROE, you must study the theater of operations with an understanding of how friendly forces will be employed and the political restraints under which they operate. You also must keep the capabilities and intentions of hostile and neutral forces in mind.⁵⁵ This can be accomplished, in part, through discussions with operators or planners, by asking the intelligence staff for a current intelligence briefing or an order of battle briefing, by reading intelligence reports on the disposition and capabilities of hostile forces, and learning, if possible, how the potentially hostile force may have fought in prior conflicts.

For example, in preparing the Operational Guidance (Transition ROE) used for Desert Shield defensive air operations, it was crucial to know *where* friendly ground forces and ground-based air defense systems were developed, *how* friendly surveillance aircraft were employed, *what* was the tempo and configuration of Iraqi air activity, and *what*, if any, civilian airline traffic was transiting Iraqi and coalition airspace.

After gaining an awareness of the factors involved in the mission, next consider who will be using the ROE. This step is vital for two reasons. First, ROE should be crafted to fully exploit the weapon systems operated by friendly forces. In Desert Storm, the wartime ROE were written to maximize the combat effectiveness of over twenty different combat aircraft and air defense systems in

53. In a 4 June 1975 letter to Senator Barry Goldwater in which he released excerpts from The ROE used in Southeast Asia, the Secretary of Defense, James Schlesinger, noted the ROE, "up until now have been classified in order to prevent the enemy from being able to gauge his conduct upon sure knowledge of the constraints imposed upon U.S. military reaction, and thus avoid retaliatory fire. A blanket disclosure of all Rules of Engagement and operating authorities is still not warranted, in my opinion, because it would disclose doctrinal patterns, and operational concepts that could be of use to potential enemy nations."— CONG. REC —(1974.)

54. "Lord Nelson did not win at Trafalgar because he had a great plan, although his plan was great. He won because his subordinate commanders thoroughly understood that plan and their place in it well in advance of planned execution." Vice Admiral Henry C. Mustin, III, Commander Second Fleet/Joint Task Force 120, Fighting Instructions, 1986, *quoted in* Joint Pub. 1, *Joint Warfare of the U.S. Armed Forces* 36 (Nov. 11, 1991).

55. This is not new advice. Almost 2500 years ago, the Chinese general Sun Tsu made a similar comment: "If you know the enemy and know yourself, you need not fear the result of a hundred battles. If you know yourself but not the enemy, for every victory gained you will suffer a defeat. If you know neither the enemy nor yourself, you will succumb in every battle." Sun Tsu, *The Art of War*, in *ROOTS OF STRATEGY* (1985.)

use by the Armed Forces from more than ten nations while maintaining vital safeguards against fratricide and unwarranted collateral damage. The use of common wartime rules of engagement during Desert Storm enabled the integration of otherwise diverse national operating procedures and committed coalition air and air defense forces to fight under the same rules. Second, the manner in which the ROE are laid out will depend on the issue of releaseability. Will the ROE be used only by U.S. forces, or will they be distributed for use by other nations' Armed Forces? Armed with answers to these questions, you finally will be prepared to draft or review the rules of engagement.

Rules of engagement that read like a rental car contract or a rock star's separation agreement impede combat operations and cost lives. The voluminous, excessively-qualified ROE promulgated during the Vietnam conflict moldered in squadron and battalion safes.⁵⁶ "Rules of engagement are useful and effective only when [airmen] understand, remember and apply them."⁵⁷

Commanders, pilots, aircraft controllers, and other military personnel who engage in combat operations need crisp, clear-cut guidance that can be committed to memory or, if necessary, quickly referred to in the heat of battle. Consequently, do not attempt to cover every detail; just give the rules of the road for the situations that you anticipate will occur. Rules should be clear and brief, i.e., "Except in emergencies, jettison munitions only in designated jettison areas." When qualifications are necessary set them out from one another in separate sentences or subparagraphs. Use an onion peel approach, establish separate sections to cover ROE for specialized missions such as "Air to Air Engagements" or "Ground-based Air Defense Systems." This technique permits operators to shred out the ROE pertinent to their mission for quick reference. It also solves certain releaseability problems because sections can be distributed on a need to know basis.

During a period of heightened tensions that may break into conflict, ensure your commanders and unit personnel do not lose sight of their inherent right of individual, unit, and national self defense. (As part of that consideration, the long range employment characteristics, attack profiles, and speed of modern weapons must be considered.) Ensure that the ROE do not interfere with the commander's right and duty to protect his unit against actual or imminent threat of attack. The ROE in effect for the 1983 Marine Battalion Landing Team failed to make this clear. The Marine Landing Team's ROE did not contemplate the threats that they faced from pedestrians or vehicles. More importantly, their ROE did not articulate when deadly force was authorized or what constituted "immediate self-defense." In contrast, the ROE in use at the U.S. Embassy in Beirut defined efforts to breach barriers or checkpoints as "hostile acts" that authorized the Marine guards to use deadly force. The Department of Defense Commission on Beirut International Airport Terrorist Incident identified this failure to provide clear self-defense criteria as a key factor in the subsequent loss of life.⁵⁸

56. For example, the ROE for fixed wing air operations stated:

(1) If the attack on an inhabited area from which enemy fire is being received is deemed necessary, and is executed in conjunction with a ground operation involving the movement of ground forces through the area, and if in the judgement of the battalion or higher commander his mission would be jeopardized by prior warning, the attack may be made without such warning or delay.

CONG. REC., *supra* note 53.

57. *Id.* at 3-55.

58. Operations Law Handbook, *supra* note 52 at 3-51.

The mere fact you are not assigned at a level where you are involved in drafting ROE for the JFACC does not mean that you can just give the ROE a quick look over. ROE should be unambiguous and capable of being followed. The ROE promulgated at theater level are drafted by individuals who are attempting to anticipate the needs of all types of combat units. Review the ROE to ensure they fit your unit's capabilities and meet your unit's needs. If they do not ask for additional or revised ROE.

Another group you are tasked to support is your ground defense force. They need ROE too. This need is particularly acute if your installation is defended by a joint or combined force. The ROE must be coordinated and consistent to avoid mishaps.

V. TARGETING

The essence of targeting is making every reasonable effort to put the bombs on a military target.⁵⁹ Absent specific target restrictions established under international law or imposed by superior commanders,⁶⁰ there are essentially two legal principles to be considered when making targeting decisions, military necessity and proportionality.⁶¹

One of the best explanations of the term "military necessity" appears in *The Hostage Case*:

Military necessity permits [an armed force], subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money....It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable...[in combat operations]; it allows the capturing of armed enemies and others of peculiar danger, but it does not permit the killing of innocent inhabitants for purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of enemy forces.⁶²

The legal principle of proportionality shares much in common with the military precept known as "economy of force" because it disallows the use of excessive force in achieving a military objective. The principle of

59. W. Hays Parks, *Conventional Aerial Bombing and the Law of War*, NAVAL REV. 102f, (1982).

60. National policy or a commander may specifically prohibit the destruction of otherwise lawful targets. Such prohibitions would normally be articulated in a "No Fire Target List." Ensure you are knowledgeable of the contents of such a list when providing targeting advice. (If the list is extensive, prepare a map depicting no-fire targets for your use in reviewing target nominations.)

61. Most scholars opine that targeting decisions encompass three legal principles rather than two. (See, e.g., NAVAL WARFARE PUBLICATION (NWP) 9, *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, at 5-4f, 8-1; OPERATIONS LAW HANDBOOK, *supra* note 52 at 3-131f.) They would include the principle prohibiting the use of weapons that cause unnecessary suffering. Annex to Hague Convention Number IV, 18 October 1907, para. 27(e). This principle was omitted because it is not germane to most combat targeting decisions. Except for questions concerning the possession of expanding (dum dum) bullets, this is not normally an issue for deploying judge advocates. The munitions deployed for use by U.S. forces undergo a legal review during the development and acquisition process to ensure their employment would not violate this prohibition. See DOD Instruction 5500.15, AFR 110-31, para. 6-7a.

62. *The Hostage Case* (United States v. List et. al.), 11 TWC 1253-54(1950), *quoted in* NWP 9, *supra* note 61 at 5-4, n. 5.

proportionality is codified in Additional Protocol I to the Geneva Conventions, articles 51(5)(b) and 57(2)(a)(iii), as prohibiting attacks "which may be expected to cause incidental loss of life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."⁶³

These principles, taken together, permit the use of armed force against military targets for the purpose of defeating hostile forces, so long as the force used does not cause incidental, collateral damage to civilians or their property that is disproportionate to the military advantage to be gained from the attack.⁶⁴

In applying these principles to a given target, you essentially need to answer two questions. First, is it a military objective? Second, will incidental injury or damage to civilians be excessive when weighed against the military advantage to be gained?

Military objectives are those objects which by their nature, location, purpose, or use, effectively contribute to the enemy's war-fighting or war-sustaining capability and whose total or partial destruction, capture or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack.⁶⁵

Consistent with this definition, military targets are not limited to concentrations of hostile forces or weapons systems. Any object not protected under international law that makes an effective contribution to military operations is a lawful military target. Defense industries and research facilities supporting weapons development fall into this category. Moreover, military targets include "dual use" facilities (those with both civil and military value) such as electric power generation facilities, POL manufacturing and storage, communications and transportation networks that support military operations. Lawful military targets also may include geographical locations such as mountain passes or wadis that provide avenues of attack.⁶⁶ When civilian property has been converted to a military use inconsistent with its civilian status, it may be lawfully attacked as well.

A judge advocate should only provide answers to targeting questions after a careful review of the facts and the planned method of engaging the target. In most instances where the proposed target is a military objective, help is needed only in developing a means of attack that meets the criteria of proportionality. Point out your concerns. Be creative and consider alternatives. For example, Saddam Hussein's nuclear research facility near Baghdad was involved in the development of nuclear weapons and constituted a legitimate military target. However, the potential collateral damage that could be caused by venting radioactive fallout into the atmosphere precluded conventional bombing attacks on the site's nuclear reactor. After extensive studies of the building housing the reactor and discussions with experts, an acceptable means of attack was developed that met collateral damage concerns. Precision guided munitions were used to cause the building to collapse on top of the reactor without damaging the fuel rods in its core, thereby preventing the release of radioactive material.

63. Although the United States has not ratified the Additional Protocols, it considers this provision a restatement of customary international law. NWP 9, *supra* note 61 at 5-6, n.6.

64. Parks, *supra* note 59 at 110; Lt. Col. Jonathan P. Tomes, *Legal Implications of Targeting for the Deep Attack*, MIL. REV. 72 (Sept. 1984)

65. NWP9, *supra* note 61 at 8-3.

66. Tomes, *supra* note 64 at 73.

Facts are critical in rendering targeting decisions. Review the targeting file. Study any available reconnaissance photographs of the target. Asks questions. You also must know the capabilities of the aircraft and munitions used by friendly forces. Some allies, for example, may use precision guided munitions that can only be employed during daylight hours. Knowing that certain laser-guided munitions are so accurate that they have a "circular error probable"⁶⁷ of less than ten feet may change your targeting from "do not strike" to "use a different munition." Certain weapons have a tendency to fall long or short of the target rather than to the right or left of it; consequently, changing the axis of attack also may solve concerns with proportionality or damage to protected objects.

Fruitful sources of information on targeting are your unit's weaponeers or coalition military members knowledgeable with the area of attack. Weaponeers approach targeting tasks somewhat differently, first assessing a target's vulnerabilities, then selecting the types and numbers of weapons needed to achieve the desired level of destruction. (A useful approach to learn.) Weaponeers have manuals and computer programs that can further assist you in learning how munitions are selected and in getting a feel for a given airframe's accuracy in dropping munitions. During the later phases of Desert Storm, Lieutenant Colonel Heintzelman, talked with members of the Kuwaiti Armed Forces daily about proposed targets in their country to gain information useful to the attacking force and to minimize collateral damage.

VI. PLANNING, LEADERSHIP, AND RESPONSIBILITY

British explorer Commander Robert Scott, while returning from an attempt to be the first person to reach the South Pole, penned the following words in his diary as he lay dying in his tent of starvation, a mere eleven miles from a prepositioned supply depot.

The causes of the disaster are not due to faulty organization but to misfortune in all risks which had to be undertaken.... We are weak, writing is difficult, but for my own sake, I do not regret this journey....We took risks, we knew we took them; things have come out against us, and therefore we have no cause for complaint, but bow the will of Providence, determined still to do our best to the last....⁶⁸

Jared Diamond, in an excellent article, "The Price of Human Folly,"⁶⁹ examines the Scott Expedition and determines that in the end what killed Scott was not "the will of Providence" but "gross errors in planning and leadership."⁷⁰ "Prudence dictated that Scott plan for a very wide margin of safety. He left none and thereby killed not only himself but four other men."⁷¹ Anyone involved in the operations arena by choice or chance, whether operator, attorney, or support individual would do well to read this article for it is a needed lesson in

67. "Circular error probable (CEP) is used to calibrate the accuracy of a munition. It indicates the distance where a munition is likely to hit within the CEP radius over fifty per cent of the time.

68. J. Diamond, *The Price of Human Folly*, DISCOVER 73 (Apr. 1989). (quoting from Scott's journals).

69. *Id.*

70. *Id.*

71. *Id.* at 75.

what happens when the unlikely but foreseeable happens in the face of unnecessary risks, poor planning, and insufficient redundancy.

A leader must get the most from his followers. Robert Scott did not. He ignored expert advice, manipulated his subordinates, and drove them past the point of exhaustion. When Scott ordered his pack ponies back to his base camp after the establishment of a food cache, a subordinate pointed out the dangerous ice conditions that were present. "Scott blew up and told him that orders were orders."⁷² On the trip back, these valuable pack animals died, as the subordinate had warned, in an ice break up. Even under the most optimistic calculations, Scott failed to bring sufficient food for his intermediate supply caches. This resulted in a severe weakening of his party's condition. Scott's diary reveals that on his return trip from the South Pole, his party was constantly hungry. Scott expressed doubts whether sufficient supplies remained to reach the next storage site, let alone home base. Yet instead of pressing for home base, Scott tarried. He repeatedly stopped half days at a time to collect field samples. Upon reaching one intermediate food cache with just one meal left in reserve, Scott wrote, "Yesterday was the worst experience of the trip and gave a horrid feeling of insecurity. Now we are right up but we must march."⁷³ Displaying a gross disregard for the risks involved, Scott subsequently directed the collection of more rock samples within hours of leaving this resupply point. Ill-marked supply points, ill-chosen expedition members, a diet that caused scurvy, and no margins of safety are other examples of Scott's misjudgments and delicts in leadership. And, as his final words show, even as death approached, he did not comprehend his ultimate responsibility for the safety of his party.

"Flexibility increases as the number of well-trained personnel increases."⁷⁴ This precept of aerospace doctrine could have been used to great advantage by Robert Scott. He had a zoologist on his expedition named Apsley Cherry-Garrard who attempted to learn navigation but had difficulties. Robert Scott did not bother to help him, noting in his journal, "of course there is not one chance in a hundred that he will ever have to consider navigation on our journey."⁷⁵ Ironically, because of personnel losses, Cherry-Garrard was the one person available who could have left the supply depot with extra supplies to rescue Scott when he became overdue. Cherry-Garrard did not because he could not navigate. Had Scott supported the training of Cherry-Garrard he would have increased the usefulness of a member of his expedition, obtaining redundancy and flexibility that could have prevented five deaths.

The specific parallels of Scott's expedition to combat or contingency deployments are simple, yet valuable. First, plan for the unlikely if you cannot afford the consequences. Second, do not overlook the specialized knowledge that pilots, weapons systems officers, targeteers, and others possess in your search for solutions to operational legal issues. Finally, accept ultimate responsibility for your mistakes. Learn from them and try to benefit from the experience and prior mistakes of others too.

While there are risks inherent to any deployment or combat operation, you should attempt to avoid or mitigate dangerous situations if possible. (There is a difference between bravery and foolishness.) However, when rendering advice on rules of engagement or recommending a course of action, tell the commander or decision maker when your advice has any safety factor or

72. *Id.*

73. *Id.*

74. *Id.* at para. 4-3a(5).

75. *Id.* at 74.

redundancy built into it. The ultimate responsibility for the success of the mission and safety of the unit is the commander's and the people that are most effected by your advice are the aircrews. They both have the right to know what all of their permissible courses of action are.

VII. FINAL THOUGHTS

It is dangerous to assume that because things worked so well in Desert Storm that they will automatically work as well the next time we are called to combat. For one thing, we had months to prepare in the desert. Second, we were able to choose when to take the initiative. Neither may be the case in a future conflict.

One of the goals of recent Air Force reorganizations is to prepare units to deploy and instantly function as effective offensive fighting forces. The result is that the operations lawyers must constantly prepare as if they are about to prosecute or defend a capital case with no set court date; but, with knowledge that when a court date is set, trial will be within forty-eight hours of notification. There is one important difference. In a worst case scenario, the old saw that the attorney gets to go home while the client ultimately faces the result of the court action may not hold true.

The judge advocate who is well versed in operations law is a vital member of the operational team. To be effective in this role, we must, first be knowledgeable; second, we must be trusted in the operational world; and finally, we must never lose sight that our ultimate mission is the Air Force mission—to fly and fight!

A Bias-Free LOAC Approach Aimed at Instilling Battle Health in our Airmen

MAJOR DENNIS W. SHEPHERD, USAF

I. INTRODUCTION

When we take the officers' commissioning oath we swear to support and defend the Constitution against all enemies foreign and domestic.¹ A transition occurs when civilian attorneys become Air Force judge advocates engaged in the military profession after which we practice within a unique military milieu. Among other things, that means being prepared to provide soldiers in peace-time a basic understanding of the law applicable in war. More dramatically, as the oath implies, it also means performing the role of a legal adviser in the arduous climate of combat. The goal of this article is to provide the judge advocate with a concise introduction into the Law of Armed Conflict (LOAC)² and a compelling rationale for becoming knowledgeable in this area. LOAC's *raison d'etres* is to establish minimum standards of human decency on the battlefield.³ For such standards to prevail, the individual participants who go to war must know LOAC, believe in and respect it, with a healthy respect for the consequences of non-compliance.⁴ The task of Air Force judge advocates becomes knowing the law of armed conflict well

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1. AIR OFFICER'S GUIDE 1 (J. Napier 28th ed. 1989). The history of the officer's oath is found in Reese, *An Officer's Oath*, 25 MIL. L. REV. 1 (1964).

2. This article generally uses the abbreviated form, "LOAC," to describe the law of armed conflict. LOAC is an acronym relatively familiar among U.S. Air Force judge advocates. The law of armed conflict includes the Hague law governing the conduct of warfare, and Geneva law which protects the victims of war. Air Force Pamphlet (AFP) 110-31, *International Law-The Conduct of Armed Conflict and Air Operations* (1976). Other alternatives to LOAC include the "law of war" and "international humanitarian law." The law of war as a descriptive may suggest that a special state of international relations is required before the rules apply. It also uses a term, "war," which can suggest a means of accomplishing national goals. Such methods have been condemned formally since 1928. See PACT OF PARIS OF AUGUST 27, 1928 [herein after KELLOGG-BRIAND PACT]. The United Nations Charter promotes a system devoted to peace and peace-keeping, the term "war" being expressly avoided. See GOODRICH AND HAMBRO, CHARTER OF THE UNITED NATIONS, COMMENTARY AND DOCUMENTS 101-104 and 582 (1949). Finally, referring to the law of war may suggest that only Hague law applies.

Using international humanitarian law seems to go too far towards the peace end of the spectrum. The term implies that the rules protecting victims, or Geneva law, are invoked. It may also indicate that the area of human rights is somehow a part of humanitarian law. For a discussion of the problems associated with this phrase see Y. Dinstein's contribution to HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES, Vol. II, at 345-348 (1984). See also F. DE MULINEN, HANDBOOK ON THE LAW OF WAR FOR ARMED FORCES, xviii (1987), where the term "law of war" is preferred.

3. U.S. Army Field Manual, 27-10, *The Law Of Land Warfare* (1956), states this general principle as follows: "The law of war places limits on the exercise of a belligerent's power...and requires that belligerents refrain from employing any kind or degree of violence which is not actually necessary for military purposes and that they conduct hostilities with regard for the principles of humanity and chivalry." See also W. LEVI, CONTEMPORARY INTERNATIONAL LAW: A CONCISE INTRODUCTION 326-327 (1979).

4. Hampson, *Fighting by the Rules: Instructing the Armed Forces in Humanitarian Law*, INT'L REV. OF THE RED CROSS No. 269 (March-April 1989).

enough and believing in it so steadfastly that you can advise commanders properly and train airmen effectively.⁵

II. BATTLE HEALTH FROM A LOAC PERSPECTIVE: ROUTINE AND REINFORCEMENT

To gauge how well you must know the law of war, you have to appreciate what the average soldier heading for war must know if minimum standards of human decency are to be achieved in the chaos of battle. The minimum level we attempt to impart to every airman before he or she ever faces an actual combat decision is described by M. Bothe's "Internalization of Norms".⁶ Bothe recognizes that the law applied in the arena of war must be a part of the combatant's consciousness before ever getting to that arena. Respecting the law in combat is based largely on the participant's voluntary compliance. As Bothe says, this "presupposes that the [participant] knows the law, that he accepts it as a yardstick of his action, [and] that compliance with the law becomes part of his working routine."⁷

While the Air Force strives to ensure a baseline of LOAC awareness through its law of war training component for basic trainees,⁸ this would seem to satisfy only Bothe's first step, i.e. knowledge of the law. The task of Air Force judge advocates is to go beyond this orientation phase to Bothe's "acceptance" and "routinization" phases.

Francoise Hampson suggests that this is done by strengthening the baseline of the soldier's cognitive knowledge with a series of appreciative factors, which have been known as the "Hampson factors."⁹

The soldier's sense of what he can and cannot do in combat and in dealing with the victims of hostilities is not, of itself, sufficient. It needs to be reinforced in three ways. He must know that the same standards are shared by his commanding officers and those responsible for the conduct of the conflict. He must be used to confronting moral dilemmas in practice, so as to be familiar with applying the rules in the chaos of combat. In other words, training exercises must include the situations in which the armed forces are required to put the law into practice. Finally, the soldier must know that a breach of the rules will entail punishment.¹⁰

The airman not only should know the basic precepts of LOAC, she should appreciate how those rules affect superiors, how they affect decision-making in the heat of combat, and how they will affect one's individual liberty in the case of a breach of the rules. "Battle health" is a term which combines a basic LOAC orientation with Bothe's internalized norms and then goes beyond this pre-conflict awareness by training the soldier how to make correct choices within the pressure-filled domain of hostile fire. Battle health is defined as the mental attitude of the combatant, an attitude shaped by enough knowledge of LOAC to make right decisions routinely, and strengthened by the Hampson factors sufficiently to favor

5. DOD Directive 5100.77 (Nov. 5, 1974). See also Air Force Regulation (AFR) 110-32 *Training and Reporting to Ensure Compliance with the Law of Armed Conflict* (1976).

6. Bothe, *The Role of National Law in the Implementation of International Humanitarian Law*, in *STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES* 301 (1984).

7. Bothe, *supra* note 6, at 303.

8. Law of Armed Conflict Teaching Guide (March 2, 1992). See also AFR 110-32, *supra* note 5 at para. 10 (describing Air Training Command's duty to ensure LOAC orientation for all entering enlisted and officers).

9. Hampson, *supra* note 4.

10. Hampson, *supra* note 4, at 115.

legally correct choices in the heat of battle. Several separate judge advocate functions intended to achieve battle health are suggested by the literature in this area: ensuring respect, implementing LOAC, training in LOAC, dissemination of LOAC, and advising the military commander are the most commonly cited areas.¹¹ By fusing the pre-conflict awareness level of Bothe with the conditioning factors of Hampson, we can adopt the most comprehensive and focused role as is possible. In sum, the Air Force judge advocate should know and believe in the law of armed conflict so well as to effectively impart a minimum level of battle health to Air Force participants to war.¹² It is with this rationale in mind, focused towards a unifying principle of practical effectiveness, that a brief background of the law of war and an outline of the legal tools of LOAC are presented.

III. BELIEVING IN LOAC: ELIMINATING BIAS AGAINST INTERNATIONAL LAW AND THE BIAS CREATED BY FAILURE

As the one charged with teaching the rules to the troops, the judge advocate must have a solid understanding of the origins of the law of war and a steadfast faith in the international commitments created by that law.¹³ Without adequate knowledge and total commitment, the ability required to effectively impart battle health suffers. The Air Force lawyer must be able to answer every notion that denigrates the law of war.¹⁴

The law of armed conflict is a subset of international law.¹⁵ To accept LOAC's binding effect on combatants, the judge advocate must accept the major premise that international law is compulsory upon the nations of the world. But does international law even exist? If it does, how do we find it?

An attorney schooled in the domestic law of the United States can begin with a famous passage from the United Nations Supreme Court: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."¹⁶ This recognition of international law by our highest court may not completely eliminate the doubt sometimes expressed about the essence of international law. This is a doubt that really involves the process of

11. Winter, "Finding the Law" - *The Values, Identity, and Function of the International Law Adviser*, 128 MIL. L. REV. 6-8 and 14-32 (1990). See Shefi, *The Status of the Legal Adviser to the Armed Forces: His Functions, and Powers*, 100 MIL. L. REV. 119 (1983).

12. AFR 110-32 defines the broad policy mandate that Air Force personnel will comply with the law of armed conflict in the conduct of military operations and related activities in armed conflict. The regulation establishes a regime of implementation highly dependent on the work of the Air Force judge advocate. The goals of mastering the law, believing in it, and disseminating it through teaching and advising are consistent with the policy and method of implementation. AFR 110-32, *supra* note 5.

13. A March 1978 policy letter by The Judge Advocate General of the Air Force (Major General Walter D. Reed) stressed that "our lawyers must really know this subject [LOAC] before they conduct any briefings." Letter of 9 March 1978: Training in the Law of Armed Conflict. See also AFP 110-31, *supra* note 2 at para. 1-2.

14. Yoram Dinstein identifies five popular misconceptions about the law of war summarized as follows: (1) during wartime there simply is no room for legal norms; (2) the laws of war are not organized but chaotic; (3) in these times of "total war" distinguishing between civilians and combatants does not comport with reality; (4) in the face of nuclear destruction efforts to regulate the conduct of warfare become unimportant; and, (5) war as a means of national policy has been outlawed (for example, by the Pact of Paris of Aug. 27, 1928). Therefore, continued work in the field of regulating war is contradictory to the international ban on war. HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES, Vol. II, at 363 (1984).

15. J. BRIERLY, *THE LAW OF NATIONS*, 25-34 (1963). See also AFP 110-31, *supra* note 2 at chapter 1.

16. *The Paquete Habana*, 175 U.S. 677 (1900). See also Henkin, *International Law As Law In The United States*, 82 MICH. L. REV. 1555 (1984).

finding the law. The Statute of the International Court of Justice provides a basis for locating the law. Article 38 of the Statute provides a road map to international law sources beginning with "international conventions...expressly recognized by the contesting states," continuing with customary international law, general principles of law, and ending with "judicial decisions and the teachings of the most highly qualified publicists of the various nations."¹⁷ Knowing that international law is recognized and is recognizable, the LOAC teacher-adviser must appreciate one of the most fundamental international legal principles, i.e. *pacta sunt servanda*, or "agreements must be kept."¹⁸

International law prescribes the rules in every regime shared by the world's nations including the seas, the air space, and outer space.¹⁹ One of the oldest branches of international law is the law of war.²⁰ The judge advocate should comprehend a broad sweep of history associated with the modern development of this subcategory of international law. Henri Dunant's witnessing of the bloody battle of Solferino in June, 1859, alone produced a chain reaction which eventually produced the Geneva Convention process that protects noncombatants and is summarized by the phrase, Geneva law.²¹ In 1863 the United States Army professor, Francis Lieber, contributed greatly to the regulation of armed conflicts by drafting what's now known as Lieber's Code.²² The culmination of western thinking on the law of land warfare came in the Hague Conventions of 1899 and 1907. Hague law, distinguished from Geneva law, establishes the legal norms for combatants and their weaponry.²³ The evolution of the law associated with combat continued with the Geneva Convention of 1929, the four Geneva Conventions of 1949, and the 1977 Protocols.²⁴

Defeating the Defeatist Attitude. To overcome the defeatist attitude towards the law of war,²⁵ it is critical to appreciate the rough cause-and-effect relationship

17. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, ART. 38.

18. J. O'CONNOR, GOOD FAITH IN INTERNATIONAL LAW (1991). Professor Bin Cheng defines the principle as a consequence of the good faith among nations: "*Pacta sunt servanda*, now an indisputable rule of international law, is but an expression of the principle of good faith, the pledged faith of nations as well as that of individuals." B. CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 113 (1987). See also I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 616 (1991). A more dramatic description of *pacta sunt servanda* is given in the introduction to an issue of the International Review of the Red Cross: "The law of armed conflicts is valid—and meaningful—only to the extent that it is implemented. *Pacta sunt servanda*. This axiom should be engraved in the conscience of mankind. Undeviating compliance with it should go without saying, since what is at stake is no less than the protection of victims of armed conflicts and the limitation of the violent effects of war. 281 INT'L REV. OF THE RED CROSS 99. This article emphasizes international law derived from treaties because the training and disseminating requirements associated with LOAC are found in the Hague and Geneva conventions. Dispelling the bias against the need to train is done by recognizing that training and dissemination are duties assigned to the High Contracting Parties by international treaty. In other words, those functions are mandated by the highest legal authority recognized to govern international relations. But, as Article 38 of the I.C.J. Statute indicates, there is another source of international law which is just as obligatory and that source is custom. Customary international law is that practice among nations which has evolved to the point that all nations are obliged to follow the practice. Briefly, *supra* note 15, at 51-52 and 59-62.

19. W. LEVI, *supra* note 3, at 129-44.

20. A. GENTILI, ON THE LAW OF WAR, 3-9 (J. Rolfe transl., 1612).

21. H. DUNANT, A MEMORY OF SOLFERINO (1962).

22. General Orders No. 100 of 24 April 1863, Instructions for the Government of the Armies of the United States in the Field, reprinted in THE LAW OF NATIONS: CASES, DOCUMENTS AND NOTES (H. Briggs ed., 1942).

23. U.N. EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION, INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW, Ch. VII, at 67-77 (1988) [hereinafter INTERNATIONAL DIMENSION OF HUMANITARIAN LAW].

24. *Id.* at 78-86. See also G. HERCZEGH, DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW 21-83 (1984).

25. That attitude is reflected to some degree in each of Yoram Dinstein's popular misconceptions about the law of war listed above. See *supra* note 14. The defeatist attitude, couched in terms of

between the historical failures in the law of armed conflict and the progress in the development of that law.²⁶ From the battle of Solferino, a battle which saw nearly forty thousand killed or wounded in less than a day,²⁷ Henri Dunant began the Geneva process. His book, *A Memory of Solferino*, evoked such a response in influential circles that the first Geneva Convention resulted in 1864.²⁸ At about the same time, the work of Professor Lieber in providing the Union Army law of war instructions that took into account humanitarian considerations was also having an influence in international spheres.²⁹ Lieber's contributions eventually led to the Hague Conference of 1899, the work of which was revised at the Hague Conference of 1907.³⁰ The failure of the World War I participants to adhere to the law of war, and the inadequacies of that law, led to the Geneva Conference of 1929.³¹

The two world wars illustrated the catastrophe that can result if established laws are not effectively taught to the combatants. Draper offers this assessment of the effectiveness of the law of war and the historic result during World War II:

At that moment in time it may be said that the knowledge of the law of war by statesmen, service commanders, staff officers, troops and other State agencies was minimal if not non-existent. Some states had published official manuals on the law of war to meet their obligations under Article I of the Hague Convention No. IV of 1907. Regular Instruction in of the subject was confined to the ICRC and to a few jurists and academics. The law itself was fragmentary, anachronistic, uncertain, and inadequate. The legal devices to secure its implementation and its enforcement were few and fragile. The experiences of World War II exposed all of these weaknesses to the world. The tide of inhumanity by man to man reached a level more shocking than the world had ever had the misfortune to witness.³²

"cynical disenchantment with law" is described in M. MCDUGAL & FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 2-5 (1961). See also Aldrich, *Compliance with International Humanitarian Law*, *INT'L REV. OF THE RED CROSS* No., 282 at 299 (May-June 1991).

26. A discussion of how society can constructively approach the historical shortcomings of humanitarian law is found in Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 *MIL. L. REV.* 99-112 (1972).

27. Dunant stated "the battle of Solferino is the only one of the Nineteenth Century which can be compared, for the number of casualties it involved, with the battles of Borodino, Leipzig and Waterloo. After the battle of June 24, 1859, the total of killed and wounded Austrians and Franco-Sardinians numbered three Field Marshals, 9 Generals, 1566 officers of all ranks (630 Austrians and 936 in the Allied Army), and some 40,000 non-commissioned officers and men." DUNANT, *supra* note 21, at 105-06.

28. From his Solferino experience, Dunant sought to establish relief societies dedicated to care for the wounded in war. He travelled to several European capitals to advocate for his ideas, winning substantial support. In 1863 the so-called "Committee of Five," including Dunant, organized a conference in Geneva attended by representatives from sixteen countries. The recommendations of that conference were adopted at the 1864 diplomatic conference and incorporated into the first Geneva Convention named the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. DUNANT, *supra* note 21, at 129-30.

29. Article 25 of Lieber's Instructions exemplifies the humanitarian nature of these war-time rules: "In modern regular wars of the Europeans and their descendants in other portions of the globe, protection of the inoffensive citizen of the hostile country is the rule; privation and disturbance of private relations are the exceptions." See *supra* note 22. Professor Lieber's battlefield code helped form the basis for the Brussels Conference of 1874 convened by the Emperor of Russia devoted to an examination of the law of war. Though no international treaty resulted, the Declaration of Brussels was taken up at the Hague Peace Conference of 1899. 2 WHEATON'S INTERNATIONAL LAW 166-67 (A. Keith ed., 7th ed. 1944). See *supra* note 23, at 71.

30. INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW, *supra* note 23, at 71.

31. Draper summarized the state of the law of war during World War I as simply inadequate. *Id.* at 76. He identified three major areas requiring a legal solution: (1) The Geneva Sick and Wounded Convention of 1906 did not adequately address casualties inflicted on the immense scale of World War I. (2) Rules governing prisoners of war were also lacking. (3) The use of poisonous gas by Germany created a new evil that had to be addressed. *Id.* See also HERCZEGH, *supra* note 24, at 37-42.

32. INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW, *supra* note 23, at 79.

The legal response was the continuation of the Geneva process in 1949.³³ The result of this process was the four Geneva Conventions of 1949.³⁴ Adjustment to the legal process limiting the means of waging armed conflict and protecting war's victims came again in the 1977 Protocols Additional to the Geneva Conventions of 1949. Protocols I and II were intended to reaffirm and extend the Geneva Conventions, especially considering the substantial improvements in weapons technology.³⁵

The conclusion from the century or so between Solferino and Geneva is that the law of war contains a dynamic element, an aspect which adjusts that law when war shows it has not been adequately contained by existing rules. After the judge advocate removes individual biases concerning international law and the adequacy of the law of war, the Bothe-Hampson model can be applied.

The Air Force judge advocate can see from this brief overview that the process of revising the international law of war is an on-going one and a recent process, given the short history of this law dating from Solferino. Rather than be overcome by statistics,³⁶ or an ostensible history of failure to adhere to standards, the constructive

33. The International Committee of the Red Cross met in 1945 to propose to governments the changes in humanitarian law made necessary by the experience of the war. Three conventions were to be revised: the 10th Hague Convention of 1907 for the adaptation to Maritime Warfare, the Geneva Convention of 1929 for the Relief of the Wounded and Sick in Armies in the Field, and the 1929 Convention on the Treatment of Prisoners of War. One convention was newly created on the protection of civilians. The following chronology of key events led to the four Geneva Conventions of 1949:

October, 1945	First meeting of experts composed of neutral members of Mixed Medical Commission
July-August, 1946	Preliminary Conference of National Red Cross Societies
April 1947	Conference of Government Experts meets in Geneva
May 1948	Draft conventions sent to all governments and National Red Cross Societies
August 1948	Draft documents adopted in Stockholm
April-August 1949	Diplomatic Conference in Geneva; after debate four Conventions emerged.

The new conventions entered into force on February 12, 1950. INTERNATIONAL COMMITTEE OF THE RED CROSS, THE GENEVA CONVENTION OF AUGUST 12, 1949 (1981).

34. HERCZEGH, *supra* note 24, at 42-55.

35. Protocol I supplements the protections given to victims of international armed conflicts by the Geneva Conventions of 1949. Protocol II develops the common article 3 protections afforded to victims of non-international armed conflicts by the same Geneva Conventions. U.N. Doc. A/32/144. ANNEXES I AND II, reprinted in I.L.M. 1391 (Protocol I), 1442 (Protocol II) (1977). The United States was an original signatory to each protocol, having participated in the diplomatic conference which developed them. But, to date, neither instrument has been ratified by the United States. W. Parks, *After Protocol I: A Military View*, reprinted in LAW FOR THE JOINT WARFIGHTER 324 (2d ed. 1989). As of 30 June 1991, 103 countries have adopted Protocol I and 93 have accepted Protocol II. These figures are in need of updating given the breakup of the former Soviet Union. INTERNATIONAL COMMITTEE OF THE RED CROSS, TWENTY-SIXTH INTERNATIONAL CONFERENCE OF THE RED CROSS AND RED CRESCENT, SIGNATURES AND RATIFICATIONS OF AND ACCESSIONS TO THE GENEVA CONVENTIONS AND THE PROTOCOLS ADDITIONAL THEREOF (Geneva 1991). From a training standpoint, one may ask the usefulness of training U.S. troops with the contents of these unratified international agreements. The response is that the United States recognizes the useful application of the vast majority of the articles in each protocol. See Aldrich, *Progressive Development of the Law of War: A Reply to Criticisms of the 1977 Geneva Protocol I*, 26 VA. L. REV. 693. Certain provisions are relatively **nonpolitical and extremely useful during armed conflict**. For example, Protocol I provides the means to **safely transport the wounded from a battle zone by air**. Beyond useful provisions for even a nonparty those **sections of the unratified protocols which are considered to represent customary international law are binding and therefore must be taught**. See Brierly, *supra* note 15, at 51-52. Acknowledgment of the **binding effect of custom on the United States during the Persian Gulf Conflict (Coalition Forces versus Iraq, 1990-1991)** is found in the Department of Defense Report to Congress on the Conduct of the Persian Gulf War, Appendix O, 31 I.L.M. 612, 625 (1992). The importance of knowing how the United States complied with its customary international law responsibilities is highlighted in critical studies such as **NEEDLESS DEATHS IN THE GULF WAR (Middle East Watch 1991)** (where the U.S., the other coalition partners and Iraq are called to task for violations of the law of war including customary law).

36. Statistics show that over 10 million Europeans died in World War I and double that number were wounded. THE COLUMBIA HISTORY OF THE WORLD, 992 (J. Garraty and P. Gay eds. 1981).

lawyer can show when LOAC proved inadequate in the modern era, LOAC was changed.

IV. THE DOD LAW OF WAR PROGRAM

Given the importance of the law of armed conflict in restricting warfare to the combatants, according to minimum standards of human decency, and given a history which begs for more effective compliance, the task of the Air Force judge advocate is to use the tools available to train, disseminate and advise better. The remainder of this article examines the Air Force Law of War regulatory system to see how it facilitates a bias-free LOAC approach aimed at effective dissemination along the lines of the Bothe-Hampson model.

The Vietnam experience revealed the self-adjusting dynamics of LOAC. The Department of Defense instituted a new directive in November, 1974, intended to correct the perceived faults in the way the U.S. military met its international obligation to implement an effective training program on the law of war.³⁷ The DOD Law of War Program and the individual service implementing regulations serve as the foundational elements for effective LOAC training.

The Department of Defense obligated itself to three primary goals under this program. First, the program was to ensure that the law of war and the obligations of the United States Government under that law were observed and enforced by the Armed Forces of the United States.³⁸ This is a tremendous commitment. It implies that training and advising will be effective enough to guarantee U.S. troops in the field act legally under all circumstances no matter how trying. Second, the program was to foster a preventive attitude in the troops to avoid LOAC breaches.³⁹ Third, the program was to guarantee that perceived LOAC violations were dealt with effectively. This process included a proper and timely investigation and, where appropriate, a method to sanction the violator.⁴⁰ Each major component of the program (LOAC compliance, preventive dissemination, and a system of redress)—fits within a very broad context of international legal norms. The directive stated that “the law of war encompasses all international law with respect to the conduct of armed conflict, binding on the United States or its individual citizens, either in international treaties and agreements to which the U.S. is a party, or applicable as customary international law.”⁴¹

Recently reported statistics include an estimate that the world spent a trillion dollars on war in 1991. *The Stars and Stripes*, Oct. 16, 1992, at 1 (citing a report of the Center for Defense Information).

37. Department of Defense Directive (DOD Dir.) 5100.77 (Nov. 5, 1974). See P. KARSTEN, *LAW, SOLDIERS AND COMBAT* 148-149 (1978). The My Lai incident occurred on 16 March 1968. *United States v. Calley*, 46 C.M.R. 1131 at 1164-1168 (1973). In effect on that day was a Military Assistance Command Vietnam (MACV) directive on prisoners of war. The directive stated that “The United States considers the armed conflict presently existing in Vietnam to be international in character. Accordingly, all articles of four Geneva Conventions are applicable.” MACV Directive 20-5, March 15, 1968. The facts of the My Lai incident reveal several individual decision makers, from the highest military levels, to a number of ground troops who made life-or-death decisions at My Lai village. Had training and advising been imparted so that “battle health” was attained, at least some of the decision makers would have made the legally correct choice in the heat of battle.

The fact that major LOAC violations occurring in Vietnam sparked the change that brought a new DOD law of war program should not be taken to mean war crimes within U.S. circles have not generally been sanctioned. Historically, the U.S. troop has been punished for LOAC violations. See Paust, *supra* note 26, at 113-118.

38. DOD Dir. 5100.77, *supra* note 37 at part II.A.

39. *Id.* at II. B.

40. *Id.* at II. C

41. *Id.* at IV. A

A. Implementing the DOD Program: Air Force Regulation 110-32

The Office of The Judge Advocate General through AFR 110-32 has primary responsibility in the training, dissemination, and advising functions associated with the law of armed conflict. It is responsible for the following functions:⁴²

1. Preparation of LOAC material
2. Dissemination of LOAC material to the field
3. Advising commands on training plans that will impart an adequate level of LOAC knowledge
4. Providing comprehensive advice on LOAC, its contents and requirements
5. Insuring that all Air Force judge advocates receive periodic LOAC instruction
6. Supervising the administration of military justice aspects of LOAC, including LOAC violations
7. Acting as a central repository for all incidents involving allegations of LOAC breaches
8. Making recommendations regarding alleged violations
9. Coordinating plans and policies with the Army on processing information regarding enemy LOAC violations⁴³
10. Reviewing and evaluating Air Force activities periodically "to insure that effective programs are maintained to prevent violations" of LOAC.

Air Force Regulation 110-32 identifies service-wide responsibilities in a way that facilitates the principle of practical effectiveness throughout the Air Force. Training responsibilities, for example, are assigned not only to the service schools, i.e. the Air Force Academy and Air University, but also to the Surgeon General,⁴⁴ as well as to the Chief of Security Police.⁴⁵ This allows the specialists of war, the policemen and the medics, to have an in-house training regimen. To provide general oversight for all Air Force activities, the regulation places the responsibility on the Inspector General of the Air Force to "inspect all activities to insure that USAF personnel are adequately trained in requirements of the law of armed conflict, that Air Force plans adequately reflect requirements of the law, and that Air Force operations are carried out consistently therewith."⁴⁶

General training responsibility is assigned to Air Education and Training Command. This command is charged with providing LOAC training to all Air Force members, as well as designing specialized training "for persons directly connected with combat operations, such as air crew member, security police, and airmen connected with target selection and evaluation."⁴⁷ Air Education and Training Command must also supervise LOAC training for all new Air Force members, including basic trainees and officers from the different commissioning programs.⁴⁸

Each of the Geneva Conventions of 1949 contains provisions to ensure that proper respect is afforded to the convention and that breaches meet with appropriate

42. AFR 110-32, *supra* note 5.

43. The United States Army is the Department of Defense executive agent for the law of war program in regard to alleged LOAC violations committed against U.S. personnel. DOD Dir. 5100.77, *supra* note 37 at part VI. F. (Nov. 5, 1974).

44. *Id.* at para 7.

45. *Id.* at para. 8.

46. *Id.* at para. 6.

47. *Id.* at para. 10.

48. *Id.*

action.⁴⁹ Ensuring the timely reporting of law of war violations is one of the five major areas of responsibility assigned to the Secretaries of the Military Departments under DOD Directive 5100.77.⁵⁰ The Air Force provides a regulatory scheme to assist the individual Air Force member in promptly reporting perceived LOAC violations. "Each member of the Air Force who has knowledge of or receives a report of an apparent violation of the law of armed conflict, must make the incident known to his immediate commander."⁵¹ In cases where the immediate commander is implicated in the crime, the regulation provides for the report to go to "the next highest command authority."⁵² Air Force Regulation 110-32 also assigns special reporting requirements to those people engaged in occupations which require close proximity to the battle area like medics, combat photographers, or police forces. For these categories a special duty to preserve evidence is established.⁵³ Beyond the foundational sources of the Department of Defense directive and the Air Force implementing regulation, the judge advocate can turn to three other documents that help make LOAC training meaningful and effective. Air Force Pamphlet 110-20, contains those Hague Conventions which have not been supplanted, and all four of the Geneva Conventions of 1949.⁵⁴ Air Force Pamphlet 110-31 includes useful commentary and annotations on virtually all aspects on the law of war, focusing upon LOAC as applied to air operations and, therefore, serving the practical needs of the Air Force.⁵⁵ Finally, the *Commander's Handbook on the Law of Armed Conflict*⁵⁶ is a very concise guide, relatively free of legal jargon, which provides someone commanding troops an overview of LOAC requirements.

The Department of Defense has created a legal framework which seeks to properly apply the international law associated with armed conflict. The United States Air Force provides the judge advocate with the necessary resources to make training a meaningful experience, and to provide advice when training ends and war begins. With this framework and given the legal tools available, the Air Force judge advocate can transform the Bothe-Hampson model into reality. Airmen can receive instruction to learn the law of war well enough to incorporate it into their daily military tasks. Routinization and realism, as Bothe and Hampson espouse, create the level of knowledge necessary to make sound choices in a chaotic atmosphere. They learn that the law is not to be questioned because the highest military leaders have ordered its effective implementation. They see it is to be applied across the board to everyone, and that breaches have a very clear system of redress.

49. Article 1, common to all four Conventions, states: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." See Geneva Convention for the Protection of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31. The following language is also found in each Convention, though in different articles: "Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following article." *Id.*, Art. 49.

50. DOD Dir. 5100.77, *supra* note 37, part VI. E. 2.

51. AFR 110-32, *supra* note 5, at para. 14.

52. *Id.* The Geneva Conventions are not specific in this area. While AFR 110-32 does specify the immediate commander or the next highest commander as the ones who receive the initial report, it is clear that anyone in a position of trust can receive the information. One Air Force major command regulation states: "If command channels are unavailable, individuals will report the alleged violations to the Air Force office of Special Investigations (AFOSI), the security police, a judge advocate, or a chaplain." United States Air Forces Europe Regulation (USAFER) 110-9 (Jan. 14 1992).

53. AFR 110-32, *supra* note 5, at para. 14. b.

54. AFP 110-20, Selected International Agreements 110-20 (July 27 1981).

55. AFP 110-31 *supra* note 2.

56. AFP 110-34, *Commander's Handbook on the Law of Armed Conflict* (July 25 1980)

B. The Law of War Program in Practice

This subsection leaves the formal style of the law review article in order to pass on personal "lessons learned" in the area of LOAC training. My principal training duties occurred in 1989 when I was assigned to the International Law Division of Thirteenth Air Force, at Clark Air Base. I was charged with training Thirteenth Air Force members deploying to Korea for Exercise Team Spirit '89. The trainees, several hundred in number, came from various Air Force skill code areas, and included flight crews, maintenance troops, security policemen, hospital personnel, and personnel specialists.

Keep It Simple. From early January until deployment day, sometime in March, I had to cover the base with talks and handouts, attempting to reach everyone with enough basic training to prepare them for the exercise. In anticipation of this pre-deployment phase, my office sorted through the briefings and handouts from previous years. We checked all of the material against the law itself and then tried to simplify everything.

Handouts were prepared in four categories: general, operations (intended for rated airmen, targeting and planning specialists, and intelligence personnel), security police, and medical personnel. The handout for each group contained the bare essentials of the legal rule, reduced to simple, non-legal language. Each category was summarized in one or two pages and every handout was reduced in size to fit easily into a wallet or flightsuit pocket. These handouts were sent to the deploying units for distribution and also given out during the several LOAC briefings leading up to deployment.

Inject Realistic Scenarios Into Training. The second lesson is to recognize the inadequacies of mere oral and written presentations. The pre-deployment LOAC preparation for Team Spirit '89 hopefully was building upon a fundamental core of knowledge already there. The lawyer as LOAC trainer must try to comprehend the whole training process and, depending on what phase he or she is contributing to, make the experience as practical and realistic as possible. The airman or pilot entering the service, according to the Air Force law of war program, receives /an initial orientation in what is or is not acceptable in war.⁵⁷ The judge advocate needs to try to determine how much more training has gone on between orientation and the moment he or she begins to train. But aim for practical exercises that challenge your trainees. Provide them with tough choices under time constraints and with ethical aspects making their decisions difficult.

Sample Scenarios. As previously stated, the law of war program involves Air Force personnel other than judge advocates.

1. You are the commander of a unit retreating frantically from a pursuing enemy force. Two enemy prisoners are impeding your successful escape. Both are seriously wounded and in need of surgery within a day or they will probably die. The enemy pursuers constitute a much larger force than yours and are literally minutes away. They will overtake your unit unless you can move quicker. What do you do?⁵⁸

2. You are a security policeman assigned to the forward area. Your duties include conducting initial interrogation of prisoners of war before they are sent to the rear. Your supervisor informs you that three prisoners just captured held positions which obviously made them privy to the most important aspects of the enemy's war plans.

57. AFP 110-31, *supra* note 2, at para. 10.

58. The law of war takes into account the need to abandon the sick and wounded for reasons of military necessity. But the abandoning force is required to, "as far as military considerations permit," leave with the wounded prisoners medical persons and material to care for them. Geneva Convention for the Protection of War Victims (Armed Forces in the Field), Aug. 12, 1949, 3 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31, article 12.

Your supervisor tells you, "Get the plans. Lean on them hard. Do not leave any marks." What action do you take?⁵⁹

3. You are a treating physician and a small battle has produced several seriously wounded combatants from both sides. The wounded have been prioritized for treatment according to accepted medical principles. The commander of those U.S. wounded pays a visit to the hospital and notices that some enemy wounded are receiving treatment ahead of his men. He tells you, "Fix my men first!" Your response?⁶⁰

Each of these sample scenarios involves an aspect of urgency and numbers two and three entail breaches of the law requiring someone to report the alleged violations. Even if you receive the absolute worst response to these situations, you can then walk the trainee through the legally correct path and convince the airman the Air Force wants him to reject the illegal. You do not shoot the wounded or leave them without care. You do not beat prisoners into submission. You do not overlook the more seriously wounded just to treat your troops first. These are simple lessons but once you have walked others through them, these experiences will serve them well when similar situations confront them in battle.

It was my experience at Clark Air Base that some units appointed a noncommissioned officer as a LOAC monitor. I recommend encouraging such non-lawyer monitors to help you carry on training year-round. Review your base's unit monitor programs and ensure their LOAC accuracy and effectiveness. Then use the monitor as your point-of-contact for your LOAC newsletters and exercise scenarios. You can send a monthly problem to each monitor for dissemination and to inject into exercises.⁶¹

How you make training realistic is largely dependent on your imagination. But strive to go beyond chalkboard lectures. Construct well thought out written problems and, to the maximum extent possible, transform these problems into realistic settings, with commanders and other "players" willing to play assigned roles so the trainees can respond to realistic pressures. Your exercises may be the only means airmen have in tracing the mental steps required to conform their behavior to the law of war in war.

"Integrate Law of War into Normal Military Actions."⁶² LOAC training is too often done just before an exercise. It is like cramming before the final exam, or doing homework at breakfast the day it is due. I learned in the Sanremo course on the law of war that LOAC training is most effective when it is made a part of your regular duties. I include as Appendix A a useful model of military organization to facilitate the integration of LOAC into your daily regimen. It is taken from the United Nations peace-keeping staff organization.⁶³ The idea is for the judge advocate to be able to picture an entire base-level fighting force in an organized manner, then ensure that each section of that force is aware of its war-time responsibilities according to the law of armed conflict. Appendix A is intended as a

59. The rules concerning the treatment of prisoners of war are clear. Treatment must be humane. Prisoners must be protected against violence, intimidation and insults. Interrogation may not involve any physical or mental torture. Geneva Convention for the Protection of War Victims (Prisoners of War), Aug. 12, 1949, 3 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135, articles 13 and 17.

60. The Geneva Conventions establish a standard which does not discriminate between wounded friendly forces and wounded enemy forces. *Supra* note 58.

61. USAFER 110-9 promotes the active injection of LOAC aspects into exercises by making judge advocates "immediately available" during exercises. USAFER 110-9, *supra* note 52.

62. This is the lesson passed on to the author and other attendees by the Course Director, Colonel Frederic de Mulinen, at the 40th International Course on Law of Armed Conflicts, Sanremo, Italy (8-21 Nov. 1992).

63. Appendix A is taken from the teaching file for command and staff exercises of the 40th International Course on the Law of Armed Conflict, Sanremo, Italy (8-21 Nov. 1992).

practical guide, not as an Air Force model. You can use it to construct the Air Force equivalent of each staff area and then apply the law of war references to your own model. The key point is to understand that the various international conventions assign duties to our forces and the better we incorporate those duties in our normal military actions, the easier it will be to follow the law in the heat of battle.

V. CONCLUSION

The key principles of this article may be condensed in the following way:

- A. Approach LOAC Bias-Free
 - 1. Accept International Law
 - a. Accept *Pacta Sunt Servanda*
 - b. Accept the process of finding the law—Applying Art.38 of ICJ Statute
 - 2. Accept the International Law Subset: LOAC
 - a. Hague Law protections for combatants
 - b. Geneva Law protections for noncombatants
 - c. Understand the self-adjusting dynamic of LOAC
 - (1) modern LOAC is fairly recent
 - (2) failures/statistics mislead
- B. Know that DOD Mandates Adherence to LOAC
 - 1. Authority: DOD Directive 5100.77
 - 2. Bias-Free approach required
- C. Know How the Air Force Implements DOD's Program
 - 1. AFR 110-32
 - 2. The Judge Advocate General takes the lead
- D. Know the Legal Tools for Achieving LOAC Goals
 - 1. AFP 110-20: Geneva and Hague Law
 - 2. AFP 110-31: LOAC and Air Operations
 - 3. AFR 110-32: Law of War Program
 - 4. AFP 110-34: Commander's Handbook on LOAC
- E. Teach, Advise, and Disseminate Effectively—according to a unifying principle of practical effectiveness
 - 1. Impart DOD's & USAF's faith in LOAC
 - 2. Impart guidelines intended to get the soldier through the heat of battle
 - 3. Impart a certainty that LOAC violations will be sanctioned

The logical conclusions sought to be conveyed by this article are relatively simple. International law contains legal norms binding on all nations using as a cohesive the principle of *pacta sunt servanda*. LOAC is a subcategory of international law; therefore, LOAC is binding on all nations. The treaty provisions of the main corpus of LOAC conventions, describing Hague law and Geneva law, require effective training and dissemination of the law of war. The Department of Defense by directive seeks to satisfy this international obligation. The United States Air Force through Air Force Regulation 110-32 is following the DOD mandate to implement a law of war program.

Besides logic, a critical point is that LOAC must be approached bias-free with the concrete goal of raising our soldiers' law of war awareness to a minimally accepted level of true battle health: a level that facilitates legally correct choices in the crucible of war.

APPENDIX A

KEY TO THE LAW OF WAR IN STAFF WORK

1. PERSONNEL	2. INTELLIGENCE	3. OPERATIONS	4. LOGISTICS	5. CIVIL AFFAIRS
<u>Incorporation:</u> H.IV.R. 1, 3 G.P.I.43	<u>Permitted search:</u> H.IV.R.29 G.P.I.46	<u>Conduct in general:</u> H.IV.R.23-28 G.P.I.40,48-56 Sea H.IX	<u>Evacuation of POW:</u> G.III.19,20	<u>General:</u> G.IV.13,136-141 G.P.I.68-79
<u>Combatants:</u> I.43,44	<u>Restricted search:</u> H.IV.R.29 G.III.17 G.IV.31 G.P.I.46	Sea H.IX <u>Attack + defense:</u> G.P.I.57,58	<u>Evacuation of wounded:</u> G.I.15 Sea G.II.14-17 Air G.P.I.30	<u>Protected zones:</u> G.I.23 G.IV.14 H.CP.1,8o G.P.I.59,60
<u>POW-status:</u> G.III.4 G.P.I.44-47	<u>Prohibited search:</u> Sea G.II.34,35 Sea G.P.I.23 Air G.P.I.28	<u>Combat means:</u> H.IV.R.22 G.P.I.35,36	<u>Medical transports:</u> G.I.35 G.P.I.8,9,12 Sea G.II.22-35,38 Sea G.P.I.22,23 Air G.P.I.24-31	<u>Medical service:</u> G.IV.16-23 G.P.I.8-30
<u>Medical personnel:</u> G.I.24-32 G.P.I.8,9,12,16 Sea G.II.36,37	<u>Permitted deception:</u> G.P.I.37	<u>Combat suspension:</u> H.IV.R.32-34,36-41 G.I.15 G.IV.15 G.P.I.59	<u>Medical establishments:</u> G.I.19-23 G.P.I.8,9,12	<u>Civil defense:</u> G.P.I.61-67
<u>Relig personnel:</u> as above medical	<u>Restricted deception:</u> G.P.I.39	Sea G.II.18 <u>Capture:</u> G.II.18 G.I.28,29,33,35 Sea G.II.29,30,36,37	<u>POW camps:</u> G.III	<u>Cultural property:</u> H.CP H.CP.R H.CP.P
<u>Wounded + sick:</u> G.I.12-16 G.P.I.8-11 Sea G.II.12-19	<u>Prohibited deception:</u> H.IV.R.23 G.III.23 G.IV.28	G.I.14,15,18 G.P.I.17 Sea G.II.16,18,21	<u>Medic service in POW camps:</u> G.III.29-33,109-114	<u>Civilian Internees:</u> H.IV.79-135
<u>Dead:</u> G.I.16,17 G.III.120,121 G.P.I.32,34 Sea G.II.19,20	<u>Use of distinctive medical sign:</u> G.I.38-44 G.IV.18,20,21 G.P.I.18 Sea G.II.41-45	<u>Wounded:</u> G.I.14,15,18 G.P.I.17 Sea G.II.16,18,21	<u>Relig activities in POW camps:</u> G.III.34-37	<u>Occupation:</u> H.IV.R.42-56 G.IV.47-78 H.CP.5 G.P.I.63
<u>Missing:</u> G.P.I.32,33	<u>Use of distinctive medical signals:</u> G.P.I.18	<u>Respect and defense of neutral space:</u> H.V.1-10 Sea H.XIII.1-9,25,26	<u>Penal + discipline affairs in POW camps:</u> G.III.82-108 G.P.I.75-77	
<u>Identity Disc:</u> G.I.16,17 Sea G.II.19,20		<u>Temporary access to neutral space:</u> Sea H.XIII.10-24 Air G.P.I.31	<u>Belligerents received in neutral territory:</u> H.V.11-14 G.I.4 G.III.4 Sea G.U.5 Air G.P.I.31	
<u>Identity card:</u> G.III.4,17 G.P.I.18				
<u>Nat Info Bureau:</u> G.III.122,123				
<u>Command responsibility:</u> G.P.I.86,87				

GUIDE TO TERMS AND ABBREVIATIONS OF APPENDIX A

- H.IV.R —Hague IV, Convention respecting the laws and customs of war on land, 18 October 1907.
—R. refers to the Regulations respecting the laws and customs of war on land.
- H.V. —Convention respecting rights/duties of Neutral Powers and Persons in case of war on land. Hague, 18 October 1907.
- H.IX. —Convention concerning bombardment by naval forces in time of war. Hague, 18 October 1907.
- H.XIII. —Convention concerning rights/duties of neutral Powers in naval war. Hague, 18 October, 1907.
- G. —Geneva Conventions for the Protection of War Victims.
—I Wounded and Sick in Armed Forces in the Field.
—II Wounded, Sick and Shipwrecked Members of Armed Forces at Sea.
—III Treatment of Prisoners of War.
—IV Protection of Civilian Persons in Time of War.
—P.I. Protection of Victims of International Armed Conflicts (Protocol I).
- H.CP. —Convention for the protection of cultural property in the event of armed conflict. Hague, 14 May 1954.
- R. —Regulations for execution of the Convention (14 May 1954).
- P. —Protocol for protection of cultural property (14 May 1954).

The Role of the Law of Armed Conflict During the Persian Gulf War: An Overview

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I. INTRODUCTION

The Persian Gulf War, more commonly referred to as Operation Desert Storm, provides the newest forum in which to study the development of the law of armed conflict. It is a study of contrasts. The United States and Coalition forces conducted "the most discriminating military campaign in history,"¹ meaning that great care was taken in its prosecution (particularly in the area of targeting) to reduce collateral damage and civilian casualties. Iraq, on the other hand, exercised no similar restraint, following the historical trend of U.S. adversaries of minimal observance of the law of armed conflict. The disparate levels of compliance with the law raises profound questions.² What is the role of aerial warfare armed conflict take into account the economic and cultural differences of the warring parties? How do we evaluate new, technologically advanced weapons?³

This article will review the conduct of both the allied Coalition and Iraq with respect to targeting and other military decisions made during the Persian Gulf War in order to understand the impact the law of armed conflict had in the formulation of those decisions. It is not the intention of this article to catalog every violation by the Iraqis or to voice every objection raised against the coalition's prosecution of the war. Rather, the goal is to describe, in general terms, the development of the current law of armed conflict and its major provisions and then apply the law to the Persian Gulf War.

II. DEVELOPMENT OF THE LAW OF ARMED CONFLICT

To better understand the questions raised by the recent conflict, it is helpful to

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1. U.S. Dept. of Defense, *Conduct of the Persian Gulf War: Final Report to Congress* 0-10 (Wash. D.C., GPO, Apr. 1992)[hereinafter DOD Report].

2. The United States Air Force firmly adheres to the law of armed conflict. Among the reasons are the humanitarian protection of civilians and other non-combatants and the military consequences which flow from violations of laws. The law is also driven by valid military doctrines, such as economy of force and conservation of resources. Air Force Pamphlet 110-31, para. 1-6, *International Law--The Conduct of Armed Conflict and Air Operations* (1976) [hereinafter AFP 110-31]. One commentator claims "[i]t is the function of the rules of warfare to encourage the operation of the principle of reciprocity in a positive direction and, in this way, to assist in ensuring however inadequately, the continuity of civilized life." GEORGE SCHWARZENBERGER, *A MANUAL OF INTERNATIONAL LAW* 197 (1967).

3. One study suggests that the rapidity and manner of Iraq's destruction "raises questions as to whether the standard and traditional targets of attack remain legitimate and necessary." WILLIAM ATKIN ET AL., *ON IMPACT* 73 (1991).

review the development of the law of armed conflict. As with the Gulf War, every armed conflict engaged in by states has helped to shape that body of law known as the "law of armed conflict." It is only since the latter part of the previous century, however, that these laws were codified.⁴

The law of armed conflict is based on both treaty (or conventional) international law and customary international law. Customary international law is that law which arises out of the collective custom and usage of states in their conduct towards one another, and, in the case of the law of armed conflict, out of the custom and practice of civilized but warring states.⁵ In contrast, all states are bound by customary international law. Treaty law arises from treaties or conventions entered into by specific states which are then bound by the provisions which they contain. Normally, states which are not signatories are not bound by these treaties unless their provisions are merely codifying customary international law, in which case they are declaratory and must be observed by all states. If one belligerent in an armed conflict breaches the provisions of a treaty, states which are parties to the treaty generally have no further duty to comply. This is not the case, however, with respect to those provisions of the law found in the Geneva Conventions dealing with the protection of non-combatants (including sick, wounded, or surrendering troops) and civilians. As one well-known authority on humanitarian law noted:

It is generally acknowledged that the non-execution of a treaty one of its parties may ultimately release the other party of its obligations, or justify the annulment of the document as in the case of ordinary contracts. This cannot be true, however, of the Geneva Conventions which remain valid under all circumstances and are not subject to the condition of reciprocity.⁶

This statement is equally true of many of the provisions of the Hague Conventions, as discussed below.

From the custom and usage of nations two complementary and interactive bodies of treaty law have emerged—the law of The Hague and the law of Geneva.⁷ Although both laws govern the conduct of war, the law of The Hague is said to be the true law of armed conflict. It governs the application and conduct of force and the legality of weapons. The law of Geneva, on the other hand, is rightly termed "humanitarian law." It has as its foundation the reduction of unnecessary suffering as well as the promotion of respect for the individual (as

4. SYDNEY BAILEY, *PROHIBITIONS AND RESTRAINTS IN WAR* 58 (1972).

5. JEAN PICTET, *DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAWS* 89-90 (1985). See also SHELDON COHEN, *ARMS AND JUDGEMENT* 12 (1989).

6. PICTET, *supra* note 5, at 90.

7. Both laws are something of a misnomer for they both contain principles which were formulated in other cities. For instance, the law of The Hague had its genesis in St. Petersburg in 1868 when Tzar Alexander II convened a conference leading to the "Declaration of St. Petersburg" which sought to abolish the use of exploding bullets and projectiles made of fulminating or flammable substances. In fact, one of the foremost authorities on the Geneva Conventions has termed the preamble of the Declaration of St. Petersburg to be the language which confers the most significance on the Declaration. This language states:

Considering...that the only legitimate object...to accomplish during the war is to weaken the military forces of the enemy; that for this purpose it is sufficient to disable the greatest possible number of men; that this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable, that the employment of such arms would, therefore, be contrary to the laws of humanity.

DOCUMENTS ON THE RULES OF WAR 30-31 (A. Roberts and R. Guelff, eds., Clarendon Press 2d ed. 1989) [hereinafter *DOCUMENTS ON WAR*]. Conversely, much of the 1898 and 1907 Hague Conventions have been incorporated into the Geneva Conventions.

far as compatible with military requirements during times of war).⁸ Because of its dual nature, the law of war has been described as “the result of a continuous tug-of-war between formative agencies: the standard of civilization and the necessities of war.”⁹

A. The Law of Geneva

The law of Geneva is best epitomized by the often-quoted statement by Jean Jacques Rousseau in his 1762 book *The Social Contract*:

War is not a relation between man and man, but between State and State, and individuals are enemies only accidentally, not as men nor even as citizens, but as soldiers; not as members of their country, but as its defenders....The object of the war being the destruction of the hostile State; the other side has a right to kill its defenders while they are bearing arms, but as soon as they lay them down and surrender, they cease to be enemies or instruments of the enemy, and become once more merely men, whose lives no one has any right to take.¹⁰

This language has been called the basis for the “fundamental rule of modern law of war.”¹¹ It lays the foundation for the distinction between combatants and noncombatants and emphasizes the importance, once the opposing state submits, of exercising mercy and forbearance towards (as opposed to exacting punishment or retribution from) the citizens of the vanquished state.

The first Geneva Convention appeared in 1864 and was entitled *For the Amelioration of the Conditions of the Wounded in Armies in the Field*. It was followed by the 1906 Convention (*For the Amelioration of the Conditions of the Wounded and Sick in the Armies in the Field*) and the two 1929 Conventions (*For the Relief of the Wounded and Sick in the Armies in the Field* and *For the Treatment of Prisoners of War*). After World War I, which saw widespread internment of civilians and no protection afforded to them, the need for the codification of laws protecting noncombatants was recognized. Due to the political landscape of the time, however, it was not until after World War II that civilians gained the protection the two previous wars had demonstrated they needed.

The period following both World Wars was characterized by neglect of the laws of war. After World War I, this was due in large part to the outlawing of all war by the League of Nations, making the law of war “unnecessary.” After World War II, the International Law Commission of the United Nations chose not to study the laws of war for fear that public opinion might interpret such a study as “showing lack of confidence in the effectiveness of the means at the disposal of the United Nations for maintaining peace.”¹²

In 1949, the 1929 Conventions were superseded by the four Geneva Conventions used today: (1) the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick, in Armed Forces in the Field (GC I),¹³ (2)

8. The law of The Hague has been said to “originate in reason rather than sentiment, in mutual interest rather than philanthropy, in direct contrast to the laws of Geneva,” which concerns itself with the effects of war on humanity. PICTET, *supra* note 5, at 49.

9. SCHWARZENBERGER, *supra* note 2, at 197.

10. JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* i, c.4. (1762).

11. PICTET, *supra* note 5, at 23.

12. *Report of the International Law Commission to the General Assembly, reprinted in* [1949] 18 Y.B. INT'L COMM'N 281, *as quoted in* DIETRICH SCHINDLER & JIRI TOMAN, *THE LAWS OF ARMED CONFLICT* viii (1973) [hereinafter SCHINDLER & TOMAN].

13. 6 U.S.T. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31, Aug. 12, 1949, entered into force with respect to the U.S. Feb. 2, 1956.

the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (GC II),¹⁴ (3) the Geneva Convention Relative to the Treatment of Prisoners of War (GC III),¹⁵ and (4) the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV).¹⁶ The first three conventions improved and expanded upon their predecessors, but the critical advancement in humanitarian law was the Fourth Convention which codified the protection of two groups of civilians: those living in enemy territory and those living in enemy-occupied territory.¹⁷ Its Articles contain protections for civilians from a variety of abuses, including reprisals, torture, intimidation, deportation, and collective punishment. Its ability to step outside of the confines of a military structure to embrace the amorphous mass of civilians caught in war zones made the Fourth Convention a revolutionary instrument of change in the protection of civilian noncombatants.

B. The Law of The Hague

In much the same way that the Geneva Conventions codified the humanitarian principles affecting the law of war, the 1907 Hague Conventions—particularly Hague Convention IV, Respecting the Laws and Customs of War on Land (Hague IV)¹⁸—codified many of the fundamental principles of customary international law pertaining to a belligerent's conduct on the field of war. These fundamental principles included accuracy in targeting, economy of force, and maximization of military advantage.¹⁹ Its most basic principle was found in the preamble, called the Martens clause (after its drafter, Friedrich von Martens). The preamble declared that, in addition to these codified laws of armed conflict

14. 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.N.T.S. 85, Aug. 12, 1949, entered into force with respect to the U.S. Feb. 2, 1956.

15. 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135, Aug. 12, 1949, entered into force with respect to the U.S. Feb. 2, 1956.

16. 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287, Aug. 12, 1949, entered into force with respect to the U.S. Feb. 2, 1956.

17. Civilians were previously accorded limited protection under Articles 42-56 of the Annex to Hague Convention No. IV, Respecting the Laws and Customs of War on Land, 36 STAT. 2227, TS 539, Bevans 631, Oct. 18, 1907, entered into force with respect to the U.S. on Jan. 26, 1910 [hereinafter Hague IV], but the protection was only in connection with the occupation of a territory by an enemy army. Furthermore these regulations only pertained to certain basic rules protecting families and private property. These general rules could offer no protection under circumstances where the whole country was involved in an all-out war "which exposed the civilian population of whole countries to the same dangers as the armed forces." JEAN PICTET, IV COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 3 (1958).

18. *Id.*

19. The law of The Hague is comprised of the St. Petersburg Declaration of 1868, (Declaration Renouncing the Use, in Times of War, of Explosive Projectiles under 400 Grammes Weight signed Nov. 29/December 11, 1868, 18 Martens Nouveau Recueil 111, 474; 1 A.J.I.L. Supp. 23 (1907), SCHINDLER & TOMAN, *supra* note 12, at 95); The Hague Conventions of 1899, (Final Act of the International Peace Conference, signed at The Hague July 29, 1899, SCHINDLER & TOMAN, *supra* note 12, at 49); The Hague Conventions of 1907, (Final Act of the Second International Peace Conference, signed at The Hague on Oct. 18, 1907, SCHINDLER & TOMAN, *supra* note 12, at 53); the Geneva Protocol of 1925 Prohibiting the Use of Asphyxiating, Poisonous, or other Gases and of Bacteriological Methods of Warfare, (26 U.S.T. 571, T.I.A.S. 8061, 94 L.N.T.S. 65, signed at Geneva June 17, 1925, entered into force for the U.S. Apr. 10, 1975; SCHINDLER & TOMAN, *supra* note 12, at 109), [hereinafter the Geneva-Gas Protocol]; and The Hague Convention of 1954, for the Protection of Cultural Property in the Event of Armed Conflict, (signed at The Hague May 14, 1954, 249 U.N.T.S. 240; SCHINDLER & TOMAN, *supra* note 12, at 557).

and until a more complete code of the laws of war have been issued. . . the inhabitants and the belligerents remain under the protection and rule of the principles of international law as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of public conscience.²⁰

This language was revolutionary in its recognition that the codified laws of war were incomplete and could supplement and interact with customary laws of war.

Through their regulation of the conduct of hostilities and their limitations of the use of weaponry, the Hague Conventions also serve to protect humanitarian interests by limiting the use of force against belligerents.²¹ For example, Article 22 of the Annex to Hague IV affirms that “[t]he right of belligerents to adopt means of injuring the enemy is not unlimited.” Furthermore, Article 23(c) prohibits the killing or wounding of an enemy who has surrendered. However, despite these protection and other protections accorded to civilians and other noncombatants, the Hague Conventions implicitly recognize the inevitability of the violation of some of their provisions due to military necessity. Through their use of the qualifying phrase “as far as military requirements permit,” the introductory language of Hague IV presumes some collateral deaths and damage to property will be necessary by the exigencies of armed conflict.

C. Laws Governing Aerial Warfare

Although the Hague Conventions set out the rules of warfare as they relate to targeting and permissible use of force, few of these rules are directly applicable to aerial warfare. The main rules which can be applied to air warfare are found in several treaties. The first of these is The Hague Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons.²² The principle contained in this Declaration (as enunciated in its title) was derived from the 1899 Hague Declaration to Prohibit for the Term of Five Years the Launching of Projectiles and Explosives from Balloons, and other Methods of a Similar Nature.²³

Two years after the expiration of this Declaration in 1905, the Second Hague Peace Conference incorporated its provisions into a second Declaration which was to expire upon the Third Peace Conference. Since the Third Conference never convened, the 1907 Declaration is still in effect, although never ratified by many states (including into France, Germany, Italy, and Russia). Despite the number of states declining to ratify this Declaration, the efforts of the parties to the Second Peace Conference to prohibit the discharge of projectiles from the air was eventually reflected in the language of Article 25 of the Annex to Hague IV. It prohibits attack or bombardment of undefended towns, and villages “by whatever means.”²⁴ Other provisions affecting aerial warfare are found in

20. DOCUMENTS ON WAR, *supra* note 7, at 45.

21. Article 22 of Hague IV states that “The right of belligerents to adopt means of injuring the enemy is not unlimited.” This principle has been described as the foundation of the entire humanitarian law of armed conflict. FRITZ KALSHOVEN, *THE LAW OF WARFARE* 27-28 (1973). Article 23(e) of Hague IV states another: “It is especially forbidden...to employ arms, projectiles, or material calculated to cause unnecessary suffering.”

22. Signed at The Hague on Oct. 18, 1907, 36 STAT 2439; 2 A.J.I.L. 216 (1908).

23. Signed at The Hague on July 29, 1899, 32 STAT 1839; 1 Bevans 270 (1899); SCHINDLER & TOMAN, *supra* note 12, at 133.

24. SCHINDLER & TOMAN, *supra* note 12, at 77-78. *But see* W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 14-15 (1990) wherein the author notes the confusion which permeated much of the discussion of the Article’s intent based on a failure to define the term “undefended.” Despite these conflicting interpretations, Mr. Parks concludes that the history of the Article

Article 23 of the Annex to Hague IV, which prohibits destruction of property not "imperatively demanded by the necessities of war," and Article 27 of the Annex to Hague IV, which limits, as far as possible, the bombardment of cultural, religious, historical, and medical facilities and buildings except those serving military purposes.²⁵

D. Military Principles Derived from the Law of Armed Conflict

In addition to the above-referenced bodies of law, there are three principles which have shaped the law of armed conflict: the principle of military necessity, the principle of humanity (or unnecessary suffering), and the principle of chivalry.²⁶ The modern concept of military necessity was first promulgated in 1863, when Francis Lieber²⁷ drafted an expansive definition of this principle in his definitive Code, in which he stated:

Military necessity admits of all direct destruction of life or limbs of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; ... it allows of all destruction of property and obstruction of the ways and channels of traffic, travel or communication, and of all withholding of sustenance or means of life from the enemy; ... and of such deception as does not involve the breaking of good faith.²⁸

Air Force Pamphlet 110-31 defines military necessity as "the principle which justifies measures of regulated force not forbidden by international law which are indispensable for securing the prompt submission of the enemy, with the least possible expenditures of economic resources."²⁹

The principle of humanity (or unnecessary suffering) is the complementary to that of military necessity. It regulates the use of force and the actions taken for reasons of military necessity. Specifically, this principle

forbids the infliction of suffering, injury, or destruction not actually necessary for the accomplishment of legitimate military purposes. This principle of humanity results in a

makes clear that "article 25 was not intended to prohibit the intentional destruction of any buildings, when military operations rendered it necessary."

25. This Article states: "In sieges and bombardments all necessary measures must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes." Note that the more expansive Convention for the Protection of Cultural Property in the Event of Armed Conflict, signed at The Hague May 14, 1954, SCHINDLER & TOMAN, *supra* note 12, at 529 (hereinafter Hague- Cultural Convention) although not ratified by the United States, was relied upon by the allied Coalition in formulating its target list.

26. AFP 110-31, para. 1-5, *supra* note 2.

27. Francis Lieber was a Doctor of Philosophy who taught law at Columbia College in New York. He was also the main architect of the rules of warfare governing the conduct of the Civil War. Copies of his Code were distributed to both sides of the war, which must have provided some comfort to him since his three sons took part in that war — two as Union soldiers, the other as a Confederate soldier.

28. Article 15, *Instructions for the Government of Armies of the United States in the Field*, General Orders #100, HQ U.S. Army, 24 Apr. 1863, SCHINDLER & TOMAN, *supra* note 12, at 3. General Order 100 was a benchmark for the conduct of an army toward an enemy army and population. Interestingly enough, the order was published the same year Henri Dunant founded the International Red Cross in Geneva. This document had a profound effect on the international law of warfare. Most of the major nineteenth century Western governments adopted its provisions in whole or in part or relied upon it extensively in formulating their own laws. Furthermore, the Hague and Geneva Conventions were directly indebted to it. R. HARTIGAN, *LIEBER'S CODE AND THE LAW OF WAR* 48-49 (1983). See also PICTET, *supra* note 5, at 36 and COHEN, *supra* note 5, at 31.

29. AFP 110-31, para. 1-5, *supra* note 2.

specific prohibition against unnecessary suffering [and] a requirement of proportionality....The principle of humanity also confirms the immunity of civilian populations and civilians from being objects of attack during armed conflict.³⁰

Finally, the principle of chivalry prohibits treachery or perfidy in the conduct of war. From this principle, permissible and impermissible "stratagems" of war the development of was are derived. The development of these stratagems is driven by the concern that humanitarian safeguards not be subverted by a belligerent to effect purely military goals.

Taken together, these principles define the permissible use of force to achieve necessary military objectives. Contained within the principles of military necessity and humanity are the concepts of economy of force and of proportionality. Economy of force holds that use of force greater than that needed to achieve the military objective is a waste of resources and, therefore, runs counter to the success of a military operation. The concept of proportionality is more difficult to define and more readily subject to misunderstanding and misapplication. Given the complexities of this debate over the definition of "proportionality," it is sufficient, for the limited purposes of this article, to define proportionality as the principle which limits the degree of force to that needed to obtain the military objective.³¹

Although the way in which states wage war has evolved over the past century, since 1907 there has been no major advancement in the Hague Conventions.³² The exception to this statement is the codification of existing customary law expressed in the 1954 Hague Cultural Convention, the 1925 Geneva Gas Protocol,³³ and, more recently, the Protocols Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of June 6, 1977, (Protocols I and II).³⁴ The laws governing aerial warfare, for example, have remained unchanged since 1907 despite increasingly sophisticated aerial warfare doctrine and technological advancements. This is not to say that no attempts have been made to bring the laws of aerial warfare into the twentieth century. From December 1922 to February 1923, a Commission of Jurists met at The Hague. The meetings resulted in a well-developed code on aerial warfare.³⁵ No consensus was ever reached on the adoption of its provision, however, and some have characterized the attempt at codification as a failure from the start "because international lawyers endeavored to draft a set of rules that were totally at odds with state technological advances and military thinking."³⁶

30. *Id.* at para. 1-6.

31. AFP 110-31 defines proportionality in the context of weapons and methods of warfare. It states that the principle of proportionality is a well-recognized legal limitation on weapons or methods of warfare which requires that injury or damage to legally protected interests must not be disproportionate to the legitimate military advantages secured by the weapons. Other commentators more generally define the principle of proportionality to hold that civilian casualties must be proportionate to military advantages sought. KALSHOVEN, *supra* note 21, at 27.

32. COMMENTARY ON THE ADDITIONAL PROTOCOLS XXIX (Yves Sandoz, et.al. eds. 1987).

33. SCHINDLER & TOMAN, *supra* note 12, at 109. BAILEY, *supra* note 4, at 66.

34. *Opened for signature* Dec. 12, 1977. U.N.Doc. A/32/144 Annex I, 11 (1977) reprinted in 16 I.L.M. 1391 (1977).

35. *Rules of Air Warfare*, Drafted by a Commission of Jurists at The Hague, December 1922-Feb. 19, 1923. SCHINDLER & TOMAN, *supra* note 12, at 139. For the complete text, see J. SPAIGHT, AIR POWER AND WAR RIGHTS 498-508 (3d ed. 1947).

36. Parks, *supra* note 24, at 31. *But see* LASSA OPPENHEIM INTERNATIONAL LAW: A TREATISE 519 (Hersch Lauterpacht, ed., 7th ed. 1952) where the code was accorded greater weight. According to Oppenheim, although the code never got beyond the drafting stage, its provisions are important "as an authoritative attempt to clarify and formulate rules of law governing the use of aircraft in war." *Id.*

The failure to codify rules of air warfare incorporating modern technological capabilities certainly frees the hands of military planners and targeters. Nevertheless, it has also raised questions as to what is permissible. For example, the bombing of electric power grids and the targeting of civilian leadership have never been specifically sanctioned by the Hague Conventions, yet these were included in the U.S. military's expanded target list for the Persian Gulf War.³⁷ It is erroneous, however, to conclude that any military or civilian target may be destroyed if military necessity can be demonstrated. Such an argument assumes greater weight accorded to the concept of military necessity than demonstrated by the actual conduct of war as waged by those states observing the law of armed conflict. Furthermore, most commentators of humanitarian law have rejected the notion that military necessity can be said to override all other considerations because the law of The Hague recognizes and incorporates the restraints placed on military necessity.³⁸ For instance, Article 23 of the Annex to Hague Convention IV prohibits, without qualification, the killing of surrendering enemy soldiers even if taking prisoners impedes an advancing army's progress. Coalition military planners recognized this limitation on their actions by avoiding legitimate military targets which had the potential for large collateral civilian casualties.³⁹

E. Protocol I

Despite the historic breakthrough in the protection of civilians which GC IV afforded, it limits this protection to acts taken against them by the enemy and does not protect civilians against the effects of war. In order to rectify this omission, the International Commission of the Red Cross (ICRC) has attempted to supplement the law of armed conflict with rules. These supplemental efforts provide for more expansive protection of civilians, better delineation between civilians and other noncombatants, better delineation between military and nonmilitary targets, and more explicit rules governing aerial warfare, particularly relating to aerial bombardment.⁴⁰ In 1977, following years of effort to advance these protections, the ICRC achieved its goal when the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva 1974-1977) adopted the two Protocols Additional to the Geneva Conventions of 12 August 1949.

37. ARKIN, *supra* note 3, at 118.

38. "The thesis is sometimes advanced that applications of the rules of humanitarian law of armed conflict always remains subject to the overriding requirement of military necessity....The thesis is demonstrably false...." FRITZ KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR 25, (1987). See also JEAN PICTET, HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS 19, (1975) "[T]he rules of humanitarian law are peremptory...not optional." Cohen, *supra* note 5, at 36. "[M]ilitary necessity can justify only what the law says it can justify. Military necessity does not conflict with the law of war, nor can it override that law."

39. DOD Report, *supra* note 1, at 0-14.

40. In 1957 the ICRC presented Draft Rules to the XIXth International Conference of the Red Cross convened in New Delhi. Although these rules were approved in principle, failure of the governments to support these rules doomed the effort. There were subsequent conferences in Istanbul, Tehran, Vienna, and Geneva which furthered the ICRC's goals of reaffirming and developing humanitarian law. It was not until 1974 that the first governmental conference convened. This conference would convene four times over the next four years before its adoption of the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of June 6, 1977 (*opened for signature* Dec. 12, 1977 U.N.Doc. A/32/I44 Annex 1, 11 (1977) reprinted in 16 I.L.M. 1391 (1977) [hereinafter Protocol I]. Col. Walter Reed, a member of the Air Force Judge Advocate General's Department, represented the United States in Committee III, dealing with combatant law. Later, as Major General Walter Reed, he became The Judge Advocate General. Mr. George Aldrich headed the U.S. delegation to the Conference that adopted the 1977 Geneva Protocols.

Although the U.S. Senate has yet to ratify Protocol II, dealing with noninternational armed conflicts, there is little military objection to its ratification. There is concern about Protocol I. In 1987 the United States announced it was not prepared to ratify Protocol I, applicable to international armed conflicts, for political reasons.⁴¹ Of primary concern were the numerous and often conflicting statements of understanding and declarations by the signatories incorporated in the Protocol. Furthermore, certain provisions were clearly unacceptable to the United States from a military standpoint. Slavish acceptance of Protocol I as the codification of the existing law of armed conflict would promote considerable confusion in the battlefield. Among its more questionable provisions are the use of the word "attacks" to describe defensive operations;⁴² the convoluted protections accorded civilians, covering even those directly participating in the war effort, so long as they are not engaged in that effort at the exact moment of attack;⁴³ the prohibition against wearing an enemy uniform to effect an escape from enemy territory as is currently sanctioned under existing law;⁴⁴ and the provision that where there is doubt about an individual's status, that person shall be presumed to be a civilian. As stated by one commentator, "in the context of ground warfare, and particularly guerilla warfare, this provision would be extremely difficult to accept; it is impossible in the realm of aerial operations."⁴⁵

Another problem with Protocol I is that it purports to codify customary international law when it describes the duty of those planning an attack to "refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."⁴⁶ This restrictive view of proportionality is not accepted by the United States for several reasons. The first is the highly subjective nature of the proportionality analysis. To require commanders to justify the decisions made in the heat of battle and the fog of war using some arbitrary scale of proportionality could have a potentially chilling effect on future decisions of battlefield commanders.⁴⁷ Furthermore, in order to ascertain its proportionality, collateral deaths, damage and injury would have to be weighed in the context of the war, and not the battle itself. Otherwise there could be no legitimate analysis of the military objectives gained at the expense of the civilian population. Fi-

41. The United States is, however, a signatory to the Protocol.

42. Article 49 states: "Attacks means acts of violence against the adversary whether in offence or in defence." MICHAEL BOTHE, ET AL., *NEW RULES FOR VICTIMS OF ARMED CONFLICT* 286 (1982). See also Parks, *supra* note 24, at 113-115.

43. Parks, *supra* note 24, at 117-19.

44. Article 39(2) states: "It is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favor, protect or impede military operations." Nevertheless, as pointed out by W. Hays Parks, "[n]ot only did this place the article in apparent conflict with article 93 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, which permits escaping prisoners of war to take any action that facilitates their escape which does not entail any violence against life or limb, but it ignored the practice of nations." W. PARKS, *AFTER PROTOCOL I: A MILITARY VIEW* 22 (1988).

45. Parks, *supra* note 24, at 117.

46. Article 57-2(a)(iii).

47. As expressed by one commentator, "[i]f the principle of proportionality serves any legal function at all, it is merely as a warning to those engaged in planning attacks to do their best to avoid collateral injury. The most that can be asked from Air Force personnel is a good faith effort to hit the target, not a pseudomathematical proportionality analysis." Burrus Carnahan, *Comments on the paper - Humanitarian Law Issues and the Persian Gulf Conflict*, (delivered at the Sixth Annual Seminar for Diplomats on International Humanitarian Law, American University, (Nov. 6, 1991)). Mr. Carnahan is a former member of the International Law Division of the Office of The Judge Advocate General and served as a member of the U.S. delegation to the Geneva Conferences from 1974 to 1977.

nally, the requirement to conduct this kind of analysis places the responsibility for a civilian population squarely on the attacker, who has no control over it, rather than on the defender, who does.⁴⁸

An unscrupulous commander could reap great political dividends by intentionally commingling his civilian population with military targets in what would be, for him, a win/win proposition. If he is successful in stopping the attacks on his legitimate military targets, he protects his resources. If, on the other hand, large numbers of the civilian population are casualties because of their close proximity to these targets, he could reap the benefits of the adverse political repercussions that would befall his enemy.

Events taking place during the Persian Gulf conflict bear this out. When the Amirya command and control bunker/bomb shelter was bombed by the allied Coalition, the world press focused on the number of civilians that were killed and the allies that killed them. Lost in the shuffle was the intentional commingling of the civilian population with military command personnel, a tactic Saddam Hussein used repeatedly.

These are only a few examples of the limitations inherent in the language used by the ICRC to advance humanitarian protections during wartime. They, nevertheless, serve to illustrate the kinds of problems inherent in Protocol I which precludes adoption of its provisions as customary international law.⁴⁹

Because neither the United States nor Iraq are party to Protocol I, it was not binding during the Gulf War, but is, nonetheless, heavily relied upon by some in alleging law of armed conflict violations on the part of the United States during the Persian Gulf War.⁵⁰ In addition, parts of the Protocol are considered by the United States to be declaratory of customary international law.⁵¹ Certain of its provisions will be referred to during the course of this article in an effort to understand the United States' application of the law of armed conflict during Operation Desert Storm. Because of Iraq's wide-spread and persistent abuse of even the most basic tenets of the law of armed conflict, however, it would be pointless to review its actions in relation to Protocol I, which advocates an even higher standard of conduct.

III. IRAQI COMPLIANCE WITH THE LAW OF ARMED CONFLICT

From the very beginning of the Gulf War, Iraq was bound to comply with both customary international law and the treaties to which it was a party. As discussed previously, all parties to the Gulf War were bound by the Geneva Conventions, because its principles have passed into customary international law and are, therefore, binding on all states.⁵² Other treaties which express customary law of armed conflict are the London Charter of August 8, 1945,⁵³ which

48. Parks, *supra* note 24, at 152-168.

49. For a full background on the history and impact of Protocol I, *see id.*, at 76-224.

50. ARKIN, *supra* note 3; NEEDLESS DEATHS IN THE GULF WAR (Middle East Watch 1991).

51. The original purpose of Protocol I was to reaffirm and develop existing humanitarian law.

52. "It may now be affirmed that the customs of Geneva and The Hague have largely lost the aspect of reciprocal treaties limited to inter-State relations and have become absolute commitments." PICTET, *supra* note 5, at 20.

53. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed at London August 8, 1945, 39 STAT. 1544; 3 BEVANS 1238; 82 U.N.T.S. 280. Although the Charter's language was directed against major war criminals of the European axis countries of World War II, the principles expressed in the Charter were unanimously reaffirmed by all nations (including Iraq) as a statement of customary international law by United Nations General Assembly Resolution 95 in December of 1946.

enunciates the Nuremberg Principles, and portions of the 1907 Hague Conventions and its Annex. Although Iraq is not a signatory to the 1907 Hague Conventions, legal authorities (including the International Military Tribunal at Nuremberg in 1946) and the practice of nations have interpreted its principles to be declaratory of customary international law and, therefore, binding upon all states.⁵⁴

A. Applicable Law

Article 6 of the London Charter establishes three categories of crimes for which individuals can be held accountable. These are crimes against peace (including the planning, preparation, initiation, or waging of a war of aggression); war crimes (including murder, ill-treatment, deportation for slave labor, or murder of prisoners of war, killing of hostages, plunder of public or private property, and wanton destruction of cities, towns, or villages not justified by military necessity); and crimes against humanity (including murder, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war). In addition to Hague IV, many of the provisions found in Hague Convention V, Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land of 18 October 1907 (Hague V);⁵⁵ Hague Convention VIII, Relative to the Laying of Automatic Submarine Contact Mines of 18 October 1907 (Hague VIII);⁵⁶ and Hague IX are considered declaratory of customary international law and, therefore, applicable to Iraq's conduct of the war against Kuwaiti and allied forces.

In addition to the above-referenced customary international law, various treaties to which Iraq is a party have further defined its permissible conduct. For example, Iraq is a party to the 1925 Geneva Gas Protocol,⁵⁷ the Convention on the Prevention and Punishment of the Crime of Genocide,⁵⁸ and the 1954 Hague Cultural Property Convention.⁵⁹ A report issued on June 4, 1991, by the American Bar Association's Standing Committee on Law and National Security concluded that Iraq violated a host of other treaties to which it was a party. The committee concluded Iraq violated the 1961 Vienna Convention on Diplomatic Relations;⁶⁰ the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons Including Diplomatic Agents;⁶¹ the 1945 Pact of the League of Arab States;⁶² the 1950 Joint Defense and Economic Co-operation Treaty Between the States of the Arab League;⁶³ and various articles of the United Nations Charter.

54. HOWARD LEVIE, I THE CODE OF INTERNATIONAL ARMED CONFLICT xxii (1986). See also VON GLAHN, LAW AMONG NATIONS 544 (1986).

55. Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, signed at The Hague, October 18, 1907, 36 STAT 2310; SCHINDLER & TOMAN, *supra* note 12, at 713.

56. Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines, signed at The Hague, October 18, 1907, 36 STAT 2332; SCHINDLER & TOMAN, *supra* note 12, at 583.

57. The Geneva Gas Protocol, *supra* note 19.

58. Adopted by Resolution 260 (iii)A of the United Nations General Assembly on Dec. 9, 1948, entered into force on January 12, 1951; 78 U.N.T.S. 277; SCHINDLER & TOMAN, *supra* note 12, at 162.

59. Although the United States is not a party to this treaty, Kuwait, Iraq, and Egypt (among others participating in the Gulf conflict) were and, therefore, this treaty was applicable to that war insofar as it regulated the conduct of these belligerents. Furthermore, the United States relied on this treaty in formulating its target list.

60. 22 U.S.T. 3227; T.I.A.S. 7502; 500 U.N.T.S. 95 (Apr. 18, 1961).

61. 28 U.S.T. 1975; T.I.A.S. 8532, (Dec. 14, 1973).

62. 70 U.N.T.S. 237; T.I.A.S. 8532; 16 U.S. Dep't of State Bull. 967 (1945).

63. 157 B.F.S.P. 669; 49 AM.J. INT'L L. Supp. 51.

The above referenced laws governed Iraqi conduct during the war itself, as well as the Iraqi occupation of Kuwait on 2 August 1990. Nevertheless, Iraqi abuse of not only treaty law but even the most basic customary laws of armed conflict was both widespread and systematic, attaching to almost every phase of the war and to every concerted Iraqi action. There was no subtlety to these violations, no nuance in interpretation of treaty or customary international law which might have lent weight to Saddam Hussein's failure to comply with law of armed conflict provisions, and no historical point to be made. Saddam Hussein made a decision at the outset of the confrontation that the military necessity of Iraq's campaign overrode all concerns for the Kuwaiti civilian population, Kuwaiti and third party civilian property, and even Iraqi civilians and property. This conduct was closely analogous to the nineteenth century German doctrine of "Kriegsraison" (war reason) propounded during World War II, which held that military necessity justifies measures in excess of the laws of war when the situation requires it.

B. Treatment of Civilians

Initially, Iraq violated the most basic principle of the law of armed conflict, as expressed in the Nuremberg Principles, when it planned, prepared for, and executed a war of aggression and the subsequent occupation on its peaceful neighbor, Kuwait, on 2 August 1990. Upon entry into Kuwait and seizing power there, Iraq became an occupying Power under the Geneva Conventions.⁶⁴ As such, it had certain obligations to Kuwaiti and third party citizens and certain prohibitions placed on its actions. Despite this, Iraq sealed off the borders of Kuwait and Iraq to all foreigners, trapping approximately 550 Americans in Iraq and 3000 Americans in Kuwait, in violation of Articles 42 and 78 of GC IV. Under the GC IV, Iraq could only intern foreign nationals if internal security rendered it "absolutely necessary" (in Iraq) or "imperative" (in Kuwait).⁶⁵ Nevertheless, perhaps the most widely disseminated information on Iraqi conduct during the initial Iraqi occupation of Kuwait was the treatment which Iraq accorded to westerners, Kuwaiti nationals, and third party citizens under its control.

On 15 August 1990, Saddam Hussein directed that all westerners in Kuwait report to a central location, where they were taken hostage. Five days later, 101 U.S. citizens, among other western hostages, were forcibly deported to strategic military and civilian sites throughout Iraq,⁶⁶ in violation of Article 49, GC IV, which prohibits "individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the occupying Power or to that of any other country ... regardless of their motive."

Iraq's purpose in taking hostages and deploying them throughout Iraq was to shield its military assets until they were fortified and protected, in violation of Article 28 of GC IV, which states that "the presence of protected persons may not be used to render certain points or areas immune from military operations." In addition, Saddam Hussein tried to use the hostages as bargaining chips to get the United States and its allies to retreat from Saudi Arabia and cancel the trade embargo levied against Iraq by the U.S. on August 2, 1990. This use of its hostages contravened Iraq's obligation under Article 27 GC IV, which states that protected persons shall at all times be humanely treated and protected against

64. Article 2, GC IV, SCHINDLER & TOMAN, *supra* note 12, at 423.

65. Articles 42 and 78, GC IV, respectively.

66. NORMAN FRIEDMAN, *DESERT VICTORY* 114 (1991).

acts of violence or threats thereof. The United Nations Security Council, in its Resolution 664, rejected Iraqi arguments justifying the need to restrict the departure of U.S. and third party nationals and demanded the immediate release of all foreign nationals in Iraq and Kuwait.⁶⁷

The last western hostages were released on 6 December 1990 following worldwide condemnation and U.N. Security Council resolutions stating an intention to hold Iraqi leadership responsible for its war crimes. During their captivity they had been subjected to a wide range of abuses, including the aforementioned mass deportations, forcible detention, and use as "human shields," as well as more conventional—but equally criminal—abuses such as provision of poor and inadequate food, clothing, shelter, little to no viable medical care, and mistreatment at the hands of their captors (including forced labor). Some hostages claim they rioted against their guards because of poor treatment and lack of food.⁶⁸ According to one report, the daily ration consisted of one piece of black bread and one scoop of rice. In some cases, food was cut off, forcing hostages to rifle through garbage to find sustenance. The medical problems which resulted from this diet were numerous. Finally, some of the hostages were repeatedly interrogated, confined, abused physically and verbally, and subjected to humiliating public display.

Iraqi treatment of non-westerners was equally abysmal. Kuwait was home to thousands of "guest-workers" from third world countries at the time of the Iraqi invasion, including more than 1.3 million Egyptians, 430,000 Indians, Pakistanis, and Bangladeshis, and almost 250,000 Sri Lankans and Filipinos.⁶⁹ After the release of all western hostages, Iraq continued to detain Kuwaiti and third party citizens, subjecting them to similar, or worse, treatment to that which they imposed on the western hostages. This included mass deportations to Iraq, where they were deployed around military nuclear and chemical facilities which Iraq anticipated would be targeted for attack. Reports indicated that as many as 2000 Kuwaitis were taken from their homes and transported from Kuwait to Basra.⁷⁰

Those remaining in Kuwait fared no better at the hands of the Iraqis. So thorough was the Iraqi destruction of Kuwait and Kuwaitis that there was a widespread belief that Iraq was intent upon the complete annihilation of the Kuwaiti people, in violation of the 1948 Genocide Convention.⁷¹ Actions taken by the Iraqis against the Kuwaitis reinforced this belief. These actions included murder, collective executions, torture, mass deportations to Iraq, and destruction of property. The Iraqis refused to provide adequate medical care to Kuwaitis, including provision of critical services and medicine and destroyed public records. All these actions violated various provisions of GC IV⁷² and were done

67. ARTHUR BLAIR, *AT WAR IN THE GULF: A CHRONOLOGY* 12 (1992).

68. *Desert Storm: The War in the Persian Gulf* 82 (TIME MAGAZINE ed., 1991).

69. *Id.* at 181.

70. Caryle Murphy, *Kuwaiti Pilots, Civilians Exult over Air Attack*, WASH. POST, Jan. 18, 1991, at A1.

71. SCHINDLER & TOMAN, *supra* note 12, at 162. Article 2 of this Convention defines genocide as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group, and (e) forcibly transferring children of the group to another group.

72. Article 55, GC IV prohibited the inadequate safeguarding of Kuwaiti public property; Article 24, GC IV mandated protection of children under the age of 15 from harm; Article 27, GC IV prohibited the rape of women; and Article 53, GC IV prohibited the destruction of real or personal property except when "rendered absolutely necessary by military operations."

for reasons other than military necessity or advantage. In addition, Kuwaiti males were compelled to join the Iraqi military, a grave breach of Article 147 of GC IV. Failure to comply with Iraqi demands was often fatal. Furthermore, Iraqis meted out collective punishment to those suspected of belonging to, or collaborating with, the Kuwaiti resistance. In addition to the torture and/or murder of the suspected member, family members were often killed and their houses and property were looted and destroyed. Iraq's main concern appeared to be the destruction of the state of Kuwait to effectuate its new identity as Iraq's nineteenth province.

Immediately prior to their withdrawal from Kuwait at the end of the war, the Iraqis stepped up their widespread destruction of anything Kuwaiti. This included murder of Kuwaiti nationals to prevent their testimony about the atrocities committed by the Iraqis, forcible removal by retreating Iraqi forces of both Kuwaiti and third party nationals from Kuwait (many of whom have yet to return to Kuwait and who are the subject of continuing inquiry by the Kuwaiti government) and intensified looting, pillaging, and destruction of Kuwaiti private and public structures.

C. Treatment of Prisoners of War

Iraq also violated its obligations towards captured prisoners of war (PWs) as set forth in GC III. Iraq's treatment of all of the allied coalition PWs demonstrated a contempt for the law of armed conflict. The world was collectively appalled when images of injured PWs repeating obviously coerced language⁷³ were displayed on television and in newsprint around the world.⁷⁴ Although it was later discovered that some of the injuries were inflicted by other than Iraqi means (ejection from aircraft being the most common), the world community reacted strongly to Iraq's flagrant violations of the most basic customs of war. For instance, under Articles 19 and 123, GCp III, the Iraqis had a duty to remove PWs as soon as practicable to an area away from the combat zone and to detain them in areas where there was no exposure to fire from the combat zone.⁷⁵ Despite this, most of the U.S. PWs were eventually detained in the Iraqi Intelligence Service Regional Headquarters, a legitimate military target which was bombed towards the end of the war.⁷⁶ While incarcerated at various sites within Iraq, the PWs experienced food deprivation, lack of warm clothing, and brutal interrogations involving physical torture.⁷⁷ No PWs were allowed contact with their government or family members, in violation of Article 70, GC III. Furthermore, the ICRC was denied visitation with the PWs and Iraq refused to comply with international law provisions which required it to inform the ICRC of their status.⁷⁸ Because of this, the U.S. government, as well as individual family members, were largely ignorant of the number and identity of the PWs in Iraq's power, as well as of their condition and treatment.

73. In violation of Article 13, GC III, which provides "prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity."

74. T. ALLEN, ET AL., *CNN-WAR IN THE GULF* 147 (1991).

75. In addition, wounded or sick PWs are also protected by the GCII.

76. This is a violation of Article 23, GC III which states "nor may [a prisoner of war's] presence be used to render points or areas immune from military operations."

77. In violation of Articles 13, 14, 17 and 130 GC III.

78. Article 70, GC III. Michael Isikoff, *U.S. Prepares for Possible War Crimes Trials*, WASH. POST, Feb. 12, 1991, at A10.

D. Terror as Weapon

As revolting as Iraq's treatment of PWs was, perhaps the most egregious violation of the law of armed conflict, because it was the most manipulative, cynical, and random, was the targeting of Saudi Arabian and Israeli towns and cities. The Scud missiles used against these countries served no apparent military purpose because they were not used against military targets or to gain military advantage. Having said this, it must be pointed out that considerable effort was spent by Coalition forces in tracking down and destroying Scud missiles. For example, one U.S. squadron's successful destruction of an Iraqi communications facility led to their subsequent engagement in a search and destroy mission of Scud missiles in Western Iraq which were pointed towards Israel.⁷⁹ These search and destroy operations, although largely successful against fixed Scud launchers, were never entirely successful against mobile Scud units. Therefore, to the extent that forces and resources were deployed against Scuds which could have been utilized elsewhere for a speedier resolution to the conflict, Saddam Hussein's efforts could be called military in nature.⁸⁰

The primary mission of the Scuds appeared to be political in nature because of their use in what was widely perceived at that time to be an attempt by Saddam Hussein to widen the war by targeting Israel. If Israel had retaliated, Arab States would have had to side with the Israelis against an Arab sister state, side with Iraq against the Coalition, or remain neutral (which would mean that the U.S. and its Western allies would have no base of operations). Furthermore, involvement in the war by Israel would have obscured the original cause of the war by introducing all of the conflicts that make up the relationship between Israel and the Arab states. If these were Saddam Hussein's intentions, they were thwarted when the United States persuaded Israel not to retaliate.⁸¹

The Scud attacks began on 18 January 1991, and continued at a rate of five a day for the first ten days of the war.⁸² Although they gradually decreased to one a day, the attacks continued until Iraq was defeated. The Circular Error Probable (CEP) of these Scud missiles was 1000 meters, meaning that approximately half of the Scuds launched could be expected to fall within a thousand meters of its target.⁸³ Firing missiles that were this inaccurate could only be justified against large military targets located in sparsely populated areas. In fact, there were such targets in Saudi Arabia and Israel, (e.g., Dhahran Air Base in Saudi Arabia and Dimona nuclear facility in Israel's Negev Desert). Because the targets were in the highly populated cities of Riyadh and Tel Aviv, it is apparent that the point of the Scud attacks was to spread terror among the civilians, who could never be sure that the missiles did not contain chemical or biological warheads in

79. Jeffrey Lenorovitz, *Air Crew Training, Avionics Credited for F-15E's High Target Hit Rates*, AV. WEEK AND SPACE TECH., Apr. 22, 1991, at 54. According to General Merrill McPeak, Chief of Staff for the Air Force, chasing Scud launchers took three times as much effort as anticipated. John D. Morrocco, *War Will Reshape Doctrine, But Lessons are Limited*, AV. WEEK AND SPACE TECH., Apr. 22, 1991, at 38, 43.

80. ALLEN, ET AL., *supra* note 74, at 136.

81. Patrick Tyler, *U.S. Tells of Retaliation Plan That the Israelis Abandoned*, N.Y. TIMES, Mar. 7, 1991, at A1.

82. ALLEN, ET AL., *supra* note 74, at 136.

83. Kenneth Roth, *Humanitarian Law Issues and the Persian Gulf Conflict* 9, paper presented at the Sixth Annual Seminar for Diplomats on International Humanitarian Law and the Armed Conflict in the Persian Gulf (Nov. 6, 1991) [hereinafter: *Humanitarian Law Report*].

violation of the customary law principle codified in Article 51, Protocol I and Article 23(e), Hague IV.⁸⁴

Although it threatened to do so, Iraq never used chemical or biological weapons during the Persian Gulf War. Whether this was because of a reluctance on the part of its field officers or a lack of technology allowing them to place the warheads on the Scud missiles has never been determined. Some commentators speculated that: the Iraqis themselves were ill-equipped to handle any chemical attack, if the United States retaliated with its own chemical warfare; they lacked the training and appropriate chemical warfare gear.⁸⁵

The Iraqi warnings which often preceded or followed Scud attacks seemed to characterize the attacks as reprisals against civilian populations. For instance, one message from the Iraqi Forces General Command stated that the Scuds which fell on Riyadh on 8 February 1991 were intended as a punishment to the al-Sa'ud family. In another, Radio Baghdad described Iraq's intentions in the 11 February 1991 attack on Tel Aviv to "sow death and alarm in the hearts of those who have isolated our women and children in the occupied land."⁸⁶

Reprisals have been defined as,

acts of retaliation, in the form of conduct which would otherwise be illegal, committed by one side in an armed conflict in order to put pressure on the other side to compel it to abandon a course of illegal action which it has been following to return to compliance with the laws of armed conflict.⁸⁷

Civilized nations follow certain rules concerning the use of reprisals. To be legitimate, reprisals must be in response to unlawful acts, conducted in an effort to compel an adversary to observe the laws of armed conflict, preceded by reasonable notice, directed against an adversary, and proportional to the original violation.⁸⁸ The Iraqi actions violated these precepts in several ways. First, the apparent targets of these reprisals were civilians (or at least their attacks were so indiscriminate that civilians had a proportionally greater likelihood of being struck than the ostensible target). Furthermore, Israel was not a party to the conflict or otherwise involved, and using reprisals against it was clearly unwarranted. Similarly, the attacks on Saudi Arabia were not in retaliation for any illegal acts, but rather because Saudi Arabia was part of a coalition waging war against Iraq. This by itself is not sufficient to justify reprisals of any kind.

E. Other Law of Armed Conflict Violations

Besides the concerted effort on the part of the Iraqi government, Iraqi service members waged an illegal war in isolated and random instances. In one case, a descending unarmed parachutist ejected from a disabled plane and was fired upon by Iraqi ground troops, in violation of customary international law.⁸⁹ In

84. Article 51 of Protocol I describes the protections to which the civilian population is entitled, including protection from indiscriminate attacks, while Article 23(e) prohibits the employment of any projectiles or material calculated to cause unnecessary suffering.

85. See Greg Easterbrook, *Operation Desert Shield*, THE NEW REPUBLIC, Sept. 30, 1991, at 32.

86. *Humanitarian Law Report*, supra note 83, at 10.

87. Howard Levie, *Combat Restraints*, 62 NAV. WAR COL. INT'L L. Stu. 201, 204 (1980).

88. AFP 110-31, supra note 2, at paras. 10-4, 10-5.

89. AFP 110-31, supra note 2, para. 4-7, citing Army Field Manual 27-10, *The Law of Land Warfare* 17 (1956), which states:

another example, Iraqi naval forces used drifting naval contact mines which they had no way of disabling in the event they broke free of their moorings in violation of Article I, Hague VIII.⁹⁰ Members of the Iraqi army also engaged in infrequent random acts of perfidy.⁹¹ One notable example occurred during the preliminary skirmishing prior to the battle of Khafji in February of 1991 when Iraqi soldiers, waving a white flag, laid down their weapons. In response to this signal, a Saudi patrol advanced to take them prisoner and were promptly fired upon by Iraqi troops concealed in buildings on either side.⁹² Because they had feigned a cease-fire through the waving of an internationally recognized sign of surrender, the Iraqis committed an act of perfidy which jeopardized future attempts by other Iraqis to surrender.

It should be noted that acts initially described as perfidy have since been rejected as such by Gulf War commentators. For instance, one report described the widely publicized incident in which Iraqi tanks turned their turrets away from the advancing Coalition forces, in a move viewed by those forces as surrender, only to have the turrets swung around and the advancing troops fired upon at the last minute. Although identified as an example of Iraqi treachery, military authorities have declined to adopt this view because of the absence of any universally accepted sign or signal indicating unequivocally an intention to surrender.⁹³

The most serious and widespread damage stemming from Iraqi actions occurred upon their departure from Kuwait, when the Iraqis took the opportunity to set off explosive charges in Kuwaiti oil wells and intentionally released more than 100 million barrels of oil into the Persian Gulf in violation of Article 53, GC IV. "[E]xtensive destruction . . . of property not justified by military necessity and carried out unlawfully and wantonly" is considered a grave breach under Article 147, GC IV. Although the United States has labeled these actions as "environmental terrorism," some suggest that the Coalition military operations were sufficiently hampered justify the defense of military necessity, given Saddam Hussein's limited arsenal against allied air strikes. For example, dense smoke from these oil well fires impeded some Coalition close air support operations.⁹⁴

Although the last oil well was capped in early 1992, effectively ending the air pollution which it had caused, the damage to the Persian Gulf's ecosystem from the bombing of the Kuwaiti oil wells and the concomitant release of oil into the Persian Gulf has been extensive and its impact on the surrounding ecosystem remains incalculable three years after the fact.

The law of war does not prohibit firing upon paratroops or other persons who are or appear to be bound upon hostile missions while such persons are descending by parachute. Persons other than those mentioned in the preceding sentence who are descending by parachute from disabled aircraft may not be fired upon.

90. This Article forbids parties "to lay anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings."

91. AFP 110-31, *supra* note 2, at para. 8-1, describes "perfidy" as involving "acts inviting the confidence of the adversary that he is entitled to protection or is obliged to accord protection under international law, combined with intent to betray that confidence." Included in acts of perfidy are the misuse of an internationally recognized protective sign (such as the Red Cross or Red Crescent) and the feigning of a cease-fire.

92. *Report With Recommendations—Holding Iraq Responsible for War Crimes* 12-5, American Bar Association Standing Committee on Law and National Security (June 4, 1991).

93. "[A] reversed turret is not a recognized indication of surrender *per se*." DOD Report, *supra* note 1, at 0-21.

94. Jeffrey Lenorovitz, *Allies Fly Defensive Missions After Air War Smashes Iraq*, AV. WEEK AND SPACE TECH., Mar. 11, 1991, at 18, 19.

IV. U.S. AND COALITION COMPLIANCE WITH THE LAW OF ARMED CONFLICT

The law of armed conflict was distorted and weakened during the Vietnam Conflict. The U.S. interpretation and application of the law was largely driven by public opinion and perceptions. The United States was overly sensitive to the political fallout from collateral damages and civilian casualties; a fact which the North Vietnamese capitalized on by mingling their military targets (anti-aircraft guns, aircraft, military convoys, etc.) with U.S. PWs and their own civilians. Exacerbating the problem was the fact that targeting decisions were made by military and civilian advisors not personally within the theater of operations. Combat was frequently interrupted to allow the United States and Vietnam to conduct endless and futile negotiations, for political reasons rather than concerns for the law of armed conflict.

At the beginning of the Gulf War, President George Bush stated "our troops will have the best possible support in the entire world, and they will not be asked to fight with one hand tied behind their back."⁹⁵ True to his word, U.S. prosecution of the Gulf War was much different from the Vietnam Conflict. Rules of engagement⁹⁶ reflected an increased understanding of permissible targeting, and military commanders in the field made virtually all of the targeting and planning decisions.⁹⁷

The United States has been in the forefront of those countries complying with treaty obligations under both the Hague and the Geneva Conventions to instruct the military on the law of war and the rights and obligations of the military under these laws during armed conflict. The U.S. military's law of war program is contained in Department of Defense Directive 5100.77 (10 July 1979). This program was initiated in 1974 and requires each military service to implement a law of war program to ensure that all military personnel are trained in the law of war commensurate with their professional duties and obligations. As they do in peacetime, judge advocates played a healthy role in advising forces in the field as well as those making targeting decisions. For example, an Army judge advocate served as General H. Norman Schwarzkopf's attorney on the battle staff. An Air Force judge advocate was a denizen of the "black hole," a large basement storage room located at the headquarters of the Royal Saudi Air Force where targeting and strategy sessions affecting the progression of the war were conducted.⁹⁸

Although the conduct of U.S. and allied Coalition forces contrasts sharply with that of Iraq, the Coalition, and in particular the United States, did not escape heavy attack for its prosecution of that war.⁹⁹ Much of the criticism centers around the kind of air war which the Coalition should have conducted, given

95. President Bush's Jan. 16, 1991 Address to the Nation as quoted in HARRY SUMMERS JR., *ON STRATEGY II* 153 (1991).

96. Rules of engagement are guidance which delineate the circumstances and limitations under which U.S. military forces can initiate and/or continue combat engagement with hostile forces both in peacetime and in wartime.

97. Major General Buster C. Glosson stated that no civilian leaders made any changes to the list of targets compiled by U.S. CENTCOM planners. Nevertheless, at least one report disclosed that after the bombing of the Amirya bunker, the Pentagon took back some of the control over targeting that it previously left to its field commanders. Tom Matthews, *The Secret History of the War*, NEWSWEEK, Mar. 18, 1991, at 28, 36.

98. *Id.*, at 28, 29.

99. Kenneth Roth, *Civilians are Off-Limits Right?*, L.A. TIMES, Feb. 4, 1992, at 11. "Nearly one half of 2500-3000 civilian fatalities directly caused by air attacks could have been avoided had the allies adhered to international standards...."

U.S. technological advances and its use of precision guided munitions (PGMs). The United States has the technology to conduct a “clean” war, through its use of PGMs, which can destroy targets while leaving the surrounding environment and its civilian population unscathed. Some suggest the United States should have used these weapons exclusively, while other commentators have suggested that PGMs mask the destructive nature of the war, making it more palatable to the world community, while ultimately having a more destructive impact on civilians in the war’s aftermath.¹⁰⁰

A. Targeting and Weapons Systems

United States officers planning the military operations in the Gulf and those responsible for drafting the Coalition target lists had extensive training in the law of armed conflict. Targets were reviewed for their military worth, their location in relation to the civilian population and their amenability to strike with limited civilian casualties. It is well-established that the possibility of collateral civilian casualties or destruction of protected property is not necessarily a lawful constraint on the use of force against such targets. The targeting decisions, nonetheless, reflected an understanding of the repercussions—both political and humanitarian—which a “disproportionate” amount of civilian casualties or property destruction could have on operations. As a result, some legitimate military targets were deliberately avoided out of concern by military planners that the collateral civilian casualties or property damage might be too high. For instance, the United States declined to target an Iraqi MiG-21 which was parked near an ancient mosque, in deference to the cultural history of the mosque despite that fact that the MiG was certainly a legitimate target.¹⁰¹

Once targets were selected they were segregated into sets, which included: command, control and communications; air defense; airfields; nuclear, biological and chemical weapons; railroads and bridges; Scud missiles; conventional military productions and storage facilities; oil production facilities; electrical systems; naval ports; and Republican Guard Forces.¹⁰² These areas were then prioritized according to the military objectives. Those which were critical to the successful prosecution of the war were targeted first.

After potential targets were segregated, another review was conducted to determine which weapons systems to use against that particular target. Driving the ultimate decisions were the principles of military necessity and of humanity. The U.S. and Coalition forces deployed a wide range of weapons systems in the Gulf War, many of which were newly developed but untested in conflict. One example was the Joint Surveillance and Target Attack Radar Systems (JSTARS), which is a specially-equipped radar aircraft designed to detect surface movement. During the war it was used to detect the movement of Scud missiles, the location of previously undetected roads, and other ground information necessary for Coalition forces operations. The JSTARS was so new that its deployment to the Gulf was the first time that this system had been field tested. Four out of eighteen crew-members aboard the JSTARS were civilian contractor employees who were responsible for getting the system up and keeping it up.¹⁰³ AWACS, an aircraft which provided continuous surveillance of the air space over

100. Erica Munk, *The New Face of Techno-War*, *The NATION*, May 6, 1991, at 583.

101. DOD Report, *supra* note 1, at 0-14.

102. Barton Gellman, *Allied Air War Struck Broadly in Iraq*, *WASH. POST*, June 23, 1991, at A1.

103. Peter Giles, *Joint STARS Does its Stuff*, *A. F. MAG*, June 1991, at 41.

Saudi Arabia and much of Iraq, gave commanders in conjunction with JSTARS, information on both ground and air movement. In addition to the JSTARS, the F-117, the so-called "Stealth Bomber," contributed to the success of the Gulf War through highly accurate navigation and weapons delivery systems which were used in heavily populated areas such as Baghdad.

In order to understand the enormous technological advances made in recent years, one need only contrast the Circular Error Probable (CEP) of PGMs deployed in the Gulf War with the technology employed in World War II and Vietnam. During World War II, the CEP for a B-17 was within thousands of feet, meaning that fifty percent of the bombs used would come within thousands of feet of hitting their target. In addition, 4500 sorties using 9000 bombs were needed to destroy a target. Things improved considerably during the Vietnam conflict when an F-105 with a CEP of within hundreds of feet needed only 95 sorties and 190 bombs to destroy its target. By contrast, during the Gulf War, F-117s deployed in the Gulf War were able to direct guided missiles and bombs within several feet of their targets, with only one sortie and one bomb needed to take out a target.¹⁰⁴ Even the Air Force's F-16 and the Navy/Marine Corps' FA-18—the most technologically advanced fighters in their respective repertoires—only have an accuracy range of 30 CEP, a range which one commentator described as "no longer interesting."¹⁰⁵ Rounding off its impressive array of advanced technological weaponry, the United States also employed state-of-the-art night attack systems which allowed bombing to continue throughout the night.

Use of these technologically-advanced weapons and surveillance systems gave Coalition forces a superior advantage over their Iraqi counterparts, a fact which was demonstrated within the first three days of the air war when Coalition forces gained complete control of Iraqi and Kuwaiti airspace. With these weapons, the Coalition was able to sharply minimize civilian deaths and property damage while dealing heavy blows to the Iraqi military machine.

B. Use of Precision Guided Munitions

As noted above, the United States and its Coalition partners have come under fire for not using a greater proportion of their vast array of PGMs against Iraqi military targets.¹⁰⁶ General Merrill McPeak, Air Force Chief of Staff, stated that only 7400 of the 84,200 tons of ordnance dropped by Allied forces were PGMs.¹⁰⁷ By another account, only seven percent of the munitions dropped were PGMs. Of the other ninety-three percent, "81,980 tons of old-fashioned dumb bombs missed their targets 75% of the time."¹⁰⁸ Critics of the Coalition's prosecution of the war argue that the law of armed conflict mandated greater use of PGMs. Several reasons are advanced for this argument: expanded use of PGMs would result in greater mission effectiveness; the military objective could be obtained more expeditiously (thereby satisfying the "military necessity" criterion); and use of PGMs would keep civilian casualties and harm to surrounding

104. W. Hays Parks, *Rules of Engagement: No More Vietnams*, PROCEEDINGS, March 1991, at 27, 28.

105. Gen. Michael Dugan, Ret., *First Lessons to Victory*, U.S. NEWS & WORLD REP., Mar. 18, 1991, at 32.

106. *Humanitarian Law Report*, supra note 83, at 3.

107. *Id.*

108. *Desert Storm: The War in the Persian Gulf*, supra note 68, at 171.

property to an extraordinarily low amount.¹⁰⁹ Supporting this argument were the impressive air strikes which destroyed a targeted structure while leaving intact all surrounding buildings. Other commentators have criticized the Coalition's use of PGMs, claiming that states have a moral obligation to forego the use of technologically advanced weapons systems because of their impact on the civilian, as opposed to the military, infrastructure.¹¹⁰

Despite these very valid reasons for an increased use of PGMs, there are several important reasons why smart bombs were not used more extensively during the conflict. The first reason was a financial one. The cost of dumb bombs is literally pennies a pound. Precision guided munitions, on the other hand, can cost from \$50,000 up to 1.6 million for a Tomahawk cruise missile.¹¹¹ Another reason is military economy. Although the commanders of the Coalition forces planned for a quick war and did everything in their power to bring the conflict to a rapid conclusion, they had no way of knowing how long the war would actually last. To deplete millions of dollars of advanced weaponry at the initial stages of the war with no reserve stockpiled in anticipation of the unknown would have shown a disturbing lack of judgment. But finally, and most importantly, there was no requirement, legal or moral, to use smart bombs. If the United States made the decision to use PGMs exclusively, it might have set a precedent which would be difficult to overcome in subsequent conflicts. Not only would the rules of war become more stringent (and more expensive) for the United States and other technologically advanced countries, but the United States would be in a category by itself in terms of compliance with the law of armed conflict, since no other state possesses the same degree of technological advantage. Future wars, therefore, might cost billions of dollars on the part of the United States to prosecute, while its opposing forces would pay a fraction of that. Furthermore, while the enemy civilian population would see their risk of injury substantially reduced, the harm to U.S. property and citizens would continue to be high, commensurate with the accuracy of less technologically developed weapons systems.

Turning now to address those who argue against the use of the deceptively "clean" PGMs, one must consider the alternative, which would be to use dumb bombs in highly populated areas surrounding legitimate military targets. This of course would result in high collateral damage and civilian deaths. As even the commentator arguing against their use has acknowledged, Coalition deployment of PGMs resulted in one of the lowest death rates in the history of modern war.¹¹² To preclude their use so that the world could be openly confronted—and presumably appalled—by the number of civilian casualties and the nature of war in general would be brutally manipulative. Furthermore, it fails to take into account the power of the press, which generally has not turned a blind eye to the "quiet" deaths of the Gulf War as a result of PGM-related destruction of electrical power grids.

109. *Humanitarian Law Report*, *supra* note 83, at 3; *NEEDLESS DEATHS IN THE GULF WAR*, *supra* note 50, at 5-6.

110. Munk, *supra* note 100, at 583.

When a capital city's communication centers can be destroyed with little damage to the surrounding buildings or people; when a nation's infrastructure can be crippled so that the deadliest effects appear long after the world's eye has moved elsewhere;...then any nation willing to forfeit its social and economic development to weapons can exert power at will, deny moral responsibility and avoid popular revulsion.

Id.

111. *Humanitarian Law Report*, *supra* note 83, at 3.

112. Munk, *supra* note 100, at 583.

C. Targeting of Electric Power Grids

In addition to its use of weapons systems, the United States and its Coalition partners also drew fire because of their target list. The target list was extensive, eventually expanding to more than seven hundred targets. Although most of the target list was unexceptional, the targeting of the Iraqi electric power grids was highly criticized because its ultimate target was the Iraqi civilian population. The targeting of the electrical power generation plants was, and continues to be, extremely controversial. Its impact has been the most long-lasting and far-reaching of any of the other Coalition targets.

Allied forces flew 215 sorties against Iraqi electrical plants, using unguided bombs, Tomahawk cruise missiles and PGMs.¹¹³ By the seventh day of the air war, the Iraqi national power grid ceased to function, and by the end of the war, seventy-five percent of electrical generating plants, and four of Iraq's five hydroelectric plants were destroyed.¹¹⁴ A nonfunctioning electrical system directly affected Iraq's refrigerating capabilities. Because of a lack of refrigeration, storage of food became problematical, resulting in food shortages. Lack of refrigeration also affected medical facilities that need it to cool certain medicines and severely impaired Iraq's sewage disposal system. The widespread dumping of sewage into the Tigris River¹¹⁵ promoted the spread of disease and contamination, which particularly affected children. A Harvard study sponsored by Greenpeace projected the deaths of over 170,000 Iraqi children under five in the year following Desert Storm due to water-borne infectious diseases.¹¹⁶

From a military standpoint, however, destruction of Iraq's electrical output was critical to United States and Coalition strategy. In fact, the United States defended its right to attack integrated power grids as a legitimate target throughout the negotiation of the Geneva Protocols.¹¹⁷ Iraqi electrical power grids were used simultaneously for military and civilian purposes. For instance, the manufacture of chemical, biological, and conventional weapons was dependent on the national electric power grid. More importantly, disruption of electric power in Iraq meant disruption of the Iraqi communications system—the lifeline of Iraqi command and control over its Armed Forces. This destruction of Iraqi communications capabilities meant that Iraqi combat forces were unable to respond quickly to Coalition actions. The targeting of Iraq's electric power grids, therefore, was militarily necessary and did not conflict with any customary international law or treaty to which the United States is a party.

Another criticism against the targeting of electrical systems and hydroelectric plants was not that they were targeted at all but that they were repeatedly hit in an effort to deny them both short-term military and long-term civilian use. Most of Iraq's power grids were continuously bombed.¹¹⁸ According to Iraqi engi-

113. Gellman, *supra* note 102.

114. United Nations Association of the United States of America, *The United Nations Response to the Gulf Conflict: Political, Economic, Humanitarian, Environmental and Social Aspects*, Mar. 7, 1991, at 6.

115. ARKIN, *supra* note 3, at 57. See also Lee Hockstader, *Baghdad Residents Face Health Crisis*, WASH. POST, Mar. 4, 1991, at A1.

116. Harvard Study Team Report: *Public Health in Iraq after the Gulf War*, May 1991.

117. George Aldrich, *New Life for the Laws of War*, 75 AM. J. INT'L L., 764, 770 (1981). See also, George Aldrich, *Progressive Development of the Laws of War: A Reply to Critics of the 1977 Geneva Protocol I*, 26 VA. J. INT'L L., 692, 716 (1986).

118. See *Defeat of Iraq Sparks Debate on Which Air Role was Crucial*, AV. WEEK AND SPACE TECH., Jan. 27, 1992, at 62, quoting Alan Arkin who states

neers, missiles hit all four steam boilers, the water treatment systems, and the administration building in the opening attack on the Al-Hartha power plant, cutting power to 1.5 million people and halting water flow and sewage pumps. It was subsequently struck twelve more times. By the final raid on 28 February 1991, it had been reduced to scrap-metal.¹¹⁹ Intensive strikes such as these only served to fuel speculation as to allied motives in reducing these power plants to rubble.

Military commanders have defended the continual bombing of these targets as essential because of Iraq's "very resilient, redundant communications system."¹²⁰ General Schwarzkopf stated that the intention was never to destroy all of Iraqi electrical power. "Because of [U.S.] interest in making sure that civilians did not suffer unduly, we felt we had to leave some of the electrical power in effect and we have done that."¹²¹ This is not to deny that the Coalition used tactics designed to induce discontent with Saddam Hussein among the Iraqi civilian population. United States military planners claim that the psychological effect of the depletion of electrical power on the part of the Iraqi people was a valid consideration in that particular targeting decision.¹²² In fact, destroying the electrical generating capabilities of a nation is necessary because, in addition to being an exercise of military strength, war is a political act. This means that the goal of a victorious state is not merely to vanquish the military forces of the opposing state. As one commentator noted, "the goal is the destruction of the enemy's will to resist, a task that involves political, social, economic and psychological, as well as military, operations."¹²³ Thus, in order to win the political, as well as the military war, it is necessary to undertake acts which induce the civilian population of an opposing belligerent state to want to end the war as quickly as possible.

In one interview, Lt. Gen. Charles Horner confirmed that many middle-of-the-night bombings were intended to remind the Iraqis that they were at war.¹²⁴ Although the primary purpose of the bombing of the electrical power grids was to strike hard at the Iraqi military, a secondary purpose was to remind the Iraqis that "Saddam Hussein was conducting a war in the South and was unable to contain it."¹²⁵ Unfortunately, it is the nature of war that some of the damage to these legitimate military targets impaired the quality of life for the civilian population even after the cessation of hostilities.¹²⁶

In particular, power plants around Basra in South East Iraq were on the ingress and egress routes for most Navy aircraft and thus often were used as secondary targets. Other power plants were in the area that was overlapped by both Kuwait and Iraq theater targeters and were on two hit lists.

119. Bernd Debusmann, *Allied Motives Queried in Raids on Iraqi Plant*, WASH. POST, Jan. 28, 1992, at A14.

120. *Saddam Had a Real Problem*, USA TODAY interview with Gen. Colin Powell, Mar. 25, 1991.

121. CENTCOM briefing of Jan. 30, 1991 at Riyadh, Saudi Arabia.

122. Thus, one Air Force planner was quoted as saying, "Big picture, we wanted to let people know, 'get rid of this guy and we'll be more than happy to assist in rebuilding. We're not going to tolerate Saddam Hussein or his regime. Fix that and we'll fix your electricity.'" Gellman, *supra* note 102, at A1.

123. Harry Summers, *Civilian versus Military Targets*, A.F. TIMES, July 8, 1991, at 62.

124. Julie Bird, *Horner: Further AF Role in Gulf Not Needed*, A.F. TIMES, Mar. 18, 1991, at 8.

125. *Id.*

126. Note, however, less than a year after Iraq surrendered, 75% of the power grid had been restored and 85% of Iraq's oil-refining capacity had been re-established. Bernd Debusmann, *Postwar Iraq Rebuilds Rapidly*, WASH. TIMES, Jan. 12, 1992, at 14.

D. The Baby Milk Factory

The U.S. bombing of the "baby milk" factory in Abu Ghraib in late January 1991 is often cited as a violation of the law of armed conflict. The factory was heavily camouflaged, leading some to speculate that this was the reason for its inclusion on the allied target list.¹²⁷ After it was bombed, reporters who entered the facility claimed they saw signs identifying (in English) the plant as a "baby milk factory." Some tasted the powdered milk-like substance in bags around the facility and verified that it tasted like powdered milk,¹²⁸ and officials in Switzerland corroborated that they had dealt with the plant in its capacity as a "baby milk" producer.¹²⁹ General Colin Powell and other military planners have reaffirmed that their intelligence was good and that the facility was, in fact, used in the production of biological weapons, (although not necessarily *exclusively* used for this production).¹³⁰ It is unlikely that the public will soon access to the information relied upon by U.S. and Coalition forces in reaching their conclusion that the plant was active in the production of biological weapons. Without this knowledge, there is no public certainty as to what the plant really produced.

Even assuming, however, that the U.S. and allied forces planners relied on mistaken intelligence, there still is no law of armed conflict violation as long as a reliance on the information was reasonable. In cases like this, the Rendulic rule is followed, which holds that a commander in the field is not to be judged by knowledge gained in hindsight. Rather, a commander's conduct is judged on the information available at the time he took the course of action which is the subject of the inquiry.

The Rendulic rule arose out of a case involving General Rendulic, Commander of the German 20th Mountain Army in Norway during WWII during his retreat of Northern Norway. He promulgated a scorched earth policy. Following the General's orders, his troops devastated the province of Finnmark in order to impede what General Rendulic believed to be the large imminent advance of the Russians. After the war, he was acquitted of the crime of unnecessary destruction of civilian property. A U.S. military tribunal in Nuremberg found that his actions were of military necessity because they were based on his reasonable, though erroneous, belief at the time that the Russians planned a strong advance. Thus, reliance on information which may later be proven to be inaccurate does not taint the target selection or the subsequent destruction of the target unless the commander, targeter, or bomber had reason to know that the intelligence data was wrong. If there was no information contradicting the intelligence data in the possession of the allied Coalition at the time of the attack, the "baby milk" factory was a legitimate target.

F. The Amirya Bomb Shelter

Another incident which stirred great debate was the 13 February 1991 bombing of the Amirya bomb shelter which killed between 200 and 400 civilians.

127. *Tactical Bombing of Iraqi Forces Outstripped Value of Strategic Hits, Analyst Contends*, AV. WEEK AND SPACE TECH., Jan. 27, 1992, at 62.

128. Lee Hockstader, *A Taste of Normalcy in Land of the Midnight Bomb*, WASH. POST, Mar. 3, 1991, at A1.

129. Ellen Ray and William Schaap, *Minefields of Disinformation*, THE VILLAGE VOICE, Feb. 5, 1991, at 8.

130. Chairman of the Joint Chiefs of Staff, General Colin Powell, stated that it was "a biological weapons facility." Briefing of Jan. 23, 1991.

many of whom were women and children. Opinions differ as to the primary purpose of the bomb shelter. According to U.S. military planners, all available evidence indicated that the shelter was actually a hardened bunker converted from a civil defense shelter to a military command, control, and communications center.¹³¹ They further claim that a Scandinavian contractor had converted ten of twenty-five such bunkers in Baghdad in 1989, including the Amiryia bomb shelter. Furthermore, allied intelligence detected a vast increase in military activity in the two weeks immediately preceding the attack, including trucks unloading communications equipment.¹³² The shelter itself had reinforced ten-foot thick concrete ceilings and was heavily camouflaged. Finally, intercepted command signals coming from the bunker indicated that this was a key military target.¹³³

Military planners were unaware of the presence of any civilians in the bunker, who are now thought to have been relatives of the military personnel utilizing the bunker.¹³⁴ Others claimed the bunker was, and always had been, nothing more than an air raid shelter routinely used by citizens at night. They claim this was readily apparent to anyone taking even a casual interest in the activities of the bunker.

The Rendulic rule applies to this targeting decision in much the same way it did for the baby milk factory. Assuming the decision to bomb the shelter was reasonable in light of the intelligence available at the time, no violation of the law of war recurred. The failure in this instance lies with Saddam Hussein, who placed civilians within an otherwise valid military target. Iraq had an affirmative responsibility not to commingle civilians with legitimate military targets.¹³⁵ Despite this obligation, Iraq mingled the two as much as possible in order to shield its military targets—a policy which resulted in the preventable deaths of hundreds of civilians.

G. Targeting of Civilian Vehicles and Day Bombing

Other criticisms levied against U.S. and Coalition forces were the strafing of civilian vehicles on the highway and the day bombings of bridges and roads which were believed to increase the number of civilian casualties.¹³⁶ Specifically targeted, according to one observer,¹³⁷ were drivers of Jordanian civilian oil tankers. Compounding the culpability of the United States, according to some critics, was State Department spokeswoman Margaret Tutweiler's 4 February 1991 response to a formal protest by Jordan. She reiterated U.S. policy not to target civilian trucks exporting petroleum from Jordan despite the fact that U.S. intelligence sources indicated that war materials were being transported into Iraq using similar types of convoys of civilian oil trucks. Critics claimed that Mrs. Tutweiler's statement engendered a false sense of security among individuals

131. Michael Gordon, *U.S. Calls Target a Command Center*, N.Y. TIMES, Feb. 14, 1991, at A17; Rick Atkinson et. al. *Bomb Strike Kills Scores of Civilians in Building Called Military Bunker by U.S., Shelter by Iraq*, WASH. POST, Feb. 14, 1991, at A1.

132. R.W. Apple, Jr., *Allies Deny Error and Cite Reports*, N.Y. TIMES, Feb. 14, 1991, at A1.

133. Rick Atkinson et al. *supra* note 131, at A1.

134. Michael Gordon, *supra* note 131.

135. Article 28, GC IV. *See also*, AFP 110-31, *supra* note 2, para. 5-8, which states, a "party to a conflict which chooses to use its civilian population for military purposes violates its obligations to protect its own civilian population. It cannot complain when, inevitable, although regrettable, civilian casualties result."

136. Alan Cowell, *More Air Attacks on Road to Jordan*, WASH. POST, Feb. 1 1991; *Allied Bombers Said to Kill 60 Civilians Fleeing by Bus*, N.Y. TIMES, Feb. 14, 1991, at A20.

137. NEEDLESS DEATHS IN THE GULF WAR, *supra* note 50, at 213-27.

because it implied that the United States and Coalition forces could discriminate between Iraqi military and other convoys and that they would target no Jordanian trucks.¹³⁸ In fact, the altitude at which many allied aircraft were flying made such distinctions difficult.¹³⁹

To expect a U.S. explanation for the collateral deaths of individuals who, during war time, chose to travel down routes frequented by the Iraqi military simply does not take into account the realities of war. The inadvertent striking of civilian vehicles commingling with Iraqi military traffic, due to the altitude flown by Coalition forces, can in no way be categorized as a law of war violation. Conserving resources and protecting personnel by flying at altitudes which pose a risk to neither is a legitimate strategy during wartime. Furthermore, many of these civilian vehicles were attacked as they ferried military personnel north from Kuwait during the Iraq withdrawal toward Baghdad. These were legitimate targets.

This was also true for the daytime bombing of bridges and highways used by both military and civilian travelers. Critics suggest that U.S. and Coalition forces were under an obligation imposed on them by Protocol I to confine the targeting of roads and bridges to night attacks. According to this argument, night attacks would have reduced collateral civilian deaths because these roads and bridges were necessarily used more during daylight hours than at night.¹⁴⁰

Nevertheless, it is a basic fact of war that legitimate military targets can be hit whenever it is most advantageous to the striking force. To restrict a belligerent's use of force to certain hours of the day in order to safeguard human life allows the enemy to confine its movements to hours it knows it will not be targeted. If it is more advantageous for an opposing force to attack during the day than at night, or if the object can be achieved more quickly, then there is no recognized legal prohibition on the destruction of roads and bridges during the day.¹⁴¹ As in most wars, bridges and roads provide the lifeline which supports the military; they transport the military, its weaponry and its supplies. Citizens of a country engaged in war are on notice that they may be inadvertently killed if they expose themselves to risk by traveling in areas frequented by their armed forces.

138. Roth, *supra* note 83, at 7.

139. U.S. and allied forces did not begin the Gulf war striking at high altitudes. Initially B-52s, for example, started off bombing from the relatively low altitude of 500 feet. They switched to altitudes of 30,000-35,000 feet after the first day due to the heavy anti-aircraft and artillery which they encountered. Similarly, pilots of F-16s trained to fly low to avoid Soviet surface to air missiles, had to change their tactics and learn to bomb from 15,000 feet. Matthews, *supra* note 97 at 30. Increasing their altitude allowed U.S. and allied Coalition forces to do maximum damage to Iraqi military targets with minimum damage to their own weapons and personnel. Nevertheless, accuracy suffered and targets which could have been hit within range of 30 feet CEP were bombed less accurately and with a higher degree of collateral damage. "The problem with bombing from higher altitudes is the loss of accuracy when using unguided weapons. Early analysis indicates that dumb bombs dropped by attack aircraft were not all that effective, according to a Pentagon official." *Flexibility of Attack Aircraft Crucial to Crushing Iraq's Military Machine*, AV. WEEK AND SPACE TECH., Apr. 22, 1991, at 46. Another report stated that "[p]reliminary reports indicate that allied tactics of dropping precision munitions from higher altitudes, 15,000-20,000 feet, diminished their lethality. While no less accurate than munitions delivered from lower altitudes, the higher angle of attack may have reduced their destructive power." John Morrocco, *Looming Budget Cuts Threaten Future of Key High-Tech Weapons*, AV. WEEK AND SPACE TECH., Apr. 22, 1991, at 66.

140. NEEDLESS DEATHS IN THE GULF WAR, *supra* note 50.

141. Comments on the paper, *Humanitarian Law Issues and The Persian Gulf Conflict*, Remarks delivered by Burtus M. Carnahan, Esq., Senior Analyst, Science Application, at the Sixth Annual Seminar for Diplomats on International Humanitarian Law, American University, Nov. 6, 1991. (Customary international law has never dictated that bombing be conducted at night rather than during daylight hours merely because incidental civilian casualties might be fewer. The timing of the bombing was a function of military requirements to effectively prosecute the war with minimum coalition casualties.)

Common sense should dictate that they avoid close proximity to legitimate military targets. Limiting attacks on when this critical infrastructure unnecessarily inhibits the opposing forces and is not legally or even morally justified.

H. The Highway of Death

One final incident illustrates the permissible uses of force. This incident occurred on the road from Kuwait City to Basra, on what has become known as "the Highway of Death." Near the end of the war, an Iraqi military convoy retreating on this road from Kuwait City back to Iraq was attacked by U.S. and Coalition forces. The Iraqis were withdrawing from Kuwait City after looting and plundering Kuwaiti property and killing citizens whom they feared might implicate them in war crimes. Retreating Iraqis were conveyed in every conceivable mode of transportation. In addition to military transport, they were driving stolen Kuwaiti civilian vehicles, Red Cross vans, trucks, tractor-trailer rigs, and Kuwaiti water and fuel tankers. The vehicles were filled with stolen Kuwaiti property, including clothes, toys, furniture, stereo equipment, government records, and cultural property.

This huge convoy was attacked by Air Force F-16 fighters and Navy and Marine aircraft from the USS Ranger aircraft carrier, among others. The pilots dropped anti-armor mines in front of the convoy to halt its progress and then disabled the rear vehicles, effectively boxing in the convoy.¹⁴² It was, in effect, a huge traffic jam, with vehicles blocked in by desert sand. So congested was the allied air traffic taking part in the attack that air traffic controllers had to divide the kill zone into discrete sections in order to avoid mid-air collisions.

Critics have charged that the U.S. and Coalition forces took part in a massacre of helpless Iraqis who were retreating from the war and were, in any case, unable to surrender. One commentator expressed his view that because these Iraqi soldiers were retreating with turrets open and white flags flying they were effectively surrendering and were, therefore, *hors de combat* and thus entitled to U.S. protection, not slaughter.¹⁴³ This view can only be premised on a misunderstanding of the law of armed conflict. These soldiers were not surrendering, they were retreating. United States planners had a legitimate reason for the attack because the retreating Iraqis were still a viable fighting force. To prevent their use as reinforcements for other divisions, their capture or death was necessary. They were also, to a large extent, the hard core of the Republican Guard. Kuwaitis have described these retreating Iraqis as the ones who had been the most vicious towards them and the ones who were in control of the Kuwaiti population, including the confinement, interrogation, and torturing of its citizens (not to mention the ones that had stripped the city of everything of value). Furthermore, the Iraqis caught in the convoy were not mercilessly slaughtered, contrary to press reports. The U.S. and allied forces made it clear to the Iraqis from the start that their vehicles were the targets and if the Iraqis left the vehicles to surrender,

142. Steve Coll & W. Branigan, U.S. *Scrambled to Shape View of 'Highway of Death'*, WASH. POST, Mar. 11, 1991, at A1.

143. Roth, *supra* note 83, at 12. The author even suggests that the Iraqis were *hors de combat* even without expressing their intention to surrender because "[w]ith their chaotic flight offering no apparent possibility even to mount an organized defense, they had effectively fallen into the power of an allied force." This view is unsupported by any law or the customary practice of nations. Carried to its logical extreme an advancing army would be prohibited from firing upon an opposing force which they *believed* at the time to be incapable of organizing a cohesive defense, a subjective standard holding potentially dire consequences for a complacent army.

they would stand a considerably better chance of survival.¹⁴⁴ More Iraqis escaped through the desert (to be taken prisoner) than were actually killed.¹⁴⁵

V. CONCLUSION

Despite the detailed criticism against the Coalition's conduct during the war, the general consensus among these critics is that the Coalition conformed its actions to the law of armed conflict and made every effort to limit the number of collateral deaths, injury, and property damage.¹⁴⁶ Mr. William Arkin, a U.S. intelligence analyst and director of the Nuclear Information Unit of Greenpeace International, was granted unprecedented access to both U.S. and Iraqi military information, including target lists and bomb sites. In addition, he was able to speak directly with members of the Iraqi civilian population. After a thorough review of all relevant information, Mr. Arkin stated that "he could find no evidence of indiscriminate attacks on cities or civilians, intentional damage for post-war leverage on the Government of Saddam Hussein, or extensive collateral damage of civilian structures near targets."

Iraqi prosecution of the war, by contrast, has been justly condemned for its abuses and its attempt to gain leverage by increasing collateral civilian casualties and property damage, not only of its citizens but also those of other countries with which it was in conflict.

Analysts will review the conduct of both sides in years to come in an effort to define the law of armed conflict in the context of that war. The Gulf War will help to chart the future progression of the law of armed conflict.¹⁴⁷ Of grave concern, however, is one crucial allied decision that will shape the law of armed conflict more definitively, and have a more detrimental effect on its future, than all others—the failure on the part of the Coalition to prosecute members of the Iraqi government and its military, notably Saddam Hussein, for their law of armed conflict violations. The Coalition's failure to take any affirmative action against Iraq for war crimes ultimately signaled to the rest of the world that the law of armed conflict is unenforceable.

Governments which stand to gain military advantage by noncompliance with the law of armed conflict may conclude that this type of conduct has been legitimized. Although it may seem an abstract concept now, or even a mark of forbearance by those seeking to promote peaceful co-existence among former antagonists, the failure to hold war crime trials may ultimately translate into greater death and suffering. Affected most will be the pilots and other military troops captured as PWs, hospitals which cannot find refuge behind the Red Cross or the red crescent, and millions of civilians whose deaths may be used to further some political or military cause.

144. In fact, although there were over 1500 vehicles on the road at the time, reporters present at the scene after that attack estimated a maximum of 300 Iraqis dead on the highway. *U.S. Scrambled to Shape View of 'Highway to Death'*, *supra* note 142.

145. *Id.*

146. NEEDLESS DEATHS IN THE GULF WAR, *supra* note 50, at 4.

147. This is not to say that the Gulf War was representative of what the U.S. can expect to confront in the future. The conditions of the Gulf War favored the Allies who, in turn, could afford to conduct the war the way that they did. Under other conditions, including terrain which is favorable to guerilla warfare as in Vietnam (or, more currently, in the many empty houses and apartments and narrow streets of Bosnia-Herzegovina) and which favor a ground war as opposed to a quick air war, the United States would be forced to conduct a radically different operation.

JA Wartime Planning: A Primer

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I. INTRODUCTION

As bombs fell on Baghdad, some would recognize what was less obvious to others, judge advocates of all military services had played an important part in planning for that fateful moment.¹ More than any other war in the history of the United States, the Persian Gulf War was a lawyers' war. "Decisions were impacted by legal considerations at every level," General Colin Powell, Chairman, Joint Chiefs of Staff, said in a statement to the American Bar Association Journal. "Lawyers proved invaluable in the decision making process."²

The important role played by judge advocates in Desert Shield/Desert Storm and the expanding influence of military law is a highly visible illustration that the law of armed conflict was not an academic abstraction but an integral part of the planning and conduct of American military combat operations.

The upshot of this article is that, in future armed conflicts, lawyers would have an important role in determining how conflicts are planned and how they are fought. As the retired Chief Judge of the United States Court of Military Appeals, Judge Robinson O. Everett, observed, the increasing involvement of military attorneys in planning modern military operations comes as a recognition of various issues. For example, the conduct of low-intensity warfare is different, tending to entwine troops more with civilian populations. Some issues are engendered by use of collective security, the U.N. Charter. All in all, there is a greater reliance on the military lawyer by senior commanders.³

The involvement of Air Force judge advocates and paralegals in Desert Shield/Desert Storm was extensive and involved the planning and execution of military operations. It is almost a certainty that The Judge Advocate General's Department will take an increasingly active role in the planning, preparation, and prosecution of future military combat operations.

Without a grasp of the fundamentals of wartime planning, Judge Advocate (JA) personnel cannot effectively participate in wartime planning to properly ensure that Air Force judge advocates and paralegals are in the right place at the right time for any future wartime contingency. Nevertheless, how the Air Force

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1. Fred Strasser, *Law Corps Aided in War Plans*, THE NAT. L. J. (Jan. 28, 1991).

2. Steven Keeva, *Lawyers in the War Room*, A.B.A. J., 52 (December 1991).

3. Strasser, *supra* note 1. Judge Everett is now Professor of Military Law, Duke University, North Carolina.

plans to fight in wartime and to mobilize and deploy its forces and personnel to an area of combat operations has remained an obscure subject for some judge advocates and paralegals. The recent experience of JA personnel involved in planning deployments for Desert Shield/Desert Storm revealed the importance of knowing the basic principles about these matters. A grounding in wartime planning fundamentals is imperative.

This article is intended as a primer⁴ that will delineate the basics of wartime planning for use in JA planning for mobilization and deployment. Gaining knowledge about the subject of wartime planning will require the immersion of the reader in an arcane specialty replete with acronyms, unfamiliar terminology, and terms of art—the language of the military planning community.⁵ Like learning how to do legal research or to speak a foreign language, the more well-versed the judge advocate is with the peculiar jargon of planning, the more capable that lawyer will be to deal with planning and the review and execution of wartime operations plans.

II. THE JOINT PLANNING PROCESS AND OPERATIONS PLANS IN CONTEXT

The National Security Council System develops national security policy based on assessments of worldwide political, military, and economic conditions. After the President approves the U.S. security policy, it is implemented through national security decision directives and the Joint Chiefs Staff (JCS) translate the policy into strategic guidance and objectives for force structuring, resource programming, and operational planning, all of which is contained in Joint Strategic Planning System (JSPS) documents.⁶

A primary JSPS document is the Joint Strategic Capabilities Plan (JSCP), which is a planning directive to the Commanders in Chief (CINCs) of the unified and specified commands and the Service Chiefs. The JSCP contains national security objectives, military strategic concepts, task assignments, and other related information for each CINC. It also identifies how the major combat forces are apportioned among the CINCs for developing operations plans (OPLANs).⁷ The OPLANs are the blueprints for combat operations.

Further, the JSCP is the basis for planning in the Joint Operations Planning and Execution System (JOPES). The essentials of this system are contained in four volumes covering deliberate planning and crisis action procedures, supplementary planning guidance and Automated Data Processing (ADP) support.⁸

JOPES, Volume I, Planning Policies and Procedures, combines both the deliberate planning and crisis action procedures in a single standardized document that will guide planning and execution of operations plans in peacetime and crisis situations.⁹ JOPES, Volume I, is of primary interest to JA planners. It provides guidance and procedures for developing, coordinating, reviewing, and gaining approval of joint operation plans during peacetime. It also provides that, in the Plan Review of the formal planning process, the military services will review

4. Perhaps the reader can turn to this article for future reference, however an effective cure for insomnia it may at first be found to be.

5. "The beginning of Wisdom is...calling a thing by its right name." Old Chinese Proverb.

6. See Air Force Regulation (AFR) 28-3, USAF Operation Planning Process (30 June 1986) and Draft AFR 28-3 (1 Oct. 1991).

7. *Id.* ch. 1.

8. *Id.*

9. *Id.*

OPLANs, which is to include a legal review of plan compliance with domestic and international law, including the law of armed conflict.

Further, JOPEs, Volume I, prescribes standard formats and minimum content for OPLANs and for OPLANs in concept format which are called Contingency Plans (CONPLANs).¹⁰ CINCs prepare OPLANs in response to JCS requirements to conduct military combat operations. OPLANs are prepared for situations sufficiently critical to national security to require prior planning.

JOPEs, Volume II, Supplementary Planning Guidance, and JOPEs, Volume III, Automated Data Processing, are not of general interest to JA planners. They are functionally oriented guidance, providing formats for selected appendices and establishing the Worldwide Military Command and Control System (WWMCCS) which is the ADP standard system that supports the planning of joint operations. JOPEs, Volume IV, Crisis Action System, is of general interest to JA planners because it provides guidance and procedures for joint planning during emergency or time-sensitive situations.

III. THE AIR FORCE WAR AND MOBILIZATION PLAN

The Air Force War and Mobilization Plan (WMP) provides the Air Staff and Air Force commanders with current policies and planning factors for supporting and conducting combat operations.¹¹ The WMP is intended to encompass all basic functions necessary to match facilities, personnel, and materiel resources with planned combat operations. The WMP is updated annually on a time-phased schedule to account for changes in planning factors. The WMP consists of six volumes:

(1) Volume I: The WMP-1, Basic Plan and Supporting Annexes, provides the Air Staff and major commands (MAJCOMs) with references for general policies and guidance for mobilization planning and supporting combat forces in wartime. As the central reference source, WMP-1 standardizes Air Force plans and the planning process. The Basic Plan covers the general situation, mission, concept of operations, and the execution tasks for Air Force units in global armed conflict. The functional annexes in WMP-1 provide more detailed guidance on how planners¹² can best plan for the use of support forces in OPLANs.

(2) Volume II: The WMP-2, Plans Listing and Summary, is a three-part document, the first two parts of which contain a listing of USAF and MAJCOM war and contingency plans. The third part includes unified and specified command plans for which the Air Force provides support.

(3) Volume III: The WMP-3, Combat and Support Forces, is considered to be the starting point for deliberate war planning.¹³ Scenario apportionment matrices reflect the availability of flying combat forces and nonflying support forces by Unit Type Code (UTC) by MAJCOMs that have been offered up as available to

10. For a discussion of OPLANs and CONPLANs, see *infra* text accompanying notes 17-19.

11. See AFR 28-3, *supra* note 6, at ch. 1 USAF Operations Planning Process, Chapter 1, Basic Planning and Resource Allocation Processes, (30 June 1986).

12. This includes functional areas such as JA. See *infra* text describing WMP-1, Annexes P and R, an essential part of the WMP that should be read and understood by all judge advocate personnel.

13. The second essential part of the WMP that judge advocate personnel should read and understand is WMP-3, Part 2. See *infra* section IV.

be tasked to deploy overseas in support of the supported commands. It is imperative that the forces are accurately portrayed; MAJCOMs must develop and update the listings of forces for inclusion in WMP-3 as required by the JSCP.¹⁴ The available resources include active duty, Air National Guard and reserve forces. Part 1 of the volume enumerates the combat forces; Part 2 enumerates the combat services and support forces; and Part 3 provides a listing of all UTCs¹⁵ for Air Force units.

(4) Volume IV: The WMP-4, Wartime Aircraft Activity, contains guidance for the planning, positioning, and employing of programmed aircraft forces in JCS-approved war plans. Part 3 is of interest to the JA planner because it contains the Headquarters, United States Air Force (HQ USAF) and MAJCOM-coordinated positions on the use of bases in wartime.

(5) Volume V: The WMP-5, Planning Factors and Data, contains the approved Air Force planning factors for the expenditure of all war consumables, except munitions, fuel tanks, racks, adapters, and pylons supporting wartime flying activities. This volume includes the HQ USAF approved wartime sortie and attrition rates including the sortie generation capability of combat units employed at various intervals from D-Day through D-plus-90-day (D+90).

(6) Volume VI: The WMP-6, Air Force Industrial Mobilization Plan, contains basic plans and seven annexes that provide guidance to MAJCOMs and field operating agencies responsible for logistics support and emergency procurement.

For judge advocates, there are two essential parts of the WMP that should be read and understood. The first is WMP-1 and the two JA annexes, Annexes P and R, which are provided for your convenience as appendices 1 and 2 to this article. Annex P consists of The Judge Advocate General's, (TJAG's) departmental concept of operations for war planning, mobility, and deployment. It establishes broad policies and furnishes planning guidelines for operation of the TJAG's Department in time of national emergency, at any level of mobilization, and at any level of command. Annex P describes situation, mission, execution, logistics and administration, and command and control. It provides general references as well as references regarding military justice, international law, claims, procurement and legal assistance. Annex P should be required reading for all judge advocates, who can likely find an updated copy of this unclassified annex within the Intelligence division of any combat wing.

Annex R consists of The Judge Advocate General's concept of operations Civil Affairs for which JA is the Air Force office of primary responsibility (OPR). While the Chief of Staff, U.S. Army, is the Executive Agent tasked to provide basic civil affairs training of all civil affairs units and personnel, the mission of Air Force commanders in civil affairs is to support military operations, fulfill obligations imposed by customary international law and applicable bilateral and multilateral agreements, perform such missions in the field of civil af-

14. The availability of JA resources is developed and updated by Air Staff and MAJCOM functional managers. HQ USAF/JAI develops and updates JA resource availability for XFFB9, the Area Defense Counsel UTC, and for XFFJ1 through XFFJ4, the JA unique UTCs. MAJCOM functional managers develop and update resource availability for the combat support group UTCs which include JA and other functional area personnel. See *infra* text accompanying notes 22-24.

15. UTCs are force and personnel packages. See discussion *infra* text, accompanying notes 21-25.

fairs as appropriate authority may direct, and further the policies of the United States.

The second essential part of the WMP that should be read and understood is WMP-3, Part 2. Scenario apportionment matrices reflect the number of JA personnel (active, Guard, and reserve) by UTC that have been offered up by HQ USAF and MAJCOMs as available to be tasked to deploy overseas in support of the supported commands. While each MAJCOM is responsible for submitting the availability for deployment of its personnel resources by UTC, problems do occur at MAJCOM levels and are to be resolved with HQ USAF Directorate of Plans, War and Mobilization Plans Division (HQ USAF/XOXWX) and Air Staff functional managers who jointly make final apportionment decisions. The HQ USAF International and Operations Law Division (HQ USAF/JAJ) is the Air Staff functional manager for The Judge Advocate General's Department.

IV. DELIBERATE PLANNING AND EXECUTION

Deliberate planning is characterized as a continuous, cyclic and sequential process.¹⁶ The four principles are that planning is a continuous process, that plans require revision prior to execution, that resource-limited situations require detailed planning, and that coordination is necessary to ensure plan feasibility.

Figure 1. depicts the JOPES deliberate planning process. Deliberate planning process has five phases: Initiation; Concept Development; Plan Development; Plan Review; and Supporting Plans Development. These are followed by plan maintenance, execution (see JOPES, Volume IV, Crisis Action System) and implementation.

16. *Supra* note 6, AFR 28-3, ch. 2.

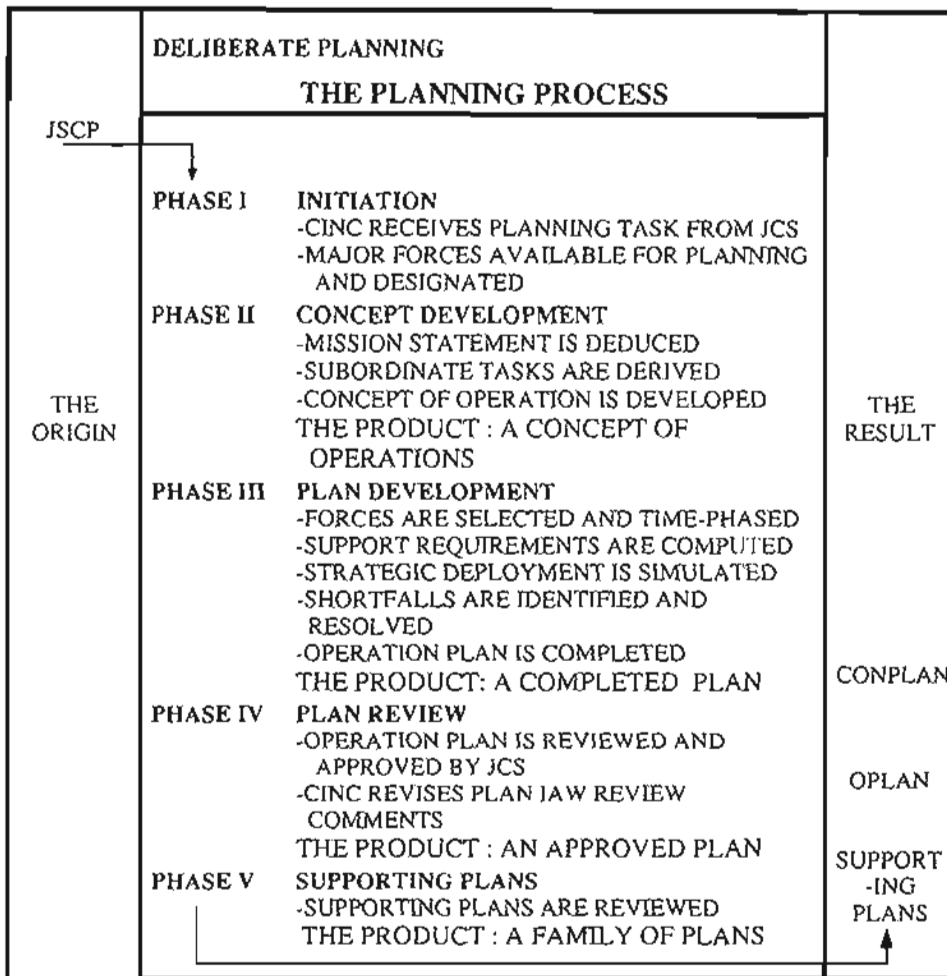


Figure 1. The JOPES Deliberate Planning Process.

It is important to note that the WMP-3 force availability data represents the maximum level of forces that can be included in the development of plans in the deliberate planning process.

A. Products of Deliberate Planning

An OPLAN is a full plan for the conduct of joint military operations that can be used to develop an Operations Order (OpOrd) and execute the operation.¹⁷ An OPLAN will include deployment and employment phases, as required. An OPLAN includes all required annexes, appendices and supporting Time-Phased Force Deployment Data (TPFDD)¹⁸ files.

A Contingency Plan (CONPLAN) is an abbreviated operations plan which contains the concept of an operation but requires considerable expansion to convert it into an OPLAN or OpOrder.¹⁹ The CONPLAN must contain a fully-

17. *Id.*

18. *See infra* text accompanying note 28.

19. *Id.*

defined concept of operations; some also contain selected annexes and appendices, and portions of a TPFDD, if required by the supported commander.

A Crisis Action Plan (CAP) is developed to respond to emergencies or time-sensitive situations. JOPES, Volume IV, Crisis Action System, provides guidance and procedures for joint planning during emergency or time-sensitive situations.

B. Execution Planning

Neither an OPLAN nor a CONPLAN can be executed without further detailed coordinated planning by the participants in the joint operation planning process. Execution planning converts an OPLAN to an Operation Order (OpOrd) a designated time. Actual execution of any plan requires the authorization of the National Command Authority.²⁰

The essential steps of converting any plan into an OpOrd are to develop a complete force list, identify actual units to fill the force requirements, plan the movement and logistic support of the force, and issue orders necessary to initiate the operation. An execution TPFDD is developed which may involve adapting an existing plan or developing a deployment plan when none exists.

V. FORCE PACKAGING AND UNIT TYPE CODES

Unit Type Codes are the building blocks of all OPLANs and TPFDD computer database files that identify which forces have been tasked and sourced to perform an OPLAN's mission.²¹

The history of how the United States has deployed its personnel in wars since 1940 is important in understanding the way forces are presently deployed. During World War II and the Korean War, the United States dispatched entire units to operational areas. With the advent of data automation and computers, the Department of Defense designated the military organizations with Unit Types and coded each unit with unique identifying data. These standardized codes permitted the development of joint planning among the services and became known as UTCs.

As the Air Force matured, it developed new UTCs to meet the deployment planning needs of its organizations and units. The UTCs were used to identify groups of functions or individual functions as well as units. For example, using a UTC to package a flying squadron to deploy did not, in itself, provide a mission capable unit because, under the Air Force's organizational structure, a flying squadron did not contain a maintenance, supply, or munitions capability. Other Air Force UTCs contained the latter capabilities. Adding the flying unit and combat support function UTCs together created a group of deployable resource packages that formed a combat and support capability to satisfy the requirements that a supported CINC had identified in his OPLAN.

One primary purpose of UTCs was to simplify and expedite war planning by providing the supported CINC and his planners with a menu of force packages to select from to build OPLANs.

Unit Type Codes are created by the services and functional area experts in their supporting commands. In devising UTCs, functional area experts determine the number of personnel, their skill levels, and equipment required for a specific

^{20.} *Id.*

^{21.} See AFR 28-3, *supra* note 6, at ch. 3, Time-Phased Force and Deployment Data (TPFDD) Development.

mission and coordinate it with Air Staff agencies and MAJCOM before it is approved.

A UTC contains a grouping of manpower and/or equipment to provide a specific, required wartime capability. An in-place UTC reflects a specific requirement for the manpower and equipment to perform a wartime function where presently located. A deployable UTC demands that its manpower and equipment be prepared to move to a supported CINC's area of responsibility (AOR) to provide a specific wartime capability.

So that supported CINC's will know what combat capability can be provided and is planned to be provided under an OPLAN, the UTCs identify both the manpower and equipment that will be provided to meet the supported CINC's requirements regardless of which MAJCOM is sourced to provide that UTC. The reliance on UTCs means the Air Force has not generally planned to deploy organizations or units per se; rather, it deploys its forces in resource packages.

A UTC consists of four basic components: UTC identifier, Title, mission capabilities statement (MISCAP), and the manpower and equipment detail.

The UTC identifier is a five-character, alphanumeric symbol that denotes a force package designed to provide a specific capability. It is the standard communications symbol used in the Joint Operation Planning and Execution System, (JOPEs), the Joint Development System, and the Contingency Operation/Mobility Planning and Execution System (COMPES). A UTC allows planners to identify a force requirement in an OPLAN Time-Phased Force Deployment Data database with one entry of five characters. Each service has developed unique UTCs to identify the forces that it can provide to support the unified and specified CINC's and their wartime requirements.

Title is a thirty-one-character description of the UTC package and is constructed according to guidelines in Air Force Regulation (AFR) 28-3, *USAF Operations Planning Process*. Because each title is constructed in a standardized format, the data automation compilation of them is made easier. Combat support force package titles are usually somewhat abbreviated and reflect a package's capability.

MISCAP is a summary of the wartime mission of and the capabilities of the manpower and equipment in a UTC force package. It describes what capability the package provides and under what circumstances; it may also state what type of bases the package can operate from and what other UTCs should be used to support it. The MISCAP may also state what levels of command (HQ USAF, FOA, MAJCOM, etc.) may task the UTC.

Manpower and Logistics Detail is the part of a UTC that contains the specific personnel and material required to support the UTC force package. These are called the Manpower Force Element Listing (MFEL) and the Logistics Detail (LOGDET). While most UTCs contain both MFEL and LOGDET listings, some contain only one or the other. The MFEL lists the manpower required to perform the mission workload defined in the MISCAP by Air Force Specialty Code (AFSC) title, AFSC number, functional account code, grade (for officers), and quantity required. The LOGDET identifies the equipment and materiel required for the UTC. It includes the weight, size, shipping characteristics, Federal and National Stock Number(s), and quantity required for each equipment item. It also lists the number of passengers requiring transportation.

A. UTCs Containing JA Assets

Air Force planners currently have approximately thirty-seven UTCs,²² at their disposal to provide supported commanders with a JA support capability. In the last decade, the majority of JA resources in OPLANs have been tasked and sourced²³ through a group of seven UTCs called combat support group (CSG) UTCs. These CSG UTCs include:

XFFB1 - A CSG UTC with one JAG and one paralegal specialist as a part of its complement of support personnel.

XFFB2 - A follow-on CSG UTC with one JAG and one paralegal specialist, and other support personnel, to supplement UTC XFFB1.

XFFB3 - A second follow-on CSG UTC with one JAG and one paralegal specialist and other support personnel.

XFFB4 - Another follow-on CSG UTC with only one paralegal specialist and no other support personnel.

XFFB5 - A follow-on CSG UTC with only one judge advocate and no other support personnel.

XFFB6 - A basic CSG UTC [designed by HQ TAC in the late 1980s] with two JAGs and two paralegal specialists as well as other support personnel.

XFFB7 - A follow-on CSG UTC [also created by HQ TAC in the late 1980s] with one JAG and one paralegal specialist.

B. JAG Unique UTCs

From 1987 through 1989, JA developed five additional UTCs to maximize The Judge Advocate General's ability to provide JAG personnel to support mobilization and deployment. As TJAG's Air Staff functional manager, HQ USAF/JAI is responsible for managing, tasking, and sourcing the resources in these UTCs.²⁴

22. A current listing of 25 UTCs containing JA resource complements, in addition to the 12 discussed in the text, is as follows: 4F9S3, CES Regional Wartime Construction Management, one judge advocate (JAG) and no paralegals; 9AABA, HQ 9AF AFFORS ADVON, seven JAGs and seven paralegals; 9AABC, HQ 12 AFFORS ADVON, two JAGs; 9AAGB, Wing/Group Staff (Independent), one JAG and one paralegal; 9AAGC, Wing/Group Staff (Dependent), one JAG and one paralegal; 9AAHG, no title, two JAGs; 9AAJ9, Commander, Airlift Forces, one JAG and one paralegal; 9AART, Composite Wing/Group Staff, two JAGs and two paralegals; 9ADKB, HQ KC-135 Wing (ANG), one JAG and one paralegal; CSFFA, HQ 12 AF Reserve Augmentation, one JAG and one paralegal; CTJLH, USAF Element, HQ USEUCOM, two JAGs; CTJPA, USAF Element, HQ USSPACOM, one JAG and one paralegal; CTJPB, HQ PACAF Augmentation, three JAGs; CTJPI, HQ USFJ Augmentation, one JAG; CTJTC, HQ LANTCOM Augmentation, one JAG; CTJTF, HQ US Forces Caribbean Augmentation, one paralegal; CTJTH, HQ US Forces Azores Augmentation, one JAG and one paralegal; HFNR1, Strategic Aircraft Reconstitution Team SART (FB-111), one JAG; HFNR2, SART (B-1B), one JAG; HFNR3, SART (B-52G), one JAG; HFNR4, SART (B-52H), one JAG; HFNR5, SART (EC-135), one JAG; HFNR6, SART (KC-135A), one JAG; HFNR7, SART (KC-135R), one JAG; HFNR8, SART (KC-135E), one JAG.

23. For a discussion of tasking and sourcing UTCs, *see infra* section V.D.

24. *See* Draft AFR 28-3, *supra*, note 6 at ch. 6, for a definition of functional managers and their responsibilities.

The MAJCOM JA functional managers may also task and source UTC XFFJ3, "CSG AFLSA JAG Specific Mission Augmentation," to ensure the deployment of sufficient JA resources to an AOR to meet JA wartime requirements by adequately supplementing the initial deployment of the independent Core UTCs that contain JA resources.²⁵ For each destination in an AOR, the XFFJ3 UTC may be tasked more times than the independent UTCs are tasked.

XFFB9 - This Area Defense Counsel UTC provides one judge advocate (Area Defense Counsel) and one paralegal specialist (Area Defense Administrator).

XFFJ1 - This UTC provides one military judge.

XFFJ2 - This UTC provides one circuit trial or defense counsel and one court administrator.

XFFJ3 - This JA Specific Mission Augmentation UTC provides one judge advocate and one paralegal specialist. It is designed to allow maximum flexibility to the JA Air Staff functional area manager or MAJCOM in deploying JA personnel to an operational area of responsibility or in support of other contingency operations for any reason.

XFFJ4 - This UTC contains one paralegal specialist to serve as court reporter in Air Force courts-martial.

C. The Core UTC Concept

After Desert Shield/Desert Storm and the advent of the objective wing structure, the Air Staff undertook an effort to streamline deliberate and time-sensitive planning. The Core UTC Concept is central to this streamlining process.²⁶ Simply stated, the Core UTC Concept involves the creation of deployment packages containing operational, command and support personnel necessary to provide minimum essential combat capability.

The Core UTC Concept has several stated objectives, all intended to improve overall Air Force combat capability. They are:

Improve command and control at deployed locations. This is to be accomplished by ensuring that a command structure, including sufficient support staff, is available at every location.

Improve transportation planning. This is to be accomplished by sourcing and packaging all UTC personnel from the same base whenever possible.

Improve deliberate planning process and reduce planning workload. Core UTCs contain validated personnel requirements. Deployment of personnel by core UTC will, therefore, reduce the need for execution phase validation.

Enhance unit training. Core UTCs will ensure that units that train together will fight together.

25. See discussion *infra* section V.C. The only difference is that the XFFJ3 UTCs may be tasked to deploy later and from a different origin than the independent Core UTCs.

26. See Draft AFR 28-3, ch. 4, *supra* note 6.

Under the Core UTC Concept, all functional areas are grouped into Combat Core and Support Core UTCs. Combat Core includes new Wing/Group Command 9Axxx UTCs containing the resources that make up the wing commander's peacetime staff. The number of personnel so assigned is derived by the aircraft mission requirements and the composition of the 9Axxx UTCs may vary among MAJCOMs. JA personnel are and will be in the 9Axxx UTCs. Support Core includes UTCs containing personnel required for base population support. The number of personnel provided and assigned will be driven by base population numbers. As MAJCOMs stand up/create new combat core UTCs, duplicative support core UTCs will not be tasked.

The Core UTC Concept also operates under several important assumptions. First, the basic deployment element is the combat aviation squadron. Each squadron is to be capable of fighting independently or together with other squadrons in a composite wing structure. When two or more combat squadrons are deployed to the same beddown location, some squadrons will deploy in an independent combat core and independent support core UTC configurations. Others will augment the combat and support functions by deploying in dependent combat core and support core UTC configurations.²⁷ Second, each combat aviation squadron will deploy with about 1200 personnel. Third, all personnel in each combat aviation squadron will deploy from one base. Fourth, each squadron will deploy within a five-day window.

The most significant change for JA under the Core UTC Concept will be that JA resources are to be provided in combat core UTCs in addition to those provided in support core UTCs. In other words, if you have a wing commander, you have a lawyer, to paraphrase divers well-known television commercials for attorneys.

An important concept for future planners to note is that the number of JA personnel tasked and sourced under combat core UTCs should in many cases reflect both combat mission and base support requirements. The creation of new core UTCs will *not* eliminate JA-unique UTCs which will be used for JA mission augmentation.

D. Core UTC Package Sourcing and Planning

The overall priorities for sourcing wartime requirements are outlined in WMP-3, Part 2. The 1 October 1991 draft of AFR 28-3, which was scheduled for publication in 1992, provides general and specific guidance with regard to Core UTC package sourcing and planning. The majority of sourcing will come from aviation commands. However, base host MAJCOMs will provide sourcing of home station requirements. JA planners should note that HQ USAF/JAI will provide exclusive sourcing of JAG-unique UTCs except for XFFJ3 which can be tasked and sourced by MAJCOMs as explained above.

E. Time Phased Force Deployment Data

The Time Phased Force Deployment Data (TPFDD) is a computer-supported database of an OPLAN. It is a multi-purpose tool which is used primarily as a central database for planning. It documents the types of forces and identifies

²⁷ Independent UTCs are to be capable of providing and supporting combat operations of a squadron without additional personnel. Dependent UTCs are to deploy with squadrons to beddown locations already manned with one or more independent UTCs.

specific units supporting an OPLAN. It also includes routing data from origin to destination.

There are two types of TPFDDs. The first type is the capabilities TPFDD associated with joint operation planning. Such a TPFDD cannot contain combat or support forces in excess of those apportioned to the theater commander for planning in the WMP-3, Parts 1 and 2. The second type is the requirements TPFDD. While such a TPFDD cannot contain forces in excess of those apportioned, requirements in excess of apportioned forces are maintained in an OPLAN shortfall addendum for use for FORCE sizing. The requirements in the addendum also may be sourced during actual OPLAN execution.

When building the initial OPLAN TPFDD, the apportioned aviation is established through a database extracted from COMPES. Once this is established, each Core UTC package is to be extracted as a force module from a master Core UTC package database. Individual functional managers, such as JA, then examine each destination in the OPLAN to determine what additional destination specific or roundout support UTCs are required. When multiple Core UTC packages are to be bedded down together, functional managers should view the overall capabilities provided and if they provide the right overall level of support they are to usually be deemed acceptable even if they are not a functionally correct set of building block UTCs.²⁸

A TPFDD can be run off a JOPES-connected computer for any DOD OPLAN and some CONPLANS. Each line on a TPFDD refers to data related to a UTC.

The Unit Line Number (ULN) is a code that uniquely describes a line entry in a TPFDD. The ULN is made up of three elements. First, is the Force Requirements Number (FRN) which uniquely identifies an entry in an OPLAN TPFDD.

If it is necessary to task more than one unit to provide portions of a force requirement, then the requirement is fragmented and each portion is assigned a "FRAG" number. When it is necessary to break down the tasking of a force requirement beyond the FRAG, the portions of the FRAG are assigned an insert identification.²⁹

The JA planners should be aware that a TPFDD can be sorted in various ways to aid in the tasking and sourcing process. For example, a planner can obtain a TPFDD extract through WWMCCS for only those UTCs containing JA resources sorted by MAJCOM, by base of origin, by UTC, by destination, or in any desired data element sequence.

VI. SUPPORT FORCE SIZING AND WARTIME MANNING REQUIREMENTS EXERCISES

Support Force Sizing (FORSIZE) is the Air Force method of determining the total wartime support force requirements. Its purpose is to determine both the overseas and CONUS support force requirements necessary to satisfy wartime commitments in support of national security objectives.

The Force Sizing Exercise has traditionally been a two-stage exercise within the Air Force. In the first stage, force sizing guidance such as evaluation scenarios, contingency definitions, and an OPLANs submission schedule is provided by

28. See Draft AFR 28-3, *supra* note 6.

29. The process of assigning a FRAG number and an insert identification is commonly referred to within the planning community as "fragging and inserting." In fact, many JA deployments for Desert Shield/Desert Storm made use of the process.

the HQ USAF Directorate of Plans (HQ USAF/XOX). Using this guidance, the overseas supported MAJCOMs build TPFDDs for use in developing their wartime requirements and establish the taskings that they require to perform their wartime missions. The TPFDDs are based on the current MAJCOM Wartime Aircraft Activity (as listed in WMP-4) for combat forces that, in turn, are used to determine support force requirements.

In the second stage, after the supported MAJCOMs have prepared the TPFDDs, the HQ USAF/XOX and HQ USAF Manpower and organization (HQ USAF/MOX), through the Air Force Wartime Manpower and Personnel Readiness Team (AFWMPRT), provide the data to the supporting MAJCOMs and Air Staff functional managers. The functional managers review their support requirements and the command sourcing of these requirements to ensure they are valid and accurate. Any noted discrepancies are then to be resolved at the annual FORSIZE TPFDD Refinement Conference attended by Air Staff functional managers and by their supporting and supported MAJCOM counterparts who meet to decide what resources from what locations they will source to meet the requirements taskings. This is the stage of planning in which JA planners consider how all available active duty judge advocates, Category A reserve JA personnel, Air National Guard JA personnel, and selected Category B reserve attorneys will be sourced for deployment.

In the FORSIZE process, supporting MAJCOMs whose resources are tasked in the TPFDDs to provide combat and support forces evaluate their capability to fill the force requirements and report specific unit sourcing to AFWMPRT. The resulting sourced requirements, as contained in the refined TPFDDs, form the basis for the Manning Requirements Exercise (MANREQ) and Base Level Assessment (BLA).

The first step in planning CONUS requirements is the BLA. This is the process of determining wartime base support requirements after deployments and reception plans have taken place. The BLA is accomplished by each base to determine support requirements for that individual base. BLA is the part of the FORSIZE process which quantifies CONUS sustaining support requirements. This is, in essence, an assessment of the number of personnel it will take to perform an Air Force base's mission after personnel have deployed. The results of the CONUS BLA are combined with the TPFDD and in-place requirements to determine the total wartime support requirement. The result quantifies the sustainment requirements by functional areas.

The MANREQ exercise is the comparison of wartime manpower requirements to current manpower assets. This provides the capability to analyze the relationship of manpower requirements and available resources by Air Force Specialty Code (AFSC) and updates the Manpower Data System. The results are that for any AFSC or functional area, to meet wartime manning requirements, there is either an overage (manning resources exceed wartime requirements), shortfall (wartime requirements exceed manning resources), or are roughly balanced (plus or minus five percent).

The JA concept of operations in the WMP-1 drives how the MANREQ/BLA process for JA is assessed. Over the past decade, a tenet of this concept has been that when the Area Defense Counsel (ADC) and Area Defense Administrator deploy from a base, they will be replaced by active duty personnel from the base office. So, not only will deploying JA personnel be backfilled by JA Individual Mobilization Augmentee (IMA) personnel, the base legal office will also need IMA backfills for the personnel who move to the ADC office.

A central theme of the process is the need of all commands and functions to review their Unit Manpower Documents (UMDs) and the manpower type (MN1)

code of each JA authorization. MNT codes should accurately identify those active duty, reserve, and ANG JA officer and enlisted positions which are wartime required and subject to deployment or are required in-place in wartime. Reviewing the UMD for accurate MNT position coding has been especially crucial in the last two years because positions coded as required only in peacetime are at risk for manpower reductions. Accurate MNT codes will remain the *sine qua non* of properly establishing JA's wartime requirements.

The importance of each JA office accurately establishing its total wartime requirements for in-place and deployment needs cannot be over-emphasized. Accurately assessed JA wartime requirements have supported programming and budgeting actions for more judge advocates, paralegals, and civilian personnel and have helped to protect JA authorizations from the impact of reduction initiatives.

VII. JAG MOBILITY PLANNING

Mobility planning involving JAG personnel should occur at every Air Force echelon. At Headquarters Air Force, the International and Operations Law Division is the functional manager for overall JA wartime planning. This includes working with JAX and the MAJCOMs in force sizing and developing manpower requirements. It also involves mobility planning and training for personnel assigned to the Air Force Legal Services Agency, which primarily deals with court reporters, military judges, circuit and area defense counsel, and specific mission augmentation.

MAJCOMs, Numbered Air Forces, and wing/base level mobility planning guidance is contained in AFR 28-4, *USAF Mobility Planning*. At base level, staff judge advocates should know not only where their personnel will deploy under extant plans but should also know who controls mobility processing, ensure that JA personnel subject to mobility are properly equipped to perform at AOR destinations, and assure deploying personnel are also issued the appropriate uniform and equipment items for deployment locations.³⁰

The key to base level mobility operations is the Mobility Control Center (MCC) found imbedded in the base logistics function known as the LGX. The MCC is responsible for forming the mobility sub-organizations and providing guidance and information on mobility processing of personnel and their equipment.

VIII. CONCLUSION

Operation Desert Shield/Desert Storm is the most recent illustration of why judge advocate personnel must be knowledgeable about wartime deliberate planning and execution planning, including TPFDD development procedures for updating an existing plan or developing a deployment plan when none exists. Judge advocates have an important role to play in future armed conflicts, especially in helping commanders maintain good order and discipline and conduct

30. Under revised DOD planning doctrine and guidance, it is possible that specific force modules may be tasked to deploy to different destinations ~~under~~ a number of plans. Although the plans would not be executed simultaneously, destinations ~~among~~ plans could vary significantly in climate, geography, culture, and other factors.

wartime operations within the constraints of rules of engagement that are consistent with the law of armed conflict. The role of judge advocates in meeting other mission requirements as set out in The Judge Advocate General's concept of wartime operations is equally important to the success of military combat operations.

The objective of this article has been to introduce JA personnel to the world of wartime planning. The authors hope the readers will consult and understand guidance and regulations about wartime planning, and be better able to contribute to the JA wartime planning process. The better that JA plans, the better able it will be to meet its mission in the armed conflicts of the future. With your help, The Judge Advocate General's Department will continue to contribute to the planning, preparation and prosecution of future combat operations.

JAG Goes to War: The Desert Shield Deployment

COLONEL SCOTT L. SILLIMAN, USAF (RET.)

I. THE HISTORICAL PERSPECTIVE

If it be true that the greatest soldier is also the best student of history, then those who write our operations plans (OPLANS) and who provide for the flow of personnel and equipment to the battlefield through the Time Phased Force Deployment Data (TPFDD) must of necessity look to the lessons of prior wars to guide their decisions. But for the Air Force judge advocate, whose principal prior combat experience was the Vietnam war from 1961 to 1973, there were few specifics that could be carried forward to help prepare for a contingency such as *Operation Desert Shield/Desert Storm*. There was, of course, the acknowledgment that the judge advocate (JAG) had to be in the combat theater in sufficient numbers to serve the needs of commanders and other wing personnel who were prosecuting the war, with the size of each legal office presumably heavily dependent upon overall base population (and the anticipated heavy workload of military justice, legal assistance, and other traditional legal services). There was also the presumption that a commander would want and need a "full up" legal office almost from the very beginning of the deployment and that there would be sufficient airlift to accommodate such a need. Finally, we assumed that, with the appropriate number and type of legal personnel, we could conduct trials within a combat theater in relatively short order. But although we became extremely proficient in writing legal annexes and ensuring that the items in our deployment kits were kept current, we tended to pay little attention to such "abstract" matters as Unit Type Codes (UTCs) and the building of the TPFDD. In fact, prior to the start of the deployment in August of 1990, the number of judge advocates who actually understood the planners' parlance and the mechanics of UTCs was probably less than a dozen. The author was not among them.

II. THE "GAME PLAN" FOR DEPLOYMENT OF JUDGE ADVOCATE PERSONNEL

The Operations Plan that governed the prosecution of *Desert Shield/Desert Storm* was USCINCCENT OPLAN 1002-90, and it tasked particular units within Tactical Air Command and other Major Commanders (MAJCOMs) to deploy to predesignated locations in Southwest Asia. The USCINCCENT OPLAN 1002-90, like any other OPLAN, had an accompanying TPFDD that specified which units would be deployed in support of the plan and an exact schedule for deployment (i.e., which units would go on C+7, which on C+12, etc.). Contrary to what most assume, the United States Air Force does not go to war by airlifting whole organizations intact to the battle front; rather, it goes to war by *UTCs*. A

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UTC can be best thought of as a computerized paper bag containing various types of combat or support personnel from a designated base or unit that are needed for a specific function at a combat location. The UTC is inserted into the TPFDD deployment flow when it is needed in support of the OPLAN at that particular time in the battle. For example, the "on the shelf" TPFDD for USCINCENT OPLAN 1002-90 provided for a small number of combat support element personnel (contained in an XFFB6 UTC) to be deployed to each base in the Southwest Asia Area of Responsibility (AOR) to provide legal, administrative and other combat support to the commander and other base personnel.¹ In most cases, these XFFB6 UTCs were to be "sourced" from the same peacetime wing that provided the principal aircraft package to the AOR installation. In this way, there could be unit integrity and a wing commander would already be familiar with the personnel in the support package. The XFFB6 UTC was a five officer/thirteen personnel in enlisted Combat Support Element package which contained two base level judge advocates (an 8816 and an 8824) and 2 paralegals (88170). It also contained an organization commander, an information management officer as well as an information management executive officer, three contracting specialists, a personnel technician, a reprographics specialist, and six administrative specialists. This UTC was intended to provide combat support staff to service up to 1500 military personnel at a bare bones base. When the TPFDD flow resulted in the base population exceeding that number, there was an XFFB7 UTC that could be inserted that increased the number of combat support staff proportionately (to cover a population up to 3000). As far as the AOR base legal office, the XFFB7 added an additional judge advocate (8824) and paralegal (88170). There were also *JAG unique* UTCs that could be inserted into the TPFDD for specialized legal functions. The XFFB9 UTC, for instance, was comprised solely of an area defense counsel (8824) and area defense administrator (88150), and this UTC would be available to be deployed to any AOR base to provide defense services for military justice actions. For management of the ADCs in the AOR, the Circuit Defense Counsel function was contained in the XFFJ2 UTC (one 8816 and one 88150). There was also an XFFJ1 (a single military judge; 8816) and an XFFJ4 (a single court reporter; 88150) to provide trial support should the need arise for courts-martial in the combat theater. Finally, there was an XFFJ3 UTC that was intended to be a judge advocate "wildcard" package that contained a single judge advocate (8816) and paralegal (88170) and which theoretically could be used to "plus up" any legal function, whether base support or judiciary.² All these UTCs were available to the deliberate planners when they crafted the TPFDD to support US-

1. Although the Objective Wing concept has now been approved, placing the judge advocate function on the wing commander's staff Air Force-wide, at the time of *Operation Desert Shield/Desert Storm* many base staff judge advocate offices were still contained in the combat support group within the wing and the prevailing UTC used in virtually all OPLANs was, therefore, the XFFB6 that contained all combat support group personnel.

2. The heading for the Mission Capabilities Statement from the USAF WMP, Volume III, Part 3, for the XFFJ3 reads, "UTC, XFFJ30; RESP CMD, OT; LEVEL, ELE; UNIT TYPE NAME, CSG AFLSA JAG SPECIFIC MSN AUG" (emphasis added). The Mission Capabilities Statement itself reads, "provides attorney/advisor capability to a BB, LB, SB, COB or MOB to support The Judge Advocate General in fulfilling his specific responsibilities listed in the USAF WMP-1, Annex P and R, and commanders and staff judge advocates in carrying out their responsibilities under federal statutes and regulations. HQ AFLSA and all MAJCOMs may task this UTC as many times as necessary at the same location. UTC may be used for active duty, guard and reserve. AFSC 08824 can be substituted for 08816 and AFSC 881X0 for 88170." When the question arose as to whether the XFFJ3 could be used to "plus up" an existing AOR legal office, the TAC/DPX and XPM Battle Staff program managers took the position that, since the owning organization was the Air Force Legal Services Center (whose principal deployable assets were judiciary personnel), this UTC was in fact an augmentor for the judiciary and could not be used for normal base level augmentation.

CINCCENT OPLAN 1002-90, and certain assumptions guided them in what they did.

First, there was an assumption that most, if not all, of the initial cadre of personnel supporting the combat aircraft at a base would have dedicated and available airlift and would, therefore, be arriving at their installation within the first five days of the deployment. This prompted the planners to insert the combat support element XFFB6 UTC (with its two judge advocates and two paralegals) very early in the TPFDD so that the wing commander would have an adequate support staff to provide services for his 1200-1500 base populace. Secondly, there was an assumption that when combat aircraft from different CONUS or OCONUS wings were to be grouped together at a large AOR base, that each flying package would require its own combat support element staff, with the "unit integrity" principle dictating that the XFFB6 UTC be sourced from the same location as the aircraft. Thirdly, with respect to specific legal functions, it was assumed that *each* AOR base would generate a sufficient amount of military justice actions to merit the deployment of an area defense counsel and area defense administrator, and that these two personnel would be needed quite early in the deployment. Hence, an XFFB9 UTC was inserted into the TPFDD within the first three weeks of the deployment flow to that particular base. Finally, there was also an assumption on the planner's part that we should and would have the capability of conducting trials by court-martial within the first month of the deployment, to support commanders at all echelons of command in maintaining discipline in a combat environment. When dealing with the unique aspects of *Desert Shield/Desert Storm*, however, some of these assumptions proved erroneous.

III. THE INITIAL DEPLOYMENT CRISIS

On 2 August 1990, Iraq invaded Kuwait and it was only a few days later that the President approved the order that would start the flow of American military personnel to the Persian Gulf. The Tactical Air Command (TAC) Battle Staff started its twenty-four hour a day operation on 2 August and the original concept under USCINCCENT OPLAN 1002-90 was that Lieutenant General Charles A. Horner's Ninth Air Force legal staff at Shaw Air Force Base (AFB), wearing their CENTAF/JA "hat" as the air component of General H. Norman Schwarzkopf's United States Central Command (CENTCOM), would control the flow of judge advocates and paralegals that would be deploying in accordance with the supporting TPFDD. Colonel Dennis Kansala, the CENTAF Staff Judge Advocate (SJA), was also charged with keeping in close coordination with my staff at TAC/JA and Colonel Raymond Ruppert (USA), the CENTCOM Staff Judge Advocate located at MacDill AFB in Tampa, Florida. Ostensibly, the TAC/JA staff at Langley AFB was to have no direct involvement other than assisting in the sourcing of legal assets and providing substantive support as required to the TAC Battle Staff. In the span of but a week, however, the MAJCOM SJAs' role, both at TAC and at other commands, would become immeasurably larger.

The first hint of a problem with the TPFDD sourcing of judge advocates and paralegals came on 7 August when two squadrons of F-15 Eagles from the 1st Tactical Fighter Wing at Langley were directed to deploy to Saudi Arabia. This was the first contingent of combat aircraft to head to the Persian Gulf, and the Wing Commander opted to use a "nonstandard" UTC package of support personnel to complement his aircrews at Dhahran. It was *nonstandard* because he

personally chose those functional specialties to take with him, rather than accepting what would have been the standardized XFFB6 UTC for a combat support element. Therefore, rather than the pre-established two attorney and two paralegal package that would normally have deployed with the 1st Tactical Fighter Wing, only Major Blane Lewis, Langley's Deputy Staff Judge Advocate at the time, was selected to go. It was assumed that he could draw administrative support from 702XXs also being deployed. The rapidity with which Langley's personnel deployed precluded any second-guessing of the Wing Commander's choice of options.

Following the departure of Langley's two squadrons of F-15s, the TPFDD went into full gear and aircraft from various TAC, Strategic Air Command (SAC), Military Airlift Command (MAC) and United States Air Force Europe (USAFE) units were identified and alerted for imminent deployment. That meant that, in most cases, combat support personnel were identified as well to accompany the operational forces. Because each unit tasked under USCINCENT OPLAN 1002-90 had a copy of the plan and the accompanying TPFDD, when a unit was notified that it would deploy, the TPFDD flow became self-executing, as it was designed to be. For example, when the 4th Tactical Fighter Wing's F-15Es at Seymour Johnson AFB in North Carolina were given the green light to head for their initial basing at Thumrait, Oman, the Personnel Readiness Unit (PRU) at that base *expected* two judge advocates and two paralegals, all supposedly preselected, to join the rest of the XFFB6 UTC that was in the TPFDD and board the first available transport aircraft. At the same time, however, at Pope AFB in North Carolina, the PRU there knew that the OPLAN called for an XFFB6 and an XFFB7 from Pope to deploy to Thumrait to accompany that base's C-130s that were to be collocated with Langley's F-15s. Thus, at Pope AFB the call went out for three judge advocates and three paralegals (virtually seventy-five percent of the base legal office) to board aircraft to the AOR. Neither Lieutenant Colonel Jarris Sanborn, Seymour Johnson's SJA, nor Lieutenant Colonel Rich Slipsky, Pope's SJA, was aware of the overlapping UTC coverage for Thumrait. That redundancy was apparent only at higher headquarters—CENTAF/JA and TAC/JA—and it was immediately clear that something had to be done to avoid sending too many attorneys and paralegals into the AOR. We quickly determined that if the full "off the shelf" TPFDD were to run its course, a total of 149 judge advocates and 138 paralegals would be deployed, many of whom would be "bunched" at the same bases to create legal offices almost twice the size of their stateside counterparts. With most AOR base populations projected to be between 1500 and 5000, such a result was undesirable.

To further compound the problem, though, as the individual units started receiving their deployment orders and the problem of overlapping UTCs became evident, Lieutenant General Horner and the rest of the CENTAF staff (including Colonel Kansala and most of his legal office) also deployed to Riyadh, Saudi Arabia, to establish what was to be *CENTAF Forward*, the principal air component headquarters in the combat theater. The TAC Battle Staff at Langley AFB was, therefore, given full responsibility to act as rear battle manager in the CONUS (*CENTAF Rear*) and to assume all those tasks previously executed by CENTAF prior to its deployment.

After telephone communications were finally established with Colonel Kansala at CENTAF Forward, the problem of the TPFDD flow was discussed and it was agreed that we would have to "decouple" the judge advocate and paralegal sourcing from the automatic TPFDD flow in order to properly manage the deployment of legal assets into the AOR. After being briefed on the problem, Major General Keith E. Nelson, The Judge Advocate General (TJAG), con-

curred in the plan. He recognized, though, that if worldwide sourcing of judge advocates and paralegals to the AOR was to be accomplished individually from Langley, the TAC SJA had to have the TJAG's full authorization to make commitments of manpower assigned to the Department, whether in the field, the judiciary, or the Air Staff. That authorization was quickly given. The final step was to coordinate the plan with the TAC Battle Staff members who would normally have monitored the XFFB6 sourcing, TAC/DPX and TAC/XPM, and each agreed to allow for JAG assets to be decoupled from the TPFDD. After the TAC Battle Staff Director, Major General Michael E. Ryan, was briefed on what was planned, he also gave his concurrence. Calls were then quickly made to Colonel Mike Ford (the Acting SJA for Ninth Air Force), Colonel Bill Moorman (the Twelfth Air Force SJA), and Colonel Mike Lumbard (Nellis's SJA) to inform them of the approved decision regarding individual sourcing of legal personnel from their respective bases. They agreed to pass the word that no judge advocates or paralegals would deploy unless specifically approved by the TAC SJA. Further calls were made to Brigadier General Roger Jones at SAC, Colonel Bryan Hawley at MAC, Colonel Bill Elliott at USAFE, and all other MAJCOM SJAs who could possibly have units that might deploy into the AOR. All agreed to defer to TAC and to allow Langley to be the central "clearing house" for sourcing of their people. Colonel Bill Dixon, Chief of the Appellate Defense Division in Washington, was also notified and he agreed to alert his circuits and ask them to, in turn, notify each Area Defense Counsel (ADC) to "hold in place" until clearance was received from Langley. Finally, a decision had to be made on the principal strategy for the manual sourcing of legal assets into what were simply bare bones bases, oftentimes little more than a concrete runway and a series of tents. After studying the projected population at each AOR base, and the time line for the buildup to end strength, it did not seem prudent to immediately send in both lawyers and paralegals when half that number might suffice. After several discussions among the TAC/JA staff and a confirming call to Colonel Kansala in Riyadh, the "i+1" formula was adopted. Under this concept, only one judge advocate and one paralegal (one half of the XFFB6 requirement) would be deployed to a bare bones base and it would be their task to establish the legal office, satisfy the immediate needs of command, and, thereafter, communicate directly with Colonel Kansala's staff at Riyadh as to workload requirements and requests for further manpower. In this way, the size of each base's legal office could be increased in *direct* proportion to the SJA's own determination of workload. Further, when more judge advocates or paralegals were needed at a particular location, an attempt would be made to match the lawyers or paralegals with their home station commanders who would also be deploying...to assure "unit integrity" to the greatest extent possible. In this way, the legal personnel and the command element at each base would already be familiar with one another before they joined as a combat team in the AOR. Such a concept seemed far better than following a preordained computer flow that could not be modified to meet real time contingencies.

The first real test of the decoupled program came but four hours later when we received word that the Shaw AFB PRU was requiring two attorneys and two paralegals to be deployed to fill out an XFFB6 to accompany Shaw's F-16s to Al Dhafra in the United Arab Emirates. Looking at the projected rate of buildup at Al Dhafra and using our newly agreed-upon strategy, the decision was made to send a "i+1" (one Judge Advocate and one paralegal) package, rather than simply sourcing the full UTC. After calls to the Shaw legal office and Colonel Ford at Ninth Air Force, Major Rob Russell (Shaw's Deputy SJA) and Technical Sergeant Brenda McManus were selected to deploy. Their names and other

identifying information were submitted in writing to the DPX and XPM program managers on the TAC Battle Staff, as previously agreed to. All seemed to be going well until the Shaw PRU called "foul" and claimed that the TPFDD had to be followed, that a full complement of two attorneys and two paralegals had to deploy as prescribed in the XFFB6 UTC. After a full hour of intensive phone calls between Langley and Shaw, the 363rd Combat Support Group Commander ultimately agreed to accept the deviation from the XFFB6 TPFDD sourcing.³ That "battle" being won, an unexpected problem immediately arose. Since we had only sourced the Shaw XFFB6 at fifty percent strength, the DPX and XPM battle staff members here at Langley wanted to close out that UTC in the computer and started procedures to cancel the remaining "1+1" that remained "unsourced" in the TPFDD (since they believed we had determined it unnecessary). We wanted just the opposite...no action. Our goal was to preserve the potential for sourcing against that unfilled "1+1" into Al Dhafra, and to be able to do it at a later time, as determined by Major Russell from Al Dhafra and Colonel Kansala from Riyadh. After discussing the problem at length, TAC/DPX and XPM agreed to allow us to enter a "9999" code into the computerized TPFDD that had the effect of putting the unsourced "1+1" in limbo. From our vantage point, it gave us the exact option we wanted and also avoided any potential adverse manpower implications; from their view, it merely required them to delay resolution of the TPFDD until a future time. To both sides, it was a satisfactory decision and one that would prove invaluable to TAC/JA in the later months of the conflict.

IV. HANDLING THE BUILDUP

Throughout the Fall of 1990, the strength of the United States Air Force in the Persian Gulf continued to build as political threats, United Nations resolutions, and the economic blockade of the Iraqi ports failed to force Saddam Hussein out of Kuwait. At places with names like King Fahd, Khamis Mushait, Abu Dhabi and Shaikh Isa, there was a continuous buildup of planes, people, and equipment, all coming under the operational control of a single "Air Boss," Lieutenant General Horner at CENTAF Forward in Riyadh. With greater numbers of fighters, bombers, tankers, and reconnaissance aircraft being dedicated to *Operation Desert Shield*, ramp space became more and more crowded and new bases like Al Kharj in Saudi Arabia were literally constructed in the middle of the desert. By the beginning of the air campaign in January of 1991, we were operating from twenty-one bases in the Persian Gulf, as well as airfields in Egypt, Turkey, Spain and other countries on both sides of the Atlantic.

As the population increased at these bases, so also did the size of the legal offices. Each day, both at TAC headquarters and at CENTAF, the personnel community provided the respective commanders and Battle Staff directors with strength figures for each installation, as well as projections for end strength based upon the TPFDD flow. Using this data, a joint decision was made by JAC/JA and CENTAF Forward/JA two or three times each week as to which base legal offices needed to be "plussed up" to accommodate increased populations. If there was an XFFB6 or XFFB7 UTC in the TPFDD close to the date when we

3. There were repeated instances of "arm wrestling" between MAJCOM SJAs and base PRUs over the sourcing of the XFFB6 UTC. In one case, where attorneys at March AFB were told to board an aircraft to the AOR, it took a flash message from Brigadier General Jones, the SAC SJA, to keep them from having to join an already adequately manned base legal office.

wanted to deploy an additional attorney and/or paralegal, then we would use that LTC as the authorization for the additional sourcing. If not, we would look back to the "unsourced" 1+1 from the original XFFB6 that had been put into limbo with the "9999" coding and use that to deploy the new people. In either case, we would provide full names, social security numbers, and other identifying data to the DPX and XPM program managers working our JAG account in the TPFDD. The actual selection of who to deploy in these instances was always left to the respective MAJCOM SJA, who worked with his NAF/SJA and respective base SJA to make the choice. Using this procedure, the *Operation Desert Shield/Desert Storm* law firm ultimately totalled forty-nine judge advocates and forty-six paralegals at thirty different locations, including the contingency hospitals in the United Kingdom and three ADCs and one Area Defense Administrator in the AOR.⁴

V. "ONE LAW FIRM" - CAN EVERYONE HAVE A PART IN THE WAR?

The Air Force Judge Advocate General's Department has always touted itself as being one law firm, comprised of our active duty, reserve and Air National Guard judge advocates, paralegals, and civilians. In *Operation Desert Shield/Desert Storm*, the issue of how each part of the Department would participate arose early in the deployment. The active duty attorneys and paralegals

⁴ On 11 March 1991, the JAG manning in direct support of *Operation Desert Shield/Desert Storm* was as follows:

LOCATION	JUDGE ADVOCATES	PARALEGALS	ADC/ADA	SOURCING MAJCOM
ABU DHABI, UAE	1	1		SAC
AL AIN, UAE	1	1		MAC
AL DHAFRA, UAE	2	2	1/0	TAC/USAFE
AL KHARJ, SA	2	2		TAC/USAFE
AL MINHAD, UAE	2	1		TAC
BATEEN, UAE	1	1		MAC
CAIRO WEST, EGYPT	1	1		SAC
DHAHRAN, SA	2	2	1/0	TAC
DIEGO GARCIA	1	1		SAC
DOHA, QATAR	1	1		USAFE
INCIRLIK, TURKEY	2	1		USAFE
JEDDAH, SA	2	2		SAC
KHAMIS MUSHAIT, SA	1	2		TAC
KING FAHD, SA	4	4		TAC/AFSOC/RES
KING KHALID IAP, SA	1	1		SAC
KING KHALID MC, SA	1	1		TAC
MASIRAH, OMAN	1	1		MAC
MORON, SPAIN	1	1		USAFE
RIYADH, SA (CENTAF)	6	5		TAC
RIYADH, SA (BASE)	1	2	1/1	TAC/SAC
RIYADH, SA (USMTM)	1	1		-
SEEB, OMAN	1	1		SAC
SHAIKH ISA, BAHRAIN	1	1		TAC
SHARJAH, UAE	1	1		MAC
TABUK, SA	1	1		TAC
TAJF, SA	2	2		TAC/USAFE
THUMRAIT, OMAN	1	1		MAC
UK CONT. HOSPITALS	4	4		AFLC/ATC/AFSC/ PACAF/USAF

were, of course, fully deployable, and if they were selected, they went with their operational units to the Persian Gulf. The larger question involved how our Air National Guard (ANG), Category A and Category B reservists would be used.

With regard to the ANG judge advocates and paralegals, because they trained to deploy with the rest of their unit, the presumption was that those assigned to flying wings and groups *would* deploy, *as long as* it would not create an overabundance of legal personnel at AOR bases where a legal office was already established and adequately manned. In fact, one of the very first attorneys to deploy into the combat theater was an ANG judge advocate, Colonel Bernard A. Paul, of the Missouri ANG state headquarters staff, who went in with one of that state's flying units to Jeddah, Saudi Arabia. Several Missouri ANG attorneys, operating on a monthly rotational basis, continued deploying in and out of Jeddah until TAC/JA and CENTAF/JA jointly determined that the legal office at that base was sufficiently manned with enough active duty personnel so that ANG augmentation was no longer required. The decision to discontinue ANG judge advocate support to Jeddah was concurred in by Colonel Jack Slayton, the Air National Guard Assistant to the TAC SJA, and Brigadier General Allen C. Pate, the Air National Guard Assistant to The Judge Advocate General.

The Category A reserve judge advocates and paralegals are also assigned directly to operational units and train to deploy with them. As with the ANG legal personnel, then, the presumption was that they would deploy with their units, *if* they were needed at the AOR base of deployment. In December of 1990, it became evident to both TAC/JA and CENTAF/JA that we would have to "plus up" one of the Saudi Arabian base legal offices with an additional judge advocate and paralegal. Because the TPFDD showed a Category A reserve flying unit scheduled to deploy to that very base, it seemed prudent to use the reserve judge advocate and paralegal assigned to that unit to augment the AOR base legal office, thus maintaining unit integrity and also assuring that an officer and enlisted representative of the Category A program would have the opportunity to participate in the conflict. TAC/JA called the unit commander and told him that his staff judge advocate and paralegal would be needed at his AOR location and to ensure that they both deployed with the unit. The next day, however, it was discovered that the unit staff judge advocate would not be able to deploy because of scheduling conflicts with his civilian job. In an attempt to resolve the problem, the AFRES SJA, Colonel Bill Henry, suggested that we could "mix and match" a Category A judge advocate from another unit to go with the deploying unit into the AOR. After conversations with CENTAF/JA; the Deputy TJAG, Major General David C. Morehouse; and the TJAG, Major General Nelson, it was decided that using a Category A staff judge advocate from another unit would not be acceptable as it would violate the unit integrity principle. The unit then deployed without its legal staff to its AOR basing location. The early cessation of hostilities precluded any further opportunities to use Category A judge advocates or paralegals in the Persian Gulf.

The traditional **role** of the Category B reservist assigned to our 9005th Air Reserve Squadron (ARS) at Denver, Colorado, (but attached to our active duty offices for training) is to be prepared to augment the active duty offices or to take the place of the active duty judge advocates and paralegals when they (the active duty force) deploy in any contingency. Training opportunities for the Category B personnel, therefore, generally center around **working** in and managing a CONUS active duty office. It follows, and was **accepted** as TJAG policy, that members of the 9005th ARS would not be **deployable** to an AOR; rather, they would be responsible for "backfilling" the stateside legal offices. That is exactly how they were **used** in the early stages of **the deployment**. Colonel John

Lester, TAC's Senior IMA at the time, happened to be serving a week of active duty training at TAC headquarters during the first part of August of 1990. His timing could not have been better. As we commenced the deployment of active duty legal personnel to the AOR, Colonel Lester, in conjunction with Colonel Ron Rakowsky, the Staff Judge Advocate for the Air Reserve Personnel Center at Denver, arranged for a one-for-one replacement of Category B personnel to fill the vacancies in our CONUS base and numbered air force legal offices. This very successful program of a one-for-one backfill continued throughout the conflict and was managed by selected senior IMAs under Colonel Lester's tutelage. A Category B reservist, Major Roger L. Young, even served for almost two months as the Staff Judge Advocate at Myrtle Beach AFB in South Carolina after Major Doug Acklin, the regular active duty SJA, deployed with the base's operational forces to King Fahd International Airport in Saudi Arabia. Also, when Colonel Kansala and his staff deployed to Riyadh, his office at Shaw AFB was reconstituted with a heavy percentage of Category B reservists. In late December of 1990, as the buildup of forces was reaching its peak prior to the 16 January 1991 commencement of the air campaign, and coincidental with the inability to source a Category A legal team with their deploying unit, Major General Nelson revised his policy guidance regarding the use of 9005th ARS personnel. He decided that, on a selective basis, Category B reservists could deploy to the AOR to augment the active duty legal offices there. Shortly thereafter, Captain William Shearer and Staff Sergeant Freddie Gravely deployed to King Fahd International Airport to join Major Doug Acklin's law office at that location, making it the largest base legal office in the AOR. Captain Shearer was in practice near RAF Bentwaters in the United Kingdom and was attached to that base for training (one of the very few members of the 9005th ARS attached to an OCONUS base for training), while Staff Sergeant Gravely was attached to the base legal office at Travis AFB in California. Both remained in the AOR until the redeployment of forces in the late spring and early summer of 1991. For his efforts, Captain Shearer was later recognized as Outstanding IMA for 1990. Again, because of the early cessation of hostilities, he and Staff Sergeant Gravely were the only two Category B legal personnel who were sent to the Persian Gulf.

VI. LESSONS FOR THE FUTURE

One of the principal problems identified in the *Operation Desert Shield/Desert Storm* deployment was our inability to manage, with precision, the flow of our legal assets into the AOR. Although many of our functional specialties were and still are contained in JAG-unique UTCs, the base level judge advocate and paralegal were part of the larger congregation of assets contained in the XFFB6 UTC, under control of the Combat Support Group Commander. Even now, with the advent of the Objective Wing concept that places the judge advocate function Air Force-wide on the Wing Commander's staff, the new 9AAGB UTC (independent wing support UTC) still contains a combination of two judge advocates (one 8816 and one 8824) and two paralegals (88170) among its numbers. Our experience in the Persian Gulf conflict proved that placing two attorneys and two paralegals into an AOR *with the initial cadre* of wing personnel was usually not warranted. Recognizing that, on 27 May 1992, Major General Morehouse issued a TJAG policy letter entitled "Policy on Deployment of Judge Advocate Personnel" that authorized TAC/JA to tailor the JAG complement in the 9AAGB UTC down to a one judge advocate and a one paralegal,

with other MAJCOMs doing likewise as they establish their independent and dependent UTCs. To ensure adequate projection of wartime requirements, however, the letter also stipulates that an XFFJ3 "wildcard" UTC also be incorporated into the TPFDD for each 9AAGB, although perhaps at a much later time in the TPFDD flow. With regard to the XFFJ3 UTC, which was not accepted by the TAC Battle Staff as a legitimate "plus up" for a base level legal office, HQ USAF/JAI is currently working to clarify the MISCAP language to avoid what happened in *Operation Desert Shield/Desert Storm*. Even with these two much needed changes, judge advocates involved in the deliberate planning process must carefully consider the exact number of judge advocates needed under any OPLAN and where they should be in the TPFDD flow.

Another lesson learned from our experience in the Persian Gulf pertains to the choice of *whom* to deploy. In some instances, those at CONUS base legal offices who were pre-designated for mobility positions were ill-equipped to be the only attorney or paralegal at a bare bones base, but they were the ones selected, if for no other reason than by "drawing the short straw." In one case, a judge advocate with less than one year's experience in the Department was deployed with the initial XFFB6 UTC and was simply not experienced enough to operate in the combat environment. He was replaced after three months by a more experienced officer from the same CONUS legal office. This is not to say, however, that the staff judge advocate or the deputy should themselves be the ones to deploy. Since most CONUS legal offices actually experienced an *increase* in workload after their operational forces deployed to the AOR, a base staff judge advocate must be prepared to keep the regular base office running at peak efficiency at the same time part of the office is lost to the combat theater. In a word, office personnel must be divided to provide the best possible coverage at both the deployed location *and* the home station. The decision will be crucial to satisfying the legal requirements of both.

A final issue involves the reserve components. As mentioned before, the Judge Advocate General modified his policy on use of Category B reservists in December of 1990 to allow deployment of members of the 9005th ARS to the AOR. Since the training program for the IMA must be geared towards a wartime tasking, the policy on that tasking needs to be reviewed as to whether we will revert to the pre-December 1990 concept or continue to allow for possible deployment in a future contingency. If it be the former, then our training directives for Category B reservists throughout the Air Force probably need little revision; but if it be the latter, then a complete review is in order. It makes little sense, however, to try to train an IMA to cover a backfilling role *as well as* a possible deployment role. It seems more prudent to consider selecting a small cadre of Category B judge advocates and paralegals, whose civilian occupations allow them, during periods of national emergency, the freedom to be away from their jobs for long periods of time and to train them together as a deployment unit within the 9005th ARS. They would then be available (and fully trained) to deploy when the MAJCOM SJA sourcing manager needed to fill an XFFJ3 UTC in any AOR.

In the end, the key lesson to be applied in any future deployment of JAG assets is the need for *flexibility*. We must have *flexibility* in the way we source our personnel, *flexibility* in the selection of those we send to the combat theater with our operational forces, and *flexibility* in how we use the different parts of our Departmental law firm. With this *flexibility*, we can truly fulfill our wartime taskings and, in so doing, make our own valued contribution to our country and the defense of freedom in the world.

Guard and Reserve Issues in Deployment

MAJOR RONNIE DAWSON JAMES, USAF

I. INTRODUCTION

The cost of active duty forces and the competing demands for government resources have increasingly forced transfer of capabilities and responsibilities to reserve components. The basic aerospace doctrine of the United States Air Force¹ dictates that the Air Force should organize to make full, effective, and coordinated use of its total force. Reserve and National Guard forces comprise a major portion of aerospace power.² The extent we rely on Air Reserve components was illustrated during Operation Desert Storm where more than 100 different Air National Guard and Air Force Reserve units and approximately 600 individual mobilization augmentees deployed in support of active duty forces.³ Since reserve components will continue to play a significant role in future deployments judge advocates must be prepared to address issues raised by their participation. This article will provide a starting point for handling those issues.

II. CATEGORIES OF RESERVE FORCES

The Air Reserve Components (ARC) of the United States Armed Forces include the Air National Guard of the United States (ANG) and the Air Force Reserve (USAFR).⁴ USAFR members are categorized by type of assignment, reserve status, military obligation, and laws or directives which govern their administration. Reserve categories include Ready, Standby, and Retired Reserve.⁵

The Ready Reserve is composed of units and individual reservists liable for active duty as provided in 10 U.S.C. §§ 672 and 673.⁶ The Ready Reserve consists of two major subdivisions - the Selected Reserve and the Individual Ready Reserve (IRR). Those units and individual reservists belonging to the Selected Reserve are required to participate in inactive duty training periods and annual training. The Selected Reserve also includes reservists on initial active duty for training or awaiting initial active duty for training.⁷ The IRR primarily consists of ready reservists not assigned to a unit or Individual Mobilization Augmentee (IMA) position.⁸

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1. Air Force Manual (AFM) 1-1, Vol. I & II.

2. *Id.* at para. 4-2a.

3. AFM 1-1, Vol. II, Essay W, n5.

4. 10 U.S.C.A. § 261 (1983).

5. 10 U.S.C.A. § 267 (1983); Air Force Regulation (AFR) 35-41, Vol. I, para. 2-4.

6. 10 U.S.C.A. § 268 (1983).

7. AFR 35-41, Vol. I para. 2-6.

8. *Id.* at para. 2-7.

The Standby Reserve is composed of units and individual reservists, other than those in the Ready Reserve or Retired Reserve, who are liable for active duty only as provided in 10 U.S.C. §§ 672 and 674.⁹ Reservists in the Standby Reserve may be in an active or an inactive status.¹⁰ While in an inactive status, a reservist is not eligible for pay or promotion.¹¹

The Retired Reserve consists of reservists who are or have been retired under 10 U.S.C. §§ 3911, 6323, or 8911 or under 14 U.S.C. § 291. It also includes those who are transferred to it upon their request, retain their status as reservists, and are otherwise qualified.¹²

III. MOBILIZATION

A. Authority to Order ARC Forces to Extended Active Duty (EAD)¹³

The request to seek mobilization from the National Command Authority (NCA) is usually initiated by the supported command (unified or specified commander-in-chief) through the Chairman of the Joint Chiefs of Staff. Mobilization approval from the NCA normally flows to the Secretary of Defense, to the Secretary of the Air Force, to the Chief of Staff, USAF, who issues the mobilization order. If less than full mobilization is considered, each MAJCOM or activity will be required to identify the resources needed to support the contingency operation. The proposed force list will be refined as part of the staffing process. The following items are included in the execution message:

1. Authority to mobilize (legislative authority¹⁴ or the Executive Order, as appropriate).¹⁵

9. 10 U.S.C.A. § 273 (1983).

10. AFR 35-41, Vol. 1 para. 2-8.

11. 10 U.S.C.A., § 273(c) (1983).

12. 10 U.S.C.A. § 274 (1983).

13. AFR 28-5, para. 2-4.

14. The statutory authorities for mobilization of the ARC under Title 10, United States Code, are (reprinted from AFR 28-5, para. 2-2.) *USAF Mobilization Planning*:

1. By the Congress:
 - a. § 123, Suspension of certain provisions of law relating to reserve commissioned officers.
 - b. § 263, Basic policy for order into federal service.
 - c. § 672(a), Reserve Components. Units and individuals assigned to the Ready, Standby, and Retired Reserve are mobilized to meet the requirements of this section. Units are ordered to active duty (AD) at their assigned strength.
2. By the President:
 - a. § 331, Federal aid for state governments.
 - b. § 333, Interferences with state and federal law.
 - c. § 671b, Members. Service extension when Congress is not in session.
 - d. § 673, Ready Reserve. Partial mobilization.
 - e. § 673a, Ready Reserve. Members not assigned to, or participating satisfactorily in, units.
 - f. § 673b, Selected Reserve--200,000 Presidential Call-Up. Order to active duty other than during war or national emergency.
 - g. § 673c, Authority of the President to suspend certain laws relation to promotion, retirement, and separation.
3. By the Secretary of the Air Force (SAF):
 - a. § 511, Reserve Components. Terms.
 - b. § 671a, Members. Service extensions during war.
 - c. § 672(b), ARC units or members not assigned to units. Order to active duty (without member consent) for 15 days (with governor consent for Air National Guard (ANG) forces).
 - d. § 672(d), Volunteer ARC members. Ordered to active duty with member consent (ANG forces also require governor consent).

2. Units and categories of personnel to be mobilized according to approved force lists.
3. Instructions to gaining major commands to issue orders for mobilization.
4. Type and duration of mobilization.
5. Reporting instructions for effective date and location of affected units and individuals.
6. Special instructions concerning delays, exemptions, Stop-Loss action, and amending orders of members already on active duty under 10 U.S.C. § 672d.

B. Full or Partial Mobilization Authority¹⁶

For partial mobilization, units, IMAs, and IRR members are mobilized as required. For full mobilization, units, IMAs, IRR members, Standby Reserve, and Retired Reserve are mobilized as required. Full or partial mobilization may be effected through several authorities.

The first of these is when Congress proclaims a national emergency or declares war. Any unit and any member not assigned to a unit organized to serve as a unit of the ARC may be ordered to active duty (other than for training). This activation may last for the duration of the war or emergency and for six months thereafter, without the consent of the persons affected. A member on an inactive status list or in a retired status, however, may not be ordered to active duty unless it is determined that there are not enough qualified reserves in an active status or in the inactive National Guard in the required category who are available.¹⁷

Mobilization also may occur when the President has proclaimed a national emergency. Any unit, and any member not assigned to a unit organized to serve as a unit, in the Ready Reserve may be ordered to active duty (other than for training) for not more than 24 consecutive months, without the consent of the persons concerned. Not more than one million members of the Ready Reserve may be on active duty (other than for training), without their consent, under this authority, at any one time.¹⁸

A third source of mobilization is when the President determines that it is necessary to augment the active forces for any operational mission under what is sometimes referred to as the "200,000 Presidential call-up." He may authorize the Secretary of Defense to order any unit, and any member not assigned to a unit organized to serve as a unit, of the Selected Reserve to active duty (other than for training) for not more than 90 days. Units and members ordered to active duty under this authority, however, may not perform any functions associated with military support for domestic emergencies under chapter 15 (Insurrection) or section 8500 (Air National Guard in Federal Service) of title 10. Nor may they provide assistance

e. § 688, Retired members. Recall of retired members with 20 or more years of active duty.

4. Additional statutory authorities relating to members of the ANG and USAFR are:

a. § 261, Reserve Components named.

b. § 267, Ready Reserve. Standby Reserve. Retired Reserve. Placement and status of members.

c. § 268, Ready Reserve. Describes the organization thereof to include the authorized strength.

d. § 269, Ready Reserve. Placement in; transfer from.

e. § 674, Standby Reserve.

f. § 675, Retired Reserve.

15. *See, e.g.*, Exec. Order No. 12,743, 18 Jan. 1991, 56 F.R. 15. Ordering the Ready Reserve of the Armed Forces to Active Duty, to respond to the continuing threat posed by Iraq's invasion of Kuwait.

16. AFR 28-5, para. 2-5.

17. 10 U.S.C.A. § 672(a) (1983).

18. 10 U.S.C.A. § 673 (1983).

to either the Federal Government or a State during a serious or manmade disaster, accident, or catastrophe. Not more than 200,000 members of the Selected Reserve may be on active duty under this authority at any one time. If the President determines that an extension is in the interest of national security, the President may authorize the Secretary of Defense to extend the ninety-day active duty period for a period of not more than ninety additional days.¹⁹ This 200,000 Presidential Call-Up authority is scenario driven and affords flexibility for building up prior to a declaration of war or national emergency.²⁰

Finally at any time, an authority designated by the Secretary of the Air Force may order a member of the ARC to active duty or retain him or her on active duty with the consent of the member. However, a member of the ANG may not be ordered to active duty under this authority without the consent of the Governor or other appropriate authority of the State or Territory, Puerto Rico, or the District of Columbia, whichever is concerned.²¹ It should be noted that the consent of a Governor described above may not be withheld (in whole or in part) with regard to active duty outside of the United States, its territories, and its possessions, because of any objections to the location, purpose type, or schedule of such activity.²²

C. Change in Statutory Authority

If the active duty authority changes from 10 U.S.C. § 672(d) (voluntary) or 10 U.S.C. § 673(b) (200,000 Presidential Call-Up) to 10 U.S.C. § 673 or 10 U.S.C. § 672(a), the active duty orders will be rescinded and new orders issued to reflect the new mobilization authority and period of service. If the member has been mobilized and the tour changes from 10 U.S.C. § 673 to 10 U.S.C. § 672(a), the mobilization orders will be amended to ensure no break in service.²³

D. Reporting Requirements²⁴

A mobilized member is required to report at the time specified in the activation order or by verbal order of the gaining commander. ARC unit members and IMAs of the Selected Reserve must report to their home station within twenty-four hours of notification of activation under the 200,000 Presidential Call-Up authority or under other mobilization statutes. All other reservists and retirees must be able to start travel no later than 2400 hours of the fifth day after notification to mobilize.²⁵ If a member fails to report, attempts must be started immediately to locate the member. Additional copies of orders must be delivered in person by the member's unit commander or designated representative or by certified mail (return receipt requested). A notarized affidavit of personal delivery must be completed when orders are personally delivered. All reasonable efforts to contact the member will be documented for possible legal action. If the member fails to reply to correspondence or to report after reasonable efforts have been made to contact him or her, the member is re-

19. 10 U.S.C.A. § 673b (1983).

20. AFR 28-5, para. 2-6. This authority was exercised prior to Desert Shield/Desert Storm through Exec. Orders No. 12,727, 22 Aug. 1990, 55 F.R. 35,027, and No. 12,733, 13 Nov. 1990, 55 F.R. 47,837.

21. 10 U.S.C.A. § 672(d) (1983).

22. 10 U.S.C.A. § 672(f) (1983).

23. AFR 28-5, para. 10-37.

24. AFR 28-5, para. 10-3.

25. *Id.* at para. 2-8.

ported as absent without leave (AWOL) by the gaining unit in accordance with AFR 35-73, *Desertion & Unauthorized Absence*.²⁶

E. Delays, Exemption, and Early Release from Active Duty²⁷

Except as discussed below, delays in reporting for active duty are not approved. Commanders have discretionary authority to approve emergency leave on an individual basis for up to seven days, subject to AFM 177-373, Volume 3, *Air Reserve Forces Pay & Allowance System*. A member may be considered for exemption if seven days is not enough time. Exempted members are not ordered to active duty.

The first broad category of exemptions are those found in AFR 28-5, table 10-1, *USAF Mobilization Planning*. These include high school students, who must be granted a delay or exemption until they cease to satisfactorily pursue such course, graduate, or attain age 20, whichever occurs first.

Members in any reserve or retired status may be granted a delay or exemption in exceptional cases where involuntary active duty will result in prolonged or temporary extreme personal hardship or where the member's withdrawal from the community would create a prolonged or temporary extreme community hardship. In the case of a personal hardship, documentary evidence from at least two disinterested parties must show that the reservist's dependents would suffer an extreme hardship greater than other members can be expected to experience if called to active duty. Approval of a delay or exemption is conditional based on the documented severity of the claimed hardship. In the case of a community hardship, documentary evidence from at least two community officials must show that the member's withdrawal from a particular community in a national emergency would have a substantial adverse effect on the health, safety, or welfare of that community. Exemption is mandatory unless otherwise directed by HQ USAF. Members who ask for exemption due to a permanent personal or community hardship must submit their resignation or a request for discharge.²⁸

Members qualified for transfer to the Standby Reserve may be granted a delay or exemption if the request is made before the alert or order to extended active duty and authority for mobilization of the Standby Reserve is not in effect. Members enrolled in graduate study or training in medicine, dentistry, veterinary, podiatry, optometry, osteopathy, or doctors of medicine or intern or residency training, may be granted delays or exemptions. This exemption also applies to members preparing for the ministry in a recognized theological or divinity school.

If the President or Congress has not authorized extension of enlistment's or periods of obligated service, or when it is required under HQ USAF established procedures and approved by the Secretary of the Air Force, the following members may be granted a delay or exemption:

1. Airmen with less than 90 days before expiration of term of service (ETS).
2. Airmen with 180 days or less obligated service remaining as of the mobilization date.
3. Officers within 90 days of discharge or retirement due to maximum service, age, or cause.
4. Officers twice passed over for promotion.

26. *Id.* at para. 10-3.

27. *Id.* at para. 13-8.

28. See *Blocher v. Fonville*, 756 F. Supp. 306 (S.D. Tex. 1991), for an unsuccessful attempt by an Army doctor to get an "extreme hardship for the community" deferment from active duty in the Persian Gulf.

Table 10-1 recognizes additional grounds for exemption, including pregnancy. Pregnant members may be granted a delay or exemption until four weeks after delivery date. (Exemption or discharge is authorized based on the advice of the attending physician with the concurrence of the member.) Members who are Medal of Honor recipients or sole surviving sons may be granted delays or exemptions. Finally, single member parents may also be granted delays or exemptions in accordance with AFR 35-59.

It should be noted that officers who have twice failed to be selected for Reserve Officer's Personnel Act (ROPA) promotion to the next higher Reserve grade are exempt unless the commander who exercises special court-martial jurisdiction over the member orders the member to active duty because of military needs.

In addition, personnel who are in basic, technical, or flying training or waiting to enter basic training are exempt. Exemptions also apply to personnel who are temporarily unable to perform duty because of an injury or illness, who are patients in a hospital, or who have a validated temporary personal hardship that cannot be accommodated within emergency leave policy (*i.e.*, exceeds seven days). Finally, an exemption applies to members due to be reassigned from the Selected Reserve or discharged in the period of active duty and who do not or cannot extend their date of separation to serve the full period of active duty.

When Stop-Loss is not in effect, early release authority for individuals remains with HQ USAF/DP based on the Total Force needs of the Air Force. Early releases for hardship or cause will be handled according to Air Force policy. No member will be involuntarily released except for cause. Members released early will revert to inactive duty status within the control of their respective states or their parent unit.

F. Stop-Loss Implementation²⁹

Under the provisions of 10 U.S.C. § 673c, the President may suspend any provision of law relating to promotions, retirements, and separations during any period when members of any Reserve component are on active duty under involuntary call-up or mobilization authorities—often referred to as “Stop-Loss.” The Air Force routinely seeks Stop-Loss authority when members of the ARC are, or will be, placed on active duty involuntarily.

IV. UCMJ JURISDICTION OVER GUARD AND RESERVE FORCES

A. Command³⁰

Command jurisdiction of all nonmobilized units of the ANG of the applicable States, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands is vested in the Governor, through the Adjutant General or other appropriate authorities. Command jurisdiction as to the District of Columbia is vested in the President. Similar command jurisdiction for USAFR units is vested in the Commander, Air Force Reserves (AFRES), who in turn is responsible to the Chief of Staff, Air Force (CSAF). When units or individuals are ordered to extended active duty, jurisdiction rules vary according to the authority by which the member is mobilized. Under a 200,000 Presidential Call-Up pursuant to 10 U.S.C. § 673b, administrative jurisdic-

29. AFR 28-5, para. 10-31.

30. AFR 45-1, para. 6a.

tion remains unchanged. Operational control transfers to the commander of the gaining command. Under other mobilization authorities, command jurisdiction transfers to the commander of the gaining command.

B. Attachment of Jurisdiction

Members of the ARC are subject to the Uniform Code of Military Justice (UCMJ) when they are lawfully called or ordered into federal service on active duty from the date when they are required by the terms of the call or order to obey it.³¹ Such members remain subject to UCMJ jurisdiction after leaving active duty for offenses committed prior to such termination of active duty if the member retains military status in a reserve component without having been discharged from all obligations of military service.³² Members may be held on active duty over objection if action is taken with a view to trial prior to the end of the active duty period. Taking action with a view to trial attaches jurisdiction over the member and such jurisdiction continues throughout the trial and appellate process and for purposes of punishment. If jurisdiction attaches before the effective terminal date of self-executing orders, the member may be held for trial by court-martial beyond the effective date. Actions by which court-martial jurisdiction attaches include apprehension, imposition of restraint (restriction, arrest, or confinement), and preferal of charges.³³

C. Recall to Active Duty

Members of the ARC who are not on active duty and who are made the subject of proceedings under Article 15 or Article 30 of the UCMJ with respect to an offense under the UCMJ may be involuntarily ordered to active duty for investigation under Article 32 of the UCMJ, trial by court-martial, or nonjudicial punishment under Article 15 of the UCMJ. The offense must have been committed while the member was on active duty or on inactive duty training in federal service.³⁴ Procedures for recalling members to active duty are set out in AFR 111-2, *Court-Martial Jurisdiction over Reserve Members*. The recalled member may not be sentenced to confinement or required to serve a punishment consisting of any restriction on liberty during a period other than a period of inactive duty training or other active duty training unless the order to active duty was approved by the Secretary of the Air Force.³⁵

V. THE SOLDIERS' & SAILORS' CIVIL RELIEF ACT

A major concern of reservists is the Soldiers' and Sailors' Civil Relief Act (SSCRA).³⁶ The purpose of the SSCRA is to help ameliorate some of the adverse consequences caused by a transition from civilian to military life. Its provisions allow for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of military members.³⁷ The SSCRA was recently amended to address some of the inequities manifested during Operation Desert Shield/Storm,

31. 10 U.S.C.A. § 802 (1983); Uniform Code of Military Justice (UCMJ), art. 2 (1988).

32. MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 204(d)(1984)[hereinafter MCM].

33. MCM, *supra* note 32, MIL.R. EVID. 202 (c).

34. 10 U.S.C.A. § 802d; UCMJ, art. 2(d).

35. *Id.*

36. 50 U.S.C. app. §§ 501-48, §§ 560-93 (1990 and Supp. 1993)

37. 50 U.S.C. app. § 510 (1990).

and more changes may be anticipated in the future. This discussion will cover some of the current provisions of the SSCRA of particular concern to mobilized members of the ARC.

The SSCRA applies to all individuals called to active duty in the military service, including members of the ARC, from the date on which the individual enters active service to the date of the individual's release from active service or death while in active service to the extent the SSCRA remains in force.³⁸ Members of reserve components who are ordered to report for military service are entitled to relief and benefits accorded persons in the military service under articles I, II, and III of the SSCRA (sections 510 to 517, 520 to 527, and 530 to 536 of 50 U.S.C. Appendix) during the period beginning on the date of receipt of such order and ending on the date upon which such members report for military service or the date on which the order is revoked, whichever is earlier.³⁹

The SSCRA offers numerous protections. These protections cover:

1. **Default Judgments.** Any default judgment rendered against a person in military service during the period of such service or within thirty days thereafter, where it can be shown that the person was prejudiced because of his or her military service in presenting a defense thereto, may be reopened by the court within ninety days after the end of such service. It must appear that the defendant has a meritorious or legal defense to the action or some part thereof.⁴⁰

2. **Stay of Proceedings.** At any stage of a proceeding involving a person in military service, during the period of such service or within sixty days thereafter, a court may, at its discretion, stay the proceedings for up to three months after the end of such service, unless the court determines that the person's ability to pursue or defend the action is not materially affected by reason of his or her military service.⁴¹

3. **Stay or Vacation of Execution.** In any action or proceeding commenced against a person in the military, before or during the period of such service, or within sixty days thereafter, a court may stay the execution of any judgments or orders entered against such person or vacate or stay any attachment or garnishment of property, money, or debts in the hands of another, for up to three months after the end of such service, unless the court determines that the ability of the defendant to comply with the judgment or order entered or sought is not materially affected by his or her military service.⁴²

4. **Statute of Limitations.** Statutes of limitations, except those prescribed under the internal revenue laws of the United States, are tolled during the period of military service.⁴³

5. **Maximum Rate of Interest.** A court may limit the maximum rate of interest on obligations or liabilities bearing an interest rate of more than six percent per year incurred by a person in military service before that person's entry into such service to six percent per year during any such period of military service, unless the court determines that the ability of such person to pay interest at a higher rate is not materially affected by reason of such service, in which case the court may make an equitable adjustment to the interest rate.⁴⁴

38. 50 U.S.C. app. § 511 (1990 and Supp. 1993).

39. 50 U.S.C. app. § 516 (1990).

40. 50 U.S.C. app. § 520 (1990).

41. 50 U.S.C. app. §§ 521 & 524 (1990).

42. 50 U.S.C. app. §§ 523 & 524 (1990).

43. 50 U.S.C. app. §§ 525 & 527 (1990).

44. 50 U.S.C. app. § 526 (1990).

6. Eviction. If the agreed rent does not exceed \$1200 per month, a person in military service cannot be evicted or distressed from premises occupied chiefly for dwelling purposes by the spouse, children, or other dependents of such person, during the period of military service, without a court order. If an action for eviction or distress is initiated, the court may, in its discretion, stay the proceedings for not longer than three months or make such other order as may be just, unless the court determines that the ability of the tenant to pay the agreed rent is not materially affected by reason of such military service.⁴⁵

7. Installment Contracts for Purchase of Property. If, after making a deposit or installment payment for the purchase of real or personal property, a person enters military service, the seller of such property cannot rescind or terminate the contract or resume possession of the property for nonpayment of any installment due or for any other breach of the terms of the contract occurring prior to or during the period of such military service, except by court order. The court may take equitable actions or stay the proceedings unless the court determines that the ability of the defendant to comply with the terms of the contract is not materially affected by reason of such service.⁴⁶

8. Mortgages. No sale, foreclosure, or seizure of property for nonpayment of any sum due under any such obligation, or for any other breach of the terms thereof, will be valid if made during the period of military service or within three months thereafter, without an agreement or court order. The court may stay any enforcement proceedings or make other equitable disposition of the case unless the court determines that the ability of the defendant to comply with the terms of the obligation is not materially affected by reason of military service. The real or personal property must have been owned by the person entering military service at the time he or she enters such service and still be owned during such service. The obligations must have originated prior to such service.⁴⁷

9. Termination of Leases by Lessees. A lease executed by a person who later enters military service for premises occupied by the person or his or her dependents may be terminated in writing at any time following the date of the beginning of such military service.⁴⁸

10. Insurance. A military member's private life insurance policies are protected against lapse, termination, and forfeiture for nonpayment of premiums or any other indebtedness for the period of military service plus two years.⁴⁹

VI. VETERAN'S REEMPLOYMENT RIGHTS ACT⁵⁰

Another area of great concern to members of the ARC is reemployment rights. One of the purposes of the Veteran's Reemployment Rights Act (VRRRA) is to provide reemployment rights protection to members of the ARC called to active duty voluntarily or involuntarily. Reemployment rights apply to members who, after entering employment on the basis of which such members claim restoration or reemployment, enter active duty (other than for the purpose of determining physical fitness or for training) in response to an order or call.

45. 50 U.S.C. app. § 530 (1990 and Supp. 1993).

46. 50 U.S.C. app. § 531 (1990 and Supp. 1993).

47. 50 U.S.C. app. § 532 (1990 and Supp. 1993).

48. 50 U.S.C. app. § 534 (1990 and Supp. 1993).

49. 50 U.S.C. app. §§ 540-48 (1990 and Supp. 1993).

50. 38 U.S.C. §§ 4301-307 (Supp. 1993).

The period of active duty may not exceed four years plus any additional period in which the member is unable to obtain orders relieving them from active duty. If the member enters active duty or is voluntarily or involuntarily extended during a period when the President is authorized to order Units of the Ready Reserve or members of a reserve component to active duty, the limitation on the length of active duty service is extended. This extension applies to the period of active duty and may not exceed the maximum period the President is authorized to order, provided such active duty is at the request and for the convenience of the Federal Government. In addition, for reemployment rights to apply, the member must be discharged or released from active duty under honorable conditions and the member must apply for reemployment with the preservice employer within ninety days after separation from active duty.

For members called to active duty under the 200,000 Presidential Call-Up, the limitation on the period of active duty service is ninety days plus another ninety days if extended and the time of application after release from active duty is within thirty-one days.

The National Committee for Employer Support of the Guard and Reserve, an activity of the Department of Defense, conducts an ombudsman program to advise Guard members, Reservists, and their employers about their rights and obligations under the VRRRA. Inquiries to the committee ombudsman may be made through a toll-free telephone number, (800) 336-4560. The ombudsman is available during normal business hours (Eastern Time), Monday through Friday. (Virginia, Guam and the Commonwealth of Marianas, call collect (202) 696-5305.)

VII. CONCLUSION

Air National Guard and Air Force Reserve units and individuals, as part of the Total Forces, are the initial and primary source of augmentation forces in any emergency that requires rapid and substantial expansion of U.S. Air Force combat capability.⁵¹ It is critical that their transition from civilian to military life be as smooth as possible so that they can focus on the contingency and not problems at home. This article serves as a starting point for addressing some issues created during mobilization. Cited authorities always should be consulted to ensure the currency of the information.

51. AFR 45-1, para. 1.

The Resort to Force in International Law: Reflections on Positivist and Contextual Approaches

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I. INTRODUCTION

Resort to armed force is the most dramatic means of coercion available in the international political arena. Yet, in a relative sense, it remains unstructured, un-systemized, and unregulated. Lest the concerted effort to force the Iraqis from Kuwait during Operation Desert Storm lull the global community into a false sense of security that the new world order has arrived, one need only consider the instability that continues to plague the Middle East, the Balkans, the former Soviet Union, the African continent, and a myriad of other hot spots. The Cold War may be over and Security Council efforts to act in concert may have finally borne some fruit, but the continued use of force, for both noble and despicable ends, will remain a fact of life for the foreseeable future. That being so, continued study of the parameters governing this ultimate coercive mechanism remains essential.

In seeking to unravel those parameters, it is important to distinguish between the international and national systems. In national systems, the use of force is highly regulated by the state. Indeed, optimally the state controls all organized means for employing force through its legislative and police powers. It establishes norms concerning the degree to, and the circumstances under, which it may be used by the various components of the body politic—citizens, private organizations, and the state itself. Enforcement of the norms is the responsibility of the Government, which usually commands the most effective instruments of force, the police and military. Centralization of the means of force is the prevailing principle.

By contrast, the international system is characterized by an incredible degree of decentralization. Despite the existence of the United Nations and regional organizations like the North Atlantic Treaty Organization (NATO), the Organization of American States (OAS) and the Arab League—all of which exercise varying degrees of competence regarding the use of force—the autonomy implicit in the concept of sovereignty mitigates against a viable centralized security system such as that which exists within the borders of most modern nations. This seminal factor predetermines the nature and context of international norms concerning the use of force and the extent to which efforts to reshape them are likely to be successful.

At the outset, it is important to recognize that this writer discards any premise that the use of force is “bad” per se. While it is true that international law should seek to move the world community in positive directions, it does not follow that force should be rejected as an instrument in the effort to do so. On the contrary, use of force has, does, and will continue to contribute in certain in-

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stances to an improvement of the global condition. The issue is not which means of coercion are employed, but rather how, in what circumstances, and with what consequences.

In a vacuum, therefore, force exhibits neutral valence. That being said, the goal then becomes discovering a method for evaluating uses of force with both predictive and prescriptive accuracy. Two approaches are considered in this article, positivism and contextualism. The former, the prevalent approach in international law, is rule oriented and textual. In overly simplistic terms, it involves a search for, and application of, "the rule." Understandably, Article 38 of the Statute of the International Court of Justice posits the primacy of international conventions.¹ Look for the rule, use it to judge international acts, and attribute predictive significance to it.

By contrast, contextualism explores policy and practice. While it does not reject the importance of textual sources, it encourages looking beyond text to the context in which it emerged and that in which it is to be applied. Contextualism also acknowledges the purely aspirational character of certain "rules," and recognizes the normative ambiguity present in many others. As a result, it asserts that practice is often a better indicator than text of where effective international prescriptions lie. In this methodology, policy plays a central role. What policies animated a particular norm when first prescribed? Are they still valid? Does a purported norm actually contribute to fulfillment of its underlying policy basis? In what situations?

To unravel this distinction as it applies to the use of force, the positivist approach will first be analyzed, paying particular attention to the centrality of Article 2(4) of the United Nations Charter. That approach will then be assessed. The article will conclude with proposal of the contextualist methodology for evaluating the use of force. It is a methodology that finds its genesis in the pioneering work of Myres McDougal and Harold Lasswell at Yale Law School.² Subsequent refinements and development have been made over the years by numerous adherents of what has become known as the New Haven School or Policy oriented Approach, most notably W. Michael Reisman of Yale.³

Finally, the reader is due one cautionary note. This edition of *The Air Force Law Review* was conceived as a "hornbook" on operational law. Hornbooks, by their very nature, are positivistic. Yet those hoping to find a catalogue of rules in this article that can be applied in use of force scenarios are destined for disappointment, for the very idea of such a catalogue is rejected. Hopefully the contextual approach suggested will better equip judge advocates to provide that advice which policy-makers, in fact, need most, i.e., whether options under consideration are likely to be *judged* lawful by *the* international community and whether *they* will *contribute* to shared goals of minimum order.

1. Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, T.S. No. 993. The article provides that the Court should look to conventions, custom, general principles, judicial decisions, and scholarly works, in that order, to find the law. Essentially, it is a choice of law clause.

2. For a brief discussion of the policy oriented approach, see Schmitt, *New Haven Revisited: Law, Policy and the Pursuit of World order*, 1 USAFA J. LEG. STU. 185 (1990).

3. Indeed, the brilliant work of Professor Reisman provided much of the foundation for this piece. See, e.g., W. Michael Reisman, *Allocating Competences to Use Coercion in the Post-Cold War World: Practices, Conditions, and Prospects*, in 26 LAW AND FORCE IN THE NEW INTERNATIONAL ORDER (L. Damrosch and D. Scheffer eds. 1991); W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 Yale J. Int'l L. 279 (1985); and W. Michael Reisman, *The United Nations Charter and the Use of Force: Is Article 2 (4) Still Workable?*, PROC. AM. SOC'Y INT'L L. 68 (1984).

II. THE POSITIVISTIC APPROACH

The law of armed conflict is subdivided into two components, *jus in bello* and *jus ad bellum*. The former concerns techniques of warfare and is the product of a much longer lineage in international law than the latter. Both scholars and practitioners of the military art have long recognized that traditional *jus in bello* principles such as proportionality, necessity, and chivalry actually complement the time proven principles of warfare, including objective, mass, and economy of force. Legano, Vattel, Vitorio, Belli, Ayala, Gentili, Grotius, and Bynkershoek—all contributed to the rich heritage in international law of customary norms governing *how* force could be employed during conflict.

In the second half of the 19th century, the principles developed by these and other thinkers began to be codified. The first such effort was the 1856 Paris Declaration on Maritime War.⁴ Since then, the process of codification has proceeded almost ceaselessly. Be it through the Hague Conventions of 1907,⁵ the Geneva Conventions of 1949,⁶ the Additional Protocols of 1977,⁷ or the plethora of additional agreements on the use of force, codification has touched on nearly every aspect of warfare.

By contrast, the *jus ad bellum*, that law which governs resort to force, is relatively unexplored territory. Traditional approaches such as the Just War Doctrine, albeit historically and ethically compelling, never developed substantial normative effect.⁸ More contemporary efforts have likewise proved limited in scope and impact. The celebrated *Caroline* standard concerning the appropriate conditions for the resort to self-defense simply posits a narrow principle that excludes certain defensive actions from the category of an act of war.⁹ In the

4. 4 Declaration Respecting Maritime Laws, Mar. 30, 1856, 115 Parry's T.S. 1, also reprinted in 7 JOHN MOORE, A DIGEST OF INTERNATIONAL LAW 561 (1906).

5. Five of the conventions are particularly important. They are: (1) Convention Relative to the Opening of Hostilities, Oct. 18, 1907, 36 Stat. 2259, U.N. T.S. 538; (2) Convention Respecting the Laws and Customs of War on Land, and Annex, Oct. 18, 1907, 36 Stat. 2277, 2295, U.N. T.S. 539; (3) Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 Stat. 2310, U.N.T.S. 540; (4) Convention Concerning Bombardment by Naval Forces in Time of War, Oct. 18, 1907, 36 Stat. 2351, U.N.T.S. 542; and (5) Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of July 6, 1906, Oct. 18, 1907, 36 Stat. 2371, U.N.T.S. 543.

6. 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, T.I.A.S. No. 3362; Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364; and, Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365.

7. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), both reprinted in 16 I.L.M. 1391 (1977).

8. On the Just War Doctrine, see Schmitt, *At the Confluence of Law and Morality: Thoughts on Just War*, XXXII *Revue de Droit Militaire et de Droit de la Guerre* (in French) (1992), reprinted in English in 3 USAFA J. LEG. STU. (1992).

9. The *Caroline* incident involved a Canadian insurrection in 1837. After being defeated, the insurgents retreated into the United States where they recruited and planned further operations. The *Caroline* was being used by the rebels. British troops crossed the border and destroyed the vessel. Britain justified the action on the grounds that the United States was not enforcing its laws along the border and that the action was a legitimate exercise of self-defense. Then Secretary of State Daniel Webster responded, in what has become known as the *Caroline* standard, that self-defense should "be confined to cases in which the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for reflection." Letter from Daniel Webster to Lord Ashburton (Aug. 6, 1842), reprinted in 2 John Moore, DIGEST OF INTERNATIONAL LAW 411, 412 (1906).

Kellogg-Briand Pact of 1928, signatories "condemn[ed] recourse to war for the solution of international controversies, and renounce[ed] it as an instrument of national policy in their relations with one another."¹⁰ Yet the pact was binding only on signatories and only in their relations with other parties to the agreement. Indeed, in terms of effect, it has proven little more than aspirational. Even the Nuremberg Charter failed to offer a comprehensive ban on unilateral acts of force.¹¹

Thus, through the end of the Second World War, the use of force remained one of the many instruments of coercion available to states in the conduct of international policy. Those few prescriptions that at least arguably could be said to exist in the *jus ad bellum* were limited and of marginal impact on the way states conducted their affairs. This should come as no surprise given the systemic distinctions between the highly structured entity of the state and the unstructured nature of the world community. Absent a body that could authoritatively generate binding norms, as well as some means for interpreting and enforcing those norms, states continued to view resort to force as a necessary sovereign prerogative. For the constituent members of the state system, to have viewed the situation otherwise would have been foolhardy. After all, resort to force is the ultimate safeguard of a state's survival and often the only way its core interests can be advanced. At least until after World War II, to have renounced unilateral use of force in toto would have been to discard it into a vacuum.

With the creation of the United Nations in 1945, the situation appeared to have changed dramatically. A near absolute ban on the unilateral resort to armed force now seemed possible. The United Nations would serve as the authoritative legislative body, competent to issue binding norms in a variety of ways, interpret those norms through its primary organs (the General Assembly and Security Council), as well as the International Court of Justice), and enforce them under direction of the Security Council. Indeed, a central purpose of the United Nations was the preservation of peace.¹² This purpose that obligated all members to renounce unilateral forceful actions was made clear in Article 2(4): "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."¹³

The success of this prohibition was dependent on the rather complex collective security scheme envisioned in the Charter. Central to this scheme was the Security Council with its five permanent members (United States, China, Union of Soviet Socialist Republics, United Kingdom, and France) and ten nonpermanent members elected by the General Assembly.¹⁴ This body

10. Treaty Providing for the Renunciation of War as an Instrument of National Policy (Paris Pact, Kellogg-Briand Pact), Aug. 2, 1928, art. 1, 46 Stat. 2343, T.S. No. 796. The treaty was ratified by 66 nations, including the United States.

11. In Article Six, the Charter defines a crime against peace as the "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements, assurances, or participation in a common plan of conspiracy for the accomplishment of any of the foregoing." Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 27. Unilateral use of force and aggression are not equally inclusive categories. Thus, resort to force is only "criminalized" when it constitutes undefined "aggression" or violates international agreements.

12. Charter of the United Nations, Oct. 24, 1945, art. 1(1), 59 Stat. 1031, T.S. No. 993.

13. *Id.* art. 2(4).

14. Interestingly, in the selection of nonpermanent members special attention was to be paid to their contributions to the maintenance of peace and security. *Id.* art. 23(1).

determined when a situation amounted to a "threat to peace, a breach of peace, or act of aggression" and what measures were appropriate to deal with it.¹⁵

Though it was not obligated to do so, the Security Council could call upon the parties concerned to comply with provisional measures designed to address potentially disruptive situations. Failure of a party to do so was to be taken into account in later consideration of the matter.¹⁶ Pursuant to Article 41, the Council could also decide to implement measures not involving the use of force.¹⁷

The real enforcement power, however, was found in Article 42. In the event that the Security Council determined Article 41 measures were inadequate, or likely to be so, it could "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security." All member states were obligated to cooperate with the United Nations, and specifically the Security Council, in fulfillment of its enforcement duties.¹⁸ In essence, the Charter had created the centralized decision making apparatus that had heretofore characterized national systems, but eluded the international community.

In order to put teeth into this authority, the Charter called for formation of an international "police force" to deal with recalcitrant states. Each member was to furnish troops, facilities, and rights of passage to the Security Council in accordance with special agreements that were to be negotiated post haste on the initiative of the Security Council.¹⁹ Then, when needed, the Council would call upon the state to place the forces at the Council's disposal, allowing the state to participate in deliberations concerning employment of its contingent.²⁰ Because military assets might be required on short notice, members were to maintain rapid deployment forces of a strength and readiness set forth either in the special agreements or by the Security Council upon the advice of the Military Staff Committee.²¹

The framers did recognize that the imperative of the moment might at times require states to act before effective enforcement action could be taken by the United Nations. Thus, Article 51 sets forth the single exception to the prohibition on the unilateral use of force—self-defense, be it by individual or collective action. This right existed, however, only until the Security Council had the opportunity to take measures necessary to restore peace and security. Furthermore, states acting in self-defense were required to immediately report such activity to the Security Council. It was also specifically pointed out that a defensive operation by a state or group of states did not divest the Security Council of either the authority or responsibility to take whatever measures were necessary to maintain peace. Thus, Article 51 cannot be viewed as a broad

15. *Id.* art. 39.

16. *Id.* art. 40.

17. Specifically cited as nonexclusive actions were "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." *Id.* art. 41.

18. This obligation is reiterated in no uncertain terms twice in the Charter. In Article 2(5) all members are required to "give the United Nations every assistance in any action it takes in accordance with the ...Charter." At the same time, they are given an affirmative duty to "refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action." Similarly, Article 49 states that member states "shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council." Note the use of the non-discretionary term *shall*.

19. *Id.* art. 43. Comprehensive agreements were not to be forthcoming.

20. *Id.* art. 44.

21. *Id.* art. 45. This latter body, composed of the Chiefs of Staff of the five permanent members, as well as others invited by the Committee, was responsible for the "strategic direction" of the forces under United Nations control. Additionally, it could establish regional committees when authorized by the Security Council and after consultation with regional organizations. *Id.* art. 47.

exception to the policy of collective security under the mantle of the United Nations. on the contrary, it was merely a mechanism designed to allow survival of the victim state in the brief interlude before the United Nations could intervene.

Since promulgation of the Charter, the use of force as a tool of international policy has been repeatedly condemned, usually by reference to the Charter regime. In the *Nicaragua* case, for instance, the International Court of Justice, citing the work of the International Law Commission, characterized 2(4) as "a conspicuous example of a rule in international law having the character of *jus cogens*."²² The prohibition against the use of force has also appeared in a variety of other international instruments, particularly regional accords.²³ Even the United Nations itself has continued to articulate condemnation of the use of force in interstate relations, most notably in the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, and in the Definition of Aggression Resolution.²⁴ At least on paper, then, unilateral resort to force remains unlawful.

III. THE STILLBORN POSITIVIST SYSTEM

The positivist system envisioned in the United Nations Charter was for all practical purposes stillborn. The reason is simple: the Charter mandated constitutive, decisional, and enforcement processes that were consensus based. Unfortunately, as a result of the Cold War that consensus never developed. The apparent unity of vision that made possible adoption of the Charter quickly dissolved with the emergence of two contending public order systems. Henceforth, situations were to be viewed through the rose colored glasses of superpower competition.

With each side exercising a veto in the critical Security Council, the systemic basis for Article 2(4) failed to materialize. The Charter prohibition of unilateral resort to force was premised on the existence of a viable centralized collective security system. The theory was that states would not have to resort to force outside the Charter regime; they would merely refer threatened violations of their "rights" to the Security Council. Given the *de facto* absence of that remedy, however, states could not be expected to, nor did they, forego forceful options. As a result, Article 2(4) became nothing more than an aspirational, rather than prescriptive, norm. Though some might argue otherwise, when the

22. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 4, 90 (quoting Draft Articles on the Law of Treaties, [1966] 2 Y.B. INT'L L. COMM'N 247).

23. For instance, Article I of the Rio Treaty provides that the contracting states "formally condemn war and undertake in their international relations not to resort to the threat or the use of force in any manner inconsistent with the provisions of the Charter of the United Nations...." Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, art. I, T.I.A.S. No. 1838, 21 U.N.T.S. 77.

24. The Preamble to the former document provides that "it (is) essential that all States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any manner inconsistent with the United Nations...", while the later defines aggression as "the use of force by a State against the sovereignty, territorial integrity or political independence of another State, or in any manner inconsistent with the Charter of the United Nations." Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, preamble, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970), reprinted in 9 I.L.M. 1292 (1970); Definition of Aggression, art. I, G.A. Res. 3314, U.N. GAOR, 24th Sess., Supp. No. 3, at 142, U.N. Doc. A/9631 (1974), reprinted in 15 United Nations Resolutions (Ser. I) 392 (Susan J. Djonovich ed., 1984).

underlying prerequisite for a rule ceases to exist, so too usually does its normative effect.

The Charter prohibition fell prey to a number of other related and unrelated factors. Obviously the mere fact that two competing systems existed exacerbated tensions by generating disputes. At the same time, the nuclear stalemate that developed between East and West arguably encouraged resort to forceful means for settling international grievances by creating a threshold below which use of armed force was thinkable. Because the superpowers understood the suicidal implications of major conflict, they were rendered impotent to act as forcefully to situations as they might otherwise have lest they activate the escalatory ladder. The end result of the standoff was the spread of "little wars" and the emergence of a new category of violence, low intensity conflict.

Factors outside the Cold War context also served to render the Charter system inoperative. The requisite consensus was further hindered by the North-South divide, rifts generated by decolonization, religious conflict, and economically motivated divisiveness. Even technology played its part by empowering minor states and terrorists to engage in violence on a significant scale and, thus, constitute a destabilizing force to be reckoned with.

In the absence of the centralization and consensus upon which the Charter regime was premised, various states and groups of states began acting to water down the simple formula posed in 2(4). One significant trend has focused on the Article 51 right to self-defense. Article 51 operations had originally been intended as temporary measures that would allow maintenance of the status quo until the Security Council could act. Given, however, the clear gap between Charter theory and practice, self-defense was now characterized as a natural right of threatened states, an action to be distinguished from those constituting "aggression." The rule was simple enough: self-defense was legal, aggression was not.

Yet such a seemingly simple rule was replete with ambiguity. What constituted self-defense? How should anticipatory self-defense be viewed? What was aggression? At what level of violence did the aggression threshold lie? Did it matter who the actors were? Were there categories beyond the self-defense-aggression paradigm? Who was competent to judge what was and was not aggression? The fact that the processes and mechanisms of the Charter were dysfunctional enhanced the need for definitional clarity.

Such clarity would prove elusive. Most notably, the attempt by the General Assembly in 1974 to formally define aggression in the Definition of Aggression Resolution was destined for failure. Even the preamble invited imprecision: "The question whether an act of aggression has been committed must be considered in *light of all circumstances of each particular case*."²⁵ Proposals to craft a broad understanding of the term, one that might be so encompassing as to brighten lines of guidance, were rejected.²⁶

The drafters ultimately decided on a definition similar in text to Article 2(4) and purported to have neither enlarged nor diminished the scope of the Charter provisions.²⁷ Yet, the resolution provided that nothing in the definition "could in any way prejudice the right to self-determination, freedom and independence...of people deprived of that right...particularly peoples under

25. Definition, *supra* note 24, preamble.

26. One held that aggression is "applicable, without prejudice to a finding of a threat to the peace, to the use of force in international relations, overt or covert, direct or indirect...." Another included force "however exerted" within the ambit of aggression. Report of the Special Committee on the Question of Defining Aggression, U.N. Doc. A/8019 (1970).

27. Definition, *supra* note 24, art. 6.

colonial and racist regimes or other forms of alien domination.”²⁸ Furthermore, those who provided support to such struggles were not to be deemed aggressors.²⁹

That such politically charged and ambiguous caveats invite abuse should be obvious. That they do little to fill the theory–practice gap in the Charter system should be equally clear. Norms remain uncertain. More importantly, given the diverse political perspectives existing within the world community, posing the aggression–self–defense paradigm in this fashion is only likely to exacerbate the lack of consensus and disincentives to centralization that have plagued the Charter formula. Nevertheless, a similar approach has been taken in an array of other efforts to regulate resort of force.³⁰

Post–Charter history has aptly demonstrated the extent to which the positivist approach of those who would look for guidance to the Charter and later documents pronouncing rules regarding the use of force is devoid of normative and predictive value. One need only look to the unwillingness of the World Court to effectively sanction Great Britain in the *Corfu Channel* case,³¹ the Security Council’s refusal to label Argentina an aggressor despite its characterization of the Falklands invasion as a breach of peace,³² or the legal gymnastics of the International Court of Justice in the Nicaragua affair³³ to understand how supposedly authoritative text can fail to serve as a guide to either action or evaluation of lawfulness. In the absence of a centralized constitutive system capable of generating, interpreting, and enforcing rules in an authoritative fashion, we are often forced to look beyond rules if we are to discover where “law” really lies.

IV. THE MYTH SYSTEM AND OPERATIONAL CODE

To understand the dynamics of the international law regarding use of force, a distinction must be drawn between myth systems and operational codes.³⁴ The first is composed of formal legal formulae, such as that expressed in Article 2(4). Laymen, and indeed many lawyers, approach legal issues from this perspective. The technique used to discover the myth system is familiar: research and identify norms expressed in formal sources of law such as treaties. This approach makes international lawyering easy. Characterize the issue at hand, and then retire to the library in search of a purportedly applicable authoritative pronouncement.

A number of problems arise, however, with the positivist methodology. In the first place, despite their seemingly obligatory character, many “rules” expressed in formal instruments are aspirational in character. They do not express norms that are in fact binding, but rather those that members of the world community

28. *Id.* art. 7.

29. *Id.*

30. For example, the International Convention Against the Taking of Hostages excludes situations “in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self determination.” Art. 12, Dec. 19, 1979, U.N. Res. 34/146, U.N. GAOR, 34th Sess., Supp. No. 46, at 245.

31. *Corfu Channel (United Kingdom v. Albania)*, 1949 I.C.J. 4.

32. S.C. Res. 502, Apr. 3, 1982.

33. *Paramilitary Activities*, *supra* note 22.

34. This distinction is developed in W. MICHAEL REISMAN & JAMES BAKER, *REGULATING COVERT ACTION: PRACTICES, CONTEXTS AND POLICIES OF COVERT COERCION ABROAD IN INTERNATIONAL AND AMERICAN LAW* 23–24 (1992); and, W. MICHAEL REISMAN, *JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW* 23–35 (1987).

would like to exist. It is one thing to say that the unilateral use of force should be unlawful; it is quite another to say it is. Clearly, in the postwar period the 2(4) prohibition has not served as a binding norm on states, for the use of force has occurred repeatedly across the spectrum of violence and often with the acquiescence of the international community. Nor has it served as a universally revered criterion against which state actions are *judged*. This divergence between the myth system and the way states actually act is telling.

An additional flaw in the approach is that it fails to account for changing contexts. Lawmaking does not occur in a vacuum. On the contrary, it reflects the concerns and intentions of elite actors at the time of promulgation, *in light of the conditions then prevailing*. It also often presumes the existence of certain conditions. Over time though, the composition of relevant political elites may change, as may the context in which the norm was intended to operate. Further, the conditions required for operation of the norm may cease to exist. Thus, while a particular norm might have constituted more than merely an aspirational pronouncement when it came into being, the progression of time may have eroded its contextual basis. Should that occur, a decay in prescriptive effect is inevitable. Article 2(4) has certainly fallen victim to this process. Even if it accurately reflected an effective binding norm in 1945, a dubious assertion at best, the context in which it was designed to operate disappeared within a few years. The United Nations never exercised the constitutive competence intended, the interpretive function of both itself and the International Court never operated in a comprehensive and authoritative way, and the enforcement mechanisms have never performed as intended. Even collective security efforts during the Gulf War, perhaps the best example of effective United Nations enforcement action since creation of the organization, failed to fully approximate Charter processes and mechanisms. In particular, Coalition operations did not operate under the guise of the United Nations, but instead were the product of U.N. authorization pursuant to Resolution 678 for member states to take whatever actions were necessary to expel the Iraqis from Kuwait.³⁵

Characterization of Article 2(4) and other textual prescriptions as a myth system does not mean states may employ force with impunity. Instead, a complex operational code governing the use of force, based upon the behavior of elites, has emerged to fill the void. It is the actual, albeit unofficial, normative system that is applied. In order to discover the parameters of the current operational code, actions and reactions must be carefully studied. Only then do criteria of "lawfulness" emerge against which forceful operations can be evaluated prospectively and judged retrospectively; only then can the expectations of politically relevant actors—law—be ascertained.

The operational code is evident in even a cursory survey of international reactions to roughly analogous acts. When the Israelis bombed the Iraqi pre-operational nuclear reactor near Baghdad in 1981, world condemnation was rampant. Yet when the Coalition forces undertook precisely the same type of missions during the Gulf War, applause followed. When Argentina moved on the Falklands pointing to historical rationales over a century old, the act was not labeled aggression by the United Nations. When Iraqi forces invaded Kuwait citing twentieth century history and anticolonial motives, the United Nations not only branded the action aggression, but authorized the use of force to expel them. The world community accepted Tanzania's 1979 overthrow of Idi Amin's

35. S.C. Res. 678 (Nov. 29, 1990), reprinted in 29 I.L.M. 1565 (1990). On this resolution, see Burns Weston, *Security Council Resolution 678 and Persian Gulf Decision Making: Precautions Legitimacy*, 85 AM. J. INT'L L. 516 (1991).

dictatorship in Uganda, but criticized Viet Nam's unseating of the at least as bloody Pol Pot regime the same year. The 1979 Soviet invasion of neighboring Afganistan resulted in United Nations calls for withdrawal; four years later when the United States invaded Grenada, the United Nations remained silent.

Criticism of such comparisons proves the point sought to be made. Though arguably similar in the abstract, each of the incidents occurred in a different context, with differing community policy concerns at stake. They prove the fallacy of the positivist approach. It is simply impossible to refer to textual sources and derive any coherent formula that can explain the varied reactions vis-a-vis lawfulness to these incidents. Instead, to understand them, to distill the normative lessons they represent, it is necessary to look for contextual differences, to evaluate those differences, and then to draw broader based conclusions that can be applied outside the specific scenario. Only by doing so can the operational code, the "law" that really matters in international affairs, be discerned. Myth systems may be neat and orderly and appeal to the international scholar or lawyer for those very reasons; but they do little for the policy maker wondering whether particular options will be judged lawful or unlawful by the world community.

V. OPERATIONAL CODE FACTORS

Ascertaining the operational code with any degree of accuracy or specificity is a complex and difficult process.³⁶ Unfortunately, discussion of the techniques for doing so is beyond the scope of this article. Their common core, however, is context analysis. Context analysis forces one to reflect on the fine distinctions that underlie elite expectations by directing attention to issues of variable relevance and contextual significance.

To make contextual analysis manageable, it is useful to categorize the factors influencing that which is being considered. One must ask who is doing what, when, where, how, to whom, why, and with what result. Only after every factor has been fully analyzed can conclusions as to lawfulness be made.

The remainder of this article is devoted to a discussion of each of these eight issues as they apply to the use of force. Broad generalizations will be made, generalizations that must be cautiously applied. Usually, no one factor will be determinative. To note, for instance, that self-defense is a highly acceptable rationale for the use of force does not mean that every defensive act will ultimately be deemed appropriate. Additionally, contextual analysis is not a checklist process. Instead, it is a comprehensive study of all aspects of a situation and of how those aspects operate in an interrelated, and often synergistic, fashion.

Finally, the points discussed are not to be considered all inclusive. Indeed, such a catalogue is an impossibility, for the influences on elite expectations are as countless as the variety of situations to which the expectations could potentially be applied. Those set forth below, therefore, are merely illustrations of the more common factors that policy makers will face.

36. Professor Reisman and his colleagues have proposed two techniques for doing so: international incidents studies and application of the communications model. On incidents studies, see *INTERNATIONAL INCIDENTS; THE LAW THAT COUNTS IN WORLD POLITICS* (W. Michael Reisman & Andrew R. Willard eds. 1988). The communications model is described in W. Michael Reisman, *International Law-making: A Process of Communication*, *PROC. AM. SOC'Y INT'L L.* 101 (1981).

A. Who and to Whom

Characterizing as relevant the issues of who acts and upon whom is perhaps troubling to those who would believe that international law should apply equally to all, that it should manifest a sort of quasi equal protection standard. Yet it does not. Like it or not, the identities of the actor and its target are critical variants of the operational code.

First and foremost, in today's state oriented system, the actions of states are deemed more acceptable than those of nonstate actors. The debate over the existence of a Palestinian state under international law is reflective of this concern. Similarly, acts undertaken by nonstate actors are often deemed illicit terrorism, while precisely the same operations conducted by states may not be. This distinction derives from the fact that the manageability of violence is dependent on the organizational structure in which it occurs. The international community consists of states; thus, the processes of international relations, particularly in the realm of conflict, are premised on the acts of such entities. Because the use of force by nonstate actors introduces a novel variable into accepted equations, it is less tolerable.

Collective action by a group of states, particularly under the auspices of a recognized regional or international organization, enjoys greater acceptance. Even if the military forces involved do not act under direct operational control of an international body, affirmative approval by these entities of the use of force by a single state or multiple states working in concert enhances the likelihood the action will be deemed lawful. Recent events in the Middle East such as Desert Storm and Provide Comfort illustrate the importance of acting collectively. Similarly, the very existence of collective security alliances like the North Atlantic Treaty Organization exemplifies the legitimizing function of collectivity in use of force options. In sum, the more inclusive a symbol of authority the group acting is, the more acceptable the act.

It is also important to recognize that the character of the state that acts influences assessments of legality. Democratic regimes have greater latitude in the international arena than those which are not. It is a simple fact that the use of force by states such as Libya or Iraq are more suspect than those by stable regimes committed to minimum order.

The factor towards whom the actions are directed reflects many of the same influences. Operations against nonstate actors like terrorists are tolerated to a greater degree than those against states. When Israeli commandos killed Abu Jihad in Tunis in 1986, for example, criticism in the United Nations focused on the violation of Tunisia's sovereignty and territorial integrity, not on the assassination. Likewise, when the target state is viewed as exercising a "right" by the international community, or significant portions thereof, actions against that state are likely to be condemned. This point is aptly illustrated in the present disapproval of Serbian actions in the former Yugoslavian republic. Finally, the "good guy-bad guy" factor plays a role as well. For instance, though the Iraqis were at least arguably the aggressors in the Iran-Iraq war, prior wrongful actions by the Iranians such as the hostage seizure had so ostracized them in the international community that criticism of the Iraqis was muted. Yet when Iraq attacked Kuwait in 1990, its actions were widely condemned. Though a wide variety of factors accounted for this difference in reaction, the international community's differing views towards Iran and Kuwait were certainly relevant.

B. What and How

In assessing what is being done and how, consideration of three traditional criteria borrowed from the *jus in bello* is essential—necessity, proportionality, and discrimination as to target. *Jus ad bellum* necessity queries whether force was necessary at all³⁷ and, if so, whether the method employed was of the type actually needed to preserve the threatened right. For example, territorial invasion is likely to be deemed excessive when bombing critical command centers would cause the target to desist. Necessity also has a temporal component. Even if the particular action is necessary in terms of genre, it should not extend beyond a period required to effectuate intent. Therefore, in a humanitarian intervention, for instance, intervening troops should generally withdraw once the *raison d'être* of the operation is realized.

Proportionality, by contrast, focuses on the wrong suffered and the right asserted. A major territorial invasion of a state guilty of wrongful minor cross border incursions might be seen as unjustified because it is disproportionate both to the act of crossing a neighbor's border in a manner not amounting to full fledged invasion and to the *harm* resulting from such an action.

Operation Peace for Galilee, the Israeli invasion and occupation of southern Lebanon in 1982, illustrates these distinctions. Arguably, the Israelis were entitled to move on Palestinian forces finding sanctuary across their northern border when the Lebanese and Syrians were unable or unwilling to stop PLO attacks on Israel. The criticism was not that the Israelis acted. Rather, it was that lesser actions, in particular ground operations of much more limited scope, might have sufficed (necessity). At the same time, the large scale invasion was seen as an overreaction in light of both the sporadic nature of the Palestinian acts and the limited threat they posed to the Israeli state (proportionality). Though many, including this commentator, might not fully concur with these assessments, they, nevertheless, highlight application of the factors.

The third criterion, discrimination, finds particular applicability in actions taken against dictatorial regimes that do not enjoy popular support, for the world community will often distinguish between wrongs of a leadership and those of its population. Thus, even when necessary and proportional, forceful options are less likely to be seen as acceptable the more they affect the population. For example, all other things being equal, air or naval options may be favored over ground operations because they are more surgical. Similarly, when the proposed operations have impact beyond the target state, discrimination comes into play. This discrimination is evident in the greater acceptability of contraband over blockade operations.³⁸ To summarize, necessity has to do with what is needed to make the wrongful state desist, proportionality focuses on what wrong has been committed and in what manner, and discrimination addresses who possible responses will affect.

C. When

The issue of when an action is taken, particularly as it relates to self-defense, has traditionally been tied to the imminency of the threat. The classic

37. The extreme variant of this approach is the "exhaustion rule." It requires exhaustion of all possible peaceful remedies prior to resort to force. As a "rule," I reject it here. Instead, the existence of peaceful remedies is merely one factor which should be considered contextually. In particular, the viability of peaceful remedies should be considered in light of the case at hand.

38. For a discussion of this distinction, see Schmitt, *Aerial Blockades in Historical, Legal, and Practical Perspective*, 2 *USAFA J. LEG. STU.* 21 (1991).

articulation of the standard was provided by Secretary of State Daniel Webster during the nineteenth century *Caroline* incident. According to Webster, the need to act had to be "instant, overwhelming, and leaving no choice of means, and no moment for deliberation."³⁹ Mere preparation was insufficient to justify a forceful response, a principle cited approvingly by the Nuremberg Tribunal.⁴⁰

As I have noted elsewhere, this approach in its purest sense is inadequate.

[I]mminence is a relative criterion. As defensive options become more limited or less likely to succeed, the acceptability of preemptive action increases. A weak state may be justified in acting sooner than a stronger one when facing an identical threat simply because it is at greater risk in having to wait. The greater the *relative* threat, the more likely preemptive actions are to be effective, and, therefore, the greater the justification for acting before the enemy can complete preparations and mount its aggressive attack....⁴¹

Certain situations exist especially those involving terrorism and nuclear threats, where even the relative understanding of imminence breaks down. Given the difficulty of tracking and targeting terrorists, it may be foolhardy to wait to react until the last moment, because identifying that moment may well be impossible. Similarly, once an avowed enemy acquires the capability to employ nuclear weapons, and has reliably indicated a willingness to use them at some indefinite point in the future, to wait until it appears clear that an attack is imminent may be to wait too long. The bombing of Iraqi nuclear potential assets in the Gulf War is apt recognition of this point. Thus, the issue of timing is not one of imminence, but rather one of determining where the last possible window of opportunity lies. Assessment by the international community will, therefore, depend more on whether the state acted when it was necessary to do so, than on the temporal proximity of the action to the threat that motivated it. The question is not when did a state act; it is when did a state *have to* act given all relevant circumstances.

D. Where

States are not equally free to act across the globe. The existence of spheres of influence, or more accurately critical defense zones, has been long recognized in such policies as the Monroe, Brezhnev, Carter, and Reagan doctrines.⁴² The area may be geographically based as in the Monroe and Carter doctrines, or it may focus on the political system of the state in which the action is contemplated, as with the Brezhnev and Reagan variants. Regardless of basis, however, it is indisputable that the leeway a state has to act forcefully often depends on where it does so. For years the United States had greater leeway in South America and the Caribbean, than it did elsewhere. Similarly, the Soviet Union could move with greater impunity in Eastern Europe, than it could, for example, in the Middle East.

The extent to which this is the case depends on the effectiveness of a state in communicating its interest in a particular area, and the world community's

39. Webster Letter, *supra* note 9.

40. *International Military Tribunal (Nuremberg). Judgement and Sentences*, 41 AM. J. INT'L L. 172, 205 (1947).

41. Schmitt, *State-sponsored Assassination in International and Domestic Law*, 17 YALE J. INT'L L. (1992).

42. On this topic see, W. Michael Reisman, *Old Wine in New Bottles: The Reagan and Brezhnev Doctrines in Contemporary International Law and Practice*, 13 YALE J. INT'L L. 171 (1988).

acceptance of (or mere acquiescence in) the fact that a special interest should exist. Of course, the end of the Cold War, and of the division of the global body politic into two predominant systems of public order, diminishes the impact of this factor to some extent. Nevertheless, the relative interests of states in various areas will continue to differ, and judgments as to lawfulness will continue to depend in part on acknowledgment of those interests.

E. Why and With What Result

The positivist approach has sown its greatest confusion in its categorization of the use of force, for it invites a value neutral application of the myth system, one in which consequentiality is absent and maintenance of the status quo is encouraged. Whether it be by application of the Article 2(4) standard or the aggression–self–defense paradigm, a tendency exists to focus almost exclusively on the category to which a particular use of force can be assigned in ascertaining lawfulness; hence, the sometimes elaborate efforts to label nonself–defense actions as self–defense.

In fact, it is not the objective label that underlies the operational code, but rather the actor's subjective intentions, the context in which those intentions operate, and the consequences thereof. It is perhaps useful to think in terms of a community hierarchy of relative need. The more significant the needs of the actor state when considered in light of the interests of the target state, the more likely an act is to be considered lawful. Under this approach, needs may range from survival to self–actualization. This approach explains the broad consensus on the legality of self–defense, for it is inevitably grounded to some degree in the survival of the state or its population. Generally, only countervailing survival concerns can bring defensive actions into question. On the other hand, the use of force to secure economic advantage is generally considered unlawful, for the needs of the actor state will usually be outweighed by that (survival) of its target.

It is important to realize that the hierarchy of community needs continually evolves over time. Before this century, needs, such as the right to participation in the political process, were not considered especially significant. At the same time, the general acceptability of warfare as an instrument of international policy suggested that needs like economic well–being were of greater significance than they are today.

In the twentieth century that acceptability has changed dramatically. Since the Second World War in particular, self–determination and political independence, often in the form of decolonization, have become uniquely compelling needs and now determine elite expectations to an unprecedented degree. As one commentator has perceptively noted, the “fundamental postulate of political legitimacy in our century has become the right of peoples to shape their own political community and to freely chose governments that are responsive to their wishes and whose actions are consistent with overarching international human rights norms.”⁴³ Condemnation of the Soviet attempt to bolster, contrary to public will, the Karmal regime in Afghanistan is but one example of this trend.

A corresponding trend has been a slight shift of focus from the state to the human condition. With the rise of human rights as an accepted, albeit unfulfilled, community goal, the emphasis on the centrality of sovereignty and territoriality has diminished to some extent. For instance, humanitarian intervention has grown in acceptability, a point illustrated by the lack of meaningful elite condemnation of operations to protect the Kurds in northern Iraq. Human rights

43. Reisman, *Allocating Competences*, *supra* note 3, at 45.

goals have necessitated a related shift away from giving automatic preference to the status quo. States can no longer shroud themselves in the garb of sovereign prerogative while abusing their own people. Since community expectations now incorporate norms of human dignity, actions to remove oppressive governments may be deemed lawful. The lack of negative reaction to Tanzania's removal of Idi Amin was a clear example of this premise.

Therefore, when determining elite expectations, it is no longer possible to take a strictly statist, status quo approach. On the contrary, goals and policies that focus on the maintenance of the world community's basic structural unit, the state, will often give way to those that address the needs of its most basic component, the global citizen. Similarly, the present condition will not be automatically favored over potentially more enlightened alternatives.

Ultimately, then, the process of ascertaining elite expectations—lawfulness—necessitates consideration of both the purpose of the act and its consequences. It is a balancing process, with the weight of purpose and consequence determined contextually. These are the critical factors in the operational code, the ones most likely to be determinative.

VI. CONCLUSION: WHERE TO FROM HERE

Recent events have raised questions concerning where the norms regarding the use of force are headed. Of greatest significance is the end of the Cold War. It was argued above that the existence of two contending systems of public order rendered fulfillment of the Charter scheme impossible. Has the demise of this division now made that scheme viable?

Unfortunately, I think not. It must be remembered that the collective security system is based in the Security Council, which in turn depends on consensus among the five permanent members. The theory was that this alliance of powerful World War II victors would make collective security actions possible. The Council, however, is no longer made up of the global community's five strongest states. Notably absent from its chambers are reunited Germany and economically potent Japan. At the same time, Russia, although still controlling significant military assets, lacks the often determinative influence exercised by the Soviet Union only a few years ago, while China, the last major bastion of discredited Communism, has become increasingly peripheral. It is even difficult to justify favored treatment of France and Great Britain given their relative strength when compared to certain other excluded states. Only the United States exhibits the global status to merit unquestioned membership in the Big Five.

The Security Council, therefore, lacks the authoritative competence required to credibly revitalize collective security as set forth in the Charter.⁴⁴ This does not mean the United Nations will never respond to threats to peace. It does mean, however, that in the foreseeable future the prospects of the United Nations providing the centralizing function necessary to effectuate Article 2(4) prescriptions in any comprehensive fashion are slim. As currently structured, the United Nations simply does not comport with the contemporary international context.

Despite these structural inconsistencies, does the collective international response to Iraqi aggression, nevertheless, indicate that an era of collectivity has arrived? Again, I think not. Only the United States and Great Britain perceived a

44. Restructuring the Council to reflect authoritative realities is an interesting possibility meriting exploration, but is unfortunately beyond the scope of this article.

systemic danger in the Iraqi invasion, and U.N. approval of individual actions (albeit joint) in Security Council Resolution 678 was only possible after certain concessions were made to secure Soviet and Chinese acquiescence. Indeed, it was only U.S. resolve that made Desert Storm possible. Future operations of international, as opposed to regional, scope will continue to depend on U.S. willingness to participate.

Arguably, in one sense the world is likely to be an even more violent place than it was in the past. Superpower competition was to some extent stabilizing. There may have been conflict between the two systems, but within those systems it was muted. The demise of the Cold War has resulted in fragmentation as the order imposed by the superpowers diminishes. Islamic fundamentalism has proven ever more divisive as the United States and Soviet Union increasingly lost influence in the region. The fall of the Iron Curtain released pent up nationalistic feelings in Eastern Europe that have expressed themselves violently. As interest in the Third World faded, traditional divisions have reemerged and are playing themselves out unconstrained by superpower mentors.

If anything, the global community is becoming less centralized, with the result that international control over unilateral use of force will remain heavily contextual. In this situation, positivism continues to offer little to those seeking to understand the predictive and prescriptive effect of international law. Instead, we must continue to search for new trends in the operational code, such as the increased attention paid by the global community to human rights.

Ultimately, the lesson is the fallacy of evaluating the use of force in terms of precise conformity to the myth system. Instead, force must be judged by the extent to which it contributes to the peace and security of the global community, minimum world order, and fosters the widest possible sharing of values, optimum world order. It is this pursuit of world order that most animates the legal system in which legal advisors, to those who execute the most powerful instrument of coercion—warfare, operate. It is the responsibility of legal advisors to seek a fuller understanding of it.

Executing U.S. Foreign Policy Through the Country Team Concept

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Foreign Policy

—the policy of a sovereign state in its interaction with other states

—Webster's Dictionary

—the sum of all the attitudes reflected in myriads of relationships and numberless points of contact that one nation has with others, large and small. For a country like the United States it is the sum of all the attitudes revealed in thousands of telegrams daily between the Department of State (and other departments) and more than a hundred foreign missions, mostly about small subjects: a citizen claims an inheritance in a foreign land; a company wishes to do business abroad; an extradition treaty is negotiated; there is a request for economic aid or a research reactor; a head of state will come to visit; a public statement is explained, or explained away.

—L. Henkin¹

I. INTRODUCTION

Reflecting Webster's broad view, most analysis of foreign policy is from a macro or top-down perspective, whether the focus is on substance or procedure. It typically begins with the constitutional delineation of executive and legislative roles, and then pursues the inevitable struggle among competing institutional interests, both interbranch and intrabranch, when war powers, foreign aid, budget priorities, and similar themes enter the picture. Although the "constant invitation for conflict"² offered by our constitutional arrangements offers more weighty discussion, this article approaches foreign policy from the micro perspective alluded to by Henkin above—the smaller chores performed daily by a wide assortment of U.S. Government agencies. Also, since volumes can be written on even the minutiae of U.S. foreign policy, the focus herein is further narrowed to process rather than substance—executive branch interagency process to be more precise—with an emphasis on the overseas setting.

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1. L. HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 13 (2d ed. 1979).

2. 3 Problems & Prospects of Presidential Leadership in the Nineteen-Eighties 19 (J. Young ed. 1983) (interview with Hans J. Morgenthau) [hereinafter 3 Presidential Leadership].

An interdisciplinary scope is an added feature. No doubt military personnel already are familiar with some of the other U.S. Government agencies present overseas. Yet, most probably are not fully aware of the size of this presence, the variety of undertakings involved, and the tremendous challenge for the U.S. Ambassador to keep everyone marching to the same drummer. This article should help sort out the players and their missions.

Central to today's foreign policy-making process overseas is the Country Team concept. Predating the Country Team, however, was an era in which inter-agency participation was haphazard.

II. DEVELOPMENT OF INTERAGENCY PARTICIPATION IN FOREIGN AFFAIRS

Both the Country Team concept and broad interagency participation and co-operation in the foreign policy-making process are relatively recent developments in U.S. history. For more than 150 years, the development of foreign policy was dominated more by the personalities of presidents and secretaries of state rather than government institutions and processes.³ To some degree, this domination was only natural given the small size of the existing bureaucracy. The first Secretary of State, Thomas Jefferson, headed a department consisting of but five clerks, two messengers, and a part-time French translator, and only ten more employees were added to the department during the ensuing thirty years.⁴

Personality transcended process from the beginning, initially highlighted in the personal diplomacy of towering statesmen such as the Franklin-Adams-Jefferson triumvirate.⁵ Frequently, personal diplomacy manifested itself in personal conflict, as when Thomas Jefferson resigned as the first Secretary of State in frustration over Washington's reliance on foreign policy advice from Treasury Secretary Hamilton.⁶ Similar examples followed: John Adams fired his Secretary of State for trying to sabotage Adams' foreign policy, with which the Secretary of State disagreed;⁷ Grant's Secretary of State threatened to resign if Grant did not stop receiving foreign policy advice from a group of old army buddies, who the Secretary referred to as "this Army influence—this backstairs, Kitchen-Cabinet;"⁸ and Wilson fired his Secretary of State merely for convening a Cabinet meeting while Wilson was ill.⁹

Without question, Franklin Roosevelt's administration was most guilty of permitting personality to dominate the foreign policy process.¹⁰ Roosevelt let his inherent distrust of the State Department guide his decision making and he frequently cut Secretary of State Hull and the secretaries of War and Navy out of the foreign policy-making process.¹¹ He sometimes considered diplomacy his

3. See T. Etzold, *The Conduct of American Foreign Relations* 64-5 (1977).

4. Cong. Q. Inc., *Cabinets and Counselors: The President and the Executive Branch* 97 (1989) [hereinafter *Cabinets & Counselors*].

5. A. DeConde, *The American Secretary of State: An Interpretation* 37 (1962).

6. Etzold, *supra* note 3, at 64; B. Baker & S. Friedelbaum, *Government in the United States* 418 (1966).

7. DeConde, *supra* note 5, at 33.

8. *Id.* at 27.

9. Baker & Friedelbaum, *supra* note 6, at 118.

10. See DeConde, *supra* note 5, at 24.

11. *Id.* at 20, 24, 103-05; Baker & Friedelbaum, *supra* note 6, at 418; 1 *Problems & Prospects of Presidential Leadership in the Nineteen-Eighties* 6 (J. Young ed. 1982) [hereinafter 1 *PRESIDENTIAL LEADERSHIP*].

personal preserve and did not hesitate to launch diplomatic initiatives without Hull's knowledge.¹² Occasionally, he invited foreign policy advice directly from other senior administration officials, including the Vice President and secretaries of Agriculture, Interior, and Treasury.¹³ Even more damaging to the foreign policy process, Roosevelt frequently received advice directly from Hull's own subordinates without Hull's knowledge.¹⁴ Not only was Secretary of State Hull uninformed on key foreign policy issues, but Vice President Truman learned of the existence of the atom bomb only after Roosevelt's death.¹⁵ General George Marshall claimed that following Roosevelt's conferences with Churchill during World War II (WWII) he and the other service chiefs often had to go to the British Joint Staff Mission in the Pentagon to learn what key decisions their Commander-in-Chief had made.¹⁶

Inevitably, daily management of the nation's foreign policy process became too complex to be driven by presidential peccadillo.¹⁷ Predating major change in the management process, however, was transformation of the Department of State from a small, old-boy network to a growing, professional organization with passage of the Rogers Act in 1924.¹⁸ Prior to 1924, State had a reputation for being an elitist organization.¹⁹ As a result of low pay (in some cases no pay) and the manner in which diplomatic appointments were made at the time, the Foreign Service came to be dominated by sons of wealthy establishment families.²⁰ Among other things, the Rogers Act raised salaries, consolidated the Foreign and Consular Services, and opened a competitive path for entry-level personnel to rise through the ranks to become career ambassadors.²¹ It provided a basis for the increased sophistication of American foreign policy, a development enhanced in the mid-1950s when the Foreign Service and State Department personnel systems were partially merged and further expanded.²²

A landmark shift in the foreign policy center of gravity came with WWII and its aftermath. Recall that the U.S. Government's overseas presence prior to WWII was minimal by today's standards. The wholesale deployment of military forces overseas common during the postwar era was largely non-existent. Even State's presence was relatively primitive, with consulates and legations more prevalent than embassies. For example, only thirteen American ambassadors were serving abroad in 1925.²³ Even when State had a significant presence, other departments

12. BAKER & FRIEDELBAUM, *supra* note 6, at 418; DECONDE, *supra* note 5, at 103-05.

13. DECONDE, *supra* note 5, at 25-26.

14. *Id.* at 25, 105.

15. HENRY KISSINGER, NUCLEAR WEAPONS AND FOREIGN POLICY 84 (1969).

16. 1 PRESIDENTIAL LEADERSHIP, *supra* note 11, at 67.

17. *But see* ETZOLD, *supra* note 3, 118-19, for evidence that Presidential micromanagement is always a factor during a crisis, citing State's Dominican Republic Desk Officer's description of events during the Dominican crisis of 1965: "On Friday I was Dominican Desk Officer; by Friday night [Secretary of State Dean] Rusk was; and by Sunday noon Lyndon Johnson was." *Id.* at 21-22.

18. Rogers Foreign Service Act, ch. 182, 43 Stat. 140 (codified as amended in scattered sections of 22 U. S.C.). ETZOLD, *supra* note 3, at 35, 51. The greatest period of growth actually came with WWII. The State Department staff in Washington, D.C. grew from 963 to 4198 between 1938 and 1948. J. SPANIER & E. USLANER, HOW AMERICAN FOREIGN POLICY IS MADE 36 (1975).

19. ETZOLD, *supra* note 3, at 23, 27.

20. While the elitist nature of the Foreign Service certainly has been diminished, there are those who argue it has not been eliminated entirely. *See* R. HILSMAN, THE POLITICS OF POLICYMAKING IN DEFENSE AND FOREIGN AFFAIRS 186-87 (1987).

21. ETZOLD, *supra* note 3, at 35.

22. *Id.* at 52-53; BAKER & FRIEDELBAUM, *supra* note 6, at 420. It should be noted that the State Department still maintains a dual personnel system—Foreign Service Officers and Civil Service employees—but the "Wristonization" (from the "Wriston" Committee studies) of the 1950s lowered the barrier to movement back and forth between the two systems. W. BACCHUS, STAFFING FOR FOREIGN AFFAIRS 5, 138 (1983).

23. ETZOLD, *supra* note 3, at 53.

had long encroached on State's supposedly exclusive territory, and the growing influence of the Departments of War, Navy, and Treasury may have eclipsed that of State in a handful of countries.²⁴ Still, few doubted that both in theory and practice State was, pre-WWII, preeminent overall.

World War II caused a major shift in influence from State to the military, or at least military themes.²⁵ Principal explanations given include Secretary of State Hull's willingness to relinquish power to the military so Japan could be appropriately punished for diplomatic perfidy; the dominant roles military men like MacArthur, Eisenhower, and Marshall played in the postwar years; and America's rejection of the philosophy epitomized by Neville Chamberlain and the "Munich syndrome—substituting in its place a tough military pragmatism in dealing with communist adversaries considered "impervious to reason."²⁶ Perhaps a more lasting explanation is that WWII permitted the military to build strong constituencies in the public by capitalizing on the public's patriotic support for those who had won the war, by strengthening the growing arms industry, and by guaranteeing the political clout through large numbers of veterans; State, the smallest department in both size and budget, had no such constituencies.²⁷

What largely completed the evolution toward unrestrained interagency participation in foreign affairs and created the foreign policy-making structure and process we know today was passage of the National Security Act in 1947 and amendments thereto in 1949.²⁸ Passed in response to congressional pique with the failure of presidents to consult their major foreign policy advisors²⁹ and concern over the high cost of national defense,³⁰ the Act (as amended) established a National Security Council (NSC) and staff headed by a National Security Advisor "to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security."³¹ The Act also created the Central Intelligence Agency (CIA), provided statutory authority for the Joint Chiefs of Staff (JCS), and consolidated the military services under a newly created Department of Defense.³² The Act also dictated the NSC membership to include the President, Vice-President, and secretaries of State and Defense, with the CIA director and JCS chairman as advisors.³³

Perhaps the most significant effect of the Act, reflected in the NSC's composition, has been to elevate further the military aspect of foreign policy at the expense of traditional diplomacy,³⁴ at the same time allowing the NSC to join DOD as a major rival to State in the foreign policy-making process.³⁵ Yet, this grow-

24. See *id.* at 67-69. See generally BACCHUS, *supra* note 22, at 27; H. BULL, THE ANARCHICAL SOCIETY 173 (1977).

25. ETZOLD, *supra* note 3, at 63.

26. *Id.* at 69-74.

27. HILSMAN, *supra* note 20, at 187, 195-96.

28. National Security Act, ch. 343, 61 Stat. 495 (1947) (codified as amended in scattered sections of 5, 10, and 50 U.S.C.); National Security Act Amendments, ch. 412, 63 Stat. 578 (1949) (codified as amended in scattered sections of 5, 10, and 50 U.S.C.). A. GEORGE, PRESIDENTIAL DECISION MAKING IN FOREIGN POLICY 141 (1980); J. CEASER, ET AL., AMERICAN GOVERNMENT: ORIGINS, INSTITUTIONS, AND PUBLIC POLICY 623 (1984) [hereinafter AMERICAN GOVERNMENT].

29. SPANIER & USLANER, *supra* note 18, at 57.

30. CABINETS & COUNSELORS, *supra* note 4, at 80.

31. National Security Act, 50 U.S.C. § 402(a) (1988).

32. AMERICAN DEFENSE POLICY 495 (J. Reichart & S. Sturm 5th ed. 1982).

33. National Security Act, 10 U.S.C. § 141(b) (1988); 50 U.S.C. §§ 402(a), 403(a) (1988).

34. See J. MOORE, LAW AND NATIONAL SECURITY 1018-22 (J. Moore, F. Tipson, & R. Turner eds. 1987).

35. CONG. Q. INC., POWERS OF THE PRESIDENCY 132 (1989), 3 PRESIDENTIAL LEADERSHIP, *supra* note 2, at 35. At least one commentator has referred to the NSC as a "little State Department." American Government, *supra* note 28, at 623. One of the reasons for the National Security

ing rivalry at the department level remains overshadowed by Presidential dominance.³⁶ Moreover, irrespective of the NSC, Presidents continue to rely heavily on informal circles of advisors on foreign policy matters, particularly in times of crisis.³⁷

Affecting interagency participation more recently has been the growing emphasis on economic issues as key components of U.S. foreign policy, particularly as the world has become increasingly interdependent during the last two decades. Stewards of the nation's economy such as the Departments of Treasury, Commerce, and Agriculture, and the U.S. Trade Representative enjoy increasing influence over foreign policy. The birth of new export markets in former communist states should continue the trend.

Shifting focus, this examination turns from a historical overview of interagency involvement in the foreign policy process at the national level to development of the Country Team locally.

III. POSTWAR AID PROGRAMS GIVE BIRTH TO THE COUNTRY TEAM CONCEPTS

The Country Team concept was a necessary creation arising from the initiation and implementation of major postwar economic and military assistance programs like the Marshall Plan and the Truman Doctrine, as well as the military strategy of "containment." No clear and enforceable guidance existed to coordinate local U.S. policy in countries such as Greece, where three independent U.S. Missions—Diplomatic, Military, and Economic Aid—pursued their own agendas.³⁸ This division led to an intolerable and self-defeating situation in which, as one observer described it, "the Ambassador was trying to strengthen the political group which was running the Greek government, while the chief of the Economic Aid Mission was doing his best to help the party in opposition."³⁹

The first purported attempt to resolve the problem was a memorandum of understanding dated February 15, 1951, in which the Departments of State and Defense, and the Economic Cooperation Administration (predecessor to U.S. Agency for International Development) formed a team at the country level, headed by the Ambassador, to coordinate their respective programs.⁴⁰ At about the same time Congress, concerned with disarray in administration of aid programs, enacted the Mutual Security Act of 1951.⁴¹

Section 507 of the Act embodied the Country Team concept in substance, though not by name, in requiring the President "to assure coordination among

Advisor's growing influence over foreign policy is that, unlike the secretaries of State and Defense, the NSA is not answerable to Congress, allowing the President a greater degree of confidentiality in foreign policy deliberations. SPANIER & USLANER, *supra* note 18, at 41. Another reason is the growth of the NSC staff — from about 12 people in Kennedy's administration to 150 in Nixon's — permitting the NSC more detailed study resulting in advice of higher quality. See HILSMAN, *supra* note 20, at 132.

36. SPANIER & USLANER, *supra* note 18, at 21, 28-29.

37. *Id.* at 57-58.

38. Jernegan, *The Ambassador and the Country Team*, State, July 1963, at 9 (Newsletter of the Dep't of State).

39. *Id.*

40. *Id.*

41. Mutual Security Act of 1951, ch. 479, 65 Stat. 373, repealed by Mutual Security Act of 1954, ch. 937, 68 Stat. 832.

representatives of the United States Government in each country, under the leadership of the Chief of the United States Diplomatic Mission."⁴²

The Country Team concept, considered "simple common sense" in hindsight,⁴³ became an important tool of U.S. foreign policy. It was in existence for a decade before McGeorge Bundy, President Kennedy's National Security Advisor, allegedly coined the term "Country Team."⁴⁴ The Kennedy administration was enthusiastic about the concept and began to incorporate it into various instructions and policy papers.⁴⁵ Yet, what appeared so promising in theory did not necessarily work well in practice, as a Senate Subcommittee on National Security Staffing and operations learned during extensive hearings in 1963.⁴⁶ At least in part because of disclosures made in these hearings, Kennedy took action to magnify the power of ambassadors overseas and revitalize the State Department's role in conducting foreign relations.⁴⁷

In subsequent administrations, the relative influence over foreign policy wielded by agencies in Washington has varied considerably, but neither the utility of the Country Team concept nor the Ambassador's leadership role overseas has been seriously challenged since Kennedy established these as cornerstones of the U.S. foreign policy process.

Although the Country Team has been a key component of the foreign policy process for several decades, no statutory or regulatory basis exists for its composition and functions. Nearly thirty years ago a former U.S. Ambassador to Iraq described it as "[w]hatever group of United States Government officers a particular American ambassador chooses to select to assist him in meeting his responsibilities to coordinate official American activities in his country of assignment."⁴⁸ This definition fits today's Country Team perfectly. The phrase "ambassador chooses to select" signals an important point—the Country Team's composition is within the Ambassador's sole discretion. As the following review of U.S. Government agencies abroad illustrates, he has a wide array of advisors from whom to choose.

IV. KEY PLAYERS IN THE CURRENT OVERSEAS ENVIRONMENT

A. The Foreign Service and Its Component Parts

The Foreign Service and Foreign Service Officer. Outsiders may view the Foreign Service as little more than a personnel system. It is much more. The Foreign Service Act of 1980⁴⁹ permits personnel from five different departments and agencies to be Foreign Service Officers (FSOs): State, Commerce, Agriculture, U.S. Agency for International Development (USAID), and U.S. Information Agency (USIA).⁵⁰ The Foreign Service is a fraternity of sorts to its

42. *Id.*, reprinted in BAKER & FRIEDELBAUM, *supra* note 6, at 421, n.39.

43. Jernegan, *supra* note 38, at 9.

44. 3 PRESIDENTIAL LEADERSHIP, *supra* note 2, at 41. See also Jernegan, *supra* note 38, at 9.

45. Jernegan, *supra* note 38, at 9.

46. BAKER & FRIEDELBAUM, *supra* note 6, at 422.

47. 3 PRESIDENTIAL LEADERSHIP, *supra* note 2, at 42; BAKER & FRIEDELBAUM, *supra* note 6, at 422.

48. Jernegan, *supra* note 38, at 9.

49. Foreign Service Act of 1980, Pub. L. No. 96-465, 94 Stat. 2071 (codified as amended in scattered sections of 5, 7, 10, 20, 22, and 26 U.S.C.).

50. BACCHUS, *supra* note 22, at 81. It should be noted that USAID and USIA are autonomous agencies with complex ties to the Department of State.

members. A FSO is more likely to say "I'm in the Foreign Service" than "I work for the State Department."⁵¹

The Foreign Service is the tip of the U.S. foreign policy spear. Charged generally with implementing U.S. foreign policy overseas, much of a FSO's duties can be summed up as "observe and report." And report they do, sending to Washington hundreds of thousands of cables (messages) annually, reporting on political, economic, and similar developments, large and small, in the host country. Information is obtained by sifting local newspapers and other publications, and making daily contact with host government officials, the local business community, and ordinary citizens.

Foreign Service Officers are often accused of having contracted a common disease known variously as "clientism,"⁵² "localitis"⁵³ and "clientitis,"⁵⁴ which is "[t]he tendency to become too supportive of the country in which [the FSO] is assigned."⁵⁵ Like specialists in other fields, including the military, many FSOs believe they are more qualified in foreign affairs matters than others.⁵⁶ Consequently, a sore subject for FSOs is the time-honored Presidential tradition of making political appointments to senior departmental positions, at the expense of career FSOs.⁵⁷

Overseas, a degree of rivalry and tension exists between FSOs and their military counterparts similar to that between the White House and the Pentagon. One commentator explains that FSOs "are more apt to regard U.S. military . . . activities abroad as alien and unwelcome intrusions than as a viable adjunct to American diplomacy."⁵⁸ Without question some feel this way and make their antipathy for the military known. Most FSOs, however, recognize a commonality of purpose and treat their military colleagues with professional courtesy and respect. Needless to say, they expect the same in return.

Similarities between the Foreign Service and the military should not be overlooked. It has been said that the degree of cohesiveness, independence, and uniqueness of outlook of the Foreign Service "invites comparison with the military in every respect."⁵⁹ In addition, the promotion systems of both have an "up or out" feature, reward field work more so than staff work in Washington, and favor the mile wide/inch deep officer more than the opposite.⁶⁰ They also have similar problems, at least in the overseas environment.

The Foreign Service Posts. Foreign Service Posts⁶¹—also known as U.S. Missions—can be of several different types, but most common are embassies, consulates general, and consulates. Currently, about 265 Foreign Service Posts worldwide, including about 150 embassies and 100 consulates/consulates general are active. Posts can vary in size from a handful to several hundred U.S. per-

51. *Id.* at 73.

52. *Id.* at 62.

53. HILSMAN, *supra* note 20, at 187.

54. C. LORD, *THE PRESIDENCY AND THE MANAGEMENT OF NATIONAL SECURITY* 48 (1988).

55. Shinn, *Statespeak: our very own hard language*, *State*, May 1992, 18, at 21 (Newsletter of the Dep't of State).

56. BACCHUS, *supra* note 22, at 103. A former NSC staff member challenges this belief: "The idea that there is a body of knowledge of foreign affairs comparable to operational military expertise and available only to career professionals is, at bottom, a fallacy." LORD, *supra* note 54, at 50.

57. BACCHUS, *supra* note 22, at 147.

58. LORD, *supra* note 54, at 47.

59. *Id.* at 49.

60. BACCHUS, *supra* note 22, at 41, 73.

61. Statistical and other data relating to Foreign Service Posts and personnel is drawn largely from the Winter 1991 U.S. Department of State telephone directory.

sonnel. Foreign Service nationals or FSNs (local national employees) can push the number well over a thousand at large posts.

Technically a mission is a specific type of post, but the term U.S. Diplomatic Mission or simply "U.S. Mission" is used in a broad sense to represent the aggregate of U.S. diplomatic⁶² personnel and property of all agencies located in a foreign country.⁶³ The terms "U.S. Mission" and "Mission" will be used. An example of a large U.S. Mission is in Mexico, consisting of an embassy with multiple agency representation, four consulates general, and five consulates.

Organizationally, a U.S. Mission is headed by the Chief of Mission with duties statutorily prescribed by Congress.⁶⁴ The number two official is the Deputy Chief of Mission (DCM), who acts as the Chief of Mission's alter ego⁶⁵ and generally exercises greater day-to-day control over Mission activities.

B. Department of State

The Embassy. The U.S. Mission's operations revolve around the embassy. The term "embassy" most often is used to refer to the place where the Ambassador has his office, and can vary in size from an office suite to a cluster of buildings, frequently enclosed within a walled compound. Yet more precise terms exist. The actual building in which the Ambassador maintains his office is the Chancery and where he lives is the Residence. Buildings (and grounds) used for other offices and residences of the U.S. Mission may or may not be co-located with the embassy, but all are protected under the Vienna Convention on Diplomatic Relations.⁶⁶

Normally, non-FSN personnel assigned to the Mission are accredited to the host government either with diplomatic titles (ambassador, minister, first secretary, attache, etc.) or as members of the embassy administrative and technical (A&T) staff. Those members with diplomatic titles enjoy the fullest extent of privileges and immunities international law can provide; A&T staff are afforded slightly less protection. Family members possess the status of their sponsors.⁶⁷

The precise structure of an embassy is determined by the Chief of Mission,⁶⁸ but embassies generally are comprised of functional sections. The principal sections found are political, economic, administrative, and consular, also representing the four cones or specialties with which FSOs are associated. Each section typically is headed by a "counselor for (political, economic, administrative, or counselor affairs." At smaller posts a single counselor may head more than one section.

Much like military bases, many embassies are designed as stand-alone operations both functionally and logistically, with their own personnel and contracting offices, security personnel, secure worldwide communication systems, mess facilities, emergency water supplies and electrical generators, etc. This ability to function as a self-contained island can prove invaluable during a crisis, particu-

62. The term "diplomatic" is used in a broad, layman's sense herein, and the distinction made between "diplomatic" and "consular" persons and things, a distinction recognized both by domestic law and international convention, is beyond the scope of this article. 22 U.S.C. § 254a (1988); Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 [hereinafter Vienna Convention]; Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, T.I. A.S. No. 6820, 596 U.N.T.S. 487.

63. 2 FOREIGN AFFAIRS MANUAL 042.1 [hereinafter FAM].

64. Foreign Service Act of 1980, 22 U.S.C. § 3927 (1988).

65. 2 FAM 043.2.

66. Vienna Convention, *supra* note 62.

67. *Id.*

68. 2 FAM 042.3.

larly in less developed countries where embassies are more likely to be isolated by or during natural disasters, civil insurrection or war, mob siege, and even crumbling infrastructure. Embassies maintain up-to-date evacuation plans, and with good reason—in 1991 foreign service personnel were evacuated from more than forty different overseas posts.⁶⁹

To perform its mission, an embassy's work habits frequently must mirror that of the host nation. For example, in a number of Islamic countries, embassies work from Saturday through Wednesday, in view of the local Sabbath. Embassies also normally observe both U.S. and local holidays. In Sri Lanka, this can amount to thirty-six days each year. Very few embassy personnel have been heard to complain about this practice.

The Chief of Mission. The Chief of Mission most often is an ambassador. Missions also may be headed, at least temporarily, by diplomats with other titles, including minister, charge d'affaires, and commissioner.⁷⁰ After confirmation by the Senate,⁷¹ an ambassador normally proceeds to his posting where he presents his credentials to the host government. It is interesting to note that although an ambassador is a State Department employee for administrative purposes, he is the President's *personal* representative during his posting and, in a narrow sense, not a State Department representative.⁷²

The Chief of Mission is the official U.S. spokesman to the host government and supervises all U.S. Mission personnel and activities. For many years, it has been the practice for the Chief of Mission to carry with him to his assignment instructions in the form of a letter from the President. Included as an annex is a standard letter outlining the Chief of Mission's authority and responsibility under applicable law. At periodic intervals, the President may tailor the letter to suit his foreign policy program, yet the substance of the letter has remained fairly consistent through successive administrations.

Of particular interest to the military is a policy dating back to the Eisenhower administration and stated clearly in the Chief of Mission letter. It tasks him "to exercise full responsibility for the direction, coordination, and supervision of all Executive branch U.S. offices and personnel" with but three exceptions, one of which is "personnel under the command of a United States area military commander." An area military commander is described elsewhere as a "combatant commander,"⁷³ which, in turn, is legally defined as a unified or specified commander.⁷⁴ Use of the term "area," however suggests the President is speaking of geographic unified commands. This term places under the Chief of Mission's supervision all personnel assigned to defense attache offices, security assistance organizations, embassy Marine security guard units, and a few other specialized

69. Roecks, *You too might be (will be?) evacuated – and then what?* State, May 1992, at 15 (Newsletter of the Dep't of State). For vivid accounts of the recent evacuation of the U.S. Embassy in Mogadishu, Somalia, see Doss, *Out of Africa: Rescue from Mogadishu*, PROCEEDINGS (U.S. Naval Institute), May 1992, at 103, and Siegel, *An American Entebbe*, PROCEEDINGS, May 1992, at 96.

70. 2 FAM 043.1. More precisely, the Chief of Mission is

The principal officer in charge of a diplomatic mission of the United States or of a United States office abroad which is designated by the Secretary of State as diplomatic in nature, including any individual assigned under section 502(c) of the Foreign Service Act of 1980 to be temporarily in charge of such a mission or office.

2 FAM 041.2.

71. U. S. CONST., art. II, § 2, cl. 2.

72 See LORD, *supra* note 54, at 158.

73. DOD Directive 5105.47, U.S. Defense Representative in Foreign Countries.

74. 10 U.S.C. § 161(c) (3) (1988).

groups, but the bottom line is that ninety-nine percent of all overseas military personnel remain within a traditional military chain of command. A useful management tool the Chief of Mission enjoys is the requirement that all executive agencies with staffs under his authority seek his approval of any request for a change in the size, composition, or mandate of their Mission staff.⁷⁵

The Political Section. The political section is where most State Department FSOs want to be. Political officers are on the front line of foreign policy, performing the most interesting and rewarding work the Foreign Service has to offer, and this cone is the route more likely to lead to the top. They interact daily with foreign affairs officials of the host government and implement the nuts and bolts of U.S. foreign policy.

Much embassy-military liaison is accomplished through the political-military (pol/mil) officer, a key member of the political section who attempts to coordinate U.S. military activities, both Mission and non-Mission, with nonmilitary Mission activities and resolve any conflicts that arise between the same.

Other Key Sections and offices. Officers in the consular section are the only embassy officials most citizens of the host nation and Americans overseas will ever meet. A consular's stock in trade consists of passports, notaries, and emergency assistance for Americans, and visas for foreigners wanting to travel to the United States.

The embassy's ability to function rests largely with the administrative section. This section manages embassy housing, transportation, supply, contracting, maintenance, personnel, etc., and often provides these services to other agencies through a foreign affairs administrative support (FAAS) agreement. Under the FAAS system, agencies are charged a fee for administrative and logistic support provided by the embassy. Agencies may utilize embassy services much like ordering from a menu. For example, an agency may choose to use embassy transportation, contracting, and personnel services, but provide its own housing and maintenance. A local FAAS Council, composed of FAAS participants and headed by the counselor for administrative affairs, provides a forum for agency input into management of the FAAS system.

The economics section analyzes host nation macroeconomic trends and trade policies, and reports on their implications for U.S. economic policies and programs. The public affairs officer (PAO) is the embassy's press and cultural affairs specialist, and is the conduit for disseminating information to the local press. The regional security officer (RSO) and his staff provide security for the U.S. Mission and its personnel, and make threat assessments for visiting U.S. businessmen and tourists. Marine security guard detachments and the civilian guard force work under RSO direction and supervision.

C. Other Non-DOD Departments and Agencies

U.S. Agency for International Development (USAID). Normally one of the largest agencies in the Mission, USAID is a component of the International Development Cooperation Agency (IDCA), an autonomous executive agency that shares a complex relationship with the Department of State. Headed by directors, resident USAID missions can be found in nearly eighty countries, mostly of the poorer variety. Pursuant to the Foreign Assistance Act of 1961,⁷⁶ USAID administers nonmilitary foreign assistance programs, including development as-

75. National Security Decision Directive Number 38, June 2, 1982.

76. The Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424 (codified as amended in scattered sections of 22 U.S.C.) [hereinafter FAA].

sistance (DA) and economic support funds (ESF). USAID focuses its DA programs on such areas as agriculture, rural development, nutrition, health, population planning, education and human resource development, environmental and energy activities, and private enterprise.

The ESF program is an element of a larger program known as security assistance. The primary purpose of ESF is to support U.S. economic, political, and security interests and advance U.S. foreign policy goals. To achieve these goals, ESF is targeted against economic and political disruption that threatens a country's security and independence.

In cooperation with the Department of Agriculture, USAID administers the Food for Peace Program,⁷⁷ through which agricultural commodities are sold or donated in ways designed to further U.S. foreign policy goals. Often working closely with DOD, USAID also plays a major disaster relief role in the wake of natural disasters.

U.S. Information Agency (USIA). Another autonomous executive agency with complex ties to the State Department, USIA was created in 1953 and charged with certain public affairs and informational duties set out in the U.S. Information and Educational Exchange Act of 1948, as amended.⁷⁸ The USIA executes its overseas responsibilities through the U.S. Information Service (USIS). The head of the USIS office is also the embassy's PAO.

Department of Commerce. Foreign Commercial Service (FCS) trade specialists are attached to some large embassies to assist U.S. business by arranging appointments with local business and government officials, advising on local business laws and customs, identifying importers, buyers, agents, distributors, and joint venture partners for U.S. firms. In several countries with large pools of potential tourists, representatives of Commerce's U.S. Travel and Tourism Administration (USTTA) are assigned to expand the U.S. tourism industry, increase the competitiveness of U.S. travel companies, and improve the U.S. trade balance.

Department of Agriculture. The FSOs of the Foreign Agricultural Service (FAS) are assigned to about fifty embassies with a two-fold mission: to promote the export of U.S. agricultural products, and monitor local and regional agricultural production and market developments.

Department of Justice. *Federal Bureau of Investigation (FBI).* Agents from the FBI, known as legal attaches, are assigned in several countries. They work closely with local law enforcement agencies to track, apprehend, and extradite (if possible) fugitives from justice, and investigate crimes of particular interest to the U.S. Government, including terrorist acts targeting U.S. citizens.

Drug Enforcement Administration (DEA). The DEA agents normally are assigned to Missions in or near countries connected to significant international drug production or trafficking. They work closely with local law enforcement agencies, conducting joint investigations, apprehensions, and drug eradication operations. The DOD assists the DEA by providing drug trafficking intelligence gathered through military channels.⁷⁹

77. Agricultural Trade Development and Assistance Act of 1954, ch. 469, 68 Stat. 454 (codified as amended at 7 U.S.C. § 1691(1988)).

78. U.S. Information and Educational Exchange Act of 1948, ch. 36, 62 Stat. 6 (codified as amended in scattered sections of 22 U.S.C.). USIA acquired additional informational, educational, and cultural tasks by way of Exec. Order No. 12,048, 43 Fed. Reg. 13,361 (1978).

79. See Lowell Keig, Note, *A Proposal for Direct Use of the United States Military in Drug Enforcement Operations Abroad*, 23 TEX. INT'L L.J. 291, at 308-09 (1988). The most comprehensive and up-to-date guidance for U.S. military personnel working counterdrug issues is the USSOUTHAF/TWELFTH AIR FORCE DRUG WARRIOR'S GUIDE 1 Mar. 1992, and available from 12 AF/JA.

Peace Corps. Established in 1961, the Peace Corps has sent tens of thousands of U.S. citizen volunteers overseas "to build links between the U.S. and the peoples of developing countries at the grass roots level, to provide practical and humanitarian assistance on a voluntary basis, and to demonstrate through the personal commitment of the volunteers the interest and involvement of American citizens in the welfare of individuals in developing countries distinct and separate from the official relations and policies of governments."⁸⁰

Although the Peace Corps "represents an intrinsic and important element of the broad foreign policy goals of the U.S.," it is required to distance itself from the "formal day-to-day conduct and concerns of foreign policy."⁸¹ Thus, the Peace Corps is given more autonomy than other U.S. agencies under the direction and supervision of the Department of State.

Peace Corps country directors and staff are U.S. officials and part of the U.S. Mission, but Peace Corps volunteers are not. Contact between Peace Corps volunteers and U.S. intelligence agencies is positively forbidden.

U.S. Customs Service (USCS). The USCS agents are assigned to a number of Missions, working closely with local customs and law enforcement agencies to combat import and export fraud of concern to the United States and host government.

Immigration and Naturalization Service (INS). A few Missions have INS agents assigned, working closely with the consular section, host government immigration officials, and airlines to enforce U.S. immigration laws by identifying aliens attempting to enter the United States through fraudulent means or for fraudulent purposes.

Other Agencies. Many other civilian agencies are represented in U.S. Missions and play a significant role in formulating and implementing U.S. foreign policy, including the Federal Aviation Administration, Voice of America, and the U.S. Secret Service.

D. Department of Defense

Office of the Defense Attache. An integral part of most embassies is the Defense Attache office (DAO). A component of the Defense Intelligence Agency (DIA), the DAO serves under the direction and supervision of the Chief of Mission.⁸² Relatively small in size, DAOs are joint-service organizations comprised of army, naval, and air attaches and supporting staff. The DAO is headed by the defense attache (DATT). The DATT normally is an O-5 or O-6 but a handful DATTs are flag officers (most recently in Beijing, Moscow, and Mexico City). Attaches and other key DAO personnel are accredited to the host nation as diplomats. The remainder of the DAO staff is accredited as part of the embassy's A&T staff.

The DAO's primary mission is intelligence collection, and personnel assigned to the DAO naturally maintain a low profile. Substantive guidance on DAO's intelligence mission is classified.⁸³ In countries without a resident security assistance organization, the DAO performs that function. About one in every five DAOs is assigned a C-12 aircraft to assist in performing its mission.

80. Text of Secretary of state and Director of Peace Corps Telegram of June 25, 1983, 1 FAM Exhibit 013.6.

81. *Id.*

82. 2 FAM 042.1, 043.1a.

83. For an overview of the roles played by DIA and other members of the U.S. intelligence community, see Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (1981).

Manned by a total of approximately 900 U.S. military and civilian personnel, resident DAOs are established in nearly 100 embassies worldwide. Some DAOs have multiple accreditation to nearby countries, and an assistant attache in one country may be the DATT in another. Frequently, the time DAO personnel spend in DIA school and language training in preparation for an assignment is nearly equal to the assignment tour length.

Security Assistance Organizations (SAOs). The SAOs are relatively small joint-service units performing security assistance (SA) functions as part of the U.S. Mission.⁸⁴

As a result largely of local political sensitivities, SAOs go by nearly two dozen different titles, but most common are Joint U.S. Military Assistance Group (JUSMAG), Office of Defense Cooperation (ODC), U.S. Military Group (USMLGP), and U.S. Military Liaison Office (USMLO).

Life is complicated for SAOs. Like DAOs, SAOs serve under the supervision and direction of the Chief of Mission.⁸⁵ Yet SAOs are under the command of the unified commander and have reporting requirements to the unified command, the Chief of Mission, the Defense Security Assistance Agency (DSAA), and others. They also have been subject to extensive micromanagement by Congress in the post-Vietnam era.⁸⁶

The primary mission of SAOs is to ensure effective planning and management of U.S. military SA programs⁸⁷ established under the Arms Export Control Act of 1976⁸⁸ and the foreign Assistance Act of 1961,⁸⁹ including the Foreign Military Financing Program (FMF),⁹⁰ Foreign Military Sales Program (FMS),⁹¹ International Military Education and Training Program (IMET),⁹² and the Military Assistance Program (MAP).⁹³

Each SAO is headed by a chief who normally ranges in grade from O-4 to O-6, with O-6 most common. Chiefs of some of the largest SAOs are flag officers. In most countries, the SAO chief is also appointed as the U.S. Defense Representative (USDR) to serve as the Ambassador's single point of contact for "coordination of all administrative and security matters for all in-country non-combat DOD elements."⁹⁴

The legal status of each SAO is usually governed by a bilateral defense assistance agreement between the U.S. and the host country. These agreements provide SAO personnel and their dependents varying degrees of protection and exemption from host country criminal and civil jurisdiction, and customs and other restrictions. As a general rule, such agreements provide *more* protection than that afforded under status of forces agreements, but *less* than the diplomatic protections enjoyed by other members of the U.S. Mission. On the other hand, some

84. Basic terms of reference for all SAOs is found in DOD Directive 5132.3, DOD Policy and Responsibilities Relating to Security Assistance. Technical guidance for SAOs is found in DOD Manual 5105.38-M, Security Assistance Management Manual.

85. Arms Export Control Act, 22 U.S.C. § 2321i(e) (1988) [hereinafter AECA]; 2 FAM 042.1, 043.1a.

86. See FAA, 22 U.S.C. § 2321i(c) (1988) (among other things, prohibiting SAOs from exceeding six military personnel without specific authority from Congress).

87. For extensive discussion of military security assistance programs see Clarke and Woehrel, *Reforming United States Security Assistance*, 6 AM. U.J. OF INT'L LAW & POL'Y 217 (1991), and Woods, *An Overview of the Military Aspects of Security Assistance*, 128 MIL. L. REV. 71 (1990).

88. AECA, 22 U.S.C. § 2751 (1988).

89. FAA, 22 U.S.C. § 2151 (1988).

90. AECA, 22 U.S.C. §§ 2761-764, 2771 (1988).

91. AECA, 22 U.S.C. §§ 2761, 2762 (1988).

92. FAA, 22 U.S.C. §§ 2347d (1988).

93. FAA, 22 U.S.C. §§ 2311-2318, 2321d, 2321h-2321j (1988).

94. DOD Directive 5105.47, *supra* note 73.

agreements expressly incorporate the SAO into the U.S. Mission, permitting SAO personnel to be accredited to the host government either with diplomatic titles or as part of the embassy's A&T staff, depending on rank and position.

Separate SAOs are established in about fifty countries. In other countries, military SA programs are administered either by the DAO, with or without SAO augmentation staff, or FSOs when no military personnel are assigned to the Mission. About 600 U.S. personnel (500 military and 100 civilian) are assigned to SAOs overseas, and individual SAOs may range in size from one to nearly one hundred people. The largest are located in Korea, Saudi Arabia, Egypt, Turkey, Philippines, and Thailand. Some SAOs are assigned a C-12 aircraft to assist in performing their mission, and others share a C-12 with the DAO.

Marine Security Guard (MSG) Detachments. About 1400 U.S. Marines serve in a unique Marine Corps battalion headquartered in Quantico, Virginia. This battalion consists of seven companies, which are further divided into MSG detachments of varying sizes, the smallest comprised of about a half-dozen and the largest about three dozen Marines. These MSG detachments are detailed to the Department of State to provide security at embassies and certain other missions around the world.

Marines assigned to MSG detachments are carefully screened for this unique assignment. When at post, they are accredited as members of the embassy A&T staff. The MSG detachments typically provide close-in security for the embassy's buildings. Perimeter security at an embassy compound is normally provided by civilian direct-hire or contract security guards. Sometimes host nation security forces are assigned to assist.

Operationally, MSG detachments work for the embassy's RSO. Administratively, they report through their company commanders to battalion headquarters.

Other Atypical DOD Personnel. Other DOD personnel may be assigned to the Mission to perform various functions. For example, military postal service personnel are frequently assigned to provide APO/FPO service to the Mission and are accredited as members of the embassy's A&T staff. DOD personnel are also assigned to U.N. peacekeeping forces and other international organizations, but they are beyond the scope of this article.

Combatant Commands. Central to the U.S. military presence overseas is the overwhelming majority of personnel who are assigned to fixed military installations pursuant to status of forces agreements and who receive their direction and supervision through combatant command channels.

Two observations one can make are that most of these personnel are assigned to either the European Command or the Pacific Command, and that within these commands most personnel are assigned to their service's major command (United States Air Force in Europe, United States Army in Europe, Pacific Air Force, Pacific Fleet, etc.). Beyond that, multiservice generalizations tend to become riddled with exceptions and lose any value they may have. Furthermore, attempting to describe the complex command structures and relationships of U.S. forces in just one corner of the world, like Korea, can make the Rule in Shelley's Case seem easy by comparison. All that is important herein is making the point that these personnel are *not* under the direction, coordination, and supervision of the U.S. Ambassador.

V. EXECUTING U.S. FOREIGN POLICY: THE COUNTRY TEAM AT WORK

A. Membership and Meetings

The Ambassador has complete discretion in establishing the Country Team's membership. Typically, the head of each agency described thus far is a member, as well as the following embassy personnel: DCM, pol/econ/cons/admin counselors, PAO, RSO, pol/mil officer, and labor attache. Determining who represents DOD combatant commands can be a delicate matter, and it is not uncommon to have multiservice representation even when a particular commander is clearly identified as being senior in-country. Depending on Mission size, Team size can vary from a handful to several dozen.

The Country Team usually meets in the embassy at regular intervals, more or less every week. During a crisis, the Ambassador may choose to call daily meetings, and he may find some utility in occasionally holding meetings elsewhere, like his residence, where he can establish a more casual atmosphere.

Each Ambassador has his own style. Soon after arrival at post, a new Ambassador makes his objectives and priorities known to the Country Team. Most members take their cue from this first encounter in determining the types of issues and level of detail the Ambassador wishes to hear and discuss.

Often, a large portion of the Team meets together regularly in other fora, such as embassy staff meetings. In such cases, the Ambassador may want the Country Team meeting to focus on members for whom the meeting may be the only regular channel of communication, like combatant commanders. Because he normally begins the meeting, however, the agenda likely will be topped by the Embassy's issue of the moment, be it local elections, a high-level visitor from Washington, a natural disaster, or local civilian unrest.

In addition to the Ambassador's priorities, each agency represented on the Team has its own, and they are not always wholly consistent with those of the Ambassador or other members. These meetings give members an opportunity to exchange information on their activities and identify areas where they may be working at cross purposes. Open and honest communication within the team is crucial to achieving national foreign policy objectives. Team members generally adopt a cooperative stance. Given budgetary and other parochial concerns, however, complete cooperation can be elusive, presenting an Ambassador with one of his greatest challenges—extracting maximum cooperation without leaving a Team member feeling as if he has lost on a particular issue. Working in the Ambassador's favor is the fact that each Team member knows failure to resolve a problem within the Team can cause the problem to be escalated through channels to Washington, inviting the sort of attention that can be uncomfortable.

B. State–DOD Conflict

Central to many Country Team conflicts is the Ambassador's inability to control non-State agencies.⁹⁵ Historically, the most fractious relations within the Country Team have been between State and DOD, clearly the result of the President having exempted combatant commanders from the Ambassador's authority. A former National Security Council staff member argues that the military is not sufficiently sensitive to the political and societal impact of a large U.S.

95. See LORD, *supra* note 54, at 159.

military presence in the host country, whereas State is too ready to compromise U.S. military requirements for the sake of harmonious foreign relations.⁹⁶

This same observer finds fault not only with State-DOD cooperation in-country, but also between the Ambassador and the unified commander,⁹⁷ and identifies interagency coordination at the operational and tactical levels as "one of the most neglected aspects of the national security process, yet it is one whose importance can hardly be overestimated."⁹⁸ One step State and DOD have taken to increase the level of communication and understanding between them is to assign State Department political advisors (POLADs) to several key military headquarters, including SHAPE, EUCOM, USAREUR, LANTCOM, PACOM, CENTCOM, SOUTHCOM, and SPACECOM.

C. Crisis Brings the Country Team Together

By all accounts, the Country Team works best when confronted with a genuine crisis. Recent years have seen a series of crises in which many U.S. lives depended upon mutual support and cooperation among Country Team members and the agencies they represent. The unparalleled success stories of Operations Desert Shield and Desert Storm, Operation Sharp Edge (evacuation of U.S. citizens during civil war in Liberia), Operation Eastern Exit (evacuation of U.S. citizens during civil war in Somalia), and Operation Fiery Vigil (evacuation of U.S. military dependents during eruption of Mt. Pinatubo in the Philippines) serve as reminders that, when it really counts, Country Team members put aside partisan concerns and pool their efforts under the Ambassador's leadership.

VI. FINAL ANALYSIS

In many ways, the Country Team is a microcosm of what it represents—an assortment of entrenched Washington bureaucratic institutions steeped in the art of turf warfare. Self-interest has been known to surface. What tends to prevail in the end though is a conviction among the Team's members that they are in fact a team, the Ambassador is the coach calling the plays, and it is their duty to run in the same direction as their teammates. They may seek adjustment at the margins, but they remain on the team and on the field.

Looking back over the last forty years, since Country Teams were first established, it is hard to deny that America's greatest victories have been in the foreign affairs arena. Ranked first among these victories is winning the Cold War. This victory was attained in large part through the hard work and dedication of countless Country Teams, implementing the tedious detail of our Nation's foreign policy one day at a time.

96. *Id.* at 40.

97. *Id.* at 159.

98. *Id.* at 158.

Status of Forces Agreements: A Sharing of Sovereign Prerogative

COLONEL RICHARD J. ERICKSON, USAF (Ret.)

I. INTRODUCTION

United States Armed Forces are permanently stationed abroad for national security purposes.¹ These purposes may be expressed in multilateral mutual security treaties, in bilateral defense arrangement,² or in domestic legislation of the United States.³ Armed Forces of the United States have also been stationed overseas as part of an international peacekeeping effort.⁴ The sending of United States forces abroad to further national security and foreign policy objectives has profound implications under United States and international law and raises the basic issue of the status, rights, privileges, and immunities of that force, its

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1. The following countries and areas make available military bases or installations for use by the United States. In Europe: Belgium, Federal Republic of Germany, Greece, Iceland, Italy, The Netherlands, Portugal (Azores), Spain, Turkey, and the United Kingdom. In East Asia and the Pacific: Australia, Japan, and Korea. In the Western Hemisphere: Bermuda, Canada, Cuba, Greenland (Denmark), and Panama. In the Indian Ocean: Diego Garcia (the United Kingdom). The following countries and areas make available lesser or technical facilities. In East Asia and the Pacific: the Marshall Islands and New Zealand. In the Middle East and Indian Ocean: Bahrain and Seychelles. In the South Atlantic: Ascension Island (the United Kingdom). In the Western Hemisphere: Antigua and the Bahamas. The following countries and areas grant the United States access rights for use of their facilities without a large permanent United States military presence: In Europe: Denmark and Norway. In East Asia: Singapore and Thailand. In North Africa, the Middle East and Southwest Asia: Bahrain, Egypt, Israel, Kuwait, Morocco, Oman, Qatar, Saudi Arabia, and the United Arab Emirates. In "other" Africa: Djibouti, Kenya, Liberia, Senegal, and Zaire. In the Western Hemisphere: Honduras. For a recent study, see BLAKER, *UNITED STATES OVERSEAS BASING: AN ANATOMY OF A DILEMMA* (1990).

2. North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, T.I.A.S. 1964, 34 U.N.T.S. 243; Southeast Asia Collective Defense Treaty, Sept. 8, 1954, 6 U.S.T. 81, T.I.A.S. 3171, 209 U.N.T.S. 23; InterAmerican Treaty of Reciprocal Assistance (Rio Treaty), Sept. 2, 1947, 62 Stat. 1681, T.I.A.S. 1838, 21 U.N.T.S. 77; ANZUS Treaty, Sept. 1, 1951, 3 U.N.T.S. 3420, T.I.A.S. 2493, 131 U.N.T.S. 83; Treaty of Mutual Cooperation and Security, United States-Japan, Jan. 19, 1960, 11 U.N.T.S. 1632, T.I.A.S. 4509, 373 U.N.T.S. 186; Mutual Defense Treaty, United States-Korea, Oct. 1, 1953, 5 U.N.T.S. 2368, T.I.A.S. 3097, 238 U.N.T.S. 199; and the Mutual Defense Treaty, United States-Philippines, Aug. 30, 1951, 3 U.S.T. 3947, T.I.A.S. 2529, 177 U.N.T.S. 133. Note: during the twentieth century, the United States discontinued the practice of entering into broad treaties of friendship, commerce, and navigation, at times referred to as FCN treaties. Treaties are now more specific, such as defense or investment. See Department of State, East Asian Pacific (EAP) Memorandum Oct. 9, 1991, *The U.S. - Samoa 1878 Treaty of Friendship and Commerce*.

3. Part U of the *Foreign Assistance Act*, 22 U.S.C. §§ 2311-22 (1991 & Supp. 1993) and the *Arms Export Control Act*, 22 U.S.C. §§ 2751-96d (1990).

4. *Multilateral Forces and Observers Participation Resolution*, 22 U.S.C.A. § 3401 note (West Supp. 1984); *Multilateral Forces in Lebanon Resolution*, Pub. L. No. 98-119, 97 Stat. 805 (1983) (to be codified in 50 U.S.C. § 1541 note); see also *The United Nations Participation Act*, 22 U.S.C. § 287d (1990).

members, and dependents.

Since the emergence of the territorial state in international relations, states have claimed jurisdiction with respect to conduct taking place within their territory. "A sovereign state," noted the United States Supreme Court in a *per curiam* decision in *Wilson v. Girard*, "has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction."⁵ It is implicit that territorial jurisdiction extends to foreigners.

When the nationals of one state enter the territory of another state, whether for business or pleasure, they subject themselves to the laws of the latter and, although those laws and the rules of procedure in the courts may be wholly different from those which obtain in their home state, so long as such laws and rules are not below the standard generally obtaining in well-ordered states and are administered fairly and impartially, neither the aliens nor their governments have a right to complain.⁶

The soundness of this view becomes evident when one considers the consequences of a rule of international law which would make foreigners immune from local law. The general rule is that foreign military personnel and their dependents, while stationed within the territory of another country, are fully subject to the law of that country unless expressly or impliedly exempted by the host country through agreement with the sending state, or by operation of customary international law. A recognized exception to the general rule is contained in the customary and conventional laws of armed conflict. In time of armed conflict, it is recognized that military forces in enemy territory, including occupied territory, are immune from the jurisdiction of local law.⁷

Another perceived exception, somewhat misunderstood, is the immunity of a military force temporarily passing through the territory of another state in peacetime. *The Schooner Exchange v. McFaddon*⁸ is widely cited in support of this proposition. The specific issue in the case involved the plaintiffs' claim to a French warship in a United States port, but in *dictum*, Chief Justice John Marshall addressed concern about jurisdiction over foreign military personnel. He observed that "The grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops, during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require."⁹ But it should be noted that Marshall was speaking of troops passing through foreign territory with flags flying and drums rolling, and that his opinion did not exclude the possibility that a state might condition its consent to passage on submission to its jurisdiction.¹⁰ That is to say, the *dictum* of *The Schooner Exchange* is not an exception to the general rule, but a

5. *Wilson v. Girard*, 354 U.S. 524, 529 (1957).

6. G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 84 (1941). See also Moore, dissenting opinion in the S.S. *Lotus*, PCIJ, ser. A, No. 10 (1927) at 69; and BECKETT, *The Exercise of Criminal Jurisdiction over Foreigners*, in 1925 *BRITISH YEARBOOK OF INTERNATIONAL LAW* 45.

7. See, *The Law of Land Warfare, DA FIELD MANUAL 27-10* (1956), para.374 at 143; *The Casablanca Case (France v. Germany)*, *The Hague Court Report (Scott)* 110, 114 (Permanent Court of Arbitration, 1909); and, S. LAZAREFF, *STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW* 13 (1971).

8. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). See also *Coleman v. Tennessee*, 97 U.S. 509 (1878).

9. *The Schooner Exchange*, 11 U.S. (7 Cranch) at 139.

10. See BAXTER, *Criminal Jurisdiction in the NATO Status of Forces Agreement*, in 7 *INTERNATIONAL AND COMPARATIVE LAW QUARTERLY* 72 (1958).

reaffirmation of it. Section 58 of *Restatement of the Foreign Relations Law of the United States*, correctly summarizes this circumstance as follows:

Except as otherwise expressly indicated by the territorial state, its consent to the passage of a foreign force through its territory implies that it waives its right to exercise enforcement jurisdiction over the members of the force for violations of the criminal law of the territorial state during the passage. Consent to the passage implies that the sending state agrees to take appropriate enforcement action.¹¹

Contributing to the misunderstanding about the customary international law principle, for which *The Schooner Exchange* stood, was the position of the United States Government prior to the conclusion of the North Atlantic Treaty Organization (NATO) Status of Forces Agreement (SOFA). During the first and second world wars, for example, the United States argued for absolute immunity. United States allies, especially the United Kingdom, did not accept this view. Through bilateral agreements, however, allies of the United States conferred immunity on U.S. forces stationed within their territory (such immunity was not usually granted to other allied powers).¹²

After World War II, negotiation of a SOFA became imperative because no exception to the general rule could be relied upon any longer by any nation. Forces were to be permanently, not temporarily, stationed abroad. Issues in addition to criminal jurisdiction had to be addressed and resolved, such as customs, taxation, and labor. Also, as a result of concluding the NATO SOFA, the misconceptions resulting from the *dicta* in *The Schooner Exchange* should have been laid to rest. The State Department took the position during the 1953 hearings on the NATO SOFA that there existed no implied immunity from the criminal jurisdiction of local courts under international law.¹³ Moreover, in *Homes v. Laird*,¹⁴ the United States Court of Appeals for the District of Columbia, in addressing the jurisdiction of the Federal Republic of Germany over United States service members stationed there, held that any old theories could no longer be accepted. That Court held, "Certainly, there is no immunity from local prosecution contrary to the explicit terms of an agreement — like the NATO SOFA, purporting to define jurisdictional areas for host and visiting countries alike."¹⁵

II. PURPOSE OF SOFAs

SOFAs are not basing or access agreements. They merely define the status of United States forces in the territory of friendly states and do not themselves authorize the presence or activities of those forces.

11. THE RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1965). See generally M. Whiteman, 6 *Digest of International Law*, sect. 15, (1968).

12. See generally LAZAREFF, *supra* note 7, at 21-28.

13. *Hearing before the Committee on Foreign Relations on the Status of North Atlantic Treaty Organization, Armed Forces, and Military Headquarters*, 83d Cong., 1st Sess. (1953) at 29. See also DEPARTMENT OF JUSTICE MEMORANDUM ON INTERNATIONAL LAW AND THE STATUS OF FORCES AGREEMENT, reprinted in SUPPLEMENTARY HEARINGS BEFORE THE SENATE COMM. ON FOREIGN RELATIONS ON STATUS OF FORCES OF THE NORTH ATLANTIC TREATY, 83d Cong., 1st Sess. 38-56 (1953).

14. *Holmes v. Laird*, 459 F. 2d. 1211 (D.C. Cir. 1972).

15. *Id.* at 1216.

Permanently stationing United States forces abroad in peacetime under the general rule of international law subjecting them fully to host nation jurisdiction is not acceptable for political reasons, as well as the need to exercise discipline over the force. Consequently, it has been a long-standing United States policy to seek broad relief from local jurisdiction through the mechanism of a SOFA.¹⁶ The purpose is not to immunize the service member from criminal sanctions, but to apply military discipline which takes into account status, custom, and military needs.

The purpose of a SOFA is to share the sovereign prerogative between the receiving and the sending state. It is intended to strike a balance between the rights and obligations of each commensurate with the interests and needs of all parties to the agreement. No SOFA, once concluded, will function well unless all parties understand the reason for "sharing" and believe their interests have been properly balanced. Dialogue between the parties is essential to this end.

An ancillary purpose of a SOFA is to resolve as many issues as possible prior to the arrival of a force in country (or for its continuance there). It establishes a smooth working relationship, thereby reducing the need for dispute resolution. Leaving too many issues unresolved in a SOFA is an invitation to discord. If SOFAs contain numerous provisions which indicate that the parties are to agree on issues at some future time and in another venue, then the beginning is not auspicious.

Consequently, the United States has historically entered into SOFAs with host governments to define the rights, immunities, and duties of the force, its members, and dependents. This is accomplished by reaching an agreement on two broad principles. The first is the sharing of criminal jurisdiction and the adoption of the concepts of "exclusive" and "concurrent" jurisdiction. The second, is the acceptance of the legal fiction that members of the force and their dependents are not to be considered permanently present within the territory of the host country. Concerning the latter principle, sending state personnel and dependents remain part of the visiting force and, as such, do not acquire incidents of residence. Hence, they are not obligated to comply with many local laws, to include those concerning military draft (absent dual nationality), work permits (absent employment with other than the force) and taxation (absent income earned locally from employment with other than the force).¹⁷

With the creation of NATO, it became evident that a multilateral SOFA would be highly desirable. The NATO SOFA was intended to apply within the territory of all of the NATO states.¹⁸ Therefore, the NATO SOFA is the only reciprocal SOFA to which the United States is a party.¹⁹ The NATO SOFA establishes only

16. Department of Defense (DOD) Directive 5525.1, *Status of Force Policies and Information*.

17. See, e.g., Article X, NATO SOFA of June 19, 1951, 4 U.S.T. 1792, T.I.A.S. 2846, 199 U.N.T.S. 67.

18. *Id.* Portugal adhered to the NATO SOFA with the understanding that the agreement is only applicable to the territory of Continental Portugal, with the exclusion of the Adjacent Islands and the Overseas Provinces (of particular note is the exclusion of the Azores).

19. The United States has from time to time considered reciprocal SOFAs with other allies, such as Israel and Australia. A treaty in the sense of the United States Constitution would be required in order to enter into a full-fledged reciprocal SOFA because of the U.S. federal-state system. Without a treaty, the United States could only agree to status provisions supported by federal law and regulations and applicable state law. In this regard, see 2 (d), 26 U.S.C. §§ 871 and 877, concerning exemption from U.S. income tax of non-United States source income; and 19 U.S.C. § 1202, Tariff Schedule 8, part 2, subpart C, §§ 820.10-822.40, regarding the right of visiting forces to exemption from customs duties. See R. Erickson, *Foreign Forces in the United States*, 9 AIR FORCE JAG REPORTER 193 (1980); W. Carroll, *Legal Status of Foreign Military Personnel in the United States*, 17 AIR FORCE JAG REPORTER 21 (1990); Air Force Pamphlet 110-3, and Civil Law, ch. 27 (11 Dec. 1987).

the minimum SOFA standards and it has been necessary to "supplement" it with bilateral agreements with each NATO country where substantial United States forces are stationed.²⁰

Omar Bradley, then Chairman of the Joint Chiefs of Staff, testified before the Senate Foreign Relations Committee regarding the practical advantages of the NATO SOFA, as follows:

The status of forces agreement is of primary interest to the Department of Defense in so far as it affects the United States as a sending state. From this point of view, its advantages are twofold: First, it enables the commander of a United States military force to engage in peacetime NATO operations in NATO countries without undue hindrance from the authorities of those countries. Second, it confers upon individual members of the United States forces stationed in NATO countries certain rights which are essential to their morale and well-being.²¹

With respect to all countries outside of NATO, the United States seeks to obtain rights, privileges, and immunities for its force which are, at a minimum comparable to those provided in NATO. Although it was not so intended, the NATO SOFA standard has become a world standard.²²

III. KINDS OF STATUS ARRANGEMENTS

Three general approaches to sharing jurisdiction exist. These include administrative and technical staff status under the Vienna Convention on Diplomatic Relations (commonly referred to as A&T status),²³ mini-SOFA, and a full-blown SOFA. Which arrangement is sought depends upon the nature and duration of the military activity within the host country, the maturity of the relationship between the sending and receiving states, and the prevailing political situation in the host nation. Some SOFAs are self-contained in a separate document, while others are integrated with other matters in a base rights or access agreement.

A&T status is appropriate in a number of situation, such as when United States forces are sent abroad to participate in joint military exercises or humanitarian relief efforts lasting for more than a few days. It is also appropriate when the presence involves only a few persons on a permanent basis, such as the establishment of a regional Defense Contract Management Area Office, Office

20. The most detailed example is the Agreement to Supplement the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces with respect to Foreign Forces Stationed in the Federal Republic of Germany of August 3, 1959, 1 U.S.T. 531, T.I.A.S. 5351, 481 U.N.T.S. 262.

21. *Hearing before the Comm. on Foreign Relations on the Status of North Atlantic Treaty Organization, Armed Forces, and Military Headquarters*, 83d Cong., 1st Sess. 33-34 (1953).

22. The SOFA between parties to the former Warsaw Pact was a pattern of the NATO SOFA. See G. Prugh, *The Soviet Status of Forces Agreements: Legal Limitations or Political Devices?* 20 MIL. L. REV. (1963). With the dissolution of the Warsaw Pact, withdrawal of Soviet troops from Eastern Europe and the breakup of the USSR into the fifteen separate and independent states of Estonia, Latvia, Lithuania, Russia, Byelarus, Ukraine, Georgia, Moldova, Armenia, Azberbaizan, Turkmenistan, Tadjikistan, Uzbekistan, Kazakhstan, and Kyrgyzstan, interest in SOFAs has heightened in the East. Because majority of Soviet forces are anticipated as belonging to Russia, all others will require a SOFA arrangement with the new Russian State until these forces are ultimately withdrawn. Harvard University is in the process of forming a team of U.S. specialists to assist all parties, many of whom have no SOFA experience, in this undertaking.

23. Vienna Convention on Diplomatic Relations of April 18, 1961, 22 U.S.T. 3227, T.I.A.S. 7502, 500 U.N.T.S. 95.

of Defense Cooperation, or Medical Research Unit, and a SOFA does not otherwise exist. It is more precise to call it "equivalent A&T status" because the objective is to treat the personnel involved as if they were part of the U.S. embassy. It may be obtained by a simple exchange of diplomatic notes. On occasion, ACT status may be granted in the context of the overall agreement authorizing the activity itself. Seeking A&T status for such activities is not extraordinary and because of its frequency, the Department of State has granted blanket authority to U.S. embassies worldwide to negotiate and conclude them.²⁴ When an exchange of notes is used, the following text is recommended:

I have the honor to refer to recent discussions between our two governments regarding the status of United States military personnel and civilian employees of the Department of Defense who may be present in [name of country] in connection with their official duties. As a result of these discussions, I have the honor to propose that such personnel be accorded the same status as provided to the technical and administrative staff of the United States Embassy. If the foregoing is acceptable to your government, I have the further honor to propose that this note, together with your reply, shall constitute an agreement between our two governments effective from the date of your reply. [Complimentary close.]²⁵

When A&T status is obtained in the context of an overall agreement authorizing the activity, it is important that the agreement be signed at the diplomatic level. The granting of A&T status means that the personnel concerned will be accorded the immunities provided for under the Vienna Convention to persons of comparable rank. The most important of these are full immunity from the criminal jurisdiction of the receiving state, and immunity from the civil jurisdiction of the receiving state to the extent that the act giving rise to the action was done in the performance of official duty. Accordingly, it is doubtful that an official of the host Ministry of Defense would possess the requisite legal authority to grant such privileges.²⁶ The 1970 Agreement between the United States and Indonesia authorizing a United States Naval Medical Research Unit to establish a laboratory at the Department of Health, Central Public Health Laboratory, Djakarta, contains language in Article IV for this purpose which reads as follows,

24. *Department of State Action Memorandum, Circular 175 Procedures: Request for Blanket Authority to Negotiate and Conclude Temporary Status of Forces Arrangements with the Sudan and Other Countries*, No. 8,132,351 (Nov. 4, 1981). As an essential factor in seeking this blanket authority it was noted,

The Department [of State] is frequently asked by the Department of Defense to ensure that U.S. military personnel temporarily sent to a foreign country are accorded an appropriate legal status while they are overseas. In the absence of an applicable status of forces agreement (SOFA), U.S. forces and personnel are generally fully subject to local law (e.g., they would have no criminal or civil immunities or exemptions from local taxes, customs, etc.). Consequently, some international agreement is usually desirable in order to resolve practical difficulties that may arise. Our practice in cases where we do not have an applicable comprehensive SOFA is to authorize the Embassy concerned to enter into a short exchange of notes which states that our personnel will have the same status as members of the technical and administrative staff of the U.S. Embassy.

Id. at 1.

25. *Id.* at 4. These short exchange of notes are usually not published and are, therefore, not easily accessible.

26. *See, e.g.*, 1981 Memorandum of Agreement Regarding United States Personnel Participating in the Exchange Program Between United States Army Western Command and the Republic of Singapore Armed Forces which states in Article II that they shall have "the same status and have the same rights, privileges, and immunities as members of the administrative and technical staff of the United States Embassy."

All United States citizen personnel assigned to NAMRU-2 in Indonesia or employed by it, and their dependents, shall be accorded the same tax and duty exemptions and other privileges and immunities as are accorded by the Government of Indonesia to administrative and technical staff of the United States Embassy in Indonesia.²⁷

Normally, by the time the military presence has expanded to an access arrangement, the political relationship has matured to the point that a mini-SOFA is appropriate and possible. full-blown SOFAs are usually reserved for circumstances in which military bases and installations are made available for use by United States forces and the numbers of U.S. personnel and dependents present in the host country require the full range of support commonly provided. Consequently, the difference between a mini-SOFA and a full-blown SOFA is one of degree. A mini-SOFA will address passport and visa requirements, criminal and civil jurisdiction, claims, customs, and taxation. Such issues as military postal service, morale and recreational facilities, military banking, local national labor, base exchanges, and commissaries may or may not be addressed in a mini-SOFA but will certainly be addressed in a full-blown SOFA where U.S. military presence requires such supporting activities.

The content of SOFAs will be discussed in much greater detail later in this article. Suffice it for now to note that SOFAs have been concluded with more than thirty countries. Some are unclassified. Others are classified, either as to their existence or as to their provisions. Some are been published, others are not. A Department of Defense Directive establishes a central repository for the texts of all SOFAs between the United States and other nations.²⁸ The United States has entered into formal SOFAs with the following countries, the existence of the SOFA itself being unclassified:

COUNTRIES HAVING A FORMAL SOFA WITH THE UNITED STATES [Numerical references are to the published Treaties and Other International Acts Series (T.I.A.S.) of the Department of State]

Antigua and Barbuda (9054)
Australia (5349)
Italy (2846)
Bahamas
Bahrain (8632)
Belgium (2846)
Canada (2846, 3074)
Denmark (2846, 4002)
Diego Garcia [with the United Kingdom] (6196, 8230)
Dominican Republic
Egypt (10238)
Federated States of Micronesia [in Compact with U.S.]²⁹
France (2846)

27. 1970 United States-Indonesia Agreement on the United States Naval Medical Research Unit, T.I.A.S. 6813. Other similar agreements include the 1976 United States-Philippines agreement on the United States Naval Medical Research Unit, T.I.A.S. 8425 and the 1981 renewal, T.I.A.S. 10174; the 1976 United States-Thailand memorandum of understanding concerning the Chaing Mai Seismic Research Station, T.I.A.S. 8774 (note: this agreement is no longer in force); 1977 United States-Thailand agreement to manage and maintain U.S. ammunition at the Royal Thai Armed Forces facilities, T.I.A.S. 8850; 1979 United States-Israel agreement regarding the construction of an airbase under the authority of the Foreign Assistance Act of 1961, as amended, T.I.A.S. 9450; 1981 United States-Sudan agreement regarding the United States forces present in that country in connection with a military exercise, T.I.A.S. 10322; and the 1987 United States-Thailand war reserve stockpile agreement. Negotiations are presently ongoing with the Socialist Republic of Vietnam (SRV) to obtain A&T status for the U.S. office in Hanoi to further POW/MLA recovery operations (Operation Resolute Duty), however, lack of diplomatic relations between the two governments has made this effort more difficult.

28. For central offices of record, see DOD Directive 5530.3, International Agreements, para. J.

Germany (2846, 5351, 5352, 7759)
Greece (2846, 3649)
Honduras
Iceland (2295)
Japan (4510)
Korea (6127)
Luxembourg (2846)
Marshall Islands [in Compact with U.S.]²⁹ again
The Netherlands (2846, 3174)
New Zealand (4151)
Norway (2846, 2950)
Panama (10032)
Papua New Guinea
Philippines (1775, 5851, 9224, 10585)
Portugal (2846) [Lajes Agreement is unpublished]
Singapore
St. Kitts and Nevis
St. Vincent and the Grenadines
Spain (2846, 10589)
Turkey (2846, 3020, 3337, 6582, 9901)
United Kingdom (2846, 6196) See also, Visiting Forces Act³⁰
Western Samoa

IV. HOW SOFAS ARE NEGOTIATED AND CONCLUDED

To negotiate and conclude a SOFA is an undertaking "having policy significance" either because of its intrinsic importance or sensitivity which would directly and significantly affect foreign and defense relations between the United States and another government, or because by its nature it would require approval, negotiation, or signature at the Office of the Secretary of Defense (OSD) or diplomatic level. Procedurally, therefore, no delegation of authority exists within the Department of Defense to negotiate or conclude such agreements.³¹

Authority to negotiate and conclude SOFAs must be obtained from the Department of State under its "Circular 175 Procedure."³² Unlike the prevailing circumstance for seeking A&T status, as discussed earlier, no blanket Circular 175 authority exists for SOFA purposes. Negotiating and concluding SOFAs is far too important to be addressed in such a fashion. Each proposed SOFA initiative requires a separate Circular 175. The Circular 175 sets forth the issue for decision, essential factors for consideration, and proposes a recommendation to the Secretary of State or his designated approval authority. At section V of this article, in support of the proposal, is a draft SOFA text and a memorandum of law exploring fully the supporting substantive authority.

29. For both the Federated States of Micronesia and the Marshall Islands, see *Compact of Free Association Act* of 1985, Pub. L. No. 99-239 (1986). The SOFA was concluded pursuant to Section 323 of the Act and has been reprinted in *COMPILATION OF AGREEMENTS BETWEEN THE GOVERNMENT OF THE UNITED STATES AND THE FREELY ASSOCIATED STATES OF THE FEDERATED STATES OF MICRONESIA, THE PRESIDENT'S PERSONAL REPRESENTATIVE FOR MICRONESIAN STATUS NEGOTIATIONS* (1987).

30. The 1952 Visiting Forces Act is a unilateral British statute enacted to implement the NATO SOFA within the United Kingdom. Britain has elected this approach, rather than conclude a supplementary agreement to the NATO SOFA with the United States as sending state. Unfortunately, the Visiting Forces Act does not fully agree with the NATO SOFA and has lead to disputes from time to time.

31. See DOD Directive 5530.3, *supra* note 28, para. 11.

32. For Circular 175 Procedures see II FOREIGN SERVICE MANUAL (FAM) 720.

Coordination with all interested departments and agencies is required. For SOFAs, this will include the Department of Defense and the National Security Council. Several general objectives are satisfied by the Circular 175 process. These include ensuring:

1. SOFAs are entered into consistent with constitutional and other appropriate limitations,
2. State Department approval, and coordination with other interested departments and agencies is obtained,
3. Timely and appropriate consultation with Congress takes place,
4. Authorization to sign the final text is obtained and appropriate arrangements for signature are made, and
5. Case Act³³ requirements are satisfied.

In addition to the Circular 175 process, many other decisions must be made to get the negotiations underway. The first among these is who will be the chief U.S. negotiator. Experience demonstrates that it is preferable to have a Washington-based negotiator. Resident ambassadors in a country have been appointed, as in recent negotiations with Spain, but their primary responsibility as the President's chief representative to the host country does not make them the best choice. Generally, the chief negotiator is from the State Department and has (or is given for purposes of the negotiations) the title of "Ambassador" or "Presidential Special Negotiator." On occasion, as with the Israeli SOFA talks, the negotiator is from the Defense Department.

The chief negotiator will have a support team from all interested departments. It is best if the team members are experienced with negotiations, expert in the subject-matter, skilled at obtaining coordinated positions from their respective department quickly, and are knowledgeable of the country concerned. All should be committed to the negotiator for the long haul. SOFAs have taken from six months to 13 years (in the case of Taiwan) to complete. It would be unrealistic to expect all participants to remain active for a decade or longer, but they should anticipate two to three years, which is the average negotiating time frame.

It is also useful to consider the team of the other government. If the talks are a renegotiation, then the other team is likely to be composed of individuals who have been involved in this process for a very long time. If the talks are with a government which has never had a SOFA with the United States (or with any other country), then the opposite is likely to prevail. In a situation where the other government has little or no knowledge about SOFAs, it would be prudent to anticipate having to make presentations on all of the basic principles and issues underlying a SOFA.

Venue of the negotiations is a complicated question. If held in the counterpart country, their delegation is likely to have ready access to their leadership and be able to obtain new instructions as needed. But they may also use the proximity of their press to influence the course of the talks. If the talks are held in the United States, the counterpart country team has an opportunity to be exposed to the dynamics of the U.S. political scene, but may have its flexibility reduced through limited instructions which cannot be easily supplemented. In addition to political considerations, factors of travel time, fatigue, and cost also must be considered. In the final analysis, the best arrangement is probably a mixture of locations, with favoritism shown to the counterpart country.

33. *Case Act*, 1 U.S.C. § 112b, implemented 22 C.F.R. § 181.

Preparation for negotiating rounds will take eighty to ninety percent of one's time with actual negotiations usually taking place in spaced sessions of four or five days once each month with participation from both State and Defense, as well as the military commands concerned. Beyond that, Washington representatives will run out of steam. Also, time is required between sessions to reconsider positions, consider new proposals, and allow positions to mature through further discussion and consensus building. Artificial deadlines for completion of the negotiations, such as the expiration of a current agreement, are unfortunate and generally work to the detriment of both parties, although most host states believe it gives them the upper hand. The key to any successful negotiation is diligence and good faith. Consequently, it is important for representation to develop a rapport with their counterpart. A "good" agreement cannot be achieved, in the final analysis, unless both sides consider it to be acceptable. If either party believes it has been taken advantage of, the relationship is already in serious trouble.

In developing a draft text, several factors must be considered: military requirements, United States law, and consistency with worldwide practice (or put another way, the precedent likely to be set). Usually the SOFA text is drafted by Foreign Military Rights Affairs, Office of the Assistant Secretary of Defense for International Security. It is then subjected to the coordinating process within the Federal Government and, as part of the Circular 175 process, a legal review will be accomplished. Some issues may be avoided as too hard to resolve politically, others may be addressed with ambiguity. One wit has called diplomacy the art of ambiguity. However, some issues are so fundamental that they must be addressed, and clearly. Knowing which are which is all important; however, sometimes ambiguity is unavoidable because the parties cannot agree upon detailed provisions.

Negotiations require a give and take, but some elements of the text will be critical. They represent a "bottom line." "Bottom line" issues are not the preserve of one party or the other. It is essential when dealing with a "bottom line" issue that it be conveyed in the most explicit of terms to the other party. U.S. primary criminal jurisdiction over official duty cases is an example of such an issue for the United States. The negotiations may well rise or fall on whether a formula can be found to satisfactorily resolve these "bottom line" issues. When rapport exists between the delegations, the chances are these "must have" knotty points can be resolved through communication. To a novice, dealing with these questions can lead to emotional highs and lows. To the more seasoned negotiator, however, it is all part of the process. During the initial exploratory rounds, the members of the delegations not only have an opportunity to begin the process of knowing one another, but each side will begin to understand what are likely to be the major issues.

Negotiations do not take place in an ideal world. If what has been said to this point has left the reader with the thought that somehow it will all work out, then the reader has been misled. One need only think of the decisions to withdraw United States forces from Thailand in 1976 and the Philippines in 1991. There will be times when no agreement can be reached for political reasons. More discouraging is when agreement cannot be reached because the delegation of the other party has no leadership or is racked with internal dissension, political division or the personal agendas of its members.

What, then, constitutes a successful negotiation? It is not reaching agreement at any price. Unfortunately, many incorrectly believe the test of a successful negotiation is whether or not an agreement is concluded. Our political system has a tendency toward this view and careers have been made or lost based upon

that standard. Yet, is not the greater interest of the country served by maintaining principles and policies, and avoiding the creation of adverse precedents which may cause difficulty with other nations? Experience demonstrates that countries negotiating a SOFA with the United States are "doing their homework." They either have access to SOFAs concluded between the United States and other countries, or they will request comparative information from the United States delegation. When a party with whom the United States is engaged in SOFA talks identifies a provision in a SOFA between the United States and a third country, it will be difficult for the U.S. team to refuse to include similar language in the present text unless it can point to unique or other circumstances.

Finally, if negotiations end with the conclusion of a SOFA, then it is important that those who will live under the agreement have a thorough and complete understanding of its provisions. This can be accomplished in two ways. First, a negotiating record. This record should be assembled during the course of the talks and should include texts tabled by both parties during the course of the negotiations, message traffic on the sessions, and notes of participants. Foreign Military Rights Affairs, as the Department of Defense office of primary responsibility for SOFAs, maintains in retrievable form these histories.³⁴ Second, team members must brief key personnel who will be responsible for implementation of the new SOFA. Hopefully, these key personnel have been kept informed about the current state-of-play of the talks and have had an opportunity to input their views during its course. Nonetheless, once the talks are concluded, a full review of the finalized agreement is appropriate.³⁵

V. THE CONTENT OF SOFA

Previously, the content of an exchange of notes to obtain administrative and technical (A&T) staff status has been discussed. The article now focus attention on the traditional elements that comprise a SOFA.

The main subject areas and subordinate topics are set forth below. Those with an asterisk (*) are usually included in a mini-SOFA. The other items may also be addressed in a mini-SOFA as necessary, in response to local circumstance. A full-blown SOFA is obtained when most, if not all, of the subject areas and subordinate topics are addressed in some detail.

SUBJECT AREAS AND SUBORDINATE TOPICS

*Definitions

United States Armed Forces

*Members of the force

*Members of the civilian component

Dependents

United States contractors

United States contractor employees

34. DOD Directive 5530.3, *supra* note 28, para. 1.

35. Dispute resolution in the context of international negotiations is a subject area in need of further research and study. See, e.g., draft proposal submitted to the Department of Defense in November 1991 by The Foreign Policy Research Institute, in U.S. BASES AND FACILITIES ABROAD: A NEGOTIATOR'S HANDBOOK.

***Respect for Law and Sovereignty**

*Duty to respect law and sovereignty.

Duty to abstain from any political activity.

United States to take all measures within its authority to ensure compliance.

***Entry and Departure Procedures**

*Members of the force exempted from passport and visa requirements (need only ID card and orders).

*Crews of visiting ships and aircraft need only ID card.

*Members of the civilian component and dependents require passports.

*Exemption from visa/multiple visa requirement

*Other topics: extent of applicability of immigration and emigration inspection, exemption from laws and regulations on the registration and control of aliens, exemption from work permit requirement if employed by the force in other than a local national position, nonacquisition of any right to permanent residence or domicile, request from host country for removal of an individual, and procedures to retire or separate in host country.

Wearing of the Uniform

When and where permitted.

Application of United States law and service regulations.

On/off facility distinction.

***Carrying of Arms**

*When and where permitted.

*Members of the force may possess and carry arms while on duty if authorized to do so.

*Other topics: host to give sympathetic consideration to exceptions, U.S. host commanders authorized to agree further, advance notice to host if arms taken off the base, and offbase carrying of arms limited to certain purposes, such as escort of a convoy.

Driving Licenses and Registration

Only U.S. forces license required to operate U.S. vehicles.

No local registration and no licensing fees for U.S. vehicles, but U.S. forces will mark.

Acceptance of U.S. license for operation of privately owned vehicle (POV) or host to issue local license without test or fee.

Local registration of POV, with payment of fee which is approximate cost of registration.

Other topics: transition period and administrative procedures.

***Criminal Jurisdiction**

*Exclusive and concurrent jurisdiction sharing formula.

*In concurrent cases, primary jurisdiction over official duty and inter se (essentially between Americans) belong to the U.S.; all others are primary host jurisdiction.

*Procedures for waiver of jurisdiction (request or recall; approval or automatic) and standard ("sympathetic consideration" or "except in cases of particular importance").

*Other topics: definition of official duty, procedures for processing official duty certificates (U.S. forces alone make official duty determination), authorization for U.S. forces to discipline and punish (to include

convening courts-martial) within host country, U.S. forces not authorized to carry out death penalty within host country (unless host law provides similar punishment), definition of security offenses and allocation of jurisdiction in security cases, notification of the decision not to exercise primary jurisdiction and the other party's latent right to exercise, trial in host country martial law courts prohibited, judicial assistance, procedures for arrest and apprehension, U.S. right to custody (through trial or through appeal) and related custody matters (maintained anywhere or in host country, and if convicted, will U.S. custody time be credited against sentence), procedures for search and seizure of property, guarantee of fair trial to include prompt and speedy trial, notification to the other party of the results of exercising primary concurrent jurisdiction, factors giving rise to a bar to trial by the other party, and circumstances of local confinement (when and where), and U.S. visitation rights.

***Civil Jurisdiction**

*Immunity for matters arising out of the performance of official duty; what action, if any lies against the United States.

Other topics: U.S. does not waive its right to raise the defense of sovereign immunity.³⁶

Arrest and Service of Process

Procedures for arrest and service of process, criminal and civil, within the military base.

***Claims**

*Types of government-to-government claims waived and the procedures for handling those not waived.

*Formula for adjudication and payment of all other claims (except contractual and combat) caused by an act or omission of U.S. personnel or by an individual for which responsible (either the United States adjudicates and the United States pays in full, or the host adjudicates and the payment is made under a cost-sharing arrangement).

Other topics: recognition of U.S. *ex gratia* claims procedures, and establishing time limitations on claims submissions.

***Duties, Taxes, and Other Charges**

*Importation, exportation, and local purchase exemption for U.S. material, equipment, supplies, provisions, and other property (also for U.S. contractor consignments on behalf of force).

*Other topics: procedures for transfer of such property to those not entitled to an exemption, exemption from future duties and taxes of a similar nature, and U.S. contractor income tax and license exemption.

36. *Foreign Sovereign Immunities Act*, 28 U.S.C. §§ 1330, 1332, 1391, 1441, 1602-611 (1988). The Act became effective January 19, 1977. The United States will assert the defense of sovereign immunity abroad only to the extent that foreign nations are permitted to assert the defense in courts of the United States. The United States is now an advocate of the restrictive theory of sovereign immunity, assertion of the defense being inappropriate in matters of an essentially commercial (nonsovereign) nature.

Importation, Use and Exemption of Personal Property³⁷

Exemption for household goods upon arrival, reasonable quantities of personal items thereafter, and POV.

Other topics: limitation on the number of tax free POVs, procedures for transfer to those not entitled to an exemption, and cooperation between the parties to prevent abuses.

Personal Tax Exemption

Exemption from personal income tax and any other tax based upon incidents of legal residence (e.g., property or poll taxes).

Other topics: conditions under which exemption may be lost (if individual is a citizen of the host country, if the income in question is derived from other sources within the host country, or if income taxes are not paid in the U.S.), and whether exemption from tax also includes exemption from filing.

Morale, Welfare and Recreation (MWR)

Authorization to establish commissaries, exchanges, sales and service activities, MWR facilities, and designation of authorized users (whether leave personnel and retirees are included).

Other topics: circumstances under which host or third country personnel may become bona fide guests and authorized users, and the rules and procedures for contracting with local commercial concerns as concessionaires.

Health Care

Basis for access to host health care.

Other topics: efforts to regulate U.S. medical care by exemption (e.g., abortions), and procedures for autopsies.³⁸

Postal Services

Authorization to establish postal service for official and private mail (letters and packages).

Other topics: operation under U.S. laws and regulations, customs control procedures, procedures for host authorities to inspect private mail (not first class letters), and any special use permitted of the host mail system.

Use of Transportation

Official vehicles, vessels, and aircraft exempt from toll road charges, landing and port fees, navigation and overflight charges, and any other similar charges.

Other topics: POVs exempt from toll road charges, and exemption from travel tax on airline tickets and departure fees from airports.

37. Tax arrangements frequently become so complex that they are addressed in agreements supplemental to the SOFA. See, e.g., the following unpublished tax agreements: 1952 Agreement Between the United States and The Netherlands for Relief From Taxation on Defense Expenditures, 1952 United States-Norway Agreement on Tax Relief, 1953 United States-Philippines Agreement on Tax Relief, 1954 United States-Turkey Tax Relief Agreement, and the 1955 United States-United Kingdom Rate Agreement.

38. No SOFA authorization is necessary to permit U.S. medical support to the force (including licensing physicians and other health care professionals) because host approval for the presence of the force within its territory is approval of all that is integral to the force.

Use of Currency and Banking Facilities

Authorization to contract for military banking services.³⁹

Relaxation of currency control restrictions and permission for military banks to convert currency of both parties and third countries (needed for travel, both official and pleasure).

Military banks authorized to provide full-range of banking services.

Other topics: contracting process done in accordance with U.S. law and regulation, circumstances permitting host to reject a bank selected through the U.S. contracting process (e.g., limited to security), host licensing of military bank (one time and pro forma), and procedures for military bank to acquire host currency (e.g., from national bank in order to obtain best exchange rate).

Contractor Employees

Limits on who qualifies (ordinarily resident, employed by other than a U.S. contractor, and not solely present in host country for purpose of performing contract).

Identify specific privileges to be accorded, e.g., household goods and POV importation duty free, tax exemption on income derived from contract employment, and use of commissary, exchange, military bank, and postal service.

Other topics: relief from work permit requirement, and assistance in expediting visa requirements for entry.

*Local Procurement⁴⁰

*Accomplished in accordance with U.S. law and regulation.

Other topics: commitment to use local contractors to maximum extent practicable on a competitive basis.

Utilization of Local Labor⁴¹

Accept local labor standards but not applicability of local labor law, rules, regulations, court decisions, or rulings.

Other topics: preferential local hiring.⁴²

39. Like medical services, if military banking services are provided in-house by the local accounting and finance office, no host nation approval is required. However, by its nature, services provided in-house may be limited to check encashment in dollars. Whether it will include currency exchange will depend on the force's access to foreign currency.

40. In the early 1950s, a concerted effort was made to conclude offshore procurement agreements. These agreements compliment SOFAs. The United States has offshore procurement or similar agreements with the following countries: Belgium (T.I.A.S. 3000), Denmark (T.I.A.S. 3987), France (T.I.A.S. 4914), Germany (T.I.A.S. 3755), Italy (T.I.A.S. 3083), Israel (T.I.A.S. 5839), Luxembourg (T.I.A.S. 3415), The Netherlands (T.I.A.S. 3069), Spain (T.I.A.S. 3094), Turkey (T.I.A.S. 3372), and Yugoslavia (T.I.A.S. 3567).

41. Labor arrangements can become so detailed and complex (establishment of a direct or indirect hire system, and providing for wage survey system) that a supplementary agreement to the SOFA on labor may be appropriate. See, e.g., the following unpublished labor agreements: 1960 Agreement for Employment of Personnel by the Hellenic Air Force for Utilization by United States Forces in Greece, 1968 Agreement Between the Government of the United States and the Government of the Republic of the Philippines Relating to Employment of Philippine Nationals in the United States Military Bases in the Philippines, and 1984 Agreement Relative to the Employment of Portuguese Nationals by the United States Forces, Azores.

42. Preferential hiring of local nationals is permitted by U.S. law if provided for in a treaty or executive agreement. See, 5 U.S.C. § 7201 note, and *Weinberger v. Rossi*, 456 U.S. 25, (1982).

***Customs⁴³**

*Procedures for importation and exportation of U.S. Government and personal property, including POVs.

*Procedures for tracking customs controlled items purchased during tour through exchanges or received through the postal service.

Other topics: inspection of household goods.

Governing Agreement⁴⁴

Preserving prior agreements not inconsistent.

Procedures for review and termination or modification of prior agreements.

***Duration and termination**

*Duration period and termination procedures (for example, either party may terminate upon notice effective after passage of stated period of time, usually one year, and absent notice there is an automatic extension from year to year).

*Ratified (if treaty) or accepted (if executive agreement) in accord with respective constitutional processes.

*Enters into force and effect on date of exchange of instruments of ratification or acceptance.

Other topics: authorization statement and signature line, and provisions for amending or suspending (special provisions in the event of armed conflict).

VI. CONCLUSION

The reader has been given only an overview of SOFAs. This broad survey should not be considered exhaustive. Many issues have only been lightly touched upon, other issues have not been discussed at all. Additional questions of interest might include: reciprocal SOFAs,⁴⁵ a SOFA as a treaty or as an executive agreement,⁴⁶ negotiating SOFAs in compliance with U.S. law,⁴⁷

43. It is not unusual for SOFAs to be supplemented by more detailed customs arrangements. *See, e.g.*, the unpublished 1982 United States-Philippines Customs, Immigration and Quarantine (CIQ) Agreement.

44. The importance of a governing agreement, provision becomes evident when it is realized that SOFAs do not contain all of the relevant provisions on SOFA subjects. Some indication of this fact has already been made by reference to specialized agreements on procurement, customs, labor, and taxation. Especially in instances where a foreign force has been present within a host country for decades, it is not unusual for an entire body of law to have evolved. A web of interrelated implementing arrangements and understandings may exist, and these may number in the hundreds. Most will be unpublished. A comparison of privileges granted by one host country, as contrasted with another, cannot accurately be made without taking into full account all SOFA subordinated arrangements. A simple comparison of SOFA texts could lead to misleading and incorrect conclusions.

45. The only fully reciprocal SOFA to which the United States is a party is the NATO SOFA, which is a treaty in the U.S. constitutional law sense. Consequently, NATO SOFA receives the benefit of the supremacy clause of Article VI of the Constitution, and is part of the "Supreme Law of the Land." Other SOFAs, in the form of executive agreements which have reciprocal provisions for foreign forces in the United States, such as with Israel, are not fully reciprocal. Only limited reciprocity is possible because of the U.S. federal system and privileges must be based upon an existing federal law.

46. Whether a SOFA should be a treaty or an executive agreement must be determined after considering several factors: the nature of commitments to be undertaken, whether a fully reciprocal SOFA is sought, the politics of ratification, timing, and the importance of ease of amendment.

47. Among the U.S. laws which must be considered when negotiating a SOFA are: the International Agreement Claims Act, 10 U.S.C.A. §§ 2734a, 2734b (1983 and West Supp. 1983); the Foreign Claims Act, 10 U.S.C. § 2734 (1983 and West Spp. 1983); the 1978 Contract

ensuring SOFAs provide necessary and appropriate exceptions from host laws,⁴⁸ and dealing with subsequent changes to U.S. or host laws which impact upon SOFA obligations.⁴⁹

Finally, it should be evident that in the absence of a SOFA, a judge advocate will have to rely upon on all known legal skills, be creative, and work hard to resolve problems. Solutions must be fashioned ad hoc. Consider how you might persuade a host official not to exercise criminal jurisdiction over a service member or convince a customs agent to release property without the payment of duties without a SOFA. Where there is a significant U.S. presence without a SOFA, military operations could be difficult, if not impossible. SOFAs establish a framework of basic rules and procedures that avoid (or at least minimize) conflicts between sovereigns. Although very essential, SOFAs do not provide ready answers to every question, and judge advocates who have wrestled with SOFA related issues will be the first to attest that plenty of work remains.

Disputes Act, 41 U.S.C. §§ 601-613 (1988); which provides the exact clause to be used for the settlement of disputes in all U.S. Government contracts; the 1984 Competition in Contracting Act, Pub. L. No. 98-369, 98 Stat. 1175 (codified in scattered sections of 28 and 41 U.S.C.); and Section 311 of the National Defense Authorization Act of Fiscal Years 1990 and 1991, Pub. L. No. 101-189, 103 Stat. 1352 (1989), which prohibits the payment of severance pay to local national workers whose jobs are lost as a result of a host government's action to terminate U.S. presence. See also GAO Report, Severance Pay: DOD Not Exempt From Paying Benefits to Greek Employees, Report B-242761 (July 1991).

The National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-90, 105 Stat. 1290 (1991), purported in section 1046 to require the President to begin negotiations with specified foreign countries to enter into agreements regarding defense cost-sharing. The President, in signing the bill into law, noted that based upon his constitutional responsibility he would consider this provision to be precatory and not mandatory.

48. The 1960 Federation of Malaya Visiting Forces Act, Parliament Act No. 23, applicability of which has been extended to U.S. forces in Malaysia, provides in Article 17(2),

While a member of any force of a country to which this section applies is by virtue of this section attached temporarily to a Federation force he shall be treated and shall have the like powers of command and punishment over members of the Federation force to which he is attached and shall be subject in all respects to the law relating to discipline and administration of that force as if he were a member of the force of relative rank.

The statute permits the exemption of the "exchange officer" from this provision if provided for by executive order.

49. For example, the 1986 Philippine Constitution purported to modify the termination provision of the 1947 Military Base Agreement, as amended. And recently the United Kingdom and other countries have suggested that agreements entered into by other than their foreign ministries (that is, by counterpart defense ministries and subordinates) are not legally binding but are merely a "gentleman's agreement." See DOD General Counsel Memorandum of October 31, 1991, International Agreements with the United Kingdom and Other Countries. Unfortunately, the United States has also engaged in such conduct. In the 1970s, Congress, seeing it as payment of foreign taxes, enacted a prohibition on the reimbursement of the Federal Republic of Germany for real estate taxes paid on behalf of properties made available for use by U.S. forces. Reimbursement was required by the 1959 German supplementary Agreement to the NATO SOFA, Article 63, para. 4(d)(ii), *supra* note 17.

If pursued, subsequent changes in national laws which are inconsistent with SOFA obligations constitute a breach of an international agreement under international law, even though properly enacted under internal constitutional law. The "wronged" state is entitled to seek appropriate remedy under international law in these circumstances. Needless to say, such situations should be avoided because they damage international relations and world order.

Overflight, Landing Rights, Customs, and Clearances

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I. INTRODUCTION

Although it is presumed that U.S. spy satellites and the retired SR-71 Blackbird regularly, and with impunity, violated the spirit of the law, if not the text, in the interests of national security, it is a basic tenet of international law that every state has complete and exclusive sovereignty over the airspace above its territory.¹ This has been codified in the Chicago Convention on International Civil Aviation of 1944.² With that basic tenet as a starting point, it is the purpose of this article to state and discuss the rules impacting on national sovereignty as they apply to overflight and landing rights and customs and clearances. Sometimes these arrangements are provided for in status of forces agreements, sometimes not.

This article will neither debate "space law" nor address questions of modern spy satellites leading to changed customs and state practice. Rather, it will discuss the practical problems faced by military lawyers and their commanders in dealing with national sovereignty issues impacting U.S. military aircraft. This article addresses the rules to be employed in overflight of countries, establishment of landing rights, and customs and clearance procedures — rules that judge advocates should know. Judge advocates should always keep in mind, however, that they are only advisors. The Commander, or in some cases, the State Department working through the Ambassador, makes the final decision.

Modern technology may render meaningless a given state's protest of unauthorized overflight of its territory. If a state cannot deter overflight because of its lack of air defense threats and the ability to employ them, then it has lost effective control of its airspace and its sovereignty has been degraded to a certain extent. That does not change the law, merely the facts. An excellent primer for the judge advocate to grasp the basics of this area of international law is found in Chapter 2 of Air Force Pamphlet (AFP) 110-31, *International Law - The Conduct of Armed Conflict and Air Operations*.

While U.S. technology would allow us to overfly countries that have no credible air defense, it is a violation of international law to do so and, even if necessary, it is not always in the best interests of the United States to so violate the law. In the 15 April 1986, attack on Libya, the United States Air Force (USAF) observed France's refusal to allow U.S. military aircraft to overfly its territory. The result for the Air Force was a forced trek of thousands of miles out

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1. Bishop, *International Law, Cases and Materials*, 3d Ed, Little, Brown and Co. 1953, 1962.

2. Dec. 7, 1994, 61 stat. 1180.

over neutral ocean territory to get aircraft into position to make the attack.³ In that instance, a nuclear power, France, had credible effective control of its airspace, i.e., perhaps they could have shot down U.S. aircraft. For pragmatic as well as other reasons, the United States avoided French airspace. In the 1973 Yom Kippur War between Israel and the Arab world, Operation *Nicklegrass* — the resupply of Israeli forces by the United States— the USAF was not allowed to proceed through Spain. Refueling and crew rest for U.S. transport crews were done through Lajes Air Base, in Portuguese territory. Portugal allowed overflight; Spain did not. Reasons for these decisions are as complicated as any reasons why countries decide to take any decision in their interests. Judge advocates and commanders involved in the field of dealing with foreign governments and their military agencies must be alert to the rules to be employed in such situations when planning operations and, especially, when conducting exercises or contingency operations.

Because these issues involve the national sovereignty of countries, establishing the rules by international agreement from the beginning can save both sides an enormous amount of work. For example, if judge advocates and their counterparts in foreign governments or military forces address these issues in writing, while preparing for a planned exercise, then in the event an actual contingency occurs where overflight and landing rights are required, it becomes an easier task to walk down the paper trail again. If parties illuminate some of the known difficulties, they may be more easily overcome.

II. INTERNATIONAL LAW OF THE AIR — BEGINNINGS

International law as customary law and as codified holds that each nation is sovereign as to the airspace above its territory.⁴ As Professor Bishop explains in his textbook on international law, this was not the sole concept of thought at the time air travel was made possible at the turn of the century.⁵ As air travel emerged in both civilian and military aspects, a meeting of the Institute of International Law in Brussels in 1902 resulted in two proposals: (1) the air be completely free to all parties for aerial navigation; (2) the air be subject to the sovereignty of the subjacent state. As the final act of the meeting, the proposal for aerial freedom was not accepted, rather the sovereignty regime was accepted in law and practice, although there were proponents for a regime in the air equivalent to that of freedom of the seas. As will be seen, countries and host nations to U.S. forces, exercise their sovereignty strenuously and insist that it be

3. A description and analysis of this raid, known as El Dorado Canyon, can be found in *Qaddafi, Terrorism and the Origins of the U.S. Attack on Libya* by Brian K. Davis, Westport CN, Praeger, 1990. A review of the book by Prof. W.T. Mallison, George Washington University is found at 86 AM J INT'L L., 227-28, Jan. 1992. It need not always be a nuclear power that poses the threat. In April 1992, a poorly marked United States C-130 drug interdiction aircraft wandered 300 miles west of its approved flight plan over Peruvian airspace and was fired upon by Peruvian Air Force SU22's, killing one U.S. crew member and injuring two others. The United States admitted later that the anti-drug mission aircraft had deviated substantially from its flight path. This episode was further complicated because the intercept occurred 80 miles off the Peruvian coast, under Peru's claim of a 200 mile territorial sea zone. The jets fired only to force the aircraft to land, not to shoot it down. The USAF crew is alleged to have believed they did not have to respond to Peruvian officials because they were, they thought, in international airspace. See WASH. POST, Apr. 26, 1992, at A-1, A-33; Apr. 28, 1992, at A-17.

4. BISHOP, *supra*, note 1, at 422-23.

5. *Id.* For a further historical analysis of the emergence of this rule of law, see Bernard E. Donahue, *Attacks on Foreign Civil Aircraft Trespassing in National Airspace*, 30 A.F. L. REV. 49, 51-52 (1989).

recognized. Exchanges of Notes between Germany and The Netherlands during World War I concerning German aircraft and zeppelins demonstrates this principle. Concerned that The Netherlands was not repatriating downed German fliers during the war, Germany protested these instances of failure to return, claiming that the fliers were disadvantaged by bad weather, poor navigation, etc., and that they should be allowed to enter Dutch territory and leave it.

The Netherlands Minister of Foreign Affairs insisted otherwise, saying:

The great liberty of action of an airplane, the facility with which it reconnoiters and escapes all control, have necessitated in its respect a special and severe treatment. If an airplane is found above Netherlands territory it is immediately fired upon, the only means to force it to respect the neutrality of the territory. If the aviator lands on territory of the Kingdom, whether of his own volition or in consequences of the firing or for any other reason, he is interned with his airplane.⁶

These beginnings of what would be later codified concerning the rights of state aircraft offer insight into the views of states as they struggled to fit the fairly new regime of the air into the regime of law. Perhaps out of necessity, i.e., a dearth of pilots and aircraft to fight the war, these Exchanges of Notes indicate the governments demanded respect for sovereignty in their positions and that a new type of law was developing. Respect for sovereignty was **considered essential—especially** if one wished to avoid becoming a belligerent. In the **above instances, neutrality** demanded that neither of the warring parties **overfly The Netherlands.**⁷ “During the World War for the first time the question of **aircraft in relation to neutral jurisdiction** became one of great practical importance. While practice was not, at first, in every instance uniform, gradually it came to be recognized that belligerent aircraft had no right to enter neutral jurisdiction.”⁸

As neutrals, The Netherlands and Switzerland took equal stances to intern aircraft and pilots. American aviators and their craft were not immune.⁹ The point being made was simply that states were not going to give up their sovereignty and surrender to the whims of new technology. As air travel increased and international routes were developed and used, agreements were sought to regulate these air lanes. Precursor to the Chicago Convention was the Paris Convention on Aerial Navigation of 13 October 1919, to which the United States was not a party. “Complete and exclusive sovereignty over the air space above its territory” was the agreement of this Convention.¹⁰ But the Air Commerce Act of 1926 codified in U.S. municipal law that exclusive national sovereignty was complete in the airspace above the United States.¹¹ Thus, the groundwork had been done for the establishment of an agreement that would codify these customary rules of international law.

6. BISHOP, *supra* note 1, at 424.

7. *Id.*

8. *Id.* at 425-26.

9. *Id.* at 426.

10. *Id.* See, *Convention on the Regulation of Aerial Navigation Held at Paris in 1919, October 13, 1919*, 11 LNTS 173.

11. BISHOP, *supra* note 1, at 426.

III. CHICAGO CONVENTION

The Convention on International Civil Aviation (Chicago Convention) entered into force with respect to the United States on 4 April 1947, almost three years after it was concluded.¹² It established the International Civil Aviation Organization and set forth the rules and guidelines for the safe and orderly development of international civil aviation. Article 1 of the convention states that the contracting states recognize that every State has complete and exclusive sovereignty over the airspace above its territory. Article 3 makes it clear that the convention only applies to civil aircraft and shall not be applicable to state aircraft. State aircraft include military aircraft and those used in customs and police services. The convention details the methods for establishing air routes and the rules to be followed for the free commerce of people and cargo. The need for such a convention grew out of the rapidly increasing international commerce of civil aircraft and passengers. Nothing was changed, however, with regard to state or military aircraft. Article 3 (c) clearly states, "No state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof."¹³

Although the convention ostensibly is not applicable to state aircraft,¹⁴ there is thought that some of its provisions codify the law applicable to state aircraft as concerns aircraft in distress.¹⁵ Article 25 of the convention provides that, "Each contracting State undertakes to provide such measures of assistance to aircraft in distress in its territory as it may find practicable...."¹⁶ Obviously, it can be argued that the distinction between state and civil aircraft is moot and the obligation arises in any instance of an aircraft in distress. The United Nations' General Assembly has stated it believes "that certain substantive rules of international law already exist concerning rights and duties with respect to aircraft and airmen landing on foreign territory through accident, mistake or distress."¹⁷

IV. DOD FOREIGN CLEARANCE GUIDE

In the normal course of business, when there are neither emergencies nor distress, U.S. state aircraft follow procedures for overflight and landing with regard to other countries as those procedures are set forth in a comprehensive document known as the Department of Defense (DOD) Foreign Clearance Guide (FCG), a directive from the office of the Secretary of Defense.¹⁸ Air Force

12. See *supra* note 2.

13. *Id.* at Article 3.

14. The distinction can be difficult at times and cause some concern. In the 1970s, USAF Aero Club aircraft at Clark Air Base in the Philippines were registered as U.S. civil aircraft with the "NC" registration letters, yet the Aero Club members wanted the aircraft treated as state (in the nature of military) aircraft under the R.P.-U.S. Military Bases Agreement which meant ease in filing flight plans, etc. The Philippines essentially argued that if the craft were civil aircraft under Articles 17 and 18 of the Convention, they would have to follow the civilian rules and be re-registered with Philippine registration. USAF Aero Club regulations required U.S. civil registry. A compromise was worked out, but a country which is not a longtime ally may not be so amenable to this exercise in negating sovereignty.

15. Army Pamphlet 27-161-1, Law of Peace, Vol 1, 4-23.

16. *Id.*

17. *Id.*

18. DOD Directive 4500.54-G. [Hereinafter referred to as Foreign Clearance Guide (FCG)] with cites to relevant chapters. Until 1991 this publication was known as the USAF FCG. AFR 8-5 is

Regulation 8-5 furnishes supplemental Air Force requirements and indicates that Headquarters (HQ) USAF/XOXXI formulates Air Force policy regarding foreign clearance matters and that office is the HQ USAF single point of contact for foreign clearance matters.¹⁹ Examination of the DOD FCG discloses the complexity of the rules issued by sovereigns for the use of their airspace and landing rights.

The Foreign Clearance Guide also distinguishes between national and international airspace.²⁰ The FCG states simply that U.S. military aircraft, cargo, equipment, DOD personnel, and DOD sponsored civilians entering another nation to conduct U.S. Government business therein must have the approval of the foreign government concerned.²¹ This applies, as well, to overflight and use of national airspace. Violations of these provisions are serious. Violations of foreign sovereignty result from unauthorized or improper entry or departure of military units, aircraft, or individuals.²² Violations of any provision of an international agreement or arrangement, or of a foreign clearance, are violations of foreign sovereignty which may or may not be so declared by the concerned country.²³ As far as the Air Force is concerned, "The use of the FCG applies to personnel in all Air Force activities."²⁴

The FCG provides the procedures needed for entry or overflight of another country and codifies agreements made between countries and the United States. It reiterates municipal laws and requirements of a potential host. The FCG is broken down into general rules, a detailing of specific areas of the world, and then specific country rules are detailed for compliance. There are time deadlines with which to comply and mission taskings for Unified and Specified Command CINCs. The FCG describes normal mission clearances and the diplomatic clearance process that is required. These rules have been worked out with individual countries in advance and changes are constantly being posted as new agreements come into existence and old ones are amended between the United States and foreign governments. The personnel involved in mission planning must always check for the latest changes in the FCG. At times, the FCG also applies, to individuals and a section known as "Personnel Clearances" should be examined to determine if an individual country requires prior notification for travel — even if the traveler is on leave.²⁵ Examples of the vagaries of the FCG show a difference in concerns of individual countries. For instance, according to the rules for the USCENCOM Area of Responsibility (AOR), Egypt requires an eleven-day notice to process aircraft clearance requirements and personnel accompanying the aircraft are required to disclose the specific purpose of their

currently under revision to reflect that AF/XOXXI is now the Executive Agent for the FCG vice being the OPR.

19. AFR 8-5, USAF Foreign Clearance Guide (FCG), para. 3b. (Sept. 1998).

20. International airspace includes all airspace seaward of coastal states' territorial seas. It includes airspace over contiguous zones, exclusive economic zones, and the high seas. Military aircraft operate in such areas free of interference or control by the coastal state. It is U.S. policy to routinely and frequently exercise our overflight rights in international airspace.

DOD FCG GENERAL INFORMATION BOOKLET, ch. Three, at 9 para. 1. The Information Booklet indicates that the U.S. recognizes territorial sea claims up to a maximum breadth of 12 miles. To see how conflicting claims can endanger U.S. military aircraft, *see supra* note 3.

21. FCG, *supra* note 18, GENERAL INFORMATION BOOKLET, ch. Three, at 11. This resource has a classified supplement which should be consulted, especially the chapter on Africa & Southwest Asia because of the recent War to Liberate Kuwait.

22. *Id.*

23. *Id.*

24. AFR 8-5, Preface

25. FCG, *supra* note 18, at ch. six, para. A2d.

visit and what subjects are to be discussed. Air Force personnel do not wear their uniforms in-country and must have proof of recent Human Immunodeficiency Virus screening.²⁶ Kuwait requires fifteen days lead time (excluding Fridays) for an aircraft request and individuals need passports and visas unless aircrew members are on a rescue mission.²⁷ Egypt allows individuals to obtain a "planeside" visa, but unless they are familiar with the FCG, they may not know that they have to carry visa photos.²⁸ On the other hand, Oman requires only a seventy-two-hour notice for aircraft, but wants to know the nationality of all crew members who are not U.S. citizens and requires a thirty-day notice for personnel.²⁹ Saudi Arabia, however, while requiring ten days clearance lead time for aircraft, has imposed new restrictions because of the continuation of Desert Shield/Desert Storm (Desert Calm).³⁰ Egypt even specifies whether individuals may take photographs, and of what.³¹

Often the rules are tied to Status of Forces Agreements (SOFAs) that the United States has entered into with other countries. Such agreements usually make entry requirements easier for SOFA mission aircraft, as will be detailed later.

Judge advocates who are engaged in exercise and contingency planning with foreign military forces must be alert to the requirements for clearance and overflight in their scenarios. This author has had the experience of planning and conducting exercises in the CENTCOM AOR and from experience can state that the single most frustrating aspect of dealing with those governments was obtaining prior and proper permission for the flight and entry of aircraft during the exercise. During the Gulf War (Operations Desert Shield/Storm), these requirements were likely maintained, although they were probably relaxed to a degree necessitated by the imminence of combat. Nonetheless, now that the immediate crisis has passed, it is most likely that the countries have returned to the difficult and time-honored way of doing whatever is necessary to maintain and manifest their national sovereignty.

V. LANDING RIGHTS

The United States, because of the global reach of its aircraft (and naval vessels), has established agreements with other governments for the use of their facilities for U.S. Armed Forces. These may be basing rights, mutual defense agreements, leases of property, agreements for the servicing of aircraft or vessels, or merely access rights to bases already established. In the past, as with the North Atlantic Treaty Organization Status of Forces Agreement and the Agreements with Japan, Korea, and the Philippines, full-fledged military basing rights agreements were established and were followed by massive buildup of facilities and the presence of many American forces.

Today in volatile areas of the world such as the Middle East and Africa, a sort of limited basing rights accommodation such as limited access rights agreements is more agreeable to host nations. By such agreements, U.S. forces may improve upon and use host country installations, but without establishing a military

26. *Id.* at 72, 76-77.

27. *Id.* at 136, 138.

28. *Id.* at 77.

29. *Id.* at 192, 194.

30. *Id.* at 217-227.

31. *Id.* at 79 (Egypt).

presence other than caretaker personnel. In areas of the world where the presence of U.S. forces is controversial (as in the Middle East), access agreements are favored. They allow the United States to make use of facilities, but the host nation does not have the difficulty of explaining to its own people why it is granting the presence of foreign forces in their midst. For the most part, these agreements are hammered out over long negotiating sessions which can be as tortuous for the host government as the potential tenant or user. But before the two sides sit to negotiate on the question of U.S. Armed Forces using another country's facilities, serious preliminaries must be accomplished by the United States. While the Department of Defense may make the determination of the need, the Department of State usually has the lead on how the need will be transformed into an agreement. The Department of Defense Directive 5530.3 sets forth the requirements for establishing international agreements; however, establishing those agreements is beyond the scope of this article.³² Landing rights agreements are a form of international agreement, whatever their context, and thus fall within the authority of the State Department under their regulations known as Circular 175.³³

In attempting to obtain a landing rights agreement with a country that has not been host to U.S. forces in the past, the lead will probably be taken by the State Department in a direct communication with the Foreign Ministry of the host nation. If the concept is agreeable to the two governments, the details of an agreement can then follow. The United States has established landing rights with numerous countries in this way, some classified but most unclassified. In the Middle East, the host governments with whom the United States deals generally do not advertise the fact of agreements with the United States for military purposes. In contrast, in the modern world it is known that the United States has agreements with NATO countries and those agreements allow for the berthing of ships and basing of aircraft and personnel. Landing rights agreements may be a type of limited agreement that will apply to allow landing of U.S. state (military) aircraft only in certain circumstances, such as an agreement with a remote island country to allow landing of test aircraft used in tracking an eclipse or some other specific event. The details of any particular unclassified agreement are found in a publication of the Department of State known as *Treaties in Force (TIF)*.³⁴ Once a document is identified in TIF, a citation to the *U.S. Treaties and other International Acts (TIAS)* series or the *United Nations Treaty Series (UNTS)* will guide the researcher to the text of an agreement. It is just a matter of time before all these resources are reachable through computer-aided research although, presently, Federal Legal Information Through Elections (FLITE) allows access to some.³⁵

While the international agreement may set the terms for the use of facilities, the specifics of how those access rights are implemented will, again, be detailed

32. One of the best resources on the establishment of international agreements is a paper prepared by Boyd W. Allen, Jr., Assistant Air Force General Counsel, dated 1 Dec. 1983, which goes into specific detail of how the Case Act (1 U.S.C. 112b) is implemented. The Act requires that Congress be notified of the establishment of international agreements and the law allows for the State Department to promulgate regulations necessary to carry out the mandate. This entire area is worthy of being a major article in and of itself.

33. Volume II, *Foreign Affairs Manual*, ch. 700.

34. This resource should be within arms reach of any judge advocate who deals in International/Operational law. It identifies which agreements are current, either bilateral between the U.S. and other countries, or multilateral agreements to which the United States belongs.

35. See DEPARTMENT OF DEFENSE FLITE USER'S MANUAL, Appendix B, Feb. 3, 1992, published by Directorate of Legal Information Services, Air Force Legal Services Agency Denver, CO 80279-5000.

in the Foreign Clearance Guide. The content of an aircraft clearance request may be required to furnish a fund citation for payment of services such as fuel and maintenance of the aircraft. Airports charge landing fees and host countries are no different. The FCG will even detail whether there will be a charge for the cost of a guard on the aircraft. It seems no detail has been left unresolved — except perhaps the status of personnel arriving in a host country. Whether an individual has diplomatic immunity, more limited forms of immunity, or no immunity from host country laws is not indicated in the FCG. If there is a status of forces agreement with the country, then military personnel and dependents may have a measure of protection from the host nation by falling under the agreement. Limited access agreements indicate the status of personnel, but sometimes the agreements are, themselves, classified so that a very few persons with the need to know are aware of the status.

The terms of an international agreement may indicate that fees are waived if U.S. aircraft land at military bases. But if the aircraft have to divert to a civilian airport to land, fees will normally be charged and “credit cards” may not be accepted. The Defense Fuel Supply Center establishes contracts and agreements around the world for purchase and, at times, storage of fuel for U.S. Armed Forces, so a number of these costs are resolved. There are times, however, when the Defense Attache Office at the host country U.S. embassy has to resolve unpaid bills and charges in unusual situations.

VI. CUSTOMS AND CLEARANCES

The sovereignty of the United States and that of a host nation will, at times, collide in the field of customs and clearances. The U.S. Armed Forces cannot allow its state aircraft to be examined if a mission might be impeded because of it. There are instances where host nations have insisted on customs inspections before a U.S. military aircraft is admitted into the country. These procedures for inspection are usually agreed to in international agreements and their implementing arrangements, but at times a change in domestic law of the host country may deviate from the agreement. When such things occur, an aircraft commander has some difficult decisions to make. The USAF position on this issue is found in the Foreign Clearance Guide. As expressed sovereign instrumentalities, U.S. military aircraft are entitled to the privileges and immunities customarily accorded warships, when aircraft are cleared to overfly or land in foreign territory.³⁶ Absent agreement to the contrary, these privileges and immunities include:

exemption from duties and taxation; immunity from search, seizure, and inspections (including customs and safety inspections); or other exercise of jurisdiction by the host nation over the aircraft, personnel, equipment, or cargo on board. USAF aircraft commanders will not authorize search, seizure, inspection, or similar exercises of jurisdiction enumerated above by foreign authorities except by direction of HQ USAF or the American Embassy in the country concerned.³⁷

36. HQ USAF/JACI (now JAI) legal memorandum of 14 June 1983. The memo details the development of these privileges and immunities as recent developments crystalizing into customary international law and was generated to respond to our ANZUS partners' claim in the 1980's that the rule of law did not prohibit them from inspecting military aircraft.

37. *Id.*

Based on this position maintained by the USAF, a message was generated detailing procedures for aircraft commanders to employ to maintain the principle in light of a confrontation on the ground with foreign authorities.³⁸ Nonetheless, because of insistence of New Zealand authorities that their officials perform agricultural spraying of aircraft, the U.S. Government was required to develop separate agreements to control the practice of landing in that country while still maintaining the principles.

VII. OPERATIONS IN THE REAL WORLD

A. Philippine Customs Immigration and Quarantine Arrangements

Air Force Pamphlet 110-20, Selected International Agreements, sets forth a number of the agreements that the United States has established with host governments. The Philippine-U.S. Military Bases Agreement (MBA) offers an opportunity to examine the details of a mutual defense arrangement to determine the access granted U.S. forces. Established in 1947, the MBA has been amended numerous times and was not renewed in 1991. Nevertheless, evolution of the MBA and numerous side agreements it spawned were indicative of the evolving nature of the relationship between the two countries. When the MBA was first established, it allowed for U.S. prosecution of Philippine nationals who committed offenses inside the U.S. military bases.³⁹ As the host country grew to be a partner in the Association of East Asian Nations (ASEAN) and assumed a leadership role in the Third World, the jurisdictional arrangements evolved also. One of the more pointed arrangements that grew out of the MBA was the 1982 Customs, Immigration, and Quarantine Arrangements (CIQ).⁴⁰

38. UNCLASS MSG from HQ Military Airlift Command, Scott AFB, IL, Date Time Group 092200Z Jan. 86, Subj: Inspections of US Aircraft by Foreign Officials. The message set forth four procedures:

3. If confronted with a search request by foreign authorities, aircrews should use the following procedures: A. In most cases, search attempts may be halted simply by a statement of the aircraft commander (A/C) to the foreign official(s) that the aircraft is a sovereign instrumentality not subject to search without consent of HQ USAF or the US Dept of State officials in the country concerned. This should be clearly conveyed in a polite manner so as not to offend foreign authorities who may honestly, but mistakenly, believe they have authority to search USAF aircraft. B. If foreign authorities insist on conducting a search, the A/C should make every effort to delay the search until contact is made with HQ USAF (through MAC Command and Control) or the appropriate embassy officials. The A/C should then notify these agencies of [sic] foreign request by the most expeditious means available and follow their instructions. C. If foreign officials refuse to desist in their search request, pending notification to HQ USAF or the appropriate embassy, the A/C should indicate that he would prefer to fly the aircraft elsewhere (provided fuel, flying time, and mechanical considerations permit a safe flight) [sic] and request permission to do so. D. If permission is refused and the foreign authorities insist on forcing their way aboard an aircraft, the A/C should state that he protests the course of action being pursued and that he intends to notify both HQ USAF and the appropriate American embassy of the foreign action. The A/C should not attempt physical resistance, and should thereafter report the incident to HQ USAF and appropriate embassy as soon as possible. 4. Other procedures may apply when carrying sensitive cargo or equipment.

39. A recent article on the evolution of the U.S.-Philippine relationship in the area of mutual defense and assistance is "The Philippine Bases and Status of Forces Agreement: Lessons for the Future", by Rafael A. Porrata-Doria, Jr., 137 *MIL. L. REV.* 67 (Summer 1992). Porrata-Doria at 86-91 discusses whether the original agreement was an "unequal treaty" because of the vast disparity in the military and economic strengths of the two countries. He concludes it was not.

40. Administrative arrangements implementing the agreement of January 7, 1979, (T.I.A.S. 9224) for the performance of customs, immigration, and quarantine functions at United States facilities at Clark Air Base and Subic Naval Base in the Republic of the Philippines, with annex

In a 1979 amendment to the MBA, the United States agreed to turn over to the Republic of the Philippines Clark Air Base and Subic Naval Base (and other smaller installations) in return for the establishment of U.S. Facilities on the bases.⁴¹ By an Exchange of Notes that established that executive agreement, the United States agreed it would allow RP customs to be established on the bases, i.e., to collect taxes, examine merchandise coming into the country through the bases, to examine passports, etc.⁴² In other words, the Philippine Government planned to do all those things a country does to express its sovereignty.

As an example of expressions of sovereignty, Article V of the 1947 Philippine-US Military Bases Agreement granted the United States complete exemption from customs and duties, to wit:

No import, excise, consumption or other tax, duty or impost shall be charged on material, equipment, supplies or goods, including food stores or clothing for exclusive use in the construction, maintenance, operation or defense of the bases consigned to, or destined for, the United States authorities and certified by them to be for such purposes.⁴³

Through further amendments in 1979, what were once U.S. military bases became Philippine bases where the United States maintained military facilities therein and kept the right to unhampered military operations concerning U.S. forces.⁴⁴

In Annex III, paragraph 9, of the 1979 amendments, it was anticipated that representatives of Philippine civilian agencies would be performing their duties on the bases. In 1982, in order to implement that incipient agreement, the CIQs were negotiated.⁴⁵ These were administrative arrangements for the performance of customs, immigration, and quarantine functions in the U.S. facilities at Clark Air Base and Subic Naval Base by Philippine officials because those were the two main, noncommercial, areas that allowed entry of personnel into the Philippines.

and exchange of notes. Signed at Manila December 8, 1982; entered into force December 8, 1982 T.I.A.S. 10585.

41. Agreement amending the agreement of March 14, 1947, as amended, concerning military bases, with implementing arrangements, exchanges of notes, and related letters. Exchange of Notes at Manila January 7, 1979, entered into force January 7, 1979, 30 U.S.T. 863, T.I.A.S. 9224. For ease of reference, the 1947 US-RP Military Bases Agreement, the 1965 amendments to Article III on jurisdiction, and the 1979 exchanges of notes can be found in AFP 110-20, *Selected International Agreements*, at 2-99 — 2-120.

42. *Id.*

43. Agreement Concerning Military Bases, Mar. 14, 1947, U.S.-Phil., 61 Stat. 4019, T.I.A.S. No. 1775, 11 Bevans 55, 43 U.N.T.S. 271.

44. See *supra* note 41. An example of what can only be called "colonial arrogance" can be seen in the following example. For years before the CIQ went into effect, U.S. military personnel were entering the Philippines through Clark AB or Subic NB in leave status for vacation. The Philippine immigration laws did not provide for this type of informal entry, but it was standard practice for U.S. personnel to enter the country this way and try to deal with Philippine officials on an "ad hoc" basis. Eventually, the issue was resolved in favor of both sides by the CIQ arrangements which specifically authorized entry to the country in leave status. See *supra* note 40.

45. The CIQ arrangements themselves were implemented by an exchange of notes between the Philippine and U.S. Governments in Manila on 8 December 1982. This author was legal advisor at US Embassy Manila at the time the CIQ arrangements were negotiated and a member of the US negotiating team which was comprised of USAF and USN judge advocates and embassy political-military personnel. The negotiations took from approximately March to December 1992, with the key issue being the reluctance of the Philippine Government to sign an agreement that specifically exempted US military personnel and their dependents from a "hold departure" roster—a Philippine institutional concept that prevents a person charged with a criminal offense from leaving the country. The logjam was broken and the agreement was reached when language was found that referenced and strengthened Article XIII of the Military Bases Agreement (Jurisdiction) as it had been amended in 1965. Compare T.I.A.S. 5851; and T.I.A.S. 10585, Sect. VII, para. 8.

The arrangements were complicated and detailed. They provided the terms for entrance of U.S. military aircraft and vessels into the country, including descriptions of cargo manifests, mail, personnel lists, and the like. Arrival and departure documents had to be produced and Philippine Immigration documents had to be presented. The arrangements set forth the rules for customs examination and made exceptions for cargo that was transiting, but not destined for, the Philippines. United States military personnel and their dependents, on leave, were now liable for immigration and alien registration fees. This created a new legal regime as far as the Philippine - U.S. relationship was concerned. In the past, the U.S. forces truly had not been held accountable for personnel and cargo entering the country. Things were destined now to be different and the Philippine personnel of the various agencies were allowed to perform their functions on the bases. This evolution of allowing customs and duties to be collected for incoming personnel led to confrontations as the Philippine agents sought to expand their authority and the U.S. representatives at the bases sought to restrain it. For instance, if one returned to the islands from leave in Korea (as many did) with "T" shirts and tennis shoes, how much was too much for personal use? Where does one draw the line between personal use items (untaxed) and business assets (taxed)? It seems there was no real problem with the dependent wife who brought back 5000 shirts — but all cases were not so cut and dried.

For almost eight years this system evolved, until June 1991 when Mt. Pinatubo erupted adjacent to Clark Air Base and the United States lost what some called the "mandate of heaven" for its continued military presence in the country. As of this writing, our forces have departed, but newly-elected President Fidel Ramos has indicated he believes we can reach agreement on U.S. access to Philippine bases.⁴⁶

Out in the Western Pacific, the Philippines is not the only country with whom our security relationship has evolved and changed significantly. Defense relationships among the United States, Australia, and New Zealand (known as ANZUS) have changed. In 1952, the United States entered into a multilateral security treaty known as the ANZUS Pact.⁴⁷ Under the authority of the treaty, the United States and Australia established a status of forces agreement in 1963.⁴⁸ In 1981, the two countries agreed on the operation of U.S. military flights through Royal Australian Air Force Base Darwin.⁴⁹ At present, there is no SOFA for U.S. forces stationed in New Zealand. There is, however, an agreement concerning scientific and logistics operations in Antarctica.⁵⁰ While there are no American military bases in either country, access to bases and transit through territory is an essential ingredient for projecting U.S. military power. The U.S. view that military aircraft are exempt from in-transit customs, immigration, and

46. For an in-depth analysis of the capabilities the U.S. lost with the withdrawal from the Philippines, see ALVA M. BOWEN, JR., *U.S. Facilities in the Philippines*, in *THE PHILIPPINE BASES: NEGOTIATING FOR THE FUTURE*, (Fred Greene, ed. 1988). The book answers many other questions about the history and utility of the bases in the Philippines.

47. Security Treaty, signed at San Francisco, Sept. 1, 1951; entered into force April 29, 1952. 3 U.S.T. 3420; T.I.A.S. 2493; 131 U.N.T.S. 83.

48. Agreement concerning the status of United States forces in Australia with protocol. Signed at Canberra May 9, 1963; entered into force May 9, 1963. 14 U.S.T. 506; T.I.A.S. 5349; 469 U.N.T.S. 55.

49. Agreement relating to operation of United States military flights through RAAF Base Darwin. Exchange of notes at Canberra, March 11, 1981; entered into force March 11, 1981. 33 U.S.T. 1300; T.I.A.S. 10112.

50. Agreement relating to cooperation in scientific and logistical operations in Antarctica, with memorandum of understanding. Exchange of notes at Wellington December 24, 1958; entered into force December 24, 1958. 9 U.S.T. 1502; T.I.A.S. 5141; 324 U.N.T.S. 111.

quarantine laws is followed by most countries of the Western Pacific, except for the ANZUS partners. Because neither Australia nor New Zealand customs or quarantine officials can find a provision in their domestic law that would exempt state (military) aircraft, they have insisted on inspecting aircraft in situations where the United States views such actions as violations of sovereign immunity. Additionally, with regard to New Zealand, the United States faces a new and powerful environmental conscience that focuses specifically on nuclear power. Since 1984, the view of New Zealand's Labor Party has been espoused in elected governments and has held that nuclear powered or armed ships or submarines would be barred from entry into New Zealand ports. Effectively, this policy led to the banning of all U.S. naval port visits because of the U.S. policy to "neither confirm nor deny" the presence of nuclear capability. In 1984, it was thought a new Tri-lateral status of forces agreement could be established to resolve these difficulties.⁵¹ In truth, as of 17 September 1986, the United States suspended obligations under the ANZUS Pact as between the United States and New Zealand.⁵² The problems have become intractable and since 1984 there has been no movement to have the trilateral SOFA established. It would thus appear that unless the United States changes its "neither confirm nor deny" policy there is, in effect, no military relationship with New Zealand. There is some indication, also, that the presence of nuclear capability was going to be as intractable a problem with the Philippines as it is with New Zealand. Thus, having lost, essentially, two areas of the Pacific for projection of air and sea power, the extent to which U.S. military might can be exercised may fall upon the cognizant American Embassy in lieu of a theater commander.

B. Ambassador's Authority

There will always be a sort of natural tension between the DOD and the State Department when it comes to issues of the use of military assets in overseas environments. But both State and Defense are creatures of the executive branch. Thus, the authority of the Chief Executive, the Commander in Chief, is paramount. Section 207 of the Foreign Service Act of 1980 provides that the Chief of Mission (COM/Ambassador/Chargé d'Affaires) to a foreign country shall have full responsibility for the direction, coordination, and supervision of all U.S. Government executive branch employees in that country except for employees under the command of a United States area military commander.⁵³ Each Chief Executive sends to the appointed ambassadors and chiefs of mission what has become to be known as "The President's Letter" outlining the President's view of the authority and responsibility of the ambassador over his mission and the personnel attached to it.⁵⁴ Military personnel in foreign

51. Commander in Chief, U.S. Pacific Command, 1984 U.S. PACOM Legal Conference, Baguio City, Philippines, Report of the Standing Committee on International Politico-Military Relations, 23 Mar. 1984.

52. 1992 *Treaties in Force*, at 302.

53. Pub. L. No. 96-465, 94 Stat. 2071, 2079-2080, Oct. 17, 1980.

54. President George Bush's 12 July 1990 letter used the following language with regard to his view of those military personnel in a particular Ambassador's country:

As Commander in Chief, I retain authority over United States Armed Forces. On my behalf, you have responsibility for the direction, coordination, supervision, and safety, including security from terrorism, of all Department of Defense personnel on official duty [in (country)/at (international organization)], except those personnel under the command of a U.S. area military commander. You and such commanders must keep each other currently informed and cooperate on all matters of mutual interest. Any differences that cannot be resolved in the field should be reported by you to the Secretary of State; unified commanders should report to the Secretary of Defense.

countries must accept the concept that the COM may well direct how certain military policies are applied on the ground in a foreign country. As an example, at Clark Air Base in the late 1970s, a local national trespassing on the base was bitten by a security police military working dog (MWD) when the intruder tried to kick the animal when it found the intruder hiding on the base. As a result, for some time after, the MWDs were muzzled at the direction of the American Embassy in Manila. While this may appear to be a minor incident in U.S.-Philippine relations, it was viewed as a serious matter by the Embassy for reasons that far outweighed the Clark AB requirement to keep intruders off the base. This incident caused the natural State-Defense tension to rise, but there was no question but that the Embassy's order was followed. The President's letter, itself, states that the Chief of Mission is the President's personal representative.

Judge advocates in foreign countries must be sensitized to the relationship between State and Defense and be prepared to act accordingly. As a rule, it is helpful to understand that the very language between the two agencies may be different. Chiefs of Mission normally look to their Political-Military Officer for direction and guidance on DOD-related issues. Issues relating to the duties of an embassy to its own national in the foreign country are handled by the Consular Sections — headed by the Consular General. Thus, the embassy consular section will normally have the say in which areas of a particular country are off-limits to U.S. personnel. This is part of the Chief of Mission's responsibility for safety and security. You should know also that the very immunities from local laws differ as between diplomats who are under the protection of the Vienna Convention on Diplomatic Immunity and consular officials who have a lesser degree of protection under the various consular conventions. As a rule, consular officials are the ones who visit Americans in the local jails unless there is U.S. military responsibility for this task under DOD Directive 5525.1 and AFR 110-12.

As a practical matter, close and continued contact with the Embassy and its personnel is a must for judge advocates in overseas areas. Personal, as well as professional, contacts can help cut away some of the State-Defense murkiness and may lead to mutual understanding of the mission. Experts in the Embassy can explain cultural aspects of the local nationals that may not have been mentioned at such times as newcomers' briefings.

The lesson to be stressed here, however, is that unless there is a direct employment of U.S. forces under the control of an area commander, most of the time the policy decisions that emanate from the Embassy are going to be the controlling principles for the conduct of U.S. personnel (including military) in a particular country.⁵⁵

VIII. CONCLUSION

This topic has stressed the need for U.S. forces and the judge advocates who advise them to respect the sovereignty of nations notwithstanding the superior military force held by the United States in its relations with other countries.

These letters can be found in the current edition of the Foreign Affairs Manual.

55. The Goldwater-Nichols Department of Defense Reorganization Act of 1986 (Pub. L. No. 99-433, 100 Stat. 992) in full implementation will bring all military personnel assigned to a particular geographic area under the control of the area commander. This was intended to clarify questions of the control of military personnel who may have been under the control of the Embassy because of the nature of their mission, but were not necessarily under the control of an area CINC.

There are very technical and detailed agreements that have been established by the United States in its realm of foreign relations and the rules must be followed. Agreements such as treaties and SOFAs are part of international law and, since at least from the time of *The Schooner Exchange v. McFaddon*,⁵⁶ international law has been part of the law of the United States. Many of the rules that must be followed for bringing U.S. forces into a foreign country can be found in the DOD Foreign Clearance Guide and related materials. Changes to the FCG may emanate from a cognizant American Embassy Defense Attache Office (DAO) who will send the changes through channels to the DOD FCG manager. It is always wise to check with the DAO for changes before either an operation or an exercise is implemented.

The suggestions above are some of the more practical solutions to be employed in judge advocates' dealings with foreign governments when use of U.S. forces is implemented. The article is intended to broaden the view of those who deal with foreign governments and their military forces in order to bring into focus the idea that while the U.S. Armed Forces are sufficiently powerful to throw their weight around with impunity, even in a dangerous and complicated world, they follow the rules.

56. 7 Cranch 116 (1812).

A Primer on Foreign Criminal Jurisdiction

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I. INTRODUCTION

In its effort to find its niche in the post-Cold War world, the United States Air Force recently published a monograph entitled "The Air Force and U.S. National Security: Global Reach - Global Power."¹ Its premise is that the power vacuum created by the demise of the Soviet Union and the rapidly changing world political environment is likely to be filled by local conflicts that could threaten the interests of the United States and its allies. Indeed, Iraq's invasion of Kuwait was an example of such a conflict. Given this potential for instability, the paper concluded that future Air Force planning "calls for an increased emphasis on force projection capabilities—even more flexible, rapidly responding, precise, lethal forces with global reach."²

Of course, the Air Force's emphasis on global mobility is not new. Basic Air Force doctrine has long held that one of its advantages over land and naval forces is its ability to deploy rapidly to any spot on the Earth:

The unbounded medium of aerospace allows commanders to disperse, concentrate, and maneuver aerospace forces to gain unparalleled observation of any point on the Earth's surface. For military operations, the aerospace medium exposes an enemy's entire power structure to assault by the aerospace vehicle, including his sustaining warfighting components vital to the prosecution of war.³

This rapid mobility doctrine, in turn, is enhanced by the principle of forward deployment: the closer a force is to its anticipated enemy, the more rapidly it can mobilize to oppose it. For many years, this strategy has guided the United States' practice of stationing its forces on friendly foreign soil. Its forward deployment supporting the North Atlantic Treaty Organization (NATO) in Europe is a good example.

Just as forward deployment abroad is an old concept, so is the fact that soldiers get into trouble. In fact, it is a phenomenon as old as armies themselves. This article is about a combination of these factors — one that has been labeled "foreign criminal jurisdiction" (FCJ). In the United States' experience, a military member's violation of foreign law has involved all sorts of issues, primarily the question whether authority to prosecute an offender in any particular situation rests with the sending or receiving state. Given the Air Force's new emphasis

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1. The Air Force and U.S. National Security: Global Reach Global Power, June 1990.

2. *Id.* at 3.

3. Air Force Manual 1-1 Basic Aerospace Doctrine of the United States Air Force, 2-2, 16 Mar. 1984.

on "Global Reach," it is a question that will continue to arise often in years to come.

The purpose of this article is to examine FCJ from a United States perspective. One of the most critical jobs for a U.S. military judge advocate stationed abroad is to minimize and manage situations involving violations of foreign laws by U.S. servicemembers. Hopefully, this article will make that often difficult effort a bit easier.

II. THE INTERNATIONAL LEGAL FOUNDATIONS OF FOREIGN CRIMINAL JURISDICTION

Although a basic working knowledge of FCJ can be attained merely by reading the governing service regulations, a thorough grasp of the topic is achieved only by understanding both its international and U.S. domestic legal foundations. This section lays that groundwork by describing how law and practice have evolved to their current forms.

Judge advocates armed with only a basic law school exposure to international law often come to the subject of FCJ with ideas that are either outdated or based on principles that do not necessarily apply to the military. In fact, because some U.S. FCJ principles are based more on U.S. domestic than international law, it is a specialized area few lawyers outside the military understand.

One common misconception about FCJ is that the United States would never allow a foreign nation to prosecute a member of its Armed Forces. Although that used to be its position, in the early 1950s the United States conceded that the principle of sovereignty demanded that visiting forces be subject to the receiving state's criminal jurisdiction in most circumstance.⁴ Knowledge of this history is a useful tool.

A. The "Law of the Flag"

One of the first commentators on the subject of jurisdiction over foreign forces was Chief Justice John Marshall. In *The Schooner Exchange v. McFaddon*,⁵ American ship owners sued to recover their vessel after it had been captured by the French and converted to a warship. Although the ship was docked in a U.S. port during the litigation, Chief Justice Marshall dismissed the suit. In his opinion, he stated that "[t]he jurisdiction of [a] nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself.⁶ In other words, a government has absolute authority over everything and everybody within its territory. Despite this recognition of the vast breadth of U.S. jurisdiction, Justice Marshall dismissed the suit because the vessel, a warship, entered the United States pursuant to a traditional waiver of jurisdiction accorded to public armed ships of a foreign sovereign. This was an example of the third of three situations in which nations traditionally limited their territorial sovereignty: immunity afforded foreign sovereigns, diplomatic immunity, and the immunity of foreign troops in transit with the territorial sovereign's consent.

4. See *Status of Forces of the North Atlantic Treaty: Supplementary Hearings Before the Senate Comm. on Foreign Relations*, 83d Cong., 1st Sess. 42 (1953)[hereinafter, NATO SOFA Supplementary Hearings].

5. 11 U.S. (7 Cranch) 116 (1812).

6. *Id.* at 136.

This principle that a military force “operating on foreign soil is in no way subject to the territorial sovereign and exercises an exclusive right of jurisdiction over its members” came to be known as “the law of the flag” and governed U.S. foreign and military policy for almost 150 years. Its view that U.S. forces abroad were subject only to the laws of the United States was also embraced by many other nations with forces outside their borders.⁷ Customary international law thus evolved to the point where license to enter foreign territory carried with it an express or implied right to maintain military discipline free from the territorial sovereign’s interference.

One of Chief Justice Marshall’s fundamental assumptions in *The Schooner Exchange* seemed to be that the need to maintain discipline is a cornerstone of military doctrine.⁸ Without the authority or ability to punish offenders within his unit, the commander would soon lose control; his “forces would cease to be an army and would become a mob.”⁹ This notion became so firmly rooted in Western military thought that custom ultimately evolved into formal agreements that gave sending states exclusive jurisdiction over the members of their forces. In World Wars I and II, the United States and United Kingdom both negotiated such agreements.¹⁰ These customs and treaties allowed sending states like the United States to exercise exclusive jurisdiction over their forces. When a member of the U.S. forces committed an offense in another country, only the United States had the right to prosecute.

B. Exclusive Receiving State Jurisdiction

World War II was the high-water mark of the law of the flag theory. At the end of the war, it began to crumble as nations became increasingly aware and protective of their sovereignty. The United States’ ratification of the NATO Status of Forces Agreement (SOFA)¹¹ signaled the end of its insistence that its troops abroad be subject only to its criminal jurisdiction. Today, it is widely agreed that in the absence of a treaty like a SOFA, jurisdiction over foreign forces rests *exclusively* with the host state.¹²

This concept of exclusive receiving state jurisdiction represented a complete reversal of traditional doctrine and, therefore, was difficult for many U.S. lawmakers to accept. Having lived with the law of the flag for so long, many U.S. Senators balked at the idea that any foreign government might exercise criminal jurisdiction over U.S. servicemembers.¹³

Nevertheless, the Senate acknowledged the treaty’s benefit to the United States and ultimately gave its advice and consent to NATO SOFA ratification. This benefit was that, with the SOFA, the U.S. military exercised at least some jurisdiction over its troops abroad; without it, international law recognized the receiving state’s sovereign right to exercise exclusive jurisdiction.

7. S. LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 12 (1971) (quoting A. Chalfour, *Le Statut Juridique des Forces Alliees Pendant la Guerre 1914-1918* (1927) (unpublished manuscript)).

8. See *The Schooner Exchange*, 11 U.S. (7 Cranch), at 140.

9. King, *Jurisdiction over Friendly Foreign Armed Forces*, 36, AM. J. INT’L L. 539 (1942).

10. See Lepper, *Short v. The Kingdom of the Netherlands: Is it Time to Renegotiate the NATO Status of Forces Agreement?* 24 VAND. J. INT’L L. 867 (1991).

11. Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67 [hereinafter, NATO SOFA].

12. See NATO SOFA Supplementary Hearings, *Supra* note 4, at 45 (Department of Justice Memorandum of Law).

13. See *generally, id.*; H.R. REP. NO. 678, 85th Cong., 1st Sess. 25 (1957) (hearings to consider revision of the NATO SOFA) [hereinafter, NATO SOFA Revision Hearings].

In the years since its ratification, the NATO SOFA has become the paradigm for similar agreements the United States has negotiated with a number of its allies around the world. Appendix 1 lists those countries. How it allocates jurisdiction between sending and receiving states is the subject of the next section. Before proceeding to that topic, however, one other exception to exclusive receiving state jurisdiction, administrative and technical (A&T) status, deserves brief mention.

The United States generally concludes SOFAs with nations in which it maintains a relatively large military presence. Others are governed by no treaty at all or, frequently, by an agreement that U.S. forces will be accorded limited diplomatic immunity. With diplomatic immunity, U.S. military members are assimilated to the embassy administrative and technical staff and share its full immunity from host nation criminal jurisdiction.¹⁴ Defense attaches and their staffs always fall in this category; personnel assigned to Military Advisory Groups and similar military missions often are accorded this status as well.

In summary, there are three possible categories of status for U.S. servicemembers facing foreign criminal charges: full criminal immunity under A&T status, no immunity when no agreement exists between the host nation and the United States, and partial immunity when a SOFA allocates jurisdiction between the United States and host nation.

III. THE NATO SOFA ALLOCATION OF CRIMINAL JURISDICTION

The NATO SOFA, as the first U.S. treaty of its kind, is still the blueprint for all other U.S. status agreements worldwide. Its twenty articles address issues ranging from taxation to claims. Article VII governs the allocation of criminal jurisdiction. Its building-block approach begins by acknowledging that both the sending and receiving states may exercise criminal jurisdiction over members of and personnel accompanying the visiting force.

1. Subject to the provisions of this Article,

(a) the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State;

(b) the authorities of the receiving State shall have jurisdiction over the members of a force or civilian component and their dependents with respect to offenses committed within the territory of the receiving State and punishable by the law of that State.¹⁵

Although this language was originally construed by the United States to extend sending state jurisdiction to military personnel, civilian employees, and their dependents, subsequent changes in U.S. domestic law have since narrowed its scope to apply only to military personnel. This will be discussed later.¹⁶ As a general rule, today the United States as a sending state may exercise criminal jurisdiction only over its military members.

14. See Vienna Convention on Diplomatic Relations, 18 Apr. 61, 23 U.S.T. 3229, T.I.A.S. 7502.

15. NATO SOFA, *supra* note 11, at art. VII, para. 1.

16. See *infra* notes 55-61 and accompanying text.

A. Exclusive Criminal Jurisdiction

Having established the fundamental concession that sending states may exercise military criminal jurisdiction within receiving states, the NATO SOFA continues by stating exactly when and under what circumstances they may do so. First, it defines exclusive jurisdiction.

2. (a) The military authorities of the sending State shall have the right to exercise exclusive jurisdiction over persons subject to the military law of that State with respect to offences, including offences relating to its security, punishable by the law of the sending State, but not by the law of the receiving State.

(b) The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force or civilian component and their dependents with respect to offences, including offences relating to the security of that State, punishable by its law but not by the law of the sending State.¹⁷

What this means is that when members of or persons accompanying the force violate the laws of only the sending or receiving states, only the offended state may prosecute. For example, it is illegal to import or sell chewing gum in Singapore;¹⁸ no comparable U.S. criminal law exists. Therefore, if a NATO SOFA-type agreement existed between the United States and Singapore, U.S. military members bringing chewing gum into Singapore would be subject to its exclusive jurisdiction.¹⁹ As a sending state, the United States commonly exercises exclusive jurisdiction. This is primarily due to the fact that many offenses, such as AWOL and desertion, have no civil counterparts. In contrast, the chewing gum example represents a rare situation. Receiving states seldom exercise exclusive jurisdiction over U.S. military members because most civil offenses will also violate the Uniform Code of Military Justice's general articles.²⁰

B. Concurrent Criminal Jurisdiction

Most of the FCJ cases encountered by U.S. military judge advocates stationed abroad are those in which both the sending and receiving states' laws have been violated. Under those circumstances, neither country has exclusive jurisdiction; NATO SOFA's Article VII, paragraph 1, quoted earlier, vests jurisdiction in both. This notion of dual jurisdiction, however, presented the drafters with at least two questions: which state prosecutes first and, if the offender is convicted, can the second state also prosecute? Article VII's paragraphs 3 and 8 provide the answers.

Paragraph 3 contains language that allocates *primary* concurrent jurisdiction between the states. In other words, it determines which state may prosecute first.

3. In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:

(a) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to

17. See NATO SOFA, *supra* note 11, at art. VII, para. 2.

18. See Project Pitfall Letter from 497 FTS/JA (24 Jan. 92).

19. There is a classified Memorandum of Understanding between the United States and Singapore that contains status of forces clauses. See *id.* at 23.

20. See 10 U.S.C. §§ 933, 934 (1988).

(i) offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent;

(ii) offences arising out of any act or omission done in the performance of official duty.

(b) In the case of any other offence the authorities of the receiving State shall have the primary right to exercise jurisdiction.

(c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other state for a waiver of its right in cases where that other State considers such waiver to be of particular importance.²¹

This paragraph establishes the general rule that the receiving state always has primary concurrent jurisdiction over any member of the visiting force or its civilian component. It also carves three important exceptions. First, the *inter se* exception gives the sending state primary concurrent jurisdiction over members who commit offenses only against the sending state, its property, or its personnel. This recognizes the idea that the sending state generally has a greater interest in prosecuting crimes that occur entirely within its military communities. Second, the official duty exception vests primary jurisdiction in the sending state when its military member commits an offense while in the performance of official duty. Third, paragraph 3(c) allows the sending and receiving states to change the general rule or its exceptions on an ad hoc basis. Since most of the United States' jurisdiction is based on these three exceptions, they are worth exploring in a bit more detail.

The *Inter Se* Exception. The *inter se* exception to the rule that the receiving state exercises primary concurrent jurisdiction recognizes that the sending state ought to have the first chance to prosecute offenses against its persons or interests. Thus, the NATO SOFA vests in the sending state primary jurisdiction over members of its force or civilian component who commit offenses solely against its security or property, or against the person or property of another member of its force or civilian component or dependent.

Two points are of particular importance here. First, the *inter se* exception's narrow application to offenses *solely* against the sending state's interests sometimes creates problems. Just as a concurrent jurisdiction offense, by definition, violates both the sending and receiving states' laws, it often also has more than one "victim." One example is an offense that is actually a series of acts, one or more of which may impact receiving state interests. A theft of property by one military member from another is clearly an *inter se* case. However, if the theft is followed by the sale of that property to a receiving state national, the scope of the impact broadens to include the receiving state.²² Another example is a single act with multiple victims, one of whom is a local national. This category might include a negligent homicide (automobile accident) resulting in the deaths of a fellow military member and his local national wife.

The question common to both examples is whether the *inter se* exception applies. The answer generally is no. However, in such cases the result is often the same as if it did apply: the sending state gets primary jurisdiction. The solution often used is one suggested by Father Joseph Snee and Professor Kenneth Pye in their seminal 1957 book on the NATO SOFA and by Article VII, paragraph

21. NATO SOFA, *supra* note 11, at art. VII, para. 3.

22. See J. SNEE & K. PYE, STATUS OF FORCES AGREEMENT: CRIMINAL JURISDICTION 55 (1957).

3(c).²³ If the impact of the offense falls more severely on the sending state, it should have primary jurisdiction.²⁴ This will often be the case if sending state property or personnel are the only physical victims. If both states suffer more or less equal injury from an offense with multiple acts, Snee and Pye suggest that each state prosecute the offenses arising out of the acts over which it has primary jurisdiction.²⁵ In the larceny example above, the sending state would prosecute the theft and the receiving state would prosecute the sale of the stolen goods. Obviously, there are many more permutations of this problem than can be discussed here. A possible solution to such cases in the waiver exception is discussed below.

The second point about the *inter se* exception worth examining is the fact that dependents are not mentioned in article VII, paragraph 3. Article VII, paragraph 1(a)(general jurisdiction) parallels paragraph 2(a)(exclusive jurisdiction) in terms of the group to which both are applicable. Both extend sending state jurisdiction to "persons subject to the military law of that state." In contrast, paragraph 3(a) extends the sending state's primary concurrent jurisdiction only to members of its force or civilian component. This conspicuously leaves dependents out of the sending state's primary concurrent jurisdiction. Snee and Pye predicted in 1957 that this would result in an all or nothing situation: the receiving state would exercise exclusive jurisdiction over dependents in all cases except those in which their offenses violated only sending state laws.²⁶ With the exception of very minor offenses for which sending state administrative sanctions are sufficient punishment, that prediction has generally held true. Sending states do not exercise primary concurrent jurisdiction over dependents.

The Official Duty Exception. Perhaps the last vestige of the "law of the flag" is the principle, codified in Article VII, paragraph 3(a)(ii), that the sending state has primary jurisdiction over offenses arising out of the performance of official military duties. This concept derives from the idea that the military member is merely carrying out the wishes of his sovereign government.²⁷ Because his government is generally immune from liability for its public official acts,²⁸ it does not require a great leap of logic to confer a similar status to its actors. It also reflects traditional military concern that its official operations must not be subject to the influence of forces outside its chain of command. Despite the apparent simplicity of these ideas, however, the official duty exception's application over the years has led to a number of problems.

The first and most important questions are what is the scope of official duty and who decides whether a particular act is official?²⁹ During the NATO SOFA negotiations, a number of theories regarding the scope of official duty were advanced. For example, the Italian representative proposed that official duty acts must be "done not only in the performance of official duty, but also within the limits of such duty."³⁰ This definition would have severely restricted the scope of official duty by incorporating the agency concept of deviation: if the member

23. *Id.*

24. *See id.* at 57.

25. *See id.*

26. *See id.* at 34-35.

27. *See Stanger, Criminal Jurisdiction over Visiting Armed Forces, 1957-58 NAVAL WAR C. INT'L L. STUD.* 211 (1957).

28. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 451 (1986). Under the restrictive theory of sovereign immunity, which the United States and most other Western nations recognize, government public acts are accorded immunity in the courts of other nations.

29. *See SNEE & PYE, supra* note 22, at 50.

30. LAZAREFF, *supra* note 7, at 174.

performing his official duties deviated from the orders given him, he would no longer be within this exception to the receiving state's primary jurisdiction.³¹ Similarly, the Canadian representative suggested that official duty acts must be "within the duty orders of the person concerned."³² Clearly, the European states, the states that would play a predominantly receiving state role, preferred a narrower standard. Their fear was that an expansive definition would merely return them to the law of the flag.³³ The United States' insistence that the concept not be unduly limited was based primarily on its concern that military discipline would be undermined unless commanders could enforce military laws and regulations while their troops were on duty. The delegates were unable to agree; to this day, the NATO SOFA contains no acceptable definition of official duty.³⁴ United States policy, however, is to construe it as broadly as reason and persuasion will allow.³⁵

Rather than argue forcefully for a broad definition of official duty, the United States instead chose to advance the idea that whatever the definition, the sending state alone should decide whether an act arose out of official duty.³⁶ Although consensus was never reached on this issue either, the United States has since consistently asserted this position. Thus, for every offense arising out of an act or omission done in the performance of official duty, sending state jurisdiction is asserted through the commander's issuance of an "official duty certificate." In the vast majority of cases, the receiving state accepts the sending state's official duty determination. In a few, however, the certificate merely creates a rebuttable presumption of official duty status.³⁷ Although the U.S. military's charter is to maximize jurisdiction abroad, it is important to recognize that official duty certificates should be issued only in appropriate circumstances. Its future credibility depends on its proper use.

The Waiver Exception. In addition to the textual commitment of certain cases to the primary jurisdiction of either the sending or receiving state, the NATO SOFA contains a clause that allows both parties to change this formula on an *ad hoc* basis. Recognizing that applying the SOFA formula mechanically may not accurately account for the interests of parties in particular cases, the negotiators included Article VII, paragraph 3(c), set out above.

This paragraph allows either state to waive its primary jurisdiction if it considers the other state's prosecution motives to be more important. The U.S. military's experience in Europe suggests that many receiving states will waive their primary jurisdiction unless they have particularly important reasons for asserting it.³⁸ The United States, in contrast, rarely waives its primary jurisdiction. This is due, for the most part, to the fact that its primary jurisdiction is already narrowly limited to cases in which it always has important prosecution interests. The Senate's admonition to maximize jurisdiction also weighs heavily against United States waivers.³⁹

31. See SNEE & PYE, *supra* note 22, at 47.

32. NATO Agreements on Status: Travaux Préparatoires, 1961 NAVAL WAR C. INT'L STUD. 197 (J. Snee ed.) [hereinafter Travaux Préparatoires].

33. See Stanger, *supra* note 27, at 222.

34. See SNEE & PYE, *supra* note 22, at 46.

35. See *id.* at 47.

36. See LAZAREFF, *supra* note 7, at 176.

37. SNEE & PYE, *supra* note 22, at 53.

38. See Parkerson & Stoehr, *The U.S. Military Death Penalty in Europe: Threats From Recent Human Rights Developments*, 129 MIL. L. REV. 41, 50 (1990).

39. See *id.* at 48.

In many states in which U.S. forces are stationed, this formula has been modified. For example The Netherlands and the United States agreed to the following resolution regarding waiver of primary concurrent jurisdiction:

The Netherlands authorities, recognizing that it is the primary responsibility of the United States authorities to maintain good order and discipline where persons subject to United States military law are concerned, will, upon the request of the United States authorities, waive their primary right to exercise jurisdiction under Article VII, except where they determine that it is of particular importance that jurisdiction be exercised by the Netherlands authorities.⁴⁰

The basic Article VII formula allocates general primary concurrent jurisdiction to the receiving state. In contrast, this "Netherlands Formula" blanket waiver shifts it to the sending state. Clearly, waiver provisions, whether they are *ad hoc* or blanket, convert otherwise rigid rules allocating jurisdiction into flexible guidelines. They allow the parties to consider whose stake in prosecution should prevail. It is the judge advocate's job to articulate the United States' prosecution interests in each case.

Double Jeopardy. In any system involving two or more sovereigns capable of prosecuting offenses, the question of double jeopardy arises. Although double jeopardy is, by definition, the multiple prosecution of the same offense by the same sovereign,⁴¹ the NATO SOFA drafters intended that prosecution by different sovereigns also be limited.⁴² Article VII, paragraph 8, establishes these constraints.

Where an accused has been tried in accordance with the provisions of this Article by the authorities of one Contracting Party and has been acquitted, or has been convicted and is serving, or has served, his sentence or has been pardoned, he may not be tried again for the same offence within the same territory by the authorities of another Contracting Party. However, nothing in this paragraph shall prevent the military authorities of the sending State from trying a member of its force for any violation of rules of discipline arising from an act or omission which constituted an offence for which he was tried by the authorities of, another Contracting Party.⁴³

During the NATO SOFA's history, this language has given rise to a number of problems judge advocates need to understand. First, there is the issue of what constitutes a "trial" sufficient for jeopardy to "attach." Snee and Pye describe the early debate of that question in the context of the *Whitley* case.⁴⁴ In 1953, Major Jack Whitley, USAF, negligently caused the death of a Royal Canadian Air Force officer while stationed in France. The French Government waived jurisdiction and the U.S. Air Force, after investigating the facts, decided not to prosecute. Shortly thereafter, the victim's widow instituted a joint civil, criminal action against Major Whitley. The French courts upheld Whitley's conviction despite his argument that, under Article VII, paragraph 8, the United States had exercised its prosecutorial discretion by not prosecuting him. This, of course, has raised all sorts of similar questions. Does adverse administrative action by the

40. Agreement With Annex Between the United States of America and the Netherlands Regarding Stationing of United States Armed Forces in the Netherlands, Aug. 13, 1954, 6 U.S.T. 103, 106.

41. See generally W. LAFAVE & A. SCOTT, CRIMINAL LAW 114 (1972).

42. See, e.g., Travaux Préparatoires, *supra* note 32, at 104.

43. NATO SOFA, *supra* note 11, at art. VII, para. 8.

44. See SNEE & PYE, *supra* note 22, at 63.

sending state preclude later prosecution by the receiving state? What about Article 15: UCMJ, nonjudicial punishment?

Unfortunately, none of these questions have simple answers; because neither the SOFA nor its negotiating history specifically addresses them, practice provides the only guides. It is generally the United States' position that when it acquires primary jurisdiction under either paragraphs 3(a) or 3(c), its decision not to proceed to trial is an exercise of jurisdiction sufficient to preclude receiving state prosecution.⁴⁵ This must, however, be distinguished from the mere failure to dispose of a case, which does not bar receiving state prosecution.⁴⁶ Similarly, administrative and nonjudicial actions should be viewed as positive exercises of primary jurisdiction equivalent to "trials" under paragraph 8.⁴⁷ The common thread running throughout these examples is that "prosecution" under military law can take many different forms. The commander chooses the form that best suits the offense, the offender, and the impact of the crime and punishment on the morale and discipline of his troops. Because discipline is the interest advanced by sending state exercise of jurisdiction, the receiving state should respect the commander's judgment.

The flip side of the double jeopardy issue is the extent to which the sending state may prosecute an offender for an offense for which he has already been tried by a receiving state court. As Snee and Pye point out, there are fewer restrictions on the sending state than on the receiving state.⁴⁸ First, because paragraph 8 bars subsequent trials only "within the same territory by authorities of another Contracting Party," the sending state may prosecute again merely by holding the trial outside the receiving state. This is generally not done by the United States. Second, only subsequent prosecutions "for the same offense" are barred. This ties into the third exception allowing the sending state to prosecute "violation[s] of rules of discipline arising from an act or omission which constituted an offence for which he was tried by the authorities of [the receiving state]." In other words, the sending state may prosecute purely military offenses defined by the same facts as the receiving state offense. Because Article 134: UCMJ makes punishable "all disorders and neglects to the prejudice of good order and discipline in the armed forces [and] all conduct of a nature to bring discredit upon the armed forces,"⁴⁹ just about any foreign offense is also a UCMJ offense. This huge loophole makes NATO SOFA Article VII, paragraph 8, impotent to prevent the United States, as sending state, from prosecuting its military members after their prosecution by the receiving state.

IV. UNITED STATES LAW AND POLICY

Although Air Force judge advocates must be firmly grounded in the international law aspects of status of forces agreements, it is perhaps even more important that they understand the U.S. law and policy underlying FCJ. In some cases, it provides a basis for construing SOFAs broadly; in others, it imposes even narrower constraints. In all cases, though, it establishes the consistent approach to FCJ that is the very reason sending states want to exercise any jurisdiction at all. Following is a discussion of some of the more important U.S. laws and policies.

45. *See id.* at 68, 71.

46. *See id.* at 71.

47. *See id.*

48. *See generally id.* at 73-81.

49. 10 U.S.C. § 931 (1988).

Because it would be impossible and impractical to address every important domestic issue in this article, this discussion will focus on those of significance to the practitioner.

A. United States Exercise of Jurisdiction

In addition to the fundamental rule, stated earlier, that the United States will maximize its exercise of jurisdiction in all FCJ cases, there are a number of corollaries and exceptions. Following are some of the more important ones.

Waiver of United States Jurisdiction. Perhaps the most significant threat to status of forces agreements in general came in 1957, when the United States waived to Japan jurisdiction over an Army soldier accused of murdering a Japanese woman.⁵⁰ At the time of the offense, Specialist 3 William S. Girard was performing guard duty when he fired an empty brass rifle cartridge from his rifle grenade launcher into an elderly woman who was foraging for spent cartridges. Although Girard's action certainly was not authorized, it was the United States' view that it arose out of "an act or omission done in the performance of official duty."⁵¹ Japan disagreed, arguing that the act was outside the scope of official duty. Ultimately, in a move that led to congressional hearings contemplating United States withdrawal from SOFAs, the Department of Defense waived jurisdiction to the Japanese.⁵²

As a result of this and other controversies, the military services have written their policies regarding waiver in a tri-service regulation on FCJ: AFR 110-12/AR 2750/SECNAVINST 5820.4G. It establishes the following policy:

Waiver of U.S. jurisdiction. Military authorities overseas will not grant a waiver of U.S. jurisdiction without prior approval of TJAG of the accused's Service. Requests from foreign authorities for waiver of the U.S. primary right to exercise jurisdiction in any case may be denied by the DCO (Designated Commanding Officer) if the DCO determines that denial is in the best overall interests of the United States. Recommendations that such requests be approved will be transmitted by the DCO through the unified commander and TJAG of the accused's Service to OSD for action.⁵³

While this does not mean that waivers are never appropriate or that the United States must always secure a waiver of foreign jurisdiction, in practice the maxim "maximize jurisdiction" is the staff judge advocate's primary guidance. Indeed, Air Force Regulation (AFR) 110-12 states that "[c]onstant efforts will be made to establish relationships and methods of operation with host country authorities that will maximize U.S. jurisdiction to the extent permitted by international agreements."⁵⁴

Jurisdiction over Civilians and Dependents. Recall that NATO SOFA Article VII, paragraph 1, allows sending states to "exercise within the receiving state all criminal and disciplinary jurisdiction conferred on them by the law of the sending state *over all persons subject to the military law of that state.*"⁵⁵ This was originally construed by the United States to extend its jurisdiction to military

50. *Wilson v. Girard*, 354 U.S. 524 (1957).

51. See *SNEE & PYE*, *supra* note 22, at 58.

52. See generally NATO SOFA Revision Hearings, *supra* note 13.

53. AFR 110-12, Status of Forces Policies, Procedures, and Information, para. 1-7C (Jan. 1990) [hereinafter AFR 101-12].

54. *Id.* at para. 1-7a.

55. See *supra* note 11 and accompanying text note 15 (emphasis added).

members, civilian employees, and their dependents. At that time, "military law" applied to members of all three categories.

In 1956, the U.S. Supreme Court, in *Reid v. Covert* and *Kinsella v. Krueger*,⁵⁶ held that civilians could not be tried by court-martial in time of peace. Since then, commanders and their staff judge advocates have struggled with the problem of holding their civilians accountable outside the exercise of foreign jurisdiction.

Perhaps the greatest dilemma arises when a civilian commits an "inter se" offense. In many of these cases, such as shoplifting at the base exchange or child abuse or neglect, the commander must choose between punishing the offender himself or turning the offender over to the local authorities for criminal prosecution. AFR 110-12 does give the commander a little flexibility: "In all cases in which the local commanders determine that suitable corrective action can be taken under existing administrative regulations, they may request the local foreign authorities to refrain from exercising their jurisdiction."⁵⁷ While this allows the commander to punish certain civilian offenses, it also carries two requirements.

First, it assumes that the local authorities are, in fact, notified of all offenses. Depending on the severity of the offense, however, this may not always be true. Certainly, very serious offenses must be disclosed. In many serious cases, commanders simply do not have the resources available to properly address the offenses. This is especially true for serious violent crimes or for crimes, like child abuse, that require substantial social services assistance. On the other hand, very minor offenses, those generally characterized as "dependent misconduct," need not always be revealed. This is especially true in cases that would be misdemeanors in the local jurisdiction and in which the local authorities have traditionally expressed little interest. When in doubt, however, report the incident to local authorities.

Second, this provision presumes that all commanders have "existing administrative regulations" under which minor offenses can be punished. Depending on the offense, this may or may not be true. For example, most bases have established methods of dealing with on-base traffic offenses or base exchange shoplifting. Other cases, however, usually require the establishment of local programs. One of the best ways to address minor civilian misconduct is through a locally-devised dependent misconduct program. If properly and credibly administered, it could go a long way toward convincing local authorities not to take action in situations they consider the commander competent to handle.

Despite the U.S. military's inability to prosecute its civilians, there still remains a very real concern that any civilian subject to foreign jurisdiction be given a fair trial. Air Force Regulation 110-12 also states where it appears that a civilian accused might not receive a fair trial, the commander should report his concerns to the DCO and, ultimately, to the U.S. Embassy.⁵⁸ In such cases, the United States might request that the receiving state forego its exercise of jurisdiction.

A recent case that arose in Saudi Arabia after Desert Storm illustrates the "double-edged" nature of problems like this.⁵⁹ On 18 July 1991, Mr. Earnest Sands, a U.S. Army civilian employee in Riyadh, Saudi Arabia, discovered his

56. 354 U.S. 1 (1956). These cases were joined in the Supreme Court.

57. AFR 110-12, *supra* note 53, at para. 1-7b(1).

58. *Id.* at para. 1-7b(2).

59. The facts cited hereafter are derived from electronic messages and telephone conversations between HQ USAF/JAI and the USMTM Staff Judge Advocate in Riyadh over the course of several months. All messages are on file at HQ USAF/JAI.

wife dead in their apartment at the U.S. Military Training Mission compound. A joint investigation by Air Force Office of Special Investigation special agents and Saudi police led to Saudi suspicion that Sands murdered her. Although the United States has had a long, friendly relationship with Saudi Arabia, the Saudi Government has steadfastly refused to negotiate a SOFA. The only agreements that govern this relationship are a 1953 agreement and a 1977 exchange of diplomatic notes.⁶⁰ Together, these documents established Saudi primary criminal jurisdiction over Sands.

Nowhere in today's world is there more concern that U.S. personnel subject to local law might not receive a fair trial or a fair punishment. Under Islamic law, murder is a "Qisas" crime that gives the victim's family the right to demand the murderer's execution.⁶¹ Thus, if Sands were subject to Saudi jurisdiction, he could face capital punishment without benefit of Western due process rights. This is the first "edge" of the problem.

Consistent with AFR 110-12, the United States requested that the Saudi Government not exercise its jurisdiction. This, however, left the United States with the second "edge" of the problem: How was it going to bring Sands to justice? Certainly, no administrative sanctions would be sufficient to address this serious allegation. Also, there is no general U.S. murder statute that applies extraterritorially. Thus, the United States couldn't prosecute him even if it wanted to. The UCMJ remains the only body of criminal law applicable outside the United States and, since *Reid v. Covert*, it does not apply to civilians. In this particular case, one fact saved the day: Sands was a retired Regular Army NCO. To extend U.S. jurisdiction to him, the Army recalled him to active duty to stand court-martial.

Only rarely will recall to active duty be an available solution to these complex problems. More often, the commander and his staff judge advocate will face the choice of local or no prosecution. Any decision will be based on a number of factors. However, if the civilian will receive a fair trial in the receiving state, rarely should the commander seek a waiver.

B. Receiving State Exercise of Jurisdiction — Procedural Guarantees

The *Sands* case illustrates the fact that the United States is not concerned about receiving state prosecution per se. If U.S. personnel commit offenses, prosecution by a foreign country generally is better than no prosecution at all. The United States is concerned, however, that its personnel be accorded minimum due process in a foreign prosecution. Only when that due process is absent, as it would have been if Sands had been tried in a Saudi court, does the United States "come to the rescue."

Following are some of the rights the United States seeks to secure for its personnel subject to foreign jurisdiction. Because they are responsible for monitoring FCJ cases, it is critical that judge advocates become familiar with them.

Trial Observers. The appointment of a trial observer is the primary means of ensuring that foreign courts give certain minimum due process rights to U.S. personnel appearing before them. Air Force Regulation 110-12 states that such observers will be lawyers (normally, judge advocates) except for trials involving

60. See Agreement Establishing the United States Military Assistance Advisory Group to Saudi Arabia, June 18, 1951, 4 U.S.T. 1482, T.I.A.S. No. 2812; Agreement Establishing the United States Military Training Mission to Saudi Arabia, Feb. 8, 1977, 28 U.S.T. 2409, T.I.A.S. No. 8558.

61. See generally Country Law Study for Saudi Arabia 20 (HQ USMTM/JA). This study is on file at HQ USAF/JAI and was written to provide judge advocates with a synopsis of Saudi Arabian law.

minor offenses at which non-lawyers may observe.⁶² Typically, Air Force paralegals or members of the accused's unit will serve as minor offense trial observers. Each trial observer is appointed to that position by the U.S. Embassy.

The trial observer's job is to determine, "in the light of legal procedures of the host country, whether a substantial possibility exists that the accused will not receive a fair trial."⁶³ Recognizing that law varies from country to country, AFR 110-12 cautions that "a trial should not be considered unfair solely because it will not be identical to trials in the United States."⁶⁴ The trial observer must use his best judgment and knowledge of U.S. law to determine whether the procedures the host nation's court uses are fundamentally fair.⁶⁵

At the conclusion of the trial, the trial observer submits his report to the DCO. That report must contain a narrative describing the trial proceedings and conclusions regarding its fairness. The DCO, with the assistance of the accused's service TJAG, is responsible for determining whether the accused was, in fact, given a fair trial.

Military Legal Advisor. By definition, the trial observer is just that, an observer with no ability or authority to assist the accused in the preparation of his defense. All U.S. personnel facing foreign criminal charges are, however, entitled to such help. One form of assistance is the assignment of a Military Legal Advisor (MLA).⁶⁶

The MLA is a judge advocate, either a member of the accused's base legal office or a local area defense counsel, who is assigned to the accused upon notification of foreign criminal charges. The MLA is *not* the accused's defense lawyer; he will not appear in his client's behalf before any foreign tribunal. He may, however, assist the accused's foreign lawyer in any matter involving the Air Force. Specifically, he may facilitate communications between the foreign attorney and the Air Force, assist in obtaining U.S. government documents, and provide advice regarding the accused's military status and any Air Force administrative actions that may be taken against him. His most important function, however, is to advise the accused of his rights guaranteed by applicable international agreements.

Lawyer-client confidentiality applies between the MLA and the accused. Because the MLA is the accused's lawyer in matters involving the Air Force, the better practice is to assign an Area Defense Counsel when available.

Payment of Counsel Fees. Another form of assistance often provided to U.S. personnel facing foreign criminal charges is payment of counsel fees and other expenses. Any U.S. military member, civilian employee, or dependent charged with a foreign criminal offense is eligible for this program established under 10 USC 1037.

To initiate government payments of counsel fees, the accused must apply through the local commander to the General Court-Martial (GCM) convening

62. AFR 110-12, *supra* note 53, at para. 1-8.

63. *Id.* at para. 1-7a(2).

64. *Id.*

65. To assist the trial observer in this task, AFR 110-12 provides at appendix D a list of "fair trial" safeguards applicable in U.S. criminal trials. While the rights afforded U.S. personnel may not be identical, they should not be so different as to create an unfair situation. Also, Article VII, paragraph 9, of the NATO SOFA lists a number of fair trial guarantees that must be afforded to each member of or person accompanying the visiting force. The United States made it clear in its statement of ratification that it would rely on trial observers to enforce those provisions. See AFR 110-12, *supra* note 53, at appendix B.

66. Air Force policy regarding MLAs is contained in AFR 110-11, a new regulation that consolidates and supersedes AFR 110-25 and AFR 110-28.

authority, the approving official.⁶⁷ Fees are paid only for attorneys licensed and qualified to practice in the local jurisdiction. Certain guidelines also apply. Fees are generally paid when the sentence normally imposed for such offenses includes confinement or death, or conviction could form the basis for administrative discharge. Fees are also available for appellate counsel if the appeal is made from any proceeding in which there appears to have been a denial of the accused's rights. In addition to these somewhat narrow, specific requirements, the approval authority is given considerable discretion to approve fees in cases he considers "to have a significant impact on the relations of U.S. forces with the host country, or involve any other particular U.S. interest."⁶⁸

Local staff judge advocates generally play an active role in the application and approval process. Although the GCM staff judge advocate (SJA) is usually designated a contracting officer for purposes of entering into a fee payment arrangement with the accused's lawyer, it is the local SJA who typically supervises the process. The SJA may also help the accused file the fee request, although better practice would be to assign that task to the accused's MLA.

Pretrial Custody. Most of the cases receiving states are unwilling to waive to the United States involve serious offenses. Thus, many also involve the imprisonment of the accused pending either a custody hearing of some sort or trial itself. In such cases, it is Air Force policy to seek the release of Air Force personnel from foreign jails.⁶⁹ The SJA plays a leading role in the execution of that policy.

The primary means by which release is effected is through exercise of U.S. custody rights. Many receiving states have formally agreed to allow the U.S. forces to retain custody over an accused pending his local trial.⁷⁰ Others will allow it on a *ad hoc* basis. In either case, the accused's SJA must first attempt to secure his release by offering Air Force custody as a substitute. If custody is transferred to the United States, it is then the SJA's responsibility to ensure that the accused appears at all court hearings and any other place his presence is required.

If the SJA is unable to secure transfer of custody, the United States may post bail to obtain the accused's release.⁷¹ Bail is offered only after all other efforts to secure release have been exhausted and is provided only to guarantee the ac-

67. AFR 110-12, *supra* note 53, at para. 2-3a.

68. *Id.* at para. 2-4. A similar criterion is used to determine whether counsel fees are appropriate in civil cases. That provision was used recently to provide representation for 11 UK-national dependent spouses who joined to oppose the UK poll tax. Since the outcome of their case could impact the many other dependents in their situation, TJAG concurred in payment of their counsel fees.

A recent HQ USAF/JAI opinion concluded that this discretion does not extend to termination of the counsel fee program. One GCM authority, in an effort to cut expenses, expressed his intent not to approve any more counsel fee requests. In its advice against such a move, JAI focused on the legislative history of this program's 1986 expansion to include civilian employees and dependents. That history suggested that counsel fees should be approved or denied on a case-by-case basis: "The committee intends that the administering Secretaries continue closely to regulate this benefit and enjoins local commanders to implement the expanded authority judiciously." Pub. L. No. 99-145, § 681, 99 Stat. 583, 665 (1985). JAI concluded that "termination of the entire program is hardly 'judicious.'" Legal opinion to HQ PACAF/JA (9 Mar. 1992).

69. AFR 110-12, *supra* note 53, at para. 1-7a.

70. See, e.g., Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, Jan. 19, 1960, 11 U.S.T. 1652, T.I.A.S. 4510, 373 U.N.T.S. 248 [hereinafter the Japan SOFA], art. XVII, agreed minute to paragraph 5; Supplementary Agreement to the NATO Status of Forces Agreement with Respect to Forces Stationed in the Federal Republic of Germany, Aug. 3, 1959, 1 U.S.T. 531, T.I.A.S., No. 5351, 481 U.N.T.S. 262, art. 22, para. 2.

71. AFR 110-12, *supra* note 53, at para. 2-5.

cused's presence at trial, not to guarantee payment of fines or civil damages. The SJA must make arrangements with local authorities for the refund of the bail when the accused appears at trial.

In both cases described above, commanders who have secured custody of personnel facing foreign charges must ensure they do not depart the receiving state prior to final disposition of those charges. "International hold" is the vehicle by which this is accomplished. International hold involves ordering military members not to depart the country and ensuring they, civilian employees, or dependents are not provided U.S. transportation out of the country.⁷²

Prison Visits. Pretrial confinement is only one way in which U.S. personnel are confined to foreign jails. Despite the Air Force's best efforts, it is sometimes impossible to obtain custody of them. U.S. personnel also often face foreign confinement after conviction. In the latter case, it is even harder to secure their release.

One problem many overseas SJAs face is the fact that their responsibility to protect the rights of U.S. personnel does not end at the foreign jailhouse doors. They must continue to ensure the confined personnel receive "the same or similar treatment, rights, privileges, and protections of personnel confined in U.S. military facilities."⁷³ These rights and privileges include legal assistance, visitation, medical attention, food, clothing, and other necessities.

Air Force Regulation 110-12 establishes Air Force policy that all U.S. military personnel, civilian employees, and dependents confined in foreign penal institutions will be visited by the prisoner's commander or representative at least every thirty days.⁷⁴ In many cases, the representative will be the SJA, accompanied occasionally by a chaplain or physician. The regulation notes that the person given the prison visit task should be familiar with the rights to which prisoners in U.S. military facilities are entitled. This makes the SJA the logical choice.

After each visit, the results must be reported to the DCO.⁷⁵ Highlights will include information regarding mistreatment, substandard living conditions, or any other situation posing a problem for or threat to the prisoner.

Prisoner Transfer Program. In some receiving states under some circumstances, it is possible for U.S. personnel serving a sentence in foreign prisons to transfer to a U.S. prison. The United States is party to a number of bilateral and multilateral international agreements allowing prisoners who are citizens of signatory nations to transfer to prisons within their own countries.⁷⁶ These agreements apply to U.S. personnel who are serving sentences in foreign prisons and want to transfer to a U.S. prison.⁷⁷

72. All of these procedures are described in AFR 110-11, a new regulation that will soon replace AFR 110-25 and AFR 110-28. Note that this authority does not include the power to seize passports.

73. AFR 110-12, *supra* note 53, at para. 3-1.

74. *Id.* at para. 3-4b.

75. DD Form 1602 is provided for this purpose as an appendix to AFR 110-12.

76. Currently, the most extensive agreement, in terms of number of parties, is the Convention on the Transfer of Sentenced Persons, Mar. 21, 1983, T.I.A.S. 10824, adopted by the member states of the Council of Europe. The United States is a party along with Austria, Belgium, Canada, Cyprus, Denmark, Finland, France, Greece, Italy, Luxembourg, Malta, The Netherlands, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. Additionally, bilateral agreements exist between the United States and Mexico, Canada, Turkey, Peru, Panama, Bolivia, and France.

77. 10 U.S.C. § 955 (1988). This statute specifically authorizes service Secretaries to take custody of transferees for the purpose of fulfilling their terms of confinement in U.S. civilian or military prisons.

The transfer process begins with a request by a prisoner in a foreign prison to be moved to a U.S. prison.⁷⁸ Requests are entertained only from U.S. citizens; dependents or civilian employees who are not U.S. citizens are not eligible for transfer to U.S. prisons.⁷⁹ Military Legal Advisors are generally responsible for informing their clients of this program. This "application" is then investigated by the U.S. Department of Justice in a hearing within the receiving state. The prisoner is entitled to counsel, who may be a military judge advocate if requested and available, and the Presiding official will be a U.S. magistrate or other U.S. citizen appointed by a U.S. federal judge. The purpose of the hearing is to verify the prisoner's informed consent to be transferred. Once verified, it is irrevocable.

The prisoner transfer program has several limitations that may disqualify certain U.S. personnel. It applies only to persons who are serving sentences pursuant to a foreign court's final judgment. A transfer is not possible if an appeal or collateral attack is pending. The crime for which the prisoner was convicted must satisfy a "double criminality" requirement — it must be a crime in both the foreign country and the United States.

Judge advocate participation in this program may increase in the coming years. With Germany's recent accession to the Council of Europe's multilateral exchange treaty, it is likely that Air Force lawyers will become involved in representing U.S. personnel seeking transfer. There is also a proposal to have military magistrates act as hearing officials. If adopted, Air Force judge advocates may also act as legal advisors to these magistrates. Regardless of their actual involvement in the process itself, judge advocates need to be familiar with this program so that they can advise commanders and U.S. prisoners on its existence and its parameters. Additional information may be obtained from Special Consular Services offices at U.S. Embassies.

C. Military Administrative Actions

In addition to the myriad procedural guarantees judge advocates must secure for their clients or base personnel facing foreign criminal charges, those charges also trigger or involve a number of Air Force administrative actions. Following are a few of the most important of these matters.

International Hold. Whenever a commander becomes aware that a member of his command, a civilian employee, or one of their dependents has been charged or is being investigated by local authorities, it is his duty to prevent that person's departure.⁸⁰ As mentioned above in the section on pretrial custody, international hold is the method by which that is accomplished. Air Force Regulation 110-11 sets out the requirements for international hold and the actions that must be taken to effect it.⁸¹ Essentially, what it means is any person facing charges or who is currently under investigation by local authorities is prevented from being reassigned by the Air Force. This status is reflected by an assignment availability code entered into the personnel computer.

78. The entire program is established by U.S. statute, 18 U.S.C. §§4100-4115 (1988 & Supp. IV 1992). The specific information provided in the text of this article is extracted from that statute.

79. 18 U.S.C. § 4100(b) (1988).

80. Air Force folklore abounds with stories of commanders attempting to help their personnel avoid foreign charges by slipping them out of the country in the dead of night before charges are filed or before news of the offense reaches local authorities. While AFR 110-11 does not specifically prohibit this practice, its intent is to keep persons who commit offenses within the receiving state so that they may face charges. Given the fact that they may later be returned to the receiving state anyway, their early departure is really quite useless.

81. See also AFR 39-11, Airman Assignments, para. 4-14b(2)(c) (July 1989).

Mutual Assistance. The NATO SOFA, as well as other such agreements, obligates sending and receiving states to provide mutual legal assistance in the investigation and prosecution of offenses. Article VII, paragraph 6(a), of the NATO SOFA states:

The authorities of the receiving and sending states shall assist each other in the carrying out of all, necessary investigations into offences, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offence. The handing over of such objects may, however, be made subject to their return within the time specified by the authority delivering them.⁸²

This provision is important to the United States; it is frequently invoked as a basis for obtaining information to support courts-martial. A similar provision, Article VII, paragraph 5(a), obligates the sending and receiving states to "assist each other in the arrest of members of a force or civilian component or their dependents . . . and in handing them over to the authority which is to exercise jurisdiction." The United States relies on this to effect apprehension of suspects outside its arrest jurisdiction. Both of these clauses also give the receiving state the right to expect U.S. cooperation when it comes to providing custody of U.S. personnel or information to support their prosecution.

Expiration of Enlistment. Although it is extremely important that the commander imposes international hold at a point not too early or too late, that action alone cannot extend an enlistment that is about to expire. Air Force Regulation 39-10 states that only if they consent, airmen may be retained beyond their expiration of term of service while they await disposition of foreign criminal charges.⁸³ Clearly, given the continued support the Air Force offers its members serving foreign prison sentences, it is generally to their advantage to give that consent. Regardless of the decision, all members must be given an opportunity to consult the area defense counsel before making it.⁸⁴

Once convicted and confined in a foreign prison, consent is no longer required to extend airmen enlistments. Air Force members are not discharged or separated from the service until the completion of their imprisonment and return to the United States.⁸⁵ This does not, however, prevent the member's commander from initiating administrative discharge action against him based on the foreign conviction or any other reason. Only the execution of an approved discharge will be delayed pending the member's release and return.⁸⁶

Return of Member for Foreign Trial. Having considered how military members are held in a receiving state pending trial on foreign criminal charges, the SJA's final concern is the return of a member who has already departed the country. Recall from the section on mutual assistance, above, that the United States is obligated under the NATO SOFA and most of its other status of forces agreements to surrender U.S. personnel to receiving states in which they face criminal charges.⁸⁷

82. NATO SOFA, *supra* note 11, at art. VII, para. 6(a).

83. *See also* AFR 35-16, The USAF Reenlistment, Retention, and NCO Status Program, Vol. 1 (July 1991).

84. Of course, consenting to an extension of enlistment may also expose airmen to the continued risk of UCMJ action if any investigation uncovers evidence of additional crimes. These and other concerns ought to be briefed to each airman nearing ETS who faces foreign criminal charges.

85. AFR 110-12, *supra* note 53, at para. 3-8.

86. *See* AFR 39-10, Administrative Separation of Airmen (Aug. 1991).

87. *See supra* note 81 and accompanying text.

This obligation has been challenged by U.S. military members who, having departed the receiving state, did not want to return to face criminal charges. In all instances, federal courts have held that the U.S. armed forces could return its members to a country in which they face charges.⁸⁸ A common prerequisite, however, is the existence of a status of forces agreement properly assigning jurisdiction to the receiving state.

V. CONCLUSION

The judge advocate stationed overseas routinely faces FCJ problems. The deployed SJA will also discover that much of his work will involve these issues. Although this article does not address all the concerns that may arise, it hopefully will be a good place to start.

When dealing with FCS problems, every judge advocate should have available two valuable tools: diplomacy and common sense. These are not exclusively legal skills, but many of the problems encountered, especially those dealing with allocation of jurisdiction, can be solved merely by discussing the position rationally with your receiving state counterpart. Most are generally happy to let the U.S. handle its own problems.

Finally, it is not surprising that the current upheaval in the world has also impacted FCJ. New challenges constantly face the United States as its allies become more assertive and resist granting substantial concessions. One example of this is the growing reluctance among European states to allow judge advocates to prosecute capital cases.⁸⁹ This adds to the difficulties judge advocates will surely face in coming years.

88. See, e.g., *Williams v. Rogers*, 449 F.2d 513 (8th Cir., 1971), *cert. denied* 405 U.S. 926; *Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir., 1972) *cert. denied* 409 U.S. 869.

89. See generally *Lepper*, *supra* note 10, at 867.

APPENDIX 1

As of 15 May 1992, the United States has entered into formal SOFAS with the following countries, the existence of the SOFA itself being unclassified:

COUNTRIES HAVING A FORMAL SOFA WITH THE UNITED STATES

[Numerical references are to be published Treaties and Other International Acts Series (T.I.A.S.) of the Department of State]

Antigua and Barbuda (9054)
Australia (5349)
Bahamas
Bahrain (8632)
Belgium (2846)
Canada (2846, 3074)
Denmark (2846, 4002)
Diego Garcia [with the United Kingdom] (6196, 8230)
Dominican Republic
Egypt (10238)
Federated States of Micronesia [in Compact with U.S.]¹ France (2846)
Germany (2846, 5351, 5352, 7759)
Greece (2846, 3649)
Honduras
Iceland (2295)
Italy (2846)
Japan (4510)
Korea (6127)
Luxembourg (2846)
Marshall Islands [In Compact with U.S.]¹ again
The Netherlands (2846, 3174)
New Zealand (4151)
Norway (2846, 2950)
Panama (10032)
Papua New Guinea
Philippines (1775, 5851, 9224, 10585)
Portugal (2846) [Lajes Agreement is unpublished]
Singapore
St. Kitts and Nevis
St. Vincent and the Grenadines
Spain (2846, 10589)

1. For both the Federated States of Micronesia and the Marshall Islands see: *Compact of Free Association Act* of 1985, Pub. L. No. 99-239 (January 14, 1986). The SOFA was concluded pursuant to Section 323 of the Act and has been reprinted in the *Compilation of Agreements Between the Government of the United States and the Freely Associated States of the Federated States of Micronesia, The President's Personal Representative for Micronesian Status Negotiations*, 1987.

Turkey (2846, 3020, 3337, 6582, 9901)
United Kingdom (2846, 6196) See also, Visiting Forces Act²
Western Samoa

2. The 1952 *Visiting Forces Act* is a unilateral British statute enacted to implement the NATO SOFA within the United Kingdom. Britain has elected this approach, rather than conclude a supplementary agreement to the NATO SOFA with the United States as sending state. Unfortunately the *Visiting Forces Act* does not fully agree with the NATO SOFA and this has led to dispute from time to time.

Provided by Colonel Dick Erickson, OASD/ISA/FMRA, Washington, D.C.

An Introduction to the Payment of Claims Under the Foreign and the International Agreement Claims Act

LIEUTENANT COLONEL DAVID P. STEPHENSON, USAF

I. INTRODUCTION

In law, as in all things, necessity is the mother of invention. Few creations of international or domestic law, however, have proved as durable, or worked so well, as the regime constructed for the payment of foreign and international claims. Both the Foreign Claims Act (FCA)¹ and the International Agreement Claims Act (IACA)² allow for the prompt and generous compensation of claimants who have suffered losses at the hands of U.S. personnel³ assigned overseas. Without these statutes and the artfully drafted claims provisions in basing agreements, the United States could not have maintained large force contingents in allied countries for decades, as it has done, without becoming an unwelcome ally or guest. This article will briefly examine the genesis of these two acts and how they have operated as an important, if little noticed, element in the relationships among the United States and its allies and friends across the world.

II. THE NEED FOR LAW

Private grievances against a foreign country were traditionally handled by diplomatic negotiations or by special *ad hoc* international claims commissions.⁴ This process was laborious and time-consuming and often left the injured party without an adequate remedy. Hoary principles of international and domestic law on sovereign immunity barred victims from suing a foreign government without its consent.⁵ Although an individual's claim might have been "espoused" by his government (that is, asserted against the other state), the espousing state gained "full

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1. 10 U.S.C. § 2734 (1990).

2. 10 U.S.C. §§ 2734a and 2734b (1990).

3. As we will see, this term has been given different meanings in different countries, but in general, it means servicemembers and civilian employees of appropriated or nonappropriated fund activities. It does not include dependents, contractors or contract employees, or indigenous employees except when they are acting within the scope of their employment.

4. R. Lillich, *Eligible Claimants Under Lump Sum Agreements*, 43 IND. L.J. 813 (1968). Through diplomatic negotiations, the United States recovered over \$27 million from Iraq for the victims of the 1987 attack on the USS *Stark*. Lt. Cmdr. William H. Archambault, *Military Law*, 36 FED. B NEWS & J. 299 (1989).

5. Maj. William R. Mullins, *The International Responsibility of a State for Torts of its Military Forces*, 34 MINN. L. REV. 59, 62 (1966) [hereinafter Mullins].

control of the claim" and could "refuse to present it" or even "surrender or compromise it without consulting the claimant."⁶

Ultimately, a state would assume responsibility only for acts in violation of a rule of international law.⁷ While asserting a claim against a foreign government for the tortious acts of its officials was procedurally complex, obtaining compensation for the unofficial acts of its representatives was all but impossible because no liability existed under international law.⁸ Thus, a victim who suffered grievous harm at the hands of an off-duty servicemember might have been without recourse against the government responsible for the servicemember's presence in the foreign country. Quite simply, the system was designed to provide redress for occasional losses sustained in a foreign country by visitors or businessmen and did not contemplate the great potential for losses caused by thousands of servicemen of a third state in a victim's country.⁹

The world wars of the twentieth century brought the shortcomings of the existing regime into sharp focus. To paraphrase a noted international legal scholar, as the United States engaged in activities that brought its personnel increasingly into contact with private parties in foreign countries, "the defects in existing international law concerning claims became more apparent and more important."¹⁰ The need for special legislation was recognized by the U.S. Congress during World War I with enactment of the first FCA.¹¹ The law allowed for the compensation of the inhabitants of allied or friendly European nations for damage caused by American military forces "as though the damages had been caused by that country's own military forces."¹²

A number of factors stimulated further legislation during and after World War II including the substantial presence of U.S. forces outside of Europe, the worldwide network of alliances that allowed for the prolonged stay of U.S. personnel in foreign countries, the requirement to maintain harmony in our security relationships, and the compelling political need for the certain and timely compensation of the aggrieved citizens of allied or friendly nations. "Never before had so many U.S. servicemen with their planes, vehicles, ships, and private vehicles been present on the territory of other nations where crimes would be committed, property damaged or destroyed, and local inhabitants tortiously injured."¹³ This new world order gave birth to the IACA and new life to the FCA.¹⁴

III. COMPLEMENTARY STATUTES

The FCA and ACA share a common purpose: "to promote and maintain friendly relations through the prompt settlement of meritorious claims."¹⁵ These complementary statutes allow the United States (or an ally by agreement) to settle

6. *Id.*

7. *Id.* at 63.

8. SERGE LAZAREFF, *STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW* at 270 (1971) [hereinafter LAZAREFF].

9. *Id.* at 268.

10. Andreas F. Lowenfeld, *Claims Against Foreign States—A Proposal for Reform of United States Law*, 44 N.Y.U. L. REV. 901 (1969).

11. Act of 18 April 1918, ch. 57, 40 Stat. 532.

12. Department of Army Pamphlet 27-162, *Claims*, ¶7-2 (1989) [hereinafter Dep't Army Pam. 27-162]; Mullins, *supra* note 5, at 63, n. 21.

13. Mullins, *supra* note 5, at 60.

14. For a more detailed history of the development of international claims law, see LAZAREFF, *supra* note 8, at 269-276; Dep't Army Pam. 27-162, *supra* note 12, ¶¶ 7-2 and 7-10.

15. This language appears only in the FCA in 10 U.S.C. § 2734(a) (1990).

claims for personal injury or death and property damage caused by military members and civilian employees of the U.S. Armed Forces in foreign countries. Although the statutes are related, each has its own role to play in the settlement of claims.

The FCA, which allows for the payment of both scope and nonscope claims arising out of the acts or omissions of U.S. personnel, should be considered under the following circumstances:

1. When a scope or nonscope claims arises in a country in which the United States has no basing agreement;
2. When a scope or nonscope claim arises in a basing rights country where the status of forces agreement contains no claims cost-sharing arrangements; or
3. When the claim arises in a basing rights country with a cost-sharing arrangement, but arises outside the scope of employment.

The IACA is used as the statutory authority to settle in-scope or government-to-government claims in countries where the United States has negotiated claims cost-sharing arrangements with our allies or friends as part of a basing rights agreement.

IV. FOREIGN CLAIMS ACT

A. Threshold Issues

The FCA is unique substantively and procedurally. Substantively, it radically departs from existing state practice by providing for compensation even when there is only a moral and not a legal obligation to pay. A renowned student of status of forces agreements, Serge Lazareff, stated that this authority to provide a victim with a remedy over and above pursuing an insolvent and perhaps absent serviceman, prevents an ally from being viewed as an occupying power.¹⁶

Procedurally, instead of authorizing The Judge Advocate General of a military service or a service secretary to settle claims, the law authorizes the secretary to appoint claims commissions, composed of commissioned officers under the secretary's jurisdiction, to settle and pay claims "under such regulations as the secretary concerned may prescribe."¹⁷ In the Air Force, those regulations appear in chapter 8 of Air Force Regulation (AFR) 112-1.

By law and regulation, some important threshold questions must be addressed before a claim can be paid. The FCA *permits* the prompt settlement of claims for damage to, or loss of, real or personal property of any foreign country or political subdivision or inhabitant of a foreign country or personal injury to, or death of, any inhabitant of a foreign country; if the damage, loss, personal injury, or death occurs outside the United States, or its Territories, Commonwealths, or possessions, and is caused by, or is otherwise incident to noncombat activities of, the Armed Forces, or is caused by a member thereof or by a civilian employee of the military department concerned or the Coast Guard, as the case may be.¹⁸

Outside the United States, or its Territories, Commonwealths or Possessions. Generally speaking, if a claim cannot be entertained under the Federal Tort Claims

16. LAZAREFF, *supra* note 8, at 271, 355.

17. 10 U.S.C. § 2734(a) (1990).

18. *Id.*

Act¹⁹ because it arose in a "foreign country," it should be considered under the FCA, the IACA, or the Military Claims Act (MCA)²⁰ as appropriate.

Foreign Countries, their Political Subdivisions, and their Inhabitants. While proper claimants under the FCA include "foreign governments and their political subdivisions, including a municipal and prefectural government,"²¹ before payment is made, careful consideration must be given to whether "any treaty, agreement, or understanding between the United States and the foreign country concerned waives compensation for such claims."²² "If a claim against the United States is waived or assumed by a foreign government or if the foreign government has agreed to hold the United States harmless from such claim," the claim should be referred to the foreign government.²³ As a matter of policy, the U.S. Government declined to pay some intergovernmental claims arising out of U.S. activities during Operations Desert Shield and Desert Storm.²⁴ National governments and their political subdivisions or their allies engaged in war or armed conflict with the United States are not proper claimants.²⁵

An inhabitant is defined in AFR 112-1 as "a person, corporation, or other business association whose usual place of abode is in a foreign country. The term . . . does not include persons who are temporarily present in a foreign country."²⁶ Foreign nationals are covered,²⁷ even those who live in a foreign country different from the one in which the claim arises.²⁸ "Thus, a Frenchman injured by an American vehicle in Germany is a proper claimant."²⁹ The requirement that the claimant be an inhabitant of a foreign country was meant to exclude U.S. nationals and citizens who are merely visiting the foreign country on business or pleasure or in connection with official business of the U.S. Government. United States corporations, branches, affiliates, or subsidiaries located and doing business in the country where the claim arose, however, are proper claimants, regardless of whether they can be considered juridical entities separate from the mother company.³⁰

19. 28 U.S.C. §§ 1346(b), 2402, 2671, 2672, 2674-2680 (1990).

20. A claim that is not cognizable under the FCA or the IACA should also be considered under the Military Claims Act (MCA), 10 U.S.C. § 2733 (1990). The MCA permits the payment of claims "against the United States for property damage, personal injury, or death caused by military personnel or civilian employees of the Air Force acting in the scope of employment or otherwise incident to the Air Force's noncombat activities." See Air Force Regulation 112-1, Claims and Tort Litigation, ¶7-1 (Oct. 1989) [hereinafter AFR 112-1]. While the scope of United States liability under the MCA is similar to that of the FCA, the MCA provides redress for claimants excluded by the FCA and IACA, namely citizens and inhabitants of the United States, U.S. military personnel and civilian employees, and persons in foreign countries who are not inhabitants of a foreign country. *Id.* at ¶ 7-8. The MCA, however, cannot be used to pay a claim arising from an incident outside a tortfeasor's scope of employment or not resulting from a noncombat activity. For example, these limitations would bar a claim by an American tourist who had been assaulted by an off duty American servicemember, even though an inhabitant of a foreign country could be compensated for such an assault. For a complete list of the excluded claims, see AFR 112-1, para. 8-11.

21. *Id.* at ¶ 8-8d.

22. Dep't Army Pam. 27-162, *supra* note 12, ¶ 7-4c(5).

23. *Id.* at ¶ 7-9a(2). See ¶ 7-9c regarding the release of the United States from claims arising out of the United States presence in Korea before July 1, 1948, and in France before July 1, 1946. In large measure, by the terms of international agreements, the United States has been released from liability for any claims arising out of World War II.

24. Although payment could have been made under the FCA, it was not required under the law. "Incident to combat" claims are barred. See text *infra* section IVB.

25. AFR 112-1, *supra* note 20, ¶ 8-9e,f.

26. *Id.* at ¶ 8-2b. Dep't Army Pam. 27-162, *supra* note 12, ¶ 7-4c(1)(a) defines an inhabitant as one who "dwells in and has assumed a definite place in the economic and social life of the foreign country."

27. AFR 112-1, *supra* note 20, ¶ 8-8a.

28. Dep't Army Pam. 27-162, *supra* note 12, ¶ 7-4c(1)(c). A requirement that the claimant be an inhabitant of the country in which the claim arises was later deleted.

29. *Id.*

30. AFR 112-1, *supra* note 20, ¶ 8-8c; Dep't Army Pam. 27-162, *supra* note 12, ¶ 7-4c.

United States nationals who reside in a foreign country primarily because they are employed by the United States or a U.S. civilian contractor are not proper claimants.³¹ Military retirees who are not employed by the United States may be proper claimants, however, those who are employed by the United States and who are injured in the scope of their employment are generally not proper claimants.³² United States nationals who are sponsored by a U.S. contractor employee³³ are barred also from recovering under the FCA as are dependents accompanying U.S. military or U.S. national civilian employees.³⁴ United States citizens who are not proper claimants under the FCA may seek compensation under the MCA,³⁵ an appropriate status of forces agreement,³⁶ or 10 U.S.C. § 27 and chapter 10 of AFR 112-1.³⁷

Inhabitants of a country at war or in armed conflict with the United States or any ally of that country are barred also from recovery unless the claims commission or a local military commander determines that the claimant is friendly to the United States.³⁸ While only enemy nationals are *ineligible* to recover under the law, service secretaries have the discretion to refuse claims submitted by inhabitants of "unfriendly" countries.³⁹ An example: claims filed by inhabitants of a communist country are not payable unless authorized by the Air Force Legal Service Agency, (AFLSA/JACT).⁴⁰

Caused by or is Otherwise Incident to Noncombat Activities of the Armed Forces. No definition of noncombat activities appears in either the law or chapter 8 of AFR 112-1. Reference should be made to the definition given in paragraph 7-17b of AFR 112-1,⁴¹ where noncombat activities are said to include those that are essentially "military in character which have little parallel in civilian pursuits and have historically furnished a proper basis for paying claims."⁴² Some examples given include maneuvers and field exercises, practice bombing, and the operation of aircraft causing sonic booms. Just as under the MCA, the FCA does not require the claimant to prove Air Force negligence, only that there was a "causal connection between an authorized noncombat activity and the injury or damage."⁴³ In Japan, Korea, Australia, and nations belonging to the North Atlantic Treaty Organization (NATO), or wherever the United States has negotiated a similar cost-sharing arrangement, noncombat activities claims must be processed under the agreed claims provisions and the IACA, not the FCA.

31. AFR 112-1, *supra* note 20, ¶ 8-8b(1) and (2).

32. *Id.* ¶ 8-111.

33. *Id.* ¶ 8-8b(3).

34. *Id.* ¶ 8-9b. If the dependent is a foreign national, the claim may be payable depending on whether he or she is an "inhabitant" of the country. Payment of a dependent who is living in a foreign country after having departed and returned solely as the result of the military sponsor's orders would not serve the objectives of the FCA. Interview with Mr. Francis B. Van Nuys, Senior Legal Advisor, Claims and Tort Litigation Division, Office of the Judge Advocate General, Department of the Air Force (June 1992) [hereinafter Interview with Van Nuys]. See also AFR 112-1, *supra* note 20, annotation to ¶ 8-9b.

35. The reader will recall that U.S. citizens who are barred from filing under the FCA may be able to assert a claim under the MCA for either an in-scope act or a noncombat activity. See *supra* note 20.

36. See discussion *infra* section V.

37. See discussion *infra* section IVD.

38. AFR 112-1, *supra* note 20, ¶ 8-9f; Dep't Army Pam. 27-162, *supra* note 12, ¶ 7-4c(3); 10 U.S.C. § 2734 (b)(2).

39. Dep't Army Pam. 27-162, *supra* note 12, ¶ 7-4c(4).

40. AFR 112-1, *supra* note 20, ¶ 8-11j. This limitation may be reviewed in light of the political changes in the former Eastern Europe and the former Soviet Union. Interview with Van Nuys, *supra* note 34.

41. 10 U.S.C. § 2733 (1990).

42. AFR 112-1, *supra* note 20, ¶ 7-17b(1).

43. *Id.* ¶ 7-17b(3); 10 U.S.C. § 2734(a)(3) (1990).

Caused by a Member or by a Civilian Employee of the Military Department Concerned. It is this portion of the FCA that makes the law a powerful tool for promoting friendly relations with foreign countries and their inhabitants. Normal provisions of tort law with respect to fault and vicarious liability simply do not apply. Under the law, as interpreted by regulation, the United States accepts responsibility for acts or omissions of military personnel that are "negligent, willful, wrongful, criminal or mere mistakes of judgment."⁴⁴ Further, the United States will accept responsibility for off-duty conduct totally unrelated to the tortfeasor's duties or employment. A 1981 letter from Headquarters United States Air Force, Directorate of Civil Law and Litigation provides a clear mandate: "The nature of the act alleged to have been committed, evidence of criminal guilt, or the personal merit of the individual should not stand in the way of applying the Foreign Claims Act to give effect to its purpose." The benefits of the law should be "brought to the attention of the damaged/injured person" when necessary to ensure U.S. responsibility is met and its interests served.⁴⁵

The FCA establishes the legal authority to make *ex gratia* payments to injured parties in nonscope cases arising in Japan, Korea, Australia, and NATO countries.⁴⁶ In countries where there are no cost-sharing arrangements or no basing agreements at all, all meritorious claims, whether or not arising out of a person's duty performance, are paid under the authority of the FCA.⁴⁷

Duty status and scope of employment do become important under the FCA when:

1. the injured party is a civilian employee of the United States (civilian employees, including local inhabitants, injured in the scope of their employment are not proper claimants)⁴⁸ or

2. the incident giving rise to the claim was caused by a local national civilian employee hired to work in that country. Such a claim is payable only when the local national employee was acting in the scope of his employment.⁴⁹ "The purpose of the FCA . . . is not furthered by accepting responsibility for the off-duty torts of employees who are in a foreign country through no act of the United States and whose principle relationship with the United States is solely their employment."⁵⁰

44. AFR 112-1, *supra* note 20, ¶ 8-15a.

45. See Letter from Col. Robert W. Norris, Director of Civil Law, to all staff judge advocates and chief circuit judges (Feb. 17, 1981) on Use of Foreign Claims Act (on file with Air Force Legal Service Agency, Fort Claims and Litigation Division (AFLSA/JACT)).

46. AFR 112-1, *supra* note 20, ¶ 8-15b(1).

47. *Id.* ¶ 8-15b(2).

48. *Id.* ¶ 8-9d. U.S. civil service employees are generally covered by the Federal Employees Compensation Act, 5 U.S.C. §§ 8101-8193. Pursuant to 5 U.S.C. § 8171, U.S. nonappropriated fund employees are generally covered by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950. Local national employees are often covered by a collective bargaining agreement or contract providing employee benefits through insurance, local law, or custom. If these benefits are not sufficient, AFLSA/JACT may authorize the payment of additional compensation. See AFR 112-1, *supra* note 20, ¶ 8-11(3).

49. AFR 112-1, *supra* note 20, ¶ 8-10c(1).

50. Dep't Army Pam. 27-162, *supra* note 12, ¶ 7-4e(3)(b). Both scope and nonscope claims arising out of the acts or omissions of third country nationals employed by the United States and arising in the country of employment can be paid under U.S. Army regulations. Payment of scope claims may be permitted in the Air Force if the third country national is considered to be a member of the civilian component under the pertinent status of forces agreement. Nonscope claims will be reviewed on an ad hoc basis. Interview with Van Nuys, *supra* note 34.

B. General Limitations

Important limitations on the payment of foreign claims have been imposed by law or regulation. (It is important to recall that the secretary has the discretion to determine which claims are paid.)⁵¹

Combat Claims. Congress determined it should not extend U.S. largesse to claims arising out of the "combat activities" of the Armed Forces.⁵² As a result, claims arising from enemy action or directly or indirectly from action of the Armed Forces of the United States in combat cannot be paid.⁵³ However, incidents arising out of combat training and the "operation of military facilities not directly involved in combat actions . . . might be payable" even if combat operations are imminent.⁵⁴ Further, of special interest to Air Force attorneys, a special exception for aircraft exists. Claims arising out of an accident or malfunction involving a U.S. aircraft while preparing for or traveling to and from a combat mission can be paid.⁵⁵

Contract Claims. Claims that are purely contractual in nature are not payable under the FCA as the Government's liability should be determined under the contract.⁵⁶ Likewise, in considering claims for "rent, damage, or other payments involving regular acquisition, possession, and disposition of real property by or for the Air Force," reference should be made to the lease or other agreement controlling the legal relationship and not to the FCA.⁵⁷

Compensatory Damages. The FCA can only be used for paying compensatory damages. Claims for attorney fees, punitive damages, bail, or court costs will not be allowed.⁵⁸

Private Obligations. Claims arising out of the "private contractual relationships between U.S. personnel and third parties for property leases, public utilities, the hiring of domestic servants, and debts of any description" will not be paid under the FCA.⁵⁹ Damage to rented premises caused by the negligence of U.S. personnel is also considered to be a private obligation arising out of contract and is not payable. These limitations hold although military personnel who fail to discharge their private civil legal obligations have caused much ill-will in foreign countries.⁶⁰

51. In *Aaskov v. Aldridge*, 695 F. Supp. 595 (D.D.C. 1988), the court ruled that the Secretary of the Air Force has complete discretion in deciding whether to settle a claim under the FCA. Thus, the courts will not attempt to compel him to consider or pay a claim.

52. 10 U.S.C. § 2734(b)(3) (1990). At the request of the Department of State, a policy decision was made to settle combat claims arising out of military operations in Grenada. The U.S. Army acted as the agent of the Department of State in processing the claims; those deemed meritorious (\$1.6 million) were paid with U.S. Agency for International Development (USAID) appropriations. Administrative expenses (\$200,000) were also paid by USAID funds. Maj. Jeffrey L. Harris, *Grenada—A Claims Perspective*, ARMY LAW 7, 8 (Jan. 1986).

53. AFR 112-1, *supra* note 20, ¶ 8-11m.

54. Dep't Army Pam. 27-162, *supra* note 12, ¶ 7-4e(2). The Air Force paid claims during Operations Desert Shield and Desert Storm under this exception to the general exclusion of combat claims. Most of the claims arose out of traffic accidents caused by training or other official activities. Interview with Van Nuys, *supra* note 34.

55. 10 U.S.C. § 2734(b)(3); AFR 112-1, *supra* note 20, ¶ 8-11m.

56. AFR 112-1, *supra* note 20, ¶ 8-11b. For example, the claim of Budget Rent-A-Car for a rental automobile destroyed by an intoxicated airman in Edmonton, Canada, was referred for payment as a contract claim under a Blanket Purchase Agreement. Without the contract, the claim would have been considered under the FCA. See Memorandum from Air Force Legal Services Agency, General Claims Division (AFLSA/JACC) to 554 OSW/JA, *Claim of Budget Rent-A-Car of Edmonton* (Mar. 28, 1991).

57. AFR 112-1, *supra* note 20, ¶ 8-11i. Army regulations provide that, except when the terms of a lease or other agreement expressly address the claimed damages, the claim may be settled under the FCA. Dep't Army Pam. 27-162, *supra* note 12, ¶ 7-4d(2).

58. AFR 112-1, *supra* note 20, ¶ 8-11c.

59. *Id.* ¶ 8-11d.

60. AFR 112-1, *supra* note 20, directs such claims to the servicemember's commander per AFR 35-18, *Personal Financial Responsibility* (Apr. 1988). Collection is hardly certain, however, especially

Dependents. The United States will also not accept liability for the acts or omissions of "dependents, guests, servants, or pets of members and employees of the U.S. Armed Forces."⁶¹ Under paragraph 8-11 of AFR 112-1, "this restriction applies even where local law imposes strict liability or where the head of a household is held vicariously liable for the negligence of his dependents."⁶² Some commentators have suggested that FCA coverage should be extended to dependents for the simple reason that the United States is just as responsible for their presence in a foreign country as it is for servicemen or civilian employees.⁶³ As convincing as the argument may be, payment cannot be made as the statute clearly does not allow it.

C. Receiving and Processing a Claim

Under paragraph 8-4 of AFR 112-1, a claim is deemed filed when a federal agency receives a Standard Form 95 or other signed and written demand for money damages in a sum certain. In some countries, a claim may be presented to host nation authorities "pursuant to a treaty, international agreement or mutual understanding."⁶⁴ A claim must be filed in writing within two years after it accrues.⁶⁵

Once the claim has been filed, the claims officer will conduct an initial investigation seeking as needed, the cooperation of local authorities. The claim will then be referred to the foreign claims commission (unless the claims officer has been made a claims commission and the claim is within his settlement authority) which will conduct further investigation, if necessary, negotiate a settlement, and take the other actions prescribed by paragraph 8-17 of AFR 112-1.

Delegations of settlement authority and authority to appoint claims commissions appear in paragraph 8-3 of AFR 112-1. Under paragraph 8-3b, any settlement authority (Secretary of the Air Force, The Judge Advocate General, Deputy Judge Advocate General, or staff judge advocates of overseas commands and installations) may appoint subordinate judge advocates or civilian attorneys as foreign claims commissions and may redelegate all or part of their settlement authority to the claims commission.

Liability and damages are determined under the law of the country in which the claim occurred.⁶⁶ Awards are reduced under the collateral source rule only for payments made by the U.S. Government, a military member or employee, a joint tortfeasor, or an insurer of one of the foregoing.⁶⁷ If insurance proceeds are available,

when the servicemember is already in financial trouble or has been separated or reassigned to the United States. Others have suggested referring the creditor to Article 139 of the Uniform Code of Military Justice (UCMJ). Article 139 permits the service secretary to charge against the pay of a member damages resulting from the wrongful damage to, or taking of private property by the member. Air Force legal officials have determined that Article 139 is not the proper article to use for the collection of ordinary debts but should be "limited to situations where the damage or taking occurs by force, violence, or riotous or disorderly conduct." See Memorandum from Headquarters United States Air Force, Military Justice Division to HQ USAF/JACC, *Scope of Article 139, UCMJ*, (Dec. 7, 1987).

61. AFR 112-1, *supra* note 20, § 8-11c.

62. *Id.* But see the annotation to this paragraph that indicates that negligent supervision of one's children may justify payment under the FCA, depending upon local law.

63. Mullins, *supra* note 5, at 77.

64. Dep't Army Pam. 27-162, *supra* note 12, § 7-5b.

65. AFR 112-1, *supra* note 20, § 8-6. The FCA contains no specific requirement that claims be in writing; under Army regulations, claims can be presented orally, although they will not be acted upon until they are reduced to writing. Dep't Army Pam. 27-162, *supra* note 12, § 7-5a and c.

66. AFR 112-1, *supra* note 20, § 8-12a. See also § 4-23c(2)(b): "the law and custom of the situs is used."

67. *Id.* § 8-12c(1). Although local law on the collateral source doctrine must be considered, as a general rule, uninsured motorist payments should not be deducted from an award. Deductions will not be made where another's insurance company acquires subrogation rights against the government, a servicemember, or a civilian employee, as a result of the payment of damages. Subrogees are expressly barred from asserting a claim under the FCA. See Memorandum from AFLSA/JACC to HQ

claimants should be directed first to the insurer, but settlement under the FCA should not be postponed if the insurer denies liability or military personnel are confined and settlement of the claim will allow their release or the early resolution of civil litigation.⁶⁸ Claimants who are dissatisfied with an award can request reconsideration provided the request is made within a reasonable time, normally sixty days.⁶⁹

D. Special Cases

Occasionally, an insurer goes bankrupt leaving claimants without compensation and U.S. personnel exposed to civil or criminal liability. Base staff judge advocates should quickly report such developments to their numbered Air Force and Major Command staff judge advocates as well as Air Force Legal Services Agency General Claims Division and Headquarter United States Air Force, International and Operation Law Division seeking authority to settle the claims.⁷⁰

In cases involving serious injuries where final settlement of a claim may be delayed pending completion of medical care or assessment of permanent disability, an advance payment should be considered under the authority of chapter 20 of AFR 112-1. Advance payments can prevent hardship to the claimant and preserve the goodwill that the FCA is intended to generate.⁷¹ Up to \$100,000 can be paid when the potential claim equals or exceeds the amount of the advance payment and the claimant has an immediate need for compensation to cover expenses for food, shelter, or medical care.⁷² Solatium payments, which are made as an expression of sympathy without regard to legal liability, are not a substitute for advance payments under chapter 20.⁷³

In some unusual cases, claimants who are not eligible for relief under the FCA (for example, tourists or businessmen who are not inhabitants of a foreign country) may be able to file a claim under chapter 10 of AFR 112-1 and 10 U.S.C. § 2737. This authority provides for the payment of claims up to \$1000 for property damage, personal injury, or death caused by a military member or civilian employee while using any government property on a government installation or while driving a government motor vehicle at any location.⁷⁴ The usefulness of this authority is limited by the small amount of compensation available and by the fact that claims must first be paid under other provisions of law and any available collateral source, for example, insurance.⁷⁵

SPACECOM/JA, *Request for Policy Guidance Regarding Foreign Claims Act Applicability to Uninsured Motorist Coverage in British Columbia* (Mar. 10, 1987).

68. AFR 112-1, *supra* note 20, ¶ 8-20a and b.

69. *Id.* ¶ 8-13.

70. *Id.* ¶ 8-20a.

71. Mullins, *supra* note 5, at 78.

72. AFR 112-1, *supra* note 20, ¶ 20-4. Advance payments cannot be made under the Federal Tort Claims Act or the IACA.

73. AFR 112-1, *supra* note 20, ¶ 8-15c. Solatium payments are expected only in a very few Asian countries, for example, Korea, Japan, and Thailand. Offering solatium payments in other countries may be considered offensive. Interview with Walter D. Phillips, Instructor, Air Force Judge Advocate General School, Department of the Air Force, Maxwell AFB, AL (June 1992).

74. AFR 112-1, *supra* note 20, ¶ 10-1.

75. *Id.* ¶ 10-7. Chapter 10 claims, however, are not preempted by Article 139 claims. *Id.* ¶ 10-6d.

V. INTERNATIONAL AGREEMENT CLAIMS ACT

The IACA is divided into two distinct parts. One addresses the adjudication and payment of claims incident to noncombat activities of U.S. Armed Forces in foreign countries, the other losses incident to activities of foreign Armed Forces in the United States.⁷⁶ Because of the relatively small number of claims arising in the United States out of the activities of foreign servicemen and because the U.S. Army has sole responsibility for settling those claims,⁷⁷ this article will address only the first section of the law which should be of more interest to Air Force lawyers.

Rather than providing for the payment of individual claims, section 2734a of the IACA authorizes the reimbursement of the pro rata share owed by the United States to allied nations that have paid claims under the terms of a basing agreement.⁷⁸ The law also permits the United States to pay an allied nation the agreed pro rata share of any claim for damage to property owned by the ally.⁷⁹ The United States has negotiated basing agreements with claims cost-sharing arrangements with members of NATO,⁸⁰ Japan,⁸¹ South Korea,⁸² Australia,⁸³ and Iceland.⁸⁴ The claims provisions in each agreement are modeled after Article VIII of the NATO status of forces agreement (SOFA), which will provide the basis for the following discussion.⁸⁵ Each addresses three types of claims as follows:

1. Intergovernmental claims made by one "contracting party"⁸⁶ to the agreement against another.⁸⁷ Such claims are generally waived in recognition of the alliance's goal to provide for the common defense at a shared financial risk.

76. 10 U.S.C. § 2734a and b (1990).

77. Dep't Army Pam. 27-162, *supra* note 12, ¶ 7-13c(1). Air Force responsibilities for processing international agreement claims in the United States are set out in AFR 112-1, *supra* note 20, ¶ 9-8. The staff judge advocate for the installation where the foreign personnel are assigned is charged with investigating the incident with the assistance of the foreign commander of the tortfeasor. Upon completion of the investigation, the claim file is to be forwarded in four copies to the U.S. Army Claims Service at Fort Meade, Maryland, which has sole authority to adjudicate and pay the claim. If suit is filed under the Federal Tort Claims Act or state law based on the actions of a member of a visiting force or its civilian component, the base staff judge advocate must report the litigation as required by AFR 112-1, *supra* note 20, ¶ 9-9. The NATO SOFA is the exclusive remedy for claims within the purview of the agreement. See *Aaskov v. Aldridge*, 695 F. Supp. 595 (D.D.C. 1988); *Brown v. Ministry of Defense*, 683 F. Supp. 1035 (E.D.Va. 1988); *Shafter v. United States*, 273 F. Supp. 132 (S.D. N.Y. 1967), *aff'd* 400 F.2d 584 (2d Cir. 1968), *cert. denied*, 393 U.S. 1086 (1969).

78. 10 U.S.C. § 2734a(a)(1) (1990).

79. 10 U.S.C. § 2734a(a)(2) (1990).

80. Agreement between the Parties to the North Atlantic Treaty Regarding the Status of Forces, June 19, 1951 (1953), 4 U.S.T. 1792, T.I.A.S. No. 2846.

81. Agreement under Article VI of the Treaty of Mutual Cooperation and Security with Japan Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, Jan. 19, 1960, 11 U.S.T. 1652, T.I.A.S. No. 4510.

82. Agreement under Article IV of the Mutual Defense Treaty between the United States and the Republic of Korea Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, July 9, 1966, 17 U.S.T. 1677, T.I.A.S. No. 6127.

83. Agreement Concerning the Status of United States Forces in Australia, May 9, 1963, 14 U.S.T. 506, T.I.A.S. No. 5349.

84. Annex (to the agreement of May 5, 1951 with Iceland) on the Status of United States Personnel and Property, May 8, 1951, 2 U.S.T. 1533, T.I.A.S. No. 2295.

85. Dep't Army Pam. 27-162, *supra* note 12, ¶ 7-12.

86. Contracting party is defined in AFR 112-1, *supra* note 20, ¶ 9-2b as "a nation signing the governing agreement."

87. North Atlantic Treaty Organization, Status of Forces Agreement, art. VIII, ¶¶ 1-4 [hereinafter NATO SOFA]; AFR 112-1, *supra* note 20, ¶ 9-5c(1); Dep't Army Pam. 27-162, *supra* note 12, ¶ 7-12b(1).

2. "Third party"⁸⁸ claims for property damage, personal injury, or death caused by either:

a. acts or omissions of a member of a force⁸⁹ or civilian component⁹⁰ in the performance of official duty; or

b. other acts or omissions for which a force or civilian component is legally responsible.⁹¹ Normal rule: Substitute the receiving state⁹² for the sending state⁹³ with the amount of compensation being shared.⁹⁴

3. Third party or contracting party claims for property damage, personal injury, or death caused by the tortious acts or omissions of a member of a force or civilian component *outside* the performance of official duty.⁹⁵

Under such circumstances, host nation courts retain jurisdiction, although the sending state can (and often does) offer an *ex gratia* settlement.⁹⁶

A. Intergovernmental Claims

Intergovernmental claims can be divided into four categories. Each is addressed in a separate paragraph of Article VIII of the NATO SOFA.

Military Property. Generally, claims for damage to military property caused by another contracting party will be waived.⁹⁷ The waiver reflects an underlying

88. Third party is defined in AFR 112-1, *supra* note 20, ¶ 9-2g, as "Those other than members of the force and civilian component of the sending or receiving States. Dependents, tourists, and other noninhabitants of a foreign country are third parties unless the agreement specifically excludes them." The NATO SOFA does not define the term. By agreement with Canada, Germany, and Japan, third parties do not include members of the U.S. force or civilian component and thus, they cannot file claims. Even dependents are excluded in Canada and Japan. On the other hand, by third Air Force policy, members of the force may now be considered third parties in the United Kingdom. Interview with Van Nuys, *supra* note 34. See also QAFR 112-1, *supra* note 20, annotation to ¶ 9-2g.

89. Members of the force are defined in AFR 112-1, *supra* note 20, ¶ 9-2c, as "personnel belonging to the land, sea, or air armed services of one contracting party when in the territory of another contracting party in connection with their official duties." Note that in some countries, for example, Japan, U.S. personnel on leave are considered members of the force even though they are not present "in connection with their official duties." This position is contrary to most NATO countries where members of the force are defined as "personnel . . . in the territory of another contracting party in the North Atlantic Treaty Area in connection with their official duties." NATO SOFA, *supra* note 87, art. I, ¶ 1(a). Thus, both a geographical and duty limitation exist. By agreement between the United States and other contracting parties to the NATO SOFA, military attaches, joint military assistance advisory group personnel and other personnel with diplomatic immunity are not considered members of the U.S. force. Dep't Army Pam. 27-162, *supra* note 12, ¶ 7-12a(2)(a). Judge advocates must consult local agreements to determine the status of similar personnel in their country of assignment.

90. In AFR 112-1, *supra* note 20, ¶ 9-2a, the civilian component is defined as "civilian personnel accompanying a force of a contracting party, who are employed by the force. Indigenous employees, contractor employees, or members of the American Red Cross are not a part of the civilian component unless specifically included in the agreement." Dependents and technical representatives are also normally excluded. Nonappropriated fund employees are generally considered to be members of the civilian component. *Id.* ¶ 9-10e.

91. NATO SOFA, *supra* note 87, art. VIII, ¶ 5; AFR 112-1, *supra* note 20, ¶ 9-5c(2); Dep't Army Pam. 27-162, *supra* note 12, ¶ 7-12b(2).

92. AFR 112-1, *supra* note 20, ¶ 902e, defines receiving state as "[t]he country where the force or civilian component of another party is located."

93. AFR 112-1, *supra* note 20, ¶ 9-2f, defines sending state "[t]he country sending the force or civilian component to the receiving state."

94. LAZAREFF, *supra* note 8, at 278.

95. NATO SOFA, *supra* note 87, art. VIII, para. 6; AFR 112-1, *supra* note 20, ¶ 9-5c(3); Dep't Army Pam. 27-162, *supra* note 12, ¶ 7-12b(3).

96. LAZAREFF, *supra* note 8, at 278.

97. While the authority to waive claims under the NATO SOFA, a treaty, has never been challenged, a question did arise over the authority of the executive branch to enter into executive agreements with mutual waiver of claims provisions. The Federal Claims Collection Act (FCCA) (31 U.S.C. § 3711) requires executive and legislative agencies of the government to "try to collect a claim

premise of any alliance—that is the forces of each nation, in a sense, coalesce to form one armed service. Frequent assertions of intergovernmental claims would not serve the goals of mutual security and may discourage necessary joint training. There are limitations, however. The waiver applies only to property owned by a contracting party and used by its Armed Forces, and only if the damage:

1. was caused by a member or employee of the armed service of another party in the execution of his duties (an example might be an accident during a joint exercise);⁹⁸ or

2. arose from the use of any vehicle, vessel or aircraft owned by another party and used by its Armed Forces, and the vessel, cargo or aircraft causing the damage was being used in connection with the treaty or the damage was caused to property being so used.⁹⁹

“For the waiver provisions to be operative then, the military property damaged or the military personnel or instrumentalities causing the damage must have some relationship with the operation of the North Atlantic Treaty.”¹⁰⁰

Nonmilitary Property. Damage to property owned by a party,¹⁰¹ but not used by its Armed Forces, will be waived only if:

1. waiver would be allowed under paragraph 1 of Article VIII for military property (i.e., the property damaged or personnel causing the damage bear some relationship to the operation of the North Atlantic Treaty);¹⁰² and

2. the claim is for less than \$1400.¹⁰³

If both of these conditions are not satisfied, the claim may be processed as an in-scope claim under the provisions of paragraph 5 of Article VIII in which case the United States will pay its pro rata share of the damage, or it may be processed as a nonscope claim under the provisions of paragraph 6.¹⁰⁴ The \$1400 has been determined by the Department of Defense to be a threshold beyond which the waiver does not apply and is not to be regarded as a deductible to the apportioned liability of the United States.¹⁰⁵

Paragraphs 2a – e of Article VIII set out an elaborate procedure for the use of an arbitrator in the event the parties cannot agree on the question of liability or the amount of damage to nonmilitary property. In fact, the arbitrator provisions have been seldom, if ever, used.¹⁰⁶

of the United States Government for money or property arising out of the activities of, or referred to, the agency.” The Deputy Assistant Attorney General has concluded that the FCCA applies only to “existing claims” and not to agreements to waive future, inchoate claims. See Letter from Deputy Assistant Attorney General John O McGinnis to Assistant General Counsel for the Department of Defense James Allen, (Aug. 21, 1990) (on file with AFLSA/JACC).

98. NATO SOFA, *supra* note 87, art. VIII, ¶ 1a; AFR 112-1, *supra* note 20, ¶ 9-5c(1)(a); Dep’t Army Pam. 27-162, *supra* note 12, ¶ 7-12c(1)(a).

99. NATO SOFA, *supra* note 87, art. VIII, ¶ 1b; AFR 112-1, *supra* note 20, ¶ 9-5c(1)(a); Dep’t Army Pam. 27-162, *supra* note 12, ¶ 7-12c(1)(a).

100. Dep’t Army Pam. 27-162, *supra* note 12, ¶ 7-12c(1)(a).

101. *Id.* at ¶ 7-12c(1)(b). Property owned by a political subdivision may not be national property and would thus not be subject to the waiver.

102. NATO SOFA, *supra* note 87, art. VIII, ¶ 2; AFR 112-1, *supra* note 20, ¶ 9-5c(1)(b); Dep’t Army Pam. 27-162, *supra* note 12, ¶ 7-12c(1)(b).

103. NATO SOFA, *supra* note 87, art. VIII, ¶ 2f.

104. *Id.* art. VIII, ¶ 2d; AFR 112-1, *supra* note 20, ¶ 9-5c(1)(b); Dep’t Army Pam. 27-162, *supra* note 12, ¶ 7-12c(1)(b).

105. Dep’t Army Pam. 27-162, *supra* note 12, ¶ 7-12c(1)(b).

106. Mullins, *supra* note 5, at 71.

Maritime Salvage Claims. Paragraph 3 of Article VIII effectively waives maritime salvage claims between the contracting parties when the vessel or cargo in question is owned by a party and is used by its Armed Forces in connection with NATO.¹⁰⁷

Claims for Injury or Death of a Servicemember. Under paragraph 4 of Article VIII, each party waives its claims for injury or death of its servicemembers while the servicemember was engaged in the performance of his official duties.¹⁰⁸ No requirement exists that the responsible party be in the performance of his official duties or that the victim be performing duties related to the operation of NATO. The waiver does not apply to civilian employees and does not limit the right of a third party to assert a claim under paragraph 5 (for scope claims) or 6 (for nonscope claims) of Article VIII or against the responsible party.¹⁰⁹

B. Official Duty Third Party Claims

Paragraphs 5 and 6 are the most frequently invoked and most important of Article VIII's claims' provisions. Together they have been used for decades not only to reduce friction between local citizens and servicemembers but between governments as well.¹¹⁰ Why has the regime worked so well? Largely because it relies so heavily on the application of local law as interpreted by local officials.

Under paragraph 5, contracting parties are liable to third parties not only under the doctrine of *respondeat superior* for an act or omission of a member of a force or civilian component in the performance of official duties, but also when the contracting party is determined to be "legally responsible" under the law of the receiving state.¹¹¹ Paragraph 9-2d of AFR 112-1 defines "legally responsible" as "a term of art providing for the settlement of claims . . . consistent with the law of the receiving state." According to Department of the Army Pamphlet 27-162, paragraph 7-12c(2), "the term legally responsible is defined by local law and custom rather than by American notions of tort liability." Most often this added proviso makes the United States or another contracting party liable for the official acts or omissions of indigenous employees,¹¹² but it may also impose absolute or strict liability under the law of the receiving state.¹¹³

At the heart of paragraph 5 is the requirement for claims to be filed and settled in accordance with the laws and regulations of the receiving state "as though the claim has arisen from the activities of the state's own Armed Forces."¹¹⁴ Thus, the measure of liability and damages, and even the methods for obtaining relief, will be

107. NATO SOFA, *supra* note 87, art. VIII, ¶ 3; Dep't Army Pam. 27-162, *supra* note 12, ¶ 7-12c(1)(c).

108. NATO SOFA, *supra* note 87, art. VIII, ¶ 4; Dep't Army Pam. 27-162, *supra* note 12, ¶ 7-12c(1)(d).

109. Recovery from the United States may be barred in certain cases, however. A United States Federal court held that a suit under the Federal Tort Claims Act by the survivors of a West German serviceman killed incident to joint military activities was barred by the U.S. Supreme Court's decision in *Feres v. United States*, 340 U.S. 135 (1950). See also *Daberkow v. United States*, 581 F.2d 785 (9th Cir. 1978). The Air Force has extended the *Daberkow* ruling to claims made under the FCA. AFR 112-1, *supra* note 20, ¶ 8-9c, states "Foreign military personnel suffering property damage, personal injury, or death from a joint military mission with the United States or from conduct of a U.S. military member or employee acting in the scope of employment [are not proper claimants] unless an international agreement specifically provides for recovery."

110. Mullins, *supra* note 5, at 73.

111. NATO SOFA, *supra* note 87, art. VIII, ¶ 5; Dep't Army Pam. 27-162, note 12, ¶ 7-12c(2).

112. AFR 112-1, *supra* note 20, ¶ 9-2d.

113. Dep't Army Pam. 27-162, *supra* note 12, ¶ 7-12c(2).

114. *Id.* ¶ 7-12c(2)(a); NATO SOFA, *supra* note 87, art. VIII, ¶ 5.

identical to those used for processing host nation claims.¹¹⁵ This ensures not only equal treatment but the perception of fairness, as well, among host nation claimants.

Claims are to be presented on local forms to an official designated by the receiving state who then conducts an investigation with the assistance of U.S. authorities. Official duty third-party claims must be referred to the receiving state office through the sending state office if they are received by U.S. officials.¹¹⁶ Although the United States will normally rely on the host nation's investigation, it can conduct "its own comprehensive investigation when circumstances warrant."¹¹⁷ Consistent with the spirit of paragraph 10 of Article VIII, which requires cooperation in the disposal of claims, "the United States can and often does make suggestions and recommendations regarding positions to be taken on specific claims."¹¹⁸

Base staff judge advocates are responsible for providing to the U.S. sending state office information available from U.S. sources on the facts surrounding the incident¹¹⁹ and the official duty status of the military member or civilian employee.¹²⁰ If the receiving state accepts the official duty certificate filed by the United States, the receiving state will complete its investigation, and adjudicate and settle the claim based on the information gathered from the claimant, host nation law enforcement agencies, and the United States.

Disputes over official duty certificates do occasionally arise. When they do, the parties enter into negotiations to settle their differences and most of the time, the matter is quickly resolved.¹²¹ All NATO countries seem to recognize "the right of U.S. authorities to make the initial determination subject to reconsideration upon the request of the receiving state, with any disagreement being amicably negotiated."¹²² Historically, the same has been true of Japan, South Korea, and Australia.¹²³ The parties can resort to arbitration as provided for in paragraph 8 of Article VIII to set-

115. Dep't Army Pam. 27-162, *supra* note 12, ¶ 7-12c(2)(d).

116. AFR 112-1, *supra* note 20, ¶ 9-7b.

117. Dep't Army Pam. 27-162, *supra* note 12, ¶ 7-12c(2)(b). Complex cases involving maneuver damages, for example, may "require extensive investigation as to who caused the damage . . . and as to how much of the damage is attributable to U.S. forces (or) other forces." Maj. David J. Fletcher, *The Lifecycle of a NATO SOFA Claim*, ARMY LAW 44, 45 (Sept. 1990).

118. Dep't Army Pam. 27-162, *supra* note 12, ¶ 7-13a(2). In Germany, the United States Army, as the military department with single service claims authority, will certify a claim as scope, scope-exceptional, not involved, or nonscope. A scope certification means the loss was caused by a serviceman or civilian employee in the performance of his duties and gives the German authorities the green light to settle the claim under paragraph 5. Scope exceptional certifications are made in the cases of exaggerated or fraudulent claims and allow the U.S. Army the opportunity to review and comment on the claim before payment is made. A not-involved certificate prevents the German authorities from settling the claim under the SOFA. A court decision in favor of the claimant may cause the U.S. Army to reconsider the claim. When a nonscope certificate is filed, the Army will then investigate, adjudicate, and settle the claim under the FCA and NATO SOFA, *supra* note 87, ¶ 6.

119. This may constitute security police reports, accident reports, witness statements, repair estimates, and any other available evidence that is not protected by law or regulation.

120. AFR 112-1, *supra* note 20, ¶ 9-7a.

121. The number of disputes varies by country. Some countries challenge the official duty certificate more than others. Interview with Col. Philip A. Meek, Chief, Claims and Tort Litigation Division, Office of the Judge Advocate General, Department of the Air Force, Washington, D.C. (June 1992) [hereinafter Interview with Meek].

122. Mullins, *supra* note 5, at 80.

123. Interview with Meek, *supra* note 121.

tle disputes over official duty status,¹²⁴ “but this drastic measure is rarely, if ever, used.”¹²⁵

Under Article VIII, and the other claims provisions modeled after it, the receiving state not only adjudicates the official duty claims, but settles and pays them as well in its own currency and then later seeks reimbursement. The full particulars of each claim with a proposed distribution of costs is communicated to the responsible sending state.¹²⁶

Each contracting party’s liability is determined according to fault, although the receiving state will pay a minimum of twenty-five percent regardless of its responsibility, thus, giving the party adjudicating the claim a financial interest in its fair settlement.¹²⁷ If the sending state does not object within two months, the proposed distribution of costs shall be regarded as accepted.¹²⁸

At least every six months (timing may vary by agreement and even by nation within NATO), the receiving state provides the sending state a “statement of sums” paid on settled claims for which the proposed distribution has been accepted, together with a request for reimbursement.¹²⁹ After sending state review, reimbursement is to be made in the “shortest possible time.”¹³⁰ According to paragraph 9–10e of AFR 112–1, the United States will not pay for administrative or overhead costs incurred in settling third party claims, but will reimburse the receiving state for property appraisals, damage surveys, or medical reports which are part of the award. Procedures to follow after payment of an international agreement bill are set out in paragraph 9–11 of AFR 112–1.

C. Nonofficial Duty Third-Party Claims

Paragraph 6 of Article VIII outlines the procedures for disposing of claims arising out of the tortious acts or omissions of a member of a force or civilian component when not in the performance of official duty.¹³¹ Claims can be presented to authorities of the receiving state who “shall consider the claim and assess compensation to the claimant in a fair and just manner, taking into account all the circumstances of the case, including the conduct of the injured person, and shall prepare a report on the matter.”¹³² Note that under paragraph 6, the receiving state only prepares a “report”—rather than adjudicating or settling the claim—which is then delivered to the sending state.¹³³

124. NATO SOFA, *supra* note 87, art. VIII, ¶ 8 provides as follows:

If a dispute arises as to whether a tortious act or omission of a member of a force or civilian component was done in the performance of official duty or as to whether the use of any vehicle of the armed services of a sending State was unauthorized, the question shall be submitted to an arbitrator appointed in accordance with paragraph 2(b) of this Article, whose decision on this point shall be final and conclusive.

125. Dep’t Army Pam. 27-162, *supra* note 12, ¶ 7-12c(2)(c).

126. NATO SOFA, *supra* note 87, art. VIII, ¶ 5d.

127. *Id.* ¶ 5e.

128. *Id.* ¶ 5d. The sending state can either object to the proposed distribution of costs or contend that the entire claim does not come within the purview of the agreement.

129. *Id.* ¶ 5e(iv); AFR 112-1, *supra* note 20, ¶ 9-10a.

130. *Id.*

131. NATO SOFA, *supra* note 87, art. VIII, ¶ 6. Traffic accidents comprise the bulk of these cases in most countries. Servicemembers are required by host nation law or Air Force regulation to carry insurance. Claimants who have been involved in traffic accidents with off-duty servicemembers should be directed to insurers first with rare exceptions. See discussion *supra* on the implementation of the FCA.

132. NATO SOFA, *supra* note 87, art. VIII, ¶ 6(a).

133. In Japan, the Defense Facilities Administration Agency (DFAA) initially considers nonscope claims and assesses damages by using the Defense Agency Internal Instructions on Compensation for Damages. DFAA’s assessment is then reported to a Fifth Air Force (SAF) foreign claims commission

Air Force officials who receive the report or a claim directly from an aggrieved party will investigate and process the claim under chapter 8 of AFR 112-1,¹³⁴ or forward it to the office with single service claims responsibility. Claims officials will consider the receiving state's recommendations on liability and damages, although they are not bound by them, and will decide whether to offer an *ex gratia* payment and, if so, in what amount.¹³⁵ If an offer is accepted in full satisfaction of the claim, payment is made under the authority of the FCA, and the sending state notified of the payment.¹³⁶

D. Unauthorized Use of Government Motor Vehicles

Paragraph 7 of Article VIII provides that claims arising out of the unauthorized use of any vehicle of the armed services of the sending state shall be treated as a nonscope claim under paragraph 6, except when the force or civilian component is legally responsible. Thus, "there are two possibilities."¹³⁷ In the more typical case where, for example, a servicemember deviates from an authorized route to pursue a "frolic of his own," the sending state will not be legally responsible and the claim will be payable only as an *ex gratia* claim under paragraph 6. In much rarer instances, the sending state might be held legally responsible when members of the force or civilian component have failed to provide proper security or supervision and a vehicle is stolen, in which case the claim is processed under paragraph 5. In this case, the claim may be payable even though the vehicle was not operated by a servicemember or employee of the sending state.

As with any claim, a third party who is involved in an accident with a sending state motor vehicle, "is not expected to determine whether his or her claim is cognizable under Article VIII, paragraphs 5 or 6."¹³⁸ The third party must only show "how the damages or injuries arose, describe their nature and extent, and request compensation by presenting a claim to the authorities of the receiving state."¹³⁹ The receiving state will then consult the sending state on the issue of vehicle use. If the sending state determines that the use of the vehicle was authorized or it is otherwise legally responsible for the loss, the claim will be processed under paragraph 5. If the claim arose out of the unauthorized use of a military vehicle for which the sending state is not otherwise responsible, the claim should be treated under paragraph 6.

E. Individual Liability of Servicemembers

Occasionally, claimants and their legal representatives are unaware of the remedies offered in Article VIII or similar claims provisions, and elect to file suit or a claim against an individual servicemember under provisions of local law. This problem happens most frequently in civil law countries where claims can be joined with an ongoing criminal prosecution.¹⁴⁰

Such suits are not prohibited even in official duty cases. In fact, paragraph 9 of Article VIII provides that "the sending state shall not claim immunity from the jurisdiction of the courts of the receiving state for members of a force or civilian

that decides whether to pay the claim and if so in what amount. See Memorandum to HQ SAF/JA from AFLSA/JACC, *Claim of Tokuji*, (Sept. 19, 1991).

134. AFR 112-1, *supra* note 20, ¶ 9-7c.

135. NATO SOFA, *supra* note 87, art. VIII, ¶ 6(b); AFR 112-1, *supra* note 87, ¶ 9-7c.

136. NATO SOFA, *supra* note 87, art. VIII, ¶ 6(c); AFR 112-1, *supra* note 20, ¶ 9-7c(2).

137. LAZAREFF, *supra* note 8, at 315.

138. Dep't Army Pam. 27-162, *supra* note 12, ¶ 7-12c(3)(c).

139. *Id.*

140. Mullins, *supra* note 5, at 74, n. 52.

component . . .” While lawsuits are not proscribed and, thus, are filed and even prosecuted to completion against individual servicemen, they do violate the clear intent of paragraph 5 that calls for the receiving state to be substituted for the sending state in the settlement of claims, thereby implying “that no action could be brought personally against the wrongdoer.”¹⁴¹ The notion that tortfeasors should not be held individually liable for their official acts or omissions is reinforced by the words of paragraph 5g of Article VIII: “A member of a force or civilian component shall not be subject to any proceedings for the enforcement of any judgement . . . in a matter arising from the performance of his official duties.”¹⁴²

To avoid the paradoxical situation in which the courts of a receiving state have decided a case but have no jurisdiction to enforce the judgment,¹⁴³ officials from both the sending and receiving states should move quickly to direct potential claimants to the remedies offered by paragraph 5 and to substitute the receiving state for the sending state and individual tortfeasors whenever necessary.¹⁴⁴ “Should suit be brought in the courts of the receiving state against personnel of a sending state, the receiving state will be expected to assert any defense that it could assert on behalf of its own personnel.”¹⁴⁵

Lawsuits against individual members of the force or civilian component in *nonscope* cases are clearly permitted by paragraph 6d of Article VIII, which provides that “nothing in this paragraph shall affect the jurisdiction of the courts of the receiving state to entertain an action against a member of a force or of a civilian component . . .”¹⁴⁶ This paragraph is nothing more than a restatement of public international law that limits a sending state’s right to claim immunity to the official acts of its employees and a recognition of the political interest of both sending and receiving states in having claims promptly settled.¹⁴⁷

While anyone having a claim against a member of a force or of a civilian component can go directly to court without first trying to obtain an *ex gratia* settlement from the sending state,¹⁴⁸ claimants are normally better served by pursuing a claim directly with an insurer or with the receiving state under paragraph 6.¹⁴⁹ Indeed, with respect to nonscope claims covered by insurance, the base staff judge advocate is required to encourage direct settlement between the claimant and the insurer. A settlement agreement releasing the United States and the tortfeasor from liability should always be obtained before payment is made by the United States or an insurer.

F. Excluded Claims

Certain types of claims cannot be paid under the IACA, the NATO SOFA, or basing agreements modeled after it.

War Damages. Section 2734a(b) of the IACA provides that “a claim arising out of an act of an enemy of the United States or arising, directly or indirectly, from an act of the armed forces, or a member thereof, while engaged in combat may not be considered or paid under this section.”¹⁵⁰ While Article VIII of the NATO SOFA

141. LAZAREFF, *supra* note 8, at 318.

142. NATO SOFA, *supra* note 87, art. VIII, ¶ 5(g); LAZAREFF, *supra* note 8, at 319.

143. *Id.*

144. Dep’t Army Pam. 27-162, *supra* note 12, ¶ 7-12c(2)(a).

145. *Id.* ¶ 7-1 2c(2)(d).

146. NATO SOFA, *supra* note 87, art. VIII, ¶ 6(d).

147. LAZAREFF, *supra* note 8, at 345.

148. *Id.* at 347.

149. *Id.* at 348.

150. 10 U.S.C. § 2734a(b) (1990).

does not address combat claims, Article XV, paragraph 1 provides that "the provisions for settling claims in paragraph 2 and 5 of Article VIII shall not apply to war damage. . . ."151 Article VIII may continue to apply during wartime to damages not related indirectly or directly to combat, although under such circumstances "the provisions of the Agreement . . . shall immediately be reviewed by the Contracting Parties. . . ."152

Contract Claims. Although the IACA makes no reference to contractual claims, paragraph 5 of Article VIII excludes them from consideration under the NATO SOFA.¹⁵³ Disputes arising out of the interpretation or application of a contract are to be settled in accordance with the terms of the contract. Subject to host nation law on sovereign immunity and the nature of the contract, host nation courts may also have jurisdiction over a contractual dispute.

Admiralty Claims. Article VIII, paragraph 5h, excludes from treatment under the SOFA claims "arising out of or in connection with the navigation or operation of a ship, or the loading, carriage, or discharge of cargo."¹⁵⁴ Losses may only be redressed under the law of the receiving state or by filing a claim against the sending state through diplomatic channels.

Two exceptions to this rule soften its impact. Claims submitted by third parties for injury or death (as opposed to property damage) can still be considered under the SOFA while claims for damage to property owned by the contracting parties, but not used by its armed services, might also still be paid.

V. THE ROLE OF CLAIMS IN MAXIMIZING CRIMINAL JURISDICTION

"Experience indicates that prompt and efficient processing of civil claims can reduce the number of criminal prosecutions against United States personnel and increase the number of waivers of jurisdiction, or reduce the severity of sentences."¹⁵⁵ This statement, as true now as it was thirty years ago when it was first made, succinctly describes an important benefit of paying foreign claims. In many jurisdictions, especially in civil law countries, the local prosecutor is typically willing to drop charges if the complainant has been compensated for his damages.

With respect to minor offenses, local authorities readily waive their right to primary jurisdiction because of their citizen's entitlement to compensation from the United States and the excellent track record in providing it. Even when the host nation retains jurisdiction, the payment of civil claims can be an important factor in reducing the servicemember's sentence. In the case of vehicular homicide for example, the offender may avoid confinement if his insurance company or the United States has compensated the victim's heirs. Another benefit as noted by one commentator is that the victim or his heirs will not "employ private counsel to aid the prosecution . . . as he is entitled to do . . . in most civil law countries."¹⁵⁶ This payment may result in "less pressure for a stiff sentence."¹⁵⁷ Without question, the ability and the proven willingness of the United States to compensate victims of crimes have made it possible for the U.S. Armed Forces to maximize criminal

151. NATO SOFA, *supra* note 87, art. XV, ¶ 1.

152. *Id.*; LAZAREFF, *supra* note 8, at 360.

153. NATO SOFA, *supra* note 87, art. VIII, ¶ 5; LAZAREFF, *supra* note 8, at 313.

154. NATO SOFA, *supra* note 87, art. VIII, ¶ 5h; LAZAREFF, *supra* note 8, at 316.

155. Mullins, *supra* note 5, at 84, citing Rouse & Baldwin, *The Exercise of Criminal Jurisdiction Under The NATO Status of Forces Agreement*, 51 AM. J. INT'L L. 29, 50 (1957).

156. Mullins, *supra* note 5, at 86.

157. *Id.*

jurisdiction over its personnel and prevent a large number of American servicemen from serving lengthy confinement sentences in foreign jails.

VI. SINGLE SERVICE CLAIMS RESPONSIBILITY

Department of Defense Directive 5515.8 assigns individual military departments the responsibility for processing claims arising under the FCA, IACA, and the MCA in specific countries.¹⁵⁸ Even the Coast Guard can request the military department with single service claims responsibility to settle claims arising from its activities.¹⁵⁹ The U.S. Army has the responsibility for receiving, processing, and reimbursing claims in Germany, South Korea, and Belgium. The U.S. Air Force has similar responsibility for Australia, Canada, the Azores, Denmark, Greece, Japan, Saudi Arabia, Spain, Turkey, the United Kingdom, and notably for claims generated by the activities of the United States Central Command and the United States Special Operations Command in countries not specifically assigned to another service.¹⁶⁰ The Navy has responsibility for Iceland, Italy, and Portugal, among other countries.

Many significant advantages are gained by using a single service to process claims for both the sending and receiving state. The Annex to NATO Document D-D (52) 26 (23 January 1953) provides for the establishment of sending and receiving state offices and directs "that the contracting parties make arrangements for notification as to claims filed, the furnishing of evidence, and for the reimbursement of the sending state share of paragraph 5 claims."¹⁶¹ All of these essential tasks are made easier by having a single military department operate the U.S. sending state office. Reduced friction, better communication, efficiency, and uniformity in claims processing are the result.¹⁶²

VII. CONSULT HOST NATION AGREEMENTS

Important and subtle differences are found in the United States treaties with each of the NATO countries as well as Japan, South Korea, Australia, and Iceland. Payment of any civil claim should not be attempted without a full understanding of the claims provisions in the basing treaty as supplemented by agreed minutes, agreed understandings, and simple practice.¹⁶³

158. See Department of Defense Directive 5515.8, ¶ D and encl. I.

159. 10 U.S.C. §§ 2734(a)(3) and 2734a(d); AFR 112-1, *supra* note 20, ¶¶ 8-19b and 9-10d.

160. Ninth Air Force exercised single service claims responsibility during Operation Desert Shield/Storm for all claims arising in Oman, Saudi Arabia, Egypt, Pakistan, and 15 other unassigned countries in the U.S. Central Command (USCENTCOM) area of responsibility and paid out over \$1.5 million under the FCA. Message from 4404 CWP to AFLSA/JAC, USCINCCENT/CCJA, and HQ USAF/JA, *Desert Storm Judge Advocate Weekly Report* (20-26 Feb. 92), (Feb. 27, 1992).

161. Mullins, *supra* note 5, at 71.

162. Dep't Army Pam. 27-162, *supra* note 12, ¶ 7-13a(1).

163. See AFR 112-1, *supra* note 20, ¶ 9-7. While most of the claims provisions and practices are similar, some important differences exist among our many agreements. Under the Icelandic agreement both official and nonofficial duty cases are to be "filed, considered, and settled or adjudicated in accordance with the laws and regulations of Iceland with respect to claims arising from acts of its own employees." Dep't Army Pam. 27-162, *supra* note 12, ¶ 7-14. Further, members of the U.S. forces are not subject to the execution of judgments against them resulting from acts or omissions arising out of their official duty. In Japan, as previously noted, servicemen traveling as tourists fall under the provisions of the agreement. Under the NATO SOFA they would be excluded as their presence would have no "connection with their official duties." *Id.* In Australia, contrary to standard policy, the United States has agreed to insure its vehicles and to require U.S. contractors and subcontractors to do likewise. In some countries the United States has agreed to assist local authorities in executing civil process upon personal property owned by U.S. forces and located on U.S. bases.

VIII. CONCLUSION

In law, as in all things, nothing succeeds like success. For nearly half a century, the United States has maintained thousands of forces and conducted thousands of training operations on **foreign** soil without becoming an unwelcome ally or guest. While the United States presence in Europe and Asia became a fact of life in the bipolar post-war world, carefully crafted claims legislation and agreements served as the lubricant to reduce the inevitable friction that resulted between our forces and local citizens. Because the United States could compensate the victims of tragic accidents and even serious crimes, American forces have been able to coexist among the inhabitants of allied and friendly nations for many years. Key to this success has been the close and professional relationship enjoyed by the receiving and U.S. sending state offices in countries around the world.

The comments of the French authority, Lazareff, on Article VIII of the NATO SOFA, which follow, might be directed to the entire foreign claims regime.

Taken all together the provisions . . . can only be approved. (Article VIII), at the same time balanced and equitable, carefully distinguishes each one of its categories of damages and brings to the settlement of each one of them just solutions. It is in this spirit that the text was written, and it is in this spirit that it is daily applied.¹⁶⁴

164. Mullins, *supra* note 5, at 89 citing LAZAREFF, *supra* note 8, at 408.

Air Force Foreign Military Sales: An Overview

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I. INTRODUCTION

Foreign Military Sales (FMS) is the sale of defense articles and defense services to eligible foreign governments and international organizations. The legal issues in FMS are exciting, varied, and involve questions of international law, contract law, administrative law, fiscal law, and more. The legal analysis of a contract, administrative, or fiscal law issue involving FMS must often include an analysis of international law. This article is intended to provide a brief overview of FMS for the legal practitioner who does not work regularly with FMS issues.

Foreign Military Sales is the principle means by which the United States provides Security Assistance (SA) to eligible foreign governments and international organizations. The Arms Export Control Act¹ (AECA) is the authority for FMS. Security Assistance is also authorized by the Foreign Assistance Act (FAA).² The regulations that implement the AECA and FAA within the Department of Defense (DOD) are the Security Assistance Management Manual (SAMM)³ and Volume 15 of the DOD Financial Management Regulation (FMR).⁴ The document by which the U.S. Government offers to sell to a foreign government or international organization defense articles or defense services pursuant to the AECA is called a Letter of Offer and Acceptance (LOA).⁵ A LOA is not considered to be an international agreement.⁶

Defense articles and defense services may be sold only or leased⁷ under the

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1. The Arms Export Control Act of 1976, as amended, is codified in Title 22, Chapter 39, Arms Export Control (22 U.S.C. §§ 2751-99 (1988 & Supp. IV 1992)).

2. The Foreign Assistance Act of 1961, as amended, is codified in Title 22, Chapter 32, Foreign Assistance (22 U.S.C. §§ 2151-2430 (1988 & Supp. IV 1992)). See also Subchapter II, Military Assistance and Sales (22 U.S.C. §§ 2301-2349 (1988 & Supp. IV 1992)).

3. DOD 5105.38-M. Specific policy for the U.S. Air Force Security Assistance Program is in AFR 130-1, Security Assistance Management (16 Dec. 1991). (AFR 130-1 will be replaced by an Air Force Instructions (AFI). AFI 16-101, International Affairs and Security Assistance Management is currently being circulated in draft form.)

4. DOD 7290.3-M. Please note: DOD is circulating for comment a revised FMS FMR tentatively titled Security Assistance Policy and Procedures, and tentatively renumbered as Volume 15, DOD 7000.1-M.

5. SAMM 70002.A.2. Prior to June 1, 1992, a LOA was on DD Form 1513. Effective with LOAs (and amendments to LOAs) received on or after June 1, 1992, DSAA prescribed the use of an automated format for LOAs so that the LOA will more closely resemble contracts commonly used within the international business community (DSAA Memo I-00555/92, Mar. 2, 1992 and SAMM change no. 5, Nov. 2, 1992). The LOA cover sheet, LOA Standard Terms and Conditions, and LOA Information are in SAMM Table 701-1.

6. DOD Directive 5530.3, International Agreements, Enclosure 2, ¶1c(3).

7. A lease is a SA transaction, but it is not an FMS transaction. See section V.H, *infra* 222 for a discussion of leases under the AECA.

AECA to friendly countries, and solely for several specifically enumerated purposes.⁸ These purposes include internal security and legitimate self-defense. Defense articles and defense services also may be sold or leased to permit the recipient country to participate in regional or collective arrangements or measures consistent with the Charter of the United Nations,⁹ or to permit the recipient nation to participate in collective measures requested by the United Nations for the purpose of maintaining or restoring international peace or security. They also may be sold or leased for the purpose of enabling less developed friendly countries to construct public works and to engage in other activities helpful to the economic and social development of such friendly countries. The LOA Standard Terms and Conditions state how items sold under an FMS case may be used. They may be used only as specified in any Mutual Defense Assistance Agreement between the country and the United States, or in any regional or bilateral defense treaty to which the country and the United States are both parties, or, if there is no such agreement or treaty, they may be used only for internal security, individual self defense, or civic action.

Security Assistance is an instrument of U.S. foreign policy that is designed to encourage arms control and discourage arms races. It helps to foster international peace by enhancing effective and mutually beneficial defense relationships between the United States and other countries. It is increasingly difficult for some countries to fulfill their defense requirements from their own production base so defense cooperation between the United States and its allies is important. This cooperation is especially necessary since the effectiveness of allied Armed Forces to act in concert to deter and defeat aggression is directly related to the operational compatibility of their defense equipment.

The AECA authorizes DOD to sell defense articles and defense services from DOD stocks to eligible countries and international organizations.¹⁰ The AECA also authorizes DOD to enter into contracts for the procurement of defense articles or defense services for sale to eligible countries and international organizations.¹¹ The United States may also provide training, either as a defense service¹² for payment, or on a reciprocal basis¹³ to military and civilian defense personnel of a friendly foreign country or international organization. Another form of SA authorized by the AECA is the sale of defense articles to U.S. companies for inclusion in end items commercially sold to foreign governments and international organizations.¹⁴

It has been said that "the cornerstone of the AECA is the full cost payment requirement,"¹⁵ i.e., that the U.S. Government recover all costs of performing FMS. Such a requirement is justified because in these transactions the U.S. Government "acts on a non-profit basis for the benefit of the purchaser... (and) the purchaser receives many benefits not available in the commercial market."¹⁶ What constitutes

8. 22 U.S.C. § 2754 (1988).

9. The Charter of the United Nations, signed at San Francisco, 26 June 1945.

10. 22 U.S.C. § 2761 (1988). A country or international organization is eligible for FMS participation only if the Presidential findings required by 22 U.S.C. § 2753 (a) are made. *See also* SAMM 20201.

11. 22 U.S.C. § 2762 (1988). *See generally* Defense Federal Acquisition Regulation Supplement (DFARS) subpart 225.73 for policies and procedures for FMS acquisitions.

12. 22 U.S.C. § 2794 (4) (1988). includes training in the definition of defense service. *See section* V.1, *infra* 222 for a discussion of security assistance training.

13. 22 U.S.C. § 2770a (1988). The reciprocal training must be comparable to the U.S. training and must be provided within one year. If comparable training is not provided within one year, then the country or international organization receiving the training must reimburse the United States for its full cost.

14. 22 U.S.C. § 2270 (1988). *See* AFR 130-1, 14-26.

15. Boyd Allen, *The Negotiation and Conclusion of International Agreements in the Department of Defense* 43 (1983) (unpublished manuscript)[hereinafter *allen*].

16. *Id.* at 45.

the "full cost" is computed differently depending on the circumstances of the sale. In the case of the sale of defense articles not intended to be replaced by the United States, the recipient country must pay the actual value of the article.¹⁷ In the case of the sale of a defense article that is intended to be replaced by the United States, the recipient country must pay the estimated cost of replacement less any depreciation in the value of the article.¹⁸ The accounting, pricing, budgeting, costing criteria, and reporting policies and procedures that are necessary to implement the financial management requirements of FMS are in the FMS FMR.¹⁹

For all sales of defense articles and defense services from stock, the payment must be in U.S. dollars,²⁰ and generally must be made in advance of, but no later than upon, delivery of the defense article or rendering of the defense service.²¹ For contracts for the procurement of defense articles and defense services for sale, the payment must be in U.S. dollars and the foreign government or international organization must provide a "dependable undertaking" to make such payments in advance of contract payment requirements.²²

In addition to paying the full cost for a defense article or defense service sold from DOD stock or acquired by contract, the purchaser also must pay an appropriate charge for administrative services.²³ Purchasers also must pay a proportionate amount of any nonrecurring costs of research, development, and production of major defense equipment (MDE), and for the recovery of ordinary inventory losses associated with the sale from stock of defense articles that are being stored at the expense of the purchaser of such article.²⁴ These charges may be waived or reduced for sales that would significantly advance U.S. interests in NATO standardization, or standardization with Japan, Australia, or New Zealand in furtherance of mutual defense treaties between the United States and these countries, or foreign procurement in the United States under coproduction arrangements.²⁵

II. THE DOD ROLE IN SECURITY ASSISTANCE

The Department of Defense has a significant role in providing SA, but it must be recognized that the Secretary of State (SECSTATE) is responsible for the continuous supervision and the general direction of SA.²⁶ The Secretary of Defense (SECDEF) works in conjunction with SECSTATE and is responsible primarily for establishing SA military requirements and for implementing programs to transfer defense articles and defense services to foreign governments and international organizations.²⁷ The Secretary of Defense's principal representative and spokesman on SA matters is the Under Secretary of Defense for Policy (USDP) who is responsible

17. 22 U.S.C. § 2761(a) (1) (A) (1988).

18. 22 U.S.C. § 2761(a) (1) (B) (1988).

19. DOD 7000.14-R, at 010101.

20. 22 U.S.C. § 2761(a) (1) (1988).

21. 22 U.S.C. § 2761(b) (1988).

22. 22 U.S.C. § 2762 (a) (1988). This provision states that the foreign purchaser must assure the United States against any loss on the contract and pay any damages or costs that may accrue from cancellation of the contract. *See also* SAMM 130104.C.2.a. (3). The LOA Standard Terms and Conditions provide that a purchaser may cancel the LOA at any time prior to the delivery of defense articles or performance of defense services, but the purchaser is responsible for all costs resulting from the cancellation.

23. 22 U.S.C. § 2761(e) (1) (A) (1988).

24. 22 U.S.C. § 2761(e) (1) (1988).

25. 22 U.S.C. § 2761(e) (1988).

26. SAMM 30001.A.1.

27. SAMM 30002.A.2.

for overall policy and coordination with the Department of State.²⁸ The principal organizational element through which SECDEF carries out his SA responsibilities is the Defense Security Assistance Agency (DSAA).²⁹

The Defense Security Assistance Agency serves as the DOD focal point for SA budgetary and legislative matters, arms transfers, and related activities.³⁰ This agency keeps DOD activities informed about the status of ongoing SA actions and is the clearinghouse for issues raised by the services that need DOD level decision. The Defense Security Assistance Agency is responsible for the conduct of international logistics and sales negotiations with foreign countries and international organizations. The Defense Security Assistance Agency also performs a liaison function with U.S. industry and provides it with assistance in exporting military equipment services.³¹ All authority conferred on SECDEF by the FAA or the AECA, and all authority under those acts that has been delegated by the President to SECDEF, have been redelegated to the Director, DSAA.³²

The military departments (MILDEPs) have SA performance as part of their defense mission.³³ Using SA funding, the MILDEPs procure and provide defense articles and defense services to meet approved SA requirements. They are also responsible for providing information necessary to ensure that proper SA planning can be accomplished. Secretaries of the MILDEPs advise SECDEF on all SA matters that have an impact on their departments and ensure that their departments are responsive to SA policies and directions from SECSTATE and SECDEF (or DSAA). Military departments act for SECDEF on SA matters only when such responsibility has been specifically delegated to them.³⁴

The Defense Logistics Agency (DLA) also plays a significant role in SA.³⁵ The Director of DLA advises SECDEF on all SA matters impacting or relating to DLA. The Defense Logistics Agency is responsible for preparing FMS cases for cataloging services, for contract administration services on our allies' commercial contracts for defense supplies and equipment produced in the United States and for the sale of DOD disposable defense articles.³⁶ The Defense Logistics Agency also works closely with the MILDEPs on FMS cases relating exclusively to medical equipment and supplies, clothing and textiles, subsistence, bulk petroleum, and for cases for consumable stock-funded secondary items.

Both the Joint Chiefs of Staff (JCS) and the Unified Commands participate in SA planning. The JCS correlate SA objectives with military force planning and provided SECDEF with military advice on SA.³⁷ The JCS provides SECDEF a military perspective and advice on proposed transfers of MDE.³⁸ The Joint Chiefs of Staff also provide advice on transfers of technology and participate in national disclosure policy considerations. The Unified Commands correlate programs with regional

28. SAMM 30002.C.1.

29. SAMM 30002.C.6.

30. *Id.*

31. *Id.*

32. *Id.*

33. SAMM 30002.C.8.

34. SAMM 30002.C.7.

35. SAMM 30002.C.9.

36. DLA is also responsible for the sale of Military Assistance Program (MAP) disposable defense articles.

37. SAMM 30002.C.10.

38. SAMM 70002.B.1.b. *See, infra*, the discussion on major defense equipment (i.e., significant military equipment with research and development, or production, costs exceeding certain dollar amounts).

plans, support in-country Security Assistance Organizations (SAOs), and contribute to the SA budget development process.³⁹

Security Assistance Organizations is a term used to encompass all DOD elements that are located in foreign countries and are assigned responsibilities for carrying out SA management functions.⁴⁰ Security Assistance Organizations are established for in-country management of international SA programs and are under the direction and supervision of the Chief of the U.S. Diplomatic Mission. The SAO ensures that DOD SA management responsibilities are properly executed.

The SAO is the interface for the exchange of information and advice between the host nation's military establishment, the Chief of the U.S. Diplomatic Mission, and DOD components.⁴¹ Security Assistance Organization personnel may provide general advisory and training assistance to the host country military establishment, but this assistance must be kept to a minimum and must not prevent SAOs personnel from fully performing their SA management responsibilities.⁴² Security Assistance Organizations personnel generally do not perform specific advisory and training assistance or serve as U.S. liaison for projects relating to armaments cooperation.⁴³ Any services that are provided by SAOs personnel, however, must be charged to FMS or other SA funds. A matrix on Executive branch decision channels for SA is included as Appendix A.

III. THE AIR FORCE ROLE IN SECURITY ASSISTANCE

The Deputy Under Secretary of the Air Force (International Affairs) (SAF/IA) is responsible for developing and implementing policy guidance for the direction, integration, management, and supervision of international programs and activities affiliated with the Department of the Air Force (AF).⁴⁴ The Deputy Under Secretary of the Air Force (International Affairs) has direct responsibility for all AF SA,⁴⁵ and coordinates with DSAA and other agencies on AF political and military matters that may affect SA.⁴⁶

The Department of the Air Force is the implementing agency for SA for defense articles and defense services under its cognizance.⁴⁷ This authority includes all articles stocked, stored, issued, and procured by the AF. The Department of the Air Force normally does not sell defense articles or defense services under the control of other DOD components.⁴⁸ The Department of the Air Force SA program management must meet the same high standards of efficiency and conduct that

39. SMM 30002.C.11.

40. SMM 30002.C.12.a. The authority for the President to assign members of the U.S. Armed Forces to a foreign country for SA purposes is 22 U.S.C. § 2321i.

41. SMM 30002.C.12.c.(1).

42. SMM 3000.C.12.c.(2).

43. SMM 30002.C.12.d.

44. Secretary of the Air Force Order (SAFO) No. 114.1 (Oct. 22, 1991).

45. SAFO 114.1, §1e, however, requires SAF/IA to transfer to the Assistant Secretary for Acquisition (SAF/AQ) program management authority for execution of large, complex, or politically sensitive SA cases requiring acquisition oversight. Other AF offices that play major roles in SA include the Directorate of Disclosure (SAF/IAD), the Directorate of Cost (SAF/FMB), the Directorate of Staff, Operations, Plans, and Readiness (HQ USAF/XOO), the Directorate of Maintenance (HQ USAF/LGM), the Directorate of Plans (HQ USAF/XOX), and the Directorate of Accounting and Finance (SAF/FMA).

46. AFR 130-1, Security Assistance Management (Dec. 16, 1991), ¶ 3-2.a.(2) [hereinafter AFR 130-1].

47. AFR 130-1, ¶ 2-1.

48. AFR 130-1, ¶ 2-2. One exception to this rule is for initial support for a system sale.

apply to other Department of the Air Force activities,⁴⁹ and AF policy requires defense articles and defense services sold through FMS be of the same quality as items sold to the U.S. Government.⁵⁰ Security Assistance delivery schedules are established to ensure effective logistics support and training, so it is important that SA purchasers understand lead time requirements, the DOD priority system, and any peculiarities of specific defense articles or defense services.

The Department of the Air Force subordinate organizations manage AFSA programs as directed by SAF/IA.⁵¹ Case Managers for SAF/IA FMS,⁵² who have total case responsibility from assignment through case closure, implement such direction through the use of an International Program Directive (IPD).⁵³ The IPD describes the scope of the SA Program Manager's (SAPM) authority and provides case management direction.⁵⁴ The IPD also directs the SAPM to prepare implementing instructions for all pertinent aspects of the IPD and to assign responsibility for LOA Line Items, and other tasks, to Line Managers.

Several AF major commands have SA responsibilities, but the principal AF field organization involved in SA is the International Logistics Center (ILC), at Wright-Patterson Air Force Base, Ohio.⁵⁵ All AF SA training is managed by the Air Force Security Assistance Training (AFSAT) Group, Randolph Air Force Base, Texas.⁵⁶

IV. PREPARATION AND PROCESSING OF FMS CASES

Eligible FMS participants may request the purchase of defense articles or defense services through the use of a Letter of Request (LOR).⁵⁷ The LOR may be in either a message or letter format, but it must clearly specify what is desired in sufficient detail to provide a firm basis for estimating cost.

The FMS customers that are interested in obtaining a defense article or defense service may request Price and Availability (P&A) estimates for preliminary planning purposes.⁵⁸ The P&A estimates reflect rough order of magnitude data showing projected availabilities and estimated costs for defense articles or defense services. The estimates are not considered valid for the preparation of a LOA and the furnishing of such data does not constitute a commitment for the United States to offer for sale the articles and services for which the data is provided.⁵⁹

All purchaser requests for P&A estimates, or for a LOA, are divided into one of two categories: Significant Military Equipment (SME) and "all other" FMS.⁶⁰ Significant Military Equipment is defined in the International Traffic in Arms Regulations (ITAR) as articles for which special export controls are warranted because of their capacity for substantial military utility or capability.⁶¹ Significant Military Equipment includes, *inter alia*, all classified articles, various categories of

49. AFR 130-1, ¶ 2-1a.

50. AFR 130-1, ¶ 7-29.

51. AFR 130-1, ¶ 3-3.

52. SAMM, ¶ 70406, states that individuals assigned as case managers must have adequate formal training.

53. AFR 130-1, ¶ 8-1b. For case management, *see generally* SAMM section 704.

54. A sample IPD is included as Attach 31 to AFR 130-1.

55. AFR 130-1, ¶ 3-4b.

56. AFR 130-1, ¶ 3-6. *See text* accompanying notes 105-108 *infra*, for a discussion of security assistance training.

57. SAMM 70003.A. The Department of State must approve all requests for FMS.

58. SAMM 70002.A.1.

59. SAMM App. B.

60. SAMM, 70003.A.2.

61. 22 C.F.R. § 120.19.

firearms and artillery projectiles (including their ammunition), rockets, launch vehicles, missiles, non-nuclear rocket and missile warheads, warships, tanks (and some varieties of military vehicles), aircraft, spacecraft, submersible vessels, and nuclear weapons (including related material and test equipment) Significant Military Equipment having a nonrecurring research and development cost of more than \$50 million or a total production cost of more than \$200 million is considered to be MDE.⁶² The import and export of SME is under the control of the Office of Defense Trade Controls, Bureau of Politico-Military Affairs, Department of State (DOS).

Requests to purchase SME that originate in a purchaser's country should be transmitted to the cognizant DOD component by the U.S. Embassy. Requests to purchase SME that originate with purchase country representatives in the United States should be addressed to the cognizant DOD component with an information copy to DSAA and the Bureau of Politico-Military Affairs, Department of State (DOS/ BPM). For MDE items, the cognizant DOD component must provide the applicable unified command and SAO with details of the purchaser's request.⁶³ Foreign Military Sales requests for all other (non-SME) defense articles and defense services that originate in country may be transmitted to the cognizant DOD component by either the purchaser or by the DOD element of the U.S. country team. An information copy of each in-country request should be transmitted to the unified command, DOS/BPM, and DSAA. Non-SME requests originated by foreign customer representatives in the United States may be transmitted directly to the cognizant DOD component. An information copy should be sent to DOS/BPM and DSAA.

Expenditures in advance of a formal LOA may be authorized by a Letter of Intent (LOI).⁶⁴ These expenditures are limited, however, to relatively small portions of a major LOA. Examples of when a LOI is appropriate include the purchase of castings and to start training to allow a program to proceed on schedule. Letters of Intent, however, are rarely used.

Standard FMS cases are divided into Defined Order Cases, Blanket Order Cases, and Cooperative Logistics Supply Support Arrangements (CLSSA).⁶⁵ Nonstandard cases are used to support commercial or obsolete end items that are generally not in the U.S. inventory, and non-U.S. origin military equipment.⁶⁶

A Defined Order Case is one in which the item(s), service(s), or training to be provided is stated explicitly in the LOA. A Defined Order Case normally requires a complete P&A study. Defined Order Cases are used for systems sales, munitions and explosives, transportation services, aircraft ferry, cartridge or propellant activated devices, and technical data packages.

A Blanket Order Case is used for a category of material or services without a definitive listing of items or quantities. Price and Availability data is not required generally because the purchaser normally estimates requirements and requests an appropriate case value. These requirements are filled generally from procurement contracts rather than from DOD stocks.⁶⁷ Blanket Order Cases reduce administrative lead times and facilitate and simplify the order of defense articles and defense services for foreign purchasers. The scope of a Blanket Order Case is determined by the value of funds made available for ordering, but the value for ordering may be increased only during the twelve month period following

62. SAMM 70002.B.1.b.

63. SAMM 70002.A.2.a.

64. SAMM 70002.A.3.

65. SAMM 70002.C.

66. SAMM 70002.C.4.

67. SAMM 70002.C.2.b.

implementation of the basic LOA.⁶⁸ Requirements appropriate for Blanket Order Cases include, *inter alia*, spare and repair parts, publications, technical assistance services, training, and repair of repairable items. Requirements that are not appropriate for Blanket Order Cases include most classified materials and publications, explosive ordnance items, MDE, SME, lumber, technical data packages, and most excess defense articles.

The CLSSAs are designed to provide continuous supply support at the depot level for U.S.-made military material possessed by foreign governments and international organizations.⁶⁹ The CLSSA is normally the most effective means for providing common repair parts and secondary item support for equipment of U.S. origin. The CLSSAs provide for the execution of FMS orders (FMSO) covering stockage, consumption, and storage. The CLSSAs require two FMS cases: the FMSO I and the FMSO II, that create a financial cycle.⁷⁰ The FMSO I finances the on-hand inventory from which requisitions by the purchaser are filled. The FMSO II is used to finance payments to contractors for supplies to replenish the on-hand inventory. The FMSO II payments liquidate obligations owed to contractors and, in effect, create new obligation authority for the FMSO I case; then the cycle commences again.

As noted earlier, the AECA authorizes DOD to enter into contracts for the procurement of defense articles or defense services for sale to eligible countries and international organizations.⁷¹ In such a case, the United States negotiates the contract's terms and conditions with the contractor. Representatives of the Purchaser are not allowed to participate in these negotiations. Purchaser representatives may be present generally during contract negotiations only if their presence is requested by AF contract negotiators in order to clarify the Purchaser's requirements.⁷² In some instances, however, purchaser's representatives have participated as observers during contract negotiations.

All LOAs and LOIs must have the coordination of the component comptroller and legal counsel.⁷³ The DSAA must coordinate on, and countersign, all LOAs and LOIs.⁷⁴

Changes may be made to a LOA after it is signed. Some changes to a LOA may be made unilaterally by the United States. These changes are made by a Notice of Modification.⁷⁵ Notices record modifications, such as administrative changes, that do not constitute an increase in the scope of the LOA. Amendments are revisions to a LOA that require the purchaser's acceptance to become effective.⁷⁶ Major changes in scope, however, normally require the preparation of a new LOA.⁷⁷ Examples of major changes include the addition of SME or a substantial expansion of a program.

The AECA requires that certain LOAs must be certified to Congress before the LOA is issued.⁷⁸ The LOAs that must be certified to Congress include any offer to

68. SAMM 70002.C.2.d.

69. SAMM 70002.C.3. See DOD Directive 2000.8, Cooperative Logistics Supply Support Arrangements (Feb. 12, 1981).

70. DOD 7000.14-R, at 0707.

71. SAMM 80101.B states that the Federal Acquisition Regulation (FAR) and the DFARS shall apply to all purchases and contracts made by the DOD for acquisitions in support of FMS.

72. AFR 130-11 § 2-14b, ¶ 2-14d discourages the release of FMS contracts to purchasers and prohibits the release to purchasers of internal AF documentation, such as Price Negotiation Memoranda.

73. SAMM 70103.1.1.

74. SAMM 70103.1.2 and 3. While DSAA coordination occurs during the countersignature process, it is not synonymous therewith and constitutes a separate function.

75. SAMM 80403.A.

76. SAMM 80402.A.

77. SAMM 80401.B.

78. 22 U.S.C. § 2776 (b).

sell any defense articles or defense services for \$50 million or more, any design and construction service for \$200 million or more, and any MDE for \$14 million or more. The certification must include the foreign country or international organization to which the defense article or defense service is to be offered for sale, the dollar amount of the offer to sell and the number of defense articles to be offered, a description of the defense article or defense service to be sold, and the name of the component that is to make the offer to sell.⁷⁹ If the offer is for design and construction services, the additional information must be included in the certification. In either event, the certification must contain a description of any contribution, gift, commission, or fee paid or offered or agreed to be paid in order to solicit, promote, or otherwise to secure such LOA. The certification also must disclose (classified if necessary) the level of sensitivity of technology contained in the defense articles or defense services proposed to be sold with a complete justification of the reasons necessitating the sale of such articles or services in view of the sensitivity of the technology. In addition, the Senate Committee on Foreign Relations or the House Committee on Foreign Affairs may request further information.⁸⁰ Such LOAs, if proposed for sale to the North Atlantic Treaty Organization (NATO), a NATO member country, Japan, New Zealand, or Australia, may not be issued if within fifteen calendar days after receiving such certification Congress enacts a joint resolution prohibiting the sale. Such LOAs, if proposed for sale to any other country may not be issued if within thirty calendar days after receiving such certification Congress enacts a joint resolution prohibiting the sale. The President, however, may waive the Congressional review requirement, if he states in the certification that an emergency exists which requires the proposed sale in the national security interests of the United States.⁸¹ If the President exercises this waiver authority, he must describe in the certification the emergency and discuss the national security interests involved.

V. CONSIDERATIONS

A. Offset Arrangements

Offset arrangements require the provision of opportunities for firms from the purchaser's country to obtain contracts. The President has established a policy that DOD shall not encourage, enter directly into, or commit U.S. firms to any offset arrangement in contracts for the procurement of defense articles or defense services for sale to eligible countries and international organizations under FMS.⁸² The decision on whether such firms should engage in offsets, and the responsibility for negotiating and implementing offset arrangements, resides with the companies involved.⁸³

B. Sole Source Requests

In general, DOD policy provides that FMS acquisitions will comply with U.S. government acquisition regulations and procedures, including using competitive

79. SAMM 70302.A.1.

80. 22 U.S.C. § 2776 (b) (1).

81. *Id.*

82. Presidential policy statement of April 16, 1990, and SAMM ¶ 140107. See generally 10 U.S.C. § 2505.

83. DFARS 225.7307-1 (c).

selection procedures to the maximum extent possible.⁸⁴ A purchaser may, however, request that a particular defense article or defense service be obtained from a particular source.⁸⁵ The request for sole source must provide the basis and justification for the sole source. Such a request may be for a prime contractor or subcontractor source. The request may be honored only if the sole source designation is based on the objective needs of the purchaser and the DOD component security assistance director approves the request.⁸⁶ The request will not be honored in any case of patently arbitrary, capricious, or discriminatory exclusion of other sources.⁸⁷ Of course, no prohibition exists against the use of other legitimate exceptions to the competition requirements if they are applicable.⁸⁸

C. Delivery and Title

The LOA Standard Terms and Conditions state that the United States will pass, and the purchaser will accept, title to defense articles at the initial point of shipment unless it is specified otherwise in the LOA. For defense articles procured for sale to the purchaser, the initial point of shipment is normally the manufacturer's leading facilities. For defense articles furnished from stock, the initial point of shipment is usually the U.S. Depot. Title to defense articles transported by parcel post shall pass to the purchaser on the date of parcel post shipment.

D. Buy-Back of Purchaser Excess Material

No FMS procedure exists for buying back any excess material that was previously sold to a purchaser under an FMS case. A purchaser may, however, offer to sell back to the United States its excess FMS defense articles, but such a transaction is generally of procurement function to be handled under the applicable procurement regulations.⁸⁹ Funds for such a transaction must come from appropriations. In exceptional circumstances during an emergency, the United States may "buy-back" articles that have not yet been delivered to the purchaser by the contractor.

E. Technology Transfer/Disclosure Policy

The DOD policy is to treat defense related technology as a valuable, limited national security resource that should be husbanded and invested prudently in pursuit of national security objectives.⁹⁰ Consistent with this DOD policy, the export of technology, goods, services, and munitions that could make a contribution to the military potential of any other country or combination of countries that could prove detrimental to U.S. national interests should be restricted. The DOD's FMS

84. SAMM 80102.A.

85. SAMM 80102.B and 10 U.S.C. § 2304 (c) (4). See generally PacOrd, B-238366, 90-1 CPD 466; and Julie Research Laboratories, Inc., B-210435.2, 85-1 CPD 196.

86. SAMM 80102B.1. See generally DFARS 225.7304 (a) and FAR 6.302-4. SAF/IA is the approval authority in the AF.

87. SAMM 80102.B.1. A purchaser may suggest specific firms to which copies of a solicitation should be sent, but a contract competition will not be restricted to sources named by the purchaser because to do so would arbitrarily exclude other sources.

88. See generally 10 U.S.C. § 2304 and FAR 6.302.

89. AFR 130-1, § 7-18. DOD 7000.14-R, permits a CLSSA customer to return a fully serviceable repairable item to the Defense Business Operations Fund for credit when the item is within the approval acquisition objective. The legal authority for this provision is not stated.

90. See generally DOD Directive 2040.2, International Transfers of Technology, Goods, Services and Munitions, and SAMM Chapter 5.

process should manage transfers of technology, goods, services, and munitions so that they are consistent with U.S. foreign policy and national security objectives. This can be achieved by limiting the transfer to any country or international organization of any advanced design and manufacturing know-how regarding technology, goods, services, and munitions to those transfers that support specific national security objectives. It is DOD policy that the MILDEPs give favorable consideration to transfers of services and munitions to allied and friendly countries that are intended to achieve specific U.S. national defense objectives.⁹¹ The MILDEPs must, however, ensure that transfers of munitions and services involving technology receive special scrutiny, take into account the importance of arms cooperation with NATO and other close friends and allies, the prevention of transfers to third parties, and the protection of military capabilities and technologies. All requests to acquire technical data under FMS procedures must be approved by the DOD component and by the Director, DSAA.⁹²

F. Excess Defense Articles

The legislation and policy on providing excess defense articles changes from year-to-year. Each transfer must be analyzed on a case-by-case basis. In general, transfers of excess defense articles are done on an "as is where is" basis, with no guarantees other than a guarantee of title. Proposed transfers need to consider follow-on support, training, spares, repairs, and transportation.

G. Reports of Discrepancy (ROD)

The DOD requires that a high level of quality control be maintained on FMS shipments and that prompt attention be given to a purchaser's concerns so that a fair solution can be achieved.⁹³ The procedures for reporting and processing discrepancies under FMS shipments are in The Joint Service Regulation.⁹⁴ The submission of a ROD on Standard Form 364 alerts the United States that a discrepancy may have occurred so that an investigation can be made. The RODs may be submitted for damage, overages, shortages, duplicate shipments, erroneous shipments, or nonreceipt of material. To be timely, a ROD must be submitted within one year of the passage of title or billing date, whichever is later, unless urgent and compelling circumstances involving latent defects justify consideration of the claim.⁹⁵ The SAMM Table 802-2 provides guidelines on the source of funding for payment of valid claims related to FMS shipments when the United States is liable. The United States is not responsible for the costs of repairing damaged or unserviceable articles unless the repair had prior U.S. approval.⁹⁶ The RODs over \$10,000 must be approved by the DSAA Comptroller before FMS administrative funds may be used to pay the claim.⁹⁷ A denied ROD may be resubmitted within 180 days for review and reconsideration.⁹⁸ A ROD is considered to be "contested" if the purchaser is not satisfied with the second review. At that point, the contested ROD is forwarded to the Air Force Secretariat for review.

91. SAMM 50003.C.

92. SAMM 140108.D.I. In the Air Force, disclosure of technical data must go through the applicable disclosure channels in AFR 200-9.

93. AFR 130-1, ¶ 8-18a.

94. AFR 67-7. AFM ¶ 67-1 must be used in conjunction with AFR 67-7 per AFR 130-1, ¶ 8-18b.

95. LOA Standard Terms and Conditions.

96. AFR 130-1, ¶ 8-29.

97. AFR 130-1, ¶ 8-31.

98. AFR 130-1, ¶ 8-30.

H. Leases

The United States may lease, rather than sell, defense articles to eligible foreign governments or international organizations in exceptional instances.⁹⁹ To lease a defense article, there must be compelling foreign policy and national security reasons for providing the article on a lease basis rather than on a sales basis.¹⁰⁰ The defense article to be leased must not, for the time of the lease, be needed for public use.¹⁰¹ In addition, the lessee must agree to pay all costs incurred by the United States in leasing the article.¹⁰² The lease must be for a fixed duration not to exceed five years and must provide that the United States may terminate the lease at any time and demand the immediate return of the leased article.¹⁰³

Leases are not FMS transactions, but there may be an associated FMS case to recover packing, crating, handling, and refurbishment of the leased item, services, or follow-on support for the leased item.¹⁰⁴

I. Training

The United States may provide training to eligible foreign countries and international organizations under the FAA and AECA.¹⁰⁵ Training may include formal or informal instruction, either in the United States or abroad, by DOD officers or employees or by contractors (including civilian educational institutions). United States personnel that provide SA training are prohibited from performing duties of a combatant nature during hostilities involving the country where the training is taking place.¹⁰⁶

Security Assistance training is primarily designed to teach defense resource management and military professionalism to foreign students who are likely to occupy positions of influence or prominence within their country's Armed Forces.¹⁰⁷ The objectives of SA training include developing the expertise necessary for effective operation and maintenance of U.S. supplied equipment, promoting military to military rapport and understanding, and increasing rationalization, standardization, and interoperability.¹⁰⁸

J. Freedom of Information Act (FOIA)¹⁰⁹

Requests for FMS records, particularly for LOAs and related documents, under the FOIA should be reviewed carefully to determine if any factors militate against

99. 10 U.S.C. § 2796. *See also* SAMM Chapter 12. 10 U.S.C. § 2796 (c) provides that leases (or loans) of defense articles under 10 U.S.C. § 2667 are not authorized for foreign countries or international organizations. *See* SAMM 120001.A.

100. 10 U.S.C. § 2796 (a) (1).

101. 10 U.S.C. § 2796 (a) (2).

102. 10 U.S.C. § 2796(a)(3). The cost must include reimbursement for depreciation, restoration or replacement if the article is damaged while leased, or replacement if the article is lost or destroyed while leased. This requirement does not apply to leases entered into for purposes of cooperative research and development, military exercises, or communications or electronics interface projects, or to any defense article that has passed three-quarters of its normal service life.

103. 22 U.S.C. § 2796(b). SAMM 120002.C.2 provides that leases may be extended beyond five years by mutual agreement of the parties provided DSAA approves and a revised lease describing the extension is drafted.

104. AFR 130-1, ¶ 12-1.

105. *See generally* SAMM Chapter 10, and AFR 50-29, Joint Security Assistance Training (JSAT) Regulations (Mar. 27, 1990).

106. 22 U.S.C. § 2761(c) (1).

107. SAMM 100002.

108. SAMM 100003.

109. 5 U.S.C. § 552.

disclosure. The reason is that the SAMM provides that if information is exchanged between the United States and a foreign government with the expectation that the information is confidential, it will be held in confidence.¹¹⁰ Thus, an exemption to disclosure under FOIA may need to be justified. An analysis of all FOIA exemptions is beyond the scope of this article.¹¹¹ Release, however, of LOAs and related documents requested under FOIA has been denied under FOIA Exemptions 3 (specifically exempted by statute), 4 (commercial information obtained in confidence), and 5 (inter- and intra-agency memorandums or letters that would not be available to a party in litigation with the agency).¹¹²

VI. CONCLUSION

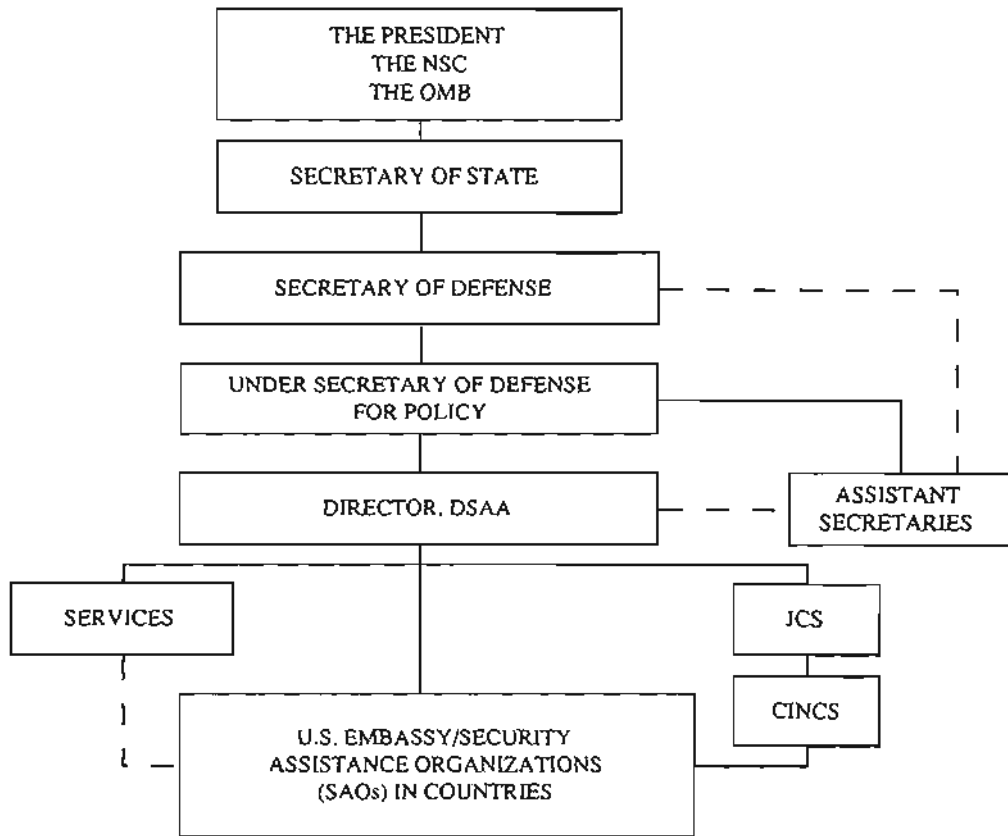
Foreign Military Sales is a dynamic instrument of U.S. foreign policy that involves people at all levels of the Air Force including the Air Force Reserve and the Air National Guard. Operational personnel, as well as personnel in logistics, contracting, training, and financial management participate significantly in FMS. The FMS cases, and the AF organizations that implement the FMS cases, generate a variety of legal issues. These legal issues, because they relate to FMS, may have permutations that are not readily apparent. For this reason, the legal analysis of matters relating to FMS should always be reviewed to see if there are any additional legal issues because the matter relates to FMS.

110. SAMM 50206.A.

111. *See generally* the U.S. Dep't of Justice's Freedom of Information Case List (Sept. 1992 Ed.), available from the U.S. Gov't Printing Office.

112. 5 U.S.C. § 552 (b) (3), 552 (b) (4), and 552 (b) (5) (1988).

APPENDIX A
DECISION CHANNELS FOR SECURITY ASSISTANCE



LEGEND: ——— Direction
 - - - - - Coordination

Operation Provide Comfort: A Case Study in Humanitarian Relief and Foreign Assistance

COLONEL PHILIP A. MEEK, USAF

I. INTRODUCTION

On 27 February 1991, President Bush ordered a cease fire in the armed conflict with Iraq. Victory was ours! While the formal cease fire was being negotiated, United States and other Coalition forces began their triumphant redeployments. But as the redeployments progressed and the Coalition forces withdrew from Iraq, another bloody conflict resumed, an internal conflict that pitted the remaining Iraqi combat forces against the Kurdish people in the north and the Shiites in the south.

During Operation Desert Storm, the Iraqi people were encouraged to rise up against Saddam Hussein. When the uprising came in the aftermath of the Gulf War, the Kurds and the Shiites were hopelessly overmatched against the heavy armor and helicopter gunships of the Iraqi regime. However, the United States was hesitant to respond to requests for intervention.

President Bush's desire to avoid being drawn into an Iraqi civil war, a "Vietnam-style quagmire," was quite understandable and reflected strong public sentiment that had been present since the United States started its military build-up in the Gulf region during Operation Desert Shield. His inaction was also understandable in that several important countries, namely Saudi Arabia and Turkey, had voiced concern that Iraq, if weakened further, might disintegrate and cause further turmoil and instability in the region.¹

However, as people around the world watched their televisions every night and witnessed the brutality of the Iraqi suppression of defenseless men, women, and children, and as they witnessed the mass exodus of almost one million Kurdish refugees into the frozen and inhospitable mountains of northern Iraq and Turkey, the mood shifted swiftly. "The polls that had shown Americans overwhelmingly wanted troops home in a hurry were now showing that Americans did not want to abandon the Kurds, even if it meant using American forces to protect them."²

On 5 April 1991, the United Nations Security Council adopted Resolution 688 (UNSCR 688), condemning the repression of the Iraqi civilian population, demanding that Iraq immediately end the repression that threatened international peace and security in the region, and insisting that Iraq allow

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1. Daniel Schorr, *Ten Days That Shook the White House*, 30 COLUM. JOURNALISM REV. at 22 (July/Aug. 1991).

2. *Id.* at 23.

immediate access by international humanitarian organizations and make available all necessary facilities for their operations.³ (Contemporaneously with UNSCR 688, President Bush announced that beginning on Sunday, 7 April 1991, U.S. Air Force transport planes would fly over northern Iraq and drop supplies of food, blankets, clothing, tents, and other relief-related items for refugees and other Iraqi civilians suffering as a result of the situation there.⁴ And so began Operation Provide Comfort- a unique, massive humanitarian assistance operation that brought together over 20,000 military forces of thirteen nations and the material contributions of thirty nations in a single coordinated effort under the leadership of the United States.⁵ It was the largest U.S. relief effort in modern military history, and judge advocates were significantly involved from the earliest planning stages.

Prior to examining the legal aspects of Operation Provide Comfort, this article will lay a foundation by discussing the humanitarian assistance organizations and processes within the Department of State and the Department of Defense (DOD). The focus will then move into Operation Provide Comfort itself, a cutting-edge case study in foreign humanitarian assistance operations. The sheer magnitude of the operation, plus its timing at the end of the Gulf War and location in battle-torn Iraq, raised countless thorny legal issues that demanded immediate resolution. Without question, operation Provide Comfort rewrote the book on humanitarian assistance.⁶

II. HUMANITARIAN ASSISTANCE

A. Within The Department of State

Although the U.S. military has conducted humanitarian relief operations abroad throughout history, the Department of State has primary responsibility for foreign humanitarian relief.⁷ Typically, when a disaster occurs in a foreign country, the U.S. Ambassador is the first to act on behalf of the U.S. Government. The Ambassador is responsible for coordinating the U.S. assistance that flows into a particular country. After considering the available information, the Ambassador may issue a formal disaster declaration, which has the immediate effect of making available \$25,000 to the foreign government for

3. Resolution 688 (1991), adopted by the United Nations Security Council at its 2982d meeting on 5 Apr. 1991. UNSCR 688 was adopted by a vote of 10-3 (Cuba, Yemen, and Zimbabwe), with China and India abstaining. 30 I.L.M. 858 (1991).

4. U.S. Department of State Dispatch, Apr. 8, 1991, *U.S. Humanitarian Assistance to Iraqi Refugees*, at 233. President Bush's statement released by the White House on 5 Apr. 1991.

5. Operation Provide Comfort After Action Report (U), Headquarters United States European Command/ECJ3, 29 Jan. 1992.

6. As stated, this article will concern foreign humanitarian relief. Readers interested in domestic humanitarian relief may wish to review the Disaster Relief Act of 1974, Pub. L. No. 93-288, 88 Stat. 143, as amended, which designates the Federal Emergency Management Agency (FEMA) as the lead federal agency for domestic humanitarian relief. FEMA has concluded a memorandum of understanding with DOD whereby DOD assets may be utilized to conduct emergency relief operations. However, without a Presidential determination, FEMA has only a limited ability to respond to disasters, with the primary responsibility for disaster response falling on state and local governments.

7. Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2151(b) (1990). Exec. Order No. 12,163, 44 Fed. Reg. 56,673 (1979), delegates to the Director, U.S. International Development Corporation Agency, the authority under 22 U.S.C. § 2292 to furnish assistance to any foreign country, or international or private voluntary organization for natural or man-made disaster relief.

relief purposes, and it also makes that country eligible for U.S. Government assistance.⁸

Within the Department of State, the United States Agency for International Development (USAID), Office of Foreign Disaster Assistance (OFDA), has the responsibility of directing and providing humanitarian assistance.⁹ The Ambassador will be in frequent if not continuous contact with OFDA in Washington, D.C. Normally, OFDA will assemble and deploy a Disaster Assistance Response Team (DART), comprised of representatives from various U.S. Government agencies, to address day-to-day issues locally and through the American Embassy to the affected Washington communities.

B. Within the Department of Defense

The Humanitarian Assistance Office under DOD International Security Affairs (ISA) has direct administrative responsibility for all DOD disaster relief assistance rendered. Requests for assistance must be officially transmitted from USAID/OFDA to DOD, and should provide a fund citation to cover the expenses incurred by DOD.¹⁰ The fund citation is very important because OFDA, as the agency primarily responsible for foreign humanitarian relief, is funded by Congress for these activities. With few exceptions, the DOD is not. Experience shows that DOD, and more specifically, the service component tasked to furnish the assistance, will have to absorb the cost out of component operations and maintenance (O&M) funds without much hope of reimbursement by OFDA unless OFDA provides the fund citation in advance. The OFDA recognizes that DOD and the tasked commanders will commit funding and materiel quickly and get on with the mission. Once received at DOD, the USAID/OFDA request is reviewed and initialed by the DOD Humanitarian Assistance Director or Deputy Director, forwarded to the OSD/General Counsel (GC) and Assistant Secretary of Defense (ASD) Acquisition and Logistics for review and concurrence, and then to ASD/ISA for approval.¹¹

After ASD/ISA approves the request for humanitarian assistance, the request is forwarded to the Logistics Readiness Center (LRC) within the Joint Chiefs of Staff (JCS)/J4 (Logistics). Subject to overriding military mission requirements, the JCS will respond as rapidly as possible. The LRC and OFDA together will work closely to develop a plan to meet the requirements of the relief operation, with the LRC implementing the plan by tasking the Unified Commands for support as required.

While the coordination and approval process is occurring, the Unified Commander whose area of responsibility (AOR) is affected may provide immediate lifesaving assistance only. The Commander should await the requisite approval from ASD/ISA before providing additional assistance. This allows time for the DOD and State Department to sort out policy and funding issues, and recognizes the primacy of the State Department in humanitarian relief operations.

8. Humanitarian Assistance Program, Department of Defense Executive Briefing, prepared by Robert K. Wolthuis, Special Assistant to the Deputy Under Secretary of Defense (Policy), Office of Humanitarian Assistance, OSD/ISA at 5 (13 July 1985).

9. See *supra* note 7.

10. See *supra* note 8.

11. *Id.* at 5.

III. OPERATION PROVIDE COMFORT

A. Fiscal Law and Funding Issues

With President Bush's sudden announcement that Operation Provide Comfort would begin two days hence, on 7 April 1991, Headquarters European Command (HQ EUCOM) and the component headquarters scrambled to develop and implement plans for the humanitarian relief operation. Interestingly, the most pressing initial issues related to the sources of funding and the legal restrictions applicable to each source of funds. Most of the funding questions arose in the early days of the operation before firm guidance was received and additional sources of funds other than O&M were available.

The fundamental starting point for the use of O&M funds was 31 U.S.C. § 1306(a), commonly referred to as the "Purpose Statute," which provides that appropriations can be applied only toward the purpose for which they were appropriated, except as provided by law.¹² Because the Department of State has primary responsibility for conducting humanitarian relief operations, the DOD has very little independent statutory authority for expending funds for humanitarian operations, and even then there are significant limitations on those funding sources.

One such special statutory authority is 10 U.S.C. § 401, which provides, in part, that the military departments may carry out humanitarian and civic assistance activities in conjunction with authorized military operations of the Armed Forces in a country if the Secretary concerned determines that the activities will promote the security interests of both the United States and the country in which the activities are to be carried out as well as the special operational readiness skills of the members of the Armed Forces who participate in the activities.¹³ The statute defines "humanitarian and civic assistance" as medical, dental, and veterinary care provided in rural areas of a country; construction of rudimentary surface transportation systems, well drilling and construction of basic sanitation facilities; and rudimentary construction and repair of public facilities.¹⁴ All of these activities were carried out in Operation Provide Comfort, and some will be discussed in greater depth later. Humanitarian and civic assistance may not be provided under 10 U.S.C. § 401, directly or indirectly, to any individual, group, or organization engaged in military or paramilitary activity.¹⁵ Further, expenses incurred as a direct result of providing humanitarian and civic assistance under this section shall be paid out of funds specifically appropriated for such purpose, except for minimal expenditures that may be funded out of other funds, e.g., O&M.¹⁶ Section 401 is

12. In 1985, the GAO and Comptroller General criticized the DOD for using O&M funds during a joint operation in Honduras, citing inappropriate humanitarian assistance as an example. Subsequently, the FY 85 DOD Appropriation Act, Section 8103, commonly referred to as the Stevens Amendment, authorized the DOD to engage in civic and humanitarian assistance "incidental" to JCS directed or coordinated exercises.

13. 10 U.S.C. § 401(a)(1) (1990).

14. 10 U.S.C. § 401(e) (1990).

15. 10 U.S.C. § 401(a)(3) (1990). A question arises as to whether this provision was violated by providing humanitarian relief supplies to Kurdish individuals and groups who had been or were engaged in military or paramilitary activities against Iraqi forces.

16. 10 U.S.C. § 401(c). See also FY 91 DOD Appropriation Act, Pub. L. No. 101-511, § 8021, 104 Stat. 1879 (5 Nov. 1990); 10 U.S.C. § 401 note, which appropriated O&M funds for humanitarian and civic assistance costs under 10 U.S.C. § 401, including the obligation of costs incidental to authorized operations. This provision also appropriated funds not to exceed \$15 million to the Office of Humanitarian Assistance for immediate emergency airlift assistance.

not a source of funds, it is an authorization. Reference should, therefore, be made to the applicable DOD Authorization and Appropriation Acts to determine amounts available at the time of a humanitarian relief operation.

When challenged in past years on its authority to conduct humanitarian relief operations, the DOD has also relied on the Economy Act, 31 U.S.C. §§ 1535-1536, to provide reimbursable support on behalf of other federal agencies. Under this authority, one federal agency may place an order with another federal agency for goods or services if the requested amounts are available or may be obtained by contract, the requesting agency decides the order is in the best interest of the United States, and the requesting agency decides that ordered goods or services cannot be provided by contract as conveniently or cheaply by a commercial enterprise.

In the early days of Provide Comfort, military supplies were distributed in the relief effort as authorized by the drawdown of defense articles and services pursuant to the President's Emergency Relief Authority under the Foreign Assistance Act (FAA) of 1961, Section 506(a).¹⁷ The Under Secretary of Defense for Policy (USDP) authorized the Commander, European Command (CINCEUR) to draw up to \$25 million in defense stocks and services, and arrange for their transfer.¹⁸ These stocks consisted of food, blankets, clothing, tents, medicine, and other relief-related items for the refugees. However, it became apparent very quickly that available DOD stocks were insufficient due to the hundreds of thousands of refugees in immediate peril.

Because relief goods were readily available on the Turkish economy at cheaper prices, and because a Turkish transportation infrastructure was in place and capable of getting the goods to the refugees, a question arose as to whether the EUCOM components of the Combined Task Force (CTF), i.e., United States Air Forces in Europe (USAFE) and United States Army Europe (USAREUR), could expend O&M funds to contract locally for section 506(a) goods. One school of thought was that O&M funds could be used to buy bulk purchase items, which then became DOD stocks that could be distributed pursuant to Section 506(a). The contrary and prevailing view, however, was that Section 506(a) only authorized the drawdown of existing DOD stocks, not stocks that must be purchased for subsequent distribution. In fact, the Under Secretary of Defense for Policy, in his 12 April 1991, message authorizing the drawdown under Section 506(a), specifically mentioned new procurement as being unauthorized.¹⁹ The same prohibition was contained in several Joint Staff J4-LRC messages to EUCOM, with guidance that non-DOD funds, such as those

17. 22 U.S.C. § 2318 (1990). If an unforeseen emergency exists that requires immediate military assistance to a foreign country or international organization, and if the emergency requirement cannot be met under the authority of the Arms Export Control Act (22 U.S.C., §§ 2751-96 (1990)), or any other law except this section, the President may direct the drawdown of defense articles from the stocks of the Department of Defense, defense services of the Department of Defense, and military education and training, of an aggregate value not to exceed \$75 million in any fiscal year. Congress may appropriate such sums as may be necessary to reimburse the applicable appropriation, fund, or account for defense articles, services, military education and training provided under this section. *See also* Section 552 (c), Foreign Assistance Act of 1961, 22 U.S.C. § 2292 (1990), which provides authority to draw down commodities and services of a U.S. Government agency for international relief. There is an annual \$25 million statutory limit for Section 552 (c) relief. An interesting issue is whether the use of Section 506 (a) to furnish disaster relief to the Kurds was proper since the statute requires the emergency assistance to be provided to a foreign country or international organization, neither of which was the recipient of the assistance furnished.

18. USDP MSG 121445Z Apr. 1991, Subj: (Unknown), discussed in HQ USAFE/JA Memorandum for CINCUSAFE, 22 Apr. 1991, Subj: Use of Component O&M Funds.

19. *Id.*

available to the local State Department and USAID/OFDA officials, should be used for new procurements.²⁰

Reflecting disagreement or at least a lack of coordination within the JCS organization, a representative of the Office of Legal Advisor to the Chairman, JCS (OCJCS/LA), in a telephonic discussion on 16 April 1991 advised the Office of the Legal Advisor, EUCOM (ECLA), to expend O&M funds for local purchases of supplies on the Turkish economy.²¹ The representative indicated that local purchase of goods on the economy by contract could be properly classified as the provision of a defense article or service under the FAA, Section 506(a). EUCOM then passed the guidance to the CTF at Incirlik Air Base, Turkey.

The Staff Judge Advocate and Comptroller at HQ USAFE, upon being apprised that the Air Force Comptroller at Incirlik Air Base was being tasked by the CTF to commit O&M funds for local contract bulk purchases, became very concerned that this guidance contradicted other very specific Washington-level guidance, and further, that it was not legally supportable. The issue of possible Anti-Deficiency Act²² violations also was raised. After discussion with the highest command levels at HQ USAFE, with Air Staff legal, accounting, and procurement channels, and with the Air Force General Counsel's Office, the HQ USAFE Comptroller informed all Air Force Accounting and Finance offices in Turkey by message on 18 April 1991 that the use of USAFE O&M funds for this purpose was not authorized.²³

The next day, EUCOM rescinded previous guidance to use non-DOD fund cites for procurement of bulk purchases, and cited as authority the opinion of the OCJCS/LA that O&M expenditures were authorized under Section 506(a).²⁴ EUCOM officials, when challenged by HQ USAFE about inconsistencies between the statute, the JCS and Under Secretary of Defense for Policy guidance, could not provide a satisfactory explanation for the discrepancy in guidance. Accordingly, HQ USAFE, while very sympathetic with the plight of the CTF in their need to obtain relief supplies, stood steadfast in the refusal to authorize the expenditure of O&M funds. Relations between EUCOM and USAFE were very strained at this point, but even very high command level pressure from EUCOM could not reverse USAFE's decision not to release funds. The legal and policy issues were so significant that consistent DOD-level guidance was necessary.

The legal issue was never resolved because on 20 April 1991, two weeks into Operation Provide Comfort, the OFDA finally provided \$5 million for the local procurement of emergency relief supplies in support of the civilian victims of the conflict.²⁵ The pressure to obtain funds was off for the moment. In addition, on 21 April 1991, the Chairman, JCS, authorized \$10 million from the CJCS

20. Joint Staff MSG 120533Z Apr. 1991, Subj: (Unknown), discussed in Joint Staff/J4-LRC MSG 171949Z Apr. 1991, Subj: Operation Provide Comfort - Local Procurement Using Non-DOD Funds.

21. Memorandum for Record, EUCOM/ECLA, 16 Apr. 1991, Subj: Funding for Operation Provide Comfort.

22. 31 U.S.C. § 1341(a) (1990). This statute provides, in part, that an officer or employee of the United States Government may not make or authorize any expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation or involve the United States in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

23. HQ USAFE/ACB MSG 181815Z Apr. 1991, discussed in CTF-JA Memorandum for Record, undated, Subj: Local Procurement Using DOD Funds in Support of Operation Provide Comfort Humanitarian Assistance.

24. HQ USAFE/JA Memorandum for CINCUSAFE, 22 Apr. 1991, Subj: Use of Component O&M Funds.

25. SECSTATE MSG 200709Z Apr. 1992, State 129433, Subj: Iraqi Conflict Disaster - Local Procurement of Emergency Relief Supplies.

Commanders' Initiative Funds (CIF) for the relief effort, the first "spendable" DOD funds for the local purchase of relief supplies and services.²⁶ Until DOD or Congress resolves the issue of using O&M funds for local purchase of humanitarian relief supplies for drawdown under the FAA, Sections 506(a) and 552(c), judge advocates and comptrollers should solicit CJCS CIF funds at the earliest stages of the humanitarian relief operation due to the flexibilities in using those funds.

A related issue at the onset was whether USAFE could use O&M funds to contract with Turkish commercial carriers, primarily trucking firms, to transport the drawdown relief supplies to the Kurdish refugee camps in Iraq. The FY 91 DOD Authorization Act, section 303(a)(2), authorized the appropriation of not more than \$3 million for the distribution of humanitarian relief supplies to displaced persons or refugees who were noncombatants. Further, Section 303(a) stated that transportation of humanitarian relief was to be provided by the most economical commercial or military means available, unless the Secretary of State determined that it was in the best interest of the United States to provide transportation other than by the most economical means available.

Notwithstanding the explicit statutory authority to contract locally for the transportation of humanitarian relief supplies, the Department of Defense has a policy that precludes the use of that authority to transport drawdown supplies distributed pursuant to Section 506(a). EUCOM and USAF attempted to obtain a reversal or an exception to that policy since the Turkish trucking costs were much cheaper, and commercial trucks could handle a much greater volume and deliver sooner than military airlift. But their efforts were not successful and the Section 506(a) relief aid had to be delivered by military airlift. The DOD should reverse this policy, which hampers the ability of the military commander to accomplish his mission as quickly, efficiently, and cheaply as possible.

On the subject of transportation, DOD also has statutory authority under 10 U.S.C. § 402(a) to transport without charge, on a space available basis, supplies which have been furnished by a nongovernmental source and which are intended for humanitarian assistance. However, the supplies may not be transported unless the Secretary of Defense makes several determinations; transportation of such supplies is consistent with the foreign policy of the United States, the supplies are suitable for humanitarian purposes and are in usable condition, and adequate arrangements have been made for the distribution of such supplies in the destination country.²⁷

Further, it is the responsibility of the donor to ensure that supplies to be transported under Section 402 are suitable for transport.²⁸ Supplies transported under Section 402 may be distributed to an agency of the Federal Government, a foreign government, an international organization, or a private nonprofit relief organization.²⁹ Finally, as in Section 401, supplies transported under this section

26. See *supra* note 24. See also EUCOM/ECLA Memorandum to ECJ5-S, 7 Nov. 1991, Subj: Humanitarian Relief Funding Authorities and References. The CINC Initiative Fund (CIF) was established by the FY 91 National Defense Authorization Act, Section 908. This is a separate budget account, managed by the Chairman of the JCS, from which funds may be provided to Unified and Specified Commands. Permissible activities for funding include: force training, contingencies, selected operations, command and control joint exercises, humanitarian and civic assistance among others. The CIF funds may be used in offshore procurement of goods and services. Also, the CIF funds are not subject to the normal O&M limitation of \$15,000 per line item. Thus, they provide much needed flexibility with big ticket items. The FY 91 DOD Appropriation Act, Pub. L. No. 101-511, 104 Stat. 1860 (5 Nov. 1990), appropriated \$35 million for this account, with Operation Provide Comfort receiving \$10 million.

27. 10 U.S.C. § 402(b)(1) (1990).

28. 10 U.S.C. § 402(b)(3) (1990).

29. 10 U.S.C. § 402(c) (1) (1990).

may not be distributed, directly or indirectly, to any individual, group, or organization engaged in military or paramilitary activity.³⁰

Due to the tremendous volume of humanitarian relief supplies arriving at Incirlik Air Base, Turkey, the CTF aerial port, it became physically impossible to keep separate the donations of foreign governments, nongovernmental organizations, and private voluntary organizations from the U.S. Government-owned drawdown, purchased and excess property relief supplies, each with their own transportation and funding rules. Accountability was lost once the relief stocks were commingled and the ramp space and storage areas saturated. In addition, relief stocks became commingled as logisticians and aircraft loadmasters concentrated on available cargo space and weight to load transport aircraft with relief supplies.

Once commingling of stocks occurs, it is very difficult to determine the applicable fund citation for transportation of relief supplies. This can lead to possible violations of the Anti-Deficiency Act and statutes such as 10 U.S.C. § 402, which requires the use of space available transportation. The logisticians will do their best, but the bottom line is that the mission demands getting the humanitarian relief aid downstream quickly to the recipients and freeing up ramp space for newly arriving relief supplies.

Another significant and time consuming funding issue was whether the O&M limitation of \$200K per single project³¹ applied to construction in the relief camps. Significant construction projects were necessary in the early stages of the operation to house not only the Kurdish refugees, but also U.S. and other Coalition forces. Initially, the Joint Staff/J4 issued guidance that the CTF did not have unlimited authority to construct U.S. operational facilities.³² The JCS viewed it as unlikely that the funded cost of any single project could exceed \$200K.³³ However, if construction costs of a facility would exceed \$200K, the CTF was to request Secretary of Defense approval under the authority of 10 U.S.C. § 2808.³⁴ The Joint Staff authorized EUCOM to expend O&M funds for the construction of facilities necessary to provide temporary shelter to refugees and/or relief workers and for the construction of sanitary facilities, water supply, medical treatment facilities, hasty roadways and airstrips, and other facilities of a temporary nature deemed essential for the welfare of refugees and/or relief workers.³⁵

Once again reflecting a variety of guidance emanating from the JCS, a representative of OCJCS/LA, in a telephonic conversation informed the Office of the Legal Advisor, HQ EUCOM, that the construction of facilities for the refugees could be treated as another defense article/service under Section 506(a), and, therefore, was not subject to the \$200K spending limit.³⁶ The OCJCS/LA view was

30. 10 U.S.C. § 402(e)(2) (1990).

31. 10 U.S.C. § 2805(d)(1)(1990). This section was amended in December 1991 to increase the O&M limit for unspecified minor military construction to \$300,000.

32. Joint Staff/J4 MSG 102110Z Apr. 1991, Subj: Facilities for Humanitarian Support in Turkey.

33. *Id.*

34. Under 10 U.S.C. § 2808, in the event of a declaration of war or the declaration by the President of a national emergency in accordance with the National Emergency Act that requires the use of the Armed Forces, the Secretary of Defense without regard to other provision of law, may undertake military construction projects, not otherwise authorized by law that are necessary to support such use of the Armed Forces. Such projects may be undertaken only within the total amount of funds that have been appropriated for family housing, and that have not been obligated. The construction authority under 10 U.S.C. § 2808 was available to the CTF because a national emergency had been declared.

35. *See supra* note 32.

36. *See supra* note 21.

that the construction of facilities for refugees was not technically "military construction" under 10 U.S.C. § 2801(a) and (c) because the refugee camps were not located on a "military installation" as that term is defined in the above provisions.³⁷ Thus, the conclusion was that the CTF was not subject to the \$200K limit on expenditure of O&M funds under 10 U.S.C. § 2805(c).

Notwithstanding the OCJCS/LA guidance, HQ USAFE was of the opinion that the \$200K limit was applicable.³⁸ "Military installation" is defined in 10 U.S.C. § 2801 as "[a]...camp...or any other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of a Secretary of a military department or, the Secretary of Defense." It seems beyond any doubt that these foreign refugee camps and U.S. camps were at a minimum under the operational control of the United States, particularly because U.S. military command structures were in place, U.S. military forces patrolled and ensured security at the camps, and U.S. forces controlled the daily lives of the refugees and all other persons in those camps. In addition, the U.S. military had entered into nonpersonal service contracts with Turkish and Iraqi landholders to obtain possession of the land for U.S. camps and refugee camps. So it appears that the United States had "jurisdiction" to a considerable degree.

In its effort to obtain unlimited O&M funding authority, EUCOM argued that its camps were strictly humanitarian relief centers, not military facilities and not military installations under U.S. operational control.³⁹ EUCOM asserted that control over the camps would be exercised in conjunction with the displaced persons themselves and the U.S. military role would be released to the United Nations or other international relief organizations as soon as possible.⁴⁰ This statement appears to concede U.S. operational control over the camps that would be reduced or eliminated in the future.

Ultimately, OSD concurred that 10 U.S.C. § 2801 did not apply to refugee relief in Iraq since the Kurdish relief camps were not military installations under the jurisdiction of DOD.⁴¹ The CJCS message transmitting the OSD decision is interesting not only because the statute does not require the camp to be a "military installation," but also because the message fails to address the issue of U.S. operational control over foreign camps, an apparent threshold issue considering the disjunctive "or" in the text of 10 U.S.C. § 2801. Perhaps the OSD decision in this case is not all that significant considering the extraordinary construction authority under 10 U.S.C. § 2808, which was available because Operation Provide Comfort occurred during a declared national emergency. However, in a peacetime humanitarian relief scenario, the result may not be the same. The issue of the applicability of the \$200K limitation to O&M funded construction will certainly be revisited in the future.

Another turn of events, contemporaneous with the OSD decision on construction authority, resulted in a new-found statutory authority to use O&M funds for an infinite variety of humanitarian relief purposes. On 29 April 1991, the Deputy Secretary of Defense requested the State Department to obtain a United

37. *Id.* Under 10 U.S.C. § 2801(a), the term "military installation" means a camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a Military Department or, in the case of an activity in a foreign country, under the operational control of the Secretary of a Military Department or the Secretary of Defense.

38. *See supra* note 24.

39. U.S.C.INCEUR/ECJ4 MSG 251634Z Apr. 1991, Subj: Provide Comfort Guidance for Construction Funding for Displaced Persons (Refugees) Camps.

40. *Id.*

41. CJCS MSG 301531Z Apr. 1991, Subj: Exceptions to the Rule.

Nations request for U.S. humanitarian assistance to the Kurdish people.⁴² Under Section 7 of the U.N. Participation Act,⁴³ the President, upon the request of the United Nations for cooperative action, may provide military personnel in a noncombatant capacity, and may furnish facilities, services, supplies, equipment, or other assistance from the Department of Defense.⁴⁴ Of particular significance, the DOD support may be furnished notwithstanding the provisions of any other law, thereby giving DOD great flexibility in the type and amount of support furnished. For instance, O&M funds may be used to purchase individual items costing in excess of \$15K, construction in excess of \$200K may be accomplished, and food and relief supplies may be purchased on the local economy for immediate distribution by military forces. The statute requires that the United Nations reimburse the United States for the expenses incurred, but the President may waive in whole or in part such reimbursement in exceptional circumstances.⁴⁵

On 30 April 1991, the Deputy Secretary of Defense announced that the U.N. request had been received and DOD support would be provided.⁴⁶ Although 10 U.S.C. § 287d-1 provides the authority for expenditures, it does not provide funds. Rather, the level of funding and duration of the support provided are policy issues to be resolved by the President, State Department, and DOD. Generally, the funds come from service O&M funds.

In the case of Operation Provide Comfort, an initial allocation of \$30M was authorized and reimbursement by the United Nations was waived to the extent necessary to ensure prompt assistance.⁴⁷ The EUCOM components tasked to provide support were authorized to provide assistance from existing stocks or through supply or service contracts, domestic or offshore, directly to the refugees and displaced persons by U.S. forces or other U.S. Government agencies, or through the United Nations, international organizations, private organizations, or foreign governments involved in the relief effort.⁴⁸

With the approval of the U.S.-requested U.N. request, the funding questions were much more easily resolved and centered mainly on not exceeding the dollar limitations of a particular source of funds. The U.N. Participation Act funds became the panacea for resolving almost every sticky funding issue. However, the availability of this authority will be scenario dependent since a U.N. request is required.

C. Disposal of Excess Government Property

When the State Department request for humanitarian assistance reaches the DOD, one of the immediate sources of relief supplies and equipment is excess government property. The basic statutory authority for the disposal of excess government property is 40 U.S.C. § 511-514. The head of each agency having foreign excess property is responsible for the disposal of it in conformance with

42. Deputy Secretary of Defense, Memorandum For the Acting Secretary of State, 29 Apr. 1991, Subj: United Nations Request for U.S. Support in Providing Assistance to the Kurdish People.

43. 22 U.S.C. § 287d-1.

44. 22 U.S.C. § 287d-1(a).

45. 22 U.S.C. § 287d-1(b). See also Exec. Order No. 10,206, Jan. 19, 1991, *Support of Peaceful Settlement of Disputes*, wherein the President delegated his authority under 10 U.S.C. § 287d-1 to the Secretary of State and Secretary of Defense.

46. Deputy Secretary of Defense Memorandum, 30 Apr. 91, Subj: Response to U.N. Request for U.S. Support For Humanitarian Assistance to the Kurdish People.

47. *Id.*

48. CJCS MSG 302307Z Apr. 1991, Subj: Funding For Humanitarian Relief in or Near Northern Iraq.

the foreign policy of the United States.⁴⁹ After screening and refusal by DOD agencies and the U.S. Coast Guard, the excess property may be disposed of by sale, exchange, lease, or transfer for cash, credit, or other property, and upon such terms as the agency head deems proper.⁵⁰ Within DOD, the Office of Humanitarian Assistance under ASD/ISA has the responsibility for administering the excess property disposal program.⁵¹

The implementing DOD manual for the excess property disposal program is the Defense Reutilization and Marketing Manual, DOD 4160.21-M. Theoretically, excess property is taken to a Defense Logistics Agency (DLA) depot or Defense Reutilization and Marketing Office (DRMO) for inspection, packing, and shipping to the designated military aerial port or seaport. However, in practice, the DLA depot and DRMO frequently decline to accept the excess property and the military agency has to dispose of the property.

An alternate statutory authority for disposing of excess government property was included in the Defense Authorization Act of 1986, codified at 10 U.S.C. § 2547, which authorized the Secretary of Defense to make available for humanitarian relief purposes any nonlethal excess supplies within DOD. Originally, the purpose of the program was to donate excess property to assist refugees and resistance groups in Afghanistan, in cooperation with USAID.⁵² However, the program has been expanded and by the end of FY 90 over thirty nine countries had benefited from the program.⁵³

The DOD's Office of Humanitarian Assistance can identify and claim excess property for the program before it is made available to other federal agencies, state and local governments, or other eligible recipients. Property cannot be claimed, however, until it has been declared excess by other DOD components,⁵⁴ a relatively easy task for property identified for humanitarian relief efforts and in some cases security assistance.

A third possible source of government property for use in humanitarian relief operations is the Southern Region Amendment (SRA) Program, which is administered by the Defense Security Assistance Agency (DSAA). Under this program, excess government equipment in Europe is provided to North Atlantic Treaty organization (NATO) countries in Southern Europe plus several key non-NATO allies, e.g., Egypt and Israel.⁵⁵ This program is advantageous to DOD and State Department humanitarian relief efforts because, like the 10 U.S.C. § 2547 excess property, the DOD Office of Humanitarian Assistance can withdraw DOD excess property before the General Services Administration can make the property available to other federal agencies and departments that may want the property.⁵⁶

D. International and Operations Law Issues

Judge advocates fortunate enough to participate in humanitarian relief operations discover very quickly that the legal issues are much broader than finding statutory authority to obtain, transport, and distribute relief supplies. Operation

49. 40 U.S.C § 511 (1990).

50. 40 U.S.C § 512 (1990).

51. See *supra* note 8.

52. United States General Accounting Office, *DOD's Humanitarian Assistance Program*, Jan. 1991. GAO/NSIAD-91-87FS Defense Inventory at 1.

53. *Id.* at 8.

54. *Id.* at 2.

55. *Id.* at 14.

56. *Id.*

Provide Comfort presented many unique challenges because it was not a classic humanitarian relief effort conducted in a permissive peacetime environment. Rather, it included a security mission to keep the advancing Iraqi military forces separate from the CTF forces, international relief organizations personnel, refugees, and other displaced persons.⁵⁷ Fortunately, the CTF was staffed by judge advocates highly skilled in international and operations law, an absolute necessity in operations such as this.

The applicability of the NATO Status of Forces Agreement (SOFA) surfaced as thousands of allied military personnel from NATO nations began arriving in Turkey. The Government of Turkey denied the applicability of the NATO SOFA, asserting that Operation Provide Comfort was an out-of-area humanitarian relief effort not involving the collective defense of a NATO member nation.⁵⁸ Turkey disclaimed any financial responsibility for claims, attempted to subject the visiting military forces to all Turkish criminal, customs, taxation, insurance, and other laws and procedures, and attempted to require the CTF to procure locally all available materials and services.⁵⁹ The United States and other military forces quite correctly asserted that the NATO SOFA applied by its terms based on the location in Turkey of military forces from NATO nations, regardless of missions.⁶⁰ The issue was never resolved and proved to be an unfortunate, time consuming distraction for the CTF during their emergency humanitarian relief efforts.

As the CTF began operations, they were aware of or came into contact with numerous dissident groups in the area, including guerrilla and terrorist organizations opposed to Iraq and, in some cases, Turkey. These groups included the Kurdish Democratic Party (KDP) and its large, lightly armed military unit, the Peshmerga, or "those who face death"; the Patriotic Union of Kurdistan (PUK); the Kurdish Workers Party (PKK), a violent Marxist group; and Dev Sol, a Turkish terrorist group that took credit for the assassination and attempted assassination of several U.S. personnel during the Gulf War. A sensitivity to the complex historical, political, military, and economic relationships was necessary to operate effectively and in cooperation with those groups that could assist in the relief effort, and likewise to operate without interference from those organizations that did not support the objectives of the CTF.

Determining the appropriate rules of engagement (ROE)⁶¹ was an early priority for the forces providing security to the relief effort. This task was more complicated than usual because the operations involved more than one nation, i.e., combined operations, and the ROE reflected the difference in doctrine or legal requirements of the participating nations. For example, some nations did not permit the use of deadly force in response to a demonstration of hostile intent only, requiring instead that an individual or unit actually receive hostile fire before responding with fire. Also, in the case of Operation Provide Comfort, the

57. See *supra* note 5, at 1. Although this reference characterizes the mission as humanitarian assistance with a security requirement, a question exists as to whether this was in actuality a humanitarian intervention.

58. *Id.* at 15. Previously, the Government of Turkey had taken the same position toward Joint Task Force Proven Force, the U.S. Joint Force that conducted air combat operations from Turkish air bases into Iraq during Operation Desert Storm.

59. *Id.*

60. *Id.* See also AFP 110-20, (July 27, 1981), Selected International Agreements at 2-2, Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Forces, Art. 1-1. The expression "force" means personnel of the armed services of one contracting party when in the territory of another contracting party in connection with their official duties.

61. JCS Publication 0-1 defines a rule of engagement as a directive issued by competent military authority which delineates the circumstances and limitations under which forces will initiate and/or continue combat engagement with other forces encountered.

initial phase of the operation occurred while the U.N. cease fire was being negotiated, but during a period of armed conflict between Iraqi forces and Kurdish guerrillas. A decision had to be made whether to authorize the use of deadly force in self-defense only, or whether to authorize more aggressive ROE because of hostilities in the area and the fact that the CTF would be between advancing Iraqi forces and the Kurdish refugees.

A very difficult issue to resolve concerned the proper method of obtaining land in Turkey and Iraq for the use of CTF personnel and for refugee camps. Ordinarily, land use is acquired by executing leases with landowners prior to entry and occupancy. However, due to the exigencies of the emergency situation, lands were taken for CTF and refugee relief operations without any land use arrangements. Subsequently, the affected farmers in Turkey and Iraq approached CTF authorities wanting compensation for the use of land and the loss of crops.

Unfortunately, there is no formal system of land deeds in the region of Turkey near Silopi, the base camp of CTF operations near the Iraq border.⁶² Similar problems existed in Iraq, where the farmers were lessees of the Iraqi Government and their leases did not permit subleases to third parties.⁶³ Complicating matters was our relationship with Iraq and an earlier U.S. policy decision not to pay claims in Iraq.⁶⁴

The United Nations High Commissioner on Refugees (UNHCR), who was to accept responsibility of the camps from the CTF, directed that all claims to the lands in question be paid by the allies prior to the transfer of responsibility to the UNHCR. For a variety of reasons, the CTF chose to execute nonpersonal service contracts with the landholders in Iraq and with the Mayor of Silopi, Turkey, who acted on behalf of the landholders.⁶⁵ Under normal circumstances, the use of nonpersonal service contracts for land occupancy and claims resolution would be questionable. However, since the funding for the contracts was provided pursuant to the U.N. Participation Act with its flexibility, i.e., "notwithstanding the provisions of any other law," the form of these contracts was less important.

Myriad other international law and operations law issues arose. Without going into a discussion of each due to the constraints of the length of this article, some of the issues included: the applicability of the Geneva Conventions of 1949 (prisoners of war; treatment of civilians); requests for political asylum and/or temporary refuge; war trophies and military souvenirs; flying of U.S. flag at relief camps and on U.S. military vehicles in Turkey; sensitivity to media reporting of Kurdish humanitarian relief efforts in Turkey; security assistance to Turkey; civil affairs planning and execution to transition CTF refugee camps to UNHCR responsibility; mutual logistic support to allies from NATO nations; water rights within Turkey; compliance with Case Act requirements to report international agreements; and, adoption of Kurdish children.

62. CTF-JA Memo for Record, 16 Oct. 1991, Subj: Silopi Land Use Contract.

63. CTF-JA Memorandum for the Judge Advocate, United States Air Forces in Europe, 9 July 1991, Subj: Operation Provide Comfort Interim After Action Report, Tab E.

64. *Id.*

65. *Id.* See also CTF-JA Memo for Record, 16 Oct. 1991 Subj: Silopi Land Use Contract. To expedite the requisition of land near Silopi, the contract was made with the Mayor as representative of the landholders. The authority of the Mayor to act in this capacity was never established, nor was the CTF able to determine if monies paid to the Mayor reached the landholders and if so, the amount paid. The CTF cannot be faulted, however, in resolving this contentious issue as quickly as possible to placate the landholders and get on with the emergency assistance.

As can be seen from the examples above, judge advocates deploying with humanitarian relief operations must be experienced in international operations. The deploying judge advocates will have limited legal reference materials available and will rely quite heavily on their prior experience and knowledge, particularly if communications with support bases or headquarters is difficult.

IV. CONCLUSION

When natural and man-made disasters occur around the world, the American people are quick to respond. The DOD is the first to answer the call for help due to its personnel, airlift, sealift and other logistical lines of communication. Operation Provide Comfort was a tremendous success due to the extraordinary efforts of all concerned, often under arduous and dangerous conditions. Nevertheless, because of its massive undertaking, Operation Provide Comfort exposed many weaknesses in the DOD's ability to react swiftly and provide emergency humanitarian relief assistance. Even where the DOD could physically obtain and deliver relief supplies, the relief efforts were often stymied by statutory, bureaucratic, and administrative restrictions. A more efficient mechanism is necessary to respond to the warp-speed developments in humanitarian relief efforts, particularly because the DOD is being tasked with a greater role in such operations. The time to improve the process and plan for the future is now.

Air Force Medical Personnel and the Law of Armed Conflict

MAJOR BRUCE T. SMITH, ANG

First of all I would repeat the basic principle that care for the wounded, without distinction between friend or foe, is a rule of ethics with which every doctor, military or civilian, must comply. Except in those dark times, some of them recent, in which barbarism has imposed its own brutal reasoning, this rule has been commonly accepted and respected by all military leaders.¹

The principle that the wounded and those who care for them in time of war should enjoy a protected status has been a constant of the law of warfare since the Peloponnesian War.² Although the laws that embody this principle have been written and rewritten countless times throughout history, the basic, simple premise remains the same: Health protection during armed conflicts is a priority, because war leads entire populations into poverty and disease and for the most vulnerable, death is often inevitable. But if respected, the law can go a long way toward protecting life.³

Beyond this basic principle, however, what is the applicable law? How does it apply to Air Force medical personnel? And how do judge advocates prepare medical personnel and assets for deployment into a theater of combat operations?

This article attempts to answer those questions and, hopefully, provide a practical, "What to do and how to do it" approach. This recitation does not attempt to trace all the philosophical underpinnings of the law as it applies to medical personnel. Neither does it purport to provide an in-depth historical analysis of the law. The prudent military practitioner should supplement his law library with the basic works on those subjects.⁴ Rather, this article provides a working understanding of the law as it applies to the duties owed to, and by, military medical personnel in time of war. It also suggests a practical approach to training medical personnel for deployment.

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1. Dr. Jean Guillermand, *The Contributions of Army Medical Officers to the Emergence of Humanitarian Law*, IRRIC No. 271, 306 at 307 (July-Aug. 1990).

2. *Id.*

3. Dr. Remi Russbach, *Health Protection in Armed Conflicts*, IRRIC No. 284, 460 at 467-468 (Sept.-Oct. 1991)

4. At a minimum, the JA law of armed conflict library should contain the following: AFR 50-3, Code of Conduct Training (May 1990); AFR 110-20, Selected International Agreements, (July 1981); AFR 110-26, Procedures for Handling Requests for Political Asylum and Temporary Refuge (May 1980); AFR 110-29, Review of Weapons for Legality Under International Law (Sept. 1981); AFP 110-31, The Conduct of Armed Conflict and Air Operations (Nov. 1976); AFR 110-32, Training and Reporting to Insure Compliance With the Law of Armed Conflict (Aug. 1976); AFP 110-34, Commander's Handbook on the Law Of Armed Conflict (July 1980); AFR 160-4, Medical Service Under the 1949 Geneva Conventions on Protection of War Victims (Sept. 1971); AFP 169-10, Law of Armed Conflict, Geneva Conventions, and Code of Conduct (Jan. 1987). DA Pam. 27-1, Treaties Governing Land Warfare (Dec. 1956). *See also* Army Pub. TC 27-10-1, Selected Problems in the Law of War.

Incidentally, the body of law that provides for the protection of medical personnel and medical assets derives from three principal sources: The Geneva Conventions,⁵ applicable Department of Defense and Air Force Regulations,⁶ and customary international law.⁷ The law in this area generally specifies the obligations combatants owe to those engaged in rendering medical aid to the sick and wounded, but the law also imposes certain duties upon those health care providers relative to the sick and wounded in their care.

I. PROTECTIONS AFFORDED MEDICAL PERSONNEL AND ASSETS

International law requires that "members of the armed forces who are wounded and sick shall be respected and protected in all circumstances"⁸ and that all combatants, whether friend or foe, be tended with the same medical care. These principles form the cornerstone of the Geneva Conventions and upon it rests the protections afforded to those who care for them.⁹

The logic is straightforward. Because parties to an armed conflict are obliged to search for and collect the sick and wounded and to ensure adequate medical care is given, without regard to the nationality of those in need,¹⁰ without special legal protection for those medical personnel who care for the sick and wounded, there can be no realistic protection afforded the sick and the wounded themselves. Thus, international law insists that medical personnel be "respected and protected in all circumstances." This specifically means that medical personnel and medical facilities can never be the object of intentional attack, on the battlefield or behind the lines.¹¹

The scope of legal protections afforded medical personnel is defined by the category they are assigned by the Geneva Conventions. Initially, it must be determined that the person is actually engaged in rendering "medical service." Air Force Regulation 160-4, paragraph 1d, defines "medical service" as:

- (1) seeking, collecting, transporting, treating, or sheltering wounded or sick personnel of the armed forces;
- (2) engaging in activities designed to prevent or limit the spread of disease to or among personnel of the armed forces;
- (3) administering the personnel or facilities engaged in the activities described in (1) or (2) above.

5. See Jean S. Pictet, *Commentary: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*; *Commentary: Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*; *Commentary: Geneva Convention Relative to the Treatment of Prisoners of War*; *Commentary: Relative to the Protection of Civilian Persons in Time of War*; ICRC, Geneva (1952).

6. The Air Force mandate judge advocate responsibility for law of armed conflict training in AFR 110-32. That regulation implements DOD Directive 5100.77, which established law of war training requirements for all branches of the military. See generally *supra* note 4.

7. See generally *The Paquete Habana*, 175 U.S. 677, 700 (1900); *Rose v. Himley*, 8 U.S. (4 Cranch) 241 (1808); RESTATEMENT OF THE LAW (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §§ 402-404.

8. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, Art. 12, T.I.A.S. No. 3362 [hereinafter Convention for Wounded and Sick].

9. Pictet, *Commentary: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, *supra* note 5, at 132.

10. See Art. 15, Convention for Wounded and Sick, *supra* note 8.

11. Pictet, *supra* note 5, at 220-21.

It is also important whether medical personnel are “permanently” or exclusively assigned medical duties or whether they are “auxiliary” or temporary medical personnel. The distinction bears a difference with regard to the protections afforded the particular member in question. Those “exclusively engaged,” in medical duties are to be “respected and protected in all circumstances” under international law.¹² The Geneva Conventions identify three distinct categories of medical personnel who are considered as “exclusively engaged.” The first category includes those who search for, collect, transport or provide treatment of the sick and wounded.¹³ This group includes doctors, surgeons, dentists, pharmacists, nurses, and stretcher bearers.¹⁴ The second category includes those who are staff members who are “exclusively engaged in the administration of medical units”¹⁵ and include those who provide office support, drive ambulances, cook and clean.¹⁶ The third category is self-explanatory and provides for the protection of “chaplains attached to the armed forces.”¹⁷ Permanent medical personnel in the Air Force must not be assigned duties incompatible with medical service. Otherwise, they may lose their protected status under international law.¹⁸

Members from one of the three categories above must be so designated by the wearing and display of a “distinctive emblem.”¹⁹ Western nations display the red cross on a white background as an internationally recognized symbol of the noncombative status as medical personnel. Other nations and Armed Forces use different symbols.²⁰ Air Force medical personnel must display the “distinctive emblem” by wearing a red cross on a white, water-resistant armband on the left arm. This armband must be stamped on the inside, clearly indicating it was issued by the competent military authority to which the individual medical personnel is assigned.²¹

While medical personnel are required to wear an identity disc or “dog tag” like other military members,²² medical personnel are also to carry a special water-resistant identity card that also bears the red cross or other distinctive emblem of medical service.²³ The medical identity card must be wallet or pocket sized, and must be worded in the national language of the bearer. It must contain the bearer’s first and last names, date of birth, rank, service number, and shall state the capacity under which the bearer holds the card. That is, the card should plainly state whether the holder is a member of the medical branch, support staff or chaplain.²⁴ The identity card must also contain a photograph and either the finger print or signature of the bearer.²⁵ Finally, the card must also be embossed with the official stamp or

12. Art. 12, *supra* note 8.

13. *Id.*

14. Pictet, *supra* note 5, at 218.

15. Art. 124, Convention for the Wounded and Sick, *supra* note 8.

16. Pictet, *supra* note 5, at 219.

17. Art. 24, Convention for the Wounded and Sick, *supra* note 8.

18. AFR 160-4, Medical Service under the 1949 Geneva Convention on Protection of War Victims para. 3(b) (Sept. 1991).

19. Art. 38, Convention for the Wounded and Sick, *supra* note 8. *See also* AFR 160-4, *id.* at para. 1(c).

20. *See also* Protocol I of the Geneva Conventions of 12 August 1949, ch. III, Art. 3. In place of the familiar red cross, other nations employ the red crescent, red lion and sun, or red Star of David on a white background.

21. Art. 40, Convention for the Wounded and Sick, *supra* note 8. *See also* AFR 160-4, *supra* note 18, at para. 3(d)(2).

22. Art. 40, Convention for the Wounded and Sick, *supra* note 8.

23. *Id.*

24. Pictet, *supra* note 5, at 314.

25. *Id.*

seal of the competent military authority that issued the card.²⁶ Air Force medical personnel must be issued such an identity card, which is DD Form 528. At no time should medical personnel be deprived of their armband or their identity card.²⁷ Pertinent Air Force regulations codify the distinction of "permanent medical personnel" as those members of a military force, whose country is a party to the Geneva Conventions, and who are trained in and exclusively engaged in medical service and who are identified as such while rendering medical service.²⁸

In the event a member from one of the three "exclusively engaged" categories falls into the hands of the enemy, he is to be regarded not as a prisoner of war but as one of the "retained personnel."²⁹ That means that these permanently assigned medical personnel may be retained by captor forces only so long as the medical and spiritual needs of prisoners of war dictate.³⁰ Retained medical personnel shall also be allowed periodic access to prisoners and must be given means of transportation to assist them in their medical duties.³¹ Retained medical personnel cannot be forced to perform labor outside of their medical or religious duties,³² and must be returned to their own forces as soon as the need for their services has passed and the repatriation can be effected practically and safely.³³

International law regards "auxiliary" or temporarily assigned medical personnel differently. A combatant's obligation to "protect and respect" medical personnel applies only when they actually perform medical related duties. The law recognizes that certain members may be trained for or assigned health care responsibilities on an "as-the-need-arises" basis. Those who serve as temporary orderlies, nurses, stretcher-bearers or who search for, or collect, transport or treat the sick and wounded are also entitled to immunity from combat when they are actually serving in a medical function. However, when they return to their normal, nonmedical duties, they lose their special protection.³⁴

Auxiliary medical personnel are entitled to wear a white armband with a miniature distinctive red cross or other medical emblem when they perform their medical duties.³⁵ Under international law, these personnel need not carry medical identification cards as do permanent medical personnel. However, the Air Force requires its auxiliary medical personnel to carry a DD Form 528³⁶ and military identification documents that describe with some degree of particularity the specialized medical training they have received, the temporary nature of their medical duties and their authority for wearing the armband.³⁷ Air Force regulations also provide for "auxiliary medical personnel" and define them as those members of a military force whose nation is party to the Geneva Conventions and who are actually engaged at the relevant time in providing medical service for which they

26. *Id.* at 315.

27. *Id.*

28. AFR 160-4, *supra* note 18, at para. 1(f).

29. Art. 28, Convention for the Wounded and Sick, *supra* note 8.

30. *Id.*

31. *Id.*

32. *Id.* The senior ranking medical officer who is retained by the captor force shall be responsible to the military authorities of the camp regarding the professional activities of all retained medical personnel. The senior ranking medical officer must be afforded direct access to the military and medical authorities of the camp and shall be afforded access and use of medical facilities.

33. *Id.* at Art. 30, *supra* note 8. Repatriated medical personnel must be permitted to take with them personal effects, valuables and medical instruments, which they originally had in their possession.

34. Pietet, *supra* note 5, at 222-23.

35. Art. 41, Convention for the Wounded and Sick, *supra* note 8. See also AFR 160-4 *supra* note 18, para. 4 (a), (b).

36. *Id.* at para. 4 (a), (2).

37. *Id.*

have been trained and when they are identified as such while performing those medical duties.³⁸

Unlike permanent medical personnel who are considered only “retained” personnel by a captor force, auxiliary medical personnel are properly considered prisoners of war when in the hands of the enemy.³⁹ Once in captivity, they must be employed in the medical duties for which they have been trained, but only insofar as the need actually arises.⁴⁰

Just as medical personnel are immune from intentional attack, so too are medical units and establishments to be “respected and protected” by the parties to an armed conflict. This protection applies to mobile medical units, military hospitals and even “hospital zones.”⁴¹ The burden to protect medical units is imposed both on the enemy and upon the Armed Force under whose protection the unit exists. Specifically, the military commander under whose jurisdiction a medical unit falls, must ensure that the medical unit is located in such a manner that it is protected from enemy attack.⁴²

Medical units enjoy the protected status so long as that unit is not used for any purpose harmful to the enemy.⁴³ Of course, a medical unit should display the distinctive red cross on a white background, or other recognized emblem, so that it is visible to the enemy from the air, land, or sea.⁴⁴ The red cross flag should be flown over such establishments, but only upon authority of the responsible military commander. It is also permissible that the national flag also be flown while the red cross flag is raised.⁴⁵

While a medical unit may not perform acts harmful to enemy forces, members of the unit may act in defense of themselves, their patients, or their medical supplies.⁴⁶ Accordingly, medical personnel may carry small arms and munitions for defensive purposes. Likewise, a hospital commander may post an armed sentry or picket to protect the establishment, supplies or patients within.⁴⁷ The commander may take these defensive actions and still not forfeit the immunity from attack guaranteed by international law. However, if a hospital unit violates the mandate that it not engage in offensive operations, the enemy commander is obliged to communicate a “cease and desist” order that the hospital stop its offensive operations. If the medical unit fails to comply with a request to cease offensive acts, then the enemy commander may lawfully attack after the expiration of a reasonable time, as the protections of the Geneva Conventions have been forfeited by misuse.⁴⁸

38. *Id.* at para. 1(b).

39. Art. 29, Convention for the Wounded and Sick, *supra* note 8. See also Art. 33 Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949 (T.I.A.S. No. 3364).

40. *Id.*

41. Art. 19, Convention for the Wounded and Sick, *supra* note 8. Annex 1 thereto provides a draft agreement that may be entered into by the parties to a conflict for the creation of hospital zones. Such zones are strictly defined geographic areas dedicated solely to the housing and treatment of the wounded and sick. In order to be entitled to the “respect and protection” of the parties, a hospital zone must satisfy six conditions: (a) The zone must comprise a small part of the territory governed by the party that created the zone; (b) The zone must be thinly populated in relation to the possibilities of accommodation; (c) The zone must be removed and free from all military objectives or large industrial or administrative establishments; (d) The zone must be located in an area far from areas of current or potential armed conflict; (e) Lines of communication and means of transport within the zone must not be used in any manner for the transportation of military personnel, even in transit; (f) Hospital zones shall, at no time, be defended by military means.

42. *Id.*

43. *Id.* at Art. 21.

44. *Id.* at Art. 42.

45. *Id.* See also AFR 160-4, *supra* note 18, at para. 7.

46. Pictet, *supra* note 5, at 203.

47. Art. 22, Convention for the Wounded and Sick, *supra* note 8.

48. Pictet, *supra* note 5, at 201-02.

An explanatory note to Air Force Regulation 160-4, paragraph 3 must be clearly understood, however.

The concept of self-defense and defense of the wounded and sick or of medical facilities is limited to defense against attack by other than the armed forces of the enemy who have respected the status of such persons and the facility.

Armed forces have a right under international law to capture medical personnel and facilities. Armed resistance to capture can result in loss of the protected status of the personnel and facilities involved.

Medical buildings and material which fall into enemy hands retain a protected status and the captor is required to ensure that those facilities and supplies are used exclusively for the care of the sick and wounded.⁴⁹ If, for instance, an enemy medical unit or establishment is taken by the opposing force, that unit or establishment must still be used for its humanitarian purpose so long as there are sick and wounded in need.⁵⁰ Should a commander deem it necessary to make some offensive use of the facility, he must ensure that the protective, distinctive emblems are removed and that the care of the sick and wounded is ensured elsewhere.⁵¹ If medical materials fall into enemy hands, such material may not be intentionally destroyed even if not presently usable to the captor force.⁵²

Medical transport also enjoys a protected status under the laws of warfare. Consistent with the theme that runs throughout the entire Geneva Conventions, medical transports also are to be "respected and protected."⁵³ Medical transports that fall into enemy hands are subject to the laws of war, but commanders who seize medical transports are required to ensure that the wounded and sick transported in those vehicles be afforded reasonable medical care.⁵⁴

II. PROTECTIONS AFFORDED MEDICAL AIRCRAFT

Of more relevant interest to the Air Force is the treatment afforded medical aircraft.⁵⁵ Special protections are provided to those aircraft used exclusively in the collection and transport of the sick and wounded.⁵⁶ Medical aircraft must display the distinctive, recognizable red cross emblem on a white background, together with their national colors, on the lower, upper and lateral surfaces.⁵⁷ If so marked, such aircraft are immune from attack when flying at heights, times, and routes agreed by both parties to the conflict.⁵⁸ Medical aircraft also may opt for visible light and

49. Art. 33, Convention for the Wounded and Sick, *supra* note 8.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at Art. 35.

54. *Id.*

55. See generally Waldemar A. Solf, *Protection of Medical Aircraft, Part I*, 24 UNITED STATES ARMY AVIATION DIGEST, at 15-27 (1978); *Part II*, Vol. 24, No. 5, at 33-36 (1978); *Part III*, Vol. 24, No. 6, at 26-29 (1978); *Part IV*, Vol. 24, No. 7, at 12-14.

56. *Id.*

57. Art. 36, Convention for the Wounded and Sick, *supra* note 8. See also AFR 160-4, *supra* note 18, at para. 5.

58. *Id.* at Art. 36.

radio signals to differentiate their special status.⁵⁹ The requirement of prior notification and agreement is a recognition of the technological realities of air warfare. Long-range, air-to-air offensive capability has rendered visual identification all but impossible. An opposing fighter will not wait until the otherwise innocent medical aircraft is within visual range before it opens fire. For the modern fighter pilot to wait for a positive visual identification before firing is to invite certain death.⁶⁰ Thus, modern attack aircraft cannot wait for a positive visual identification of the red cross symbol before making the decision whether or not to open fire.⁶¹ Thus, the requirement exists that belligerents notify and agree one-to-another concerning medical overflights and radio or light signals.

Once over enemy territory during an agreed overflight, a medical aircraft must, nonetheless, obey a summons to land issued by the opposing force.⁶² The opposing force enjoys the right to board and inspect the aircraft to determine if it is being

59. Edward R. Cummings, *The Juridical Status of Medical Aircraft Under the Laws of War*, 66 MIL. L. REV., 105, 119 (1974). Protocol I, Art. 6, that provides for additional means of visual identification of medical aircraft.

Article 6 - Light Signal

1. The light, consisting of a flashing blue light, is established for the use of medical aircraft to signal their identity. No other aircraft shall use this signal. The recommended blue color is obtained by using, as trichromatic co-ordinates:

green boundary $y=0.065 + 0.0805x$

white boundary $y=0.400 - x$

purple boundary $x=0.133 + 0.600y$

The recommended flashing rate of the blue light is between sixty and one-hundred flashed per minute.

Article 7 – Radio Signal

1. The radio signal shall consist of a radiotelephonic or radiotelegraphic message preceded by a distinctive priority signal to be designated and approved by a World Administrative Radio Conference of the International Telecommunication Union. It shall be transmitted three times before the call sign of the medical transport involved. This message shall be transmitted in English at appropriate intervals on a frequency agreed by the parties. The use of the priority signal shall be restricted exclusively to medical units and transports.

2. The radio message preceded by the distinctive priority signal...shall convey the following data:

(a) call sign of the medical transport; (b) position of the medical transport; (c) number and type of medical transports; (d) intended route; (e) estimated time en route and of departure and arrival, as appropriate (f) any other information such as flight altitude, radio frequencies guarded, languages and secondary surveillance and codes.

60. *Id.* at 120.

61. *Protection of Ambulance Helicopters*, IRRC, 400 at 403 (July 1971).

62. Cummings, *supra* note 59, at 121. See also Protocol I, Art. 30 which prescribes the method of inspecting a landed medical aircraft in enemy territory.

If the inspection discloses that the aircraft:

(a) is a medical aircraft.

(b) is not in violation of those provisions of the Geneva Conventions which prohibit medical aircraft from performing acts harmful to the enemy

(c) has not flown without or in breach of a prior agreement where such agreement is required

The aircraft and those occupants who belong to the adverse party...shall be authorized to continue its flight without delay. But if the inspection reveals that the aircraft is in violation of any of these requirements, the aircraft may be seized. Its occupants shall be treated in conformity with the Geneva Conventions. But any aircraft seized which had been assigned as a permanent medical aircraft may be used thereafter only as a medical aircraft.

See also AFR 160-4, *supra* note 18, at para. 5 (b).

operated in a manner consistent with its humanitarian purpose. The opposing force must expedite its inspection and allow the aircraft to proceed.⁶³ If, however, the enemy force discovers that the medical flight was used for offensive or harmful acts, then the aircraft may be seized and its crew taken prisoner.⁶⁴ Otherwise, "no-notice" medical flights over enemy-held territory are not permitted. In fact, flights over enemy territory without prior approval **are** expressly prohibited.⁶⁵ So, if an overflight is one that has not been previously agreed by the belligerents, the aircraft may be lawfully attacked or forced to land and its flightcrew, and the sick and wounded can be taken as prisoners of war.⁶⁶ The captor force must still ensure the continued care and protection of any sick and wounded on board. Medical personnel must be treated in a manner consistent with their status as "retained personnel" and repatriated as soon as there are no pressing medical reasons to retain them amidst their own national forces.⁶⁷ The capturing force may keep the aircraft as a prize of war, but must not use it in a manner inconsistent with its medical markings. The aircraft may be stripped of its distinctive medical markings and employed in any manner consistent with the law of war.⁶⁸

It is crucial to note that any medical aircraft, which during an overflight of enemy territory (whether that flight has been agreed upon or not), may **be fired** upon if a 69/ summons-to-land is issued and ignored.⁶⁹ In the event a medical aircraft flies over enemy-held territory without prior agreement, or in violation of a prior agreement (either through navigational error or mechanical difficulty) the crew must make efforts to identify itself and inform the enemy of its circumstances.⁷⁰ Once the enemy power is "on notice" of those circumstances, it must give the aircraft a reasonable opportunity to land, or to take measures to safeguard its own interests, before resorting to an attack against the medical flight.⁷¹

The Geneva Conventions also provide for medical flights over neutral or noncombatant nations. Belligerent nations may fly medical relief flights in neutral airspace, provided that notice is given to the neutral power of the intended overflight.⁷² The neutral power, however, is granted the right to order the aircraft to land and submit to inspection.⁷³ Otherwise, a medical flight may proceed along routes, at heights and at times specifically agreed upon between the combatants and the neutral power.⁷⁴

III. DUTIES OWED BY MEDICAL PERSONNEL

Medical personnel owe numerous and, significant obligations to the wounded and sick, military or civilian, under international law. The guiding principles which apply to the variety of specific duties were set forth in the Hague Convention of 1907, which stated "prisoners of war must be treated humanely," and "the

63. Cummings, *supra* note 59, at 121.

64. *Id.* at 122.

65. *Id.* at 120.

66. *Id.* at 121.

67. Pictet, *supra* note 5, at 282.

68. Cummings, *supra* note 59, at 121. *See also* Pictet, *supra* note 5, at 292.

69. Protocol I, Art. 27.

70. *Id.*

71. *Id.*

72. Art. 37, Convention for the Wounded and Sick, *supra* note 8.

73. Pictet, *supra* note 5, at 295.

74. Art. 37, Convention for the Wounded and Sick, *supra* note 8.

government into whose hands prisoners of war have fallen is charged with their maintenance.”⁷⁵

Article 3,⁷⁶ common to all four of the Geneva Conventions, elaborates on this theme and provides that those persons who do not take an active part in hostilities or who, by reason of wounds, sickness, or any other cause, are “out of combat” must be treated humanely in all circumstances.⁷⁷ Although Article 3 applies to conflicts not of an international character, its provisions require basic, humane treatment to all persons “without any adverse distinction founded on race, color, religion, faith, sex, birth, or wealth or any other similar criteria.”⁷⁸ Medical personnel are charged, at least, with an obligation to collect and care for the wounded and sick.⁷⁹

Given the unique position of medical personnel, perhaps a moral obligation is imposed upon them by the Geneva Conventions to monitor and prevent “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture.”⁸⁰ Medical personnel need to be aware of the specific prohibition that “no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest.”⁸¹ Any such atrocity is considered a “grave breach” of the Geneva Conventions⁸² and as such, may be prosecuted as a war crime.

The same prohibition against torture or cruel or inhumane treatment is specified for armed conflicts of an international nature.⁸³ Consistent with the theme that all sick and wounded are to be cared for and respected is the requirement that “only urgent medical reasons will authorize priority in the order of treatment” of patients.⁸⁴ In other words, decisions regarding order of treatment must not be based upon nationality or armed service. Rather, the sole consideration must be medical need. This means that enemy prisoners are to be treated in the same manner as are friendly forces who are in need of medical attention.⁸⁵

While the Geneva Conventions require that treatment not be denied on the basis of “sex, race, nationality” etc., special provision is made in the treaty that “women, regardless whether military or civilian, friend or foe, shall be treated with all consideration due to their sex,”⁸⁶ and “shall in all cases benefit by treatment as favorable as that granted to men.”⁸⁷ From a medical perspective, this means that there be made available personnel and resources to handle the particular needs of women prisoners or civilians.

As was discussed above, authorized medical personnel are duty bound to display certain recognizable, distinctive emblems of their unique service. This is a rule of

75. Art. 4, 7, Hague Convention No. IV, Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, DA Pam. 27-1 at 8.

76. See generally Convention for the Wounded and Sick, *supra* note 8; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949 (T.I.A.S. No. 3363); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949 (T.I.A.S. No. 3365).

77. Art. 3, Convention for the Wounded and Sick, *supra* note 8.

78. *Id.* See also AFR 160-4, *supra* note 18, at para. 9.

79. *Id.*

80. Pictet, *supra* note 5 at 39-40. A fair reading of Pictet suggests the “medical” outrages of the Nazi concentration camps as the basis for a “moral obligation.”

81. Art. 13, Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 39.

82. Art. 50, Convention for the Wounded and Sick, *supra* note 8.

83. *Id.* at Art. 12.

84. *Id.* See also AFR 160-4, *supra* note 18, at para. 9.

85. Pictet, *supra* note 5, at 139-40.

86. Art. 12, Convention for the Wounded and Sick, *supra* note 8. See also Pictet, *supra* note 5, at 146-148.

87. Art. 14, Convention Relative to the Treatment of Prisoners of War, *supra* note 39.

practicality, since medical personnel are obliged to search for, collect and transport the sick and injured and to ensure their medical needs are met.⁸⁸ Recognizable emblems, such as the red cross, are one means of ensuring humanitarian efforts are not interrupted by gunfire and that medical personnel are not unnecessarily exposed to danger.⁸⁹

After the sick and wounded and dead are collected, medical personnel must assist in the collection and preservation of certain personal data. That data includes the wounded person's nationality, service number, surname, first name date of birth, date and place of capture and particulars concerning that person's wounds, illness, or death.⁹⁰

The Geneva Conventions also impose upon medical personnel certain obligations relative to the day-to-day living conditions afforded enemy prisoners of war. Prisoners must be interned only on land which assures "every guarantee of hygiene and healthfulness."⁹¹ That means prisoners should not be kept in areas where they are likely to be exposed to an unreasonable risk of disease or injury, on account of insects, animals, weather, or geographic locale.⁹² Medical personnel of the detaining force should, therefore, insist on a voice in all decisions relative to the placement of prisoner internment facilities. Likewise, medical personnel should review billeting facilities and bedding and blanket accommodations in order to ensure prisoners have a warm, dry place to sleep and that men and women are segregated in their living facilities.⁹³ Decisions whether living accommodations are suitable are subjective ones, but must be made by doctors,⁹⁴ and those facilities must be periodically visited by those physicians to ensure quarters are not prejudicial to those housed in them.⁹⁵

Medical personnel should also be involved in matters concerning prisoner's dietary needs. The law requires that daily food rations be of sufficient "quantity, quality and variety to keep prisoners in good health and to prevent weight loss or the development of nutritional deficiencies."⁹⁶

Prisoner internment facilities must be equipped with sufficient toilet and shower facilities, for men and women, and must be constructed in such a way to ensure "cleanliness and healthfulness" and to "prevent epidemics."⁹⁷ There also must be provided an infirmary or other medical facilities where prisoners of war can receive adequate medical attention.⁹⁸ Medical facilities must also be equipped with isolation wards to segregate prisoners with contagious or mental diseases.⁹⁹

Medical personnel are obliged to ensure a level of health among enemy prisoners of war by conducting monthly medical examinations of those prisoners.¹⁰⁰ International law requires that medical personnel make efforts to detect contagious disease, especially tuberculosis, malaria, and venereal disease.¹⁰¹ Each prisoner also

88. Art. 15, Convention for the Wounded and Sick, *supra* note 8.

89. *See generally* Pictet *supra* note 5, at 150-53.

90. Art. 16, Convention for the Wounded and Sick, *supra* note 8.

91. Art. 22, Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 39.

92. Pictet, *supra* note 5, at 182-83.

93. Art 25, Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 39.

94. Pictet, *supra* note 5, at 193.

95. *Id.*

96. Art. 26, Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 39.

97. *Id.* at Art. 29.

98. *Id.* at Art. 30.

99. *Id.*

100. *Id.* at Art. 31.

101. *Id.*

should be weighed and that weight recorded to ensure against weight loss during captivity.¹⁰²

Prisoners of war may be forced to perform certain types of labor while in captivity,¹⁰³ but medical officials must ensure that those prisoners be provided "suitable working conditions."¹⁰⁴ Medical personnel, therefore, should review prisoners' food, clothing, living facilities, equipment, and working conditions including hours worked per day and rest periods. The law also provides that prisoners may not be employed in any labor that is unhealthy or dangerous, unless that prisoner has volunteered to do so.¹⁰⁵ However, from a policy standpoint, it is inadvisable that prisoners be allowed to volunteer for that which medical personnel believe to be inherently unsafe. In this, and other requirements of international law, medical personnel may find themselves serving as the "moral conscience" of command.

As indicated above, medical personnel must perform monthly medical examinations of all prisoners. But physicians must also conduct monthly medical examinations of those prisoners who perform forced labor to determine whether those prisoners are fit.¹⁰⁶ If a physician or surgeon is of the opinion that a prisoner ought not perform labor, then that prisoner should be exempted from those duties.¹⁰⁷

If, during the course of the required medical examinations, physicians discover that enemy prisoners suffer from a variety of grave ailments, then those prisoners must be repatriated as soon as possible.¹⁰⁸ The law requires that these prisoners must be repatriated directly to their home nations or forces:

- (1) The incurably wounded and sick whose mental or physical fitness seems to have been gravely diminished;
- (2) The wounded and sick who, according to medical opinion, are not likely to recover within one year, whose condition requires treatment and whose mental or physical fitness seems to have been gravely diminished;
- (3) The wounded and sick who have recovered, but whose mental or physical fitness seems to have been gravely and permanently diminished.¹⁰⁹

Air Force Regulation 160-4 requires commanders to ensure that all medical personnel, and all appropriate nonmedical personnel are instructed in the law of armed conflict as it applies to them.¹¹⁰ Accordingly, the staff judge advocate, or an attorney in the base legal office, is tasked with teaching the law of armed conflict to medical personnel.

102. *Id.*

103. *Id.* at Arts. 49, 50.

104. *Id.* at Arts. 51, 53.

105. *Id.* at Art. 52.

106. *Id.* at Art. 55.

107. *Id.* See also Article 68, *id.*, which provides that a prisoner of war may be entitled to make a claim for compensation for injury or disability arising from his forced labor. Because such claims may be raised, medical personnel are advised to keep accurate records of the results of monthly medical examinations.

108. *Id.* at Art. 109.

109. *Id.* at Art. 110.

110. AFR 160-4, *supra* note 18, at para. 10.

IV. A SUGGESTED APPROACH TO TEACHING THE LAW OF ARMED CONFLICT

The following is a suggested step-by-step approach to a successful law of armed conflict teaching program.¹¹¹

STEP 1: Be prepared. Read and become familiar with key sources of the law. Footnote four contains a list of references your medical law of armed conflict library should contain.

STEP 2: Create a deskbook. Obtain one or two large, three-ring binders to hold your medical law of armed conflict materials, plus crossfeed information, briefings, and correspondence.

STEP 3: Learn from others. Visit the wing inspector's office (CVI) and get copies of inspection reports from medical law of armed conflict inspections of other units. Profit from the mistakes of others. Find out what worked and what did not work at other wings.

STEP 4: Solicit crossfeed information. Make contact with your counterpart at the various levels of your chain of command, including : major command, numbered air force, and other wing.

STEP 5: Prepare a marketing strategy. By now you have gathered a sufficient quantity of academic information—but you need to consider how to present the information in an interesting, appealing manner. You need not feel tied to the standard military briefing format. Remember your audience, too. Tailor your presentation to medical personnel. Toward that end, Air Force Pamphlet (AFP) 169-10, Attachment 1 (5 January 1987), contains a teaching outline of the essential law of armed conflict basics that should be presented to medical and nonmedical personnel. Another idea is to create "real world" scenarios for use in your hospital's Continuing Medical Readiness Training. Use other judge advocates as "role players" in the field in presenting legal issues for resolution. Also, consider a multimedia approach. Elements of the spoken word, graphics, and video make an effective presentation. Obtain USAF Film 38646, Geneva Conventions and Medical Personnel, from your audio/visual detachment. Base supply might have poster-board and ink products so you can create "self-help" graphics. You might consider reproducing the internationally recognized symbols for medical personnel and other protected places contained in AFP 110-34. In sum, you are only limited by your imagination!

STEP 6: Schedule your briefings. Contact the hospital commander or first sergeant and find out when the next commander's call or readiness training exercise occurs. Get you medical law of armed conflict program on the agenda.

STEP 7: Practice what you preach. In addition to briefings to medical personnel, find ways to put your program into action during wing exercises. Coordination between the wing commander, staff judge advocate, hospital commander, and wing inspector is a must. Enlist judge advocates from the legal office or area defense counsel's office to "role play." Build violations of the law into the exercise script, together with all the other taskings created by the CVI staff. Include issues such as "misuse of the red cross," "injured enemy pilot," "raid on a medical facility," etc. Monitor to see if medical personnel recognize and report violations. Also consider "spot testing" of medical personnel with short, written tests in the field. These are

¹¹¹ Charles J. Dunlap & Bruce T. Smith, *Establishing a Winning LOAC Program*, THE REPORTER, at 3 (Mar. 1990).

excellent feedback tools to help you determine if your briefings are getting through to your audience.

STEP 8: Keep important players in the loop. Create a law of armed conflict deskbook for use in the wing command post or battle staff. At the very least, this deskbook should include talking papers on medical law of armed conflict issues, reporting requirements, and key telephone numbers. The on-duty judge advocate assigned to the command post or battle staff must be armed with the medical law of armed conflict deskbook you created in step 2.

STEP 9: Record and evaluate. Make sure you note all medical law briefings and exercises in your deskbook. Also, note your test results to see if your presentations are getting through. Alter your teaching methods accordingly.

V. CONCLUSION

Air Force medical personnel and their war-time responsibilities are focal points of international law. As the Gulf War illustrated, Air Force personnel must be well-prepared and knowledgeable of the requirements of law before deployment. Therefore, it is incumbent upon Air Force lawyers to assist in training medical personnel in the law of armed conflict. The training which lawyers provide, then, must be on-going, thorough, and creative.

Air Force Enemy Prisoner of War Operations

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I. INTRODUCTION

In Operation Desert Storm, the U.S. Army and Marine Corps forces captured 62,456 enemy prisoners of war (EPWs);¹ the U.S. Air Force captured none.² This experience may lead Air Force commanders and judge advocates to assume that they need not concern themselves with the obligations of a detaining power under the Geneva Conventions. This conclusion is both imprudent and potentially very harmful to the ability of the United States to conduct effective military operations in the future, especially where support of the American public and favorable world opinion are critical. The mishandling of a single EPW by the American forces during the Gulf War would have presented Saddam Hussein and his supporters with a major propaganda tool to use against the United States. In turn, support could have eroded both at home and abroad for the U.S.-led effort and, worse, strengthened the resolve of Iraqi soldiers to fight rather than surrender and be mistreated.

Without doubt, Operation Desert Storm is the model upon which operational and logistical planning for future military operations will be based. The Gulf War, however, was not a representative conflict from an air base defense perspective. The two principal threats to American air bases did not emerge during the war: attack from the air by enemy combat aircraft and infiltration on the ground by enemy special operations forces. If either of these threats had materialized, Air Force commanders, judge advocates, security police, medical personnel, intelligence personnel, special investigators, and services personnel would have been called upon to act promptly to receive and process EPWs. Failure to respond properly might have denied the United States critical moral and legal leverage in dealing with an enemy holding American airmen as prisoners of war (POWs).

What follows is an overview of the historical development of international law vis-a-vis EPW operations, a synopsis of the relevant conventional and customary law of armed conflict (LOAC),³ an abstract of Departments of Defense (DOD)

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1. Within the Department of Defense, the acronym EPW (enemy prisoner of war) refers to an enemy belligerent entitled to prisoner of war status and held by the United States or other coalition partner's forces. In contrast, the acronym POW (prisoner of war) refers to a member of the Armed Forces of the United States or of a coalition partner held by the enemy.

2. DEPARTMENT OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS L-2 (1992) [hereinafter DODD FINAL REPORT].

3. The law of armed conflict is the phrase adopted by both the U.S. Air Force and Navy in their respective doctrinal publications to describe the body of conventional and customary international humanitarian law governing armed conflict. Both the U.S. Army and Marine Corps prefer the phrase law of war; this term is used in the Manual for Courts-Martial. See MANUAL FOR COURTS-MARTIAL, R.C.M. 201(f)(1)(B). Regardless of how characterized, this body of law becomes binding on all U.S. forces upon the initiation of armed conflict. DEPARTMENT OF DEFENSE DIRECTIVE 5100.77, DOD LAW OF WAR PROGRAM ¶ E.1.a. (1977) [hereinafter DODD 5100.77].

and Air Force EPW policy directives, and a suggested approach to establishing a credible training program for wing-level EPW operations. No novel legal theories are discussed or advocated here; the purpose is diametric. This article will provide the practicing judge advocate with a primer on Air Force EPW operations to be used and dog-eared in Air Force legal offices around the world.

II. DEVELOPMENT OF THE MODERN HUMANITARIAN LAW OF ARMED CONFLICT RELATIVE TO PRISONERS OF WAR

One foundation for the modern international system of juridical norms that govern the conduct of armed conflict is found in the work of the seventeenth century Dutch jurist, Hugo Grotius. In his classic treatise, *De Jure Belli Ac Pacis*,⁴ Grotius called for a systematic and comprehensive body of international law governing armed conflict. Even so, humane treatment of prisoners of war was not emphasized in the practice of western nations until the second half of the nineteenth century.⁵

The United States is recognized internationally as a pioneer in the application of humanitarian principles to warfare. Over 125 years ago in 1863, the U.S. Army adopted a formal code on the law of armed conflict—the Lieber Instructions.⁶ Out of the 157 articles, 48 were concerned with prisoners of war.⁷ Although developed for domestic application to an internal conflict, the Lieber Instructions, nonetheless, served as a model for rules later developed to regulate international armed conflict as will be discussed shortly.

Contemporaneously, Swiss philanthropist Henri Dunant was working in Europe to convene an international conference to develop rules regulating the protection of the wounded and sick in war. Dunant, so horrified by the carnage and tremendous suffering he had observed on the battlefield at Solferino⁸ in 1859, dedicated the remainder of his life to seeking protection for persons *hors de combat* (out of combat). His efforts resulted in the Geneva Conference of 1863⁹ that, in turn, led to the founding of the International Committee of the Red Cross (ICRC).¹⁰ Although the ICRC's work initially focused on protection

provides "[t]he Armed Forces of the United States shall comply with the law of war in the conduct of military operations and related activities in armed conflict, however such conflicts are characterized."

4. HUGO GROTIUS, *ON THE LAW OF WAR AND PEACE* (F.W. Kelsey trans. 1925) (1625).

5. See generally OPPENHEIM'S *INTERNATIONAL LAW* 367-96 (H. Lauterpact ed. 1952).

6. Instructions for the Government of Armies of the United States in the Field, General Order 100, Apr. 24, 1863 [hereinafter General Order 100]. General Order 100 is based on *A CODE FOR THE GOVERNMENT OF ARMIES IN THE FIELD/ AS AUTHORIZED BY THE LAWS AND USAGES OF WAR ON LAND* written by Francis Lieber (1798-1872), a German immigrant educator and political philosopher. See generally RICHARD S. HARTIGAN, *LIEBER'S CODE AND THE LAW OF WAR* (1983); DIETRICH SCHINDLER & JIRI TOMAN, *THE LAWS OF ARMED CONFLICTS* 3-23 (1981) [hereinafter SCHINDLER & TOMAN].

7. General Order 100, *supra* note 6, arts. 48-80, 119-133.

8. See generally HENRI DUNANT, *A MEMORY OF SOLFERINO* (International Committee of the Red Cross ed. 1986) (1862). At Solferino in northern Italy, 138,000 French and Sardinian troops under the command of Napoleon III stormed the heights above the plains of Lombardy defended by 129,000 Austrians under the command of Emperor Franz Joseph. Following the battle, some 38,000 dead and dying men were left on the battlefield.

9. SCHINDLER & TOMAN, *supra* note 6, at 209-11. The 1863 Conference was the catalyst for developing the humanitarian aspects of the laws of war in the Geneva Conventions of 1864, 1906, 1929, and 1949.

10. INTERNATIONAL COMMITTEE OF THE RED CROSS, *III COMMENTARY ON THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR* 3 (III Pictet ed., 1960) [hereinafter III Pictet].

of wounded and sick combatants, Dunant and his Red Cross movement also encouraged humanitarian treatment of prisoners of war. In 1870, the ICRC authorized the establishment of an information bureau for prisoners of war at Basel, Switzerland. Later, the Geneva Conventions of 1929 and of 1949 also included articles providing for the information bureau.¹¹

Other efforts at codifying the law of armed conflict included the Brussels Conference of 1874 that resulted in a Declaration¹² and the publication of a set of rules in 1880 in the *Oxford Manual*¹³ by the International Law Institute. The first codification of international humanitarian law regarding prisoners of war is found in the Regulations annexed to the Second Hague Peace Conference, Convention (IV) Respecting the Laws and Customs of War on Land (Hague Regulations).¹⁴ Convention (IV) was modeled on the principles of the Lieber Instructions, the Brussels Declaration, and the *Oxford Manual*. The Convention was a comprehensive multilateral agreement on the laws and customs of war.

Put to their first test during World War I, the Hague Regulations were found by practically all of the belligerents to lack sufficient detail on matters concerning prisoners of war.¹⁵ Consequently, opposing states-parties found it necessary to sign temporary agreements among themselves to resolve disputed points.¹⁶ Because of the perceived or actual shortcomings of the prisoner of war articles contained in the Hague Regulations, a post-war effort was undertaken by several nations to develop a separate convention concerning the care and treatment of prisoners of war. Internationally, experts from several nations worked together to produce a draft to be presented to a 1929 Diplomatic Conference sponsored by the ICRC at Geneva. The draft was accepted and became the 1929 Geneva Prisoner of War Convention,¹⁷ also known as the Prisoner of War Code.¹⁸ In order to ensure that the new convention was not seen as abridging rights granted POWs under the Hague Regulations, the 1929

11. III Pictet, *supra* note 10, at 572-601; SCHINDLER & TOMAN, *supra* note 6, at 289-90, 404-06. Articles 77 to 80 provided for the Bureau in the Geneva Convention Relative to the Treatment of Prisoners in War of 1929 while articles 122 to 125 provided for the Bureau in the Geneva Convention (III) Relative to the Treatment of Prisoners of War of 1949.

12. SCHINDLER & TOMAN, *supra* note 6, at 25-34 (1981); I, THE LAW OF WAR 194-203 (1972); P. BORDWELL, LAW OF WAR 101-16 (1908). In 1874, an international conference called by the Tsar of Russia convened at Brussels and made the first attempt by governments to codify the law of armed conflict. While the Declaration of the Brussels Conference never came into effect as an international convention, it, nevertheless, had considerable influence on later successful efforts to codify the law of armed conflict. Because it represented a consensus of the position of the major powers, the Brussels Declaration was generally viewed as an authoritative statement of the prevailing customary law of armed conflict. Articles 9-11 and 23-24 dealt with prisoners of war. SCHINDLER & TOMAN, *supra* note 6, at 25-34. During the Russo-Turkish War (1877-78), the Tsar ordered his troops to comply with these provisions. See generally LEVIE, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT 8, A. 32 (1978) [hereinafter LEVIE].

13. INTERNATIONAL LAW INSTITUTE, MANUAL OF THE LAWS AND CUSTOMS OF WAR (1880); SCHINDLER & TOMAN, *supra* note 6, at 35-48. Articles 21-23 and 61-78 dealt with prisoners of war.

14. Second Hague Peace Conference, Convention (IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, October 18, 1907, [1910], 36 Stat. 2277. Articles 4-20 of the Annexed Regulations were concerned with prisoners of war. See generally SCHINDLER & TOMAN, *supra* note 6, at 57-92 comparing the First Hague Peace Conference of 1899, Convention (II) with Respect to the Laws and Customs of War on Land with the Second Hague Peace Conference of 1907, Convention (IV) Respecting the Laws and Customs of War on Land; THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907 (J.Scott, ed. 1915); W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV., 8-23 (1990).

15. LEVIE, *supra* note 12, at 9. See also ARMY PAMPHLET 27-161-2, INTERNATIONAL LAW [VOL. II] 71, 8 (1962).

16. LEVIE, *supra* note 12, at 9.

17. The Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, (1932).

18. III Pictet, *supra* note 10, at 5.

Convention noted that it augmented the 1907 Hague Regulations and did not supersede them.¹⁹

The 1929 Geneva POW Convention was applied by its states-parties throughout World War II. With few exceptions, soldiers, sailors, airmen, and marines of one state party to the Prisoner of War Code were treated reasonably well by a detaining power if it were also a state-party to the Geneva POW Convention. It was evident that the states-parties involved in that conflict were not unmindful of their obligations under the 1929 Convention²⁰ and implemented its provisions as interpreted by the particular detaining power. Even so, lessons learned as a result of experiences during World War II dictated the need to revise the Prisoner of War Code. For example, matters, on which guidance was viewed as inadequate, included repatriation, prisoner labor, camp management, and camp discipline.²¹

The ICRC, after meeting with national Red Cross societies and government experts, prepared complete texts of four new humanitarian law conventions, one of which was a greatly expanded Prisoner of War Code. The texts were adopted with certain amendments by the 1948 International Red Cross Conference at Stockholm and comprised the single working document of the 1949 Diplomatic Conference convened by the Swiss Government at Geneva that, in turn, produced the four 1949 Geneva Conventions.²²

The Geneva Convention (III) relative to the Treatment of Prisoners of War of 1949 (GPW)²³ along with the Hague Regulations and applicable customary international law constitute the body of international law that presently governs U.S. forces in armed conflict. The conventions, as treaties confirmed by the Senate, are constitutionally incorporated into our national law.²⁴ By Supreme Court decision, the customary international law of armed conflict is likewise binding on the U.S. forces.²⁵ Moreover, as a matter of national policy, U.S. forces are bound by the international law of armed conflict even in international armed conflicts in which the enemy may not be a state-party to the conventions²⁶ as evidenced by U.S. practice in Korea and Vietnam.

19. *Id.*

20. Notably, neither Japan nor the Soviet Union were states-parties to the 1929 Geneva POW Convention. For Japan, the concept of a prisoner of war was alien to a Japanese military tradition that viewed surrender as dishonor. In Germany, the treatment afforded Russian prisoners was generally less humane than that afforded American and British POWs. See generally MORRIS GREENSPAN, *MODERN LAW OF LAND WARFARE* 95-153 (1959).

21. III Pictet, *supra* note 10, at 5-6.

22. Convention (I) for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) Relative to the Treatment of Prisoners of War; and Convention (IV) Relative to the Protection of Civilian Persons in Time of War.

23. Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1956], 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW]. This convention is often referred to as the Third Geneva Convention or simply the Third Convention, i.e., the name comes from the order of signature among the four Geneva Conventions of 1949.

24. U.S. CONST. art. VI, § 2.

25. International law is a part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat.

The Paquette Habana, 175 U.S. 677, 700 (1900).

26. DODD 5100.77, *supra* note 3, ¶¶ D.1., E.1.a.; AIR FORCE PAMPHLET 110-31, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS (Nov. 1976) [hereinafter AF PAMP. 110-31].

A further effort to expand humanitarian principles during armed conflict resulted in Protocol I²⁷ in 1977. The United States has declined to ratify Protocol I, however. The American view is that the convention is "fundamentally and irreconcilably flawed."²⁸ Among other concerns, the United States objects to a provision that arguably extends prisoner of war status to some classes of "terrorists."²⁹

III. THE ROLE OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS

The ICRC is an international nongovernmental organization based in Geneva³⁰ that traditionally has sought to ensure the care and protection of prisoners of war. In recognition of the ICRC's extraordinary role, the drafters of the GPW preserved the ICRC's special status with the following language:

The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of prisoners of war and for their relief.³¹

Among its prerogatives, the ICRC has the right to inspect transfer points and places where EPWs are interned.³² And, while each belligerent has the right to nominate a neutral State to act as a protecting power on behalf of its servicemen and women held by an enemy power, the ICRC may be asked to take on this role.³³ Additionally, the ICRC may handle relief shipments to EPWs³⁴ and receive communications from EPW representatives.³⁵

While the ICRC must deal with all parties to a conflict impartially, its representatives are approachable and respect the United States as a leading advocate of humanitarian law in armed conflict. During Operations Desert Shield and Desert Storm, U.S. Central Command (USCENTCOM or CENTCOM) maintained close and effective liaison with the ICRC representative for the Arabian Peninsula,³⁶ a fact that contributed to the ICRC's conclusion at the war's end

27. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, (Protocol I), June 8, 1977, 16 I.L.M. 1391 (1977), U.N. Doc. A/32/144, Annex I (1977), reprinted in A.F. PAMPHLET 110-20, SELECTED INTERNATIONAL AGREEMENTS 3-127 (1981).

28. Letter of Transmittal from President Ronald Reagan, Protocol II Additional to the 1949 Geneva Conventions, and relating to the Protection of Victims of Noninternational Armed Conflicts, S. Treaty Doc. No. 2, 100th Cong., 1st Sess., at III (1987) reprinted in 81 AM. J. INT'L L. 910. The rejection of Protocol I was incorporated into the Presidential document seeking the advice and consent of the Senate to the ratification of Protocol II.

29. *Id.* The term terrorist is a political rather than a legal term. See LILICH, TRANSNATIONAL TERRORISM: CONVENTIONS AND COMMENTARY xiii, n.1 (1982) ("we have cause to regret that the legal concept of 'terrorism' was ever inflicted upon us. The term is imprecise; it is ambiguous; and, above all, it serves no operative legal purpose.")

30. Only Swiss citizens may be ICRC delegates; they are identified by their Swiss passports and ICRC credentials.

31. GPW, *supra* note 23, art. 9.

32. *Id.* arts. 56 (3), 126 (4).

33. *Id.* art. 10 (3).

34. *Id.* arts. 72 (3), 73 (3), and 75 (1) (2).

35. *Id.* arts. 97 (1), 81(4).

36. Mr. Arnold Leuthold.

that "[t]he treatment of Iraqi prisoners of war by US forces was the best compliance with the Geneva Convention by any nation in any conflict in history."³⁷

In the event that an ICRC delegation appears at an operating base to inspect EPW holding facilities or to perform other duties, commanders and their servicing judge advocates must be prepared to provide the ICRC with a liaison officer (normally a judge advocate),³⁸ billeting, messing, and a facility from which to conduct its activities. Consequently, unit operational plans (OPans) should provide that the servicing judge advocate will be immediately contacted whenever a person purporting to be an ICRC delegate presents himself at the operating base or otherwise communicates with the organization. Additionally, any such contact should promptly be reported to higher headquarters in the unit's next regular situation report (SITREP) in order to keep superiors in the chain of command apprised of ICRC activities among the U.S. forces and to permit them to react promptly should corrective action be required.

IV. DEPARTMENT OF DEFENSE POLICY ON EPWS

Department of Defense policy on the treatment of EPWs is promulgated in DOD Directive 5100.69.³⁹ The stated policy provides that "[t]he Armed Forces of the United States will comply with the Geneva Conventions which govern the treatment and accountability of EPW and other detained person."⁴⁰

The directive also designates the Department of the Army as DOD executive agent for EPW matters:

The Secretary of the Army is designated as the Executive Agent for the Department of Defense for the administration of the DOD EPW/Detainee Program. In this capacity, [the Secretary] will act for the Department of Defense in the planning, policy development and necessary coordination for the operation of a program for those personnel captured or detained by the Armed Forces of the United States and those personnel transferred to the custody of the United States.⁴¹

37 DOD FINAL REPORT, *supra* note 2, at L-1.

38. Usually the person will be the Chief of Operational Law.

39. DEPARTMENT OF DEFENSE DIRECTIVE 5100.69, DOD PROGRAM FOR PRISONERS OF WAR AND OTHER DETAINEES (1972) [hereinafter DODD 5100.69]. A September 1991 draft revises DODD 5100.69, but it had not been implemented as of late 1993. The major difference between the two versions is recognition of the role and authority of the unified combatant commander under the Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 1005 (1986).

40. DODD 5100.69, *supra* note 39 ¶ IV.A. The 1991 revision reads: "The Armed Forces of the United States will comply with the principles, spirit, and intent of the laws of [armed conflict], both customary and codified, to include the Geneva Conventions, as set forth in DOD Directive 5100.77."

41. DODD 5100.69, *supra* note 39, ¶ V.B. The term "detainee" includes civilian internees (CIs) detained under article 42 of the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 31. This convention is referred to as the Fourth Geneva Convention or simply the Fourth Convention, which refers to the order of signature among the four Geneva Conventions of 1949.

The First Geneva Convention or First Convention lists retained persons as another class of persons to be considered. This class is composed of medical and religious personnel retained in custody under Article 28 of the Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GWS]. Retained persons are neither EPWs nor CIs, but rather are retained only if needed to administer to the religious and medical needs of EPWs. Otherwise, these persons must be repatriated. See *id.* art. 28.

The Army's responsibilities vis-a-vis EPW/Detainees include:

- a. developing and providing policy guidance for the treatment, care, accountability, legal status and administrative procedures to be followed pertaining to the capture, detention, and release, transfer or other disposition of personnel;⁴²
- b. providing for an EPW/CI camp liaison and assistance program upon the transfer of EPW or CI captured or detained;⁴³
- c. operating a U.S. Prisoner of War/Civilian Information Center and branches upon the outbreak of an armed conflict as required by the 1949 Geneva Convention;⁴⁴ and
- d. providing appropriate reports to other government agencies and the ICRC.⁴⁵

The DOD General Counsel Office is assigned to provide legal guidance within DOD on the DOD Enemy PW/Detainee Program. The Office is to review plans and policies developed in connection with the program and to coordinate special legislative proposals and other legal matters with other Federal agencies.⁴⁶ The Chairman of the Joint Chiefs of Staff reviews and updates the plans, policies and programs of commanders of unified and specified commands to ensure compliance with the policies and procedures in the Directive.⁴⁷

V. THE AIR FORCE EPW/DETAINEE PROGRAM

The responsibilities of the U.S. Air Force in the implementation of the DOD EPW/Detainee Program include:

- a. investigating, reporting, and monitoring alleged violations;⁴⁸

The 1991 revision to DODD 5100.69 reads:

The Secretary of the Army is designated as the Executive Agent for the Department of Defense for the administration of the DOD EPW/Detainee Program. In this capacity, the Secretary of the Army will act on behalf of the Department of Defense in the administration of the EPW/Detainee Program.

42. DODD 5100.69, *supra* note 38, ¶ V.B.1. The 1991 revision includes developing and providing policy and planning guidance on the treatment, care, accountability, legal status, and administrative procedures pertaining to EPWs/Detainees.

43. *Id.* ¶ V.B. 3. The 1991 revision provides for liaison with States that have agreed to accept EPW/Detainees from U.S. control.

44. *Id.* ¶ V.B. 6. Upon the outbreak of conflict, detaining powers are required to establish a national information bureau on prisoners of war in their power. The United States' prisoner of war information bureau is administered by the Army and uses state-of-the-art computerized data system. The 1991 revision provides for the operation of the National Prisoner of War Information Center (PWIC).

45. *Id.* ¶ V.B. 7. The 1991 revision includes providing reports of EPW operations to the Secretary of Defense, the Joint Staff, and other information, as appropriate, upon request of the Congress, other U.S. Government agencies, and the ICRC.

46. *Id.* ¶ V.E. The 1991 revision is consistent with the Army's role as the DOD Executive Agent. The Judge Advocate General of the Army will be tasked to provide guidance within DOD pertaining to the EPW/Detainee Program including the legal review of plans and policies developed in connection with the Program.

47. *Id.* ¶ V.D. 1. The 1991 revision provides that in an operational military theater, the unified combatant commander assumes overall responsibility for the proper execution of the DOD EPW/Detainee Program by issuing and reviewing appropriate plans, policies, and directives.

48. *Id.* ¶ V.C.1. In the 1991 revision, the Air Force is to develop internal policies and procedures consistent with the DOD EPW/Detainee Program as administered by the U.S. Army.

b. providing internal instructions to Air Force personnel on the principles of the Geneva Conventions;⁴⁹ and

c. providing for the proper treatment, classification, administrative processing, and custody of PW/CI captured or detained.⁵⁰

Air Force Regulation (AFR) 125-25⁵¹ is the service's prime directive on implementation of the DOD EPW/Detainee Program. After identifying the four Geneva Conventions of 1949, AFR 125-25 declares that "[i]t is Air Force policy that the provisions of the above Geneva Conventions will be supported and observed scrupulously by all Air Force personnel."⁵² The Air Force policy continues by adopting a principle that greatly simplifies matters for wing commanders, judge advocates, and security personnel:

[A]ll personnel captured or detained as a result of combat actions or operations in a hostile environment that are not readily identifiable as being entitled to PW status will, nevertheless, be treated in the same manner as PWs until their true status can be established by a competent tribunal.⁵³

Competent tribunal is the term found in GPW Article 5, that mandates a formal procedure for the examination of evidence and formal determination whether the captive falls into one of the classes of persons entitled to prisoner of war status under Article 4 of the GPW. Under Army doctrine, Article 5 tribunals are conducted at theater-level EPW camps.⁵⁴ Accordingly, Air Force personnel need not usually concern themselves with determining whether a particular captive is entitled to EPW status. Rather, the captors should thoroughly document all the facts and circumstances of the capture and ensure that this information is forwarded along with the prisoner when transferred from Air Force custody.

VI. BEGINNING OF CAPTIVITY

Air Force commanders, judge advocates, security police, medical personnel, intelligence personnel, special investigators, and services personnel must understand those provisions of the GPW concerning the start of captivity. Because DOD doctrine provides for the transfer of EPW/detainees to the U.S. Army as soon as feasible, the dealings of Air Force personnel with EPW/detainees at operating bases will normally be limited to the capture, protection, medical care, interrogation, and transfer of captured persons.

49. *Id.* ¶ V.C.2. The 1991 revision requires appropriate training on EPW/detainee operations be given to Air Force personnel. Air Force Regulation 110-32, Training And Reporting to Insure Compliance with the Law of Armed Conflict (1976) [hereinafter AFR 11032]. This regulation implements DODD 5100.77, *supra* note 3.

50. DODD 5100.69, *supra* note 38, ¶V.C.3.

51. Air Force Regulation 125-25, Prisoners of War (1970) [hereinafter AFR 125-25].

52. *Id.* ¶ 2.

53. *Id.*

54. See generally Army Field Manual 19-40, Enemy Prisoners of War, Civilian Internees, and Detained Persons (1976). EPWs are classified at the "echelon above corps" level, ordinarily by a military police brigade specially trained in EPW operations and attached to the "theater Army support command" organization. During Operation Desert Storm, the 800th Military Police Brigade, an Army Reserve unit from New York, operated four EPW camps in Saudi Arabia—two at location "Brooklyn" and two at location "Bronx." See generally DODD FINAL REPORT, *supra* note 2, app. L.

More than likely, initial contact with an EPW will involve air base ground defense (ABGD) security police forces (SPs) capturing enemy aircrew⁵⁵ or enemy members of special operations forces (SOF) units who have infiltrated the area. The ABGD SPs will disarm immediately the EPW and will prevent the destruction of papers and other material of possible intelligence value. A captive's military identification card, however, must not be seized.⁵⁶ Personal papers and effects, especially those of sentimental value, must be returned to the prisoner as soon as it is determined that they are not militarily significant.⁵⁷ A capture tag⁵⁸ should be completed as soon as possible after capture,⁵⁹ as well as a receipt for items taken and not returned to the prisoner because of genuine security concerns.⁶⁰

The EPW immediately should be provided protective clothing appropriate to the combat situation, e.g., helmet, chemical warfare ensemble, etc., and then promptly removed from any place of imminent danger.⁶¹ Additionally, captured enemy personnel must be shielded from public curiosity.⁶² Of course, the captive must be provided adequate food, shelter, clothing, and access to hygiene facilities.⁶³ An EPW's wounds or injuries must receive prompt medical

55. A "shot down" enemy pilot. An enemy aircrew member descending by parachute is *hors de combat* and may not be fired upon unless he commits a further hostile act. Distinguish enemy aircrew members, however, from descending enemy paratroops or others on a hostile mission who may be fired upon. See Army Field Manual 27-10, The Law of Land Warfare ¶30 (1956).

56. GPW, *supra* note 23, art. 18 (2): "At no time should prisoners of war be without identity documents. The Detaining Power shall supply such documents to prisoners of war who possess none."

57. *Id.* art. 18 (3): "Badges of rank and nationality, decorations and articles having above all a personal or sentimental value may not be taken from prisoners of war."

58. *Id.* art. 30 (1): "Immediately upon capture, or not more than one week after arrival at a camp, ... every prisoner shall be enabled to write . . . a card similar, if possible, to the model annexed, informing his relatives of his capture, address and state of health. . . ." *Id.* Annex IV, B, Capture Card. U.S. Armed Forces comply with article 70 through the use of DD Form 629, Receipt for Prisoner or Detained Person.

59. AFR 125-25, *supra* note 51, ¶ 4.d; GPW, *supra* note 23, art. 70 (1): "The said [capture] cards shall be forwarded as rapidly as possible and may not be delayed in any manner."

60. AFR 125-25, *supra* note 51, ¶ 4c; GPW, *supra* note 23, art. 18 (3):

Sums of money carried by prisoners of war may not be taken away from them except by order of an officer, and after the amount and particulars of the owner have been recorded in a special register and an itemized receipt has been given, legibly inscribed with the name, rank and unit of the person issuing the said receipt.

GPW, *supra*, art. 18(4): "The Detaining Power may withdraw articles of value from prisoners of war only for reasons of security; when such articles are withdrawn, the procedure laid down for sums of money impounded shall apply." Retained personal items must be inventoried on AF Form 52 (Evidence Tag) and the EPW must be provided a copy of that receipt. Retained personal items must be transferred with the EPW.

61. GPW, *supra* note 23, art. 19 (1): "Prisoners of war shall be evacuated as soon as possible after capture, to camps situated in an area far enough from the combat zone for them to be out of danger."

Removing the EPW from danger is a concept developed in the time of the linear battlefields of World War II and basically meant evacuating the EPW "to the rear." In today's nonlinear combat environment, the requirement is to take reasonable action to protect the EPW from imminent danger.

62. *Id.* art. 13 (2): "[P]risoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity." During the Gulf War, the ICRC took the position that any photography of EPWs was inconsistent with GPW Article 13. The United States disagreed. Even so, media use of photographs of EPWs raised some apprehension among U.S. officials because of formal U.S. condemnation of the videotapes of U.S. and coalition POWs being made under coercion and shown in Iraq. Other DOD officials and CENTCOM also expressed concern for the safety of the families of Iraqi defectors who might be identified by Iraqi officials using media photographs. Because of these sensitivities, and consistent with the U.S. interpretation of GPW Article 13, DOD developed press guidelines limiting photography of EPWs. These guidelines placed controls on media access to EPWs and restricted the use of EPW photographs. DODD FINAL REPORT, *supra* note 2, at 0-18.

63. GPW, *supra* note 23, arts. 25-27, 29; AFR 125-25, *supra* note 51, ¶ 4g.

attention; further, the priority of medical treatment provided to the EPW may be determined only on the basis of medical urgency.⁶⁴

An EPW may be interrogated provided the questioning is humanely conducted in a language the prisoner understands.⁶⁵ Even so, the EPW is not obligated to provide any information other than full name, rank, date of birth, and military service number.⁶⁶ After interrogation of, or a reasonable effort to interrogate, the EPW is completed, the captive should be transferred as soon as feasible to the custody of the U.S. Army. Currently, Air Force personnel may not directly transfer an EPW to any other authority.⁶⁷

VII. PREPARATION AND TRAINING TO CONDUCT AIR FORCE EPW OPERATIONS

Preparation and training to conduct Air Force EPW operations generally fall into three distinct categories: deliberate planning, formal instruction, and exercises. Judge advocates have important responsibilities in each area. For this reason, it is crucial that each operational wing staff judge advocate's organization include a Chief of Operational Law. Ideally, this judge advocate would be most experienced judge advocate in the office excepting the staff judge advocate—in most cases, the deputy staff judge advocate. The Chief of Operational Law duties should focus on the three general areas of concentration identified above: reviewing operational plans, conducting formal LOAC training for wing personnel, and planning and evaluating wing exercises.

A. Review of Operational Plans

Historically, the review of OPlans, while routinely accomplished by judge advocates at unified command, component and major command levels, is not viewed as a mission-essential task to be performed by operational wing judge advocates. It is critical, however, that wing OPlans be scrutinized by judge advocates to ensure consistency with the law of armed conflict. Of course, this evaluation requires the lawyer conducting the legal review to have the requisite security access.

Experience suggests many judge advocates, either consciously or subconsciously, seek to avoid all contact with the OPlan, apparently intimidated by the fact the document is classified. Of those who do participate in the deliberate planning process, many limit their role in the planning process to the pro forma updating of the legal appendix to the personnel annex of the standard OPlan. In many cases, this update involved nothing more than determining whether the listed references were the current versions of those documents. This attitude and performance have no place in a legal office dedicated to the support of the wing's wartime mission. The Chief of Operational Law must be familiar with the

64. GWS, *supra* note 41, art. 12: "Only urgent medical reasons will authorize priority in the order of treatment to be administered." *Id.* art. 30.

65. *Id.* art. 17(6): "The questioning of prisoners of war shall be carried out in a language which they understand."

66. *Id.* art. 11(1): "Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information."

67. Although international agreements have been concluded for the transfer of EPWs from United States custody to the custody of other GPW states-party, e.g., Korea and Saudi Arabia, such transfers are accomplished only by the U.S. Army after formal processing of EPWs through the U.S. PWIC system.

basic concept of the plan and be especially knowledgeable in those areas of the plan where proper guidance can ensure compliance with LOAC. In this regard, participation in the earliest phases of the deliberate planning process presents the Chief of Operational Law with the opportunity to influence the entire OPlan.

In preparation for possible EPW operations, the Chief of Operational Law must expand the legal review to include the following plan elements:

a. **Basic Plan:** The legal review includes a determination that the basic plan is in harmony with U.S. law and international law, with special emphasis on the law of armed conflict. The legal considerations paragraph must be scrutinized to determine whether the statement articulates a sound legal basis for executing the plan's course of action.

b. **Annex B—Intelligence:**

(1) A thorough legal review includes an examination of the intelligence annex to ensure that the EPW interrogation process comports with the requirements of GPW Article 17, including the requirement that interrogation be conducted in a language that the EPW understands.

(2) The plan must contain an instruction that urgent medical treatment of an EPW may not be delayed to facilitate interrogation.

c. **Annex D—Logistics:**

(1) **Appendix 2—Mortuary Services:** The legal review must reflect an assessment of the planned capability to provide mortuary services and graves registration for deceased enemy personnel, including deceased EPWs.⁶⁸

(2) **Appendix 3—Medical Services:** An examination of the procedures for providing medical treatment to EPWs is a critical part of any plan review. Special attention must be given to triage. The planned triage procedure must be consistent with the principle that only the gravity of the patient's medical condition determines the priority of treatment,⁶⁹ i.e., neither the basis of the patient's nationality nor the basis of an operational requirement to quickly return a U.S. or allied patient to duty determines medical priority of treatment.

d. **Annex C—Operations:**

(1) **Appendix 8—Rules of Engagement:** The rules of engagement (ROE) for air base ground defense forces must be examined to determine whether the ROE for EPW capture and handling are clear and consistent with U.S. legal obligations.

e. **Annex E—Personnel:**

(1) **Appendix 1—EPWs, Civilian Internees, and Other Detained and Retained Persons:** This appendix is the principal one on EPW operations. The reviewing judge advocate determines if the plan contains sufficient safeguards to ensure that:

68. GWS, *supra* note 41, arts. 16, 17.

69. *Id.* art. 15.

- (a) All captives will be treated as EPWs and delivered to the U.S. Army for classification;⁷⁰
- (b) EPWs will be treated humanely at all times;⁷¹
- (c) EPWs will be immediately provided needed protective equipment and clothing;⁷²
- (d) EPWs will be permitted to retain their military identification cards at all times;⁷³
- (e) EPWs lacking identification cards and dogs tags⁷⁴ will be issued them upon capture;
- (f) EPWs will be promptly removed from danger;
- (g) EPWs will be promptly given needed medical treatment;⁷⁵
- (h) EPW personal property will be properly inventoried, safeguarded, and transferred with the EPW;⁷⁶
- (i) EPWs will not be subjected to public curiosity;
- (j) EPWs will be provided with adequate food, shelter, and clothing;⁷⁷ and
- (k) EPW misconduct will be thoroughly investigated and documented and the completed report forwarded to the U.S. Army at the time of transfer of the EPW to Army custody.

(2) Appendix 4—Legal: In addition to other relevant matters, the Legal Appendix must provide:

- (a) Any complaint of maltreatment of an EPW shall be immediately reported to the staff judge advocate;⁷⁸
- (b) The staff judge advocate must be immediately contacted in the event that an individual purporting to represent the ICRC requests access to the base; and
- (c) ICRC visits will be promptly reported to higher headquarters in the next regular situation report (SITREP).

B. Formal Law of Armed Conflict Instruction

The second major area in which operational wing judge advocates can help prepare the wing to properly conduct EPW operations is through an aggressive and credible LOAC training program. As a matter of DOD policy⁷⁹ and Air Force regulation,⁸⁰ LOAC training has long been required. While all wing

70. AFR 125-25, *supra* note 51, ¶3.c. and d.

71. *Id.* ¶¶ 2. and 3.

72. *Id.* ¶ 4.g.

73. *Id.* ¶ 4.c.

74. While not required by the GPW, issuing "dog tags" constitutes a reasonable step to ensure that the remains of the EPW killed in a general attack on the base are not mistaken for the remains of U.S. personnel.

75. AFR 125-25, *supra* note 51, ¶4.a.

76. *Id.* ¶ 4.c.

77. *Id.* ¶ 4.g.

78. *Id.* ¶ 5.

79. DODD 5100.77, *supra* note 3, E.2.a.

80. *Id.* E.2.c. (1). DODD 5100.77 is implemented by AFR 110-32, *supra* note 49. Other Air Force publications on the matter are Air Force Regulation 110-29, Review of Weapons Legality Under International Law (1981); AFR 125-25, *supra* note 51; Air Force Regulation 160-4, Medical Service Under the 1949 Geneva Convention on the Protection of War Victims (1971) [hereinafter AFR 160-4]; Air Force Pamphlet 110-34, Commander's Handbook on the Law of Armed Conflict (1980); and AF Pamph. 110-31, *supra* note 26.

Each of the services implement DODD 5100.77, *supra* note 3, through these publications: Army Field Manual 27-10, The Law of Land Warfare, July 1956; Naval Warfare Publication (NWP)

personnel should receive regular training in the basic principles of LOAC, additional specialized training must be provided to medical,⁸¹ intelligence personnel, security police, special investigators, and services personnel emphasizing the respective role of each group in EPW operations. Even so, the quality of LOAC training programs has varied greatly from location to location.

To have an effective and credible LOAC training program, each wing judge advocate must have a working knowledge of LOAC; the Chief of Operational Law should be the wing's acknowledged operational law expert. One method is to keep current by reading professional material. Another method of acquiring knowledge is through classroom training. Three of the services offer courses on operational law that include classes on the law of war.⁸²

C. Planning and Evaluating Wing Exercises

An effective LOAC training program includes incorporation of LOAC scenarios into the exercises. The Chief of Operational Law must be a member of the wing's exercise evaluation team (EET) and participate in the exercise development process.

In Europe, the "shot down pilot" and "enemy infiltrator" scenarios are staples of North Atlantic Treaty Organization (NATO) Tactical Evaluations (TAC-Evals) and U.S. Air Forces in Europe (USAFE) operational readiness inspections (ORIs).⁸³ Such scenarios in local wing exercises conducted in anticipation of TAC-Evals and ORIs provide the Chief of Operational Law with an excellent opportunity to critically examine EPW handling planning and performance. In this regard, a critical element in any valid evaluation of the legal sufficiency of the EPW handling process is regular participation in wing exercises by local Air Force Office of Special Investigations (AFOSI) personnel practicing their wartime mission.

A common procedural technique for introducing scenarios to evaluate EPW handling capability during exercises is the modification of master scenario events list (MSEL) which uses inputs provided by other elements in the wing. For example, the wing's Intelligence Flight Commander may have developed a "shot down enemy pilot" scenario to exercise the wing staff's human intelligence exploitation capability or to introduce a new element into the exercise.⁸⁴ This scenario provides an excellent opportunity for the Staff Judge Advocate and Chief of Security Police to evaluate the wing's ability to properly receive, process and capture an EPW. The MSEL input should be modified to permit evaluation of the wing's EPW handling capability. Additionally, the Chief of Operational Law may submit original MSEL inputs compatible with those submitted by other wing elements.

9. The Commander's Handbook on the Law of Naval Operations, 1987: 1987; NWP 9 adopted by U.S. Marine Corps as Fleet Marine Force Manual (FMFM) 1-10.

81. AFR 160-4, *supra* note 71.

82. The Army, Navy, and Air Force all have permanent schools for the judge advocates. The Army Judge Advocate General's School is located at the University of Virginia, Charlottesville, VA; the Naval Justice School is located at the Newport Naval Base, Newport, RI; and the Air Force Judge Advocate General School is located at Maxwell Air Force Base, Montgomery, AL. Marine Corps and Coast Guard judge advocates usually train at the Naval Justice School.

83. The author was the judge advocate member of the USAFE, Inspector General's NATO Tac/Eval-ORI Team during 1987-88.

84. Frequently, in Europe, the "shot down enemy pilot" would report that he noticed other aircraft loading chemical bombs as he was departing for his mission.

VIII. CONCLUSION

This article has provided information on the historical development of the law of armed conflict relative to EPW operations, a synopsis of DOD and Air Force EPW policy, and a recommended approach to establish a credible training program for wing-level EPW operations.

Air Force judge advocates must never lose sight of the fact that "the mission of the Air Force is to fly and to fight!"⁸⁵ During the Gulf War, Air Force judge advocates proved their mettle by operating from locations ranging from General Schwarzkopf's⁸⁶ headquarters and the "black hole" targeting cell in Lieutenant General Horner's Air Force component headquarters⁸⁷ to isolated and often austere locations in the deserts of the Arabian Peninsula, Egypt, and Turkey. The record of achievement of these judge advocates, supported by their paralegal specialists, is the paradigm for Air Force judge advocates.

Operations Desert Shield and Desert Storm clearly demonstrated that Air Force units can expect to be called upon to convert from peacetime operations to a forward deployed, ready-for-combat mode in only twenty-four hours. All wing elements must be prepared to fully execute their wartime missions on short notice. The wing's judge advocates are responsible for ensuring that Air Force commanders, security police, medical personnel, intelligence personnel, special investigators, and services personnel are prepared to conduct EPW operations that adhere to the Air Force's scrupulous observation⁸⁸ of the letter and spirit of the law of armed conflict.

As with most things lawyerly, the three keys to achieving success in conducting EPW operations are preparation, preparation, and more preparation.

85. The exact source of this popular maxim is unknown.

86. General H. Norman Schwarzkopf, USA, served as Commander, Central Command (CENTCOM) throughout Operations Desert Shield and Desert Storm. CENTCOM headquarters was located in Riyadh, Saudi Arabia.

87. Lieutenant General Charles A. Horner, USAF, served as Commander, Central Command Air Forces (CENTAF) throughout Operations Desert Shield and Desert Storm. CENTAF headquarters was located in Riyadh, Saudi Arabia.

88. AFR 125-25, *supra* note 51, ¶ 2.

The Military and the War on Drugs

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At one point in the novel on the drug war, *Hammerheads*, a frustrated admiral argues, "This is *not* a law-enforcement action, damn it. It's a national security issue...."¹ Although the admiral is but a creation of Dale Brown's imagination, the observation is accurate. The threat posed by illicit drugs to the United States has indeed become a "national security issue."²

I. COCAINE IS THE PREDOMINANT THREAT

The threat from illegal drugs encompasses a variety of substances and sources, from heroin produced in the Far East to marijuana grown in North America. The National Drug Control Strategy has identified cocaine as the foreign drug posing the greatest threat to the United States. One hundred percent of the cocaine consumed in the United States comes from United States Southern Command's (USSOUTHCOM) area of responsibility (AOR).³ With a worldwide market, potential annual production could be as much as 900 to 1100 metric tons.⁴

Sixty percent of the world's coca leaf is grown in the Upper Huallaga Valley of Peru, thirty percent in the Chapare region of Bolivia, and the balance mostly in

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1. D. BROWN, *HAMMERHEADS* 105 (1990).

2. As serious as the drug threat is to this nation, it pales when compared to the menace faced by Latin America. Colombia for example, has one of the highest mortality rates in the world. Assassins regularly target Supreme Court Justices, law enforcement officers, and politicians. Kidnapping and hostage taking, by way of intimidation, are also common. In 1991, more than 490 Colombian police officers were killed in drug-related violence. Statement by General George A. Joulwan, USA, Commander, United States Southern Command, before the Senate Committee on Foreign Relations, Subcommittee on Terrorism, Narcotics, and International Operations, 20 Feb. 1992 [hereinafter CINC's Statement].

3. USSOUTHCOM's AOR includes all of Latin America, except Mexico. The Andean Ridge countries of Bolivia and Peru (coca leaf fields and initial processing) and Colombia (final processing and transshipment) are the principal cocaine producing countries.

4. CINC's Statement, *supra* note 2, at 3. 1000 metric tons equals 2,204,600 pounds or 1,000,000 kilos. With an average U.S. wholesale price of \$16,000–25,000 per kilo, this is clearly a billion dollar industry to the traffickers. Profits within the United States are even higher, with each kilogram (diluted or "cut" and sold on the street in grams) yielding \$70,000–\$300,000. DEP'T OF JUSTICE/DRUG ENFORCEMENT AGENCY, *INTELLIGENCE TRENDS*, Vol. 17, No. 1 (1990).

Colombia.⁵ The leaf is made into cocaine paste⁶ and base⁷ using precursor chemicals in crude maceration pits located near cultivation sites and generally flown from Peru and Bolivia into Colombia for final processing.⁸ The primary means of transport is aboard hundreds of light, fixed-wing aircraft. From Colombia, the resulting cocaine hydrochloride (HCl) is distributed by air and sea throughout the world.⁹

The predominant method traffickers use to transport cocaine HCl to the United States are air routes into Mexico, Guatemala and other Central American countries, and then across the U.S. land border in vehicles, on pack horses, and even on the backs of illegal aliens. The 1991 National Drug Control Strategy reported that Mexico is the primary transit point for cocaine entering the United States.¹⁰

With the incentive of a multi-billion dollar business, the drug traffickers have developed roots in every country in Latin America. Their method of operation is insidious and destructive. Typically, their first step is the purchase of land in remote regions of Belize, Guatemala, and Mexico, for example. Crude airfields quickly appear, and the flights from Colombia begin.

Local nationals working in the traffickers' employ are frequently paid not with cash but cocaine. The drugs, in turn, are sold on the local economy; a new market develops for the trafficker as another country begins to suffer drug addiction. Local police and judges are also often corrupted to protect the trafficking operation. These illicit "businessmen" seek to destroy the very institutions that protect and guarantee emerging democracies.¹¹

5. Peru dominates coca leaf production due to the potency of the cocaine derived from Peruvian leaf. "The cocaine hydrochloride content of the coca grown in the [Upper] Huallaga Valley [of Peru], for example, is estimated to be 10 times higher than that grown in Colombia." *U.S. Government Anti-Narcotics Activities in the Andean Region of South America, Hearings Before the Senate Committee on Governmental Affairs*, (testimony of John Walters, office of National Drug Control Policy, Chief of Staff, 17 (26, 27, 29 Sept. 1989).

6. Conversion of coca leaf to coca paste occurs in crude maceration pits, usually a hole in the ground lined with heavy plastic or metal drums. The coca leaves are placed in the pit where an alkaline material (sodium carbonate), kerosene, and water are added. The resulting mixture is agitated (trampled by two to five people depending on the size of the pit) for several hours. Cocaine alkaloids and kerosene separate and the water and leaves are drained. The cocaine alkaloids are next extracted from the kerosene yielding a diluted acid solution. Additional sodium carbonate is added which causes a precipitate to form. The acid and water are drained and the precipitate is filtered and dried to produce the coca paste, a light-brown, putty-like substance. It takes approximately 110 kilograms of leaf to produce 1 kilo of paste. R. BLY, THE NATIONAL NARCOTICS INTELLIGENCE CONSUMERS COMMITTEE (NNICC) REPORT 1990, 49 (June 1991).

7. Cocaine base laboratories are located at sites near rivers and airstrips. The coca paste is dissolved in sulfuric or hydrochloric acid and water. Meanwhile, potassium permanganate is combined with water and this mixture is added to the dissolved coca paste. Allowed to stand for about six hours, the solution is then filtered and ammonia water added to form another precipitate. The solution is drained and the precipitate dried with heating lamps. The gray, granular powder produced is cocaine base. To make one kilo of base requires about five kilos of paste. *Id.*

8. CINC's Statement, *supra* note 2, at 4.

9. The final stage of cocaine processing, usually conducted in Colombia, requires sophisticated skills and equipment. It also calls for expensive chemicals and is dangerous. Initially, acetone or ether is added to dissolve the cocaine base and the solution is filtered. Hydrochloric acid diluted in acetone or ether is added to the solution causing cocaine to precipitate as cocaine hydrochloride (HCl). Cocaine HCl is dried under heat lamps, in microwave ovens, or laid out to dry with the aid of fans. BLY, *supra* note 6. The cocaine market is worldwide. In 1992, a kilo of cocaine HCl has a street value of approximately \$20,000 in New York City, \$88,000 in Athens Greece, and \$300,000 in Tokyo. CINC's Statement, *supra* note 2, at 6.

10. Another trafficking route, presently less popular, is through the Caribbean, where favored tactics include airdrops to high speed boats that take the drugs ashore.

11. CINC's Statement, *supra* note 2, at 6.

II. THE U.S. RESPONSE

To cope with this massive drug problem, the Executive Department began in 1989 to develop a pervasive counterdrug strategy. In his first speech to the American people from the oval office, President Bush outlined a national strategy which offered to more than double federal assistance to state and local law enforcement agencies and pledged “the appropriate resources of America’s armed forces” to foreign governments engaged in the battle against the drug cartels and their pernicious trade.¹² Assistance from federal authorities to domestic law enforcement agencies included wide-ranging Department of Defense (DOD) support which, in some cases, by-passed traditional fiscal law principles by eliminating the requirement of reimbursement.¹³

Secretary of Defense Cheney, echoing a classified National Security Directive signed just weeks before, followed the President’s plan with broad counterdrug guidance to DOD.¹⁴ The Secretary labeled international trafficking in drugs a national security problem for the United States. Not surprisingly, he found the DOD had a crucial role in defending the nation against the threat. Moreover, he designated the detection and countering of the production, trafficking, and use of illegal drugs as a “high priority national security mission” for the DOD.¹⁵

Both the original and present guidance contain many challenges for lawyers, not the least of which continues to be how to juxtapose policy and law and still provide commanders with cogent, practical advice. This area is where what the law “giveth,” policy may “taketh.”¹⁶

Interpretation is another challenge. Neither simplicity nor clarity has come with time, and the classified nature of much of the guidance adds a further aura of mystery, if not frustration.¹⁷

III. THREE COUNTERDRUG MISSIONS

A. Detection and Monitoring

In 1989 Congress designated the DOD “as the single lead agency of the Federal Government for the detection and monitoring of aerial and maritime transit of illegal drugs into the United States.”¹⁸ As of 1991, Congress required this military mission to “be carried out *in support of* the counter-drug activities of Federal, State, local, and foreign law enforcement agencies.”¹⁹ The addition of the “in support of” language is to ensure that DOD’s detection and monitoring activities are responsive to intelligence queuing and combined planning with law enforcement agencies, domestic and foreign. This activity occurs with increasing sophistication.²⁰

12. *Text of Address by President George Bush*, WASH. POST, Sept. 6, 1989, at 18.

13. National Defense Authorization Act for FY 1991, Pub. L. No. 101-510, § 1004, 104 Stat. 1629 (1990), *as amended by* Pub. L. No. 102-190, § 1088, 105 Stat. 1484 (1991).

14. DOD GUIDANCE FOR IMPLEMENTATION OF THE PRESIDENT’S NATIONAL DRUG CONTROL STRATEGY (18 Sept. 1989).

15. *Id.* at 3. DOD’s counterdrug funding reflects the increase in priority. DOD funding increased from \$300 million in 1989 to \$1.08 billion in 1991 and \$1.19 billion in 1992.

16. National Security Directive (NSD) 18 (21 Aug. 1989).

17. See Mansfield Amendment discussion *infra* section IVc.

18. 10 U.S.C. §124 (1988 & Supp. IV 1992).

19. National Defense Authorization Act for FYs 1992-93, Pub. L. No. 102-190, § 1088, 105 Stat. 1484 (1991) (emphasis added).

20. House Report No. 102-60, Pub. L. No. 102-190, § 1088 (1991).

Detection and monitoring permit limited, nonconfrontational intercepts and pursuit of suspected narcotrafficker aircraft in accordance with international law, U.S. policy, and statute.²¹ In combined operations with host nation military and law enforcement agencies, care is taken not to involve U.S. forces with host nation counterdrug activities that could be contrary to this authority.²²

Department of Defense personnel may conduct detection and monitoring intercepts outside the land area of the United States to gather intelligence, to identify and communicate with the suspect vessel or aircraft, and to relay directions of appropriate civilian officials that the vessel or aircraft go to a designated location. Special rules apply for pursuit over the U.S. land area.²³ Use of force is strictly limited to self-defense, consistent with DOD's peacetime rules of engagement (ROE).²⁴

The legislative history of the original detection and monitoring legislation indicates the conferees urged DOD to "pursue vigorously activities that result in the earliest possible detection of such [suspected drug trafficking] targets."²⁵

21. Convention on International Civil Aviation (Chicago Convention) Air Force Pam. 110-20, Selected International Agreements, 6-3 (1981); 10 U.S.C. § 375 (1988). The United States has long opposed the use of weapons against civil aircraft. Under international law generally, and in particular under Article 3(d) of the Chicago Convention, states are required to have due regard for the safety of civil aviation in directing their military, customs, and police aircraft. Following the Soviet shootdown of Korean Air Lines (KAL) flight #007, the International Civil Aviation Organization unanimously adopted Article 3 *bis* as a proposed amendment to the Chicago Convention to codify the requirement that every state "must refrain from resorting to the use of weapons against civil aircraft in flight and that, in the case of interception, the lives of persons on board and the safety of aircraft must not be endangered." Although Article 3 *bis* has not yet obtained the necessary number of ratifications, it is viewed as customary international law, and, therefore, binding on all nations.

The use of force in self-defense, acknowledged under Article 51 of the United Nations charter, is the only recognized exception to this rule. This view is consistent with U.S. ROE and statutory authority: (1) SM-846-88, U.S. Peacetime ROE, governs the employment of military force in terms of the right to self-defense against hostile acts or demonstration of hostile intent; and (2) under 10 U.S.C. § 374 (1988), aircraft detected outside the U.S. may be intercepted for the purpose of communicating directions from CLEAs that the aircraft go to a designated location. The legislative history is clear that such authority does not include "physical interruption of the flight or passage of the aircraft...." See H.R. Conf. Rep. No. 100-989, National Defense Authorization Act FY 1989, Pub. L. No. 100-456, § 1104 (1988).

22. 262325Z NOV 91, CJCS Message, *Delegation of Authority for Approving Operational Support to Drug Law Enforcement Agencies and Counterdrug-Related Deployment of DOD Personnel*.

Para. 3: DOD personnel are not authorized to accompany U.S. DLEAs [Drug Law Enforcement Agencies] or host nation forces/foreign DLEAs on actual field operations or to participate in any activities where hostilities are imminent. CINCs and their delegates are not authorized to approve CD [counterdrug] activities which would result in DOD personnel remaining overnight in the Upper Huallaga Valley of Peru....

Para. 5d: CINCs will ensure that DOD personnel do not directly participate in search, seizure, arrest, or other similar activities (stop and frisk; containment; interdiction of vehicles, vessels, or aircraft; surveillance or pursuit of persons (unless specifically authorized as a part of an approved detection and monitoring operation); or interrogation) when providing support, and will make every attempt to minimize the possibility of confrontation (armed or otherwise) with civilians.

23. In cases in which a vessel or an aircraft is detected outside the land area of the United States, Department of Defense personnel may begin or continue pursuit of that vessel or aircraft over the land area of the United States. 10 U.S.C. § 124(b)(2) (1988). Note that Congress intended such "pursuit" to be distinctly nonconfrontational in accord with the Chicago Convention. DOD operators without a counterdrug background, on the other hand, will likely understand "pursuit" to mean: "An offensive operation designed to catch or cutoff a hostile force attempting to escape, with the aim of destroying it." JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS (1989). This illustrates the importance of judge advocates ensuring DOD operators understand the scope of their authority and a few of the nuances of counterdrug law and policy.

24. Peacetime Rules of Engagement for U.S. Forces SM-846-88.

25. H. R. Conf. Rep. No. 101-331, National Defense Authorization Act for FYs 1990-91, Pub. L. No. 101-189, § 1202 (1989). As a result, DOD operators, generally in conjunction with DLEAs and host nation personnel, frequently monitor suspect narcotics traffickers from their launch points in the Upper Huallaga Valley, for example. This authority has been interpreted to permit detection and monitoring of suspect air traffic between Latin American countries (e.g., Peruvian base/paste to

In addition to aircraft intercepts, the mission has been executed through the use of fixed and mobile ground radars, radar ships, ship-based aerostats and airborne early warning aircraft. Department of Defense detection and monitoring assets are employed within the United States, in international waters and airspace, and within the territory of consenting host nations. The information acquired by DOD may be shared with other federal agencies and other nations in order to track suspect vessels and aircraft.²⁶

The legislation establishing the detection and monitoring mission also required the Secretary of Defense to integrate the command, control, communications and technical intelligence assets of the United States (dedicated in whole or in part to counterdrug interdiction) into an "effective communications network." This integration is an on-going process.²⁷

Authority to provide detection and monitoring support on land is contained in the FY 1990-91 Defense Authorization Act under a provision that requires the Secretary of Defense to conduct training exercises "to the maximum extent practicable" in drug interdiction areas (DIAs).²⁸ The enabling legislation defines DIAs to include those "land and sea areas in which, as determined by the Secretary, the smuggling of drugs into the United States occurs or is believed by the Secretary to have occurred."²⁹ This legislation has permitted the use of military working dog teams (MWDTs), long-range reconnaissance patrols in rough terrain, remote sensors, listening/observation posts, and tunnel detection assistance along the border.

The Secretary's authority to designate DIAs has been delegated to the Commanders-in-Chief (CINCs).³⁰ In addition to supporting detection and monitoring activities, DOD has two other counterdrug support roles: (1) support for drug law enforcement agencies (DLEAs) and (2) support for non-DLEAs.

B. Support for DLEAs

Support for DLEAs is addressed by Chapter 18 of Title 10 U.S.C. and by a variety of DOD authorization acts.³¹ The Title 10 provisions authorize DOD to: transfer data and intelligence to federal, state, and local DLEAs, subject to national security

Colombia for processing) as well as the distribution of the final product north towards the U.S. border. This interpretation is consistent with 18 Sept. 1989 SECDEF guidance that the flow of drugs be attacked at every phase—at the source, in transit, and in the United States. *See supra* note 14.

26. 10 U.S.C. § 371 (1988) (federal, state, or local law enforcement).

27. National Defense Authorization Act for FYs 1990-91, Pub. L. No. 101-189, § 1204, 103 Stat. 1564 (1989). The key to the integration of the DLEA's communications networks is secure systems interoperability between the regional DOD detection and monitoring activities (Joint Task Forces (JTFs) 4, 5 & 6), the C3I centers, and the DLEAs. The DOD plan to achieve this goal is called the Drug Enforcement Telecommunications Implementation Plan (DETIP). The Defense Communications Agency was named by SECDEF to implement the DETIP. In FY 1991, \$56 million was budgeted to support the secure voice and data requirements of DLEAs. Communications support is provided continuously to U.S. Customs in the Caribbean and to DEA to improve its Snowcap operations in the Andean Ridge. The Customs P-3 early warning aircraft, for example, have recently been equipped with satellite communications. Programs are underway to fuse multisource intelligence data in the Antidrug Network (ADNET) so that all subscribers will have access to the intelligence data. DOD provides installation support, training, configuration management, security engineering, and trouble-shooting assistance.

28. National Defense Authorization Act for FYs 1990-91, Pub. L. No. 101-189, § 1206, 103 Stat. 1564 (1989).

29. *Id.* § 1206(c).

30. Pub. L. No. 101-189, and *supra* note 22, at para 5g. The CINCs designation of DIAs will be in writing, with supporting rationale. There are no blanket designations. DIAs are designated mission by mission.

31. Chapter 18 of Title 10 U.S.C. includes sections 371-380. *See* Defense Authorization Acts, Pub. L. No. 101-189, 103 Stat. 1352 (1989) and Pub. L. No. 102-190, 105 Stat. 1290 (1991).

considerations;³² make available any equipment or base facility to DLEAs;³³ train and advise DLEA officials in the operation and maintenance of equipment;³⁴ maintain DLEA equipment and operate equipment for detection and monitoring, aerial reconnaissance, communications intercepts and (subject to prior approval, under this authority) transport DLEA personnel, and operate a base of operations for DLEAs.³⁵ Such support, however, must not adversely affect the military preparedness of the United States.³⁶

As a rule, DOD support provided to another federal agency, must be promptly reimbursed by the agency supported under the Economy Act.³⁷ There are, however, limited exceptions when DOD supports DLEAs under Chapter 18 of Title 10.³⁸

32. 10 U.S.C. § 371 (1988). DOD is directed to consider the information needs of DLEAs, to the maximum extent practicable, when planning and executing military training and operations. If, for example, DOD reconnaissance aircrews require periodic training and the DLEA has areas of particular interest that require overflight, such needs "shall, to the maximum extent practicable, be taken into account" *Id.* at § 371(b).

The DOD's intelligence data and activities raise issues about the scope of authority and special restrictions with regard to "U.S. persons." Exec. order No. 12,333, *United States Intelligence Activities* (1981), DOD Directive 5240.1 and DOD 5240.1-R, *Procedures Governing the Activities of DOD Intelligence Components That Affect United States Persons* (1982), provide guidance for the intelligence activities of the U.S. intelligence community. Note that this guidance applies only when U.S. persons are a target of the intelligence activity and only to DOD intelligence elements; not to law enforcement activities. The general rule is that information properly collected (under DOD 5240.1-R, procedure 2) may be retained (under procedure 3) or disseminated (under procedure 4). See also Air Force Reg. 123-3, *Air Force Intelligence Mission and Responsibilities* (1984) and Air Force Reg. 200-19, *Conduct of Intelligence Activities* (1983).

33. 10 U.S.C. § 372 (1988).

34. 10 U.S.C. § 373 (1988).

35. 10 U.S.C. § 374 (1988). Note that section 374 requires a request "from the head of a Federal law enforcement agency...." Accordingly, that last-minute request for help from the local police will not suffice for section 374 support. But recall that the needs of local (and state, in addition to federal) law enforcement may, in certain cases, be accommodated under section 371 for "planning and execution of military training or operations."

36. 10 U.S.C. § 376 (1988). See also the National Defense Authorization Act for FY 1991, Pub. L. No. 101-510, § 1004(d), 104 Stat. 1630 (1990):

Notwithstanding section 376 of title 10, United States Code, the Secretary of Defense may provide support pursuant to subsection (a) [section 1004-type support] in any case in which the Secretary determines that the provision of such support would adversely affect the military preparedness of the United States in the short term if the Secretary determines that the importance of providing such support outweighs such short-term adverse effect.

37. The Economy Act, 31 U.S.C. § 1535A (1988), authorizes one governmental agency or major organizational unit to place an order with a major organizational unit within the same agency or another agency for goods or services. The Act requires that payment be promptly made for the goods or services provided. The Act has no provision under which the SECDEF may, on his discretion, waive the repayment provision. The Comptroller General, however, has set forth specific circumstances or conditions under which an agency or major organizational unit is not required to seek reimbursement for support provided under the Act. The Comptroller General determined that:

Loans of supplies, equipment and materials may be made on a non-reimbursed basis if for a temporary period and the borrowing agency (or unit) agrees to assume costs incurred by reason of the loan. However, as further stated in 38 Comp. Gen 558 (1959), transfers which are or may become permanent must be made on a reimbursable basis.... 50 Comp. Gen. 366 (1980) See DOD/GC Memorandum for ISA/IAI (26 Oct. 1989).

Specific guidance on reimbursement for the loan of equipment or supplies is provided in Air Force Reg. 172-1, Vol. 1, *USAF Budget Policies and Procedures* (1990) and Air Force Reg. 177-101, General Accounting and Finance Systems at Base Level (1991). Reimbursement for communications computer systems services is under Air Force Reg. 700-3, Information Systems Requirements Processing (1984). SAF/MI is the USAF approval authority for nonoperational support reimbursement waivers. See DOD Directive 5525.5, DOD Cooperation with Civilian Law Enforcement officials (1986). The dollar value of a requested waiver will be determined in accord with DOD Directive 7220.9-M, ch. 26, DOD Accounting Manual (1983). The DLEAs budgetary resources and past determinations for similar types of support are considered when evaluating such requests. HQ USAF/XO message 212030Z NOV 90.

38. With regard to DOD support provided to DLEAs under Chapter 18 of Title 10, the cost of operational support, including transportation, must be reimbursed by the law enforcement agency

Reimbursement by state or local agencies is addressed by the Intergovernmental Cooperation Act.³⁹

Additional DOD authority exists for counterdrug support which avoids the reimbursement requirement. For FY 1992, for example, Congress authorized \$40 million in operation and maintenance funding for additional DOD counterdrug support of DLEAs (a decrease of \$10 million from FY 1991 authority).⁴⁰ Such support is provided to other agencies without seeking reimbursement under the Economy Act. Section 1004 of the FY 1991 Defense Authorization Act (amended by section 1088 of the Defense Authorization Act for FYs 1992 and 1993) authorized the following DOD services and support:

- (1) Maintenance, repair, and (in some cases) upgrade of DLEA equipment. DOD electronics technicians are quite popular.
- (2) Transportation of U.S. or foreign personnel, supplies, or equipment to facilitate counterdrug operations worldwide. DOD helicopters and crews are available to DLEAs at locations stateside and in the Caribbean, for example.
- (3) Establishment (including minor construction) and operation of bases of operations to facilitate (UC, or host nation) counterdrug activities worldwide.⁴¹
- (4) Counterdrug training of federal, state, local or foreign DLEA personnel. Mobile training teams in helicopter and small unit tactics, for example, have been provided. DOD foreign language and survival schools often include DLEAs.⁴²
- (5) Aerial and ground reconnaissance, outside, at, or near U.S. borders. Again, DOD aviators and their equipment are frequently on-call for reconnaissance support to DLEAs.
- (6) Construction of roads, fences, and lighting at U.S. border smuggling corridors. DOD construction and repair projects along the southwestern border are common.
- (7) Establishment of Command, Control and Communications (C3) and computer networks for integration of DLEA, active duty and National Guard counterdrug activities. DOD data management specialists frequently travel to intelligence centers to continue these integration efforts.⁴³

unless approval authorities (SECDEF, CINC, or his delegatee) determine that the support is provided in the normal course of military training or operations, or results in a substantially equivalent operational or training benefit. 10 U.S.C. § 377. If reimbursement is required and the requesting agency is unwilling or unable to reimburse DOD, CINCs will forward the request to the Joint Staff for OSD review and decision. CJCS message 262325Z NOV 91, para. 6.

39. 31 U.S.C. §§ 6501-08 (1988).

40. Pub. L. No. 102-190, § 1088, 105 Stat. 1484 (1991). See also Pub. L. No. 101-510, § 1004, 104 Stat. 1629 (1990) and Pub. L. No. 101-189, § 1212, 103 Stat. 1567 (1989).

As a general matter, the reimbursement requirements of the Economy Act provide an important degree of fiscal accountability when one agency provides support to a mission assigned to another agency. Particularly in an era of declining funds available for critical readiness functions, the [DOD] does not have unlimited funds to underwrite the transportation, operations, maintenance, and training needs of civilian agencies. The conferees agree, however, that in addition to support now provided by the [DOD], the Department can provide a certain amount of logistical and training support... [t]he conferees believe that up to \$40 million of funding for the designated support services is consistent with military preparedness and military training and operations requirements.

H. R. Conf. Rep. No. 101-331, Pub. L. No. 101-189, § 1212 (1989).

Unfortunately, for FY 1992 no funds were specifically appropriated by Congress for 1004-type support. Accordingly, the \$40 million must come from DOD's general O&M account; depleting O&M funding that otherwise would have been available for other DOD O&M activities.

41. Hearings, *Operation Snowcap: Past, Present and Future*, House Committee on Foreign Affairs, 23 May 1990.

42. Proceedings by the Congressional Research Service, *The Andean Drug Strategy and the Role of the U.S. Military*, 34-35 (Jan. 1990). Unclassified discussion of a fixed base camp in the Upper Huallaga Valley of Peru at Santa Lucia.

43. National Defense Authorization Act for FY 1991 Pub. L. No. 101-510, § 1004, 104 Stat. 1629 (1990).

Guidance for support to law enforcement agencies is covered by Air Force Regulation 55-35.⁴⁴ At present, this regulation should be reserved for law enforcement support issues that are unrelated to counterdrugs. Issues regarding counterdrug support for DLEAs (to include foreign DLEAs in certain circumstances) is addressed by a series of messages from the Secretary of Defense, Joint Chiefs of Staff, and the Air Staff.⁴⁵ This interim guidance makes important distinctions between operational and nonoperational support of DLEAs.⁴⁶

A great deal of the nonoperational support to DLEAs is coordinated through four Regional Logistics Support Offices (RLSOs). The RLSOs are under the direct supervision of the office of the DOD Coordinator for Drug Enforcement Policy and Support.⁴⁷ Each installation has a counterdrug point of contact who works closely with his RLSO counterpart. The RLSOs are the primary point of contact for DLEA requests for equipment loans,⁴⁸ facilities, training in formal schools, hazardous ma-

44. Air Force Reg. 55-35, *Air Force Assistance to Civilian Law Enforcement Officials* (1986) is under revision. The revised edition is not expected to be published for some time.

45. a. SECDEF/ODCEP&S message 301240Z APR 91, RLSO Mission and Function.

b. CICS message 262325Z NOV 91, Delegation of Authority for Approving Operational Support to Drug Law Enforcement Agencies and , Counterdrug-Related Deployment of DOD Personnel.

c. HQ USAF/XO message 261815Z DEC 90, Military Assistance to Civilian Law Enforcement Agencies.

d. HQ USAF/XO message 212030Z NOV 90, Air Force Assistance to Drug Law Enforcement Officials.

Although not addressed by the messages listed above, overseas deployment of U.S. military personnel in support of counterdrug operations raises significant issues regarding status. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). *MANUAL FOR COURTS-MARTIAL, R.C.M.*, 201(d) Discussion.

As previously indicated, our focus as USSOUTHAF is on Latin America (LATAM). Only one nation in LATAM has entered into a formal status of forces agreement (SOFA) with the United States: Panama. Honduras and the United States have a protocol concerning jurisdictional status that mirrors the NATO SOFA formula. Elsewhere within this AOR, U.S. forces on counterdrug duties deploy with the prospect of being subject to host nation law without appropriate legal immunities. See Air Force Pam. 110-3, Civil Law, ch. 19 (1987). The status problem has been raised through command channels. Presently, STATE and OSD are attempting, through an exchange of diplomatic notes, to acquire the equivalent of Administrative and Technical (A&T) status, under the 1961 Vienna Convention on Diplomatic Relations for deploying counterdrug forces. See Air Force Pam. 110-20, Selected International Agreements, 7-17 (1981). Host nation political concerns may complicate such efforts. Whatever the nation involved, judge advocates involved in the planning process should ensure that the issue of status is addressed.

46. *Operational Support.* Counterdrug support to DLEAs involving military personnel and their associated equipment and training, provided by the CINCs from forces assigned to them or made available to them by the services for this purpose. Operational support does not include support in the form of equipment alone, use of facilities, military working dog support, training in formal schools, or the conduct of joint law enforcement investigations by military criminal investigative organizations with cooperating civilian LEAs, or other support provided by the services from forces not assigned or made available to the CINCs.

Nonoperational Support. Support provided to DLEAs that includes loan or lease of equipment without operators, use of facilities (such as buildings, training areas, and ranges), training conducted by formal schools, transfer of excess equipment, or other support provided by the services from forces not assigned or made available to the CINCs. Military working dog support will be provided IAW DOD Instruction 5525.10.

47. The four RLSOs are located in Buffalo NY; Miami FL; El Paso TX; and Long Beach CA. SECDEF/ODCEP&S message 301240Z APR 91, RLSO Mission and Function.

The offices were established so that [DOD] can have good coordination of the requests from law enforcement agencies when they see something we can help them with, in other words, so they don't have to go to Washington D.C., and dig into the Defense Department and find the right agency within DOD. They can go to a[n] [RLSO] and explain their needs to the people there...hopefully, we can do the coordination much faster than in Washington. That is the whole idea.

Steven M. Duncan, DOD Coordinator for Drug Enforcement Policy and Support, testifying before the Investigations Subcommittee of the House Committee on Armed Services, 10 Apr. 1990.

48. National Defense Authorization Act for FYs 1990-91, Pub. L. No. 101-189, § 1208, 103 Stat. 1566 (1989). Under this authority, DOD has loaned DLEAs individual clothing and equipment, office

terial disposal, or other support provided by the services from forces not assigned or made available to the CINCs; i.e., nonoperational support. The services, however, retain approval authority for such nonoperational support.

Requests for support by United States Air Force MWDTs that the installation does not have the capability to support in accordance with DOD Instruction 5525.10, should be coordinated with the MWD Executive Agent (AFSPA/SPLE, Kirtland Air Force Base, New Mexico).⁴⁹ The SPLE provides MWDT data and coordinates, as appropriate, with the RLSO.

C. Support to Agencies Without Law Enforcement Role

DOD support to agencies other than DLEAs is primarily provided to the State Department (State). State provides international counterdrug assistance to foreign governments and international organizations under the Foreign Assistance Act of 1961, as amended,⁵⁰ the Arms Export Control Act of 1976, as amended, the Foreign Operations, Export Financing and Related Programs Appropriations Act, and the International Narcotics Control Act.⁵¹

State's counterdrug authority includes coordinating all international U.S. assistance, to include the negotiation of international agreements to help control drug production, processing and distribution, and efforts to eradicate the illicit drug crops through application of herbicides.

DOD support of State is frequently provided through Mobile Training Teams (MTTs) under the Foreign Assistance Act (including, for example, training in small unit tactics, and equipment repair). The DOD assistance under the Act can also include drawdown (section 506) of existing defense articles and services (e.g.,

furniture, flak vests, vehicles and aircraft, night vision devices, radios, weapons and specialized equipment. Note that arms, ammunition (as a consumable, ammunition must be purchased), combat vehicles, vessels and aircraft require secretarial approval. See HQ USAF/XO message, 212030Z NOV 90, Air Force Assistance to Drug Law Enforcement Officials.

49. Statutory authority for MWDT support is found in 10 U.S.C. § 372 (MWDTs are considered "equipment"; see DOD/GC Memorandum for the Service Secretaries and Chairman of the Joint Chiefs of Staff, Military Working Dog Teams, 31 May 1990) for the purposes identified at section 374(b)(2) (to include detection and monitoring) and at Pub. L. No. 101-189, § 1206, 103 Stat. 1567 (1989) (military training exercises in drug interdiction areas (DIAs); where drugs are believed to be smuggled). There are no "blanket" designated DIAs. DIAs are designated in writing by the CTNC for each mission. MWDT support must (1) be consistent with the installation's missions requirements, (2) result in no substantial expense to the command, and (3) be provided under circumstances that preclude any confrontation between MWDTs and civilian subjects of search. Once the dog "alerts" the MWDT will advise the DLEA and withdraw. The DLEA is responsible for conducting any subsequent search/seizure. MWDTs will not be used to track persons, seize evidence, attack, hold, or in any way help in the apprehension or arrest of persons.

50. Part I of the Foreign Assistance Act (FAA) of 1961, as amended (Pub. L. No. 87-195, 75 Stat. 424) authorizes the State Department to provide foreign countries developmental (nonmilitary) assistance (22 U.S.C. §§ 2151-2294). Part II of the FAA concerns security (military) assistance (22 U.S.C. §§ 2301-2349aa-9).

51. The International Narcotics Control Act (INCA) of 1990 (Pub. L. No. 101-623, 104 Stat. 3350), was signed by President Bush, 21 Nov. 1990, despite having "a number of serious reservations about the Act." 26 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, 3 Dec. 1990.

For example, the Act required the President, under 22 U.S.C. § 2291, to implement a "detailed program of instruction to train host country pilots...to fly host country aircraft involved in counternarcotics in Andean countries [replacing all U.S. Government flight crews involved in such operations over Colombia, Bolivia, and Peru] ...within 18 months after the date of enactment...." *Id.* at section 13(a) and (b).

While the Administration, with assistance from DOD, was then working to increase host country capability to conduct air operations, the President's concern was that the arbitrary deadline in section 13 [May 1992] "could endanger the lives and property of U.S. and foreign citizens." Note that this provision of the INCA would have had no impact on the USAF C-130 attacked by Peruvian fighters on 24 Apr. 1992. Section 13's focus is on STATE's international counterdrug programs and upon "host country aircraft." Missions for U.S. military aircraft, particularly those performing a DOD mission (i.e., detection and monitoring), are not affected by the INCA.

aircraft, boats, communications equipment, training, etc.) and provision of excess defense articles (section 517).⁵²

IV. LEGAL AND POLICY RESTRICTIONS

A. Posse Comitatus

The restrictions on military personnel under the Posse Comitatus Act are probably the most widely known.⁵³ The Act was originally enacted to place limits on the direct active use of military personnel (not equipment) by civilian law enforcement in enforcing the laws of the United States. As is recognized in the text of the Act, Congress left room to expressly authorize certain forms of DOD assistance to law enforcement.

B. Title 10, Section 375⁵⁴

Posse Comitatus exceptions under Chapter 18 of Title 10 (previously outlined at section IIb) were made to encourage greater DOD counterdrug support of DLEAs,

52. Sec. 506. Special Authority... (a)(2)(A). If the President determines and reports to the Congress... that it is in the national interests of the United States to draw down defense articles from the stocks of the Department of Defense, defense services of the Department of Defense, and military education and training, he may direct—

(i) the drawdown of such articles, services, and the provision of such training for the purposes and under the authorities of chapter] 8 [International Narcotics Control] ... of Part I [of the Foreign Assistance Act]....

Sec. 517. Modernization of Military Capabilities of Certain Major Illicit Drug Producing Countries... (b). Excess defense articles may be transferred... only for the purpose of encouraging the military forces of an eligible country in Latin America and the Caribbean to participate with local law enforcement agencies in a comprehensive national antinarcotics program....

An 'eligible country' is limited to those—

- (1) which are major illicit drug producers,
- (2) with democratic governments, and
- (3) whose armed forces do not engage in a consistent pattern of gross violations of internationally recognized human rights.

53. Whoever, except in cases and under circumstances expressly authorized by the Constitution or Acts of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than \$10,000 or imprisoned not more than two years, or both.

18 U.S.C. § 1385 (1988). The Posse Comitatus Act is applicable to the Navy and Marine Corps as a matter of DOD policy, *see* DOD Directive 5525.5. The Act essentially ended the Reconstruction era practice of using military forces in aid of federal law enforcement personnel. As Senator Hill, one of the sponsors of the Posse Comitatus Act, put it, "whenever you conclude that it is right to use the Army to execute civil process... it is no longer a government founded upon the consent of the people; it has become a government of force." 7 CONG. REC. 4245 (1878).

By its terms, the Act prohibits the use of the military as a posse comitatus except as that use is expressly authorized in the Constitution or in federal statutes (addressed in text). Under the constitutional exception to Posse Comitatus, the use of federal troops in a law enforcement capacity has been interpreted to be limited to emergency situations, such as the protection of persons and property from imminent hazards.

54. The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that any activity (including the provision of any equipment or facility or the assignment or detail of any personnel) under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity is otherwise authorized by law.

10 U.S.C. § 375 (1988).

beginning in 1981.⁵⁵ Chapter 18, despite its authority for what might be characterized as passive support to DLEAs, reaffirms that DOD must still avoid direct participation in certain law enforcement activities.

Of potential significance to DOD's counterdrug efforts is the Department of Justice conclusion that Posse Comitatus and 10 U.S.C. §375 restrictions are without extraterritorial effect.⁵⁶ This does not mean, however, that DOD is free of law enforcement type restrictions overseas.⁵⁷

C. Mansfield Amendment

The Mansfield Amendment to the Foreign Assistance Act generally restricts all U.S. Government (to include DOD) personnel from directly effecting an arrest in any foreign country as part of any foreign police action with respect to narcotics control efforts.⁵⁸

The amendment also includes an exception, to the effect that: U.S. personnel may with approval of the U.S. chief of mission, be present when foreign officers are ef-

55. With regard to the purpose served by section 375, see Department of Defense Authorization Act 1982, Pub. L. No. 97-86, § 905, 95 Stat. 1114 (1981), ("to clarify [existing] authority for cooperation between military and civilian law enforcement officials." H.R. REP. No. 97-71), as amended by National Defense Authorization Act, FY 1989, Pub. L. No. 100-456, § 1104, 102 Stat. 2043 (1988), ("to expand the opportunities for military assistance in a manner that is consistent with the requirements of military readiness and the historic relationship between the armed forces and civilian law enforcement activities," H.R. CON. REP. No. 100-989, § 1104).

56. William Barr, DOJ, Office of Legal Counsel (OLC) Memorandum for General Brent Scowcroft, Assistant to the President for National Security Affairs, National Security Council, Extraterritorial Effect of the Posse Comitatus Act (3 Nov. 1989). This opinion must be read in conjunction with another DOJ OLC Memorandum, Authority of the Federal Bureau of Investigation to override Customary or other International Law in the Course of Extraterritorial Law Enforcement Activities (21 June 1989), also authored by William Barr.

It is important to note, as the author has acknowledged, that these opinions address the limited question of our domestic legal authority abroad, and do not reflect any "sea change" in U.S. policy.

The potential legal and political consequences of nonconsensual operations overseas are wide-ranging. The repercussions will likely vary with the seriousness of the offense(s) for which the operation is executed; the citizenship of the offender(s); the condition of U.S.-host nation relations; and what actions, if any, the host nation had taken to seize/shelter the offender(s). An excellent discussion of the issues to be considered in this context was presented in testimony by Judge Abraham D. Sofaer, then Legal Advisor to the Department of State, 8 Nov. 1989, before the House Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary.

57. When testifying on 19 Apr. 1990, before the Investigations Subcommittee of the House Armed Services Committee, Steven Duncan, DOD Coordinator for Drug Enforcement Policy and Support, was asked for a written statement of DOD policy, *inter alia*, with regard to the DOJ memoranda, *supra* note 56, by Mr. Barr. Mr. Duncan's reply to Congressman McCloskey, dated 23 May 1990, states:

Although the Defense Department agrees with the legal interpretation that the "Posse Comitatus Act", 18 U.S.C. section 1385 [*] does not apply outside of the territory of the United States, sensitive diplomatic and other considerations dictate that military commanders should not have unbridled authority to provide direct assistance to civilian law enforcement officials to perform law enforcement functions abroad.

Essentially, such direct assistance must be approved, on a case-by-case basis, by the SECDEF or Deputy SECDEF when compelling and extraordinary circumstances justify them. DOD Directive 5525.5, DOD Cooperation with Civilian Law Enforcement Officials (1986), as modified by SECDEF Memo, dated 20 Dec. 1989.

Note that the 10 U.S.C. § 375 restrictions, which Mr. Barr had also concluded were without effect extraterritorially, were not addressed in Mr. Duncan's reply. The essence of section 375 was also included in the "Coordinating Instructions" portion of CJCS Delegation of Authority Message, 262325Z NOV 91, para 5d: "CINCs will ensure that DOD personnel do not directly participate in search, seizure, arrest, or other similar activities...when providing support...."

58. 22 U.S.C. § 2291(c)(1) (1988). We emphasize *foreign* police action because DOD support of police action overseas to enforce U.S. (as opposed to foreign) laws is not prohibited by the Mansfield Amendment. As indicated, the DOJ has concluded the Attorney General may call upon the military to assist him in the enforcement of U.S. drug laws outside the territorial jurisdiction of the United States. See Exec. Order No. 11,727 and 21 U.S.C. § 873(b), *supra* note 56.

fecting an arrest and may assist such officers.⁵⁹ This statutory exception, however, is subject to a significant policy limitation.

D. Actual Field Operations

Notwithstanding the conditional exception under the Mansfield Amendment, guidance from the President and the Chairman of the Joint Chiefs of Staff (CJCS) prohibits DOD personnel from accompanying U.S. DELAs or host nation forces/foreign DLEAs on actual field operations or participating in any counterdrug activities where hostilities are imminent. Moreover, CINCs are directed to ensure that DOD personnel do not directly participate in search, seizure, arrest or other similar activities.⁶⁰ This is an example of U.S. policy overriding otherwise available legislative authority.⁶¹

E. Fiscal Constraints

This topic raises some of the most complex counterdrug issues, and a detailed examination is beyond the scope of this article. Briefly, a failure to properly apply fiscal law principles to federal counterdrug activities can lead to the unauthorized expenditure of funds and potential criminal and administrative sanctions.⁶²

Consistent with the fundamental principles of fiscal law, funds appropriated to DOD are only available for those missions or activities for which they were appropriated. Traditionally, DOD missions and activities have been determined by statute or, in the absence of statutory authority, through the broad constitutional powers of the President as Commander in Chief.⁶³ Required reading in this regard are two Comptroller General decisions that arose from the Ahuas Tara II joint combined military exercises in Honduras in the early 1980s that explain how fiscal principles affect military operations.⁶⁴

59. 22 U.S.C. § 2291(c)(2) (1988).

60. *Supra* note 22. See also USCINCSO message 301351Z MAR 92, Supplemental Guidance for Counterdrug (CD) Deployments in SOUTHCOM AOR, definitions at paragraphs 2 and 3:

"Accompany" means to physically go with as an associate or companion. U.S. forces personnel "accompany" [host nation] forces and [U.S. government/host nation law enforcement] when they travel with such personnel on foot or in the same vehicle, aircraft, ship, or boat (including any groupings of the same).

"Actual field operations" are activities during which the intent, or the reasonable expectation, is that the [host nation forces/law enforcement agents] will engage in [counterdrug] law enforcement functions. These functions include detection and monitoring, surveillance, search, seizure, arrest, interrogation of suspects, destruction of contraband and facilities, or similar law enforcement activities.

"Imminent" means that all available facts indicate that a [counterdrug] activity or [counterdrug] related hostile action will occur at any time.

"Direct participation" is defined as U.S. forces personnel participation in a law enforcement activity or their supervision or direction of the performance of such an activity by U.S. [law enforcement agencies] or [host nation law enforcement agents]/forces.

61. The U.S. Department of Justice, Office of Legal Counsel, has concluded that the Mansfield Amendment prohibits participation by U.S. officers in foreign counterdrug operations which typically involve arrests, such as drug raids. Conversely, it was found not to prohibit involvement of U.S. officers in activities that do not typically involve arrests, such as planning and preparing for a drug raid. Nor does it limit training of foreign agents, the provision of intelligence or equipment for drug operations, or participation in operations aimed solely at destroying drug crops or drug facilities where arrests are not expected. DOJ Memorandum for the Attorney General (18 Sept. 1986).

62. Though not directly related to the counterdrug mission, Air Force Pam. 110-4, Fiscal Law (1988), is a good primer on fiscal law as it relates to Air Force matters.

63. DOD/GC Memorandum for Office of the Legal Advisor, National Security Council (21 July 1989).

64. Comp. Gen. Dec. B-213137 (June 22 1984), 63 Comp. Gen. 422; Decision on Reconsideration (Jan. 30, 1986).

A great deal of interest has been expressed by the General Accounting Office in the dividing line between organization and maintenance (O&M, Title 10) funded activities and security assistance (Title 22). As a general rule, an activity will not constitute security assistance to a foreign nation so long as: (1) the benefit to the host nation is incidental and minor and is not comparable to that ordinarily provided as security assistance and (2) the clear primary purpose of the activity is to serve U.S. military interests.⁶⁵ Title 10 funds are probably authorized under these circumstances. In all other cases (i.e., where support to the host nation is substantial or the primary beneficiary of the activity is the host nation), DOD will likely be limited to use of State funds (under Title 22) and subject to the accompanying security assistance restrictions.⁶⁶

While performing security assistance training is not a DOD mission for which O&M funds are available, successful arguments have been made that the preparation of DOD personnel (e.g., area familiarization for those personnel who will subsequently perform security assistance training; "training the trainers") is an appropriate mission for O&M funding.⁶⁷

Counterdrug guidance from the CJCS, alluded to previously, stresses that "[i]t is imperative that all Department of Defense counterdrug funds be obligated only for the specific activity(ies) for which appropriated and transferred." To ensure this requirement is accomplished, all counterdrug deployments made under the CINC's delegated authority must identify, *inter alia*, the funding source "to include specific project code, for Department of Defense-funded deployments."⁶⁸ The identification of funds represents a significant new obligation for judge advocates, comptrollers, planners, and operators involved in the war on drugs.

F. Human Rights

Human rights violations by our allies can present a serious obstacle, both in law and policy, to our counterdrug efforts overseas. Several U.S. statutes require the U.S. Government to take the human rights performance of foreign states into consideration in its political and commercial relations. These statutes generally prohibit or strictly limit U.S. developmental and security assistance (to include counterdrug

65. Not every "transfer" of O&M procured equipment and supplies to the host nation constitutes security assistance. As indicated, the central issue is for whose benefit is the "transfer" to be made? Air Force Reg. 130-1, Security Assistance Management (1991), paragraph 12-3, recognizes that certain temporary "custodial transfers" of USAF equipment to a foreign government may be authorized (in accord with international agreements, see Air Force Reg. 11-21, Negotiating, Concluding, Reporting and Maintaining International Agreements (1989)) where "the equipment will continue to be operated and maintained in direct support of [the] U.S. Air Force mission...." Requests for custodial transfer in excess of 180 days or which concerns equipment with a value of more than \$100,000 are reviewed by SAF/IAP and SAF/GCI. Note, however, that the first sentence of Air Force Reg. 130-1, paragraph 12-3a (i.e., "The AECA permits temporary custodial transfer...") is incorrect and should read "[t]he AECA does not prohibit temporary...transfer[s]." SAF/IAR indicates this change will be made to future editions of the regulation.

66. Comp. Gen. Dec. *supra* note 64. The FAA provides the legal basis as well as the funding for U.S. military counterdrug-related support of foreign personnel. STATE is charged with execution of any FAA program. Accordingly, DOD must have STATE authorization prior to providing such support. 31 U.S.C. § 8686 (1988).

67. DOD/GC Memo, *supra* note 63.

68. *Supra* note 22, at para. 5n. At issue will be whether the proposed counterdrug activities are reasonably related to the purposes of the appropriation to which the specific project codes relate. In examining the propriety of appropriation expenditures, the Comptroller General relies on a necessary expenses rule. Under 31 U.S.C. § 1301(a), appropriated funds may be used only for the purpose for which they were appropriated. The Controller General holds that even though a particular expenditure may not be specifically provided for in the appropriation act, the expenditure "is permissible if it is reasonably necessary in carrying out an authorized function or will contribute materially to the effective accomplishment of that function, and is not otherwise prohibited by law." B-230062 (22 Dec. 1988); 66 Comp. Gen. 356 (1987); see also B-206273.2 (4 Aug. 1989).

assistance) to any country that "engages in a consistent pattern of gross violations of internationally recognized human rights."⁶⁹

Recognizing the importance of human rights to the mission, USSOUTHCOM requires that all U.S. military personnel entering the AOR in an official capacity receive a briefing on human rights. Personnel are instructed to report "all instances of suspected human rights violations immediately through the chain of command to the U.S. Military Group Commander."⁷⁰ These reports are promptly investigated. The human rights record for those countries receiving U.S. assistance, is then reported through State Department channels and annually by the Secretary of State to the Congress.⁷¹

V. CONCLUSION

This article has examined the wide variety of legal issues that are an integral part of DOD's counterdrug mission. Counterdrugs is a uniquely law-related activity—an activity subject to tremendous change and growth, much as the threat from those who choose to traffic in illegal drugs.

In this conflict, DOD has received carefully limited authority and a circumscribed mission, but there remains a great deal that can be accomplished through detection and monitoring, support to law enforcement, the State Department and to other non-law enforcement agencies. This is an area of military practice where, as in any war, active duty, national guard, and reserve judge advocates are actively involved with planners and operators to ensure that service members operate within legal and policy limits, and just as importantly, that they appreciate the full scope of their authority as "drug warriors."

69. See sections 116 and 517 of the Foreign Assistance Act of 1961, *as amended* (22 U.S.C. §§ 2151m and 2304). The term "gross violations of internationally recognized human rights" includes torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, causing the disappearance of persons by the abduction and clandestine detention of those persons, and other flagrant denial of the right to life, liberty, or the security of a person. 22 U.S.C. § 2304(d)(1) (1988).

There is some indication that certain human rights violations may be tied to a "lack of confidence" in the host nations' judicial systems. Consistent with our stated human rights objectives, the United States provides a variety of assistance to strengthen the administration of justice in LATAM and the Caribbean under the Foreign Assistance Act. See section 534 (22 U.S.C. § 2346c), as recently amended by Pub. L. No. 102-266, § 124, 106 Stat. 97 (Apr. 1992) (which includes "up to \$16 million for Bolivia, Colombia, and Peru.").

70. General A. Joulwan, Reporting of Human Rights Violations Policy Memo, (15 Apr. 1991). General A. Joulwan is Commander in Chief, U.S. Southern Command.

71. 22 U.S.C. § 2304(b) (1988). These "Country Reports on Human Rights Practices" are closely scrutinized by Congress. "The State Department's report on human rights [for Guatemala] concedes "the security forces are virtually never held accountable for human rights violations"....The Committee cannot continue to support aid to Guatemala if these concerns are not addressed." H.R. REP. 102-108, from the Committee on Appropriations on the Foreign Operations, Export Financing, and Related Programs Appropriations Bill, 33 (1992).