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LEGAL ASPECTS: Civilians/Contractors in the War Zone & Disaster Relief support

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Message From the Director

BG James O. Barclay, III, USA
Director, JCOA

As I complete my tenure as Director, Joint Center for Operational Analysis (JCOA), much has been accomplished in the area of studies and analysis to assist the warfighters in their efforts. Many of the completed study reports are posted for review on the JCOA classified website, and significant findings from the studies are being briefed to various commands and organizations. I'd like to welcome my replacement, BG Anthony Crutchfield, who comes to JCOA from HQ TRADOC and brings a wealth of knowledge and experience to our organization. I look forward to the continued success of future JCOA studies in supporting the warfighter.

This edition of the JCOA Journal presents articles focused on legal issues. These articles have been submitted from a number of different commands and represent a cross section of some of the issues being worked within the judge advocate general sector. The first three articles discuss the legal challenges of having civilians and contractors accompanying the forces. Brig Gen David Ehrhart, USAF, talks about *Closing the Gap: The Continuing Search for Accountability of Civilians Accompanying the Force*, exploring the processes and issues of dealing with potential misconduct of civilians accompanying the forces.

The second article, *Civilians In the Air Force Distributed Common Ground System*, Lt Col Duane Thompson looks at the Law of Armed Conflict and International Law and applying these laws to civilian workers. This is followed by Ms. Sandra Patterson-Jackson's article *Deploying DOD Civilians: Answering the Call to Duty*, which discusses the legal aspects of deploying DOD civilian employees in times of conflict as part of the DOD total force policy.

The next two articles are from US Strategic Command and discuss the legal questions involved in the recent satellite shootdown and unauthorized movement of nuclear weapons. Major Brandon Hart and Colonel Carol Joyce each present a legal synopses of the potential domestic and international liability for events such as these.

The sixth article by Capt C. Christopher Ford, *Military or Judicial Search - Which Standard Applies? Lessons Learned in Bosnia*, looks at the conflict between NATO and EUFOR on legal requirements for initiating document exploration missions in Bosnia.

Discussions on disaster relief operations with their inherent legal and financial restrictions, as well as the lessons and best practices during the recent deployment of USS Peleliu (LHA 5) as part of the Pacific Partnership complete the final three articles in this Journal. *Warship On A Mission of Mercy*, by LCDR Tomlinson looks at the Peleliu deployment and how members of several US Government organizations, non-government organizations, and various foreign nations coordinated to provide medical and humanitarian relief in the WESTPAC region.

Major Byrnes presents an article on *Foreign Disaster Relief: A Fiscal Focus,* to highlight funding aspects of supporting foreign disaster and the necessity of tracking the correct funds expenditures. The final article, *Legal Preparedness Assists Disaster Preparation*, by LTC Tim Tuckey, Staff Judge Advocate for Joint Task Force Civil Support (JTF-CS), provides an effective planning tool that enables legal planners to immediately access state statutory authority, and quickly assess relevant laws and potential impacts on the mission.

JAMES O. BARCLAY, III
Brigadier General, U.S. Army
Director, Joint Center for Operational Analysis

JCOA UPDATE

We have completed the counterinsurgency (COIN), Targeting, and ISR study (CTI) for GEN Petraeus, and are staffing the findings for distribution of best practices and solutions to problems identified in the study. In parallel, we have begun a new study for Multinational Forces - Iraq (MNF-I) focused on the joint tactical environment (JTE). This study is to document successful integration of command and control (C2), joint fires, airspace control, and ISR operations in a complex tactical environment to improve joint capabilities. A team of 10-15 subject matter experts from across the Department of Defense (DOD) is scheduled to deploy to Iraq soon in support of this effort. Completion should be in September with the report to follow.

Our new JCOA Director, BG Tony Crutchfield, will be leading the JTE team. He arrives on 23 June and will hit the ground running as he leads the study team into theater. BG Crutchfield comes to us from the US Army Training and Doctrine Command, where he serves as Deputy Commanding General/Chief of Staff US Army Accessions Command. BG Barclay officially relinquishes the Directorate on 20 June and moves to Ft Rucker as Commanding General, United States Army Aviation Warfighting Center. Under BG Barclay's vision and leadership JCOA has flourished, and he will be missed; our loss is Ft Rucker's gain. BG Crutchfield will undoubtedly continue BG Barclay's legacy of success.

Our Knowledge and Information Fusion Exchange (KnIFE) division continues to be an extremely successful organization, serving as DOD's foundational brokerage and repository for improvised explosive device (IED) data. In essence, KnIFE is a "one-stop shop" for any kind of IED information. They maintain an operations center to assist customers 24 hrs per day/7 days per week, using state of the art web portals in six different networks to provide its products to customers around the globe. Their efforts are four-fold: pre-deployment training assistance, support to joint training, joint capabilities integration, and IED defeat knowledge management. KnIFE's capabilities are available to all authorized users, including US warfighters in the field and in training, coalition and alliance partners, the research and development community, and interagency organizations. Allied access continues to with the addition of the North Atlantic Treaty Organization (NATO) Transnet capability; resources can now be found on the links below:

NIPR: https://knife.jfcom.mil
SIPR: http://knife.jfcom.smil.mil
CENTRIXS (MCFI): http://knife.jfcom.mcfi.cmil.mil/KnIFE
CENTRIXS (GCTF): http://knife.jfcom.gctf.cmil.mil/KnIFE
NATO Secret WAN: http://knife.act.nato.int/portal
NATO Transnet: http://transnet.act.nato.int/WISE/CounterIED/KnIFE0

If required information cannot be readily found on the website, a request for information (RFI) can be submitted. Once received, it will be answered within 24 hours. To date, over 1,000 such RFIs have been processed. The KnIFE Watch can be contacted as follows:

NIPR email: KnifeRFIwatch@jfcom.mil
SIPR email: KnifeRFIwatch@jfcom.smil.mil
CENTRIXS (MCFI) email: KnifeRFIwatch@jfcom.mcfi.cmil.mil
CENTRIXS (GCTF) email: KnifeRFIwatch@jfcom.gctf.cmil.mil
NATO email: KnifeRFIwatch@act.nato.int
Commercial telephone: 757-203-0777 // DSN: 312-668-0777
VOSIP: 302-529-7502/7503

As we begin this new era with BG Crutchfield, the future is bright. The Commander, Joint Forces Command, Gen Mattis, is personally involved in our focused studies and projects, and has integrated our work in support of his emphasis on irregular warfare. There is a natural fit with our charter and where Gen Mattis wants to take this command. Additionally, as asymmetric engagements continue to evolve, KnIFE is poised to expand its capabilities to those irregular warfare threats.

> "Law is order, and good law is good order."
> -- Aristotle

Mr. Bruce Beville
Deputy Director JCOA

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CLOSING THE GAP: The Continuing Search for Accountability of Civilians Accompanying the Force

Brigadier General David G. Ehrhart, USAF

> *"Adaptability is the law which governs survival in war as in life—war being but a concentrated form of the human struggle against the environment." - B. H. Liddell Hart*

I. Introduction [1]

Recently, Congress passed legislation that amended the Uniform Code of Military Justice (UCMJ) to extend military criminal jurisdiction over civilians accompanying the force.[2] This has raised a multitude of issues, which the armed forces and contractors who support contingency operations need to sort through. This paper will examine the historic context for contractors on the battlefield, the problems associated with the lack of criminal jurisdiction over civilians, and the issues driven by the new language in the UCMJ.

Last year, *The Washington Post* revealed disturbing allegations that armed personal security detail (PSD) contractors working for Triple Canopy went on an unprovoked shooting rampage in Baghdad.[3] *The Washington Post* reported that Triple Canopy had assigned four (three American and one Fijian) PSDs to protect executives from Kellogg, Brown, and Root. The article stated one of the contractors began that day's mission by saying, "I want to kill someone today." Then, while traveling between the Green Zone and the Baghdad Airport, he opened fire on an old man in a taxi cab, and another contractor in the same vehicle opened fire on a civilian truck. It is unknown whether anyone was injured in those incidents or whether any of the PSDs was or will be prosecuted. [4]

Similarly, in 2005, an allegation arose against 19 armed security guards from a North Carolina based security company named Zapata while they were working for an American engineering firm which had contracted for work in Iraq. [5] The accuser alleged that the contracted guards opened fire on unarmed Iraqi civilians and also on a Marine outpost tower in Fallujah. The Marines arrested and jailed the 19 men, but they were all eventually released. That case likewise has not resulted in any prosecutions.

Contractor discipline was again highlighted this past September when Blackwater security guards escorting a diplomatic motorcade allegedly fired at a car when it did not heed a policeman's call to stop. At least 10 Iraqis were killed.[6] While this incident is still under investigation at the time of this writing, it underscores the need to adopt appropriate processes to deal with potential contractor misconduct. [7]

II. Contractors on the Battlefield

A. Traditional Roles

Historically in this country, contractors have always been present in some capacity on the battlefield. From the American Revolution, where George Washington used contractors to haul supplies, up through the numerous wars of the 20th Century, contractors have continued to be part of the make up of our ability to fight wars.[8] It has been only recently, however, that the United States has transformed the role of contractors from merely supplementing military efforts to one of serving as an absolutely essential function indispensable to military operations.

Throughout the nineties, the role of contractors continued to increase. During DESERT STORM, nearly 10,000 contractors were deployed.[9] They provided supplies, did the laundry, manned the mess halls, drove vehicles, maintained high-tech support equipment, and more. After the Dayton Peace Accords, contractors in Bosnia became increasingly essential in peacekeeping operations, freeing up the military to focus their resources on operational missions.[10] Their presence also helped to alleviate pressure to hold military troop strength down.[11] Contractors now were not only needed, they had become such an integral part of contingency operations that they were absolutely essential.[12] Stated more precisely, the mission could no longer be done without them. In the 21st Century, this

trend continued in Operation ENDURING FREEDOM (OEF) in Afghanistan and Operation IRAQI FREEDOM (OIF).[13]

B. New Roles

As their presence increased, so did their role. Contractors began to serve as interrogators and guards, providing intelligence services, and increasing their utility for traditionally military-only activities.[14] Their presence raised significant issues in a number of areas of the law to include the Law of Armed Conflict.[15] The presence of contractors on the battlefield also raised fundamental acquisition law questions regarding the intersection between traditional military operations and non-traditional contract actions.

As contractors assumed these new roles in OEF and OIF, they also began paying a heavy price. For example, in Fallujah, four Blackwater PSD contractors were ambushed while escorting kitchen equipment through the city. Their bodies were burned, dismembered, and hung on a bridge.[16] Many also encountered roadside bombs, surprise attacks, and snipers.[17]

Civilian contractors manually clear a mine field surrounding a Russian monument on Bagram Airfield, Afghanistan, Sept. 14, 2007. The contractors work for the Mine Action Center at the airfield. (U.S. Army photo by Sgt. Jim Wilt) (Released)

Photographer's Name: SGT. JIM WILT Date Shot: 10/14/2007 Date Posted: Location: Bagram Airfield

Contractors not only became indispensable, they also felt the negative consequences of being so close to kinetic military operations. As an integral part of US Armed Forces presence then, many of the same factors that make military operations successful apply to contractors as well. First and foremost among these is discipline. George Washington said it best when he said "Discipline is the soul of an Army."[18] More broadly stated, discipline is the soul of the Armed Forces, of civilians accompanying the force, and of contractors who support that mission.

C. Discipline is the Soul of the Force

We do not have to look too far to see that a lack of discipline can have a disastrous effect on the outcome of a military operation. The prison abuses at Abu Ghraib still ring in our minds as an unfortunate example of how the lack of discipline by a few individuals (both military and civilian) can totally undercut a commander's ability to win.[19] We were able to win the war; the bigger question was (and still is) can we win the peace? [20] The primary battle being waged now is for the hearts and minds of the people of Iraq and Afghanistan. When we have a lack of discipline on the scale of Abu Ghraib, or even during the business of going door-to-door searching houses, interrogating detainees, or simply driving a vehicle among the population, our ability to win the peace will be undercut.

This is not meant to argue that misconduct on the part of civilians is out of control. While we have no statistics on civilian misconduct during contingency operations, we can examine disciplinary rates in the Air Force and nation wide. In the past 10 years, only 0.263 percent of Air Force military personnel have been subject to a court-martial.[21] Fortunately, like the military, relatively few civilians commit crimes. About three percent of the US population has engaged in criminal conduct resulting in imprisonment.[22] While it is encouraging that percentages are relatively low, with the number of contractors increasing over the past 15 years, the issue of how to deal with serious criminal misconduct has become increasingly worrisome.

III. JURISDICTIONAL GAP

A. Uniform Code of Military Justice

Since 1947, commanders have exercised discipline over the uniformed military by

applying the Uniform Code of Military Justice. The UCMJ is amazingly broad and flexible and applies globally. Commanders, however, have had no effective means to deal with civilian misconduct and/or lack of discipline when civilians accompanied the force overseas.

Article 2(10)(a) of the UCMJ [23] provides that "[i]n time of war, persons serving with or accompanying an armed force in the field" are subject to this law.[24] Courts have interpreted the critical words "in time of war" to mean during a declared war.[25] In our country's history, we have had only five declared wars [26] with the last one being World War II. Under this structure, it was very unlikely that the UCMJ would be used to cover the jurisdictional gap.

B. War Crimes Act

In 1996, Congress passed the War Crimes Act.[27] This Act punishes US Armed Forces members and US nationals who commit grave breaches of the Geneva Convention's Article 3.[28] These grave acts include torture, cruel or inhumane treatment, biological sexual experiments, murder, mutilation or maiming, rape, assault, and hostage taking. While the Act does grant jurisdiction for a number of serious crimes, it falls short in dealing with a whole host of other serious crimes for which the US government would want to hold civilians accountable.

For example, during peacekeeping operations in Bosnia, it was alleged that contractor employees were running a sex slave operation. Once investigators learned the likely suspects were civilian contractors, they attempted to turn over the investigation to local authorities for prosecution. Those authorities were either unable or unwilling to prosecute the case. The War Crimes Act did not apply and neither did the UCMJ.[29]

In another instance, the United States Court of Appeals for the Second Circuit overturned the conviction of a civilian who was convicted of sexual acts with a minor, his step-daughter.[30] The court held that because the abuse occurred in base housing in Germany, the conviction lacked the requisite jurisdictional element for the federal crime.[31]

Once again the cry went out for Congress to close this jurisdictional gap as the judge in that case took the unusual step of directing his clerk to forward his opinion to Congress.[32] They responded with the Military Extraterritorial Jurisdiction Act (MEJA).[33]

C. MEJA

MEJA applies to crimes defined as felonies under US law which are committed outside the United States. Its reach extends "to persons employed by or accompanying the US Armed Forces overseas and certain uniformed personnel, such as separated personnel whose crimes were not discovered prior to discharge." [34]

Seemingly, at least for felonies, MEJA looks like it had done its job in closing the jurisdictional gap. In practice, however, it has proved much more difficult. The first problem with MEJA was that only a US Attorney could prosecute the offense and must use his or her own resources to do so.[35] As it has turned out, MEJA has been used very infrequently.[36] One of the first uses of MEJA was in a case out of Japan. In 2002, Mr. Billy Bryan, a civilian employee, sexually assaulted an 11-year-old girl on Yokota Air Base, Japan.[37] Through extensive cooperation between the base legal office, the victim, Japanese prosecutors, and the US Attorney's Offices in Guam and Tacoma, Washington, the United States was successful in prosecuting the defendant upon his arrival in Washington.[38] Even more illustrative of the issues facing the US Attorney, however, was the case of LaTasha Arnt.

Staff Sergeant Matthias Anthony Arnt III and LaTasha Arnt were stationed at Incirlik Air Base in Turkey. In 2003 at the beginning of OIF, all civilian dependents were evacuated from Incirlik due to its proximity to Iraq and the possibility that it could be attacked. After Iraq fell, the dependents were allowed to return. On her second night back, Mrs. Arnt fatally stabbed her husband during a domestic dispute. As in the *Bryan* case, the Department of Defense (DOD) had not yet issued implementing guidance for MEJA.[39] Despite this, the Staff Judge Advocate (SJA) at Incirlik and the SJA for United States Air Forces in Europe worked closely with Air Force Judge Advocate (AF/JA), Secretary of the Air Force General Counsel (SAF/GC), and DOD/GC to find a MEJA solution to this case.[40] Using the draft MEJA regulations, the MEJA point of contact at the Department of Justice (DOJ) called the US Attorney's Office for the Central District of California, where Mrs. Arnt was from, and an Assistant US Attorney agreed to prosecute the case. This Assistant US Attorney tried the case in the Los Angeles District Court and it ended with

a hung jury. Mrs. Arnt was retried and was convicted of manslaughter and sentenced to eight years in prison. In April of 2007, the Ninth Circuit Court overturned the case finding the trial judge erred in not advising the jury that they could have found Mrs. Arnt guilty of the lesser included offense of involuntary manslaughter.[41] Consequently, the US Attorney's Office will have to try this case again.

An additional problem with MEJA was that it did not initially extend to non-Defense Department contractors. Congress attempted to remedy this in 2004 by applying MEJA to contractors of other federal agencies, to the extent their employment related to supporting the DOD mission overseas.[42] Recently, Central Intelligence Agency (CIA) contractor David Passaro was convicted and sentenced to eight years in prison for charges in connection with the death of an Afghan farmer, whom Passaro beat during in a series of interrogations.[43] However, because Passaro was a CIA contractor and the offense occurred prior to the effective date of the 2004 amendment to MEJA, prosecution under MEJA would have been problematic.[44] Thus, US prosecutors chose to try Passaro under the USA PATRIOT Act, [45] which extends the reach of American law to military bases located overseas. [46]

On the whole, US Attorneys are very cooperative and are willing to try MEJA cases. However, making them less attractive is that the crime scene can be thousands of miles away and prosecutors must transport the defendant and witnesses from significant distances. To achieve a successful prosecution, the US Attorneys must devote precious fiscal and human resources. Hence, the jurisdictional gap remained open.

IV. Closing the Gap – Back to the UCMJ

A. The New Law

The most recent attempt to close the jurisdictional gap came in 2006 with the passage of the 2007 National Defense Authorization Act.[47] Senators Lindsey Graham and John Kerry introduced the legislation to change the UCMJ to include civilians under its jurisdiction. The law changed Article 2(a)(10) to read:

> In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field shall be subject to this chapter.[48]

There is no legislative history accompanying this provision but the title of this section of the legislation is instructive: "SEC. 552. *Clarification of Application of Uniform Code of Military Justice During Time of War*."[49] Clearly Congress was attempting to deal with the ruling of the Supreme Court in *Reid* and the military courts in *Averette*.[50] The press quoted Senator Graham as saying:

> Right now you have two different standards for people doing the same job. This will bring uniformity to the commander's ability to control the behavior of people representing our country.[51]

While my guess is that Senator Graham most likely defines "the same job" rather broadly, the significant impact of this new law has been to put civilians under the jurisdiction of the UCMJ. This of course raises a whole host of issues as to how this new law will apply to contractors.[52] Some authors have suggested dire consequences.[53] For corporate counsel who must advise their clients, one of the main concerns has been the nature of the guidance the Department of Defense will provide regarding the application of this law.

B. Joint Service Committee Review

In January 2007, pursuant to DOD Directive 5500.17,[54] the Joint Service Committee on Military Justice (JSC) was tasked to address how DOD would review this new legislation and recommend amendments, if necessary, to the Manual for Courts-Martial (MCM).[55] The JSC made interim recommendations in May 2007 and presented its views to the DOD General Counsel.[56] One of the non-voting advisors to the JSC, Mr. Robert Reed of DOD/OGC, analyzed the criminal articles under the UCMJ and the MCM to determine which would apply to civilians. By their nature, some offenses do not apply to civilians because one of the elements of these offenses is that the charged person must be in the military.[57] Some offenses are only offenses under the UCMJ since they have no counterpart in other federal law.[58] Some are violations of both the UCMJ and other federal law—providing for jurisdiction by civilian and military courts.[59] Mr. Reed worked through the various specifications of each offense to determine the appropriate category for each. Due to the subjective

nature of that analysis however, the effort was to achieve "the 80 percent solution" for the purposes of making some preliminary determinations on how DOD would approach the application of the UCMJ to civilians, in light of MEJA jurisdiction.

The draft analysis revealed that of 163 offenses listed in the UCMJ and Part IV of the MCM, 14 are not applicable to civilians.[60] Of the remaining 149 UCMJ offenses, 67 have no comparable crime in other federal law and are, therefore, exclusive court-martial jurisdiction.[61] The remaining offenses have an analogous offense under other federal law: 60 are felony-level offenses to which MEJA would apply and 22 are "minor offenses" to which MEJA would not apply (since MEJA jurisdiction only applies to felony-level offenses). This 80 percent solution then sets up the discussion for how the armed forces might begin to deal with the application of the UCMJ to DOD contractors and DOD civilian employees.

Some would argue that the DOD should at least give the DOJ the right of first refusal since many prefer prosecutions of civilians in civilian courts whenever a civilian court has jurisdiction. DOJ officials have stated that they could let DOD know within two business days whether they will take a particular case for MEJA prosecution.

In a memorandum, dated 10 March 2008, the Secretary of Defense (SECDEF) issued general guidance concerning the exercise of UCMJ jurisdiction over civilians accompanying the forces.[62] The SECDEF directed that before initiating a disciplinary action pursuant to the UCMJ authority over civilians accompanying the forces, the DOD must formally notify the DOJ of the case and any potential US federal criminal jurisdiction in order to afford DOJ an opportunity to determine if it intends to pursue US federal criminal prosecution and to advise DOD accordingly.[63] "After DOD's formal notification to DOJ, DOJ shall expeditiously (but in no case longer than 14 calendar days) determine whether it intends to exercise jurisdiction over the case." [64] In other words, DOJ will be offered the right of first refusal.

C. Withhold Authority

Military command and orders are executed through the chain of command. It is anathema to the military justice system for a higher level commander to direct a subordinate commander to take a particular disciplinary action. In fact, this would be illegal.[65] If a superior commander either prefers to exercise jurisdiction on a case himself or disagrees with a subordinate commander, that commander would withhold the authority of the lower level commander to exercise his court-martial or non-judicial punishment authority.[66] This approach keeps the lines of authority clear and allows an unfettered and independent authority to decide the disposition of a particular case. Therefore, in this new area of exercising jurisdiction over civilians accompanying the force during contingency operations, the proper level of making a decision to prosecute a civilian has been made through this type of withholding action.

In the SECDEF Memo, the Secretary of Defense withheld Article 2(a)(10), UCMJ, jurisdiction to himself for: [67]

- Offenses committed within the "United States" [68]
- Persons who were within the "United States" at some time during the alleged misconduct
- Persons who are located within the "United States" when court-martial charges are initiated or notice of Article 15, UCMJ proceedings is given.

The SECDEF also directed that only geographic combatant commanders and those commanders assigned to, or attached to, a combatant command and who possess general court-martial convening authority, may exercise court-martial convening authority or impose nonjudicial punishment in Article 2(a)(10) cases.[69]

These restrictions are consistent with the JSC's general belief that authority to exercise this power should remain at a high level. Overall, combatant commanders are ultimately responsible for operations in their area of responsibility. Among many things, this includes good order and discipline. There were suggestions that the power to prosecute a civilian should be held at the level of the SECDEF and some authorities may very well be withheld at that level. However, actions taken in the military justice realm by SECDEF could only be appealed to the President. The better practice would be to keep most of these actions at lower levels where this authority would be exercised by senior-level decision makers at the combatant commander level, or just below. The JSC further proposed that these withholding actions be combined with the proper level of oversight.

D. Oversight

Regarding oversight, the JSC considered several elements. Importantly, civilian employees and/or contractors need to know under which convening authority they fall.[70] This need has collateral impacts on the military's efforts to track contractors deploying with the force (CDF) in the theater of operations.[71] Designation of the responsible convening authority should be done as part of that process. The JSC also proposed that the SECDEF's withholding action to general court-martial (GCM) convening authorities be accompanied by a requirement that the GCM first notify and obtain combatant commander approval to dispose of a case under the UCMJ before initiating court-martial or nonjudicial punishment action.[72] By doing so, this enables potential federal concurrent jurisdiction to be examined and affords the combatant commander, as a superior competent authority with equivalent jurisdiction to determine whether the combatant commander's general court-martial convening authority will instead be exercised in the case. For potential MEJA cases, the JSC proposed that the GCM notify DOD/GC, pursuant to DOD Instruction 5525.11 MEJA reporting requirements, of its intended actions under the UCMJ.[73] Because of the unique nature of exercising court-martial jurisdiction over civilians, with the attendant litigation and legal challenges to be expected which may require DOJ support and representation if challenged in the federal court system, it is clear that DOD envisions a reporting requirement of the intended UCMJ disposition that will afford a review of possible federal prosecution alternatives and litigation risk analysis before the commander embarks on his intended UCMJ disposition and commits the case to a course of protracted litigation and constitutional challenges. Not all cases on their facts and circumstances may be worthy of weathering this storm.

These recommendations were adopted in the SECDEF Memo, which included the following oversight measures: [74]

- Authority to initiate court-martial charges and nonjudicial punishment proceedings is withheld until the notification requirements established by SECDEF in Attachment 3 of the SECDEF Memo are accomplished; and

- For cases where the DOJ notifies DOD that it intends to pursue federal criminal prosecution for what is substantially the same offense or a related offense, authority is withheld while DOJ is pursuing its federal prosecution of the case and until such prosecution is completed or terminated prior to its completion.

Under the new SECDEF guidance, after the combatant commander notifies DOD/GC and DOD notifies DOJ, DOJ has 14 days in which to determine whether it intends to exercise jurisdiction over the case. After the review period, including any agreed upon extension, if DOJ does not advise DOD that it intends to pursue prosecution of the case, DOD may notify DOJ that it intends to initiate UCMJ proceedings and may then inform the combatant commander that, as a matter of command discretion, disciplinary action under Article 2(a)(10) of the UCMJ may be initiated.[75]

V. Conclusion

Through the history of warfare civilians and contractors have accompanied armed forces on the battlefield. In the past several years, the number of contractors working with the military in contingency operations has risen dramatically. This has resulted in new roles for contractors that have made them essential to the successful execution of military missions. Successful execution requires not only disciplined uniformed members but also disciplined civilians accompanying the force.

Unfortunately, for commanders in contingency operations, virtually no tools have existed with which to control or deter misconduct by civilians accompanying the force overseas. The War Crimes Act covered some of the more heinous crimes addressed by the Geneva Conventions, but this statute has proved too limiting for the type of control commanders need. The Military Extraterritorial Jurisdiction Act (MEJA) has attempted to solve some of these problems, but has still left a large jurisdictional gap where civilian prosecutions were concerned. The latest attempt to close the gap occurred in an amendment to the UCMJ in the 2007 National Defense Authorization Act. That amendment expanded UCMJ jurisdiction over civilians accompanying the force in declared wars or contingency operations.

This latest statutory change has raised a number of issues of concern to the Department of Defense and fears for contractors supporting contingency operations. The JSC, however, has analyzed the new legislation and their

recommendations for managing how these cases are procedurally addressed are promising. The JSC review of the offenses involved was thorough and the Secretary of Defense has provided only very senior military officials the authority to invoke the new legislation's powers. As an additional protection, he established an oversight mechanism to ensure appropriate DOD-level review. The outlook is promising for a reasonable application of the new rules to civilians with a focus on discipline and mission accomplishment. This approach will not guarantee that we will win the peace, but it may prevent us from losing it because of a lack of discipline by either uniformed members or civilians.

About the Author:

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Endnotes:

1 This article was originally published in The Reporter, Winter 2007-2008, and has been updated to reflect recent developments. It is based on a presentation to the 2007 AFMC Corporate Counsel Day and to the 2007 ABA Annual Meeting. The author recognizes and expresses his deep appreciation for the research contributions made by Maj Karen Douglas and editing/ research suggestions by Lt Col Lisa Lander, Maj Rich McDermott, Capt Mark E. Scabavea, and Mr. Bill Wells.

2 2007 National Defense Authorization Act, Pub. L. No. 109-364, 120 Stat. 2217 (2006) [hereinafter cited as 2007 NDAA] amended Article 2(a)(10) of the Uniform Code of Military Justice.

3 Tom Jackman, *US Contractor Fired on Iraqi Vehicles for Sport, Suit Alleges*, Wash. Post, Nov. 17, 2006, at A20.

4 *Id.* The article noted the contractor employees were returned to the United States and were then suspended and later fired.

5 T. Christian Miller, *The Conflict in Iraq: US Marines Detained 19 Contractors in Iraq*, Los Angeles Times, June 8, 2005, at A10.

6 Sabrina Tavernise and James Glanz, *Iraqi Report Says Blackwater Guards Fired First*, N.Y. Times, Sep. 19, 2007, at A12; John M. Broder and James Risen, *Shootings by Blackwater Exceed Other Firms in Iraq*, N.Y. Times, Sep. 27, 2007, at A1. *But* see Joshua Partlow and Walter Pincus, *Iraq Bans Security Contractor*, Wash. Post, Sep. 18, 2007, at A1 (Blackwater vice president said that the company's guards had responded appropriately to an ambush.)

7 The New York Times quoting "government and industry officials" suggests that Blackwater "has been involved in cases in which its personnel fired weapons while guarding State Department officials in Iraq at least twice as often per convoy mission as security guards working for other American security firms…" *Id.* The trend of shooting by security contractors seems to be on the rise. From May 2006 to May 2007, the number of warning or deadly shots fired at Iraqis by security contractors was 207. This was up from 115 for the same period the previous year. Jim Michaels, *Number Of Incidents In Which Civilians Fired Shots Nearly Doubles*, USA Today, Sep. 4, 2007, at 7. The Deputy Secretary of Defense has weighed in as well sending a memorandum covering the importance of managing contractor personnel accompanying the force and highlighting that "DOD contractor personnel (regardless of nationality) accompanying US armed forces in contingency operations are currently subject to UCMJ jurisdiction." Memorandum, Deputy Secretary of Defense Gordan England, subject: Management of DOD Contractors and Contractor Personnel Accompanying US Armed Forces in Contingency Operations Outside the United States (25 Sept. 2007).

8 Karen L. Douglas, *Contractors Accompanying the Force Empowering Commanders with Emergency Change Authority*, 55 A.F.L. Rev. 127, 130 (2004) [hereinafter cited as Douglas]; Rebecca R. Vernon, *Battlefield Contractors; Facing the Tough Issues*, 33 Pub. Cont. L. J. 369, 373-374 (2004).

9 Douglas, *supra* note 8, at 130.

10 Wm. C. Peters, *On Law, Wars, and Mercenaries: The Case for Courts-Martial Jurisdiction over Civilian Contractor Misconduct in Iraq*, 2006 B.Y.U.L. Rev. 367, 380-84 [hereinafter cited as Peters].

11 Douglas, *supra* note 8, at 131.

12 *See* Ricou J. Heaton, *Civilians at War: Reexamining the Status of Civilians Accompanying the Armed Forces*, 57 A.F.L. Rev 155 (2005) [hereinafter cited as Heaton] citing the Gen. Accounting Office, GAO-03-695, Military Operations: Contractors Provide Vital Services to Deployed Forces but are not Adequately Addressed in DOD Plans, at 8-9, 16 (2003) [hereinafter 2003 GAO Report on Military Operations] (discussing reliance on contractors to provide maintenance for various systems is unavoidable because the armed forces simply lack any internal capacity to maintain the equipment).

13 The numbers increased as well. *Overseas War Profiteering and Contractor Crimes, 2007; Hearings on H.R. 369 Before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Judiciary Committee,* 110th Congress (2007) (statement of Scott Horton Adjunct Professor, Law Columbia University School of Law) [hereinafter cited as Horton Testimony]. Professor Horton testified: "Before the commencement of the surge, for instance, the total community of contractors in Iraq was around 100,000 and the number of uniformed service personnel was around 125,000." *Id.*

14 *See* 2003 GAO Report on Military Operations, *supra* note 12, at 2-10, Table 1 at 7.

15 Phillip Carter, *Hired Guns: What to do about Military Contractors Run Amok*, Slate Magazine, (Apr. 10, 2004)

http://www.slate.com/id/2098571 **(last visited Jan. 26, 2008).** For a summary of how contractors and civilians are treated under the Law of Armed Conflict, *see generally* Heaton, *supra* note 12.

[16] Colin Freeman, *Horror at Fallujah – 4 US Contractors Die,* San Francisco Chronicle (Apr. 1, 2004), available at http://www.sandline.com/hotlinks/San_Fran_Chron-Blackwater.html (last visited Jan. 27, 2007). *See* Alan Feuer, *For An Iraq Contractor, Duty, And Then Death*, N.Y. Times, Aug. 8, 2007, at A12 (private security expert killed by a roadside bomb). Many understand the risks but believe the compensation is worth it. See Tyler Bridges, *Hired Guns Shrug Off War Risks For Payday*, Miami Herald, Aug. 1, 2007, at 1. *See also* Eviatar, *Contract With America, Hard Terms for the Soldier of Fortune*, Harper's Magazine, 74-77 (October 2007).

[17] Certainly contractors did not start paying the price here. Whenever they were close to the action they were at risk. For example, in World War II, when the Navy started building airfields in the South Pacific, the invading Japanese army captured, killed or wounded contractors right along side their military hosts. Michael E. Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon?,* 51 A.F. L. Rev. 111, 118-119 (2001). This was the motivating factor for the creation of the Fighting Seabees Construction Battalions. *Id.* citing Hugh B. Cave, We Build, We Fight! The Story of the Seabees (New York 1944). The creation of this construction battalion also inspired the Hollywood movie The Fighting Seabees (Republic Pictures 1944).

[18] The American Revolution, at http://www.americanrevolution.com/AmRevFormArmy.htm (last visited Jan. 27, 2008):

> Basing his observations on his experience with British Regulars during the French and Indian War, Washington wrote: "Discipline is the soul of an army. It makes small numbers formidable; procures success to the weak and esteem to all." *Id.*

[19] Major General George R. Fay's investigation into the Abu Ghraib scandal is available at http://www.defenselink.mil/news/Aug2004/d20040825fay.pdf. He went on to write:

> I would be remiss if I did not reemphasize that the 180,000 US and coalition forces, under all echelons of command within the CJTF-7, were prosecuting this complex counter-insurgency operation in a tremendously horrid environment, and were performing above all expectations. Leaders and Soldiers confronted a faceless enemy whose hatred of the United States knew no limits. The actions of a few undisciplined Soldiers at Abu Ghraib have overshadowed the selfless service demonstrated every day, twenty-four hours a day, by the vast majority of our Soldiers and civilians on the battlefield. We, as a Nation, owe a debt of gratitude to our service members who have answered our Nation's call and are in harm's way, every day. This fact became perfectly clear to me as I conducted my investigation. *Id.*

[20] Josh White & Amy Goldstein, Abu Ghraib Investigator Points to Pentagon, Wash. Post, Jun. 17, 2007, at A7. See also Joshua Partlow and Walter Pincus, Iraq Bans Security Contractor, Wash. Post, Sep. 18, 2007, at A1 (Iraqi Government revoked the license of Blackwater USA for its involvement in a shootout in Baghdad that killed a number of people).

[21] Air Force Legal Operations Agency (AFLOA)/JAJM figures as of June 25, 2007. The Army and Navy do not keep similar statistics.

[22] *Criminal Offender Statistics*, US Department of Justice, (last modified Sep. 6, 2006), *available at* http://www.ojp.usdoj.gov/bjs/crimoff.htm (last visited Jan. 27, 2008).

[23] 10 USC §§ 801-946 (2005) (prior to enactment of the 2007 NDAA, *supra* note 2).

[24] *Id.*

[25] Reid v. Covert, 354 US 1 (1957), and progeny, *as cited in* US v. Averette, 41 C.M.R. 363 (C.M.A. 1970), at 364. *See also* McElroy v. United States, 361 US 281 (1960). *But see* Peters, *supra* note 10**,** at 394-406.

[26] *Congress' Role in War*, USA Today, (last modified May 18, 2005) *available at* http://www.usatoday.com/news/nation/2002-10-08-congress-war.htm (last visited Jan. 27, 2008). The War of 1812, Mexican-American War, Spanish-American War, World War I, and World War II have been the only instances where the United States Congress has declared war against other countries. *See* Peters, *supra* note 10 at note 153 and accompanying text.

[27] 18 USC § 2441 (2005).

[28] The relevant conventions which have a common Article 3 are: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[29] *See The U.N. and the Sex Slave Trade in Bosnia: Isolated Case or Larger Problem in the U.N. System?: Hearing Before the Subcommittee on International Operations and Human Rights of the Committee on International Relations*, 107th Cong. 9-10 (Apr. 24, 2002).

[30] United States v. Gatlin, 216 F.3d 207 (2d Cir. 2000).

[31] *Id.* at 209. *See* Glenn R. Schmitt, *Closing the Gap in Criminal Jurisdiction Over Civilian Accompanying the Armed Forces Abroad – A First Person Account of the Creation of the Military Extraterritorial Jurisdiction Act of 2000*, 51 Cath. U.L. Rev. 55, 76 (2001).

[32] *Id.*

[33] 18 USC § 3261 (2007).

[34] Ronald R. Ratton, *Case Study: Use of the Military Extraterritorial Jurisdiction Act to Prosecute Misconduct by a*

Civilian Employee in Japan, 29 The Reporter (Vol. 4) 32, 32-34 (2003) [hereinafter cited as Ratton].

[35] As with most Government agencies, funding is tight. The DOJ is no exception. See Scot J. Paltrow, *JUSTICE DELAYED*: *Budget Crunch Hits US Attorneys' Offices*, Wall Street Journal, Aug 31, 2007; p. A1.

[36] *See* William Matthews, *Contractor Crackdown: Civilian contract employees can now be prosecuted under the UCMJ*, Armed Forces Journal, **http://www.armedforcesjournal.com/2007/02/2471808** (last visited Jan. 17, 2007).

[37] Ratton, *supra* note 34, at 32-34.

[38] *Id*. On 9 January 2003, Mr. Bryan pled guilty pursuant to a plea agreement. On 4 April 2003, the court sentenced him to 18 months confinement followed by three years of supervised release. *Id*. at 34.

[39] However, DOD had drafted proposed implementing regulations that were followed in the Arnt case as an informal Beta Test of the proposed procedures. Interestingly, as in the *Bryan* case, Mrs. Arnt did not challenge jurisdiction under the MEJA.

[40] This involved a great deal of coordination between Incirlik Air Base (39th ABW/JA), United States Air Forces in Europe (USAFE/JA), the Air Force Directorate of the Judiciary, Military Justice Policy Division (AFLSA/JAJM), the DOD/GC (Associate Deputy General Counsel (Military Justice and Personnel Policy)), and the DOJ Criminal Division.

[41] United States v. Arnt, 474 F.3d 1159 (9th Cir. 2007).

[42] The extent to which this attempt has effectively extended jurisdiction to non-DOD civilians is questionable. The language is broad and vague and would raise problems for prosecutors. These problems may explain why Congress is considering amending MEJA again. In October of 2007, the House passed H.R. 2740. Paragraph 3 of Section 2 of this bill would amend MEJA to apply to contractors of any federal agency "in an area, or in close proximity to an area (as designated by the Department of Defense) where the Armed Forces is conducting a contingency operation."

[43] Andrea Weigl, *Passaro Will Serve 8 Years for Beating*, The News & Observer, Feb. 14, 2007, *available at* http://www.newsobserver.com/nation_world/passaro/story/543038.html (last visited Jan. 25, 2008).

[44] *See Q&A: Private Military Contractors and the Law*, Human Rights Watch, http://hrw.org/english/docs/2004/05/05/iraq8547.htm (last visited Jan. 25, 2008).

[45] Horton Testimony, *supra* note 13. Andrea Weigl, *Passaro Convicted of Assaulting Afghan: The Former CIA Contractor, Found Guilty of Beating a Prisoner in Afghanistan, Faces a term of two to 11.5 years*, News & Observer, Aug. 18, 2006, *available at* http://www.newsobserver.com/nation_world/ passaro/story/476483.html (last visited Jan. 26, 2008) [hereinafter Weigl].

[46] Horton Testimony, *supra* note 13. Weigl, *supra* note 45.

[47] H.R. 5122, 109th Cong. § 2 (2006) (*emphasis added to highlight the amended language*).

[48] 2007 NDAA, *supra* note 2.

[49] *Id*.

[50] The 1996 NDAA directed that an Advisory Committee comprised of DOJ and DOD representatives be established to examine the possibility of criminal prosecution of civilians accompanying the armed forces in the field outside the United States in time of armed conflict not involving a war declared by Congress. Congress directed the Advisory Committee to provide proposed legislation in its report back to Congress. This committee, which included Mr Reed, concluded that the judicially-construed "declared war" of Article 2, UCMJ, did not reflect how the military had been engaging in present-day armed conflicts and also recommended that Congress amend the UCMJ to include "contingency operations as designated by the Secretary of Defense (e.g., 10 USC § 101(a)(13)(a))." Discussion between Mr. Robert Reed, Associate Deputy General Counsel (Military Justice and Personnel Policy), Department of Defense, and the author.

[51] Griff Witte, *New Law Could Subject Civilians to Military Trial*, Wash. Post, Jan. 15, 2007, at A01.

[52] *Id*.

[53] *Id*. William Mathews, *New Law Subjects Contractors to Military Justice*, Jan. 5, 2007, http://www.federaltimes.com. *But see* Peters, *supra* note 10, at 406.

[54] US Dep't of Defense, Dir. 5500.17, Role and Responsibilities of the Joint Service Committee (JSC) on Military Justice (3 May 2003).

[55] Briefing by Mr. Robert Reed to the ABA Public Contract Law Section's Battle Space and Contingency Procurements Committee on June 8, 2007 [hereinafter cited as Reed Briefing].

[56] *Id*.

[57] For example, desertion, AWOL, fraternization, etc. *See* Uniform Code of Military Justice (UCMJ) arts. 85, 86, 134 (2005).

[58] For example, disorderly conduct, drunk driving, provoking speech. *See* UCMJ arts. 134, 111, 117 (2005); *See* Manual for Courts-Martial, United States (2005) [hereinafter MCM], Rules for Courts-Martial (R.C.M.) 201(d)(1) on exclusive court-martial jurisdiction.

[59] *See* MCM, *supra* note 58, R.C.M. 201(d)(2).

[60] Reed Briefing, *supra* note 55. In these offenses, the offender must be a member of the armed forces. The nature of the offenses and the elements are only applicable to service members. *Id*.

[61] *Id*. *See* MCM, *supra* note 58 a*nd* R.C.M. 201(d)(1).

[62] Memorandum, Secretary of Defense, subject: UCMJ Jurisdiction of DOD Civilian Employees, DOD Contractor Personnel, and Other Persons Serving With or Accompanying the Forces Overseas During Declared War and in Contingency Operations (10 Mar 2008) [hereinafter cited as SECDEF Memo].

[63] *See* SECDEF Memo, Attachment 3, *supra* note 62, These requirements include following the procedures and information requirements of DOD Instruction 5525.11, Criminal Jurisdiction Over Civilians Employed By or Accompanying the

ARMED FORCES OUTSIDE THE UNITED STATES, CERTAIN SERVICE MEMBERS, AND FORMER SERVICE MEMBERS.

[64] SECDEF Memo, Attachment 3, *supra* note 62.

[65] *See* US v. Levite, 25 M.J. 334 (1987); US v. Treakle, 18 M.J. 646 (1984).

[66] MCM, *supra* note 58, R.C.M. 306(a) provides:

> Each commander has discretion to dispose of offenses by members of that command. Ordinarily the immediate commander of a person accused or suspected of committing an offense triable by court-martial initially determines how to dispose of that offense. A superior commander may withhold the authority to dispose of offenses in individual cases, or generally. A superior commander may not limit the discretion of a subordinate commander to act on cases over which authority has not been withheld.

[67] *See* SECDEF Memo, Attachment 2, *supra* note 62.

[68] For the purposes of this determination, "United States" means "the several States of the United States, the District of Columbia, and the commonwealths, territories , and possessions of the United States. *Id.*

[69] *See* SECDEF Memo, Attachment 2, *supra* note 62. Commander, COCOM has authority to further limit by withholding action to specified general court-martial convening authorities; limit to specified geographic areas within COCOM theater of contingency operation; and to further limit by withholding action against host-nation or third country national employees/contractors serving with or accompanying the armed force in the field. Reed Briefing, *supra* note 55 and SECDEF Memo, Attachment 2, *supra* note 62.

[70] Reed Briefing, *supra* note 55.

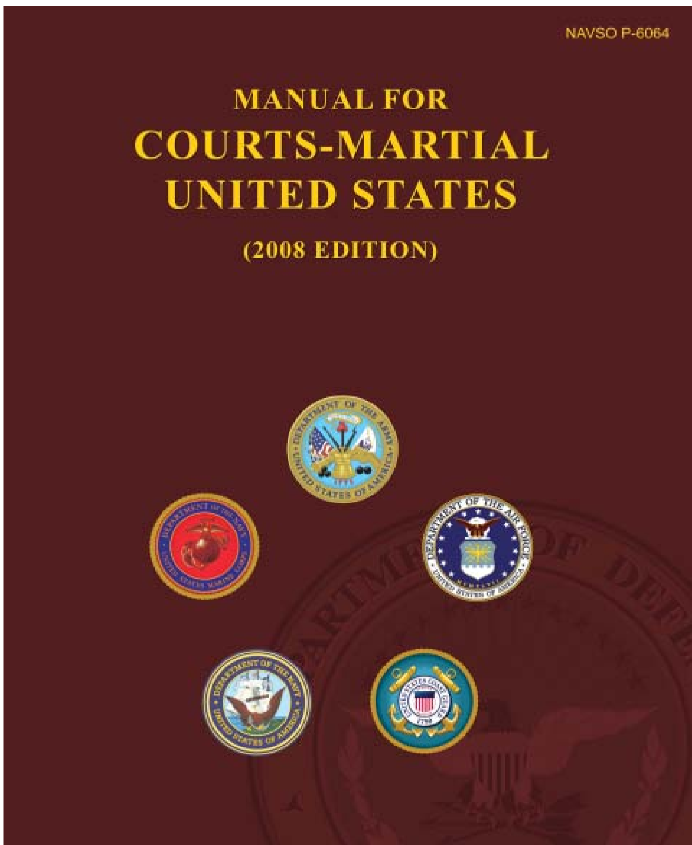
[71] US DEP'T OF DEFENSE, Inst. 3020.41, CONTRACTOR PERSONNEL AUTHORIZED TO ACCOMPANY THE US ARMED FORCES (3 Oct. 2005), requires the Under Secretary of Defense for Personnel and Readiness (USD (P&R)), in coordination with the Under Secretary of Defense for Acquisition, Technology and Logistics (USD (AT&L)), to designate or develop a joint web-based database and procedures for its use, as the central repository for information on all CDF personnel. Memorandum, Director, Defense Procurement and Acquisition Policy Shay Assad, subject: Implementation Guidance for the Synchronized Predeployment and Operational Tracker (SPOT) to Account for Contractor Personnel Performing in the United States Central Command Area of Responsibility (AOR) (28 Jan. 2008). The Synchronized Predeployment and Operational Tracker (SPOT) was designated as the database to serve as this repository. *Id.*

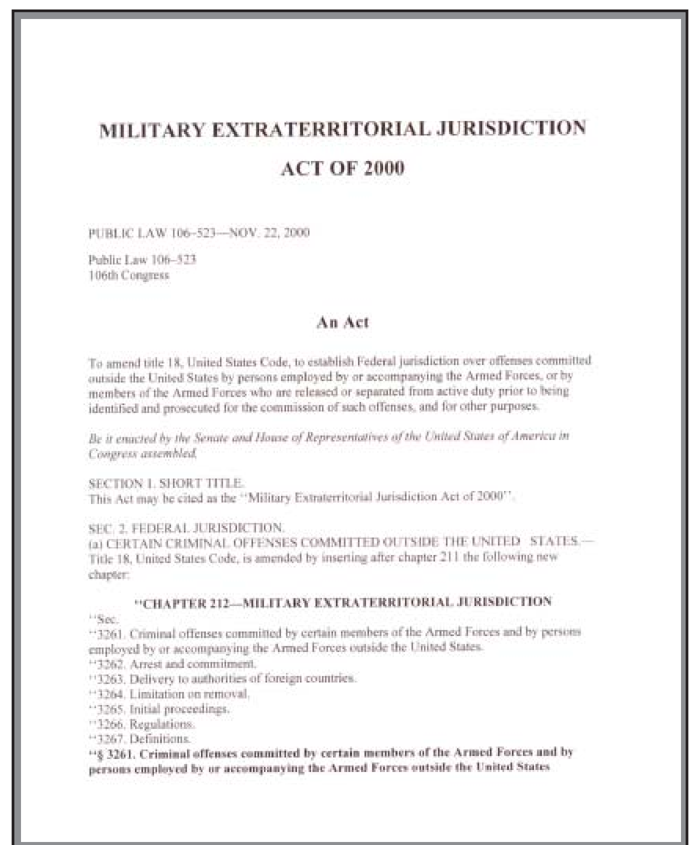
[72] Reed Briefing, supra note 55. This would provide the COCOM the option to withhold authority or exercise his or her own authority in a particular case.

[73] *Id.*

[74] *See* SECDEF Memo, Attachment 3, *supra* note 62.

[75] *Id.*





MILITARY EXTRATERRITORIAL JURISDICTION

ACT OF 2000

PUBLIC LAW 106–523—NOV. 22, 2000

Public Law 106–523
106th Congress

An Act

To amend title 18, United States Code, to establish Federal jurisdiction over offenses committed outside the United States by persons employed by or accompanying the Armed Forces, or by members of the Armed Forces who are released or separated from active duty prior to being identified and prosecuted for the commission of such offenses, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.
This Act may be cited as the ''Military Extraterritorial Jurisdiction Act of 2000''.

SEC. 2. FEDERAL JURISDICTION.
(a) CERTAIN CRIMINAL OFFENSES COMMITTED OUTSIDE THE UNITED STATES.—Title 18, United States Code, is amended by inserting after chapter 211 the following new chapter:

''CHAPTER 212—MILITARY EXTRATERRITORIAL JURISDICTION

''Sec.
''3261. Criminal offenses committed by certain members of the Armed Forces and by persons employed by or accompanying the Armed Forces outside the United States.
''3262. Arrest and commitment.
''3263. Delivery to authorities of foreign countries.
''3264. Limitation on removal.
''3265. Initial proceedings.
''3266. Regulations.
''3267. Definitions.

''§ 3261. Criminal offenses committed by certain members of the Armed Forces and by persons employed by or accompanying the Armed Forces outside the United States

US Army (USA) Corps of Engineers (USACE) Civilian, Billy Sellin (left), Resident Engineer, Balad Air Base (AB) Resident Office, Gulf Region North (GRN), speaks with several civilian subcontractors (center and right) about the construction progress of the new medical supply warehouse at the Logistical Support Area (LSA) Balad, Balad Air Base (AB), Salah Ad Din Province, Iraq (IRQ), during Operation IRAQI FREEDOM. Photographer's Name: JIM GORDON, CIV, USACE Date Shot: 7/13/2005 Date Posted: Location: BALAD AB

Civilians in the Air Force Distributed Common Ground System (DCGS)

Lt Col Duane Thompson, HQ USAF

Given the increasing importance of civilians to modern warfare, it is necessary to be familiar with the line separating legitimate civilian activities from those that would violate the Law of Armed Conflict (LOAC). Specifically, the issue arises as to whether, consistent with LOAC, reserve personnel can man positions in the Air Force Distributed Common Ground System (DCGS) (AN/GSQ-272 "Sentinel") in their civilian status during an international armed conflict. The Air Force Operations Law Division concluded that, to avoid potential loss of prisoner of war (PW) status and prosecution as an unlawful combatant if captured by an enemy force, civilians should not man the DCGS. Other Department of Defense (DOD) policy concerns, such as avoiding risk to civilians or ensuring the positions are filled during wartime, may also dictate manning the DCGS only with active or activated military personnel.

Air Force DCGS System

The Air Force DCGS "Sentinel" is a network-centric weapon system. It is capable of tasking intelligence, surveillance, and reconnaissance (ISR) sensors and receiving, processing, exploiting, and disseminating data, information, and intelligence from airborne, national, and commercial platforms and sensors, including the U-2, Global Hawk (RQ-4), and Predator (MQ-1). The DCGS consists of numerous active duty, Air National Guard, and mission-partner sites interconnected by a robust communications infrastructure that allows collaborative and distributed reach-back operations. DCGS operators task, process, correlate, exploit, and disseminate multiple-source, decision-quality intelligence information to the joint task force (JTF) commander and lower echelons, including significant support to time-critical targeting.[1] This article focuses on whether, given the particular functions and capabilities of DCGS, it is permissible under LOAC, or otherwise advisable, to man civilian positions within an Air Force DCGS.

Civilian Support to the Armed Forces under LOAC

Under LOAC, personnel involved in an armed conflict fall into two basic categories: combatants and non-combatants. Combatants are persons who engage in hostile acts in an armed conflict on behalf of a Party to the conflict.[2] Lawful Combatants are members of the armed forces authorized by a Party to engage directly in armed conflict.[3] They are entitled to immunity for combatant acts they perform during war, including those which directly harm the enemy, provided they comply with LOAC.[4] The Hague Convention of 1907 states that the laws, rights, and duties of war extend to armies, militia, and volunteer corps that fulfill four conditions: (1) they are commanded by a person responsible for his subordinates; (2) they have a fixed distinctive emblem recognizable at a distance; (3) they carry arms openly; and (4) they conduct operations in accordance with the laws or customs of war.[5] When captured, combatants are entitled to prisoner of war (POW) status.[6]

Unlawful Combatants [7] on the other hand, are persons who engage in hostile acts who are not authorized to do so, or persons who improperly use their protected status as a shield to engage in hostilities.[8] Unlawful Combatants are a proper object of attack when engaged in combatant activities. [9] If captured, they may be tried and punished for their actions. [10]

Non-combatants can be further divided into three sub-groups: non-combatant military, civilians accompanying the force, and civilians.[11] Each sub-group has different protections and responsibilities. First, non-combatant military personnel includes: medical personnel, chaplains, and other personnel employed in specific medical functions. [12] If captured they are not considered POWs, but rather "retained personnel" and may be held by the opposing power to perform work within their specialty. [13]

The second group of non-combatants includes civilians accompanying the force. The Hague Convention of 1907 and the Geneva Conventions of 1949 recognized that civilians will support and accompany the armed forces.[14] Civilians accompanying the force,

provided they have received authorization from the armed forces they accompany, are entitled to PW status if captured.[15] As civilians they may not be targeted directly, but they are subject to personal risk by virtue of working in close vicinity to lawful military targets. These civilians are not entitled to act as combatants by taking a direct part in hostilities and could be prosecuted as unlawful combatants should they do so.

The third category of non-combatants includes civilians not associated with the armed conflict. The Fourth Geneva Convention gives protected status to all persons who find themselves in the hands of a party to the conflict or an occupying power of which they are not nationals, excluding those persons already protected by Geneva Conventions I through III.[16] Civilians who are not associated with the armed conflict are to be protected and respected by all parties to the conflict.[17] Such protection includes keeping them separate and distinct from lawful military targets, and not targeting them for attack.[18] However, civilians that participate directly in hostilities can lose their protection while participating,[19] and if they act as combatants causing harm to the enemy, they can be prosecuted as unlawful combatants if captured.

Lawful Activities of Civilians Accompanying the Force

The extent of activities that civilians may lawfully carry out in support of combat operations has been the subject of great debate, since the explicit guidance provided by the relevant treaties is limited. The following discussion identifies those civilian support activities that are expressly permitted by the relevant treaties (a.k.a. "black letter law"), and then discusses different methods of delineating permissible and impermissible activities in the "grey zone;" that is, activities not specifically addressed in the treaties.

Black Letter Law

Treaties to which the United States is a signatory provide a starting point in determining the types of activities that may be conducted by civilians accompanying the force. Activities expressly included in treaties to which the United States is a signatory can be conducted without fear of crossing the line into unlawful combatancy. Hague Convention IV of 1907, Article 13, includes "newspaper correspondents and reporters, sutlers[20] and contractors."[21] Geneva Convention III of 1949, Article 4A(4), includes "civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces."[22] Article 4A(5) also gives PW status to "members of crews, including masters, pilots and apprentices, of the merchant marine and the crew of civil aircraft of Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law."[23]

The relevant conventions do not expressly define those activities that civilians may not perform. However, it is relatively clear that only combatants may take a "direct" or "active" part in hostilities. Common article 3 to the Geneva Conventions protects persons "taking no active part in the hostilities."[24] Additional Protocol I notes that combatants have the "right to participate directly in hostilities"[25] and protects civilians "unless and for such time as they take a direct part in hostilities."[26] Neither "active" nor "direct" participation are defined. There must be certain acts which are limited to combatants, or the entire scheme of distinguishing civilians from combatants, and civilians from civilians accompanying the force, would be meaningless. The principle of distinction is a central tenet of the law of armed conflict. For that reason it can be consid-

Col. Alan Tucker (left), 950th Electronic Systems Group commander, and Col. Rodney Liu, 950th ELSG deputy commander, view a demonstration of the DCGS Integrated Backbone. The DIB provides the common standards, architectures, tools, and documentation that facilitate the integration of capabilities across the DCGS community of interest. [By M. D. Morales ESC Public Affairs]

ered reasonably certain that causing direct harm to the enemy, for example by firing a weapon or dropping a bomb, would be considered combatant activity that no civilian could lawfully perform. [27]

Between complete nonparticipation in armed conflict and firing a weapon at the enemy lays a vast range of functions that support the combatant. These functions could include production of war armaments, logistics, maintenance, planning, base support, intelligence, communications, transportation, and myriad others. Legal scholars have struggled to extract a definitive formula from international law to separate combatant activities from activities that may legitimately be performed by civilians accompanying the force. To separate prohibited direct participation from acceptable participation, previous analysis has tried to assimilate or analogize concepts such as proximate cause from tort law, accessorial liability from criminal law; similarly, distinctions have been based on the degree to which a function is integrated into the war-fighting effort. Unfortunately, these tests have produced ambiguous, unhelpful results. The following subparagraphs examine permissible civilian involvement through various lenses, including customary international law, analogy to tort or criminal law, and the policy ramifications of defining the scope of permissible civilian support broadly or narrowly.

Customary International Law

Customary international law develops through the general and consistent practices of States following such practices from a sense of legal obligation. [28] Customary international law can be open to interpretation as a guiding standard, since it often consists of broad concepts rather than detailed guidance. States may not be consistent in their practice and the law may evolve with widely accepted changes in practice. Such ambiguity and inconsistency is especially prevalent in modern warfare and with respect to the employment of civilians. While the practice of States at the turn of the 20th century may have been to view warfare as the exclusive province of uniformed soldiers, with civilians acting in limited support functions, in the 21st century civilians have played wider roles much closer to combat. States integrating civilians into various fields of combat support can craft legal justifications to support their approach, given that black-letter guidance on what civilians cannot do is open to interpretation.

Commentaries and treatises provide some guidance on customary international law, although they are not in themselves authoritative. The International Committee of the Red Cross (ICRC) Commentary to Article 4(A)(4) of the Geneva Convention on Prisoners of War (GPW), which identifies the legal category of 'civilians accompanying the force,' states that "the list [29] given is only by way of indication however, and the text could therefore cover other categories of persons or services who might be called upon, in similar conditions, to follow the armed forces during any future conflict."[30] The realm of permissible civilian support activities was left open to be guided by analogy to the short list of professions included in Article 4(A)(4). The ICRC Commentary to Article 43.2 of Additional Protocol I, addressing direct participation in hostilities, noted that the ICRC wanted to express the view that direct participation "cover[s] acts of war which are intended by their nature or purpose to hit specifically the personnel and materiel of the armed force of the adverse party." [31] However, the Commentary goes on to opine that there is "room here for some margin of judgment: to restrict this concept to combat and active military operations would be too narrow, while extending it to the entire war effort would be too broad, as in modern warfare the whole population participates in the war effort to some extent, albeit indirectly." [32] The range of permissible civilian participation is therefore left open to interpretation and a wide range of State practice.

Analogies to Tort and Criminal Law

Analogies to tort law or criminal law provide a frame of reference with which lawyers are familiar, but when applied to this issue, do not produce consistent results. The Geneva Conventions and Additional Protocol I refer to "direct" participation or taking an "active" part in hostilities. Analysis of how involved is too involved frequently resembles a tort "proximate cause" inquiry [33] from the common law tradition. The ICRC Commentary to Additional Protocol I alludes to this frame of reference: "Direct participation in hostilities implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place."[34] Unfortunately, the Commentary description begs many questions. If various civilians build a bomb in the homeland, drive it to the port, ship it to the area of responsibility (AOR), drive it to the airfield, load it on the plane, fly it to the target and drop it, knowing at every step of the way that these actions will ultimately bring

destruction to the enemy, at what point is the causal line crossed? "But for" any of these steps a bomb would not have fallen and yet not all of these steps, considered individually, would constitute impermissible "direct" participation in hostilities. [35] This "but for" test must be constrained by geographic, temporal, and *mens rea* [criminal intent] connections to the results, creating a difficult and arbitrary case-by-case determination.

Another approach to determining when civilian participation crosses the line into direct participation in hostilities would be to determine when that individual would be liable under criminal law as a party to an offence or as an accessory, such as by conspiring to commit [36] or aiding and abetting [37] in the completed offense. The analogy is not a direct fit, because the criminal template would capture activities that constitute permissible support to military forces. If the "criminal act" were considered to be shooting at the enemy, then any civilian performing support to the soldier could be considered a co-conspirator, which would negate the immunity accorded to civilians accompanying the force for their support activities. In the criminal context, supplying a weapon to the shooter accompanied by the requisite *mens rea* would clearly bring shared liability with the person who shot it at the victim. [38] Yet in the LOAC context, civilians could be involved at multiple points in the weapons manufacture and supply chain while not losing their status as civilians accompanying the force. In some ways, the criminal law paradigm would support a very wide interpretation of permissible civilian activity. As it is not a criminal offence for a combatant to kill an enemy combatant, it is not a criminal offence for a civilian to support the combatant. There can be no accessory or conspiracy liability if the action of the principal is lawful. The civilian would only be criminally liable if they took part in violence against an enemy combatant as principal. Hence the criminal law analogy is fraught with ambiguity and contradiction.

Policy Considerations in Defining the Permissible Scope of Civilian Support

Given there is certainty that uniformed military can lawfully perform combat and combat support functions, the clearest course would be to utilize uniformed military for all combat support. The reality is that in modern warfare, civilians play critical roles across the full spectrum of military operations. High-tech weapons require contractors in training and maintenance roles. Civilians perform intelligence, planning, and communications support functions, especially for global operations that can be planned, conducted, and controlled from locations thousands of miles away from the actual area of operations. Civilians fill numerous logistics functions, especially as the trend toward contracting out support functions continues. Defining a category of support as combatant has an immediate impact on military operations, since civilians will either be precluded from providing that support or face criminal prosecution as unlawful combatants if captured. As a general policy, the US does not place civilians in the untenable position of undertaking duties and responsibilities considered illegal under LOAC. [39] Taken together, these considerations support the proposition that broadly interprets the areas of permissible civilian support.

When considering how narrowly to restrict civilian support functions as "direct participation in hostilities," policy considerations include the impact on the ability to target the enemy, enemy incentives to shield targets with civilians, and our ability to prosecute unlawful combatants.

An enemy force may be tempted to completely replace the force with civilians, in order to shield them from direct attack, since civilians not taking a direct part in hostilities are protected from being targeted under the Geneva Conventions. In other words, permitting civilians to perform a broad array of support functions as civilians accompanying the force narrows the potential pool of enemy personnel who may be targeted directly at any time. Conversely, since international law is reciprocal, this logic similarly protects civilians accompanying a friendly force. Given the importance of civilians to modern warfare, the reduced ability to target a civilianized enemy force while they are away from lawful objects of attack (such as military flight lines or assembled military personnel) may be acceptable to friendly forces who would trade off these targeting limitations in favor of the benefits derived from an increased number of civilians accompanying friendly forces.

An enemy force may be tempted to civilianize their force to shield valid military targets and force the attacker to consider the presence of civilians in their collateral damage analysis. While the presence of civilians does not immunize valid military targets, their presence is a policy factor to consider, as well as a factor in considering how to minimize collateral damage. Increasing reliance upon civilians accompanying the force will

probably lead, over time, to a diminution of the importance of the presence of such civilians as a factor in the collateral damage calculation. Their association with the targeted operations could be analogized to assumption of the risk, since the enemy is not performing its obligation to keep protected persons and valid military targets separate and distinct.

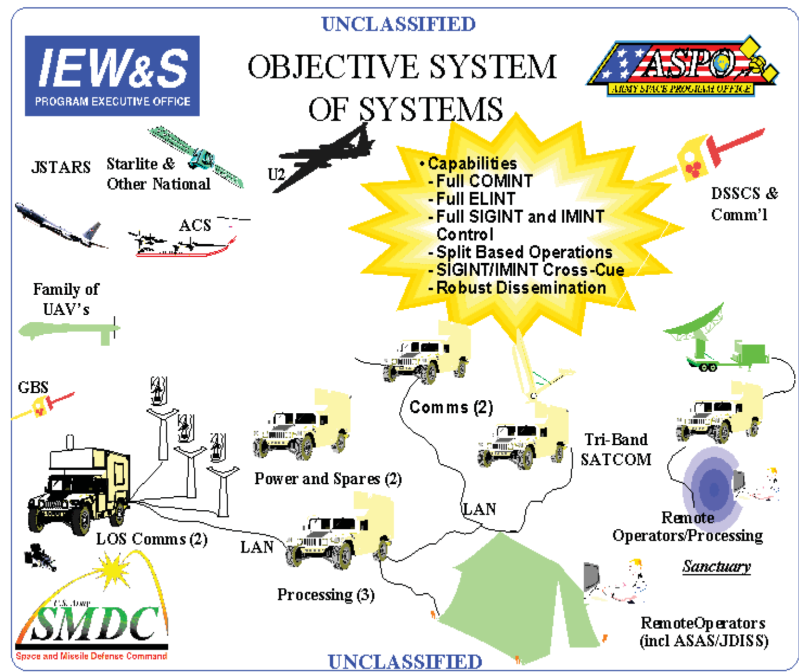
Prosecuting Enemy Unlawful Combatants. Civilians taking a direct part in hostilities are unlawful combatants who may be captured and prosecuted for their actions. A narrow definition of what actions comprise direct part in hostilities will reduce the number of individuals who can be denied PW status and prosecuted as unlawful combatants. Again, since international law is reciprocal, this logic similarly protects civilians accompanying a friendly force.

Implementing the Purposes of LOAC. While the considerations discussed in the preceding paragraphs can provide insights, the best approach in delineating functions that should only be performed by uniformed military is to ensure that the underlying principles of LOAC are advanced and safeguarded. Some key LOAC considerations include the following:

Accountability and Discipline. Combat is an activity that must be authorized and controlled by the State. Armed Forces are to operate under a chain of command that reaches back to the State to ensure that the actions of individual participants are constrained by national and international law. [40] Both the Hague Regulation and Geneva Conventions require combatants to comply with LOAC.[41] Additional Protocol I requires armed forces to be subject to an internal disciplinary system to enforce compliance with LOAC.[42] Using the US as an example, members of the armed forces are under the jurisdiction of a military chain of command and they may be held accountable for violations of LOAC under the Uniform Code of Military Justice (UCMJ). As US civilians become more integrated into armed conflict, the ability to hold them accountable for violations of LOAC has increased. More federal laws have gained extended extraterritorial application either individually or pursuant to the Military Extraterritorial Jurisdiction Act (MEJA). [43] The jurisdictional scope of the UCMJ itself has also expanded in recent years. [44] Nonetheless between civilians and military, the military are subject to more rigorous training and stricter levels of discipline. Therefore as a general rule, those who are in a position to make decisions or take actions that could violate LOAC should be uniformed military members, who are subject to military discipline and accountability.

Distinction. The more combatants wear distinctive uniforms, the easier it is for the enemy to distinguish between combatants and non-combatants, thereby protecting non-combatants. Conversely, the more civilians are engaged in combat support roles, the more likely they, as well as non-involved civilians, could be targeted indirectly or directly. Additional Protocol I requires the parties to distinguish between the civilian population and combatants, and only direct operations against military objectives. [45] Combatants may be targeted at any time regardless of their activity at that time. To the extent civilians perform combatant functions, the enemy will be more inclined to attack them directly, and possibly not just at the time they are performing the illegal acts. This can lead to a weakening of the protection for all civilians.

Clarity of Status Upon Capture. Uniformed combatants are entitled to PW status under GPW, as are civilians accompanying the force. A capturing force will have little difficulty granting PW status to uniformed combatants.



Presentation of the DCGS System of Systems
[Extracted from US Army DCGS Migration Briefing]

Civilians on the other hand may be scrutinized as to what they were doing and under whose authorization before they are granted (or denied) PW status. The capturing force may harbor suspicions that civilians performing a "support" function could defend that function if it came under attack, instantly switching from a non-combatant to combatant role. This concern is especially acute for activities conducted in or near enemy-occupied territory.

Five Categories of Activities That Should be Performed by Uniformed Military

Personnel fulfilling any of the following five functions should be uniformed military for purposes of LOAC, vice civilians accompanying the force. The list below is not all-inclusive: there may also be activities not addressed below that may not be conducted by civilians accompanying the force. [46] Future functions should be evaluated on a case-by-case basis. Note that for other policy reasons, such as avoiding risk to civilians or ensuring functions are performed in wartime, nations may opt to man additional support functions with uniformed military. [47]

"Shooters": There is little debate that persons causing actual harm to enemy personnel or equipment must be uniformed military. [48] The underlying principle is accountability. These individuals are the last step in the decision/execution chain capable of preventing a violation of LOAC. They are individually responsible for violations of LOAC and must disobey unlawful orders to violate LOAC. [49] These are persons causing actual harm to the enemy; they are the quintessential combatant and cannot be substituted by civilians. [50]

"Tactical/Operational Commanders": Persons exercising command and control of persons causing actual harm to enemy personnel or equipment should be uniformed military.[51] Tactical and operational commanders make critical decisions regarding the application of force against an enemy and represent a critical link in the accountability chain between the State and the shooter. Under principles of command responsibility, commanders may be held accountable for LOAC violations committed by their subordinates.[52] The commander also plays a critical role in enforcing military discipline.[53] For these reasons commanders should be uniformed military. [54] Tactical or operational commanders are identified because they are in a position to make decisions on how a battle is conducted: decisions with the potential to violate rules concerning *jus in bello*, or humanitarian rules on conduct in war.[55]

"Targeteers": Persons who relay target identification for an imminent real-world mission to persons causing actual harm to enemy personnel or equipment should be uniformed military. [56] Frequently the targeteer is the individual who has the information to know what a bomb or bullet is about to hit. The shooter might reasonably rely on the veracity of that information prior to pulling the trigger, just as a commander might reasonably rely on that data when crafting an order to attack. [57] Therefore under the LOAC principle of accountability, targeteers relaying data for an actual mission should be uniformed military. Persons further removed from providing targeting for an immediate mission, who instead support the targeting function by collecting intelligence data, performing analysis, creating plans, or developing information for future missions, will not have the same degree of LOAC risk. When it comes time for execution others will review, reconsider, and make binding decisions prior to the execution of a planned activity (e.g., targeteers, commanders, and shooters). For this reason, the involvement of civilians in intelligence collection, analysis, and planning will be less objectionable. [58]

"Intelligence Collectors in Enemy Zones of Operation": This category is framed slightly differently from the others, because it is based on the rules for spies found in the Hague Regulations. In short, only intelligence operatives who distinguish themselves from the local population are entitled to PW status on capture inside the territory or zone of operation of an adversary. [59] Civilians and military out of uniform, while not in violation of international law by virtue of conducting espionage missions, face domestic prosecution by the targeted state with potentially severe consequences if captured.[60] It is highly probable that an enemy country would view a "civilian accompanying the force" performing intelligence collection in enemy territory as a spy by virtue of the fact that he/she was gathering intelligence clandestinely in the guise of an ordinary civilian. [61]

"Crews of Systems Conducting Functions in Subparagraphs 1-4 Above": Members of a crew assigned to permanent positions within a system that causes actual harm to enemy personnel or equipment, provides command and control to ongoing operations, relays real-time targeting information to shooters, or collects intelligence within enemy zones of operation

should also be uniformed military members. The principle underlying this category is clarity of status, along with historical practice. For example, in a tank only the gunner may be pulling the trigger and acting as the final decision link in the execution chain bringing fire against a target. That person has LOAC responsibility as a shooter. The tank driver or loader could not independently violate LOAC while performing their support functions. But they could instantly become combatants if they step outside their vehicle to defend the weapon system. A capturing enemy would be inclined to view the entire crew as combatants, whether from a historical mindset in which all members of combat vehicles or systems were uniformed combatants, or from an inability to easily identify who the true combatant was. This category is not framed as an absolute however, since in addition to there being no explicit treaty language encompassing weapon systems, the Geneva Convention itself provides civilian members of military aircrews as an example of civilians accompanying the force. [62] This opinion identifies a distinction for permanently assigned positions versus persons temporarily performing support functions. For instance, there may be instances when civilians accompanying the force, such as defense contractors, are required to temporarily assist in training the military on how systems are operated or maintained. If captured, the enemy would have to determine the status of these civilians temporarily accompanying a weapon system.

Conclusion

The DCGS delivers tactical intelligence relevant to targeting for real-time missions that inflict harm to enemy personnel and property. The Air Force Operations Law Division concluded, therefore, that individuals manning the DCGS should be uniformed military, either because they perform the "targeteer" function discussed above, or because they man assigned positions in a weapon system performing targeteer functions.

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Endnotes:

[1] AF DCGS description provided by Maj Huber, AF DCGS Program Element Monitor (PEM), AF/A2RM-P, by email 8 Nov 07. See also the "AF DCGS Capability-based Manpower Standard" by 1 MRS.

[2] See Air Force Publication (AFP) 110-31, International Law—The Conduct of Armed Conflict and Air Operations, 19 Nov 76, paragraph 3-2a. While this publication has been rescinded, it still provides a useful formulation of customary international law for the points cited within this paper. Cf. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977, 16 ILM 1391 (1977) [Hereinafter "AP I"], Art. 43.2. , which defines 'combatants' by their status as members of the armed forces of a party to the conflict, rather than by their actions. The AP I definition is more akin to the definition of 'lawful combatant'. Note that the United States is not a signatory to AP I and does not accept that the entirety of AP I is reflective of customary international law.

[3] See AFP 110-31, para. 3-2a. See also AP I, Arts. 43.1 & 43.2.

[4] See AP I, Art. 43.2.

[5] Hague Convention (IV) of 18 October 1907, Respecting the Laws and Customs of War on Land, Annexed Regulations, 36 Stat. 2277, 205 Consol.T.S. 277 [Hereinafter "HR"], Art. 1. These same requirements are echoed in Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 6 UST 3316, 75 UNTS 135 [hereinafter "GPW"], Art. 4A(2). AP I Articles 43 and 44 remove the requirement of a recognizable emblem and require arms to be carried openly only during the attack. The United States opposed these changes as weakening the distinction between combatants and noncombatants and not reflective of customary law.

[6] GPW, Art. 4.

[7] Also referred to as "unprivileged belligerents."

[8] AFP 110-31, para. 3-3a.

[9] Id. See also AP I, Article 51.3, which provides that civilians lose their protected status while taking a direct part in hostilities.

[10] AFP 110-31, para. 3-3a. A competent tribunal under GPW Article 5 would determine whether or not captured persons were entitled to PW status. See GPW, Art. 5 ("Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by competent tribunal."). If a civilian committed a belligerent act (e.g. attacked the enemy or otherwise took a direct part in hostili-

ties), they may be classified as an unlawful combatant and could be prosecuted in domestic tribunals for their actions. If, however, the actions carried out constituted support activities within the range of activities that may lawfully be performed by civilians accompanying the force (as defined by GPW Art. 4A(4)) they would be entitled to the status and treatment of PWs.

[11] Another category of non-combatant could be assigned for combatants who are hors de combat, such as prisoners of war (POWs), the wounded, sick, and shipwrecked. See HR, Art. 23(c); Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, 19 August 1949, 6 UST 3114, 75 UNTS 31 [hereinafter "GWS"], Art. 12; Geneva Convention for the Amelioration of the Conditions of the Wounded, Sick, and Shipwrecked members of Armed Forces at Sea, 12 August 1949, 6 UST 3217, 75 UNTS 85 [hereinafter "GWS-SEA"], Art. 12; GPW], Art. 12. AFP 110-31, paragraph 3-4d, also addresses non-combatants.

[12] AFP 110-31, para. 3-4c; GWS Arts. 24 & 25; GWS-SEA Arts. 36 & 37. See also GPW Art. 33.

[13] GPW Art. 33.

[14] HR Art. 13; GPW Art. 4A(4).

[15] Id. Authorization is normally indicated by the issuance of an identity card. See GPW Art. 4A(4).

[16] Geneva Convention Relative to the Protection of Civilians in Time of War, 12 August 1949, 6 UST 3516, 75 UNTS 287 [hereinafter "GC"], Art. 4. Accordingly "civilians accompanying the force" are not "protected persons" for the purpose of GC. Compare AP I, Article 50.1, which defines civilians in a manner that includes "civilians accompanying the force".

[17] GC, Art. 27.

[18] Cf. GC, Art. 28 (prohibiting the use of protected persons to immunize targets); AP I, Art. 48 (restating the customary law principle of distinction between civilian objects and military objectives).

[19] Cf. AP I, Art. 51.3.

[20] Sutler: a civilian provisioner to an army post often with a shop on the post. MERRIAM-WEBSTER'S ONLINE DICTIONARY available at http://www.m-w.com/dictionary/sutler.

[21] HR Art. 13.

[22] GPW Art. 4A(4).

[23] Id. Art. 4A(5).

[24] Common Article 3 is applicable only by analogy, since by its terms it applies only to "armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties."

[25] AP I Art. 43.2. As noted before, the US is not a party to AP I.

[26] Id. Art. 51.3.

[27] In the ICRC Commentary for Additional Protocol I, the ICRC expressed the view that "hostilities" covered acts of war which are "intended by their nature or purpose to hit specifically the personnel and the materiel of the armed forces of the adverse Party." Claude Pilloud et al., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 516 (Yves Sandoz et al. eds., 1987) [hereinafter "ICRC AP I Commentary"].

[28] RESTATEMENT OF THE LAW THIRD, FOREIGN RELATIONS LAW OF THE UNITED STATES, section 102(2).

[29] "…civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces…", GPW Art. 4(A)(4).

[30] Jean de Preux, ICRC COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 64 (Pictet ed, 1960).

[31] ICRC AP I Commentary 516.

[32] Id.

[33] "Proximate cause" has been defined as "that [cause] which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces injury, and without which the result would not have occurred." BLACK'S LAW DICTIONARY 712 (Abridged 6th Ed. 1990)

[34] ICRC AP I Commentary, p. 516. Michael Schmitt, in his article on civilian participation in hostilities, creates a similar test stating: "the civilian must have engaged in an action that he or she knew would harm (or otherwise disadvantage) the enemy in a relatively direct and immediate way." Michael N. Schmitt, War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century: Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees, 5 CHI. J. INT'L L. 511, 533 (Winter 2005).

[35] For example, as the previously noted, the ICRC AP I Commentary states that applying the exclusion to the entire population supporting the war would be too broad (e.g. munitions industries). Likewise supply contractors delivering supplies to the front are specific examples of permissible civilians accompanying the force in GPW Article 4(A)(4). Civilian members of vessels and military air crews could fall under GPW Articles 4(A)(4) and (5).

[36] Under Article 81 of the Uniform Code of Military Justice (UCMJ), one is liable for conspiracy if the accused enters into an agreement to commit an offense and, while remaining a party to the agreement, one of the co-conspirators performs an overt act for the purpose of bringing about the object of the conspiracy. See 10 U.S.C. § 881.

[37] Under Article 77 of the UCMJ, one can be charged as a principal to an offense if he commits an offense or aids, abets, counsels, commands, or procures its commission; or causes an act to be done which if directly performed by him would be punishable. See 10 U.S.C. § 877.

[38] Cf. MANUAL FOR COURTS-MARTIAL UNITED STATES (2005 ed.) [hereinafter "MCM"], Part IV, para 1b(3)(a) (providing as an example of one guilty under aiding and abetting under Article 77 the case where a person, knowing another

person intended to shoot someone and intending that such an assault be carried out, provided that person with a pistol, even though the provider was not present at the scene).

[39] See Department of Defense Directive (DODD) 2311.01E, DOD Law Of War Program, paras. 4.1 & 4.2.

[40] Cf. GPW, Art 4(A)(2) (requiring members of militias, volunteer corps, and resistance movements be "commanded by a person responsible for his subordinates"); AP I, Art. 43(1) (identifying the armed forces of a Party as "all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party").

[41] HR Art 1; GPW, Art. 4(A)(2); AP I, Art. 43(1).

[42] AP I, Art. 43(1).

[43] Military Extraterritorial Jurisdiction Act (MEJA), 18 U.S.C. §§ 3261-3267 (2006) .

[44] The National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2007 broadened the scope of UCMJ Article 2(a) to provide jurisdiction over persons serving with, or accompanying the armed forces in the field in times of "declared war or contingency operations." (emphasis added). NDAA FY07, available at GovTrack.us. H.R. 5122--109th Congress (2006): <http://www.govtrack.us/congress/bill.xpd?bill=h109-5122> (accessed Jul 18, 2007).

[45] AP I, Art. 48. See also Article 44(3) of Additional Protocol I, which discusses distinguishing combatants from the civilian populations while they are engaged in an attack or in a military operation preparatory to an attack.

[46] State practice will continue to shape the evolving parameters of permissible civilian support activities. For example, the US Military Commissions Act (MCA) of 2006, 10 U.S.C. §§ 948a et seq., includes within its definition of "unlawful enemy combatant" persons who "purposefully and materially supported hostilities." 10 U.S.C. § 948a(1)(A)(i). Presumably this material support would not encompass permissible support provided by enemy civilians accompanying the force. In The Public Committee against Torture in Israel and ors. v. The Government of Israel and ors. (available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/ 02007690.a34.pdf), the Israeli Supreme Court stated that taking a direct part in hostilities included persons who collect intelligence on the army, transport unlawful combatants to or from a place where hostilities are taking place, operate a weapon which unlawful combatants use, or supervise the operation of a weapon or provide service to such weapons (at para. 35). The Court excluded persons who sell food or medicine to combatants, provide general strategic analysis, grant logistical or general support including monetary aid, or distribute propaganda (at para. 35). The Court also included persons who sent the person committing the physical attack, decided upon the act, or planned the attack (at para. 36).

[47] See, e.g., Department Of Defense Instruction (DODI) 1100.22, Guidance for Determining Workforce Mix, 7 Sep 06; DODI 1100.4, Guidance for Manpower Management, 12 Feb 05; DODI 3020.41, Contractor Personnel Authorized to Accompany the US Armed Forces, 3 Oct 05; Office Of Management And Budget Circular A-76, Performance of Commercial Activities, 29 May 03 (with amendments through 2006). Notwithstanding recent expansions to the coverage of the UCMJ and/or the Military Extraterritorial Jurisdiction Act (MEJA), the preference for military personnel is reinforced by the reality that civilians bear little penalty beyond loss of employment should they decide to abandon the combat zone or disobey a commander's orders; whereas military members may be relied upon to follow orders which they are bound by oath and moral compulsion to obey.

[48] Shooters include individuals firing small arms, artillery, tanks, lasers, dropping bombs, or launching other weapons against an enemy. They would also include individuals emplacing munitions to be detonated later, such as mines or improvised explosive devices (IEDs). Individuals using laser designators or other terminal guidance systems to guide a weapon to its target are effectively in control of the weapon and should be assimilated to shooters.

[49] THE JUDGE ADVOCATE GENERAL'S SCHOOL INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, OPERATIONAL LAW HANDBOOK 36 (2006).

[50] Note that civilians may be lightly armed for self-defense without becoming combatants. This principle is extrapolated from GWS Article 22(1), which allows medical personnel to retain their protected status despite being armed for self defense or defense of the wounded and sick in their charge. The self-defense permitted is only against banditry however and cannot be directed against enemy forces. See, e.g., GWS Art. 21 & GC Art. 19 (discussing loss of protection for medical units which commit acts, outside their humanitarian duties, harmful to the enemy).

[51] This is not phrased as an absolute requirement, because the strict requirement of the Geneva Conventions is only that a lawful combatant be commanded by a person responsible for his subordinates—with no explicit requirement that the commander be military or uniformed. See GPW Art. 4A(2)(a).

[52] Case of General Yamashita (1946) AD Case No. 111; Prosecutor v Delalić and others (Čelebići Case) (Appeals Chamber) (1999) 40 ILM 677. Command responsibility is evident in the requirement in HR Article 3 and GPW Article 4(A)(1)(2) that lawful combatants be "commanded by a person responsible for his subordinates." Likewise States are responsible for prosecuting not only persons who commit violations of LOAC, but those who ordered grave breaches to be committed. See, e.g., GPW, Art. 129. In certain circumstances, the commander in possession of the facts and possessing the proper intent could be held accountable for a LOAC violation, while his subordinate, who followed orders relying on the commander's information, could be exonerated. Cf. MCM para. 1b(2)(a) (providing as an example of principle liability under UCMJ Article 77: "if, upon orders of a superior, a soldier shot a person who appeared to the soldier to be an enemy, but was known to the superior as a friend, the superior would be guilty of murder (but the soldier would be guilty of no offense).").

[53] In the US system, the commander is responsible for enforcing the UCMJ.

[54] Depending on a State's structure the military command may be subordinate to civilian state leadership. State leadership may be civilian; however principles permitting targeting of individuals exercising command responsibility may extend to the highest—including civilan—commander.

[55] While strategic commanders could be held accountable for starting the conflict in the first place (jus ad bellum), this is not the focus of LOAC rules for how war is conducted. Cf. The Trial of the Major War Criminals before the International Military Tribunal (the Nuremberg Judgment) (1947) Vol. XXII IMT 477 (prosecuting the waging aggressive war).

[56] This category is not stated as an absolute. There is nothing explicitly within the relevant treaties that states that intelligence collection or dissemination equates to combatant activity that must be performed by uniformed military. This conclusion is instead reached through the logical observation that in certain circumstances, the targeteer could have complete culpability for LOAC violations vis-à-vis the shooter.

[57] A prime example would be a person calling in indirect fire support by relaying grid coordinates over the radio to an artillery position. The person relaying targeting data knows what is intended to be attacked, whereas the artillery crew simply executes a series of mechanical steps to launch the munitions on target. The same could be said for a sniper team where one member makes the identification through binoculars, or an airborne hunter-killer team where one platform with a camera relays targeting information to another with a missile. The targeteer needs discipline and accountability since the process set in motion could result in a violation of LOAC.

[58] But see The Public Committee against Torture in Israel and ors. v. The Government of Israel and ors., available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/ 02007690.a34.pdf, where the Israeli Supreme Court included persons who collect intelligence on the army (para. 35) and persons who planned the attack (para. 36).

[59] See HR Art. 29 ("A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party. Thus, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies…"). See also AFP 110-31, para. 9-2a.

[60] See, e.g., UCMJ Art. 106 (prescribing a maximum penalty of death for individuals found spying); AFP 110-31, para. 9-2b.

[61] Intelligence collectors on board state aircraft and vessels clearly marked as such arguably are not acting clandestinely, even if they are civilians. Cf. AFP 110-31, para. 7-3a. The prudent course of action to provide clarity of status on capture is to require such individuals to be uniformed military.

[62] See GPW Art. 4(a)(4). Cf. AFP 110-31, para. 3-2 (asserting that the combatant status of individuals aboard a military aircraft is determined once they debark from the plane based on their "authorization, individual activities and mode of dress.").

Members of the 480th Intelligence Wing at Langley AFB, Virginia, performing operations in the DCGS. [Photo courtesy 480 IW Public Affairs.]

Deployed DOD Civilians: Answering the Call to Duty

Ms. Sandra Patterson-Jackson
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The Department of Defense (DOD) Total Force policy recognizes that civilian employees and contractors are an important and integral component of the national defense effort.[1] In increasing numbers over the past two decades, civilians have filled support positions that were previously held only by uniformed personnel, and they have deployed to armed conflicts to support the military forces.[2]

As part of the Total Force effort, DOD Directive 1400.31 expressly mandates civilian workforce preparedness for deployments "for all contingencies and emergencies."[3] Such mission requirements include wars and other "in-theater" operations; and also include missions of humanitarian assistance, disaster relief, and other emergencies such as the responses to Hurricanes Katrina and Rita.

Federal employees deploy on the basis of needed skills and the availability of those skills among specially designated personnel. The Global War on Terror, and in particular, Operations ENDURING FREEDOM and IRAQI FREEDOM, have resulted in the deployment of over 10,000 civil service employees serving directly in the combat areas.[4] For the most part, civilians serving in Afghanistan and Iraq have volunteered to deploy. However, if necessary, current policies allow for certain civilians to be directed to deploy. In late 2006, the Iraq Study Group made specific recommendations that, if effected, would result in civilians receiving orders to serve in Iraq where necessary.[5]

This article outlines some of the personnel policies and issues concerning the deployment of DOD civilians to combat areas.[6]

Emergency Essential (E-E) Personnel

On 18 November 1988, President Reagan issued Executive Order (EO) 12656 which addressed the "Assignment of Emergency Preparedness Responsibilities."[7] The effect of EO 12656 was to distribute among the various federal departments and agencies responsibilities for handling national security in times of emergencies.

The Executive Order articulated the nation's policy that this country should "have sufficient capabilities at all levels of government to meet essential defense and civilian needs during any national security emergency."[8] The EO went on to define such an emergency as "any occurrence, including natural disaster (sic), military attack, technological emergency, or other emergency, that seriously degrades or seriously threatens the national security of the United States."[9]

Under EO 12656, federal agencies and departments were directed to develop plans and other measures to "adequately respond to all national security emergencies..."[10] The Department of Defense, in coordination with the Secretary of Labor, the Office of Personnel Management (OPM), the Selective Service System, and the Federal Emergency Management Agency (FEMA), was specifically tasked to develop a system to make available necessary human resources to meet essential military and civilian needs in national security emergencies. Part of that system includes "identification of functions that would have to be performed during such an emergency; development of plans for performing these functions; and development of the capability to execute those plans."[11]

In 1999, the United States Code (USC) Title 10, Section 1580, amended provisions covering civilian employees to add the emergency essential designation.[12] Three specific criteria were included to identify duties that would qualify an employee as emergency essential. Those criteria are:

1) Duties that provide immediate and continuing support or combat operations, or to support maintenance and repair of combat essential systems of the armed forces;

2) Performing such duties in a combat zone after the evacuation of nonessential personnel, including any dependents of members of the armed forces, from the zone in connection with a war, a national emergency declared by Congress or the President, or the commencement of combat operations of the armed forces in the zone; and,

3) Impracticality of converting the employee's position to a position authorized to be filled by a member of the armed forces because of a necessity for that duty to be performed without interruption.

Civil servants are primarily mobilized for in-theater operations through the designation of their positions as "emergency essential." As previously mentioned, these positions are limited to those expressly required for successful combat operations and are ordinarily filled on a voluntary basis.[13] However, employees may also be directed to perform emergency essential duties if they possess special skills that are not otherwise available to satisfy required needs.[14] Although most of the DOD instructions and directives concerning deploying civilians only mention deployment of E-E employees, there are also employees who may deploy to the combat area to perform duties that are not emergency essential. These employees operate outside the scope of an E-E designation, placing them in a unique category where questions of status and entitlement sometimes arise.[15]

The law grants agencies specific authority to direct work assignments to the degree "necessary to carry out the agency mission during emergencies."[16] Thus reassignment, relocation, or detailing of personnel to address a national crisis is well within the scope of an agency's power. Employees inclined to resist such actions should know that they are expected to obey the direction first and seek permissible remedies "at the earliest practicable time" afterwards.[17]

Notwithstanding an agency's authority, directed assignments should be limited, particularly when unanticipated or not planned well in advance. However, the need of the nation in times of crisis is the driving force.

Emergency essential civilians are required to meet physical standards prior to deploying. These requirements include obtaining necessary vaccinations, such as smallpox and anthrax shots.[18] While the vaccines may be seen by some as an extra burden of serving during emergencies, the same service entitles affected personnel to certain options not generally available.

Special Benefits for Civilians Deployed to a Combat Zone

Deploying to combat zones for any civilian employees entitles those employees to certain benefits for their service. The DOD provides for danger pay allowances; Geneva Convention Identity Cards; separate maintenance allowances where appropriate; evacuation of dependents from crisis locations to the same extent as is provided to military members and family; treatment for disease or injury equivalent to that of active duty personnel if sustained during hostilities; and certain special trainings for combat related duty.

Civil servants may also accumulate additional compensation in the form of premium pay, under certain circumstances and depending upon the employee's status. The DOD presently authorizes the waiver of the standard bi-weekly premium pay cap (which in one geographic area, as an example, is normally limited to approximately $5,380.00 every two weeks). The waiver of this bi-weekly cap permits use of the annual premium pay cap for work that is considered "critical to the mission." The limitation that applies under the waiver is "the greater of the maximum payable for GS-15 (including any applicable locality pay adjustment or special salary rate) or the Executive Schedule level V."[19]

Two significant factors are directly relevant to the issue of the bi-weekly pay waiver. First, it is a discretionary matter subject to determinations on a case-by-case basis. Second, the work accomplished must meet the "critical to the mission" definition. Language in the US Code provision specifically pertaining to "limitation on premium pay" defines qualifying work as "work in connection with an emergency…that involves a direct threat to life or property…."[20] Therefore, not all work performed even in a combat zone will automatically qualify for the pay waiver and the higher pay rate.

Civilian employee pay benefits in combat zones closely approximate those of the armed forces; however, there are important differences. One controversial point of distinction between civilian combat pay and military member pay is the tax exemption to which military members are entitled. Federal employee combat zone earnings continue to be fully taxed. The tax exemption has proven to be a hot topic. At least two bills have been introduced in the US Congress that would extend the same tax benefit to civilians as now applies to

military. However, so far the matter has not progressed beyond committee discussions.[21] The primary concerns appear to be measured in dollars and cents, as projected costs of the proposal have been reported to exceed $1 billion.[22]

"Civilian Accompanying the Force"

The status of a person under the Geneva Conventions is a crucial distinction which could determine the treatment of an individual if captured during armed conflict. While the scope of this article is not intended as a discourse on international law implications of the Geneva Conventions, mention of the legal significance of this status must be made.[23]

The Geneva Convention Relative to the Treatment of Prisoners of War (POW) identifies a category of civilians "…accompanying the armed forces without actually being members thereof." [24] This is, in almost all instances where DOD civilian employees deploy with the military, an apt description of those civilians.[25] As civilians *accompanying the armed forces*, they receive different treatment from other civilians since they are entitled to POW status if captured. It is essential that DOD civilians deploying to a combat area have the appropriate designation on their identification card.[26]

Even a civilian *accompanying the force* may not take an active part in hostilities. They may be armed only for self defense. Civilians who engage in combat activities will be considered to be unlawful combatants. As such, they would lose their protected status - not only would they become lawful targets, but would be subject to criminal charges.[27] However, the issue of what constitutes directly engaging in hostilities, and what is merely a support activity, has become more complicated in recent years and is a topic that is the subject of growing examination and debate.[28]

Conclusion

As the US military continues its transformation to a more expeditionary force, we can expect more DOD civilians to be deploying to areas of conflict. In February 2008, the Under Secretary of Defense for Personnel and Readiness, Dr. David S.C. Chu, introduced interim policy guidance to promote building an increased civilian deployment capacity. In his guidance, Dr. Chu wrote, "An agile civilian workforce with expeditionary capabilities prepares the Department to prevail in the Global War on Terror...The Department relies on these volunteers to meet many contingency operations mission requirements...This unity of effort is essential to win the long war in which our Nation is engaged." [29] Emergency essential employees, as well as those others "accompanying the forces," have every reason to feel especially proud of the role they play in the total force and in the mission.

About the Author:

Sandra Patterson-Jackson is a graduate of Georgetown University Law Center with J.D. and LLM degrees; Fisk University with a B.A.; and Fisk-Meharry Medical College graduate program with an M.A. degree. Presently USJFCOM Senior Attorney-Advisor concentrating in Personnel Law, Ethics, Freedom of Information/Public Affairs, and general Information Security. The author previously served as Acting Counsel for the Military Sealift Command Far East desk in Yokohama, Japan, and has spent many hours handling issues related to the Navy's deployed civilian mariner community.

Endnotes:

[1] U.S. General Accounting Office, *DOD Civilian Personnel, Medical Policies for Deployed DOD Federal Civilians and Associated Compensation for Those Deployed.* Testimony Before the Subcommittee on Oversight and Investigations, Committee on Armed Services, House of Representatives (Sep. 18, 2007) [hereinafter cited as GAO Report on Deployed Civilian Personnel].

[2] *See* U.S. General Accounting Office, *Human Capital: DOD's Civilian Personnel Strategic Management and the Proposed National Security Personnel System,* GAO-03-493T (May 12, 2003). Testimony Before the Subcommittee on Oversight of Government Management, the Federal Workforce and the District of Columbia, Senate Committee on Governmental Affairs (statement of David M. Walker, Comptroller General of the United States) [hereinafter cited as Walker Testimony].

[3] Department of Defense, Directive 1400.31, *DOD Civilian Work Force Contingency and Emergency Planning and Execution* (Apr. 28, 1995).

[4] HASC Subcommittee on Oversight & Investigations Report, *Deploying Federal Civilians to the Battlefield: Incentives, Benefits, and Medical Care* at 10 (Comm Print No. 9, Apr. 2008). "Over the course of more than seven years of war, nearly 10,000 federal civilian employees have been deployed to Iraq or Afghanistan..." *See also* Stephen Barr, *Legislators Balk at Combat-Zone Tax Breaks for Civilians*, Wash Post, Dec. 4, 2007 at D04 [hereinafter cited as Barr].

[5] *See* Daniel Friedman, *Unions Oppose draft of Federal Workers to Iraq*, Dec. 8, 2006, http://www.federaltimes.com (last visited Jan. 24, 2008).

[6] In their article, *Civilians at the Tip of the Spear,* Major Lisa Turner and Major Lynn Norton provide a comprehensive examination of many issues concerning DOD civilians, contractors, and non-affiliated civilians working across the spectrum of conflict. See Lisa Turner and Lynn Norton, *Civilians at the Tip of the Spear*, 51 A.F.L. Rev. 1 (2001)[hereinafter cited as Turner & Norton].

[7] Exec. Order No. 12656, 228 Fed. Reg. 53. (Nov. 19, 1988).

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] 10 U.S.C. Chapter 81- Civilian Employees, 1999 Amendments. Pub.L. 106-65, Div. A, Title XI, § 1103(b)(2), Oct. 5, 1999, 113 Stat. 777, added item 1580, "Emergency essential employees; designation."

[13] Department of Defense, Directive 1404.10, *Emergency Essential (E-E) DOD U.S. Citizen Civilian Employees* (Apr. 10, 1992) [hereinafter cited as DOD Dir 1404.10].

[14] Id. at 4.

[15] The U.S. Army addresses this issue by treating these employees as Emergency Essential: "All civilian employees deploying to combat operations/crisis situations are considered EE regardless of volunteer status or the signing of the EE position agreement. The employee will be in an EE status for the duration of the assignment." Department of the Army, Pamphlet 690–47, para 1-4 (Nov. 1, 1995).

[16] 5 U.S.C. § 7106(a)(2).

[17] Department of Defense, Civilian Personnel Management Guide for Management Officials During Contingencies and Emergencies (Mar. 2003) at page 1-4, *available at* http://www.cpms.osd.mil/civ_prep/ManagementGuide.pdf.

[18] DOD Dir 1404.10, *supra* note 13. Vaccinations may also include the anthrax immunization per Assistant Secretary of Defense Memorandum, Subject: Notifying Emergency-Essential Employees Regarding Anthrax Immunization Requirements (Jun. 25, 2001).

[19] See Office of Under Secretary of Defense Memorandum, Subject: Premium Pay Limitation (Jan. 22, 2003).

[20] 5 U.S.C. § 5547(a)

[21] *See* Barr, *supra* note 4.

[22] *Id.*

[23] *See* Jane G. Dalton, *Future Navies-Present Issues,* 59 Naval War College Review 1 (2006).

[24] Geneva Convention Relative to the Treatment of Prisoners of War, art. 4A(4), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[25] Identification cards are issued in accordance with Department of Defense, Directive 1000.22, *Uniformed Services Identification Cards* (Oct. 8, 1997); Department of Defense, Instruction 1000.23, *DOD Civilian Identification Card* (Dec. 1, 1998); Department of Defense, Instruction 1000.13, *Identification Cards for Members of the Uniformed Services, Their Dependents, and Other Eligible Individuals* (Dec. 5, 1997.

[26] *See* J. Ricou Heaton, *Civilians at War: Reexamining the Status of Civilians Accompanying the Armed Forces*, 57 A.F.L. Rev. 156 (2005 [hereinafter cited as Ricou] *See also* K. Michael Hoskin, *Civilians Accompanying the Force,* Strategy Research Project, U.S. Army War College (Apr. 7, 2003).

[27] Ricau, *supra* note 26 at 174.

[28] *See* Turner & Norton, *supra* note 6.

[29] Under Secretary of Defense Memorandum, Subject: Building Increased Civilian Deployment Capacity (Feb. 12, 2008).

Legal Implications Surrounding Recent Interception of US Spy Satellite

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On 20 February 2008, the United States destroyed a spy satellite using a modified Standard Missile-3 launched from an Aegis missile cruiser (the USS Lake Erie). The satellite was launched on 14 December 2006 and was registered with the United Nations as "USA 193." Shortly after launch, USA 193 stopped working. The implications of this failure were that the re-entry of USA 193 would be uncontrolled, and it would return to Earth with all of the fuel that should have been expended during planned operations, had it functioned as originally designed. The fuel used by USA 193 was hydrazine—a toxic substance that, depending where it impacted the Earth, could have released deadly fumes over an area roughly the size of two football fields.

Over a hundred articles have been written addressing the technical aspects of the intercept, second-guessing the wisdom of this action, and debating foreign policy implications. This article will not rehash any of this material. Instead, it will address a more practical matter—the legal issues surrounding the intercept. The intent is two-fold: first, to document some unique and interesting legal issues recently considered by US Strategic Command (USSTRATCOM) and other joint agencies; and second, to serve as a resource to legal offices and commands that may have to consider similar events in the future.

This article will address the following legal issues:

1. Potential International Liability
2. Potential Domestic Liability
3. Environmental Concerns
4. International Consultations

Potential International Liability

If the falling satellite had hurt or damaged foreign citizens or property, there were a number of ways they might have sought to recover compensation from the United States.

First, the United States is a party to the Convention on International Liability for Damage Caused by Space Objects, commonly referred to as the Liability Convention. In accordance with this treaty, a State that launches an object into outer space is "absolutely liable to pay compensation for damage caused by its space object on the surface of the Earth or to aircraft in flight." (Article II).

The treaty also addresses the situation where a State's activities cause damage to another State's assets in outer space; for example, if the debris caused by the destruction of the satellite collided with and destroyed a satellite belonging to another State. In a case such as this, the State causing damage is "liable only if the damage is due to its fault". (Article III).

In either situation, an important issue would be what kinds of damages would be payable. This issue remains uncertain. The Liability Convention defines "damage" as meaning "loss of life, personal injury, or other impairment of health; or loss of or damage to property" (Article I (a)). Another provision of the Liability Convention provides that the compensation for damage shall "provide such reparation in respect of the damage as will restore the person . . . to the condition which would have existed if the damage had not occurred." What damages are meant to be included by these provisions is still subject to much academic debate. Examples of questionable claims include lost profits and other consequential damages.

In the 36 years since the Liability Convention has been in effect, there has been only one claim made under its terms. On 24 January 1979, a Soviet nuclear satellite, Cosmos 954, crashed into Canada. Canada undertook cleanup operations for approximately nine months and then submitted a claim to the USSR for a little over $6,000,000.00 (Canadian). A year and a half later, Canada and the USSR settled for $3,000,000.00 (Canadian).

Practically speaking, this model for handling claims may not serve as the best way to provide relief to those who could be damaged by our falling satellite. Remuneration would likely be too slow to provide for any emergency needs. Furthermore, the process is designed for payment to other States that are party to

the Treaty, not their individual citizens—though a State may make a claim on behalf of its citizens.

International claimants may also seek to sue the manufacturer of the satellite, on the grounds that the failure of the satellite was the cause of their injury. After all, if the satellite had functioned properly, at the end of its life it would have been guided on re-entry into an area that would not cause harm (and the hydrazine would have been expended in normal operations). Litigants could feasibly pursue these lawsuits in either US courts, or even courts in foreign countries. Also, depending on the terms of the contract between the US and the manufacturer, the US could have found itself needing to indemnify the manufacturer or represent it in a dispute.

There was also the possibility that a foreign country would elect to sue the US in an international court. For example, after the USS Vincennes shot down Iran Airlines Flight 655 in 1988, Iran brought a suit against the US in the International Court of Justice. The US settled that case by paying Iranian families $300,000.00 for each wage earner and $150,000 for each non-wage earner.

Another means of recovery for damaged foreigners would be to file a claim under the Foreign Claims Act. This Act allows payment of up to $100,000 to inhabitants of foreign countries who are damaged as a result of the noncombatant activities of the armed forces. Though this satellite belonged to the intelligence community rather than to the armed forces, the armed forces shot it down, so the Act would likely apply. The armed forces handle these claims. Different countries are handled by different Services, for example, the Air Force would handle any claims brought by Japanese claimants, the Army would handle claims brought by German claimants, and the Navy would handle claims of Greek claimants. Using the Foreign Claims Act might be the best way possible to resolve any foreign claims as emergency payments could be made quickly, and the administrative process for documenting and paying claims is already well established.

Potential Domestic Liability

If USA 193 caused damage to US citizens or property, potential claims could have been possible under different legal regimes. Perhaps the most likely source of recovery would be under the Military Claims Act. It authorizes the military departments to pay claims of US citizens and inhabitants for death, personal injury, or property damage. Significantly, the Military Claims Act does not require proving the US was negligent—merely that the damage was caused by noncombatant activities of the United States military. The Military Claims Act does not give a "right" and would not provide the grounds for a successful lawsuit. It would, however, provide an expedient means of compensating a party for damage caused by USA 193 or its debris.

It is also quite possible that the US would handle any damage in the US via a special compensation program. The US used such a program to compensate victims of 11 September 2001 (9/11).

Another possible means of recovery by a US citizen would be to file a "takings claim" under the Fifth Amendment of the US Constitution. The Fifth Amendment provides, in part, that private property shall not be taken for public use without "just compensation."

Though, not likely applicable, no analysis of potential domestic relief would be complete without consideration of the Federal Tort Claims Act (FTCA). Under this Act, a claimant can sue the US for damages caused by the negligence of federal employees. Besides the difficulty of proving negligence, there are several exceptions to the FTCA that would likely apply in the current case—making the FTCA an ineffective means for recovery. First, the "foreign country" exception bars lawsuits for injuries or damage that occurs in a foreign country. Second, the "discretionary function" exception bars lawsuits based on the performance of a federal employee of a discretionary function. In this case, both the decisions on the design of the satellite and the determination to destroy the satellite would likely be considered "discretionary functions" and prevent the FTCA from applying. Third, the FTCA does not cover negligence by contractors—hence, a litigant could not file a claim based on perceived negligence of one of the contractors who built USA 193. Perhaps the most significant reason the FTCA would not provide any relief in the current case is the "State's secrets doctrine." Under this doctrine, a litigant would not be privy to information that would adversely affect national security—like the design of a spy satellite. The result of the State's secrets doctrine would either be the plaintiff proceeding to trial without the needed information (likely leaving him unable to prove his case) or potentially dismissing the plaintiff's case outright.

Injured US citizens may well seek to sue the contractor directly, rather than suing the government. This would lead to issues of whether the government's contract with the contractor included a clause requiring the US to indemnify the contractor or not. Regardless, the "State's secrets doctrine" would still likely prevent a plaintiff from getting any documentation that might allow him to prove his case. The contractor may also be able to rely on the "government contractor defense," which would shield the contractor from liability if it manufactured the satellite in accordance with US specifications.

Environmental Concerns

If USA 193 were to fall within the US, various federal pollution control laws would need to be considered. Relevant federal laws would include the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA); the Resource Conservation and Recovery Act (RCRA); and the Clean Water Act (CWA). Under these laws, the US would likely find itself required to clean up any hazardous contamination caused by USA 193 and possibly provide some compensation under these laws.

International Consultations

The Outer Space Treaty, to which the US is a party, requires a State to engage in "appropriate international consultations" prior to undertaking an activity in outer space if it "has reason to believe" the activity "would cause potentially harmful interference."

A successful intercept of USA 193 would, by definition, create a certain amount of debris in space—regardless of how low it was when intercepted. This debris, still traveling at orbital speeds, could damage or destroy other satellites operating in low Earth orbits in the event of a collision. That said, the odds of such collision are extremely low. This being the case, the first question to be determined was whether the intercept was an activity that "would cause potentially harmful interference." This is a question of fact to be determined on review of available evidence.

In a press conference on 14 February 2008, US Ambassador James Jeffrey noted the US position, "[w]hile we do not believe that we meet the standard of Article IX of that treaty that says we would have to consult in the case of generating potentially harmful interference with other activities in space, we do believe that it is important to keep other countries informed of what is happening." Besides the public press conference, Ambassador Jeffrey noted the US was "reaching out to all countries and various organizations—the UN [United Nations], some of its subordinate agencies, the European Space Agency, and NATO [North Atlantic Treaty Organization]" to inform them of the planned intercept.

Conclusion

The satellite interception, besides displaying amazing technical capability and generating significant political controversy, raised complex legal issues. Evaluation of potential liability required consideration of several international treaties and domestic laws. US environmental laws also merited consideration as it was unknown where the satellite debris would land or the extent of potential contamination. Finally, determinations had to be made regarding whether the Outer Space Treaty's requirement for "appropriate international consultations" had been triggered. Taken together, the interception of USA 193 generated a fascinating array of legal issues.

About the Author:

Major Hart is currently the Chief of Space Law at US Strategic Command. He received his B.S. degree in Sociology from Brigham Young University in 1993, his J.D. from the University of Utah in 1996, and an LL.M. degree in Air and Space Law from McGill University in 2007. His LL.M. thesis was entitled, "Anti-satellite Weapons: Threats, Laws and the Uncertain Future of Space" and was published in abridged form in McGill's Annals of Air and Space Law. Major Hart was commissioned into the United States Air Force in 1996 and has served in a variety of JAG assignments: Hickam AFB, Hawaii; Incirlik AB, Turkey; Nellis AFB, Nevada; Yokota AB, Japan (with a tour to Balad AB, Iraq); McGill University, Montreal; and his current position at US Strategic Command, Nebraska.

USSTRATCOM STAFF JUDGE ADVOCATE

Colonel Carol K. Joyce, US Marine Corps
Staff Judge Advocate, US Strategic Command

> *We are called on to be the most, in my view, the most responsive combatant command in the US arsenal. Responsible today for providing the Secretary of Defense time sensitive planning to conduct global strike operations anywhere on the planet. We are tasked to conduct operations and support the global fight we are engaged in today, and we are doing just that.*
>
> *And we are tasked to be the masters and defenders of domains that have become [even] more critical not only to the way we fight as a nation, but to our way of life as a nation – those being the domains of space and cyberspace.*[1]

The United States Strategic Command (USSTRATCOM) is certainly not the Strategic Air Command (SAC) of old. While it has its roots and headquarters in SAC missions and buildings, anyone who has not followed USSTRATCOM's evolution over the past 15 years would barely recognize it. As the current combatant commander (CDRUSSTRATCOM), General Kevin Chilton, USAF, noted above, the transformation of USSTRATCOM since 2002 has been dramatic. Over the past four years the previous CDRUSSTRATCOM, General James Cartwright, USMC, restructured the command to perform not only its readiness mission of nuclear deterrence, but its newly assigned missions in space, cyberspace, and several other unique mission areas identified in the President's Unified Command Plan (UCP). As General Chilton shifts the command's focus from restructuring to planning and execution of its missions, the USSTRATCOM Office of the Staff Judge Advocate (OSJA) has tackled many multi-faceted legal challenges facing the command. While many of these challenges involve classified issues, events attracting national and international media attention throughout the past year provide insight into a good sample of USSTRATCOM mission areas and the legal questions involved.

- The Joint Task Force – Global Network Operations (JTF-GNO) is a subordinate component command of USSTRATCOM, responsible for defending the DOD Global Information Grid (GIG). The Joint Functional Component Command – Network Warfare (JFCC-NW), another subordinate command, plans and conducts operations in cyberspace and coordinates such activities with other national entities in computer network defense and network warfare. In April 2007, the Republic of Estonia experienced what it termed a "cyber attack," suffering critical failures of its cyber infrastructure resulting from a deliberate, expansive, and well coordinated effort. If such an event occurred against the DOD GIG, would it constitute an "armed attack" under Article 51 of the United Nations Charter and/or Article 5 of the NATO Treaty? What lawful responses could JTF-GNO and/or JFCC-NW take? What if the event occurred on systems outside of JTF-GNO's responsibility, but still vital to national security (e.g., attacks ".gov" or ".com" networks, rather than the ".mil" networks for which JTF-GNO is directly responsible)? What authority would USSTRATCOM and its subordinate commands have to protect such critical cyber infrastructure?

- In August 2007, a B-52 was inadvertently loaded with air launched cruise missiles (ALCMs) carrying nuclear warheads, rather than the inert "dummy" warheads that should have been used for transport of the ACLMs from Minot AFB, ND to Barksdale AFB, LA. Although the nuclear weapons never left positive control of the US military, it raised several legal questions. Who was responsible for control of the warheads at each stage of the incident? Who was legally responsible for investigation, and if necessary, disciplinary action, as a result? Were there treaty obligations that may have been violated

by this unannounced movement? What, if any, authorities needed to be changed to prevent such an incident in the future? USSTRATCOM attorneys continue to analyze these legal issues for the future.

- On 2 November 2007, the DOD Chief Information Officer (CIO) issued a new policy on the use of DOD Information Systems, directing a new uniform DOD banner on computer systems and changes to the notice and consent language in computer user agreements. The DOD CIO's policy raised concerns within the legal community, as the new banner language appeared to require users to waive their right to privileged communications, even those recognized by our military justice system (e.g., lawyer-client, communications to clergy, and psychotherapist-patient). On 7 December 2007, at the request of the senior service Judge Advocate Generals, the DOD CIO placed a temporary hold on enacting the new policy until such legal concerns could be resolved. The USSTRATCOM OSJA remained actively involved in this issue until 9 May 2008, when CIO issued a new policy taking into account the legal concerns of safeguarding recognized privileges and confidential communications while also meeting CDRUSSTRATCOM's need to protect the GIG.

- On 28 January 2008, the National Security Council announced that a US satellite (USA 193) was deorbiting and would likely survive reentry into the Earth's atmosphere sometime in the months of February or March. The US had launched USA 193 in December 2006. Shortly after launch, the satellite failed and began to tumble out of control. In this uncontrolled state, there was no way for the US to guide its reentry to a safe area (e.g., over an ocean), nor was there any way to predict the potential location of impact with any certainty until shortly before it happened. Unfortunately, the satellite still contained all of its fuel—1,000 pounds of hydrazine—a highly toxic material that was predicted to survive reentry and pose a significant health hazard. At a joint press conference on 14 February 2008, Ambassador James Jeffrey, Assistant to the President and Deputy National Security Advisor; General James Cartwright, USMC, Vice Chairman of the Joint Chiefs of Staff; and Dr. Michael Griffin, Administrator of NASA, announced the President's decision to try to mitigate this toxic hazard by intercepting the satellite with a Standard Missile 3 prior to its reentry. On 20 February 2008, the satellite was successfully intercepted. USSTRATCOM attorneys were heavily involved with other interagency and DOD partners in analyzing treaty obligations, developing courses of action, determining potential claims responsibilities and advising on various other legal aspects relating to this event.

As noted above, there are numerous other legal issues the USSTRATCOM OSJA addresses on a daily basis. While some are routine actions found at any command, such as military justice, ethics, and traditional law of war questions, there are many more that have a unique – and global – flavor. The USSTRATCOM OSJA is a key enabler to ensuring the CDRUSTRATCOM and his subordinate commanders and staffs accomplish its two overarching categories of missions:

> *In the first category are global missions that require us to operate across physical and/or functional boundaries. The three mission areas within this category are Strategic Deterrence Operations, Space Operations, and Cyberspace Operations.*
>
> *The second category is comprised of those global missions where our purpose is not to operate across boundaries, but rather to knit together seams between boundaries [fielding and advocating an Integrated Missile Defense System, integrating DOD efforts to combat WMD, managing the allocation of high demand/low density Intelligence, Surveillance and Reconnaissance (ISR) assets, and integrating Information Operations in support of all combatant commands].*[2]

While the namesake of our headquarters building, General Curtis E. LeMay, still remains, the SAC era

of deterrence through the threat of mutually assured destruction between two superpowers is gone. Today's world is one characterized by rogue states, some with nuclear capabilities, instantaneous global internet connectivity, and increasingly widespread access to space. In this new era, USSTRATCOM is leading the way in deterrence, cyber and space.

About the Author:

Colonel Joyce is the Staff Judge Advocate for the Commander, United States Strategic Command, Offutt Air Force Base, Nebraska. She was commissioned an officer in the Marine Corps in 1981 after receiving a Bachelor of Arts from Arizona State University. She began her Marine Corps career as a Ground Supply Officer. In 1986, she was accepted into the Marine Corps Excess Leave (Law) Program (ELP(Law)) where she attended Suffolk University Law School in Boston and received her juris doctor (JD) degree in 1989. In 1996, she received a Masters of Military Science from the Marine Corps Command and Staff College, Quantico, VA. Her tours as a judge advocate include such assignments as Chief Trial Counsel and later as Chief Assistant to the U.S. Attorney's Office (SAUSA) for the Eastern District of North Carolina; Research Officer for the Judge Advocate Division, Headquarters, U.S. Marine Corps, Washington, D.C.; procurement attorney for Marine Corps Systems Command, Quantico, VA; Chief Trial Counsel, Camp Lejeune, NC where she was the lead prosecutor in the 1998 Aviano EA-6B mishap case; Regional Defense Counsel for the Pacific Region, Okinawa, Japan; Deputy Director for Analysis and Assessment Branch for the Assistant Secretary of the Navy for Manpower and Reserve Affairs, Washington, D.C.; Deputy Chief Prosecutor for Military Commissions at Guantanamo Bay, Cuba; and her previous tour as Chief Defense Counsel of the Marine Corps, Washington, D.C. She also had the unique opportunity to be selected to serve two years as Commanding Officer for Marine Wing Headquarters Squadron 1 (MWHS-1), Okinawa, Japan, from 2001 to 2003.

Endnotes:

[1] Assumption of Command Ceremony Remarks by General Kevin J. Chilton, Commander, United States Strategic Command, October 17, 2007, available at http://www.stratcom.mil/Spch&test/Assumption%20of%20Command%20Remarks_17Oct07.html (last visited January 25, 2008).

[2] Statement of General Kevin P. Chilton, Commander, US Strategic Command, Before the Strategic Forces Subcommittee House Armed Services Committee on United States Strategic Command, at 3-4 (27 February 2008)

The *Lake Erie*, a US Navy Aegis-class cruiser, launches a missile to intercept the malfunctioning satellite. DOD Imagery (Released)

Military or Judicial Search - Which Standard Applies? Lessons Learned in Bosnia

Capt C. Christopher Ford
Chief of Operational Law
435th Air Base Wing

The Scene

Pale, Republika Srpska, Bosnia-Herzegovina, Fall 2007: Over the course of 16 hours, a hundred North Atlantic Treaty Organization (NATO) and European Union Forces (EUFOR) troops conducted successful simultaneous raids on five targets in support of the International Criminal Tribunal for the Former Yugoslavia (ICTY). However, the lead EUFOR Legal Advisor refused to sign the closeout paperwork for this document exploitation (DOCEX) mission, claiming the entire mission as executed was illegal. This paper explores the debate that ensued and has yet to be finally resolved.

Background

In 1993, the International Criminal Tribunal for the former Yugoslavia was formed through United Nations Resolution 827. The ICTY is an investigative, legal body that seeks to bring to justice persons who committed crimes against humanity. To help create a "*safe and secure environment*," NATO and EUFOR, at the request of the ICTY, assisted in apprehending persons indicted for war crimes (PIFWC) and in conducting DOCEX missions to track the protection and funding of PIFWC support networks.

In 2004, the NATO heads of state transferred the NATO-led peacekeeping mission in Bosnia, known as the Stabilization Force (SFOR), to the European Union (EU). Part of the reason for the transfer was the considerable improvement in the daily life and security of Bosnia. Although not yet clear of other tensions in the Balkans, Bosnia has continued to improve its stability and relationship with EU and NATO nations. Following this transfer, United Nations (UN) Security Council Resolution (UNSCR) 1575 split the mission between NATO and EU Forces. This EU-led mission was named Operation ALTHEA. Currently, the EU runs the Bosnia mission in close coordination and cooperation with NATO. EUFOR accesses NATO's assets and planning under a series of agreements known as "Berlin Plus." NATO maintains a headquarters in Sarajevo and continues to assist Bosnia in defense reform and counterterrorism, as well as with the PIFWC mission.

The Debate

The General Framework Agreement for Peace (GFAP) is the legal authority by which NATO and the EU conduct operations in Bosnia. NATO has committed to pursue a safe and secure environment in Bosnia as that country continues down the road of defense reform, ultimately to the point of NATO membership. However, from the initial GFAP through the follow-on UN resolutions and Berlin Plus, there has yet to be further delineation or enshrinement of what providing a safe and secure environment entails. Because the presence of PIFWCs continues to be a major impediment to the peace process, it is reasonable to conclude that pursuing a safe and secure environment does include searching for and capturing PIFWCs, and in effectively disrupting their support networks. The associated challenge lies in determining what, if any, legal process must attend the mission activities. As NATO continues to advise on defense reform, and with many other international elements present in Bosnia to help reform other governmental institutions, the question is inevitably raised as to how NATO and the EU conduct military actions such as PIFWC or DOCEX missions.

The historical approach applied during both the NATO and EU-led operations has been to operate with the full breadth and leverage afforded through the GFAP by conducting searches for PIFWCs as a military mission. If NATO or the EU has information on a PIFWC, or their support network, then the action is conducted as a military matter in pursuit of a safe and secure environment under the GFAP. Information is presented to the commander of NATO or EUFOR for a sufficiency determination prior to the search and seizure mission. Within this construct, however, certain traditional criminal law procedures are not employed, such as the presentment of evidence to a magistrate to obtain a finding of probable cause prior to conducting a search and seizure operation.

This current legal debate was framed by EUFOR's position that it is illegal to conduct a PIFWC or DOCEX mission without first presenting probable cause evidence to a magistrate, and that it was legally insufficient to instead present information to the commander of NATO or EUFOR for a sufficiency determination. The EUFOR

Legal position is based on the fact that no provisions in the GFAP, or in subsequent UN resolutions, specifically permit NATO or the EU to conduct operations as they have to date, without a probable cause determination by a magistrate to authorize the mission.

The other side of this debate is that missions have been conducted without a probable cause determination by a magistrate because there is no such requirement in the GFAP or any other empowering document. However, some argue that Bosnia, as a signatory to the GFAP, is eligible to handle cases of war crimes not rising to ICTY level and should be the arbiter of search and seizure probable cause determinations, rather than the commander of NATO or EUFOR. The response to that counterargument is that Bosnia's justice system is in the process of being rebuilt from the ground up and is not yet developed enough to handle such sensitive cases.

First, unquestionably it is the current stable, peaceful ethos of Bosnia that even allows this debate to take place. Second, if the problem is taken at face value, there are two sincere legal interpretations at play: a strict statutory reading of the GFAP in the continental European tradition; and a broader, more incorporative common law reading in the American and British legal traditions.

Ultimately, the legal opinion that a probable cause determination must be made by a local magistrate calls into question the legal legitimacy of a crucial part of the joint, cooperative international mission between long-established NATO and EUFOR forces. This issue has the potential to be divisive amongst the NATO and EUFOR staffs, who share a headquarters and a common mission.

Due to the rotational environment of the forces involved in this mission, the debate is bound to rise again. Looking at the most likely scenario, as new legal advisors rotate in from their home country they are unfamiliar with the mission. These advisors will recognize the absence of specificity in the GFAP and Berlin Plus and they will likely rely upon the legal education and procedural standards they learned in their home country. This scenario may lead to a dramatic, and perhaps unnecessary, restriction of the search and seizure power of the GFAP. At the very least, unnecessary delay will result due to ongoing debate and the potential need for retraining of the new personnel. And the mere debate at the operational level of such fundamental legal procedures regarding the legitimacy of action could easily frustrate and dishearten the forces entrusted to carry out the mission, and could potentially cause friction amongst them. NATO and EUFOR may also lose standing if, through local and international observation, they are perceived to operate without precision and professional accord. Furthermore, by having to evaluate the differing legal interpretations after each rotation, they run the risk of diminishing the authority they have been entrusted with to provide a safe and secure environment for Bosnia. Unfortunately, this type of situation presents a contagion that could spread from Bosnia into future NATO-EU cooperative arrangements.

Opportunity for Resolution

This probable cause/search and seizure issue in quasi military/police operations needs to be removed from the staff level interpretations. If not through United Nations resolution, then NATO and EUFOR must make use of the opportunity to further amend and define the conduct of the mission under the GFAP and Berlin Plus at several different levels: at the foreign minister/ambassador level (the North Atlantic Council with the EU's Political and Security Committee); at the level of the Military Committee; and at the working group committee level. This matter can be addressed and resolved with senior legal advice and resolution within these committees. If this issue is not addressed quickly, NATO and EUFOR could very well find the search and seizure procedural issue being revisited with every planning session, every staff deployment rotation, and every PIFWC or DOCEX mission. The issue of differing legal interpretations between NATO and EUFOR could also migrate to other joint NATO/EU enterprises.

About the Author:

Captain Craig Christopher Ford served as the Deputy Legal Advisor to NATO Headquarters, Sarajevo, from September 2007 through February 2008 and is presently the Chief of Operational Law for the 435th Air Base Wing, Ramstein Air Base, Germany. As such, he also serves as the legal advisor to the 86th Contingency Response Group, and liaison to NATO Commander-Air. After graduation from the University of Oxford in 1997, he began work in maritime and admiralty policy. In 1999, he became a policy aide for the 11th US Congressional District, Ohio, while simultaneously attending law school at Case Western Reserve University. He received his juris doctor (JD) degree in 2002. For several years prior to joining the US Air Force, Captain Ford served as a felony circuit trial defense attorney for the State of Florida's 6th Circuit.

WARSHIP ON A MISSION OF MERCY: Lessons Learned From USS PELELIU Pacific Partnership

LCDR Carmel Tomlinson, USN
LT Andrew Myers, USN

"The Pacific Partnership team is a unique team formed from organizations with very different skills and capabilities, but unified in purpose to conduct a very important mission. They carry with them a spirit of caring, commitment and compassion on this deployment for our Pacific neighbors." - Admiral Robert F. Willard, Commander, US Pacific Fleet

In May 2007, an unprecedented humanitarian and civic assistance (HCA) mission utilizing USS PELELIU (LHA 5), a TARAWA-class amphibious assault warship, embarked on a goodwill tour across Southeast Asia and Oceania. Prior to PELELIU's historical deployment, hospital ships USNS MERCY and COMFORT were the platform of choice for humanitarian missions. With a crew of 1,600 United States and foreign partner nation military and civilian nongovernmental organization (NGO) volunteers, PELELIU completed its four month multinational mission with stops in the Republic of the Philippines, Vietnam, Papua New Guinea, Solomon Islands, Federated States of Micronesia, and Republic of the Marshall Islands. With "partnership" as the central theme of the mission, US military and civilian personnel trained side by side with partner nation military from Japan, Canada, New Zealand, Australia, India, Singapore, Malaysia, Republic of Korea, Vietnam, and Papua New Guinea; treating over 35,000 medical and dental patients, 2600 veterinary cases, instructing 1,300 medical seminars, and completing 44 engineering projects.

USS PELELIU and its battery of organic lift assets equipped the multi-talented mission teams with the perfect platform to provide medical and engineering support to rural host nation populace. At 820 feet in length and almost 40,000 tons, PELELIU steams across the ocean at up to 24 knots. The ship carries two Landing Craft Utility (LCU), one Landing Craft Air Cushion (LCAC), four MH-53 heavy-lift rotary wing aircraft, and a variety of small watercraft. During the mission, LCUs provided transportation of vehicles, equipment, supplies, and personnel to beachheads and piers. The LCAC provided high-speed transportation with similar heavy lift capability (60 to 75 ton payload). The MH-53s carried mission personnel, patients, distinguished visitors, and cargo (up to 16 tons) at 170 knots during ship to shore transits. PELELIU also utilized its substantial storage capacity to transport earth moving equipment, Project Handclasp donations, and engineering and medical supplies.

The Color of Money

Through the statutory support of Title 10 United States Code (USC) § 401, Department of Defense (DOD) and the Navy support various programs that provide humanitarian relief to foreign countries during approved

USS PELELIU (LHA 5) in transit to the Republic of the Marshall Islands

deployments such as fleet operations, exercises, or training. DOD has issued DODD (Directive) 2205.2 and DODI (Instruction) 2205.3 to establish policy and implementing instructions for the HCA program. Statutory language and DOD policy require HCA medical, dental, veterinary, and engineering services are provided in rural or underserved areas to promote (1) the security interests of the US and host nation and (2) specific operational readiness of Service members who will participate in the activities. These activities must be conducted with prior approval from the host nation, typically through the US Embassy. All projects and services should compliment, and may not duplicate, any other form of social or economic assistance provided by any other Department or Agency of the United States (i.e., United States Agency of International Development--USAID).

Plan, partner, then participate

Unlike Humanitarian Aid and Disaster Relief missions, the planning team had several months to build the mission. First, a military platform was selected which determined the number of medical and engineering personnel that would participate in the mission. Second, the host nations were selected based on several criteria including current status of relations with the US, force protection considerations, level of humanitarian need, and location. Third, medical and engineering representatives drafted mission proposals for each country phase. Statutorily, engineering projects were limited to well drilling, construction of basic sanitation facilities, rudimentary construction, or repair of surface transportation systems and public facilities. "Rudimentary" construction projects were designed to meet host nation building codes and incorporate utilities such as sewer, electric, and water, when available. Medical outreaches were limited by available in-country facilities and time constraints to allow for proper pre- and post-operative care of patients.

Once proposals were completed, pre-deployment site survey teams (PDSS) visited with host nations, US Embassies, and USAID to identify engineering projects and medical outreaches that would fit within the scope of the mission proposals. For expectation management, PDSS teams remained conservative in their medical and engineering outreach plans with direction to "under promise, over provide." Outreaches were devised to sustain delays due to unforeseen obstacles such as helicopter mechanical difficulties or monsoon rains at a construction site. Over-extending the mission capabilities was taboo as was the risk of leaving the host nation with unfinished building projects or untreated patients who traveled miles for help. With the relative novelty of HCA missions, future PDSS teams would also be instrumental in the following:

- Inquiry into the purchase of mission medical supplies at a reduced cost (thousands of dollars less than American brands) from the host nation for use in-country, which would avoid lengthy customs procedures;
- If a type of status-of-forces agreement (SOFA) exists between the US and host nation, ensuring the host nation and US Embassy are familiar with its terms, in particular, recognition of sovereign immunity of the military vessel, medical credential standards, port and landing fee waivers, customs regulations, and visa requirements;
- Obtaining a list of illegal medications or chemicals (e.g., Sudafed, pesticides) and other supplies that would typically accompany HCA medical and engineering teams in-country; and
- Negotiation as to which uniforms could be worn by US and foreign partner nation military participants during the mission.

During the execution phase of the mission, PELELIU Pacific Partnership's (PPP) engineering teams flexed to meet the needs and challenges of each host nation.

Commodore Robert Stewart, COMDESRON-31 and Mission Commander, joins Ambassador Kristie Kenney, US Ambassador to the Republic of the Philippines, and members of the Legaspi government and Armed forces of the Philippines in a cake cutting ceremony commemorating Pacific Partnership 2007

In the Philippines, debris-blocked rivers were cleared with front-end loaders and dump trucks. Smaller scale renovations to clinics and orphanages were completed in Vietnam with standard shore power tools and equipment. Solar panels used to power utilities were installed by two-man teams on sparsely populated atolls in the Marshall Islands. The warship with LCU, LCAC, and helicopter assets enabled engineer teams and their tools and supplies to be transported with relative ease to remote and populated locales alike. Teams were not dependent upon host nation transportation (i.e., water taxis) or supply importation from outside resources. If an engineering site needed additional supplies that would be difficult, if not impossible, to obtain in-country, supplies could be borrowed from onboard mission stock and replaced prior to the next mission phase.

The medical teams also adapted to challenges to meet mission goals. Medical, dental, and veterinary teams were prepared to work on shore within the host nation and on-board PELELIU. A typical mission day included surgery on board PELELIU for a child's cleft lip-cleft palate repair or removal of cataracts for a senior citizen, while nurses vaccinated a village, dentists extracted decayed teeth, and veterinarians provided husbandry education to the local pig breeder. Due to the remote locations and inaccessibility of certain mission sites, medical staff consistently prepared to remain overnight for several days with camping gear, medical supplies, food, water, and personal items. Medical sites that were collocated with engineering sites faired the best for overnight capability. Medical teams also worked closely with host nation clinics, hospitals, and individual medical providers to ensure patients received proper post-operative and follow-up care after PELELIU departed the country.

"Our mission is to basically see how the US Navy operates and join the other nations on this mission to see where we can help out. Joining with other nations sends a message quite loud to the rest of the world that we can work as a team to achieve something that's good." - Navy Warrant Officer Medic Lee Matravers, from Whangaparoa, New Zealand

To enhance future HCA medical and engineering missions, the following lessons should be incorporated:

- Continue to include NGOs, partner nation, and host nation participants in nightly briefs and daily planning meetings during mission execution. Inclusion of these parties propagates partnership and ownership in the HCA mission;
- US Public Health Service (USPHS) representatives played an active role during the mission, and should be included on future HCA PDSS visits to plan sanitation and potable water projects, which provide long term health benefits, in conjunction with construction projects;
- Project Handclasp school books and

Medical and dental teams assist patients during deployment with the USS Peleliu

supplies, medical supplies, toys, and sewing machines were well-used to subsidize construction and refurbishment projects. Over 180 pallets were distributed to needy people and organizations during the mission. Project Handclasp supplies should also be ordered for dissemination to patients brought aboard the ship to include warm clothing, shoes, personal hygiene supplies, and toys for the children. Patients from tropical climates typically do not have long sleeved shirts, slacks, or shoes needed to keep them warm in an air conditioned surgical ward. Child patients tend to get bored and can be easily entertained with toys and coloring books during pre- and post-operative downtime; and

- US military members with proficient conversational and written language skills applicable to the host nations should be assigned to the mission to act as interpreters during medical lectures and procedures, and building projects.

"The multi-nation and service support during Pacific Partnership shows our dedication to work together as one team and to help those in need around the world." - CAPT Ed Rhoades, USN, Commanding Officer, USS PELELIU (LHA 5)

A Ticket to Ride

Throughout the course of an HCA deployment, it will become necessary to transport military and civilian personnel, equipment, and supplies on US military assets in furtherance of the mission. Specific approval for transportation may be required depending on the nature of the mission, the cargo to be transported (people versus equipment and supplies), and the assets available.

The Secretary of Defense (SECDEF) is the approval authority for the transportation of equipment and supplies of host and partner nation military, US and foreign NGOs, and other US government agencies and entities supporting HCA operations. SECDEF routinely delegates this lift authority to the combatant commander for further delegation to subordinate commands. [See, DODD 4500.9E]

Transportation of such equipment and supplies is normally on a non-reimbursable basis subject to the following conditions:

- The authority cannot be used if an acquisition and cross-servicing agreement, a cooperative military airlift agreement, an agreement entered into pursuant to section 607 of the Foreign Assistance Act of 1961, or similar agreement applies.
- The transportation may be provided only when the DOD mission is advanced and either:

  – the lift is scheduled to support authorized humanitarian aid activities and is properly resourced with available funds appropriated for that purpose, an Economy Act order from another US government agency, or other appropriate authority; or

  – there is no increased cost to the DOD in providing the transportation, the mission is already scheduled, and the transportation is on an opportune, noninterference basis.

- Equipment and supplies of international organizations (such as the United Nations) may be transported on a reimbursable basis when the DOD mission is advanced. Such transportation may also be approved on a non-reimbursable basis when there is no means of repayment and the requirements of paragraph (b) have been satisfied.

"These donations are dedicated to the earthquake and tsunami victims in Western and Choiseul provinces of the Solomon Islands. They were donated by US citizens and collected by Navy personnel to help in some small way to meet your needs. We are eager to help the Solomon Islands people and help the rehabilitation process." - Commodore Robert B. Stewart, CAPT, USN, PELELIU Pacific Partnership Mission Commander

Space A, all the way

As in this deployment, once transportation of equipment and supplies was approved, NGOs were required to move their gear to any port of embarkation along PELELIUs course. NGOs were advised of the Denton Program which allows private US citizens and organizations to use space available on US military cargo planes to transport humanitarian goods, such as clothing, food, medical and educational supplies, and agricultural equipment and vehicles to countries in need. The program is jointly administered by USAID, the Department of State (DOS), and DOD. The

products for shipment under the Denton Program must be certified as follows:

- The project is in the national interest of the US;
- The material being transported is in usable condition; and,
- There are legitimate requirements for the material and adequate arrangements for distribution are identified.

There is a minimum load requirement of 2,000 pounds and the NGO must have a designated recipient for the cargo at the destination. However, case-by-case evaluation of weight waiver requests will be considered. In addition, transportation depends on the availability of a military flight between specific origin and destination points, and no assurance of a specific delivery date can be provided. Whether NGOs use the Denton Program to transport their equipment and supplies or rely upon corporate donations of travel, all NGO supplies must be transported at NGO expense to and from the point of embarkation and debarkation of the military aircraft or vessel. Because some of the NGO's medical supplies required special handling (such as refrigeration for vaccines and custody and control documentation for narcotics), the Denton Program was not heavily utilized by NGOs for PELELIU Pacific Partnership 2007 (PPP07).

Due to the potential difficulties associated with transportation of NGO supplies and equipment.

- Do not accept proprietary interest in NGO equipment and supplies as gifts in kind (GIK) without a proper gift analysis. During PPP07, NGO supplies were not accepted as GIK, but were provided transportation aboard PELELIU to the mission site for distribution by NGO volunteers and US and partner nation military members in partnership during the HCA mission;
- Ensure transportation responsibilities, ownership, and inspection of NGO equipment and supplies are clearly delineated in a Memorandum of Understanding; and,
- Provide the NGOs with a detailed list of acceptable and banned medical equipment and supplies for use with the HCA mission in each country to prevent disposal difficulties for unused or expired products.

All aboard

For personnel travel, the authority to transport and the authority to embark are distinct—the former is a legal determination and the latter a command and control function. A senior commander may limit the authority of their subordinate commanders to embark personnel in order to control and maintain situational awareness over those embarking a ship or aircraft under his control.

When authority to approve travel is not delegated, or the purpose of transportation is unrelated to the HCA mission, the standard rules governing transportation and embarkation of US Navy ships and aircraft will apply. Some of these rules include:

- DOD Senior Official Travel: Traveling DOD senior officials (flag or general officers and SES personnel) must personally request in writing the authority to travel on military aircraft (MILAIR) in accordance with DODD 4500.56. Accompanying spouses must have invitational travel orders (ITO).
- Air Transportation Eligibility: DOD 4515.13-R allows authorization of the transportation of personnel directly involved in an HCA mission, subject to the appropriate approval authority.

  – Foreign NGOs and Foreign Military: Chapter 10 of DOD 4515.13-R outlines procedures for those not otherwise eligible for transportation on DOD aircraft. For example, under paragraph C10.7, US Pacific Command/Commander Pacific Fleet (USPACOM/COMPACFLT) may authorize transportation of foreign nations (civilian, military, or NGO) when travel is in the primary interest of DOD.

  – US Civilian NGOs: Travel that is designed to improve relations, increase good will, or serve humanitarian purposes does not meet the criteria for public affairs travel; NGOs as an individual or part of a group, confer with the DOD on official matters, and perform direct services to the DOD personnel, may be issued ITOs in accordance with paragraph C2.2.7 of DOD 4515.13-R and JFTR/JTR Appendix E1 paragraph 2(c).

  – Personnel of other US Government Agencies (DOS, USAID): A commander can authorize transportation of personnel of other US government agencies when they are traveling on official business exclusively for DOD. [See, paragraph C2.2.5.3 of DOD 4515.13-R]; however,

Chapter 10 of DOD 4515.13-R also provides that COMPACFLT is the approval authority for transportation of US ambassadors and their senior deputies when the travel is in the primary interest of the DOD. If personnel in either category are not traveling exclusively for DOD, they may still be authorized transportation on a space available basis.

– Media: Media may be transported in accordance with Chapter 3 of DOD 4515.13-R, Public Affairs Travel, and SECNAVINST 5720.44B, Public Affairs Policy and Regulations. Since virtually all of the media travel involved with HCA will be local travel, local Commanders may be authorized to approve the travel for public affairs purposes.

- Space Available Travel (Space A): OMB Circular A-126 allows Space A travel if:

– The aircraft is already scheduled for use for an official purpose;

– Space A travel use does not require a larger aircraft than needed for the official purpose;

– Such Space A travel use results in only minor additional costs to the government; and,

– Reimbursement is provided if travel is in support of political activities.

For logistical purposes during an HCA mission, lift and embarkation approval authority should be delegated to the mission commander for essential personnel in direct support of the mission, to include US and foreign military, US and foreign NGOs, personnel of other US government agencies (i.e., Department of State and US Public Health Service (USPHS)), foreign nations (i.e., patients, escorts, and interpreters), and US and foreign media. However, approval for transportation of distinguished visitors (DV), to include US and foreign flag officers, members of the Senior Executive Service (SES), and US Ambassadors and their senior deputies, typically will remain with the type commander (TYCOM) for the HCA mission.

"The people we are helping now will remember us for the rest of their lives. I am very blessed to come along on this mission and help those in need. I will remember them for the rest of my life." -Diana Hardin, a volunteer with international health charity Project Hope and participant in PELELIU Pacific Partnership.

Conclusion

Whether future Pacific Partnership missions are executed with a gray hull warship or a white hospital ship with the universally recognized red cross emblazoned, the message of care and compassion across the Pacific will continue to resound. Through proper planning, a complete dedication to partnership, and committed leaders who believe in the importance of the mission, HCA deployments will continue to be a success for all involved.

[Note: "PROJECT HANDCLASP receives, collects, consolidates, and stores humanitarian, educational, and goodwill material for transportation on naval vessels, which are then distributed by US Navy and Marine Corps personnel on behalf of American citizens to needy people overseas."]

About the authors

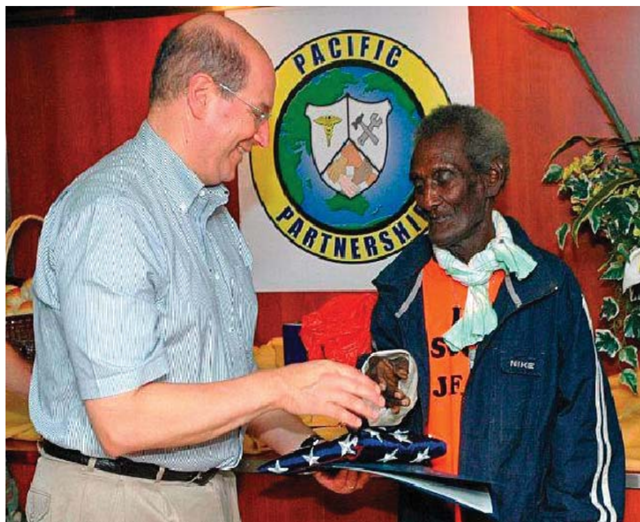
LCDR Tomlinson is a reservist on active duty with Commander, Pacific Fleet Detachment 120. Prior to joining the Reserves, she served eight years on active duty with the Navy Judge Advocate General Corps. Her experience includes assignments involving joint operations, international and operational law, installation law, and military justice. She deployed with PELELIU Pacific Partnership 2007 where she served as the legal advisor to the Mission Commander. LCDR Tomlinson worked as a civilian criminal defense attorney, both public and private, and interned for the Chief Judge, US District Court, Middle District of Florida prior to joining the Navy. She is licensed to practice in Florida and Hawaii.

LT Andrew Myers, JAGC, USN, is the assistant Fleet Judge Advocate at Commander, Pacific Fleet. He provided legal guidance during the planning phase of PELELIU Pacific Partnership and will deploy as the legal advisor to the Mission Commander for Pacific Partnership 2008. LT Myers has six years of prior enlisted naval service along with seven years of service in the JAG Corps. After graduating from University of Miami School of Law and prior to his commissioning as an officer, LT Myers worked as an Assistant State Attorney, 19th Judicial Circuit, State of Florida. He is licensed to practice law in the State of Florida.

CAPT Nepomeucemo, USN, treats a Filipino boy during a MEDCAP in Jolo, Philippines.

The USS Peleliu off the coast

Commodore Stewart presents Project Handclasp school supplies, toys and clothing to an orphanage in DaNang, Vietnam.



The honorable Donald C. Winter, Secretary of the Navy, presents an American Flag and certificate to Mr. Eruni "Aaron" Kumana on board USS PELELIU in the Solomon Islands. Mr. Kumana assisted in the rescue of John F. Kennedy and his PT109 Crew following their collision with a Japanese Destroyer in 1943.

A military member ouside one of the operations buildings.

LCAC vehicle (Landing Craft, Air Cushion) arrives with supplies for an ENCAP and MEDCAP on the remote island of Sassamungga, Solomon Islands.

MH53 helicopters transport post-surgery patients and U.S. military escorts from USS PELELIU (LHA 5) back to Madang, Papua New Guinea.

Helping to care for the livestock is an important aspect of the aid provided.

Doing construction work to improve local conditions.

Foreign Disaster Relief: A Fiscal Focus

Major Bradford B. Byrnes, US Army

> In Every Challenge is an Opportunity;
> In Adversity is Opportunity

The Department of Defense's (DOD) successful and well publicized foreign disaster relief operations have made measurable positive impressions of the United States military. Whether the mission was Operation UNIFIED ASSISTANCE [1] or relief from Cyclone Sidr, working with the host country forces in disaster relief has proved an extremely valuable form of military engagement. The February 2008 cooperation by the US Air Force and the Peoples Liberation Army to provide relief supplies to snow stricken parts of China demonstrates the potential for disaster relief to provide an opportunity to engage foreign forces. Consequently, DOD's foreign disaster relief operations are likely to increase in number. While each relief mission is distinct, common legal challenges can be identified. The foremost legal challenge is funding the mission.

This paper will focus on funding authority. Disaster response is subdivided into "immediate response" and "deliberate response." I will draw the crucial distinction for funding relief activities between immediate response and deliberate response. Then I will explain the flow of funds down to the task force level. Each type of response has a separate source of authority and funding. Neither the authorities nor the funding overlap and may not be combined.

In order to execute any foreign disaster response mission the first requirement is to know what the local US ambassador and US Department of State (DOS) intend the US official response to be. The decision of the ambassador will affect the funding and the task force entry into the country. US government policy provides that the DOS is the lead agency in responding to foreign disasters. Department of State will respond through its Office of Foreign Disaster Assistance (OFDA) and United States Agency for International Development (USAID). The ambassador will make his request for DOD assistance through the Department of State. The request is passed from the DOS to DOD where the Secretary of Defense may approve the request in its entirety, or in part. The Secretary of Defense approval of support triggers both the legal authority to conduct the deliberate relief mission and the release of funds for the mission.

Funding Foreign Disaster Relief Operations

For DOD, the immediate response period is the first 72 hours after the disaster, and limited actions taken during this time do not require the Secretary of Defense's approval. The deliberate response encompasses those actions taken after the Secretary of Defense (SECDEF) has approved the disaster relief mission until mission completion. The SECDEF will define the bounds of the actions, if any, taken during the deliberate response period. The relatively short 72 hour period of the immediate response is to ensure commanders do not execute a disaster relief mission without the SECDEF's explicit approval.

Immediate Response

During the immediate response period, a commander may take two kinds of actions. First, he may take measures to save lives and he may assess the damage. DOD policy and law do not restrict the ability of the on-scene commander to take actions to prevent the loss of life. These immediate response actions are funded from the commander's normal operations and maintenance (O&M) funds (otherwise known as his unit's budget). For example, during the Cyclone Sidr aftermath, a US Army medical unit already in Bangladesh for training immediately switched mission and engaged in life-saving medical treatment for the affected population. No higher headquarters approval was needed to take the immediate action.

The second action that may be taken without higher headquarters approval is an assessment of the effect of the disaster. These actions are typically executed by headquarters above the on-scene commander. The authority to assess the situation comes from the requirement that a commander be aware of situations

that may affect their defense mission. The means of assessing the situation will vary with each disaster. For example, the geographic combatant commander (GCC) may direct aircraft to conduct aerial assessments. When appropriate, the GCC may deploy a humanitarian assistance survey team (HAST). This team works with the US embassy staff and local forces to appraise the support requirements. In the deliberate response period the HAST's mission can transition to provide initial command and control capability. All assessments are funded with unit O&M.

Deliberate Response

Based on a disaster declaration from the US Ambassador of the affected country, the Secretary of State will formally request that the Secretary of Defense assist the DOS in the disaster relief effort. When the SECDEF agrees to the request, he will instruct his department to make available certain assets to the relief effort. It is the direction from the Secretary of Defense that authorizes DOD's deliberate response.

Typically the GCC will stand-up a joint task force (JTF) in the disaster area to manage the actual day-to-day relief effort. The JTF commander will be responsible for executing DOD's deliberate relief mission in the affected area. If the disaster response will be limited in scope, then the GCC may designate a single Service component to be the lead in the relief effort. Other units will be tasked to support the Service component. There is no one right way for the GCC to organize his relief response. For example, in Operation UNIFIED ASSISTANCE, a formal JTF headquarters was established. In contrast, for the Cyclone Sidr response, the Marine Forces Pacific (MARFORPAC) was made the supported command. Sometimes circumstance provides ready-made solutions. In February 2006, a combined US force package had just arrived in the Philippines for Exercise BALIKATAN when a disastrous mudslide struck Leyte. The exercise commander and his staff became command and control element for the disaster relief.

The DOD deliberate response will terminate when either the GCC declares his mission complete or the US ambassador to the country in which the relief mission is being conducted declares that DOD support is no longer required. Termination of the DOD mission ends all funding for further relief actions, and the authority to transport nongovernmental and third country forces and equipment without reimbursement ceases. The ambassadorial declaration only turns off DOD support; USAID usually remains to continue the long term relief projects. Upon mission completion, DOD transitions back to its primary defense mission.

Following the Funds

Congress has specifically appropriated funds to the DOD for the purpose of conducting foreign disaster relief. These funds are known as Overseas Humanitarian Disaster and Civic Aid (OHDACA). Because Congress intends that DOD uses OHDACA to pay for disaster relief, it is inappropriate, and a possible violation of law, to use any other funds. This means funding disaster relief is not like funding a unit's normal mission. Relief missions have a whole set of unique rules. For example, the DOD Financial Management Regulation (DOD FMR) requires that all helicopter flight hours incurred in support of the disaster relief mission be paid for with OHDACA monies and not the unit's funds.[2] Units may not use their operating funds to fly relief missions even if they want to.

Within DOD, Defense Security Cooperation Agency (DSCA) acts as the "banker" for the OHDACA funds. Current practice is for DSCA to place a limited amount of its OHDACA funds with the GCC's comptroller. Unless otherwise authorized, the funds are to be used only for a foreign disaster relief mission in that theater. This is like having a forward supply base for OHDACA funding. It allows the GCC to quickly access OHDACA without waiting for the time it takes to transfer funds from DSCA. When the GCC determines the limited amount of OHDACA in his account will be insufficient, he will then request that DSCA push more funds to his comptroller.

The GCC comptroller, in turn, makes the OHDACA funding available to the joint task force performing the relief mission. The funding paragraph of the execute order (EXORD) will instruct the units to account for their disaster relief costs separately and that OHDACA will cover the costs. To ensure enough money is always available, the GCC comptroller will determine the "daily burn rate" of OHDACA. Based on the GCC's estimate of how long the disaster relief mission will last, an approximation of the total cost can be made.

This approximated cost is passed to DSCA which ensures sufficient funds are pushed to the GCC.

The funding of the relief mission is a strictly sequential process. The Secretary of Defense approves an ambassador's request for DOD support which triggers DSCA and the GCC to release the OHDACA funds to the units conducting the relief mission. Prior to the release of the OHDACA units do not have the congressionally mandated funds to spend. They may not cover the relief mission costs with unit funds.

In some disaster relief missions, the DOS may offer to reimburse the DOD for the cost of supporting Department of State's relief missions. For example, in Cyclone Sidr, the Department of State informed SECDEF that it was willing to reimburse DOD up to a particular dollar amount. This requires the unit providing the support to the Department of State (typically OFDA) to account for the cost of the support separately. The reimbursement to DOD is made at the departmental level in Washington, DC.

Conclusion

When foreign disaster strikes, the US military is very likely to be a first responder. The engagement opportunity afforded by applying DOD's unique assets to disaster relief should not be underestimated. As DOD responds, it is important for planners and commanders to understand the distinction between immediate response and deliberate response. Actions taken during the immediate response are funded with unit O&M. These actions are limited in scope and duration. Engaging the full resources of DOD in support of an ambassadorial request requires SECDEF approval. Once SECDEF has approved a relief mission DSCA will fund it with OHDACA. The SECDEF-approved disaster relief mission is the DOD deliberate response. Units should ensure they follow the rules on funding relief missions. Improperly funding a relief mission may lead to a violation of law or policy, and partial mission failure. A successful disaster relief operation can dramatically change foreign opinion of the United States, and mission success depends on the smooth flow of funds.

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Endnotes:

[1] Response to the 2004 Asian Tsunami disaster.

[2] For more information see, DOD FMR Vol 12, Chap 23, 230902.

US Army CH-47 Chinook helicopter crewmen and Pakistani military members unload relief supplies in a remote town in Northern Pakistan on Oct. 12, 2005. The Department of Defense is supporting the State Department by providing disaster relief supplies and services following the massive earthquake that struck Pakistan and parts of India and Afghanistan. DOD photo by Spc. Christopher Admire, U.S. Army. (Released)

Legal Preparedness Assists in Disaster Preparedness: JTF-CS' Legal Compendium Provides Effective Planning Tool

LTC Timothy M. Tuckey, Staff Judge Advocate
Joint Task Force, Civil Support, US Northern Command

Laws permeate nearly every aspect of government. This is no less true when one considers the narrow area of government services, especially when those services must be provided in the aftermath of a disaster. As members of the Department of Defense (DOD), Service members and civilian employees are generally focused on federal laws. Those federal laws, like The Stafford Act [1] and the Posse Comitatus Act, [2] are of great importance when the DOD responds to emergencies or disasters within the United States, yet there is a vast array of applicable state laws that frequently weigh more heavily in relief operations. Federal planners who exclude substantive state law considerations from disaster assistance plans are certain to face the same criticism leveled against federal relief workers who overlook (and potentially violate) state laws while executing relief efforts. Moreover, domestic military plans and operations that do not contemplate applicable state laws are less likely to be viewed as successful – and may even garner failing grades in some critical fields. Consequently, federal planners must have prompt access to critical legal references from all relevant jurisdictions. One tool designed to fill that void is the Joint Task Force – Civil Support's (JTF-CS) [3] State Law Compendium (SLC).

The JTF-CS has a daunting mission: Under the command of US Northern Command (NORTHCOM), to plan and integrate DOD's support to the designated Primary Federal Agency (PFA) for domestic Chemical, Biological, Radiological, Nuclear and high yield Explosive (CBRNE) consequence management operations. [4] While the Department of Homeland Security's (DHS) Federal Emergency Management Agency (FEMA) [5] is the most likely PFA, the JTF-CS must also be ready to support other federal agencies that may be designated to lead the federal response. [6] The JTF-CS' mission may require the unit to operate in any one of the United States' many subordinate jurisdictions.

Frequently, military and political issues are constrained by borders and jurisdictional limits; however, like natural disasters which defy atlas boundaries, CBRNE events will not be contained through neat, political subdivisions. Winds may carry a nuclear detonation's plume across state lines; a single day's interstate commerce may spread a biological pathogen through fifty states; chemicals spilled near waterways may wend through multiple counties, states or even countries. The effects of a CBRNE disaster will have somewhat predictable but wide spread affect. Consequently, NORTHCOM and its subordinate CBRNE Consequence Management Response Force (CCMRF) must train to complete an untold variety of federal consequence management (CM) missions in a multitude of undetermined locations. [7]

Confronted with the scope of these responsibilities, JTF-CS attorneys realized that they needed a specialized legal research tool to contend with the variety of potentially applicable laws, to inform JTF-CS' planning, and to assist in the unit's operations. This note will outline the development of the SLC, its benefits, and its future value.

According to Mr. Mike Shaw, the Deputy of the Office of the Staff Judge Advocate for JTF-CS, the SLC provides the JTF-CS command's leadership with one of its most effective crisis action planning tools. The JTF-CS' previous legal officers had all recognized the difficulties that would be encountered during domestic CM operations, where DOD forces would operate in states, territories and protectorates where non-federal laws applied. While the full capabilities of the JTF-CS had not been operationally employed, multiple exercises had revealed both the potential difficulties that might arise from operations spanning multiple jurisdictions and the challenges posed by the application of Federalist policy to multi-state disasters. However, there were no known extant planning tools that enabled the JTF-CS leadership to effectively anticipate and address the variety and nature of legal issues that might arise in any given operation.

The SLC was therefore born of necessity, but was the brainchild of Mr. Shaw and LTC Stephen M. Parke, then serving as the JTF-CS Staff Judge Advocate. "In the

immediate aftermath of the nine-eleven attacks," Mr. Shaw said, "we raced to collect relevant information from New York, Pennsylvania and Virginia. One of our office's implied tasks is to identify any legal restraints or constraints on the unit's plans or operations. The commander needed to know if there are any legal impediments or limits, but we didn't know where we might be sent or which law might be applicable. At that moment we knew that we needed to create a template for the future."

Mr. Shaw and LTC Parke immediately began to systematically research and organize specific areas of non-federal laws that might affect DOD forces planning for and conducting any anticipated CM operations. "We knew that there were some common issues that arise in both CBRNE and all-hazard CM operations and we focused first on the most critical issues," reported Mr. Shaw. "We started ear-marking any potentially applicable statute from the affected states but realized that we needed to have immediate access to those references. It didn't take long for us to realize that we had to create a system to track and compare the laws."

Mr. Shaw first devised a simple chart but quickly realized that a more practical tool was needed. "During the post 'nine-eleven' months we had time to grow the project." Using Microsoft Excel and leveraging his computer skills, Mr. Shaw devised an interactive spreadsheet to categorize hundreds of laws. Then the legal team captured and charted the various laws. [8] The result of this effort was the SLC, a product which enables users to quickly locate a single state and then focus in on numerous legal issues.

"Obviously, with our small staff, the scope of this project consumed all of our time in the beginning," said Mr. Shaw. "And we had to take one step at a time, methodically adding pertinent statutes one state at a time. Working through the states alphabetically might have seemed logical, but the Nunn-Lugar-Domenici Act [9] had just directed the flow of resources to the top 120 'at-risk' metropolitan areas. So, we decided that our efforts to expand our database should reflect Congress' designated priorities." The result was the sequential addition of states based upon perceived aggregate threat to each state.

"We quickly understood that the Compendium needed to be broad," added LTC Parke. The biggest cities, the most populous states, and symbolic landmarks were obvious terrorist targets, but "it was clear to many planners that the terrorists might create more fear by striking softer targets in middle America – places that were not on Congress' list of 120 vulnerable cities." This realization underscored both the need to include every jurisdiction and the necessity to complete the expanded project as quickly as possible. Eventually, the SLC included every US jurisdiction.

"As we examined state laws, we discovered some interesting differences," said LTC Parke. "Some states were more proactive in keeping laws current, but other states' public health laws were more antiquated. For instance, many states' quarantine laws date to public health emergencies in the first half of the 20th century." But a statute's age does not necessarily diminish its relevance or value. Frequently, the differences in state laws on a topic reflect the differences between states' population's social and political perspectives.

"In regard to some issues, like mandatory inoculations, state laws create varied conditions and obligations," states LTC Parke. "Sometimes these rules foster a friction between individual liberties and the public's interest." Acknowledging the challenges that the military has had ensuring compliance with its internal personnel vaccination requirements, he adds "we will face some big issues in any multi-state, public health operation. Just imagine the variety of issues that might arise," he challenges. Both gentlemen understood that the SLC had to be both inclusive and broad.

The SLC spreadsheets now include tabs or sheets for each state and territory as well as categories of applicable issues that apply to each state. The program enables users to quickly compare or contrast individual state's laws. While it was designed for electronic research, the format enables users to easily print a paper copy when necessary. "Having a print-out is important to us because we need to ensure that we can operate in austere environments," added Mr. Shaw. While the categories of laws included in the SLC primarily focus on the subjects that are likely to affect plans for and CM operations after a CBRNE incident, many facets of the SLC, such as health powers and evacuation authorities, may also affect broader, all-hazards CM operations. According to Mr. Shaw, "we wanted to have a flexible resource because JTF-CS could be called upon to assist the lead federal agency in responding to a non-CBRNE event."

"After we created the 'shell' for the laws, we realized that we could use the tool for even more purposes," added Mr. Shaw. "We were also able to include key points of contact for each state, including the name, phone number, and email address of each state's attorney general and National Guard staff judge advocate." Having a single source of contact information for the many possible "partners" is invaluable. "But people change jobs frequently," he added, "and we have to admit that we have a big challenge in keeping those lists up-to-date."

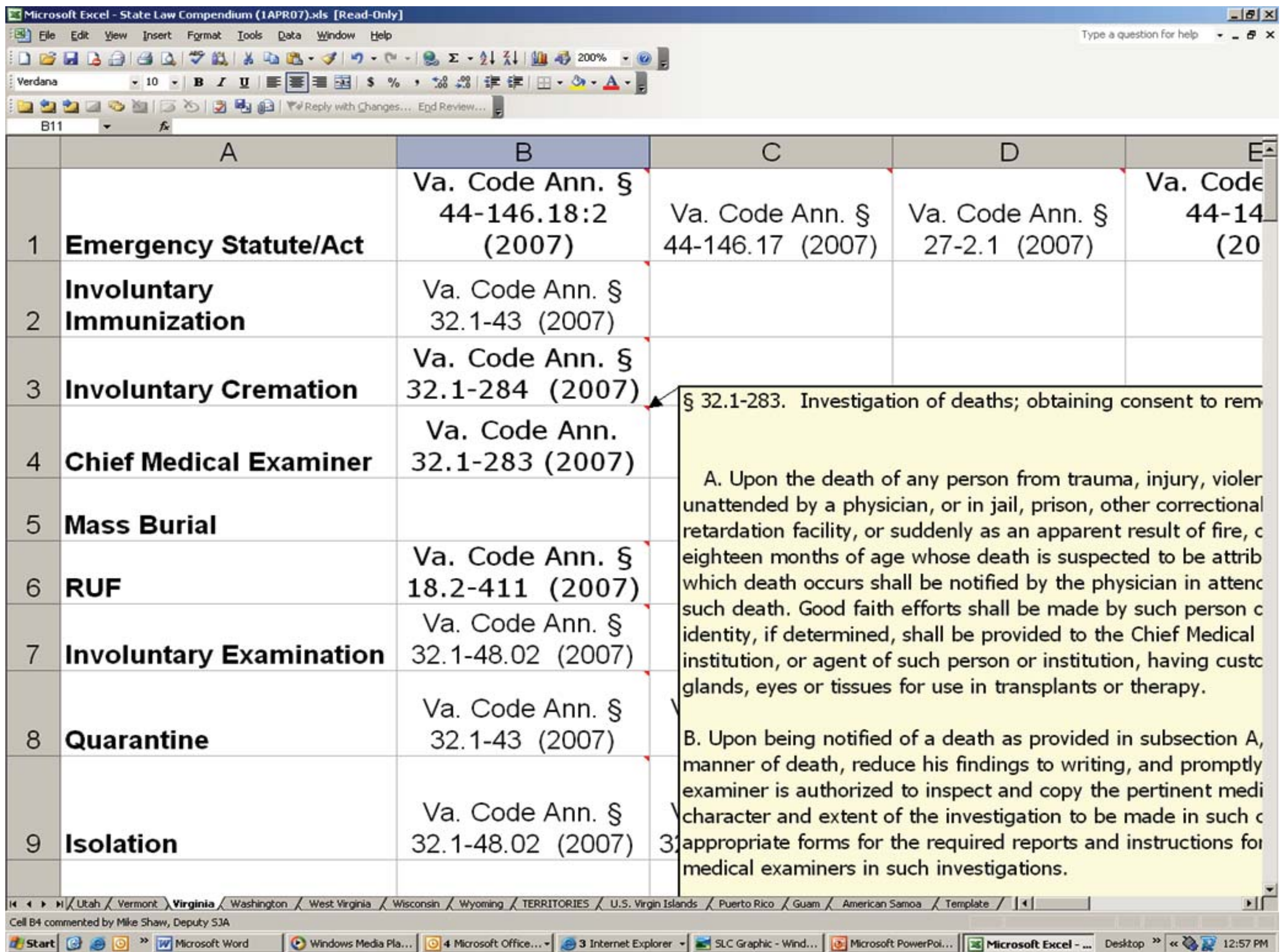
Any failure to remain current is also an issue that could affect the primary function of the SLC. "The SLC is only valuable if it is accurate. If we don't have the most current law, we could easily give the commanders inaccurate advice," stated Mr. Shaw. "Laws change frequently. So, we spend a significant amount of our time working to ensure that the SLC reflects the most current law. One of our Individual Augmentees (IA) just invested four months checking content and citations." There are "fewer pertinent federal laws than state laws, so we can stay on top of changes to federal laws much more easily than changes to state laws," adds Mr. Shaw. "Staying current is a huge investment, but when we deploy to a disaster, we will not have much margin for error. We will immediately need to know the right law and how to speak the locals' language."

More importantly, "the legal profession's ethical rules demand competence," asserts LTC Parke, "and we cannot be competent if we are not current. We cannot afford to show up in a state and point to an amended or superseded statute as the controlling law. If we do, it degrades or invalidates the advice we give our commander, and it degrades any credibility we might have with the state," he adds. "We deploy to provide assistance, but we cannot supplant state law through federal fiat. Our assistance will only be welcomed by states if we both know and follow their laws."

That point is not lost on the JTF-CS' leadership. The Deputy Commander of JTF-CS, US Marine Corps Colonel Randall "Hap" Holm, clearly recognizes the need to be familiar with state laws and regulations. "We must focus our attention on state law," said Colonel Holm. "The federal government and the military may be the proverbial 800 pound gorilla that cannot be ignored, but we do not get to impose our will by ignoring state laws." Indeed, state law controls every aspect of operations that are not specifically governed by federal law or regulation. While the Supremacy Clause of the United States Constitution [10] declares that federal law is preeminent, the 10th Amendment [11] reserves to the states all power not specifically delegated to the federal government. Those powers not specifically delegated can be varied and extensive.

"We support 54 different sovereigns [12] with 54 different sets of laws and 54 different sets of regulations," said Colonel Holm, "and those laws

Successful domestic operational law missions require careful coordination between commanders and their legal advisers. Above, Mr. Mike Shaw, JTF-CS deputy staff judge advocate, and Colonel Randall "Hap" Holm, deputy commander of JTF-CS, discuss state law constraints that affect the unit's planning efforts. The computerized State Law Compendium enables military attorneys to quickly access and draw upon individual state laws that might affect the Department of Defense's consequence management operations in support of a primary federal agency. Although the U.S. Constitution's Supremacy Clause elevates federal law above state law, the 10th Amendment reserves to the states all powers not specifically delegated to the federal government. State laws therefore control most activities within the state. Consequently, it is imperative that planners understand the impact of state laws on domestic operations. (Photo by SSgt Christopher D. Hale, USMC)



SLC Graphic: The above screen shot demonstrates the State Law Compendium's ability to immediately access pertinent state statutory authority relating to consequence management topics. This tool enables legal planners to quickly access relevant laws and to assess the potential impact on the JTF-CS mission. The Compendium does not address every potential legal issue but it provides attorneys with a critical crisis action planning tool.

are not always congruent with federal law." Further complicating the JTF-CS mission is the fact that "we don't get to choose which laws apply any more than we can choose where we might be deployed," he adds. "So the sooner that we can inform ourselves of the applicable rules, the sooner we will be ready to save lives and mitigate hardship – wherever that might be."

Underscoring the need to understand a supported state's laws, Colonel Holm declares, "We need to have credibility when we deploy to help local or state governments. We need to understand who we support and, more importantly, we must understand the parameters in which they work, because we are also going to be limited by that same law of the land." Credibility is important in CM operations. "When we deploy, the locals may not immediately trust us. There is a natural and logical resistance to federal assistance. States will want the capabilities we can bring but may not want our command in their backyard. But if we are sent somewhere, it is because the nation needs us to be there, and it behooves us to be as prepared as quickly as possible."

"Timing is everything," adds Colonel Holm, "so a well prepared legal cell is an indispensable component of JTF-CS' mission set." In CM circles there is an adage that those providing relief at a catastrophe site should not be obligated to waste valuable time to distribute business cards; preparedness necessitates familiarity. Similarly, supporting attorneys cannot wait for a disaster before delving into the relevant law.

Colonel Holm and the JTF-CS leadership well understand this concept. "It is critical that the command immediately have both a comprehensive and granular view of the controlling law," said Colonel Holm. "That's the value of the Compendium; it helps us to see issues from the state's point of view. More importantly, it enables us to be nimble, to change our operational details based upon the laws of the jurisdiction, so we can work anywhere." This flexibility is crucial because CBRNE events are not going to be constrained by lines on a map.

The SLC helps to provide that flexibility while improving fidelity with a supported state's (or multiple states') efforts. But the SLC's exclusive focus on state statutes also exposed a weakness. "After working with the Compendium for several years, we now realize that we had unintentionally limited its usefulness," admitted Mr. Shaw. State statutes control activities within the states, but those who work for state agencies are not always familiar with the controlling statutes. Instead, they demonstrate a high degree of familiarity with the implementing regulations that apply the law to the agencies' operations. "Knowing the state law is important," asserts Mr. Shaw, "but regulations more frequently govern the space where the proverbial rubber meets the road." Consequently, the legal team decided to expand the SLC to include state regulations. But, like the initial growth of the SLC, this expansion will take additional time and resources.

"While we originally saw the present SLC as our goal," said Mr. Shaw, "the present product now looks like a springboard for an even more useful project." The present spreadsheet's internal hyperlinks to relevant state statutory provisions provide a perfect model for the incorporation of state regulations. "Our database is just the bones. We want to 'flesh-out' the SLC's frame with links to available regulatory guidance. I can envision a time when the SLC could be completely web-based and interactive. This could be a virtual disaster assistance library that any agency could use," adds Mr. Shaw.

A web-based Compendium could provide benefits to a wide range of governmental agencies. When asked when the CM community might expect either the expanded regulatory database or the finished interactive product, Mr. Shaw is noncommittal. "That is going to be a labor-intensive project. Initially, we could simply add internal hyperlinks to the existing database, but that would take us many, many months, even with the assistance of additional IAs." Nonetheless, even in its present state, the SLC is an effective and valuable tool.

But like any tool, the SLC could be mishandled. "There might be a tendency for some leaders to look at the Compendium as the definitive legal guidance on an issue," posits Mr. Shaw, "and that poses some danger. This is merely a tool; the verbatim text of a statute does not equal legal advice from an attorney." The law may exist in a vacuum, but it is distinctively useful only when it is applied to facts. The state law passages in the SLC provide parameters, but the application of the law requires interpretation, construction and context. "Attorneys recognize this principle but it is a fine point that is often misunderstood by laymen."

But the SLC was not created for laymen. "We created the Compendium for our internal use," states Mr. Shaw, "and we view it primarily as a tool for attorneys who advise commanders. Our commanders and senior leaders love the product, but we do not want any commanders to trade-in their attorneys for a computer program." Attorneys are trained to apply the law; however, Mr. Shaw is quick to point out that a legal degree does not provide anyone with a monopoly on insight. "Our mission is to help commanders to be successful in their mission. Sometimes the rules are intuitive; sometimes they contain ambiguities. In either case, our task is to ensure the law is properly construed."

Explaining the value of properly construed laws, Colonel Holm talks about lessons learned in JTF-CS' exercises. "Fortunately we have not been called upon to respond to a catastrophe involving mass casualties," confides Colonel Holm. "There is incredible variety in states' laws regarding the handling of remains. Layered on top of these laws are a population's cultural perspectives and individual religious beliefs. Through our exercises we've learned that this is an area where we have got to be sure that we are doing things right. And our legal team has been the key to that and other lessons."

Mr. Shaw can also point to occasions when the legal team's SLC research affected the manner in which the command approached its mission. "In one mass casualty exercise, the initially proposed plan required the temporary interment of contaminated bodies," said

Mr. Shaw, "but we discovered that the state's health code precluded any disinterment for the purpose of interment in another state, if the body had been contaminated before burial." Knowing this limitation underscored the command's credibility with the state, permitted the command to more effectively work with state planners, and aided in developing well-received alternatives. Issues such as this may be inconsequential during an exercise, but the potential real-world political and public relations fall-out of an oversight of this type could prove both embarrassing and problematic.

Fortunately, the differences between most state laws are limited. "Of course," reports Mr. Shaw, "there are some major distinctions between the states whose laws are based upon English common law and places like Louisiana," where the law is based upon the French civil model. "The good news story is threefold: first, we have learned to spot the areas where we expect to find differences; second, there are few problem areas; and third, having the Compendium gives us advance warning and time to react."

The JTF-CS, like most organizations, does not have the luxury of an attorney from every jurisdiction. If and when it is deployed in support of a federal agency directing relief operations, JTF-CS may be augmented with state law experts from the affected jurisdiction(s), but until that time the SLC provides the command with a most effective crisis action planning tool that military attorneys can access through two intranet sites. [13] The SLC also affords the JTF-CS legal staff flexibility and adaptability that it would not otherwise have. The staff's investment in research and efforts to capture potentially applicable laws has already paid dividends; by leveraging technology and allocating additional research resources, the team knows that it will reap even greater rewards. "We would like to see this tool expanded even more. With some nurturing, this project could develop into a more accessible and more useful tool that benefits all government agencies engaged in consequence management operations."

As disaster preparedness becomes more important, so does legal preparedness. Consequently, there will always be a need for tools like the SLC. "The law is not going to go away," muses Mr. Shaw, "even in the most dire situation, our government's commitment to the rule of law will endure."

About the Author:

LTC Timothy Tuckey is the Staff Judge Advocate for Joint Task Force – Civil Support, a subordinate command of US Northern Command, located on Fort Monroe, Virginia. He received his Juris Doctorate from Suffolk University and his Masters of Law (LL. M.) from The Judge Advocate General's Legal Center and School, where he later served as an instructor and as his academic department's vice-chair. In previous assignments he served as Staff Judge Advocate in Okinawa, Japan, and in numerous legal billets with the US Army in Hawaii, Germany, and Italy. He is a graduate of the Army's Command and General Staff College and a member of the Bars of Massachusetts and the US Supreme Court.

Endnotes:

[1] The Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 USC § 5121, et. Seq., as amended by Pub. L. No. 106-380 (2000). The Stafford Act is the primary legal authority for federal emergency and disaster assistance to state and local governments.

[2] The Posse Comitatus Act, 18 USC § 1385 (2006). Posse Comitatus is a Latin phrase meaning the "power of the county" by which able bodied persons could be called upon to aid law enforcement officials in suppressing or preventing civil disorder. This statute provides the primary restriction against the use of military personnel to civilian law enforcement.

[3] The Joint Task Force – Civil Support (JTF-CS) is a joint task force headquarters subordinate to US Northern Command (NORTHCOM). The JTF-CS website outlines its purpose as:

> "to save lives, prevent injury and provide temporary critical life support during a Chemical, Biological, Radiological, Nuclear or high-yield Explosive situation in the United States or its territories and possessions. [The] JTF-CS is the only military organization dedicated solely to planning and integrating Department of Defense forces for consequence management support to civil authorities in such a situation.
>
> While hoping the need never arises, JTF-CS stands ready to aid the designated Primary Federal Agency, most likely the Federal Emergency Management Agency [FEMA], in charge of managing the consequences of a CBRNE accident or incident. A former independent agency tasked with planning for and responding to disasters, FEMA became part of the Department of Homeland Security in March 2003. When directed, JTF-CS deploys and establishes command and control of DOD forces supporting the PFA in order to reduce the harmful effects of a CBRNE situation.

JTF-CS is a standing joint task force comprised of active, reserve and Guard members from the Army, Navy, Air Force, Marines and Coast Guard, as well as civilian personnel, and is commanded by a federalized Army National Guard General Officer. Established in October 1999, JTF-CS is a subordinate unit of US Northern Command, a unified combatant command formed in October 2002 to plan, organize and execute both homeland defense and civil support missions. When directed by the President or the Secretary of Defense, USNORTHCOM provides defense support of civil authorities, including consequence management operations.

JTF-CS accomplishes its consequence management mission in strict adherence with the principles of the Constitution and public law. Deployment of JTF-CS, at the direction of the Commander of US Northern Command, and on the authority of the Secretary of Defense, would occur only after a Governor requests federal assistance from the President, and after the President issues a Presidential Disaster Declaration. In any domestic setting, JTF-CS remains in support of the LFA throughout the CBRNE consequence management operation."

JTF-CS Unit Fact Sheet, available at: http://www.jtfcs.northcom.mil/About_JTFCS/About_JTFCS.html (last visited Jan. 30, 2008).

[4] "When directed by the Commander of US Northern Command, JTF-CS will deploy to the incident site, establish command and control of designated DOD forces, and provide defense support of civil authorities to save lives, prevent injury and provide temporary critical life support." Id.

[5] In 2002, the Federal Emergency Management Agency (FEMA) was assigned to the newly established Department of Homeland Security. See, Pub. L. No. 107-296. Under § 507, FEMA "shall remain the lead agency for the Federal Response Plan established under Executive Order No. 12148 (44 Fed. Reg. 43239) and Executive Order No. 12656 (53 Fed. Reg. 47491)." Id.

[6] The Emergency Support Function (ESF) Annex of the National Response Plan (and the soon to become effective National Response Framework) designates Primary Federal Agencies (PFA) and assigns responsibilities for particular functions in various catastrophic incident planning and recovery scenarios. The FEMA is the PFA for most ESFs. See generally, National Response Plan, Dec. 2004; and Presidential Decision Directive (PDD)-39, (US Policy on Counterterrorism), June 1995.

[7] According to NORTHCOM, its area of operations:

"...includes air, land and sea approaches and encompasses the continental United States, Alaska, Canada, Mexico and the surrounding water out to approximately 500 nautical miles. It also includes the Gulf of Mexico and the Straits of Florida. The defense of Hawaii and our territories and possessions in the Pacific is the responsibility of US Pacific Command. The defense of Puerto Rico and the US Virgin Islands is the responsibility of US Southern Command. The commander of USNORTHCOM is responsible for theater security cooperation with Canada and Mexico."

See, About NORTHCOM available at http://www.northcom.mil/About/index.html (last visited of Feb. 4, 2008).

[8] In addition to states' emergency powers statutes, the SLC includes a wide variety of regulatory subjects. Among the spreadsheet's public health laws are entries for involuntary immunization, involuntary medical examination, involuntary hospitalization, quarantine and isolation, and Good Samaritan concerns. The closely related mortuary affairs matters include state coroner regulations, involuntary cremation rules, and laws related to mass burial. There are also entries related to the employment of National Guards, law enforcement, civil confinement, and state Rules on the Use of Force, as well as general consequence management issues like evacuation and debris removal.

[9] The Nunn-Lugar-Domenici Domestic Preparedness Program was created under Title XIV of the National Defense Authorization Act of 1996, Pub. L. 104-201 (1996).

[10] US CONST., Art. VI, Clause 2. This section of the Constitution, commonly referred to as the "Supremacy Clause" states:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Id.

[11] US CONST., Amend. X (reserving powers not delegated to federal government to states or the citizenry).

[12] These sovereigns include the 50 United States, the District of Columbia, and the US territories within the NORTHCOM area of operation.

[13] Interested readers within the military community can find the copies of the SLC on the JTF-CS OSJA's page of the NORAD – USNORTHCOM Command (Internal – FOUO/LES) Portal, available at: https://command.noradnorthcom.mil/sites/JTFCS/SJA/State%20Law%20Compendium/Forms/AllItems.aspx (last visited Feb. 8, 2008) and on the Army's Center for Law and Military Operations' "Homeland Security" webpage within JAGCNET, available at: https://www.jagcnet2.army.mil/8525727C0052D0F2/(JAGCNetDocID)/C2B2A0CC64FF0452852572C8004F6B2A?OpenDocument (last visited Feb. 8, 2008).

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