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International and Operational Law Division
The Judge Advocate General's School
United States Army
Charlottesville, Virginia 22903-1781

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This handbook is a comprehensive, yet structured, approach toward resolving legal issues evolving from deployment activities. This book is organized to enhance the understanding of the role of law in military operations.

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OPERATIONAL LAW HANDBOOK

JA 422

PREFACE

The Operational Law Handbook is a "how to" guide for Judge Advocates practicing operational law. It provides references, and describes tactics and techniques for the conduct of the operational law practice. It supports the doctrinal concepts and principles of FM 100-5 and FM 27-100. The Operational Law Handbook is not a substitute for official references. Like operational law itself, the Handbook is a focused collection of diverse legal and practical information. The information was not designed to provide Judge Advocates with "the school solution" to a particular problem, but to help them recognize, analyze, and resolve the problems they will encounter in the operational context.

This Handbook was written for the Army Judge Advocate practicing operational law. Other service and allied Judge Advocates may find the information in the Handbook useful in understanding how the Army Judge Advocate General's Corps conducts its operational law mission. The Operational Law Handbook is compatible with current joint and combined doctrine. Unless otherwise stated, masculine pronouns apply to both men and women.

The proponent for this publication is the International and Operational Law Division, The Judge Advocate General's School (TJAGSA). Send comments, suggestions, and work product from the field to TJAGSA, International and Operational Law Division, ATTN: MAJ Marc Warren, Charlottesville, VA 22903-1781.

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TAB A
DOCTRINE

DEFINITION OF OPLAW

That body of domestic, foreign, and international law that impacts specifically upon the activities of U.S. Forces in war and operations other than war.

Operational law is the essence of the military legal practice. It is a collection of diverse legal and military skills, focused on military operations. It includes military justice, administrative and civil law, legal assistance, claims, procurement law, national security law, fiscal law, and international law. The practice of operational law requires competence in military skills. The tenets of the operational law practice mirror the tenets of Army operations: *initiative, agility, depth, synchronization,* and *versatility.*

Because the definition of operational law is so broad, ample statutory and regulatory references serve to establish the substance of the practice. The difficulty, however, is not WHAT to do, but HOW and WHERE to do it. The following list of references, while not exhaustive, provides authority for legal support in military operations.

DIRECTIVES

Together, the following three directives mandate aggressive operational law programs. The first two direct commanders to use their lawyers. The third message ensures that the loop is closed. If the command has not sought legal input from the top, this message forces it "from the bottom," directing lawyers to liaison with G-3 operators.

DOD Dir. 5100.77, 10 July 79, requires all US Forces to abide by the law of war. "The Armed Forces of the United States shall comply with the law of war in the conduct of military operations and related activities in armed conflict, however such conflicts are characterized." (NOTE: A revised DoD Dir 5100.77 is expected in 1994/95. The proposed revision incorporates legislative changes (Goldwater/Nichols, e.g.) and lessons learned from Operations URGENT FURY, JUST CAUSE, and DESERT STORM.)

Joint Chiefs of Staff Memoranda (MJCS 59-83, 1 June 83, and MJCS 0124-88, 4 Aug 88) require lawyers to provide advice on both restraint and the right to use force. "Legal Advisors should be immediately available to provide [LOW advice and compliance] during joint and combined operations." That advice should "address not only legal restraints upon operations, but also legal rights to employ force." Further, lawyers "should attend planning conferences for joint and combined operations and exercises when ROE and related topics will be discussed."

FORSCOM Message, Subject: Review of Operations Plans (292030 Oct 84). Legal Advisors will review and advise commanders and staff on all operational plans and orders. **JAs will make direct liaison with the operations officer (G-3) to act as the operational law advisor.**

FIELD MANUALS

FM 100-5, OPERATIONS (June 1993). Establishes Army doctrine. Of particular importance to JAs are Chapter 2, Fundamentals of Army Operations, and Chapter 13, Operations Other Than War. Discipline, rules of engagement (ROE), and the law of war are discussed at pages 2-3 and 2-4. Restraint and ROE are discussed at page 13-4.

FM 27-100, LEGAL OPERATIONS (September 1991). Establishes Army JAGC legal operations doctrine. Although premised on the AirLand Battle Doctrine, FM 27-100 provides an overview of traditional Army JAGC legal support structures, roles, and missions.

FM 27-10, THE LAW OF LAND WARFARE (July 1956, with Change 1, July 1976). The essential reference. Unfortunately, it contains little direct language on how and where the command obtains the legal advice necessary to follow the laws and principles embodied in the manual.

FM 100-10, COMBAT SERVICE SUPPORT (February 1988). Generally prescribes and defines legal service support to various levels of command (pages 4-11 and 4-12).

FM 100-16, SUPPORT OPERATIONS: ECHELONS ABOVE CORPS (April 1985). Lists "necessary legal support" and provides authority for JAs operating with maneuver brigades (pages 7-11 and 7-12).

FM 100-15, CORPS OPERATIONS (September 1989). Provides "wiring diagram" of Corps staff, identifying SJA as a member of Personal and Special Staffs (page 2-2). Establishes and defines Corps command posts and cells, and identifies SJA positions in the CSS cells of the Corps tactical operations Center (CTOC) and Corps Rear Command Post (pages 4-9 through 4-11).

FM 100-25, DOCTRINE FOR ARMY SPECIAL OPERATIONS FORCES (December 1991). Identifies functional areas of legal services to SOF. Provides doctrinal authority for legal support to SOF and for organic JAs in SF groups (pages 14-20 and 14-21).

FM 71-100, DIVISION OPERATIONS (June 1990). Identifies division staff organization and functions, and identifies SJA position locations in the division in the field. Provides authority for SJA positions in the CSS cells of the division Tactical Operations Center (DTOC) and division Rear Command Post (pages 3-4 through 3-7).

FM 71-100-2, INFANTRY DIVISION OPERATIONS: TACTICS, TECHNIQUES, AND PROCEDURES (August 1993). Prescribes division command post operations and techniques. Provides for one JA (identified as the DSJA) as part of the G-3 Plans element of the Main CP (page 2-42). Provides for main SJA body location in the G-1 support element of the division Rear CP (pages 2-61, 2-62, and 2-73 through 2-76). Places a JA in the G-3 Operations element of the division Assault CP; states that," The SJA [representative] is a critical element in the assault CP during the early stages of the deployment" (pages 2-80 through 2-84). Discusses SJA's extensive role in operations other than war, including advice on ROE and "legal considerations" (chapter 6).

FM 101-5, STAFF ORGANIZATION AND OPERATIONS (May 1984). Establishes basic staff structure for major field commands; identifies SJA as member of Special and Personal Staffs (pages 2-6 through 2-10). Defines the "Special Staff Group" and "Personal Staff Group" (pages 2-4 and 2-5). Lists responsibilities of the SJA (pages 3-31 and 3-32).

FM 41-10, CIVIL AFFAIRS OPERATIONS (January 1993). Establishes CA doctrine. Provides for "Legal" as a CA Functional Specialty (page 4-14). Affords good overview of CA missions and addresses matters of interest to the operational lawyer (chapter 14, for example, discusses the Country Team and NGOs). Include this FM in your deployment load list.

REGULATIONS

Although not "doctrinal," regulations also provide authority for the performance of the operational law mission:

AR 27-1, Judge Advocate Legal Service (September 1989). Identifies the "international law" responsibilities of TJAG (2-1g); provides that JA officers should not routinely perform nonlegal duties (paragraph 3-2c); and prescribes operational law as a responsibility of SJAs (paragraph 5-2a(3)(e)).

AR 27-10, Military Justice (December 1989). Provides for mutual support responsibilities between SJAs and USATDS (chapter 6); addresses tactical unit support and performance of nondefense duties by USATDS JAs (paragraph 6-8). Provides for judicial cross-servicing IAW R.C.M. 201(e)(4) (paragraph 8-6e) and for administrative and logistical support to military judges (paragraph 8-7). Restates and implements U.S. custody policy overseas (chapter 17).

AR 570-2, Manpower Requirements Criteria (May 1992). Serves as the basic document for TOE staffing. Now being revised. *See*, Combat Developments Notes, *New Manpower Requirements Criteria*, Army Law., April 1994, at 58. The Manpower Requirements Criteria (MARC) is the authority for operational law attorney positions in units.

COMMAND REGULATIONS & PUBLICATIONS

Command regulations and publications can reinforce the operational law mission. Numerous commands have regulations on Law of War Programs and Reporting Law of War Violations. For example, USAREUR Regulation 27-8, Law of War Program (December 1992) effectively implements directives and doctrine by mandating SJA involvement in training and operations, as well as establishing command policies on law of war training and violation reporting procedures. Probably the best technique for making operational law an integral component of your command (and not dependent on the force of personality of the operational law attorney) is to ensure that appropriate references to operational law support are placed in unit Tactical and Field SOPs.

TAB B
NATIONAL SECURITY: STRATEGY & STRUCTURE

The successor to a doctrine of containment must be a strategy of enlargement, the enlargement of the world's free community of market democracies.

Anthony Lake, National Security Advisor, Sep. 21, 1993

I. STRATEGY.[1]

A CHANGED WORLD

The dissolution of the Soviet Union caused a fundamental change in US strategy.[2] Where the US once had the "luxury" of a clearly identifiable threat (the Soviets), it now must focus on a broader array of regional contingency threats. The National Command Authority changed US strategy from "containment" to "peacetime engagement" to "enlargement."[3]

The engagement/enlargement philosophy encourages the US to use its elements of national power to prevent wars and regional conflicts, rather than having to confront adversaries in combat (or "cold war" scenarios).[4] The elements of national power are: military strength, public diplomacy, economic vitality, moral and political example, and alliance relationships.

At the heart of the engagement strategy--articulated in the August 1991 National Security Strategy[5]--is a desire for a new world order. Former President Bush described the new world order as one "where brutality will go unrewarded and aggression will meet collective resistance." It will be a "world where the rule of law supplants the rule of the jungle. A world in which nations recognize the shared responsibility for freedom and justice. A world where the strong respect the rights of the weak." The major elements of the order will be: "peaceful settlements of disputes, solidarity against aggression, reduced and controlled arsenals, and just treatment of all peoples." It is necessary to understand the essence of the engagement strategy to fully grasp the means to achieving the enlargement strategy.

JULY 1994: A NATIONAL SECURITY STRATEGY OF ENGAGEMENT AND ENLARGEMENT

The Clinton Administration refined the engagement strategy by defining what was to be accomplished in the engagement process. Enlargement became the strategy theme, *to emphasize the specific cornerstones* of the American experience that were essential to the continuation of our way of life. The cornerstones are freedom, liberal democracy, human rights, and open market economies. Additionally, President Clinton reorganized the emphasis placed on each of the elements of national power. Where President Bush focused on military power and alliance relationships, President Clinton emphasizes economic vitality and the moral and political example that the US sets.

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[1]Note that "strategy" is an all encompassing concept, not just strategy for the military. While the military is obviously a strong element within our national structure, it exists to support civilian objectives. Accordingly, US military strategy evolves (as a subset) from the US National Security Strategy.

[2]US strategy changes with the times. During the Eisenhower administration, "massive retaliation" was the concept for keeping the Soviet Union in line. Under Kennedy, the idea changed to "flexible response." Since then, "containment" and "deterrence" has been the key to dealing with communist expansionism.

[3]Two sides can be seen emerging in the struggle to set American foreign policy. One is "America First," and the other is "Pax Americana." America First proposes we withdraw from our entangling arrangements overseas, and let other countries provide for their own defense. Pax Americana on the other hand, states that US interests are best served by our staying engaged (peacetime engagement), thereby obviating the need for Germany, Japan or others to substantially rearm. In fact, the classified 1992 Defense Planning Guidance (leaked to the press in March '92) urges the US to not only recognize its pre-eminent position in the world, but to actively seek to maintain that position (Pax Americana). "This classified document makes the case for a world dominated by one superpower whose position can be perpetuated by constructive behavior and sufficient military might to deter any nation or group of nations from challenging American primacy."

[4]Even the UN has shifted large parts of its diplomacy from international conflicts, and is focusing on internal affairs of states. The Security Council now "spends most of its time on civil wars." The secretariat has formed a new office for civil wars whose work is called "humanitarian diplomacy." Its director operates at the intersection of humanitarianism and security, relief and peacekeeping. His focal point is 40 million refugees from internal conflicts, 17 million pushed across borders, 23 million displaced within their homelands. (S. Rosenfeld, Washington Post)

[5]The National Security Act of 1947, as amended (see Section 603, Goldwater Nichols Defense Department Reorganization Act of 1986), requires the President to transmit a Nat'l Sec. Strategy Report to Congress each year. The unclassified version is available for $2.75 from the GPO under stock # 040-000-00-561-7.

The 1994 Engagement and Enlargement Strategy is a 3 part approach:

SECURITY

- Goal: Maintain a force structure to respond to two "nearly simultaneous" major regional conflicts;
- Pentagon's "Bottom Up Review";
- President's pledge to "draw the line" against cuts that undermine force structure or readiness;
- Strengthen NATO's leadership role in Europe;
- Combat proliferation of weapons of mass destruction; and
- Policy reform on US involvement in multilateral peace operations.

ECONOMICS

- Reduce deficit and promotion of economic growth;
- Approval of NAFTA;
- GATT - Uruguay negotiations on world trade (opening of new markets);
- Asian Pacific Economic Cooperation (APEC) meeting -- (steps taken to expand US ties with Asia);
- Environmental Protection -- signing of the BioDiversity Treaty in June 1993 and development of a National Climate Plan; and
- Population Control -- US will take world leadership lead in strategies that allow families to choose the number and spacing of children.

DEMOCRACY

- Support democratic and market reforms in the Former Soviet Union;
- Support the embryonic democracy of South Africa;
- Strengthen UN sanctions against the military rulers of Haiti (with a view toward restoration of democracy);
- Proposed revision of the Foreign Assistance Act.

In accordance with the shift in strategy that began in the early 1990's, the force structure has undergone significant restructuring (downsizing). To accomplish the peacetime engagement mission, the 1992 National Military Strategy established a "Base Force" consisting of: strategic deterrence, forward presence, crisis response, and force reconstitution. This base force continues to be reevaluated -- the latest being a "bottom up review" conducted by the Department of Defense. The 1994 National Security Strategy announces a shift from downsizing to stabilizing the force, so that it can respond to two "nearly simultaneous major regional contingencies."

II. THE STRUCTURE : THE UNIFIED / SPECIFIED COMMAND SYSTEM

Fighting Commands

The unified commands are the fighting commands of the US. Collectively, their job is to conduct military operations wherever and whenever US national interests require. Unified commands have broad continuing missions, and employ the forces of two or more services. Specified Commands (when created) also have broad, continuing missions, but only employ one service component to fulfill that mission.

Assignment of Forces

US forces are assigned to 10 unified commands under the authority of the SECDEF. There are 10 combatant commands.[6] The Commanders-in-Chief (CINCs) are assigned either regional or functional responsibilities. Five of the ten unified commands (USACOM, EUCOM, PACOM, SOUTHCOM, CENTCOM) have regional responsibilities; the other five have functional responsibilities.

1. Regional CINCs. The regional CINCs support US national security interests in particular areas of the world. These CINCs command the US Atlantic Command, US European Command, US Pacific Command, US Southern Command, and US Central Command.

2. Functional CINCs. The functional CINCs provide their specialized support world-wide. These CINCs command the US Transportation Command, US Special Operations Command, US Space Command, US Strategic Command, and NORAD.

Operational Chain of Command

1. National Command Authority. The operational chain of command for these combatant forces runs from the National Command Authority (NCA), i.e., the President and the SECDEF, through (not with) the Chairman of the Joint Chiefs of Staff (CJCS) to the CINCs.

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[6]In June 1992, the Strategic Air Command (a Specified Command) became the US Strategic Command (a Unified Command). This command is the US' "nuclear" command, combining the strategic nuclear capabilities of the Air Force with those of the Navy. And in 1993, US Atlantic Command changed its name from USLANTCOM to USACOM in accordance with its new role as the joint force integrator, responsible for the training of all US forces.

2. CJCS. The Chairman of the JCS has no command authority. He acts, instead, as an executive agent for SECDEF and provides a channel of communication between the NCA and the combatant commands.

3. Military Departments. Note that the military departments (i.e., the Army, Navy, and Air Force) are not in the operational chain of command. These departments are responsible for ensuring that CINCs have the forces and material necessary to fulfill their warfighting missions. The MilDeps may retain forces for their inherent installation functions of recruiting, training, etc.

Brief Description of Combatant Commands

Regional Commands

US Atlantic Command (USACOM, Norfolk, VA). Responsible for planning/conducting US military operations in Atlantic and the training of all forces in the U.S. The CINC, Atlantic is also Supreme Allied CDR, Atlantic, a major NATO CDR. Note that **Forces Command** (FORSCOM, Fort McPherson, Georgia) is now the Army component of USACOM, and no longer a separate specified combatant command. FORSCOM has traditionally been responsible for: 1) the land defense of the Continental United States (CONUS); 2) providing a general reserve of combat-ready Army forces to reinforce other commands, and 3) readiness and related deployment planning for those forces.

US European Command (USEUCOM, Stuttgart, Germany). Primarily responsible for providing combat ready forces to NATO. Area of responsibility includes certain Middle East and most African countries.

US Pacific Command (USPACOM, Camp Smith, Hawaii). Responsible for supporting US and allied national interests in the Pacific and Indian Ocean areas.

US Southern Command (USSOUTHCOM, Panama). Responsible for a wide-range of regional military activities to enhance security in Central and Latin America.

US Central Command (USCENTCOM, MacDill Air Force Base (AFB), FL). Responsible for the planning/execution of military operations in SW Asia, for joint exercises involving US and regional forces, and for security assistance in the area.

Supporting Commands

US Transportation Command (USTRANSCOM, Scott AFB, Illinois). Responsible for providing global air, land, and sea transportation. It includes the Military Airlift Command (MAC), the Military Sealift Command (MSC), and the Military Transportation Management Command (MTMC).

US Special Operations Command (USSOCCOM, MacDill AFB, Florida). Responsible for providing a general reserve of specially trained and equipped special operations forces to reinforce other commands. Additionally, pursuant to a specific tasking by the President and SECDEF, the Commander-in-Chief, USSOCCOM, may command a special operations mission.

US Space Command (USSPACECOM, Peterson AFB, CO.). Responsible for the defense of the Continental US (CONUS) from air, missile, and space attack. Provides warning support to N. American Air Defense Cmd (NORAD), the joint US-Canadian command responsible for air defense of N. America.

US Strategic Command (USSTRATCOM, Offutt AFB, Nebraska). Responsible for deterring major military attack on the US or its allies. Should deterrence fail, it will employ appropriate forces (strategic nuclear forces if needed).

North American Aerospace Defense Command (NORAD). Responsible for: safeguarding the sovereignty of North American air space; deterring attack on North America by aerospace surveillance, warning, and characterization of attack; and should deterrence fail, to defend against air attacks.

III. THE ROLE OF THE JUDGE ADVOCATE.

Judge Advocates have a natural role in this new, more complex, strategy. Whether deployed forward, as a part of the contingency forces that comprise the power projection package, or as a part of the various command and support strata, the Operational Law Judge Advocate fulfills a special role in the peacetime engagement mission, as the staff expert on such issues as use of force, rules of engagement, international agreements, domestic law (e.g., drug interdiction, military support to law enforcement, disaster relief) and so on.

Operational Law specializes in the "military strength" component of the elements of national power, and the OPLAWYER can walk the commander up to the line between peacetime engagement and conflict. In this manner, law becomes an "arrow in the quiver" for commanders, and can be used as a force multiplier.

TAB C
INTERNATIONAL AGREEMENTS

Introduction

This chapter does not attempt to discuss specific international agreements that may affect military operations. They are too numerous, and too many are classified. Instead, this discussion focuses on a basic understanding of what constitutes an international agreement, plus the procedural and substantive authorities for the negotiation and conclusion of international agreements by DOD personnel. Finally, it provides a checklist for drafting or reviewing proposed agreements.

Role of the JA

The Operational Lawyer (OPLAWYER) should have at least a general awareness of the international agreements between the US and the receiving states to which his unit deploys.[1] Agreements that are not available at the unit level most likely may be obtained from the Unified Command whose AOR includes the deployment site. Other possible sources for relevant agreements are the Component Command and the international/operational law divisions of the service TJAGs.

After reviewing applicable agreements, the JA must determine whether issues relevant to the deployment have been adequately addressed in existing agreements or whether new agreements are required. If a new agreement appears appropriate, the JA should raise the matter through command channels to the appropriate authority under AR 550-51.[2] This authority may be OSD, the service secretary/chief, the Chairman of the Joint Chiefs of Staff or the cognizant Unified Commander.

The JA should assist in interpreting and implementing international agreements and be prepared to monitor compliance with their terms,[3] as they typically set out the conditions under which the forces of a sending state are present in the territory of the receiving state. The most common example, and frequently the most important agreement to the JA, is the status of forces agreement (SOFA). As the name suggests, a SOFA sets out the status of the force as an instrumentality of the government of the sending state, providing for various privileges, immunities and responsibilities, as well as the rights and responsibilities of individual members of the force. For example, SOFAs typically provide that, as an extension of the sovereignty of the sending state, visiting forces do not pay import/export taxes in the receiving state.

SOFAs also provide for the status of individual members of the force, including soldiers, civilian employees and the dependents of each. Some SOFAs include contractor personnel as well, but not many. All agreements should be analyzed carefully to determine the classes of persons to whom they apply, usually by studying the definitions of such terms as "the force," "US forces" or "members of the force." For example, retired personnel often complain of being denied the right to shop in commissaries overseas, a right earned by many years of active service. In fact, receiving states are jealous of the revenues they lose when they exempt visiting forces from customs duties and other fees, so the SOFA typically limits the

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[1] International agreements to which the US is party are listed in "Treaties in Force," an official State Department publication. Unclassified texts are published in Treaties and Other International Agreements ("TIAS)," and US Treaties (UST), available through the Government Printing Office, Washington, DC 20402, phone (202) 783-3238. [Beware that publication of an agreement frequently takes 8 to 10 years after signature.] Texts of classified agreements of interest to the OPLAWYER are most readily available from the Unified Commander into whose AOR your unit deploys. The DOD General Counsel is the official repository for most agreements negotiated by DOD personnel [see DOD DIR 5530.3, ¶E2].

[2] See also DOD Directive 5530.3, International Agreements; SECNAVINST 5710.25A, International Agreements; and AFR 11-21, Negotiating, Concluding, Reporting and Maintaining International Agreements.

[3] Be alert to the restrictions contained in ¶K of DOD DIR 5530.3 on raising issues of noncompliance on matters of policy significance.

classes of persons to whom such privileges are extended. Retired personnel do nothing to benefit the receiving state, and, from the US perspective, it is not cost effective to jeopardize negotiation of the agreement to accommodate what is likely to be a very small number of persons anyway. As a result, they are generally excluded from such coverage. The same result is common in the case of contractor personnel, who are usually present in a receiving state to make a profit -- as opposed to soldiers who are present due solely to their military orders.

Perhaps the most important substantive provision of the typical SOFA is criminal jurisdiction, whether exercised by the sending state or the receiving state.[4] Other common provisions include the right to enter the territory of the receiving state on ID cards and orders rather than passports and visas -- which can become expensive and time-consuming if required for entire units. In addition to privileges and immunities, SOFAs may also impose certain obligations on members of the force, such as refraining from any interference in the internal affairs of the receiving state.

The NATO SOFA is the "grand-daddy" of SOFAs, but SOFAs with Korea and Japan are also significant. These agreements address a variety of status issues in great detail, but be alert to the possibility that status provisions may be included in another type of agreement, such as an "access agreement" or "defense cooperation agreement." A lease is usually not regarded as an international agreement, but a lease for facilities overseas that includes status provisions -- and there are precedents -- rises to that level.

Agreements other than SOFAs are also important to the operational lawyer. A mutual defense treaty[5] may obligate the US to come to the aid of another country in case of armed attack. Another agreement may authorize the US to pre-position war material in the territory of a receiving state to avoid lengthy logistics tails in case of a contingency. Others may provide for the US to loan cryptological (communications security, or COMSEC) gear to another country in the interest of interoperability. Other types of agreements may provide for a wide variety of defense activities, such as cooperative research and development, exchange of personnel, mutual logistics support (cross-servicing), fuel storage, combined exercises, training for the armed forces of the receiving state, access, host nation support, exchange of military information, intelligence exchange, etc.

The Nature of International Agreements

International agreements are commonly misperceived as elaborate documents signed at solemn ceremonies by heads of state, with the advice and consent of the Senate and formal ratification by the President. While some agreements certainly are of this type, the majority of agreements with which JAs will be concerned are on a much lower level.

The elements of an international agreement are (1) an agreement (2) between governments (or agencies, instrumentalities or political subdivisions thereof) or international organizations (3) signifying an intent to be bound under international law.[6] In many respects, an international agreement is simply a contract. If a document includes the elements listed above, it is an international agreement, and its title or form is of little consequence. It is also possible that an agreement may be oral. Similarly, the actual status or position of the signer is not as important as the representation that he speaks for his

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[4] For a discussion of DOD policies on foreign criminal jurisdiction, see AR 27-50/SECNAVINST 5820.4G/AFR 110-12].

[5] International law treats all agreements equally. US domestic law, however, regards "treaties" and "other international agreements" as distinct. Under the Constitution, a treaty requires the advice and consent of two-thirds of the Senate, while the President may enter into an executive agreement pursuant to his own constitutional powers to conduct the foreign affairs of the United States, or as Commander in Chief of the armed forces. As a result, security "commitments," which are obligations binding under international law, are embodied in treaties made with the advice and consent of the Senate. By comparison, a security "arrangement," a pledge to take certain action in the event of a threat to another country's security, is frequently made by executive agreement solely on the constitutional authority of the President.

[6] See AR 550-51, found at Appendix A of DA Pam No. 27-24, Selected International Agreements, Vol. II.

government. The OPLAWYER should be suspicious of any document that begins, "The Parties agree . . ." unless appropriate delegation of authority to negotiate and conclude is apparent.

An international agreement may be styled a memorandum of understanding or memorandum of agreement, exchange of letters, exchange of diplomatic notes ("Dip Notes"), technical arrangement, protocol, note verbale or aide memoire. Forms that usually are not regarded as international agreements include contracts made under the FAR, credit arrangements, standardization agreements (STANAGs), leases, procedural arrangements and FMS letters of offer and acceptance. There are exceptions, however. A memorandum that merely sets out standard operating procedures for deconflicting radio frequencies is not an international agreement, while a "lease" that includes status provisions would rise to the level of an international agreement. The point is, form is not as important as substance.

Negotiating and Concluding International Agreements

Historically, foreign relations have been the bailiwick of the President, and the majority of the international agreements to which the US is party are "executive agreements" made pursuant to powers vested in the President by the Constitution. The power to enter into status of forces agreements, for example, is derived at least in part from the President's authority as Commander-in-Chief of the Armed Forces.

The President's authority over foreign relations is not absolute, however. His power to make treaties is tempered "by and with the advice and consent of [two-thirds of] the Senate." In addition, it is Congress which is specifically empowered by Article II, section 8, of the Constitution to regulate commerce with foreign nations. Agreements frequently require the expenditure of public funds; no money may be drawn from the treasury but in consequence of appropriations made by law; and Congress enacts appropriations bills. As a result, the Congress sees itself as an equal partner with the President in the international agreements arena.[7]

Perceptions of presidential excesses have sometimes caused concern in Congress, resulting in assertions of congressional authority. The Case-Zablocki Act[8] demonstrates congressional interest in agreements concluded by the executive branch. It requires transmission of the text of any executive agreement to Congress within 60 days of signature. SECSTATE determines if a proposed draft is an "international agreement" and, if so, must approve it before any agreement is concluded on behalf of the US. Case-Zablocki also specifically prohibits the expenditure of funds on any unreported agreement. Regulatory guidance is found in State Department Circular No. 175 of 13 DEC 55, as amended, codified in Chapter 700 of the Foreign Affairs Manual. (See also DA Pam 27-161-1 at 8-12.)

For DOD personnel involved in international agreements, DOD Directive 5530.3 is the "bible."[9] It discusses international agreements in detail and assigns responsibilities for their negotiation and conclusion. It designates approval authorities for various types of agreements and sets out procedural requirements for obtaining approval to negotiate and conclude an agreement. No DOD personnel are authorized to negotiate or conclude an international agreement without the prior written approval of the cognizant approval authority. Any agreement having "policy significance," requiring new legislation or involving a major unprogrammed fiscal obligation must be approved by the Undersecretary of Defense

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[7] See Missouri v. Holland, 252 U.S. 416 (1920), for a discussion of the treaty power and the relative authorities of the President and the Congress in this arena. Note also that there are differences between executive agreements made solely under presidential authority and agreements based on combinations of presidential and congressional authority. For example, cross-servicing agreements could probably be supported solely on the President's authority as Commander-in-Chief, but they are also specifically authorized by 10 U.S.C. § 2342.

[8] PL 92-403, codified at 1 U.S.C. § 112b.

[9] The importance of compliance with DOD DIR 5530.3 cannot overemphasized. Chairman, Joint Chiefs of Staff, Memoranda of Policy ("MOP") 21, International Agreements, and 43, Military Communications Agreements, should also be consulted. See also service implementers, n. 2, supra.

(Policy). "Policy significance" generally means that by its nature the agreement requires approval, negotiation or signature at the OSD or diplomatic level, creates a new security commitment or involves significant technology transfer. During DESERT SHIELD and DESERT STORM, all agreements in the theater of operations were construed as having policy significance, even one as simple as providing solely for the mutual waiver of claims between US and British forces. The Undersecretary of Defense (Acquisitions) must approve any agreement providing for use of other-than-competitive contracting procedures. Virtually all agreements must have the concurrence of the DOD General Counsel.

Authority to negotiate an agreement is an extraordinarily important matter. There are precedents for the Chairman of the Joint Chiefs of Staff to order DOD personnel who have negotiated an agreement without proper authorization to repudiate the agreement, and for SECSTATE to order the ambassador to do likewise. DOD personnel approached by foreign representatives seeking to initiate negotiation of an agreement for which authority to negotiate has not been obtained are required to report the encounter to appropriate authority and await authorization before participating in negotiations. The rule of thumb is that if you have to ask if you are authorized to negotiate an agreement, you probably are not. During negotiations, DOD personnel should ensure that no position deviating from existing instructions is communicated to the other party and that no proposal beyond existing authorization made by the other side is agreed to without clearance from the original approval authority. In this regard, remember that agreeing to a proposal "subject to approval by higher authority" is prohibited. DOD Directive 5530.3 regards such action as conveying to another party the substantive position of the United States without authority.

Note that DOD Directive 5530.3 addresses only the procedural aspects of negotiating and concluding an agreement. Substantive authority for an agreement is a discrete, entirely separate issue and derives from the law applicable to the functional matter that is the subject of the agreement. Substantive legal authority for cross-servicing agreements, for example, is found at 10 U.S.C. § 2342, while 10 U.S.C. § 421 provides a basis for loaning cryptological equipment to a foreign force in the interests of interoperability with US forces.

The procedures prescribed by 5530.3 provide for the DOD component having the primary interest in the agreement to request authority to negotiate/conclude by forwarding a draft text or outline of the proposed agreement to the cognizant approval authority. A Memorandum of Law citing specific authority for each obligation the USG will assume under the agreement must be included, as well as a fiscal memo specifying the estimated costs of obligations to be assumed by the USG under the agreement and the source of funds to be obligated. A statement that additional funds for the purpose of the agreement will be requested for a specific fiscal year may be used in lieu of citing specific funding sources. A technology assessment/control plan prepared in accordance with DOD Directive 2040.2 is also required.[10]

One particularly important feature of DOD Directive 5530.3 is its delegation of approval authority over certain classes of agreements to the Chairman, Joint Chiefs of Staff (CJCS), and the Service Secretaries. CJCS has further delegated much of his authority to the Unified Commanders (CINCs) in CJCS Memoranda of Policy (MOP) 21 and 43. The CINC's SJA is a prime source of assistance to the deploying JA in locating pertinent international agreements, as well as for assistance in negotiating and concluding any necessary additional agreements.

AR 550-51 further delegates to Heads of Army Staff agencies and MACOMs much of the authority of the Secretary of the Army to negotiate and conclude international agreements. It permits further delegation of this authority, but not the responsibility for ensuring compliance with regulatory requirements. Given their role in the agreement process, MACOMs may also be possible sources of assistance in locating or concluding international agreements. In general terms, AR 550-51 establishes procedures for negotiating and concluding international agreements to be followed in the Department of

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[10] OPLAWYER's should not overlook the technology transfer implications of international programs. When in doubt, consult the National Disclosure Policy expert, often found in the S-G-J 2 community.

the Army (DA). Other important aspects of AR 550-51 include its definitions of the terms "negotiation" (¶ 3c) and "conclusion" (¶ 3d) and a list of documents considered not to constitute international agreements (¶ 3b).

Subjects of International Agreements

Common subjects of international agreements include status of forces, logistics support, pre-positioning, cryptological support, personnel exchange programs and defense assistance, including security assistance programs. For the deploying JA, status of forces agreements are probably the most important, followed by logistics support agreements.[11]

Pre-positioning of Material. If US equipment or material is to be pre-positioned in a foreign country, an international agreement should be concluded which contains meets the following minimum requirements:

- Host nation permission for the US to store stocks there.
- Unimpeded US access to those stocks.
- Right of removal, without restriction on subsequent use.
- Adequate security for the stocks.
- Host nation must promise not to convert the stocks to its own use, nor to allow any third party to do so. (Legal title remains vested in the US.)
- Appropriate privileges and immunities (status) for US personnel associated with storage, maintenance or removal of the stocks.

In some cases, the DOD General Counsel has allowed some lee-way in negotiating prepo agreements, provided host government permission for US storage in its territory and unequivocal acknowledgment of US right of removal are explicit. "Legal title" need not be addressed per se, if it is clear the host government has no ownership rights in the stocks -- only custodial interests -- and that prepo is solely for US use. "Access" to the pre-positioned stocks need not be addressed explicitly, unless US access is necessary to safeguard them. There can be no express restrictions on US use. Prior "consultation" for US removal of pre-positioned stocks is not favored, and prior "approval" is not acceptable. "Conversion" need not be specifically addressed, if it is clear that prepo's sole purpose is to meet US requirements. "Security" must be specifically addressed only when stores are at risk, due to their value. "Privileges and immunities" are required only when it is necessary for US personnel to spend significant amounts of time in the host country to administer, maintain, guard or remove the stocks.[12]

Host Nation Support. When a unit deploys overseas, some of its logistical requirements may be provided by the host nation. If so, it is desirable to have an international agreement specifying the material the host nation will provide and on what conditions, such as whether it is provided on a reimbursable basis.

Acquisitions and Cross-Servicing Agreements (ACSA). Subchapter 138 of Title 10, U.S.C., also provides authority for government-to-government acquisitions and for cross-servicing agreements for mutual logistics

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[11] As mentioned above, substantive authority for international agreements is derived from the law applicable to the subject matter. For example, mutual support agreements are authorized by 10 U.S.C. § 2342; defense assistance programs are authorized by the Foreign Assistance Act and the Arms Export Control Act, 22 U.S.C. §§ 2151 et seq and 22 U.S.C. §§ 2751 et seq, respectively; and cryptological support by 10 U.S.C. § 421.

[12] Cite the DOD OGC memo from which this comes.

support. Under 10 U.S.C. 2342, US Forces and those of an eligible country[13] may provide logistics support, supplies and services on a reciprocal basis. The primary benefit of cross-servicing is that such support, supplies and services may be reimbursed through replacement in kind; trade of support, supplies or services of equal value; or cash. In addition, ACSA allows the deletion of several common contractual paragraphs required by the FAR but frequently objectionable to other sovereigns.[14]

For NATO, there is an aggregate ceiling of $100 million per year on the total amount of liabilities the US may accrue under this subchapter, except during a period of active hostilities. The limit is $10 million per year for non-NATO countries. The amount of acquisitions and cross-servicing a component may conduct each year is allocated by the cognizant Combatant Commander.

There are some restrictions on ACSA. For example. it cannot be used as a substitute for normal sources of supply, nor as a substitute for foreign military sales procedures. "Major end items," may not be transferred under a cross-servicing agreement. For general guidance, see DOD Directive 2010.9, Mutual Logistic Support between the United States and Governments of Eligible Countries and NATO Subsidiary Bodies.

Cryptologic Support. 10 U.S.C. § 421 authorizes SECDEF to use funds appropriated for intelligence and communications purposes to pay the expenses of arrangements with foreign countries for cryptologic support. This authority has been frequently used as the basis for agreements to loan communications security (COMSEC) equipment, such as message processors or secure telephones, to allied forces. Equipment of this raises obvious technology transfer issues, and among the key provisions of any COMSEC agreement is the assurance that the receiving state's forces will not tamper with the equipment in an effort to retro-engineer its technology. See CJCSI 6510.01, Joint and Combined Communications Security, for guidance.

Typical Status Provisions

As mentioned earlier, status of forces is probably the area of most concern to the JA. The following discussion is designed to serve as a partial checklist of some of the more important issues that should be addressed in an international agreement pertaining to an overseas deployment. It is not all-inclusive. Many of these issues will pertain to both combat deployments and overseas deployment for training.

1. Status/Foreign Criminal Jurisdiction (FCJ). One of the most important deployment issues is criminal jurisdiction. The general rule of international law is that a sovereign nation has jurisdiction over all persons found within its borders. There can be no derogation of that sovereign right without the consent of the receiving state, and, in the absence of agreement, US personnel are subject to the criminal jurisdiction of the receiving state. On the other hand, the idea of subjecting US personnel to the jurisdiction of a country in whose territory they are present due solely to orders to help defend that country raises political concerns within the US. As a result of the Senate's advice and consent to ratification of the NATO SOFA,[15] DOD policy is to maximize the exercise of jurisdiction over US personnel by US authorities.

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[13] Eligible countries include all NATO countries, plus non-NATO countries designated by SECDEF. Criteria for eligibility include: defense alliance with the US; stationing or homeporting of US Forces; pre-positioning of US stocks; or hosting exercises or staging US military operations.

[14] See 10 U.S.C. 2343.

[15] See Appendix B to AR 27-50/SECNAVINST 5820.4G/AFR 110-12.

An exception to the general rule of receiving state jurisdiction is deployment for combat, wherein US forces are generally subject to exclusive US jurisdiction.[16] As the exigencies of combat subside, however, the primary right to exercise criminal jurisdiction may revert to the receiving state.[17]

Consistent with the policy of maximizing US jurisdiction over its own personnel, the approach most desirable from the US perspective is some form of diplomatic immunity for deployed soldiers. While some nations may balk at extending the complete civil and criminal immunity of diplomatic agents to large number of military personnel, others may consent to granting US personnel the privileges and immunities accorded the administrative and technical staff of the US embassy.[18] In many cases, this may be accomplished by simply by incorporating by reference the privileges and immunities already granted to US military personnel under another agreement, such as a defense assistance agreement that included personnel assigned to the US embassy or to a Military Assistance Advisory Group (MAAG).[19]

While there are some offenses as to which jurisdiction may be exclusive, the NATO SOFA sets up a regime of mostly concurrent jurisdiction, with specific rules for determining which state has the primary right to exercise its jurisdiction in a given case. SOFA's with Japan and Korea follow this model. In addition, they provide specific rights for an accused comparable with traditional US notions of due process of law. In countries in which the legal system and its procedural protections are significantly different from those of the US, it may be desirable to obtain an agreement for the US to exercise its jurisdiction in all cases.

If the receiving state will not agree to allowing the US to exercise its jurisdiction exclusively, an FCJ arrangement similar to that in the NATO SOFA may be negotiated. The host nation may retain the right to prosecute US personnel for offenses that are either exclusive violations of its law or those over which it has the primary right to exercise concurrent jurisdiction.[20] In this case, the agreement should specify the procedural protections to be accorded US personnel in cases tried by the host nation. It will be difficult, if not impossible, to obtain OSD approval for agreements whose procedural protections do not approximate US concepts of due process of law.

2. Claims. Claims for damages almost always follow deployments of US forces. Absent agreement to the contrary, the US is normally obligated to pay for damages caused by its forces. As a general rule, the desirable arrangement is for state parties to waive claims against each other. Since the receiving state benefits from hosting a combined exercise with US forces or from some other form of US presence, it is

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16 See Schooner Exchange v. McFaddon, 7 Cranch 116 (U.S. 1812). "Generally" is used because US forces could conceivably be tried for war crimes in a forum other than US or military courts.

17 After Operation URGENT FURY, exclusive criminal jurisdiction over US soldiers reverted to Grenada. A JA on-scene drafted an Exchange of Notes by which Grenada waived all criminal jurisdiction over US forces. Because it took 5 months to be finalized, an "informal understanding" to the same effect was reached between the JA and the Attorney General of Grenada. During DESERT STORM, the US retained exclusive jurisdiction over it personnel in Saudi Arabia under an agreement with an indefinite term for the duration of the hostilities. Since there was no formal ending to the hostilities, identifying a date certain on which the agreement – and its jurisdictional provisions – no longer apply is difficult. As units deployed to Saudi Arabia in August 1992 for Operation SOUTHERN WATCH, the question – tacit and unanswered – was whether the DESERT STORM agreement remained in effect. Due to the calibre of the personnel involved, or perhaps just fortuitously, as of late October 1993 no incident has occurred requiring an answer to that question.

18 See Vienna Convention on Diplomatic Relations, TIAS 7502, Articles 22-34, discussed also in ¶'s 5-7 et seq., DA Pam 27-161-1. Members of the A&T staff are immune to the criminal jurisdiction of the receiving state and from its civil jurisdiction for official acts.

19 This was done in 1982 for Ahuras Tara in Honduras. The only previous agreement concerning status of US personnel in Honduras was the 1954 Mutual Military Assistance Agreement that stated US personnel would operate as part of the embassy and would be "accorded all privileges and immunities conferred by international custom to Embassy personnel...."

20 This is the current situation in Honduras. See Protocol 1 to the 1954 Agreement, signed 20 May 85, entered into force 8 Apr 87).

not uncommon for a receiving state to agree to pay third party claims caused by US forces in the performance of official duty. As a result, the US is liable only for third party claims caused other than in the performance of official duties. In such a case, the desirable language is that the United States may, at its discretion, handle and pay such claims in accordance with US laws and regulations, i.e., the Foreign Claims Act.[21]

3. Force Security/Use of Deadly Force. The general rule of international law is that a sovereign is responsible for the security of persons within its territory. This does not, however, relieve the US commander of his responsibility for the safety (i.e., self-defense) of his unit. As part of the predeployment preparation, the JA should determine whether the applicable agreement includes provisions regarding force security. While the host nation is generally responsible for the security of persons in its territory, it is common for the US to be responsible for security internal to the areas and facilities it uses. It may also be desirable to provide for the US to have the right to take measures to protect its own personnel under certain circumstances. For example, Article III of the Korean SOFA provides that "in the event of an emergency, the United States armed forces shall be authorized to take such measures in the vicinity of the facilities and areas as may be necessary to provide for their ... feguarding and control." [Emphasis added.] This may include a provision allowing military police the authority to apprehend US personnel off the installation. The relative responsibilities of host nation and US commanders is a sort of "sliding scale;" forces deployed for combat operations should expect little security from the receiving state.

4. Entry/Exit Requirements. Passports and visas are the normal procedures for identifying nationality and verifying that presence in the receiving state is authorized. But the issuance of passports to large numbers of military personnel is expensive and impractical, and -- in an emergency -- the issuance of visas unacceptably slow. Even in peacetime, the time it takes to process visa requests impacts significantly on operational flexibility. As a result, it is desirable to provide that US personnel may enter and exit the territory of the receiving state on their military identification cards and orders.

5. Customs and Taxes. While US Forces clearly should pay for goods and services requested and received, sovereigns do not generally tax other sovereigns. As a result, US forces should be exempted from the payment of host nation customs and taxes on goods and services imported into or acquired in the territory of the receiving state for official use.

6. Contracting. Specific authority for US forces to contract on the local economy for procurement of supplies and services not available from the host nation should be included.[22] As noted above, provision should always be made to exempt goods and services brought into or acquired in the host country from import duties, taxes and other fees.

7. Vehicle Registration/Insurance/Drivers' Licenses. The receiving state may attempt to require that US vehicles be covered by third party liability insurance and that US drivers be licensed under local law. These efforts should be resisted, and provisions specifically exempting US forces from these requirements should be included in the exercise agreement.

The US Government is "self-insured." That is, the USG bears the financial burden of risks of claims for damages, and the Foreign Claims Act[23] provides specific authority for the payment of claims. As a result, negotiation of any agreement should emphasize that official vehicles need not be insured.

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[21] 10 U.S.C. § 2734. Keep in mind that the payment of claims under the Foreign Claims Act is based not on legal liability, but on the maintenance of good foreign relations.

[22] An example is an MOU concluded by the USAREUR Exercise Division (in conjunction with the Moroccan-US Liaison Office) with the Moroccan Force Armees Royal for AFERDOU Exercise 87.

[23] 10 U.S.C. § 2734.

Official vehicles may be marked for identification purposes, if necessary, but local registration should not be required by the receiving state. In many countries, vehicle registration is expensive. SOFAs frequently provide for POVs to be registered with receiving state authorities upon payment of only nominal fees to cover the actual costs of administration.

A provision for US personnel to drive official vehicles with official drivers' licenses expedites the conduct of official business. It is also helpful if the receiving state will honor the US drivers' licenses of US personnel or, in the alternative, issue licenses on the basis of possession of a valid stateside license without requiring additional examination.

CCJA DATE

INTERNATIONAL AGREEMENTS REVIEW CHECKLIST

1. **Agreement being reviewed:**

   a. Title: _____

   _____
   (Is this title accurately descriptive of the substance of the agreement?)

   b. Parties: _____

   _____

   c. Type of Agreement : _____

   d. Purpose: _____

   _____

   _____

   e. Is there already another agreement covering this subject? Check TIAS and other indices for redundancy.

2. **Procedural authority for negotiation.**

   a. Approval authority (Does the agreement have "policy significance?"):
   _____

   b. Is there written documentation of authority to negotiate?

   c. How designated: _____

   d. Negotiator: _____

   e. Should there be terms of reference or other written guidance for the negotiator?

   f. Is there a need to limit the negotiator's authority, e.g., should agreements reached at the table be *ad referendum* only?

   g. Does the person representing the other party appear to have proper authority?

3. **Substantive authority.**

   a. Enumerate each commitment or responsibility the US will assume under the agreement. Look especially for:
      (1) Security commitments.
      (2) Things that cost money.
      (3) Things that impact on operational flexibility.
      (4) Provisions affecting the privileges, immunities, responsibilities and quality of life of US personnel.

   b. For each commitment or obligation, articulate a corresponding legal authority, *e.g.* :
      (1) US Constitution.
      (2) Statute.

(3) Regulation.
(4) Existing treaty or other international agreement.

4. **Substance of the agreement.**

a. Is there language signifying the intent of the parties to be bound under international law?

b. Does the agreement purport to subject the force, as an instrumentality of the US Government, to the jurisdiction of the receiving state?

c. If under the agreement US personnel will be present in foreign territory, is there adequate provision for their status?

d. Does the agreement provide for immunity from taxation by the receiving state for US activities, including contracting and acquisition of goods and services, and import/export of materials?

e. If facilities will be built under the agreement, is there provision for meeting US standards/specifications?

f. If construction or improvement of facilities is funded by the US, is there provision for recouping their residual value upon turnover to the host nation?

5. **Fiscal matters.**

a. Has a funding source been identified?

b. Have funds been budgeted (check out-years) to support all commitments or obligations under the agreement? In the alternative, is there an indication that the budgeting of funds will be requested?

c. Specify budget category data and estimated cost of performance in current/out years.

d. Are planned expenditures consistent with the purpose for which the funds were appropriated?

e. Are any planned expenditures inconsistent with fiscal policies established by the Comptroller General or subordinate comptroller officials?

f. Does the agreement have a fund availability qualification? If not, has an Obligation been created improperly?

g. Have pertinent agreements concerning claims, security, reciprocal medical cars, or reciprocal procurement/ logistics been factored into the agreement and, if necessary, incorporated by reference? If yes, list related supporting agreements.

h. If the agreement provides for reimbursement to the US, is there authorization for deposit in a specific account, or does it go into miscellaneous receipts?

6. **Security review.**

a. Is the agreement properly classified for its substantive content?

b. Has the J2 chopped on the draft agreement?

c. Will classified military information pass from the US to the other party to the agreement?

d. Is there a General Security of Information Agreement with the other prospective party?

e. Even if unclassified, is information susceptible to transfer such that a Technology Assessment/Control Plan is required?

f. Are there provisions in the agreement to safeguard against the unauthorized dissemination of classified information?

g. Does the agreement or any of the information it covers implicate National Disclosure Policy?

h. Does any classified information concern special category information, *e.g.* , "sensitive" technology?

i. Will the agreement result in foreign visitors or liaison officers?

7. **Signature page.**

a. Are the signers properly identified:
(1) by name: _____
(2) by title: _____
(3) by position: _____

(**NOTE:** This information is frequently left blank until the day of actual signing, then all that is written in are the signatures. Names should be typed to ensure legibility, and the signers should be properly identified. "For the United States of America" is not descriptive of the position of the person signing the agreement and does little to suggest his authority.)

b. Is there a place for dating the agreement?

c. Is the date of entry into force (effective date) indicated?

_____

d. Is there a statement regarding the language of the agreement?

e. If there is a version in any language other than English, is there a certificate that they are substantially the same by a qualified US linguist?

8. **Miscellaneous.**

Is there an indication that the office or command responsible for concluding the agreement is aware of the reporting requirements of the Case Act (1 USC § 112) and enclosure (6) to DOD Directive 5530.3?

JA DATE

MEMORANDUM OF LAW IN SUPPORT OF AN INTERNATIONAL AGREEMENT

SUBJECT: Proposed Acquisition and Cross-Servicing Agreement between the United States and Orange

1. PURPOSE: The purpose of this agreement is to permit the acquisition and mutual provision of logistic support, supplies and services, on the basis of cash reimbursement, replacement-in-kind or exchange of supplies and services of equal value, between the armed forces of the United States of America and of the State of Orange. It authorizes, but does not require, mutual logistic support under certain circumstances and establishes terms, conditions and procedures for acquisitions and cross-servicing. It is intended to be used primarily during combined exercises, training, deployments, operations or other cooperative efforts, and for unforeseen circumstance and exigencies when the need arises for temporary logistic support. It is not intended to be used to satisfy the routine supply requirements of the armed forces of designated countries or of the United States.

2. EXECUTIVE AGREEMENT: As discussed in paragraph 3, infra, this agreement could be made solely under and in accordance with the powers of the President of the United States under Article II of the United States Constitution. In addition, it is supportable by existing legislation. Accordingly, and in the absence of a security commitment that would require the advice and consent of the Senate to a treaty under Article I, section 2, of the Constitution, its purposes are properly the subject of an executive agreement.

3. LEGAL AUTHORITY:

a. International authority for this agreement is found in the recognized principle of customary international law that sovereign states have the capacity to and are entitled to enter into agreements with each other.

b. Constitutional authority for this agreement is found in the President's executive powers under Article II, section 1; his foreign relations powers under Article II, sections 1 and 2 combined; his authority as Commander-in-Chief of the Armed Forces of the United States under Article II, section 2; and his responsibility under Article II, section 3, to take care that the laws be faithfully executed.

c. The Congress of the United States has enacted specific statutory authorization for acquisition and cross-servicing agreements in Subchapter I of Chapter 138 of Title 10, United States Code (10 U.S.C. secs. 2341 et seq), popularly known as the North Atlantic Treaty Organization (NATO) Mutual Support Act, as amended. In addition, this cross-servicing agreement would implement and advance the goals and objectives of the Agreement on Defense Cooperation between the Government of the United States of America and the Government of the State of Orange concluded on October 27, 1991.

d. Section 2342 of Title 10, United States Code, authorizes cross-servicing agreements with the governments of designated countries that are not members of the North Atlantic Treaty Organization. The Secretary of Defense is authorized, after consultation with the Secretary of State and determining that it is in the best interests of the national security of the United States, to designate countries with which the United States may enter into cross-servicing agreements. He is then required to provide notification of that designation to the Committees on Armed Services and Foreign Relations of the Senate and Armed Services and Foreign Affairs of the House of Representatives. By memorandum of 26 March 1987, the authority of the Secretary of Defense was delegated to the Chairman of the Joint Chiefs of Staff, who by memorandum CM-789-87 of 22 June 1987, redelegated it to the Commander-in-Chief, United States XXX Command (USCINCXXX). By memorandum of 14 December 1987 USCINCXXX designated Orange as country with which the United States may enter into a cross-servicing agreement.

4. AUTHORITY TO NEGOTIATE AND CONCLUDE: Paragraph 6.a of Department of Defense Directive 2010.9 of 30 September 1988 provides that the Unified Combatant Commands shall "[n]egotiate cross-servicing agreements as an Executive Agent when authorized by CJCS." In his memorandum CM-789-87 of 22 June 1987 the Chairman of the Joint Chiefs of Staff delegated to USCINCXXX authority to negotiate (but not conclude) cross-servicing agreements. After negotiation but prior to signing , the agreed-upon text should be submitted to the Joint Staff with a request for authority to conclude the negotiated agreement. In the alternative, the draft agreement may be submitted to the Joint Staff for coordination with a concurrent request for authority to negotiate and conclude, provided negotiations does not result in any deviation from the approved text. After conclusion, it should be reported to the Congress, through the Secretaries of Defense and State, in accordance with the Case Act, 1 U.S.C. § 112b.

5. CONCLUSION: For the foregoing reasons, the proposed acquisition and cross-servicing agreement between the United States and Orange is legally unobjectionable.

XXXXXXX
Colonel, USA
Staff Judge Advocate

TAB D
LEGAL BASES FOR MILITARY OPERATIONS

There are a variety of internationally recognized legal bases for use of force abroad. These bases lie in both customary and codified international law. Generally speaking, there are two categories into which use of force actions may be placed: 1) UN sanctioned enforcement actions under Chapter VII of the UN Charter, and 2) actions taken by one or more nations in self-defense pursuant to Art. 51 of the UN Charter (which sanctions both individual and collective self-defense).[1]

Policy and Legal Considerations

Upon receipt of a CINC's recommendation for the use of US military force abroad, US decision makers must make a number of fundamental policy determinations. In considering whether to pursue force options, the National Command Authority (NCA) must be sensitive to the legal, political, diplomatic, and economic factors inherent in a decision to satisfy national objectives through the use of force. Thus, any decision to turn to force options must focus on two principal legal issues: (1) the existence of a viable legal basis in international law for the intervention of US combat forces, and (2) our own domestic legal basis for the use of force, including the applicability of the 1973 War Powers Resolution (WPR).

Though these issues will normally be resolved at the NCA level, it is nevertheless essential that JAs understand the basic concepts involved in the decision-making process resulting from a CINC's recommendation to use US military force.[2] As a result of this process, the combat Commander will very likely be given a broad mission statement identifying the purpose of an operation. Using this mission statement, and in coordination with higher headquarters, the JA must become familiar with the legal justification for the mission, and brief all local Commanders as to the rationale. This will enable the Commanders to better plan their missions, structure public statements, and conform their conduct to the national policy. It will also assist Commanders in drafting and understanding the ROE for the mission, as one of the primary purposes of ROE is to ensure that any use of force is consistent with US national security and policy objectives.

The JA must also be mindful of the fact that, in this age of limited conventional conflicts, the success achieved in the use of US force abroad will very likely depend upon the degree of domestic support (particularly Congressional support) demonstrated for the initial deployment and sustained use of such force, as well as the reaction of the international community to such an event. Clear well-conceived, effective and timely articulated legal basis for a particular use of US force will be essential to sustain support at home and acceptance abroad.

The General Prohibition Against the Use of Force

The UN Charter mandates that all member nations resolve their international disputes peacefully and requires that they refrain in their international relations from the threat or use of force. An integral aspect of this prohibition against the use of force in the international community is the principle of nonintervention. It is an established principle of international law that one State must refrain from interference in the internal affairs of another. The rule is inherent in the proposition that States must respect one another's sovereignty. American foreign policy statements have frequently affirmed this principle. Furthermore, the concept has been made an integral part of US law through the signing and ratification of the Charters of the UN and the Organization of American States (OAS), as well as other multilateral international agreements incorporating this principle.[3]

Aggressive Force Outlawed. While the UN Charter outlawed the use of aggressive force, it failed to define it. The

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[1]Other bases have been cited, and one, humanitarian intervention, will probably grow in stature in any "new world order." The US assistance to the Kurds in northern Iraq after the Gulf War was based on humanitarian concerns. Similarly, the use of military forces in disaster relief situations (e.g., Bangladesh) is humanitarian intervention. Ironically, this basis has been scorned by some Third World countries (at least by their leaders) as being a subterfuge for imperialist expansionism.

[2]In 1989, the 7th Infantry Division (Light) Division Readiness Force brigade commander deployed for operation "Nimrod Dancer" in Panama and was engulfed by the international press as soon as he landed. One of their questions was under what authority was he acting. Though he had not previously sought specific JAG guidance, he strongly recommended that all subsequent deploying commanders receive legal briefings prior to deployment.

[3] Article 2(3) of the U.N. Charter provides: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered." Having made this positive pronouncement, Article 2(4) then states: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state . . . ."

Similarly, Article 18 of the O.A.S. Charter provides: "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements."

Article I of the Rio Treaty states that ". . . Parties formally condemn war and undertake in their international relations not to resort to threat or the use of force in any manner inconsistent with the provisions of the Charter of the United Nations or this Treaty."

General Assembly finally adopted a Resolution in 1974 (G.A. Res. 3314) which gave the term "aggression" some specific parameters. Aggression was defined as ". . . [T]he use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any manner inconsistent with the [UN] Charter . . . ." The first use of armed force by a State in contravention of the UN Charter constitutes prima facie evidence of an act of aggression.

The Lawful Use of Force

Despite the broad legal prohibitions against the use of force and other forms of intervention, certain legal justifications have been developed for a State's recourse to the use of force and, in certain instances, armed intervention in another State. While States have made numerous claims for the legitimacy of such actions, utilizing a variety of justifications, it is generally agreed that only three circumstances exist in which a State or group of States may justify the use of force, including armed intervention, in accordance with international law: (1) as part of a properly authorized enforcement action under Chapter VII of the UN Charter; (2) As part of a properly authorized regional organization's enforcement action conducted pursuant to Chapter VIII of the U.N. Charter; or (3) as a legitimate act of individual or collective self-defense pursuant to Art. 51 of the UN Charter and or customary international law.

UN ENFORCEMENT ACTIONS

Chapter VII of the UN Charter, entitled "Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression" gives the Security Council authority to determine what measures should be employed to address acts of aggression. Art. 41 of the Charter contemplates the use of measures short of force to compel compliance with its decisions, which include a wide variety of sanctions (air, economic, postal, severance of diplomatic relations, etc.). Art. 42 states that once the Security Council has determined that measures taken under Art. 41 have proven inadequate to address the situation, it may resort to forceful measures to be carried out collectively by the armed forces of the member nations.

-- Security Council Resolution 678 authorizing member states cooperating with the Government of Kuwait to use "all necessary means to uphold" prior Security Council resolutions was passed pursuant to the Security Council's authority under Chapter VII.

REGIONAL ORGANIZATION ENFORCEMENT ACTIONS

Chapter VIII of the UN Charter allows for the creation of "regional organizations" or agencies to deal with such matters relating to the maintenance of international peace and security as are appropriate for regional actions (see Article 52). Regional organizations are required to encourage peaceful settlement of international disputes, and must prohibit the aggressive use or threat of force in international relations. Additionally, Article 53 of the UN Charter requires that enforcement action may be carried out by a regional organization only if sanctioned by the UN Security Council and that such enforcement actions must always be consistent with the principles of the Charter. Finally, the Security Council may use regional organizations for enforcement actions under its own authority.

SELF-DEFENSE

The inherent right of all nations to defend themselves is established in customary international law, and was specifically codified in Art. 51 of the UN Charter. This second exception allowing a State to use force to defend itself arises when there is a necessity to resort to force, and it requires that any force used be proportionate to the threat.

This notion that every nation has an inherent right of self-defense has found expression in three recurring areas: 1) protection of nationals and their property located abroad, 2) protection of a nation's political independence and 3) protection of a nation's territorial integrity.

Protection of Nationals

A State has the right to afford protection to its citizens abroad if their lives are placed in jeopardy and a host State is either unable or unwilling to protect them. The 1965 US intervention in the Dominican Republic illustrates this concept of intervention. During the course of an insurgency, Dominican authorities stated that they could no longer control the situation, that American and foreign lives were in danger, and that assistance was required. In response to an urgent appeal from the US ambassador, 400 US Marines were put ashore, in the words of President Johnson, ". . . to give protection to hundreds of Americans who are still in the Dominican Republic and to escort them safely back to this country."

Although the initial actions of the US were generally considered justified as a matter of urgent necessity to protect the lives of US citizens, the US was later severely criticized for leaving its troops in the Dominican Republic long after any necessity existed for the protection of its nationals.

The protection of US nationals was cited also as one of the legal bases justifying initial US military intervention in both Grenada and Panama. In doing so, however, the US emphasized that this basis for intervention, standing alone, did not necessarily provide the legal basis for the full range of US activities undertaken in those countries. Thus, while intervention for the purpose of protecting nationals is both valid and obviously vital in certain situations, this form of intervention cannot serve as an independent basis for continued US military presence in another country after the mission of safeguarding US nationals has been accomplished.

The right to use force to protect citizens abroad also extends to those situations in which a host State is an active participant in the activities posing a threat to anotner State's citizens (e.g., the government of Iran's participation in the hostage taking of US embassy personnel in that country - 1979-80; and Ugandan president Idi Amin's support of terrorists who kidnapped Israeli nationals and held them at the airport in Entebbe).

Protection of Political Independence

A nation's political independence is a direct attribute of sovereignty. It includes the right to select a particular form of government and governmental leaders, to enter into treaties, and to maintain diplomatic relations with the world community. This concept also includes the right to engage in trade and other economic activity. Each State has the duty to respect the political independence of every other State. Force may be used to protect a State's political independence when it is threatened and all other avenues of peaceful redress have been exhausted.

Protection of Territorial Integrity

Nations possess an inherent right to protect their national borders, airspace, and territorial seas against. No nation has the right to violate another nation's territorial integrity, and force may be used to preserve that integrity where all lesser means have failed.

Collective Self-Defense

There is no right of a State to intervene in purely internal conflicts where the issue at hand is one of a group's right to self-determination. When a threat to the recognized government of a State evolves from an external source and that State requests, or consents to, the assistance of a third State or States, it is generally agreed that the latter may legitimately intervene on behalf of the former. It is the question of whether the threat to a government is, in fact, external in nature that most often proves to be controversial. Thus, much of the criticism of US intervention in Vietnam resulted from the view that the conflict in that country was a popular internal uprising (an insurgency), rather than one of external aggression or an externally directed and/or supported insurgency.

Additionally, it is essential that the lawful authority of a host State either requests or consents to the intervention of a third State or group of States if the avowed purpose of such intervention is to provide assistance to the legitimate government of the host State. US intervention in Grenada, undertaken in conjunction with members of a regional organization, the Organization of Eastern Caribbean States (OECS), was conducted on this basis, i.e., a request by the Governor General of Grenada that the OECS intervene for the purpose of restoring internal order.

Thus, if a State is, in fact, the victim of external aggression, or internal violence externally directed and/or supported, and the duly constituted government of that State has requested US assistance, there is a valid legal basis for US intervention. This legal position, acknowledged in Art. 51 of the UN Charter, will be discussed further below.

Misperceptions

Defense treaties and bilateral military assistance agreements are sometimes cited as bases for intervention. From an international law standpoint, such agreements, in and of themselves, do not provide such bases. There must be an underlying factual situation that gives rise to one of the bases named above.

Collective Defense Treaties

Collective defense treaties, such as the North Atlantic Treaty (NATO); the Inter-American Treaty of Reciprocal Assistance (the Rio Treaty); the Security Treaty Between Australia, New Zealand, and the US (ANZUS); and other similar agreements between the US and Korea, Japan, the Philippines, and Panama do not provide an international legal basis for the use of US force abroad, per se. These agreements simply establish a commitment among the parties to engage in "collective self-defense," in specified situations, and establish the framework through which such measures are to be taken. From an international law perspective, a legal basis for engaging in measures involving the use of military force abroad must still be established from other sources of international law extrinsic to these collective defense treaties.

Note should also be made of the fact that, though the US has undertaken an international commitment to use force abroad in collective defense situations, this use of force is still subject to applicable domestic law, specifically, the Constitutional and statutory delegation of the War Powers.

Bilateral Military Assistance Agreements

The US has entered into bilateral military assistance agreements with numerous countries around the world. These are not defense agreements and thus impose no commitment on the part of the US to come to the defense of the other signatory in any given situation. Moreover, such agreements, like collective defense treaties, also provide no intrinsic legal basis for the use of military force.

Self-Defense Under International Law

To understand fully the comprehensive nature of self-defense under international law, the concept must be examined in terms of both the codified and customary rights of self-defense.

Anticipatory Self-defense Under Customary Law

To some, the "customary" right of self-defense appears to be broader than the right of self-defense embodied in Art. 51 of the UN Charter. Under customary international law, States could use force to repel not just actual armed attacks, but also "imminent" armed attacks. Under this concept, a State was not required to absorb the proverbial "first hit" before it could resort to the use of force in self-defense to repel an imminent attack.

Anticipatory self-defense finds its roots in the 1842 Caroline case and a pronouncement by then US Secretary of State Daniel Webster that a State need not suffer an actual armed attack before taking defensive action, but may engage in anticipatory self-defense if the circumstances mandating such a use of force are ". . . instantaneous, overwhelming, and leaving no choice of means and no moment for deliberation." As currently interpreted, anticipatory self-defense must meet three specific criteria: (1) the threat in issue must be imminent/immediate; (2) the action taken must be necessary (no viable alternative); and

(3) the force used must be proportionate to the threat posed.

The 1962 Cuban blockade ordered by President Kennedy is an example of the concept of anticipatory self-defense in action. The US perceived a threat of imminent attack by Cuban and Soviet forces as a result of their deployment of nuclear-capable, intercontinental ballistic missiles to Cuba. Waiting for an actual armed attack before taking measures in self-defense could have had disastrous implications for the US. Accordingly, we utilized proportionate force (a blockade) to defend ourselves against the threat of imminent attack.

This right of anticipatory self-defense serves as the foundation for our current JCS Peacetime ROE, which make it clear to Commanders that they do not necessarily have to absorb the first hit before their right/obligation to exercise self-defense arises.

Article 51 Codified Right of Self-Defense.

The right to engage in self-defense through use of force is an essential aspect of codified international law, as evidenced by the following provisions:

Art. 51, UN Charter. "Nothing in the present Chapter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the UN until the Security Council has taken measures necessary to maintain international peace and security."

Art. 21, O.A.S. Charter. "The American States bind themselves in their international relations not to have recourse to the use of force, except in the case of self defense. . . . "

Art. 3(1), Rio Treaty. "Parties agree that an armed attack by any State against an American State shall be considered as an attack against all the American States and, consequently, each one of the said . . . Parties undertakes to assist in meeting the attack in the exercise of the inherent right of individual or collective self-defense recognized by Art. 51 of the Charter of the UN.

The question which inevitably arises in conjunction with the "codified" right of self-defense is whether, as suggested by the language of Art. 51 of the UN Charter, this right now exists only when a State is responding to an actual "armed attack." Has the customary right to exercise anticipatory self-defense now been eliminated by Art. 51?

Those in the international community who advocate a more restrictive approach toward the exercise of self-defense argue that an acceptance of the concept of customary self-defense, to include anticipatory self-defense, would vitiate Art. 51 of the UN Charter and its clearly stated requirement that a State actually undergo an armed attack prior to any use of defensive force.

Critics of this view contend that the customary right of self-defense is an inherent right of a sovereign state, and was not "negotiated" away under the Charter. Moreover, they argue, experience has demonstrated that, given the failure of the UN Security Counsel to deal effectively with Art. 2(4) acts and threats of aggression, States will continue to exercise their customary right of self-defense. Given this reality, then, it is best to establish specific criteria for the lawful and limited exercise of this right, rather than artificially limiting self-defense under international law only to responses against "armed attack."

The JA must be familiar with these basic concepts of self-defense as they relate to both overseas deployments and other operational issues, such as the JCS Peacetime ROE and the response to state-sponsored terrorism.

The Weinberger Factors

In 1984, then SECDEF Caspar Weinberger gave a speech before the National Press Club in which he articulated six factors that the nation must agree exist before US armed forces would be committed into hostilities. Weinberger's six criteria for the use of US military forces abroad have been adopted as US policy: [4]

1. The US should not commit forces to combat overseas unless the particular engagement or occasion is deemed vital to our national interests;
2. The commitment should only be made with the clear intention of winning;
3. It should be carried out with clearly defined political and military objectives;
4. It must be continually reassessed and adjusted if necessary;
5. It should have the support of the American people and their elected representatives in Congress; and
6. It should occur only as a last resort.

Domestic Law and the Use of Force

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[4]

The Bush Doctrine

At the end of his presidency, George Bush articulated the "Bush Doctrine" (at a speech at West Point). The nation's fundamental role abroad, he said, is to "marshal its moral and material resources" to promote peace. But, he said, "there can be no single or set rules" to define when military force should be used. He did offer the following guidelines:

- Before the military is used, other policies should have proven unsuccessful
- Force should be likely to achieve a set goal
- The use of the military should be limited in scope and time, with the benefits justifying the likely sacrafice
- The mission should be "clear and achievable," with the military's way out as defined as its way in.

The Clinton Doctrine?

In his Inaugural Address, President Clinton added to the classic reason of "protecting our vital interests" as a basis for the use of force. He said, "When our vital interests are challenged, or the will and conscience of the international community is defied, we will act, with peaceful diplomacy whenever possible, with force when necessary."

The Constitution and the War Powers Resolution

In every situation involving the possible use of US force abroad, one of the first legal determinations to be made concerns the domestic legal basis for the use of force under the Constitution and the applicability of the 1973 War Powers Resolution (WPR), Public Law 93-148, 50 USC 1541-1548.

The war powers were divided in the Constitution between the Executive and Legislative branches of government. Art. I §8 of the Constitution gives Congress the power to declare war and to raise and support armies, to provide and maintain a Navy, and to make all laws necessary and proper for carrying into execution the foregoing. At the same time, Art. 2 vests the executive power in the President, and makes him the Commander-in-Chief of the armed forces.

This ambiguous delegation of the war powers created a "zone of twilight" in which the coordinate political branches of government exercise concurrent authority over decisions relating to the use of armed forces overseas as an instrument of US foreign policy. Congress, in 1973, attempted to map this twilight zone of shared war powers by passing, over presidential veto, the WPR. This legislation seeks to make the Congress a "full partner" in decisions relating to the use of US forces overseas, and attempts to accomplish this by imposing a number of reporting and consultation obligations upon the President whenever he uses US armed forces as an instrument of foreign policy.

Though the applicability of the WPR to any given overseas deployment is not a decision that will be made at the Corps or Division level, once US forces are committed overseas, the deploying JA must be sensitive to the impact of the W. 'R on the deployment. The Commander may ask for a briefing on the effect, if any, of the WPR. More important, because the resolution provides that the President shall terminate any use of US armed forces within 60 days unless Congress has declared war, extended the 60-day period for another 30 days, or is physically unable to meet because of an attack on the US, operations may have to be accelerated or modified in order to avoid a confrontation with Congress.

Procedures have been established which provide that the Legal Advisor to the CJCS will review all force deployment actions routed through the JCS which may implicate the WPR. The Chairman's Legal Advisor, upon reviewing a proposed force deployment, will make his views concerning WPR applicability known to the DOD General Counsel. If the DOD General Counsel makes a determination that the situation merits further inter-agency discussion, he will consult with both the State Department Legal Advisor and, most probably, the Attorney General. As a result of these discussions, advice will then be provided to the President concerning the Congressional consultation and reporting requirements mandated by the WPR.

WAR POWERS RESOLUTION - GENERAL INFORMATION

Traditional Constitutional and Legislative Foundations of War-making Authority:

Executive:
- Article II of the Constitution provides that "The executive power shall be vested in a President," and designates the President as "Commander-in-Chief of the Army and Navy of the United States."
- Once declared, the President has the sole responsibility to "conduct war."
- The Militia Act of 1795 - Presidential authority to mobilize state militia and insure appropriate orders whenever the US shall be invaded, or be in imminent danger of invasion. . . . Act gives President discretion to determine when an emergency is "imminent." This act provides legal and theoretical basis for Presidential actions in the interest of national security.
- Steady historical growth of Presidential war-making activities supported by specific legislative authorization (e.g., Tonkin Gulf Resolution), treaty authorizations (e.g., NATO, OAS), and the inherent power of the Chief Executive.

Legislative:
- Article I, Sec. 1 of the Constitution provides that "all legislative powers herein granted shall be vested in a Congress."
- Article I, Sec. 8 grants Congress the power "to declare war," to "raise and support armies," and "provide and maintain a Navy."
- The necessary and proper clause.
- Power of the purse-strings through the appropriations authority.
- Impeachment power.

Background:
- In effect since November 1973. Pub. L. No. 93-148, 87 Stat. 1556-60 (1973), codified in 50 U.S.C. § 1541 et seq. (1976).
- Product of Congressional reaction to perceptions of Presidential commitments without prior consultation with Congress in Korea and Vietnam coalesced by US force deployments to Cambodia ('70) and Laos ('71).

Consultation/Reporting Provisions:

Resolution requires the President to submit reports in 3 cases (absent declaration of war) which involve the introduction of U.S. Armed Forces:
- (1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances. "Imminent involvement" has been interpreted by the Departments of State and Defense to mean situations in which there is a serious risk from hostile fire to the safety of U.S. forces (Initial and status reports are required).
- (2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces. (Only an initial report is required).
- (3) in numbers which substantially enlarge US Forces equipped for combat already located in a foreign nation. (Case (2) exceptions to reporting requirements are interpreted as applying to this case also. Only an initial report is required.)

- The three cases appear in the purpose and policy section of the Resolution and therefore under principles of statutory interpretation do not determine statutory rights and do not enlarge or affect the scope or effect of the Resolution proper. This becomes important in the context of the President's inherent constitutional power to commit U.S. troops abroad to protect, for example, threatened U.S. citizens.
- Resolution also requires prior consultation "in every possible instance" in the hostilities/ imminent hostilities situation (Case (1) above).
- Resolution Section 8(c) defines "introduction of United States Armed Forces" for purposes of consultations and Case 1 reports as including "the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities."
- Reporting cases (2) and (3) above are limited in application to foreign territories, airspace and waters.
- Case (1) (hostilities/imminent hostilities) is not limited to foreign territories, airspace and waters; it would include domestic deployments of US armed forces into hostilities/imminent hostilities (e.g., Los Angeles Riots of May 1992).
- Note that CIA and covert activities are covered by separate legislation. Such legislation does not, however, guarantee that there will be no problems under the Resolution.

Use of Forces in Hostilities/Imminent Hostilities after Presidential Report Submitted (or should have been submitted):
- Resolution provides that, within 60 days, President shall terminate any use of U.S. Armed Forces with respect to the report unless Congress:
- has declared war or authorized the use of Armed Forces
- has extended (by law) the 60-day period
- is physically unable to meet as a result of an armed attack upon the U.S.

The President determines and certifies to Congress that unavoidable military necessity respecting the safety of U.S. Armed Forces requires the use of the forces in the course of bringing a prompt removal of the forces (the maximum extension is 30 days).
- Resolution provides that the Congress can, by concurrent resolution, direct removal of U.S. Armed Forces from hostilities/imminent hostilities at anytime. (But see Chadha decision below.)
- As to legislation and treaties:
- Section 8(a) (1) - provides that legislation must contain specific grants of war-making power before the President can utilize it as authority to commit U.S. Armed Forces into hostilities.
- Section 8(a) (2) - provides that treaties are not self-executing, requiring the President to seek implementing legislation or an area resolution before relying upon a treaty for commitment of U.S. Armed Forces. Three area resolutions are currently recognized as valid: Formosa, Middle East, and Cuban Resolutions.
- The Supreme Court ruled in Immigration and Naturalization Service v. Chadha, 103 S. Ct. 2764 (1983) that a one House of Congress resolution, in the form of a legislative veto, violated the constitutional concepts of bicameralism and separation of power by not requiring joint House approval and preventing the President from fully participating in the legislative process by denying him the opportunity to sign or veto legislation. Logic would extend this decision to cover concurrent resolutions as well. This decision would seem to indicate also that Congress may not order the President to discontinue United States involvement in hostilities through concurrent resolution, nor may Congress cause the President to terminate such involvement through the use of a "silent veto" by refusing to undertake the necessary action to terminate or continue the involvement. Note that as to Case 2 and 3 above only an initial report is required. A case specific time-line graphic is prepared for JCS when deliberating on proposed deployments.

Executive Branch Implementation Procedures for Resolution Consultation/Reporting Responsibilities:
- The President's responsibilities have not been delegated. Each report has actually been signed by the President.
- Based on exchange of correspondence between Secretary of State Kissinger and SECDEF Schlesinger, procedures were established providing for the Legal Adviser to Chairman of the JCS to review all force deployment actions routed through the Chairman's office which might raise questions under the WPR.
- If in the judgment of the Legal Adviser, consultation or a report to Congress is required, or if he has any substantial doubt on the requirement, the Legal Adviser must refer the matter to the DOD General Counsel.
- The DOD General Counsel simultaneously provides all necessary information to the State Department Legal Adviser.
- If the State Dept Legal Adviser and/or DOD General Counsel deem that Presidential consultation or reporting is required; they must advise their respective secretaries, who may, in turn, advise the President.
- The Attorney General's advice might also be solicited before the President decides whether he must consult or report.

TAB E-AF
THE UNITED STATES AIR FORCE

One strength of our DESERT STORM air campaign was our adherence to the law: our JAGs defined the legal envelope and we stayed within it.... We are committed to forging closer ties between law and operations....

MG David C. Moorehouse, USAF Judge Advocate General

Operations Law in the US Air Force is not significantly different than that practiced in the other services. What sets it apart, however, is its particular focus on air and space operations. The Air Force's "bible" in this area is AFP 110-31, The Conduct of Armed Conflict and Air Operations. Like FM 27-10, it applies the treaties and customs governing war to the way we conduct operations. Judge advocates trained in international and operations law can be found on the legal staffs of most unified commands. Air Force policy in the operations law area however, is established at the International and Operations Law Division, Office of The Judge Advocate General, HQ US Air Force (HQ USAF/JAI) Pentagon room 5C340, Washington, DC 20330-5120 (703-695-9631, AV 225-9631).

References

AFP 1-1, Basic Aerospace Doctrine of the US Air Force, Mar 1984
AFP 110-31, Conduct of Armed Conflict & Air Operations, 19 Nov 76
AFR 110-32, Training & Reporting to Insure Compliance with the Law of Armed conflict, 2 Aug 1976
AFR 110-29, Review of Weapons for Legality Under IL, 10 Sep 81
The AF & US National Security: Global Reach--Global Power, Jn 90

Overview

Basic aerospace doctrine states that the objective of aerospace forces is to win the aerospace battle--to gain and/or maintain control of the aerospace environment and to take decisive actions immediately and directly against an enemy's warfighting capacity. As was most recently demonstrated in DESERT STORM, the capability to perform this mission can greatly multiply the effectiveness of the overall land/sea/air force. The specific combat missions performed by the Air Force include strategic aerospace defense, strategic aerospace offense, counter air, air interdiction, close air support of ground forces, special operations, airlift, aerospace surveillance and reconnaissance, and aerospace maritime operations. AFM 1-1 contains detailed descriptions of each of these.

Operations law provides the legal basis for the conduct of all these operations. Following are some examples of areas in which Air Force judge advocates provide advice to operational unit Commanders during war. Many of them are taken from our recent experiences in Operation DESERT STORM.

Even before bombs are dropped on targets, all service judge advocates are responsible for reviewing all weapons for compliance with international law. In the Air Force, AF/JAI has that job. Once our weapons are deemed lawful, the next question is whether the targets against which they will be employed are also proper under the laws of war. Answering that question, both in prior planning and in real time, and translating the answer into rules of engagement are perhaps the most important JAG combat functions. As the Dec 1991 issue of the ABA Journal reported, the Air Force had a JAG on the staff of General Horner's targeting cell. His job was to review proposed target folders to determine whether the target, munitions to be employed, and objective sought to be achieved complied with the law. He was not just a "rubber stamp"; his advice led to the modification of many proposed targets and kept air operations well within the laws of armed conflict. Although EPW (enemy prisoner of war) matters reside within the Army's executive control, the Air Force is the DOD executive agent for POW issues (issues involving US personnel in enemy captivity). As such, AF/JAI provides legal advice on problems such as the code of conduct, enemy treatment of our prisoners, and others.

Operations law also applies to many peacetime issues. Matters involving the right of military aircraft to fly around the world are handled by operations lawyers, as are questions regarding our rights and responsibilities in space. Law of armed conflict training for all our personnel is a common, and often very difficult and time consuming duty for operations lawyers in all the services.

New forms of warfare are as challenging to the Air Force as to the other services. Counterdrug operations are now conducted by the Air Force alone and as components to unified commands. AF/JAI is the principal advisor to the Air Force counterdrug operations division and, as such, coordinates on all deployments of troops in support of law enforcement agencies or foreign governments. Special operations in low intensity conflict require considerable Air Force support. Legal advice in this area comes primarily from the judge advocates at the Air Force Special Operations command (AFSOC/JA) at MacDill AFB, Florida.

In addition to the operations law support given by Air Force judge advocates at AF/JAI and the unified commands, it is important to note the other echelons at which it is available. The Air Force is organized along major command (MAJCOM) lines. Under Headquarters Air Force at the Pentagon, field MAJCOMs like Air Combat Command (ACC), Air Materiel Command (AMC), Military Airlift Command (MAC), US Air Forces in Europe (USAFE), and Pacific Air Forces (PACAF) provide operational support to the unified commands of which they are components. At an echelon below MAJCOM are Numbered Air Forces (NAF) and, below NAFs, wings. The wing is the smallest self-contained unit capable of going into battle. Judge advocates sit on the command staffs at all three of these echelons and provide operations law advice. During DESERT STORM, JAGs deployed with their unit Commanders and provided that important advice.

Although the Air Force has a number of discrete, independent missions, its efforts are always in support of the unified combat effort of all land, sea, and air forces. From the Air Force perspective, the operations lawyer's primary responsibility is to insure that those efforts are conducted within the boundaries of international and domestic US law. Our success at that mission during DESERT STORM made the US Armed Forces not only more effective and efficient, but also deserving of the respect it received.

Possibilities for the future?

A Jan 93 interview with AF CoS GEN McPeak revealed some joint planning underway within the Air Force. GEN McPeak suggested the integration of the AF 23d Wing with the 82d Airborne for a long deployment, quick forcible entry capability. Under the concept, the 23d would transport the 82d in C-130s, and provide firepower with A-10 anti-armor aircraft, F-16 fighters, and eventually AC-130 gunships. The Army would provide helicopters. To some, like Senator Nunn, chairman of the Senate Armed Services Committee, McPeak is doing just what Congress wanted when it called for a review of roles and missions. Whether such ideas will fly remain to be seen, but this serves as an example for the "joint" thinking needed for survival in the down-sized armed force of the future.

TAB E-CG
THE US COAST GUARD

The practice of operational law in the Coast Guard (CG) focuses on a variety of peacetime and wartime missions. The CG does not have a Judge Advocate General (JAG) Corps. All lawyers, including those who practice operational law, are line officers. As such, these lawyers are rotated to non-legal billets in other mission areas throughout their careers.

The Maritime and International Law Division (COMDT G-LMI), located at CG Headquarters, Washington, D.C. 20593-0001 (202-267-1527), sets policy and direction in the field of operational law. The Chief of this Division is the US representative to the International Maritime Organization (IMO) legal committee. CG lawyers at Maintenance and Logistics Command Atlantic (MLCLANT) Operational and Command Advice Law Branch (lo) (212-668-7140) and Maintenance and Logistic Command Pacific (MLCPAC) Command and Operational Law Branch (lj) (510-437-3330) provide advice to the senior CG operational commanders in their respective areas.

14 USC 2 sets forth the primary duties of the CG. Protecting the life and property of those at sea is the foundation of CG missions. Today, CG roles encompass maritime law enforcement, international ice patrol, fisheries patrols, search and rescue, aids-to-navigation, marine environmental protection, boating safety, port safety and security, military readiness, marine inspection, and waterways management. These involve the interpretation and enforcement of numerous laws and regulations. CG lawyers are involved in negotiating international agreements on the environment, marine pollution, fisheries enforcement, vessel safety, safety of life at sea, search and rescue, maritime law enforcement and aids-to-navigation.

References

COMDTINST M16247(series) Maritime Law Enforcement Manual Vol. I Title 14, USC, U.S. Coast Guard
Title 18, USC, Crimes and Criminal Procedure
Title 33, CFR, Navigation and Navigable Waters
Title 46, CFR, Shipping
UN Convention on the Law of the Sea
Convention on the High Seas
Convention on the Territorial Sea and Contiguous Zone

Overview

14 USC 1 and 10 USC 101 recognize the Coast Guard as a military service and an armed force of the US. The CG is the smallest of the five Armed Services, comprised of 38,000 active duty personnel, 34,000 Auxiliarists, 12,000 Reservists and 5,000 civilians. It operates under the Department of Transportation in times of peace, receiving its orders from the Secretary of Transportation. In time of war or by presidential decree, 50 USC 191a authorizes the transfer of operational control of the CG to the Department of the Navy. When operating under the Department of the Navy, the CG receives its naval operational direction and orders from the Secretary of the Navy and/or Chief of Naval Operations. During such times, the Commandant of the CG retains full administrative control of the CG and operational control of activity in all other mission areas not related to military readiness or national defense.

Operational lawyers are frequently faced with issues that arise in the context of maritime law enforcement and CG boardings. The exercise of CG authority to enforce all Federal laws (not state laws) in the maritime arena is strictly governed by a use of force policy as opposed to guidance contained in rules of engagement. This policy restricts the use of force to the minimum necessary to achieve the desired result with minimum injury to persons and property. Only such force as is reasonably necessary under the circumstances may be used.

The authority granted to the CG sets it apart from the other services. By the Posse Comitatus Act and internal policies, DOD is prohibited from enforcing or executing federal, state and local laws except under circumstances explicitly authorized by the Constitution. The Act does not apply to the CG. The CG's federal maritime law enforcement authority is set out in two statutes. 14 USC 89 authorizes commissioned officers, warrant officers, and petty officers of the CG to go on board any vessel subject to the jurisdiction of the US and make inquiries, inspections, searches, seizures and arrests. Since these CG personnel are also officers of the customs and subject to regulations issued by the Secretary of the Treasury under 14 USC 143, the CG derives supportive authority from 19 USC 1581(a) which allows customs agents to board and inspect vessels within customs waters and anywhere in the US.

The broad authority granted in 14 USC 89 gives the CG jurisdiction over the high seas and waters subject to the jurisdiction of the US. Additionally, the CG can board US vessels for the purpose of enforcing maritime law wherever they are found, including foreign territorial waters (with permission of the coastal state). In international waters, the CG may exercise the "right of approach" and board stateless (claiming no nationality) vessels. Consensual boardings of foreign flag vessels may be conducted with the voluntary consent of the person-in-charge of the vessel or with the consent of the flag state. By policy and Presidential directive, an approval must be obtained by the operational unit from the Commandant prior to asserting law enforcement authority following a consensual boarding or to conduct nonconsensual boardings and law enforcement activity. CG lawyers review these requests to ensure compliance with international law and agreements.

The long standing duty of every mariner to assist those in danger of being lost at sea has evolved into the "right of assistance

entry". The CG has been involved in the development of this legal theory. This right permits the CG to enter the territorial seas of a nation, normally the waters within 12 nautical miles of the nation's coastline, without the coastal nation's permission to engage in bona fide efforts to render emergency assistance to those in danger or distress at sea.

The Mansfield Amendment, 22 USC 2291(c)(1), prohibited the involvement of an officer or employee of the US in any direct police action in any foreign country with respect to narcotics control efforts due to the adverse impact such actions could have on foreign relations. One amendment to the Mansfield Amendment added an exception for maritime law enforcement, making the prohibition on involvement not applicable to maritime law enforcement operations in the territorial sea of a consenting country. This amendment allowed for joint operations between the Colombian Navy and CG to patrol Colombian waters for the purpose of drug interdiction. Another amendment allows, with the approval of the US chief of mission, the presence and assistance of US officers and employees when foreign officials are effecting arrests. This is used during riverine training operations conducted by the CG's International Maritime Law Enforcement Team (IMLET). Both of these amendments give the CG broad authority to assist local officials.

The CG also participates in other programs abroad that require legal advice to ensure the propriety of operational decisions within the international arena. Programs such as UNITAS ("UNITAS" is spanish for "unity") deploy CG members aboard US Navy vessels to West African and Central and South American countries to give seminars on CG matters such as boardings and boat maintenance. The Joint US Military Advisory Group (JUSMAG) employs members of all of the armed forces, including the CG, at American embassies around the world. These individuals act as the US component on the embassy staff for military to military relations with the host country.

Members of the CG also provide military education and training to military and civilian personnel of foreign countries in the US and abroad through the International Military Education and Training (IMET) program, 22 USC 2347. Education and training in at-sea law enforcement, port security, and general maritime skills are provided under the maritime training provision, 22 USC 2347. The CG participates in IMET at the request of DOD and the foreign country and provides service school training as well as mobile training teams (MTT). Recently, this has lead to teams being sent to Venezuela and Columbia.

CG personnel, originally deployed to Grenada to assist the Grenada government in enforcing Grenada law, intercept weapons and subversives, and provide search and rescue support for invading troops, later remained in Grenada to provide training for the Grenada coast guard forces. Current events have led to an assessment of needs to convert former Soviet republic navies and border patrols into coast guards. The CG's international law enforcement training team at CG Reserve Training Center Yorktown will be providing assistance and training to these nations.

Operational lawyers must maintain a familiarity with the other armed forces. The CG's versatility and involvement in a variety of military missions requires cooperative work efforts work with the Joints Chief of Staff, Department of Defense, Department of the Navy, and Chief of Naval Operations. Liaison officers are assigned to offices and positions in each organization as well as to Joint Task Forces (JTFs) 4 and 5 which are involved in the drug war.

Under 14 USC 2, the CG is tasked to maintain a state of readiness to function as a specialized service in the Navy in time of war and, among other duties, be ready to fulfill the Maritime Defense Zone (MDZ) command responsibilities. CG area commanders are designated as MDZ Commanders, responsible to naval fleet commanders-in-chief (FLTCINC) for the Navy' s coastal and harbor defense missions including, but not limited to, inshore undersea warfare, surveillance, interdiction, and mine countermeasures. Operational assignment of CG and Navy units to the MDZ Commanders is necessary to conduct all assigned missions. Lawyers practicing operational law also provide advice regarding the Geneva and Hague Conventions and applicability of Status of Forces Agreements to CG operations.

Regardless of the international scene, the CG must continue to carry out its duties that focus on maritime responsibilities at home. CG lawyers continually assist and provide legal advice to commands responsible for the enforcement of all applicable Federal laws within the navigable waters of the US and the scope of assistance that can be provided to local authorities. Congress authorizes the CG, under 14 USC 141, to use its personnel and facilities to assist any Federal agency, State, Territory, possession, or political subdivision thereof, or the District of Columbia, in any activity that the CG may be especially qualified. Under this statute, the CG provided assistance to Federal agencies to quell the widespread looting on St. Croix after Hurricane Hugo ravaged the island. By separate action, the President exercised his authority under 10 USC Chapter 15, and ordered that members of the CG be used to suppress violence and restore law and order on St. Croix.

The CG has been successful in its missions during peacetime and wartime because CG lawyers are an integral part of the operational decision-making process. In Desert Shield/Desert Storm, the boarding of vessels transiting the Gulf was, in large part, performed by CG personnel. A CG lawyer is assigned to the US Navy for the Maritime Interdiction Force (MIF) located in the Persian Gulf and the Gulf of Acaba. CG lawyers provided advice on, and drafted and reviewed regulations in support of, port security during the outloading of personnel, equipment, and ammunition. Advice was also provided to CG port security units deployed in Bahrain and Saudi Arabia.

Whether abroad or at home, the CG possesses unique authority that complements that enjoyed by the other armed services. For example, 1O USC 124 identifies DOD as the lead agency to detect and monitor the maritime transit of illicit drugs. However, only the CG can stop, board, and seize a vessel and its contraband during maritime transit on the high seas, on waters subject to the jurisdiction of the US, or in the territorial seas of another nation. It is because of the CG's status as an armed force with broad foreign and domestic authority that make the practice of operational law in the CG truly unique.

TAB E-M
MARINE CORPS

I. Mission: The Marine Corps' (MC) primary mission is to be "organized, trained and equipped to provide fleet marine forces of combined arms, together with supporting air components, for service with the fleet in the seizure or defense of advanced naval[1] bases and for follow on land operations as necessary."[2] In addition, the MC provides detachments and organizations for service on Navy vessels, security detachments and such other duties as the President may direct. This broad mission statement translates into a MC that is many different things to many different people.

Consequently, the ground, air, and supporting forces that make up the MC are trained and equipped to make available to the NCA the capability to react quickly to any military contingency in the world--a "911" force. As a result, Marine operational forces are "task organized" and deployed to meet whatever contingency mission they may be assigned: ranging from a hasty NEO such as "Operation Eastern Exit,"[3] to sustained ground combat such as in "Operation Desert Storm." Because Marine forces deploy from and are sustained by sea-based platforms, they are often referred to as *expeditionary* forces or the *expeditionary* force of choice.[4]

II. Force Structure.

A. Division, Wing, FSSG. "The MC, within the DON, shall be so organized as to include not less than 3 combat divisions and 3 aircraft wings, and such other land combat, aviation, and other services as may be organic therein."[5] Presently, DOD plans call for a Marine Corp end strength of 159,100 in FY97. At that level, the third division and wing will not be manned at full strength unless augmented with reserve forces. Ultimately, a Marine division will consist of approximately 14,000 people. The major elements of the evolving division are expected to be: 2 infantry regiments with organic reconnaissance; a combined arms regiment with 2 light armored infantry (LAI) battalions; a tank battalion and a light armored reconnaissance company; an artillery regiment; an anti-aircraft battalion; a combat engineer battalion; and a light armored reconnaissance battalion.

Likewise, Marine aircraft wings (MAWs) will downsize to about 12,000 people. The major assets of the evolving wing are expected to be: 72 F/A-18 fighter/attack aircraft; 40 AV-8B Harrier vertical/short take-off and landing (V/STOL) aircraft; 10 EA-6B electronic warfare aircraft; 12 KC-130 aerial refueling and transport aircraft; 96 CH-46E medium lift helicopters; 32 CH-53E heavy lift helicopters; 54 AH-1W attack helicopters; 27 UH-1N light/utility helicopters; an air defense battalion, equipped with Hawk and Stinger batteries; and, an air control group with the supporting establishment necessary to maintain independent operations. Like the Marine division, a Marine air wing is the "warehouse" of capabilities that make available to the task force commander a variety of assets ready to support a broad range of missions.

The combat service support function is performed by the Force Service Support Groups (FSSG). This organization contains the maintenance, supply, engineer support, landing support, motor transport, medical, dental and other units necessary to support sustained combat operations. The FSSG is also tasked with providing legal services to the operational units. This is accomplished through the Legal Services Support Section (LSSS) within the FSSG.

Traditionally, the LSSS is headed by an officer-in-charge usually of the rank of lieutenant colonel. The OIC is responsible for leading the Marines and managing the assets that will provide the legal services to the fleet. Although its structure will change with the downsizing of the fleet marine force, the LSSS consists of approximately twenty lawyers performing the functions of prosecution, defense, and administrative law. In garrison, the legal assistance function is performed by the host installation. When the FSSG is deployed, however, this function transfers to the LSSS. While the OIC is responsible for supporting the legal needs of the operational commands, he or she does not provide legal advice to the commanding general of the wing or division. That traditional duty remains with the SJA. Each major command (division, wing, FSSG) has a staff JA and a small legal staff consisting of a deputy and two or three clerks. The bulk of the legal assets remain in the LSSS.

B. Task Organization. In order to meet . . . mission oriented expeditionary requirements, the MC has developed the concept of [Marine Air Ground Task Forces] MAGTF organization. . . . It is a building block concept; the fleet/joint commander's operational requirement or task is analyzed, and type units are drawn from a Marine division, aircraft wing, and force service support group [FSSG] into and air-ground-logistics team under one commander to meet the task. The resulting MAGTF may be of any size, and the weight and composition of its component elements may vary, depending on the mission and enemy situation. In each case, there will a MAGTF command element [CE], a ground combat element [GCE] (under certain conditions, more than one), an aviation combat element [ACE], and a combat service support element [CSSE].[6]

As the US reduces the number of its permanently based overseas military forces, forward-deployed, self-sustainable, naval forces

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[1] "Naval base" in this instance means a base for support of forces afloat. Generally, naval is used in the US military to refer to both the Navy and the Marine Corps: i.e., the U.S. Navy and U.S. Marine Corps comprise the operating naval forces within the Department of the Navy.

[2] 10 U.S.C. § 5063(a) (1991).

[3] The evacuation of U.S. and foreign nationals from the U.S. embassy in Somalia in January 1991.

[4] Concepts and Issues, US Marine Corps, 1992 (available from Ms. Bobbi Schell, CMC (RPR), DSN 224-1503).

[5] Id.

[6] FMFM 1-2, § 4005.d.

provide the ability for continued presence and power projection. Naval forces enable the U.S. to secure access to ports, airfields and routes for the sequenced employment of heavier U.S. and allied forces. Moreover, expeditionary forces can deter crises, influence friends and foes, provide humanitarian assistance and fight if required.

For instance, Operation SEA ANGEL in Bangladesh involved the 5th Marine Expeditionary Brigade (MEB), diverted from its return to CONUS after 5 months in Desert Shield/Storm. During its mission, 5th MEB delivered over 2,000 tons of food, fuel, medicine and equipment. This task force included Army blackhawk helicopters, Green Beret assessment teams, Air Force C-130 transport aircraft, a Navy Amphibious Group and members of the US Agency for International Development.

The CG's of Fleet Marine Force Atlantic and Pacific exercise command over all division, wings and FSSGs. In response to a mission received from the operational (warfighting) CINC, the FMF commander "builds" the MAGTF to meet the specifically assigned mission, using the assets available to him from the wing, division and FSSG. He then assigns a commander for the resulting MAGTF and "chops" (change of operational control) the MAGTF to the warfighting CINC.

The 3 traditional types of MAGTFs are: a Marine Expeditionary Unit(MEU); Marine Expeditionary Brigade(MEB); and a Marine Expeditionary Force (MEF). A MEU generally consists of a reinforced infantry battalion, a reinforced helicopter squadron, a MEU service support group--which provides combat service support--and a command element. A MEB consists of a reinforced infantry regiment, an aircraft group, and a brigade service support group. Finally, a MEF can consist of one or more divisions and aircraft wings, together with corresponding combat support and force service support groups.

Current operational tempo calls for 2 MEU (SOC)s (Special Operations Capable) to be deployed aboard amphibious shipping at all times. These units generally operate in the Western Pacific and the Mediterranean areas. MEU(SOC)s often train for operations to be executed within 12 hours of receipt of the mission.

For example, during Operation Eastern Exit in Jan 91, Marine helicopters launched from Navy ships at night, 466NM from Mogadishu to conduct a NEO from civil-war torn Somalia. The 281 evacuees included diplomats from Britain, Germany, Kenya, Kuwait, Nigeria, Oman, Sudan, Turkey, UAE; 39 Soviets and 61 Americans.[7] The naval units involved, which had to be diverted from Desert Storm, received the order and departed on their mission only 3 days prior from a distance of 2,000 miles.

III. Capabilities

MAGTFs are general purpose expeditionary forces with the ability to conduct special operations; thus giving the National Command Authority the ability to prevent or respond to crises before they become major conflicts. Probable missions include the protection of U.S. citizens and property overseas, NEO, anti-terrorist operations, special operations, disaster relief, nation-building, limited strikes and full-scale, joint combat operations. An overriding requirement for MAGTFs, and especially MEU(SOC) MAGTFs, is the ability to plan rapidly and effectively for the execution of a real world contingency with the forces, lift, logistics and enemy situation at hand. To this end, MAGTFs deploy by amphibious shipping and air lift and are sustained on the ground by Maritime Prepositioned Ships (MPS) or other prepositioned equipment. In Desert Shield/Storm, for example, the MC deployed several MEBs aboard amphibious shipping, by strategic airlift, and by MPS. These units were then combined into 2 MEFs: 1 ashore and 1 afloat. The MEF ashore was specifically tailored for combined arms warfare against a mechanized threat. I MEF was a corps-sized force of 2 divisions, and expanded aircraft wing, and a combat service support command equivalent to 2 force service support groups. The MEF afloat, on the other hand, was task organized to conduct forcible entry operations from the sea.

The MPS got its first real world test after a decade of theory in the Gulf War. The MPS program, which began in 1981, consists of 13 self-sustaining, roll-on/roll-off ships operated by the Military Sealift Command (MSC) and organized into 3 MPS squadrons. Each MPS squadron provides enough tanks, artillery, vehicles, ammunition, supplies, food, fuel, and water to support a MEB for 30 days of combat. The ships can be used separately or in larger groups to support smaller or larger MAGTFs. A single MPS ship is capable of supporting a MEU for 30 days. In Operation Fiery Vigil, for instance, a single MPS ship helped support and evacuate over 17,000 people as Marines assisted with emergency relief following the June 1991 eruption of Mount Pinatubo in the Philippines.

During Operation Desert Shield, MPS demonstrated its responsiveness. Within two weeks following the Iraqi invasion of Kuwait, an entire squadron of MPS ships had sortied offshore of Saudi Arabia and provided logistic support to Marine and Army units on the ground; thus buying valuable time for Army logistic trains to get into place for sustained support.

IV. Role of the Marine Operational Lawyer

In a nutshell, as the MC is many things to all people, so to the Marine operational JA must be many things to the units he or she supports. As a result, an OPLAWYER in the MC should strive to be involved in and familiar with the operations planning and plan review process as well as functionally proficient in the more traditional tasks of legal assistance, claims, military justice, and admin law. The specific role of the Marine operational lawyer, however, is in large part determined by the extent to which the JA gains the confidence of the commander and his staff. Consequently, a Marine operational lawyer must not only be proficient technically but must continue to acquire and hone those military skills that readily identify Marine JAs with the elite units they support. Every MAGTF will have at least one JA deployed with the unit, and in the case of a MEB or MEF will have a number of JAs assigned. These attorneys are selected from the pool of assets available in the LSSS. The MAGTF JA for a MEU-size or smaller unit will serve as the legal advisor to the commander of the deployed unit. These duties, however, rarely consume the JA's time. As a result, JAs have traditionally performed a variety of additional non-legal duties, such as assistant operations officer, staff secretary, adjutant, or custodian of classified documents and cryptographic equipment.

In the final analysis, however, it is the expeditionary nature of the mission that sets the tone for the practice of OPLAW in the MC. Because expeditionary operations will involve necessarily ground, air and sea forces, the MC operational lawyer must be familiar with the law of land warfare as well as the law of the sea, air and space. While the MC rarely is involved in overseas stationing, the Marine JA must nevertheless be familiar with stationing agreements and applicable SOFAs in addition to the foreign claims process and contingency contracting in order to support adequately short-term deployments to foreign countries. Furthermore, the MC's ability to shape events short of war requires that the operational JA have a solid grasp of the peacetime rules of engagement as well as an appreciation for the combat considerations that may require the modification of ROE to the specific mission.

A broad understanding of the legal issues involved in both peacetime and wartime deployment scenarios as well as a grasp of the organization and capabilities of the MC, will enable the Marine JA to provide adequate legal support to the fleet marine forces. With respect to the former, the OPLAW Handbook will prove invaluable. With respect to the latter, all Marine JAs bear the responsibility to continue their professional development through reading and study.

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[7] A.B. Siegel, Lessons Learned From Operation Eastern Exit, Marine Corps Gazette, June 1992, at pp. 75-81.

TAB E-N
NAVY

REFERENCES

OPNAVINST CS711.9C (INCSEA/DMA instruction)
NWP-1A, Strategic Concepts of the U.S. Navy
NWP-9A, The Commander's Handbook on the Law of Naval Operations
Maritime Claims Manual
1982 United Nations Conference on the Law of the Sea (UNCLOS III)

The Navy's mission is to prepare for and conduct prompt and sustained operations at sea in support of U.S. interests and operations worldwide.[1] While various operations in the recent past (Desert Shield/Storm; Earnest Will; Just Cause; Urgent Fury) have indeed involved combat operations, many of the Navy's important functions do not involve armed conflict. NWP-1A discusses in much more (and unclassified) detail strategic concepts such as sea control, power projection, strategic nuclear deterrence, overseas deployments, and security of sea lines of communication. It and NWP-9A are good primers.

Navy judge advocates are routinely involved in operational law matters. The typical carrier battle group (the "standard" deployment group, consisting of the carrier and its airwing of approximately 85 fixed- and rotary-winged aircraft; two or three destroyers; two frigates; one or two cruisers; one or two replenishment/repair ships; and perhaps a submarine) will be commanded by a rear admiral who has a lieutenant or lieutenant commander staff judge advocate.

The battle group commander will usually be operating under the direction of a numbered fleet (2d, 3d, 6th or 7th) commander or Commander, Middle East Force, who will have a more senior staff judge advocate, but the battle group judge advocate and the carrier judge advocate are the ones who will be relied upon for prompt, correct advice on a variety of issues ranging from asylum and refuge, to payment of claims, to boarding and search, to use of force in self-defense. The Navy judge advocate will not become involved in procurement, as a general rule. (Note: The battle group judge advocate is likely to be the only judge advocate for miles around. If the battlegroup has an aircraft carrier assigned to it, it will have at least one JAG on board, and he too may be involved in operational matters. Furthermore, because of communications difficulties, the battle group judge advocates often may not be able to contact a senior judge advocate or Washington, D.C., for a second opinion, so a correct answer is even more crucial.

One of the most important missions of the Navy is to maintain sea lines of communication. The United States is, after all, an island nation, and much of its commerce depends on an ability to navigate freely in international and territorial waters. Furthermore, the Navy helps other nations maintain their navigation rights through the Freedom of Navigation program.

Freedom of Navigation operations (FONOPS) are usually classified because of the sensitive nature of the challenges. It is fair to say, though, that in some ways they are like the real property doctrine of adverse possession -- that is, they are effective only if open and notorious, under a claim of right. The object of FONOPS is to prevent the possibility of a nation's illegal claims (e.g., territorial sea exceeding 12nm; excessive straight baselines; restrictions in exclusive economic zone that do not relate to resource exploitation, etc.) from, over time, ripening into a claim of right under customary international law. Accordingly, the Navy will conduct a challenge tailored to the offending practice (e.g., engaging in "noninnocent" passage in an area claimed, illegally, as territorial sea).

Flight Information Region (FIR) operations are a variation of the FONOPS. A Flight Information Region is an air-control region outside a nation's airspace, affecting by treaty civil aeronautics, designed principally as a buffer to that nation's sovereign airspace. Occasionally nations will require military aircraft to check in with controllers and use the services. United States' policy, stated in NWP 9A, The Commander's Handbook on the Law of Naval Operations, is that military aircraft on routine, point-to-point operations with no intention of entering airspace, or aircraft engaged in carrier operations, will not check in. A FIROP will be designed to challenge that requirement.

The judge advocate will become involved in planning both FONOPS and FIROPS. For both operations, a good grasp of international conventions (e.g., 1982 U.N. Convention on Law of the Sea; 1944 Chicago Convention on International Civil Aviation; provisions of the International Civil Aviation Organization), rules of engagement, and the law of self-defense is vital. A good starting place is NWP-9A.

Before becoming involved in any operations, the judge advocate should be thoroughly familiar with the Fleet Operating Orders (CINCLANTFLT 2000-XX; CINCPACFLT 201-XX; COMIDEASTFOR 1000-XX; COMSIXTHFLT 4000-XX, to name a few). Those OPORDERS will contain cruising instructions, rules of engagement guidance, and general information on the region that the fleet commanders expect to be observed. The judge advocate should also have a good idea of a nation's maritime claims (found in the DOD Maritime Claims Reference Manual, which should be part of the judge advocate's library) and local political sensitivities. Local hackles are especially important when planning allied exercises.

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[1] See the Armed Forces Journal 14, Nov 92. It describes a new strategy dubbed "From the Sea," wherein the focus shifts from a global threat to regional challenges and concentrates on "near land" warfare. It signifies a fundamental shift from open-ocean fighting toward joint operations from the sea. In a global setting, the Navy could prevent the enemy from choosing where the fight would occur. In regional warfare, the site of battle is predetermined to a large extent, and the Naval operations call for extending the fleet's battle space across the shore so naval forces can fight with and alongside the Army and Air Force.

Much of the Armed Forces' concerns generally over the last fifty years have centered about the Soviet threat. With the end of the Cold War and the breakup of the Soviet Union, some of those concerns may have abated. There are, however, bilateral agreements with the former Soviet Union in force that the Navy is bound to honor. Most significant are the 1972 "Agreement on the Prevention of Incidents On and Over the High Seas" and the 1990 "Agreement . . . on the Prevention of Dangerous Military Activities." The former, classified confidential, arose out of a series of near-collisions and buzzing incidents that could have brought about armed conflict, and it now imposes on the parties a duty to avoid provocation at sea. The latter, unclassified, covers four discrete areas: dangerous laser use; interference with command and control nets; entering the other party's territory; and operations in "special caution areas," areas where the parties themselves are not involved in hostilities but may inadvertently be drawn in. Both treaties are contained in OPNAVINST C5711.96, and essentially lay out detailed "rules of engagement" for how each side will respond to certain dangerous incidents when they occur in the air or on/under the sea.

An ever-growing mission for the Navy is drug interdiction. The Coast Guard, as it serves a law-enforcement function, is the primary enforcer in this arena; but the endurance, armament, and station-keeping ability of Navy combatants have made them good platforms for Coast Guard Law Enforcement Detachments. The Coast Guard has an excellent manual on drug interdictions (CHECKMATE 7 OPLAN - nicely adapted, incidentally, to maritime interception operations) that the battle group judge advocate should have in the library.

Before deployment, the battle group judge advocate should be familiar not only with the OPORDERS of the region of the deployment, but also with regional treaties (e.g. NATO SOFA), regional defense policies (once again, NATO is a good example; understand the chain of command and the philosophy behind the exercise of self-defense), regional legal manuals (e.g., SIXTH FLEET legal manual), the Manual for Courts-Martial and current case law (especially important for post-trial matters), and service directives implementing the UCMJ and existing ROE.

Operational issues encountered by the deploying judge advocate in the Navy are almost identical as those encountered by all other service judge advocates when they deploy. The primary variation, of course, is that we traditionally deploy at sea. This fact requires deploying Navy JAGs to have a firm working knowledge of the Law of the Sea, international agreements (SOFA's in particular), and exercise of foreign criminal jurisdiction in areas where we have no SOFA with the host nation. We must also be prepared to handle legal issues which arise out of our conduct of Freedom of Navigation (FON) operations challenging excessive maritime claims of various nations in our AOR. When in port overseas, Navy JAGs face the same legal issues that other service JAG's would face on a typical overseas exercise deployment (with the one possible exception of having to handle admiralty claims in port).

TAB F
OPLANS AND OPORDS

The references at TAB A, this Handbook, require Judge Advocate review of OPLANS and OPORDS.

The Corps/Division OPLAN in Context

The Corps/Division OPLAN does not exist in a vacuum. As a supporting plan to the OPLAN of a particular Unified Command, it must reflect the guidance contained in that plan and be structured in such a way as to assist in the overall accomplishment of the Unified Command mission.

Unified Command OPLANs are the mechanisms through which CINCs will accomplish the national security objectives and derived military objectives and tasks assigned them in Vol. I of the Joint Strategic Capabilities Plan (JSCP). This is one of the principal Joint Strategic Planning System (JSPS) documents prepared by the JCS for the purpose of translating national security policy (formulated by the National Security Counsel (NSC) into strategic guidance, direction, and objectives for operational planning by Unified and Specified commands.

The JSCP, Vol. I and II (Vol. II identifies the major combat forces assigned a CINC, for planning purposes, in the development of his OPLAN) triggers the Joint Operations Planning and Execution System (JOPES). JOPES applies to those OPLANS prepared by CINCs in response to the missions assigned them by the JCS in the JSCP, Vol. I.

JOPES provides the guidance and procedures for use in the development, coordination, dissemination, review, and approval of Unified CMD joint operations plans during peacetime. It also prescribes standard formats and the minimum content for OPLANS. The Deliberate Planning Process, that most often used in developing Unified Command OPLANs, involves 5 distinct phases: (1) Initiation, (2) Concept Development, (3) Plan Development, (4) Plan Review, and (5) Supporting Plans.

JAs should become involved in the Plan Development process and not merely in the Plan Review stage. Participation in the Plan Development process enables JAs to prevent the inclusion of legally questionable actions into the OPLAN. While the detailed JOPES Deliberate Planning Process may not be used in developing supporting OPLANs at the Corps/Division level, JAs should also be alert to the advantages of participating in the Plan Development, as well as the Plan Review process.[1]

Reviewing Plans and Mission Orders

Types of Plans and Mission Orders. Units plan for specific contingencies and missions. In an actual deployment, operations or contingency plans (OPLANS/CONPLANS) become operations orders (OPORD) which direct how to accomplish a particular mission. Divisions and higher-level units prepare OPLANs and CONPLANs days, months, or years prior to deployment. At brigade level and below, written and oral mission orders are often prepared and executed within hours. All plans and orders identify the SITUATION, the MISSION, how the mission will be executed (EXECUTION), how the mission will be supported (SERVICE SUPPORT), and how the mission will be controlled (COMMAND AND SIGNAL). Additional details appear in annexes, appendices, and tabs following the basic plan or order.

Responsibility for Plans and Order Review. Plans review is often accomplished by the Operational Law Attorney, who must periodically review all existing OPLANs and CONPLANs. Moreover, a number of divisions utilize brigade trial counsel to review plans and orders in their units. Regardless of who conducts the review, the responsibility for the review rests with the SJA. The plans review process must

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[1]The regulatory bases for judge advocate review of OPLANs is found at TAB A. Additionally, JOPS I provides, in the Plan Review phase of the Deliberate Planning Process, that services will conduct a legal review of plan compliance with both domestic and international law. (JOPS I, IV-5.)

be continuous, with the SJA's representative in constant coordination with the G-3 Plans element. Some units have assigned an Operational Law Attorney to work in the G-3 Plans shop for several days each week. The key point is that the JA must be a member of the "plans team," a "known commodity," not an interloper in the operations planning process.

Operational Law Concerns in Plans and Orders. Traditionally, JAs review plans and mission orders to determine if: (a) law of war issues have been addressed, (b) legally and practically sufficient rules of engagement have been defined, and (c) other necessary legal issues have been adequately discussed. Division-level and higher plans are usually general in scope and do not raise significant law of war questions other than EPW treatment. They do address other OPLAW issues, however, such as criminal jurisdiction and claims, in a Legal Annex. Mission orders below Division-level may raise law of war questions. A developing role of JAs is to serve as "the honest broker" in the review of plans and orders. Look at the ENTIRE PLAN -- both of your unit and of the higher unit. Pay particular attention to the Mission Statement and Commander's Intent. Is the statement and intent clear? Does it sufficiently define the parameters of the operation, while affording the requisite flexibility to the unit? Carefully review the parts of the plan which discuss Civil Affairs, Military Police, Intelligence (particularly low level sources), and Acquisition (procurement and funding) operations.

The OPLAN Review Checklist

As noted in the Preface of the OPLAN Checklist, the Checklist uses the JOPES format (the Checklist is at the end of this TAB). Though structured for the review of OPLANS at higher echelons, the Checklist offers an extensive list of issues to look for in plans and mission orders at all levels of command. JAs with more experience than time may prefer to use a shorthand approach to OPLAN/OPORD Review. The FAST-J method, which precedes the OPLAN Checklist, is a good generalized mechanism for OPLAN/OPORD review.

Developing the Legal Annex to an OPLAN

A detailed and easily understood Legal Annex (or Appendix) to an OPLAN/OPORD, complete with relevant references, is essential. Specific Legal Annexes or Appendices must be tailored to each operation, and developed on the basis of individual mission statements and force composition.

Personal Preparation for Deployment

Deploying JAs must ensure that their personal affairs are up-to-date and that they are prepared for overseas movement. Personal equipment, TA-50, hygiene materials, and clothing should be assembled upon assignment to the unit, and continually maintained in a state of readiness for deployment. Decide procedures early for drawing/securing weapons and protective masks. Inquire whether additional equipment or special clothing will be required, what additional documents (such as TOC passes and meal cards) may be needed, and how they will be obtained. Annual weapons qualification with assigned weapon, and military skills proficiency, must be taken seriously!

Preparation of the Legal Deployment Package

A deployment package includes tactical and office equipment, office supplies, and reference materials. This equipment should be packed and ready for deployment at all times. Store deployment materials in footlockers or other containers and keep them up to date to prevent delays during the deployment sequence. Check the contents and condition of the containers according to a schedule. Determine how the deployment package can be palletized. Have load plans for vehicles. Know how to prepare vehicles and equipment for air movement or shipment. In most units, the SJA deployment package is the responsibility of the Operational Law Attorney, but the Legal Administrator and the Chief Legal NCO must participate in the preparation and care of the deployment package. Specifically, NCOs should take charge of palletizing and preparing for -- and executing -- movement. Train on executing the office deployment plan. Take the deployment package to the field. Tailor the materials for your unit's AOR and likely missions. Consider packing a manual typewriter, extension cords, transformers, and toilet paper

in addition to traditional legal and office materials. A mission-specific review of essential materials must be done as early as possible once deployment is ordered. SOFAs, if applicable, Country Law and Area Studies, and publications of the unified command having responsibility for the country in which operations will occur should made a part of the deployment package.

Deployment SOPs

D ployable SJA offices must maintain an up-to-date deployment SOP. Corps and Division SOPs will necessarily vary as a result of differences in missions and force composition. To the extent possible, SOPs for SJA offices operating in the same theatre should be coordinated for the purpose of ensuring uniformity and consistency of approach toward the provision of legal services to combat commanders. Deployment SOPs must be exercised and refined periodically.

THE FAST-J METHOD

1. **FORCE**

When and what do we shoot?
Mission?
Commander's Intent?
ROE?

2. **AUTHORITY**

To conduct certain missions
- "Law enforcement"
- Training (FMS, FAA)
- HCA

To capture/detain locals

3. **STATUS**

Ours
- Law of the Flag (combat or vacuum [Somalia, e.g.])
- SOFA
- Other (Admin. & Tech. P. & I. through Diplomatic Note, e.g.)

Theirs
- Status
- Treatment
- Disposition

4. **THINGS**

Buying (Contracting)
Breaking (Claims)
Blowing Up (Targeting)

5. **JUSTICE**

Jurisdiction
Convening Authorities
Control Measures (General Order Number 1?)
TDS, MJ Support

CHECKLIST FOR COMPLIANCE WITH LAW OF WAR REQUIREMENTS OF OPERATION PLANS USING THE JOPES FORMAT[2]

This law of war (LOW) checklist is an instructional device to demonstrate the vast range of LOW and related issues that arise during the operational staff planning process. Some of the issues raised obviously will not concern staff officers at the small unit level, others are of universal import and require close attention at all levels, and some would be considered only by the National Command Authorities. The checklist was prepared by the Headquarters Marine Corps Law of War Reserve Augmentation Unit (TDE).

The checklist has been prepared to assist staff officers and commanders in the development and review of operation plans (Oplans) and concept plans (Conplans). Since these plans are an essential link between the Commander's decision and the initiation of military action, it is important that all plans ensure that US responsibilities under domestic and IL are properly discharged. DOD Directive 5100.77 requires the Chairman of the JCS and the commanders of unified and specified commands to ensure that ROE conform to the LOW. MJCS memo 0124-88, 4 Aug 88, requires periodic review of joint documents for consistency with the LOW. Paragraphs 4(c) and 5(b) (5) of Secretary of the Navy Instruction 3300.1A require review of all plans, orders, directives and ROE for conformity with the LOW. Periodic review of operation and concept plans to assure consistency with the LOW is required by para. 10(g) of Marine Corps Order 3300.3, by para. 4(b) (2) of Chief of Naval Operations Instruction 3300.52, and by paragraphs 3(i) and 9 of AF Reg 110-32.

The checklist assumes, without further emphasis, that all regular members of the force to be deployed (1) are equipped with the ID tags and cards required by the 1949 Geneva Conventions; and (2) have received the required accession level LOW training and the additional training required for commanders and those filling billets requiring specialized LOW training. It further assumes that all non-nuclear weapons to be employed by the force have been reviewed for compliance with the LOW in accordance with DOD Instruction 5500.15. The checklist does not cover normal military law or UCMJ questions except as they might interact with or be affected by the LOW. The Appendix has a list of the abbreviations used in the checklist with the full titles of the references spelled out. Also included in the Appendix are certain treaties and directives which, while not referred to in this checklist, have possible LOW application to the preparation and review of Oplans and Conplans. The latter documents are identified by an asterisk (*).

___ Is Art 2 or 3 applicable to the situation?
___ Have partners and opponents ratified Protocol 1 and II?

ANNEXES

ANNEX A - TASK ORGANIZATION

Appendix 1 - Time-phased force and deployment list (TPFDL).

Does the task organization include civilians or other non-military personnel accompanying the force in the field (arts. 3 and 13 of Hague IV, arts. 13 of GWS and GWS(Sea), and art. 4 of GPW)? If so:

___ Are they equipped with the proper identification provided for such individuals (see, e.g., art. 40 of GWS, art. 4(A) (4) and Annex IV(A) of GPW, and DOD Instruction 1000.1, "ID Cards Required by the Gen. Convention")?
___ Have they been instructed in their rights, duties and obligations under the LOW?

Does the task organization include personnel of the American Red Cross Society or other US voluntary aid societies assigned exclusively to medical and medical support duties (arts. 24 and 26 of GWS)?:

___ Are they subject to US military laws and regulations?
___ Has their intended assistance been notified to the enemy?
___ Have they been instructed in their rights, duties and obligations under the LOW?
___ Do they have ID cards required by art. 40 of GWS?

Does the task organization include personnel of a recognized national red cross society or other voluntary aid societies of a neutral country (art. 27 of GWS)? If so:

___ Are they present with US authorization and the previous consent of their own government?
___ Are they under official US control?
___ Has their intended assistance been notified to the enemy?
___ Have they been instructed in their rights, duties and obligations under the LOW?
___ Have they been furnished the ID cards required by art. 40 of GWS?

Are the medical and religious personnel of the force (art. 24 of GWS) equipped with the protective identification provided for such individuals (art. 40 and Annex II of GWS and art. 42 and the Annex to GWS(Sea))?

___ Are such personnel assigned exclusively to medical or religious duties or to the administration of medical or religious organizations?
___ Have they been trained in the special rights, duties and obligations of such personnel under the LOW?
___ Has a model of the protective ID card for such personnel been communicated to the enemy as required by art. 40 of GWS?
___ Are auxiliary medical personnel of the force (art. 25 of GWS) equipped with protective emblems (see art. 41 of GWS) and with military ID documents specified by that art.?

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[2]This Checklist also appears in Annex AS6-3 of the Annotated Supplement to the Commander's Handbook on the law of Naval Operations, NWP9 (Rev. A)/FMFM 1-10, 5 Oct 89.

Does the task organization include personnel of the American Red Cross Society whose duties are not exclusively medical or medical support? If so:

___ Are they aware of the restrictions on their use of the red cross emblem contained in art. 44 of GWS?

___ Are there any theater-specific LOW training requirements or ROE for the area?

ANNEX B - INTELLIGENCE

Appendix 1 - Essential Elements of Information

Should the plan call for:

___ collection of information about enemy's policies, attitudes and practices concerning compliance with LOW?

___ collection of information about allied policies, attitudes and practices concerning compliance with LOW?

___ collection of information about enemy and allied protective emblems and insignia?

___ locating enemy POW camps?

___ locating civilian and military hospitals or other medical installations?

___ locating civilian concentrations, including refugee camps?

___ locating civilian artistic, scientific or cultural institutions within the contemplated area of operations?

Appendix 2 - Signals Intelligence

___ Is plan consistent with the prohibition against the presence or use of cryptographic equipment aboard hospital ships supporting the US forces, as required by art. 34 of GWS(Sea)?

___ Are signals intelligence personnel aware of the prohibition on the enemy's use of cryptographic equipment and encrypted communications on hospital ships?

Appendix 3 - Counterintelligence

___ Is plan consistent with prohibition on assassination contained in art. 23(b) of Hague IV and para. 2.11 of Exec Order 12333? (NOTE: Lawful targets and combatants may be attacked whenever and wherever found.)

___ Does plan provide guidance on the processing of captured enemy agents and spies consistent with art. 29 of Hague IV and para. 75 to 78 of FM 27-10?

___ Does plan comply with IL concerning the arrest, detention or expulsion of HN or third country nationals (GC generally)?

Appendix 4 - Target List/Target Intelligence

___ Are any potential targets restricted or prohibited because of an erroneous interpretation of the requirements of the LOW? If so, they should be promptly identified to the issuing authority. (NOTE: Lawful targets and combatants may be attacked whenever and wherever found.)

___ Is target list consistent with IL governing attack of defended places only (paragraphs 39 and 40 of, and Chg I to, FM 27-10 and arts. 25 and 26 of Hague IV)?

___ If plan contemplates bombardment of a defended place containing civilians, does plan provide for the appropriate (i.e., either specific or general) warning (para. 43 of FM 27-10 and art. 26 of Hague IV)?

___ Is target list consistent with restrictions on intentional attack of buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, hospital zones, safety zones, and places where the sick and wounded are collected (paragraphs 45 and 57 of FM 27-10 and provisions of Hague IV, Hague IX, GC, GWS, GWS(Sea), the Roerich Pact and the Hague Cultural Property Convention)?

___ If plan contemplates the attack of any buildings or zones described in the preceding para. on the grounds that the buildings or zones are being used for military purposes, does plan require the prior authorization of a sufficiently responsible level of command?

___ Does the target list reference or identify appropriate protective symbols (art. 27 of Hague IV, art. V of Hague IX, arts. 23 and 38 and Annex I of GWS, arts. 36, 38 and 40-44 of GWS(Sea), art. 23 of GPW, arts. 14 and 83 and Annex I of GC, arts. I and III of the Roerich Pact, and arts. 6 and 16-17 of the Hague Cultural Property Convention)?

___ Does plan identify the requirement for warnings and the appropriate level of authorizing authority where protective emblems and areas are abused by the enemy (art. 26 of Hague IV, art. 21 of GWS, art. 34 of GWS(Sea), and art. 11 of the Hague Cultural Property Convention)?

___ Is plan consistent with the right of self-defense where protected emblems and areas are misused against our forces?

Appendix 5 - Mapping, Charting & Geodesy

Do maps and overlays of the contemplated area of operations of US forces identify targets which may be entitled to special protection?

___ Are hospital, safety and neutral zones, if any, identified? Are they visibly marked (art. 23 and Annex I of GWS and art. 14 and Annex I of GC)?

___ Are special agreement hospital ship safety zones identified?

___ Are friendly/neutral embassies, consulates and chanceries identified?

___ Are POW and civilian internee and refugee camps identified? Are they visibly marked (art. 23 of GPW and art. 83 of GC)?

___ Are hospitals, schools, and civilian facilities such as orphanages, retirement homes and the like identified?

___ Are facilities and sites such as nuclear plants, chemical plants and dams, damage to which might be dangerous to the populace, identified?

___ Are important cultural and artistic locations identified? Are they visibly marked in accordance with art. 27 of Hague IV, art. V of Hague IX, art. III of the Roerich Pact, or art. 6 of the Hague Cultural Property Convention?

Appendix 6 - Human Source Intelligence

___ Has the right of members of the force to POW status if captured been considered in determining whether modifications to or elimination of their uniforms, or other ruses, will be permitted (arts. 23, 24 and 29 of Hague IV and art. 4 of GPW)?

___ Does plan include instructions to insure proper treatment of POWs during interrogation? In particular:

___ Is plan consistent with the prohibitions against the killing, torture or mistreatment of POWs effective from the time of their surrender (paragraphs 28, 29, 84 and 85 of FM 27-10 and the provisions of GPW and Hague IV cited therein)?

___ Does plan recognize limitations on the interrogation of POWs including the requirement that they be interrogated in a language they understand (art. 17 of GPW)?

___ Does plan provide a procedure for inventorying and safeguarding POW personal property?

___ Does plan provide guidance on disposition of captured enemy armaments including limitations on the taking of souvenirs? (AR 608-4 of 28 Aug 1969, "Control and Registration of War Trophies and War Trophy Firearms." (Issued by all services as Chief of Naval Operations Instruction 3460.7A, AF Reg 125-13 and Marine Corps Order 5800.6A).)

Appendix 7 - Intelligence Estimate
Appendix 8 - Tactical Study of Weather and Terrain
Appendix 9 - Beach Study
Appendix 10 - Helicopter Landing Zone/Drop zone Study
Appendix 11 - Surveillance and Reconnaissance Plan

___ Has the right of members of the force to POW status if captured been considered in determining whether modifications to or elimination of their uniforms, or other ruses, will be permitted (arts. 23, 24 and 29 of Hague IV and art. 4 of GPW?

ANNEX C - OPERATIONS

Appendix I - Nuclear Operations
Tab A - Nuclear Options
Tab B - Nuclear Option Analysis
Tab C - Reconnaissance Operations to Support Nuclear Options

___ If nuclear weapons are to be deployed with US forces, will any deployment route be over or through foreign countries which prohibit or restrict such weapons?

Tab D - Nuclear Fire Support Table/Target Lists.
Tab E - Nuclear Target Overlay

Appendix 2 - Chemical Warfare and NBC Defense Operations

___ Does plan contemplate the use of riot control agents, defoliants, chemical agents or gases of any kind? If so, is the intended use consistent with the Geneva Gas Protocol and Exec Order 11850? (also paragraphs 37 and 38 and Change 1 to FM 27-10 and art. 23(a) of Hague IV).

___ If plan contemplates the use of any of the above, is the prior authorization of a sufficiently responsible level of command required (Exec Order 11850 and Annex F, Joint Strategic Capabilities Plan)?

___ Is the contemplated use consistent with the provisions of the UN Environmental Modification Convention?

Appendix 3 - Electronic Warfare Operations

Appendix 4 - Psychological Operations

___ Is plan consistent with the requirement that psyops efforts supporting US forces comply with IL?

___ Do such propaganda operations constitute permissible ruses of war as allowed by art. 24 of Hague IV?

___ Is there sufficient guidance to ensure psyops efforts do not violate restrictions on coercion, compulsion, and force towards civilians in arts. 23 (h), 44 and 45 of Hague IV and arts. 27, 31 and 51 of GC?

Appendix 5 - Unconventional Warfare Operations

___ Does plan contemplate clandestine operations designed to kill high ranking or key enemy officers or authorities? If so, are such plans compatible with the prohibition against assassination (para. 31 of FM 27-10, art. 23(b) of Hague IV and para. 2.11 of Exec Order 123331? (NOTE: Lawful targets and combatants may be attacked whenever and wherever found.)

___ Does plan require unconventional warfare personnel to conduct operations in uniform to the extent practicable in order to avoid denial of POW status if captured (art. 29 of Hague IV and art. 4 of GPW)?

Appendix 6 - Search and Rescue Operations
Is the plan consistent with:

___ the fact that search and rescue personnel and their transport do not enjoy special protection under the LOW (see, e.g., art. 27 of GWS(Sea))?

___ the requirement to take all possible measures to search for and collect shipwrecked, wounded and sick combatants, without delay following an engagement, IAW art. 15 of GWS and art. 18 of GWS(Sea)?

___ common art. 12 of GWS and GWS(Sea) requiring US forces to care for shipwrecked, wounded and sick combatants without adverse distinction other than medical priority?

___ the requirement that enemy wounded, sick and shipwrecked combatants who fall into the hands of US forces be accorded POW status in compliance with art. 14 of GWS, arts. 14 and 16 of GWS(Sea), and art. 4 of GPW?

___ the requirement that enemy wounded, sick and shipwrecked religious and medical personnel who fall into the hands of US forces be accorded retained person status in compliance with, arts. 24, 26 and 28 of GWS and art. 33 of GPW?

Appendix 7 - Deception

Is the plan consistent with:

___ prohibition against the use of treachery/perfidy to gain advantage over the enemy (art. 23 of Hague IV)?

___ prohibition against the improper use of a flag of truce, and misuse of the protective emblems of the GCs (art. 23(f) of Hague IV, art. 44 of GWS and art. 45 of GWS(Sea)I?

___ prohibition of art. 23(f) of Hague IV against improper use of the enemy's national flag, military insignia and uniform?

___ Are other ruses or deceptions consistent with the LOW (see, e.g., art. 24 of Hague IV)?

___ Does plan designate the appropriate level of command to determine whether medical installations, facilities and personnel will be protected by the protective emblem of the GCs or will rely upon camouflage and camouflage discipline (arts. 39 and 42 of GWS and art. 41 of GWS(Sea))?

Appendix 8 - ROE

___ Do any ROE restrict the operational freedom of action of the force because of an erroneous interpretation of the requirements of the LOW? If so, they should be promptly identified to the issuing authority.

___ Do any of the ROE erroneously make avoidance of collateral civilian casualties and/or damage to civilian objects a primary concern? Only intentional attack of civilians and employment of weapons and tactics which cause excessive collateral civilian casualties are prohibited. Any actions taken to avoid collateral civilian casualties and damage must be consistent with mission accomplishment and force security.

___ Do the ROE recognize the inherent right of self-defense of all persons?

___ Is plan consistent with restrictions on unnecessary killing and the devastation, destruction, or seizure of property (paras. 3, 34, 41, 47, 56, 58, and 59 and Chg 1 to FM 27-10; Arts 27 and 56 of Hague IV and GC Art. 53)?

___ If plan contemplates any military actions which could only be justified as reprisals, is it consistent with the requirement that reprisals may only be conducted with the approval of the National Command Authorities (para. 497 of FM 27-10 and the provisions of the GCs cited therein)?

Appendix 9 - Reconnaissance

___ Has the right of members of the force to POW status if captured been considered in determining whether modifications to or elimination of their uniforms, or other ruses, will be permitted (arts. 23, 24 and 29 of Hague IV and art. 4 of GPW)?

Appendix 10 - Operations Overlay

Appendix 11 - Concept of Operations

___ Does the concept of operations contain any limitations on the operational freedom of action of the force which are erroneously attributed to LOW requirements? If so, they should be promptly identified to the issuing authority.

___ Is plan consistent with the restrictions on unnecessary killing and the devastation, destruction, or seizure of property (paragraphs 3, 41, 47, 56, 58, and 59 of FM 27-10; arts. 27 and 56 of Hague IV; and art. 53 of GC)?

___ If reprisals are contemplated, they may only be conducted with the approval of the National Command Authorities (para. 497 of FM 27-10).

Appendix 12 - Fire Support

___ Are fire support plans consistent with IL governing the attack of defended places only (paragraphs 39 and 40 of FM 27-10 and arts. 25 and 26 of Hague IV)?

___ If a fire support plan contemplates the bombardment of a defended place containing a concentration of civilians, does plan provide for the giving of an appropriate (i.e., either specific or general) warning (para. 43 of FM 27-10 and art. 26 of Hague IV)?

___ Are the fire support plans consistent with the restrictions on intentional attack of buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, hospital zones, safety zones, and places where the sick and wounded are collected (paragraphs 45 and 57 of FM 27-10 and provisions of Hague IV, Hague IX, GC, GWS, GWS(Sea), the Roerich Pact and the Hague Cultural Property Convention)?

___ If the fire support plans contemplate the attack or bombardment of any buildings or zones of the type described in the preceding para. on the grounds that the buildings or zones are being used for military purposes, do they require the prior authorization of a sufficiently responsible level of command prior to such attack or bombardment?

___ Do the fire support plans reference or identify appropriate protective symbols (art 27 of Hague IV, art. V of Hague IX, arts. 23 and 38 and Annex I of GWS, arts. 36, 38 and 40- 44 of GWS(Sea), art. 23 of GPW, arts. 14 and 83 and Annex I of CC, arts. I and III of the Roerich Pact, and arts. 6 and 16-17 of the Hague Cultural Property Convention)?

___ Do the fire support plans identify the requirement for warnings and the appropriate level of authorizing authority where protective emblems and areas are abused (art. 26 of Hague IV, art. 21 of GWS, art. 34 of GWS(Sea), and art. 11 of the Hague Cultural Property Convention)?

___ Are the fire support plans consistent with the fundamental right of self-defense in situations where protective emblems and protected areas are misused against our forces?

___ Do maps and overlays of the AO identify targets entitled to special protection?

___ Are hospital, safety and neutral zones, if any, identified? Are they visibly marked (art. 23 and Annex I of GWS and art. 14 and Annex I of GC)?

___ Are special agreement hospital ship safety zones identified?

___ Are friendly/neutral embassies, consulates and chanceries identified?

___ Are POW and civilian internee and refugee camps identified?

___ Are they visibly marked (art. 23 of GPW and art. 83 of GC)?

___ Are hospitals, schools, & other civilian facilities (orphanages, retirement homes and the like) identified?

___ Are facilities and sites such as nuclear plants, chemical plants and dams, damage to which might be dangerous to the populace, identified?

___ Are important cultural/artistic locations identified? Are they visibly marked in accordance with art. 27 of Hague IV, art. V of Hague IX, art. III of the Roerich Pact, or art. 6 of the Hague Cultural Property Convention?

Tab A - Air Fire Plan
Enclosure 1 - Preplanned CloseAir Support
Enclosure 2 - Air Target List
Enclosure 3 - Air Fire Plan Target Overlay

Tab B - Artillery Fire Plan
Enclosure 1 - Target Overlay
Enclosure 2 - Fire Support Table (Preparation Fires)
Enclosure 3 - Fire Support Table (Groups of Fires)

Tab C - Naval Gunfire Plan
Enclosure 1 - Naval Gunfire Support Operations Overlay
Enclosure 2 - Schedule of Fires
Enclosure 3 - Naval Gunfire Reports
Enclosure 4 - Radar Beacon Plan

Tab D - Chemical Fire Plan
___ Does plan contemplate the use of riot control agents, defoliants, chemical agents or gases of any kind? If so, is the intended use consistent with the Geneva Gas Protocol and Exec Order 11850? (also paragraphs 37 and 38 of, and Chg I to, FM 27-10 and art. 23(a) of Hague IV).
___ If plan contemplates the use of any of the above, if the prior authorization of a sufficiently responsible level of command required (Exec Order 11850 and Annex F, Joint Strategic Capabilities Plan)?
___ Is the contemplated use consistent with the provisions of the UN Environmental Modification Convention?
(1) Enclosure 1 - Chemical Fire Support Table/Target List
(2) Enclosure 2 - Chemical Target Overlay

Tab E - Target List
Tab F - Fire Support Coordination Plan
Tab G - Fire Support Communication Plan
Tab H - Countermechanized Fire Plan

Appendix 13 - Countermechanized Plan
Tab A - Countermechanized Overlay

Appendix 14 - Counterattack Plan
Tab A - Operation Overlay
Tab B - Fire Support

Appendix 15 - Breaching Plan
Appendix 16 - Obstacle/Barrier Plan
___ Is the barrier plan consistent with the prohibition against indiscriminate and uncharted mining?

ANNEX D - LOGISTICS

___ Will plan support the logistics requirements for anticipated POWs, refugees and internees?
___ If plan contemplates an occupation can it be supported logistically with respect to the requirements of the civilian population (arts. 47-78 of GC)?

Appendix 1 - Petroleum, Oils, and Lubricants Supply
Appendix 2 - Mortuary Services
___ Does plan provide for the collection, care, and accounting for enemy dead in accordance with arts. 16 and 17 of GWS and arts. 19 and 20 of GWS(Sea)?
___ Is plan consistent with the limitations on cremation and the provisions regarding burial at sea of enemy dead (art. 17 of GWS and art. 20 of GWS(Sea))?

Appendix 3 - Medical Services
___ Is plan consistent with the limitations on capture or destruction of enemy medical material, stores and equipment imposed by art. 33 of GWS and art. 38 of GWS(Sea)?
___ Is plan consistent with the qualified requirement of arts. 23 and 56 of GC for the free passage of medical and hospital stores intended only for civilians of the opponent?
___ If plan contemplates an occupation does it provide for medical supplies for the occupied population to the fullest extent of the means available (as required by art. 55 of GC)?
___ Is plan consistent with the limitations on requisition of medical materials and stores of an occupied population contained in art. 57 of GC?
___ Does plan provide, subject to the Commander's discretion, for the marking with the red cross of all US medical vehicles, facilities and stores in accordance with arts. 39 and 42 of GWS and art. 41 of GWS(Sea), and for their use exclusively for medical purposes if so marked?

Appendix 4 - Mobility/Transportation
___ Is medical transport marked, at the discretion of the Commander, with the protective emblem provided for by art. 39 of

GWS and art. 41 of GWS(Sea), and is their intended use restricted exclusively to medical purposes if so marked?
___ Will plan support the possible requirement for evacuation of POWs, civilian internees, refugees, and the sick and wounded?
___ Have the names and descriptions of all hospital ships been notified to the parties to the conflict at least ten days before their employment, as required by arts. 22, 24 and 25 of GWS(Sea)?
___ Have all converted hospital ships been stripped of inappropriate armament and cryptographic equipment?
___ Are all hospital ships, rescue craft and lifeboats marked IAW the requirements of art. 43 of GWS(Sea)?
___ If hospital ships of the American Red Cross Society, other recognized US relief societies or private US citizens are employed, have they been given an official commission as required by art. 24 of GWS(Sea)?
___ If hospital ships of a national red cross society, other officially recognized relief societies, or private citizens of neutral countries are employed, have they placed themselves under the control of one of the' parties to the conflict as required by art. 25 of GWS(Sea)?
___ Are crews and medical personnel of hospital ships aware of their rights, duties and obligations under arts. 29, 32 and 34-37 of GWS(Sea)?
___ If any aircraft are to be exclusively employed for medical and medical support purposes are they marked in accordance with the provisions of art. 36 of GWS and art. 39 of GWS(Sea)?

Appendix 5 - Civil Engineering Support Plan
___ Does plan provide, as far as possible, for the locating of medical establishments and units in such a manner as not to imperil their safety, in accordance with art. 19 of GWS?
___ Does plan provide for the locating of POW camps in such a manner as not to expose them to the hazards of combat, IAW art. 23 of GPW?
___ Is plan consistent with the possible requirement for construction of POW, internee, and civilian refugee camps?

Appendix 6 - Nonnuclear Ammunition
___ Does plan provide guidance on disposition of captured enemy armaments including limitations on the taking of souvenirs? (AR 608-4 of 28 Aug 1969, "Control and Registration of War Trophies and War Trophy Firearms." (Issued by all services as Chief of Naval Operations Instruction 3460.7A, AF Reg 125-13 and Marine Corps Order 5800.6A).

ANNEX E - PERSONNEL

___ Are all members of the force subject to the UCMJ for LOW purposes?
___ Is there a POC designated to deal with the ICRC?
___ Is a POC designated to collect evidence on war crimes?

Appendix 1 - Enemy POWs, Civilian Internees, and Other Detained and Retained Persons
___ Does the plan designate responsibility to establish PW compounds and arrange for PW visits (by ICRC)?
___ Is plan consistent with the provisions of FM 19-40, Enemy Prisoners of War, Civilian Internees and Detained Persons?
___ Does plan include procedures for ascertaining whether various persons who fall into the hands of US forces are entitled to treatment as POWs or retained personnel, or to be released (arts. 4 and 5 of GPW, arts. 24-32 of GWS, and arts. 36- 37 of GWS (Sea))?
___ Is plan consistent with the requirement that where there is any doubt as to the status of a person who has committed a belligerent act and is in the hands' of US forces such person shall be treated as a POW until such time as his status is determined by a competent tribunal (art. 5 of GPW)?
___ Does plan provide procedures for art. 5 (GPW) tribunals?
___ Does plan include appropriate instructions to insure proper treatment of POWs at the point of capture and during interrogation? In particular:
___ Is plan consistent with the prohibitions against the killing, torture or mistreatment of POWs effective from the time of their surrender (paras. 28, 29, 84 and 85 of FM 27-10 and the provisions of GPW and Hague IV cited therein)?
___ Does plan recognize the limitations on the interrogation of POWs, including the requirement that they be interrogated in a language they understand (art. 17 of GPW)?
___ Does plan provide a procedure for inventory and safeguarding POW personal property?
___ Are procedures for the evacuation of POWs consistent with arts. 19 and 20 of GPW?
___ Does plan provide for furnishing ID's to POWs who possess none, consistent with art. 18 of GPW?
___ If plan contemplates transfer of POWs to the custody of allied forces, is it consistent with the requirements of art. 12 of GPW and DOD Directive 5100.69, "DOD Program for Prisonerr of War and Other Detainees"?
___ Does plan assign responsibility to an appropriate component command (usually Army) for the care and handling of POWs? In particular:
___ Internment (arts. 21-24 of GPW);
___ Quarters, food and clothing (arts. 25-28 of GPW);
___ Hygiene and medical care (arts. 29-32 and 112-114 of GPW)
___ Religious, educational and recreational activities (see arts. 34-38 of GPW);
___ Labor and compensation (arts. 49-57 of GPW);
___ Information bureaus, mail service and other communications with the exterior (arts. 69-77 of GPW);
___ Prisoner relations (arts. 79-81 of GPW);
___ Discip. and penal sanctions (arts. 82-108 and 115 of GPW);
___ Release and repatriation (arts. 109-110 and 112-119 of GPW);
___ Care of enemy wounded and sick and graves registration (arts. 109-110, 112-114 and 120-121 of GPW).
___ Is plan consistent with the requirements of arts. 79-135 concerning the treatment of civilian internees?

Appendix 2 - Processing of Formerly Captured, Missing or Detained US Personnel

___ Does plan include appropriate procedures for reporting alleged war crimes and related misconduct committed by the enemy, and alleged misconduct by US and allied POWs, and assign responsibility for the collection and preservation of evidence of all such matters (see, e.g., common art., 49/50/129/146 of the GCs)?

ANNEX F - PUBLIC AFFAIRS

___ Is plan consistent with the serious incident reporting requirements of higher headquarters as they pertain to alleged war crimes and related misconduct (the various directives in the Appendix)?

Appendix 1 - Personnel Requirements
Appendix 2 - Equipment Requirements

ANNEX G - CIVIL AFFAIRS

___ Is plan consistent with the guidance contained in FM 41-5 and FM 41-10?

Appendix 1 - Public Safety

___ Does plan provide guidance on requests for asylum and temporary refuge in accordance with DOD Directive 2000.11, "Procedures for Handling Requests for Political Asylum and Temporary Refuge"?
___ If plan contemplates the internment of civilians, does it provide guidance on the establishment and operation of internee camps in accordance with the requirements of arts. 79-135 of GC until such time that the camps can be turned over to other agencies?
___ If plan contemplates occupation of foreign or enemy territory by US forces, does plan provide that civil affairs operations conform to IL relating to occupations as set forth in arts. 42- 56 of Hague IV and arts. 47-78 of GC?
___ ___ Is plan consistent with the obligation of an occupier to restore and preserve public order and safety while respecting, in accordance with art. 43 of Hague IV, the laws in force in that country?
___ ___ If plan includes draft proclamations, laws, or ordinances for use in the occupied territory, do those documents conform to requirements of IL as set forth in arts. 42-56 of Hague IV and arts. 64-78 of the GC?
___ Is plan consistent with IL to avoid the unnecessary destruction of public utilities and safety facilities?
___ Does plan comply with IL regarding methods of property control and does it recognize the limitations on the requisitioning, seizure and use of civilian property (see, e.g., arts. 43 and 47-56 of Hague IV and arts. 33, 53, 97 and 108 of GC)?
___ Is plan consistent with IL in affording maximum protection to shrines, buildings, symbols, etc., associated with the religion and culture of the civilian populace?
___ If plan contemplates the utilization of the services and labor of the civilian population, are the procedures consistent with the requirements of Hague IV and GC in addition to US policy as set forth in DAPam 690-80, Administration of Foreign Labor During Hostilities? Are they consistent with existing alliance agreements and SOFAs?
___ Does plan allow procedures for civilians to send and receive news of a strictly personal nature to members of their families in accordance with arts. 25 and 26 of GC?
___ Is plan consistent with the prohibition against the improper transfer, deportation or evacuation of civilians in occupied territory contained in art. 49 of GC?

Appendix 2 - Public Health and Welfare

___ Does plan ensure that all aspects of the civil affairs program conform to the requirements of IL, and in particular to GC, with a view to giving maximum attention to alleviating the human suffering of the civilian population?
___ Does plan ensure refugee collection points and routes of evacuation are consistent with scheme of maneuver and as remote as practicable from areas where combat can be expected?
___ Does plan allow, where tactically appropriate, for the evacuation from besieged areas of wounded, sick, infirm, young and aged civilians as set forth in art. 17 of GC?
___ Is plan consistent with the special obligation imposed by art. 16 and other provisions of GC to give particular protection and respect to civilian wounded and sick, aged and infirm, and expectant mothers?
___ Does plan provide that displaced persons, refugees and evacuees be treated in accordance with the requirements of IL?
___ Does plan comply with the protection required for civilian hospitals and staff set forth in arts. 18-20 and 57 of GC?
___ Does plan provide for or reference draft agreements for the establishment of safety or neutral zones for civilians as permitted in art. 15 of GC?

Appendix 3 - Information and Education

___ If plan includes draft proclamations, laws, or ordinances for use in the occupied territory, do those documents conform to the requirements of IL as set forth in arts. 42-56 of Hague IV and arts. 64-78 of the GC?

ANNEX H - ENVIRONMENTAL SERVICES

___ Are the provisions of plan for disposition of enemy dead consistent with both the LOW (art. 17 of GWS and art. 20 of GWS(Sea)) and environmental restrictions?
___ Are the provisions of plan for disposition of captured munitions, fuels, and other toxic and dangerous substances consistent with environmental restrictions such as the UN Environmental Modification Convention?

ANNEX J - COMMAND RELATIONSHIPS

___ Are the command relationships consistent with the concept and obligation of command responsibility under the LOW?
Appendix 1 - Command Relations Diagram

ANNEX K - COMMUNICATIONS AND ELECTRONICS

Appendix 1 - Communications Security

___ No cryptographic methods and equipment on hospital ships (art. 34 of GWS(Sea)).

___ Does plan provide for medical aircraft to have the communications capability to respond to "every [enemy] summons to alight" during mutually agreed medevac missions as required by art. 36 of GWS and art. 39 of GWS(Sea)?

___ Does plan provide for the communications capability to communicate with the enemy in furtherance of the various notification, truce and local agreement provisions of the GCs and Hague IV?

Appendix 2 - Radio Circuit Plan
Appendix 3 - Call Signs and Routing Indicators
Appendix 4 - Wire and Multichannel Radio Plan
Appendix 5 - Visual and Sound Communication
Appendix 6 - System Management and Control
Appendix 7 - Command Post Displacement
Appendix 8 - Tactical Satellite Communications
Appendix 9 - Contingency Communications

___ Does plan allow for communications with the enemy for truce and local agreement purposes?

___ If plan contemplates local agreements with the enemy for medical aircraft operations and overflights, do medical aircraft have the communications capability to respond to "every [enemy] summons to alight" required by art. 36 of GWS and art. 39 of GWS(Sea)?

Appendix 10 - Commercial Telecommunications
Appendix 11 - Special Maintenance Procedures
Appendix 12 - Messenger Service

ANNEX L - OPERATIONS SECURITY

Appendix 1 - Essential Elements of Friendly Information

___ Should plan call for the collection of information about allied policies, attitudes and practices concerning compliance with the LOW?

___ Should plan call for the collection of information about enemy and allied protective emblems and insignia?

ANNEX M - AIR OPERATIONS

Appendix 1 - Air Defense/Antiair Warfare

___ Is the air defense appendix consistent with the permissible attack of descending enemy paratroopers and the impermissible attack of aircrews abandoning disabled enemy aircraft?

Appendix 2 - Air Support
Appendix 3 - Assault Support
Appendix 4 - Air Control

Appendix 5 - Search and Rescue

___ Is plan consistent with the fact that search and rescue personnel and their transport do not enjoy special protection under the LOW (see, e.g., art. 27 of GWS(Sea))?

___ Is plan consistent with the requirement to take all possible measures to search for and collect shipwrecked, wounded and sick combatants, without delay following an engagement, in accordance with art. 15 of GWS and art. 18 of GWS(Sea)?

___ Is plan consistent with common art. 12 of GWS and GWS (Sea) requiring US forces to care for shipwrecked, wounded and sick combatants without adverse distinction other than medical priority?

___ Is plan consistent with the requirement that enemy wounded, sick and shipwrecked combatants who fall into the hands of US forces be accorded POW status in compliance with art. 14 of GWS, arts. 14 and 16 of GWS(Sea), and art. 4 of GPW?

___ Is plan consistent with the requirement that enemy wounded, sick and shipwrecked religious and medical personnel who fall into the hands of US forces be accorded retained person status in compliance with arts. 24, 26 and 28 of GWS and art. 33 of GPW?

Appendix 6 - Armament
Appendix 7 - Aircraft Schedules
Appendix 8 - Air Communications

___ If plan contemplates local agreements with the enemy for medical aircraft operations and overflights, do medical aircraft have the communications capability to respond to "every [enemy] summons to alight" required by art. 36 of GWS and art. 39 of GWS(Sea)?

Appendix 9 - Air Operations Overlay

ANNEX P - COMBAT SERVICE SUPPORT

Appendix 1 - Concept of Combat Service Support
Appendix 2 - CSS Overlay
Appendix 3 - CSS Installations Defense
Appendix 4 - Reports

Appendix 5 - Bulk Fuel

Appendix 6 - Medical/Dental

___ Are medical personnel of the force (art. 24 of GWS) equipped with the protective emblems provided for by art. 38 of GWS and art. 41 of GWS(Sea), and with the special identification cards referenced in those conventions?
___ Are such personnel assigned exclusively to medical duties or to the administration of medical organizations (art. 24 of GWS)?
___ Have such personnel been trained in their special rights, duties and obligations under the LOW?
___ Are auxiliary medical personnel (art. 25 of GWS) equipped with protective emblems provided for by art. 41 of GWS and with military ID documents specified by that art.?
___ Does plan reference or identify appropriate protective symbols (art. 38 of GWS and art. 41 of GWS(Sea)?
___ Does plan provide for a command determination as to whether medical personnel and facilities will display the protective emblem or will rely upon camouflage and camouflage discipline?
___ Does plan provide, subject to the Commander's discretion, for the marking with the red cross of all US medical vehicles, facilities and stores in accordance with arts. 39 and 42 of GWS and art. 41 of GWS(Sea), and for their use exclusively for medical purposes if so marked?
___ Does plan provide, as far as possible, for the locating of medical establishments and units in such a manner as not to imperil their safety, in accordance with art. 19 of GWS?
___ Have the names and descriptions of all hospital ships been notified to the parties to the conflict at least ten days before their employment as required by arts. 22, 24 and 25 of GWS(Sea)?
___ Is plan consistent with the prohibition against cryptographic methods and equipment on hospital ships (art. 34 of GWS(Sea))?
___ Have all vessels converted to hospital ships been stripped of inappropriate armament and cryptographic equipment?
___ Are all hospital ships, rescue craft and lifeboats marked IAW the requirements of art. 43 of GWS(Sea)?
___ If hospital ships of the American Red Cross Society, other recognized US relief societies or private US citizens are employed, have they been given an official commission as required by art. 24 of GWS(Sea)?
___ If hospital ships of a national red cross society, other officially recognized relief societies, or private citizens of neutral countries are employed, have they placed themselves under the control of one of the parties to the conflict as required by art. 25 of GWS(Sea)?
___ Are crews and medical personnel of hospital ships aware of their rights, duties and obligations under arts. 29, 32 and 34-37 of GWS(Sea)?
___ If any aircraft are to be exclusively employed for medical and medical support purposes are they marked in accordance with the provisions of art. 36 of GWS and art. 39 of GWS(Sea)?
___ Is plan consistent with the fact that search and rescue personnel and their transport do not enjoy special protection under the LOW (see, e.g., art. 27 of GWS(Sea))?
___ Does plan contemplate local agreements with the enemy for medical aircraft operations and overflights (art. 36 of GWS and art. 39 of GWS(Sea)?
___ If so, do medical aircraft have the communications capability to respond to "every [enemy] summons to alight" required by art. 36 of GWS and art. 39 of GWS(Sea)?
___ Is plan consistent with the requirement to take all possible measures to search for and collect shipwrecked, wounded and sick combatants, without delay following an engagement, in accordance with art. 15 of GWS and art. 18 of GWS(Sea)?
___ Is plan consistent with common art. 12 of GWS and GWS(Sea) requiring US forces to care for shipwrecked, wounded and sick combatants without adverse distinction other than medical priority?
___ Is plan consistent with the requirement that enemy wounded, sick and shipwrecked combatants who fall into the hands of US forces be accorded POW status in compliance with art. 14 of GWS and arts. 14 and 16 of GWS(Sea)?
___ Is plan consistent with the requirement that enemy wounded, sick and shipwrecked religious and medical personnel who fall into the hands of US forces be accorded retained person status in compliance with arts. 24, 26 and 28 of GWS?
___ Does plan provide for the care of enemy wounded and sick and graves registration (arts. 109-110, 112-114 and 120-121, GPW).
___ Is plan consistent with the limitations on capture or destruction of enemy medical material, stores and equipment imposed by art. 33 of GWS and art. 38 of GWS(Sea)?
___ Is plan consistent with the special obligation imposed by art. 16 of GC to give particular protection and respect to civilian wounded and sick, aged and infirm, and expectant mothers?
___ Is plan consistent with the qualified requirement of arts. 23 and 56 of GC for the free passage of medical and hospital stores intended only for civilians of the opponent?
___ If plan contemplates an occupation does it provide for medical supplies for the occupied population to the fullest extent of the means available (as required by art. 55 of GC)?
___ Does plan recognize the limitations on requisition of medical material and stores of an occupied population?
___ Are the provisions of plan for disposition of enemy dead consistent with both the LOW (art. 17 of GWS and art. 20 of GWS(Sea)) and environmental restrictions?

Appendix 7 - Plan for Landing Supplies
Appendix 8 - ADPS Support
Appendix 9 - Personnel

___ Are personnel provisions consistent with the requirements of DAPam 690-80, Administration of Foreign Labor During Hostilities (1971) (NAVSO P-1910; AFM 40-8; MCO P12190.1) and with any relevant alliance and SOFAs?

Appendix 10 - Support Agreements

___ Are support agreements consistent with the provisions of DAPam 690-80, Administration of Foreign Labor During Hostilities (1971) (NAVSO P-1910; AFM 40-8; MCO P12190.1) and with any relevant alliance and SOFAs?

Appendix 11 - Force Landing Support Party

ANNEX Q - LEGAL

Appendix 1 - Personnel Legal Assistance
Appendix 2 - Military Justice

___ Are all members of the force subject to the UCMJ for LOW purposes?
___ Are units properly attached for jurisdiction?

Appendix 3 - Claims
Appendix 4 - International Law Considerations

___ Have the various elements of plan been reviewed for LOW considerations by the appropriate staff sections and members of the executive and special staffs?
___ Does the concept of operations contain any limitations on the operational freedom of action of the force which are erroneously attributed to LOW requirements? If so, they should be promptly identified to the issuing authority.
___ Do any of the ROE restrict the operational freedom of action of the force because of an erroneous interpretation of the requirements of the LOW? If so, they should be promptly identified to the issuing authority.
___ Do any of the ROE erroneously make avoidance of collateral civilian casualties and/or damage to civilian objects a primary concern? Only intentional attack of civilians and employment of weapons and tactics which cause excessive collateral civilian casualties are prohibited. Any actions taken to avoid collateral civilian casualties and damage must be consistent with mission accomplishment and force security.
___ Do ROE recognize the inherent right of self-defense of all persons?
___ Have the requirements for any special LOW training, planning and equipment been met? In particular:
___ Are civilians or other nonmilitary personnel accompanying the force equipped with the proper identification provided for such individuals (see, e.g., art. 40 of GWS, art. 4(A) (4) and Annex IV(A) of GPW, and DOD Instruction 1000 .1, "ID Cards Required by the Geneva Conventions"), and have they been instructed in their LOW rights, duties and obligations?
___ Does the force include personnel of the American Red Cross Society or other US voluntary aid societies assigned exclusively to medical and medical support duties (arts. 24 and 26 of GWS)? If so:
Are they subject to US military laws and regulations?
Has their intended assistance been notified to the enemy?
Have they been instructed in their LOW rights/duties/obligations?
Have they been furnished the ID cards required by art. 40 of GWS?
___ Does the force include personnel of a recognized national red cross society or other voluntary aid societies of a neutral country (art. 27 of GWS)? If so:
Are they present with US authorization and the previous consent of their own government?
Are they under official US control?
Has their intended assistance been notified to the enemy?
Have they been instructed in their LOW rights/duties/obligations?
Have they been furnished the ID cards required by art. 40 of GWS?

___ Does the force include personnel of the American Red Cross Society whose duties are not exclusively medical? If so, are they aware of the restrictions on their use of the red cross emblem contained in art. 44 of GWS?
___ Are the medical and religious personnel of the force equipped with the protective identification provided for such individuals (art. 40 and Annex II of GWS and art. 42 and the Annex to GWS(Sea)), and have they been trained in their special rights, duties and obligations under the LOW?
___ Has a model of the protective ID card for such personnel been communicated to the enemy as required by art. 40 of GWS?
___ Are there any theater-specific LOW training requirements or ROE for the area into which the force is to be deployed?
Should the plan call for:
___ the collection of information about the enemy's policies, attitudes and practices concerning compliance with the LOW?
___ the collection of information about allied policies, attitudes and practices concerning compliance with the LOW?
___ the collection of information about enemy and allied protective emblems and insignia?
___ Does plan include procedures for ascertaining whether various persons who fall into the hands of US forces are entitled to treatment as POWs or retained personnel, or to be released bee arts. 4 and 5 of GPW, arts. 24-32 of GWS, and arts. 36- 37 of GWS (Sea))?
___ Is plan consistent with the requirement that where there is any doubt as to the status of a person who has committed a belligerent act and is in the hands of US forces such person shall be treated as a POW until such time as his status is determined by a competent tribunal (art. 5 of GPW)?
___ Does plan provide procedures for setting up and operating an art. 5 (GPW) tribunal?
___ Does plan include appropriate procedures for reporting alleged war crimes and related misconduct committed by the enemy, and alleged misconduct by US and allied POWs, and assign responsibility for the collection and preservation of evidence of all such matters (see, e.g., common art. 49/50/129/146 of the GCs)?
___ Is plan consistent with the serious incident reporting requirements of higher headquarters as they pertain to alleged war crimes and related misconduct?
___ If plan contemplates an occupation, is it consistent with the obligation of an occupier to restore and preserve public order and safety while respecting, in accordance with art. 43 of Hague IV, the laws in force in that country?
___ If plan includes draft proclamations, laws, or ordinances for use in an occupied territory, do those documents conform to the requirements of IL as set forth in arts. 42-56 of Hague IV and arts. 64-78 of the GC?

Appendix 5 - International Agreements and Congressional Enactments

If plan contemplates deployment of US forces into a foreign territory, the following questions should be answered:

___ Will deployment of US forces into the foreign territory be at the request of or with the consent of the lawfully constituted government? Consider arts. 2 and 51 of the UN Charter, and relevant provisions of any regional defense treaties, SOFAs, or other agreements applicable to the foreign territory involved.

___ Will deployment of US forces into the foreign territory be part of a peacekeeping mission undertaken pursuant to the UN Charter or other international agreements, including regional treaties? Consider arts. 11, 12, 14, 24, 39-49, and 52-54 of the UN Charter, and arts. 24, 25, and 43 of the OAS Charter.

___ Is deployment of US forces into the foreign territory an act of individual or collective self-defense against an armed attack, either direct or indirect?

Consider arts. 51 and 103 of the UN Charter, and any collective defense arrangements involving the foreign territory and the US Also, consider any Congressional enactment which may be applicable.

___ Is deployment of US forces into the foreign territory to protect or extract US or foreign nationals? Consider the traditional theories of justifiable intervention developed under the customary and codified IL.

___ Is deployment of US forces into the foreign territory to protect or extract sensitive US material or equipment such as nuclear ordnance or cryptographic material or to protect US (as opposed to private installations such as embassies, consulates or military sites)?

Consider the analogy to traditional theories of justifiable intervention under customary and codified IL to protect US nationals and property.

If plan contemplates the deployment of US forces into foreign territory, consider whether the War Powers Resolution is applicable.

___ Does the deployment situation clearly indicate imminent US involvement in hostilities?

___ Will the deployed forces be equipped for combat?

___ Will the deployed forces substantially enlarge US forces already located in the foreign territory?

If plan specifies certain methods and routes of deployment, the following questions should be answered:

___ Does plan contemplate deployment routes which traverse the airspace, territory or territorial seas of any foreign country or the establishment of staging areas or bases within the foreign territory?

___ Does an agreement exist with the foreign country which grants the US such rights? If so, does plan make reference to the agreement and is it consistent with the terms of the agreement? If such an agreement exists, does it require consultation with and the consent of the foreign country prior to exercising those rights?

If consultation and consent are required, does plan recognize the necessity of securing such consultation or consent through Defense or State Department channels prior to deployment?

If no such agreement exists, does plan recognize the necessity of securing such rights through Defense or State Department channels prior to deployment?

___ Are planned deployment routes, staging areas, en route bases, safe havens, etc., set forth in plan consistent with applicable international agreements?

If nuclear weapons are to be deployed with US forces, will any deployment route be over or through foreign countries which prohibit or restrict such weapons?

Will any staging or en route bases be established in areas recognized as demilitarized zones?

If plan contemplates deployment by sea route through territorial waters, will such passage conform to the requirements of innocent passage as set forth in arts. 1-17 and 23 of the Territorial Sea Convention?

___ Is the foreign state a party to the Territorial Sea Convention?

___ Do we have SOFAs with the countries US forces will pass through or be deployed into? If so:

Do the agreements allow US forces sufficient rights and freedom of action to carry out the mission contemplated by plan?

Do the agreements have any provisions changing the status of US personnel in the event of hostilities?

Do the agreements have any provisions which are either automatically suspended or become subject to review in the event of hostilities?

___ If we have no SOFA with a country through which US forces will pass or be deployed into, or if an existing agreement is inadequate for planned mission:

Does plan recognize need to initiate through Defense or State Dept channels discussions with foreign authorities regarding appropriate arrangements governing the status of US forces?

___ Does plan assign responsibility to an appropriate command or staff office for maintaining liaison with the US diplomatic mission and local authorities on status of forces matters?

ANNEX R - AMPHIBIOUS OPERATIONS

Appendix 1 - Advance Force Operations

___ If plan contemplates deployment by sea route through territorial waters, will such passage conform to the requirements of innocent passage as set forth in arts. 1-17 and 23 of the Territorial Sea Convention?

___ Are planned deployment routes, staging areas, en route bases, safe havens, etc., set forth in plan consistent with applicable international agreements?

Appendix 2 - Embarkation Plan
Appendix 3 - Landing Plan
Appendix 4 - Rehearsal Plan
Appendix 5 - CSS Control Agencies Plan
Appendix 6 - Withdrawal Plan

ANNEX X - EXECUTION CHECKLIST
ANNEX Z - DISTRIBUTION

APPENDIX OF CHECKLIST REFERENCES AND ABBREVIATIONS

This Appendix is a list of the reference abbreviations used in the checklist with the titles of the references spelled out. Complete citations to the source(s) of these references can be found in standard IL sources, as well as various service publications. Also included in the Appendix for convenience are certain treaties and directives which, while not referred to in this checklist, have possible LOW application to the preparation and review of Oplans and Conplans. The latter documents are identified by an (*).

TREATIES

*St. Petersburg Declaration: St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight of 11 Dec 1868.
*Hague Declaration No. 3: Hague Declaration No. 3 Concerning Expanding Bullets of 29 July 1899.
*Hague III of 1907: Hague Convention No. III Relative to the Opening of Hostilities of 18 Oct 1907.
Hague IV: Hague Convention No. IV Respecting the Laws and Customs of War on Land of 18 Oct 1907, with Annexed Regs.
*Hague V: HC No. V Respecting the Rights & Duties of Neutral Powers & Persons in Case of War on Land of 18 Oct 1907.
Hague IX: Hague Convention No. IX Concerning Bombardment by Naval Forces in Time of War of 18 Oct 1907.
Geneva Gas Protocol: Geneva Protocol for the Prohibition of the Use in War of Asphyxiating Poisonous or Other Gases and of Bacteriological Methods of Warfare of 17 June 1925.
*Kellogg-Briand Pact: Paris Treaty Providing for the Renunciation of War as an Instrument of National Policy of 27 Aug 1929.
Roerich Pact: Washington Inter-American Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments of 15 Apr 1935.
UN Charter: United Nations Charter of 26 June 1945.
*London Agreement: London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis of 8 Aug 1945.
*Tokyo Charter: Tokyo Special Proclamation by the Supreme Commander for the Allied Powers Establishing an International Military Tribunal for the Far East of 19 Jan 1946, with Annexed Charter as Amended on 26 Apr 1946.
OAS Charter: Bogota Charter of the Organization of American States of 30 Apr 1948, with Protocol of Amendment of 27 Feb 1967.
Geneva Conventions: Collectively, the four 1949 Geneva Conventions.
GWS: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 Aug 1949.
GWS(Sea): Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 Aug 1949.
GPW: Geneva Convention Relative to the Treatment of Prisoners of War of 12 Aug 1949.
GC: Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 Aug 1949.
Hague Cultural Property Convention: Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, with Annexed Regs. (NOTE: The US is not a party but most of our NATO allies are.)
Genocide Convention: UN Convention on the Prevention and Punishment of the Crime of Genocide of 11 Dec 1948.
Territorial Sea Convention: Geneva Convention on the Territorial Sea and Contiguous Zone of 29 Apr 1958.
*Bacteriological Convention: Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological and Toxin Weapons and on Their Destruction of 10 Apr 1972.
UN Environmental Modification Convention: UN Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 18 May 1977.
*Protocol I: Geneva Protocol I Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of International Armed Conflicts of 12 Dec 1977. (NOTE: The US has signed but not ratified the 1977 Protocols.)
*Protocol II: Geneva Protocol II Additional to the Geneva Conventions of 1949 and Relating to the Protection of victims of Non-International Armed Conflicts of 12 Dec 1977. (NOTE: The US has signed but not ratified the 1977 Protocols.)
*UN Conventional Weapons Convention: UN Convention on Prohibitions or Restrictions on Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects of 10 Oct 1980, with Protocols I, II and III. (NOTE: The US has signed but not ratified the Conventional Weapons Convention)

STATUTES

*Displaced Persons Act of 1948, as amended by the Act of 1950, 62 Stat. 1009, 64 Stat. 219.
*Interned Belligerent Nationals Act of 25 June 1948, 62 Stat. 818, 18 USC sec. 3058.
*Red Cross Act of 24 May 1949, 63 Stat. 92, 18 USC sec. 906 (making criminal the unauthorized use of the Red Cross insignia).
UCMJ of 5 May 1950, as amended by the Act of 10 Aug 1956, the Military Justice Act of 1968, the Military Justice Amendments of 1981 and the Military Justice Act of 1983, 64 Stat. 108, 82 Stat. 1335, 95 Stat. 1085, 98 Stat.1393; 10 0.S.C. sec. 801 et seq.
Joint War Powers Resolution of 7 Nov 1973, P.L. 93-148, 87 Stat. 555-58 (1973); 50 USC sec. 1541.
*Foreign Sovereign Immunities Act of 21 Oct 1976, P.L. 94-583, 90 Stat. 2892; 28 USC secs. 1330, 1602-1611.
*Diplomatic Relations Act of 1978, 22 USC sec 254a, et seq.
*Nuclear Non-Proliferation Act of 1978, P.I. 95-242, 92 Stat. 120, 130, 134, 137-139, 144, 145, 42 USC secs. 2153(d), 2155(b), 2157(b), 2158, 2160(f) (1976 ed., and Supp. V).
*Foreign Intelligence Surveillance Act of 25 Oct 1978, P.L. 95-511, 92 Stat. 1783; 50 USC sec. 1801 et seq.
*International Security and Development Assistance Authorizations Act of 1983, P.L. 98-151, 97 Stat. 964.
*1984 Act to Combat Terrorism of 19 Oct 1984, P.L. 98- 533, 98 Stat. 2706; 18 USC secs. 3071-3077.
*International Security and Development Cooperation Act of 1985, P.L. 99-83.
*International Emergency Economic Powers Act, 50 USC sec 1701 et seq.

EXECUTIVE ORDERS

*Exec Order 10631 of 17 Aug 1955, 20 Fed. Reg. 6057, "Code of Conduct for Members of the Armed Forces of the US," as amended by Exec Order 11382 of 28 Nov 1967, 32 Fed. Reg. 16247 and Exec Order 12017 of 3 Nov 1977, 42 Fed. Reg. 57941.
Exec Order 11850 of 8 Apr 1975, 40 Fed. Reg. 16187, 50 USC sec. 1511, "Renunciation of Certain Uses in War of Chemical Herbicides and Riot Control Agents." Reprinted in Change 1, FM 27-105.
*Exec Order 12333 of 4 Dec 1981, 46 Fed. Reg. 59941, "US Intelligence Activities."

*Exec Order 12543 of 7 Jan 1986, 51 Fed. Reg. 875, restricting travel of US citizens to Libya.
*Exec Order 12544 of 8 Jan 1986, 51 Fed. Reg. 1235, blocking the transfer of all property of the government of Libya in the US and in the possession of US persons in their overseas branches.
*Treasury Regs of 16 Jan 1986, 51 Fed. Reg. 2462, implementing Exec Orders 12543 and 12544.
*Manual For Courts Martial

SERVICE DIRECTIVES

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*DOD Instruction 5500.15 of 16 Oct 1974, Review of Legality of Weapons Under International Law.
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TAB G
PSYCHOLOGICAL OPERATIONS

Introduction/Overview

PSYCHOLOGICAL OPERATIONS (PSYOPS) are planned activities of propaganda and psychological actions in peace and war. These efforts are directed toward foreign enemy, friendly, and neutral audiences, and are designed to influence attitudes and behavior in a favorable manner to achieving national political and military objectives.

PROPAGANDA is the selling of ideas, information, or rumors through a variety of media. It is designed to influence opinions, emotions, attitudes, or behavior. Its source may or may not be known.
Black propaganda purports to emanate from a source other than the true one.
White propaganda is disseminated and acknowledged by the sponsor, or, an accredited agency of the sponsor.
Grey propaganda does not specifically identify its source.

PSYCHOLOGICAL ACTIONS include the use of media and supporting activities such as military alerts, real or staged troop movements, rallies, agricultural and medical programs, etc.

PSYOPS may be directed toward:
- Building and sustaining support for the US or allied political systems, including ideology, infrastructure, and/or their political programs.
- Attacking the legitimacy and credibility of a competitor's political system.
- Mobilizing popular support for political, social, and economic programs consistent with US or allied goals.
- Publicizing planned reforms and programs that will benefit the populace after the defeat of a competitor.
- Shifting the loyalty of hostile forces and their supporters to a friendly power.

PSYOP DISSEMINATION METHODS INCLUDE:
LEAFLETS: distributed by air drop, patrol "leave behinds," enemy mail, artillery placement, etc.
POSTERS: "leave behinds".
LOUDSPEAKERS: broadcasts by air and ground.
"FACE TO FACE:" Through use/interrogation of PWs and interview of civilians in the targeted area.
RADIO/TELEVISION: Use of HN broadcasting assets, "Volant Solo" Aircraft (USAF EC-130-E airborne broadcast platform), truck mounted radio and television platforms.
OTHER AUDIO VISUAL MEDIA: Use of direct, indirect, smuggled or shipped movies, videos, and slides to the area.

For the JA. Addressing Psyops issues will usually involve inquiry into:
-Is the planned activity a permissible ruse under Art. 24, HC IV?
-Is there sufficient guidance to ensure the PSYOP efforts do not violate the restrictions on coercion, compulsion, and force towards combatants, civilians, and other non-combatants? (Art. 23(h), 44, 45 HC IV, and Art. 27, 31, 51 of the GC).

Is the planned activity limited by:
-Exec. Order 12333? (DOD Dir. 5240.1 and AR 381-10 implement this order)
-Allied Command Europe Dir. 80-11?
-Nat. Sec. Dec. Dir. 130?
-DOD Dir. 3321.1 (authorizing use of overt peacetime psyop programs)? HOWEVER, CDRS MUST CONSULT THE NCA BEFORE INITIATING ANY PREHOSTILITY PSYOPS!
-DOD 1990 PSYOP Master Plan?
-JCS Pub 0.2, Unified Action of Armed Forces?

C. FOR FURTHER INFORMATION, or copies of relevant references, contact:
Group JA, HQ, 4th PSYOP GRP, FT Bragg, NC 28307-5240
AV 236-6169; Comm (919) 432-6169
Group JA, HQ, 5th PSYOP GRP, (USAR), 5550 Dower House Rd., Wash, DC 20315-0320. Comm (301) 763-2327/1430/2474

TAB H
RULES OF ENGAGEMENT

Commanders and soldiers must thoroughly understand how and when they may use force. The role of the JA is to provide assistance, guidance, and advice on ROE to the commander and operators. Where directed, the JA will draft the ROE. In all circumstances, the JA must strive for ROE which are sound, flexible, understandable, and enforceable.

JAs and operators must collaborate closely on ROE. JAs must become familiar with mission and operational concepts, planning, nomenclature, capabilities and constraints, and battlefield operating and weapons systems. Operators must familiarize themselves with the international and domestic legal limitations on the use of force, and the laws of armed conflict. The Army operates with applicable ROE, conducting warfare in compliance with international laws and within the conditions specified by the higher commander. Lawyers and operators must talk the same language to provide effective ROE to the fighting forces.

DEFINITION OF ROE

ROE may be defined contextually. The technical (strategic/operational level) definition of ROE:

ROE are directives issued by competent military authority to delineate the circumstances and limitations under which its own naval, ground, and air forces will initiate and/or continue combat engagement with other forces encountered. They are the means by which the National Command Authority (NCA) and operational commanders regulate the use of armed force in the context of applicable political and military policy and domestic and international law.

The practical (operational/tactical level) definition of ROE:

ROE are the commander's rules for the use of force.

PURPOSES OF ROE

ROE impose political, practical, and legal limitations upon commanders. They are the primary means by which the NCA can, through the JCS and the unified command CINCs, provide guidance to deployed forces in peacetime for handling crises and in wartime to help control the level of hostilities. The JCS Peacetime/Standing ROE (P/SROE) are the policies on the use of force articulated by JCS to the unified command CINCs. The JCS P/SROE have been termed "the tether between the NCA and the soldier." In reality, the JCS P/SROE are used by the CINCs to develop P/SROE for their respective AORs. The CINCs' P/SROE serve either as the ROE for specific missions or as the bases for ROE tailored to specific missions. In any event, JAs must ensure that ROE do not constrain a commander's actions unduly and that they assist the commander in constraining the uses of force that are inconsistent with national command policy. The practical purposes of ROE are many; several of the most important are below:

- ROE define the mission by limiting the use of force in such a way that it will be used only in a manner consistent with the overall military objective. For example, units deployed overseas for training exercises may use force only when acting in immediate self-defense. This limitation on the use of force reinforces the training, rather than combat, nature of the mission.

- ROE regulate command involvement in battle. When ROE vest authority in the commander to authorize the use of certain weapons, it is essential that one constantly consider the tactical situation and disposition of his units. Moreover, the commander is more capable of directly influencing the battle through his authority to either grant or withhold the use of particular weapons.

- ROE protect the commander by providing guidance assuring that subordinates comply with the law of war and national policy. For example, the commander may issue ROE that reinforce the law of war specifically prohibiting destruction of religious or cultural property. In the area of national policy, ROE can limit such items as the use of chemical weapons, riot control agents, and herbicides. The inclusion of restrictions on these agents in an OPLAN insulates, to the extent possible, the commander from subordinates who may violate national policy out of ignorance.

BASES FOR ROE

ROE are not formulated in a vacuum, but are based on several factors, all of which must be considered by the JA in the drafting and/or reviewing process. These factors include:

JCS P/SROE;
Unified command P/SROE
Higher HQ ROE;
Mission;
Commander's Intent;
Intelligence:
- Threat;
- Enemy Tactics;
- Enemy Weapons Systems;
- Enemy Capabilities;

Law of war;

Operational concerns;
International concerns;
Political concerns;
US policy;
Domestic law;
HN law and agreements (if applicable);
Doctrine.

Some of these factors are discussed below:

Law of War. Although the law of war serves as a basis for ROE, an attempt should not be made to use ROE as a substitute for law of war training. ROE that attempt to serve such a purpose are cumbersome and do not serve their primary purpose -- providing guidance to commanders and soldiers concerning the use of force. As noted above, ROE emphasize those critical aspects of the law of war relevant to a specific mission. ROE drafters must recognize that some of the fundamental constraints on the use of force are derived from the law of war, but restatements of the Geneva and Hague Conventions belong in an annex to the unit Field Standard Operating Procedures (FSOP), not in the OPLAN.

Operational Concerns. These form a critical basis for ROE. Commanders who do not wish to destroy roads, bridges, railroad lines, communications centers and other potential targets may ensure that subordinates are aware of this fact through the use of carefully drafted ROE. Commanders may also use ROE to withhold the authority to use certain weapons or to target certain facilities. ROE must be carefully tailored to each and every mission that your unit has been assigned -- never expect "generic" ROE to fit the vast array of missions that the armed forces are assigned.

International Concerns. International public opinion and diplomatic pressure may also influence ROE. The use of certain weapons or the targeting of specific areas may antagonize world opinion and harden the resolve of the enemy.

US Policy/Political Concerns. Policy concerns, such as avoidance of injury to civilians, influence ROE. As demonstrated in Operation DESERT STORM, there is increasing concern over preventing casualties that are due to "friendly fire". ROE serve as an excellent vehicle to communicate these concerns to all soldiers.

US Domestic Laws. Our Constitution, federal statutes and service regulations may impose additional obligations and restraints upon military forces which may affect ROE. Executive Order 11850 (restricting the use of RCA) and Executive Order 12333 (prohibiting assassination of heads of state as a matter of US policy) are two examples.

Host Country Law and Agreements with the US. HN law, particularly in an exercise context, influences ROE. In the absence of a SOFA or other form of access agreement, local law may dictate when a soldier can fire his weapon to protect himself from attack. If the soldier acts too aggressively, he may violate HN law thus subjecting the soldier to prosecution by the HN. ROE will advise members of a deploying unit as to the degree of force they may utilize in a given situation. For this reason, ROE may, and should, be changed when they do not make sense for a particular unit or operation. Subordinate commanders are always free to make ROE more restrictive; however, superior commanders must approve changes that make ROE less restrictive.

Army Doctrine on ROE. FM 100-5, OPERATIONS, discusses ROE in the context of "Disciplined Operations" in Chapter 2, "Fundamentals of Army Operations," and in the context of "Restraint" in Chapter 13, "Operations Other Than War." ROE are defined at page 2-4:

> ROE specify the circumstances and limitations in which forces may engage the enemy. Many factors influence ROE, including national command policy, mission, operational environment, commander's intent, and law of land warfare. ROE always recognize the soldier's right of self-defense. Properly written ROE are clear and tailored to the situation. ROE may change over the duration of a campaign. A force-projection army tends to face a wide array of ROE. For example, ROE during Operations Just Cause, Desert Shield, Desert Storm, and Provide Comfort were widely diverse; within each operation, the ROE were different and changed over time.

ROE are addressed again at page 13-4:

> Apply appropriate military capability prudently.
> The actions of soldiers and units are framed by the disciplined application of force, including specific ROE. In operations other than war, these ROE will be more restrictive, detailed, and sensitive to political concerns than in war. Moreover, these rules may change frequently. Restraints on weaponry, tactics, and levels of violence characterize the environment. The use of excessive force could adversely affect efforts to gain legitimacy and impede the attainment of both short and long-term goals. Transmission of and assured understanding of ROE throughout the totality of units requires follow-through, rehearsals with situations to check understanding and compliance, and continuing brief-backs. Soldiers who thoroughly understand ROE are better prepared to act with initiative and defend themselves and members of their unit.

DRAFTING AND REVIEWING ROE

Key Substantive Areas

Drafters and reviewers must ensure that ROE do not interfere with the commander's right and responsibility to protect his command against an actual or imminent threat of attack. In this regard, the right and obligation of unit self-defense must be specified in every set of ROE. NOTHING IN THE ROE SHOULD PROHIBIT THE RIGHT OF SELF-DEFENSE!

Operational ROE should go beyond mere self-defense guidance concerning use of force; they must also provide guidance on the use of force for mission accomplishment.

Writing Effective ROE

JAs in the field will often be called upon to "draft" ROE by simplifying ROE promulgated by higher HQ. JAs must ensure that their product is consistent with the higher ROE. The guiding precept for drafters of ROE is that ROE must be readable and easily understood by their audience. Commanders and soldiers must often refer to these rules to resolve difficult issues quickly. Guidance must be clearly and simply stated. In this regard, the following suggestions are offered.

Make ROE clear and brief. Use short words found in the common vocabulary. Avoid using acronyms that some soldiers will not understand. Communicate ideas directly. Do not use the passive voice. Use short sentences. Express only one idea in each sentence. Although such an approach may not be possible in every case, it should be used whenever feasible.

Avoid excessively qualified language. ROE are directives. They advise subordinates of how the commander desires the mission be conducted. They should, therefore, be as direct as any other order issued by the commander. Even though qualified language may blur meaning, its use is often necessary to convey the proper guidance. In such a case, the drafter should use separate sentences or subparagraphs to assure clarity of expression.

Tailor the language to the audience. ROE are distributed to commanders at all levels of responsibility. These commanders then disseminate the ROE of the higher command and may impose additional restrictions. Ultimately, specific rules are provided to individual soldiers. Be aware of the sophistication level of the audience, and draft accordingly.

Separate ROE by job description. Constraints on the use of force often flow from the types of weapons carried or the mission of the particular soldier. For example, ROE for infantrymen and those pertaining to artillerymen should be issued separately. This technique allows the members of each discipline to memorize one set of rules. These ROE can be placed on cards to be carried by the soldiers. Squad leaders should drill their troops on ROE.

ROE must be understood, remembered, and applied. ROE are useful and effective only when soldiers understand, remember and apply them under stress. A Pocket Card, while a good technique for reinforcement of previously learned guidance, is no substitute for realistic, evaluated training conducted to precise standards. Vignette or scenario-driven field training on ROE (used with great success by the 10th Mountain and 1st Armored Divisions) is far superior to classroom instruction on ROE.

Key Drafting Points

Use the JOPES Format for Unit ROE. Use plain, unambiguous, and enforceable language for Pocket Cards.

Avoid Tactics. Tactics should drive ROE, not vice versa. ROE should not delineate the tactics for use in a particular mission. ROE are designed to limit the use of force and are neither tactical control measures nor substitutes for the exercise of the commander's military judgment. Phase lines, control points, and other tactical control measures should not be contained in ROE. These measures belong in the coordinating instructions. Prescribing tactics in ROE denies flexibility.

Avoid Safety-Related Restrictions. ROE should not deal with safety-related restrictions. Certain weapons require specific safety-related, pre-operation steps. These should not be detailed in the ROE, but may appear in the tactical or field SOP.

Avoid Strategy and Doctrine. ROE should not be used as a mechanism through which to convey strategy or doctrine. The commander should express his battlefield philosophy through the battle order and his personally communicated guidance to subordinates.

Avoid Restating the Law of War. ROE should not restate the law of war. Commanders may desire to emphasize an aspect of the law of war that is particularly relevant to a specific operation, but they should not include an extensive discussion of the Hague Regulations and Geneva Conventions.

Consider the Purpose of ROE. ROE govern the use of force. A discernable trend is to include in mission ROE various control measures and reporting requirements. Examples include cordon and roadblock procedures, and procedures and reports for the detention of civilians. While the inclusion of such information in ROE consolidates guidance, it may dilute the provisions on the use of force. JAs drafting or reviewing ROE should be aware of, and balance guidance "consolidation" and "dilution."

Key to Conduct, Not Status. Particularly in ROE for OOTW where there may be no declared "hostile force," key the use of force to hostile acts or intent, not to "status" of the perpetrator.

A Generic Approach to Drafting ROE

The key to success in drafting ROE is familiarity with the commander's concept of the mission. The more intimately involved JAs become in the planning process, the better prepared they will be to draft or review ROE. The suggested approach below outlines the JA's role in the planning process.

Master the ROE from Higher Headquarters. Become familiar with the ROE established at higher headquarters. This will orient the JA to the constraints the plan must meet. Further, this will alert the JA to proposed ROE that do not conform to a superior commander's ROE.

Master the SOPs. Become familiar with the tactical SOP, the field SOP, and the exercise SOP in order to determine the guidelines already in effect for the organization.

Master the OPLAN. Read the mission statement, the concept of the operation, and the subunit missions in the OPLAN. Review the operation in order to understand what it is the commander wishes to accomplish. Obtain a map of the maneuver area and trace the concept of the operation over the terrain. Analyze the key terrain from the perspective of the targeteer. Determine the location of protected places and other areas that should not be targeted.

Review Plans. Review the fire support plan, the mine plan, and the other operational overlays in order to become familiar with the operation and to warn operators of potential violations of law or policy.

Review the coordinating instructions. Consider the control measures imposed by the commander and determine if additional ROE are necessary in order to enhance mission accomplishment.

Review OPLAN Annexes. Pay particular attention to the control measures and coordinating instructions in these annexes. ROE should supplement and explain these control measures.

Draft ROE. With this exhaustive review of the OPLAN and its annexes, the JA should be prepared to review and/or draft ROE. Maintain close coordination with the operators. Have BDE and BN 3s review your draft for a "reality check." Brief the commander on the proposed ROE. Make sure he appreciates that the ROE are his rules. If time permits, consider formation of an ROE Working Group within the Legal, Operations/Plans, and Intelligence elements. If producing Pocket Cards, remember that cards are typically ROE extracts, NOT restatements of the ROE.

JCS PEACETIME/STANDING RULES OF ENGAGEMENT (P/SROE)

The P/SROE issued by the JCS direct US armed forces to exercise force consistent with the mandates of the UN Charter and customary international law. During peacetime, US forces may exercise force only when acting in self-defense. The JCS P/SROE govern the conduct of the vast majority of US forces deployed overseas. Operators are often more familiar with the ROE promulgated by the unified command CINCs for their AOR. These documents are consistent with, and closely resemble, the contents of the JCS P/SROE. CINCs, as are all subordinate commanders, of course, are always free to make the ROE more restrictive.

The P/SROE apply to commanders at all echelons of command. These ROE control the use of force during all military operations and contingencies short of declared war or prolonged conflict and remain in effect until specifically modified or superseded.

As currently written the P/SROE, which are classified secret, are divided into three sections. An unclassified synopsis of the three sections follows below.

SECTION I: Section I contains the actual P/SROE. First, and most importantly, it defines the inherent right of self-defense in terms of unit and national self-defense.

"Unit self-defense" is the act of defending a particular unit of US forces, or an element thereof, against a hostile act or a manifestation of hostile intent. The need to exercise unit self-defense may arise in situations ranging from apparently unrelated, localized violence, to terrorist acts, low-level conflicts and prolonged engagements.

"National self-defense" is the act of defending the US, US forces, and, in certain circumstances, US citizens, their property, or US commercial assets from a hostile act or hostile intent. The need to exercise national self-defense may arise in isolated or prolonged regional or global situations that are often related to international instability.

Section I then goes on to define hostile act and hostile intent. A hostile act, quite simply, is an attack. Determining hostile intent, on the other hand, is extremely difficult because it involves the use of force in response to a threat of the imminent use of force by the other party. It requires the soldier or the commander to have a keen sense of situational awareness.

The use of force in self-defense must always comply with the traditional international law concepts of necessity and proportionality. The necessity element is fulfilled when the soldier or commander determines the existence of a hostile act or hostile intent. Proportionality then requires that the soldier or commander use only that amount of force necessary to subdue the threat. Section I emphasizes that the use of force in self-defense is a protective, not a punitive measure.

Section I also contains guidance on several other matters such ROE approval authorities, pursuit of forces, operating with a multi-national (combined) force, and many more. It also currently contains annexes for seaborne, air, and land forces. The annexes provide particularized guidance for those operating environments.

SECTION II: Section II describes the procedures by which the P/SROE contained in section I may be supplemented, and also contains specific supplemental ROE for use in contingency operations. A supplemental measure may be mandated by the higher HQ ROE or requested by any subordinate command implementing the ROE. Subordinate commands may also draft and propose measures not already stated in Section II. This supplemental mechanism is invaluable as it gives the commander, who considers his current ROE inadequate for his mission, a means by which he can request adequate ROE. SUPPLEMENTAL ROE RELATE ONLY TO MISSION, NOT TO SELF-DEFENSE. SUPPLEMENTAL MEASURES NEVER OVERRIDE THE

RIGHT AND OBLIGATION OF SELF-DEFENSE.

SECTION III: Section III is the definitional section of the P/SROE. The exhaustive list of terms contained within the section is an invaluable resource.

P/SROE Guidance is Critical. The commander must understand the requirements of the P/SROE prior to a deployment. The PROE make clear that the responsibility for exercising unit self-defense is ". . . a matter of utmost importance, demanding considered judgment of command. All available intelligence, the status of international relationships, the requirements of international law, the possible need for a political decision, and the potential consequences for the US must be carefully weighed." In order to inform the commander of these responsibilities, the JA should obtain a copy of the unified command's P/SROE from Corps or a higher command during the planning process.

Changes to the PROE. As of this writing, May 1994, the P/SROE are undergoing a five year review. While modifications are being made to the document as part of this inter-service review, the substantive concepts and procedures discussed above should not be significantly affected by the review. One change that is quite certain is the change of the name of the document to "Standing ROE" (SROE), a change which reflects the reality of their present use. Additionally, the SROE will contain a more comprehensive Land Forces annex to section I, stronger language concerning the exercise of the right of self-defense, and clearer guidance on the effect of the Supplemental Measures. Section I of the SROE may be unclassified.

ROE FOR EXERCISES

Exercise ROE serve two purposes. The first is to provide guidance to US troops concerning use of force during the conduct of the exercise. These ROE are essentially designed for combat operations, but have been tailored to the exercise environment. The second purpose of exercise ROE is to structure a US response to an actual threat that may arise during the conduct of the exercise. While the potential for such a threat is generally low, the possibility of unfriendly contact may exist. The JA must ensure that exercise ROE address both situations.

Key Areas of Concern in Drafting Exercise ROE

Host Nation (HN) Security. Drafters of exercise ROE should begin with the premise that the HN will provide security for US forces. However, this premise may be affected by the international agreements in effect between the US and the HN. Accordingly, JAs should coordinate exercise ROE with higher HQ, to include the responsible Unified Command.

Live Ammunition. Specify which elements of the deploying forces (if any) will carry live ammunition. State where this ammunition will be carried (e.g., "Magazines will be placed in ammunition pouches") and whether loaded magazines will be placed in the weapons.

Deadly Force. Specify when, and under what circumstances, soldiers are authorized to use deadly force. Any soldier can be detailed to guard duty, but only certain facilities will be important enough to defend with deadly force. These should be clearly identified for guard personnel.

Warning Shots. The means of challenging and engaging intruders must be clear. The ROE should indicate whether warning shots will be fired, and, if so, how many and what the aiming point should be. If used, warning shots require extensive training.

Transition from Peacetime to Combat ROE. ROE must contain a device for triggering the transition from a peacetime to a wartime environment.[1]

A commander must be capable of alerting his troops to a changed environment and have guidance in place to effect the use of force. An example of a ROE transition device is contained in the Exercise ROE in effect for the 101st Airborne Division (Air Assault). These ROE set forth guidance for three different threat levels: GREEN (when no credible threat of attack against US or HN personnel exists), AMBER (when a credible threat to US forces exists) and RED (when US forces actually have been attacked or the commander specifically proclaims a RED threat level). This transitioning device is easily memorized by soldiers and serves to alert them to changes in the threat level.

SELECTED SAMPLE ROE AND SAMPLE ROE POCKET CARDS

DESERT SHIELD ROE

THESE ARE PEACETIME RULES OF ENGAGEMENT. NOTHING IN THESE RULES LIMITS THE RIGHTS OF INDIVIDUAL SOLDIERS TO DEFEND THEMSELVES OR THE RIGHTS AND RESPONSIBILITIES OF LEADERS TO DEFEND THEIR UNITS.

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[1] One of the specific criticisms of the Long Commission concerning the ROE for the Battalion Landing Team in Beirut was that, although the nature of the threat facing the Team changed from one where conflict was not anticipated to one where conflict was imminent, the ROE were not modified to meet these changing circumstances.

A. You may not conduct offensive military operations (raids, ambushes, etc).
B. You may use force in self-defense in response to attacks or threats of imminent attack against US or host nation forces, citizens, property, or commercial assets
C. You are not permitted to enter the land, sea, or airspace of other countries--besides the host nation.
D. If you inadvertently enter territorial land, sea, or airspace of another country, you may use force in self-defense to withdraw.
E. You may not seize property of others to accomplish your mission in peacetime.
F. Proper contracting processes must be followed to obtain supplies and other items necessary to accomplish the mission.
G. Treat all persons and property with respect and dignity. Remember we are at peace.

REMEMBER

1. WE ARE NOT AT WAR.
2. THESE RULES ARE IN EFFECT UNLESS HOSTILITIES BEGIN.
3. KNOW THE WARTIME ROE AND FOLLOW THEM IF HOSTILITIES BEGIN.

DESERT SHIELD/STORM
SPECIAL OPERATIONS FORCES RULES OF ENGAGEMENT
IN IRAQ

NOTHING IN THESE ROE LIMITS YOUR RIGHT TO TAKE APPROPRIATE ACTION IN SELF-DEFENSE!

THE FORCES OF IRAQ HAVE BEEN DECLARED HOSTILE AND MAY BE ATTACKED. THIS INCLUDES ALL IRAQI MILITARY PERSONNEL AND VEHICLES TRANSPORTING THE ENEMY OR THEIR SUPPLIES.

A. Do not attack civilians unless they commit a hostile act or it is clear they are about to commit a hostile act against SOF. If a civilian does nothing, they are no threat and may not be attacked.
B. Don't fire into civilian populated areas or buildings which are not being defended or being used for military purposes.
C. Treat all civilians and their property with respect and dignity. You may use enemy public property for military purposes, but you may not use enemy private property without your commander's permission. If private property is used, a receipt must be given.
D. Treat all prisoners humanely and with respect and dignity.
E. Do not engage anyone who has surrendered, is out of battle due to sickness or wounds, is shipwrecked, or is an aircraft crew member descending by parachute from a disabled aircraft.
F. Should a civilian come across SOF during a reconnaissance mission, the civilian may not be attacked unless they commit a hostile act or show hostile intent.
G. Civilians may be detained by SOF for their own safety and the safety of SOF; however, they must be given the same treatment as EPW's. If necessary they may be restrained and left in an area where they will be found or eventually escape.
H. Use only the minimum force required to regain custody of any detainees attempting to escape. Deadly force may only be used in self defense to a hostile act or clear display of hostile intent.
I. SOF are not required to wear a particular uniform and may use legitimate ruses such as wearing the enemy's uniform to infiltrate the enemy's lines. During actual combat however, SOF must wear their own uniform to distinguish them as combatants.
J. ROE annex to the OPLAN provides more detail. Conflicts between this card and the OPLAN should be resolved in the favor of the OPLAN.

REMEMBER:
1. ATTACK ONLY COMBATANTS.
2. ATTACK ONLY MILITARY TARGETS.
3. SPARE CIVILIAN PERSONS AND OBJECTS.
4. RESTRICT LETHAL FORCE TO WHAT YOUR MISSION REQUIRES.

DESERT STORM
RULES OF ENGAGEMENT

ALL ENEMY MILITARY PERSONNEL AND VEHICLES TRANSPORTING THE ENEMY OR THEIR SUPPLIES MAY BE ENGAGED SUBJECT TO THE FOLLOWING RESTRICTIONS:

A. Do not engage anyone who has surrendered, is out of battle due to sickness or wounds, is shipwrecked, or is an aircrew member descending by parachute from a disabled aircraft.
B. Avoid harming civilians unless necessary to save US lives. Do not fire into civilian populated areas or buildings which are not defended or being used for military purposes.
C. Hospitals, churches, shrines, schools, museums, national monuments, and any other historical or cultural sites will not be engaged except in self-defense.
D. Hospitals will be given special protection. Do not engage hospitals unless the enemy uses the hospital to commit acts harmful to US forces, and then only after giving a warning and allowing a reasonable time to expire before engaging, if the tactical situation permits.
E. Booby traps may be used to protect friendly positions or to impede the progress of enemy forces. They may not be used on civilian personal property. They will be recovered or destroyed when the military necessity for their use no longer exists.
F. Looting and the taking of war trophies are prohibited.
G. Avoid harming civilian property unless necessary to save US lives. Do not attack traditional civilian objects, such as houses, unless they are being used by the enemy for military purposes and neutralization assists in mission accomplishment.
H. Treat all civilians and their property with respect and dignity. Before using privately owned property, check to see if publicly

owned property can substitute. No requisitioning of civilian property, including vehicles, without permission of a company level commander and without giving a receipt. If an ordering officer can contract the property, then do not requisition it.

I. Treat all prisoners humanely and with respect and dignity.

J. ROE Annex to the OPLAN provides more detail. Conflicts between this card and the OPLAN should be resolved in favor of the OPLAN.

REMEMBER

1. FIGHT ONLY COMBATANTS.
2. ATTACK ONLY MILITARY TARGETS.
3. SPARE CIVILIAN PERSONS AND OBJECTS.
4. RESTRICT DESTRUCTION TO WHAT YOUR MISSION REQUIRES.

PANAMA
SECURITY INSTRUCTIONS
(Operation NIMROD DANCER, 1989 [Show of Force])

NOTHING IN THESE RULES NEGATES IN ANY WAY YOUR RIGHT TO TAKE ALL NECESSARY AND APPROPRIATE ACTIONS FOR YOUR PERSONAL SELF-DEFENSE AND FOR THE DEFENSE OF YOUR UNIT.

RULES FOR LEADERS

1. A COMMANDER WILL TAKE ALL STEPS NECESSARY AND APPROPRIATE FOR HIS/HER UNIT'S SELF DEFENSE.
2. USE ONLY THE MINIMUM FORCE NECESSARY TO CONTROL THE SITUATION.
3. IF POSSIBLE WHEN RETURNING FIRE, USE SELECTED MARKSMEN.
4. WITHOUT ENDANGERING YOUR UNIT OR RISKING THE SUCCESS OF THE MISSION, TAKE MEASURES TO MINIMIZE RISK TO CIVILIANS.
5. RIOT CONTROL AGENTS MAY ONLY BE USED WHEN AUTHORIZED BY THE DIVISION COMMANDER OR HIS DESIGNATED REPRESENTATIVE.
6. UPON CEASE FIRE, TAKE NECESSARY MEASURES TO MAINTAIN CONTROL AND TO ASSIST ANY INJURED.

RULES FOR INDIVIDUALS

1. IF FIRED UPON, FIRE BACK IF NECESSARY IN SELF-DEFENSE.
2. IF IT REASONABLY APPEARS THAT YOU ARE ABOUT TO BE FIRED UPON, FIRE IF NECESSARY IN SELF-DEFENSE.
3. WHEN RETURNING FIRE, AIM DIRECTLY AT ITS SOURCE. DO NOT SPRAY YOUR FIRE INTO A GENERAL AREA.
4. CEASE FIRING WHEN THE THREAT IS OVER.
5. ALLOW ANYONE TRYING TO SURRENDER TO DO SO.
6. TREAT INNOCENT CIVILIANS WITH RESPECT.

THREE INTERRELATED LEGAL PRINCIPLES APPLY TO ALL OPERATIONS.

1. **MILITARY NECESSITY:** MEASURES WHICH ARE NOT OTHERWISE FORBIDDEN BY INTERNATIONAL LAW ARE JUSTIFIED WHEN NECESSARY TO SECURE THE COMPLETE SUBMISSION OF THE ENEMY AS SOON AS POSSIBLE. MILITARY NECESSITY DOES NOT JUSTIFY ANY OF THE MEASURES EXPRESSLY PROHIBITED BY THE LAW OF WAR.
2. **PROPORTIONALITY:** THE APPLICATION OF COMBAT POWER AND RESULTING DESTRUCTION OF LIFE AND PROPERTY SHOULD NOT BE DISPROPORTIONATE TO THE MILITARY ADVANTAGE GAINED THEREBY.
3. **AVOIDANCE OF UNNECESSARY SUFFERING:** DESTRUCTION OR INJURY TO PERSONS OR PROPERTY IS PROHIBITED UNLESS NECESSARY TO GAIN SOME MILITARY ADVANTAGE AGAINST THE ENEMY. WHERE MILITARY NECESSITY DICTATES THE ENGAGEMENT OF A TARGET, WEAPONS WILL BE EMPLOYED IN SUCH A MANNER AS TO MINIMIZE COLLATERAL DAMAGE TO THE EXTENT PRACTICAL, BUT IN NO EVENT WILL MINIMIZATION TAKE PRECEDENCE OVER U.S. LIVES.

UNDER THE LAWS OF WAR YOU MUST:

- TREAT CAPTIVES AND DETAINEES HUMANELY.
- RESPECT CIVILIANS AND THEIR PROPERTY.
- AVOID FORBIDDEN TARGETS, TACTICS, AND TECHNIQUES.
- PREVENT AND REPORT TO YOUR SUPERIOR(S) ANY CRIME COMMITTED UNDER THE LAWS OF WAR.

LOS ANGELES CIVIL DISTURBANCE ROE (1992)
JOINT TASK FORCE, L.A.

A. EVERY SERVICEMAN HAS THE RIGHT UNDER LAW TO USE REASONABLE AND NECESSARY FORCE TO DEFEND HIMSELF AGAINST VIOLENT AND DANGEROUS PERSONAL ATTACK. THE LIMITATIONS DESCRIBED BELOW ARE NOT INTENDED TO INFRINGE THIS RIGHT, BUT TO PREVENT THE INDISCRIMINATE USE OF FORCE.

B. FORCE WILL NEVER BE USED UNLESS NECESSARY, AND THEN ONLY THE MINIMUM FORCE NECESSARY WILL BE USED.

(1) USE NON-DEADLY FORCE TO:

(A) CONTROL THE DISTURBANCE.
(B) PREVENT CRIMES.
(C) APPREHEND OR DETAIN PERSONS WHO HAVE COMMITTED CRIMES.

(2) USE DEADLY FORCE ONLY WHEN:

(A) LESSER MEANS OF FORCE EXHAUSTED OR UNAVAILABLE; AND

(B) RISK OF DEATH OR SERIOUS BODILY HARM TO INNOCENT PERSONS IS NOT SIGNIFICANTLY INCREASED BY THE USE; AND

(C) PURPOSE OF USE

1 - SELF-DEFENSE TO AVOID DEATH OR SERIOUS BODILY HARM;
2 - PREVENTION OF CRIME INVOLVING DEATH OR SERIOUS BODILY HARM;
3 - PREVENTION OF DESTRUCTION OF PUBLIC UTILITIES WHICH HAVE BEEN DETERMINED VITAL BY THE TF COMMANDER.
4 - DETENTION OR PREVENTION OF ESCAPE OF PERSONS WHO PRESENT A CLEAR THREAT OF LOSS OF LIFE.

(3) WHEN POSSIBLE, THE USE OF DEADLY FORCE SHOULD BE PRECEDED BY A CLEAR WARNING THAT SUCH FORCE IS CONTEMPLATED OR IMMINENT.

(4) WARNING SHOTS WILL NOT BE USED.

(5) WHEN FIRING, SHOTS WILL BE AIMED TO WOUND, IF POSSIBLE, RATHER THAN KILL.

(6) WEAPONS WILL NOT BE FIRED ON AUTOMATIC.

(7) WHEN POSSIBLE, LET CIVILIAN POLICE ARREST LAWBREAKERS.

(8) ALLOW PROPERLY IDENTIFIED NEWS REPORTERS FREEDOM OF MOVEMENT, SO LONG AS THEY DO NOT INTERFERE WITH YOUR MISSION.

(9) DO NOT TALK ABOUT THIS OPERATION OR PASS ON INFORMATION OR RUMORS ABOUT IT TO UNAUTHORIZED PERSONS; REFER THEM TO YOUR COMMANDER.

(10) JTF COMMANDER WITHHOLDS AUTHORITY FOR USE OF RIOT CONTROL AGENTS AND SNIPER TEAMS.

C. ARMING ORDERS

ARMING ORDER	BAYONET RIFLE	BAYONET SCABBARD	BAYONET	PISTOL	AMMUNITION BATON	AMMUNITION MAG/CHAMBER	AMMUNITION CNTRL
AO-1	SLING	ON BELT	SCABBARD	HOLSTER	BELT	IN POUCH/EMPTY	OIC/NCOIC
AO-2	PORT	ON BELT	SCABBARD	HOLSTER	BELT	IN POUCH/EMPTY	OIC/NCOIC
AO-3	SLING	ON BELT	FIXED	HOLSTER	HAND	IN POUCH/EMPTY	OIC/NCOIC
AO-4	PORT	ON BELT	FIXED	HOLSTER	HAND	IN POUCH/EMPTY	OIC/NCOIC
AO-5	PORT	ON BELT	FIXED	HOLSTER	HAND	IN WEAPON/EMPTY	OIC/NCOIC
AO-6	PORT	ON BELT	FIXED	IN HAND	BELT	IN WEAPON/ LOCKED/LOADED	OIC

[NOTE: the above ROE utilized by JTF LA were adapted from the generic ROE contained in the Army's GARDEN PLOT CIVIL DISTURBANCE PLAN, and modified slightly based upon input from Dep't of the Army (7th ID), CINCFOR, and the

JCS Staff]

UNOSOM II (SOMALIA) ROE
April 1993

1. UNOSOM PERSONNEL MAY USE DEADLY FORCE:
   a. To defend themselves, other UN personnel, or persons and areas under their protection against hostile acts or hostile intent.
   b. To resist attempts by forceful means to prevent the Force from discharging its duties.

2. CHALLENGING:
   a. Whenever practicable, a challenge should be given before using deadly force.
   b. Challenging is done by:
      (1) Shouting in English: "UN, STOP OR I WILL FIRE," or
      (2) Shouting in Somali: "UN, KA HANAGA JOOGA AMA WAA GUBAN," or
      (3) Firing warning shots in the air.

3. PRINCIPLES FOR USE OF FORCE:
   When it becomes necessary to use force, the following principles apply:
   a. Action which may reasonably be expected to cause excessive collateral damage is prohibited.
   b. Reprisals are forbidden.
   c. Minimum force is to be used at all times.

4. SPECIFIC RULES:
   a. UNOSOM Forces may use deadly force in response to a hostile act or when there is clear evidence of hostile intent.
   b. Crew-served weapons are considered a threat to UNOSOM Forces and the relief effort whether or not the crew demonstrates hostile intent. Commanders are authorized to use all necessary force to confiscate and demilitarize crew-served weapons in their area of operations.
   c. Within those areas under the control of UNOSOM Forces, armed individuals may be considered a threat to UNOSOM and the relief effort whether or not the individual demonstrates hostile intent. Commanders are authorized to use all necessary force to disarm and demilitarize groups or individuals in those areas under the control of UNOSOM. Absent a hostile or criminal act, individuals and associated vehicles will be released after any weapons are removed/demilitarized.
   d. If UNOSOM Forces are attacked or threatened by unarmed hostile elements, mobs, and/or rioters, UNOSOM Forces are authorized to employ reasonable minimum force to repel the attacks or threats. UNOSOM Forces may also employ the following procedures: verbal warnings to demonstrators, shows of force including use of riot control formations, and warning shots.
   e. UNATTENDED MEANS OF FORCE: Unattended means of force, including booby traps, mines, and trip guns, are not authorized.
   f. DETENTION OF PERSONNEL: Personnel who interfere with the accomplishment of the mission or who otherwise use or threaten deadly force against UNOSOM, UN, or relief materials, distribution sites, or convoys may be detained. Persons who commit criminal acts in areas under the control of UN Forces may likewise be detained. Detained personnel will be evacuated to a designated location for turnover to military police.

5. DEFINITIONS:
   a. SELF-DEFENSE. Action to protect oneself or one's unit against a hostile act or hostile intent.
   b. HOSTILE ACT. The use of force against UNOSOM personnel or mission-essential property, or against personnel in an area under UNOSOM responsibility.
   c. HOSTILE INTENT. The threat of imminent use of force against UNOSOM Forces or other persons in those areas under the control of UNOSOM.
   d. MINIMUM FORCE. The minimum authorized degree of force which is necessary, reasonable, and lawful in the circumstances.

6. Only the Force Commander, UNOSOM, may approve changes to these ROE.

HAITIAN ASSISTANCE GROUP ROE
October 1993 (Proposed)

The following ROE will control the use of force during this operation and remain in effect until specifically modified or superseded. These ROE will apply to all UN Forces in Haiti. The ROE do not limit an individual's right of self-defense or a leader's obligation to conduct unit self-defense.

1. The following specific rules apply:
   a. No forces are declared hostile.
   b. Offensive military operations (raids, assaults, ambushes, etc.) are not authorized. UN Forces are authorized to conduct security patrols of UN installations and facilities.
   c. The authorities of Haiti are responsible for the protection of UN Forces in Haiti against civil disturbances and similar threats. If Haitian forces are unable or unwilling to provide the necessary protection to UN Forces, then the following measures are authorized:
      (1) UN Forces must use the minimum amount of force which will provide protection.
      (2) Use of deadly force is authorized only when there is an immediate threat to the life of UN personnel, US or other personnel serving with JTF Haiti, and when no lesser degree of force is adequate to counter the threat.
      (3) Use of deadly force is not authorized to protect property.

(4) UN personnel must issue a vocal warning if the situation permits, before resorting to aimed fire.

(5) UN personnel may fire weapons without prior warning only if UN personnel, or US or other personnel serving with JTF Haiti are subject to a hostile act or when there is clear evidence of hostile intent. Hostile act and hostile intent are defined as the use, or threat of imminent use, of force against UN, US or other personnel serving with JTF Haiti. Stop firing as soon as the situation permits.

d. UN response to hostile acts directly threatening death or serious injury to UN Forces will be rapid, decisive, and directed at the source of the threat, using only the minimum amount of force necessary to eliminate the threat.

e. Geographical restraints: UN Forces are not authorized to enter the territorial land, air, or waters of neighboring countries without the prior approval of the UN.

f. Equipment and munitions: Use of riot control agents is not authorized without the prior approval of the UN.

g. Relations with civilians:

(1) Treat all civilians with respect - dignity.

(2) UN Forces are authorized to detain, using the minimum force necessary, any person posing a threat to the security of UN personnel, US or other personnel serving with JTF Haiti, or JTF equipment, or property.

(3) UN Forces shall release all detained Haitians to the custody of the haitian authorities as soon as practicable.

h. Relations with military or civilian authorities:

(1) UN Forces will use the minimum force necessary to resist attempts by Haitian military or civilian authorities to take them into custody or disarm them.

(2) UN and associated US personnel are authorized to carry issued individual weapons for which they are qualified. CJTF Haiti will have authority for the control and disposition of assigned individual weapons.

i. Property encountered in the area of operations:

(1) UN Forces are not authorized to use private property provided or purchased without the approval of the UN authorities.

(2) UN Forces are authorized to use private property provided or purchased as a result of contracting or procurement.

(3) UN Forces are not authorized to use the public property of Haiti for UN business without the approval of the senior UN representative in Haiti.

j. Temporary refuge and diplomatic protection:

(1) Do not enter, engage, or search diplomatic residences, facilities, or personnel without the prior approval of the UN Security Council.

(2) UN Forces are not authorized to grant political asylum. Temporary refuge will be granted only if necessary to protect human life.

k. Violations of the ROE:

(1) Report, through command channels to the senior UN representative in Haiti, all violations, or allegations of violations, by UN Forces of the ROE, simultaneous copies to USCINCLANT J33/J02L.

(2) Preserve all evidence of violations, or allegations of violations, of the ROE.

l. Nothing in these rules negates a commander's obligation to take all necessary and appropriate action for his unit's self-defense.

m. Commanders will take whatever actions they deem necessary to protect their forces if they are endangered.

TAB I
INTERNATIONAL LAW CONSIDERATIONS IN THE ACQUISITION OF SUPPLIES AND SERVICES DURING MILITARY OPERATIONS

We cannot rely only on the principles of international law for the acquisition of supplies and services to support military operations. Limitations under international law make it imperative that we normally acquire supplies and services using U.S. acquisition laws (see TAB K). Nevertheless, battlefield acquisition techniques (confiscation, seizure, and requisition) may prove a valuable means of supporting some of the needs of a deployed force when active combat or actual occupation of hostile territory occurs.

U.S. Rights and Obligations Under International Law Relating to Battlefield Procurement of Goods.

The law of land warfare regulates the taking and use of property by military forces. The rights and obligations of military forces vary depending on the ownership of the property, the type of property, and whether the taking occurs on the battlefield or under military occupation. Certain categories of property are completely protected from military action (e.g., historic monuments, museums, and scientific, artistic, and cultural institutions).

Acquisition of Enemy Property in Combat.

Confiscation is the permanent taking or destruction of enemy public property found on the battlefield. HR (Hague Conv. Annex Reg.), art. 23, para. (g); HR, art. 53; Field Manual 27-10, Law of Land Warfare, paras. 59, 393-424 (July 1956) (hereinafter FM). When required by military necessity, confiscated property becomes the property of the capturing state. The concept of state ownership includes the requirement to preserve property. Confiscation is a taking without compensation to the owner. Thus, a commander may acquire the supplies of an enemy armed force and its government. Public buildings may also be used for military purposes. When military necessity requires it, if ownership is not known, a commander may treat the property as public property until ownership is determined.

Seizure is the temporary taking of private property. When the use of private real property on the battlefield is required by military necessity, military forces may temporarily use it without compensation. (Use of private real property is discouraged; try to use public real property [firehouses make excellent CPs]. Anything other than a transient use of private real property will require a lease [typically retroactive] concluded by the Corps of Engineers.) Private personal property, if taken, must be returned when no longer required, or else the user must compensate the owner. HR, art. 53; FM 27-10, para. 406-10. Examples of property which might be seized include arms and ammunition in contractor factories; radio, T.V., and other communication equipment and facilities; construction equipment; privately owned vehicles, aircraft, ships, etc.

To the maximum extent possible, avoid seizing private property. Use enemy public (government or military) property instead. If private property must be seized, give a receipt for the property, if possible, and record the condition of the property and the circumstances of seizure. Units should produce duplicate forms for this purpose, not only to document the seizure, but to notify operators and logisticians of the availability of the property. Units likely to seize property (typically airborne and light units with few organic vehicles) should train on seizure, recordation, and reporting procedures. Vehicle seizure procedures should be in the TACSOP of such units. Marking of seized vehicles (with spraypaint or marker panels) should be addressed in the TACSOP to minimize the likelihood of fratricide.

Acquisition of Enemy Property in Occupied Territories.

An occupation is the control of territory by an invading army. HR, art. 42; FM 27-10, para. 351. Public personal property that has some military use may be confiscated without compensation. FM 27-10, para. 403. The occupying military force may use public real property, if it has some military use or is necessary to prosecute the war. FM 27-10, para. 401. However, no ownership rights transfer.

Private property capable of direct military use may be seized and used in the war effort. Users must compensate the owner at the end of the war. FM 27-10, para. 403.

DoD makes a distinction between those instances in which a contractual obligation has arisen and those in which the private owner must initiate a noncontractual claim for compensation. 25 Jan. 90 memo from Deputy General Counsel (Acquisition) to ASA (RDA) (two categories of claims set forth). The first category involves products or services acquired as result of express or implied in fact contract. The second category which gives rise to potential compensation claims arises when a gov't representative unilaterally takes possession of the property. In both cases, an owner may have extraordinary relief available (Pub. L. 85-804). In no case, however, is relief under Pub. L. 85-804, or under any other contractual remedy, available to pay for combat damage.

Requisition is the taking of private property needed to support the occupying military force. Users must compensate the owner as soon as possible. FM 27-10, para. 417. The command may levy the occupied populace to support its force, i.e., pay for the requisition. Requisition is the right of the occupying force to buy from an unwilling populace. Requisitions apply to both personal and real property. It also includes services.

If a lawful government invites U.S. forces into its territory, the territory is not occupied, and U.S. forces have no right to take property. The Host Nation may agree to provide for some of the needs of U.S. forces which cannot be met by contracting. Example: Saudi Arabia in Operation DESERT SHIELD/STORM.

U.S. Rights and Obligations Under International Law Relating to Battlefield Procurement of Services.

The law of war also regulates use of PWs and the local populace as a source of services for military forces. PWs and civilians may not be compelled to perform services of a military character or purpose.

Use of PWs as Source for Services in Time of War.

PWs may be used as a source of labor; however, the work which PWs may perform is very limited. Geneva Conv. for the Protection of PWs (GPW), art. 49; FM 27-10, para. 125-133. PWs may not be used as source of labor for work of a military character or purpose. GPW, art. 49; FM 27-10, para.126. The regulation governing PW labor is AR 190-8, which requires a legal review (with copy to OTJAG) of proposed PW labor in case of doubt concerning whether the labor is authorized under the law

of war. Note that PWs may be used to construct and support (food preparation, e.g.) PW camps.

Use of Civilian Persons as Source for Services in Time of War.

Civilian persons may not be compelled to work unless they are over 18, and then only on work necessary either for the needs of the army of occupation, for public utility services, or for the feeding, sheltering, clothing, transportation, or health of the population of the occupied country. Geneva Conv. Relative to Protection of Civilian Persons in Time of War (GC), art. 51; FM 27-10, para. 418-424. Civilians are considered to be protected persons. Protected persons may not be compelled to take part in military operations against their own country. GC, art. 51; FM 27-10, para 418.

The prohibition against forced labor in military operations precludes requisitioning the services of civilian persons upon work directly promoting the ends of war, such as construction of fortifications, entrenchments, or military airfields; or transportation of supplies/ammunition in the Area of Operations. There is no prohibition against their being employed voluntarily and paid for this work. FM 27-10, para. 420.

Practical Considerations on Use of International Law Principles for Acquisition of Supplies and Services.

The uncertainty of these principles (confiscation, seizure, and requisition) as a reliable source for the acquisition of supplies and services make them a less-preferred means of fulfilling the requirements of U.S. forces than traditional contracting methods. However, these principles do provide an expedient complement to other acquisition techniques which should not be overlooked in appropriate circumstances. Before using these acquisition techniques, however, consider:

The impact that takings of private property or forced labor inevitably have on the populace.

The difficulty in accurately computing compensation owed if accurate records do not exist (units must set up a system for recording takings of private property in SOPs) if battlefield acquisitions are anticipated).

The difficulty of providing compensation under U.S. law--there is no simple way to pay.

Tab J
CLAIMS

COMBAT CLAIMS
Introduction

Deployments wherein the claims procedures are invoked are usually deployments into a Low Intensity Conflict (LIC) environment at the invitation of the Host Nation (HN).[1] Invariably, this type of deployment has political as well as military ramifications.

Effect of International Agreements. The impact of an international agreement between the US and the HN on the claims operation will most probably be minimal. Most bilateral Military Assistance Agreements to which the US is a party have no provisions regarding the payment of claims. If a Status of Forces Agreement, which addresses claims issues, has previously been concluded, it may be suspended in time of armed conflict.[2] Moreover, a SOFA provision covering claims may not be applicable to "war damage." One option the JA should investigate, however, is that of concluding an agreement between the US and the HN under which the latter assumes the obligation of paying all claims that result from any combat activity.[3]

Noncombat Claims Arising on Conventional Combat Deployments. A basic principle found throughout the US claims statutes and AR 27-20 is that damage resulting directly from combat activities[4] is not compensable. For example, claims resulting either from "action by an enemy" or "directly or indirectly from an act of the armed forces of the United States in combat" are not payable under the Foreign Claims Act.[5] This is not to infer, however, that a SJA element deploying on a conventional combat operation will not have to be prepared to pay claims. To the contrary, all of the types of noncombat claims discussed in this Section may also occur on a combat operation. Claims unrelated to combat activities will arise under the Foreign Claims Act and the Military Claims Act.[6] The same is true of the Personnel Claims Act,[7] which does allow compensation of property losses due to enemy action. Additionally, there exists no prohibition against the payment of solatia[8] for injury or death resulting from combat activities, and the expression of sorrow and compassion will help maintain the support of the populace.

Finally, Art. 139, UCMJ claims,[9] and real estate claims will also arise. The JA must be prepared to process all of these claims, and a Class A Agent must be present to make claims payments, preferably in the local currency.

Combat Claims Arising on Conventional Combat Deployments. As has been stated, most combat-related claims are not compensable. However, the prohibition on payment of such claims operates in direct contradiction to the principal goal of low intensity conflict/foreign internal defense--obtaining and maintaining the support of the populace.

Each of our substantial combat scenarios over the last 30 years has been unique, the Gulf War in particular. The 3 major deployments prior to the Gulf--Vietnam, Grenada, and Panama--provide a variety of ways to deal with combat claims. The first (Vietnam), already discussed, is to conclude an international agreement under which the HN assumes the responsibility of paying all combat-related claims. The second (Grenada), is to seek special legislation to allow for such claims to be paid.[10] The third

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[1] Navy: see Chapter VIII (Gen. Claims Provisions), JAGINST 5800.7C, JAGMAN, 3 Oct 90, and JAGINST 5890.1, Admin Processing and Consideration of Claims on Behalf of and Against the US, 17 Jan 91.

[2] NATO SOFA Art. XV, e.g., provides that in the event of hostilities, a party may suspend the SOFA by giving 60 days notice.

[3] This was done in Vietnam. South Vietnam had responsibility for processing and paying all combat claims generated by the US and the "Free World forces."

[4] Defined as "Activities resulting directly or indirectly from action by the enemy, or by the US Armed Forces engaged in, or in immediate preparation for, impending armed conflict.

[5] 10 USC 2734. See generally, Chapter 10, AR 27-20 and Chapter 7, DA Pam 27-162.

[6] 10 USC 2733 as amended. See generally, Chapter 3, AR 27-20 and portions of Chapter 4, DA Pam 27-162

[7] 31 USC 3721. See generally, Chapter 11, AR 27-20 and Chapter 2, DA Pam 27-162.

[8] See, Paragraph on Solatia Payments on page L-7.

[9] 10 USC 939. See generally, Chapter 9, AR 27-20 and Chapter 10, DA Pam 27-162.

[10] At the conclusion of combat on Grenada, it quickly became apparent that, in order to maintain the support of the Grenadian citizens, the US could not refuse to pay for combat-related damage. With the claims statutes providing no legislative basis upon which to pay these claims, it was determined to conclude a Participating Agency Servicing Agreement (PAPA) between the US Agency for International Development (USAID) and the US Army Claims Service (USARCS). This Agreement allowed for combat claims to be paid.

The agencies agreed upon a Letter of Instruction (LOI), which established the procedures to be followed, listed those categories of claims deemed to not be compensable, and set monetary limits on recovery for personal injury and death claims. Foreign Claims

(Panama), is to work through the existing government, and provide a "pot of money" to the government from which they can pay claims.[11]

Requisitions under the Law of War. Another aspect of the claims operation frequently overlooked is the impact of lawful requisitions of private property on the battlefield. Under the law of war, a soldier may requisition any type of property if there is a valid military necessity for such an action.[12] Complications arise, however, when the owner of the property files a claim for its damage, destruction, or use, and no accounting of the requisition of the property in question has been made.

To ensure that undocumented claims are not paid, the JA must implement a procedure under which requisitions are recorded. This might be a system as simple as providing designated NCOs with booklets of receipts to provide civilians when property is requisitioned. Copies of receipts would be maintained for accounting purposes. Additionally, law of war training should include instruction on the requisitioning of property and property accountability.

Conclusion. The importance of the JA's role in implementing claims procedures on a conventional combat operation is obvious. A fair, quick, compassionate claims operation is one of the best ways to gain and maintain the support of the local populace. Such an operation, combined with disciplined soldiers, well-trained in the rules of property acquisition and accountability, will help ensure the success of the mission.[13]

OTHER (THAN COMBAT) CLAIMS

JAs planning for legal contingencies impacting upon overseas exercises may be certain that claims will arise. Personal injuries and deaths will occur. Property will be lost, damaged, and destroyed. Claimants will include not only local nationals, but US soldiers. Because of this, the goal of deploying JAs must be to establish a system enabling them to resolve these claims as quickly and efficiently as possible.

A viable claims system is important for three reasons. First, the CDR will be focusing on the mission of exercising the unit and should not be distracted by the demands of claimants, regardless of their importance and legitimacy. The SJA element must be prepared to handle these demands. Secondly, soldiers deserve to have their claims resolved quickly. Morale will suffer if this does not occur. Finally, the ability or inability to effect the rapid payment of legitimate claims presented by local nationals is a matter which will impact directly upon relations between the US and the HN.

Prevention Program. The initial step in any successful claims effort is the establishment of a continuous maneuver damage prevention program. Such a program should include briefing the soldiers and unit claims officers on both the steps to be taken to reduce maneuver damage and on the procedures to be followed when damage or injury occurs. The briefing can be general in nature or tailored to a particular upcoming exercise. These procedures should then be implemented during all exercises, regardless of whether the exercise location is in CONUS or overseas.

Once a continuous maneuver damage prevention program is in place, the JA may concentrate on the claims issues that will arise on specific overseas exercises. Among the issues that must be addressed are: What is the deployment location? Are there any international agreements with the HN that will impact on the claims operation? Has single-service claims responsibility been assigned? What claims will arise? What logistical support is required, and what support is available? How will claims be investigated? Where will the claims office be located? How will the claims be paid? Must the impact of HN law on legal issues, such as negligence, be considered? If so, how will these laws be determined?[14]

Deployment Location. When US forces deploy overseas, international agreements between the US and the HN may impact on the

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Commissions had already been appointed to resolve claims under the Foreign Claims Act not barred by the "combat claims exclusion." These commissions proceeded to adjudicate and pay the combat-related claims, essentially using the same procedures already established for the payment of claims under the Foreign Claims Act and incorporating the special requirements imposed by the LOI. $1,800,000 of USAID money was made available: $200,000 to support the claims office and personnel; the remainder to pay claims.

[11] This was done in Panama for a variety of reasons. First, there was a limited amount of money, and numerous claims. A largely slum area around the Commandancia had burned, and resolving claims would have been both massive and guesswork. More importantly, by giving the money to the Endara government, it helped to establish its legitimacy. Our mission was to support the legitimate government, not act in place of it.

[12] An common example is the taking of private vehicles for tactical transportation. US forces took vehicles in Operations Urgent Fury, Just Cause, and Desert Storm. Other lawful examples would be the taking of food to feed soldiers who cannot be resupplied because of the tactical situation or the billeting of soldiers in private dwellings if other suitable shelter is not available.

[13] There is a very practical side to this as well. Though initially unintended, the claims office in Grenada became the principal place of contact between US forces and Grenadian citizens. The support of the Grenadians for the US resulted in so much intelligence being received at the claims facility that, eventually, military intelligence personnel were stationed at the office on a full-time basis.

[14] See generally, Chapters 1,2 & 15, AR 27-20 and Chapter 11, DA Pam 27-162.

claims operation. The JA must be aware of any procedures previously established to resolve claims under such any agreement and must be prepared to operate in accordance with such procedures.[15]

Another important aspect of deployment location is the designation of single-service claims responsibility. Claims arising during deployments to countries over which the Department of the Army has single-service claims responsibility will be settled by Army JAs. However, Army forces may well deploy to countries for which either the Navy or Air Force has the responsibility to resolve claims. In this situation, JAs must be prepared to process claims under the procedures established by these services. If single- service claims responsibility has not been designated, the appropriate unified CDR may, on an interim basis, assign responsibility.[16]

Potential Claims. Another important aspect of predeployment claims planning is the determination of the types of claims that may arise during the overseas exercise. Essentially, these will be the same types of claims normally encountered at a CONUS installation, with two exceptions. First, the Federal Tort Claims Act[17] does not apply to claims arising in a foreign country. Secondly, because the unit will be deployed overseas, claims will occur that are cognizable under either a SOFA[18] or some other form of stationing arrangement, or the Foreign Claims Act. The following discussion is a short summary of the types of claims that may be encountered on an overseas exercise. Its purpose is not to make JAs experts in all aspects of claims adjudication. Rather, the intent is to both alert JAs to the types of claims that may arise and provide a sound basis for predeployment preparation.

Claims Cognizable under the Military Claims Act (MCA).[19] The MCA is applicable worldwide, and claims payable under its provisions include those involving damage to real or personal property and personal injury or death. Overseas, the MCA will have limited effect, as the Foreign Claims Act takes precedent over claims presented by inhabitants of foreign countries. Moreover, a claim cognizable under the Personnel Claims Act must be settled under that Act. These two restrictions limit the MCA's applicability to claims presented by individuals abroad who are not inhabitants of a foreign country, such as US tourists.

There are two bases for a claim under the MCA. The first is that the damage or injury in issue resulted from an ". . . act or omission determined to be negligent, wrongful, or otherwise involving fault of military personnel . . . acting within the scope of their employment." The second is that the damage or injury in question resulted from "noncombat activities." This latter basis for a MCA claim is that most likely to be encountered by JAs.

Claims Cognizable under the Personnel Claims Act (PCA).[20] The PCA is applicable worldwide; however, it is limited to claims for loss, damage, or destruction of personal property of military personnel which occurred incident to service. Bases for claims that may arise while a unit is deployed on an overseas exercise include loss while the property was in an authorized place, transportation losses, losses due to terrorism, loss of clothing and articles being worn, and loss due to on- post robbery. Negligence on the part of the claimant will preclude recovery.

The PCA is the Act under which deployed soldiers will file for loss of personal property, and the JA must be prepared to settle these claims quickly. Failure to do so will adversely affect morale.

Claims Cognizable under the Foreign Claims Act (FCA).[21] With respect to overseas exercise deployments, the FCA is the most important claims statute, and JA knowledge of the procedures for settling claims under its provisions is essential. Simply stated, the Act covers claims by inhabitants of foreign countries for personal injury, death, or property loss or damage caused by US military personnel outside the US Compensable claims are those which result from either "noncombat activity" or from a negligent or wrongful act or omission by US military personnel. With respect to the second basis for recovery, there is no requirement that individuals causing the injury or damage be acting within the scope of their employment.

Another important aspect of the FCA is that claims arising within its provisions are adjudicated before a foreign claims commission comprised of either one or three members. The members of these commissions should be appointed prior to deployment. Finally, the JA involved in predeployment preparation must realize that, when adjudicating a claim under the FCA, the law of the country in which the claim arose must be considered. The need for advice on HN law may well necessitate contracting for the services of local attorneys.

SJA offices in CONUS do not routinely encounter the FCA, a relatively complex statute. However, the implementation of a foreign claims program is the responsibility of the deploying CDR. These facts make predeployment planning in preparation for adjudicating FCA claims on exercises a matter for particular emphasis.

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[15] Prior to deployment the JA who will be responsible for claims handling should either contact the Chief of Claims in the SJA office of the Unified Command responsible for that particular Country or contact the U.S. Army Claims Service , Office of the Judge Advocate General, Fort George G. Meade, Maryland 20755-5360 (1-301-677-6851/DSN 8-923-6851) for further information.

[16] See, Section III, Chapter 10, AR 27-20 and Section III, Chapter 7, DA Pam 27-162. At the end of this Section in the DA Pam Figure 7-1, which is a table of Countries with a designation of DOD Department responsibility.

[17] 28 USC 2671-2680. See generally, Chapter 4, AR 27-20 and parts of Chapter 4 & 5, DA Pam 27-162 and U.S. Army Claims Service, Federal Tort Claims Act Handbook.

[18] See generally, Section II, Chapter 7, DA Pam 27-162.

[19] See Footnote 6, supra.

[20] See Footnote 7, supra.

[21] See Footnote 5, supra.

Claims under Reciprocal International Agreements (SOFA Claims).[22] The previous section dealing with the FCA focuses on that situation in which units deploy to countries ". . . with which the US does not have a formalized claims agreement covering the receipt, investigation, processing and payment of claims filed by local inhabitants as a result of activities of the 'visiting' military forces." Generally, US units will deploy, for exercise purposes, to a country with which the US has a reciprocal international agreement that regulates the settlement of any claims that may arise. For example, if a unit deploys to a NATO country, Korea, or Japan, claims matters will be managed by a command claims service under the system of single-service claims responsibility previously discussed.[23]

This latter type of exercise deployment places two predeployment responsibilities on the JA. First, knowledge of the claims provisions contained in the applicable SOFA is mandatory. Secondly, the JA must be aware of the procedures in effect in the receiving state for the settlement of claims. The SJA element of the deploying unit ". . . may legitimately expect and plan for technical assistance from the servicing command claims service and should coordinate with that service prior to deployment."

Solatia Payments. If a unit deploys on an exercise to the Far or Middle East, the JA must consider the custom, widespread in that part of the world, of making solatia payments to the victims of accidents. These payments are immediate, generally nominal, ". . . and based on a feeling of responsibility or sympathy by the individual involved toward the victim or his or her family." There does not necessarily exist any legal requirement for such a payment. Rather, payment is made as an expression of remorse. The ability of the command to make prompt solatia payments is a matter that will impact directly upon relations with the HN and the goodwill of its people.

Art. 139 Claims.[24] Art. 139 deals with claims alleging willful damage to or wrongful taking of property by military personnel acting outside the scope of their employment. Upon deployment, Art. 139 claims will be processed just as they are at the installation. The processing of these claims overseas may prove to be a bit more complicated, however, once such a claim is filed. When these claims arise in the context of an overseas exercise, will the claim be adjudicated while the unit is deployed, or delayed until redeployment? If the claim is to be adjudicated in the deployment location, will the SPCMCA who has authority over the soldier in question be available? Who will serve as the investigating officer? Will the SJA element be prepared to provide the required legal review? As with all other legal issues discussed in this section, the procedures to be used in the processing of Art. 139 claims must be an integral part of predeployment planning.

Real Estate Claims. When deployed on an overseas exercise, the JA must be aware that the Corps of Engineers has the responsibility for resolving all claims for ". . . rent, damage, or other payments involving the acquisition, use, possession, or disposition of real property." The authority for resolving real estate claims is AR 405-15. There are instances when claims for damage to real property will be "founded upon tort." If so, they will be processed under the provisions of either the MCA or the FCA. The majority of real estate claims, however, will be settled by an Engineer Real Property Team, and predeployment coordination on this issue is essential.

Logistical Support. The plan for logistical support may be relatively simple. Claims forms, legal memoranda, and finance vouchers do not have to be typed. Accordingly, extensive clerical support is not essential. However, there do exist some issues which must be considered. These revolve around three aspects of the claims operation: location of the claims office, investigation, and payment.

The initial steps of any claims operation are the establishment of a central location for the receipt of claims and the publicizing of this location for the benefit of local nationals. The establishment of such a location should not be difficult. A tent will suffice. If something more substantial is desired, however, a Real Property Team should be available to lease the facility required. Publicizing the location and hours of operation of the office can be accomplished by the G-5 and, if available, Public Affairs personnel. The local embassy may provide individuals to assist in this effort, and civil affairs personnel may also be used, if such personnel have deployed on the exercise.

Transportation assets will be limited. Notwithstanding this fact, JAs and other claims investigators must be able to travel to the sites of claims. A vehicle should be made available for their exclusive use. This requirement must be met if the claims operation is to be effective. Assistance in investigating claims may also be necessary. Embassy and civil affairs personnel may be helpful, and local national insurance adjusters may serve as additional sources of assistance.

Once claims have been adjudicated, they must be paid. Payment requires the presence of a Class A agent and a sufficient amount of local currency. Who will provide security? Still another issue is the "type" of money used to fund the operation. The Class A agent will very probably come from the deployed unit; however, the money to pay for claims filed under the FCA must come from USARCS. These issues must be resolved during predeployment planning through extensive coordination with unit comptroller personnel and USARCS.[25]

Bibliography

1. AR 27-20: Claims (28 February, 1990).
2. DA Pam 27-162: Claims (15 December, 1989).
3. OTJAG, Army Claims Service, Federal Tort Claims Act Handbook (October 1991).
4. OTJAG, Army Claims Service, Allowance List-Depreciation Guide ('90 Revision: Effective 15 Aug 91).
5. AR 405-15.

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[22] See Footnote 18, supra.

[23] See Figure 7-1, page 151 of DA Pam 27-162 for a list of U.S. sending state offices and single Services offices.

[24] See Footnote 9, supra.

[25] See Footnote 15, supra.

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INTRODUCTION

Operations Desert Shield/Desert Storm highlighted the role that contracting plays in military operations. Contracting became an effective force multiplier for deployed forces. Operations Desert Shield/Desert Storm also revealed that a challenging problem for deployed forces is compliance with contract and fiscal law while conducting military operations in the field. Recent operations in Somalia proved again the value of contracted support to a deployed force. Attorneys participating in future deployments must be prepared to handle contract and fiscal law issues.

Contracting as a force multiplier: contracting locally reduces dependence on the CONUS-based logistics system; contracting with local sources frees airlift and sealift for other priority needs; contracting with local contractors reduces the time between identification of needs and the delivery of supplies or performance of services; contracting with local contractors provides alternative sources for supplies and services.

Applicable Law During a Deployment.

Contracting during a deployment involves two main bodies of law: international law, and U.S. contract and fiscal law. Attorneys must understand the authorities and limitations imposed by these two bodies of law.

International Law.

- The Law of War -- Combat.
- The Law of War -- Occupation (may be directly applicable, or followed as a guide when no other laws clearly apply, such as in Somalia during Operation Restore Hope).
- International Agreements.

U.S. Contract and Fiscal Law.

- Armed Services Procurement Act of 1947, as amended. 10 U.S.C. §§ 2301-2331.
- Federal Acquisition Regulation (FAR) and Agency Supplements.
- Fiscal Law. Title 31, U.S. Code; AR 37-1; AR 37-100-XX.
- Executive Orders and Declarations.

Wartime Funding.

Congressional declarations of war and similar resolutions may result in subsequent legislation authorizing the President and heads of military departments to expend appropriated funds to prosecute the war as they see fit. However, recent military operations (Somalia, Desert Shield/Desert Storm, Panama, Grenada) were not declared "wars."

Wartime Contract Law.

Congress has authorized the President and his delegees to initiate contracts that facilitate national defense notwithstanding any other provision of law. Pub. L. No. 85-804, codified at 50 U.S.C. §§ 1431-1435; Executive Order 10789 (14 Nov. 1958); FAR Part 50. These powers are extremely broad, but authority to obligate funds in excess of $50,000 may not be delegated lower than the Army Secretariat. Earlier versions of this statute were the basis for the wholesale overhaul of defense acquisition at the beginning of World War II. This may occur again in a future general conflict. Although these are broad powers, Congress still must provide the money to pay for obligations incurred under this authority.

PREPARATION FOR DEPLOYMENT CONTRACTING

The Unified Command or MACOM controlling the deployment will set policy and procedure affecting contracting plans. Coordinate with the controlling headquarters and other MACOMs that will have roles in expected deployments. OPLANs will determine when the contracting personnel will deploy. The contracting element will consist of contracting, legal, and support personnel.

General Considerations.

Recent operations have demonstrated the need to begin planning early for contracting during a deployment. The personnel necessary for effective contracting must be identified and trained. Units must develop plans for contracting personnel/teams to deploy with the organization. Units must realize that assets for contracting normally will come from their organic resources. Reserve assets may provide some contracting support. Coordinate in advance to determine the extent of this support.

Contracting Officer (KO) / Ordering Officer Support

Commanders should identify KO/ordering officer support requirements. Only contracting officers and their authorized representatives (e.g., ordering officers) may obligate government funds. KOs enter, administer, or terminate contracts and make determinations and findings permitted by statute and regulation. FAR 1.602-1.

Commanders should ensure that KOs and ordering officers are properly appointed and trained. KOs may be appointed by the Head of Contracting Activity (HCA), an attache, a chief of a foreign mission (Army), or certain officials in the Army Secretariat. FAR 1.603; AFARS 1.603-2.

HCA may delegate appointment power to a Principal Assistant Responsible for Contracting (PARC). This is the official who usually exercises authority to hire and fire KOs.

Ordering officers may be appointed by the chief of the contracting office. AFARS 1.603-1(2). There is no specific guidance on appointing ordering officers -- common practice is to appoint a commissioned officer, warrant officer, or noncommissioned officer. Ordering officers usually are not part of the contracting element, but are a part of the forward units. Ordering officers make purchases with imprest funds, make over the counter purchases with SF 44s, and issue delivery orders against existing indefinite delivery contracts awarded by KOs. AFARS 1.603-1-90. Ordering officers may be government credit card holders. AFARS 13.9.

KOs and ordering officers are subject to limitations in their appointment letters and procurement statutes and regulations. Contracting authority may be limited by dollar, subject matter, purpose, time, etc., or may be unlimited. Typical limitations are restrictions on the types of items that may be purchased and on per purchase dollar amounts.

Administrative Needs.

Deployable units should assemble contracting support kits. Package and label kits in footlockers or similar containers for easy deployment. Administrative needs forgotten may be difficult to obtain in the area of operations. Kits should contain a 90-day supply of administrative needs, all essential references.

References

Statutes: Titles 10, 31, and 41 of U.S. Code.

Regulations: FAR, DFARS, AFARS/AFFARS/NAPS, AR 37-1, AR 37-100-XX, AR 37-103, and command supplements to these regulations. If these are too much to deploy with, take a pocket FAR or the CFR version maintained with your own updating. If possible, take CD-ROM contract references and LEXIS/WESTLAW software.

Contract Forms.

These are essential. The contracting element should ensure it brings a 90-day supply of: Standard Form (SF) 44s (Purchase Order-Invoice-Voucher), DD Form 1155s (Purchase Order), SFs 26, 30, 33, and 1442 (solicitation, award, and modification, and construction solicitation forms), DA Form 3953 (Purchase Request and Commitment), and form specifications for common items, such as:

Subsistence items.
Labor and other services.
Fuel.
Billeting.

Typing contract documents manually is tedious and time-consuming. Contracting elements should deploy with Standard Army Automated Contracts System (SAACONS) software loaded on personal computers for automated production of contract documents. Translations of contract forms, specifications, and other provisions also should be obtained before deployment if possible.

Other Logistical Needs.

Bring maps, area phone books, catalogs with pictures, etc., to assist in finding and dealing with sources in the deployment theater. Also bring desks, typewriters, computers, paper, etc., as well as personnel trained to use them. Arrange for translator support for the contracting element (coordinate with Civil Affairs unit in COSCOM or TAACOM; contact embassy if necessary to obtain this support). Deploy with a notebook computer, and include a CD-ROM drive to access FAR, DFARS, and service supplements to the FAR, if these references are available in this format.

Finance and Funding Support.

Finance specialists are not part of the contracting element and not under its control. A deploying unit should train to account for funds properly when they must do so without the aid of a finance office. Generally, deploying units will receive a bulk-funded DA Form 3953, Purchase Request and Commitment (PR&C) if requested to support needs while deployed.

Consider establishing an imprest fund in advance of deployment notification. FAR 13.4; DFARS 213.4; AR 37-103, ch. 8. Practice making purchases with the fund to support unit requirements in garrison. Installation commanders may establish funds up to $10,000. Imprest funds operate like a petty cash fund; it is replenished as payments are made from it. The fund should include local currency if available before deployment. FAR 25.501 requires that off-shore procurements be made with local currency, unless the contracting officer determines the use of local currency inappropriate (e.g., if a SOFA exists and it allows use of U.S. dollars).

Finance personnel or designees (e.g., Class A agents) hold money and will accompany an ordering officer to actually make payment if a vendor will not take SF 44 or other contract document and invoice the U.S. later. Identify the deploying Class A paying agents, and ensure they are appointed and trained as necessary.

CONTRACTING DURING A DEPLOYMENT

This section discusses various methods used to acquire supplies and services. It begins with general discussion of seeking competition, and discuss specific alternatives for contracting to meet the needs of a deploying force. Key to successful contracting operations are the proper training and appointment of contracting personnel. Units should verify that contracting support personnel have received necessary training. If time permits, provide centralized refresher training. Also review letters of appointment for contracting officers and ordering officers. Ensure that personnel know the limitations on their authority. Review and update contents of contracting support kits. Ensure that references include latest changes.

Competition Requirements.

10 U.S.C. § 2304 requires the government to seek competition for its requirements. In general, the government must provide for full and open competition, providing all responsible sources an opportunity to compete. No automatic exception is available for contracting operations during deployments.

The statutory requirement for full and open competition for purchases over the small purchase threshold creates a 45-day minimum procurement administrative lead time (PALT) for solicitations issued, and contracts awarded and performed, within the Continental U.S. (CONUS). The 45-day PALT results from a requirement to publish notice of the proposed acquisition 15 days before issuance of the solicitation (thru synopsis of the contract action in the Commerce Business Daily (CBD)), then to provide a minimum of 30 days for offerors to submit bids or proposals. Three additional time periods extend the minimum 45-day PALT: 1) time needed for requirement definition and solicitation preparation; 2) time needed for evaluation of offers and award

of the contract; and 3) time needed after contract award for delivery of supplies or performance of services. Exceptions to the usual requirement for full and open competition include:

Unusual and compelling urgency; this exception authorizes a contract action without full and open competition. It permits the contracting officer to limit the number of sources solicited to those who are able to meet the requirements in the limited time available. FAR 6.302-2. This exception also authorizes an agency to dispense with publication periods (minimum 45-day PALT) if the government would be seriously injured by this delay. It also allows preparation of written justifications for limiting competition after contract award. FAR 6.302-2(c)(1).

National security is another basis for limiting competition; it may apply if the existence of the operation or the acquisition is classified. Mere classification of specifications generally is not sufficient to restrict the competition, but it may require potential contractors to possess or qualify for appropriate security clearances. FAR 6.302-6.

Public interest is another exemption to full and open competition, but only the head of the agency can invoke it. FAR 6.302-7.

Use of the urgent and compelling, national security, and public interest exceptions require a "Justification and Approval", or J&A. FAR 6.303. Approval levels for justifications are listed in FAR 6.304:

Actions under $100,000: the contracting officer.

Actions from $100,000 to $1 million: the competition advocate.

Actions from $1 million to $10 million: the HCA or designee.

Actions above $10 million: the agency acquisition executive; for the Army this is the Assistant Secretary of the Army for Research, Development, and Acquisition (ASA(RDA)).

Contract actions made and performed outside the United States, its possessions, and Puerto Rico, for which only local sources will be solicited, generally are exempt from compliance with the requirement to synopsize the acquisition in the CBD. These actions therefore may be accomplished with less that the normal minimum 45-day PALT, but they are not exempt from the requirement for competition. See FAR 5.202 (a)(12); see also FAR 14.202-1(a) (thirty-day bid preparation period only required if requirement is synopsized). Thus, during a deployment, contracts may be awarded with full and open competition within an overseas theater faster than within CONUS, thus avoiding the need for a J&A for other than full and open competition for many procurements executed in rapid fashion.

Methods of Acquisition.

Sealed bidding: award is based only on price and price-related factors, and is made to the lowest, responsive, responsible bidder.

Negotiations (also called "competitive proposals"): award is based on stated evaluation criteria, one of which must be cost, and is made to the responsible offeror whose proposal offers either the lowest cost, technically acceptable solution to the government's requirement, or the best value, even if it is not lowest in cost. The basis for award (low-cost, technically-acceptable or best value), and a description of the factors and subfactors that the contracting officer will consider in making this determination, must be stated in the solicitation.

Small purchase and simplified contracting procedures: simplified contracting procedures are for the acquisition of supplies, nonpersonal services, and construction in amounts less than the small purchase threshold.

Sealed Bidding as a Method of Acquisition.

Sealed bidding procedures must be used if the four conditions enumerated in the Competition in Contracting Act exist. 10 U.S.C. § 2304(a)(2)(A); Racal Filter Technologies, Inc., B-240579, Dec. 4, 1990, 70 Comp. Gen. 127, 90-2 CPD ¶ 453.

1. Time permits the solicitation, submission, and evaluation of sealed bids;
2. Award will be made on price and price-related factors;
3. It is not necessary to conduct discussions with responding sources about their bids; and
4. There is a reasonable expectation of receiving more than one sealed bid.

Use of sealed bidding results in little discretion in the selection of a source. Bids are solicited using Invitations for Bids (IFBs) under procedures that do not allow for pre-bid discussions with potential sources. A clear description/understanding of the requirement is needed to avoid having to conduct discussions. Sealed bidding requires more sophisticated contractors because minor errors in preparing a bid prevent the government from accepting the offer, because such errors are likely to make the bidder nonresponsive. Only fixed-price type contracts are awarded using these procedures. Sealed bidding procedures seldom are used during active military operations. The fluidity of a military operation generally requires discussions with responding offerors to explain our requirements and/or to assess their understanding of, and capability to meet, U.S. requirements. Accordingly, sealed bidding procedures rarely are used until the situation has stabilized. See FAR Part 14.

Negotiations (Competitive Proposals) as a Method of Acquisition.

Negotiations are used when the use of sealed bids is not appropriate. 10 U.S.C. § 2304(a)(2)(B). Negotiations permit greater discretion in the selection of a source, and allow consideration of non-price factors in the evaluation of offers, such as technical capabilities of the offerors, past performance history, etc. Offers are solicited by use of a Request for Proposals (RFP). Discussions with offerors permit better understanding of needs and capabilities. Negotiations permit the use of any contract type. Negotiations procedures also permit the use of letter contracts and oral solicitations to expedite awards of contracts and more rapidly fulfill requirements. See FAR Part 15.

Small Purchase and Simplified Contracting Procedures.

Small purchase refers to contractual actions up to $25K in peacetime and during exercises, or up to $100K during a contingency operation declared by the Secretary of Defense for contracts awarded and performed outside the United States. 10 U.S.C. § 2302(7); DFARS 213.000. The Department of Defense has invoked this increased threshold twice, first during Operations Desert Storm/Desert Shield, and next during Operation Restore Hope.

About 95% of the contracting activity conducted in a deployment setting will be small purchases. The following are various methods of making or paying for these simplified purchases. Most of these purchases can be solicited orally, except for

construction exceeding $2000 and complex requirements. The types of small purchase procedures likely to be used during a deployment are:

Purchase Orders. FAR Subpart 13.5; DFARS Subpart 213.5; AFARS Subpart 13.5.
Blanket Purchase Agreements (BPAs). FAR Subpart 13.2; DFARS Subpart 213.2; AFARS Subpart 13.2.
Imprest Fund Purchases. FAR Subpart 13.4; DFARS Subpart 213.4; AFARS Subpart 13.4.
Government Credit Card Purchases. AFARS Subpart 13.9.

Purchase Orders.

A purchase order is an offer to buy supplies or services, including construction. Purchase orders usually are issued only after requesting quotations from potential sources. Issuance of an order does not create a binding contract. A contract is formed when the contractor accepts the offer either in writing or by performance. In operational settings, purchase orders may be written using two different forms.

Dep't of Defense (DD) Form 1155. This a multi-purpose form which can be used as a purchase order, blanket purchase agreement, receiving/inspection report, property voucher, or public voucher. It contains some contract clauses, but users must incorporate all other applicable clauses. FAR 13.507; DFARS 213.507. See clause matrix in FAR Part 52. When used as a purchase order, the KO may make purchases up to the small purchase threshold. Only KOs use this form.

Standard Form (SF) 44. See Appendices A & B. This is a pocket-sized form intended for over-the-counter or on-the-spot purchases. Clauses are not incorporated. Use this form for "cash and carry" type purchase. Ordering officers, as well as KOs, may use this form. Reserve unit commanders may use the SF 44 for purchases not exceeding $2,500 when a Federal Mobilization Order requires unit movement to a Mobilization Station or site, or where procurement support is not readily available from a supporting installation. AFARS 1.603-1-91(b). Conditions for use:

As limited by appointment letter.
Away from the contracting activity.
Goods or services are immediately available.
One delivery, one payment.

Ordering officers may use SF 44s for purchases up to $2,500 for supplies or services, except purchases up to the small purchase threshold may be made for aviation fuel or oil. A KO may make purchases up to the small purchase threshold if overseas and the SECDEF has declared a contingency.

Blanket Purchase Agreements (BPAs).

A BPA is a simplified method of filling anticipated repetitive needs for supplies or services essentially by establishing "charge account" relationships with qualified sources of supply. They are not contracts but merely advance agreements for future contractual undertakings. BPAs set prices, establish delivery terms, and provide other clauses so that a new contract is not required for each purchase. Gov't is not bound to use a particular supplier as it would be under a requirements contract. KO negotiates firm-fixed-prices for items covered by the BPA, or attaches to the BPA a catalog with pertinent descriptions/prices.

BPA's are prepared and issued on DD Form 1155 and must contain certain terms/conditions. FAR 13.203-1(j).

Description of agreement.
Extent of obligation.
Pricing.
Purchase limitations.
Notice of individuals authorized to purchase under the BPA and dollar limitation by title of position or name.
Delivery ticket requirements.
Invoicing requirements.

KOs may authorize ordering officers and other individuals to place calls (orders) under BPA's. AFARS 13.203-1(a)(S-92). Existence of a BPA does not per se justify sole source purchasing. Consider BPA's with multiple sources. If insufficient BPA's exist, solicit additional quotations for some purchases and make awards through separate purchase orders.

Imprest Funds.

An imprest fund is a cash fund of a fixed amount established by an advance of funds from a finance or disbursing officer to a duly appointed cashier. The cashier disburses funds as needed to pay for certain small purchases. Funds are advanced without charge to an appropriation, but purchases are made with notation on the receipts returned to the imprest fund cashier of the appropriation which will be used to reimburse the imprest fund for the amount of the purchase. Maximum amount in a fund at any time is $10K. Maximum single transaction amount is $500, except during overseas contingencies declared by SECDEF, when the maximum amount is $2500. DFARS 213.404.

Ordering officers, as well as KOs, may use the imprest fund procedures. Imprest fund cashiers, however, cannot be ordering officers and cannot make purchases using imprest funds.

Each purchase using imprest funds must be based upon an authorized purchase requisition. If materials or services are deemed acceptable by the receiving activity, the receiver annotates the supplier's sales document and passes it to the imprest fund cashier for payment.

Government Credit Card Program.

Authorized government credit card holders may use the cards (VISA cards issued through Rocky Mountain Bankcard System) to purchase goods and services up to $2,500 per purchase, or the small purchase threshold, if the cardholder is a KO. Funds must be available to cover the purchases. Special training for cardholders is required. AFARS Subpart 13.9. Issuance of these cards to deploying units must be coordinated in advance of deployment. Time for issuance is not available once the unit receives deployment notice.

Small Purchase Competition Requirements.

Competition requirements apply to small purchase actions as well as to larger procurements. For new purchases up to 10% of the small purchase threshold ($2,500 normally, $10K in contingencies), only one oral quotation is required, if the KO finds the price to be fair and reasonable. Northern Virginia Football Officials Assoc., B-231413, Aug. 8, 1988, 88-2 CPD ¶ 120. Distribute such purchases equitably among qualified sources. Grimm's Orthopedic Supply & Repair, B-231578, Sept. 19, 1988, 88-2 CPD ¶ 258. If practical, solicit a quotation from other than the previous supplier before placing a repeat order.

For purchases between 10% of the small purchase threshold and that threshold ($25K normally, $100K during declared contingencies), obtain oral quotations from a reasonable number of sources. Omni Elevator, B-233450.2, Mar. 7, 1989, 89-1 CPD ¶ 248. Soliciting three sources is considered reasonable. If practicable, solicit two sources not included in the previous solicitation. FAR 13.106(b)(1) & (5). You normally should also solicit any incumbent contractor. J. Sledge Janitorial Serv., B-241843, Feb. 27, 1991, 91-1 CPD ¶ 225.

Use written solicitations for construction over $2000 or when oral quotations are not feasible. If only one source is solicited, justify the absence of competition in writing.

Requirements aggregating more than the small purchase dollar limitations may not be broken down into several purchases to permit the use of small purchases. FAR 13.103(b).

Subject to the following exceptions, the KO is not required to publicize contract actions that will not exceed the small purchase threshold.

- Public posting of the request for quotations for 10 days is required if the order is estimated to exceed $5,000, except when ordering perishable subsistence items. 15 U.S.C. § 637(e); 41 U.S.C. § 416; FAR 5.101.
- For a CONUS contract action, if the order is estimated to exceed $10,000, and only one source is expected to compete, publish notice of the Request for Quotations (RFQ) in the Commerce Business Daily (CBD). 41 U.S.C. § 416. California Properties, Inc., B-232323, Dec. 12, 1988, 68 Comp. Gen. 146, 88-2 CPD ¶ 581. KOs must also publish a synopsis of CONUS sole-source awards in the CBD. 15 U.S.C. § 637(e).
- There is no requirement to publish a synopsis of pending contract actions by defense agencies which will be made and performed outside the U.S., its possessions or Puerto Rico, and for which only local sources will be solicited. Many KOs forget the "local sources only" limitation.

In evaluating quotations, if the KO receives a single quotation, the KO must verify price reasonableness (e.g., through obtaining another quote, or by comparison with established catalog prices) only when the requiring activity or the KO suspects or has information to indicate that the price may not be reasonable, or when the gov't is purchasing an item for which no comparable pricing information is available (e.g., an item that is not the same as, or similar to, other items recently purchased on a competitive basis). If a price variance between multiple quotations reflects a lack of adequate competition, the KO must document how he determined the price to be fair and reasonable. FAR 13.106(c).

Occasionally an item can be obtained only from a supplier who quotes a minimum order price or quantity that either unreasonably exceeds stated quantity requirements or results in an unreasonable price for the quantities required. In these instances, the KO should inform the requiring activity of all facts regarding the quotation, and request it to confirm or alter its requirement. The file shall be documented to support the final action taken.

Use of Existing Contracts to Satisfy Requirements.

Existing ordering agreements, indefinite delivery contracts, and requirements contracts already may be available to meet recurring requirements, such as fuel and subsistence items. Investigate existence of such contracts with contracting offices of units and activities with continuing missions in the deployment region. For example, the Navy had an existing contract for the provision of shore services to its ships in the port of Mombasa, Kenya, which was used in lieu of new contracts to provide services to air crews operating out of Mombasa during Operation Provide Relief.

The Transatlantic Division of the Army Corps of Engineers has a cost-type contract known as LOGCAP (Logistics Civil Augmentation Program) which provides for comprehensive logistics and construction support to a deployed force anywhere in the world. By using this contract to provide logistics support to a deployed force, a commander can perform a military mission with a much smaller force than might otherwise be necessary, and without developing and awarding an entirely new contract to obtain required support.

Alternative Methods for Fulfilling Requirements.

New and existing contracts are not the only method of meeting the needs of deployed military forces. The military supply system is the most common source of supplies and services. Cross-servicing agreements and host-nation support agreements exist with NATO, Korea, and other major U.S. allies. Similarly, under the Economy Act, other government agencies may fill requirements for deployed forces, either from in-house resources or by contract. Finally, service secretaries retain substantial residual powers under Public Law 85-804 which may be used to meet critical requirements that cannot be fulfilled using normal contracting procedures.

Host nation support and cross-servicing agreements as means of fulfilling the needs of deployed U.S. forces are addressed in 10 U.S.C. §§ 2341-2350; DOD Dir. 2010.9; and AR 12-16. These authorities permit acquisitions and transfers of specific categories of logistical support. Transactions may be accomplished notwithstanding certain other statutory rules related to acquisition and arms export controls. However, except during periods of active hostilities, transactions are limited to a total of $150M per year for NATO and $10M per year for non-NATO allies. The usefulness of these arrangements may be limited when the host nation has not invited U.S. intervention.

The Economy Act (31 U.S.C. §§ 1535-1536) provides another alternative means of fulfilling requirements. An executive agency may transfer funds to another agency, and order goods and services to be provided from existing stocks or by contract. For example, the Air Force could have construction performed by the Army Corps of Engineers, and the Army might have Dep't of Energy facilities fabricate special devices for the Army. Procedural requirements for Economy Act orders, including obtaining contracting officer approval on such actions, are set forth in FAR Subpart 17.5 and DFARS 217.5.

Extraordinary contractual actions under Pubic Law 85-804 (50 U.S.C. §§ 1431-1435; FAR Part 50) may be entered under the broad residual authority of the SECARMY to initiate extraordinary contractual actions to facilitate national defense. Requiring activities may request that the Secretary use this authority. There are few limitations on use of these powers. FAR 50.203(a).

Procedures for requesting use of these powers are found in FAR Subpart 50.4, DFARS Subpart 250.4, and AFARS Subpart 50.4. Congress still must appropriate funds needed to pay obligations incurred under this authority.

Leases of Real Property.

The Army is authorized to lease foreign real estate at an annual rent of under $250,000. 10 U.S.C. § 2675. Authority to lease is delegated on an individual lease basis. AR 405-10, para. 3-3b. Billeting services are acquired by contract, not lease. True leases normally are accomplished by the Army Corps of Engineers using area teams.

INTERNATIONAL LAW CONSIDERATIONS IN THE ACQUISITION OF SUPPLIES AND SERVICES DURING MILITARY OPERATIONS

We generally cannot rely on the principles of international law for the acquisition of supplies and services to support military operations. Limitations under international law make it imperative that we normally acquire supplies and services using U.S. acquisition laws. Nevertheless, battlefield acquisition techniques may prove a valuable means of supporting some of the needs of a deployed force when active combat or actual occupation of hostile territory occurs. TAB I provides a summary of the international law principles which govern the acquisition of property while opposing an enemy force or in occupied territory.

POLICING THE BATTLEFIELD

The Grenada and Panama operations spawned a large number of irregular or unauthorized procurements and other actions with procedural defects. At the end of active hostilities, U.S. forces faced the problem of correcting errors made in acquisitions supporting combat units. Generally, resolution involved ratification, extraordinary contractual actions, and GAO claims procedures.

Ratification of Contracts Executed by Unauthorized Gov't Personnel.

Only certain officials (chief of a contracting office, Principal Assistant Responsible for Contracting (PARC), Head of Contracting Agency (HCA)) may ratify agreements made by unauthorized persons and bind the U.S. in contract. FAR 1.602-3. There are dollar limits on the authority to ratify unauthorized commitments:

Up to $2,500 - Chief of Contracting Office
$2,500 - $25,000 - PARC
Over $25,000 - HCA

These officials may ratify only when:

The government has received the goods or services.
The ratifying official has authority to obligate the U.S. now, and could have obligated the U.S. at the time of the unauthorized commitment.
The resulting contract would otherwise be proper (a proper contract type, a contract not prohibited by law, etc.), and adequate funds are available, were available at the time of the unauthorized commitment, and have been available continuously since that time.
The price is fair and reasonable.

Extraordinary Contractual Actions.

If ratification is not appropriate, e.g., where no agreement was reached with the supplier, the taking may be compensated as an informal commitment. FAR 50.302-3. Alternatively, the supplier may be compensated using residual powers of the service secretary. FAR Part 50.

Requests to formalize informal commitments must be based on a request for payment made within 6 months of furnishing the goods or services, and it must have been impracticable to have used normal contracting procedures at the time of the commitment. FAR 50.203(d).

These procedures have been used to reimburse owners of property taken during the Korean War (AFCAB 188, 2 ECR ¶ 16 (1966)); in the Dominican Republic (Elias Then, Dept. of Army Memorandum, 4 Aug. 1966); in Jaragua S.A., ACAB No. 1087, 10 Apr. 1968; and in Panama (Anthony Gamboa, Dep't of Army Memorandum, Jan. 1990).

General Accounting Office (GAO) Claims.

GAO claims procedures provide another method of settling claims for which the legal authority or procedures are uncertain. The GAO has broad authority to settle claims against the U.S. See 31 U.S.C. § 3702(a); Claim of Hai Tha Trung, B-215118, 64 Comp. Gen. 155 (1984). The procedures are set forth in 4 C.F.R. Part 30, and in Title 4, GAO Policies and Procedures Manual for the Guidance of Federal Agencies. See also AR 37-1, paras. 20-19 & 20-96.

Voluntary Creditors. Generally, government employees who make payments from private funds on behalf of the U.S. may not be reimbursed. See 31 U.S.C. § 1342; Voluntary Payments--Gov't Reimbursement Liability, B-115761, 33 Comp. Gen. 20 (1953). A limited exception to this rule may apply in cases of urgent, unforeseen emergencies. Reimbursement of Personal Expenditures by Military Member for Authorized Purchases, B-195002, May 27, 1980, 80-2 CPD ¶ 242. Circumstances authorizing reimbursement include protection of government property, Meals--Furnishing--General Rule, B-177900, 53 Comp. Gen. 71 (1973), and unforseen impediments to completion of an urgent agency mission, Reimbursement of Personal Expenditures by Military Member for Authorized Purchases, B-195002, May 27, 1980, 80-2 CPD ¶ 242.

GAO claims procedures may be used to reimburse employees who have made payments which may fit within the above exceptions to the general rule. The case at 64 Comp. Gen. 155 involved a claim by Vietnamese man that the GAO determined to be cognizable, but which was barred by a statute of limitations. The case at 33 Comp. Gen. 20 involved a person who submitted a voucher for $13.50, $9.00 of which was denied. A supervisor reimbursed that person the $9.00 out of his own pocket,

and claimed that money by letter to GAO (GAO denied recovery because supervisor volunteered payment, and proper way was for person himself to file directly with GAO for $9.00). The case at 53 Comp. Gen. 71 involved a claim for the cost of providing food service to Federal Protective Services Officers; the GAO found it reimbursable on an emergency basis because the officers had to be on call to protect a federal building occupied by protesters.

If the GAO believes that a meritorious claim cannot be paid because an appropriation is not available for its payment, GAO reports to Congress. 31 U.S.C. § 3702(d). This reports may form the basis for congressional private relief legislation.

CONCLUSION

Planning is critical to the success of contracting operations in an operational setting. Identification and proper training of contracting personnel before deployment is essential. In addition to understanding the basic contracting rules that will apply during U.S. military operations, contracting personnel also must know basic fiscal law principles (see TAB L).

Unauthorized commitments are easier to avoid than to correct through ratifications. Avoid them by putting contracting capability where it is needed on the battlefield. When they do occur, ensure that they are detected and reported early while they are easier to correct.

APPENDIX A:
STANDARD FORM 44

INSTRUCTIONS

(This form is for official Government use only)

1. Filling in the Form

(a) All copies of the form must be legible. To insure legibility, indelible pencil or ball-point pen should be used. SELLER'S NAME AND ADDRESS MUST BE PRINTED.

(b) Items ordered will be individually listed. General descriptions such as "hardware" are not acceptable. Show discount terms.

(c) Enter project reference or other identifying description in space captioned "PURPOSE." Also, enter proper accounting information, if known.

2. Distributing Copies

Copy No. 1—Give to seller for use as the invoice or as an attachment to his commercial invoice.

Copy No. 2—Give to seller for use as a record of the order.

Copy No. 3—

(1) On over-the-counter transactions where delivery has been made, complete receiving report section and forward this copy to the proper administrative office.

(2) On other than completed over-the-counter transactions, forward this copy to location specified for delivery. (Upon delivery, receiving report section is to be completed and this copy then forwarded to the proper administrative office.)

Copy No. 4—Retain in the book, unless otherwise instructed.

3. When Paying Cash at Time of Purchase

(a) Enter the amount of cash paid and obtain seller's signature in the space provided in the Seller section of Copy No. 1. If seller prefers to provide a commercial cash receipt, attach it to Copy No. 1 and check the "paid in cash" block at the bottom of the form.

(b) Distribution of copies when payment is by cash is the same as described above, except that Copy No. 1 is retained by Government representative when cash payment is made. Copy No. 1 is used thereafter in accordance with agency instructions pertaining to handling receipts for cash payment.

U.S. GOVERNMENT

PURCHASE ORDER—INVOICE—VOUCHER

DATE OF ORDER | ORDER NO.

PRINT NAME AND ADDRESS OF SELLER (Number, Street, City, and State)*

PAY $

FURNISH SUPPLIES OR SERVICES TO (Name and address)*

SUPPLIES OR SERVICES	QUANTITY	UNIT PRICE	AMOUNT

AGENCY NAME AND BILLING ADDRESS*

TOTAL

DISCOUNT TERMS

% DAYS

DATE INVOICE RECEIVED

PAY TO $

ORDERED BY (Signature and title)

PURPOSE AND ACCOUNTING DATA

PURCHASER—*To sign below for over-the-counter delivery of items*

RECEIVED BY

TITLE | DATE

SELLER—*Please read instructions on Copy 2*

☐ PAYMENT RECEIVED $..... ☐ PAYMENT REQUESTED $.....

NO FURTHER INVOICE NEED BE SUBMITTED

SELLER | DATE

BY ..... (Signature)

I certify that this account is correct and proper for payment in the amount of

$ .....

DIFFERENCES

ACCOUNT VERIFIED; CORRECT FOR

..... (Authorized certifying officer)

BY

PAID BY ☐ CASH | DATE PAID | VOUCHER NO.

OR ..... (Check No.)

* PLEASE INCLUDE ZIP CODE

1. SELLER'S INVOICE (See instructions on Copy 2)

STANDARD FORM 44A (Rev. 10-83) PRESCRIBED BY GSA FAR (48 CFR) 53.213(c)

APPENDIX B:
ORDERING OFFICER'S HANDBOOK

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CHAPTER 3 - RESPONSIBILITIES AND DUTIES OF ORDERING OFFICERS
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CHAPTER 5 - PRE-PLANNING

CHAPTER 1: INTRODUCTION

PURPOSE -- This handbook provides a consolidated source of information for an ordering officer to use during contingency operations or exercises. Concepts and guidelines contained in this handbook also may be used by contracting personnel during deployment exercises.

SOURCE -- Materials contained in this handbook are based on regulatory guidelines concerning contingency contracting, and after-action reports from actual deployments.

DEFINITIONS -- Contingency -- An operation in which members of the military are or may become engaged in active hostilities against an enemy or an opposing force. It does not include routine training exercises or activities at or away from the home station.
Contingency contracting -- Provides those essential supplies and services needed to sustain the mission during a contingency operation.

MISSION STATEMENT -- "To support purchases of over-the-counter supplies and services essential to the mission of deployed units." The operative word is "support." A truly effective ordering officer never forgets the mission is to provide timely support to the unit by purchasing those legitimate requirements at a fair and reasonable price.

CHAPTER 2: FUNDING ISSUES

INTRODUCTION -- This chapter highlights appropriate contingency contract funding practices. In every case, proper authorities must certify appropriated funds as available prior to an ordering officer's execution of an SF 44. The procedures for acquiring such certification will depend on the location and duration of the deployment, and proximity of the Finance and Accounting Officer. Failure to secure sufficient funds prior to the execution of an SF 44 will cause delays in payment which create an embarrassment to the unit and may eliminate an important source of supply. Such a failure also may result in adverse consequences for the ordering officer personally.

FINANCE AND UNIT RELATIONSHIPS -- A deployed unit must maintain a close working relationship with its Finance and Accounting Officer for timely fund certifications and payments. Communications must be maintained throughout the deployment to ensure expenditures are within the funds available, and that any supplemental funding is obtained prior to making purchases. Early coordination with the Finance and Accounting Officer will avoid confusion and will assist in a more organized departure.

FUNDING PROCEDURES -- Prior to deployment, the unit must submit a funding document, certified by the proper authority, to the Directorate of Contracting. The document that usually serves as support for this funding action is DA Form 3953, Purchase Request and Commitment. The DA Form 3953 must state the number of SF 44s needed by the deploying unit and the approximate time frame for their use. When approved by the finance officer or designee, the DA Form 3953, Purchase Request and Commitment, makes funds available for obligation and records them as commitments in accounting records. The amount approved is an estimate of the amount which may be obligated by the recipient unit for a specific period of time and designated purpose. DA Form 3953 normally is issued to the Directorate of Contracting to permit requirements to be funded without having to certify "funds availability" for each requisition. If the Directorate of Contracting is issued such a bulk-funded DA Form 3953, the ordering officer is responsible for keeping a record of obligations and the remaining balance of funds on the reverse of the form.

CLASS A PAYING AGENTS -- Class A paying agents are appointed when payment to vendors cannot be made by disbursement from a central paying office. The use of Class A paying agents often is necessary when paying in foreign currency. Their use also expedites payments to help establish and maintain good vendor relationships. Most small businesses in CONUS and overseas cannot afford to wait for payment for long periods of time, and availability or lack of expedited payment will influence their decision to do business with the Government, or the prices they charge. Most overseas purchases are cash-and-carry only.

CLASS A PAYING AGENTS' DUTIES -- Class A paying agents are appointed in writing by the installation commander or individual commanders of tenant activities. They make payments for purchases made by the ordering officer. Prior to deployment, the paying agent should receive a thorough briefing from the Finance and Accounting Officer on duties and responsibilities, and be given written operational instructions. Designated pick-up points and emergency procedures are essential for the timely release and replenishment of funds.

CHAPTER 3: RESPONSIBILITIES AND DUTIES OF ORDERING OFFICERS

Before buying anything, ordering officers must ensure that:

a. Sufficient funds are available. A DA Form 3953, Purchase Request and Commitment Form, signed by a Budget Officer or other designated certifying officer must be in place prior to the ordering officer entering into any transactions.

b. The purchase amount of any one transaction does not exceed the dollar limitation specified in the appointment letter. The requirement will not be split to avoid this dollar limitation. The current limitation for use of the SF 44 is $2,500 (small purchase threshold is the limitation for aviation fuel).

c. The supplies or services are available in the local trade area.

d. One delivery of supplies or services and one payment will be made per SF 44.

e. The price is fair and reasonable.

f. The purchases are rotated among sources of supply when possible.

g. Items are justified and mission essential.

The ordering officer must also:

a. Prepare the Standard Form 44 in accordance with the completion instructions of Chapter 4.

b. Comply strictly with all provisions of the appointment letter.

c. Maintain a register of orders issued and copies of each SF 44 with supporting documents, in accordance with the recording instructions of Chapter 4.

d. Promptly report individual transactions made during the month and at the completion of the operation, in accordance with Chapter 4.

e. Become thoroughly familiar with AR 600-50, Standards of Conduct, and review it at least semiannually. The ordering officer will furnish the appointment authority a signed statement that AR 600-50 has been read and is understood.

CHAPTER 4: STANDARD FORM 44

GENERAL -- This chapter prescribes policies and procedures governing the activities of ordering officers authorized to make small purchases using Standard Form 44.

DEFINITIONS -- Ordering Officer -- a military or DOD civilian employee authorized to make small purchases of supplies and non-personal services by virtue of an appointment letter issued by the Director of Contracting. Individuals considered for appointment must be qualified and have the time available to act as an ordering officer.

Class A Agent -- a Commissioned, Warrant or Noncommissioned Officer in the grade E-7 or above, appointed to act as an agent of the Finance and Accounting Officer (FAO) for the purpose of making payments as specified in the appointment letter.

Receiving Officer -- a military or DOD civilian employee, from the requiring activity, normally in a position to verify receipt of supplies or services. This individual does not require orders. Whenever feasible, the ordering officer and receiving officer should be separate individuals.

POLICIES -- USE OF STANDARD FORM 44

a. The Standard Form 44 is printed as a carbon interleaved form, with four sheets per set, and provides in one document a Purchase or Delivery Order, a Receiving Report, a Property Voucher, and a Payment Voucher.

b. Purchases with this form will only be made by a duly appointed ordering and/or contracting officer. Total dollar amount of each SF 44 will not exceed the dollar limitation specified in the appointment letter or by regulation.

c. Orders will be for off-the-shelf items. Prices may be obtained by telephone or from a vendor's place of business. Only one source of supply must be considered, so long as the ordering officer can justify the price as reasonable. Do not use the same vendor all the time. Switching vendors will increase the interest of several vendors in conducting business with the government, and ensure reasonable prices.

d. Similar type items will be consolidated, whenever possible, into one order. When the aggregate monetary amount exceeds the authorized dollar limitation of the ordering officer, requirements will not be split to avoid the limitations on the ordering officer's authority. These requirements will be referred to the contracting officer for procurement action.

e. Ordering officers cannot redelegate their responsibilities. They must sign all documents used for purchasing with the same name as appears in their appointment letter and use the title "Ordering Officer." No one will sign for an ordering officer under any circumstances.

f. When a purchase is to be made using the SF 44, the ordering officer executes the purchase document. The items will be signed for by the receiving officer and paid by the Class A Agent. If the Class A Agent is not available, and depending on the circumstances, the ordering officer either will give the Seller copies 1 and 2 of the SF 44 with instructions to forward copy 1 to the Finance and Accounting Office (FAO) designated on the form for payment, or will only give copy 2 to the Seller for his records, and send copies 1 and 3 to the FAO directly for payment.

g. Ordering officers will not make any purchases from individuals who are employed by the U.S. Government, or from a company with which the ordering officer has an interest or stock. If this is the only source of supply, the appointing authority must be notified.

DISTRIBUTION OF THE SF 44

a. When the SF 44 is paid immediately by the Class A Agent, copy 1 is signed by the seller and given directly to the Class A Agent; if not, see para. f. above under "Policies."

b. Copy 2 (seller's copy of invoice) will be given to the vendor at the time of purchase.

c. Copy 3 will be annotated by the receiving organization, and forwarded to the proper FAO/Class A Agent as the receiving report.

d. Copy 4 will be retained by the ordering officer and forwarded with the end-of-month report.

USE OF THE SF 44

a. The ordering officer must be aware that just because an item is authorized by a TDA or other publication does not mean it is authorized for local purchase. Close coordination with unit supply personnel is required to make these determinations. Items which are not utilized in direct support of the activity for which the ordering officer was appointed may not be purchased. Purchasing items, or contracting for services, other than those authorized, is not legal and the ordering officer may be held pecuniarily liable. For example, some ordering officers in Grenada bought "PT uniform" T-shirts for their units, and ended up paying for them personally.

b. The ordering officer must be aware that the SF 44 is a direct draft upon the U.S. Treasury, which may be accepted by vendors without further proof of authority to execute. Therefore, the ordering officer must safeguard all SF 44s, or risk being held accountable for those forms presented for payment over the signature of someone other than the ordering officer.

c. The SF 44 may be used to effect purchases when one or more of the following conditions exist:

(1) When an emergency situation precludes submission of a purchase request through normal supply channels. Lack of foresight or pre-planning does not constitute an emergency.

(2) When authorized supplies are not available through normal supply channels and local procurement for these supplies is determined to be the most efficient means of re-supply.

(3) When there are no other sources of U.S. Government supply available within a reasonable area.

COMPLETION OF STANDARD FORM 44

Block 1 -- Self explanatory.

Block 2 -- Order No. The order number consists of thirteen (13) alpha numeric characters as follows:

Characters 1 thru 6 -- Activity Address Number

Characters 7 and 8 -- Current Fiscal Year (i.e. 91)

Character 9 -- M

Character 10 thru 13 -- Serial number assigned in numerical sequence preceded by the alpha character X (i.e. X001).

A completed order number looks like the following: DAHC76-91-M-X001.

Block 3 -- Complete name and address (including zip code) of supplier.

Block 4 -- Unit and address for which the ordering officer is making the purchase and is otherwise assigned.

Block 5 -- Description of supplies or services to include quantity, unit price, and extended amount.

Block 6 -- Self explanatory.

Block 7 -- Discount terms, if applicable.

Block 8 -- Agency name and billing address of the FAO.

Block 9 -- Signature of ordering officer.

Block 10 -- Purpose and Accounting Data. Give complete fund citation. The ordering officer needs to obtain this information from the appropriate budget officer.

Block 11 -- Signature of the receiving officer or ordering officer as appropriate.

Block 12 -- Self explanatory.

Block 13 -- Self explanatory.

Block 14 -- Check this block and insert the total amount from Block 6. NOTE: If the Seller is going to be responsible for submitting copy #1 (original) of the SF 44 to the FAO, give the Seller copies 1 and 2 with instructions on processing of the original (copy 1) to the FAO.

Block 15 -- If the Seller is going to use the SF 44 as its invoice, it needs to sign in this block. If the Seller is using its own invoice, attach the invoice to copies 1 & 3, and forward to Finance & Accounting Office, or give these copies to the Class A Agent. When the supplier wants to use its own invoice, it does not sign in Block 15.

Block 16 -- Self explanatory.

RECORD OF PURCHASES BY THE ORDERING OFFICER

a. The ordering officer will maintain a record of purchases made in register format. The register will show, as a minimum, purchase instrument number, vendor identification, and total cost of the transaction. Copy 4 of the SF 44, with a copy of the Seller's sales slip or invoice, will be filed with or cross-referenced to the related register page and entry number.

b. The ordering officer also will maintain a record of funds remaining available to him on the back of the DA Form 3953. This will be maintained in checkbook register style, with each entry being subtracted and a running balance maintained at all times.

REPORTING OF INDIVIDUAL TRANSACTIONS

a. A report of the transactions made during the month will be made directly to the Appointing Authority no later than the last day of each month. Cut off date for the report will be the 20th day of each month to ensure submittal of the report by the last day of the month.

b. Ordering officers appointed for a period of less than one month, or for an operation lasting less than four weeks, and whose period of appointment overlaps the 20th of the month in which the appointment begins, will submit a single report within 10 days of the date of termination stated in the appointment letter or the end of the operation.

c. Negative reports are required in all cases.

CLEARANCE REQUIREMENTS / LETTERS OF CLEARANCE

a. When an ordering officer's appointment is terminated, the ordering officer will bring to the Director of Contracting or Appointing Authority the following:

(1) Original copy of appointment letter.

(2) Copies of all reports filed previously.

(3) A complete report for any period between the last report and the date of termination, including all copies of the SF 44, all sales slips or other receipts, and any justifications, if any, regarding price or source reasonableness.
(4) An original copy of the DA Form 3953.
(5) Any unused SF 44s in his possession.

b. A Letter of Clearance/Termination signed by the contracting officer will be returned to the ordering officer after all the above has been reviewed and certified to be acceptable.

CHAPTER 5: PRE-PLANNING

GENERAL -- At this point, the ordering officer should have a basic understanding of legal authorities, funding practices, and duties. The previous chapter dealt with mechanics on how to fulfill those duties. This chapter will focus on pre-planning and preparation actions for establishing local purchase capability. While not intended to be all inclusive, it should provide the ordering officer a good foundation and better perspective on his or her role.

PRE-PLANNING AND PREPARATION -- There are many things a unit can and should do to prepare for an operation. Preparing in advance is important for one very basic reason: there will not be enough time to do these things once an operation gets under way. The following areas are those an ordering officer should at least address and plan for prior to deployments.

a. Personal and Administrative Preparations. The following is a list of administrative requirements an ordering officer must possess to start an operation:
(1) SF 44s furnished by the Directorate of Contracting.
(2) Ordering officer handbook.
(3) Copy of the DA Form 3953 that the SF 44s were issued against.
(4) Ordering officer appointment letter.
(5) Civilian clothes. In some instances, it may be necessary to keep a low profile and blend in with the local community.

b. Arrange for the Class A paying agent to accompany the ordering officer with local currency for local purchases.

c. Establishing the Rules of Engagement. The ordering officer needs to have a plan that will best support the unit's needs. This will entail establishing a set of rules for customers to follow when submitting requirements. The rules should include instructions on purchase descriptions, funding, pick-up, and delivery procedures. The rules should also discuss consolidating requirements, when possible, to avoid unnecessary trips downtown. When multiple units are operating in a particular area, the ordering officers and their commanders should coordinate their requirements to avoid competing among themselves for scarce resources.

d. Locating Sources. One of the most difficult problems for the ordering officer at an unfamiliar deployment site is locating capable contractors who can satisfy the unit's requirements. The following are various ways an ordering officer may solve this problem:
(1) Knowledgeable interpreter/guide. This person is a logical first choice for obtaining sources, although the ordering officer must be careful to ensure that he or she is not related to most of the vendors.
(2) U.S. Embassy (if available). This can be an excellent source of information. The defense attache office in most embassies can help with currency conversions and storage of funds, as well as providing a source list of reputable contractors. In addition, the Embassy General Services officer (GSO) may be able to provide some contracting support -- particularly if a contract is to be written with the host country's government.
(3) Site surveys. This is an excellent tool to speed up the ordering process. Ordering officers should add sources to the site survey list as they become known.
(4) Ask around. There are a multitude of ways of finding sources. Some successful ways have included contacts with the Chamber of Commerce (or equivalent), business associations, local clergy, influential citizens, and local government leaders such as the mayor. The major hotel chains overseas have business offices which can help locate local sources of supplies. In addition, there is nothing wrong with asking other contractors where certain requirements might be obtained. Finally, the local yellow pages is an invaluable source of information on local firms.

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INTRODUCTION

Fiscal law principles apply to all federal operations. For the military services, fiscal law issues frequently arise during contracting, drug interdiction, humanitarian and civil affairs, security assistance, disaster relief, and special forces operations. With a growing number of non-traditional missions to fulfill, the Department of Defense (DOD) increasingly encounters fiscal issues in conducting its operations. Failure to apply fiscal law principles properly may lead to unauthorized expenditures of funds, and to administrative and/or criminal sanctions against those responsible.

The U.S. Constitution gives Congress the authority to raise revenues and appropriate the proceeds to federal agencies. In implementing this authority, Congress has strictly limited by statute the ability of the executive branch to obligate and expend appropriated funds. Additionally, Congress and DOD have agreed informally to other restrictions, which generally require DOD to notify Congress before taking certain actions. These restrictions are implemented by regulations and policy within DOD.

BASIC FISCAL CONTROLS ON APPROPRIATED FUNDS

Congress has imposed fiscal controls through three basic mechanisms. Each is implemented by one or more statutes. The Comptroller General of the U.S., who heads the General Accounting Office (GAO), regularly audits executive agency accounts and scrutinizes compliance with the fiscal controls imposed by Congress. The three basic fiscal controls are:

Obligations and expenditures must be for a proper purpose;

Obligations must occur within the time limits applicable to the appropriation (e.g., operation and maintenance (O&M) funds are available for obligation for one fiscal year); and

Obligations must be within the amounts authorized by Congress.

The enforcement mechanism adopted by Congress for these controls is the Antideficiency Act (ADA). See 31 U.S.C. §§ 1341(a), 1514(a). The ADA prohibits any government officer or employee from making or authorizing an expenditure in excess of the amount available in an appropriation; incurring an obligation in advance of an appropriation, except as authorized by law; or making or incurring obligations in excess of formal subdivisions of funds within the executive branch, or in excess of amounts prescribed by regulations governing the formal subdivisions of funds. Penalties for violations may be criminal or civil. 31 U.S.C. §§ 1349, 1350. Commanders must investigate suspected violations to establish responsibility, and discipline violators. AR 37-1, Army Accounting & Fund Control, para. 7-8.

THE PURPOSE STATUTE – GENERALLY

Although each of the above basic controls on the use of appropriated funds is important, the control which becomes an issue most often during the conduct of active military operations is the purpose control. Expenditures from an appropriation must be reasonably related to the purpose of that appropriation. 31 U.S.C. § 1301(a). The Comptroller General stated the test for a proper purpose in Secretary of the Interior, B-120676, 34 Comp. Gen. 195 (1954):

An expenditure must be for the particular purpose of the appropriation or for a purpose that is necessary and incident to the general purpose of the appropriation.

The expenditure must not be prohibited by law.

The expenditure must not be otherwise provided for; it must not fall within the scope of some other appropriation.

The GAO applies the Purpose Statute to military operations. See To The Honorable Bill Alexander, B-213137, 63 Comp. Gen. 422 (1984) [hereinafter Honduras I]; The Honorable Bill Alexander, B-213137, Jan. 30, 1986 (unpub.) [hereinafter Honduras II].

Augmentation of an Appropriation Generally Is Prohibited

A corollary to the purpose statute's control on appropriated funds is the general prohibition against augmentation. See Nonreimbursable Transfer of Admin. Law Judges, B-221585, 65 Comp. Gen. 635 (1986); cf. 31 U.S.C. § 1532 (prohibiting transfers from one appropriation to another except as authorized by law). Appropriated funds designated for a general purpose may not be used to pay for an effort for which Congress has specifically appropriated other funds. Secretary of the Navy, B-13468, 20 Comp. Gen. 272 (1940). If two funds are equally available for a given purpose, an agency may elect to use either, but once the election is made, the agency must continue to charge the same fund, absent legislation to authorize the change. Recording Obligations under EPA Cost-Plus-Fixed-Fee Contract, B-195732, 59 Comp. Gen. 518 (1980), rev'd on other grounds, 61 Comp. Gen. 609 (1982). There are a few statutory exceptions to the prohibition on augmentations. For instance, DOD may expend its O&M funds for humanitarian assistance efforts that complement (but do not duplicate) activities funded by the appropriations of other agencies, such as the State Department. See 10 U.S.C. §§ 401-02. See also Foreign Assistance Act (FAA), 22 U.S.C. §§ 2344, 2360, 2392 (permitting foreign assistance accounts to be transferred and merged); 22 U.S.C. § 2318 (emergency Presidential draw down authority) (discussed below).

Another way Congress authorizes the lawful augmentation of accounts is to enact special interagency transaction authorities. These authorities limit or eliminate standard reimbursement requirements between agencies. The FAA (mentioned above and described below in more detail) and U.S. counterdrug policy provide good examples of this principle.

In counterdrug operations, for example, Congress has authorized certain expenditures for military support to civil law enforcement agencies (CLEAs). Training is one of DOD's primary O&M funded missions. In the law authorizing DOD's support for CLEAs, Congress provided that support is reimbursable unless it occurs during normal training and results in DOD receiving a benefit substantially equivalent to that which otherwise would be obtained from routine training or operations. By authorizing DOD support for CLEA missions essentially at no cost to CLEAs, Congress has provided authority for the augmentation of CLEA appropriations through the assistance provided by DOD's training operations.

There is no specific statute prohibiting augmentations. The prohibition flows from several statutory provisions which implement Congress control of government funding. In the Honduras II opinion, the GAO described the concept in this manner:

> Because congressional authority is largely asserted through the appropriations process, the Congress places great significance on the rules that govern the use of appropriations by Federal agencies. It has devised specific measures to ensure that those rules are followed, and that, for instance, programs in one area are not supported by appropriations intended to be used elsewhere. E.g., 31 U.S.C. §§ 1301(a), 1341(a), 1532. Honduras II at 2.

DOD Appropriations and their Purposes

Operation & Maintenance (O&M) Appropriations. These appropriations pay for the day-to-day expenses of DOD components in garrison and during exercises, deployments, and military operations. End items costing over $15,000,[1] or which are centrally managed within the supply system, may not be purchased with these funds. Additionally, exercise-related construction of permanent facilities, during exercises coordinated or directed by the Joint Chiefs of Staff outside the U.S., or any construction in excess of $300,000, may not be funded with O&M appropriations.[2]

Military Construction (MILCON) Appropriations. Congress has extensive and pervasive oversight programs in place for MILCON appropriations. Virtually all construction projects costing more than $1.5 million require specific prior approval by Congress. Additionally, 41 U.S.C. § 12 provides that no public contract relating to erection, repair, or improvements to public buildings shall bind the Government for funds in excess of the amount specifically appropriated for that purpose. Nevertheless, there is also a Unspecified Minor Construction Program for minor construction projects within each military department and within DOD agencies. Money for these unspecified minor construction projects is set aside within each MILCON appropriation. The services use this money (normally a relatively small amount) for projects costing less than $1.5 million without specific congressional approval.

Procurement Appropriations. These appropriations fund purchases of investment end items of equipment (presently those costing more than $15,000),[3] and items that are centrally managed within the supply system. See DOD Manual 7110.1-M, DOD Budget Guidance Manual.

Other Appropriations. DOD receives dozens of other appropriations, each with its own fund citation and specific purpose. In an operational environment, however, the appropriations most likely to be encountered are those noted above. Additional guidance on the use of the O&M and MILCON appropriations is provided below.

THE PURPOSE STATUTE – SPECIFIC MILITARY OPERATIONAL ISSUES

The above discussion of the Purpose Statute provides an overview of how this control mechanism applies to DOD operations. More specific applications of the Purpose Statute to military operations are described below.

O&M Appropriations – Use during Deployments and Contingency Operations

Deploying units normally rely on O&M appropriations available to support their deployment operations. Attorneys, finance officers, contracting personnel, and others charged with responsibility in the funding of unit operations must be familiar with commonly encountered fiscal controls on appropriated funds, particularly the O&M accounts, and verify the amounts and types of funds available.

O&M appropriations pay for the day-to-day expenses of training, exercises, contingency missions, and other deployments. As noted above, the most important limitations on the use of O&M funds are: (1) O&M funds generally are not available for procurement of end items costing over $15,000, or of any value if the items are centrally managed;[4] (2) O&M funds are not available for exercise-related construction that is not truly temporary in nature during exercises coordinated or directed by the Joints Chiefs of Staff outside the U.S.; and (3) O&M funds normally are not available for any permanent construction in excess of $300,000.[5] See 10 U.S.C. § 2805(c)(2).

The Deputy General Counsel of the Army for Fiscal Law & Policy has opined that a potential expansion of the allowable uses of O&M funds may be permissible during contingency operations. The basis for this expansion is that O&M funds are the primary funding source supporting contingency operations; therefore, if a unit is fulfilling legitimate requirements necessitated only by the contingency, then O&M appropriations are the proper funding source. See TJAGSA Practice Notes, Contract Law Note:

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[1] The Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139, § 8092, 107 Stat. 1418, 1461 (1993), permits DOD to raise this threshold to $25,000. If DOD implements a change to the Budget Guidance Manual pursuant to this new authority, then O&M funds will be available for purchases up to $25,000.

[2] But see infra the text under the subheading **O&M Appropriations – Use during Deployments and Contingency Operations** for a discussion of the possible expansion of O&M fund uses during contingency operations.

[3] See supra notes 1 & 2.

[4] But see supra notes 1 & 2.

[5] But see infra the text below for a discussion of the possible expansion of O&M fund uses during contingency operations.

Funding Issues in Operational Settings, Army Law., Oct. 1993, at 38. Under this possible expansion of the normal rules governing O&M funds:

Units may use O&M funds for the acquisition of materials and/or cost of constructing facilities which:

a. are of a temporary operational nature and operational forces intend to use the materials/facilities for only a temporary period as required to facilitate operations; and

b. will not be used to sustain permanent, recurrent, or follow-on contingency operations at the conclusion of the immediate efforts.

Example: Road work by engineers during Operation Restore Hope.

Normal funding rules apply in all other situations, including the funding of construction for which the U.S. would have a follow-on or contingency use after the termination of the military operations necessitating the construction. Analysis of whether construction is "temporary" should focus on the duration and purpose of a facility's use by U.S. forces, not on the materials used in the construction. A brick latrine may meet a temporary need for a latrine facility which affords its occupants some protection from sniper fire.

The Feed and Forage Act (41 U.S.C. §§ 11 & 11a) provides special obligational authority. The act permits DOD and the Coast Guard to contract for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies for the current fiscal year, even in the absence of an appropriation (i.e., this is a special authority to spend in advance of normal O&M appropriations). Notice to Congress is required. On August 24, 1990, the Secretary of Defense invoked the provisions of 41 U.S.C. § 11 to support Operation Desert Shield.

Secretarial Contingency Funds are special funds within the O&M appropriation. The Secretary of the military departments may expend these funds without regard to other provisions of law. 10 U.S.C. § 127. However, numerous regulatory controls apply to prevent abuse. See DOD Dir. 7250.13, Official Representational Funds (Mar. 22, 1985); AR 37-47, Contingency Funds of the Sec'y of the Army (Jan. 15, 1990).

CINC Initiative Funds are available to fund special training, humanitarian assistance, civic assistance, and other selected operations without many of the usual O&M constraints. 10 U.S.C. § 166a. The restraints applicable to these funds are greater, however, than those applicable to Secretarial Contingency Funds. Annual acts appropriating these funds may impose expenditure ceilings for particular activities.

Congress regularly earmarks funds within annual O&M appropriations to be used only for specific purposes. For instance, DOD receives part of its O&M funds earmarked for use in providing humanitarian and civic assistance under 10 U.S.C. § 401(c). Such earmarked appropriations require separate fiscal accounting. DOD may not use general O&M appropriations for the same purposes as the funds earmarked for specific purposes within an annual authorization or appropriations act. See, e.g., National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 1504(b), 107 Stat. 1547, 1839 (1993) (eliminating DOD's authority to use general O&M funds to provide minimal humanitarian and civic assistance, except to the extent that such expenditures are incident to providing humanitarian and civic assistance with earmarked funds); id. § 301(18) ($48,000,000 provided for humanitarian assistance during FY 1994).

Military Construction – A Special Problem Area

Congressional oversight of military construction is extensive and pervasive. Specific approval is required for any project in excess of $1.5 million. Funds for such larger projects, known as the Specified Military Construction Program, are provided in the annual MILCON appropriations.

The Unspecified Minor Construction Program

MILCON appropriations also fund part of the Unspecified Minor Military Construction Program, through which Congress provides annual funding to DOD and the military services for minor construction projects that are not specifically approved in a MILCON Appropriations Act. Pursuant to the unspecified minor construction authority of 10 U.S.C. § 2805(a), the Secretary concerned may use minor military construction funds (known as Minor Military Construction, Army, or MMCA funds for the Army) for minor projects not specifically approved by Congress.

This authority is limited to $1.5 million for each project. Because 10 U.S.C. § 2805(c) permits the use of O&M funds for construction below $300,000, DOD has elected to use minor military construction funds only for projects in the $300,000 to $1.5 million range, except during JCS-controlled exercises outside the U.S.

Statute and regulations require approval by the Secretary of the department and notice to Congress before commencement of any minor military construction project exceeding $500,000.

Besides projects costing between $300,000 and $1.5 million, minor military construction funds (MMCA for Army) also pay for all permanent construction during JCS-coordinated or directed exercises conducted outside the U.S. See 10 U.S.C. § 2805(c)(2). The authority for such exercise-related construction is limited to no more than $5 million per military department per fiscal year. 10 U.S.C. § 2805(c)(2). This limitation does not affect funding of minor and truly temporary structures such as tent platforms, field latrines, shelters, and range targets that are completely removed once the exercise is completed. Units may continue to fund these through the O&M accounts. See below, however, regarding notification requirements if such work totals more than $100,000.

Most installations and deploying units are funded only with O&M appropriations, which are not available for construction work except as specifically authorized by law. They must request MILCON or minor military construction funds from higher headquarters.

10 U.S.C. § 2805(c) authorizes use of O&M funds for unspecified minor military construction projects, but limits this authorization to $300,000 per project. O&M appropriations are normally the source of funds for the portion of the unspecified minor military construction program below the $300,000 per project level. Use of MILCON or MMCA funds for projects in this category requires HQDA (COE) approval. AR 415-35, Minor Constr., Emergency Constr. & Replacement of Facilities Damaged or Destroyed, para. 2-1 (Oct. 15, 1983).

Projects must have a funded cost of $300,000 or less to be paid for with O&M funds. Funded cost refers to the "out-of-pocket" cost of a project, such as contract costs, TDY costs, etc. It does not include the salaries of military personnel, depreciation on equipment, and similar "sunk" costs. The cost of fuel used to operate equipment is a funded cost. Although unfunded costs do not count toward the statutory ceilings applicable to

the different types of construction funds, records of unfunded costs are kept, and these figures are reported to higher headquarters.

Project splitting is not permitted. An agency cannot treat "clearly interrelated" construction activities as separate projects. Honduras II, p. 22.

DOD must notify Congress if construction (temporary or permanent) exceeding $100,000 will be done during any exercise. See Military Construction Appropriations Act, 1994, Pub. L. No. 103-110, § 113, 107 Stat. 1037, 1042 (1993).

Military construction, as defined in 10 U.S.C. § 2801 and AR 415-35, includes any construction, development, conversion, or extension of any kind carried out with respect to a military installation. The definition of a military installation is very broad, and includes foreign real estate under the operational control of the U.S. military. Military construction includes all work necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility. See The Honorable Michael B. Donley, B-234326.15, Dec. 24, 1991 (unpub.) (project splitting is prohibited). Minor military construction, whether accomplished with O&M or MMCA funds, is a single undertaking at a military installation with an approved cost equal to or less than $1.5 million.

Examples of construction (see AR 415-35, sec. II, Glossary):

The erection, installation, or assembly of a new facility.

A change to a real property facility, such as addition, expansion, or extension of the facility, that adds to its overall external dimensions.

Work on an "existing facility" that improves its functions or enables it to fulfill changed requirements. Such work is often called an alteration of the facility. This includes installation of equipment made a part of the existing facility.

Conversion of the interior or exterior arrangements of a facility so that the facility can be used for a new purpose. This includes installation of equipment made a part of the existing facility.

Replacement of a real property facility, which is a complete rebuild of a facility that has been destroyed or damaged beyond economical repair.

Relocation of a facility from one installation to another and from one site to another.

Construction includes the cost of installed equipment that is made part of a new or existing facility, related site preparation, excavation, filling, landscaping, or other land improvements.

Maintenance and repair are not construction. Maintenance is recurrent work to prevent deterioration; i.e., work required to preserve or maintain a facility in such condition so it is usable for its designated purpose. AR 420-10, Management of Installation Directorates of Eng'g & Housing, sec. II, Terms (July 2, 1987). Repair is restoration of a facility, so it may be used for its designated purpose, by overhauling, reprocessing, or replacing parts or materials that have deteriorated by action of the elements or by wear and tear in use, and which have not been corrected through maintenance. AR 420-10, sec. II, Terms. When construction and maintenance or repair are performed together as an integrated project, each type of work is funded separately, unless the work is so integrated that separation of construction from maintenance or repair is not possible. In the latter case, fund all work as construction.

Methodology for analysis of minor construction issues:

- Define the scope of the project;
- Classify the work as construction, repair, or maintenance;
- Determine the funded cost of the project; and
- Select the proper appropriation.

Examples:

1. A US Army unit deploys to central Europe at the request of a newly-elected democratic government. It occupies a former Soviet installation as a base. After years of neglect, a large multi-story barracks facility is proposed for conversion to an administration facility. The Division Engineer advises that the work involved will include: (a) replacement of the roof, the flooring, several interior walls, and the heating system ($1.1 million); (b) repair of numerous other failing components of the building ($450,000); (c) installation of a new central air-conditioning unit ($150,000); and (d) construction of new walls to accommodate the new configuration ($100,000). The Division Engineer proposes to classify the project work as mostly repair work, with a small amount of new construction. The total funded cost of the project is estimated to be $1.8 million. Because the air-conditioner and new walls will cost only $250,000, the Division Engineer contends that the entire project can be approved and funded locally. Is the Division Engineer right? No. A conversion is construction by definition. All work is required for the conversion of this building to an administrative facility, so it must all be funded as construction (use MILCON money because the cost exceeds $1.5 million). If U.S. forces were to continue using the facility as a barracks, then the air-conditioning and new walls could be segregated from the other (repair) efforts, and all work could be funded with O&M money.

2. The road to the division fuel supply point is in urgent need of repair. The division's training tempo increased substantially last year, so the road has been getting greater use by heavier vehicles than it was designed to handle. Heavy delivery trucks used by the fuel supplier with the current contract for diesel fuel and gasoline have been breaking up the road. The Division Engineer believes that, in addition to filling up the holes in the road, two additional inches of asphalt should be added to support the increased and heavier traffic. The Division Engineer estimates that a paving contractor will charge $330,000 to fill the holes and add two inches of asphalt. The Division Engineer insists that O&M funds can be used. Is the Engineer correct? Maybe. Filling the potholes is clearly a repair, and this cost does not count against the cost of the construction effort. Resurfacing the road may be a repair if the resurfacing is intended to restore the road to its former capacity, not to improve it for heavier use, and if this is the method normally used to maintain and/or repair roads of this type. To the extent it upgrades the road, however, it may be construction, particularly considering the fact that the exterior dimensions of the road will change (two inches thicker). The cost of this portion of the work may be less than $300,000 (if the potholes cost more than $30,000 to repair), however, so O&M funds may be appropriate for this work even if it is considered construction.

3. What if the road in Example 2 is located in Northern Saudi Arabia in February 1991? The work under these circumstances is clearly not part of an effort to improve post infrastructure; apparently it is needed to support ongoing operations. Therefore, this work is more likely to qualify as a repair. Even if it is considered construction, and even if the cost of the two inches of additional asphalt exceeds $300,000, the work may fall within the scope of the potential expansion of the use of O&M funds during contingency operations discussed above in the **O&M Appropriations – Use during Deployments and Contingency Operations** section above.

Emergency Construction Authority

Upon a Presidential Declaration of National Emergency, 10 U.S.C. § 2808 permits the Secretary of Defense to undertake construction projects not otherwise authorized by law that are necessary to support the armed forces. Such projects are funded with any unobligated military construction and family housing appropriations. On November 14, 1990, President Bush invoked emergency construction authority under 10 U.S.C. § 2808 for support of Operation Desert Shield. See Executive Order 12734 of November 14, 1990, 55 Fed. Reg. 48099.

Other emergency construction authorities available under existing law include:

Emergency Construction, 10 U.S.C. § 2803. Requirements: 1) notice to congressional appropriations committees; 2) determination that project is vital to national defense; 3) a twenty-one day waiting period after notification before project begins; and, 4) total amount expended must not exceed $30 million in any fiscal year, and the funds must be obtained by reprogramming money already appropriated but not yet obligated for military construction.

Contingency Construction, 10 U.S.C. § 2804. Requirements: 1) notice to congressional appropriations committees; 2) project justification; 3) a twenty-one day waiting period after notification before project begins; and 4) obtain funds from monies already appropriated for military construction, but not yet obligated.

During Operation Desert Shield, these authorities were not timely exercised. Future operational plans should include provisions to exercise these authorities immediately upon execution, so construction and improvement of logistics facilities can commence immediately with the proper appropriations.

Humanitarian and Civic Assistance (HCA)

Broadly defined, HCA comprises all activities which help foreign nations improve the quality of life for their civilian populations. HCA includes activities such as providing medical and veterinary care, digging wells, and constructing public facilities and roadways. Unfortunately, there is no single, recognized definition for the full range of these activities.

Primary responsibility for HCA lies with the Department of State, through the U.S. Agency for International Development (USAID). Historically, DOD conducted limited HCA operations in foreign nations without separate statutory authority. In 1984, the Comptroller General decided in the Honduras I opinion that DOD's extensive use of O&M funds to provide HCA violated the Purpose Statute (31 U.S.C. §1301(a)) and other well-established fiscal principles. The GAO concluded that DOD had used its O&M accounts improperly to fund what was essentially foreign aid and security assistance.

As noted above, the Purpose Statute enforces congressional control of the national purse, and requires expenditures from an appropriation to be reasonably related to the purpose of that appropriation. The Honduras I opinion applied the standard three-pronged test to determine whether certain expenses for construction and to provide medical and veterinary care were proper expenditures:

> First and foremost, the expenditure must be reasonably related to the purposes for which the appropriation was made . . . . Second, the expenditure must not be prohibited by law . . . . Finally, the expenditure must not fall specifically within the scope of some other category of appropriations.

Honduras I at 427-28.

This test is widely used to analyze fiscal law problems. Applying it to the military operations conducted in Honduras in 1983, the GAO disapproved certain expenditures using O&M funds which were reasonably related to DOD purposes, that is, expenditures which achieved "readiness and operational benefit" for DOD. The GAO determined that the otherwise valid O&M expenditures were improper either because they were prohibited by law (violating the second prong of the above test), or because they achieved objectives which were within the scope of more specific appropriations, such as appropriations to the State Department for foreign aid under the FAA or the Arms Export Control Act (violating the third prong).

The Honduras II opinion, while continuing to apply the above-described three-pronged test, nevertheless clarified and modified its interpretation of the third prong of the test. This opinion affirmed that DOD O&M funds may be used to conduct activities which are similar to activities funded by more specific appropriations if there are distinctions in "scope and purpose" between the activities. Honduras II at 27-30.

For example, during combined exercises (with U.S. participation funded from DOD O&M accounts), limited interoperability, safety, and orientation training of/with foreign personnel may be funded from O&M accounts, even though the FAA and Arms Export Control Act provide specific authority and appropriations to train and equip foreign forces (traditional security assistance efforts). Interoperability, safety, and orientation training are necessary for successful DOD participation in such exercises, however, and this type of training differs in scope and purpose from training normally provided through security assistance programs. Particular care must be taken to differentiate between legitimate interoperability, safety, and familiarization training, and training that is more properly conducted under security assistance programs.

DOD's changing missions resulted in expansion of its HCA operations in recent years. Congress eliminated most funding problems for these operations through a statutory solution. DOD and the State Department now each receive separate appropriations for humanitarian assistance. Any HCA projects must be funded from the special O&M funds earmarked for this purpose in annual DOD authorization and appropriations acts. See, e.g., National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 301(18), 107 Stat. 1547, ____ ($48,000,000 provided for humanitarian assistance during FY 1994). However, Congress has eliminated DOD's authority to use general O&M funds for minimal HCA purposes, except to the extent that using general appropriations may be incident to HCA efforts using O&M funds earmarked for that purpose. See National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 1504(b), 107 Stat. 1547, 1839 (1993). Separate authority exists for the use of general O&M appropriations for limited civic assistance efforts in the Pacific. Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139, § 8012, 107 Stat. 1418, 1440 (1993).

Formerly the GAO interpreted DOD's ability to provide HCA in conjunction with its other operations in this way:

> [T]he mere fact that O&M-funded activities create an incidental civic or humanitarian benefit does not require that they be financed from other appropriations. Where, however, the type and amount of activities are such that they fall within the scope of other appropriation categories . . . they must be funded from those other sources. Thus, with that caveat, we agree . . . that no funding violation results from bona fide training activities that result in a concurrent civic or humanitarian benefit.

See Honduras II at 38. This language formed the basis for DOD's use of O&M funds to provide HCA as an incidental benefit of its operations in foreign countries, before the specific statutory authority of 10 U.S.C. § 401. Section 401(c)(2) preserved this incidental benefit authority until passage of the FY 1994 Authorization Act. With the recent change to that code provision, DOD no longer appears to have statutory or decisional authority to provide minimal HCA benefits in conjunction with its general operations. Instead, 10 U.S.C. § 401(c) now requires the use of O&M funds earmarked for HCA purposes for any efforts that will provide direct HCA benefits to foreign citizens.

When DOD engages in HCA efforts pursuant to 10 U.S.C. § 401, several conditions constrain its HCA operations. First, the HCA must be provided "in conjunction with authorized military operations" which "promote" the security interests and "specific operational readiness skills" of the participants. Second, the statute apparently confines authorized HCA to four general areas which are defined by statute; these areas are: (1) medical, dental, and veterinary care; (2) construction of rudimentary surface transportation systems; (3) well drilling and construction of basic sanitation facilities; and (4) rudimentary construction of public facilities. Third, the Secretary of State (or delegate) must approve any proposed HCA under this authority. This ensures that DOD's HCA complements other foreign assistance provided by the U.S., which is a fourth condition. Fifth, the HCA must not be given to indigenous foreign military organizations. Sixth, each year DOD must report HCA conducted under this authority to Congress. Seventh, though not expressly stated, the legislative history indicates that "authorized military operations" refers only to JCS-directed or coordinated exercises.

Military doctrine defines "civic action" and generally uses this term to describe the activities which Congress has labeled HCA in 10 U.S.C. § 401. See FM 41-10, Civil Affairs Operations (Dec. 17, 1985). The exact relationship between "civic affairs" and "humanitarian and civic assistance" is unclear. Arguably, civic action is broader and includes more activities than HCA. Consequently, 10 U.S.C § 401's applicability to the full range of civic action is unclear. The safest approach, however, is to subject all forms of military civic action to the conditions specified in 10 U.S.C. § 401.

The CINC initiative fund also is available for humanitarian assistance. See 10 U.S.C. § 166a. Specific limitations apply. For instance, funds may not be used for any purpose for which Congress has denied a funding request.

Additionally, DOD may transport supplies provided by nongovernmental sources without charge on a space-available basis. DOD cannot use this authority to supply a military or paramilitary group. 10 U.S.C. § 402. DOD may also provide transportation on other-than a space-available basis, if it pays such transportation costs with its O&M funds earmarked for HCA purposes. See 10 U.S.C. § 2551.

The JA's primary role during military operations that may have incidental HCA efforts associated with them is to ensure mission accomplishment within the constraints of current law; JAs must interpret 10 U.S.C. § 401 in light of its latest amendment, and ensure that O&M funds earmarked for HCA purposes are used for HCA efforts. The JA must ensure that problems are identified during exercise planning and avoided. After-the-fact justifications which stretch the language in 10 U.S.C § 401 risk GAO scrutiny and adverse ramifications for those who seek to circumvent congressionally-imposed limitations.

Security Assistance

Funding for aid to foreign armies is specifically provided for in foreign assistance appropriations. Transfers of defense items and services to foreign countries is regulated by the Arms Export Control Act. 22 U.S.C. §§ 2751-96. See also DOD Reg. 7000.14-R, Financial Mgmt. Reg., vol. 15, Security Assistance Policy and Procedures (Mar. 18, 1993). Providing weapons, training, supplies, and other services to foreign countries must be done in compliance with the Arms Export Control Act, the Foreign Assistance Act (FAA) (22 U.S.C. §§ 2151-2430i), and other laws. Past problem areas have been:

Joint training exercises which have the principal purpose of training foreign forces to operate U.S.-provided weapons.

Provision of U.S. military uniforms to friendly foreign forces to prevent misidentification and so these forces could restore order in "occupied" areas. U.S. forces did this in Panama, so they could identify who was supporting U.S. efforts and who was not. This was, in effect, assistance to foreign forces that should have been provided through appropriations for that purpose, not O&M funds.

Transfer of U.S. military equipment to allies to facilitate interoperability.

As a general rule, the U.S. may not give away anything to a foreign government or international organization without reimbursement. Therefore, DOD may not use its appropriations to aid any foreign entity, except as authorized by Congress. The GAO has provided guidance to aid in determining when such aid complies with congressional intent. Examples of permissible training include:

Familiarization and safety training, unless it arises to the level of formal training normally conducted through security assistance projects. Such incidental training merely to ensure interoperability during combined exercises is different in purpose and scope from that normally conducted as security assistance. See Honduras I at 441.

Special forces exception -- training indigenous forces is a fundamental special forces mission. 10 U.S.C. § 2011 (recently codified after recognition in DOD policies and GAO decisions).

Military training during an exercise is not security assistance if the benefit to the host government is incidental, minor, and not comparable to that ordinarily provided as security assistance; and if the exercise's primary purpose is to train American forces. General Fred F. Woerner, B-230214, Oct. 27, 1988 (unpub.) (repairing bullet holes in foreign aircraft and inventorying a foreign warehouse).

The Arms Export Control Act

The Arms Export Control Act permits DOD and commercial sources to provide defense articles and defense services to foreign countries to: enhance the internal security or legitimate self-defense needs of the recipient; permit the recipient to participate in regional or collective security arrangements; or permit the recipient to engage in nation-building efforts. 22 U.S.C. § 2754. Section 21(a)(1) of the Arms Export Control Act (22 U.S.C. § 2761(a)(1)) permits the sale of defense articles and services to eligible foreign countries. State Department appropriations and foreign countries' own revenues fund Arms Export Control Act activities. To sell defense articles and services (procured with DOD appropriations) to foreign countries, the State Department first obtains them from the DOD. The Defense Security Assistance Agency (DSAA) manages the process of procuring and transferring defense articles and services to foreign countries for the State Department. This process provides for reimbursement of the applicable DOD accounts from appropriated State Department funds, or from funds received from sales agreements directly with the foreign countries.

The reimbursement standards for defense article and services are established in Section 21(a)(1) of the Arms Export Control Act (22 U.S.C. § 2761(a)(1)). For defense articles the reimbursement standards are:

> not less than [the] actual value [of the article], or the estimated cost of replacement of the article, including the contract or production costs less any depreciation in the value of such article.

For defense services the reimbursement standards are:

> [f]ull cost to the U.S. Government of furnishing such service [unless the recipient is purchasing military training under the International Military Education and Training or IMET section the FAA, 22 U.S.C. § 2347] . . . [the value of services provided in addition to purchased IMET is recovered at] additional costs incurred by the U.S. Government in furnishing such assistance.

Section 21(e) of the Arms Export Control Act (22 U.S.C. § 2761(e)) requires the recovery of DOD costs associated with its administrative services in conducting sales, plus certain nonrecurring costs and inventory expenses.

The Foreign Assistance Act (FAA)

The FAA has two principal parts. Part I provides for foreign assistance to developing nations; Part II provides for military or security assistance. The FAA treats these two aspects of U.S. government support to other countries very differently. The treatment is different because Congress is wary of allowing the U.S. to be an arms merchant to the world, but supports collective security and efforts to defeat communism. See 22 U.S.C. § 2301. The purposes served through the provision of defenses articles and services under Part II of the FAA are essentially the same as those described for the Arms Export Control Act (see 22 U.S.C. § 2302), but under the FAA, the recipient is more likely to receive the defense articles or services free of charge.

Congress imposes fewer restraints on non-military support (foreign assistance) to developing countries. The primary purposes for providing foreign assistance under Part I of the FAA are to: alleviate poverty; promote self-sustaining economic growth; encourage civil and economic rights; and integrate developing countries into an open and equitable international economic system. See 22 U.S.C. §§ 2151, 2151-1. In addition to these broadly defined purposes, the FAA contains numerous other specific authorizations for providing aid and assistance to foreign countries. See 22 U.S.C. §§ 2292-2292q (disaster relief); 22 U.S.C. § 2293 (development assistance for Sub-Saharan Africa).

The overall tension in the FAA between achieving national security through mutual military security, and achieving it by encouraging democratic traditions and open markets, is also reflected in the interagency transaction authorities of the act (compare 22 U.S.C. § 2392(c) with 22 U.S.C. § 2392(d) (discussed below)). DOD support of the military assistance goals of the FAA is generally accomplished on a full cost recovery basis; DOD support of the foreign assistance and humanitarian assistance goals of the FAA is accomplished on a flexible cost recovery basis.

By authorizing flexibility in the amount of funds recovered for some DOD assistance under the FAA, Congress permits some contribution from one agency's appropriations to another agency's appropriations. That is, an authorized augmentation of accounts occurs whenever Congress authorizes recovery of less than the full cost of goods or services provided. The authorized augmentation occurs because, under generally applicable fiscal principles (the Purpose Statute and the Economy Act), full cost recovery is required.

State Department reimbursements for DOD or other agencies' efforts under the FAA are governed by 22 U.S.C. § 2392(d). Except under emergency Presidential draw down authority (22 U.S.C. § 2318), reimbursement to any government agency supporting State Department objectives under "subchapter II of this chapter" (Part II of the FAA (military or security assistance)) is computed as follows:

> [a]n amount equal to the value [as defined in the act] of the defense articles or of the defense services [salaries of military personnel excepted], or other assistance furnished, plus expenses arising from or incident to operations under [Part II] [salaries of military personnel and certain other costs excepted].

This reimbursement standard is essentially the "full reimbursement" standard of the Economy Act (see below). Procedures for determining the value of articles and services provided as security assistance under the Arms Export Control Act and the FAA are described in the Security Assistance Management Manual (DOD Manual 5105.38-M) and the sources referenced therein.

The emergency Presidential draw down authority of 22 U.S.C. § 2318 authorizes the President to direct DOD support for various State Department efforts that further national security, including counterdrug programs (22 U.S.C. § 2318(a)(2)(A)(i)). In addition, Part VIII of subchapter I (in Part I of the FAA) is the International Narcotics Control provision of the act (22 U.S.C. §§ 2291-2291k. A draw down of DOD resources may be reimbursed by a subsequent appropriation (22 U.S.C. § 2318(c)); however, this seldom occurs. When no appropriation is forthcoming, a Presidential draw down is another example of an authorized augmentation of accounts (DOD appropriations are used to achieve an objective ordinarily funded from State Department appropriations).

In addition to the above, Congress has authorized another form of DOD contribution to the State Department's counterdrug activities by providing that when DOD provides services in support of this program, it is reimbursed only for its "additional costs" in providing the services (i.e., its costs over and above its normal operating costs), not its full costs.

The flexible standard of reimbursement under the FAA mentioned above for efforts under Part I of the FAA is described in 22 U.S.C. § 2392(c). This flexible standard of reimbursement for interagency transactions is applicable when any other federal agency supports State Department foreign assistance (not military or security assistance) objectives for developing countries under the FAA.

> [A]ny commodity, service, or facility procured . . . to carry out subchapter I of this chapter [Part I] [foreign assistance] . . . shall be (reimbursed) at replacement cost, or, if required by law, at actual cost, or, in the case of services procured from the DOD to carry out part VIII of subchapter I of this chapter [International Narcotics Control, 22 U.S.C. § 2291(a)-2291(h)], the amount of the additional costs incurred by the DOD in providing such services, or at any other price authorized by law and agreed to by the owning or disposing agency.

Note the specific reference to DOD services in support of State Department counterdrug activities. "Additional costs incurred" is the lowest acceptable interagency reimbursement standard. If Congress wishes to authorize more DOD contribution (that is, less reimbursement to DOD appropriations), Congress authorizes the actual expenditure of DOD funds for or on the behalf of other agencies. See National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, §§ 1001-11, 104 Stat. 1485, 1628-34 (1990) (providing general authority for DOD to engage in counterdrug operations); see also National Defense

Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 1121, 107 Stat. 1547, 1753-54 (1993) (extending DOD's counterdrug authority through FY 1995).

The reimbursement standards for DOD in 22 U.S.C. § 2392(c) are interpreted in the DOD Accounting Manual (DOD Manual 7220.9-M). When DOD provides services in support of State Department counterdrug activities, the manual permits "no cost" recovery when the services are incidental to DOD missions requirements. The manual also authorizes pro rata and other cost sharing arrangements. See DOD Manual 7220.9-M, ch. 26, para. G.2.c.

Emergency authorities also exist to permit the U.S. to provide essential assistance to foreign countries when in the interest of U.S. security. See, e.g., 22 U.S.C. § 2364 (President may authorize assistance without regard to other limitations if he determines it will assist U.S. security interests, and notifies Congress; certain limitations still apply).

Special Forces Exception

Special Forces training of foreign personnel, conducted to train, test, and evaluate Special Forces units, is not required to be funded from the more specific appropriation for security assistance. The GAO recognized this limited exception to the Purpose Statute's prohibition against augmentation because it would be impractical and unfair to require a host nation (HN) receiving Special Forces training to use scarce security assistance funds for the limited training thereby imparted. Honduras II at 29. The Comptroller General's recognition of the scope and purpose distinction regarding special operations training was based on the fact that training indigenous military units is a fundamental mission of Special Forces; such training is provided as a means of achieving specific U.S. operational goals. This "Special Forces Exception" is now codified at 10 U.S.C. § 2011.

Disaster Relief Operations

Domestic Disaster Relief

DOD Directive 3025.1 (Use of Military Resources during Peacetime Emergencies within the United States, its Territories, and Possessions) and AR 500-60 (Disaster Relief) regulate emergency disaster relief operations within the U.S. In 1989, Congress created the Defense Emergency Response Fund (DERF), funded with $100,000,000, to remain available until expended, to reimburse current appropriations used for supplies and services in anticipation of requests from other agencies for disaster assistance. Department of Defense Appropriations Act, 1990, Pub. L. No. 101-165, Title V, 103 Stat. 1112, 1126-27 (1989). The DERF legislation permits DOD to use DERF funds if the Secretary of Defense determines that immediate action is necessary before receipt of a formal request for assistance on a reimbursable basis from another federal agency or a state government. In 1993, Congress expanded DOD's ability to use DERF funds, to make this appropriation available after a request for assistance from another federal agency or a state government, if the Secretary of Defense determines that use of the fund is necessary. Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139, § 8131, 107 Stat. 1418, 1470 (1993). This change makes DERF funds available for DOD domestic disaster assistance efforts after a request for assistance, and avoids DOD from jeopardizing its O&M accounts by providing disaster assistance in the absence of a reimbursement agreement. However, DOD activities should continue to obtain reimbursement agreements as emergency conditions permit, rather than relying on DERF funding exclusively.

The Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. §§ 5121-5203) authorizes the President to direct federal agencies to provide assistance essential to meeting immediate threats to life or property resulting from a major disaster, with or without reimbursement. 42 U.S.C. §§ 5170a & 5170b. Agencies may immediately incur obligations by contract or otherwise in such amounts as are made available to them by the President. 42 U.S.C. § 5149(b). Federal agencies may receive reimbursement for their relief efforts if the Federal Emergency Management Agency (FEMA) requested assistance. Reimbursement is limited to expenses above normal operating levels. Agencies may credit reimbursements received to their operating accounts. 10 U.S.C. § 5147; AR 500-60, paragraph 5-3. A Memorandum of Understanding between DOD and FEMA should address reimbursements. DOD activities also should seek a FEMA mission letter defining the exact scope of disaster relief responsibilities. The mission letter should state a not-to-exceed reimbursable amount, which DOD units should not exceed without approval from higher headquarters.

Foreign Disaster and Emergency Assistance

The President may furnish foreign disaster assistance under such terms and conditions as he determines appropriate pursuant to 22 U.S.C. §§ 2292-2292q. A limitation of $50 million from each year's foreign assistance appropriations applies to foreign disaster assistance under this authority. 10 U.S.C. § 2292a(b). Additionally, 22 U.S.C. § 2318 permits the President to draw down defense stocks and services in response to unforeseen emergencies requiring military assistance to a foreign country or international organization. Use of this authority requires notice to Congress, and is limited to $ 75 million per fiscal year.

Correcting Purpose Act Violations

Finally, and importantly, improper expenditures of appropriated funds must be rectified. Improper expenditures can be rectified by identifying a proper source of appropriated funds, and transferring funds from it to the appropriation improperly used. Even when this is accomplished, it is possible an Antideficiency Act violation[6] has occurred. Improper uses of appropriated funds can be corrected without a violation of the Antideficiency Act only if the proper funds were available at the time of the use of the improper use of funds, the proper funds remained available continuously until the time of correction, and the proper funds were available in an adequate amount at the time of the actual funding adjustment to correct the improper use of funds; and if the improper use of funds did not violate any statutory limitation on the use of funds, or a regulatory limitation on the use of funds that amounts to a formal subdivision of funds.[7] Even when an Antideficiency Act violation is unavoidable, however, an accounting adjustment to charge the proper appropriation is still required.

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[6] See infra text under the heading Availability of Appropriations as to Amount.

[7] An example of such a regulatory restriction is the current $15,000 limitation on the use of O&M funds for the purchase of supply items. See DOD Manual 7110-1-M, Budget Guidance Manual, para. 241.4.C.1.f. (May 1990).

AVAILABILITY OF APPROPRIATIONS AS TO TIME

Although Congress appropriates to executive agencies some funds that are available until expended, most appropriations are available for limited periods. If funds are not obligated during these periods of availability, they expire. Expired funds are unavailable for new obligations (e.g., new contracts), but they may be available for adjustments to existing obligations (e.g., paying for an unexpected price increase under an existing contract). Appropriations have different periods of availability:

Operation and maintenance -- 1 year.
Procurement -- 3 years.
Construction -- 5 years.[8]

The bona fide need rule states that appropriations are only available to support needs arising during their periods of availability. See 31 U.S.C. § 1502(a) (the bona fide need statute). Existing contracts generally may be completed using appropriations current when they were awarded, even if performance extends beyond the end of the fiscal year (the fiscal year ends at midnight each September 30th). However, new requirements added to a contract (as distinguished from adjustments for price changes for work originally encompassed within a contract's scope) must be funded with current appropriations regardless of the money used for the original obligation. For service contracts, the need for the services generally is considered to arise at the time the services are performed, not when the contract is awarded. Therefore, the bona fide need rule generally requires new funding for services performed on or after October 1st of each new fiscal year. Certain statutory exceptions to this general rule are provided in 10 U.S.C. § 2410a.

Overstocking supplies at the end of a fiscal year violates the bona fide need rule. Purchases should cover only current year needs, and any inventory needed to cover the lead time before deliveries begin under contracts placed in the next fiscal year.

AVAILABILITY OF APPROPRIATIONS AS TO AMOUNT

Deploying forces must determine the amount of funds necessary and available to support their operations before deploying, and seek additional funds of the proper type for the purposes needed before or during the deployment as requirements develop. The amount available for deployment requirements will depend on the amount of funds allocated by higher headquarters. See 31 U.S.C. § 1514(a) (requires agencies to subdivide and control congressional appropriations). Agency regulations govern the uses of and controls over appropriated funds to avoid obligations and expenditures in excess of the amount of funds available for a particular purpose. See AR 37-1; AR 37-100-XX (the "XX" is the current fiscal year).

The Antideficiency Act (31 U.S.C. §§ 1341(a) & 1514(a)) prohibits any government officer or employee from:

Making or authorizing an expenditure or obligation in excess of the amount available in an appropriation.
Making or authorizing expenditures or incurring obligations in excess of formal subdivisions of funds; or in excess of amounts permitted by regulations prescribed under 31 U.S.C. § 1514(a).
Incurring an obligation in advance of an appropriation, unless authorized by law.
Accepting voluntary services unless otherwise authorized by law. 31 U.S.C. § 1342.

Regulations require investigation of suspected ADA violations. AR 37-1, para. 7-7. Army commanders must initiate investigations into suspected Antideficiency Act violations under AR 15-6, Procedure for Investigating Officers and Boards of Officers (May 11, 1988). If a statutory violation occurs, the agency must investigate to determine the senior responsible individual, report the circumstances and the individual's name to Congress through the ASA(FM) and DOD Comptroller, and impose administrative and/or criminal sanctions on that individual. No one is exempt. Lawyers, commanders, and resource managers have been found to be senior responsible individuals.

Common problems that have resulted in ADA violations have included:

Incurring obligations in advance of an appropriation (e.g., before passage of a new appropriations act or other spending authority (like continuing resolution authority) at the beginning of a new fiscal year).
Exceeding the amount of a statutory funding limitation (e.g., a construction project exceeding $300,000 funded with O&M money).
Obligating funds for purposes expressly prohibited by an annual or permanent limitations on uses of appropriated funds.

THE ECONOMY ACT

The Economy Act, 31 U.S.C. § 1535, provides general authority for federal interagency transactions. It authorizes interagency transactions when no other statute permits the providing agency to render the requested service, and when the requested service is not one for which the providing agency has already received funds. Merit Sys. Protection Board--Travel Expenses of Hearing Officers, B-195347, 59 Comp. Gen. 415 (1980). Funds normally are transferred between the military services and between DOD and other agencies using a Military Interdepartmental Purchase Request (MIPR), DD Form 448.

The Economy Act is not applicable to interagency transactions conducted under the authority of the FAA because the latter contains internal interagency transactions authorities. 22 U.S.C. § 2392(c) & (d).

The Economy Act mandates full reimbursement to the providing agency, including indirect costs incurred by that agency to provide the requested service. Augmentation occurs if less or more than the full applicable costs are reimbursed to the providing agency (57 Comp. Gen. at 682-83).

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[8] Although the appropriation life of MILCON appropriations is five years, Congress has limited DOD's authorization to spend MILCON appropriations to three years in recent Authorization Acts. See Military Construction Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 2701, 107 Stat. 1856, 1880 (1993).

Other authorities may permit reimbursement of less than the full cost of providing services to a requesting agency, but the Economy Act requires full reimbursement from the requesting agency to the providing agency. Because the Economy Act requires exact reimbursement, neither less nor more, it prohibits reimbursement for costs which are properly charged to the mission of the providing agency. Consequently, the Economy Act does not prohibit separately funded agencies from undertaking authorized activities which support a common goal; in fact, it prohibits reimbursement between agencies when both have a mission and appropriations to accomplish complementary activities.

CONCLUSION

Congress limits the authority of DOD and other executive agencies to use the funds appropriated to them. The principle controls imposed on the use of appropriated funds, the purpose, time, and amount limitations discussed above, apply during military operations and to all other federal activities. The GAO, service audit agencies, and the Inspectors General, monitor DOD compliance with fiscal controls on appropriated funds. Improper uses of funds (e.g., funds used for a purpose other than that for which they were appropriated), even if otherwise lawful, may be corrected under some circumstances, but preventive practice by JAs accompanying deploying forces can avoid most improper uses. Funding violations may result in adverse administrative or criminal consequences against those responsible.

REFERENCES FOR FURTHER RESEARCH

Statutes

1. Title 31, U.S. Code.
2. Annual DOD Authorization and Appropriations Acts.

Regulations

1. DOD: DOD Reg. 7000.14-R, Financial Management Regulation, vols. 1-15 (this will replace DOD Manual 7220.9-M below, when all volumes are published, but as of January 1994, only volumes 1, 7, and 15 are published).
   DOD Manual 7220.9-M, DOD Finance & Accounting Manual.
   DOD Manual 7110.1-M, DOD Budget Guidance Manual.
2. Army: AR 37-1.
   AR 37-100-XX (the "XX" is the current fiscal year).
3. Navy: Navy Comptroller Manual.
4. Air Force: AFR 170-6.
   AFR 170-8.
   AFR 170-13.
   AFR 172-1.
   AFR 177-16.
   AFP 110-4.

Decisional Law

Decisions of the Comptroller General of the United States (a bound reporter published by the Government Printing Office, cited as "Comp. Gen."; agencies can request advance opinions concerning their operations by forwarding a request through channels--see AR 37-1, para. 20-19).

Treatises

1. General Accounting Office, Principles of Federal Appropriations Law, 2d ed., GAO/OGC 91-5 (July 1991) (to be issued in four volumes; volumes 1 and 2 are in print as of January 1994).
2. General Accounting Office, Accounting Guide, GAO/AFMD-PPM-2.1 (Sept. 1990).
3. General Accounting Office, Policies and Procedures Manual for Guidance of Federal Agencies, Title 7 (Feb. 1990).

TAB M
THE RESERVE COMPONENT STRUCTURE

A. Introduction.

Use of ARNG and Army Reserve personnel can be critical to mission accomplishment. As General Collin Powell stated in December 1990 before the Senate Armed Services Committee, "[t]he success of the Guard and Reserve participation in DESERT STORM cannot be overemphasized. Their participation has been a significant factor in affording us flexibility and balance, and [it] reinforces.. . the Total Force concept."

The purpose of this section is to provide the AC SJAs with information on the following topics:

1. Nature, mission, and capabilities of ARNG and Army Reserve legal units and individuals,

2. Examples of prior employment of such RC legal personnel,

3. Procedures that may be used by AC SJAs to procure such RC legal personnel, and

4. The RC Premobilization Legal Preparation Program (PLP)

B. Nature, Mission, Capabilities, and Procurement of ARNG Legal Personnel

ARNG legal personnel support both militia missions and preparation for mobilization in federal service missions. Approximately 50% of ARNG judge advocates are embedded in SJA sections in combat and support units. The TOE structure is the same in the National Guard units as in the AC. The remaining 50% of ARNG judge advocates are usually assigned to the state (STARC) or territory (TARC) headquarters and from there support both the militia and federal missions. Each of the fifty states, and Guam, Puerto Rico, Virgin Islands, and the District of Columbia have their own distinct independently commanded National Guards. Therefore, the roles and missions of the judge advocates assigned to the state and territory area commands vary.

Fifty-three of the fifty-four National Guards each have a single full time AGR judge advocate and most a senior traditional State Staff Judge Advocate. Their primary mission is to advise their respective Adjutant Generals. The AGR Judge Advocate or the State SJA are the POC for purposes of coordinating training and preparations for natural disasters, civil disturbance, civilian assistance, and counterdrug missions within their jurisdictions. They are also the POC for the post federal mobilization mission of assistance to all military family members within their jurisdictions beyond the support capability of Class 1 AC installations.

The SJA of ARNG combat or support units is the POC for training for his or her SJA office for the federal mobilization mission. Depending on other demands, the SJAs of these National Guard units are generally interested in one or two of their legal personnel working in an AC SJA office during a 15 day Annual Training period. ARNG judge advocates possess a broad range of experience and expertise. Many ARNG judge advocates have prior AC judge advocate experience. Others have extensive civilian legal practices focusing on such areas as government regulation, labor law, environment, contracts, criminal law, and family legal practice. All have the experience of providing general legal services to their respective ARNG units. ARNG judge advocates because of their local community contacts are effective liaisons with local and state governments. ARNG SJAs recognize the necessity to develop AC training opportunities for ARNG enlisted personnel. Candid SJA to SJA contact is recommended in order to insure that the partnership established meets the expectations of both the AC and ARNG SJAs.

The POC for the Mil to Mil program and solicitations for ARNG judge advocate individual volunteers is the Office of the Judge Advocate, National Guard Bureau. The Key Personnel Upgrade Program (KPUP) permits individual volunteers to deploy for several weeks or longer to an AC unit. AC SJAs with specific training opportunities can request a KPUP tour through AC channels to the National Guard Bureau.

The ARNG POCs telephone numbers and addresses are listed in the JAGC Personnel and Activity Directory beginning at page 209.

C. Nature, Mission, and Capabilities of Army Reserve Legal Personnel. See Chs. 2-3, FM 27-100, Legal Operations, 3 Sep 1991.

1. **Judge Advocate Service Organizations (JAGSOs).** General. The JAGSOs are cellular TOE teams designed to provide legal services to nondivisional troops not otherwise provided sufficient organic legal support. JAGSOs also provide CONUS sustaining base support for mobilization, mobilization sustain- ment, and casualty assistance. Eight types of JAGSO teams exist.

2. **Mission.** JAGSOs provide combat, combat support, and combat service support commanders and soldiers

professional and responsive legal services in all functional areas to ensure mission accomplishment. In an area of operations, all JAGSO teams (except defense and military judge teams) function under and are responsible to the SJA and commander of the unit to which they are assigned. Such teams may be used to augment the existing SJA section or they may work as a remote detachment.

3. **Assignment.** The Army assigns JAGSO teams to theater armies (TAs), theater army area commands (TAACOMs), corps, corps support commands (COSCOMs), corps artillery, and other organizations as required. TJAG is responsible for the technical supervision, training, and assignment of JAGSO personnel.

4. **Legal Support Organizations (LSOs)** (Formerly Military Law Centers). Among the eight teams, the LSO's size, structure and functions resemble those of a heavy division SJA section (one colonel, six lieutenant colonels, four majors, four captains, one warrant officer, five legal NCOs, four legal specialists, and two court reporters). There are now 20 LSOs, each commanded by an O6 RC JA. The Army expects to reduce the number of LSOs to 15 and, in addition, to designate the 15 as follows:

a. Seven of the 15 are allocated one to each of three corps, two theater armies, and two TACOMs. (These are the headquarters at echelons above division programmed to fight in two major regional contingencies.)

b. The remaining eight function as Mobilization Support Organizations (MSOs). MSO assignments are made by HQ, FORSCOM, on the basis of recommendations by HQ, USARCOM.

5. **Other Types of JAGSOs.** In addition to the LSO, seven other types of JAGSOs exist as listed below:

a. The International/Operational Law Team. This JAGSO team advises on the application of international and operational law to military operations. In particular, the team is trained to investigate and prepare reports on alleged violations of the law of war by enemy forces (one, major, one captain, one legal NCO).

b. The Court-Martial Trial Team. This JAGSO team advises on matters related to the administration of military justice, including the disposition of alleged violations of the UCMJ. In particular, the team is trained to perform trial counsel duties at all levels of courts-martial and to act as recorders before administrative boards (one major, three captains, two court reporters, two legal NCOs).

c. The Court-Martial Defense Team. Members of this JAGSO team performs all defense counsel duties in courts-martial and represents soldiers before administrative boards and other proceedings. Team members may also act as "consulting counsel" as required by law or regulation (one major, three captains, one legal NCO).

d. The Legal Assistance/Claims Team. This JAGSO team receives, investigates, and adjudicates claims by and against the United States arising from military activities. In addition, members of the team provide legal assistance services (one major, two captains, one legal NCO, two legal specialists).

e. The Administrative/Contract Law Team. In addition to performing all administrative law functions, this JAGSO team provides advice and assistance on all aspects of the acquisition process -- including combat contacting (one major, two captains, one legal NCO, one legal specialist).

f. Two Military Judge Teams. Judges from the regular military judge team preside at general and special courts-martial; they also perform magistrate and other judicial duties. Senior Military Judge Teams perform the same functions as the regular team but also provide technical supervision to other military judges (one military judge, one legal NCO).

D. Employment of RC Legal Units and Personnel

1. General. RC legal personnel are capable of providing legal support to AC units in many diverse ways. Here some actual examples of such RC support.

a. Mobilization Legal Assistance. In the course of Operation DESERT STORM, AC JAs at Fort Sill, OK, recognized that they would not be able to provide all of the mobilization legal assistance (wills, powers of attorney, etc.,) needed by AC and RC personnel deploying from Fort Sill. Accordingly, the 218th JAGSO, headquartered in Bismarck, ND, was requested to help provide such assistance at Fort Sill. Similar support was provided at other installations around the country by other JAGSO units.

b. Procurement Law. Soon after U.S. Forces began arriving in SWA for Operation DESERT STORM, AC JAs recognized the need for additional legal support to help with local procurement activities. Accordingly, the 207th JAGSO, headquartered near Washington, DC, was mobilized and deployed to SWA where they provided the majority of acquisition law services to U.S. Forces. In fact, the ARCENT and 22d SUPCOM (TAA) SJA offices were principally staffed with RC JAs.

2. Other examples include activation of teams to:

a. Augment the Military Police/Enemy Prisoner of War Structure. Presently, the reserve EPW structure has an insufficient number of JAs to support the national and theater prisoner of war information centers and fourteen EPW battalions in the reserve structure.

b. Augment STARC and TARC Headquarters. With usually one full time AGR and one or two other NG JAs, the STARCs and TARCs are not staffed to support military family members within their jurisdiction. Although these HQs have the mission, they lack the resources to staff casualty assistance centers, to assist family support groups, and to provide individual legal assistance to family members as well as function as the command judge advocate.

c. Augment garrison SJA offices to replace deploying JAs.

d. Augment theater army SJA offices to perform foreign claims commission function or war crimes investigation.

e. Augment SJA offices to assist with civil affairs function and staffing of civilian military operation centers.

E. Procurement of RC Legal Units and Personnel

1. Corps/Division SJAs may be able to secure RC legal support depending upon several factors. First, the time factors: how quickly support is needed and for period. Second, the particular legal expertise required. Third, the number and grade of the people needed. And, fourth, the availability of funds.

2. Funding may or may not be a problem. For example, when an entire RC unit and any individual member of the ARNG or Army Reserve performs annual training (AT), funds for such AT are usually set aside long before the two-week training period commences. Accordingly, to the extent that AC SJAs are able to secure legal support ARNG/Army Reserve units or individuals during their AT periods, funds for such training normally need not be provided by the AC unit seeking RC legal support. Furthermore, with sufficient advance notice RC units and individuals may be able to reschedule AT to fit the needs of the AC unit. During Operation Desert Storm, preparation of many AC and RC soldiers for overseas movement could not have been accomplished without the help of RC JAGSOs that rescheduled and performed their AT at installations where such soldiers were processed.

3. While there are many possibilities, two scenarios will be discussed: first, a Corps SJA needs two company grade RC judge advocates for a single short period -- say 60 days of temporary active duty and, second, a Division SJA needs a dozen field and company grade JAs plus the enlisted members for two weeks to each year during an exercise to backfill most of the military staff of the Division SJA office.

a. Two RC JAs for Two Months. First note that absent mobilization by the President, it is exceedingly difficult to get individual RC soldiers -- including JAs -- involuntarily activated for the performance of such duties. Even during DESERT STORM, individual RC JAs were not involuntarily activated under the 200K limitations. However, volunteers can be requested to Fill this requirement for RC company grade JAs. Since the period of active duty is more than two weeks, such volunteers would not be able to use their AT period (and related funds) to provide such service. Accordingly, the First hurdle here may well be funding since the Corps may not have budgeted funds for such RC temporary active duty. Assuming the Corps supports such a request for RC personnel but does not have the funds, the Corps SJA might informally contact PPT&O, the FORSCOM SJA Office (and perhaps the USARCOM SJA Office) to explain the need for these RC JAs, to determine whether such temporary active duty could be funded, and to seek assistance in locating suitable RC volunteers.

b. Dozen RC JAs for Two Weeks Annually. As the required period of active duty equals two weeks each year, any RC units or individuals who performed such duty for the Division SJA could do so during their regular AT periods without expending Division funds. To acquire such a group of JAs, the Division SJA has some less formal and more formal options available. On an informal basis, the Division SJA could contact the Commanders of the two or three nearest military law centers (MLCs) to make known the Division's need for legal support during the specified two-week period. For example, from time to time XVIII Airborne Corps SJA contacts contact such Commanders to invite them to consider AT at Fort Bragg, NC. Given the variety of legal expertise and experience within each MLC and its subordinate units, the MLC Commander might even be able to tailor a special AT group to fit the particular needs of the Division SJA. Once the Division SJA identifies a particular MLC with the appropriate personnel to support the Division on a long-term basis, consideration might then be given to a formal affiliation between the RC unit and the AC Division through the Army's CAPSTONE program. See AR 11-30.

Note: During DESERT STORM there were a number of requests for the activation of entire JAGSO units. Determining which JAGSO's to activate in response to these requests was a joint function of the FORSCOM SJA and PPT&O.

TAB Mc
DEPLOYMENT

Everyone will now be mobilized and all boys old enough to carry a spear will be sent to Addis Ababa. Married men will take their wives to carry food and cook. Those without wives will take any woman without a husband. Women with small babies need not go. The blind, those who cannot walk or for any reason cannot carry a spear are exempted. Anyone found at home after receipt of this order will be hanged.

Haile Selassie
Emperor of Ethiopia, 1935 (upon invasion by Italy)

I. OVERVIEW
II. OFFICE ORGANIZATION & DEPLOYMENT FUNCTIONS
III. DEPLOYMENT PLANNING & CHECKLISTS
OPLAW Deployment Checklists (includes separate checklists for each substantive legal area).
1. Pre-Alert Preparation Checklists
2. Post-Alert/Pre-Deployment Checklists
3. Post Deployment Checklists
IV. EXERCISE DEPLOYMENTS (Includes both outline and text of legal briefing for deploying soldiers).

I. OVERVIEW

The primary purpose of this Tab is to assist SJAs prepare for, and execute, deployment. Timely, effective legal support in deployment depends in large part on the following live factors:

1. Familiarity with the general legal support needed during mobilization, so that SJA offices can be organized and functions prioritized to provide such support.

2. Knowledge of the particular requirements in each substantive area of the law in order that all legal personnel can be properly trained and so that proper references and forms will be on hand when needed.

3. Participation in exercises to test the deployment plans that have been made and the training provided.

4. Effective utilization of RC legal personnel wherever feasible (see Tab M, this Handbook).

5. Establishment of good working relationships with key personnel within the supported unit.

II. OFFICE ORGANIZATION & DEPLOYMENT

The manner in which SJA offices organize for deployment depends upon the composition and mission of the unit. Accordingly, each SJA office must develop a detailed plan and SOPs which ensure both the successful deployment of the SJA office or element and the extensive legal support needed to POM and deploy the supported unit. The following is a sample basic Deployment Plan for a division.

OSJA DEPLOYMENT PLAN

SJA planning for deployment is based on an assessment of likely conflicts in which the Division may become involved and on several assumptions:

1. Contingencies may require deployment of the Battalion-sized Division Ready Force (DRF) with no notice;

2. Although the DRF will be supported by a joint task force (JTF), it can expect little or no legal, civil affairs, or combat procurement support from the JTF in the first several days of a conflict;

3. Follow on deployment of the Division Ready Brigade and additional Divisional forces.

These planning assumptions result in the following plan for deployments:

1. One JA, normally the Chief of Operational Law, will be prepared to respond to a no-notice alert at all times. In the event of an actual deployment, the JA will join the staff of the DRF CDR and deploy with the task force to provide operational law, civil affairs and combat procurement support until reinforcement.

2. If the DRB reinforces the DRF, another JA, normally the assigned trial counsel, will deploy with the Bde. The ranking JA will become the principal legal advisor to the entire task force.

3. If the Division HQ deploys, the SJA will deploy with such support as permitted by the circumstances.

4. Normally, the entire OSJA will not deploy. Individual soldiers will be prepared to deploy according to the deployment schedule (usually within one week of notification).

5. Personnel designed to accompany the DRB and Division HQ should be prepared to deploy immediately (within 18 hours of notification).

OPERATIONAL LAW DUTIES

SJA. Responsible for delivery of legal services to the Division. Ordinarily, the SJA deploys with the Division CG and is situated so as to directly advise the Command Group and primary staff.

Deputy SJA. Assists the SJA and directly supervises the operational law function in garrison. Ordinarily, the Deputy SJA deploys only when the entire Division deploys. When the DSJA deploys, he supervises JA operations in the Division Rear CP. When the DSJA does not deploy, but the SJA does, the DSJA manages the office. The DSJA is responsible for RC augmentation of the office.

Chief, Criminal Law. Supervises trial counsel and ensures, through them, that units are prepared for deployment from the military justice viewpoint, by attachment of other deploying units for the administration of criminal law and by making necessary arrangements with respect to accused, witnesses, and members for cases affected by deployment. Ensures that pending cases are disposed of in an orderly manner prior to deployment. Ensures that Rear Area/Home Station jurisdiction, including creation of provisional units, if necessary, is properly established. Through SJA, provides advice on punitive policies and General Orders, and proposes plans for handling criminal law matters in the AOR. Coordinates with Senior Defense Counsel (SDC) to provide defense counsel during deployment. The Chief, Criminal Law is located in the Division Rear CP upon deployment.

Trial Counsel. Responsible for LOW and other appropriate training (e.g. SOFA, ROE) for their respective jurisdictions. Coordinates with Bde and Bn S-1s concerning attachment schemes for deploying units and makes arrangements regarding accused, respondents, witnesses, and members in pending cases affected by deployments. Reviews Bde OPLANs. Supports preparation for overseas movement exercises(POMEXs) in supported Bde(s). Trial counsel for Bdes ordinarily deploy with the Bdes and are located at the Bde Support Area (BSA). Other trial counsel, if deployed, are located in the Division Rear CP.

Chief, Operational Law. Plans and executes the operational law program. Coordinates operational law training, reviews Division OPLANs, and coordinates with the Division staff in operational law matters. Plans and implements an aggressive and comprehensive program to prepare Division units for deployment. Deploys with the DRF or, if applicable, the Division Assault CP (if SJA does not deploy with the CG in the Assault CP) to provide immediate operational law support. As the area of operations matures and additional divisional units are deployed, becomes the principal operational law advisor to the CDR of Divisional forces. When the Division HQ is deployed, the Chief, Operational Law, is located in the G-3 Plans cell in the Division Main CP.

Chief, Legal Assistance. Manages preparation for overseas movement (POM) programs and provides other legal services as required. Coordinates with local bar and courts regarding legal assistance issues, requirements, and stays necessitated by deployment. Serves as POC for Family Support Groups and Support Centers. Deploys as required; is located in the Division Rear CP upon deployment.

Chief, Administrative Law. Assists in POM programs and provides advice on command policies and General Orders, processing of conscientious objector applications, and processing of administrative separations and other actions. Assists in the establishment and operation of Rear Area/Home Station jurisdictions. Deploys only if entire Division deploys. If deployed, located in Division Rear CP.

Chief, Claims. Assists in POM programs and ensures that Division can conduct claims operations in the AOR for deployed soldiers, and for Foreign Claims Act claimants through foreign claims commissions. Provides advice on planning to limit losses to soldiers' property and automobiles when left at Home Station during deployment. If deployed, located in Division Rear CP or, if activated, in CMOC. Plans and executes claims mission IAW Claims Office Considerations, infra.

Legal Administrator and Chief Legal NCO. Ensures equipment and supplies are ready for deployment at all times. In coordination with Chief, Operational Law, ensures deployment box contains appropriate materials. Deploys as required.

LEGAL SUPPORT FOR THE DEPLOYING FORCE

Identify legal personnel who will deploy. Trial counsel will generally accompany Bde-sized task forces on deployments. When units from one major subordinate command are attached to another, the counsel from the larger unit will usually accompany the task force. Legal specialists assigned to the deploying Bns will also deploy. Together, these personnel will provide support to the task force. Because there is no provision for the Bde legal center to logistically support itself in the field, the trial counsel will usually accompany the Bde HQ, and legal specialists will accompany their assigned Bn. The SDC will assign a defense counsel to deploying units, as the SDC deems appropriate. A defense counsel should accompany Bde task forces.

Identify the role of the JA during deployment.

1. The trial counsel accompanying the task force must meet with the CDR and members of his principal staff prior to deployment, in order to determine their expectations of the JA during deployment and the support the JA can expect from them.

2. JAs in an emergency deployment may be tasked to provide civil affairs support. Civil affairs includes identification of local resources and support, minimizing local interference with US operations, and generally helping the CDR in his dealings with the

local populace. Civil affairs support for the Division comes primarily from Army Reserve units, which may not arrive for some time after deployment begins. Initially, the Chief, Operational Law provides civil affairs support to the DRF. JAs who deploy later, with the DRB, should be prepared to assist in the Civil Affairs mission (see FM 41-10, Civil Affairs Operations).

3. In addition to identifying deployment duties, the JA must also see that resources are available to permit transportation and communication between the Bde HQ, subordinate Bns, and, when it is deployed, the Division HQ. The trial counsel must have access to the unit tactical operations centers (TOCs), both to learn about task force operations in the field and to provide appropriate advice concerning operational law questions. Inclusion on TOC access rosters is a must.

III. DEPLOYMENT PLANNING AND CHECKLISTS

Effective planning and preparation is essential to the success of any deployment, and, quite often, much of this may be accomplished well in advance of the JCS Warning and Execute orders. This includes routine preparation unrelated to specific missions, as well as mission-specific preparation and planning. The result is an efficient and speedy deployment when an Execution order is received.

Perhaps the most useful, yet most neglected, preparation procedure is that of visiting with fellow OPLAWYERs in other units. This includes not only higher HQ, but with other Divisions that will most probably be called together as part of the deployment Task Force. In virtually all the areas described below, prior coordination with other units will pay handsome dividends upon actual deployment. Standardization of policies (or at least comparison of annexes) may prevent many unforeseen problems, and reduces the "recreating the wheel" effect--especially for new OPLAWYERs.

8 Steps for Deployment Preparation

The JA must be aware of those countries to which his unit, as a part of the Army component of a Unified Command, is most likely to deploy. After identifying which international agreements are relevant to such deployments, concentrate on the following 8 areas of deployment preparation:

1. OPLAW Training (Law of War Training at TAB Q, this Handbook; other training infra.)
2. OPLAN Development and Review (TAB F, this Handbook)
3. Developing the Legal Annex (TAB F, this Handbook)
4. The Deployment Checklist (this Tab)
5. Personal Preparation for Deployment (this Tab; Tabs F and R, this Handbook)
6. Preparation of the Legal Deployment Package (this Tab; Tabs F and R, this Handbook)
7. Effecting the Deployment SOP (this Tab; Tab F, this Handbook)
8. Developing Rules of Engagement (ROE) (Tab H, this Handbook.

OPLAW Training

Routine unit training is part of the preparation that all units must undertake to ready themselves for deployment. The JA contribution to unit deployment training is a comprehensive operational law training program consisting of two parts: judge advocate education and soldier education.

Judge Advocate Education. Each JA must develop expertise in OPLAW. Familiarity with this Handbook is a start. The Chief, Operational Law, should prepare additional materials and classes on OPLAW subjects. JAs should deploy to the field as much as possible to: 1) become familiar with the field environment, and 2) become part of the "operational team" on the CDR's staff. JAs must be proficient in military skills.

Soldier Education. Deploying soldiers must have a sound knowledge of the law of war and ROE. Additionally, key members of the deploying unit must have knowledge of SOFA provisions, claims, fiscal law, and procurement matters. Note also that military justice training, as well as other OPLAW instruction, may be required for reservists activated for deployment. Instructional requirements may be established by regulation or directives from higher HQ, or instruction may be necessitated by practical considerations. In preparing for any deployment, JAs must plan for, and involve themselves in, all necessary training and education. A key aspect of predeployment training, if time permits, is realistic vignette training which integrates ROE and the law of war. The SJA is a key player in planning and executing this training.

Questions for a New SJA

Is there an active OPLAW program?
Have attorneys received OPLAW training?
Is there an ongoing OPD/NCOPD program which includes OPLAW?
Is there a full-time OPLAW attorney?
Is the office actively engaged in reviewing OPLANS?
Do OPLAWYERS have TOP SECRET clearances?
Do OPLAWYERS have access to the TOC?
Do OPLAWYERS have solid working relationships with G-3 counterparts?
Do OPLAWYERS regularly participate in field and other exercises?

Does the OSJA have a realistic and periodically evaluated deployment plan and Field SOP?
Do all SJA personnel know where (Bn, Bde, Main CP, Rear CP, CMOC) they are located upon deployment?
Are all OSJA personnel deployable?
Are all OSJA personnel proficient in military skills?
Is there a program to train soldiers on the LOW and ROE?
Is realistic LOW training integrated into field exercises?
Is there a clear understanding of ROE staffing, training, and implementation procedures?
Are specific attorneys identified and prepared for immediate deployment?
Are deployment boxes sufficiently stocked and periodically uddated?
Are replacements available and on the TPFDL once the first deployment occurs?
What is the plan for RC augmentation, both in the AOR and at Home Station?
Where does the OSJA obtain vehicular support, tentage, pallets, etc.? (NOTE: This should be "NCO business," but requires some SJA attention. The temptation in many offices is to avoid drawing vehicles in garrison because of maintenance and accountability considerations. The office then must deploy and is shocked to learn that no or limited vehicular support is forthcoming. A "lesson learned" over and over again -- if you want a vehicle in the field, you must draw, use, and maintain it in garrison and in exercises.)

OPLAW DEPLOYMENT CHECKLISTS

This sample checklist is divided into 3 sections: **PREPARATION, PRE-DEPLOYMENT, and DEPLOYMENT.**

1. Pre-Alert Preparation Checklists ("before the balloon goes up.")

Personal Considerations. Personal readiness reduces turmoil and uncertainty, increases individual confidence, and helps establish credibility.

_ Do you have TA-50 and is it serviceable?
_ Have you familiarized yourself with, and qualified with your assigned weapon?
_ Take care of personal affairs. Consider: a will, power of attorney, automatic deposits/payment of bills, child care plans, etc. Encourage subordinates to do the same.
_ Are your dog tags correct (particularly your blood type)? Wear them!
_ Is your field equipment and TA-50 assembled in accordance with your unit's field SOP?
_ Do you have a TOP SECRET security clearance? Get one if possible! Operational decision making is based on Top Secret and compartmented information. If you don't have access to this information, your advice will be limited and you'll look foolish.
_ Are your shots (and shot records) up to date?
_ Is your "A Bag" packed and ready to deploy at all times? (Check the FSOP for items in addition to: additional uniforms, field jacket, socks and underwear, shaving gear, toothbrush and paste, wash cloth, soap, towel, etc.) A packed bag allows you to minimize personal turmoil and be able to focus on the mission when it's time to go to the field or to war.

Office Considerations.

GENERAL

_ Is SJA office on the distribution list for message traffic and for all OPLANS/CONPLANS?
_ Is a JAG attending all staff briefings? By becoming part of the normal staff team, you won't be overlooked during deployment planning. If your unit is overlooking the JAGs, talk to the S-3/G-3 and get on the notice list.
_ Does SJA office have sufficient transportation to move personnel and equipment to the field?
_ Are the vehicles dedicated to the SJA office (vs. HHC)?
_ Is there a licensed driver for each assigned vehicle?
_ Do all personnel have a military driver's license?
_ Can the office deployment package be deployed on the available transportation?
_ Has the load plan been tested?
_ Does the office have sufficient field equipment (tentage, chairs, field tables, field desks, etc.) to be able to operate in a field environment for an extended period of time?
_ Do the personnel know how to set up the tentage and break it down quickly?
_ Are the field desks fully stocked with supplies and ready for deployment?
_ Are there portable manual typewriters so that power outages won't stop the office operation?
_ Are there flashlights and batteries?
_ Is the deployment library ready (fully stocked) for immediate deployment?
_ Does the office have an effective Field SOP (FSOP) and Readiness SOP (RSOP)? Simplicity and workability should be the goal.
_ Has everyone been POMd? Are all fully qualified to deploy?
_ Do all office personnel have serviceable TA-50/field gear? INSPECT IT!
_ Do parents have plans for the care of their children? See AR 600-20, Family Care Plan
_ Does the office have an up-to-date alert roster and has it been tested?
_ If after-action reports of prior deployments exist, review them!

INTERNATIONAL LAW CONSIDERATIONS

- __ Are there copies of all Status of Forces and Supplementary Agreements, with maps of countries, where deployment is likely? For classified agreements and Country Law Studies, contact higher HQ, the Unified Command (i.e., SOUTHCOM, CENTCOM, etc.), or OTJAG (International/Operational Law Div).
- __ Ensure regular and thorough training in the law of war (Hague Regulations and Geneva Conventions) and code of conduct is provided to CDRs and soldiers. Emphasis should also be given to the treatment of property, the taking of war trophies, and ROEs.
- __ Ensure law of war, ROE, and operational law problems are included in field problems, exercises, and CPXs. See AR 350-41.
- __ Regularly review operations and contingency plans for the unit. Pay close attention to the ROE, targeting, and PW portions of the plans. Numerous law of war (and "front page") issues can spring from these areas, if they contain misleading, incorrect, or illegal information.
- __ Determine whether deploying JAs will be assisted by Reserve Component support, (e.g., JAGSO Teams) in the area of deployment or Individual Mobilization Augmentees (IMAs) at Home Station. If JAGSO teams are deploying, ensure that this fact is included in the operations order.
- __ Ensure all personnel have the necessary security clearances to review operation plans and contingency plans and attend briefings and planning conferences.
- __ Determine potential legal problems in the countries of probable deployment (e.g., unique religious laws that would affect US personnel, limitations on the use of military vehicles in country, unique customs or currency laws, and any significant terrorist threats). If potential legal problems exist, they should be addressed in the OPLAN or CONPLAN for that country.
- __ Do any international agreements need to be negotiated prior to deployment of US Forces?
- __ Become part of the operational team by attending all coordination and planning conferences.
- __ When working in planning groups, assist in areas other than the law. Become a team player.
- __ Does your deployment package have the necessary ARs, FMs, DA PAMs, etc.?
- __ Make sure that the deployment package has a camera, film, and sworn statement forms.
- __ Submit JA portions of upcoming exercise play on time (and ensure they are keyed to the master scenario plan). The planning process can begin a year in advance. The Master Scenario Events Lists (MSELs) are usually the way exercise play is keyed to the master plan. These are usually submitted six months before the exercise. The people you work with during this year-long planning process are the same operators you will deal with as the operational law adviser in combat. Giving them a good timely product during this exercise planning phase is an excellent way to demonstrate your competence.
- __ Contact the G-2 and G-5 if an interpreter will be necessary.
- __ Consider solving recurring issues such as war trophies, ROE, requisitioning of property, contracting, etc. by working them into SOPs, exercises, and the like. Make key contacts now!

International Law References

Manual for Courts-Martial, 1984.
AR 27-50/SECNAVINST 5820.4G, Status of Forces Policies, Procedures, and Information, 15 Dec 89.
AR 190-41, Customs Law Enforcement
AR 350-30, Code of Conduct Training.
DA Pam 27-1, Treaties Governing Law Warfare.
DA Pam 27-1-1, Protocols to the Geneva Conventions of 12 Aug 1949.
DA Pam 27-24, Selected International Agreements, Vol. II.
DA Pam 27-161-1, The Law of Peace, Vol. I.
DA Pam 27-161-2, International Law, Vol. II.
DOD Dir. 5030.49, Customs
FM 27-2, Your Conduct in Combat Under the Law of War (formerly TC 27-1.)
FM 27-10, The Law of Land Warfare with change 1 (if you can only take one Law of War document, this is the one to take!).
FM 41-5/NAVMC 2500, Joint Manual for Civil Affairs, 18 Nov 66.
FMFM 1-10, The Commander's Handbook on the Law of Naval Operations, Oct 89; and Annotated Supplement, NWP 9 (Rev. A)/FMFM 1-10, 5 Oct 89.
MCO 3460.1A, Training and Education Measures Necessary to Support the Code of Conduct (11 June 90)
TC 27-10-1, Selected Problems in the Law of War.
TC 27-10-2, Prisoners of War.
TC 27-101-3, Instructor's Guide to The Law of War.
AF Pam 110-20, Selected International Agreements.

CLAIMS CONSIDERATIONS

- __ Ensure that at least two, one-member, and one three-member foreign claims commissions are available for appointment by the Cdr, US Army Claims Service (USARCS). Periodically review the commissions to ensure their members are available and prepared for deployment.
- __ Determine whether any international agreements govern claims responsibility.
- __ Determine if single-service responsibility exists for probable areas of deployment. If it does not exist, then coordinate with USARCS to establish one (if necessary).
- __ Prepare a claims kit, to include manual typewriter and required forms. The forms must be in the language of the local nationals.
- __ Assemble and train a claims expert. Anticipate and prepare for the following:

(1) The JA should assist the G-4 in obtaining extended purchase authority, LAW AR 37-21, up to the limit of 10 USC 2304 for Ordering Officers and Class A Agents, down to battalion level, if necessary; develop guidance for the use of operations

funds; and assist the Class A Agents in distributing such funds.

(2) In the absence of an established organization in the Area of Operations (AO) (i.e., one with contracting officers, civil affairs personnel, and a full complement of combat service support), at what level will CDRs be authorized to contract for necessary supplies and services? This warrant must be obtained from the Head of the Contracting Activity (e.g. CDR, FORSCOM; CDR, Eighth Army, etc.).

(3) The probable need to ratify irregular acquisitions, (i.e., those made by individuals not authorized to commit the US). See AR 37-107, para. 5-25; and applicable sections of the Federal Acquisition Regulations (FARS), DOD Acquisition Regulations (DFARS) and Army Acquisition Regulations (AFARS).

(4) What kinds of funds will be available for acquisition of supplies and services in the AO, and what controls will be placed on the expenditure or obligation of these funds?

(5) How is the furnishing of goods and supplies by the US forces to allied forces to be accomplished.

__ Review legal studies and materials dealing with the area of operations (AO).

Claims References and Forms

References

AR 27-20, Claims, chs. 2 & 10.
DA Pam 27-162, Claims, chs. 4 & 6.
Chapter VIII (General Claims Provisions), JAGINST 5800.7c, Manual of the JAG (JAGMAN), 3 Oct 90
JAGINST 5890.1, Administrative Processing and Consideration of Claims on Behalf of and Against the US, 17 Jan 91.

Required Forms

SF 95, Claim for Damage or Injury, with simplified instruction forms (1000 each).
DA Form 1668, Small Claims Certificates (500 each).
SF 1034, Vouchers (500 each).
DA Form 3, Individual Claims Data Reports (500 each).
DA Form 1208, Report of Claims Officer
DA Form 1666, Settlement Agreement (500 each).
DA Form 1667, Claims Journal
DA Form 1668, Small Claims Certificate

CRIMINAL LAW CONSIDERATIONS

__ Ensure all deploying soldiers are assigned or attached to a deploying unit for UCMJ purposes.
__ Ensure all rear detachment personnel are assigned or attached to a follow-on unit for UCMJ purposes.
__ Ensure the criminal law section's deployment materials are up-to-date and necessary ARs, PAMs, and forms are present.
Ensure that a manual portable typewriter is included.

Criminal Law References and Forms

References

Manual for Courts-Martial, 1984.
AR 15-6, Procedures for Investigating Officers and Boards of Officers.
AR 27-10, Military Justice, with local supplements (if any).
AR 27-50, Status of Forces Policies, Procedures, and Information.
AR 190-30, Military Police Investigations.
AR 190-34, Correctional Custody.
AR 190-41, Customs Law Enforcement.
AR 190-47, US Army Correctional System.
AR 195-2, Army Criminal Investigation Program.
AR 195-5, Evidence Procedures.
Combat Law Library, to include references A-K, DA Pam 27-9 (Military Judges, Benchbook, DA Pam 27-10 Trial Counsel and Defense Counsel , and the Military Justice Digest.

Required Forms.

DD Form 457, Investigating Officer's Report (50 each).
DD Form 458, Charge Sheet (200 each).
DD Form 497, Confinement Order (50 each).
DA Form 2627, Report of Proceedings Under Art. 15, UCMJ (300 each).
DA Form 2627-1, Summarized Record of Proceedings Under Art. 15, UCMJ (300 each).
DA Form 2823, Sworn Statement (100 each).
DA Form 3169-R, Report of Judicial and Disciplinary Activity in the Army (10 each).
DA Form 4430-R, Report of Results of Trial (200 each).
DA Form 4916-R, Certificate of Service/Attempted Service (100 each).
DA Form 4917-R, Advice as to Appellate Rights (200 each).
DA Form 5110-R, Art. 15 Reconciliation Log (50 each).

DA Form 5111-R, Summary Court-Martial Rights Notification/ Waiver Statement (50 each).
DA Form 5112-R, Checklist for Pre-Trial Confinement (50 each).
SFs 1156, 1157, Witness Payment Forms (50 each).
Local Forms, Form Letters, Disposition Forms Forwarding Charges, Referring Cases to Trial, etc.

2. Post-Alert I Pre-Deployment Preparation Checklists ("after the balloon goes up.")

These are issues that may arise and considerations that should be addressed from the point of the alert, or notification of deployment, up to the time of actual deployment.

Office Considerations

GENERAL

_ Obtain a copy of the Operations Order (OPORDER). If the OPORDER is based on an OPLAN previously reviewed by the SJA Office, compare the two for changes. Look, particularly, for changes in the mission, assumptions, and rules of engagement.
_ What is the legal basis for the military action? Particularly in OOTW, this question may arise. Brief CDRs on the legal basis (or bases). Ensure the reasons you cite are consistent with the chain of command, up to the National Command Authority.
_ Monitor (or man) the Emergency Operations Center (EOC). Always be conscious of Operational Security (OPSEC).
_ Account for all personnel, draw assigned weapons, and check field equipment. Establish security for individual weapons while office personnel conduct their work.
_ Ensure SJA personnel, particularly those who deploy with the advance echelons, are assigned or attached to the deploying unit for messing, administrative support, and UCMJ purposes.
_ Review the Field SOP/Readiness SOP and load plans.
_ Establish deadlines for the loading of each section of the SJA office. Prepare a sequenced deployment timeline. Details depend upon the mission and your unit's deployment sequence.
_ If the mission appears to require more expertise in one specialty area (e.g. Claims, International Law, or Contracts), allocate adequate personnel to those areas.
_ Review the legal annex to ensure that it supports the mission and that your office can support the requirements set out in the annex.
_ Determine from G-1 whether reserve JAGSO units will augment the SJA office. If so, plan for allocating their resources where needed. Ensure these teams are attached to a unit for quarters, messes, administrative supportand UCMJ purposes.
_ Determine where the unit's Command Post (CP), logistical base, and other pertinent staff elements will be located. Determine where to locate the main SJA office and selected sections, if they need to be separate (e.g. Claims and Operational Law). Have an officer in charge of each site.

_ If an interpreter will be needed for contracting, claims, or investigations of combat incidents, coordinate with the G-2 or G-5 to ensure this support will be available.
_ Detail someone to keep notes or record lessons learned, ideas, details of incidents, etc. These will be invaluable when you later have to prepare an after action report.

INTERNATIONAL LAW CONSIDERATIONS

The International/Operational Law Officer should be the SJA office's point of contact at the EOC and should keep the office advised at all times. He should attend all EOC briefings.

_ Does each SJA section have copies of the SOFA, maps, etc. of the deployment area?
_ Review the OPLAN/OPORDER for potential problems. If it has been previously reviewed looked for changes and focus on the mission statement, assumptions, and ROEs.
_ Reread the country law study. If needed, request information from the higher headquarters SJA (Unified Command level; e.g., SOUTHCOM), or CTJAG, International/Operational Law Div. (Pentagon (703)695-3170).
_ Coordinate with the G-5/Civil Affairs office to determine the existence and terms of any Civil Affairs Agreement with the Host Nation (HN).
_ Give briefings on the Law of War and ROE to troops awaiting transportation.
_ Consider how the unit will transition into a stabilization phase after combat. Develop peacetime ROEs with the CDR and G3.
_ Ensure an OPLAWYER is scheduled for early deployment with the command group.
_ Double check the Operational Law deployment package. Ensure key items (to include camera and film) are present. Then, make sure it gets loaded!

LEGAL ASSISTANCE CONSIDERATIONS

_ Establish POM/POR sites to rapidly process deploying personnel. It may be necessary to draw upon other cross-trained attorneys in the office to assist in this effort.
_ Are there sufficient forms to handle last-minute legal assistance problems at departure site?
_ Spot-check deploying soldiers to ensure basic legal assistance needs have been met.
_ Notify JAs remaining at the installation of follow up legal assistance requirements.
_ If reservists will augment the SJA office, have guidance.
_ Organize and initiate legal assistance briefings for dependents.

Legal Assistance References and Forms (See Tab R, this Handbook)

CLAIMS CONSIDERATIONS

__ Coordinate with Chief, Management and Budget, US Army Claims Service (USARCS), to ensure that funds are available to pay claims after deployment has begun.
__ Review the OPLAN/OPORDER and any SOFA to see if any international agreements govern claims responsibility.
__ Contact the Chief, Foreign/Maritime Claims Division, USARCS, to finalize appointments of the foreign claims commissions (at least two one-member and one three-member commissions). If the country to which you are deploying comes within the geographical responsibility of certain Unified Commands, the CINC can appoint claims commissions. See AR 27-20, paras. 1-3c & 1-3e 10-14).
__ Coordinate with the Corps of Engineers Real Property Team to ensure prompt real estate lease support upon deployment.
__ Coordinate with the Comptroller to have Judge Advocates designated as Class A agents for purpose of solatia payments.

CONTRACT LAW CONSIDERATIONS

__ Ensure the contracts deployment package has all of the key regulations, pamphlets, and manuals.
__ Review OPLAN/OPORDER to see if overseas procurement will be necessary.
__ Review all contract considerations discussed under the PREPARATION section above.

Contract Law References

Federal Acquisition Regulation (FAR).
DOD Federal Acquisition Regulation Supplement (DFARS).
Department of Army Federal Acquisition Regulation Supplement (AFARS).
AR 37-20, Administrative Control of Appropriated Funds.
AR 37-21, Commitments and Obligations.
AR 37-103-1, Imprest Funds.
AR 37-107, Processing and Payment of Commercial Accounts.
AR 405-15, Real Estate Claims Founded Upon Contract.
AR 415-35, Minor Construction, Emergency Construction, and Replacement of Facilities Damaged or Destroyed.
DA Pam 27-153, Procurement Law.
DA Pam 715-xx, Contingency Contracting
DA Pam 690-80, Use and Administration of Local Civilians in Foreign Areas During Hostilities.
TM 5-300, Real Estate Operations in Overseas Command.
Forms: SF 44 Vouchers, DD 1155 Vouchers

CRIMINAL LAW CONSIDERATIONS

__ Determine if a SOFA exists or arrangements have been made for exclusive jurisdiction over US personnel. If there is a SOFA, is it expressly applicable during hostilities?
__ Plan for the exercise of criminal and administrative jurisdiction over personnel left behind.
__ Ensure deploying soldiers are assigned or attached to a deploying unit for UCMJ purposes.

Plan for continued military justice operations. Depending on the anticipated duration, consider the following:

__ Should a military judge deploy to try cases at the location?
__ Have the Trial Judiciary and Circuit Chief Judge been notified?
__ How will Art. 32 investigations be conducted at location of deployment?
__ How will pretrial confinement be established?
__ How will summary court officers be drawn? (line officers, staff officers, or JAs).
__ Will prisoners serving sentences locally be released to deploy with their units?
__ Ensure deployed JAs have access to an interpreter for interviews and/or depositions of local witnesses. The Claims JA interpreter may be able to serve this function.
__ Ensure that, if cases are to be tried during the duration of the deployment, the pool of officers and enlisted members for court-martial panels contains only deploying personnel.
__ Ensure personnel are briefed concerning conditions on liberty in their deployment area.

3. Post Deployment Checklists ("why the balloon went up.")

These are issues that may arise and considerations that should be addressed from the time of actual deployment, until the final redeployment of forces.

Office Considerations

General. Monitor the various sections of the SJA office to ensure that the office's assets are applied where the need is greatest. For example, during the initial phases of the deployment or when combat activity is the greatest, the Operational Law section will undoubtedly be much busier than the other sections. As the situation moves into a stabilization phase, claims and contracting will become busier.

- Establish communications and a courier service with rear echelon JAs.
- Keep superiors informed.
- Keep reports simple and have them address only essential information.
- "Bad news does not get better with time."
- Observe OPSEC.
- Check the activities of each section daily, especially if they are not at the same location.

INTERNATIONAL LAW CONSIDERATIONS

The early stages of a deployment will usually have a multitude of issues of International/OPLAW concern. Close coordination/contact must be maintained with the operational section (G-3 and the command group). Trial counsel or legal advisers assigned to each subordinate unit (usually Brigade size units) should watch for potential International/OPLAW issues in their units.

- Establish contact and become the liaison between the International Committee of the Red Cross (ICRC) and the command. Attempt to determine the identities of the ICRC representatives and whether they have been approved by the State Department prior to their arrival. Once they arrive, identification information concerning the ICRC representatives should be forwarded to the next higher SJA office for verification of authenticity.
- In a permissive environment (either no hostilities or we are supporting a HN), establish liaison with the US Embassy or Department of State representatives. In this regard, activities should be coordinated with the appropriate sections of the Embassy.
- Coordinate with provost marshal (PM) and logistics personnel to ensure that provisions have been made for PWs, to include security, housing, food, religious needs, barbed wire, transfer from other US military services or allies, medical attention, interpreters, separate accommodations for females, if any, and reporting to the ICRC. The following groups will enjoy PW status:
  1. Regular armed forces of a party to the conflict;
  2. Members of resistance movements who are commanded by a person responsible for subordinates, who have a fixed emblem recognizable at a distance, carry arms openly, and conduct their operations in accordance with the laws and customs of war;
  3. Civilians accompanying the armed forces.
  4. Other categories of individuals entitled to PW status, but who are rarely encountered, are members of a levee en masse, members of regular armed forces not recognized by the detaining power, military personnel interned in neutral countries, and demobilized soldiers. In case of doubt as to entitlement to PW status, such status should be afforded the individual, pending resolution of their status by a tribunal of three officers, at least one of whom should be a JA. A directive should be prepared and promulgated describing how an Art. 5 Geneva Prisoner of War Convention. Tribunal will be constituted and implemented (if it is not already in the legal annex).
- Ensure arrangements have been made to recover the enemy's dead when the combat situation permits. Attempts should be made to identify the bodies. This information should be given to the ICRC. If the situation permits, these bodies should be returned to the enemy. Alternatively, the bodies should be promptly buried in a dignified manner, the graves marked and recorded, and this information provided to the ICRC.
- Ensure that all combat incidents (e.g., inadvertent bombing of a protected place) and allegations of war crimes (by either side) are promptly reported and investigated. This is a command responsibility. It is absolutely imperative that the evidence be preserved immediately. If necessary, a JA should conduct the preliminary investigation.
- Coordinate with other US representatives in country, such as the State Department.
- Assure close and continuous coordination with the G-5/Civil Affairs office.
- Be prepared for sustained involvement with representatives from US Agency for International Development (USAID) and State Department, including Embassy personnel.
- Have guidance prepared for the command concerning War Trophies. If the potential exists for troops to obtain war trophies, publish guidance rapidly! Advise troops of the law concerning theft of private property (Art. 121, UCMJ) and the retention of enemy public property captured on the battlefield (Art. 103, UCMJ). They should also be briefed concerning the category of items that they may request as souvenirs.
- Review and coordinate psychological operations and intelligence collection plans/activities.
- Establish channels for reporting law of war violations and coordinate with the PM to ensure that credible allegations are investigated. Coordinate with the military justice section and/or claims section to employ court reporters and interpreters to record witness testimony or other statements of witnesses in the country of deployment. Be prepared to use SJA office assets to investigate allegations of law of war violations.
- Ensure that, in accordance with the OPLAN/OPORDER and ROE, protected targets, such as churches, hospitals, or charitable, cultural, or historical facilities, are not targeted or bombarded, unless they are being used for a military purpose. If a protected place is being used by the enemy for a military purpose, such use should be documented. Hospitals being

misused by the enemy should be warned, unless time does not permit and delay would jeopardize the mission. In all such cases of misuse of protected places, incidental or collateral damage should be kept to a minimum.

__ Determine if war crimes trials will be conducted within the area of deployment. If trials will be held, jurisdiction over PWs for pre-capture offenses may be established through Art. 18 or Art. 21, UCMJ. For post-capture offenses, PWs will be tried under the same rules and procedures applicable to US soldiers (Art. 2, UCMJ, applies). Always check with the next higher legal office regarding war crimes trials, as the decision to prosecute has significant political implications.

__ If an occupation is anticipated, coordinate with the G-5/Civil Affairs office in order to review potential legal issues (i.e., occupation ordinances, occupation courts, etc.).

__ Be prepared to advise the command on the seizure and requisition of government and private property.

1. Movable property, such as vehicles belonging to the enemy state, may be used for military purposes. Real property belonging to the enemy state may also be used, as appropriate.
2. Private property cannot be confiscated.
3. Private property may be seized for use by US forces if it has a direct military use, such as ammunition, weapons, vehicles, or communication devices. At the end of hostilities, however, the property must be returned and compensation must be paid for its use. Thus, records and receipts must be kept of all seizures.
4. Property and services may be requisitioned and, to the extent necessary, force may be used to effect requisition. Requisitions are based on military necessity and are made pursuant to the authority of the senior area CDR. Payment or receipt must be given for the requisition. There are humanitarian limits on the ability to requisition. For example, medical supplies and foodstuffs may be requisitioned only for the use of the occupying force and only after due consideration for the needs of the population.

__ In a permissive environment, the SJA should advise the CDR to provide a liaison officer (preferably the SJA or one of his officers) to the US Embassy in order to represent the CDR at country team, political, or military meetings, etc.

__ Coordinate with the G-1 and PM concerning the preparation and issuance of special ID cards in the local language. Such cards should be especially useful in a permissive environment for local police assistance purposes.

__ In a permissive environment in which US forces are assisting in the stabilization phase, ensure that the HN has granted authority to US MPs to apprehend or arrest local nationals. This will normally be accomplished through an ordinance or executive proclamation.

__ Coordinate with the JA (and/or Country Civil Affairs Team) of the major theater component/supporting command to arrange HN liaison for soldiers detained by the HN. Negotiation responsibility is normally assigned to the SJA for one of the major component commands in theater. If there is a SOFA, it will usually specify the liaison authority.

__ In a permissive environment, coordinate with HN national police authorities concerning the status of the US force in country. Ensure members of the HN police force understand the status of US nationals.

__ As the hostilities stabilize and the combat phase ends, coordinate with the PM and the ICRC to arrange repatriation of PWs.

CLAIMS CONSIDERATIONS

__ Establish a central location for the receipt of claims.

__ Publicize the existence and location of the claims processing site, e.g., by radio and leaflet, in English and the local language.

__ Coordinate with the PM in order to establish security for the claims processing site.

__ Claims personnel should become familiar with the conduct of the military operation and the nature and date of the resultant damage.

__ Obtain damage surveys from Civil Affairs, Disaster Assistance Survey Team, and USAID.

__ Investigate and adjudicate claims within applicable settlement authorities.

__ Coordinate with Comptroller for payment of claims. Checks are preferable to local currency, as currency would cause security problems at the claims processing site. Also, coordinate with the Comptroller on irregular procurement claims.

__ Ensure liaison with the Corps of Engineers real property team for real property claims, and leasehold acquisition of real property assets by deploying force or retroactive leasing of property (AR 405-15). Take pictures of leasehold property to establish condition of the property at the time of the leasehold.

LEGAL ASSISTANCE CONSIDERATIONS

In the area of deployment, the Legal Assistance section should:

__ Respond to inquiries from soldiers in country.

__ Establish liaison with communications, transportation, and aviation elements for contact and courier service with JAs in the rear echelon (the installation from which the deployment took place).

__ Establish liaison with US Consulate at deployment location for overseas marriage and adoption coordination, in addition to emergency leave procedures.

At the home installation, the Legal Assistance section should:

__ Follow up on legal assistance cases referred by deployed LAOs.

__ Coordinate with communications, transportation, and aviation elements on the installation to ensure contact and courier service with deployed LAOs.

__ Extend legal assistance office hours, as necessary, to handle legal assistance problems of working dependents.

__ Continue legal assistance briefings for family members. Notice of these meetings should be mailed to the individual, using previously obtained mailing addresses and disseminated by post newspaper and local television and radio media.

__ Coordinate with local banks and financial institutions to expect a higher usage of powers of attorney.

__ Coordinate with local courts concerning the failure of deployed members to appear.

__ Be prepared to brief and assist survivor assistance officers.

CONTRACT LAW CONSIDERATIONS

- Establish immediate contact with the contracting officer and civil affairs element which identity and coordinate acquisition of locally available materials and services.
- Provide legal advice and other assistance, as required, on all contract and fiscal law matters.
- When procuring legal property by requisition or seizure (as opposed to contracting), ensure that receipts describing the items seized, the location, the owner, and the custodian are prepared.
- Coordinate real estate arrangements in the area of operations with engineers accompanying the force. (See AR 405-15).
- Ensure that minor and emergency construction comply with applicable law & regulation. (See AR 415-35).
- To the extent possible, accompany contracting personnel dealing with the local populace.

CRIMINAL LAW CONSIDERATIONS

- Coordinate with communications, transportation, and aviation elements to establish contact and courier service with the rear detachment.
- Ensure that, where necessary, testimony of local witnesses is preserved by deposition. A deployed court reporter and interpreter may be used for this purpose. The country law study or local legal agencies should be consulted to determine whether the HN laws place restrictions on local nationals giving depositions (particularly if they are local officials).
- Coordinate with the PM to determine whether: Evidence-handling procedures are adequate. Pretrial confinement facilities, if any, have been established.
- Make periodic visits to forward units to meet with CDRs, witnesses, and, in the case of deployed defense counsel, suspects and accused.
- Ensure that, if Art. 32 investigations and courts-martial will be conducted during the deployment, courtroom facilities have been located and equipped.
- If it is a short-term deployment, ensure that, if nonjudicial punishment is to be administered during the deployment, the attendant paperwork is forwarded by courier to the rear detachment for processing.
- Ensure that allegations of law of war violations are thoroughly investigated and that evidence has been preserved.
- Ensure that orders assigning or attaching soldiers to other than their original units for UCMJ purposes are revoked upon deployment.
- If, in an area where a SOFA is applicable, ensure that a waiver of jurisdiction is obtained prior to redeployment of an accused.

IV. EXERCISE DEPLOYMENTS

A deployment for an overseas exercise is the type of deployment scenario most likely to confront JAs, as Army personnel increasingly participate in exercises in diverse areas of the world, to include Europe, Korea, the Philippines, Central and Latin America, the Middle East, and North Africa. Thus, it is particularly important that JAs be familiar with the functional legal issues associated with such exercises. Much of the guidance provided in connection with functional operational law issues evolving from combat deployments is equally applicable to exercise deployments.

Planning for Exercises

The planning phase of an exercise is usually the longest phase. This phase develops all support plans that govern the execution and post-exercise phases. Planning begins immediately after the decision has been made to conduct an exercise, and the planning steps include preparing an exercise directive, assigning responsibilities for planning, preparing a supporting plans schedule, publishing a Master Scenario Events List (MSEL), conducting a reconnaissance, completing the exercise support plan, preparing the scenario, preparing and issuing the OPLAN, publishing the letter of instruction (LOI), preparing the terrain, and conducting a rehearsal.

A MSEL is usually published by the G3 and is used to shift phases of the exercise and to highlight the significant events that will occur during the exercise. It is necessary, therefore, that law of war play be one of the MSEL items.

The training objectives and the echelon at which the exercise is to be conducted will determine how complex planning steps will become. For example, at Battalion level, there may be little or no need to conduct detailed research or to write a planning schedule. Much of the planning can take place during training meetings. However, at Division level, research and written planning schedules are necessary. They can be the key to a successful exercise. For the training exercise to run smoothly and accomplish its objectives, written plans must contain practical guidance for the exercise participants. These plans are distributed to CDRs, controllers, and opposing forces (OPFOR).

All training exercises require control. Some, such as tactical exercise war table (TEWT), need only CDRs. Others, such as command post exercises (CPXs) and field training exercises (FTXs), require a formal control system responsible for conducting the entire exercise. The control system for any exercise should ensure that the exercise is followed and that exercise objectives are obtained. Controllers ensure that events occur at the right time and place, in accordance with the scenario and schedule. Umpires determine the outcomes of engagements, fires, obstacles, and support activities. They report outcomes to the players of the exercise and the controllers. Evaluators observe activities in order to determine whether tasks are performed to standard. Ideally, one person should not serve as controller, evaluator, and umpire during the same exercise. As the focal point for controlling each exercise, the exercise control center will portray the higher headquarters of the player unit. It will also be responsible for the administration and logistics necessary to support the exercise. The chief controller will coordinate all activities of the control organization in accordance with the exercise directive.

For exercises such as CPXs that have no OPFOR, umpires assess damage and casualties with the use of published assessment and computation tables. For exercises such as FTXs, that have OPFOR, umpires with player and OPFOR units should determine the effects of fires and damage. For instance, when an observer locates a target and calls for artillery fire, the unit umpire gets the fire request information and informs the company umpire of the impact location. This information is passed from the

friendly to the OPFOR umpire, who assesses casualties and damage based on damage tables, accuracy of fire, and subjective judgment, as appropriate.

OPFOR units are trained and equipped to confront US units with realistic opponents that look and fight like potential adversaries. Well-equipped OPFOR units are skilled in the tactics and techniques of a potential adversary. They not only add realism to training exercises, but generate player enthusiasm. Soldiers learn the potential adversary's tactics and doctrine, and OPFOR units encourage effective intelligence gathering procedures, electronic warfare techniques, operations security (OPSEC) measures, deception measures, and unconventional warfare techniques.

EXPLAN Development and Review

Depending upon the nature, extent, and duration of an overseas exercise, the necessity for careful and detailed preparation of an exercise plan (EXPLAN) may be as great or greater than that required for an OPLAN. The JA must thus be an integral part of the EXPLAN development and review process. Many of the same considerations posed in conjunction with a combat deployment must be examined. Of particular importance in the exercise deployment scenario is the question of the existence of or necessity for international agreements speaking to HN jurisdiction over US personnel and other related issues.

Functional Exercise Legal Issues

When a unit deploys, functional legal issues, or "real world" problems, will arise at both the deployment location and at the home station. The SJA and the OPLAW JA must anticipate and prepare for this situation, as the daily legal problems at the home station must be handled by a reduced staff, while the exercise will generate new and demanding legal issues. The result is that the SJA office, as a whole, will confront more work than normal, with fewer people in each location to handle it. The importance of extensive predeployment planning cannot be overstated.

Following is a Briefing Outline to brief deploying soldiers. The full text is found at the end of this outline.

DEPLOYMENT BRIEFING

A Legal Briefing for Deployment to _____

I. INTRODUCTION.

A. Purpose.

B. Background.
   1. Geography.
   2. Government.
   3. Role of Police/Military.
   4. Religion.
   5. Culture.

II. ENTRY REQUIREMENTS.

A. Documents.
   1. Passport, Visa, Military ID.
   2. Immunization Record.

B. Status of Personnel.
   1. Diplomatic Agent - full criminal/full civil.
   2. Admin & Tech Staff - full criminal/limited civil.
   3. Members of Service Staff - immunity for off duty.

C. Restrictions.
   1. Weapons.
   2. Drugs (Individual/Medical).
   3. Currency.
   4. Prohibited Items.

III. LAW.

A. Traffic.
   1. Licensing.
   2. Speed Limits/Road Signs.
   3. Accident Reporting.
   4. Insurance.
   5. Punishment.
   6. Special Restrictions.

B. Criminal.
   1. Jurisdictional Rules.
      a. Degree of Immunity.
      b. NATO SOFA Model.
   2. Individual Rights.
   3. Reporting Crimes.

4. Special Offenses.
    a. National Security.
    b. Weapons.
    c. Assault.
    d. Insult.
    e. Sexual Offenses.
    f. Alcohol/Drugs.
    g. Prohibited Items.
5. Punishments

C. Contracts.
1. Written.
2. Oral.
3. Attachment/Self Help.

D. Claims.
1. Against United States.
2. Against Individuals.
    a. Torts.
    b. Causation.
    c. Liability.

E. Family Law.
1. Marriage.
2. Divorce.
3. Paternity.
4. Wills/Estates.

F. Miscellaneous.
1. Taxes.
2. Postal Restriction.
3. Photography.
4. Labor Law.
5. Local Customs.

IV. EXIT REQUIREMENTS.

A. Local Customs Inspections.

B. U.S. Customs Inspections.

SAMPLE LEGAL BRIEFING FOR DEPLOYMENTS

The US Army trains troops in many countries every year. This training includes sending small teams as part of Military Assistance Training; entire battalions to participate in missions of extended duration (e.g., MFO in the Sinai); and division or larger-sized units to participate in joint exercises (e.g., Bright Star series). For many soldiers, this may be their first time overseas and their curiosity, coupled with the customs and laws of a foreign country, may cause problems for the soldier, and possibly embarrassing diplomatic incidents for the United States.

The potential for such problems can be reduced by pre-deployment training and information briefings. These briefings cover a wide spectrum of topics ranging from individual military duties to the historical background of the foreign country. They should, but do not always, include a legal briefing on the laws, rules, and customs of the foreign country, particularly those that may affect the unit commander and his troops. Most deployments include opportunities for our soldiers to visit historical sites and meet local nationals. In order to avoid problems for the soldier or problems within the host nation, we have the responsibility to ensure our soldiers are aware of and respect local laws and customs.

The following discussion provides an outline for the deploying Judge Advocate to use in preparing a legal briefing for soldiers. The outline must be modified based on the type of deployment. Experience will result in a refinement of the areas that should be included. Most legal studies of foreign countries concentrate on the structure and theory of the legal system and provide little information on the specific laws as they would apply to soldiers. The average soldier needs to know the laws, not the theory. Consequently, judge advocates working with operation plans should be aware of the countries within which their units have operational responsibility; request information well in advance if scheduled as potential deployment; and prepare a briefing for each of these countries. Sources of information include higher headquarters (with the focal point being the unified command), the International/Operational Law Division of OTJAG, the International/Operational Law Division of TJAGSA, and counterparts in other services. Any publication concerning the foreign country should be reviewed. Country Law Studies, Country Studies, Histories, and even tourist publications may include helpful information (and maps!).

The sample briefing is for an exercise deployment to Egypt:

I. Introduction.

A. Purpose. The purpose of the briefing should be explained in sufficient detail to ensure the soldiers understand that the information will keep them out of trouble and potentially out of a foreign jail.

B. Background. In order for the soldiers to appreciate the laws and customs of the foreign country, they need to be aware of the country's place in the world and history. Since government is the source of law, they should understand the basic structure of the government. Here points of similarity and dissimilarity without our government should be stressed. Since in many countries the police and the military are closely associated and since our soldiers will be working closely with the military in the foreign country, the soldiers should be aware of this relationship. Finally, the religion and culture should be briefly reviewed, so the soldiers will understand the differences and be more tolerant. This could avoid numerous problems in the long run.

Much of the above information should be covered in detail in civil affairs briefings, but a brief review/preview is worthwhile. It will reinforce the civil affairs briefing and provide a background upon which the country's laws and regulations can be discussed.

II. Entry Requirements.

A. Documents. A logical starting point for the briefing is the point of entry. The First requirement for entry is proper documentation. The soldier must understand what is required and why; the consequences of not possessing the proper documentation; and how to respond if he or she is stopped without proper documentation. The need for passports, visas, and identification cards should be clearly defined. Many countries now have strict immunization requirements, so the importance of an up to date shot record, including AIDS testing, needs to be mentioned.

B. Status of Personnel. US personnel may have one of five statuses. They may be have full diplomatic immunity, administrative and technical staff immunity, service staff immunity, status under a SOFA, or simple tourist status. If treated as diplomatic agents, they will have full civil and criminal immunity from the laws of the foreign country. Administrative and technical staff personnel have full criminal and limited civil immunity. Members of the service staff have immunity while in the performance of official duty. The NATO SOFA model provides for jurisdictional immunity based on the type of offense. As a tourist, the soldier is subject to full civil and criminal jurisdiction in the foreign country. Depending on the type of deployment, the duration of the deployment, and the existence of any agreements, any of the above could apply. Soldiers should be advised of the status that applies to them, what that means legally, and that they continue to be subject to UCMJ jurisdiction at all times.

C. Restrictions. Entry into a foreign nation may carry special restrictions. Examples of restricted items include weapons, ammunition, drugs (individual prescriptions and medical supplies), currency, alcohol, and pornography. The restrictions applicable to the foreign nation must be impressed on all soldiers to avoid entry being denied or, even worse, an arrest at the port of entry.

III. Law

A. Traffic. Regardless of where US forces deploy or the length of the deployment, our soldiers will be operating tactical and administrative-use vehicles on the roads of the foreign country. They need to be aware of licensing requirements, speed limits, and road signs if they are different from standard US road signs. Accidents will happen, so it is important that they know the procedure for properly reporting them. Some countries require the road to be cleared as soon as possible; others require the vehicles

to remain untouched until police arrive.

While some soldiers may drive off-duty, their military license may not apply. The requirements for personal vehicle use should be covered to include licensing, insurance, and any other special restrictions. This portion of the briefing should close with a few comments on general road conditions and traffic density.

B. Criminal. Soldiers will be soldiers. On any deployment of extended length, soldiers are sure to get involved in some degree of trouble that may result in criminal charges. They need to clearly understand the risk and the consequences of their misconduct. The first point that should be stressed is that they are always subject to jurisdiction under the UCMJ.

Second, they should understand who will prosecute them and under what circumstances. Depending on their status in the country, they may be subject to U.S. jurisdiction, foreign jurisdiction, or both. If they find themselves subject to foreign jurisdiction, they should be aware of their rights under the laws of the foreign country and any agreement we may have with the foreign power. The best way to analyze this is by comparing the rights of the individual under foreign law with the basic rights we expect our soldiers to receive. Section 9, Article VII of the NATO SOFA enumerates seven rights that all US personnel should be entitled to:

1) to a prompt and speedy trial,
2) to be informed, in advance, of trial of the charges against him,
3) to confront the witnesses against him,
4) to have compulsory process to obtain witnesses in his favor,
5) to be represented by legal counsel,
6) if necessary, to have the assistance of an interpreter, and
7) to maintain contact with US representatives who may also attend the trial.

Most of these rights are guaranteed by agreement with our allies. However, many of the nations to which we send soldiers may not have these guarantees.

The discussion of individual rights should include an overview of the trial procedure. Many countries operate under a civil law system in which the roles of prosecutors and judges are quite different from their roles under our system. These differences should be pointed out so the soldiers have a general understanding of the foreign criminal process.

Special requirements for reporting crimes and special offenses in the foreign country should be stressed. An effective way to do this is by comparing the crime and punishment under our system with a similar offense under the foreign system. Special attention should be given to criminal offenses which are not crimes under our law (e.g., possession and consumption of alcohol in Saudi Arabia). Also, customs or practices in the foreign country which would violate the UCMJ must be pointed out. If our soldiers visit the local area and "go native," they need to be aware of any acts, which although legal under the foreign law, might result in a court-martial or Article 15 punishment. Finally, "black marketing' should be discussed. Most countries have strict prohibitions on the goods that may be transferred to local nationals. Since most of the property we deploy with is imported tax free, the sale or trade of these items would constitute a customs violation.

The types of punishments and, generally, the crimes to which they apply, need to be discussed. Many nations require prisoners to work and the work may be hard physical labor. Some continued military benefits may be available, while the soldier is in prison and these should be mentioned. Prison conditions in most smaller countries, particularly less developed countries, are terrible. A graphic description of these conditions may have a considerable deterrent effect on the soldiers and dissuade a borderline soldier from taking a chance.

C. Contracts. On a routine deployment, most soldiers will not be involved in any contractual matters. Consequently, the main area of concern in this area is oral contracts. Our society generally treats only written agreements as binding. Although oral contracts are enforceable, parties to an agreement do not consider themselves legally bound until "something" is put in writing. This is not true in other countries, particularly countries with a low literacy rate. A soldier may ask a vendor to make something, e.g., jewelry or carved handiwork, and later change his mind on the purchase. His request and the work of the vendor may obligate the soldier to pay the full amount. If this is the law, soldiers must be forewarned.

D. Claims. Claims may be filed against a soldier in his official capacity or personal capacity. Claims against him in his official capacity are actually against the US Government and the work of the Claims Judge Advocate. However, claims against the soldier in his personal capacity should be addressed. The basic theory of tort liability should be reviewed and a comparison of tort liability to report of survey liability could be used to clarity the issues to the soldier. Unique grounds for liability should be discussed. For example, in many Islamic countries, an insult to family, morals, or honor is considered to be a basis for liability. If a soldier asks a Moslem girl for a date, he could be liable for money damages to the girl and the other members of her family.

E. Family Law. This area of discussion depends on the length of the deployment. The longer our soldiers are in a foreign country, the greater the chance they will become involved in matters of marriage, divorce, and paternity. For example, the evidence and standard of proof in a paternity case may vary greatly in a foreign country. We can expect our soldiers to become involved with local nationals, and the longer the deployment, the greater the involvement. Most of these matters cannot be controlled, but the soldiers must be advised of the legal ramifications of their actions.

F. Miscellaneous. This is the "catchall" section of the outline. A variety of matters may be discussed here. Among them are taxes, labor law, postal restrictions, photography restrictions, and local customs. Although taxes should not be a major concern, they should be considered because they may either cause a misunderstanding or possibly benefit the soldier. In Germany, US forces personnel are exempt from paying the federal sales tax. This can be a substantial benefit. Usually labor law is totally inapplicable, but it may apply to contractors participating in the deployment and would apply to local nations working for the US Army. To the extent our soldiers may be required to supervise or work with these individuals, they should be advised of any special

rules or requirements.

Local customs should be discussed in some detail. Some of the practices or customs in our culture may be illegal or offensive in another culture. This could lead to insult, argument, and an assault charge, or it could result in tort liability for an insult to someone's morals, honor, or family. This section of the briefing, like the initial background section, can reinforce and supplement the civil affairs briefing.

IV. Exit Requirements.

A. Local Customs Inspections. Assuming the soldiers have survived the deployment and are not staying behind in a local jail, two customs inspections are required. The first is a local customs inspection by foreign authorities. Soldiers need to be briefed in advance of the articles which they may and may not export. Usually, this inspection is cursory since the soldier is leaving the foreign country.

B. US Customs Inspections. The US customs inspections at the port of entry is much stricter. The Customs Service has strict controls on what can be imported, and the list is extensive. Soldiers should be provided copies of these lists, and items common m the foreign country to which deployed should be pointed out. Examples include food, pets, furs, stuffed animals/toys, and some manufactured goods. If the soldiers are aware of the controlled items in advance, they can avoid buying them, wasting their money, and being stopped at the point of entry.

V. Conclusion.

The above discussion includes most of the areas that should be addressed in a legal briefing prior to deployment. The briefing itself must be tailored to the duration and type of deployment. In some special operations, other areas will need to be included. This will serve as a good starting point for the deploying Judge Advocate, and <u>any</u> information which will assist the commanders and soldiers in their day to day relations in the foreign county is worthwhile.

TAB N
SPECIAL OPERATIONS

We have to learn to live mainly by our heads instead of our hands...war between mass armies weighed down by baroque equipment they cannot use properly has become an established third world sport. The advanced world, too vulnerable to survive a war of attrition or mass destruction, must learn to conduct its affairs by the rapier--by the threat or use of small specialized forces exploiting high tempo and strategic surprise.

Richard Simpkin

1. The formation of the United States Special Operations Command (USSOCOM) under the Goldwater-Nichols Reorganization Act (10 U.S.C. 167e(2)), and the great successes of special operations forces (SOF) in Operation DESERT STORM, validated the significant role of US SOF.[1] These forces train for their wartime mission through an extensive series of CONUS and OCONUS combined exercises. Additionally, they frequently deploy overseas in order to conduct security assistance missions. This section will focus on the unique legal issues associated with Special Operations (SO) and on the role that the JA should play in SO. Doctrine for SOF is stated in FM 100-25, Doctrine for Army Special Operations Forces (December 1991).

2. **Applicable Law.**

a. SO often do not fit neatly into the legal framework which supports conventional military operations. Nevertheless, the unique nature of the missions and the frequent need to conduct these missions in a discreet fashion do not exempt these operations from the requirement to comply with domestic and international law. In almost all cases there are no special rules for SO.

b. The Department of the Army's (DA's) policy statement on SO recognizes the very special, often sensitive, and extremely complex role played by SOF in peace and war.[2] Nevertheless, DA requires that all US Army SO comply with US law, national policy, DOD Directives, and Army regulations. This requirement exists, regardless whether SOF missions are conducted during an international or non-international conflict, or during peacetime.

3. **Special Operations Forces.**

a. The Army's SOF currently consist of Special Forces, Ranger, Psychological Operations, Civil Affairs, Special Operations Aviation units, and Special Mission units. These units are organized under a major Army Command (MACOM), the US Army Special Operations Command, located at Fort Bragg, North Carolina. They may be employed during peacetime as one element of a national response to a National Command Authority (NCA) tasking or, during wartime, in strategic, operational, and tactical roles.[3] Most SOF are regionally oriented, capable of rapid deployment, and equipped for all-weather, all-terrain, worldwide deployment.[4]

b. Some of the peacetime missions of SOF are:
   (1) Assisting foreign governments or other elements of the US government.
   (2) Training, advising, and supporting foreign military and paramilitary forces through security assistance programs.
   (3) Supporting foreign internal defense operations, terrorism counteraction and counter drug support.
   (4) Conducting show-of-force operations.
   (5) Conducting humanitarian operations (HCA).

c. The wartime missions of special operations forces include:
   (1) Foreign internal defense.
   (2) Unconventional warfare.
   (3) Special and tactical reconnaissance.
   (4) Strategic and tactical psychological operations.
   (5) Civil Affairs in support of general-purpose forces.
   (6) Civil Administration.
   (7) Special light infantry.[5]

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[1]Headquarters, Dep't of Army Letter 525-86-1, subject: DA Policy on Special Operations, 10 July 1986. Although this letter expired on 10 July 1988, it continues to reflect Army policy.

[2]Id.

[3]Training and Doctrine Command, Pamphlet No. 525-34, Operational Concept for Special Operations Forces, 4-5 (26 July 1984) [hereinafter TRADOC Pam. 525-34].

[4]Id. at 4.

[5]Id. at 5 See also FM 31-20, Chapter 3.

(8) Collateral Activities: Security Assistance (SA), Humanitarian Assistance (HA), Anti-terrorism, counterdrug, Sea Air Rescue (SAR).
(9) Direct Action.
(10) Multiple and follow-on missions.
(11) Special Activities.

4. The Need for a Legal Advisor to Special Operations Forces.

a. Army SOF currently receive operational law support from the SJA, US Army Special Operations Command (USASOC), US Army Special Forces Command (Airborne) [USASFC(A)], the US Army Civil Affairs and Psychological Operations Command (USACAPOC), and all Special Mission units. Additionally, a JA is assigned to each Special Forces Group, the 4th Psychological Operations Group, the 75th Ranger Regiment, and the 160th Special Operations Aviation Regiment. These attorneys are responsible for providing the legal advice a SO unit commander requires to perform his assigned mission.

b. SO missions are politically sensitive, particularly in a peacetime or low-intensity conflict environment, and thus, the area of SO is fraught with potential legal pitfalls. The commander must consider not only the effect of traditional law of war requirements on his operation, but also the requirements of US law, such as security assistance and intelligence statutes, and international law in the form of mutual defense treaties and host nation support agreements. Failure to be aware of and comply with these legal and policy demands could result in embarrassment for the commander, a criminal investigation and prosecution, or an international incident contrary to U.S, foreign policy goals and objectives.

c. A SO commander should be provided legal advice by a JA who knows not only the applicable law, but also the client's business. The JA must have a working knowledge of the force structure, missions, doctrine, and tactics of the SOF unit he advises. This knowledge may come from prior service in SO units, from SO training, (e.g. Special Forces or Ranger training), or from working closely with the commanders and staff of the unit. Just as important, the SO legal advisor must have access to information in order to effectively do his job. The JA must possess a Top Secret clearance, as a minimum, and should be eligible for access to Sensitive Compartmented Information.

d. The Center for Special Operations Law (CSOL) at Fort Bragg provides a rapid source of information for the SOF soldier and JA dealing with SOF unique issues. The CSOL has an extensive compilation of SOF references and access to numerous data bases. The CSOL may be reached at DSN: 236-8647/7176.

5. The Duties of the Special Operations Judge Advocate.

a. **Office Supervision.**

(1) In many ways, a JA assigned to a SO unit will face the same responsibilities as those encountered by a JA in other units. The JA may need to provide legal support to the command in the form of legal assistance, administration of military justice, and routine administrative law issues. The JA will often deploy with the unit, and thus, must establish a system through which the rear detachment legal actions of the command will be processed in a timely manner during the deployment. Usually a support agreement will be concluded between the SO unit and its host installation SJA's office. In addition, legal augmentation is provided as needed through the SO chain of command. Normally, the JA will have a small staff, consisting of one legal NCO and one or two legal specialists. The JA is responsible for the training and professional development of these soldiers. They must receive sufficient training to successfully complete all Army skill and MOS tests. This is of particular importance in a SO unit, because the legal specialists and NCO may not experience the same quantity of standard legal actions that they would encounter in a conventional legal office.

(2) The JA must establish standard operating procedures (SOPs) for garrison, deployment, and the field. The deployment and field SOPs should be designed to work for "no notice" deployments to overseas locations in which the JA may have to function under austere conditions. Additionally, the SOPs must be coordinated with other staff sections in order that all elements of the command understand the JA's duties and responsibilities.

b. **Advising the Commander and His Staff.**

The principal function of any Command JA is to provide legal advice to the commander and his staff on legal matters. Accordingly, commanders and staff officers are accustomed to receiving, and even soliciting, advice from the JA on traditional legal matters, such as military justice and administrative law. In our increasingly complicated world, commanders are incorporating Judge Advocate input into the decision process. Experience has demonstrated that continual JA input from the concept phase, through mission planning and execution, is most effective. Judge Advocates in SOF units have the unique opportunity to demonstrate that they are "force multipliers" by guiding the commanders and staff throughout the planning cycle. Any initial resistance to this substantial role is overcome by references to the JCS requirement for JA review of all OPLANS and CONPLANs[6] and the USASOC command policy (USASOC Reg 10-1) which requires JA review and participation in mission planning and execution. Judge Advocates individually account for the most important aspect of this process by their involvement in day-to-day operations, field exercises, and field training. The Judge Advocate's credibility is developed and sustained by this interaction with the operations and intelligence sections.

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[6]Joint Chiefs of Staff Memorandum 0124-88, subject: Implementation of the DoD Law of War Program, 4 Aug 1988.

c. **Law of War Training.**

(1) All SO soldiers must receive law of war training commensurate with their duties and responsibilities.[7] This training must address not only the conventional legal issues that arise in an armed conflict, but the situations peculiar to SO, as well.

(2) An example of this is SOF use of the enemy's uniform. Article 23f of the Hague Regulations[8] prohibits the improper use of the enemy's uniform. The special operator may consider wearing such a uniform during some phase of an operation. Thus, he must be educated concerning the very narrow circumstances under which he may do so, and the ramifications of being captured in this uniform. Other special issues that must be addressed in training are the proper handling of prisoners of war, the legality of the use of weapons not a part of the standard US inventory, and the prohibition against assassination as set forth in Executive Order 12333.

d. **Reviewing Operations Plans.**

The JA in a SO unit must review each of the operations, contingency, and exercise plans affecting his unit. Many of these plans will probably call for the unit to support a larger conventional operation, and the JA must understand the tasks of the SO unit. If the unit has already developed a plan to support that of the higher headquarters, the JA should review this plan for compliance with the law of war, US law, national policy, DOD Directives, and Army regulations. If the unit is in the process of developing a supporting plan, the JA should become a part of this process. He must convey to the operations officer that the provision of legal input, as the plan is being developed, is much more effective and less time consuming than a review of the completed product.

UNIQUE SPECIAL OPERATIONAL LEGAL ISSUES

1. **Combined Exercises.**

a. SOF spend significant time practicing their wartime missions through exercises with host country armed forces overseas. These combined exercises afford SOF with an excellent opportunity to train in regions of the world to which they are slated to deploy in "real world" situations.

b. The JA must be aware of the legal issues arising in the context of exercises, of which the principal issue is the jurisdictional status of US forces while in the host country. A peacetime stationing agreement may exist between the US and the host country which establishes this jurisdictional status. If there is not such agreement, however, the JA must take steps to secure one. He must first determine who, within the appropriate unified command, has been delegated that authority to negotiate international agreements. He must then request, through command channels, that this negotiating authority conclude an agreement setting forth the jurisdictional status of US forces with the host country. This agreement should also address a number of other relevant issues, such as host nation support and customs requirements for the exercise force. (See Chapter 3, Section IIILB). As with any international agreement, strict compliance with the Case Act (1 U.S.C. 112b) and USSOCOM Directive 550-1 is required.

c. The JA must also review all proposed training, construction, and humanitarian assistance and civic action (HCA) activities that are to occur during the course of the exercise in order to ensure that these activities comply with existing statutory and regulatory requirements. As has been noted, legislation exists which provides DOD with greater flexibility in conducting such activities during combined exercises, but particular care must be taken to carefully differentiate between legitimate exercise-related training and training that is more properly conducted under security assistance programs. The most effective way of ensuring that training activities remain within the scope of US law is for the JA to attend all exercise planning sessions.

d. SOF units deploy in support of the war-fighting CINCs across the full spectrum of Deployments for Training (DFTs), Emergency Deployment Readiness Exercises (EDREs), Foreign Internal Defense (FID) training, joint and combined exercises, and actual real world contingency missions. Under a GAO developed, and recently legislated (10 U.S.C. 2011) "Special Forces Exception", the uniqueness of SO forces is recognized to the extent that these forces are authorized to essentially perform security assistance missions as part of their "trainer" missions. The purpose of this legislation is to enhance the ability of CINC USSOCOM to "prepare special operations forces to carry out assigned missions" by clarifying his authority to program and expend funds to train SOF in both the US, its possessions and territories, and overseas. It also assists the commander of other unified combatant commands to fulfill their responsibilities for ensuring the preparedness of their forces to carry out assigned missions, among which is dealing with low-intensity conflict environments. Unlike conventional forces, the successful accomplishment of many types of SOF activities is dependent upon language capability and a thorough understanding of national and/or ethnic backgrounds, cultures, social norms, and customs. These specialized forces must develop and maintain this knowledge and understanding the ability to work with indigenous forces. This is particularly true in view of their role as force multipliers, i.e., trainers of indigenous forces in foreign internal defense and unconventional warfare scenarios.

2. **Security Assistance Missions.**

a. SOF, particularly the Special Forces, are often tasked to deploy Mobile Training Teams (MTTs) overseas to conduct

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[7]USASOC Law of War Training Program, USASOC Circular 27-90-1, dated 1 June 1990.

[8]Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex, 36 Stat. 2277, T.S. No. 939 [hereinafter 1907 Hague Regulations], reprinted in Dep't of Army Pamphlet No. 27-1, Treaties governing Land Warfare, at 5 (Dec. 1956).

security assistance training. The JA must review the proposed mission in order to ensure that the jurisdictional status of the team members has been addressed. Typically, the mission will be conducted as a Foreign Military Sales (FMS) case under the Arms Export Control Act (AECA).[9] The FMS Letter of Offer and Acceptance (LOA) (DD Form 1513) should set forth the status of the team members while they are in the host country. These personnel will most probably receive the same privileges and immunities as those accorded the administrative and technical staff of the US embassy pursuant to the Vienna Convention on Diplomatic Relations. Security assistance team members may also be considered part of the US security assistance office (SAO) located in the host country. The JA should refer to the bilateral agreement between the US and the host country in order to determine these privileges. If neither the LOA nor the SAO addresses the jurisdictional status of US forces, the JA should contact the Security Assistance Training Management Office, Fort Bragg, North Carolina (DSN: 239-9108/1599/5057/9008.)

b. Although the MTT will responsible to the US military mission in the host country, it may operate autonomously in the field. The team members must be aware of their sensitive, visible mission. For this reason, the JA should thoroughly brief the MTT on the laws and customs of the country to which they are deploying. This briefing is particularly important if team members have not previously deployed to this particular country. The MTT may deploy to a country experiencing internal armed conflict. In this situation, team members must be informed of the AECA (10 U.S.C. 2671c) which prohibits US personnel from performing any duties of a combatant nature, including duties related to training and advising, that may result in their becoming involved in combat activities. (Also see CJCS MSG DTG 1423587Feb91, which prohibits DoD personnel from accompanying Host Nation Forces on actual operations where conflict is imminent.) In addition, guidance with respect to the acceptance of gifts from foreign governments and humanitarian law concerns must be provided.

3. Targeting.

Direct action operations are among the wartime missions assigned SOF. As a result, these forces may be required to attack tactical or strategic targets. These missions are normally developed through a formal procedure by which a unified command provides a target folder to the SOF. The unit then analyzes the target and prepares a plan of execution, returning the plan to the unified command or forwarding to a higher command for approval. The SO unit's targeting committee requires the assistance of a legal advisor in developing the target folder in order to ensure that the plan complies with the law of war, US law, national policy, DOD Directives, and Army regulations. Given the nature of SO, it is possible that the only legal review the plan will receive will be at the unit level. Thus, the JA must be an active member of his unit's targeting committee.

4. Civil Affairs.

a. Civil Affairs (CA) units support both conventional forces and SOF. CA doctrine is stated in FM 41-10, Civil Affairs Operations (January 1993). CA assets provide the commander with advice and assistance concerning civil-military operations. CA are especially critical to those SOF that depend on the support of the local populace for their success; i.e., SOF tasked with foreign internal defense and unconventional warfare missions.

b. The JA should contact the CA units that support his SO unit under each operation, contingency, and exercise plan. He should then determine how the CA units plan to support his unit and whether these units have their own legal staff. Regardless of whether the CA units possess in-house legal assets, the SO JA must be prepared to advise his commander on the legal aspects of CA. The JA must consider all operations in light of human rights, intelligence law, and fiscal law pertaining to such deployments.

5. Psychological Operations.

US policy and strategy stress the use of psychological operations in conflicts short of war. Legal factors, however, may constrain the use of psychological operations in some cases. JAs advising PSYOP unit planners and commanders must ensure psychological operations follow US and international law, especially when used in the offense without a declaration of war. PYSOP JAs must ensure the legitimacy of psychological operations in accordance with US policies and laws as well as international law.

The success of psychological operations depends upon how they are conducted and how others perceive them. Psychological operations also have significant political implications. Therefore, all psychological operations must have a sound legal basis. All PSYOP personnel must understand the legal implications of their operations. It is imperative that PSYOP personnel maintain awareness of the legal aspects of their actions. Judge Advocates at all levels must ensure their commanders are aware of the legal aspects of specific operations. PSYOP JAs must keep themselves informed of all aspects of plans, policies, directives, and doctrine so they can provide PSYOP commanders and their staffs with proper legal advice, guidance.

JAs advising PSYOP units must be familiar with the following policies and law that affect psychological operations:

Executive Order 12333, 4 December 1981; DoD Directive 5240.1; AR 381-10; DoD Directive 3321.1; DoD 1990 PSYOP Master Plan; JCS Pub 0.2; Joint Strategic Capabilities Plan, Annex D

PSYOP JAs must be very proactive during pre-hostilities. Battlefield preparation in the PSYOP arena is extremely limited and extensively regulated. Only the National Command Authority can release the national psyop planning guidelines to the warfighting CINCs to start pre-hostility PSYOPS.

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[9] 22 U.S.C. 2751-2796c.

CONCLUSION

SOF play a very sensitive and complex role in war and peace. Their missions give rise to a myriad of legal issues. Failure to address these issues can jeopardize US relations with an ally or result in a loss of public and Congressional support for a program vital to US national security interests. The SO JA must fully understand the very critical role he must play in identifying and resolving matters of legal concern.

TAB O
ADMINISTRATIVE LAW

I. Conscientious Objectors
II. Diplomatic Immunity / Asylum / Refugees
III. Environmental Law
IV. Expenses: Authority to Pay (Exercise Unique Legal Issues)
V. Gifts
VI. Reports of Survey
VII. 15-6 Investigations
VIII. Nationality

I. CONSCIENTIOUS OBJECTORS

References.
- 50 USCA App. sec. 456(j) (West 1990) (the military Selective Service Act: Deferments and Exemptions from Training and Service).
- DOD Directive 1300.6, Conscientious Objection (20 AUG 1971, w/IO4 dated 11 SEP 75).
- AR 600-43, Conscientious Objection (1 AUG 83).
- AR 614-30, Assignments, Details and Transfers: Overseas Service (1 APR 88).
- Message, HQDA, DAPE-MPA-C8, 022213Z Jan 91, Personnel Applying for Conscientious Objector Status Change in Policy.

Soldiers who have "a firm, fixed and sincere objection to participation in war in any form or the bearing of arms, by reason of religious training and belief" may apply for Conscientious Objector (CO) status.

The two classes of COs are:
1. Class 1-O: A soldier who, by reason of conscientious objection, sincerely objects to participation of any kind in war in any form.
2. Class 1-A-O: A soldier who, by reason of conscientious objection, sincerely objects to participation as a combatant in war in any form, but whose convictions permit military service in a non-combatant status.

CO status will not be granted when requests are:
- Based on a CO claim that existed, but was not presented, prior to notice of induction, enlistment, or appointment. Claims arising out of experiences before entering military service, however, which did not become fixed until after entry, will be considered.
- Based solely on CO claim that was denied by the Selective Service System before induction.
- Based solely upon policy, pragmatism, or expediency.
- Based on objection to a certain war.
- Based upon insincerity.

The applicant for CO status must prove by "clear and convincing" evidence that:
1) the basis of the claim satisfies the definition and criteria for CO; and 2) his or her belief is honest, sincere and deeply held. Once the soldier makes this prima facie showing, the Army must grant the application unless the administrative record shows affirmative written evidence supplying a "basis in fact" for denial of the application. A 1-0 applicant cannot be granted 1-A-0 status as a compromise, nor can 1-A-0 applicants be discharged.

The soldier will be counseled by his or her CDR and interviewed by a chaplain and psychiatrist. These recommendations are forwarded with the application to the Special Court-Martial Convening Authority (GCMCA), who appoints an investigating officer (IO). The IO conducts a hearing at which the applicant may appear and present evidence. The IO's written report is forwarded to the GCMCA where it is reviewed, approved, disapproved, or forwarded to HQDA for action. The GCMCA may approve application for Class 1-A-O status. HQDA acts on applications for Class 1-O status and 1-A-O applications that were not approved by the GCMCA.

The 2 Jan 91 message change affects the time at which a soldier may submit a CO request. The message change affects both AR 600-43 and AR 614-30. It distinguishes soldiers who have individual reassignment orders and soldiers who are assigned or attached to units that are deploying. A soldier who receives individual orders for reassignment or who has departed his unit in compliance with individual reassignment orders may not apply for CO status until he arrives at the new duty station. This policy does not apply to soldiers who are TDY en route for a period in excess of 8 weeks. These soldiers may apply at their TDY duty station.

On the other hand, a soldier who is assigned or attached to a unit that is deploying to a new duty station may submit an application for conscientious objector status after the unit's deployment order is announced. The unit must process the application as operational and mission requirements permit. The soldier must continue to prepare for deployment and will deploy with the unit unless the soldier's application has been approved. If the soldier's application has been forwarded to the DA Conscientious Objector Review Board (DACORB), the GCMCA may excuse the soldier from deployment. The DACORB should be contacted to determine the status of the application before the GCMCA excuses the soldier (DACORB: AV 221-4122 or commercial (703) 325-4122).

In the case of RC soldiers, not on active duty, AR 600-43, para. 2-10 provides, the submission of an application after receipt of orders to report for AD or ADT, will not serve as a basis to delay reporting. If the soldier applies for CO status before AD or ADT orders are issued and the soldier's application cannot be processed before the soldier's reporting date, the

soldier must comply with the orders. (the application must, however, be sent to the proper Active Army GCMCA for processing).

II. DIPLOMATIC IMMUNITY

Treatment of Foreign Diplomatic and Consular Personnel

1. Protected Status under International Conventions.

Foreign diplomatic and consular personnel and facilities are protected in accordance with two international conventions that describe, in detail, their protected status and the obligations of the HN in that regard.[1] The US is a party to these treaties, thereby making them the supreme law of the land and obligating military CDRs to act in conformity with the conventions, as well as US policy set forth below.

2. Protection of Foreign Diplomatic & Consular Personnel (in US).

In case of armed conflict, the US will provide assistance to foreign diplomatic and consular agents (other than US nationals) and their families and staffs to enable them to leave the US at the earliest possible time. This effort includes placing necessary transportation at their disposal and applies even to the representatives of enemy states.[2] Thus, deploying US troops must respect the protected status of these diplomatic and consular personnel and will assist in their timely departure, if so required by higher authority.

The US also is obliged to respect and protect the diplomatic premises and property left behind by foreign personnel after their departure, even when caused by the breaking off of diplomatic relations or armed conflict between the US and the foreign state.[3] US forces are therefore required to respect the foreign mission's premises, together with its property and archives.

3. Treatment of Foreign Diplomatic & Consular Personnel Overseas.

In overseas areas, US troops must respect the status of diplomatic and consular personnel of neutral states. In particular, military attaches and other diplomatic representatives of neutral states who establish their identities as such and are accompanying an army in the field, or are found within a captured fortification, are not to be held as prisoners, provided that they took no part in hostilities against the US or its allies. They may, however, be ordered out of the theater of war or interned, if they refuse to leave.[4]

Diplomatic and consular personnel of neutral states should be allowed to leave a besieged place before hostilities commence, but this privilege cannot be claimed while hostilities are in progress, and those who choose to remain are subject to the same risks as the other inhabitants.[5]

In enemy territory occupied by US forces, diplomatic and consular personnel of neutral states must be treated with all the courtesy due their positions. They must be given such freedom of action as is possible to allow, consistent with the necessities of war. US forces should not forcibly enter diplomatic and consular premises of neutral states and should not damage or seize property contained therein. Note that this rule does not apply to foreign consular personnel who are enemy nationals.[6]

US authorities may grant safe-conduct through occupied territory to diplomatic agents of neutral states, even when accredited to the enemy state. This, however, is not a legal requirement and may be denied if military considerations so dictate. Safe-conduct is normally granted at diplomatic or national command authority level.[7]

Diplomatic and consular personnel of the enemy state, encountered in overseas areas, may appropriately be given the benefits of treatment as prisoners of war, rather than as civilian internees.[8]

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[1] Vienna Convention on Diplomatic Relations, April 18, 1961, 22 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 [hereinafter Diplomatic Convention]; Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820, 596 U.N.T.S. 487 [hereinafter Consular Convention].

[2] Diplomatic Convention, at art. 44; Consular Convention, at art. 26.

[3] Diplomatic Convention, at art. 45; Consular Convention, at art. 26.

[4] Dep't of Army, Field Manual 27-10, The Law of Land Warfare, July 18, 1956, para. 83.

[5] Id. at para. 44b.

[6] Id. at para. 549.

[7] Id. at 456b.

[8] Id. at para. 70 and index p. 205 (Diplomats).

Political Asylum and Temporary Refuge

1. Definitions.

a. **Political Asylum.** Political asylum is protection and sanctuary granted by the US within its territorial jurisdiction or on the high seas to a foreign national who applies for such protection because of persecution or fear of persecution as a result of race, religion, nationality, membership in a particular social group, or political opinion.[9]

b. **Temporary Refuge.** Temporary refuge is protection given for humanitarian reasons to nationals of any country in a shore installation, facility, or vessel within the territorial jurisdiction of a foreign nation under conditions of urgency in order to secure the life or safety of that person against imminent danger (such as pursuit by a mob). Temporary refuge will also be granted, under similar circumstances, on US vessels on the high seas.[10]

2. Procedures to be Followed by US Forces Overseas.

DOD Directive 200.11[11] and Army Regulation 500-1[12] provide detailed guidance on US military action in response to requests for political asylum or temporary refuge. In summary:

a. Political asylum may not be granted in any Army installation or facility or on board any aircraft or vessel within the territorial jurisdiction of a foreign country.[13]

b. If temporary refuge is granted in overseas areas, it ". . . will end only when directed by higher authority, through the SECARMY." Custody of the person will be transferred to ". . . the authorities designated in the message authorizing the release."[14]

c. All requests for political asylum or temporary refuge must be reported in accordance with the procedures and format contained in AR 550-1, para. 7.

d. "The involved Army element will not release any information to the public or to the media, whether or not the request [for political asylum or temporary refuge] is granted, without prior HQDA approval."[15]

JTF-GTMO
Guantanamo Bay, Cuba

REFUGEE / ASYLUM PROCESSING

Introduction. The following is a brief overview of US refugee/asylum procedures. It has not been coordinated with or cleared by INS. It is not inteuded to provide a detailed explanation of the specific procedures applicable to processing of Haitian migrants at GTMO. It is understood that INS, not JTF, has responsibility for immigration processing. In any event, the following discussion may be helpful in understanding immigration procedures, concepts and terms impacting on JTF-GTMO operations.

Refugee v. Asylum

a. "Refugee" is generally defined as: A person outside his country of nationality and not within the US or at the borders of the US who is unable or unwilling to return to his home country because of past persecution or a "well-founded fear" of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. Title 8, § 1101(a) (42) (A) of the Immigration and Naturalization Act (INA), as amended by the Refugee Act of 1980. The definition of refugee adopted from the Refugee Act removed tha geographical and ideological basis for granting asylum. Previously, the INA limited asylum only to persons fleeing communist or Middle Eastern countries.

b. A person seeking asylum on the other hand, is either physically present within the US or seeking admission at a border or port of entry. The INS applies the same "well-founded fear of persecution" standard to both refugee and asylum applicants. A person may apply for asylum in three ways: (1) in exclusion proceedings before an immigration Judge, (2) in deportation

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[9] Dep't of the Army, Reg. No. 550-1, Procedures for Handling Requests for Political Asylum and Temporary Refuge, Oct. 1, 1981, para. 3a [hereinafter AR 550-1].

[10] AR 550-1, supra note 9, at para. 3b.

[11] Dep't of Defense Directive No. 2000.11, Procedures for Handling Requests for Political Asylum and Temporary Refuge, March 3, 1972.

[12] See supra note 9.

[13] AR 550-1, supra note 9, at para. 6b(1)(a).

[14] Id. at para. 6b(2).

[15] Id. at para. 8b.

hearings before an immigration Judge or (3) by filing affirmatively for asylum with the INS Asylum Office before being detained or served with an order to show cause in deportation proceedings. Asylum status is granted for an indefinite period.

c. The term "migrant" is used with respect to interdicted Haitians to clarify that they do not necessarily qualify for refugee/asylum status.

Aliens have the right to apply and make a claim for asylum status. However, the granting of such status is discretionary, even if the alien meets all the criteria. As early as 1892, the US Supreme Court held:

"It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions or to admit them only in such cases and upon such conditions as it may see fit to prescribe." Nishimura Ekiu v. U.S., 142 US 651 (1892).

International Agreements. The present US definition of "refugee" is based on the 1967 United Nations Protocol Relating to the Status of Refugees ("UN Protocol"), to which the US acceded in 1968. The UN Protocol, in turn, incorporates articles 2-34 of the 1951 United Nations Convention Relating to the Status of Refugees, which the US did not sign. US courts, including the recent 11th Circuit opinion in Haitian Refugee Center, Inc v. Baker III, have generally held that the UN Protocol is not "self-executing" and therefore does not grant any legal rights to aliens applying for refugee or asylum status in the US

"Well-Founded Fear" Standard. As previously noted, to be entitled to refugee/asylum the alien must demonstrate a "well-founded fear" of persecution. This requires:

(1) fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion (a subjective standard)
(2) a "reasonable possibility of actually suffering such persecution" (an objective standard); and
(3) that the individual is unable or unwilling to return because of such fear: 8 CFR 208.13(b) (2).

An applicant need not establish that he would be singled out individually for persecution if

(1) he establishes that there is a pattern or practice of persecution of groups of persons similarly situated to the applicant on account of 1 of the 5 statutory grounds, and
(2) he establishes his own inclusion in and association with such a group.

Harsh conditions shared by many, general civil strife, or adverse economic conditions are not considered "persecution". A person who has suffered past persecution is presumed to have a "well- founded fear of persecution" in the future. 8 CFR 208.13(b) (1). DOS and INS have noted that the vast majority of Haitian migrants are not entitled to refugee status because they are seeking better economic conditions, not fleeing persecution based on one of the five statutory grounds.

Grounds for Exclusion.

a. General. An applicant does not qualify as a refugee/asylee if he participated in "the persecution of any person on account of race, religion, nationality, membership in a particular social group, or Political opinion." INA § 1101(a) (42).

In addition, just as with other aliens seeking entry into the US, applicants are subject to various grounds of exclusion, INA § 1182. Many of these grounds are automatically waived for applicants otherwise qualifying for refugee/asylum status: those who would become a public charge (lack of financial support); lack of a "labor certification" authorizing employment and lack of appropriate documentation (travel documents, visas, passport, etc). Exclusionary grounds that cannot be waived (and thus bar granting of refugee/asylum status) are trafficking in controlled substances and various "security" concerns, including involvement in terrorist activities and any alien whom the Secretary of State "has reasonable grounds to believe would have potentially serious adverse foreign policy consequences" for the US INS Section 1182(a) (3). In addition, an alien who has been convicted of an aggravated felony may not apply for or be granted asylum. 8 USC §1158 (d).

b. HIV Pos. Persons with communicable diseases of public health significance (which includes individuals who are HIV pos) are excludable from the United States. Section 1182(a) (1). With respect to persons who are determined to be refugees, however, the Attorney General may waive the medical exclusion "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." INA §1157(c) (3). The request for waiver must be in writing and is granted only on an individual basis following an investigation.

Other waivable exclusion grounds include: (1) conviction of certain crimes (except trafficking in controlled substances); (2) prostitution; (3) membership in a communist or other totalitarian party; and (4) aliens who have made previous illegal entries into the US.

Overseas Refugee Processing

a. Background. Each year the President designates the number of "normal flow" refugees to be admitted. In 1991, for example, there were 131,000 allocations, 3,100 of which were designated from Latin America/Caribbean. Additional "emergency flow" refugees may be admitted where an unforeseen emergency exists such that admission is justified by "grave humanitarian concerns or is otherwise in the national interest." (This is presumably the category in which the Haitian migrants fall).

Ordinarily, a person within his own country does not meet the definition of "refugee". In special circumstances, however, the President may authorize refugee processing when such persons otherwise qualify for refugee status. INS Section 1101(a)(42)(B). This is the case with respect to refugee processing currently taking place at Port-au-Prince.

b. **Process.**[16] A refugee applicant submits an application and record of medical examination with an overseas INS Officer or at one of a handful of designated consular offices, which then conducts a hearing. Each applicant must be sponsored by a "responsible person or organization" who can provide assurances of housing and employment. 8 CFR 207.2(d). The alien must also not be "firmly resettled" and must obtain a waiver of any discretionary grounds for exclusion. "Firmly resettled" means an offer of permanent residency, citizenship or similar status by another nation.

If the application is approved, the refugee (and any spouse and children not statutorily disqualified) is conditionally admitted into the US for one year. The alien may then apply for adjustment of status to permanent resident alien. Denial of waiver from exclusion or the denial of refugee status is not appealable.

Asylum Processing. As previously noted, a person seeking asylum is either physically present within the US or seeking admission at a US border or port of entry.

a. **"Excludable" vs "Deportable" Aliens.** An excludable alien, although physically within the US, is deemed not to have made an "entry" or "an admission" into the country. This includes aliens who are being detained or who have been "paroled" (either permanently or temporarily pending determination of their excludability). A deportable alien, on the other hand. has made an entry," even if illegally. The difference between this admitted legal fiction is significant. Far more procedural protections are afforded to an alien in a deportation hearing than to one in an exclusionary hearing (for example, certain constitutional protections).

b. **Parole.** The Attorney General may temporarily parole aliens into the United States "for emergency reasons or for reasons deemed strictly in the public interest." Parole does not constitute an admission into the US and confers no immigration or refugee status. "Parole" is a discretionary act granted to persons preliminarily found to be inadmissible presenting neither a security risk or risk of absconding. Under the Refugee Act of 1980 (amending the INA), the Attorney General's broad authority to parole persons otherwise qualifying as refugees is limited to where required by "compelling reasons in the public interest with respect to that particular alien."

c. **Process.** Asylum petitions are sent to the Asylum Officer (AO) who has jurisdiction over the area in which the applicant lives. The AO conducts an asylum interview in "a nonadversarial manner." The alien may have legal counsel or a representative present and may present evidence and witnesses. A copy of the application is then forwarded to the DOS Bureau of Human Rights and Humanitarian Affairs (BHRHA). BHRHA has 45 days to comment. 8 CFR 208.11(b). An application for asylum which has been denied by the AO may be reviewed before an Immigration Judge.

The AO's decision must be in writing and give specific reasons for denial. Mandatory grounds for denial include: conviction of a particularly serious crime, firm resettlement, and security concerns. The decision of the AO is not appealable. If asylum is denied and the alien is a parolee, the alien may be placed in exclusionary proceedings. If asylum is denied and the alien "entered" the US, he may be granted voluntary departure or deportation proceedings will be commenced. An application for asylum, which has been denied by the AO may be reviewed before an Immigration Judge. Decisions of Immigration Judges may be appealed to the Board of Immigration Appeals.

Withholding of Deportation. INA Section 1253(h) provides:

"The Attorney General shall not deport or return any alien to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership of a particular social group, or political opinion." This section is based on Art. 33 (non-refoulement) of the U.N. Protocol.

Withholding of deportation under Section 1253(h) is mandatory if the alien so qualifies (in contrast to the discretionary grant of asylum/refugee status). Withholding also differs from asylum in that it is country specific -- it seeks to withhold deportation to a particular country where the applicant's "life or freedom would be threatened." Also, unlike asylum, the alien is not eligible for permanent residency after one year. Grounds for disqualification from withholding include (1) participation in the persecution of persons on account of race, religion, nationality, membership in a particular social group or political opinion, (2) conviction of a particularly serious crime (e.g. a felony), (3) commission of a serious "nonpolitical" crime outside the U. S., and (4) being a security risk. Withholding of deportation is only considered after the alien has been denied asylum.

Haitian Migrant Processing. Because Haitian migrants at GTMO are neither physically present within the US nor seeking admission at a US border or port-of-entry, the courts have held that they are not entitled to the provisions of US law relating to asylum processing. In Haitian Refugee Center v. Baker III, supra, the court affirmed that Haitian migrants interdicted on the high seas and held at GTMO may not rely on the provisions of the UN Protocol (including Art. 33, refoulement), the US/Haitian Interdiction Treaty, the Executive Order establishing Alien Migrant Interdiction Operations (AMIO), or INS migrant processing guidelines.

Procedures in place at GTMO for processing of Haitian migrants involve the conduct of pre-screening interviews to determine whether a migrant has (or has not) established a credible fear of return. Migrants with credible claims are temporarily "screened in" to be further processed for parole into the US to pursue their claims of asylum. A final determination is made on a migrant's "screened in" status after further medical testing is completed by the Public Health Service. The migrants who are determined to be HIV positive are given a second interview under the "well-founded fear of persecution" standard. "Screened-out" migrants are processed for repatriation, with certain exceptions (where justified by family unity concerns or, in some cases, with respect to unaccompanied minors).

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[16] Navy: see SECNAVINST 5710.22, Procedures for Handling requests for Political Asylum and Temporary Refuge, 7 Oct 72.

III. ENVIRONMENTAL LAW

Among the many challenges we in the United States Army face today, none is more crucial than the balancing of realistic training, dwindling resources, and the preservation of our vital natural resources. We must remain trained and ready; we must protect the environment today and in the future.

GEN Gordon R. Sullivan, Army Chief of Staff

This section provides information on issues relating to environmental policy at US bases overseas.[17]

a. DOD has divided application of environmental law into two distinct areas: current compliance and environmental restoration.

b. The restoration policy is undergoing initial staffing. The Conference Report to the FY 91 National Defense Authorization Act expresses the sense of Congress that the US expenses for environmental amelioration during base closures will not exceed the amount of residual value owed to the US by the HN. Section 2921 of the Act defines "residual value" as "fair market value".

c. The overseas installation/facility environmental compliance policy was recently published in DOD Dir. 6050.16 (20 SEP 92).
   1. Operations conducted off facilities/installations located overseas are not covered by this directive.
   2. It applies to all DOD components including unified and specified commands.
   3. It explicitly does not apply to:
      a. The operation of naval vessels or military aircraft.
      b. Determination or conduct of remedial or cleanup actions necessary to correct environmental problems arising from past DOD activities.

d. 6050.16 requires that DOD components operating abroad develop a country specific "baseline" document. The baseline will consist of standards applicable to similar operations conducted in the US and all US environmental laws with extra-territorial effect.
   1. Once developed, the baseline will be compared with existing host nation law. After consultation with the US Diplomatic Mission in the host country, the "Executive Agent" will determine whether to apply baseline standards or host nation standards.
   2. Disposal of hazardous wastes in the host country will be limited to instances where:
      a. Disposal complies with the baseline guidance and any applicable international agreements; or,
      b. Disposal complies with the baseline guidance and host nation authorities have concurred with disposal in their country.

e. Waivers from applicable standards can be obtained from the Executive Agent where "compliance would seriously impair operations, adversely affect relations with the host country, or require substantial expenditure of funds not available for such purpose." Consultation with the Diplomatic Mission must occur before compliance with a host nation standard is waived.

The following documentation represents the preliminary phase of a Deployment Guide For Environmental compliance OCONUS. Although targeted at Latin America, much of the US law and many of the treaties cited will have universal applicability.

CHECKLIST FOR ENVIRONMENTAL CONSIDERATIONS

A - US LAW
- ___ US Law: Master List & Summaries

B - ENVIRONMENTAL TREATIES
1. ___Treaty Master List
2. ___Treaties cross-referenced by country
3. ___Summaries

C - COUNTRY SPECIFIC INFORMATION
1. ___ List of Countries
2. ___ Country summaries
   - ___ Environmental concerns
   - ___ US Points of contact
   - ___ Host Nation points of contact
   - ___ Treaties cross-referenced to Master List

APPENDIX
1. ___ World Heritage List

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[17] The start point for any US military activity overseas is international law, particularly any SOFA in the country.

2. ____ Endangered Species List

SUMMARIES OF MAJOR ENVIRONMENTAL LAW LEGISLATION

OCEAN DUMPING - 33 USC 1401 THRU 1419

This major legislation regulates the dumping of any material into ocean waters which would adversely affect human health, welfare, amenities or the marine environment or its economic potential.

DEEPWATER PORTS- 33 USC 1501 INTERNATIONAL APPLICATION THROUGH 33 USC 1510

The purpose of this major legislation is to regulate construction, ownership, and operation of deepwater ports beyond the territorial limits of the US, thereby protecting indigenous marine life and the coastal environment.

FOREIGN CLAIMS ACT - 10 USC 2734

Property loss; personal injury or death: incident to noncombat activities of the armed forces; foreign countries

This major legislation prescribes the standards, procedures and amounts payable for claims arising out of noncombat activities of the US Armed Forces outside the US.

INTERNATIONAL AGREEMENTS CLAIMS ACT - 10 USC 2734A

Property loss; personal injury or death; incident to noncombat activities of armed forces; foreign countries international agreements

This major legislation regulates payment of claims by the US. where such claims are founded on an international agreement applying to the US Armed Forces and the civilian component.

NATIONAL HISTORIC PRESERVATION ACT - 16 USC 470a - 2

This Act provides for the nomination, identification (through listing on the National Register) and protection of historical and cultural properties of significance. Specific procedures are established for compliance including rules for consultation of the World Heritage List or equivalent national register prior to approval of any OCONUS undertaking.

THE OIL POLLUTION ACT OF 1961 - 33 USC 1001-1015

This is an Act to implement the provisions of the International convention for the Prevention of the Pollution of the Sea by Oil, 1954. Specifically it implements the 1969 and 1971 amendment to the International convention; but, this Act is not in effect at present time.

PRE COLUMBIAN MONUMENTS - P.L. 92-587

TITLE II - REGULATION OF IMPORTATION OF PRE-COLUMBIAN MONUMENTAL OR ARCHITECTURAL SCULPTURE OR MURALS

This Public Law prohibits the importation into the US of pre-Columbian monumental or architectural sculptures or murals which are the product of pre-Columbian Indian culture of Mexico, central America, South America, or the Caribbean Islands without a certificate from the country of origin certifying that the exportation was not in violation of law.

ANTARCTIC PROTECTION - 16 USC 2461

This major legislation prohibits prospecting, exploration, and development of Antarctic mineral resources by persons under the jurisdiction of the US.

ENDANGERED SPECIES ACT OF 1973 - 16 USC 1531

The purpose of this Act is to determine fish, wildlife, and plant species which might be threatened or endangered; and to specify geographically the "critical habitat" of such species.

MARINE SANCTUARIES ACT (72), as amended - 16 USC 1431-1435 IMPLEMENTED THRU 33 USC 1419

This major Federal legislation sets out the procedures for designation of marine sanctuaries and the enforcement procedures for their protection. It also addresses the circumstance where this legislation applies to non-citizens of the US.

MARINE MAMMAL PROTECTION- 16 USC 1361 & 1378

This major legislation establishes a moratorium on the taking and importation of marine mammals and marine mammal products, during which time no permit may be issued for the taking of any marine mammals nor may marine mammal products be imported into the US without a permit.

FOREIGN ASSISTANCE - 22 USC 2151p, ENVIRONMENTAL AND NATURAL RESOURCES

This subsection of the Foreign Assistance Legislation requires environmental accounting procedures for projects that fall under the Act and significantly affect the global commons or environment of any foreign country.

RESOURCE CONSERVATION AND RECOVERY ACT (RCRA) - 42 USC 6938

This subsection of the Resource Conservation and Recovery Act prohibits the export of hazardous waste without the consent of the receiving country and notification to the appropriate US authorities.

ACT TO PREVENT POLLUTION FROM SHIPS, 33 USC 1901

This Act provides the enabling legislation which implements the protocol of 1978 relating to, the International Conv. for the Prevention of Pollution From Ships, 1973. The protocol is specifically designed to decrease the potential for accidental oil spills and eliminate operational oil discharges from ships at sea and in coastal waters. It contains many new requirements concerning

the design, construction, operation, inspection, and certification of new and existing ships. Specifically, it requires the installation of oil-water separating equipment and oil content monitors in nearly all ships and prohibits the discharge of oil at sea.

EXECUTIVE ORDERS (EO) AND DOD DIRECTIVES

EO 12114 - ENVIRONMENTAL EFFECTS ABROAD OF MAJOR FEDERAL ACTIONS

This Executive order establishes the requirement for every Federal agency to establish procedures to account for the environmental effects of "major Federal actions significantly affecting the environment" outside the geographical borders of the US, its territories and possessions. Actions included: (1) major Federal actions significantly affecting the environment of the global commons; (2) major Federal actions significantly affecting the environment of a foreign nation not participating with the US and not otherwise involved in the action; (3) major Federal actions significantly affecting the environment of a foreign nation which provides to that nation a product that is prohibited or strictly regulated in the US; (4) major Federal actions outside the US, its territories and possessions which significantly affect natural or ecological resources of global importance.

DOD DIRECTIVE 6050.7 - ENVIRONMENTAL EFFECTS ABROAD OF MAJOR DOD ACTIONS

This directive is the DOD's implementing guidance for EO 12114. It requires environmental considerations for the same categories of actions set out in 12114 and further stresses the need to respect the sovereignty of other nations. The DOD Directive also requires coordination with the Department of State on formal communications with foreign governments.

DOD Directive 6050.16 - DOD POLICY FOR ESTABLISHING AND IMPLEMENTING ENVIRONMENTAL STANDARDS AT OVERSEAS INSTALLATIONS

See the discussion in the text to Part III.

DOD DIRECTIVE 4210.15 - HAZARDOUS MATERIAL POLLUTION PREVENTION

This directive establishes policy, assigns responsibility and prescribes procedures for hazardous material pollution prevention. It requires Secretaries of Military Departments and Heads of Defense Agencies to develop and revise Hazardous Material Pollution Prevention Plans.

ARMY REGULATIONS

AR 27-20 CHAPTER 10 - CLAIMS COGNIZABLE UNDER THE FOREIGN CLAIMS ACT (FCA)

(a) This chapter implements the FCA and authorizes the administrative settlement of claims of inhabitants of a foreign country, or a foreign country or a political subdivision thereof; against the United States; for personal injury, or death or property damages caused outside the US, its territories, commonwealths, or possessions; by military personnel or civilian employees of the DA; or claims which arise incident to noncombat activities of the Army.

(b) Claims resulting from the activities, or caused by personnel of another military department, service, or agency of the US may also be settled by Army foreign claims commissions when authorized by this chapter.

(c) Claims arising from acts or omissions of employees of nonappropriated fund activities may also be settled by Army foreign claims commissions pursuant to this chapter, otherwise applicable, but are payable from nonappropriated funds (chap. 12).

AR 200-1 ENVIRONMENTAL PROTECTION AND ENHANCEMENT (Para. 1-24 and 1-40)

This Army regulation sets out standards and procedures far environmental protection by CDRs outside the US (OCONUS). It regulates compliance with environmental standards set out in HN law or Status of Forces Agreements (SOFA) and supplies regulatory standards for OCONUS CDRs at locations where there is an absence of HN law or SOFA requirements.

AR 200-2 (Subpart H & G) - EFFECTS OF ARMY ACTIONS ABROAD

AR 200-2, Appendix 6, requires that proposed actions affecting "global commons" be subject to a documented decision making process. "Global commons" are areas outside the jurisdiction of any nation, including such areas as the oceans and Antarctica. AR 200-2, Glossary

AR-200-2, Appendix H requires that proposed actions significantly harming the environment of a foreign nation or a protected "global resource" also be subject to a documented decision making process.

AR 42O-40 HISTORIC PRESERVATION

This regulation prescribes management responsibilities and standards for the treatment of historic properties, including buildings, structures, objects, districts, sites, archaeological materials, and landmarks, on land controlled or used by the Army.

Outside the US, Department of Army activities will comply with: (1) historic preservation requirement of the HN; (2) International and Status of Forces Agreements; (3) requirements for protections of properties on the World Heritage List.

NAVY REGULATIONS[8]

NAVY OPNAVINST 5090.1 - NAVY PROGRAM FOR THE PROTECTION OF THE ENVIRONMENT AND CONSERVATION OF NATURAL RESOURCES

This Navy regulation contains guidance to deployed CDRs concerning the management of hazardous materials, the disposal of hazardous waste, and ocean dumping. It also contains the Navy's implementing guidance for Executive order 12114 and DOD Directive 6050.7, setting out the situations that require environmental review for OCONUS actions.

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[8] See Chapter 37 (Overseas Environmental Compliance), NAVJUSTSCOL Envir. Law Deskbook (Rev.10/91); Sec. 1006 (Foreign Environmental Law), JAGINST 5800.7C, JAGMAN, 3 OCt 90; Art. 0939, US Navy Reg, 1990.

MARINE REGULATIONS[19]

MARINE MCO P5090.2 - ENVIRONMENTAL Compliance AND PROTECTION MANUAL

This codification of the Marine Corps policies instructs the deployed CDR to adhere to SOFA guidance and HN laws that establish and implement HN pollution standards.

AIR FORCE REGULATIONS

AF REG 19-3 - ENVIRONMENTAL IMPACT ANALYSIS PROCESS (EIAP) OVERSEAS

This regulation is the Air Force's implementing guidance for Executive Order 12114 and DOD Directive 6050.7. It sets out service activities that require environmental documentation and the type of documentation required.

LIST OF SIGNIFICANT ENVIRONMENTAL INTERNATIONAL AGREEMENTS

1. Conv. of Nature Protection & Wildlife Preservation in W. Hemisphere
2. Conv. For Establishment of an Inter-American Tropical Tuna Commission
3. I'l Plant Protection Convention
4. I'l Conv. [To] Prevent Pollution of Sea by Oil (amended 11 Apr 1962 & 21 Oct 1969)
5. Conv. on the Continental Shelf
6. Conv. of Fishing & Conservation of the Living Resources of the High Seas
7. Conv. on the High Seas
8. The Antarctic Treaty
9. Vienna conv. on civil liability for nuclear damage
10. Treaty Banning Nuclear Tests in Atmosphere/Space & Under Water
11. I'l Conv. For the Conservation of Atlantic Tunas
12. I'l Conv. on Civil Liability for Oil Pollution Damage (as amended)
13. I'l Conv: Intervention on the High Seas in Cases of Oil Pollution Casualties
14. Protocol relating to intervention on the high seas in cases of marine pollution by substances other than oil (as amend)
15. Conv. on Wetlands of I'l Importance Especially as Waterfowl Habitat
16. Treaty [prohibiting] emplacement of nuclear weapons [& others of mass destruction] on the sea-bed/ocean floor & in subsoil thereof
17. Conv. for the conservation of Antarctic Seals
18. Conv. concerning protection of world cultural & natural heritage
19. Conv. [preventing] pollution by dumping of wastes & other matter (amended)
20. Conv. of I'l trade in endangered species of wild fauna & flora
21. I'l conv. for the prevention of pollution from ships, 1973
22. Protocol of 1978: I'l conv. for the prevention of pollution from ships, 1973
23. Conv. [for] the archaeological, historical, & artistic heritage of the American nations (Conv. of San Salvador)
24. Conv. [prohibiting] military or other hostile use of environmental modification techniques
25. Treaty for Amazonian co-operation
26. Conv. for the conservation & management of the vicuna
27. Conv. on conservation of Antarctic marine living resources
28. UN Conv. on the Law of the Sea
29. Conv. [to protect & develop] marine environment of wider Caribbean region
30. Protocol: co-operation in combating oil spills in the wider Caribbean region
31. I'l tropical timber agreement
32. Vienna Conv. for the protection of the ozone layer
33. Montreal protocol on substances that deplete the ozone layer*
34. Conv. on early notification of a nuclear accident
35. Conv. on ass't in nuclear accident or radiological emergency
36. Conv. on the reg. of Antarctic mineral resource activities
37. Protocol for the conservation & management of protected marine & coastal areas of the S. East Pacific
38. Protocol: protect the S. East Pacific against radioactive contamination
39. Protocol: protected areas & wildlife to the Conv. for the protection & development of the marine environment of the wider Caribbean region
40. Supp. Protocol to agreement on region co-operation in combating pollution of the S. East Pacific by oil & other substances in case of emergency
41. Basel Conv: control [i'l] movement & disposal of hazardous wastes
42. I'l Conv. on salvage
43. Protocol: protect the S. East Pacific against pollution from land
44. Agreement on regional co-operation in combating pollution of the S. East Pacific by oil & other substances in cases of emergency
45. Conv.: Protect the marine environment & coastal area of the S. East Pacific

IV. EXERCISE UNIQUE LEGAL ISSUES: FUNDING

As a result of their nature, combined training exercises afford the US an excellent opportunity to demonstrate tangible US support for host countries & provide invaluable readiness training to US forces. Moreover, combined exercises also serve as an

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[19] See MCO P5090.2, Envir. Compliance and Protection Manual, 26 Sep 91.

excellent mechanism by which the US may assist countries in addressing a number of the social & economic conditions which make them vulnerable to low intensity conflict. It must be emphasized, however, that the combined training exercise cannot be used for the purpose of circumventing existing US statutory requirements. With this in mind, the JA must be aware of three specific aspects of combined exercises that have consistently given rise to exercise unique legal issues.

Exercise Related Construction (ERC)

Engineer Exercise Activities as MILCON.

In developing an exercise plan for concept approval by JCS and subsequent assignment of exercise tasks to service components, may theater operators and planners "build into" the exercise certain construction projects which may later prove to be of military or economic benefit to the HN? A 1984 decision issued by the US Comptroller General (63 Comp. Gen. 422 (1984) and, in particular, a follow-on 1986 Comptroller General decision (1986 Comp. Gen. Decision) set forth the following guidance concerning construction activities undertaken in conjunction with overseas training exercises.

1. DOD may utilize operation & maintenance (O&M) appropriations (exercise funds) to finance construction activities undertaken in support of joint combined exercises only if such activities fall within the specific statutory authority of 10 USC 2805(c) (minor construction projects under $200,000). (Note that under 10 USC 2233a(b), this dollar limitation is $100,000 for construction projects undertaken by Army Reserve and National Guard units.)

2. Exercise-related construction may not be deemed and funded as operational expenses chargeable to O&M exercise funds (as opposed to minor construction under 10 USC 2805 (c)), unless such construction consists of "minor structures clearly of a temporary nature." (For a discussion of "temporary construction," see AR 350-28, Dec. 15, 1983; this is an extremely limited exception & rarely, if ever, applicable to the type of construction activities under discussion) of importance is the fact that these funding principles apply not only to "vertical structures," but to other types of construction as well, to include roads and airstrips.

"Scope" of the Construction Project.

Note that a military construction project includes all military construction work necessary to produce a "complete and usable" facility or a "complete and usable" improvement to an already existing facility (10 USC 2801). This requirement is designed to eliminate the possibility of "project splitting." (See AR 415-35, Minor Construction, Emergency Construction, & Replacement of Facilities Damaged or Destroyed, 15 Oct. 1983). For a detailed discussion of this concept, see the 1986 Comp. Gen. decision, pp. 11-13.

10 USC 2805 Amended.

In responding directly to funding and construction cost issues which arose in conjunction with the 1986 Comp. Gen. guidance regarding exercise-related construction activities, Congress amended 10 USC §2805 and issued specific instructions concerning the costing procedures to be used in determining the total cost associated with exercise construction projects. The principal elements of this legislation are:

1. Each Service Secretary may use up to $5,000,000 each fiscal year for exercise-related unspecified minor military construction projects undertaken in conjunction with JCS coordinated or directed exercises occurring outside the US. Note this funding is limited to JCS coordinated or directed exercises.

2. A Service Secretary retains the 10 USC 2805(c) authority to use up to $200,000 of O&M funds for each unspecified military construction project undertaken during an overseas exercise, if such an exercise is not JCS coordinated or directed. That is, the 10 USC 2805(c) minor MILCON exception may be used to defray construction project costs associated with single service (Army only) deployments for training (DFTs).

Congress has also mandated that all services must follow the guidelines set forth in the Conference Report accompanying the Continuing Appropriations Act for fiscal year 1987 with respect to the manner in which costs of construction projects undertaken in support of overseas military training exercises should be determined. These guidelines apply to both JCS coordinated or directed and uni-service exercises and are as follow: For the purpose of determining the costs of projects constructed in support of military training exercises, the following shall not be included:
1. Transportation costs of materials, supplies and Government-furnished equipment;

2. Travel and per diem costs applicable to troop labor; costs of material, supplies, services and fuel furnished by sources outside of DOD on a non-reimbursable basis. These costs shall be reported to the extent that such costs exceed $50,000 per project. The costs of supplies or services furnished on a non-reimbursable basis should be estimated on a fair market value basis.

For the purpose of determining costs attributable to such construction projects, the following costs shall be included:

1. Costs of all materials, supplies and services applicable to the project, including those furnished on a non-reimbursable basis by other military departments and Defense agencies;

2. Labor costs, except for US military labor;

3. Overhead or support costs, which can be identified as representing additional costs which would not have been incurred were

it not for the project, except for planning and design costs; 4. DOD funded costs applicable to the operation of Government-furnished equipment, including fuel and direct maintenance costs.

Cost estimates of non-DOD funded items should be included in the estimate of the project costs, but are not to be derived from the fun H.R. Rep. No. 99-1005, 99th Cong., 2d Sess. 737 (1986) (Conference Report accompanying H.J. Res. 738).

Congress has also reaffirmed the previously noted Comp. Gen. determination that structures of a minor and temporary nature (e.g., base camp facilities such as tent platforms, field latrines, range targets and installed relocatable structures), completely removed at the termination of an exercise may be funded through O&M exercise accounts. A detailed explanation of the statutory basis and cost accounting procedures for ERC is set forth in the attached HQDA/Engineer message.

Construction projects undertaken within the context of an exercise may often be sensitive and relatively complex issues. Judge advocates advising CDRs on such matters should effect careful coordination of proposed projects through established command channels.

Training Activities

Ostensibly, a combined training exercise would appear to be a convenient vehicle by which badly needed military training might be provided to HN military personnel. The training, it would seem, could be furnished quickly, unencumbered by the bureaucratic delays and reimbursement of the security assistance & arms transfer programs. Such is not the case.

The Comptroller General has recognized that some degree of "familiarization and safety" instruction is necessary prior to the conduct of combined training activities in order to ensure interoperability. However, the 1986 Comp. Gen. Decision states that, when familiarization & safety instruction provided prior to combined exercises or incidental instruction provided during an exercise rise to a level of formal training comparable to that normally provided by security assistance projects, these activities fall within the scope of security assistance & must be funded as such (1986 Comp. Gen. Decision, pp. 20-21).

An issue often associated with the appropriateness of training provided during a combined exercise is the extent of such training in which Special Forces (SF) personnel might engage. The argument often put forward in connection with these personnel is that, as an integral part of the SF mission is to train indigenous forces, SF training of such forces is undertaken simply to meet SF training requirements.

The Comptroller General has recognized the necessity to distinguish between security assistance training and "minor instruction provided incidental to other DOD operational requirements," i.e., instruction not conducted for the purpose of providing assistance to foreign governments, but designed to fulfill SF training requirements. While the 1986 Comp. Gen. Decision recognizes that there are a number of distinctions in both scope and purpose between these forms of training, it emphasizes, nevertheless, that DOD must ensure that SF training activities are not utilized as a means of providing security assistance to HN forces. (1986 Comp. Gen. Decision, pp. 20-27.)

JAs responsible for providing advice to Army personnel, to include SF personnel, participating in combined exercises must be aware that training activities undertaken during the exercise may not constitute the provision of security assistance training for which the US must be reimbursed.

Humanitarian and Civic Assistance Activities

DOD is engaged in an expanding role of providing humanitarian and civic assistance (HCA) to countries within the context of combined exercises. Given the nature of the activities involved & the environment in which these activities are taken, HCA projects uniquely lend themselves to the skills of specially trained US military personnel. Working in coordination with local US diplomatic representatives and in conjunction with HN armed forces & government agencies, DOD personnel, while addressing destabilizing social & economic conditions within a country, ultimately serve to enhance both US & regional security interests.

JAs must be aware, however, that HCA is generally recognized as a form of foreign assistance and, as such, programmed, administered, and funded by the Department of State (Agency for International Development (AID)). Given this fact, DOD traditionally has possessed limited authority to engage in HCA.

In certain cases, DOD resources may be utilized to provide assistance through written agreements with AID under the authority of the Economy Act, 31 USC 1535. This legislation requires, however, that, if DOD undertakes assistance projects under agreement with AID, full reimbursement be made for costs "attributable" to DOD services performed.

Apart from the authority of the Economy Act, DOD may also engage in civic action activities on a limited basis through security assistance programs. Under 502, Part II of the Foreign Assistance Act, defense articles and services may be provided to a foreign country for, among other purposes:
...assisting foreign military forces in less developed friendly countries (or the voluntary efforts of personnel of the Armed Forces of the US in such countries) to construct public works and to engage in other activities helpful to the economic and social development of such friendly countries. It is the sense of the Congress that such foreign military forces should not be maintained or established solely for civic action activities and that such civic action activities not significantly detract from the capability of the military forces to perform their military missions and be coordinated with and form part of the total economic and social development effort.

In addition to the above authority, which has always proven to be of minimal value, DOD received specific statutory authority to engage in HCA during authorized overseas operations in 1986. As a precursor to this 10 USC authority, which will

later be examined in detail, section 8103 of the FY 85 DOD Appropriations Act (the Stevens Amendment) had authorized DOD to engage in HCA incidental to authorized operations & to fund costs associated with such assistance through O&M funds. Consistent with the legislative history accompanying this amendment, JCS limited the provision of this form of assistance to HCA activities conducted incidental to JCS directed or coordinated exercises. This "Stevens authority" was extended under section 8072 of the 1986 Continuing Appropriations Resolution & sec. 9062 of the 1987 DOD Appropriations Act.

Given the difficulty associated with attempting to define and establish the parameters of "incidental" in the Stevens HCA and the requirement that the provision appear in every DOD Appropriations Act, DOD sought and received specific and permanent 10 USC authority to engage in humanitarian assistance and civic action during the course of authorized military operations overseas (10 USC Chapter 20, sec. 401). Several provisions are of particular importance to JAs.

Sec. 401(b) mandates that HCA may not be provided to a foreign country unless the Secretary of State specifically approves the provision of such assistance. Note should be taken that this approval authority has been delegated to State representatives at the embassy level and is generally effected in coordination with a representative of the responsible Unified command.

Sec. 401(e) defines HCA for the purpose of this legislation. A key term of art set forth in this section is "rudimentary." What is meant by "rudimentary" surface transportation systems & "rudimentary" construction and repair of public facilities? The interpretation of this term by a command providing HCA under the authority of 10 USC is an issue meriting close JA scrutiny and careful coordination through the chain of command.

Sec. 401(c)(1) deals with the payment of expenses incurred by a command as a direct result of the provision of HCA. Note that sec. 401(c)(1) directs that such expenses will be paid from funds (O&M funds) specifically appropriated for this purpose.

Sec. 401(c)(2) was added to the originally proposed legislation by Congress. It merits close examination. Recall that the purpose of DOD's seeking permanent statutory authority to engage in HCA activities was the elimination of the interpretative difficulties associated with the "incidental" HCA authority of the Stevens Amendment. Sec. 401(c)(2) provides, nevertheless, that DOD may now incur "minimal" expenditures for HCA activities and defray these costs with O&M funds other than those specifically appropriated pursuant to sec. 401(c)(1). Is this authority to incur "minimal"HCA expenditures simply a return to the "incidental" standard, with all of the interpretative difficulties associated with this concept? No.

Congress, in passing the 10 USC HCA legislation, provided specific guidance, in the accompanying Conference Committee Report, of what it viewed "minimal" expenditures for "diminimus" HCA activities to be. The language of the Report follows:

> The conferees . . . exempted "diminimus" activities from this section. [sec. 403(a)]. The conferees did not put a specific dollar ceiling on the definition of "diminimus" but wish to make clear they had in mind activities that have been common-place on foreign exercises for decades. These would include a unit doctor's examination of villagers for a few hours, with the administration of several shots & the issuance of some medicines--but would not include the dispatch of a medical team for mass inoculations. "Diminimus" would also include the opening of an access road through trees & underbrush for several hundred yards--but would not include the asphalting of any roadway.

Clearly, then, the "diminimus" HCA activities for which sec. 401(c)(2) "minimal" expenditures may be made are very limited in nature, a fact of which JAs must be aware. DA/Engineer guidance concerning HCA construction & cost accounting procedures is attached.

The provision of HCA to a HN in the context of a combined training exercise is a legitimate DOD activity and an exceptionally effective use of DOD personnel & equipment, particularly in a potential low intensity conflict environment. The role of the JA is to ensure that HCA is provided in a manner fully consistent with the applicable law.

Exercise-Specific Legislation

JAs should be aware of the existence of legislation specifically related to the ability of developing countries to participate in combined training exercises. This legislation is referenced below.

1. Authority to Pay Certain Expenses of Developing Countries in Combined Exercises. DOD provides policy direction & oversight responsibility for this program.

2. Authority to Pay Certain Expenses of Defense Personnel of Foreign Countries.

V. GIFTS

To determine whether the acceptance of a gift is appropriate, 5 C.F.R. 2635, Subpart B requires a 4 step analysis:

1. **Is it a gift, or 1 of 9 exclusions (Sec. 2635.203(b))?**
   If not a gift, item may be accepted. Items of little intrinsic value intended solely for presentation, or benefits available to all military personnel in an area are "non-gifts."

2. **If it is a gift, then decide whether it is problematical because it is either:**
   a) from a prohibited source (Sec. 2635.203(d)) [someone seeking business], or
   b) given because of recipient's official position.

3. **If it is a prohibited gift, then determine whether it falls within 1 of 12 exceptions.**
   - $20 or less, but cannot exceed $50 in a calendar year from one source
   - A gift, not from a prohibited source, to a group (but doesn't favor those of higher rank)
   - Awards for meritorious public service or achievement if pursuant to an established program of recognition, other than awards or decorations from a foreign government
   - Social invitations from other than prohibited sources, but based on employee's official position, if no fee is charged to anyone attending.

4. **If it is a prohibited gift to which no exception applies, it must be disposed of: pay for it; return it (at Government expense); if perishable, may give it to charity, share and consume it, or destroy it.** (Sec. 2635.202(c))
   If it is a prohibited gift, but an exception applies, still can't accept it if it was in exchange for influence, was solicited or coerced, or if it appears someone is using public office for private gain. (Sec. 2635.2020(c)).

If a gift is from a competing contractor to a procurement official (See 41 U.S.C. 423), analysis must comport with FAR 3.104-4(f).

Above analysis applies whether the donor is from the US or local deployment area. It does not apply if it is from a foreign government (agent or representative). (See 5 U.S.C. 7342, AR 672-5-1).

A gift of more than $200 can only be accepted on behalf of the US.

If the gift is valued at $200 or less, the recipient may keep it; if more than $200, the gift must be turned over to PERSCOM.

POC: Mr. Wentink DSN 227-0921

VI. REPORTS OF SURVEY

I. **REFERENCES.**

A. AR 37-1, Army Accounting and Fund Control, 30 Apr 91.
B. AR 600-4, Remission of Indebtedness for Enlisted Members, 1 Dec 83.
C. AR 735-5, Policies and Procedures for Property Accountability, 31 Jan 92 (Unit Supply UPDATE Issue No. 13, 31 Jan 92).
D. DA Pam 710-5, 15 April 1987, Unit Commander's Supply Handbook.

II. **INTRODUCTION.**

III. **REPORT OF SURVEY SYSTEM.**

A. Alternatives to Reports of Survey that Commanders Should Consider.
1. Statement of charges when liability is admitted and the charge does not exceed one month's base pay.
2. Cash collection voucher when liability is admitted and the charge does not exceed one month's base pay.
3. Cash sales of handtools and organizational clothing and individual equipment.
4. Unit level commanders may adjust losses of durable handtools up to $100 per incident, if no negligence or misconduct is involved.
5. Abandonment order may be used in combat, large scale field exercises simulating combat, military advisor activities, or to meet other military requirements.
6. Recovery of property unlawfully held by civilians is authorized - show proof it is U.S. property and do not breach the peace.
7. AR 15-6 investigations and other collateral investigations can be used as a substitute for the report of survey investigation.
8. If the commander determines that no negligence was involved in the damage to the property no report of survey is required as long as the approving authority concurs.

B. Initiating the Report of Survey.
1. Active Army commanders will initiate the report of survey within 15 calendar days of discovering the loss or damage.
2. The goal is a thorough investigation.
3. Mandatory requirements for a report of survey or AR 15-6 investigation.
   a. Individual refuses to admit liability by signing a statement of charges, cash collection voucher or other accountability document, and negligence or misconduct is suspected.
   b. Anytime a higher authority or other DA regulations directs a report of survey.
   c. Whenever a sensitive item is lost or destroyed.
   d. Property is lost by an outgoing accountable officer, unless voluntary reimbursement is made for the full value of the loss.
   e. When the amount of loss or damage exceeds an individual's monthly base pay, even if liability is admitted.
   f. When damage to government quarter's or furnishings exceeds one month's base pay.
   g. When the loss involves certain bulk petroleum products.
4. In the Active Army, reports of survey will normally be processed within 75 days.

C. Appruving Authority.
1. The approving authority is normally the battalion commander, but it may be any commander in the grade of LTC or higher.
   a. Does not have to be a court-martial convening authority.
   b. Takes final action by authority of the Secretary of the Army.
2. Regardless of who initiates the report of survey, it will be processed through the chain of command of the individual responsible for the property at the time of the incident, provided the individual is subject to AR 735-5.
3. If negligence or no negligence is clearly established on the report of survey, the approving authority may recommend liability without appointing a surveying officer. The approving authority is then responsible for ensuring that the charges are properly computed and the individual held financially liable is properly notified.

D. Appointing Authority.
1. When approving authority is retained at the Colonel level or above, the approving authority may designate as appointing authority a lieutenant colonel or U.S. DOD civilian employee in the grade of GS/GM-13 or above.
2. The appointing authority appoints report of survey investigating officers. The appointing authority also reviews all reports of survey arising within his or her command or authority.

E. Surveying Officer.
1. The surveying officer will be senior to the person subject to possible financial liability, "except when impractical due to military exigencies."
2. The surveying officer can be an Army commissioned officer; warrant officer; or enlisted soldier in the rank of Sergeant First Class or higher; a civilian employee GS-07 or above; a commissioned officer of another service; or a Wage Leader (WL) or Wage Supervisor (WS) employee.
3. Consult AR 640-3, table 5-2 for the grade equivalency between military personnel and civilians employees.
4. The investigation is the surveying officer's primary duty.
5. The surveying officer should get a briefing from a judge advocate.

F. Legal Considerations for Imposing Liability. (AR 735-5, Appendix C.

1. Standard of liability.

a. Simple negligence - the failure to act as a reasonably prudent person would have acted under similar circumstances.

(1) A reasonably prudent person is an average person, not a perfect person. Consider also:

(a) What could be expected of the person considering their age, experience, and special qualifications.

(b) The type of responsibility involved.

(c) The type and nature of the property. More complex or sensitive property will normally require a greater degree of care.

(2) Examples of simple negligence.

(a) Failure to do required maintenance checks.

(b) Leaving weapon leaning against a tree while attending to other duties.

(c) Driving too fast for road or weather conditions.

(d) Failing to maintain proper hand receipts.

b. Gross negligence - an extreme departure from the course of action to be expected of a reasonable prudent person, all circumstances being considered, and accompanied by a reckless, deliberate, or wanton disregard for the foreseeable consequences of the act.

(1) Reckless, deliberate, or wanton -

(a) These elements can be express or implied.

(b) Does not include thoughtlessness, inadvertence, or error in judgment.

(2) Foreseeable consequences.

(a) Does not require actual knowledge of actual results.

(b) Need not foresee the particular loss or damage that occurs, but must foresee that some loss or damage of a general nature may occur.

(3) Examples of gross negligence.

(a) Soldier drives a vehicle at a speed in excess of 40 mph of the posted speed limit. Intentionally tries to make a sharp curve without slowing down.

(b) Soldier lives in family quarters and has a child who likes to play with matches. Soldier leaves matches out where child can reach them.

c. Willful misconduct - any intentional or unlawful act.

(1) Willfulness can be express or implied.

(2) Includes violations of law and regulations such as theft and misappropriation of government property.

(3) A violation of law or regulation is not negligence per se.

(4) Examples of willful misconduct.

(a) Soldier throws a tear gas grenade into the mess tent to let the cooks know what he thought about breakfast, and as a result, the tent burns to the ground.

(b) Soldier steals a self-propelled howitzer, but he does not know how to operate it. Accordingly, his joy ride around post results in damage to several buildings.

d. Proximate cause - the cause which, in a natural and continuous sequence, unbroken by a new cause, produces the loss or damage, and without which the loss or damage would not have occurred. It is the primary moving cause, or the predominating cause, from which the injury follows as a natural, direct, and immediate consequence, and without which it would not have occurred.

(1) The damage arises out of the original act of negligence or misconduct.

(2) A continual flow or occurrence of events from the negligent act or misconduct.

(3) Use common sense.

(4) Examples of proximate cause.

(a) Soldier driving a vehicle fails to stop at a stop sign and strikes another vehicle after failing to look. Proximate cause is the soldier's failure to stop and look.

(b) Soldier A illegally parks his vehicle in a no parking zone. Soldier B backs into A's vehicle. B did not check for obstructions to the rear of his vehicle. A's misconduct is not the proximate cause of the damage. Instead, B's negligent driving is the proximate cause.

e. Independent intervening cause - an act which interrupts the original flow of events or consequences of the original negligence. It may include an act of God, criminal misconduct, or negligence.

f. Joint negligence or misconduct - two or more persons may be held liable for the same loss.

(1) There is no comparative negligence.

(2) The financial loss is apportioned according to AR 735-5, Table 12-3.

2. Loss. There are two types of losses which can result in financial liability.

a. Actual loss. Physical loss, damage or destruction of the property.

b. Loss of accountability. Due to the circumstances of the loss, it is impossible to determine if there has been actual physical loss, damage, or destruction because it is impossible to account for the property.

3. Responsibility for property.

a. Command responsibility.

(1) The commander has an obligation to insure proper use, care, custody, and safekeeping of government property within his or her command.

(2) Command responsibility is inherent in command and cannot be delegated. It is evidenced by assignment to command at any level.

b. Direct responsibility.

(1) An obligation of a person to ensure the proper use, care, custody, and safekeeping of all government property for which the person has receipted.
(2) Direct responsibility is closely related to supervisory responsibility which is discussed below.

c. Personal responsibility. The obligation of an individual for the proper use, care, and safekeeping of government property in their possession, with or without a receipt.

d. Supervisory responsibility.
(1) The obligation of a supervisor for the proper use, care, and safekeeping of government property issued to, or used by subordinates. It is inherent in all supervisory positions and is not contingent upon signed receipts or responsibility statements.
(2) If supervisory responsibility is involved, consider the following additional factors.
(a) The nature and complexity of the activity and how that affected the ability to maintain close supervision.
(b) The adequacy of supervisory measures used to monitor the activity of subordinates.
(c) The extent supervisory duties were hampered by other duties or the lack of qualified assistants.

G. Determining the Amount of Loss.
1. Consider depreciation. Compute the charge according to AR 735-5, Appendix B.
2. Limits on financial liability.
a. The general rule is that an individual will not be charged more than one month's basic pay.
(1) Charge is based upon the soldier's basic pay at the time of the loss.
(2) For ARNG and USAR personnel, basic pay is the amount they would receive if they were on active duty.
b. As exceptions to the general rule, there are times when personnel are liable for the full amount of the loss.
(1) Any person is liable for the full loss to the Government (less depreciation) when they lose, damage, or destroy personal arms or equipment.
(2) Any person is liable for the full loss of public funds.
(3) Accountable officers will be held liable for the full amount of the loss.
(4) Any person assigned government quarters is liable for the full amount of the loss to the quarters, furnishings, or equipment as a result of gross negligence or willful misconduct of the responsible individual, his guests, dependents, or pets.

H. Rights of Individual for Whom Financial Liability is Recommended.
1. The report of survey form (DA Form 4697) contains a rights notice; however, to adequately inform an individual of his or her rights, see AR 735-5, para. 13-34 and figure 13-12.
2. If financial liability is recommended the surveying officer must take the following actions.
a. Give the person an opportunity to examine the report of investigation.
b. *Ensure the person is aware of rights.*
c. Fully consider and attach any statement the individual desires to submit.
d. Carefully consider any new or added evidence and note that the added evidence has been considered.
e. Explain the consequences of a finding of gross negligence for a survey involving government quarters, furnishings and equipment.

I. Duties of the Approving Authority.
1. Before the approving authority takes action, the survey will be reviewed by a judge advocate as to the adequacy of the evidence and propriety of the findings and recommendations.
2. The approving authority is not bound by the surveying officer's, or judge advocate's recommendations.
3. If the approving authority decides to assess financial liability contrary to the recommendations of the surveying officer or judge advocate the decision and the rationale must be reduced to writing.
4. If considering new evidence, the approving authority must so notify the individual and provide an opportunity to rebut.
5. The approving authority must ensure that the individual was advised of rights (See AR 735-5, para. 13-43 and figure 13-13).
6. Initiate collection action by sending documentation to the servicing finance office.
7. The approving authority may request that a charge be prorated beyond 2 months.

J. Involuntary Withholding of Current Pay.
1. Members of the armed forces may have charges involuntarily withheld. 37 U.S.C. § 1007.
2. Involuntary withholding for civilian employees.
5 U.S.C. § 5512, AR 37-1, Chapter 15.
3. No involuntary withholding for the loss of NATO property (DAJA-AL 1978/2184).
4. No involuntary withholding for the loss of MFO property.

IV. RELIEF FROM REPORTS OF SURVEY.

A. Appeals.
1. The appeal authority is the next higher commander above the approving authority (normally the brigade commander).
2. Individual has 30 days to appeal unless he or she shows good cause.
3. Appeal is submitted to approving authority for reconsideration before action by the appeal authority.
4. If the approving authority denies reconsideration the following actions are required.
a. Prepare a memorandum giving the basis for denying the requested relief.
b. *The approving authority must personally sign the denial.*
5. Action by the appeal authority is final.
6. Issues on appeal.

a. Survey not initiated within 15 calendar days after discovery of the loss as required by AR 735-5. Time limits are for the benefit of the government. Deny the appeal.
b. Surveying officer was not senior to the person held financially liable as required by AR 735-5. Purpose of the requirement is to prevent a "chilling effect" on the surveying officer. If senior individual is held liable, then the purpose of the regulation has been met. Deny the appeal.
c. Rights warning not given by the surveying officer. This is an administrative procedure. A failure to warn does not invalidate the survey. Deny the appeal.
d. Surveying officer does not complete the investigation within 30 days as required by AR 735-5. Some investigations may take longer than others. Deny the appeal.
e. Survey not processed through the chain of command of the person responsible for the property at the time of the loss as required by AR 735-5. This a purely administrative requirement and harmless error. Deny the appeal.

B. Reopening Reports of Survey.
1. Not an appeal.
2. Authority to reopen rests with the approval authority.
3. May occur:
a. As part of an appeal of the assessment of financial liability.
b. When a response is submitted to the surveying officer from the person charged subsequent to the approving authority having assessed liability.
c. When a subordinate headquarters recommends reopening based upon new evidence.
d. When the property is recovered.
e. When the approving authority becomes aware than an injustice has been perpetrated against the government or individual.

C. Remission of Indebtedness (AR 735-5; AR 600-4).
1. Enlisted soldiers only.
2. Only to avoid extreme hardship.
3. Only unpaid portions can be remitted. Suspend collection action long enough for the soldier to submit his request for remission of the debt.
4. Must request reconsideration before submitting request for remission of indebtedness.

D. Army Board for the Correction of Military Records (ABCMR) (AR 15-185).
E. Civilian employees may avail themselves of the grievance/arbitration procedures.
F. Lawsuits (with civilian counsel).

V. STAFF JUDGE ADVOCATE'S REVIEW.
A. For the Approving Authority: adequacy of evidence and propriety of findings and recommendations.
B. For the Appeal Authority: evidence is adequate and findings are proper.
C. The same attorney cannot perform both legal reviews.

VI. CONCLUSION

VII. 15-6 INVESTIGATIONS

Procedure for Investigating Officers and Boards of Officers[20]

Army Regulation 15-6 (Procedure for Investigating Officers and Boards of Officers) contains the basic rules for Army regulatory boards. Many boards, however, are appointed under a specific regulation or directive (e.g., AR 635-200 provides for the appointment of boards to consider the separation of enlisted personnel). In that case, the provisions of the specific regulation or directive will control the proceedings. Often, that specific regulation will have a provision that makes AR 15-6 applicable to the proceedings. Consequently, you may have to look to both the specific regulation involved and to AR 15-6 for the proper board procedures. If the two regulations conflict on a particular point, the provisions of the specific regulation authorizing the board will override the provisions of AR 15-6.

A. General.

(1) Function and Purpose. The primary purpose of an investigation or board of officers is to look into and report on the matters that the appointing authority has designated for inquiry. The report will include findings of fact and recommendations. Often, when criminal misconduct is suspected, it may be more appropriate to conduct an R.C.M. 303 commander's inquiry or to have either the military police or Criminal Investigation Division conduct the investigation.

(2) Methods. An administrative fact-finding procedure under AR 15-6 may be designated an investigation or a board of officers. The proceedings may be informal or formal. Proceedings that involve a single officer using the informal procedures are designated investigations. Proceedings that involve more than one investigating officer using formal or informal procedures or a single investigating officer using formal procedures are designated boards of officers.

(3) Uses. AR 15-6 does not require that an investigation be conducted before taking adverse administrative action. But, if inquiry is made under AR 15-6, the findings and recommendations may be used in any administrative action against an individual. An adverse administrative action does not include actions taken pursuant to the Uniform Code of Military Justice (UCMJ) or the Manual for Courts-Martial (MCM).

B. Informal Procedures. An informal investigation or board may use whatever method it finds most efficient and effective for acquiring information. For example, the board may divide witnesses, issues, or evidentiary aspects of the inquiry among its members for individual investigation and development, holding no collective meeting until ready to review all the information collected. Also, evidence may be taken telephonically, by mail, or in whatever way the board deems appropriate. A respondent shall not be designated when informal procedures are used and no one is entitled to the rights of a respondent.

C. Formal Procedures. The board will meet in full session to take evidence. Definite rules of procedure will govern the proceedings. Depending on the subject matter under investigation, these procedural rules will be found in AR 15-6, the specific regulation governing the investigation, or both. If a respondent is designated, formal procedures must be used. For example, a board of officers considering an enlisted soldier for separation under AR 635-200 must use formal procedures. When a respondent is designated, a hearing must be held.

D. The appointing authority must determine, based on the seriousness and complexity of the issues and the purpose of the inquiry, whether to designate an investigation or a board of officers to conduct the inquiry.

1. Investigation. Conducted by a single investigating officer using informal procedures. An investigation would be appropriate for relatively simple matters. It could also be useful in a serious matter to conduct a preliminary inquiry to be followed by a formal proceeding.

2. Board. When more than one fact-finder is appointed, whether formal or informal procedures are used, they will be designated a board of officers. Additionally, a single fact-finder will be designated a board when formal procedures are to be used.

Authority to Appoint a Regulatory Board
(AR 15-6, Chapter 2)

A. After consultation with the servicing judge advocate or legal advisor, the following individuals may appoint a Formal board of officers:

1. Any general court-martial convening authority (GCMCA) or special court-martial convening authority (SPCMCA), including those who exercise that authority for administrative purposes only;

2. Any general officer;

3. Any commander or principal staff officer in the grade of colonel or above at the installation, activity, or unit level; or

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[20] Navy: see Chapter II (admin investigations), JAGINST 5800.7C, JAGMAN, 3 OCt 90.

4. Any State adjutant general.

B. Informal investigations or boards may be appointed by:

1. Any officer authorized to appoint a formal board or investigation.

2. A commander at any level.

3. A principal staff officer or supervisor in the grade of major or above.

C. If the appointing authority is a general officer, he or she may delegate the selection of board members to members of his or her staff.

Function of Investigations and Boards of Officers
(AR 15-6, para. 1-5)

The primary function of any investigation or board of officers is to ascertain facts and report them to the appointing authority. It is the duty of the investigating officer or board to ascertain and consider the evidence on all sides of each issue thoroughly and impartially and to make findings and recommendations that are warranted by the facts and that comply with the instructions of the appointing authority.

Method of Appointment
(AR 15-6, para. 2-1b)

Informal investigations and boards may be appointed either orally or in writing. Formal boards will be appointed in writing but, when necessary, may be appointed orally and later confirmed in writing. Whether oral or written, the appointment should specify clearly the purpose and scope of the investigation or board and the nature of the findings and recommendations required. The governing regulation should be specified and any special instructions should be detailed.

If the board or investigation is appointed in writing, a Memorandum of Appointment will be used. Note that the Memorandum of Appointment must include certain information--the specific regulation or directive under which the board is appointed (in this example, AR 635-200), the purpose of the board, the scope of the board's investigatory power, and the nature of the findings and recommendations required. The scope of the board's power is very important because a board has no power beyond that vested in it by the appointing authority. A deficiency in the memorandum may nullify the proceedings for lack of jurisdiction. If this occurs, AR 15-6, para. 2-3, should be consulted. It may be possible for the appointing authority to ratify the board's action.

The memorandum also names the parties to and designates their roles in the board proceeding. If the board were appointed specifically to investigate one or more known respondents, the respondent(s) would also be named in the Memorandum of Appointment.

Board Membership
(AR 15-6, paras. 2-1c, 5-1, 5-2, and 5-3; AR 635-200, para. 2-7)

The appointing authority will personally appoint the members of a board, except that appointing authorities who are general officers may delegate the selection of board members to members of their staff.

Only commissioned or warrant officers will be appointed as investigating officers or voting members of boards of officers, unless the specific directive under which the appointment is made provides otherwise or unless the member is appointed as a "member with special technical knowledge" (discussed below). AR 635-200, para. 2-7 (which is a "specific directive" under which appointments may be made), authorizes the appointment of noncommissioned officers in the grade of sergeant first class (E-7) and above, provided that the noncommissioned officer is senior to the respondent. Under AR 635-200, a majority of the members must be commissioned or warrant officers and the president must be a major or above.

The investigating officer or voting member of a board appointed to examine a soldier's conduct or performance of duty, or to make findings or recommendations that may be adverse to a soldier, will be senior in rank to that soldier, except where the appointing authority determines that it is impracticable because of military exigencies. The various types of board members and their responsibilities are discussed below.

1. President. The senior voting member of the board acts as president. The senior voting member appointed will be at least a major, except when the appointing authority determines that such appointment is impracticable due to military exigencies. The president controls all administrative aspects of the board. Also, unless a legal advisor has been appointed to the board, the president will rule on evidentiary and procedural matters and on challenges to any other board member. His rulings on evidentiary and procedural matters may be reversed by a majority vote of the voting members present.

2. Members. Persons specifically appointed to hear a case and to vote upon findings and recommendations are considered members of the board. All members of a formal board of officers are voting members unless designated otherwise by AR 15-6, the governing regulation, or the Memorandum of Appointment.

3. Recorder. The Memorandum of Appointment may designate a commissioned or warrant officer as recorder. His duties are similar to those of a prosecutor in a criminal trial, and he does not have a vote. If no recorder is designated in the appointing memorandum, the junior member of the board acts as recorder and he retains his vote on the proceedings.

4. Legal Advisor. A legal advisor is a nonvoting member of the board. Unless the specific directive under which the board is appointed requires a legal advisor, a judge advocate or civilian attorney who is a member of the judge advocate legal service may be appointed legal advisor under the following circumstances only:

   a. The Judge Advocate General authorizes the appointment;
   b. The general court-martial convening authority (GCMCA) directs the appointment; or
   c. An other than GCMCA who has a judge advocate assigned to his organization or a subunit thereof under an applicable Table of Organization and Equipment or Table of Distribution and Allowances authorizes the appointment.

The legal advisor will rule finally on challenges for cause against board members (except a challenge against the legal advisor) and on all evidentiary and procedural matters. The legal advisor may not dismiss any question or issue before the board.

5. Members With Special Technical Knowledge. Persons with special technical knowledge may be appointed as voting members or, unless there is a respondent, as advisory members without vote. Appointment may be appropriate where their expertise is needed to clarify technical and complex points. They need not be commissioned or warrant officers.

Once a member is appointed to the board, attendance at board sessions takes precedence over all other duties unless he is excused in advance by the appointing authority. In order to have a legally constituted board, however, a majority of the appointed voting members of the board must be present. This is called the quorum requirement.

When members are absent or challenged for cause, the board is still legally constituted as long as a quorum is present. If less than a quorum is present, the board is not properly constituted. To anticipate this problem, the Memorandum of Appointment may designate several "alternate members." The appointing memorandum should specify that these alternate members are to be called in the sequence listed if necessary to constitute a quorum in the absence of a regular member. The president calls alternate members without further consultation with the appointing authority. A member added thereby becomes a regular member with the same obligation to be present at all further proceedings of the board.

In addition to the quorum requirement, some regulations require that a certain minimum number of members be present to have a lawfully constituted board. For example, AR 635-200 requires at least three members for a board considering an enlisted soldier for separation. When a minimum number of members are required, both the quorum rule and the minimum number requirement must be fulfilled.

Respondent
(AR 15-6, paras. 1-7, 5-4)

A. General. A respondent may be designated when the appointing authority desires to provide a hearing for a person with a direct interest in the proceeding. The mere fact that an adverse finding may be made or adverse action recommended against a person, however, does not mean that he or she should be designated a respondent.

The appointing authority decides whether to designate a person as a respondent, except when designation of a respondent is --

1. Directed by authorities senior to the appointing authority; or
2. Required by other regulations (e.g., AR 635-200 separation proceedings) or directives or when procedural protections available only to a respondent under AR 15-6 are mandated by other regulations or directives.

B. Before Proceedings. When it is decided at the time a formal board is appointed that a person should be designated a respondent, the designation should be made in the Memorandum of Appointment.

C. During the Proceedings. The appointing authority may designate a respondent at any point in the proceedings. A respondent so designated will be allowed a reasonable time to obtain counsel and to prepare for subsequent sessions. The record of the proceedings to date and all evidence will be made available to the newly designated respondent and counsel. The respondent may request that witnesses who have previously testified be recalled for cross-examination.

D. When adverse administrative action is contemplated against an individual, including an individual designated as a respondent, based upon information obtained as a result of an investigation or board conducted pursuant to AR 15-6, the appropriate military authority must observe the following minimum safeguards before taking final action against the individual:

1. Notify the person in writing of the proposed adverse action and provide a copy (unless previously provided) of that part of the findings and recommendations on which the proposed adverse action is based.
2. Give the person a reasonable opportunity to reply in writing and to submit relevant rebuttal material.
3. Review and evaluate the person's response.

The requirement to refer the investigation to the affected individual does not apply when the adverse action contemplated is prescribed in regulations or other directives that provide procedural safeguards. For example, it would not be necessary to refer the investigation before issuing an adverse performance evaluation, because the regulations governing performance evaluations provide the necessary procedural safeguards.

Review of Function of Parties
(AR 15-6, paras. 5-1, 5-3)

As the presiding officer, a board president calls the board into session and, when no legal advisor has been appointed, rules on challenges and objections, although some rulings are subject to objection by other members. He may specify certain administrative details, such as the uniform for a hearing. A president directs and supervises the activities of the recorder to ensure that all business of the board is properly conducted and that the report of proceedings is submitted promptly.

Members, including the president, consider all evidence gathered during an investigation. After consideration of the evidence, they vote in closed session and make appropriate findings and recommendations.

A respondent and his counsel defend against any adverse matters presented during board proceedings.

The person with the greatest number of specifically assigned duties is the recorder. Before a hearing, he does the things necessary so that a prompt, full, and systematic presentation of the case is possible. To do this, he secures appropriate physical resources (room, paper, etc.), evidence, and witnesses; provides notice to appropriate parties; and, if required, arranges for a reporter and an interpreter. Subject to security requirements, a recorder arranges for the furnishing to and the use of evidence by the board and the respondent.

At a reasonable time prior to the hearing, the recorder gives notice of the hearing to witnesses, members, and the respondent. This notice must include the date, time, and location of the hearing. Oral notice is sufficient for all parties except the respondent, who is entitled to written notice. Also, the respondent may be entitled to a specific minimum amount of notice.

During the hearing, a recorder executes any order of the board. At the initial session, he reads and enters the Memorandum of Appointment into the record. At each session, he notes for the record the presence or absence of the members, the respondent, and respondent's counsel, if any. The recorder keeps or supervises the taking of a record of proceedings. The recorder also presents evidence and examines witnesses for the board in a manner similar to that of trial counsel in a court-martial. The recorder may make an opening argument before evidence is submitted to the board and a closing argument after all evidence has been submitted by both sides.

Although the duties of the recorder during a board proceeding are extensive, your SJA office will normally have a script or checklist to enable the recorder to properly present the case.

After the board's proceedings, the recorder either prepares or supervises the preparation of the record of proceedings and arranges for the authentication of the completed report. The completed report is authenticated when it is read and signed by all members of the board who are available at the time.

Respondent's General Rights
(AR 15-6, paras. 1-4, 3-5, 3-7c(5), 5-4, 5-6, 5-8, 5-10)

A respondent is entitled to certain procedural rights, which include the right to a hearing, the right to adequate prior notice, and the right to counsel. JAs should remember that this section deals with general regulatory provisions for boards of officers. Other regulations may specify additional rights depending upon the matter under investigation.

A respondent is entitled to written notice and to be given a reasonable time to prepare for the hearing. The recorder is responsible for providing this notice. This notice may be either personally delivered by the recorder, sent by messenger, or mailed. At a minimum, the notice must state the date, hour, and location of the hearing; the specific matter to be investigated; the respondent's rights with regard to counsel; the names and addresses of the government's witnesses; the fact that the recorder will endeavor to arrange for the presence of any available witnesses desired by the respondent upon timely written request; and the respondent's rights to be present, to present evidence, and to call witnesses.

A respondent, either a soldier or an Army civilian employee, is entitled to representation by counsel. If the soldier or Army civilian employee has not hired a private attorney at his own expense, he is entitled to be represented by a military counsel designated by the appointing authority. A respondent who declines the services of designated counsel is not entitled to have a different military counsel appointed.

A civilian employee, who is a member of a collective bargaining unit, has an additional right. Whenever the employee is a respondent or witness at a military proceeding and reasonably believes the inquiry could lead to disciplinary action against him, he is entitled to request and have present the exclusive representative of his collective bargaining unit.

Unless specified by the directive under which the board is appointed, counsel need not be a lawyer.

A government civilian employee may voluntarily act as counsel for another civilian employee or a military member. These services must be gratuitous, while on leave, or after normal hours of employment, and they must not conflict with regular duties.

Proceedings of an investigation or board are normally open to the public only when there is a respondent. In any case, the appointing authority may specify whether the proceedings will be open or closed. See AR 15-6, para. 3-5, for further guidance.

Except for good cause shown on the record, a respondent and his counsel may be present at all open sessions and may cross-examine adverse witnesses.

A respondent may testify on his own behalf. If he is suspected of an offense punishable by court-martial, he cannot be interrogated or requested to make any statement without first being informed of the nature of the offense of which he is suspected and the fact that any statement made by him may be used as evidence against him in a trial by court-martial. This warning is required by Article 31, Uniform Code of Military Justice. The respondent may also elect to remain silent, and no adverse inference can be drawn from his failure to testify.

After all evidence is received, the investigating officer or board members consider it in closed deliberations and arrive at their findings and recommendations.

Part 1. Witnesses
(AR 15-6, paras. 3-1, 3-6, 3-7, and 4-2)

Investigating officers and boards generally do not have subpoena power over civilian witnesses. A civilian who agrees to appear voluntarily may be issued invitational travel orders that entitle the witness to be reimbursed for expenses. Soldiers and government employees may be ordered (subject to rules against self-incrimination) to testify by their commander or supervisor.

An informal investigation or board may use whatever method it finds most efficient and effective to acquire relevant information. A board may divide witnesses, issues, or evidentiary aspects of the inquiry among the members for individual investigation and development and hold no collective meeting until ready to review all the information collected to determine its completeness. Relevant information may be obtained by personal interview, correspondence, telephone inquiry, or other informal means.

In formal boards of officers, the government and respondent are entitled to call witnesses to testify under oath at a hearing. Either the president or recorder may administer the oath. Although direct evidence is preferable, evidence in the form of medical records, counseling statements, police reports, and other records may be considered, even if the preparer is available to testify. Nonetheless, given the preference for direct evidence, if a requested witness is reasonably available, he should generally be produced. When a witness, subject to military control, is material to a case, his commander generally determines his availability.

When a board is convened under a directive other than AR 15-6, that directive should also be reviewed to determine whether it contains different rules on the introduction of evidence and proof of facts.

A military witness or military respondent will not be compelled to incriminate himself, to answer any question the answer to which could incriminate him, or to make a statement or produce evidence that is not material to the issue and that might tend to degrade him. A witness or respondent who is not subject to the UCMJ will not be required to make a statement or produce evidence that would deprive him of his right against self-incrimination under the fifth amendment of the U.S. Constitution.

If it appears appropriate and advisable, a board must explain to a witness his right against self-incrimination. If a witness declines to answer a question on these grounds, the witness must specifically state that his or her refusal is based upon these grounds. The investigating officer or board will decide, after consultation with the legal advisor or, if none, the servicing JA (unless impracticable to do so), whether the reason for refusal is well taken. If it is not, a witness who is subject to military authority may be ordered to answer.

Rules of Evidence
(AR 15-6, paras. 3-4, 3-6, 5-1)

Because board proceedings are administrative and not judicial in nature, they need not adhere to the rules of evidence for court proceedings. Subject only to some specific limitations discussed herein, anything (oral or written) that in the minds of reasonable persons is relevant and material to an issue may be accepted as evidence. As discussed above, however, there is a preference for direct testimony. Consequently, when a requested witness is reasonably available, the witness should generally be called.

All evidence will be given such weight as the circumstances warrant. Admissibility is ruled upon finally by the legal advisor, if one is appointed. If a legal advisor is not appointed, admissibility is ruled upon by the president in open session, subject to objection by any member. Upon a member's objection to the president's ruling, admissibility is determined by a majority vote of the voting members present. A tie vote upholds the president's ruling.

Unless agreed to by both the respondent and the recorder, no evidence concerning the results of, taking of, or refusal to take a polygraph (lie detector) test can be received in evidence or considered by a board or investigating officer.

In addition, the following are examples of evidence that is not admissible before a board or investigation: privileged communications (attorney-client; penitent-clergyman; husband-wife), "off the record" statements, required statements regarding disease or injury, involuntary admissions, and bad faith unlawful searches.

A bad faith unlawful search is one known to be illegal by the searcher at the time of the search; for example, a

commander who knows there is no probable cause to search a soldier would be engaging in a bad faith unlawful search. Such evidence is acceptable only if it can reasonably be determined by the legal advisor or, if none, by the investigating officer or president, that the evidence would inevitably have been discovered. In all other cases, evidence obtained as a result of any search or inspection may be accepted, even if it has been or would be ruled inadmissible in a criminal proceeding.

MISCELLANEOUS MATTERS
(AR 15-6, para. 5-7)

Challenges

The respondent may challenge the legal advisor and any voting member of the board. Only challenges for cause are permitted, and the only basis for such a challenge is a lack of impartiality by the challenged members. No peremptory challenge is permitted.

A challenge should be made as soon as the respondent or his counsel knows that grounds exist. If the board has not yet convened, the challenge should be presented to the appointing authority for his or her ruling. If the board is in session, the legal advisor will decide on the challenge. If a legal advisor has not been appointed or if the legal advisor is challenged, the president will rule on all challenges. If the president is challenged and a legal advisor has not been appointed, the next senior, unchallenged voting member of the board will decide the challenge.

If a challenge for cause is sustained, the challenged member is excused and the remaining members constitute the board. If, after challenges, additional members are needed to have a legal board, alternate members may be called by the president or additional members may be appointed by the appointing authority. The members added to the board are, of course, subject to challenge for cause.

Findings and Recommendations
(AR 15-6, Section II, paras. 3-9 and 3-12)

A board of officers must first make findings of fact. To the best of its ability, a board of officers must fix dates, places, persons, and events, definitely and accurately. They should answer such questions as: What occurred? When did it occur? How did it occur? and Who was involved (and the extent of their involvement)? A board should give exact descriptions and values for any property involved in an investigation. These findings must be based upon the evidence.

A finding is a clear and concise statement of a fact that can be readily deduced from evidence in the record. Unless another directive or an instruction of the appointing authority establishes a different standard, the finding of investigations and boards governed by AR 15-6 must be supported by a greater weight of evidence than supports a contrary conclusion; that is, evidence that, after considering all evidence presented, points to a particular conclusion as being more credible and probable than any other conclusion.

In addition to findings, a board makes recommendations. A recommendation must be warranted by the findings and generally covers pecuniary, disciplinary, and corrective phases of the investigated matter.

The types of findings and recommendations required must be clearly stated in the Memorandum of Appointment. These instructions define the outer limits of the board's power.

Unless another directive specifies otherwise, a majority vote of the voting members present determines questions before the board. In the case of a tie, the president's vote is the determination of the board.

Normally, board members will agree on the findings and recommendations. If there is disagreement as to the findings, the recommendations, or both, a minority report may be submitted. Reasons for the minority report must be clearly stated in the report of proceedings.

Report of Proceedings
(AR 15-6, paras. 2-2, 3-13 et. seq.)

The appointing authority is responsible for making available necessary clerical assistance. The recorder prepares the report of proceedings or supervises its preparation. Employment of civilian contract reporters is allowed only for a formal board and only if authorized by a specific directive under which the board is appointed. A contract reporter will not be employed if a government reporter is available. If the regulation under which a board was appointed does not require a particular form or character of report, the report of proceedings is prepared on DA Form 1574 [Report of Proceedings by Investigating Officer (Board of Officers)]. If a verbatim record of the proceedings is required, the DA Form 1574 will be attached as an enclosure. Reports of board proceedings are normally prepared in duplicate, with an additional copy for each respondent.

Reports of proceedings are authenticated by the recorder's signature and the signature of all board members present at deliberations. If any person cannot authenticate because of death, disability, or absence, or refuses to do so, the reason is stated in the report of proceedings. After authentication, all copies of the report of proceedings are forwarded to the appointing authority for his or her final action.

Legal Review

(AR 15-6, para. 2-3)

AR 15-6 does not require that investigations conducted under its provisions receive legal review. Nonetheless, appointing authorities are encouraged to obtain legal review of investigations that involve serious or complex matters. Additionally, other specific directives may require legal review. For example, AR 635-200, para. 2-6, directs that all separation actions in which limited use evidence was introduced and all actions containing a recommendation that the respondent receive an other than honorable discharge must be reviewed by a judge advocate.

Legal review under AR 15-6 will address the following issues (remember, when the investigation was initiated under a specific directive, if that directive provides a standard for legal review, that standard must be followed):

(1) Whether the proceedings comply with legal requirements.
(2) What effects any errors would have.
(3) Whether sufficient evidence supports the findings of the investigation or board or those substituted or added by the appointing authority.
(4) Whether the recommendations are consistent with the findings.

Appointing Authority Actions
(AR 15-6, paras. 2-3 and 3-19)

Unless otherwise provided by another directive, the appointing authority is neither bound nor limited by the findings and recommendations of an investigation or board. Therefore, when an investigation or board is conducted solely under the provisions of AR 15-6, the appointing authority may take action that is less favorable than the board or investigating officer recommended.

Additionally, the appointing authority may consider any relevant information in making his decision, to include adverse information that was not considered by the board.

The appointing authority may also direct the investigating officer to conduct additional investigation or to make additional findings or recommendations. As discussed, the appointing authority's discretion to take any of these additional actions may be limited when the investigation has been appointed pursuant to some directive other than AR 15-6.

NATIONALITY

I. Dual Nationality

1. Definitions.

Alien. Any person not a citizen or national of the United States. 8 U.S.C. § 1101 (a)(3).

Allegiance. "A citizen or subject owes an absolute and permanent allegiance to his government or sovereign, or at least until, by some open and distinct act, he renounces it and becomes a citizen or subject to another government or another sovereign. . . . An alien, while domiciled in country, owes a local and temporary allegiance, which continues during the period of his residence." United States v. Tomoya Kawakita, 96 F.Supp. 824, aff'd 190 F.2d 506, aff'd 343 U.S. 717, reh'g denied 344 U.S. 850 (1951).

Citizen. Not defined in the Immigration and Nationality Act of 1952, as amended. Although the term "national" is broader than the term "citizen," both terms are used interchangeably. The Fourteenth Amendment provides that "[all persons born or naturalized in the United States, and subject to the jurisdiction thereof," are citizens.

National. A person owing permanent allegiance to a state. 8 U.S.C. § 1101(a)(21).

National of the United States. A citizen of the United States or a person who, though not a citizen of the United States, owes permanent allegiance to the United States. 8 U.S.C. § 1101(a)(22).

Naturalization. The conferring of nationality of a state upon a person after birth by any means whatsoever. 8 U.S.C. § 1101(a)(23).

2. Dual Nationality.

The acquisition of citizenship depends entirely on municipal law and is not governed by international law. Tomasicchio v. Acheson, 98 F.Supp. 166 (1951)

The United States is not a party to the Convention on Certain Questions Relating to the Conflict of Nationality Laws, signed at The Hague, 12 April 1930. According to Gerhard von Glahn, however, "states today follow in practice almost all of *[the Convention's] provisions, despite the absence of general conventional rules.*" The Convention provides, in part, the following: "It is for each State to determine under its own law who are its nationals. . ." (art. 1); "Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State" (art. 2); "[A] person having two or more nationalities may be regarded as its national by each of the States whose nationality he possesses" (art. 3); A state may not afford diplomatic protection to one of its dual nationals against a state also claiming the same national (art. 4).

In the Nottebohm Case (Liech. v. Guat.) 1955, the ICJ held that it is for every sovereign state to legislate rules for the acquisition of nationality; more than one state may confer nationality upon the same individual; and when two nationalities have been invoked, the ICJ will recognize the real and effective nationality based on several factors, such as the individual's habitual residence, the center of his interests, his family ties, his participation in public life, and the attachment he has shown for a given country and inculcated in his children.

3. Potential Problems Arising from Dual Nationality.

Upon returning to his country of origin, a dual national may be unable to leave or liable to military service.

A dual national may be liable to taxes in more than one state of nationality, depending on the laws of the countries concerned.

A dual national may not know which country may assert claims on his behalf or afford him diplomatic protection.

Access to classified information. Within the Department of Defense, only U.S. citizens are granted a security clearance, assigned to sensitive duties, or granted access to classified information unless competent authority determines that there are compelling reasons for an exception to this policy. Para 2-100, AR 380-67. Individuals who are not U.S. citizens or who claim both U.S. and foreign citizenship are not eligible for sensitive compartmented information (SCI). Para 3-501e, AR 380-67. A person who actively maintains dual U.S. and foreign citizenship may be disqualified for a security clearance if he engages in any of the conduct listed in para I-3b(1), AR 380-67, including possession and use of a foreign passport to enter a *sovereign state; service, or willingness to serve, in the armed forces of a foreign state; voting in a foreign election or receipt* of foreign honors, titles, financial compensation, or social welfare benefits from a foreign government; travel to or residence in a foreign state to fulfill citizenship requirements or obligations; maintenance of dual citizenship to protect financial interests in a foreign state; and registration with a foreign office, embassy, or consulate for military service or to obtain benefits. These disqualifying factors are mitigated if the claim of dual citizenship is with a country whose interests are not inimical to those of the United States and is based solely on the applicant's birth; the applicant has not actively maintained his foreign citizenship in the last ten years; and the applicant indicates that he will not do so in the future. Military service in the armed forces of a foreign state is mitigated if the foreign state's interests are not inimical to those of the United States and such service was officially sanctioned by the United States. Para I-3c(1) and (2), AR 380-67.

4. Solutions.

The U.S. may be a party to an international agreement that addresses the problem. Since 1868, the U.S. has entered into bilateral agreements permitting immigrants to voluntarily renounce their original nationality upon becoming U.S. citizens, thus eliminating all but one nationality.

According to the Protocol Relating to Military Obligations in Certain Cases of Double Nationality, signed at The Hague on 12 April 1930, and which entered into force for the U.S. on 25 May 1937, "A person possessing two or more nationalities who habitually resides in one of the countries whose nationality he possesses, and who is in fact most closely connected with that country, shall be exempt from all military obligations in the other country or countries. This exemption may involve the loss of the nationality of the other country or countries."

The U.S., Argentina, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Honduras, Nicaragua, and Panama are parties to the Convention on the Status of Naturalized Citizens Who Again Take Up Their Residence in the Country of Their Origin. It provides, in part, that if a native of any of the countries signing the convention and naturalized in another again resides in his native country without intending to return to the country where naturalized, he will be deemed to have reassumed his original citizenship and to have renounced the citizenship acquired by naturalization. The intention not to return will be presumed when the naturalized person has resided in his native country for more than two years absent evidence to the contrary. But see Schneider v. Rusk, 377 U.S. 163 (1964) (holding that a statutory provision which denationalized naturalized citizens who returned to their native countries and lived there for three years unconstitutionally discriminated against naturalized citizens).

There are two doctrines that may apply. The doctrine of dominant nationality provides that a dual national is deemed a national of the state where domiciled. The doctrine of nonresponsibility of states for claims of dual nationals provides that a dual national cannot make a country to which he owes allegiance a defendant before an international tribunal.

II. Loss of Nationality

Expatriation. Expatriation refers to an individual's voluntary renunciation of one or more nationalities. A United States citizen may legally terminate his nationality by unilaterally renouncing it without the consent of the United States. Shanks v. Dupont, 28 U.S. 242 (1830). A United States citizen loses his citizenship when he unambiguously and voluntarily renounces his citizenship. Renunciation of citizenship does not require acquisition of another citizenship. Davis v. District Director, Immigration and Naturalization Service, 481 F.Supp. 1178 (1979).

Denationalization. Denationalization refers to the means by which a state deprives one of its nationals of his nationality. It may occur by operation of law or after an administrative or judicial proceeding.

According to T. Alexander Aleinikoff in his article, "Theories of Loss of Citizenship," 84 Mich. L. Rev. 1471 (1985), the Supreme Court has "collapsed denationalization into expatriation." Before depriving a citizen of his citizenship, the U.S. must prove by a preponderance of the evidence (1) that the citizen committed an expatriating act as defined by statute; (2) that the citizen did so voluntarily; and (3) that the citizen intended to relinquish his citizenship. Vance v. Terrazas, 444 U.S. 252 (1980); Kahane v. Shultz, 653 F.Supp. 1486 (1987). See also Troy v. Dulles, 356 U.S. 86 (1958) (Congress may not prescribe loss of citizenship as punishment for desertion in time of war); Afroyim v. Rusk, 387 U.S. 253, 87 S.Ct. 1660 (1967) (Congress may not denationalize naturalized citizens solely because they move to a foreign country and vote in that country's elections).

Congress has set out all expatriating acts in 8 U.S.C. §1481(a). A person who is a national of the United States "shall lose his nationality by voluntarily performing any of the following acts with the intention of relinquishing United States nationality:" (1) becoming naturalized in a foreign state upon application after attaining the age of eighteen years; (2) swearing or affirming allegiance to a foreign state after attaining the age of eighteen years; (3) entering or serving in the armed forces of a foreign state if such armed forces are engaged in hostilities against the United States or such person serves as a commissioned or noncommissioned officer; (4) accepting, serving in, or performing the duties of any office under the government of a foreign state after attaining the age of eighteen years if such person acquires the nationality of that foreign state or such office requires an oath or affirmation of allegiance; (5) formally renouncing nationality before a diplomatic or consular officer of the United States in a foreign state; (6) making in the United States a written renunciation of nationality before an officer designated by the Attorney General whenever the United States is in a state of war and the Attorney General approves the renunciation as not contrary to national defense; and (7) committing any act of treason or sedition if and when convicted by a court-martial or by a court of competent jurisdiction.

TAB P
CRIMINAL LAW

Summer soldiers will be transferred before the sun goes down.
From Patton's Principles

Use the 2 PIECES OF BAD PAPER rule. *Everybody is entitled to one mistake, within reason.* But in today's volunteer Army--with its various procedural safeguards--there is little use for someone who repeatedly gets in trouble. Once a soldier gets his 2nd piece of "bad paper,"[1] consider getting rid of him. Don't keep him around and then have to deal with his problems (or chaptering or court-martialing him) once you're in a foreign country. Many CDRs have recently found themselves in the jungles of Panama and the deserts of the Middle East with soldiers they wished they had left at home. Do yourself, the command, and even the soldier a favor: separate him from the military while his service can still be called "honorable." NOW IS THE TIME TO WEED OUT THE POOR PERFORMERS!

GENERAL

Continuity of Garrison Criminal Law Support

A principal criminal law concern in preparing for deployment is that all soldiers be assigned or attached to a unit which can dispose of criminal and administrative actions that may arise during the deployment period.

Upon notification of deployment, the unit CDR should determine the need for attaching the unit to another organization. For example, a deploying company may be attached to a deploying battalion. The unit adjutant should then initiate a request for orders to accomplish attachment as directed by the unit CDR. The unit CDR must also determine the need to create a provisional rear detachment to which nondeploying soldiers may be attached during the period of deployment. If required, the unit adjutant should then initiate a request for orders to attach the rear detachment to another remaining at the camp, post, or station.

Finally, the CDR must determine which soldiers assigned to the deploying unit are deployable and which are nondeployable. Judicial action, whether by military or civil authorities, generally makes a soldier nondeployable for exercises, although probably not for actual combat operations. There are also administrative reasons which may block deployment.

TC should provide a monthly roster to the SJA, indicating those soldiers who are nondeployable for legal reasons. Counsel should also advise CDRs of those soldiers who are not themselves the subject of legal action, but who are required to participate in legal proceedings (such as witnesses or court or board members). The decision as to whether these soldiers will deploy is the CDR's, usually made after coordination with his TC.

The unit adjutant should initiate procedures to obtain the release of soldiers in confinement whom the CDR requests be made available for deployment. The adjutant should also initiate a request for orders to attach nondeploying soldiers to a unit remaining at the camp, post, or station.

Deployment Location and Duration

Criminal law issues will be dictated, for the most part, by two factors - the deployment location and the deployment duration.

Deployment Location.

As noted in TAB C, International Agreements, the location of the overseas exercise is crucial. Reference must be made to Treaties in Force in order to determine if a stationing arrangement or some other form of agreement is in effect between the US and the HN. If no such agreement exists, the HN may attempt to exercise exclusive criminal jurisdiction over US soldiers who violate HN laws. If a SOFA is in effect, the foreign criminal jurisdiction arrangement must be ascertained. In either event, a Country Law Study of the HN should be obtained. The deploying soldiers must then be briefed concerning the HN criminal legal system and the foreign criminal jurisdiction arrangement, if one exists. The briefing will not only inform the soldier of the law, but also act as a significant deterrent.

Another issue that must be considered is the question of whether the HN will allow CDRs to exercise UCMJ jurisdiction, either by nonjudicial punishment or court-martial, within its territory. This issue must be addressed prior to deployment and arrangements made for resolving cases elsewhere if the HN objects to this exercise of US sovereignty.

Deployment Duration.

The period of time US soldiers will be deployed overseas is critical when making the determination as to where military justice actions will be handled. Will cases be tried at the deployment location? Will all cases be delayed until the unit returns to CONUS? Or, will individual soldiers be returned to CONUS to stand trial? Regardless of the decision made concerning the place of trial, the resulting logistical problems may prove to be substantial.

(a) Trial in the Host Nation.

If cases are to be tried in the HN, court personnel, such as the military judge, court reporter, and, possibly, even the defense counsel, must be detailed and brought to the area. Will the court members be selected from those officers (and possibly enlisted personnel) already deployed as part of the exercise? Where will the actual trial take place--in a tent? How will all of the pretrial procedural requirements be accomplished?

(b) Trial in CONUS.

In the alternative, if the cases are to be tried in CONUS, either individually, on a case by case basis, or upon redeployment

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[1]Several examples: 2 Arts. 15; a letter of reprimand and an Art. 15; a counseling statement and a summary court-martial; and so on. Naturally, each case must be determined on its own merit, and this is certainly not intended to take away the commander's discretion. Be conscious of improper command influence, and use the 2 PIECES OF BAD PAPER rule as a red flag to look more closely at a soldier's performance.

of the entire unit, other problems will arise. If an individual accused is returned for trial before the entire unit redeploys, will any military witnesses, perhaps essential personnel, also be returned in order to testify at the trial? If there are local national civilian witnesses, how will their testimony be obtained? Will the presence of these individuals be required by the military judge? Is the SJA element prepared to take their depositions?

On balance, subject to witness availability, it would appear that delaying trials until redeployment, if possible, is clearly the better alternative. Other problems must also be considered, however. If an accused is taken into custody by HN authorities, does a Designated Commanding Officer exist, and how will the custody of the accused be monitored? How will courts pending at the time of deployment be handled? Will speedy trial problems be encountered if a nondeployable accused in pretrial confinement is approaching the 90 day limit? Finally, have rear detachment CDRs been given UCMJ authority so that pending actions can be resolved expeditiously?

Criminal law issues are certain to occur within the context of overseas exercise deployments. Accordingly, careful predeployment preparation is certain to pay significant dividends.

COMBAT CRIMINAL LAW ISSUES

This section of the HANDBOOK addresses criminal law problems associated with combat and, specifically, wartime related offenses.[2]

Time of War. Several reasons mandate a determination of the existence of a "time of war":

1. Certain offenses can occur only during time of war (Arts. 101, 105, and 106);
2. Certain offenses are punishable by death only during time of war (Arts. 86, 90, and 113; wartime is an aggravating factor for the purpose of death sentences for arts. 118 and 120); and
3. Time of war is an aggravating factor for drug offenses, malingering, and offenses by a sentinel.
4. Para 5{B}{2}{IV}, Part V, MCM, permits a CDR to reduce a soldier two grades pursuant to Art 15, UCMJ, during time of war or national emergency if the SECARMY determines that circumstances require lifting the 1 grade reduction limitation.

Definition

The Manual for Courts-Martial (MCM) defines "time of war" as ". . . a period of war declared by Congress or the factual determination by the President that the existence of hostilities warrants a finding that time of war exists." The definition applies only to the following portions of the MCM: the aggravating circumstances that must be present to impose the death penalty (R.C.M. 1004(c)(6), the punitive articles (MCM 1984, Part IV), and nonjudicial punishment (MCM, 1984, Part V).

In applying the definition of "time of war," the Court of Military Appeals (CMA) has held that the war need not always be formally declared. Whether a "time of war" exists depends upon the purpose of the specific article in which the phrase appears, and on the circumstances surrounding the application of the article. There are two specific applications of this phrase.

1. Persons serving in, or accompanying, the force are not subject to court-martial jurisdiction, except during time of war. In US v. Averette[3], CMA held that, in order for the military courts to have jurisdiction over civilians, Congress had to issue a formal declaration of war.
2. Art. 43, UCMJ, extends the statute of limitations for offenses committed in time of war.y[4] The specific provisions follow:

   a. There is no statute of limitations for the crimes of Desertion, Absence Without Leave, Aiding the Enemy, Mutiny, or Murder, and persons accused of these crimes may be tried and punished anytime (UCMJ art. 43(a)).
   b. The President or Service Secretary may certify particular offenses that should not go to trial during a time of war if prosecution would be inimical to national security or detrimental to the war effort. In these cases, the statute of limitations may be extended to six months after the end of hostilities (UCMJ art. 43(c)).
   c. The statute of limitations is also suspended for three years after the end of hostilities for offenses pertaining to fraud, offenses involving real property, and offenses relating to contracts.[5]

Determination of "Time of War." CMA has established a factual test to determine whether a time of war exists and has articulated several factors it will look to in making such an analysis.

1. There must be armed hostilities against an organized enemy.[6]

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[2]By nature, combat related offenses are unusual to the normal JA practice of military law. Thus, they require special attention, research, and ingenuity in prosecution and defense. While some cites are provided herein, sources such as the UCMJ and MCM are essential to proper charging. For historical perspective, one should see W. Winthrop's Military Law and Precedents (1920), and E. Samuel's An Historical Account of the British Army and of the Law Military (1816).

[3] 19 U.S.C.M.A. 363, 41 C.M.R. 363 (1970).

[4]CMA held that Vietnam was a time of war for statute of limitations purposes. US v. Anderson, 38 C.M.R. 386 (1968).

[5]UCMJ art. 43(f). The date hostilities end is proclaimed by the President or established by a joint resolution in Congress.

[6]See US v. Shell, 23 C.M.R. 110 (1957).

2. There must be significant movement to and numbers of US forces in the combat area.[7]
3. There must be a large number of casualties inflicted by either party to the conflict.[8]
4. There must be legislation, executive orders, or proclamations concerning the hostilities, indicative of a time of war.[9]
5. A ferocity of combat must exist.[10]
6. There must be substantial suffering by the parties to the conflict.[11]
7. There must be a major impact on the nation caused by the conflict in question.[12]

CMA rejected the notion that there is a geographical component to the "time of war" in the sense that absence from the combat zone at the time of an offense does not prevent the offense from occurring in "time of war." For example, in a case in which an accused absented himself without leave from Fort Lewis, Washington, during the Korean conflict, CMA held that the Korean conflict was a war within the meaning of UCMJ, art. 43(a) and that the accused's geographical location at the time of the offense was irrelevant. "In either instance, the Armed Forces are deprived of a necessary--perhaps vitally necessary--combat replacement."[13]

Applying the "Time of War" Requirement. Three offenses may occur only during time of war.

1. Improper use of a countersign (UCMJ art. 101) prohibits disclosing the parole or countersign to one not entitled to receive it and giving a parole or countersign different from that authorized by the command.
2. Misconduct as a prisoner (UCMJ art. 105) makes it criminal to improve one's position as a prisoner (a) to the detriment of other prisoners[14] and (b) contrary to law, custom or regulation. Art. 105 also makes criminal the maltreatment of prisoners while the accused is in a position of authority.
3. Spying imposes a mandatory death penalty upon those who lurk, act under false pretenses to collect, or attempt to collect information for conveyance to the enemy.[15]

The MCM provides that five offenses warrant imposition of the death penalty in time of war. These offenses are not capital crimes in peacetime, but, because commission of these offenses can place entire units in jeopardy, the death penalty may be imposed to deter soldiers from committing these offenses. These five offenses are discussed below.

1. Desertion in time of war normally occurs when the accused leaves his unit or place of duty with either the intent to remain away permanently or with the intent to avoid hazardous duty or to shirk important service. The last execution for desertion came during World War II.[16]
2. Commission of one of three separate acts--striking, assaulting, or disobeying a superior commissioned officer--constitutes a violation of Art. 90, UCMJ (Assaulting or Willfully Disobeying a Superior Commissioned Officer).
3. Misbehavior of a sentinel (UCMJ art. 113) punishes soldiers who are found drunk or asleep on their posts or who leave their posts before being properly relieved.
4. Rape is a capital offense in both wartime and peacetime. The elements of the crime are the same in both situations, but the fact that a rape occurs during wartime provides one of the aggravating factors that must be present before a court may impose the death penalty.
5. Homicide (UCMJ art. 118) is another offense which may be a capital offense in wartime and peacetime. As in the instance of wartime rape, homicide may be aggravated by the fact of its commission in wartime, allowing the court to impose the death penalty.

"Time of war" is a factor which increases the sentence for certain offenses. The maximum punishments for drug offenses, malingering, and loitering while serving as a sentinel are increased when committed in time of war.

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[7] See Averette, 41 C.M.R. 363 (1970).

[8] Id.

[9] See Bancroft, 11 C.M.R. 5 (1963).

[10] Averette, at 365.

[11] Id.

[12] Id.

[13] See Ayers, 15 C.M.R. at 227 (1954).

[14] For example, reporting plans of escape, secret food and arms caches, etc. An escape that causes injury to fellow prisoners does not fall within the ambit of this offense.

[15] UCMJ art. 106. Spying does not violate the law of war. "Spies are punished, not as violators of the law of war, but to render that method of obtaining information as dangerous, difficult, and ineffective as possible." (FM 27-10, para 77).

[16] See Slovik, E. Theatre of Operations CMCO No. 5555.

Offenses Unique to a Wartime Environment. Certain violations of the UCMJ penalize conduct unique to a combat environment. As described above, several offenses may occur only in time of war or have increased punishments in time of war. The following crimes need not occur in time of war to be criminal, but they have elements that may occur only in a wartime situation.

Misbehavior Before the Enemy. Art. 99, UCMJ, is an amalgamation of nine different offenses and is meant to cover all offenses of misbehavior before the enemy. UCMJ, article 134 is not a catch-all designed to apply to these types of violations. Each of these crimes must be committed before, or in the presence of, the enemy.

"Enemy" Defined. Enemy includes forces of the enemy in time of war, or any hostile body that our forces may be opposing, such as a rebellious mob or a band of renegades, and includes civilians as well as members of military organizations.[17]

"Before the Enemy" Defined. To be before, or in the presence of, the enemy, one must stand in close tactical, not physical, proximity to the foe. CMA has defined the concept as follows:

It may not be possible to carve out a general rule to fit all situations, but if an organization is in a position ready to participate in either an offensive or defensive battle, and its weapons are capable of delivering fire on the enemy within effective range of the enemy weapons, then that unit is before the enemy.[18]

In applying this definition, courts have held that a member of a front line platoon, a member of a mortar unit supporting friendly troops, and a soldier running away near friendly artillery units less than six miles from the front lines were all "before the enemy." The definition and the court interpretations make this element dependent upon the circumstances surrounding the offense and leave the issue to the trier of fact.[19]

"Before the Enemy" Offenses.

a. An accused is guilty of running away if, without authority, he leaves his place of duty to avoid actual or impending combat. He need not actually run, but must only make an unauthorized departure.
b. Shamefully abandoning, surrendering, or delivering up command punishes cowardly conduct of CDRs who, without justification, give up their commands. Such acts can be justified only by the utmost necessity or extremity.
c. An accused endangers the safety of a command when, through disobedience, neglect, or intentional misconduct, he puts the safety of the command in peril.
d. Soldiers may not cast away arms or ammunition before the enemy for any reason. It is immaterial whether the accused acted to aid himself in running away, to relieve fatigue, or to show his disgust with the war effort.
e. Cowardly conduct consists of an act of cowardice, precipitated by fear, which occurs in the presence of the enemy. The mere display of the natural feeling of apprehension before, or during, battle does not violate this article; the gravamen of this crime is the accused's refusal to perform his duties or abandonment of duties because of fear.[20]
f. Quitting one's place of duty to plunder or pillage occurs when an accused leaves his place of duty with the intent to unlawfully seize public or private property. It is enough that the accused quit his duty with the specified purpose; he need not ever actually plunder or pillage to violate this subdivision of the article.
g. Causing false alarms includes the giving of false alarms or signals, as well as spreading false or disturbing rumors or reports. It must be proven that a false alarm was issued by the accused and that he did so without reasonable justification or excuse.
h. An accused willfully fails to do his utmost to encounter the enemy when he has a duty to do so and does not do everything he can to encounter, engage, capture, or destroy certain enemy troops, combatants, vessels or aircraft. An example of this offense might be a willful refusal to go on a combat patrol.
i. The failure to afford relief and assistance involves situations where friendly troops, vessels or aircraft are engaged in battle and require relief or assistance. The accused must be in a position to provide this relief without endangering his own mission and must fail to do so. The accused's own specific tasks and mission limit the practicable relief and assistance he can give in a particular battle situation.

War Trophies. Soldiers must give notice and turn over to the proper authorities, without delay, all captured or abandoned enemy property. Individuals failing to adhere to this requirement can be punished for three separate acts.
1. Failing to give notice or turn over property.[21]
2. Buying, selling, trading, or in any way disposing of, captured or abandoned property.
3. Engaging in looting or pillaging. Under a provision of the Assimilative Crimes Act, 18 USC section 13, violations of 26

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[17] US v. Monday, 36 C.M.R. 711 (A.B.R. 1966), pet. denied, 37 C.M.R. 471 (C.M.A. 1969)

[18] US v. Sperland, 5 C.M.R. 89, 91 (1952).

[19] During Urgent Fury, a soldier who refused to board a plane at Pope Army Airfield (Ft. Bragg) was charged with misbehavior before the enemy. The judge dismissed the charge (not "before the enemy"). The accused was convicted of missing movement by design.

[20] See Smith, 7 C.M.R. 73 (A.B.R. 1953), and Barnett, 3 C.M.R. 248 (A.B.R. 1951).

[21] See Morrison, 492 F.2d 1219 (1974). Captured or abandoned property (here, money) discovered during wartime becomes the property of the government whose forces made the discovery.

USC 5844, 5861 (unlawful importation, transfer, and sale of a dangerous firearm) may be charged as violations of the UCMJ, art. 134.

Private Property. As a general rule, private property may always be requisitioned or destroyed if military necessity so requires. The goal during combat is to avoid unnecessary destruction of such property, as well as disciplinary problems, by training soldiers in the law regarding private property. This training will aid the CDR in accounting for property and in paying for only proper claims.

Wrongful destruction of private property violates UCMJ, art. 109. This article prohibits either willful or reckless destruction or damage to private property and carries a maximum punishment of a dishonorable discharge, total forfeiture of all pay and allowances, and confinement for five years.

A wrongful taking of private property violates UCMJ, art. 121. There are no provisions in this article that apply, specifically, to wartime situations. The maximum punishment for violation of this provision is dishonorable discharge, forfeiture of all pay and allowances, and confinement for five years.

A Detailed Analysis of Potential Wartime Offenses.

Mutiny or Sedition (UCMJ art. 94). Mutiny and sedition consist of four separate offenses, all of which require the endangerment of established military or civilian authority. Neither mutiny or sedition has to occur during "time of war" to be punishable by death.

Mutiny requires an intent to usurp or override military authority and can be committed by either creating violence or a disturbance or by refusing to obey orders or perform duties. While creating violence or a disturbance can be accomplished either alone or with others, a refusal to obey orders or perform duties requires a concert of purpose among two or more people to resist lawful military authority. The resistance may be nonviolent or unpremeditated and may consist only of a persistent refusal to obey orders or to perform duties.

Sedition is a separate offense and requires a concert of action among two or more people to resist civil authority through violence or disturbance. Failure to prevent, suppress, or report a mutiny or sedition also constitutes a crime.

Failure to prevent these acts requires that the mutiny or sedition took place in the accused's presence and that he failed to do his utmost to prevent and suppress the insurrection. If the accused fails to use the force, to include deadly force, necessary to quell the disturbance under the circumstances, he has failed to do his utmost.

The accused's failure to take all reasonable means to inform his superiors of an offense of mutiny or sedition, which he had reason to believe was taking place, constitutes the fourth offense under article 94. The accused must take the most expeditious means available to report the crime. Whether he had reason to believe these acts were occurring is judged by the standard of the response of a "reasonable man" in similar circumstances.

Subordinate Compelling Surrender (UCMJ art. 100). The death penalty can be given for the offense of compelling a CDR to surrender, an attempt to compel surrender, and for striking the colors or flag to any enemy without proper authority. Compelling surrender involves the commission of an overt act by the accused that was intended to, and did, compel the CDR of a certain place, vessel, aircraft or other military organization to give it up to the enemy or to abandon it. An attempt is comprised of the same elements, except the act must only "apparently tend" to bring about the compulsion of surrender or abandonment, and the overt act must amount to more than mere preparation. These offenses are similar to mutiny, except that no concert of purpose is required to be found guilty.

To be guilty of striking the colors or the flag requires that the accused make, or be responsible for, some unauthorized offer of surrender to the enemy. The offer to surrender can take any form and need not be communicated to the enemy. Sending a messenger to the enemy with an offer of surrender is sufficient to constitute the offense; it is not necessary for the enemy to receive it.

Improper Use of Countersign (UCMJ art. 101). A countersign is a word or procedure used by sentries to identify those who cross friendly lines; the parole is a word to check the countersign and is given only to those who check the guards and the CDRs of the guards. Two separate offenses fall within the ambit of article 101: disclosing the parole or countersign to one not entitled to receive it and giving a parole or countersign different from that authorized.

Those authorized to receive the parole and countersign must be determined by the peculiar circumstances and orders under which the accused was acting at a particular time. Revealing these procedures or words is done at one's peril, despite the intent or motive at the time of disclosure. Negligence or inadvertence is no defense to the crime, nor is it excusable that the accused did not know the person to whom the countersign or parole was given was not entitled to receive it.

Forcing a Safeguard (UCMJ art. 102). A safeguard is a guard detail or written order established by a CDR for the protection of enemy and neutral persons, places, or property. The purpose of a safeguard is to pledge the honor of the nation that the person or property will be respected by US forces. A belligerent may not employ a safeguard to protect its own forces. A safeguard may not be established by the posting of guards or off-limits signs unless a CDR takes those actions necessary to protect enemy or neutral persons or property.

This offense is committed when the accused violates the safeguard and he knew, or should have known, of its existence. Any trespass of the safeguard is a violation of this article.

Aiding the Enemy (UCMJ art. 104). Five separate acts are made punishable by this article: aiding the enemy, attempting to aid the enemy, harboring or protecting the enemy, giving intelligence to the enemy, and communicating with the enemy.

Although this article does not prohibit aiding prisoners of war, it does make assisting or attempting to assist the enemy with arms, ammunition, supplies, money, or any other form of assistance a crime.

Harboring or protecting the enemy requires that the accused, knowing the person being helped is the enemy, and without proper authority, shields him from injury or other misfortune. The protection can take any form; physical assistance or deliberate deception will both violate the article.

An accused violates the prohibition against giving intelligence to the enemy by giving accurate, or impliedly accurate, information to the enemy. This is an aggravated form of communicating with the enemy, because the offense implies that the information passed has potential value to the opposition. The information need not be entirely accurate, nor must the passing of the information be directly from the accused to the enemy; however, the accused must have actual knowledge of his acts.

The final offense under this article is communication with the enemy. Any form of unauthorized communication, correspondence, or intercourse with the enemy is prohibited, whatever the accused's intent. The content or form of the communication is irrelevant, as long as the accused is actually aware that he is communicating with the enemy. Completion of the offense does not depend on the enemy's use of the information or a return communication from the enemy to the accused; the offense is complete once the correspondence issues--either directly or indirectly-- from the accused. Prisoners of war and citizens of neutral powers residing in, or visiting invaded or occupied territory can violate this article, as it applies to all persons, whether or not they are otherwise subject to military law.

Spying (UCMJ art. 106). This offense makes it a crime to act under false pretenses to collect, or attempt to collect, information for the enemy in areas in which people are working to aid the US war effort. The prosecution must prove that the accused intended to convey information to the enemy, but need not prove that the accused actually received information or conveyed it to the enemy. Anyone, military or civilian, may be tried for spying, unless they fall into the following categories.

1. Members of an armed force or civilians who are not wearing a disguise and perform their missions openly after penetrating friendly lines.
2. Spies, who after having returned to enemy lines, are later captured.
3. Persons living in occupied territory who report on friendly activities without lurking, and without acting clandestinely or under false pretenses. Such individuals may be guilty of aiding the enemy, however.

Misbehavior of a Sentinel (UCMJ art. 113). A sentinel who is found drunk or asleep on his post, or who leaves his post before being properly relieved, may suffer the death penalty if the offense is committed in time of war.

The definition of "drunk" comes from article 111, Drunken or Reckless Driving. A person is drunk when he is intoxicated sufficiently to "impair the rational and full exercise of the mental or physical faculties." The definition of "asleep" requires impairment of the sentinel's mental and physical condition, sufficient enough that, although not completely comatose, he is unable to fully exercise his faculties.

The sentinel's post is the area at which he is required to perform his duties. Straying from this area slightly does not amount to an offense, unless the departure would prevent the sentinel from fully executing his mission. A sentinel is posted when he is ordered to begin his duties. No formal order or ceremony is needed; it is enough that routine or standard operating procedures require the individual to be on post at a particular time. The term applies equally in garrison, in the field, or in combat when listening posts, observation posts, forward security, and other warning devices are used.

Malingering (UCMJ art. 115). Soldiers who feign illness, physical disablement, or mental impairment or who intentionally injure themselves in order to avoid duty are guilty of malingering. The offense punishes those who intend to avoid work. The severity and the method of infliction of the injury are immaterial to the issue of guilt.

Prosecutors must allege, and prove, the following elements to obtain a conviction for soldiers who intentionally injure themselves to avoid overseas duty.

1. The accused was ordered overseas for duty;
2. The accused knew of these orders;
3. In order to avoid complying with the orders, the accused injured himself in some manner.

The specification must allege that the injury was inflicted to avoid work, duty or service. In US v. Mamaluy, the accused injured himself in order to avoid confinement in the brig at Pearl Harbor Navy Base. The trial counsel alleged that the accused injured himself "for the purpose of avoiding confinement in the US Naval Base Brig." The defense contended that this phrase did not fairly state, or imply, that the injury was inflicted to avoid work, duty or service. The court held that the necessary element was fairly implied, as the accused's place of duty was the brig at Pearl Harbor and the specification protected him from any further prosecution on the same charge.

Offenses by a Sentinel (UCMJ art. 134). Sentinels are held to a high standard of conduct, especially in wartime. Thus, it is a criminal offense for a sentinel to loiter or wrongfully sit down on his post when that conduct is prejudicial to good order and discipline or brings discredit to the armed forces. These are criminal acts in peacetime and wartime; however, the maximum punishment is increased to a dishonorable discharge, forfeiture of all pay and allowances, and confinement for two years in time of war.

Straggling (UCMJ art. 134). Straggling applies in peacetime and combat to soldiers who, while accompanying their organization on a march, maneuver, or similar exercise wander away, stray, or become separated from their unit. Trial counsel must plead the specific mission or maneuver in the specification.[22]

[22] During Operation Urgent Fury, a platoon radio-telephone operator straggled behind the unit and eventually became so scared that he was found cowering in a ditch. He was charged with straggling (UCMJ art. 134) and endangering the safety of his platoon (UCMJ art. 99(3)).

SAMPLE TRANSFER OF JURISDICTION
(APPX Entry & Letter)

APPX 7 (LEGAL AFFAIRS) TO ANNEX E (PERSONNEL AND ADMIN) TO 1ST ID (MECH) REFORGER PLANNING DIRECTIVE (REAR DETACHMENT OPERATIONS)
REFERENCES:

a. AR 27-10 b. FT Riley Supplement to AR 27-10
c. AR 27-20 d. AR 27-40
e. AR 27-50 f. AR 210-40
g. AR 735-11 h. Manual for Courts-Martial, 1984

1. SITUATION. Basic Planning Directive.
2. MISSION. To provide legal services and support to the 1st ID(Mech) Rear (Prov) and FT Riley during REFORGER 86.
3. EXECUTION.
   a. General. Basic Planning Directive.
   b. Military Justice.
      (1) CDR, 1st ID (Mech), upon departure from FT Riley will:
         (a) Transfer General Court Martial Convening Authority (GCMCA) for 1st ID (Mech) Rear (Prov) to the Deputy Post CDR, FT Riley, Kansas, until his return from REFORGER 86.
         (b) Transfer all cases he has referred to trial to the Deputy Post CDR, FT Riley, Kansas, until his return from REFORGER 86.
      (2) Deputy Post CDR, FT Riley, will:
         (a) Assume command of FT Riley during the absence of the CDR, 1st ID (Mech) and FT Riley, for REFORGER 86.
         (b) Exercise GCMCA over all service members and units assigned or attached to the 1st ID (Mech) Rear (Prov), FT Riley, and the US Army Correctional Activity.
      (3) CDRs of all deploying Major Subordinate Commands (MSC), 1st ID (Mech), will:
         (a) Organize provisional headquarters and chain of command for rear detachments, as appropriate.
         (b) Provide G3, Force Development, unit organizational structure and chain of command for respective rear detachment NLT 1 Nov 1985.
         (c) Upon departure from FT Riley, transfer Special Court-Martial Convening Authority (SPMCA) over respective rear detachments to CDR, 937th Eng. Group.
         (d) Upon departure from FT Riley, transfer all cases they have referred to trial to the CDR, 937th Engineer Group, until their return from REFORGER 86.
         (e) Insure service members facing charges that have been referred to trial are not deployed on REFORGER 86.
      (4) The CDR, 937th Engineer Group, will exercise SPMCA over all MSC, 1st ID (Mech), rear detachments during the absence of MSC CDRs for REFORGER 86.
      (5) G3, Force Development, will:
         (a) Issue appropriate orders implementing the command structures of the 1st ID (Mech) Rear (Prov), and FT Riley.
         (b) Issue appropriate orders attaching all provisional MSCs and rear detachment personnel to the 937th Engineer Group for special court-martial jurisdiction.
      (6) SJA, 1st ID (Mech) and FT Riley, will:
         (a) Prepare letter transferring GCMCA to the Deputy post CDR for the signature of the CDR, 1st ID (Mech) and FT Riley, prior to his departure for REFORGER 86.
         (b) Prepare letter for MSC CDRs' signatures transferring SPCMCA to the CDR, 937th Engineer Group, prior to their departure for REFORGER 86.
         (c) Assist G3 in establishment of rear detachment jurisdiction and publication of appropriate attachment orders.
   c. Legal Assistance, Administrative Law, Claims.
      The SJA, 1st ID (Mech) and FT Riley, will maintain sufficient staffing to provide full legal support in all areas of responsibility to the 1st ID (Mech) Rear (Prov) and FT Riley during REFORGER 86.
4. SERVICE SUPPORT. Basic Planning Directive.
5. COMMAND AND SIGNAL. Basic Planning Directive.

Sample Letter Transferring Court-Martial Convening Authority.

SUBJECT: Order Transferring Special Court-Martial Jurisdiction.

1. Effective 0001 hours, _____ Jan 1986, I hereby order the transfer, to the CDR 937th Engineer Group, 1st ID (Mech), of special court-martial jurisdiction over all court-martial cases referred to trial by the command and all new cases coming into existence on, and after, the date of this order.
2. The departure of the _____(Brigade/DIVARTY/DISCOM) for REFORGER 86 causes the transfer of special court-martial convening authority.
3. The return of the _____(Brigade/DIVARTY/DISCOM) from REFORGER 86 will rescind this order.

Colonel, _____
Commanding

DESERT SHIELD
GENERAL ORDER 1

OPER/DESERT SHIELD/MSGID/ORDER/USCINCCENT
SUBJECT: DESERT SHIELD GENERAL ORDER
ACTIVITIES FOR US PERSONNEL SERVING IN CENTRAL COMMAND

1. This message transmits USCINCENT Desert Shield General Order No. 1. It is applicable to all us military personnel and to us persons serving with or accompanying the Armed Forces in the USCENTCOM aor deployed or acting in support of Operation Desert Shield. Commanders are directed to readdress this order to their units and ensure widest dissemination to the lowest levels of command.

2. Statement of military purpose and necessity. Operation Desert Shield places US Armed Forces into USCENTCOM AOR countries where Islamic Law and Arabic customs prohibit or restrict certain activities which are generally permissible in Western societies. Restrictions upon these activities are essential to preserving US - host nation relations and the combined operations of US and friendly forces. Commanders and supervisors are expected to exercise discretion and good judgement in enforcing this General Order.

3. THE FOLLOWING ACTIVITIES ARE PROHIBITED!
   a. Taking of war trophies.
   b. Purchase, possession, use or sale of privately owned firearms, ammunition, explosives, or the introduction of these items into the USCENTCOM AOR.
   c. Entrance into a mosque or other site of Islamic religious significance by non-moslems unless directed to do so by military authorities or by military necessity.
   d. Introduction, possession, use, sale, transfer, manufacture or consumption of any alcoholic beverage.
   e. Introduction, possession, transfer, sale, creation or display of any pornographic photograph, videotape, movie, drawing, book or magazine or similar representations. For purposes of this order, "pornographic" means any medium which displays human genitalia, uncovered women's breasts, or any human sexual act. It is intended to include not only "obscene items", but items of "art" which display human genitalia, uncovered women's breast or any human sexual act.
   f. The introduction, possession, transfer, sale, creation or display of any sexually explicit photograph, videotape, movie, drawing, book or magazine. For purposes of this order, "sexually explicit" means any medium displaying the human anatomy in any unclothed or semi-clothed manner and which displays portions of the human torso (i.e., the area below the neck, above the knees and inside the shoulder). By way of example, but not limitation, are body building magazines, swim-suit editions of periodicals, lingerie or underwear advertisement, and catalogues, as well as visual mediums which infer but do not directly show human genitalia, women's breasts, or human sexual acts.
   g. Gambling of any kind, including sports pools, lotteries and raffles.
   h. Removing, possessing, selling, defacing, destroying archeological artifacts, or national treasures.
   i. Selling, bartering or exchanging any currency other than at the official host-nation exchange rate.

4. This order is punitive. Persons subject to the uniform code of military justice may be punished under Art. 92, UCMJ for violating a lawful general order. Civilians accompanying the armed forces of the us may face adverse administrative action.

5. All persons subject to this order are charged with the individual duty to become familiar with and respect the laws, regulations, and customs of their host nation insofar as they do not interfere with the execution of their official duties. Individual acts of insensitivity or flagrant violations of host nation laws, regulations and customs may be punished as a dereliction of duty under Art. 92, UCMJ. Civilians accompanying the Armed Forces may face adverse administrative action.

6. Unit commanders and supervisors are charged to ensure all, repeat all, personnel are briefed on the prohibition of these activities.

7. Items which violate this General Order may be considered contraband and may be confiscated. Before destruction of contraband, commanders or law enforcement personnel should coordinate with their servicing staff judge advocate.

8. This General Order will expire upon the completion of Operation Desert Shield unless rescinded, waived or modified.

9. Because tolerance varies for some of these activities across the AOR, authority to waive or modify the prohibitions of this order relative to alcoholic beverages, sexually explicit materials and gambling is delegated to the designated commanding officers (DCO) for the respective host nation aor countries. (See Appendix A to CENTCOM reg 27-2; i.e. Saudi Arabia, Egypt and Oman rests with COMUSCENTAF; Bahrain and UAE rests with COMUSNAVCENT). Staff judge advocates for the designated commanding officers are to coordinate all waivers with the USCENTCOM Staff Judge Advocate.

TAB Q
THE LAW OF WAR (LOW)

General

The JA must be prepared both to advise commanders at all levels concerning LOW issues and to provide instruction to members of the command regarding customary international law and the essential provisions of the Hague and Geneva Conventions.[1] The following discussion highlights those areas of the LOW most critical to these specific JA responsibilities.

Targeting

General Principles. JAs must participate in targeting decisions. In Somalia, a JA was a key player in the daily targeting conferences. Three general principles form the basis for all targeting considerations undertaken in the absence of specific guidelines set forth under international and domestic law. **Learn these by heart (and apply them)!**

Military necessity: This principle justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible. **Military necessity is not an excuse for committing acts prohibited by the LOW, because military necessity was considered in the development of those prohibitions. In short, military necessity is no defense to the commission of war crimes!** FM 27-10, para. 3.

Unnecessary suffering: The LOW prohibits the use of weapons, projectiles, or other materials calculated to cause unnecessary suffering. FM 27-10, para. 34.

Proportionality: The loss of life and damage to property incidental to military action must not be excessive in relation to the concrete and direct military advantage expected to be gained. FM 27-10, para. 41.

Express Prohibitions of the LOW

The following measures are expressly prohibited by the law of war and are not excusable on the basis of military necessity:

a. Attack or bombardment of undefended locales or undefended civilians. This does not prohibit attack or bombardment of facilities directly supportive of the enemy's war effort, such as munitions factories and warehouses containing war material.
b. Attack or bombardment of medical units, facilities, individual medical personnel performing medical duties, or medical vehicles or aircraft transporting the wounded or sick.
c. Attack or bombardment of chaplains or religious facilities used for religious purposes.
d. Attack or bombardment within hospital or safety zones established under Art. 14 of the Geneva Civilians Conv. (GC) or neutral zones established under GC Art. 15.
e. Use or positioning of friendly medical units or facilities as a shield from attack.
f. Utilization of the Red Cross protective emblem by personnel, vehicles, aircraft, or facilities not engaged in medical or religious services.
g. Ordering that no quarter be given.
h. Killing or wounding of enemy who have surrendered or are incapacitated and incapable of resistance.
i. Using weapons which cause unnecessary suffering, prolonged damage to the natural environment, or poison weapons. This prohibition does not preclude the use of herbicides or riot control agents by US forces when authorized by the President of the US or his delegate. The U.S. has renounced all use of biological weapons.
j. Pillage or plunder of cities, towns, villages, or other properties. Art. 103, UCMJ (1984 Rev).
k. Treacherous killing or wounding. This prohibition applies to situations where the laws and customs of war require good

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[1]Navy and Marine Corps see:
SECNAVINST 3300.1A, Law of Armed Conflict (Law of War) Program to insure Compliance by the Naval Establishment, 2 May 80;
JAGINST 3300.2A, Law of Armed Conflict Resource Materials, 27 Oct 83;
MCO 3300.3, Marine Corps Law of War Program, 2 Aug 84;
FMFM 1-10, The Commander's Handbook on the Law of Naval Operations, Oct 89, and Anno. Supp., NWP 9 (Rev. A)/FMFM 1-10, 5 Oct 89.

faith between opposing forces as a matter of soldierly honor. Examples of treacherous killing include the killing of enemy troops after feigning surrender or showing a flag of truce; after falsely broadcasting an armistice or ceasefire; or through misuse of the Red Cross emblem. There is no prohibition against legitimate deceptions, such as feigned attacks, false radio traffic, dummy emplacement, or release of false information.

l. The taking of hostages.

m. Reprisals against persons or property protected by the Geneva Conventions, to include the wounded, sick, or shipwrecked, prisoners of war, detained personnel, civilians, their property, religious or cultural edifices, and items such as food stuffs and livestock essential to the survival of the civilian population.

n. Forcing a safeguard. Art. 102, UCMJ.

Procedures Required When Practicable

The following procedures are required unless military necessity dictates otherwise or the CDR lacks the means for effective compliance.

a. Warn the civilian populace prior to bombardments or attacks which will subject them to danger. This requirement does not apply to assaults (where surprise is critical) or bombardment of purely military targets.

b. Spare buildings dedicated to religion, art, science, or charity, historical monuments, hospitals, and other places where the wounded and sick are collected.

Precautions in Attack

The following precautions are mandatory and apply to all applications of combat power against hostile targets or forces:

a. Verify the military nature of the target or objective.

b. Use weapons or means which avoid unnecessary suffering, destruction, and civilian casualties.

c. Do not attack if the military advantage to be gained is not proportionate to the destruction inflicted.

d. Warn noncombatants in accordance with the procedures noted above.

Targeting Considerations

General. The SJA must be alert both to targeting principles embodied in the Hague and Geneva Conventions and to command decisions which, though legally supportable, may not be consistent with U.S. policy or common sense.

Determining Proper Targets. The determination of proper targets is particularly critical in operations other than war (OOTW). "Restraint" is a principle of OOTW. Recent experiences in Somalia suggest that US Forces may face "civilians" as unlawful combatants or used to mask attacks. Principal considerations in determining the propriety of targets are:

(1) Is it a military objective? Specifically, is the potential target a combatant, a defended place, or an object that makes an effective contribution to the enemy's military effort, and its destruction, capture, or neutralization offers a definite military advantage?

(2) Will the taking or destruction of the objective result in loss of civilian life and/or destruction of private property disproportionate to the military advantage to be gained? There are few absolutes in targeting. The JA must provide legal advice in this area only after a thorough review of the facts and a complete examination of all of the surrounding circumstances.

War Crimes

General. US policy on the the LOW is stated in DoD Directive 5100.77 (DoD Law of War Program). Except when properly determined by National Authority that it is not applicable, DoD Components shall comply with the LOW in the conduct of military operations and related activities in armed conflict.

Definition of War Crime. The term "war crime" is the technical expression for a violation of the LOW committed by any person or persons, military or civilian. Every violation of the LOW is a war crime.

Command Responsibility. CDRs are responsible for war crimes committed by their subordinates when any one of three circumstances applies:

(1) The CDR ordered the commission of the act;

(2) The CDR knew of the act, either before or during its commission, and did nothing to prevent or stop it;

or when

(3) The CDR should have known, "through reports received by him or through other means, that troops or other persons subject to his control [were] about to commit or [had] committed a war crime and he fail[ed] to take the necessary and reasonable steps to insure compliance with the LOW or to punish violators thereof."

JAs must keep their CDRs informed of their responsibilities concerning the investigation and prosecution of war crimes. The CDR must also be aware of his potential responsibility for war crimes committed by his subordinates.

Investigative Assets. Several assets are available to assist CDRs investigate suspected violations of the LOW. Investigations can be conducted with organic assets and legal support, using AR 15-6 or commander's inquiry procedures. (Command regulations, drafted IAW DoD Directive 5100.77, should prescribe the manner and level of unit investigation.) An investigation may also be conducted by the Criminal Investigation Division Command (CID). CID has investigative jurisdiction over suspected war crimes in two instances. The first is when the suspected offense is one of the violations of the UCMJ listed in Appendix B to AR 195-2, Criminal Investigation Activities. The second is when the investigation is directed by HQDA (para. 3-3a(7), AR 195-2).

In addition to CID, and organic assets and legal support, a CDR may have Reserve Component JAGSO teams available to assist in the investigation. JAGSO teams perform JA duties related to international law, including the investigation and reporting of violations of the LOW, the preparation for trials resulting from such investigations, and the provision of legal advice concerning all operational law matters. Other available investigative assets include the military police, counterintelligence personnel, and judge advocates.

Reports. WHEN IN DOUBT, REPORT. Report a "reportable incident" by the fastest means possible, through command channels, to the responsible CINC. A "reportable incident" is a possible, suspected, or alleged violation of the law of war. The reporting requirement should be stated not only in a "27 series" regulation or legal appendix to an OPLAN or OPORD, but in the unit TACSOP or FSOP. Normally, an OPREP-3 report established in Joint Pub 1-03.6, JRS, Event/Incident Reports, will be required.

Prevention of War Crimes. CDRs must take steps to ensure that members of their commands do not violate the LOW. The two principal means of effecting this goal are to recognize the factors which may lead to the commission of war crimes and to train subordinate commanders and troops to standard concerning compliance with the law of war and proper responses to orders that violate the LOW.

Awareness of the factors that have historically led to the commission of war crimes allows the command to take preventive action. The following is a list of some of the factors that the command and the JA should monitor in subordinate units.
(1) High friendly losses.
(2) High turnover rate in the chain of command.
(3) Dehumanization of the enemy (derogatory names or epithets).
(4) Poorly trained or inexperienced troops.
(5) The lack of a clearly defined enemy.
(6) Unclear orders.
(7) High frustration level among the troops.

Soldiers who receive unclear orders or who receive orders which clearly violate the LOW must understand how to react to such orders. Accordingly, the JA must ensure that soldiers receive instruction in this area.

Troops who receive unclear orders must insist on clarification. Normally, the superior issuing the unclear directive will make it clear, when queried, that it was not his intent to commit a war crime. If the superior insists that his illegal order be obeyed, however, the soldier has an affirmative obligation to disobey the order and report the incident to the next superior CDR, military police, CID, nearest JA, or local inspector general.

Chemical Weapons

General. International and domestic law place severe limitations on the use of chemical and bacteriological weapons in armed conflict. The US condemns the use of all biological and bacterial agents under any circumstances. The US position on the use of chemical weapons and riot control agents (RCA) is evolving.

Limitations. The Geneva Protocol of 1925, to which the US has been a party since 1975, prohibits the use of "asphyxiating, poisonous or other gases" in international armed conflicts. The US, like many other parties to the treaty, reserved the right to use chemical weapons in response to a chemical attack. Only the President (or his delegate) could order such a response. In 1993, however, the US signed the Chemical Weapons Convention (CWC). Although the US is not yet a party to the CWC, the President submitted the treaty to the Senate for its advice and consent in November 1993. Under the terms of the CWC, the development, production, stockpiling, and use of chemical weapons is prohibited -- even if in response to a prior unlawful use of chemical weapons by the enemy.

The US position has been that chemical herbicides and riot control agents fall outside the ambit of the Geneva Protocol of 1925. The US takes the position that while the treaty prohibits use of both lethal and incapacitating agents, the use of chemical herbicides and riot control agents is permissible "because they produce, in all but the most unusual circumstances, merely transient effects that disappear within minutes after exposure to the agent has terminated." As a matter of national policy, nevertheless, the US has unilaterally renounced the "first use of herbicides in war, except, under regulations applicable to their domestic use, for control of vegetation within US bases and installations or around their immediate defensive perimeters [and] first use of riot control agents, except in defensive military modes to save lives."[2]

An expanded list of first uses appears in annex F to the Joint Strategic Capabilities Plan (JSCP). Neither the list in Executive Order 11850, nor that in the JSCP, is all-inclusive. Note, however, that even in a listed case of first use, prior Presidential approval is required. This approval can be -- and often is -- predelegated.

The US takes a similar position on the effect of the CWC on RCA. While the CWC clearly bans RCA as a "method of warfare," the US position is that at least two of the listed uses in Executive Order 11850 (control of PWs and control of civil disturbances) are not methods of warfare and thus not covered by the CWC. (Whether the other listed uses [or other uses which are not listed] constitute methods of warfare prohibited by the CWC is an open issue.) In any event, the CWC applies only to "international armed conflicts." Accordingly, it did not apply to US operations in Somalia, where RCA were used with Presidential approval.

JAs must be familiar with the evolving legal considerations governing the use of chemical weapons and RCA. JAs must

[2]The exceptions are use of riot control agents 1) in areas under direct and distinct US military control (e.g., to control rioting POWs); 2) when civilians are used to mask attacks; 3) in rescue missions; and 4) to control civil disturbances in rear areas.

carefully review OPLANS, OPORDS, and ROE to ensure that they comply with current US policy.

PWs and Detainees

General. The Geneva Conventions recognize prisoners of war (PWs) and certain categories of civilians as protected persons. Beginning with the general requirement that they be treated humanely, the Conventions further delineate specific protections to which they are entitled. While the CDR may have adequate MP and Civil Affairs assets to handle the processing and administration of PWs and civilian detainees, this will not always be the case, particularly during the initial combat phase. The JA must thus be prepared to advise the CDR on all aspects of the handling of such personnel.

Identification and Status. The initial combat phase will likely result in the capture of a wide array of individuals.[3] The US applies a broad interpretation to the term "international armed conflict" set forth in common Article 2 of the Conventions. JAs, therefore, should advise CDRs that, regardless of the nature of the conflict, all enemy personnel should initially be accorded the protections of the GPW Convention, at least until their status may be determined. In that regard, recall that "status" is a legal term, while "treatment" is descriptive. When drafting or reviewing guidance to soldiers, ensure that the guidance mandates treatment, not status. For example, a TACSOP should state that persons who have fallen into the power of US Forces will be "treated as PW," not that such persons "will have the status of PW." When doubt exists as to whether captured enemy personnel warrant continued PW status, Art. 5 Tribunals must be convened. It is important that JAs be prepared to conduct such tribunals. During the Vietnam conflict, a Directive established procedures for the conduct of Art. 5 Tribunals; however, no comparable Directive is presently in effect.[4] A sample Art. 5 Tribunal SOP is printed in the TJAGSA Law of War Workshop Deskbook.

Treatment. There is a legal obligation to provide adequate food, facilities, and medical aid to all PWs. This obligation poses significant logistical problems in fast moving tactical situations; thus, JAs must be aware of how to meet this obligation while placing a minimum burden on operational assets.[5] PWs must be protected from physical and mental harm. They must be transported from the combat zone as quickly as circumstances permit. Subject to valid security reasons, PWs must be allowed to retain possession of their personal property, protective gear, valuables, and money. These items must not be taken unless properly receipted for and recorded as required by the GPW Convention. In no event can a PW's rank insignia or identification cards be taken. These protections continue through all stages of captivity, including interrogation.

Detainees. Particularly in conflicts not of an international character (Somalia, e.g.), persons who commit hostile acts against US Forces and who are captured may not meet the legal criteria of PW under the GPW Convention. These persons may be unlawful combatants and termed "detainees" instead of PW. Absent responsible guidance to the contrary, however, such persons should initially be treated as PWs by detaining soldiers and units. The effect of unlawful combatant status would attach to such persons later in captivity, if at all. (For example, unlawful combatants may be tried as criminals; jurisdiction and the appropriate forum for trials are more issues of policy and politics than law.) In any event, detainees must be treated humanely throughout the period of their captivity. Apply key parts of existing standards in order to structure minimum treatment standards during the period of detention. For example, use portions of the GPW and Civilians Conventions, and Protocol II (although the US is not a party) by analogy.

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[3] For example, in two days of fighting in Grenada, Army forces captured approximately 450 Cubans and 500 hostile Grenadians. Panama provided large numbers of detainees, both civilian and "PDF" (Panamanian Defense Force / police force) for the Army to sort out. The surrender of almost overwhelming numbers of Iraqi forces in the Gulf War was well publicized.

[4] No Article 5 Tribunals were conducted in Grenada, as all captured enemy personnel were repatriated as soon as possible. In Panama, all detainees were sent to the rear (Corps) for determinations to be made. In the Gulf, emphasis was placed on turning detainees over to the Saudis for POW determination.

[5] The following examples are illustrative. When U.S. Forces landed in Grenada, they did not possess the food necessary to feed the large number of PWs and detainees who would come under our control. Thus, we used captured foodstuffs to feed them. Similar situations occurred in Panama. Thus, by using captured food, the U.S. met its obligation under the GPW, and the ground commanders were able to conserve valuable assets.

Initially, PW facilities on Grenada, in Panama, and in the Gulf were each inadequate in their own ways. They consisted of dilapidated buildings, with no sanitation facilities or electricity, or were simply non-existent (in the desert). The ground commanders could not afford to use critically needed combat personnel (the personnel necessary to handle PWs were not initially available) to construct PW camps. Because the LOW does not require combatants to use their own assets to construct PW camps, the US used captured property and PWs to construct adequate camps. (In fact, in Grenada the PWs were Cuban construction workers...).

Medical assets also tend to be in high demand and short supply during combat. The LOW, however, prohibits the willful denial of needed medical assistance to PWs, and priority of treatment must be based on medical reasons. While the Capturing Party has the obligation to ensure adequate medical care for enemy wounded, the GWS Convention encourages the use of "retained persons" to treat enemy wounded. The US has made use of this provision as well.

As these examples indicate, the JA must be familiar with and apply the LOW in a practical manner. In doing so, he enables the commander to comply with legal requirements, without jeopardizing the mission.

Enemy Dead

General. The LOW requires Parties to a conflict to search for the dead and prevent their despoilment. The Parties must ensure proper burial, register grave sites, and, as soon as circumstances permit, relay to the affected Party, the exact location of burial and details of death. Parties may cremate the dead only for hygienic or religious reasons.

Problems. While the law is clear, experience has shown that it is difficult to apply in a fast moving combat situation, particularly in a climate where bodies despoil quickly and when identification tags are lacking. All of these problems existed in Grenada. Delay in burying enemy dead in the initial days of combat resulted in despoiled bodies. The lack of identity discs required by the GPW Convention made it impossible not only to identify the dead, but, in some cases, to determine their nationality. Because some remains could not be identified, the International Committee of the Red Cross (ICRC), the organization assisting in the return of Cuban dead, balked at returning a number of the unidentified bodies to Cuba.

Preventive Measures. JAs should ensure that OPLANs and OPORDs emphasize the proper treatment of enemy dead. Additionally, issues associated with the treatment of enemy dead may be included in exercise problems. For example, such issues may be integrated with other post-battle tasks, such as the handling of PWs.

War Trophies

General. The law of war authorizes the confiscation of enemy military property. War trophies, as long as taken from enemy military property, are legal under the law of war. The problem with war trophies arises under US domestic law, rather than under the law of war. Confiscated enemy military property is property of the US. The property becomes a war trophy -- and capable of legal retention by an individual soldier -- only if the US so designates the property IAW law and regulation.

War Trophy Policy. Section 1171 of the 1994 National Defense Authorization Act states the US policy on war trophies. In essence, the law amends 10 USC 2579 by requiring that all enemy material captured or found abandoned shall be turned in to "appropriate" personnel. The law, which directs the promulgation of an implementing directive and service regulations, contemplates that members of the armed forces may request enemy items as souvenirs. The request would be reviewed by an officer who shall act on the request "consistent with military customs, traditions, and regulations." The law authorizes the retention of captured weapons as souvenirs if rendered unserviceable and approved jointly by DOD and ATF. Ample flexibility (or ambiguity) is created by the law so as to continue the need for punitive command policies or regulations which limit the items that may properly be taken as war trophies. USCENTCOM General Order Number 1 is perhaps the classic example of a war trophy order. These regulations and policies, and relevant UCMJ provisions, must be made known to US forces prior to combat. War trophy regulations must be emphasized early and often, for even those who are aware of the regulations may be tempted to disregard them if they see others doing so.

The key to a clear and workable war trophy policy is to publicize it before deployment, work it into all exercises and plans, and train with it! When drafting a war trophy policy, consider the "6 Cs:"

1. COMMON SENSE -- does the policy make sense?

2. CLARITY -- can it be understood at the lowest level?

3. CI -- is the word out through all command information means available? (Pos. on unit bulletin boards, post in mess facilities, put in post newspaper, put in PSA on radio, etc.)

4. CONSISTENCY -- are we applying the policy across all layers and levels of command? (A policy promulgated for an entire Corps is better than diverse policies within subordinate divisions; a policy which is promulgated by the unified command and applies to all of its components is better still.)

5. CUSTOMS -- prepare for customs inspections, "courtesy" inspections prior to redeployment, and amnesty procedures.

6. CAUTION -- Remember one of the prime purposes of a war trophy policy: to limit soldiers from exposing themselves to danger (in both Panama and the Gulf, soldiers were killed or seriously injured by exploding ordnance encountered when they were looking for souvenirs). Consider prohibitions on unauthorized "bunkering, "souvenir hunting," "climbing in or on enemy vehicles and equipment." A good maxim for areas where unexploded ordnance or booby-traps are a problem: "If you didn't drop it, don't pick it up."

INTERACTION WITH THE INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC)

ICRC Objectives[6]

1. Limit the suffering caused by armed conflicts, disturbances, and tension.
2. To ensure humanitarian activities are carried out in safe conditions (and particularly, that ICRC staff are respected).
3. To strengthen the Movement's identity and image.
4. To propagate a spirit of peace.

ICRC Subject Matter

1. The four 1949 Geneva Conventions and their two 1977 Additional Protocols;
2. The Fundamental Principles, the Movement's ideals, its activities and its historical background. There are intentional links to human rights law, refugee law, etc.

ICRC Targets

1. The armed forces and other authorities responsible for applying International Humanitarian Law;
2. National Society (Red Cross) leaders, staff, and volunteers.
3. Young people and teachers.
4. The media.

Dealing with the ICRC

Subject to essential security needs and other reasonable requirements, the ICRC must be permitted to visit PWs and provide them certain types of relief. Typically, the US will invite the ICRC to observe PW conditions as soon as circumstances permit. Once on the scene, the ICRC will closely examine compliance with the LOW and, in particular, the Geneva Conventions concerning a broad range of issues.

It is important to recognize that the nature of combat makes it likely that allegations of LOW violations will occur. Unlike other combat-related mistakes, however, violations are widely publicized. Because the ICRC will have direct communications to its headquarters in Geneva and, consequently, to the world news media, it is particularly important that the CDR and his staff be prepared for the ICRC's arrival and fully understand its mission.

As a result of his professional qualifications and specialized training in the LOW, the JA should serve as the command's point of contact with the ICRC.[7] As has already been noted, the JA can quickly identify and resolve many LOW issues before they come to the CDR's attention. For those LOW matters requiring command decision, the JA is best suited to provide advice to the CDR and obtain timely responses. These same skills are essential in dealing with ICRC observers. The JA can best serve as the CDR's skilled advocate in discussions concerning the LOW with the ICRC.

Both the CDR and the JA must be aware that the ICRC does not function merely as a LOW referee, eagerly watching for and reporting LOW violations.[8] It is capable of providing assistance in a variety of ways. In Grenada, the ICRC assisted in making arrangements for the transportation of the remains of dead enemy combatants and for repatriating PWs and civilian detainees. By maintaining a close working relationship with ICRC representatives, the JA receives a twofold benefit. He is assisted in identifying LOW issues before they pose problems to the command, and he has access to additional legal resources which may be used to resolve other LOW and OPLAW matters.

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[6]Taken from their "Guidelines for the '90s" (Apr 92).

[7]General Prugh (former TJAG) fulfilled the task of "interfacing" with the ICRC when he was the legal advisor to CDR, MACV in Viet Nam. General Prugh relates that during the early stages of Viet Nam, OTJAG concluded that the US was involved in an Art 3, not Art 2, conflict. In June '65 the situation had changed, and by Aug '65 a formal announcement was made that Art 2 now applied. Soon, ICRC delegates began to arrive, and it fell upon the JAs to meet with the delegates.

[8]It is essential to understand the neutrality principle of the ICRC. One must stay at arm's length from the delegates so as to not risk harming their relationships with the enemy.

LAW OF WAR OUTLINE
[Instructor's Outline; Instructor's Notes included after outline]

I. INTRODUCTION

II. SOURCES OF THE LOW

A. Treaties
B. Uniform Code of Military Justice (UCMJ)
C Customary LOW

III. REASONS TO COMPLY WITH THE LOW

A. Compliance ends conflict more quickly
B. Increases public support of military
C. Encourages reciprocal conduct by enemy soldiers
D. Reduces waste and costs of any reconstruction
E. Required by our national law

IV. SOLDIER'S GENERAL RESPONSIBILITIES IN WARTIME

A. Follow all lawful orders
B. Proper response to orders that seem unlawful
C. Know and apply The Soldier's Rules

V. THE SOLDIER'S RULES

A. Fight only enemy combatants
B Do not harm enemies who surrender -- disarm them and turn them over to your superior
C. Do not kill or torture EPW
D. Collect and care for the wounded, whether friend or foe
E Do not attack medical personnel, facilities, or equipment
F. Destroy no more than the mission requires
G. Treat all civilians humanely
H. Do not steal -- respect private property and possessions
I. Do your best to prevent violations of the law of war -- report all violations to your superior

VI. FORBIDDEN TARGETS, TACTICS, AND TECHNIQUES

A. General Observations
B. Forbidden Targets
C. Forbidden Tactics
D. Forbidden Techniques

VII. RULES REGARDING CAPTURED SOLDIERS

A. Handling Surrender of Enemy Soldiers
B. Treatment of Captured Soldiers on Battlefield
C. Your Rights and Responsibilities If Captured

VIII. RULES REGARDING CIVILIANS AND PRIVATE PROPERTY

A. Treatment of Civilians

1. General Rules
2. Special Classes of People

a. Women
b. Spies

B. Treatment of Private Property

1. Avoid confiscation, seizure or destruction of private property
2. Narrow exception for military mission

IX. OBLIGATIONS TO PREVENT AND REPORT LOW VIOLATIONS

X. CONCLUSIONS AND QUESTIONS

LAW OF WAR CLASS[9]

[Instructor's Notes; Instructor's Outline precedes these notes]
Time expected: 50 minutes

Suggestions: TRAIN, DON'T LECTURE. Adapt training to the needs, mission, METL, and experiences of the particular unit. Integrate training into exercises, maximize combat realism, use role players. Synchronize law of war training with ROE vignette training. Be aggressive, dynamic, and enthusiastic.

Further Sources: For a more complete guide, see, "Instructor's Guide -- The Law of War," TC 27-10-3 (April 1985). Interesting problems are found in, "Selected Problems in the Law of War," TC 27-10-1 (June 1979). For answers to substantive questions, the best sources are, "The Law of Land Warfare," FM 27-10 (July 1956), and its companion, "International Law, Volume II," DA Pam 27-161-2 (October 1962). A short, simple presentation of the soldier's law of war (LOW) obligations is found in, "Your Conduct in Combat Under the Law of War," FM 27-2 (November 1984). The Army's LOW training obligations are set forth in AR 350-41 (19 March 1993).

I. INTRODUCTION.

(Consider using a personal experience or other interesting information to get the students' attention. Caution students that, as soldiers, they are subject to criminal prosecution and severe punishment for commission of some of the acts covered in the class. Also, note that following the LOW rarely, if ever, prevents a soldier from accomplishing the military mission.)

II. SOURCES OF THE LOW

A. Treaties signed by US and most other countries (e.g., Hague Convention Number IV of 1907 and Geneva Conventions of 1949, commonly called the "Hague and Geneva Conventions")

B. Uniform Code of Military Justice (UCMJ) (e.g., under UCMJ, soldiers can be severely punished for assault, pillage, rape, and murder of enemy prisoners of war (EPWs) or civilians)

C. Customary LOW (e.g., at Nuremburg trials after WWII, members of the German High Command were imprisoned and in some cases executed for violations of the customary LOW.

III. REASONS TO COMPLY WITH THE LOW -- EVEN IF ENEMY DOES NOT

A. Compliance ends the conflict more quickly. Mistreatment of EPWs may encourage the remaining enemy soldiers to fight harder and resist capture. During Operation DESERT STORM, favorable treatment of Iraqi EPWs by coalition forces helped end the war quickly because reports of such treatment likely encouraged massive surrender by other Iraqi soldiers.

B. Compliance enhances public support of our military mission; violations of the LOW seriously reduce the support that US soldiers generally receive not only from the US public but also from people in other countries (e.g., reports of misconduct in Vietnam reduced public support of military mission).

C. Compliance encourages reciprocal conduct by enemy soldiers. Mistreatment of EPWs by our soldiers may encourage enemy soldiers to treat captured US soldiers in the same manner.

D. Compliance not only accelerates termination of the conflict but it also reduces the waste of our resources in combat and the costs of reconstruction after the conflict ends.

E. Compliance is required by law. LOW arises in large part from treaties which are part of our national law. Violation of the LOW is a serious crime punishable by death in some cases.

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[9]When a lawyer teaches this class in conjuction with a Chaplain and a Commander, this course is often referred to as LEGALITY, MORALITY, AND REALITY!

IV. SOLDIER'S GENERAL RESPONSIBILITIES IN WARTIME

A. Carry out all lawful orders promptly and aggressively.

B. In rare case when an order seems unlawful, don't carry it out right away but don't ignore it either; instead, seek immediate clarification of that order.

1. Soldiers may be held criminally responsible for any unlawful acts which they personally commit in time of war. Since there is no "statute of limitations" on the prosecution of war crimes, soldiers may have to defend themselves many years after the conflict ends.

2. If a soldier is court-martialed for carrying out an unlawful order, that soldier cannot normally defend himself by claiming he was "just following orders." As a result of attending this class and using common sense, soldiers are expected to be able to recognize an unlawful order and take appropriate action.

C. Know:

1. The Soldier's Rules.
2. Forbidden targets, tactics, and techniques.
3. Rules regarding captured soldiers.
4. Rules for the protection of civilians and private property.
5. Obligations to prevent and report LOW violations.

V. THE SOLDIER'S RULES

A. Fight only enemy combatants.
B. Do not harm enemies who surrender -- disarm them and turn them over to your superior.
C. Do not kill or torture EPW.
D. Collect and care for the wounded, whether friend or foe.
E. Do not attack medical personnel, facilities, or equipment.
F. Destroy no more than the mission requires.
G. Treat all civilians humanely.
H. Do not steal -- respect private property and possessions.
I. Do your best to prevent violations of the law of war -- report all violations to your superior.

VI. FORBIDDEN TARGETS, TACTICS, AND TECHNIQUES

A. General Observations. Soldiers attack aggressively . . . violently; but there are several important limitations in attacking the enemy.

B. Forbidden Targets. It is forbidden to attack certain targets. Examples of these targets include:

1. Protected persons and other non-combatants
2. Parachutists -- unless clearly combatants
3. Persons, vehicles, buildings marked with Red Cross or other recognized symbol
4. Other protected property such as religious buildings, schools, historical monuments, and other similar properties of cultural significance

C. Forbidden Tactics. It is forbidden to use certain tactics in attacking the enemy. Examples of these tactics include:

1. Pretending to surrender to conceal a surprise attack
2. Attacking enemy soldiers who have lost the ability to fight

3. Wearing Red Cross when not performing medical duties
4. Establishing a defensive position in church, hospital, or other protected place
5. Fighting the enemy in civilian clothes or while wearing the enemy's uniform
6. Causing destruction beyond that required to complete the military mission

D. Forbidden Techniques. Certain weapons are prohibited by the LOW because such weapons are calculated to cause "unnecessary suffering" for the victims (e.g., "dum-dum" bullets and poisons). During an assault in the course of Operation DESERT STORM, was the use of bulldozers to bury Iraqi soldiers lawful? Argue tactic was lawful (a) because Iraqi soldiers did not elect to surrender and (b) because there was little possibility of unnecessary suffering; we assume buried soldiers quickly suffocated. Contrast to the unlawful use of poisons that can cause slow agonizing death and that might harm innocent civilians that come in contact with such poisons.

VII. RULES REGARDING CAPTURED SOLDIERS

A. Handling Surrender of Enemy Soldiers

1. Be cautious, follow unit procedures in allowing enemy soldiers to approach your position and surrender.
2. Waiving white flag may not mean surrender; it may simply mean that the enemy wants a brief cease-fire so they can safely meet with us. Enemy may seek such a meeting to arrange surrender but meeting may also be sought for other reasons (e.g., to pass a message from their commander to our headquarters or to arrange removal of wounded from the battlefield).
3. Enemy soldiers must be allowed to surrender if they wish to do so. Any order not to accept surrender is unlawful.

B. Treatment of Captured Soldiers on Battlefield

1. Again, follow established unit procedures for the handling of EPWs (e.g., recall the "5 S's" process).

2. Recognize that soldiers have a duty to treat EPWs humanely. The willful killing, torture, or other inhumane treatment of an EPW is a very serious LOW violation -- a "grave breach." Other LOW violations are referred to as "simple breaches."
3. Note it is also forbidden to take EPWs' personal property except to safeguard it pending their release or movement elsewhere.
4. In addition, soldiers have certain affirmative duties to protect and otherwise care for EPWs in their custody. Because this is often difficult in combat, must move EPWs to rear as soon as possible.
5. Certain captured enemy personnel are not technically EPWs but are rather referred to as "retained personnel." Such retained personnel include medical personnel and chaplains.

C. Your Rights and Responsibilities If Captured

1. General. Note soldiers' separate training on Code of Conduct, SERE, etc., provides additional information.
2. Rights as a Prisoner of War (POW). As discussed earlier, war prisoners are entitled to certain protection and other care from their captors. Such care includes food, housing, medical care, mail delivery, and retention of most of your personal property you carried when you were captured. Generally, such rights cannot be waived by the POW.
3. Responsibilities as a POW[10]
   a. POWs must obey reasonable camp regulations
   b. Information: if asked, soldier may provide four items of information (name, rank, service number,

[10]One attention getter is to have all students pull out their green military ID Card. Note that at the bottom of the front of the card, and at the top of he back of the card, there is reference to the card serving as proper identification for purposes of the Geneva Convention on Prisoners of War.

and DOB). Explain that such information needed by capturing country to fulfill reporting obligations under international law.

c. Work. In addition, enlisted POWs may be compelled to work provided the work does not support the enemy's war effort. Also, POWs are entitled to payment for their work. Note commissioned officer POWs may volunteer for such work but may not be compelled to do so.

VIII. RULES REGARDING CIVILIANS AND PRIVATE PROPERTY

A. Treatment of Civilians

1. General Rules

a. While soldiers have certain affirmative LOW obligations regarding EPWs on the battlefield, such as the obligation to feed, clothe and otherwise protect such EPW's from harm, the soldiers' LOW obligations regarding civilians are generally different

b. Soldiers have primarily negative obligations with regard to civilians on the battlefield. E.g., the obligation not to kill or torture them and not to take them as hostages or otherwise subject them to inhumane treatment. Such mistreatment of civilians represents a "grave breach" of the LOW. If captured, could Saddam Hussein be tried under the LOW for the taking of civilian hostages during the Persian Gulf War? Argue that he could be found guilty of such a "grave breach" by an appropriate tribunal.

2. Special Classes of People

a. Women. The LOW specifically prohibits any attacks on their honor, including any form of sexual assault.

b. Spies. The term "spy" refers only to an enemy agent who acts secretly in our area of operations to obtain information on those operations with the intent of communicating that information back to the enemy. Thus, an enemy soldier in uniform (i.e., without a disguise) who quietly enters our area of operations to obtain and communicate such information to the enemy headquarters is not a spy. US soldiers must treat all spies as well as other captured persons as EPWs pending a formal determination as to each such person's status.

B. Treatment of Private Property

1. As a general rule, it is a violation of the LOW to confiscate or destroy private property. Note that extensive destruction or appropriation of civilian property may be a "grave breach" of LOW (e.g., Iraqi looting and other destruction of private property in Kuwait was so extensive as to constitute a "grave breach" of the LOW).

2. However, LOW does recognize a narrow exception to this general rule. The destruction or seizure of civilian property will not be a violation of the LOW if such action is necessary to accomplish a military mission and the civilian loss involved is not out of proportion to the military advantage to be gained from the planned action. Note concepts of "military necessity" and "proportionality."

IX. OBLIGATIONS TO PREVENT AND REPORT LOW VIOLATIONS

A. Prevention. Soldiers not only must avoid committing LOW violations, they must also attempt to prevent violations of the LOW by others.

B. Reporting Obligation. Under LOW, soldiers are obligated to promptly report any actual or suspected violations of the LOW to their superiors; if that is not feasible, soldiers may file reports with other

appropriate military officers (e.g., IG, Judge Advocate, or Chaplain)

X. CONCLUSIONS AND QUESTIONS

TAB R
LEGAL ASSISTANCE

I. REFERENCES.

A. AR 600-8-101, Personnel Processing (In- and Out- and Mobilization Processing), 26 February 1993.

B. AR 27-3, The Army Legal Assistance Program (30 September 1992).

C. AR 600-20, Interim Ch. 102 (1 Apr 92), para 5-5 (Family Care Plans).

D. Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. Appendix, as amended, §§ 500-548; 560-591 (1990).

E. JA 260, Soldiers' and Sailors' Civil Relief Act Guide (TJAGSA Jun 93).

F. JA 272, Deployment Guide (TJAGSA Feb 94).

II. INTRODUCTION.

A. Winning in wartime depends in large part on the efficiency of each soldier in combat. However, the soldier's combat efficiency may be adversely affected by legal problems left behind at deployment. One objective of the Army Legal Assistance Program is to assist the soldier in avoiding those problems and thereby enhance combat efficiency. The Deployment Guide, JA 272, outlines a program that will enable judge advocates involved in deployment activities to tailor their legal assistance program to meet the needs of soldiers and their families both before and during such deployment.

B. The many facets of legal assistance make it impossible to summarize in this Handbook all necessary law and to identify all resources. However, it does provide material that may help a Legal Assistance Office (LAO) prepare for pre-deployment and deployment operations. Refer to JA 272, Deployment Guide, for policy guidance, sample SOPs and letters.

III. THE LEGAL ASSISTANCE MISSION.

A. From an operational standpoint, the mission of legal assistance is to ensure that the soldiers' personal legal affairs are in order prior to deployment, and then, in the deployment location, to meet the soldiers' legal assistance needs as quickly and as efficiently as possible. Accomplishing this mission may well be one of the JA's most important functions. Personal legal difficulties may not only reduce combat efficiency but may also result in problems requiring disciplinary action.

B. Given this situation, performing legal assistance functions during peacetime exercises is crucial, as the legal problems soldiers encounter on exercises are often the same as those which arise during combat. Prior to deployment, both the soldier and the soldier's family must be prepared for the deployment. For the soldier, this preparation is an ongoing effort that should begin upon his arrival at the unit and end only upon transfer. The SJA office must make an aggressive and continuous effort to ensure soldiers' legal affairs are reviewed and updated.

IV. SOLDIER READINESS PROGRAM (Preparation for Exercises and Deployment)

A. Introduction.

1. The Army Legal Assistance Program (ALAP), AR 27-3, consists of a number of client and preventive law services. No distinction is made between the type of legal service assistance that is provided to a client seeking help with a personal legal problem and that which is rendered to a soldier preparing for deployment.

2. Legal Assistance is provided by Active Component (AC) and Reserve Component (RC) judge advocates and civilian attorneys in a variety of settings, to include:

a. During combat readiness exercises such as an emergency deployment readiness exercise (EDRE) or an ARNG readiness for mobilization exercise (REMOBE) or mobilization deployment readiness exercise (MODRE),

b. During a RC Premobilization Legal Preparation (PLP),

c. During Soldier Readiness Program (SRP) processing, and

d. During a demobilization briefing.

B. **SOLDIER READINESS PROGRAM (PEACETIME).**

1. AR 600-8-101, Personnel Processing (In- and Out- and Mobilization Processing) establishes the Soldier Readiness Program (SRP):

   a. To ensure that all soldiers will be administratively ready for deployment at all times,

   b. To replace preparation of replacements for overseas movement (POR) qualification, and

   c. To incorporate planned checks on the soldier readiness status of the individual soldier.

2. The processing program prepares, validates and reports individual soldier and unit readiness for deployment, including shortfalls, to the unit commander.

3. The status of individual soldier readiness is checked during:

   a. In-processing (at the battalion/unit level, follow-up action is required on soldier readiness processing requirements),

   b Once annually as a unit or an individual,

   c During out-processing, and

   d. Within 30 days of actual unit deployment date or date individual soldier departs on extended TDY (90 days or more).

4. DA Form 5123-1-R (Personnel In-processing Record) is used to determine the readiness status of the soldier. (Form contained in AR 600-8-101)

5. The Soldier Readiness Processing Team (SRPT) from the installation and community staff agencies:

   a Accomplishes the "unit and individual annual " and "30 days prior to actual deployment" soldier readiness checks, under general leadership of the G1/AG (Chief, Military Personnel Division).

   b The SRPT will include a representative from the legal office (as well as personnel, medical, dental, provost marshall, finance, security, logistics, and operations).

6. There are five (5) levels of requirements to prepare soldiers for basic movement through deployment and wartime movement. Each level requires different legal preparation.

   a. *Level 1 - Basic movement soldier readiness processing requirements. No specific legal* review requirements; however, SGLI forms will be reviewed or revised - also, soldiers requiring them will have satisfactory Family Care Plans (DA Form 5304-R) on file; otherwise, they will not deploy.

   b. Level 2 - Wartime movement stopper soldier readiness processing requirements. Each soldier must have received sometime in their current enlistment/career, a Geneva Convention briefing prior to deployment. (see Appendix re: LOW training/Geneva Convention)

      Note: At Levels 1 and 2, signature of the person in charge of the individual SRPT *station is required (signifying all requirements have been met by the soldier) before* clearance for movement is granted).

   c. Level 3 - Other soldier readiness processing requirements.

      (1) Each soldier pending civil felony charges will be provided assistance and may not move as result of these charges.

      (2) Given time and other resources, power of attorney support may be provided to each soldier.

      (3) Given time and other resources, support may be provided to each soldier for making a Will.

(4) Soldiers will be counseled on insurance and other civil matters.

d. Level 4 - Deployment area/mission unique soldier readiness processing requirements. Each soldier will be briefed on the applicable local laws for deployment area.

e. Level 5 - Peacetime PCS/transition soldier readiness processing requirements. Assistance will be provided soldiers pending civil and military charges, which may result in the soldier not complying with PCS orders.

C. **UNIT AND INDIVIDUAL MOVEMENT (PEACETIME).**

1. Unit movement policy.

a. Contingency operations.

(1) Prior to actual soldier or unit movement in support of combat or contingency operations, commanders will:

(a) Physically review on-site

(b) Within 30 days of departure

(c) Processing requirements in Levels 1 through 4 (see III above). Levels 1 and 2 are mandatory compliance levels while 3 and 4 may be waived by a general officer in command.

(2) The Soldier Readiness Processing Team (SRPT) will assist commanders.

b. Administrative movement.

(1) Prior to actual movement during peacetime, commanders will review processing requirements at Level 1.

(2) SRPT will assist commanders.

2. Conducting unit movement soldier readiness check:

a. Chief, SRPT will coordinate with Bn S1 on schedule, location and roster of personnel to be checked.

b. Chief, SRPT will provide list of nondeployables and reason(s) for this status to Bn S1 for corrective action, with copy furnished to G1/AG and G3 operations.

c. AR 600-8-101, Table 5-1, provides steps and work centers for unit movement soldier readiness checks. *(See Below)*

UNIT MOVEMENT SOLDIER READINESS CHECKS
(Table 5-1, AR 600-8-101)

STEPS	WORK CENTER	REQUIRED ACTION
1	BN1	Issue soldier DA Form 5123-1-R
2	SDR	Process at personnel station
3	SDR	Process at medical station
4	SDR	Process at dental station
5	SDR	Process at finance station
6	SDR	Process at legal station

7	SDR	Process at security clearancestation
8	SDR	Process at Bn S3
9	SDR	Return completed DD Form 5123-1-R to Bn S1
10	BN1	Verify completeness of forms
11	BN1	Inform unit commander and Bn S3 of unit processing status and specific deficiencies by soldier
12	BN1	File form for future reference

V. THE RESERVES.

A. MOBILIZATION PROCESSING PROGRAM.

- Involves home station and mobilization station processing requirements to administratively access individuals and units into the active force.
- Involves expansion of the peacetime in- and out-processing activity (work center is IOPR) as a sub-work unit of the installation mobilization and deployment center (MADC).
- Involves installation task force operations, if partial or higher state of mobilization has been declared.

1. Mobilization is the process by which the Armed Forces or part of them are expanded and brought to a state of readiness for war or other national emergency.

   a. Includes calling all or part of the Reserve Components to active duty and assembling and organizing personnel supplies and material.

   b. The call of Reserve Component units to active duty may include:

      (1) A Presidential Selected Reserve Call-up, S-Day,

      (2) Partial mobilization, T-Day, or

      (3) Full mobilization, M-Day.

2. There are 5 phases of federalizing/mobilizing RC units:

   a. Phase I - Preparatory. Concerns RC units at home station during peacetime. The units plan, train, and prepare to accomplish assigned mobilization missions.

   b. Phase II - Alert. Begins when RC units receive notice of pending order to active duty and ends when units enter active Federal service.

   c. Phase III - Mobilization at Home Station (HS). Begins units' entry onto active Federal duty and ends when unit departs for their mobilization stations (MS) or ports of embarkation (POE).

   d. Phase IV - Movement to Mobilization Stations. Begins with units departing from HS, by most expeditious and practical means available, and ends when units arrive at MS or POE.

   e. Phase V - Operational Readiness Improvement. Begins when units arrive at their MS and ends when they are declared operationally ready for deployment.

3. CONUS Replacement Centers (CRC).

a. Operations are executed by the CRC Replacement Battalion (USAR) on pre-designated Army installations. CRC units normally ordered to duty under Presidential Selected Reserve Call-up.

b. CRC mission is, among other things, to verify completion of SRP (Soldier Readiness Processing).

4. Soldier Readiness Processing Requirements.

a. Levels I and II SRP requirements (see above) are mandatory. Deficiencies will be remedied on the spot during processing or follow-up referrals made.

b. SGLV 8286 (SGLI) and needed Wills are SRP requirements which are major workload generators at both home station and mobilization station.

5. AR 600-8-101, chapter 6, details the mobilization process. Para. 6-43 provide rules for mobilization processing at the legal station:

a. All soldiers will process through this station.

b. Ar 600-8-101, chapter 4, details SRP requirements (see outline above)

c. If resources permit, Wills and powers of attorney may be made.

d. Copies of Wills and POA will be filed in the soldier carried mobilization packet. The original and one copy will be given to soldier.

e. AR 600-8-101, Table 6-17, provides steps and work centers for Mobilization Processing at the Legal Station. (See Below)

MOBILIZATION PROCESSING AT THE LEGAL STATION
(Table 6-17, AR 600-8-101)

Step	Work Center	Required Action
1	IOPR	Verify Geneva Convention Briefing
2	IOPR	Determine soldier's requirement for a Will
3	IOPR	Provide powers of attorney services
4	IOPR	Verify pending military charges
5	IOPR	Verify pending civilian charges
6	IOPR	Process application for Soldiers'and Sailors' Civil Relief Act if required

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VI. LEGAL ASSISTANCE PREPARATION FOR READINESS EXERCISES AND DEPLOYMENT.

A. Legal Assistance offices should be aggressive in sponsoring preventive law programs to educate soldiers and their families before deployment occurs. Topics covered should include:

1. Who is eligible for legal assistance services.
2. SGLI designations and "By Law" implications.

3. Wills for both spouses.
4. Powers of Attorney.
5. Consumer law issues.

B. Typically readiness exercises and rapid deployments will be conducted on no-notice or short-notice basis.

1. The Chief, Legal Assistance should:

a. Designate teams of attorneys and clerks to staff exercise and deployment sites,

b. Establish an SOP (Standard Operating Procedure) for legal administration both on-site and at the legal assistance office during the exercise or deployment.

(1) Include directions regarding Will and Power of Attorney preparation.

(a) Execution is not done during exercises and appointments should be scheduled to properly complete documents at the legal office.

(b) Wills should be prepared using LAAWS; however, statutory form wills may be used.

(c) Will executions will be supervised by an attorney.

(2) Provide attorneys guidance concerning soldiers pending civil and criminal proceedings.

(a) Requests for stays of civil proceedings should be made via letter from the soldier's commanding officer - requests for stays by legal assistance attorneys may be considered appearances and work to the detriment of the soldier

(See: The Soldiers' and Sailors' Civil Relief Act (SSCRA)).

(b) Attorneys may request postponements of criminal proceedings, but such stays are not governed by the SSCRA.

(3) Designate when and where the legal team will meet for the exercise or deployment,

(4) Provide who will remain at the legal assistance office as back-up support for the exercise/deployment legal team.

c. Reschedule office hours of operation if necessary.

d. Ensure close coordination with unit commanders for sufficient logistical support and full soldier participation,

e. Ensure all needed supplies, forms and equipment are available at the site.

f. Get adequate feed-back after the exercise from the legal team.

2. During deployment, the legal assistance office should continue briefing family members as needed.

3. After deployment, the legal assistance office should follow-up on legal assistance matters not resolved prior to deployment.

VII. FAMILY CARE PLANS (AR 600-20, Interim Ch. 102 (1 Apr 92), para 5-5.)

A. Mission, readiness, and deployability needs especially affect Active Component (AC) and Reserve Component (RC) single parents and dual military couples with dependent family members.

B. AR 600-20, Interim Ch. 102, requires those soldiers to implement the Family Care Plan to provide for the care of their family members when military duties prevent the soldier from doing so.

1. Plans must be made to ensure dependent family members are properly and adequately cared for when the soldier is deployed, on TDY, or otherwise not available due to military requirements.

2. RC soldiers are subject to these policies and regulations, and will implement plans during any periods of absence for Annual Training, regularly scheduled unit training assemblies, emergency mobilization and deployments, or other types of active duty.

C. All married soldiers who have dependent family members are encouraged, even if not required by the regulation, to complete and maintain a Family Care Plan.

D. Family Care Plan Responsibility.

1. Commanders have responsibility for ensuring affected soldiers complete the Family Care Plan.

a. The unit commander is the sole approving authority for DA Form 5304-R.

b. This responsibility will not be delegated.

2. Affected soldiers are considered nondeployable until a Family Plan is validated and approved.

E. In conjunction with Family Care Plan counseling, commanders will encourage, but not require, soldiers to consult legal assistance attorneys for will preparation.

F. More information concerning Family Care Plans is provided in JA 272, Deployment Guide.

VIII. LEGAL ASSISTANCE SUPPORT DURING DEPLOYMENT

A. PREPARATION.

1. While the term "mobilization" technically refers to the activation of Reserve Component (RC) personnel -- including individuals and units of both the Army National Guard (ARNG) and the Army Reserve (AR), here the term "mobilization" is used more broadly to refer to the preparation of both AC and RC units for deployment overseas or other distant movements.

2. Timely effective legal support of the mobilization of AC and RC units depends in large part on the following five factors:

1. Familiarity with the general legal support needed during mobilization, so that SJA offices can be organized and functions prioritized to provide such support,

2. Knowledge of the particular requirements in each substantive area of the law in order that all legal personnel can be properly trained and so that proper references and forms will be on hand when needed,

3. Opportunities to participate in Corps/Division exercises to test the deployment plans that have been made and the training provided,

4. Effective utilization of RC legal personnel wherever feasible, and

5. Establishment of good working relationships with key personnel within the Corps and Division

B. IN THE THEATER OF OPERATIONS.

1. Legal Assistance in Theatre. The nature of combat causes Legal Assistance services to become more pronounced and take on significant immediate importance to the client, the command, and the servicing attorney. The provision of legal assistance during combat deployments may occur anywhere within the theater. As soon as possible, do the following:

a. Establish communications links with the Rear,
b. Establish courier/fax service to home station,
c. Build rapport with family support groups,
d. Anticipate problems arising with Casualty Assistance.

2. Casualty Assistance.

a. In addition to legal assistance problems arising at the deployment location, casualties may

occur. If so, the SJA elements, both on the exercise and with the rear detachment, must be prepared to assist the next of kin of the soldier, the command, and the Survivor Assistance Officer (SAO). Among the many issues that attend the death of a soldier are reporting the casualty, notifying the next of kin, appointing an SAO and providing legal advice to that officer, disposition of the remains, including a possible autopsy, advising the next of kin concerning their legal rights and benefits, appointing a summary court officer, and conducting a line of duty investigation. Pre-deployment preparation is essential.

b. Familiarity with DA Pam 608-33 (Casualty Assistance Handbook) and AR 600-8-1 (Casualty and Memorial Affairs) is essential.

c. JAs will also become involved in helping next of kin of soldiers missing in action or taken prisoner. DOD 7000.14-R, Part 4 (40304), DOD Pay Entitlements Manual (1 Jan 93), permits the Secretary of the Department concerned to initiate or increase an allotment on behalf of family members if circumstances so warrant.

d. Prior to deployment, soldiers should be encouraged to closely review their DD Form 93 (Record of Emergency Data) which designates beneficiaries of pay and allowances.

C. GENERAL LEGAL ASSISTANCE CONSIDERATIONS.

1. In the area of deployment, the Legal Assistance section should:

a. Respond to inquiries from soldiers in country.

b. Establish liaison with communications, transportation, and aviation elements for contact and courier service with JAs in the rear echelon (the installation from which the deployment took place).

c. Establish liaison with US Consulate at deployment location for overseas marriage and adoption coordination, in addition to emergency leave procedures.

2. At the home installation, the Legal Assistance section should:

a. Follow up on legal assistance cases referred by deployed LAOs.

b. Coordinate with communications, transportation, and aviation elements on the installation to ensure contact and courier service with deployed LAOs.

c. Extend legal assistance office hours, as necessary, to handle legal assistance problems of working dependents.

d. Continue legal assistance briefings for family members. Notice of these meetings should be mailed to the individual, using previously obtained mailing addresses and disseminated by post newspaper and local television and radio media.

e. Coordinate with local banks and financial institutions to expect a higher usage of powers of attorney.

f. Coordinate with local courts concerning the failure of deployed members to appear.

g. Be prepared to brief and assist survivor assistance officers.

D. LEGAL RESOURCES NEEDED (Checklists).

1. If possible, Legal Assistance Attorneys should take the following resources with them to the theater of operations.

___ Supply of pens and pencils
___ Wills and POA worksheets
___ Envelopes
___ Lap top computer/printer
___ LAAWS program
___ Disks containing sample forms

___ Downloaded disks with all relevant TJAGSA LA publications (See The Army Lawyer for downloading directions)
___ CD ROM with publications (if available)

[TJAGSA Publications on LAAWS Bulletin Board (available for downloading) and on CD ROM in 1994]

JA 260 Soldiers' & Sailors' Civil Relief Act
JA 261 Real Property Guide
JA 262 Wills Guide
JA 263 Family Law Guide
JA 265 Consumer Law Guide
JA 267 Legal Assistance Office Directory
JA 268 Notarial Guide
JA 271 Legal Assistance Office Administration Guide
JA 272 Legal Assistance Deployment Guide
JA 274 Uniformed Services Former Spouses' Protection Act Outline and References
JA 276 Preventive Law Series

2. In the event of computer failure, the following should also be included.

___ Manual typewriter with supply of ribbons (include correction ribbons or tape).
___ Simple Form Will for soldiers with no dependents.
___ Simple Form Will for soldiers with spouse only.
___ Simple Form Will for soldiers with spouse and children.
___ Statutory Form Wills for states authorizing them.
___ Form Letters (250 each):
  ___ Form letter to creditor requesting extension of payment date because of deployment.
  ___ Form letter to landlord/mortgagor requesting extension because of deployment.
  ___ Form letter: Soldiers' and Sailors' Civil Relief Act (e.g., request for stay of proceedings; request for interest rate reduction to 6%). (See samples)
  ___ IRS Forms requesting extension of filing deadline or local JAG office form letter requesting extension because of deployment.
  ___ Form letters to state or municipal tax authorities requesting extension because of deployment.

a. Powers of Attorney Forms:

___ General Power of Attorney Form.
___ Special Power of Attorney Form with standard clauses for special situations, e.g., sale of car, sale of house, ability to engage in particular banking transactions.

3. If available, copies of the following regulations, pamphlets, and legal publications should also be taken.

___ AR 27-3, The Army Legal Assistance Program (30 Sep 90)
___ AR 600-8-101, Personnel Processing (In- and Out- and Mobilization Processing) (26 Feb 93)
___ AR 600-15, Indebtedness of Military Personnel (14 Mar 86)
___ AR 600-240, Marriage in Overseas Command.
___ AR 608-61, Application for Authorization to Marry Outside the US.
___ AR 608-99, Family Support, Child Custody, and Paternity (22 May 87)
___ DA PAM 608-33, Casualty Assistance Handbook (17 Nov 87)
___ DA PAM 608-4, A Guide for the Survivors of Deceased Army Members (23 Feb 89)
___ Martindale-Hubbell Law Digests, vol. VIII (most recent edition).

Preparation for Deployment
Supplies and Equipment

SAMPLE READY BOX

Item	Quantity
Lap top computer/printer	2
LAAWS program	
Disks containing sample forms	
Downloaded disks with all TJAGSA LA publications	
CD ROM with publications (if available)	
Manual Typewriter/ribbons/correction tape	2
Client Interview Cards (DA Form 2465, Jul 92)	100
Electrical extension cords	3
Will Cover Letters	200
Envelopes, 4" x 9 1/2" (DA)	50
Envelopes, 4" x 9 1/2" (plain)	50
Markers, red	10
Masking tape, rolls	2
Scotch Tape, rolls	5
Paper, tablets	2
Pens, boxes	5
DA Form 4944-R (Jul 92) Report on Legal Assist. Services	10
Powers of Attorney (10 USC 1044a Notary)	
General	200
Blanks	50
Special Power of Attorney Clause Formats	1
Check Cashing	50
Medical	50
Temporary Guardianship	50
Use of Car	50
Seals (authority of 10 USC 1044a)	2
Signs (Legal Assistance)	2
Staple removers	4
Stapler w/extra staples	4
Will Guides	3
Will Interview Worksheets	100
Simple Will Forms	100
Routine Form Letters	

B. MOBILIZATION AND MOVE OUT

1. LEGAL ASSISTANCE CONSIDERATIONS that may arise and considerations that should be addressed from the point of the alert, or notification of deployment, up to the time of actual deployment.

__ Establish sites to rapidly process deploying personnel. It may be necessary to draw upon other cross-trained attorneys in the office to assist in this effort.
__ Are there sufficient forms to handle last-minute legal assistance problems at departure site?
__ Spot-check deploying soldiers to ensure basic legal assistance needs have been met.
__ Notify JAs remaining at the installation of follow up legal assistance requirements.
__ If reservists will augment the SJA office, leave guidance.
__ Organize and initiate legal assistance briefings for dependents.

2. **LEGAL ASSISTANCE CONSIDERATIONS that may arise and considerations that should be addressed from the time of actual deployment, until the final redeployment of forces.**

In the area of deployment, the Legal Assistance section should:

_ Respond to inquiries from soldiers in country.
_ Establish liaison with communications, transportation, and aviation elements for contact and courier service with JAs in the rear echelon (the installation from which the deployment took place).
_ Establish liaison with US Consulate at deployment location for overseas marriage and adoption coordination, in addition to emergency leave procedures.

At the home installation, the Legal Assistance section should:

_ Follow up on legal assistance cases referred by deployed LAOs.
_ Coordinate with communications, transportation, and aviation elements on the installation to ensure contact and courier service with deployed LAOs.
_ Extend legal assistance office hours, as necessary, to handle legal assistance problems of working dependents.
_ Continue legal assistance briefings for family members. Notice of these meetings should be mailed to the individual, using previously obtained mailing addresses and disseminated by post newspaper and local television and radio media.
_ Coordinate with local banks and financial institutions to expect a higher usage of powers of attorney.
_ Coordinate with local courts concerning the failure of deployed members to appear.
_ Be prepared to brief and assist survivor assistance officers.

IX. ADDITIONAL FORMS/SAMPLES/INFORMATION FOUND IN DEPLOYMENT GUIDE, JA 272 (Nov 93)

FAMILY CARE PLANS INFORMATION
MOBILIZATION AND MOVE OUT
- 8 STEPS FOR DEPLOYMENT PREPARATION
- OPLAW DEPLOYMENT CHECKLISTS
- POST-ALERT / PRE-DEPLOYMENT PREPARATION CHECKLISTS
- POST DEPLOYMENT CHECKLISTS

LIMITATION ON ACCEPTANCE OF VOLUNTARY SERVICES
DESERT STORM AFTER-ACTION
- LEGAL TEAM REPORT

PROPOSED ARMY DOCTRINE ON WILL PRIORITY
STANDARD OPERATING PROCEDURES
- SOP: Participation of OSJA, Legal Assistance Office, in Soldier Readiness Program (SRP) Processing

INFORMATION PAPERS
- Legal Assistance Services
- Soldier Readiness Program (SRP)
- Designation of Beneficiaries Under Servicemen's Group Life Insurance (SGLI)
- Powers of Attorney
- Revision of General Power Of Attorney (POA)
- Demobilization Legal Issues for Reserve Component (RC) Units and Individuals

MEMORANDA FOR COMMANDERS
- Legal Preparation for the Soldier Readiness Program/Processing (SRP) scheduled on (DATE)
- Legal Readiness of (UNIT)

ROUTINE SRP TRACKING SHEET
SOP: Preparation of Wills, Living Wills and Durable Powers of Attorney
SAMPLE CLIENT INTERVIEW FORM
FAMILY MEMBER PRE-MOVEMENT CHECKLIST
ARMY GUIDANCE FOR ESTATE PLANNING
FAMILY DEPLOYMENT BRIEFING
SAMPLE WILL BRIEFING
WILL PREPARATION WORKSHEET
T A K E - 1
- MAKING YOUR WILL
- ALL ABOUT PROBATE

SAMPLE DUAL REPRESENTATION LETTER
FOR NEW ESTATE PLANNING CLIENTS
ESTATE PLANNING CHECKLIST
SAMPLE LETTERS: TO CREDITOR; TO OPPOSING ATTORNEY REQUESTING STAY OF PROCEEDINGS; TO CLERK OF COURT REQUESTING STAY OF PROCEEDINGS
SAMPLE AFFIDAVIT IN SUPPORT OF STAY REQUEST
SAMPLE LETTER FROM COMMANDER REQUESTING A COURT STAY
T A K E - 1
- SOLDIERS' AND SAILORS' CIVIL RELIEF ACT

BENEFICIARY CHECKLIST
RECOMMENDED SGLI LANGUAGE
SURVIVOR BENEFITS OFFSETS
WHAT NOTARIES MAY DO ... AND OTHER CONSIDERATIONS
TAKE-1 : POWERS OF ATTORNEY
CHECKLIST FOR PREPARING A POWER OF ATTORNEY
CLIENT INSTRUCTIONS FOR POWER OF ATTORNEY
SAMPLE POWERS OF ATTORNEY

TAB S
CIVIL DISTURBANCE OPERATIONS AND DOMESTIC DISASTER RELIEF

CIVIL DISTURBANCE OPERATIONS

I. REFERENCES.

10 U.S.C. § 1385. (Posse Comitatus Act).
10 U.S.C. §§ 331-334. (Civil Disturbance Statutes).
AR 500-50, Civil Disturbances, 21 April 1972
FM 19-15, Civil Disturbances, 25 November 1985.
FM 100-19, Domestic Support Operations, July 1993.
AR 190-52, Countering Terrorism and Other Major Disruptions on Military Installations.
Memorandum of Understanding - Domestic Terrorist Incidents.
TC 19-16, Countering Terrorism on U.S. Army Installations.
DOD Civil Disturbance Plan ("Garden Plot"), February 1991.
MCO 3000.8B, Employment of Marine Corps Resources in Civil Disturbances, 30 Jul 79.
OPNAVINST 3440.16B, DON Civil Emergency Ass't Program, 4 Sep 91.
DOD Directive 5525.5, DOD Cooperation with Civilian Law Enforcement Officials (w/change one), 21 February 1986.
AR 500-51, Support to Civilian Law Enforcement, 1 August 1983.
MCO 3440.7, Marine Corps Ass't to Civil Authorities, 1 Jan 92.
SECNAVINST 5820.7B, Cooperation with Civilian Law Enforcement Officials, 28 March 1988.
AFR 55-35, Air Force Assistance to Civilian Law Enforcement Officials, 22 December 1986.

II. MILITARY ASSISTANCE IN CIVIL DISTURBANCES.

Definitions.

Civil Disturbances Group acts of violence and disorders prejudicial to public law and order. (AR 500-50).

Terrorist Incident A form of civil disturbance defined as a distinct criminal act committed or threatened to be committed by a group or single individual in order to advance a political objective and greatly endangering safety or property. (DoD Dir. 3025.12).

Terrorism. The calculated use of violence or the threat of violence to attain goals, political, religious, or ideological in nature. This is done through intimidation, coercion, or instilling fear. Terrorism involves a criminal act that is often symbolic in nature and intended to influence an audience beyond the immediate victims. (AR 190-52).

Restrictions on the Use of the Armed Forces.

- The Posse Comitatus Act. 10 U.S.C. § 1385.

> **"Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, wilfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both."**

- Act applies to active duty members of the Army and Air Force, active duty, active or inactive duty for training reservists.

- Act does not apply to off-duty active duty personnel, nor does it apply to National Guardsmen who are not in federal status (i.e, Title 32 status vice Title 10).

Statutory exceptions to the Posse Comitatus Act which allow active duty military to respond to civil disturbances.

Request from a state–10 U.S.C. Â331.

> Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.

Enforcement of Federal law–10 U.S.C. Â332.

> Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings. he may call into Federal service such of the militia of any State, and use such of the armed forces, a he considers necessary to enforce those laws or to suppress the rebellion.

Protection of civil rights--10 U.S.C. Â333.

> **The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it--**
>
> **(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or**
>
> **(2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.**
>
> **In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.**

Prerequisites for Use of Federal Troops Under 10 U.S.C. §§ 331-333.

Personal decision by President. AR 500-50, para. 2-3. See Executive Order 12804 (1 May 1992) in connection with Los Angeles riots.

Proclamation to disperse. 10 U.S.C. § 334. See Proclamation 6427 (1 May 1992) in connection with Los Angeles riots.

Responsibilities.

Department of Justice - lead agency.

Department of Defense - coordinates Federal military response.

Department of the Army - executive agent of DOD via Secretary of the Army.

Navy, Air Force, and Marine Corps - support role.

Command Authority Over Troops - See AR 500-50.

Role of Federal Troops - See AR 500-50.

Use of Federal Troops in Domestic Terrorist Incidents.

- Memorandum of Understanding (MOU) between DoD, DOJ, and FBI on Use of Federal Military Force in Domestic Terrorist Incidents. Executed Summer 1983.

Attorney General responsible for management of Federal response to acts of terrorism in U.S.

FBI is lead agency within DOJ for operational response to domestic terrorist incident.

Secretary of Defense is responsible for all military preparations and operations.

Secretary of the Army is DoD Executive Agent.

-- Responsibilities of DoD are carried out principally through DA.

III. OPERATIONAL PROBLEMS.

Use of Force. See, Tennessee v. Garner, 471 U.S. 1 (1985); **DOD Civil Disturbance Plan ("Garden Plot").**

Minimum force must be used at all times when responding to civil disturbances.

Deadly force may be used only if:

Lesser means have been exhausted or are unavailable; and

Risk of harm to innocent persons is not significantly increased; and

Purpose of use is one of the following:

- In self-defense to avoid death or serious bodily harm.
- To prevent crime involving serious risk of death or serious bodily harm.
- To prevent destruction of vital public health/safety property.
- To prevent escape of person who is serious threat to person or property.

For Civil Disturbance ROE, see TAB H, OPLAW Handbook; also see Appendix C of the "Garden Plot".

Exercise of Authority Over Civilians.
Detention - See AR 500-50 and Garden Plot.
Search and seizure - See AR 500-50 and Garden Plot.

IV. LEGAL PROBLEMS.

A. Potential Criminal Liability.
B. Potential Civil Liability.

DOMESTIC DISASTER RELIEF OPERATIONS[1]

I. INTRODUCTION.

A. Purpose. To provide judge advocates with an overview of the legal bases, restrictions, and policy considerations applicable to domestic disaster relief operations.

B. Chain of command: President-FEMA-DOD-SECARMY-DOMS-JTF (if required) -Service Commands

C. References:

- The Robert T. Stafford Act, as amended, 42 U.S.C. §§ 5121 et. seq..
- Executive Order 12148, Federal Emergency Management.
- Executive Order 12656, Assignment of Emergency Preparedness Responsibilities.
- The Federal Response Plan, April 1992.
- 44 CFR Part 206, Federal Emergency Management Agency.
- DOD Dir. 3025.1, Use of Military Resources During Peacetime Civil Emergencies Within the United States, its Territories, and Possessions, 15 January 1993.
- AR 500-60, Disaster Relief, 1 August 1981.
- 18 U.S.C. § 1385 (Posse Comitatus Act).
- FM 100-19, Domestic Support Operations, 1 July 1993.

D. Definitions.

1. **Emergency.** Any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States. (42 U.S.C. § 5122(1)).

2. **Major Disaster** Any natural catastrophe (including any hurricane, tornado, storm, high water, winddriven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this chapter to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby. (42 U.S.C. § 5122(2)).

3. **Federal Emergency Management Agency (FEMA)** Agency authorized by executive order to act as lead agency in all domestic disaster relief organizations. [Get a copy of orders by FEMA designating area as disaster area!]

4. **Director of Military Support (DOMS)** Two-star Army officer assigned in DCSOPS who acts as SECARMY's representative, in SECARMY's capacity as the executive agent within DoD for domestic disaster relief operations.

5. **Federal Coordinating Officer (FCO)** Senior FEMA official who coordinates all federal disaster relief activities.

6. **Defense Coordinating Officer (DCO)** DoD officer designated to coordinate all DoD disaster relief operations. Often, but not necessarily, this is the senior military commander (e.g., Joint Task Force Commander) designated to oversee disaster relief efforts.

II. MILITARY ASSISTANCE IN DOMESTIC DISASTER RELIEF OPERATIONS.

A. Statutory Basis for providing relief is the Stafford Act.
Key: there is no inherent authority for the federal government to infringe upon the authority of a State to manage its own internal affairs.

B. Four mechanisms which trigger involvement of Federal troops.

1. 42 U.S.C. § 5170b(c). President's emergency 10-day authority to use DoD to perform work "essential for the preservation of life and property." Done prior to any Presidential declaration of "emergency" or "major disaster." Emergency work includes clearing and removing debris and wreckage and the temporary restoration of essential public facilities and services.

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[1] Until FEMA was created in 1979, the Defense Department's civil defense directorate was the primary federal agency that responded to natural disasters. Several back to back disasters in 1992 caused Congress to reconsider whether FEMA should remain the lead agency in this area. Senator Nunn has said, "If we want a federal agency that can do [large scale disaster relief], maybe we should make FEMA part of the Department of Defense."

2. 42 U.S.C. § 5170. Presidential declaration of a "major disaster"

(a) Must be at the request of the Governor, after an appropriate finding that the incident is of such severity and magnitude it is beyond the capabilities of the State and that Federal assistance is required.

(b) As a prerequisite, the Governor must --

(1) Respond under State law (e.g., activate the State National Guard under Title 32).

(2) Execute the State's emergency plan.

(3) Provide information (to FEMA) regarding the resources that have been committed.

(4) Certify that the State will comply with costsharing provisions under the Act.

3. 42 U.S.C. § 5191. Presidential declaration of an "emergency."

(a) Must be at the request of the Governor, after an appropriate finding that the incident is of such severity and magnitude it is beyond the capabilities of the State and that Federal assistance is required.

(b) As a prerequisite, the Governor must --

(1) Respond under State law (e.g., activate the State National Guard under Title 32).

(2) Execute the State's emergency plan.

(3) Provide information (to FEMA) regarding the resources tha have been committed.

(4) Certify that the State will comply with costsharing provisions under the Act.

(5) Define the type and amount of federal aid required. (This is the only difference between a major disaster and an emergency. Traditionally, an "emergency" was viewed as less severe than a "major disaster" and was used primarily to get Federal assistance in the form of programs, grants, and other monetary federal assistance. The 1988 amendments to the Stafford Act, for all practical purposes, have eliminated the differences between a "major disaster" and an "emergency" in relation to the type of Federal aid available; however, as a general rule more money is available under the section pertaining to major disasters than is available under the section pertaining to emergencies.

4. DOD Directive 3025.1: Immediate Response Authority.

(a) Note this is not authority provided in The Stafford Act.

(b) Authorizes local military commanders to save lives, prevent human suffering, and mitigate great property damage in imminently serious conditions and time does not permit approval from higher headquarters.

(c) Authorizes following types of support: rescue, evacuation, and emergency treatment of casualties; emergency restoration of power; debris removal and EOD; and food distribution.

C. The importance of FEMA.

1. Designated by EO 12656 as the lead Federal agency for all domestic disaster relief.

2. Federal Response Plan. Basically a memorandum of understanding between all the federal agencies which provide disaster relief and FEMA. The Federal Response Plan establishes twelve Emergency Support Functions (ESF) and assigns primary and supporting agency responsibility for each ESF.

(a) DoD is primary agency for --

(1) ESF 3, Public Works and Engineering (through the Army Corps of Engineers).

(b) DoD is supporting agency for all other ESFs.

1 - Transportation.
2 - Communications.
4 - Firefighting.
5 - Information and Planning.
6 - Mass Care.
7 - Resource Support.
8 - Health and Medical Services.
9 - Urban Search and Rescue
10 - Hazardous Materials.
11 - Food.
12 - Energy.

NOTE: a supporting agency can be, and DoD often is, tasked with primary responsibility for a particular mission (or for the entire ESF) outside its primary agency responsibility.

3. Fiscal considerations.

(a) Federal agencies are authorized reimbursement for their expenses incurred during disaster relief operations from those monies either set aside or specially appropriated for a particular disaster (42 U.S.C. § 5147).

(b) FEMA, under its implementing regulations (44 CFR Part 206), is the sole authority that decides whether or not reimbursement is forthcoming. **Always route all requests for assistance through FEMA, this will preclude argument at a later time as to whether the particular mission was valid and reimbursement is forthcoming.** All requests for DoD assistance should be routed in either one of two manners --

(1) From the State or local agency to FEMA. FEMA, through the FCO, will evaluate the request and approve, disapprove, or partially approve the request. Approved requests are tasked by the FCO to the DCO, who in turn disseminates the task down to the unit(s) providing the support.

(2) From the State or local agency to a DoD unit. This request should be forwarded to the DCO, who will coordinate with the FCO to determine if it will be approved, disapproved, or partially approved. Approved requests are tasked by the FCO to the DCO, who in turn disseminates the task down to the unit(s) providing the support.

D. Types of support authorized.

1. Personnel, equipment, supplies, facilities, and managerial, technical, and advisory services in support of relief authorized under the Act (42 U.S.C. §§ 5170a(1) and 5192(a)).

2. Distribution of medicine, food, and other consumable supplies, and emergency assistance (42 U.S.C. §§ 5170a(4) and 5192(a)(7)).

3. Utilizing, lending, or donating Federal equipment, supplies, facilities, personnel, and other resources to State and local governments (42 U.S.C. §§ 5170b(a)(1) and 5192(b)).

4. Performing on public or private lands or waters any work or services essential to saving lives and protecting and preserving property, public health, and safety, including --

a. Debris removal.
b. Search and rescue, emergency medical care, emergency mass care, emergency shelter, and provision of food, water, medicine, and other essential needs, including movement of supplies or persons.
c. Clearance of roads and construction of temporary bridges necessary to the performance of emergency tasks and essential community services.
d. Provision of temporary facilities for schools and other essential community services.
e. Demolition of unsafe structures which endanger the public.
f. Warning of further risks and hazards.
g. Dissemination of public information and assistance regarding health and safety measures.
h. Provision of technical advice to State and local governments on disaster management and control.
i. Reduction of immediate threats to life, property, and public health and safety. (42 U.S.C. §§ 5170b(a)(3)).

E. Restrictions on the provision of support.

1. **Posse Comitatus Act**, 18 U.S.C. § 1385.

"Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both."

a. Applies to Army and Air Force troops in active federal service. Does not apply to National Guardsmen performing duties under Title 32.

b. The *Stafford Act is not a statutory exception to the Posse Comitatus Act akin to* 10 U.S.C. §§ 331-333 (Civil Disturbance and Insurrection statutes).

c. If, as a result of an emergency or major disaster, the situation decays to a degree that Federal troops are required to maintain the peace, a separate declaration under 10 U.S.C. § 334 must be issued by the President.

2. **All mission taskings must either originate from FEMA, or be routed through FEMA for approval prior to execution.** Other than under the emergency 10-day provision (42 U.S.C. § 5170b(c)) and the DOD 3025.1 immediate response authority, DoD has no authority to provide disaster relief independent from FEMA.

III. OPERATIONAL PROBLEMS

A. Posse Comitatus Act (PCA) Problems

1. Traffic Control Points. Often local officials will seek military assistance in operating traffic control points to replace nonoperational traffic lights. The PCA prohibits Federal troops from manning traffic control points unless there is a military purpose in doing so, e.g., opening the way for a convoy or keeping a military supply route open. If there is no military purpose involved, traffic control in the civilian community is a civilian law enforcement function. National Guard troops in Title 32 status may be used to perform this function.

2. Patrolling. Whenever a military commander is assigned an area of responsibility, one of the first priorities of work will be to ensure that the area is secure. Frequently, looting and other illegal activities may be occurring within a commander's sector. Patrolling in civilian neighborhoods for the purpose of providing security, whether on foot or in military vehicles, violates the PCA. It is important to distinguish patrols designed to execute a humanitarian relief mission (e.g., delivering MREs, medical assistance, and other essentials) from patrols designed to ensure security of the sector (i.e., the civilian population and property therein). The former are proper, the latter violate the PCA. Even though the mere presence of a humanitarian relief patrol may deter potential lawbreakers, there is no violation of the PCA so long as troops do not become involved in a law enforcement function.

3. Security at Supply Depots. Using Federal troops to guard any military facility, to include a supply depot under the control of the military, does not violate the PCA. As long as the facility is operated by the military, the fact that some or all of the materials and supplies stored there are State and local property (by virtue of their donation from other agencies) is irrelevant.

4. Security at Life Support Centers (LSCs). Although the American Red Cross has responsibility under ESF 6 for providing temporary shelter, often the military is called upon to provide tentage and personnel support for these LSCs. LSCs are under the control of, and operated by, State and local governments and not by the military, irrespective of the degree of material and personnel on site which is military. As such, the security of LSCs is exclusively a local law enforcement function. *Often this function is performed by local law enforcement officials, locally deputized Federal Marshals, or National Guardsmen on State status.*

B. Rules for the Use of Force

1. Unlike the **GARDENPLOT** stand-alone Rules of Engagement, there are no preexisting stand-alone ROE/Rules for the Use of Force for domestic disaster relief operations. In the absence of published ROE/Rules for the Use of Force, the JCS Peacetime ROE apply by analogy.

2. It should be noted that, given the nature of the operation, generally no additional ROE/Rules for the Use of Force are necessary. Indeed, in most instances troops are entering a non-hostile environment and are welcomed by the local populace with open arms. However, in instances where a major disaster strikes a metropolitan area, often the breakdown of routine services, to include police services, will result in sporadic looting and gang-related incidents. In those instances, commanders will seek advice from their judge advocates regarding the arming of their troops and their attendant Rules for Self Protection.

C. Force Protection

1. During disaster relief operations in metropolitan areas, the force may be subjected to the threat of violence by local street gangs and other criminal elements. In these instances, commanders will wish to effect liaison with local law enforcement agencies (LEA) in order to properly assess the threat to the force.

2. Due to the nature of disaster relief operations, G2/S2 personnel are often underemployed and commanders may seek to have these personnel conduct liaison with LEA. This should be avoided whenever possible. Executive Order 12333 and AR 381-10 allow LEA liaison activities, so long as no special investigations/operations are conducted. However, AR 381-10 mandates that, in general, all information obtained as a result of local LEA liaison efforts be destroyed upon mission completion. This includes all forms of the information (e.g., written reports, hard drives, floppy disks, and notes). Failure to destroy this information triggers reporting requirements (questionable activities) which involve both the Army General Counsel and the Army Inspector General.

3. AR 380-13 and DOD Dir. 5200.27 allow G3/S3 personnel to perform the same LEA liaison function for the purpose of force protection. Although AR 380-13 contains similar restrictions against information retention after mission completion, there are no reporting requirements up through the Army General Counsel and the Army Inspector General.

D. Election Support

1. Federal law (18 U.S.C. § 592) prohibits the positioning of troops "at any place where a general or special election is held." Often, State and local officials desire to hold some form of election while disaster relief

operations are ongoing. Elections are considered essential community services under the Stafford Act, and are eligible for Federal support, subject to the restrictions of 18 U.S.C. § 592.

2. The Department of Justice has opined that, where State and local officials set up polling sites in the immediate proximity of troop concentrations (e.g., billeting areas, food distribution centers, and life support centers), there is no violation of Federal law so long as, to the maximum extent practicable, troops avoid any demonstration of Federal military authority at or near the polling site. Furthermore, DOJ has opined that troops can erect tents with light sets and provide generator maintenance for these sites without violating Federal law.

E. **Chaplain Activities** Chaplains routinely deploy with their units (usually at the battalion-size or larger). Their role in disaster relief operations is not expanded by the Stafford Act or other legislation. Chaplains must refrain from ministering to civilian disaster victims. This activity violates the Establishment Clause's prohibition on government sponsorship of religion.

F. **Claims.**

1. The Stafford Act (42 U.S.C. § 5148) states that "the Federal Government shall not be liable for any claim based upon the exercise of or failure to exercise or perform a discretionary function or duty on the part of a Federal agency or an employee of the Federal Government in carrying out the provisions of this chapter." USARCS has interpreted this language as having no impact on how claims and potential claims are processed.

2. The Stafford Act (42 U.S.C. § 5173) conditions Federal debris removal assistance on the affected State and local governments agreeing to "indemnify the Federal Government against any claim arising from such removal." USARCS and FEMA share the opinion that it is FEMA rather than the Army that will seek indemnification from a State or local government. Accordingly, from investigation through adjudication, the normal Army claims procedures are followed. After adjudication, however, claims resulting from debris removal by Army units should be forwarded to USARCS, who will turn them over to FEMA.

G. **Debris Removal.**

1. The Stafford Act (42 U.S.C. § 5173) authorizes Federal agencies to remove debris from both public and private lands. Such assistance is conditioned on the affected State or local government obtaining unconditional authorization for the debris removal, and, in the case of private lands, the Federal Government must also be indemnified against any claim arising from such removal.

2. As a policy matter, commanders may wish to restrict troops from removing debris from private property in the absence of the property owner's request and presence. This will avoid adverse publicity which can arise from angry property owners whose lots were cleared against their will. As an alternative, property owners can be instructed to remove debris to the public right of way for removal, and troops can assist property owners who are present and request assistance in hauling debris to the right of way.

H. **Donated Property.**

1. It is very common for military units (predominantly Army Materiel Command) to be tasked to establish depots to warehouse and distribute construction materials, clothing, furniture, and other property that has been donated for distribution to disaster victims. All donated property is considered to be donated to the State, and distribution of property is done at the direction of the State agency designated as the coordinating agent for this purpose (usually the State chapter of the American Red Cross).

2. At the close of operations, when military units are returning to home station, FEMA must be contacted to coordinate a transition plan with the State. Often, private relief organizations will appear at depots requesting transference of property contained within the depot to them. Donated property in military custody that has not been distributed to disaster victims or other relief agencies must be disposed of according to the instructions of the government entity having dominion over it.

I. **Environmental Compliance.**

The Stafford Act (42 U.S.C. § 5159) exempts actions taken by Federal agencies while providing disaster relief from being considered a "major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969." However, while environmental impact statements are specifically waived, due consideration must be given to the effects of disaster relief operations and compliance with other federal environmental laws (such as the Clean Air Act and Clean Water Act) are not waived. This is especially important in the area of debris removal. Often debris is removed to open burn sites, which requires a State waiver under the Clean Air Act.

J. **Medical Support to Relief Workers.**

1. The Stafford Act (42 U.S.C. § 5170b(a)(3)(B)) clearly envisions the provision of medical care to disaster victims. On its face, the statute appears to apply only to disaster victims, and not to the numerous relief workers in the area who may also require medical treatment. Army Regulations (AR 40-3, Medical Services) do not provide an independent source of authority.

2. The Office of the General Counsel, FEMA, has opined that the Stafford Act does authorize the provision of medical care to all persons within the disaster are, to include relief workers. Under this authority, the Public Health Service, which has primary responsibility for relief worker health under the Federal Response Plan, may request that FEMA task DoD to provide these medical services.

K. **Operating a Disaster Relief Radio Station** There is no authority under the Stafford Act to operate a radio station to broadcast public service messages related to DoD disaster relief efforts. However, the Federal Communications System has, in the past, granted a limited license to operate a radio station for these purposes. The FCC should be contacted through FEMA and the National Communications System (responsible for ESF 2). The radio station can be operated by PSYOP personnel, with the caveat that it broadcast only public service messages (no music or commercial programming) and cease operation with the termination of DoD relief efforts.

L. **Volunteers**

1. There are statutory exceptions to the general prohibition against accepting voluntary services under 31 U.S.C. § 1342 that can be used to accept the assistance of volunteer workers. The statute itself authorizes the acceptance of voluntary services in "emergencies involving the safety of human life or the protection of property." The Stafford Act (42 U.S.C. § 5152(a), 5170(a)(2)) authorizes the President to use the personnel of private disaster relief organizations and to coordinate their activities.
2. Despite these exceptions, military units should not attempt to organize or supervise volunteer workers. Considerations of liability and control dictate that all volunteers be channeled through private relief organizations.

IV. DEPLOYMENT LIBRARY

1. The Robert T. Stafford Act, as amended, 42 U.S.C. §§ 5121 et. seq.,
2. The Federal Response Plan, April 1992.
3. 44 C.F.R. Part 206, Federal Emergency Management Agency.
4. DOD Dir. 3025.1, Military Support to Civil Authorities.
5. DOD 3025.1-M, Military Support to Civil Authorities Manual (to be published).
6. AR 500-60, Disaster Relief.
7. AR 700-131, Loan and Lease of Army Materiel.
8. AR 15-6, Investigations and Boards of Officers.
9. AR 27-10, Military Justice.
10. AR 27-1, Legal Services.
11. AR 27-20, Claims.
12. AR 27-3, Legal Assistance.
13. AR 27-40, Litigation.
14. AR 405-80, Acquisition of Real Estate.
15. AR 95-1/2&3, Aviation Operations.
16. AR 40-3, Medical Services.
17. AR 381-10, Intelligence Activities.
18. AR 380-13, Acquisition and Storage of Information Concerning Nonaffiliated Persons and Organizations.
19. Reserve Components Update.
20. Supply Update.
21. Manual for Courts-Martial, United States, as amended (1984).

Tab T
SUPPORT TO COUNTERDRUG OPERATIONS

REFERENCES

A. 18 U.S.C. § 1385, **Posse Comitatus Act.**
B. 10 U.S.C. §§ 371-381, Chapter 18 - **Military Support For Civilian Law Enforcement Agencies.**
C. 1989, 1990-91, 1990-91, 1992-93, 1993, and 1994 **National Defense Authorization Acts** (Public Laws 100-456, 101-189, 101-510, 102-190, 102-484, 103-160 respectively).
D. DOD DIR. 5525.5, **DOD Cooperation With Civilian Law Enforcement Officials (w/change one), 21 February 1986.**
E. AR 500-51, **Support to Civilian Law Enforcement,** 1 August 1983.
F. AR 700-131, **Loan and Lease of Army Materiel,** 4 September 1987.
G. SECNAVINST 5820.7B, **Cooperation With Civilian Law Enforcement Officials,** 28 March 1988.
H. AFR 55-35, **Air Force Assistance to Civilian Law Enforcement Officials,** 22 December 1986.
I. FM 100-19, **Domestic Support Operations,** July 1993.
J. DA-PAM 27-21, **Administrative and Civil Law Handbook,** Chapter 3 ("Military Assistance to Civil Authorities"), 18 September 1990.
K. CJCS Instruction 3710.01, **Delegation of Authority for Approving Operational Support to Drug Law Enforcement Agencies and Counterdrug-Related Deployment of DOD Personnel,** 28 May 1993.
M. NAVMC 2915, **Counterdrug Campaign Plan,** 23 November 1993.

The war against drugs currently has two arenas: domestic and international. Where a unit is operating will determine the various laws that affect the operation. This TAB covers both arenas, but the drug effort abroad actually falls under **NATION ASSISTANCE (TAB U)** It is covered here simply for convenience (one "DRUG" tab). Operators and lawyers should keep in mind the NATION ASSISTANCE implications when planning and conducting counterdrug operations abroad.

In addition to the standard references listed above the following materials are also extremely helpful if you are working extensively in this area: **"Counternarcotics Notebook,"** Center for Special Forces Operations Law, US Army Special Forces Command, Fort Bragg, (919) 396-8788; **"Drug Warrior's Guide,"** Headquarters, USSOUTHAF/12 AF, DSN 685-2865/66; COMM (512) 369-2865.

DOD COUNTERDRUG MISSIONS

IT IS IMPORTANT TO NOTE THAT DOD'S COUNTERDRUG OPERATIONS ARE STRICTLY IN SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES.

DOD Support to Civilian Law Enforcement Agencies (CLEAs) DOD has specific statutory authority to support certain activities of US CLEAs. This support role has both a domestic and an international application [see 10 USC §§371-381].

DOD Support For Non-CLEAs. Under the general authority of the Economy Act [see 31 USC §1535] and the Intergovernmental Cooperation Act, as well as specific statutory authority for the agency concerned (e.g. State, CIA, etc.), DOD may support other federal, state and local agencies which have a counterdrug role even though the agencies are not CLEAs. DOD provides extensive support to State Department international drug control activities pursuant to authority under the Foreign Assistance Act, Arms Export Act and other legislation.

DOD's Counterdrug Mission DOD also serves as the single lead agency for the Federal Government for the detection and monitoring of aerial and maritime transit of illegal drugs into the US [see 10 USC §124]. 10 USC §124 states that this role is in support of federal, state, local, and foreign CLEAs.

BACKGROUND INFORMATION

a. The Posse Comitatus Act (18 USC §1385) prohibits use of Army and Air Force personnel to enforce the civil laws of the US, "except in cases and under circumstances expressly authorized by the Constitution or Act of Congress." Violation of the Act carries with it criminal liability (felony) and the possibility of a $10,000 fine. This prohibition is applicable to Navy and Marine Corps personnel as a matter of DOD policy [see DOD Directive 5525.5]. The primary prohibition of the Posse Comitatus Act is against direct military involvement in law enforcement activities. Generally, court interpretations have held that military support short of actual search, seizure, arrest, or similar confrontation with civilians (i.e., indirect assistance) is not a violation of the act. Congress essentially codified these court interpretations in 10 USC §§371-381, Military Support For Civilian Law Enforcement Agencies. 10 USC §375 codifies the prohibition against direct participation in law enforcement activities by military personnel, and specifically forbids military members conducting a search, seizure, arrest, or similar activity (interrogation, surveillance, undercover work, etc.).

[NOTE: the key phrase in the Posse Comitatus Act is "to execute the laws". Three different court interpretations have emerged from federal courts regarding what this language means. In United States v. Jaramillo, 380 F.Supp 1375 (1974), the court looked to whether the conduct of the military "pervaded the activities" of civilian law enforcement. In United States v. Red Feather, 392 F.Supp 916 (1975), the court held that executing the laws meant "direct active use" of military personnel. In United States v. MacArthur, 419 F. Supp 186 (1976), the court decided that execution of the laws meant subjecting citizens to military authority which was "regulatory, proscriptive, or compulsory" in nature. In United States v. Yunis, 681 F.Supp 891 (1988), the court applied the analysis from United States v. MacArthur and reaffirmed the "regulatory, proscriptive, or compulsory" test. All three tests may be applied to a single situation, and if any is violated, the court is free to decide that the Act itself has been violated.]

b. DOD's counterdrug mission is to detect and monitor the aerial and maritime transit of drugs into the US. The scope of this mission is being developed as the Secretary of Defense assigns missions to unified commanders. However, this mission does not give DOD general police powers and DOD personnel are not relieved of current restrictions against law enforcement activities within the US.

[NOTE: the seminal document in understanding counterdrug missions as they are assigned to the unified commanders is the Chairman of the Joint Chiefs of Staff Delegation of Authority Instruction (CJCSI 3710.01, 28 May 1993), in which the Secretary of Defense, through the Joint Chiefs of Staff, gave authority to unified commanders (e.g. USACOM, USPACOM) to approve various facets of counterdrug support to CLEAs and to further subdelegate approval authority to flag-level officers in their chain-of-command. Activities which are not included in the delegation message are held for closer scrutiny by DOD because they tend to be controversial, unprecedented, or require close coordination with DOJ and DOS.]

c. Different rules apply to DOD activities in foreign countries. Neither the Posse Comitatus Act nor similar prohibitions contained in 10 USC §375 are applicable outside the territorial jurisdiction of the US. (See opinion of the Office of Legal Counsel, U.S. Dept. of Justice, Extraterritorial Effect of the Posse Comitatus Act, Nov 3, 1989; see also The Posse Comitatus Act and Drug Interdiction: Just How Far Can We Go?, the Army Lawyer, Dec. 1990). While DOD's counterdrug mission does not include enforcing US drug law overseas, there is a potential DOD support role of this nature. Note, however, the impact of DOD Directive 5525.5, DOD Cooperation With Civilian Law Enforcement Officials. This directive, which applies worldwide to all US forces, implements the direct participation proscription of 10 USC §375 (search, seizure, arrest, etc.). Thus, absent the SECDEF waiver provided in DOD Directive 5525.5, US forces operating OCONUS are still subject to significant restrictions on their activities. Further restrictions are mentioned in the next paragraph.

d. DOD has support roles overseas, including support for federal CLEAs with responsibilities in foreign countries and support for State Department international counterdrug programs. In these support roles, additional restrictions under the Foreign Assistance Act limit DOD participation in arrest actions of foreign police (e.g., the Mansfield Amendment).

e. **Funding considerations**

(1) If DOD is not the lead agency for a particular part of the US counterdrug policy, DOD may act in a supportive role for the lead agency. When DOD is performing a support role, fiscal law principles require that the supported agency reimburse DOD for the costs of providing the support, unless otherwise provided by law.

[NOTE: under 10 USC 377(b), a supported agency need not reimburse DOD if such support is provided in the normal course of military training or operations, or results in a benefit to DOD that is substantially equivalent to that otherwise obtained from military operations or training. This provision is one of the keys in providing timely, efficient support to Cleas. Cleas, especially the state and local variety, often do not have funds for expansion of existing capabilities, and often will not consider military support unless it is provided free of charge. To provide unreimbursed support, there must be a military training nexus to satisfy the criteria of 10 USC 377. Demonstrate this nexus by citing the METL-related skills required to perform the support, or the METL-related tasks the servicemembers/units will accomplish while providing the support.

(2) Congress has authorized and funded counterdrug roles for several agencies. Agencies are required to manage their appropriations so as not to duplicate the role Congress assigns to another agency unless authorized by law. Basic fiscal principles are outlined in Tab L.

1. **DOD Support to Civilian Law Enforcement Agencies (CLEAs).**

a. **General** This paragraph describes the support which DOD may provide to federal, state, local, and foreign CLEAs. The support is authorized primarily within the territorial jurisdiction of the US, including the territorial seas. Certain actions are authorized outside the land area of the US, e.g. various federal CLEAs, such as the FBI, the Drug Enforcement Administration (DEA) and the Coast Guard may participate in cooperative international efforts to combat drug production and trafficking. If US law is the basis for this CLEA role, DOD may provide support under 10 USC §374(b)(1)(A). These agencies may also assist foreign governments with their counterdrug programs. DOD may support this federal CLEA activity under 10 USC §374(b)(1)(B). Some activities are forbidden unless specifically authorized by law.

b. Statutory authority defining DOD's role.

(1) **General assistance** in support of federal, state and local civil law enforcement agencies (CLEAs) (10 USC §§371-374).

(a) DOD may provide information gained during normal military training or operations, and **shall** "to the maximum extent practicable" consider the information needs of CLEAs when planning normal training or military operations; and **shall**, "to the extent consistent with national security", share intelligence with CLEAs (10 USC §371).

[NOTE: during an otherwise valid training mission or exercise, information gathered may be passed to other agencies. Moreover, 10 USC 371 requires DOD to take CLEA needs into account when planning/executing operations. Examples cited in legislative history include "scheduling training exercises using night vision devices in border areas, conducting photo-recon training missions in a manner that serves the need of a CLEA for aerial surveillance of potential marijuana fields, and similar activities". House Conference Report No. 100-989, Nat'l Def. Auth. Act FY 89, p. 2529, US Cong. and Admin. News.]

(b) DOD may provide equipment, supplies, spare parts, and facilities to CLEAs (10 USC §372).

1. Requests by CONUS law enforcement agencies for equipment, facilities, and training from the training base should be coordinated, and many times, processed by the appropriate Regional Logistics Support Office (RLSO - regional RLSOs are located at Buffalo, Miami, El Paso, and Long Beach) in accordance with current DOD policy and service regulations. AR 500-51 also contains guidance on providing equipment, facilities, and personnel to CLEAs.

[NOTE: Loans (which may be made only to Federal agencies) and leases (which may be made to State and local agencies) must comply with relevant statutes, e.g., the Economy Act and the Leasing Statute, and service regulations, e.g., AR 700-131, Loan and Lease of Army Materiel. The process for loaning equipment to federal agencies is fairly straightforward, and usually can be arranged without cost to the CLEA. The process of leasing equipment to State and local agencies is more complicated, requiring the payment of fair rental value and a surety bond (see AR 700-131). One approach is to ask the State or local agency to acquire "federal sponsorship" so the material may be loaned instead of leased.]

(c) DOD may make personnel available to train CLEA officials in the operation and maintenance of equipment and to provide "expert advice" to CLEA officials "relevant to the purposes of this chapter" (10 USC §373).

[NOTE: Cite 10 USC 373 for linguist/translator and intelligence analyst support (expert advice) to CLEAs (see also section 1041 of FY 93 National Defense Authorization Act for additional authority). These are two of the most popular types of support requested by CLEAs in CONUS. If the support provided involves individuals with an intelligence MOS, additional requirements may arise (e.g., E.O. 12333 and DOD Reg. 5240-1R require service component General Counsel approval of intelligence support to CLEAs. This requirement has been challenged as violative of the spirit of Goldwater-Nichols which would give the CINCs this authority, and this approval authority is currently under review. Also, DOD policy prohibits those with a counterintelligence MOS from participating in CONUS counterdrug operations with CLEAs. 10 USC 373 authorizes a wide variety of support besides intelligence. Beware of the "Kelly Girl" prohibition which states that DOD will not provide "routine logistical or administrative support" to CLEAs (see DA Gen. Counsel opinion of 9 Jan 1991). 10 USC 373 may also be used to send training MTTs to CLEAs.

(d) DOD may make personnel available to maintain equipment for Cleas (10 USC §374).

(e) DOD may provide personnel to operate equipment "for purposes other than" those described in paragraph 1b(2) and (3), below, "only to the extent that such support does not involve direct participation by such personnel in a civilian law enforcement operation unless such direct participation is otherwise authorized by law" (10 USC §374(c)).

[NOTE: this "catch all" section authorizes a "motherload" of support to CLEAs. It is particularly useful outside known drug interdiction areas (DIAs). Cite to this provision as the underlying authority for marijuana eradication and ground recon missions while supplementing it with more specific provisions according to mission requirements (e.g., 10 USC 371, "pass information gathered to CLEAs"; and 10 USC 373, "train CLEA officials in the use of night vision equipment". This section allows support of State and local CLEAs, not just federal CLEAs. Caution, if you have a specific statute which allows you to perform the support, cite to it (e.g., Â1206, Pub.Law 101-189, NDAA for FY 90-91, Training Exercises in Drug Interdiction Areas; and 10 USC 373, Training and Advising Civilian Law Enforcement Officials.

(2) Operate equipment including equipment provided under 10 USC §372, in support of federal CLEAs (10 USC §374(b)(I)(A)).

(a) DOD may make personnel available to operate equipment for a federal CLEA with responsibility for controlled substances laws, including the Maritime Drug Law Enforcement Act (e.g., DEA and Coast Guard); Immigration and Nationality Act enforcement (e.g., INS); and customs law enforcement (e.g., U.S. Customs Service) 10 USC §374(b)(1)(A) and (b)(4)(A));

(b) DOD may make personnel available to operate equipment for a federal CLEA with respect to "assistance that such agency is authorized to furnish to a state, local, or foreign government which is involved in the enforcement of . . ." laws similar to federal controlled substances laws (including the Maritime Drug Law Enforcement Act), immigration and customs law enforcement (10 USC §374(b)(1)(B) and (b)(4)(A)). Note that regardless of whether the authority under §374 (b)(1)(A) or (B) is invoked, §374(b)(1) requires the request to come from the head of a federal agency.

(c) Personnel made available to support CLEAs under this authority may operate equipment for these purposes (10 USC §374 (b)(2):

1. Detection, monitoring, and communication of the movement of air and sea traffic, 10 USC §374(b)(2)(A).

2. Detection, monitoring, and communication of the movement of surface traffic outside the geographic boundary of the US and within the US not to exceed 25 miles if the initial detection occurred outside of the boundary. 10 USC §374(b)(2)(B).

3. Aerial reconnaissance, 10 USC §374(b)(2)(C).

4. Interception of vessels or aircraft detected outside the land area of the US for purposes of communicating with them and directing them to go to a location designated by appropriate civilian officials. Continue to operate this equipment to pursue these vessels or aircraft into the land area of the US in cases where the detection began outside such land area, 10 USC §374(b)(2)(D) and 10 USC §374(b)(3). **[Note: this "hot pursuit" provision is exceptional authority for DOD to conduct operations within CONUS that would normally fall within the purview of CLEAs].** This authority does not permit physical forcedowns of aircraft; the US considers such action as being violative of international law (Chicago Convention).

5. Operation of equipment to facilitate communications for CLEAs, 10 USC §374(b)(2)(E).

6. Subject to the joint approval of SECDEF and the Attorney General, transport federal CLEA personnel and operate a base of operations for them (10 USC §374(B)(2)(F) [as amended by Sect. 1210, National Defense Authorization Act for FY 90-91, Pub. L. 101-189]); see also sect. 1004, National Defense Authorization Act for FY 92-93, Pub. L. 102-190], 10 USC §374(b)(2)(F). In the case of law enforcement operations OCONUS, the conduct of these operations also requires the approval of the Secretary of State.

[NOTE: joint approval of SECDEF and the AG is not required when transporting CLEAs under the authority of Â1004, Nat'l Def. Auth. Act for 1991, Pub. L. 101-510. Â1004 authority expired at the end of FY 91 but was extended through FY 95 by Â1121, Nat'l Def. Auth. Act for 1994, Pub.L. 103-160]

(3) SECDEF may provide additional support to federal, state, local, and foreign agencies which have "counterdrug responsibilities," §1004, Nat'l Def. Auth. Act 91, Pub. L. 101-510, as amended by succeeding provisions in the National Defense Authorization Act. §1004, as amended by §1041, offers the most flexible counterdrug authority. It represents extremely strong authority because Congress specifically enumerated the 10 categories of support to CLEAs. This authority is also noteworthy in that Congress has authorized, and to a lesser extent, appropriated funds for these specific activities. Consequently, DOD does not need to seek reimbursement when providing these types of support. It should be emphasized, however, that Congress has never appropriated as many funds as they've authorized.

This additional support includes:

(a) **Maintenance and repair of equipment that has been made available to any department or agency of the Federal Government, or State or local government by DOD for purposes of:**

(i) Preserving the potential future utility of such equipment for DOD;

(ii) Upgrading such equipment to ensure compatibility with other equipment used.

(b) **Maintenance, repair, or upgrading of equipment (including computer software), for the purpose of:**

(i) Ensuring that the equipment being maintained or repaired is compatible with equipment used by DOD; and

(ii) Upgrading such equipment to ensure the compatibility with equipment used by DOD.

(c) **Transportation of personnel of the United states and foreign countries (including per diem expenses associated with such transportation), and the transportation of supplies and equipment for the purposes of facilitating counterdrug activities within or outside the U.S.**

(d) **The establishment (including unspecified minor construction) and operation of bases of operations or training facilities for the purpose of facilitating counterdrug activities within or outside the US.**

(e) **Counterdrug related training of law enforcement personnel of the Federal Government, of State and local governments, and of foreign countries, including associated support expenses for trainees and the provision of materials necessary to carry out such training.**

(f) **Aerial and ground reconnaissance outside, at or near the borders of the United States.**

(g) **Construction of roads and fences and installation of lighting to block drug smuggling corridors across international boundaries of the United States.**

(h) **Establishment of Command, Control, Communications, and Computer Networks for improved integration of law enforcement, active military, and National Guard activities.**

c. Domestic restrictions on support DOD may provide to CLEAs (10 USC §375 and §376).

(1) DOD personnel may not conduct or fund any activity which includes or permits "direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity" unless otherwise authorized by law [see 10 USC §375 (which does not have extraterritorial effect; note, however, DOD Directive 5525.5, which implements these restrictions, and does have worldwide application.)].

(2) DOD may not provide any support which will adversely affect military preparedness [see 10 USC §376].

(3) Note that additional restrictions apply to OCONUS operations - see para. 2.d.(5) below.

d. OCONUS restrictions on DOD support for federal CLEAs with responsibilities in foreign countries.

(1) The primary restriction on DOD support for federal CLEAs outside the land area of the US is the derivative nature of DOD's authority. DOD's authority to support the federal CLEA in foreign jurisdictions depends entirely on the CLEAs authority to act in these jurisdictions (10 USC §374(b) (1) (A) and (B).

(2) In addition to the derivative nature of DOD's support authority, if DOD's support is to be provided within the jurisdiction of a foreign country, State Department coordination (approval) is required (see Sect. 4601(a), International Drugs Control Act of 1988, Pub. L. 100-690 and paragraph 5, below).

(3) The Posse Comitatus Act and 10 USC §375 do not apply in foreign countries, their territorial seas or international waters (See Appendix A). DOD is not prohibited from enforcing US law in these places. However, DOD policy requires SECDEF or DSECDEF approval if military personnel are to provide direct assistance to execute the law outside the territorial jurisdiction of the US (DOD memo, Modification of DOD Directive 5525.5, "DOD Cooperation with Civilian Law Enforcement Officials, dated 20 Dec 89).

(4) Also if DOD support is provided to assist a federal CLEA in any foreign police action with respect to foreign country drug control efforts, restrictions under the **Mansfield Amendment** to the **Foreign Assistance Act** are applicable (Sect. 481(c), FAA, 22 USC 2291(c), as amended by the International Drugs Control Act of 1989, Sect. 15, Pub. L. 101-231), paragraph 5d(I), below).

(5) DOD support may not adversely affect military preparedness (10 USC §376).

e. **Reimbursement considerations.**

(1) Congress has appropriated funds for DOD to train military personnel but not for DOD to perform domestic civil law enforcement (See 10 USC §377(a) and (b)). Fiscal law principles require that the costs attributable to the support DOD provides to CLEAs be reimbursed by CLEAs unless:

(a) The support is provided in the normal course of military training or operations (10 USC 377(b) (I)); or

(b) The support results in a benefit to DOD which is "substantially equivalent" to that which would otherwise be obtained from training or operations (10 USC §377(b) (2)); or

(c) The support is provided in accordance with special appropriations (Congress appropriated $40 million for SECDEF to provide "additional support" to federal agencies which have "counterdrug responsibilities during FY 90-91 (See Sect. 1212 and 1201(g), Pub. L. 101-189 and paragraph 6a(I)(i), below). In the same act, Congress authorized the transfer of excess DOD personal property to CLEAs for their counterdrug mission "without cost to the recipient agency." Absent this authority, it is an augmentation of an agency's accounts (to the extent it retains funds which it otherwise would have used to purchase property) for an agency to receive property without paying for it.

(2) Support provided to federal CLEAs which does not provide training or operational benefit to DOD and is not "additional support" must be reimbursed (10 USC §377(a) and 31 USC §1535).

(a) The mechanism for reimbursement is the **Economy Act** It requires that the providing agency be fully reimbursed for all direct and indirect costs associated with the goods and services it provides to the other agency unless otherwise provided by law.

(b) The **Economy Act** also requires reimbursement for pay and allowances and all costs associated with DOD's preparation of an asset for other agency use. There should be no residual cost to DOD's appropriations for any support provided (See 57 Comp. Gen. 674 (1974). This opinion provides a good analysis of the Economy Act and how the Comptroller General interprets it, e.g., all direct expenses and certain indirect expenses attributable to providing support are recoverable by the providing agency [at page 682]).

(c) The **Economy Act** permits nonreimbursable or "accommodation" loans of equipment. The borrower assumes "the costs incurred by reason of the loan" (See 30 Comp. Gen. 295 (1951)). The cost assumed by the borrower include equipment operation and costs associated with returning the equipment in the condition received, less fair wear and tear. 38 Comp. Gen. 558 (1959).

(3) Support provided to state and local CLEAs which does not provide training or operational benefit to DOD must be reimbursed (10 USC §377(a) and 31 USC §6501 et seq).

(a) The mechanism for reimbursement is the Intergovernmental Cooperation Act. It requires "payment of pay and all other identifiable costs of providing the services" requested by an agency (31 USC §6505).

(b) DOD is required to charge applicable rates for non-DOD users of DOD assets (see DOD 7230.7). Charges may be waived or reduced when full payment by a state or local government would not be in the best interest of the program (paragraph D.3.b.(2), DOD 7230.7).

(4) The assignment of Coast Guard personnel to surface naval vessels for law enforcement purposes (10 USC §379) is funded from appropriations transferred from DOD to the Coast Guard (See e.g., Legislative History, Pub. L. 100-456, 1985 U.S. Code Cong. and Admin. News at 2582-3 [$6 million for FY 1989]).

2. **DOD's Support For Non-CLEAs**

a. General.

(1) **The Economy Act** (31 USC §1535) is free standing general authority for any US agency to provide goods and services to another federal agency on request and by mutual agreement. The agreement must include the details of reimbursement. The Intergovernmental Cooperation Act accomplishes a similar purpose for federal transactions with state or local government.

(a) **The Economy Act** is specifically incorporated into the law authorizing DOD support to federal CLEAs (10 USC §377(a)).

(b) The **Intergovernmental Cooperation Act** is applicable to DOD support to state and local CLEAs (IO USC §377 (a) referring to reimbursement under other applicable law).

(2) The transfer of goods or services to a federal, state or local agency, other than a CLEA or the State Department, in support of the US counterdrug policy is going to be a rare occurrence. However, it is

possible that an agency which does not have a counterdrug law enforcement mission can be involved in the counterdrug policy. For instance, the CIA is one federal agency which does not have a counterdrug civil law enforcement mission, but which may have a role (intelligence collection, covert activity?) in international counterdrug operations or activities.

(a) The transfer of goods and services to the CIA or any other federal agency which is not a CLEA, can be accomplished under the Economy Act. As an example, the transfer of TOW anti-tank weapons from the Army to the CIA in what has become known as the Iran-Contra affair was determined by the Government Accounting Office (GAO) to be a lawful Economy Act transaction (See Iran Arms Sales. DOD's Transfer of Arms to the Central Intelligence Agency, GAO Report, NSIAD-87-114, March 1987).

(b) Under the Intergovernmental Cooperation Act, certain goods and services could be transferred to a non-CLEA state or local agency.

b. **Restrictions on DOD support.** The transfer of goods and services to the CIA, or any other federal agency which is not a CLEA, or to a state or local agency which is not a CLEA, will be subject to restrictions placed on that agency's activities and subject to law enforcement restrictions applicable to members of the Armed Forces of the US. See Sect. 662, FAA (intelligence collection ok, but other activities must have Presidential finding and comply with Sect. 501 National Security Act)

c. **Reimbursement considerations.** The costs associated with suppo.t DOD Provides to federal, state and local agencies which are not CLEAs must be reimbursed under either the Economy Act or the Intergovernmental Cooperation Act.

d. DOD Support To State Department International Drug Control Program.

(1) General. The State Department is the largest non-CLEA receiving DOD counterdrug support. All DOD efforts in the land area or territorial seas of a foreign country must be coordinated with the State Department. SECSTATE is charged to coordinate all US assistance "to support international efforts to combat illicit drugs production or trafficking" (Sect. 4601(a), Pub. L. 100-690). This includes DOD support to federal CLEAs with responsibilities in foreign countries (See paragraph 4d, above).

(2) Within the State Department, the Bureau of International Narcotic Matters (INM) and the Agency for International Development (AID) provide assistance to countries and international organizations involved in counterdrug efforts. The authority for this assistance is in the Foreign Assistance Act (Section 481-489, International Narcotics Control, 22 USC 2291-2291h; See Drug Control, U.S. International Narcotics Control Activities, GAO/NSIAD-88-114, GAO Report B-225282 (March 1, 1988) for a description of the assistance provided and an analysis of its effectiveness). DOD may support this State Department effort under Section 632(b) and (c) of the Act (22 USC §2392(b) and (c)).

(3) Statutory authority defining DOD's support role for State Department.

(a) State Department provides international drug assistance to foreign governments (and international organizations) under the Foreign Assistance Act (Chapter 8, Part I, Foreign Assistance Act, International Drugs Control, Sect. 481-489, 22 USC 2291-2291h).

(b) NOTE: The International Drugs Control program is not security assistance (security assistance is Part II of the act). DOD has a support role in both Part I and Part II programs under the Foreign Assistance Act (Security assistance authorities are described in Appx C).

(c) State Department Authority

(i) "Notwithstanding any other provision of law, the President (delegated to SECSTATE by paragraph 1-201(a) (24), E.O. 12163, Sept. 29, 1979, as amended) is authorized to furnish assistance to any country or international organization, on such terms and conditions as he may determine, for the control of psychotropic drugs and other controlled substances" (Sect. 481(a) (4), FAA, 22 USC §2291(a) (4)).

(ii) The Secretary of State is "responsible for coordinating all assistance provided by the US government to support international efforts to combat illicit drugs production or trafficking" (Sect. 4601(a), Pub. L. 100-690).

(iii) The US counterdrug policy is a significant objective of the Foreign Assistance Act: "suppression of international drugs trafficking is among the most important foreign policy objectives of the US, Sect. 481(a) (1) (B), FAA, 22 USC §2291 (a) (1) (B)).

(iv) State Department may conclude agreements with foreign countries to "facilitate control of the production, processing, transportation, and distribution of drugs . . . and other controlled substances" (Sect. 481(a) (2), FAA, 22 USC §2291(a) (2)).

(v) State Department, in cooperation with foreign countries, may fund the use of herbicides to eradicate drug crops; the authority to use herbicides is closely monitored by Congress (See Sect. 481(d), FAA, 22 USC §2291(d) as amended by Sect. 17(c), Pub. L. 101-231; see also Control. U.S.- Mexico Opium Poppy and Marijuana Aerial Eradication Program, GAO-NSIAD-88-73, B-225282 (January 11, 1988). Without separate authority and appropriations, DOD may not conduct (fund) its own herbicide spraying operation because Congress has provided State Department a more specific appropriation with which to conduct this activity.

(vi) State Department may transfer to foreign countries "any property seized by or otherwise forfeited to the US Government in connection with drug-related activity" (Sect. 6071, Anti-Drug Abuse Act Amendments of 1988, Pub. L. 100-690, 22 USC §2291-2 and §2291-3). To be eligible, the foreign country must have contributed to the seizure (See 21 USC §881 (e)(l)(E)).

(vii) State Department and the participating foreign country share the costs. A foreign country "should bear an appropriate share of the costs of any drug control program, project, or activity" for which U.S. assistance is provided. These costs may be borne by "in-kind" contributions from the foreign country (Sect. 482(d), FAA, 22 USC §2292(d), as amended by Sect. 17(g), Pub. L. 101-231). [NOTE: prior to being amended, the law required a 25% contribution by the foreign country].

(4) State Department Appropriations. State Department foreign activities and programs, including the International Drug Control Program, are funded from separate appropriations for the Department (See Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1990, Pub. I. 101-167).

(5) Restrictions on DOD support for State Department efforts under the Foreign Assistance Act.

(a) The **Mansfield Amendment** to the **Foreign Assistance Act** is applicable only when United States personnel participate in foreign police actions. It prohibits certain police-type actions by "officers and employees of the US" except in special situations enumerated below.

(i) DOD personnel may not "directly effect an arrest in any foreign country as part of any foreign police action with respect to drug control efforts, notwithstanding any other provision of law" (Sect. 481(c) (1), FAA, 22 USC §2291(c) (1), as amended by Sect. 15, Pub. L. 101-231).

(ii) With the "approval of the US chief of mission," the restriction described above, Section 481(c) (1), does not prohibit DOD personnel from "being present when foreign officers are effecting an arrest or from assisting foreign officers who are effecting an arrest" (Sect. 481(c) (2), FAA, 22 USC §2291(c) (2), as amended by Sect. 15, Pub. L. 101-231).

(iii) Section 481(c) (1) does not prohibit DOD personnel "from taking direct action to protect life or safety if exigent circumstances arise which are unanticipated and which pose an immediate threat to United States officers or employees, officers or employees of a foreign government, or members of the public" (Sect. 481(c) (3), FAA, 22 USC §2291(c)(3), as amended by Sect. 15, Pub. L. 101-231).

(iv) If a foreign country agrees, Section 481(c) (1) will not apply with respect to "maritime law enforcement operations in the territorial sea of that country" (Sect. 481(c) (4), FAA, 22 USC §2291(c) (4), as amended by Sect. 15, Pub. L. 101-231).

(v) DOD personnel may not "interrogate or be present during the interrogation of any US person arrested in any foreign country with respect to drug control efforts without the written consent of such person" (Sect. 481(c) (5), FAA, 22 USC §2291(c) (5), as amended by Sect. 15, Pub. L. 101-231).

(vi) These prohibitions do not apply to DOD personnel who are carrying out US responsibilities under applicable SOFAs (Sect. 481(c) (6), FAA, 22 USC §2291(c) (6), as amended by Sect. 15, Pub. L. 101-231).

(b) Police training prohibition (Sect. 660, FAA, 22 USC §2420). This section of the **Foreign Assistance Act** prohibits sending funds appropriated for the act to train, advise, assist, support or equip "police, prisons, other law enforcement forces ... or any program of internal intelligence or surveillance" of a foreign country. This prohibition applies to any training provided under the **Foreign Assistance Act** (Appendices B and C provide examples of how Section 660 affects the sale of training under the act). It would severely limit U.S. international counterdrug policy, except:

(i) It does not apply to Chapter 8, Part I, International Drugs Control, Foreign Assistance Act (22 USC §2420(b) (1)).

(ii) It does not apply to sharing crime statistics and other information with foreign governments (22 USC §2420(b) (1); See 42 USC §3763(b) (1)).

(iii) It does not apply to "any authority of the Drug Enforcement Administration or Federal Bureau of Investigation which relates to crimes of the nature which are unlawful under the laws of the US" (22 USC §2420(b) (1)).

(iv) It does not apply to "assistance, including training, in maritime law enforcement and other maritime skills" (22 USC §2420(b) (3)).

(v) It does not apply to "a country which has a longstanding democratic tradition, does not have standing armed forces, and does not engage in a consistent pattern of gross violations of internationally recognized human rights" (22 USC §2420(c)).

(vi) It does not apply when specifically waived or otherwise made inapplicable. This occurs when Congress requires security assistance (Part II, FAA and the AECA) authorizations and appropriations to be devoted to international drug control efforts (See e.g., Sect. 3, 4, 5, 6, and 8, Pub. L. 101-231 [discussed in Appendix B]).

(vii) Using the interagency transaction authorities in the Foreign Assistance Act (discussed in "Reimbursement considerations," paragraph (e), next below), State Department may, for example, request DOD support to train foreign counterdrug personnel (See Sect. 632(b), 22 USC §2392(b)). DOD would be reimbursed as required in Section 632(c) (22 USC §2392(c)) of the act. Programs conducted by the Coast Guard, DEA or FBI under State's authority may likewise be supported by DOD.

(c) State Department may not use funds made available for International Drug Control (Chapter 8, Part I, FAA) "for the procurement of weapons or ammunition" (Sect. 482(b), FAA, 22 USC §2292(b)).

(6) Reimbursement considerations (22 USC §2385(a), §2392(b) and §2392(c)).

(a) The **Foreign Assistance Act** contains its own interagency transaction authorities which require supporting agencies to be reimbursed by State Department in accordance with a specified standard. The standard is "replacement cost, or if required by law, at actual cost, or, in the case of services procured from the Department of Defense to carry out chapter 5 of part I [International Drugs Control the amount of the additional costs incurred by the Department of Defense in providing such services, or at any other price authorized by law and agreed to by the owning or disposing agency" determined as follows:

(i) Items from stock are reimbursed at replacement cost.

(ii) Military Airlift Command (MAC) transportation is reimbursed at actual cost (because a separate law requires all MAC services be reimbursed at actual costs).

(iii) Services, other than MAC airlift, are reimbursed at the additional costs incurred by DOD to provide the services.

(iv) Agreed upon prices (as authorized by law) are reimbursed at the agreed upon price.

3. DOD's Counterdrug Mission.

a. General. Pursuant to the provisions of the National Defense Authorization Act for FY 89 (Pub. L. 100-456), DOD has assumed military missions in support of the national counterdrug strategy. These DOD missions have been modified with the passage of the National Defense Authorization Act for FY 90-91 (Pub. L. 101-189) and FY 92 (Pub. L. 102-190). This mission is funded through congressionally authorized O&M funds.

(1) Statutory authority defining DOD's counterdrug mission.

(a) DOD will serve as the single lead agency of the Federal Government for the detection and monitoring of aerial and maritime transit of illegal drugs into the United States (10 USC §124(a) and 10 USC §113 (I)).

(b) DOD may operate equipment to intercept a vessel or an aircraft detected outside the land area of the United States for the purposes of identifying and communicating with that vessel or aircraft and directing it to go to a location designated by appropriate civilian officials (10 USC §124(b) (1) (A) and (B)).

1. When the vessel or aircraft is detected outside the land area of the United States DOD personnel may begin or continue pursuit of it over the land area of the United States (under a "hot pursuit" theory (10 USC §124(b) (2)).

2. The "land area of the US" is defined as "the several states and any territory, commonwealth, or possession of the US." (10 USC §124(c)).

3. Missions conducted under this authority include AWACS flights, USN/USCG deployments, mobile radar site deployments, etc.

(c) In consultation with the Director of National Drug Control Policy, SECDEF "shall integrate into an effective communications network the command, control, communications, and technical intelligence assets of the US that are dedicated (in whole or in part) to the interdiction of illegal drugs into the US" (Sect. 1204 and Sect. 1201(d), Pub. L. 101-189).

(d) SECDEF shall ensure research and development activities are devoted to technologies to improve DOD's detection and monitoring mission (Sect. 1205 and Sect. 1201(e), Pub. L. 101-189).

(e) SECDEF "shall direct that the armed forces, to the maximum extent practicable, shall conduct military training exercises (including training exercises conducted by the reserve components) in drug-interdiction areas." Drug interdiction areas include "land and sea areas in which, as determined by the Secretary, the smuggling of drugs into the US occurs or is believed by the Secretary to have occurred" (Sect. 1206, Pub. L. 101-189).

[NOTE: this statute constitutes important authority in the Southwest border/JTF-6 region. The entire region has been declared a "drug interdiction area" (DIA). Consequently, much counterdrug support takes place in this region that would not be authorized elsewhere in CONUS. Examples include recon, terrain denial, LP/OPs, and cultivated marijuana eradication. Additional DIAs can be declared by the CINCs. Three counties in southern Florida were declared DIAs. Supporting units/commands must convince the CINC that the DIA designation is appropriate. This may be accomplished through law enforcement affidavits, CLEA intelligence reports, photos, data of past seizures, arrests, etc. Having an area in your AOR declared as a DIA enables your unit/command to conduct a variety of exercises not possible outside the DIA. The DIA designation carries with it increased responsibility and increased need for legal oversight.]

(f) SECDEF "may provide to the Governor of a State who submits a plan . . . sufficient funds for" pay and allowances, subsistence, travel, etc., of National Guard "drug interdiction and counterdrug activities" and "operation and maintenance of equipment and facilities" and "procurement of services and leases of equipment" for such purposes (Codified as 32 USC §112; Sect. 1207 and Sect. 1201(c), Pub. L. 101-189). **NOTE:** This law specifically recognizes that "National Guard personnel, while not in federal service, "may perform "any law enforcement activities authorized by State and local law and requested by the Governor" when conducting "counterdrug activities." Important requirements for the governor's plan and coordination of the plan are prescribed.

[NOTE: the National Guard, as a state militia, is not subject to the restrictions of the Posse Comitatus Act while not in federal service. Thus, the Guard sometimes has more flexibility than federal forces in conducting counterdrug support operations. However, the National Guard Bureau (NGB) has imposed a number of policy restrictions on counterdrug operations (see particularly NGR 500-2). Also, state law will determine whether a particular operation may be legally supported by the Guard.

Perhaps the most interesting aspect of 32 USC 112 is that, although the National Guard is performing counterdrug support operations using federal funds and under federal guidance, it remains a state militia force and is not to be considered a federal force "for purposes of the Posse Comitatus Act or for any other purpose." (Legis. Hist., House Conf. Report 100-989, Pub. L. 100-456, p. 2583, U.S. Cong. and Admin. News.). Also note that National Guard members are covered by the Federal Tort Claims Act while engaged in counterdrug operations, although they remain in a non-federal status. (see commentary, The Use of National Guard Personnel for Counterdrug Operations: Implications Under the Federal Tort Claims Act, The Army Lawyer, June 1991. It is this hybrid situation which has led some to argue that 32 USC 112 is in fact a pretext for circumventing the Posse Comitatus Act restrictions and that the National Guard are placed in "constructive federal service" under 32 USC 112.]

(g) SECDEF, in consultation with the Attorney General and Director of National Drug Control Policy, may transfer excess DOD property including "small arms and ammunition" to federal and state agencies for use in "counterdrug activities." This excess property may be transferred "without cost to the recipient agency" (Sect. 1208, Pub. L. 101-189).

(h) SECDEF shall, "to the extent funds are available, pay for expenses incurred by the Civil Air Patrol in conducting drug surveillance flights (§1003, Pub. L. 101-510).

b. Fiscal considerations. DOD must ensure that appropriated funds it receives for this mission are spent for purposes for which these funds are appropriated (Appendix B).

APPENDIX A
THE USE OF DOD PERSONNEL TO ENFORCE US CONTROLLED SUBSTANCES LAW IN FOREIGN JURISDICTIONS

1. The **Posse Comitatus Act** applicable to the Army and Air Force by its terms and to the Navy and USMC by DOD policy, prohibits DOD personnel from enforcing the civil law in the US. The act is not applicable outside the US (**Extraterritorial Effect of the Posse Comitatus Act** opinion of the Office of Legal Counsel, US DOJ, Nov 3, 1989).

a. DOJ has concluded that the FBI may enforce US controlled substance laws outside US jurisdiction and that military personnel may participate in the arrest of persons indicted under US controlled substances law (**Authority of the FBI to Override Customary or other International Law in the Course of Extraterritorial Law Enforcement Activities** opinion of the Office of Legal Counsel, US DOJ, June 21, 1989).

b. This opinion cites 21 USC §873(b) for the proposition that the Attorney General may request DOD assistance (and DOD is obligated to assist) in the overseas enforcement of "all the significant drug law of the US." Another basis for DOD support is found at 10 USC §374(b) (1) (A).

c. Consistent with these two DOJ opinions, this authority may be exercised without the cooperation of the foreign country concerned. This would constitute an invasion of foreign sovereignty and, as indicated, may include JS military forces to accomplish the objective.

2. Even though the **Posse Comitatus Act** is not applicable and the Attorney General may request (demand) DOD support, USCINCPAC does not have operational initiative for such missions.

a. Counterdrug activities which take place in foreign jurisdictions must be approved by SECSTATE (Sect. 4601(a), International Narcotics Control Act of 1988, Pub. L. 100-690).

b. Further, DOD policy "with respect to military actions conducted outside the territorial jurisdiction of the US" restricts "direct assistance by military personnel to execute the laws." Exceptions to this policy may be approved by SECDEF or DSECDEF on a case by case basis (See SECDEF Memo, Subj: Modification of DOD Directive 5525.5, **"DOD Cooperation with Civilian Law Enforcement Officials"** dated 20 Dec 89).

3. For these reasons, the specific mission of enforcing US law in foreign jurisdictions is addressed in the basic memorandum. The DOJ opinions cited are important sources of law and are commended to those involved in providing legal advice for counterdrug operations.

APPENDIX B
SECURITY ASSISTANCE IMPLICATIONS OF THE US Counterdrug POLICY

1. Purpose.

a. This appendix distinguishes developmental assistance programs from security assistance programs under the FAA and demonstrates how DOD participates in both. It highlights how Congress has integrated certain provisions of security assistance legislation (Part II, FAA the Arms Export Control Act) into the US counterdrug policy and suggests how other provisions of this legislation can support the policy.

b. Congress earmarks a portion of security assistance appropriations for countries cooperating with the US in counterdrug efforts. Decisions concerning the use of these appropriations are made in Washington and the foreign country concerned.

2. DOD Participation In ST DEPT Programs Under The FAA.

a. The FAA authorizes ST DEPT to provide foreign countries developmental assistance (Part I of the act, Sect: 101-495X, FAA, 22 USC §§2151-2292q) and security assistance (Part II of the act, Sect. 501-576, FAA, 22 USC §§2301-2349aa-9).

b. The act authorizes any federal agency, including DOD, to participate in both Part I and Part II programs.

(1) Part I, developmental assistance, provides commodities and services "used for the purpose of furnishing nonmilitary assistance" (Sect. 644(c) and (k), FAA, 22 USC §2403(c) and (k)).

(2) Part II, security assistance, provides goods and services "used for the purpose of furnishing military assistance" (Sect. 644(d) (1) -(3), FAA, 22 USC §2403(d) (1) -(3) and Sect. 644(f), FAA, 22 USC §2403(f)).

c. When DOD goods and services, defined as "defense articles" and "defense services" are contributed in support of either Part I or Part II programs, DOD is reimbursed by the State Department under terms specified in the act (Sect. 632(c) and (d), FAA, 22 USC §2392(c) and (d)).

d. Defense articles and services are furnished for "nonmilitary assistance" when they are provided in support of Part I programs. International Narcotics Control (Sect. 481-489, FAA, 22 USC §§2291-2291h) is a Part I program. When DOD provides "defense articles" and "defense services" in support of this program, DOD is not participating in a security assistance program.

e. The significance of this is in the flexibility it provides both DOD and the State Department.

(1) Defense articles and services provided as security assistance are provided under foreign military sales (FMS) cases (See generally, Chapters 7-9, DOD 5105.38-M, Security Assistance Management Manual (SAMM)). Security assistance is managed for State Department by the Defense Security Assistance Agency (DSAA), with only minor inputs from CINCs. DOD's "entire cost" in providing support for the security assistance program must be reimbursed to DOD (Sect. 515(a) and (d), FAA, 22 USC §2321i(a) and (d) and Sect. 632(d), FAA, 22 USC §2392(d)). Furthermore, Congress closely regulates the manner in which security assistance is provided. Security assistance legislation limits the number of military personnel who may be assigned to foreign countries and restricts their duties (Sect. 515(a)-(c), FAA, 22 USC §2321i(a)-(c)), it prohibits assigning military trainers and advisors if their duties may involve them in combat situations (Sect. 21(c), AECA, 22 USC §2761(c)) and it prohibits most military training for foreign police and intelligence units (Sect. 660, FAA, 22 USC §2420).

(2) Defense articles and services provided to the State Department for Part I programs are provided under interagency transaction agreements between CINCs and State Department decision makers (Sect. 632(c), FAA, 22 USC §2392(c)). Under these agreements, some expenses which would otherwise be reimbursable to DOD are shared between DOD and State Department (See paragraph 5e, basic memo). Finally, because DOD's support is not security assistance, none of the restrictions discussed above concerning how security assistance is provided are applicable.

3. Congress Is Using Security Assistance Legislation In The Counterdrug Policy.

a. Military assistance is provided to foreign countries primarily for internal and collective defense purposes (Sect. 502, FAA, 22 USC §2302 and Sect. 4, AECA, 22 USC §2754). Congress dedicates a portion of military assistance authorizations and appropriations to counterdrug efforts (See International Narcotics Control Act of 1989, Pub. L. 101-231). This law provides:

(1)Military and law enforcement assistance for Colombia, Bolivia, and Peru. This section authorizes the use of defense articles and services and International Military Education and Training (IMET) (Sect. 541-545, FAA, 22 USC §§2347-2347d) to assist the named countries. It waives the police training prohibition (Sect. 660, FAA) and authorizes $125 million in expenditures (See Sect. 3, Pub. L. 101-231).

(2) The authority to use the Special Defense Acquisition Fund (Sect. 51, AECA, 22 USC §2795(a)) to purchase defense articles "particularly suited for narcotics control purposes" (See Sect. 4, Pub. L. 101-231).

(3) An amendment to Chapter 2, Part II, FAA (22 USC §2311 and following) adding a new Section 517, authorizing the transfer of excess defense articles for antidrug activities. This new section applies only to Latin America and Caribbean countries. It authorizes "no cost" transfers to recipient countries. It also waives Section 632(d), FAA which otherwise would require ST DEPT reimbursement for DOD expenses (See Sect. 5, Pub. L. 101-231).

(4) Waiver of certain provisions of the FAA which prohibit military assistance. The **Brooke-Alexander Amendment** (no foreign assistance if country is in default on loans) (Sect. 620q, FAA, 22 USC §2370(q)) and related laws (See Sect. 6, Pub. L. 101-231). Similarly, Section 481(h), FAA (withholding a portion of available foreign assistance to countries which are major drug traffickers), is waived if the President makes the prescribed certification to Congress (See Sect. 8, Pub. L. 101-231).

(5) Debt-for-drugs exchanges. Congress has permitted the President to release Bolivia, Columbia, or Peru from principal and interest payments on loans obtained under the FAA and Arms Export Control Act if the President determines these countries are reducing the flow of cocaine into the US (See Sect. 9, Pub. 1. 301-231).

b. Congress has amended other provisions of the FAA to achieve counterdrug objectives (See Foreign Operation, Export Financing, and Related Programs Appropriations Act, §3990, Pub. L. 101-167).

(1) Drawdown Authority. Congress has modified Section 506 (Special Authority), FAA, to permit the emergency drawdown of defense articles, services and training "for the purposes and under the authorities of" the International Narcotics Control program (Chapter 8, Part I, FAA). There is an annual authorization of $75,000,000 for this purpose (Sect. 553, Pub. L. 101-167).

(2) Excess DOD Property. Congress has modified Section 516 (Modernization of Defense capabilities of Countries of NATO'S Southern Flank), FAA, to permit "no cost" transfers of excess DOD property to major illicit drug producing countries for counterdrug purposes. This section applies only to Latin American and Caribbean countries and Section 632 (d), foreign Assistance Act is waived (note similar authority discussed in paragraph 3a (3), above). There is an annual authorization of $10,000,000 for this purpose (see Sect. 573, Pub. 1. 101-167).

c. These provisions of security assistance legislation aid the overall US counterdrug policy. This part of the counterdrug policy is under the authority of the secretary of state who coordinates all US support for international efforts (Sect. 4601(a), International Narcotics Control Act of 1988, Pub. L. 100-690). Unified commands, working with local security assistance organizations and DSAA, can help integrate these authorities into theater counterdrug operations.

4. Integrating Other Security Assistance Programs Into The Counterdrug Policy.

a. Section 30A, AECA (22 USC §770a) permits the reciprocal exchanges of units for training. This could include training for counterdrug missions. Training opportunities provided by the US must be reciprocated within one year or the country must pay the US for the value of training received by its personnel. Security assistance funds may not be used for this purpose. One unique provision of the law allows the US to pay a greater dollar amount in the exchange if the US receives some sort of value in return. This permits the US, for instance, to pay the cost of transporting the foreign unit to the US site for training in exchange for our receiving a longer period of training in the foreign country (paragraph 100703-4, SAMM, DOD 5105.38-M).

b. Section 544, FAA (22 USC §347c) permits the reciprocal exchange of training spaces in professional military education (PME) schools without charge to security assistance appropriations. Exchanges could include emphasizing counterdrug skills (See paragraph 100702, SAMM, DOD 5101.38-M).

5. Conclusions.

a. Planning for counterdrug efforts should include aggressive DOD support for ST DEPT's International Narcotics Control program by using the interagency transaction authorities contained in the FAA.

b. Planning must also consider the Congressionally directed application of security assistance legislation in the US counterdrug policy.

c. Planning should also consider the integration of "reciprocal" security assistance activities into the counterdrug policy. These military exchange activities do not require security assistance appropriations.

TAB U
CIVIL AFFAIRS

Introduction

Civil affairs relates to those activities during peace and war that facilitate the relationship between the military forces, civil authorities and population of a friendly country or area or occupied country or area in which the military forces are operating. Civil affairs (CA) is concerned with the impact of civilians on military operations as well as the economic, social, and political impact of military operations on civilians.

CA elements engage the nonmilitary aspects and phases of operations to enhance military efforts and promote legitimacy of military operations. CA elements support both general purpose and special operations forces in all environments, across the operational continuum from peacetime competition, through conflict, to war.

CA operations cover the full spectrum of civil-military relationships ranging from liaison and coordination with civil authorities to civil administration in the occupied enemy territory. The nature of the CA operations in a particular situation is affected by such variables as command mission, environment (e.g., economic, political, and social development of the HN), status of hostilities, national policy, and the provisions of laws and agreements applicable to the command. Although conditions may differ, the basic mission of securing local acceptance and support for US Forces, of minimizing and eliminating the frictions and misunderstandings that can detract from US relations, remains the same.

Mission

Civil affairs supports strategic, operational, and tactical missions. Regardless of the mission, CA operations must comply with international law as well as US national law and, where applicable, national law when dealing with the inhabitants and institutions of host, liberated, or occupied territories; CA missions include civil-military operations and civil administration.

Civil-military operations (CMO) include foreign nation support, dislocated civilian (DC) operations, disaster relief, protection of cultural properties, humanitarian and civic assistance (H/CA), populace and resource control (PRC), and military civic action (MCA). With respect to H/CA, PRC, and MCA, these operations were designed for low intensity conflict (foreign internal defense and unconventional warfare). However, the operations may be applied across the operational continuum as appropriate. Clearly, civil-military operations are an integral part of contemporary land warfare and must be fully integrated into all combat operations.

Regarding foreign nation support, this action involves the identification, negotiation, and procurement of civil resources from within a foreign nation in support of a US military mission during peace, preparation for war, and wartime. Foreign nation support (FNS) includes both HN support and third country support. By receiving this support, the US Army reduces the need for US personnel, material, and services within the area of operations.

The G5/CMO is responsible for identifying and acquiring FNS required by the force. CA elements assist the G5/CMO by identifying available resources, facilities, services, and support, within the supported command's area of operations. Additionally, CA elements coordinate US requirements for, and assist in the acquisition of local resources, facilities, services, and support. For example, in the procurement process, CA personnel make recommendations concerning the availability of local resources, identify the source, and serve as the initial intermediary for the US military and the local source.

CA operations in FNS were clearly demonstrated during Operation DESERT SHIELD/DESERT STORM. In particular, CA elements met with Saudi officials in order to work out arrangements for the use of various facilities such as laundry, shower, mail, warehouse, and maintenance space. Also, CA elements arranged for the procurement of food, water, medicine, and other supplies to support both dislocated and enemy prisoner of war operations.

With respect to dislocated civilian operations, CA elements minimize local population interference with US military operations and protect civilians from the collateral effects of combat. obviously, uncontrolled masses of people seriously impair the movement of military units and supplies in support of the CDR's operations. CA elements advise the CDR on the anticipated reaction of the populace to military operations. Also, CA elements plan, supervise and coordinate the movement and control of dislocated civilians within and through the area. Additionally, CA elements provide humanitarian and civic assistance to dislocated civilians outside the combat zone.

For example, subsequent to Operation DESERT STORM, CA elements were involved in operation Provide Comfort in Northern Iraq. The major CA effort involved establishing and operating camps for the displaced Kurdish civilians. Towards that end, CA units interfaced with over 60 private and voluntary organizations, the USAF, the USMC and the armies of over eight allied countries and the UN in providing assistance to the Kurds. CA personnel worked with various supporting units and organizations to insure that over a half million Kurds were housed, moved, clothed, fed and assisted while displaced from their homes.

Disaster relief operations provide emergency assistance to victims of natural or manmade disasters abroad. These operations are responses for immediate help and rehabilitation from foreign governments or international agencies. Disaster relief operations may include refugee assistance, food programs, medical treatment and care or other civilian welfare programs. CA units are well qualified to plan, coordinate, and implement disaster relief operations. The functional structure of CA units and

the experience, training, and orientation of CA personnel provides a ready reservoir of soldiers possessing the skills necessary for administration of relief, institution of programs for rehabilitation, and provision of control measures appropriate to the situation.

CA supports the CDR by providing information to him on protected cultural assets such as arts, religious edifices, monuments, and archives. CA elements provide safeguards and any other required protection over collections of artifacts and objects of historical or cultural importance, including appropriate records thereof. Additionally, the CA elements make appropriate recommendations on plans to use or target buildings or locations of cultural value, such as temples, universities, and shrines.

As observed earlier, the next three civil-military operations were designed for the low intensity conflict environment. Nevertheless, H/CA, PRC, and MCA may be applied across the operational continuum to protect and assist the foreign country.

Regarding humanitarian and civic assistance, these actions provide a mechanism through which Us military personnel and assets augment other US non-military programs to assist Third World populations. H/CA operations assist the host government to improve the quality of life for the civilian population. These operations are specifically defined in 10 USC Section 401(e) to include: (1) medical, dental, and veterinary care provided to rural areas of a country; (2) construction of rudimentary surface transportation systems, (3) well drilling and construction of basic sanitation facilities; and (4) rudimentary construction and repair of public facilities.

Additionally, the statute requires that the Secretary of State approve the provision of humanitarian and civic assistance to the foreign country. The statute prohibits the provision (directly or indirectly) of H/CA to individuals, groups, or organizations engaged in military or paramilitary activity. With respect to funding matters, Congress has provided that funds will be specifically set aside for H/CA operations. However, Congress has authorized that DOD may incur minimal expenditures of other funds (other OMA or mission funds) not specifically set aside by Congress for H/CA operations.

CA elements support H/CA operations in a number of ways. For example in the area of humanitarian assistance, CA elements can be employed to help control refugees and/or establish and operate refugee camps. While planning and coordinating these activities, CA elements can also assist in consolidating and organizing refugees.

In the civil assistance area, CA elements have the technical experience to provide advisory assistance to the host government in a variety of areas such as public safety, transportation, communications, and public education. For example, CA elements rendered assistance to the government of Kuwait in the restoration and reconstruction of Kuwait City. CA elements performed damage assessments of critical facilities within the City and recommended and coordinated short-term remedial action to restore, as quickly as possible, the functions and services of the Kuwait government. Also, CA elements performed long term planning and reconstruction efforts within the City. In support of the Kuwait government, CA personnel defined contract requirements, reviewed contract proposals, and advised government officials on the merits of proposed contract arrangements. As a result of CA efforts, more than 558 million dollars in contracts were awarded by the Kuwait government to restore country operations.

Regarding populace and resources control operations, these activities consist of measures to deny support and assistance to the insurgent by controlling the movement of people, information, and goods. PRC was designed for low intensity conflict scenarios, but may be used in other environments. Examples of PRC would include such measures as registration, identification, movement control, curfews, rationing, price-controls, censorship, licensing and checkpoint operations. CA elements support PRC operations by providing advice and assistance in planning and conducting PRC. PRC measures are the exclusive province of the HN. Because PRC measures are politically sensitive, US forces should only conduct PRC operations only when the situation is clearly beyond the capabilities of the nation's security forces, only on the request of the host government, and only after approval by appropriate US authorities, to include the US ambassador.

With respect to military civic action, this involves the use of preponderantly indigenous military forces on projects useful to the local population at all levels in such fields as education, training, public works, agriculture, transportation, communications, health, sanitation, and others contributing to economic and social development, which would also serve to improve the legitimacy of the military forces and host government with the populace. With MCA, the primary objective of civil affairs is to mobilize and motivate civilians to assist the government and military forces. CA elements may plan, coordinate, advise, and direct MCA operations for the host government. As an example, CA elements may assist indigenous forces by providing skills in the technical areas of light-construction engineering and medical support. Successful operations eliminate or reduce military, political, economic and sociological problems.

Turning to the issue of Civil Administration, this operation concerns the direct involvement of the military in executive, legislative, or judicial areas of civilian government. CA efforts include: (1) assisting a host/allied government in meeting its people's needs and maintaining a stable and viable civil administration; (2) establishing a temporary civil administration to maintain law and order and to provide life sustaining services until the HN can resume normal operations; and (3) establishing a civil administration in occupied enemy territory at the direction of the National Command Authority.

In addition to the above, CA elements advise and assist the tactical CDR in fulfilling his legal and moral obligations in accordance with all the international agreements (Hague and Geneva Conv.s and status of forces agreements), international laws, US laws, executive directives and policy. Toward that end, CA legal advisors, in coordination with the Staff Judge Advocate of the supported command, review current plans and future operations with respect to applicable laws and agreements and advise the CDR, as required. Additionally, CA personnel observe conditions within the area of operations and ensure the CDR is kept informed of the needs of the local populace.

Command and Control

CA personnel supporting a general purpose force operation may be assigned to the unit they support and either augment or work under the staff supervision of the Assistant Chief of Staff (ACofS), G5, Civil-Military Operations. The G5 is the principal staff assistant to the CDR in all matters concerning political, economic, and social aspects of military operations. Also, he acts as a liaison between the military forces,, civil authorities, and people in the area of operations. The G5 supervises CA functions of the command in the areas of government, economics, public facilities, and special functions, such as displaced civilians, refugees, evacuees; arts, monuments, and archives; cultural affairs; and civil information.

Upon mobilization, the CA Command (or senior CA element in a theater) is normally under the command of the theater Army (TA). The TA will normally exercise OPCON of the CA Command directly. Subordinate CA elements may be GS, DS, or OPCON to supported headquarters within the theater. In all cases, CA units look to the next higher level CA unit in country for technical and policy guidance. It should be noted that, in peacetime and conflict, CA operations must be thoroughly coordinated and synchronized with the country team to insure unity of effort and synergism of effort.

Legal Personnel in Support of Civil Affairs

The SJA is the CDR's primary legal advisor and supervises legal operations in support of civil affairs. Within the CDR's staff, the ACofS, G5 normally has staff responsibility for CA legal activities. The G5 coordinates with the SJA on CA legal activities and on matters of US, local and international law, e.g, the Hague Conv.s, the Geneva Conv.s of 1949, and status of forces agreements as they concern and affect civil-military operations. CA legal activities include such matters as civil administration and the establishment and operation of CA tribunals and other judicial and administrative agencies.

JAs assigned to civil affairs units are the primary legal advisors to their respective units. The senior judge advocate of the unit is designated the Command Judge Advocate (CJA) and, therefore, is a member of the CDR's personal and special staff. CA JAs provide mission-essential legal services to the unit, including operational law legal service. The CJA of the unit will coordinate with the SJA of the command to which the civil affairs organization is assigned or attached for technical guidance and supervision.

Legal Services in Support of Civil Affairs

IAW FM 27-100, Legal Operations, the SJA of the supported command and the civil affairs CJA will effect coordination in an effort to provide legal services to their CDRs during all phases of CA operations.

In the planning phase, JAs provide advice and assistance in the preparation and review of civil affairs plans for consistency with US law, national command authority guidance, and the rules and principles of international law including those incorporated in lawmaking treaties, other international agreements, and the provisions of the law of the place where the US Armed Forces will be conducting operations.

Additionally, legal personnel prepare the legal section of the civil affairs area study and assessment. The area study and assessment is a planning document containing information on the designated area of operations compiled before deployment or hostilities. For a detailed review of the area study and assessment, see FM 41-10, Civil Affairs Operations, Appendix B.

Legal services are also provided to the command in the nature of predeployment CA training. This training should include subjects such as: (1) Geneva/Hague Conventions, (2) human rights violations and reporting requirements, (3) rules of engagement, (4) military justice, and (5) miscellaneous information concerning the SOFAs with the HN, if any. Additionally, command personnel should receive a premobilization legal briefing prior to deployment.

During the combat operational phase, JAs address legal issues concerning population control measures; targeting to minimize unnecessary collateral damage or injury to the civilian population; treatment of dislocated civilians, civilian internees, and detainees; requests for political asylum and refuge; acquisition of private and public property for military purposes; psychological operations and their effects on the civilian population; and other operational law matters as necessary.

During the stability and consolidation phase, JAs may provide legal services concerning such matters as claims submitted by local civilians, disaster relief, and humanitarian and civic assistance issues. Additionally, JAs may be called upon to give advice and assistance on matters relating to civil administration within a friendly or enemy country. JAs may also provide counsel regarding the creation and supervision of military tribunals and other activities for the proper administration of civil law and order. In addition, legal services may be necessary with respect to the issue of a local court's jurisdiction over US military personnel and activities.

International Law Applicable to Civil Affairs Operations

The following is an index of provisions of the Hague Conv. No. IV Respecting the Laws and Customs of War on Land and the Annex Thereto Embodying Regulations Respecting the Laws and Customs on Land (HR) and the Geneva Conv. Relative to the Protection of Civilians Persons in Time of War (GC). This index is not intended to be an all inclusive listing of the legal requirements for CA operations. Rather, the index should be considered a starting point for research when considering civil affairs issues in the operational environment.

Civilian Persons

-Application and Scope of GC - GC, Arts 2, 3 & 6
-Children (under age of fifteen) - GC, Art 24
-Duration - GC, Art 6
-Expectant Mothers - GC, Art 16
-Fundamental Rights of Protected Persons - GC, Art 27
-Hostages - GC, Art 34
-Human Rights - HR, Art 46
-Individual Responsibility for Misconduct - HR, Art 50:' GC, Art 33
-Internment - GC, Arts 41 - 43, 68, 78 - 135
-Methods of Obtaining Information- HR, Art 44; GC, Art 31
-Non-renunciation of Rights - GC Art 8
-prohibited Acts Towards Protected Persons - GC, Art 32
-Protected Person Defined- GC, Art 4
-Protecting Power - GC, Art 30
-Wounded and Sick - GC, Art 16
-Women - GC, Art 27

Occupied Territories

-Contributions & Taxes - HR, Arts 48, 49 & 51
-Courts Suspension - GC, Art 54
-Defined - HR, Art 42
-Duration - GC, Art 6
-Duty to Provide Public Health, Hospital Service, Hygiene -GC, Art 56
-Duty to Provide Food and Medicine - GC, Art 55
-Duty to Restore and Maintain Order - HR, Art 43
-Inviolability of Rights - GC, Art 47
-Oath of Allegiance to Hostile Power - HR, Art 45
-Penal Provisions - HR, Art 43; GC, Arts 64 - 77
-Pillage - HR, Art 28 & 47; GC, Art 33
-Relief Operations - GC, Arts 59, 60, 61, 62, 63
-Religious Beliefs/Needs of Populace - HR, Art 46; GC, Art 58
-Requisitions - HR, Art 52; GC, Arts 55 & 57
-Protected Persons' Service in Armed Forces - GC, Art 51
-Protected Persons' Work - GC, Arts 51 & 52
-Public Officials - GC, Art 54

Property (Enemy)

-Confiscation of State Movable - HR, Art 53
-Cultural Property - HR, Art 56
-Destruction - HR, Art 23; GC, Art 53
-Municipal Property - HR, Art 56
-Pillage - HR, Art 28 & 47; GC, Art 33
-Private Property (Real) - HR, Art 46 & 52
-Private Property (Movable) - HR, Art 46, 52 & 53
-Religious Property - HA, Art 56
-State Movable Property - HA, Art 53
-State Real Property - HR, Art 55; GC, Art 53

Basic References

International Treaties and Agreements

-Hague Conv., Respecting the Laws and Customs of War on Land and the Annex thereto, embodying the Regulations Respecting the Laws and Customs of War on Land
-Gen. Conv. Relative to the Protection of Civilians in Time of War
-UN Charter, Arts 1(3),13(1),55,56,62(2), and 76
-Universal Declaration of Human Rights
-Conv. on the Prevention and Punishment of the Crimes of Genocide
-Protocol Relating to the Status of Refugees
-Conv. on the Political rights of Women
-Slavery Conv. of 24 Sep 1926
-Protocol Amending the Slavery Conv. Signed on 25 Sep 1926
-Supplementary Conv. on the Abolition of Slavery, the Slave Trade, Institutions, Practices Similar to Slavery

US Laws

-Uniform Code of Military Justice
-Foreign Assistance Act
-Arms Export Control Act
-Foreign Claims Act
-Posse Comitatus Act

Joint and Multi-Service Publications

-Joint Publication 1-02. DOD Dictionary of Military and Associated Terms. 1 Dec 1989.
-Joint Publication 3-07. Doctrine for Joint Military Operations in Low Intensity Conflict
-Joint Publication 3-57. Doctrine for Civil Affairs (Final Draft). Nov 1990.

Publications

-AR 27-1 Judge Advocate Legal Service
-AR 27-20 Claims
-AR 27-50 Status of Forces Policies, Procedures, and Information
-AR 500-50 Civil Disturbances
-AR 500-60 Disaster Relief
-AR 550-1 Procedure for Handling Requests for Political Asylum and Temporary Refuge
-AR 550-51 Authority and Responsibility for Negotiating, Concluding, Forwarding, and Depositing of International Agreements
-FM 19-15 Civil Disturbances
-FM 19-40 Enemy Prisoners of War, Civilian Internees and Detained Persons
-FM 27-10 The Law of Land Warfare
-FM 27-10 Legal Operations
-FM 31-20 Doctrine for Special Forces Operations
-FM 41-5 Joint Manual for Civil Affairs
-FM 41-10 Civil Affairs Operations
-FM 100-20 Military Operations in LIC
-FM 100-25 Doctrine for Army Special Operations Forces
-FM 101-5 Staff Organization and Operations
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-PA Pam 27-1 Treaties Governing Land Warfare
-DA Pam 27-I-1 Protocols to the GC of 12 Aug 1949
-PA Pam 27-21 Administrative and Civil Law Handbook
-DA Pam 27-161-1 Law of Peace
-DA Pam 27-161-2 International Law, Volume II

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-Borek, Legal Services During War, 120 Mil. L. Rev. 19 (1988).
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-Graham, Operational Law-A Concept Come of Age, The Army Lawyer, Jul. 1987, at 9.
-Greenhut, Civil Affairs in Operation Just Cause, Special Warfare, Winter 1991, at 28.
-Ivey, But It's Only Civilian Property..., Special Warfare, Fall 1989, at 42.
-Parkerson, US Compliance with Humanitarian Law Respecting Civilians During Operation Just Cause, 133 Mil. L.Rev. 31 (1989).
-Santerre, From Confiscation to Contingency Contracting: Property Acquisition on or Near the Battlefield, 124 Mil. L. Rev. 111 (1989).
-Simmions, Legal Aspects of Security Assistance, Special Warfare, Fall 1989, at 29.
-Walsh, Role of Judge Advocate in Special Operations, The Army Lawyer, Aug. 1989, at 4.
-Woods, An Overview of the Military Aspects of Security Assistance, 128 Mil. L. Rev. 71 (1990).

TAB V
HUMANITARIAN ASSISTANCE

WARNING

Even though the Armed Forces are involved in doing a lot of good things for a lot of people around the world, THERE IS NO OPEN ENDED AUTHORITY FOR DOD TO DO GOOD DEEDS! That is, our acts must be based on:

a) a specific statute,
b) security assistance; or
c) Economy Act, 31 USC 1535 (funds transfer). See 63 Comp Gen 422 (1984) -- disallowance of O&M to fund minor MILCON, and training of Honduran armed forces "incident" to an exercise.

The Office of Foreign Disaster Ass't (OFDA), Agency for International Development, Department of State, is the lead agency for responses to foreign disasters.

Since 1985, DOD has conducted humanitarian and civic assistance programs in support of broader US foreign policy objectives. Our assistance, provided to more than 75 countries worldwide, has enhanced military-to-military relations, improved relations with the people of a number of countries, and made a major contribution to the relief of human suffering. This assistance takes many forms, including donation of excess food, clothing, and medical supplies, construction of schools and roads by US military personnel, foreign disaster assistance, and the transportation by US military aircraft of privately donated humanitarian cargo.

During the past year, DOD demonstrated anew its ability to respond rapidly to humanitarian disasters in Africa, Latin America, Asia, Eastern Europe, and the former Soviet Union.

> **In the face of an absolutist doctrine of the right of nations, there is now a tentative right to interfere. Men cannot eat sovereignty...the order within nations is just as important as that among them.**[1]

Sources

22 USC sec. 2292 gives the President authority to provide disaster assistance. When directed, DOD may assist OFDA in providing disaster relief services. The DOD proponent is DASD (Global Affairs). The assistance will usually take place through the combatant command with geographical responsibility for the affected area.

22 USC sec. 506a(2)(A)(i) authorizes the President to direct the drawdown of defense articles and services and the provision of training for the purposes authorized in sec. 2292.

10 USC sec 2547 authorizes SECDEF to make nonlethal excess supplies available for humanitarian relief purposes. These supplies are to be provided to the Dep't of State for distribution.

10 USC sec 401 authorizes humanitarian and civic ass't in conjunction with military operations. This authority is used during exercises to provide ass't to civilian populations in the vicinity of exercises.

10 USC sec. 402 authorizes SECDEF to transport relief supplies provided by non-governmental sources on a space available basis. DOD proponent is DASD (Global Affairs).

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[1] Referring to Somalia, US News & World Report 25, December 21, 1992.

Examples:

Fuertes Caminos was taking place in Panama when an earthquake struck. US forces gave assistance in Panama and Costa Rica.

Operation Sea Angel: Gave humanitarian assistance after a monsoon in Bangladesh.

Provide Hope: Relief to the Republics of the former Soviet Union.

Provide Comfort: Relief and protection to Kurds in northern Iraq after Desert Storm. Relief was turned over to the UN. (See case study below).

Restore Hope: Relief to Somalia.

In the New World Order, people are more important than borders and human rights are more important than sovereign rights.

Daniel Schorr, America's National Public Radio

LEGAL AUTHORITY FOR SOMALIA RELIEF OPERATIONS
(Abridged version)

MEMO for SECDEF
FROM DOD General Counsel
Dec 5, 1992

The Chairman, JCS, has presented for your approval an order to CINCCENT to execute humanitariean relief operations in Somalia, which will include authority to use force if necessary to over come resistance to safe and effective delivery of humanitarian relief. The order would implement the President's direction to you to conduct such operations. It is my legal opinion that the order is lawful.

The US has the authority to employ the US Armed Forces as contemplated by the order under a treaty and the laws of the US concerning support for the UN and providiing for the conduct of disaster relief activities. The President, as commander in chief under the Constitution, may exercise this authority of the US as contemplated by the order.

In addition to the President's constitutional powers as commander in chief, two basic lines of authority and funding exist for the Somalia relief operations: 1) the UN Charter, UN Participation Act, and defense appropriations acts, and 2) disaster relief statutes, including defense appropriations acts.

UN Charter, UN Participation Act, and Defense Appropriations Act

The UN Charter is a treaty to whic the US is a party. Chapter VI of the Charter provides for the UN Security Council to address through pacific means situations the continuance of which are likely to endanger the mainenance of international peace and security. Chapter VII provides the Security Council to address threats to the peace, breaches of the peace and acts of aggression, including in specified circumstances taking "su h action by air, sea, or land forces as may be necessary to maintain or restore international peace and security." (Art. 42) Under Art. 25, "[t]he Members of the UN agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

On Jan 23, 1992, acting under Chapter VII, the UN Security Council adopted Resolution 733 calling upon all States "to contribute to the efforts of humanitarian assistance to the population in Somalia." With the determinations of the SEC of State dated Aug 20, 1992 under Sec 7 of the UN Participation Act (22 U.S.C. 287d-1) and Executive Order 10206, the US Armed Forces have been and may continue to be used to implement Resolution 733 as a service to the UN, and DOD funds may be used to fund such action. Operation and maintenance (O&M) funds used for that purpose count against the overall limitation of $100 million on use of O&M funding under the UN Participation Act set by SEc 9158 of the DOD Appropriations Act, 1993 (Public Law 102-396). By memo of Aug 29, 1992, The DEP SECDEF authorized CINCCENT to provide support to the UN for UN disaster relief in Somalia under the UN Participation Act within specified funding limitations.

Acting under Chapter VII of the Charter, on Dec 3, 1992, the UN Security Council adopted Res 794, authorizing states to use all necessary means (i.e., including force) to establish as soon as possible a secure environment for humanitarian relief operations in Somalia. Chapter VII and Art 25 of the UN Charter, as a treaty, constitute the supreme law of the the land under the Constitution and have the effect in this situation of a request to the US to undertake a military mission, which the President has directed the SECDEF to execute with US armed forces. Thus, defense appropriations amy be used for employment of the US armed forces for this mission in relation to Chap VII. See Comp. Gen. 347 (1953) ("... existing appropriations of Departments or Agencies are available to defray the expenses of additional duties imposed upon them by proper legal authority.")

The SECDEF has flexibility in the Somalia operation to determine when the US Forces are proceeding in relation to Chap VI authority and Sec 7 of the UN Participation Act (i.e., noncombatant authority) and when they are proceeding in relation to Chap VII authority (excluding Art 43, which DOD is not acting under in this situation) to use all necessary means (i.e., including force).

Disaster Relief Statutes

With or without UN Security Council action under Chapters VI or VII, the US armed forces may engage in disaster relief activities authorized by law to the extent of available appropriations. Such authorization includes those security measures required to ensure safe and effective delivery of disaster relief. See Sec 1301 of Title 31, U.S.C.

DOD May use the $25 million appropriated in Sec 8105A of the DOD Appropriations Act, 1992 (Public LAw 102-172) "for the

unanticipated costs of disaster relief activities of the DOD and the military services overseas;" the at least $50 million available un the O&M, Defense Agencies heading of the DOD Appropriation Act, 1993 (Public Law 102-396) for "the global disaster relief activities of the DOD;" and the not to exceed $25 million for the CINC initiatives fund account under the O&M, Defense Agencies heading of the DOD Appropriations Act, 1993 (Public Law 102-396). The DOD also has available $28 million appropriated under the "Humanitarian Assistance" heading of the DOD Appropriations Act and Sec 2551 of Title 10 U.S.C. as enacted by Sec 304 of the National Defense Authorization Act for Fiscal Year 1993 (Public Law 102-484). It must be emphasized that there are other planned uses for all these funds, so that use of them for Somalia would require DOD to forego alternative planned uses for the funds. Also note that portions of the amounts already have been obligated.

Conclusion

For the foregoing reasons, it is my legal opinion that you may lawfully approve the execute order the Chairman JCS has presented for your approval.

It should be noted that the US armed forces always may defend themselves and expend for that purpose O&M funds appropriated to the DOD.

To keep the Congress informed as a matter of comity and to avoid any unnecessary executive-legislative debate concerning the scope and constitutionality of the War Powers Resolution, the Executive Branch may wish to transmit promptly to the Congress a written description of the Somalia relief operation.

OPERATION PROVIDE COMFORT

- Initially a US JTF formed in Apr 91 to provide assistance to 500,000 refugees along the Turkish/Iraqi border.
- Legal basis was "Humanitarian Relief" under UN Resolution 688
- Other nations soon joined, making it a Combined Task Force (CTF); this was the first deployment of a JA from Spain in 35 years!
- Ground forces from 6 nations entered Iraq, creating a sec. zone.
- Turkey not cooperative: concern US, UK, Germany, Spain, etc. may establish an independent Kurdistan. Turkey's position: CTF not doing NATO work, so no NATO SOFA status.
- Oper. control for CTF fell under EUCOM with a US CG. A CTF staff was established (C-1 thru C-6, [C-5 plans & policy; C-6 commo).
- US constructed refugee camps.
- Coalition aircraft patrolled north of 36 parallel.
- CTF assisted UN sponsored NGOs with humanitarian ass't.
- CTF flew tribal leaders to camps, then villages to verify safety.
- When situation stabilized, refugees returned home.
- Phased withdrawal from Iraq by 15 Jy 91; air patrols continued.
- Residual forces remained in S. Turkey, and Turkey joined coalition, extending permission to con't operations to 30 Sep 91.
- Fixed wing patrols continued over NAPOLEON. Iraq until 31 Dec 91.

Legal Issues

- Security: What force protection was appropriate? The British called the deployment Operation Haven; the Aussies called it Operation Habitat. The Brits could act in self-defense and respond to hostile intent, but could not act in defense of others (i.e., the US). Many felt Provide Comfort was similar to Lebanon when it came to force protection (SNAFU).
- US was under JCS PROE. What right did US have to secure Iraqi weapons and equipment? (Hostilities had ended)
- Arguably, there were no Geneva Conv. rights because the CTF was not an occupying force.
- What rights did CTF have over international flights north of 36th parallel (as did a Swiss Air and Turkey fighter doing recon)?
- What right to apprehend criminals or terrorists? (2 Gendarme shot by man who then waived to GIs...)
- "No claims/no compensation" policy was unrealistic (as shown when a small child was run over...). A claims authority is needed. The Air Force was given single service claims responsibility.
- Without viable gov't in NAPOLEON. Iraq, what laws were to be applied?
- Should there be standard ROE among CTF? At first there were different ROE for each component force. After 1 May 91, a standard set was issued. However, tensions rose when the US was not allowed to disclose its classified PROE (to Syrians, Egyptians, etc).
- Military justice issues required inter-service coordination. JCS Pub 2 is required reading! Command influence arose with guidance that "x" act should be handled in "y" fashion.
- Fiscal law issues: 1) financing the relief effort; 2) construction limitations for building camps; 3) financing access road to base; 4) humanitarian ass't; 5) refueling coalition aircraft; and 6) supplying equipment.

OPERATION PROVIDE COMFORT
LEGAL CONCERNS CARD

TURKISH LAW AND JURISDICTION

- Military members are not exempt from Turkish Law or free from Turkish prosecution.
- Violations of Turkish law generally subjects you to jurisdiction of Turkish courts.
- Turkey almost never waives its right to prosecute.
- Pretrial confinement always possible for all major offenses. Becomes a real probability in case of fatality or sex offenses.
- Promptly notify the Law Enforcement Desk of any involvement with Turkish authorities
- Use IABVA 110-1 - card with base #s and request for assistance written in English and Turkish (Carry this card at all times).

- Turkish authorities will allow such contact when respectfully requested.
- In appropriate cases, an attorney and an interpreter will respond to the scene or Turkish police station.
- While waiting for the attorney, be courteous, polite and be advised it is considered disrespectful to cross your legs or fold your arms in police stations.
- The NATO SOFA provides you essentially the same safeguards as our Bill of Rights; however neither suspect nor witness have the right to refuse to provide a statement.

SPECIFIC CRIMES YOU NEED TO KNOW ABOUT:

- Drugs - Pretrial confinement likely. Little US can do to secure your release. Simple use or possession: 3-5 years imprisonment
- Traffic Violations - Criminal offense of dangerous driving is possible. Fault is assessed in 1/8 increments. Even 1/8 at fault could result in trial and conviction.
- Blackmarketing - Persons making any gift, sale, or exchange of BX, Class VI, Commissary, APO, or any other item brought into Turkey tax free can be tried by Turkey for smuggling and by US for violation of Art 92 of the UCMJ.
- Includes all items not just beyanname or high value items. (Even those you plan to throw away).
- Antiquities - Must have museum certificate to remove antiques and other historical assets from Turkey.
- Insult - Speaking in a demeaning or contemptuous manner.
- Serious offense to insult something which is part of Turkish heritage -Turkish flag, Ataturk the founder of Turkey, the Turkish people as a whole or the government.
- Also includes defacing or treating with disrespect Turkish currency.
- Okay to bring an action against a person for theft but you may not say to the person "you are a thief". (TRUTH IS NOT A DEFENSE).
- Law applies to both Turkish Nationals and Americans.
- Religious Proselytizing - Freedom of worship is acceptable, however, it is illegal to try to convert others. Avoid religious conversations with Turkish Nationals or Non US Nationals.
- Sex Offenses - Statutory Rape - Under 18. Seduction of virgin with promise to marry - age not relevant.
- Photography - Photographing military installations or official buildings prohibited. (Ask permission prior to photographing Turkish Nationals).

ACCESS TO INCIRLIK AIR BASE

- Controlled by Turkish Military. Entry requires a Turkish gate pass.
- Personnel arriving by air should check with commanding officer for instructions. Personnel arriving by surface must be sponsored by on base personnel who will have gate pass approved prior to their arrival. TDY PERSONNEL MAY NOT DRIVE POVs FOR PERSONAL USE EITHER ON OR OFF BASE! This restriction applies whether you have an IL drivers license or a USAFE Form 181.
- Reason: A vehicle accident could delay your departure from Turkey from 2 months to 2 years.

CUSTOMS AND BEYANNAME

Beyanname Items - tax/duty free items which the Government of Turkey and the US have mutually agreed to track from entry into or purchase in country to their proper transfer or departure from Turkey.

- Due to the extensive paperwork this entails, as well as the impact a loss or theft would have on an individual's ability to depart the country, TDY PERSONNEL ARE NOT ALLOWED TO MAKE BEYANNAME PURCHASES. (Unlike Operation Desert Storm, an exception to this policy has not been granted for Operation Provide Comfort).
- If a beyanname item was brought with you in country and placed on your orders, you must present that item each time you leave the country (even temporary departures).
- Loss or theft of these should be reported immediately to the L.E. Desk and TMO's Customs Liaison Office.

IMMIGRATION AND STAMPED ORDERS
- Check your orders or passport to make sure you were stamped in country.
- If not, contact the MAC Terminal, ext 66424.
- SAFEGUARD THESE ORDERS - required to present this order upon your departure. A failure could result in a substantial delay in your departure.

TOURS
- Tourism is highly regulated. Only licensed agencies may organize and conduct tours. MWR Tour Division is the only agency on base authorized to arrange tours.

CONTRACTS/INTERNATIONAL AGREEMENTS
- Ads seek the assistance from the CTF Provide Comfort Judge Advocate, 39TACG legal office, or your servicing legal officer prior to entering into any type of contract or agreement.
- Only certain levels of command have authority to even negotiate mutual understandings with US as a Party.

TERRORIST THREAT
- Generally speaking Turkey is quite safe; yet, you should maintain a low profile.

CULTURAL SENSITIVITIES
- Both men and women should avoid wearing revealing or excessively tight clothing and starting conversations with strangers.

- May generate harassment or lead to a more serious incident.
- Avoid using the words sick or peach and the one hand gesture for okay.
- Disrespectful to cross legs with sole of foot facing another

WEARING YOUR UNIFORM OFF BASE FOR ANY REASON (OFFICIAL OR UNOFFICIAL) IS PROHIBITED. BOTTOM LINE -- RESPECT TURKISH LAW, ASK QUESTIONS IF UNSURE OF PROPER CONDUCT AND REMEMBER, YOU ARE A GUEST!

OPERATION PROVIDE COMFORT
COMMANDER'S GUIDANCE ON
USE OF FORCE
(as of 1 May 1991)

1. This is a humanitarian assistance operation. The multinational forces are not at war.

2. You have the right to use force in self defense. Nothing in this guidance negates a commander's obligation to take all necessary actions for his unit's self defense.

3. CTF Provide Comfort forces are authorized to use force in self defense when responding to attacks or threats of imminent attack against the multinational forces, humanitarian relief personnel and refugees.

4. Use only the minimum force necessary and proportional to eliminate the threat and control the situation.

5. Deadly force should only be used to protect lives in response to a hostile act or demonstration of hostile intent.

GUIDELINES FOR DISARMING
AND DETAINING WITHIN SECURITY AREAS

You will disarm and detain any Iraqi soldier or member of a paramilitary security force, or any civilian policeman without proper authorization, within a designated security area. Immediately contact the Military Coordination Center through your chain of command so that the Iraqi Liaison Officer may respond.

USE THE MINIMUM FORCE NECESSARY TO DISARM AND DETAIN, UP TO AND INCLUDING THE USE OF DEADLY FORCE IF HOSTILE INTENT IS EXHIBITED OR A HOSTILE ACT COMMITTED.

Other Humanitarian and
Civic Assistance Activities

DOD is engaged in an expanding role of providing humanitarian and civic assistance (HCA) to third countries within the context of combined exercises. Given the nature of the activities involved and the environment in which these activities are taken, HCA projects uniquely lend themselves to the skills of specially trained US military personnel. Working in coordination with local US diplomats and in conjunction with HN armed forces and government agencies, DOD personnel, while addressing de-stabilizing social and economic conditions within a country, ultimately serve to enhance both US and regional security interests.

JAs must be aware, however, that HCA is generally recognized as a form of foreign assistance and, as such, programmed, administered, and funded by the Department of State (Agency for International Development (AID)). Given this fact, DOD traditionally has possessed limited authority to engage in HCA. In certain cases, DOD resources may be utilized to provide assistance through written agreements with AID under the authority of the Economy Act, 31 USC 1535. This legislation requires, however, that, if DOD undertakes assistance projects under agreement with AID, full reimbursement be made for costs "attributable" to DOD services performed.

Apart from the authority of the Economy Act, DOD may also engage in civic action activities on a limited basis through security assistance programs. Under 502, Part II of the Foreign Assistance Act, defense articles and services may be provided to a foreign country for, among other purposes:

> ...assisting foreign military forces in less developed friendly countries (or the voluntary efforts of personnel of the Armed Forces of the US in such countries) to construct public works and to engage in other activities helpful to the economic and social development of such friendly countries. It is the sense of the Congress that such foreign military forces should not be maintained or established solely for civic action activities and that such civic action activities not significantly detract from the capability of the military forces to perform their military missions and be coordinated with and form part of the total economic and social development effort.

In addition to the above authority, which has always proven to be of minimal value, DOD received specific statutory authority to engage in HCA during authorized overseas operations in 1986. As a precursor to this 10 USC authority, which will later be examined in detail, sec. 8103 of the FY 85 DOD Appropriations Act (the Stevens Amendment) had authorized DOD to engage in HCA incidental to authorized operations and to fund costs associated with such assistance through O&M funds. Consistent with the legislative history accompanying this amendment, JCS limited the provision of this form of assistance to HCA activities conducted incidental to JCS directed or coordinated exercises. This "Stevens authority" was extended under sec. 8072 of the 1986 Continuing Approp. Resolution and sec. 9062 of the 1987 DOD Approp. Act.

Given the difficulty associated with attempting to define and establish the parameters of "incidental" Stevens HCA and the requirement that the provision appear in every DOD Appropriations Act, DOD sought and received specific and permanent 10

USC authority to engage in humanitarian assistance and civic action during the course of authorized military operations overseas (10 USC Chapter 20, sec. 401). Several provisions are of particular importance to JAs.

Sec. 401(b) mandates that HCA may not be provided to a foreign country unless the Secretary of State specifically approves the provision of such assistance. Note should be taken that this approval authority has been delegated to State representatives at the embassy level and is generally effected in coordination with a representative of the responsible Unified command.

Sec. 401(e) defines HCA for the purpose of this legislation. A key term of art set forth in this sec. is "rudimentary." What is meant by "rudimentary" surface transportation systems and "rudimentary" construction and repair of public facilities? The interpretation of this term by a command providing HCA under 10 USC is an issue meriting close JA scrutiny and careful coordination through the chain of command.

Sec. 401(c)(1) deals with the payment of expenses incurred by a command as a direct result of the provision of HCA. Note that sec. 401(c)(1) directs that such expenses will be paid from funds (O&M funds) specifically appropriated for this purpose.

Sec. 401(c)(2) was added to the originally proposed legislation by Congress. It merits close examination. Recall that the purpose of DOD's seeking permanent statutory authority to engage in HCA activities was the elimination of the interpretative difficulties associated with the "incidental" HCA authority of the Stevens Amendment. Sec. 401(c)(2) provides, nevertheless, that DOD may now incur "minimal" expenditures for HCA activities and defray these costs with O&M funds other than those specifically appropriated pursuant to sec. 401(c)(1). Is this authority to incur "minimal"HCA expenditures simply a return to the "incidental" standard, with all of the interpretative difficulties associated with this concept? No.

Congress, in passing the 10 USC HCA legislation, provided specific guidance, in the accompanying Conference Committee Report, of what it viewed "minimal" expenditures for "diminimus" HCA activities to be. The language of the Report follows:

> The conferees . . . exempted "diminimus" activities from this section. [sec. 403(a)]. The conferees did not put a specific dollar ceiling on the definition of "diminimus" but wish to make clear they had in mind activities that have been common-place on foreign exercises for decades. These would include a unit doctor's examination of villagers for a few hours, with the administration of several shots and the issuance of some medicines - but would not include the dispatch of a medical team for mass inoculations. "Diminimus" would also include the opening of an access road through trees and underbrush for several hundred yards - but would not include the asphalting of any roadway.

Clearly, then, the "diminimus" HCA activities for which sec. 401(c)(2) "minimal" expenditures may be made are very limited in nature, a fact of which JAs must be aware.

The provision of HCA to a HN in the context of a combined training exercise is a legitimate DOD activity and an exceptionally effective use of DOD personnel and equipment, particularly in a potential low intensity conflict environment. The role of the JA is to ensure that HCA is provided in a manner fully consistent with the applicable law.

EXCESS PROPERTY - HUMANITARIAN ASSISTANCE

10 USC 2547: permanent authority in SECDEF to furnish non-lethal excess property for "humanitarian relief" purposes. Separate from other authorities because:

(a) SECDEF has not delegated authority;
(b) DOS has a role;
(c) no dollar cap.

Transportation remains a problem.

compare: 503-505, 516, 517, & 519 of the FAA which also address disposal of excess property.

GENERAL HUMANITARIAN & CIVIC ACTION ASSISTANCE (CA/HA)

10 U.S.C. 401(a) (1) permits pre-planned CA/HA "in conjunction with authorized ops" subject to:
(a) SECSTATE approval;
(b) very specific dollar cap;
(c) non-interference other programs.

10 USC 401(c) (1) permits incidental CA/HA if involves "minimal expenditure" of funds. A/K/A Stevens Amendment. Terms:
(a) no dollar cap;
(b) no SECSTATE approval;
(c) must be genuinely incidental or spontaneous;
(d) part of JCS directed exercise.

PEOPLE PROGRAMS

General Reference: Joint Security Ass't Regulation Army Reg 12-15; AFR 50-29; SECNAVINST 4950.4, SECNAVIST 5700.13, Coordination of US Navy and Marine Corps Personnel Interchange Program, 20 Apr 71, and MCO 5700.4C, Marine Corps Foreign Personnel Exchange Program (MCFPEP), 10 Nov 88.
See also OPNAVIST 3440.16B, DON Civil Emergency Ass't Program, 4 Sep 91; and MCO 3440.7, Marine Corps Ass't to Civil Authorities, 1 Jan 92.

A. SCIENTIST AND ENGINEER EXCHANGES

Based on legal authority of MILDEPS and DOD to do R & D: 10 USC 4503,5151,5152,7203,9503. DOD DIR 5134.1 (Draft) will institutionalize current practices. ODUSD(IP) has primary lead in DOD.

B. PROFESSIONAL MILITARY EDUCATION EXCHANGES

Regulated by the JSAT, CH 14 Parity Required. Authorized by Sec. 544 of the Foreign Assistance Act. Covers exchanges of quotas on a one-for-one basis at War & Command and Staff Colleges. Strict.

C. SMALL UNIT EXCHANGES

Regulated by Ch. 14-2 of JSAT. Based on 30A of AECA which inter alia permits the exchanges of small units for training purposes.

These exchanges occurs pursuant to a MOU (usually) and reciprocity is required.

D. PERSONNEL EXCHANGE PROGRAM

These agreements are concluded under the general operating authority of the services: 10 USC 5062/5013 (Navy); 3012 (Army); 8012 (Air Force). Further implemented by instruction. Navy: 5700.7F

SECSTATE has given "blanket" approval for conclusion of these agreements by the service secretaries.

An umbrella MOU agreement is concluded with each country which specifies "status" and "entitlement" issues.

SAMPLE HUMANITARIAN ASSISTANCE SOFA

[KEY POINTS FROM THE SOFA WITH BANGLADESH DURING SEA ANGEL]

On 14 May 91 the US Ambassador to Bangladesh authorized JTF Sea Angel to negotiate and conclude a temporary SOFA. The JTF SJA began negotiations the next day, and on 19 May the President of Bangladesh signed the 3 page agreement. Following are the key provisions of the agreement.

MOU BETWEEN BANGLADESH AND THE US
TO SPECIFY THE LEGAL STATUS OF
THE US PACIFIC COMMAND DISASTER RELIEF TASK FORCE

1. The purpose of this agreement is to specify the legal status of USPACOM Disaster Relief TF personnel while temporarily present in Bangladesh in connection with its disaster relief mission.

2. It is the intent of the parties to this agreement to be bound by its terms and conditions and to do whatever is necessary to implement the agreement.

3. With respect to members and equipment of the TF, Bangladesh agrees that:

   a. TF personnel will be accorded status equivalent to that provided to members of the admin & tech staff of the US Embassy under the Vienna Convention on Diplomatic Relations 1961. They may enter and leave Bangladesh upon presentation of a US Armed Forces ID card and individual or collective movement or travel orders. In Bangladesh they shall enjoy freedom of movement and the right to undertake those activities deemed necessary for the performance of their mission.

   b. The US and the military personnel to whom this MOU applies shall be exempted from taxation or charges under [the pertinent laws, statutes and ordinances].

   c. US military personnel shall be accorded immunity from the jurisdiction of the courts of Bangladesh and inviolability in respect of official acts in like manner to that of immunity and inviolability accorded admin & tech staff of the US Embassy.

   d. US military aircraft will be permitted to land at [the appropriate airports] for the purposes of supplying equipment and personnel to the TF; and extracting TF personnel and equipment. Such aircraft will be exempted from customs inspections under [the pertinent acts and rules]. US military landing crafts may land at such location necessary to accomplish the disaster relief mission.

4. The Embassy of the US shall provide the SEC of Foreign Affairs (Bangladesh) with the name, rank and ID # of each member of the TF within 10 days of arrival. Upon their departure, the US shall notify the SEC of Foreign Affairs (within 10 days).

5. This MOU shall enter into force upon signature with retrospective effect from the date of the arrival of the TF and shall remain in force until revoked by either party with 10 days of prior notice.

6. Done at the Ministry of Foreign Affairs, Dhaka this 20th day of May, 1991.

SIGNED: William B. Milam
US Ambassador

Abul Ahsan
Foreign Secretary, Bangladesh

TAB W
HUMAN RIGHTS

Why can't the responsible powers of the world now unite to impose civilized standards of behavior on those who flout every measure of human decency? Are we not nearing a point in world history where civilized nations can in unison stand up to the most immoral and deadly excesses against humanity? ... What is being done in Somalia is what is needed in many places around the globe -- a humanitarian velvet glove backed by a steel fist of military force.[1]

In 1991, SOUTHCOM directed that all personnel assigned or deployed to the theater receive Human Rights training.[2] In a similar vein, several ambassadors requested that Human Rights training be conducted for their respective countries. Because of the broad missions of the Armed Forces and the continued possibility of deployments to numerous countries, it is essential to have a feel for Human Rights law. Consider the following:

Defense Secretary Aspin has decided to restructure the policy-making apparatus of the Pentagon to direct more attention to new national security concerns such as human rights and to give the department a forceful voice on these issues. (Washington Post, front page, 28 January 1993)

As part of a SOUTHCOM initiative to assist Peru institutionalize human rights programs of instruction, the following "TEN COMMANDMENTS OF HUMAN RIGHTS FOR SOLDIERS" were developed. Corresponding sketches (next several pages) were used to help get points across to soldiers who were illiterate.

TEN COMMANDMENTS OF HUMAN RIGHTS FOR SOLDIERS

THOU SHALL:

1. **HONOR THE SPIRIT OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS.**
2. **GIVE AND OBEY ONLY LAWFUL ORDERS.**
3. **REPORT CRIMES AND HUMAN RIGHTS VIOLATIONS TO PROPER AUTHORITIES.**
4. **RESPECT INDIVIDUAL INTEGRITY AND HUMAN DIGNITY.**
5. **ABIDE BY THE MILITARY CODE OF HONOR, BE CHIVALROUS, AND TELL THE WHOLE TRUTH IN HUMAN RIGHTS INVESTIGATIONS.**
6. **SPREAD THE WORD: ORDER DEPENDS ON RESPECT FOR HUMAN RIGHTS.**

THOU SHALL NOT COMMIT, NOR TOLERATE:

7. **MURDER, RAPE, TORTURE, OR THE EXCESSIVE USE OF FORCE.**
8. **DISAPPEARANCES.**
9. **THE UNNECESSARY DESTRUCTION OF PROPERTY.**
10. **EXTRAJUDICIAL PUNISHMENT.**

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[1] Ronald Reagan, Los Angeles Times 11, December 14, 1992.

[2] See Policy Memo #5-91.

1.

THOU SHALL HONOR THE SPIRIT OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS.

- The Universal Declaration is a starting point for improving the life of people all over the world.
- It is a combination of poetry and prose:
  It is poetry in that it embodies a spirit for a better life;
  It is prose in that it establishes guidelines in which man should live.
- While not all aspects of the Universal Declaration can be readily achieved, the intent of the fundamental characteristics of the document should be pursued.
- The focus of the Universal Declaration is the protection of the integrity of the individual. Characterized by the "Civil and Political" rights, the spirit of the declaration calls for no cruel punishment, due process, and protection of one's home, family, and personal security.
- When the government respects and protects the rights of the people, the government maintains its legitimacy. In this way, respect for the government is achieved.

DO WHAT IS RIGHT!

2.

THOU SHALL GIVE AND OBEY ONLY LAWFUL ORDERS.

- Common sense, in addition to laws and directives, dictates that leaders shall give only lawful orders.
- Directing a subordinate to commit a human rights violation (or other crime) subjects the person who gave the order to the same punishment — and even more than the one who committed the offense!
- Following orders is not a valid defense to acts which clearly violate internationally accepted norms.
- While it is not the duty of a subordinate to question the order of a superior, soldiers have an obligation to uphold the rule of law over clearly illegal commands. Any order that directs someone to commit a gross violation would be an example of an order that should not be followed.

IF YOU THINK AN ORDER IS UNLAWFUL, ASK FOR CLARIFICATION!

3.

REPORT CRIMES AND HUMAN RIGHTS VIOLATIONS TO PROPER AUTHORITIES.

- All suspected violations must be reported to appropriate authorities. It does not matter whether the suspect is a member of the military, or someone else. Likewise, it does not matter whether the victim was civilian or military.
- Suspected violations should be reported to your immediate commander. If for some reason your immediate commander is not available or is not a good source for reporting the incident (for example, if you believe he was involved), report the incident to the next higher authority, a Judge Advocate, a Chaplain, or some other responsible authority.
- One should allow his chain of command to first investigate and handle the problem before seeking outside remedies.
- Stop crime by:
  Using moral arguments.
  Threatening to report the act.
  Asking your superior to clarify the order.
  Stating your personal disagreement.
  Asking others to help intervene.

YOU HAVE A DUTY TO PREVENT CRIME.

INDIVIDUAL INTEGRITY

- No torture.
- No cruel or inhuman treatment or punishment.
- No invasion of privacy:
  Freedom of thought, conscience, religion.
  Freedom of expression, communication, and information.
  Freedom of assembly and association.
- Due process:
- Notification of charges.
- Review of arrests and detentions.
- Fair trials.

HUMAN DIGNITY

- Pregnant women, children, the sick, the aged, the homeless, and other members of society who are not in a position to protect themselves deserve special care and attention.
- The military is a part of the community. As the protectors of society, we must earn the respect of those we serve. We are the "good guys."
- Protecting human dignity may produce valuable information, gain active support for you, and deny support for the enemy.
- Mistreatment serves only the interests of the subversives.

4.

RESPECT INDIVIDUAL INTEGRITY AND HUMAN DIGNITY.

PUT YOURSELF, YOUR WIFE, OR YOUR CHILD IN THE SITUATION. HOW WOULD YOU LIKE TO BE TREATED?

THE MILITARY CODE OF HONOR

- Respects and adheres to the Law of War
- The military is one of five true professions: Medical, Legal, Clergy, Teaching, and the Profession of Arms. Each requires:
  - Special training.
  - Service to others.
  - Adherence to a code of ethics.
  - Self-regulation.

CHIVALRY

- Courage.
- Honor.

- Ready to help the weak.

TELL THE WHOLE TRUTH

- Do not settle for half-truths.
- Do not quibble.
- Set the example for others to follow.

5.

ABIDE BY THE MILITARY CODE OF HONOR, BE CHIVALROUS, AND TELL THE WHOLE TRUTH IN HUMAN RIGHTS INVESTIGATIONS.

LEAD BY EXAMPLE!

- The individual is the basic building block of society. By protecting each individual, the whole of society is improved.
- It is the duty of government to protect the governed. If government fails to protect, it loses its legitimacy, and order is lost.
- Each soldier should not only know what is expected, but should promote human rights standards.

6.

SPREAD THE WORD: ORDER DEPENDS ON RESPECT FOR HUMAN RIGHTS.

YOU ARE RESPONSIBLE FOR THEIR SAFETY!

7.

THOU SHALL NOT COMMIT, NOR TOLERATE MURDER, RAPE, TORTURE, OR THE EXCESSIVE USE OF FORCE.

- Murder is the wrongful taking of life. If someone surrenders or is captured, they are entitled to a trial.
- Torture can be physical or mental. The use of torture to obtain a confession or intelligence is illegal under customary international law. Besides, confessions and intelligence gathered *through the use of torture* are automatically suspect anyway!
- Military necessity, national security, and other such bases are no excuse for torture!
- The use of force must be proportional to the military advantage gained.

USE ONLY THE FORCE NECESSARY TO ACCOMPLISH THE MISSION.

BEATING DETAINED PEOPLE IS CLEARLY EXCESSIVE!

8.

THOU SHALL NOT COMMIT, NOR TOLERATE *DISAPPEARANCES.*

- People taken into custody will be accounted for at all times.
- A register will be kept with the following information:
  Identity.
  Reasons for being held, and the authority therefore.
  Day and hour of detension and release.
- If transferred, central accountability will be maintained.
- Contact with family, by visits or correspondence, will be permitted.

ACCOUNT FOR EVERY PERSON WHO COMES INTO THE CUSTODY OF THE MILITARY!

9.

THOU SHALL NOT COMMIT, NOR TOLERATE THE UNNECESSARY DESTRUCTION OF PROPERTY.

- Only property and material that directly contributes to the effort of opposing forces may be attacked.
- Villages, towns, and homes are not permissible targets, even though the terrorists, or their equipment and supplies may be inside.
- Soldiers must take care to avoid afflicting unnecessary destruction and unnecessary suffering.
- Do not cause destruction beyond the requirement of your mission.

THE TAKING OF PROPERTY IS A CRIME!

10.

THOU SHALL NOT COMMIT, NOR TOLERATE EXTRAJUDICIAL PUNISHMENT.

- In a country with the rule of law, a person's life, freedom and property may be taken only by a court order.
- The courts must be "regularly constituted" and due process must be followed.

THE MILITARY PROTECTS AND DEFENDS. LEAVE THE PUNISHMENT UP TO THE COURTS!

GROSS VIOLATIONS

- MURDER, RAPE, OR TORTURE
- PROLONGED DETENTIONS (Without charges or trial)
- DISAPPEARANCES
- DENIAL OF LIFE, LIBERTY, OR SECURITY

TAB X
SECURITY ASSISTANCE MISSIONS

The idea is to train the troops; the treatment is the honey left behind.
Reserve MEDRETE Commander, Bolivia, 1992

The JA's role in providing legal advice concerning the deployment of US personnel on security assistance missions has become increasingly important. As the number of US service members providing training to third country personnel has grown, JAs have been called upon to provide guidance to CDRs concerning those legal issues most often associated with security assistance missions. A basic understanding of the structure of the security assistance system, the principal security assistance programs, and the most common legal issues evolving from security assistance missions is essential.

Security assistance (SA) is defined as:

Statutory programs and authorities under which the US may provide and/or regulate forms of assistance and sales to foreign governments (and international organizations) for the purpose of enhancing US/mutual security.

SA is not a give-away program, developed and maintained as a result of the philanthropic or altruistic nature of the US. It is a billion dollar business designed to be utilized for the accomplishment of global strategic security objectives. In a peacetime environment, SA may well be the most effective program available to a unified CINC for the accomplishment of regional security and geo-political objectives. Effectively developed and implemented, SA can quite literally be used to shape world events.

Structure of the Security Assistance System.

1. Interrelationship of US Civil and Military Agencies.

a. The US Country Team.

The President has assigned to the Secretary of State the authority and responsibility for the overall direction, coordination, and supervision of overseas activities, to include SA. The Under Secretary of State for Security Assistance, Science and Technology is responsible for coordinating the plans and programs dealing with the SA activities carried out by the military. In this capacity, he chairs the Arms Transfer Management Group (ATMG), which provides policy planning and reviews functions for SA matters.

Coordination of US foreign policy, of which SA is considered an integral part, is accomplished in a given country by the US Country Team. The Team includes representatives of all in-country US government departments. The Ambassador, as the President's representative, has full responsibility for directing and coordinating the activities and operations of all elements of the US diplomatic mission. The Ambassador's authority does not, however, include the direction of US military forces operating in the field when such forces are under the command of a US area military command The CINC of the US area military command usually participates as a member of each Country Team, even though he is not a member of the diplomatic mission and may not be physically located in the country (See Figure 1).

The Country Team's focus is directed toward both the identification of potential sources of conflict and threats to US interests in a particular country and to the amelioration of these problems through programs designed to assist the economy, upgrade medical care, improve transportation systems, etc. When assessing the needs of a country, HN capabilities and potential threats are also evaluate On the basis of this evaluation, political, economic, SA and, if necessary, military actions are recommended.

Involvement of US military forces in SA programs in a foreign country will seldom be restricted to a single service. Service components will operate in concert with each other and HN armed forces, under joint or unified CDRs, and in coordination with US civilian agencies.

b. DOD Organization and Responsibilities (Figure 2).

(1) DOD. Within DOD, the SECDEF has delegated his authority on SA matters to the Under SECDEF for Policy, who sits on the ATMG and serves as the principal DOD point of contact and policy spokesman for SA matters. He is assisted by the Director, Defense Security Assistance Agency (DSAA). The DSAA is specifically designed to place increased emphasis on the management, control, and implementation of approved and funded military SA programs. Accordingly, DSAA is the DOD office most responsive to the day-to-day management of all DOD SA.

(2) Joint Chiefs of Staff (JCS). The JCS play a key role in US SA efforts by developing joint strategic planning system documents, such as the Joint Strategic Capabilities Plan (JSCP) and the Joint Security Assistance Memorandum (JSAM). The JSAM sets forth the joint worldwide SA program. Additionally, the JCS systematically review ongoing SA programs for specific countries and geographical regions in order to ensure their compatibility with US global security interests and to confirm that military assistance resources are being utilized in ways that promote US strategic objectives. All military-related SA guidance, plans, and programs promulgated at the national level are referred to JCS for review and concurrence. Directives and communications pertaining to military assistance affairs are coordinated, initially, with JCS in order to ensure that force objectives, strategic objectives, and military plans are not being inadvertently circumvented or ignore Finally, program recommendations coming from the Security Assistance Organization (SAO) in a particular country and unified commands are also fully coordinated through JCS in order to ensure their consistency with US global security plans and the JSAM.

(3) Military Departments. The military departments participate in developing, negotiating, and executing agreements pertaining to SA programs. Additionally, they provide advice on such matters as cost, and, in order to ensure timely delivery of materiel and services, the availability and lead time on military equipment and training. The departments also furnish the resources and administrative support necessary to move assets to a recipient country.

(4) Unified Commands. The unified commands play a vital role in military SA activities, as the CINCs are responsible for ensuring that all military assistance plans and activities are coordinated, integrated, and in consonance with regional US defense plans. In the implementation of SA programs, the CINC is the principal player, as he identifies and applies the resources required to achieve

US strategic goals at the regional level. Accordingly, the CINC's objective must be to utilize effectively the military resources available to him to contribute to national development and to support political and economic initiatives in individual countries and on a regional basis.

(5) **Component Commands.** Component commands of unified commands, in coordination with and as directed by the CINC concerned, participate in the planning and execution of military SA programs. This participation includes the following functions:

(a) Assisting in development and execution of long-range plans, to include foreign military sales;

(b) Providing technical advice on weapons systems, tactics, doctrine, and information relative to logistics support; training and technical assistance by Mobile Training Teams (MTT) and Technical Assistance Teams (TAT);

(c) Ensuring component contingency plans and international activities undertaken in conjunction with allied and friendly forces (such as combined training exercises and standardization conferences) are correlated with SA programs and overall US military objectives;

(d) Advising on the capabilities and limitations of allied and friendly forces, to include their capability of operating effectively with US forces in support of US contingency plans;

(e) Advising on the organization, force objectives, and modernization programs of allied and friendly forces;

(f) Keeping informed of the item content of a particular country's SA program;

(g) Providing advice and assistance directly to component sec.s in the Military Assistance Advisory Groups (MAAGs); and

(h) Making field trips to assist in accomplishing the SA mission.

(6) **Security Assistance Organization (SAO).** Authorized under § 515 of the Foreign Assistance Act, the SAO is located within an individual country, generally as an integral part of the US Country Team (Figure 1), w' 1 diplomatic status, and provides the in-country management for SA programs conducted under both the Foreign Assistance Act a1.1 the Arms Export Control Act. The officer heading the SAO is the key point of contact for SA matters. He and his staff are capable of providing guidance and assistance to JA responsible for advising CDRs tasked with deploying security assistance teams to the country in issue.

Basic SA Legislation and Programs.

As a fundamentally important aspect of US foreign and security policy, SA generates intens.: Congressional interest in and control over the SA process. Accordingly, the various requirements and restrictions applicable to US SA and arms transfer programs are subject to specific Congressional authorization, appropriation and oversight. This, in turn, results in periodic changes in SA programs. It is often difficult, therefore, for the JA to become completely familiar with the many details of the overall SA process. This fact dictates that advice provided in the SA arena be carefully coordinated through legal channels. This will ensure compliance with currently applicable legislative and regulatory requirements and interpretations of existing law. Moreover, such coordination will substantially reduce both legal and programmatic difficulties and the possibility of adverse Congressional reaction to what it perceives as an abuse of current SA and arms transfer programs.

1. **The Foreign Assistance Act (FAA) (22 USC 2151).**

The FAA is the most comprehensive of the statutes dealing with security assistance. The broad purpose of this legislation is essentially two-fold: (1) to provide economic, agricultural, medical, disaster relief and other forms of assistance to developing countries (Part I, FAA), and (2) to authorize measures that may be undertaken in matters of comm on defense against internal and external aggression, to include the furnishing of military assistance, upon request (and generally sul ect to Congressional approval), to friendly countries and international organizations (Part II, FAA).

Of special note is the fact that FAA programs and, most importantly, the funds annually appro,riated for their implementation, are by law administered by the Department of State. Thus, while Part II of the FAA deals with SA and is essentially defense oriented, SA programs and funds nevertheless fall under State Department supervision and control. JAs must be aware of this fact, reflective of a Congressional view that SA is to be planned and implemented as an integral pa.t of US foreign policy. State Department administration of the FAA thus mandates close coordination and cooperation between DOD and civilian US agencies at all levels of the SA process.

The principal FAA SA programs are: (1) the Foreign Military Financing Program (FMFP), (2) International Military Education and Training (IMET), (3) Antiterrorism Assistance, (4) the Economic Support Fund (ESF), and (5) Peacekeeping Operations (PKO). Note that all of these FAA SA programs are grant programs.

a. **Foreign Military Financing Program (FMFP)**

The Foreign Military Financing Program (FMFP) was previously known as Foreign Military Sales Financing (FMSF), Foreign Military Sales Credits (FMSCR), and the Military Assistance Program (MAP). The purpose of FMFP is to enable US allies and friends to enhance their self-defense capabilities through the acquisition of US military articles, services, and training. Due to the high cost of modern weapon systems, FMFP is primarily a grant program. While MAP and FMSF is still in effect, FMFP is the primary component of military assistance to other nations under the security assistance policy.

b. **International Military Education and Training (IMET) (22 USC 2347).**

IMET, 541, FAA, authorizes the President specific dollar amounts each fiscal year to furnish military education and training to military and related civilian personnel of foreign countries. This education and training may be provided in both the US and abroad and must be designed, in part, to foster mutually beneficial relations between the US and participating countries and to improve the ability of participating countries to utilize their resources, to include defense articles and services provided under MAP.

c. **Antiterrorism Assistance (22 USC 2349aa).**

Under this SA program, 571, FAA, the President is authorized specific dollar amounts each fiscal year to furnish assistance to foreign countries in order that they may enhance the ability of their law enforcement personnel to deter terrorist activities. The program is administered by the Assistant Secretary of State for Human Rights and Humanitarian Affairs, who determines the countries to be provided assistance and the type of assistance to be furnished Training service undertaken under this program cannot be conducted outside the US, and US advisory personnel must, to the maximum extent possible, carry out their responsibilities within the US

d. Economic Support Fund (ESF) (22 USC 2346).

Under ESF 531, FAA, the President is authorized specific dollar amounts each fiscal year to provide, when particular US national interests so dictate, economic support in certain amounts or to certain countries, the provision of which cannot be justified solely under Chapter I, Part I, FAA. The Secretary of State administers this program and determines whether an economic support program will be developed for a particular country. Funds may be used only for economic programs and may not be used for military or paramilitary purposes. Congress may, periodically, designate specific sums for specific countries.

e. Peacekeeping Operations (PKO) (22 USC 2348).

Chapter 6, Part II of the FAA authorizes the provision of assistance to friendly countries and international organizations for peacekeeping operations (known as "PKO"). This authority may be used to provide financial resources, equipment and supplies, or services for peacekeeping purposes. Using this authority, the US has provided equipment, fuel and other supplies, and airlift services for a number of UN and other peacekeeping efforts (to include the Multinational Force and Observers (MFO). This authority is in addition to the authority under the UN Participation Act (UNPA) to provide assistance for UN peacekeeping operations.

FAA, Part III, General Administrative Provisions.

Having examined the principal SA programs administered under Part II of the FAA, note is made of the fact that Part III of this act contains a series of general provisions which impact on the administration of the SA programs as a whole. Some of these provisions, such as FAA (22 USC 2420, §660,FAA) are substantive, as well as administrative, in nature. § 660 will be discussed below.

3. The Arms Export Control Act (AECA) (22 USC 2751).

The US foreign military sales (FMS) program, carried out under the provisions of the AECA, complements the FAA SA programs. Moreover, like the FAA SA programs, FMS is controlled by the Department of State. The AECA provides for the transfer of arms and other military equipment, as well as various defense services, through government to government agreements. Under this program, DOD purchases military equipment or services from US firms or takes equipment from US stocks (under limited conditions) and sells the equipment or services to a foreign government or international organization. The services of DOD personnel, such as training or management advice, may also be sold to such a government or organization. Additionally, authority is provided for the leasing of defense articles in DOD stocks to eligible recipients. Note that, unlike SA provided under the FAA, the arms transfer program is not a grant program. It is to be implemented at no cost to the US.

The AECA further provides the President with the authority to finance sales of defense articles and services or to guarantee financing to friendly foreign countries or international organizations. A major purpose of credit extended under the AECA is to assist economically less developed countries to transition from grant aid to sales.

As in the case of the various SA programs administered under Part II, FAA, the AECA is subject to revision on an annual basis and contains relatively complex and sensitive legislative requirements, prohibitions and limitations.

4. Country and Issue-Specific Legislation.

JAs must be aware of the existence of country and issue-specific legislation that may mandate or proscribe US SA activities in specified countries. Generally, Congress will utilize these legislative devices to restrict the eligibility of certain countries to fully participate in US SA and arms transfer programs. Such provisos generally occur in the form of amendments to the FAA and the AECA, although they may also appear in other pieces of legislation, such as the International Security and Development Cooperation Act and the annual DOD Appropriations Act.

Unified command Legal Advisers and country SAOs will be able to advise JAs of any country and issue-specific legislation relevant to a proposed SA mission. Nevertheless, JAs should possess a working knowledge of such legislation affecting those countries within their command's area of operations.

Examples of issue-specific legislation which may well impact on the ability of the US to conduct SA programs in particular countries follow.

a. § 502B, FAA (Kennedy Amendment).

Sec. 502B of the FAA provides, in part, with respect to SA provided to countries that violate human rights:

> (a)(1) The US shall, in accordance with its international obligations as set forth in the Charter of the UN and in keeping with the constitutional heritage and traditions of the US, promote and encourage increased respect for human rights and fundamental freedoms throughout the world without distinction as to race, sex, language, or religion. Accordingly, a principal goal of the foreign policy of the US shall be to promote the increased observance of internationally recognized human rights by all countries.
>
> (2) Except under circumstances specified in this section, no SA may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights. Security assistance may not be provided to the police, domestic intelligence, or similar law enforcement forces of a country, and licenses may not be issued under the Export Administration Act of 1979 for the export of crime control and detection instruments and equipment to a country, the government of which engages in a consistent pattern of gross violations of internationally recognized human rights unless the President certifies in writing to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate that extraordinary circumstances exist warranting provision of such assistance and issuance of such licenses. Assistance may not be provided under chapter 5 of this part to a country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights unless the President certifies in writing to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate that extraordinary circumstances exist warranting provision of such assistance.

(3) In furtherance of para.s (1) and (2), the President is directed to formulate and conduct international security assistance programs of the US in a manner which will promote and advance human rights and avoid identification of the US, through such programs, with governments which deny to their people internationally recognized human rights and fundamental freedoms, in violation of international law or in contravention of the policy of the US as expressed in this section or otherwise.

Sec. 502B further provides for annual reports to Congress on the human rights practices of all countries receiving SA, for special human rights reports on particular recipients upon the request of either House or its foreign affairs committee, and for the termination of assistance to any such recipient if directed by joint resolution of Congress. Since the adoption of this provision in 1976, the reports required by Sec. 502B have been regularly provided by the executive branch. No recipients of SA have been determined to be engaging in a consistent pattern of gross violations of internationally recognized human rights, however, nor has the Congress acted under this Sec. to terminate assistance to any recipient.

b. § 620(e)(1), FAA (First Hickenlooper Amendment).

Sec. 620(e)(1) of the FAA, the First Hickenlooper Amendment, provides for the suspension of assistance to any country that:

(A) has nationalized or expropriated or seized ownership or control of property owned by any US citizen or by any corporation partnership, or association not less than 50 % beneficially owned by US citizens, or

(B) has taken steps to repudiate or nullify existing contracts or agreements with any US citizen or any corporation, partnership, or association not less than 50 % beneficially owned by US citizens, or

(C) has imposed or enforced discriminatory taxes or other exactions, or restrictive maintenance or operational conditions, or has taken other actions, which have the effect of nationalizing, expropriating, or otherwise seizing ownership or control of property so owned, . . .

and has failed "within a reasonable time":

. . . to take appropriate steps, which may include arbitration, to discharge its obligations under international law toward such citizen or entity, including speedy compensation for such property in convertible foreign exchange, equivalent to the full value thereof, as required by international law, or fails to take steps designed to provide relief from such taxes, exactions, or conditions, as the case may be; and such suspension shall continue until the President is satisfied that appropriate steps are being taken, and the provisions of this subsection shall not be waived with respect to any country unless the President determines and certifies that such a waiver is important to the national interests of the US. Such certification shall be reported immediately to Congress.

Sec. 620(e) has been invoked on a few occasions, and the threat of its invocation has been used on other occasions as a means of encouraging reasonable settlements by foreign governments

c. §§ 669 and 670, FAA (Symington-Glenn Amendments).

Sec.s 669 and 670 of the FAA (the Symington-Glenn Amendments) place substantial limitations on the ability of the US to provide SA to countries involved in various nuclear transactions. Pakistan has received a special statutory exception from certain of these provisions. The Congress has not invoked these provisions with respect to any other country.

d. Other Issue-Specific Provisions.

Other provisions of a general character in the FAA and AECA relate to assistance to Communist countries, § 620(f), FAA, 22 USC § 2370(f). assistance to countries in default on loans from the US Government, § 620(q), FAA, 22 USC § 2370(g) - the Brook Amendment), and assistance to countries granting sanctuary to international terrorists § 620A, FAA, 22 USC § 2371).

Special Presidential Authorities.

Certain provisions of the FAA and AECA authorize the President to waive provisions of law or take other extraordinary measures in emergencies or other compelling circumstances. In particular, Sec. 614 of the FAA provides, in part:

Sec. 614. Special Authorities. --(a)(1) The President may authorize the furnishing of assistance under this Act without regard to any provision of this Act, the Arms Export Control Act, any law relating to receipts and credits accruing to the US, and any Act authorizing or appropriating funds for use under this Act, in furtherance of any of the purposes of this Act, when the President determines, and so notifies in writing the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate, that to do so is important to the security interests of the US.

(2) The President may make sales, extend credit, and issue guarantees under the Arms Export Control Act, without regard to any provision of this Act, the Arms Export Control Act, any law relating to receipts and credits accruing to the US, and any Act authorizing or appropriating funds for use under the Arms Export Control Act, in furtherance of any of the purposes of such Act, when the President determines, and so notifies in writing the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate, that to do so is vital to the national security interests of the US.

This authority does not permit waiver of all such statutory restrictions. For example, it may not be used to waive the limitations in Sec. 610 on transfers of funds between accounts. Nonetheless, it is a very useful provision to deal with special compelling circumstances. It has been used to permit the use of "earmarked" funds for other recipients and to permit assistance to particular countries that would otherwise be prohibited The executive branch must be prudent in its use of this authority, however, as its abuse on matters of fundamental concern to Congress would soon lead to the restriction or repeal of this authority.

In addition Sec. 506 of the FAA provides, in part:

Sec. 506. Special Authority. - (a) If the President determines and reports to the Congress in accordance with sec. 652 of this Act that --

(1) an unforeseen emergency exists which requires immediate military assistance to a foreign country or international organization; and

(2) the emergency requirement cannot be met under the authority of the Arms Export Control Act or any other law except this section;

he may direct, for the purposes of this part, the draw down of defense articles from the stocks of the DOD, defense services of the DOD, and military education and training, of an aggregate value of not to exceed $75,000,000 in any fiscal year.

This authority provides an immediate source of military equipment and services, in the absence of available SA funds, and has been drawn upon in various emergency situations, such as conflicts in Chad and El Salvador.

A variety of other provisions provide special emergency authority in the SA area. Sec. 552(c) of the FAA provides limited emergency transfer authority for peacekeeping operations; Sec. 36(b) and similar provisions of the AECA permit the President to waive the statutory waiting period for major arms transactions in emergency situations; and, as noted above, the President has specific waiver authority in the case of many of the prohibitions on assistance in the Acts.

JAs must be aware, and so advise operators and planners, that the above noted special Presidential authorities are very rarely used. These authorities may not be delegated. Each use will occur only after extensive review at both the State Department and DOD.

Common Security Assistance Deployment Issues.

The JA functioning at the Corps or Division level will generally confront a limited number of SA legal issues. A discussion of those issues most often encountered follows.

1. **SA Missions - The Provision of a "Defense Service."**

When a command is tasked with providing personnel to perform a SA mission, this mission occurs in the form of the provision of a "defense service" to a third country or its personnel. "Defense services"are purchased through a Foreign Military Sales (FMS) case under the AECA or paid for through, generally, the use of MAP (grant) funds under the FAA. US personnel engage in the provision of "defense services" in the form of Mobile Training Teams (MTTs), Technical Assistance Teams (TATs), or Technical Assistance Field Teams (TAFTS).

The definition of "defense service" is comprehensive. § 47(4), AECA, 22 USC 2794 states that a "defense service" includes ". . . any service, test, inspection, repair, training, publication, technical, or other assistance, or defense information used for the purpose of making military sales." (§ 644, FAA provides an almost identical definition.) Equally comprehensive, the definition of "training," specifically referenced as a "defense service," states, in § 47(5), AECA:

> Training includes formal or informal instruction of foreign students in the US or overseas by officers or employees of the US, contract technicians, or contractors (including instruction at civilian institutions), or by correspondence courses, technical, educational, or information publications and media of all kinds, training aids, orientation, training exercise, and military advice to foreign military units and forces.

JAs must be aware of the comprehensive nature of these definitions. The operative presumption must be that any service provided by US personnel for a third country falls within the gambit of SA.

2. **Status of SA Personnel.**

An issue of initial concern to military personnel deploying overseas for a SA mission is the status they will enjoy in the country concerned. The JA should be aware that this status will generally be that of Administrative and Technical Privileges and Immunities (Admin. and Tech. P and I). This is a limited form of diplomatic immunity -- excepting SA personnel from HN criminal jurisdiction and, for official duty actions, civil jurisdiction.

The status and privileges to be enjoyed by SA personnel will generally be set forth, in detail, in the document through which the particular "defense service" to be provided by such personnel is sold. This is DD Form 1513, A Letter of Offer and Acceptance (LOA), often referred to as a mini-SOFA. Copies of all LOAs involving Army personnel performing SA missions should be on file at and available from the Security Assistance Field Training Activity (SAFTA), located at Ft. Monroe, Virginia.

3. **Defense Services of a "Combatant Nature" – An Absolute Prohibition.**

An issue of critical importance to both SA personnel and the JA providing advice to the SA team is the absolute prohibition against SA personnel performing defense services of a "combatant nature." §21(c)(1), AECA, 22 USC 2761(c) states:

> Personnel performing defense services sold under this Act may not perform any duties of a combatant nature, including any duties related to training and advising that may engage US personnel in combat activities outside the US in connection with the performance of these defense services.

This prohibition also applies to "defense services" provided by SA personnel under MAP, the FAA grant program referenced above.

This Congressionally imposed prohibition is sensitive and closely monitored. It is generally reflected in the ROE applicable to US military personnel in a particular country, ROE developed by the responsible unified command in conjunction with the US embassy in the country concerned. The JA should be prepared to brief SA team members on this limitation on SA activities and the importance of familiarizing themselves with applicable ROE immediately upon their arrival in-country.

4. **§ 660, FAA - Prohibition of Police Training.**

An issue which sometimes tends to generate confusion in the SA arena is the § 660, FAA, 22 USC 2420 prohibition against HN police training. §660 provides that FAA funds cannot be used to provide training, advice, or financial support to police, prisons, or other law enforcement forces of a foreign government or for any program of internal intelligence or surveillance on behalf of a foreign government.

This provision does not apply to longtime democracies which have no standing armed forces and do not violate human rights (Costa Rica and certain Caribbean countries). Additionally, El Salvador and Honduras are specifically exempted from § 660.

This provision is not to be confused with Chapter 8, Part II, FAA -- Antiterrorism Assistance. This grant program is designed to provide training to third country law enforcement personnel solely to enhance their ability to deter terrorist activities. Moreover, the training provided cannot be conducted outside the US, and US advisory personnel must, to the maximum extent possible, carry out their responsibilities within the US Lastly, this type of training is rarely provided by US military, as opposed to civilian personnel.

TAB Y
PEACE OPERATIONS
April 1993

In reviewing this Tab on peacekeeping, keep firmly in mind the difference between peacekeeping and other "peace operations" (terms such as peacemaking, peace enforcement, and "peace implementation" are often used with inconsistent imprecision.). Peace operations doctrine is evolving, particularly after the withdrawal of US Forces from Somalia. FM 100-23, PEACE OPERATIONS (1994) is the Army's keystone doctrinal reference on the subject. Joint Pub 3-07.3, JOINT TACTICS, TECHNIQUES, AND PROCEDURES FOR PEACEKEEPING OPERATIONS (1994) is a valuable guide. Peacekeeping evolved as a compromise out of the Security Council's inability to use its Chapter VII enforcement powers. Since the end of the Cold War this has changed, and the Security Council has been able to use its enforcement powers on numerous occasions. Some of these actions have been described generically as "peacekeeping," when they should more accurately be called "peace enforcement." Operation RESTORE HOPE in Somalia and those parts of the UN Protection Force operating in Bosnia-Herzegovina are not true peacekeeping operations (the UN forces operating in Croatia are peacekeepers), but rather forms of Chapter VII enforcement actions. True peacekeeping operations are completely neutral, have the full consent of all the parties to the conflict, and have very restrictive ROE based on self-defense. Often enforcement units are be given overly restrictive ROE to promote the appearance of a peacekeeping force. This may place the force in a hostile environment wholly unprepared to both complete its mission and defend itself (examples are the Marines in Beirut and the UNPROFOR [UN Protection Force] in Bosnia-Herzegovina).

INTRODUCTION

Support for Peacekeeping Activities

The changing international security environment and renewed prominence of the UN have increased the scope of the UN's peacekeeping efforts and widened the potential for greater US participation and support for peacekeeping operations. Between 1948 and 1978 the UN was involved in only 13 peacekeeping operations with no new operations from 1978 to 1988. Since 1988, 12 new peacekeeping operations have been initiated, including a military and civilian force of over 20,000 to Cambodia, at a cost of $1.2 billion per year. US law provides for US armed forces participation in UN peacekeeping forces, with the cost of such participation normally borne by the UN (paid for with mandatory contributions from member states, the US share is 30%). Before 1991 only a handful of US military observers served in three UN peacekeeping operations. Since the end of the Cold War US military personnel are serving in UN peacekeeping operations in Kuwait/Iraq, the Western Sahara, Cambodia, the former Yugoslavia, and US personnel will likely become part of a follow-on UN force in Somalia. The Defense Department has provided logistic support and planning expertise to most UN peacekeeping operations, as well as providing assistance to other peacekeeping operations where the UN is not involved (i.e. Sinai, Beirut, Africa, and the Caribbean). These activities, undertaken in close cooperation with the Department of State, support US foreign policy objectives for the peaceful resolution of conflict, reinforce the collective security efforts of the US, our allies, and other UN member states, and enhance regional stability.

Definition of Peacekeeping

There is no universally accepted definition of the term "peacekeeping." The absence of one specific definition has resulted in the term being used to describe almost any type of behavior intended to obtain what a particular nation regards as peace. Because the US participates with other nations in peacekeeping operations, it is important for US personnel to be aware of the different definitions of peacekeeping. The US definition of Peacekeeping is:

> Efforts taken with the consent of the civil or military authorities of the belligerent parties in a conflict to maintain a negotiated truce in support of diplomatic efforts to achieve and maintain peace.

In his report, An Agenda for Peace, 17 June 1992, the Security General of the United Nations defined peacekeeping as:

> The deployment of a United Nations Presence in the field, hitherto with the consent of all the parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well. Peace-keeping is a technique that expands the possibilities for both the prevention of conflict and the making of peace.

Peacemaking and Peace Enforcement: The term Peacekeeping is often incorrectly used to describe Peacemaking or Peace enforcement (action which does not require consent from the parties to the conflict). The terms "peacemaking", "peacekeeping", and "peace enforcement" along with the terms "preventive diplomacy" and "peace-building" are integrally related in the peace process. In An Agenda for Peace, these terms are defined as follows: Preventive diplomacy is action to prevent disputes from arising between parties, to prevent existing disputes from escalating into conflicts and to limit the spread of the latter when they do occur; Peacemaking is action to bring hostile parties to agreement, essentially through such peaceful means as those foreseen in Chapter VI of the Charter of the United Nations. Peace enforcement is armed response employing those measures provided for in Chapter VII of the Charter of the United Nations to maintain or restore international peace and security in the face if a threat to the peace, breach of the peace, or act of aggression (for instance Korea, Desert Storm, and Operation Restore Hope); finally, the related concept of post-conflict peace-building is an action to identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse into conflict. Peacekeeping is a technique that expands the possibilities for both the prevention of conflict and the making of peace. Preventive diplomacy seeks to resolve disputes before violence breaks out; peacemaking and peacekeeping are required to halt conflicts and preserve peace once it is attained. If successful, they strengthen the opportunity for post-conflict peace-building, which can prevent the recurrence of violence among nations and peoples.

Future of Peacekeeping and Peace Enforcement

As the momentum for peacekeeping continues to grow the most likely limiting factor will be cost. The peacekeeping budget is expected to reach $3 billion for the next calendar year, far surpassing the regular UN budget with over 4[illegible],000 peacekeepers deployed. The major contributors are demanding a greater accounting for these expenditures and are questioning the overall cost.

At the same time, the Security Council is also showing a willingness to use Chapter VII enforcement actions with ease (i.e., Bosnia and Somalia). In June 1992, as part of his Agenda for Peace, the Secretary General, called for nations to make armed forces available on an ad hoc and permanent basis for peace-enforcement units, essentially giving the UN a "rapid deployment force." The Secretary cited that "the ready availability of armed forces on call could serve, in itself, as a means of deterring breaches of the peace, since a potential aggressor would know that the council had at its disposal a means of response." Many smaller countries dislike the idea of such a force fearing the large countries would use the forces to enforce the status quo.

The French have offered to put military units on call. The Russians have also indicated they may be willing to provide troops for such a force. In September 1992, President Bush, falling short of an offer to make forces available did offer military and intelligence expertise, logistics, and US military bases to train peacekeeping forces. The pentagon is skeptical about placing US troops under foreign command and fears US soldiers may become special targets. President Clinton has expressed his initial support for a UN rapid deployment force, with the possibility of US forces being part of such a force, potentially putting US forces under UN command. The follow on peacekeeping mission in Somalia could be the first major test of putting significant numbers US forces under UN command.

History of Peacekeeping

Modern peacekeeping efforts evolved after World War II with the establishment of the UN. Although the UN Charter did not make any provisions for peacekeeping forces, the UN gradually developed a body of thought and doctrine for peacekeeping. The first peacekeeping operation came in 1948 to monitor the Arab-Israel armistice agreement. This operation is still ongoing today.

The term peacekeeping first came into use in 1956 when the UN created a "Special Committee on Peacekeeping Operations" to conduct its peacekeeping activities. Since the UN began functioning, the international body has introduced international military observer groups, missions, and forces into global hot spots on 25 occasions. Once deployed, these missions have monitored cease fires, patrolled borders, supervised troop disengagements, provided internal security, preserved or provided essential government functions, supervised elections, and interposed themselves between hostile neighbors.

Peacekeeping is not without its dangers, over UN 800 peacekeepers have been killed in the performance of their duties. Most recently peacekeepers have been killed and injured in Lebanon, Bosnia, Croatia, Cambodia, and Somalia.

The US has always played a role in international peacekeeping operations under the auspices of the UN because the US is one of the five permanent members of the UN Security Council. As such, the US has veto authority over substantive decisions of the Security Council. Additionally, the US has a greater responsibility, incorporated into the UN Charter, for maintaining international peace and security.

Historically the US has provided relatively few troops for UN peacekeeping endeavors because of a deliberate policy by the UN to rely upon small, non-aligned nations for the bulk of its peacekeeping forces. Another reason is the perception that superpower participation may escalate, rather than reduce, the conflict. Additionally, the UN has consciously avoided using troops from the permanent members of the Security Council in order to preserve an atmosphere of nonpartisanship. Recently this preference has faded with both the US and Russia providing peacekeeping forces in places like Yugoslavia (both US and Russia) and Cambodia (US).

The US has also contributed other types of support for almost two-thirds of all UN peacekeeping operations and missions. The support the US has provided includes airlift/sealift, communications, local transport, arms and ammunition, food, and necessities such as maps, language phrase books, inoculations, clothing, blankets, and medical services. For most large peacekeeping operations, the United states has provided initial airlift services to the UN and the countries providing the units.

During the last two decades, the US has ventured into several peacekeeping activities outside the UN framework. As part of the Camp David Accords, the US established the Multinational Farce and Observers (MFO) in 1979 to serve on peacekeeping duties in the Sinai. The establishment of the MFO corresponded with the expiration of the UN's Emergency Force II (UNEF II), which had previously served in the area. The MFO functioned in lieu of UNEF II for two reasons. First, member states of the UN were unable to agree upon a method of using peacekeeping forces to support the controversial treaty between Egypt and Israel. Second, both Egypt and Israel preferred to have a non-UN force that would include major US units in its ranks.

In April 1982 the US joined with several other Western powers to establish a Multinational Force (MNF) in Beirut to oversee the evacuation of Palestine Liberation Organization guerrillas from Lebanon. As with the establishment of the MFO, the MNF came into being out of a combination of disunity in the UN and Israeli preference for a non-UN force. The MNF withdrew in Aug 1982, only to return as MNF II the following month when internal instability led the Lebanese government to seek its return.

The operation in Lebanon is an example of how peacekeeping can become a major problem when there is not consent by all the parties to the conflict and the peacekeepers are not neutral. The US engaged in what was called a peacekeeping operation but because there was no agreement between the parties involved, and because the US became directly involved in the dispute in support of the Lebanese

Government, the US units were no longer peacekeepers. The rules of engagement however, remained peacekeeping ROE, leaving the Marines wholly unprepared to protect themselves. The Marines of MNF II remained in Beirut until Feb 1984. The last MNF II contingent (France) left Lebanon in Mar 1984.

The US continues to support UN and other peacekeeping operations when, from a US viewpoint, they contribute to the maintenance of international peace and security. This support ranges from political negotiation and votes in the Security Council, financial and logistical support, as well as individual and unit participation in peacekeeping operations.

AUTHORITY FOR PEACEKEEPING OPERATIONS

Military peacekeeping operations support diplomatic efforts to achieve or maintain peace in areas of potential or actual conflict. As discussed earlier the single most important requirement of a peacekeeping operation is consent to the operation by the authorities of all the parties in the dispute. Such consent represents an explicit agreement permitting the introduction of a neutral third party.

Each peacekeeping operation is tailored to a specific mission; no two peacekeeping operations have been the same. The ad hoc formation of peacekeeping organizations stems from the fact that neither the UN as a whole, nor any individual nation, maintains standing forces dedicated to peacekeeping.

US Authority for Peacekeeping and Procedures

Legal authority for US involvement in peacekeeping operations (UN or non UN sponsored) could come from several sources:

- Sec. 551, Chap 6, Part II of the Foreign Ass't Act of 1961 amended (Public Law 87-195) authorizes the President to furnish assistance to friendly countries and international organizations, on such terms and conditions as he may determine, for peacekeeping operations and other programs carried out in the furtherance of the national security interests of the US. 22 U.S.C. § 2348.
- United Nations Participation Act of 1945 (Public Law 72-264), authorizes the President to provide US armed forces to serve as observers, guards, or in any non-combat capacity, upon request of the UN, limited to 1,000 personnel. 22 U.S.C. § 287d and 287d-1. Under this grant of authority US forces may not be involved in Chapter VII actions.
- Depending on the mission, the Department of Defense Appropriations Act and/or Disaster Relief Statutes may also provide the authority for US participation in peacekeeping.

US participation in peacekeeping operations may be as part of a UN, regional, or other multinational force or may be unilateral.

When the decision is made by the appropriate political authority for the US to support a peacekeeping mission, the US may employ all elements of national power to conduct such peacekeeping operations to assist the parties involved.

The Department of State is the lead government agency in executing US foreign policy and has the responsibility for overall planning and execution of US support to peacekeeping operations. DOS involvement extends from policy formulation to mission execution at the host nation and Country Team Levels.

Requests involving DOD support are forwarded to the Secretary of Defense. Guidance and taskings are communicated to the appropriate services/agencies through the Chairman of the Joint Chiefs of Staff, who provides overall guidance to combatant commands and the services. Often the CJCS will form a joint action cell to organize, coordinate, and monitor the support required.

The Combatant Commander will coordinate and monitor all military peacekeeping activities in his area. The combatant command provides administrative, personnel, operational, logistics, and communications support for committed US military forces and forces of other nations when such support is in accord with diplomatic agreement. The combatant commander, based on the mandate, will normally develop the terms of reference to govern US participation in the peacekeeping operation. Along with being subject to approval by CJCS, DOD, DOS, and the NCA, the terms of reference may also be subject to approval by the parties to the conflict. Although the parties to the conflict may agree on the mandate and the truce because it is politically and militarily expedient for them to do so, they may have different and hidden agendas, thus interpreting the terms of reference to suit their own purposes.

UN Authority for Peacekeeping

Peacekeeping evolved out of a necessity to control conflicts without formally presenting the issue to the Security Council of the UN for Chapter VII "Enforcement Actions" where a veto would typically prevent the mission from occurring. As a result, the Charter of the UN does not provide direction in this matter.

There is no general agreement on what constitutes an authority for peacekeeping. Some maintain that peacekeeping operations are based on the general authority of the Security Council. However, Article 29 of the UN Charter allows the Security Council to establish such subsidiary organs as it deems necessary for the performance of its functions. Observer missions and peacekeeping forces are generally considered to fall within the context of Article 29. The Security Council is thus the authority for mandating and terminating UN peacekeeping operations. Although the General Assembly has authorized peacekeeping operations in two circumstances, its authority to do so is not widely accepted.

The Secretary-General is responsible to the Security Council for the organization, conduct, and direction of the force, and he alone reports to the Security Council about it. The Security Council decides the force's tasks and is charged with keeping the Security Council fully informed of developments relating to the force. Recognizing the Secretary-General's need for some latitude and flexibility in his day-to-day dealings with a peacekeeping force, he is given a measure of discretion within the terms of the force's mandate. The majority of the members of the Council prefer this approach.

The Secretary-General appoints the force commander, who conducts the day to day operations, all policy matters are referred back to the Secretary-General.

UN Versus Non-UN Peacekeeping

Peacekeeping operations depend on the consent of the parties to the dispute, the HN, and on the agreement of other powers which perceive that their interests may be affected. Consequently, the UN is most often, but not always an acceptable or practicable sponsor of peacekeeping operations. Peacekeeping operations take place following diplomatic negotiation and agreement among the belligerents concerning the participating peacekeeping nations on the size and type of forces each will contribute. These operations will be conducted in accordance with agreements among the parties to the conflict. Peacekeeping efforts support diplomatic endeavors to achieve or to maintain peace in areas of potential or actual conflict and often involve ambiguous situations requiring the peacekeeping force to deal with extreme tension and violence without becoming a participant.

The UN Charter also recognizes the right of regional organizations to deal with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the purposes and principles of the UN.

The attitude of Third World states vary as to whether they favor a UN peacekeeping force, the force of another regional or international organization, or any outside involvement. While the emergent nations often find a UN peacekeeping force a local and convenient means of controlling a dangerous local dispute, they also have reservations. As the UN becomes more willing and able to use its Chapter VII enforcement powers to impose its will, many Third World states fear a new kind of colonialism. They fear UN becoming more and more involved in their internal affairs claiming such action is required to maintain international peace and security. Some African nations regarded the UN operation in the Congo as a thinly disguised western interference and have favored the Organization of African Unity as a sponsor for peacekeeping.

To be successful, a peacekeeping operation outside the UN must have:

- The support of a regional power or a multinational group.
- A properly constituted political organization through which policy directives, finance and administrative matters can be coordinated and channeled to the force CDR. This may be a regional organization, such as the MFO Headquarters in Rome. A committee of ambassadors obtaining separate instructions from their own governments may be necessary in an emergency to launch an operation, but it should be replaced by an organization tailored to the requirement as soon as possible.
- A designated military CDR with an integrated headquarters. This can be a joint task force provided by a CINC.

Successful peacekeeping, cont.

- The consent of the parties to the dispute and of the host countries, and preferably enjoy wide enough international support, or at least tacit acceptance, to avoid damaging interference.
- Adequate guaranteed financial support.

US SUPPORT TO PEACEKEEPING OPERATIONS

There are three broad missions the US may perform in peacekeeping operations: support, observer missions, and peacekeeping forces. Whereas peacekeeping operations usually include military personnel, they may also include civilian police, administrators, and other subject experts.

Support

Financial support is a predominate form of US support to international peacekeeping operations, especially to UN sponsored peacekeeping. The UN finances peacekeeping operations through the obligatory contributions of its members. The US share for UN peacekeeping operations is currently 30%.

The US also provides logistical support in the form of equipment and supplies as well as airlift/sealift to support a peacekeeping operation. In the past the US seldom sought payment for these services. This policy is changing, with the US starting to account for these services and seeking reimbursement.

The US may provide a wide variety of personnel in support of peacekeeping operations. Military units and individuals (military and civilian) may be available for peacekeeping force missions or to provide functional support to an international force, e. g., medical, administration, and communications.

Observer Missions

US military personnel may perform a wide variety of functions in support of peacekeeping. One of these functions includes acting as individual observers under the command of the UN or some other organization.

Military observers observe, record, and report implementation of the truce and any violations thereof. They also carry out such additional tasks as vehicle patrols in sensitive areas, local negotiations between rival forces, and special investigations. Observer groups usually operate under an open-ended mandate which, in the case of a UN operation, can only be terminated by the UN Security Council. Typical observer missions include:

- Observing and reporting any alleged violation of the protocol.
- Handling alleged cease-fire violations and/or alleged border incidents.
- Conducting regular liaison visits to units within their AO.
- Continuously checking forces within their AO and reporting any changes thereto.
- Maintaining up-to-date information on the disposition of forces within their AO.
- Periodically visiting forward positions; report on the disposition of forces.
- Receiving aircraft at airfields and supervising the loading and unloading.
- Assisting civil authorities in supervision of elections, transfer of authority, partition of territory, & administration of civil functions.

Observers, by their presence, are often sufficient to deter breaches of cease-fire and armistice agreements. They must understand that their updated and impartial reports provide useful evidence and help eliminate the paralyzing claims and counterclaims put forward by partisan interests. Observer missions are particularly useful to verify the provisions of demilitarized zone and arms limitation agreements.

Peacekeeping Forces

Peacekeeping forces may consist of combat, combat support, and combat service support units. The US may commit units intact, build composite units, or provide individuals to serve on multinational staffs. A typical peacekeeping force is a combat unit in a peacekeeping role supported by logistics and communications units under a joint headquarters. Units may include ground, air, or maritime forces, or a combination of all of these. A Judge Advocate is a key element of the staff of a peacekeeping headquarters.

PEACEKEEPING OPERATIONS AND TASKS

There are three operations and six tasks which may be associated with any peacekeeping effort and may be supported by any of the following: ground operations, air operations, and maritime operations. The three operations are: peace observation, internal supervision and assistance, and monitor terms of protocol. The six tasks are: supervision of free territories, supervision of cease-fires, supervision of withdrawals and disengagements, supervision of prisoner of war exchange, supervision of demilitarization and demobilization, and maintenance of law and order.

Ground Operations

The primary mission of the peacekeeping force is to monitor the terms of the protocol which established the peacekeeping operation. The peacekeeping forces can separate armed forces of the hostile states in a conflict, enforce disengagements and cease-fires, and supervise the withdrawal of the combatants. To accomplish these tasks, the peacekeeping force may be required to establish buffer zones and monitor the cease-fire lines.

The peacekeeping force often deploys an interposition force to separate the opposing sides and, at the same time, establish a buffer zone. As the force supervises a truce or cease-fire agreement, it can also prevent hostilities between nations or within a nation. By deploying military peacekeeping units and observer groups into a demilitarized zone or a buffer zone between the opposing forces, the force is able to:

- Exercise control and surveillance of an area or boundary and demarcation line between the opposing parties.
- Prevent infiltration within the area or a confrontation between the opposing forces.
- Complete the separation of the sides in order to establish a buffer zone.
- Facilitate local negotiations between the parties concerned.

The assignment may also involve truce/peace observation and reporting of the military and paramilitary units within a specified zone in order to ensure:

- Permitted units of the belligerent parties are not increased above the strength stipulated by the parties involved.
- Existing fortifications are not reinforced or enlarged.
- There is no increase of arms and supplies apart from those agreed upon.
- The Armistice Demarcation Line (ADL) or the buffer zone are not overflown by aircraft from the opposing sides.

The force can also provide internal supervision and assistance by:

- Contributing to the maintenance of law and order and a return to normal conditions.
- Assisting civil authorities in supervision of elections, transfer of authority, partition of territory, or the temporary administration of civil functions or in some cases, and, such as Cambodia, actually administering the Government and elections.
- Providing initial assistance/support to refugees and/or displaced civilians.

Air Operations

An air component can make a significant contribution to all peacekeeping forces and observers. It is particularly useful in the difficult and undeveloped terrain where forces may be deployed. Air operations may also be used to patrol areas that are heavily mined and/or areas that may contain unexploded ordnance. Additionally, its ability and flexibility in covering large areas in a short amount of time is an asset for both ground and maritime operations. The air component's contributions to peacekeeping can be in the nature of airlift; logistics; surveillance; reconnaissance; command, control, and communications; intelligence; aerial refueling; search and rescue, and medical evacuation.

Maritime Operations

Maritime involvement in peacekeeping operations may involve sealift, surface forces, marine amphibious forces, or individuals. The use of naval forces may be somewhat more limited in scope than that of land forces. It may also extend beyond simply a physical presence between the naval ships of the belligerent parties. Naval forces may also contribute to the peacekeeping operation by:

- Provide a staging platform and sustain the force logistically.
- Accompany and protect neutral shipping.
- Observation and surveillance of coastline.
- Interdiction. Appropriate rules of engagement apply.
- Coastal sea control.
- Protection of offshore assets.
- Harbor defense/port security.
- Countermines.
- Search and Rescue.

PEACEKEEPING CONDITIONS AND PREREQUISITES

The importance of peacekeeping in controlling conflicts cannot be overemphasized. Peacekeeping operations differ fundamentally from internal security in that a peacekeeping force does not act in support of a government; it is entirely neutral. Once it loses its reputation for impartiality, the usefulness of the force is destroyed. There are certain conditions that must be present in order for peacekeeping operations to work well. These conditions are:

- Consent of the authorities of the belligerent parties.
- Political recognition of the peacekeeping operation by most if not all of the international community.
- A clear, restricted, and realistic mandate or mission.
- Sufficient freedom of movement for the force and observers to carry out their responsibilities.
- An effective, command, control, and communications (C3) system.
- Well trained, balanced, impartial, and non-coercive forces, both civilian and military.
- An effective and responsive all-source information gathering capability.
- An effective and responsive logistics support system.

Political Considerations

It is important to understand how political factors influence the tactical execution of peacekeeping operations. Specifically, the mandate, status of forces agreement, terms of reference, and rules of engagement (use of force) are directed by the political process. The legal status of the force and observers must be secured through specific agreements. In addition, force protection methods must be developed for each peacekeeping operation. The tactical CDR must comply with instructions and inform the chain of command of the tactical implications of a political decision. Political and military leaders must understand each other's perceptions and problems.

Mandate

The peacekeeping mission will operate with a mandate which describes the scope of operations for the mission. The sponsoring bodies usually consist of several countries. Also, the agreement should frame the mandate for the peacekeeping force in such a way that it gives advantage to no side. For these reasons, the agreement may be imprecise and susceptible to different interpretations by the belligerent parties as well as the countries contributing to the force as well.

The Secretary-General prepares the mandate based upon the results of his negotiations with the parties to the dispute, including the HN and states which are both potential contributors of contingents and acceptable to the HN.

The mandate will:

- Nominate the force CDR and ask for the Council's approval.
- Recommend the size of the force.
- List those states which may provide contingents.
- Outline proposals for the movement and maintenance of the force, including states which might provide transport aircraft, shipping, and logistical units.
- Propose an initial time limit for the operation.

SAMPLE UN MANDATE

RESOLUTION PASSED BY THE UN SECURITY COUNCIL AT THE xxTH MEETING (DATE)

The Security Council,

Noting that the present situation with regard to (country) is likely to threaten international peace and security and may further deteriorate unless additional measures are promptly taken to maintain peace and to seek out a durable solution.

Recognizing the positions taken by the parties in relations to the peaceful intentions signed at New York on (date), keeping in mind the relevant provisions of the Charter of the UN and its article 2, para 4, which reads: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the UN,"

1. Calls upon all Member States, in conformity with their obligations under the Charter of the UN, to refrain from any action or threat of action likely to worsen the situation in ( ) and ( ), or to endanger international peace.
2. Asks the Governments of ( ) and ( ), which have the responsibility for the maintenance and restoration of law and order, to take all additional measures necessary to stop violence and bloodshed in their countries.
3. Recommends the creation, with the consent of the Governments of ( ) and ( ), of a UN Peacekeeping Force in those countries. The composition and size of the Force shall be established by the Secretary-General, in consultation with the Governments of ( ) and ( ). The CDR of the Force shall be appointed by the Secretary-General and report to him. The Secretary-General, who shall keep the Governments providing the Force fully informed, shall report periodically to the Security Council on its operation.
4. Recommends that the function of the Force should be, in the interest of preserving international peace and security, to use its best efforts to prevent a recurrence of fighting and, as necessary, to contribute to the maintenance and restoration of law and order and a return to normal conditions.
5. Recommends that the Stationing of the Force shall be for a period of three months, all costs pertaining to it being met, in a manner to be agreed upon by the Governments providing the contingents and by the Governments of ( ) and ( ). The Secretary-General may also accept voluntary contributions for that purpose.
6. Recommends further that the Secretary-General designate, in agreement with the Governments of ( ) and ( ), a mediator, who shall use his best endeavors with the representatives of the communities and also with the aforesaid Governments, for the purpose of promoting a peaceful solution and an agreed settlement of the problem confronting ( ) and ( ), in accordance with the Charter of the UN, having in mind the well-being of the peoples of ( ) and ( ) as a whole and the preservation of international peace and security. The mediator shall report periodically to the Secretary-General on his efforts.
7. Requests the Secretary-General to provide, from funds of the UN, an appropriation for the remuneration and expenses of the mediator and his staff.

Status of Forces/Status of Mission Agreement

The SOFA (often called a SOMA in UN operations) proceeds from the mandate. With the advice of the concerned CDR, the diplomatic elements establish stationing agreements which are often referred to as SOFAs or SOMAs. These agreements between the host nations, sponsor, and contributors will establish the detailed legal status of the force or mission, its military and civilian personnel, and property. The agreement must balance two fundamental factors: the independence of the UN forces versus the governmental authorities of the host government, and freedom of movement. However, as a minimum the SOFA/SOMA should include the following main points:

- The international status of the UN Force and its members.
- Entry and departure permits to and from the HN.
- Identity documents.
- The right to carry arms as well as the authorized type(s) of weapons.
- Freedom of movement in the performance of UN service.
- Freedom of movement of individual members of the force in the HN.
- The utilization of airports, harbors, and road networks in the HN.
- The right to operate its own communications system
- Postal regulations.
- The flying of UN and national flags.
- Uniform regulations.
- Permissions to operate UN vehicles without special registration.
- Application of "The Convention of the Privileges and Immunities of the UN."
- Matters of jurisdiction.
- Military Police.
- Tax and duty regulations.
- General supply and maintenance matters (imports of equipment, commodities, local procurement of provisions and POL.
- Matters of compensation (in respect of the HN's property).

All aspects of the SOFA or SOMA must have the appearance of total neutrality of the force. Military and civilian personnel of a peacekeeping force remain under the criminal jurisdiction of their own nations, and the legal instrument should provide for the handing over of members of the force from the host government to their respective contingents for disciplinary action. The parties must make specific arrangements for dealing with motor accidents. While members of a peacekeeping force enjoy a considerable measure of protection, even when off duty, they must respect the laws, regulations, religions, and mores of the HN and refrain from all political activity.

Identification of peacekeeping forces will usually be as follows:

- UN Peacekeeping Forces. All members, vehicles, patrols, positions, and demarcation lines must be clearly marked in the following manner:
  - Personnel. Blue helmet liner or blue beret with UN badge, blue brassard or armband, shoulder patch, blue scarf and identity card. If time permits, the UN will make a partial issue of these items before the contingent leaves its home base; however, UN identity cards will be issued on arrival in the area of operations. Four passport photographs for each individual should be obtained before departure.
  - Vehicles. Every vehicle must display a UN flag and have the Organization's insignia painted on it in accordance with the force regulations. Vehicles will usually be painted white.
  - Patrols. Dismounted patrols must carry a UN flag.
  - Positions. All headquarters, military and domestic installations, observation posts, checkpoints, road blocks, and positions must be very visible, usually painted in white, fly the UN flag, and have insignia painted prominently on the walls. If there is an air threat, or a perceived air threat, the appropriate markings should be painted on the roofs. Positions should be illuminated at night.
  - Demarcation Lines. Lines separating forces must be clearly marked.

- Non-UN Peacekeeping Forces. These forces will conform broadly to UN practice except that they will use their own colors and insignia. Previous and current non-UN peacekeeping forces have used the following:
  - Multinational Force and Observers (MFO), Sinai. Terracotta berets, white helicopters, white vehicles, armbands and badges, and MFO flags and other identifying markings. Observers wear orange overalls and hats.
  - Multinational Force (MNF), Beirut. Each contingent displays its national flag on its vehicles.

Terms of Reference

Terms of reference are developed based upon an analysis of the mandate and the situation. The terms of reference may be subject to approval by the parties to the dispute. These TOR describe the mission, command relationships, organization, logistics, accounting procedures, coordination and liaison, and responsibilities of the military units and personnel assigned to or supporting the peacekeeping force. The terms of reference are often far less precise than is desirable from a military point of view for the following reasons:

- The nature of the UN resolution authorizing the mission may be a compromise to obtain acceptance by both parties.
- The terms of reference may be rendered innocuous or ambiguous to obtain acceptance of the mission by the HN or nations.
- The terms of reference may have been quickly prepared in an effort to publish the terms rapidly activate the mission.

Rules of Engagement

Another political factor involves the rules of engagement. Commanders must assess the threat, to include both conventional and non-conventional means, and make recommendations for specific ROE through the chain of command. The ROE must be clearly stated in simple language. The two principal tenets are the use of force for self-defense only, and total impartiality. The use of deadly force is justified only under situations of extreme necessity (typically in self-defense), and as a last resort when all lesser means have failed to curtail the use of violence by the parties involved. ROE must be approved and understood by all parties in the conflict and the peacekeeping force.

The use of unnecessary or illegal force undermines the credibility and acceptability of a peacekeeping force to the host nations, the participants in the dispute, and within the international community. It may escalate the level of violence in the area and create a situation in which the peacekeeping force becomes part of the local problem. The use of force must be carefully controlled and restricted in its application. Peacekeeping forces normally have no mandate to prevent violations of an agreement by the active use of force.

- The passive use of force employs physical means which are not intended to harm individuals, installations, or equipment. Examples are the use of vehicles to block the passage of persons or vehicles and the removal of unauthorized persons from peacekeeping force positions.
- The active use of force employs means which result in physical harm to individuals, installations, or equipment. Examples are the use of batons, rifle butts, and weapons fire.

Force used as a last resort depends on careful, well planned courses of action which consider all likely scenarios. Planning should be influenced by the following guidelines:

- Firmness. The will and the ability to use force as the last resort are essential if a peacekeeping operation is to survive hostile threats and the use of force.
- Preliminary Warning. At an early stage of a force's deployment, the parties to the dispute should be informed of the circumstances in which the peacekeepers might be obliged to use force and of their warning procedures. They should also be warned of the risks of escalation should either party let an incident get out of hand.
- Anticipation. Intelligent anticipation based on good information will often permit a timely deployment to a threatened area before the danger becomes serious. If a situation develops in which force is likely to be employed, the manner in which it will be used should thoroughly planned.
- Passive Force. If the peacekeeping forces are deployed in sufficient strength and obviously in control of the situation, use of passive force to block movement may be sufficient.

Force guidelines, cont.

- Contingency Response. When the situation dictates, the prompt arrival of a reserve composed of all the national contingents will demonstrate collective determination and discourage further aggressive action. Success is achieved by good planning, rehearsal, and anticipation.
- Defensive Positions. Positions must be reconnoitered, prepared for occupation, and protected by obstacles. They must include shelters to protect troops from shell, mortar, and rocket fire when necessary. Their occupation must be rehearsed.

All troops must be briefed on arrival in the area of operations on the following points and kept up-to-date on:

- SOFA/SOMA.
- ROE.
- The potential threat.
- Closing checkpoints to prevent entry into the buffer zone.
- Deployment to positions.
- How to act in foreseeable emergencies when force may have to be used.

The use of active force is permissible only as a last resort in self-defense. As a guide, the following constitute grounds for self-defense:

- By members of the peacekeeping force when it reasonably appears necessary to protect themselves or when there is reasonable belief that the members are in imminent danger of death or serious physical injury.
- When one of the parties to the conflict attempts to use force to compel a withdrawal from a position which is vital for the security of the force.
- When attempts are made to disarm members by force.
- When attempts are made to arrest or abduct peacekeeping force members.

Clear warning of the intention to use force must conform to existing international agreements or requirements specified by the host nation. Barring said guidance, the following procedures if possible apply:

- Warn the party to halt, or cease aggressive action, by shouting the word "halt" in the local language.
- If necessary, repeat the warning, and cock the weapon.
- Repeat the warning a third time.
- Fire warning shots, but only if bystanders are not endangered.
- If the warnings are disregarded and the aggression continues, open fire with single shots, using the minimum number required.
- Apply first aid to the casualties and evacuate them.
- Notify HQ immediately, collect the names of witnesses, and prepare a full written report.

The peacekeeping force may use only the minimum amount of force to stop the threat to life or the aggressive violation. As soon as the attack or violation ceases, fire must be ceased. In circumstances where a peacekeeping force is subjected to serious attack, it may be necessary to use support weapons. In such cases the force CDR might delegate authority to the CDR on the scene. If a resort to force is necessary, it must be applied and perceived to be impartial.

The following ROE are those currently in use by the Multinational Force and Observers in the Sinai:

ROE - MFO

Threat against the TF or MFO in general is low. Even though the TF is operating in a highly volatile area of the world, MFO has never been the direct target of a terrorist or belligerent attack. This fact is due to several reasons including the negative publicity such an attack would elicit and the fact that an MFO site is not an unguarded, unarmed, easy target.

ROE - MFO Cont.

Even so, MFO HQs issued rules of engagement (ROE) for MFO soldiers. Each soldier carries an orange ROE card, and one card is left in place at each weapon position. The ROE are:

March 1991

RULES FOR THE ACTIVE USE OF FORCE

1. The "active use of force" is the employment and use of means that may result in the physical harm to individuals, installations, and equipment. Examples of active use of force are the use of batons and rifle butts, and, in extreme cases, weapons fire.
2. The MFO will, to the utmost, seek to fulfill it's mission and tasks without resorting to the active use of force.
3. Active use of force is authorized only as a last resort when other means have failed.
4. Active use of force is authorized only in self defence and resisting forceful attempts to prevent MFO personnel from discharging their peacekeeping duties.
5. Examples of situations which might require the use of active force by MFO personnel are:
   a. In self defence, including attempts to disarm MFO personnel.
   b. When attempts are made to capture and hold MFO personnel.
   c. When MFO premises are entered by force.
   d. When armed attempts are made to capture and hold MFO personnel.
   e. When supporting MFO personnel who are under siege or armed attack.
6. Observing the principle of minimum force, the active use of force, always be to discriminate. The aim should be to stop the aggressor with minimum force and minimum damage. The active use of force should be terminated as soon as the situation permits.
7. When the use of active force is considered, the senior officer, NCO, or private on the scene is responsible for making the judgment pursuant to the instructions, to order or execute the actions deemed necessary.
8. Should the situation permit, instructions must be sought from higher HQ before resorting to the active use of force.
9. Demonstrations or other actions directed against the MFO that are not seriously endangering MFO individuals, installations, or equipment, or preventing the MFO from discharging it's duties shall not be countered by the active use of force.
10. Since guidance cannot cover all possible situations which may be encountered, common sense and good military judgement must be applied by personnel on the scene.

INSTRUCTIONS FOR THE USE OF FIREARMS

GENERAL

1. Unless you are ordered to make ready or are about to fire, your weapon must always be made safe: No live round in the breech; the working parts forward; and the safety catch applied. You will normally carry your weapon fitted with an empty magazine.
2. Any use of firearms may only be authorized by the senior officer, NCO, or private on the scene. When the situation permits, instructions must be sought from higher headquarters.
3. Only when MFO units or individuals are being subject to aimed fire or other lethal attacks, may weapons by fired without warning. In all other instances weapons may be fired only when the active use of force is required, when all other means of active force have failed, and when the MFO challenging procedure has been used.

CHALLENGING

4. The MFO Challenging procedure is as follows:
   a. Replace the empty magazine with a charged one from your pouch.
   b. Shout "HALT - KEF - ATSAR".
   c. If the person fails to halt, cock the weapon and repeat the shout.

CHALLENGING, CONT.

d. If the person still fails to halt, two warning shots are fired up into the air (so as not to endanger any person).
e. If the person still fails to halt, after the warning shots and is directly threatening you or other MFO members, then you may open fire as permitted in paragraph 5 below.

OPENING FIRE

5. If you have to open fire, you should:
   a. Fire only aimed shots, whenever possible directing fire primarily so as to disable your target.
   b. Fire no more rounds than necessary. Stop firing as soon as the situation permits.
   c. Take all sensible precautions not to injure anyone other than your target.

The following ROE were those used initially by the Marines with the Multi-National Force in Beirut. These ROE were overly restrictive, based solely on self-defense. They were inadequate in light of the Marine's mission, which included training the Lebanese Army and bolstering the Lebanese Government. Missions that clearly took the Marines out of the impartial and neutral roles as peacekeepers.

ROE - MNF

WHITE CARD

THE MISSION OF THE MULTI-NATIONAL FORCE (MNF) IS TO KEEP THE PEACE. THE FOLLOWING RULES OF ENGAGEMENT WILL BE READ AND FULLY UNDERSTOOD BY ALL MEMBERS OF THE US CONTINGENT OF THE MNF:

WHEN ON POST, MOBILE OR FOOT PATROL, KEEP A LOADED MAGAZINE IN THE WEAPON. WEAPONS WILL BE ON SAFE, WITH NO ROUNDS IN THE CHAMBER.

DO NOT CHAMBER A ROUND UNLESS INSTRUCTED TO DO SO BY A COMMISSIONED OFFICER UNLESS YOU MUST ACT IN IMMEDIATE SELF-DEFENSE WHERE DEADLY FORCE IS AUTHORIZED.

KEEP AMMUNITION FOR CREW-SERVED WEAPONS READILY AVAILABLE BUT NOT LOADED IN THE WEAPON. WEAPONS WILL BE ON SAFE AT ALL TIMES.

CALL LOCAL FORCES TO ASSIST IN ALL SELF-DEFENSE EFFORTS. NOTIFY NEXT SENIOR COMMAND IMMEDIATELY.

USE ONLY THE MINIMUM DEGREE OF FORCE NECESSARY TO ACCOMPLISH THE MISSION.

STOP THE USE OF FORCE WHEN IT IS NOT LONGER REQUIRED.

IF EFFECTIVE FIRE IS RECEIVED, DIRECT RETURN FIRE AT A DISTINCT TARGET ONLY. IF POSSIBLE, USE FRIENDLY SNIPER FIRE.

RESPECT CIVILIAN PROPERTY; DO NOT ATTACK IT UNLESS ABSOLUTELY NECESSARY TO PROTECT FRIENDLY FORCES.

PROTECT INNOCENT CIVILIANS FROM HARM.

RESPECT AND PROTECT RECOGNIZED MEDICAL AGENCIES SUCH AS RED CROSS, RED CRESCENT, ETC.

THESE RULES OF ENGAGEMENT WILL BE FOLLOWED BY ALL MEMBERS OF THE US MNF UNLESS OTHERWISE DIRECTED.

CONTINGENCY PLANNING

States of Readiness

Force headquarters will establish states of readiness usually covering key personnel, the reserve force, manning of normal positions and temporary observation posts, increased patrolling, reinforcement of checkpoints, issue of reserve ammunition, and a viable evacuation plan. The states of readiness may vary from force to force, but UN forces normally have three states of readiness: normal vigilance, increased vigilance, and full alert. Each increase in the state of readiness will be complemented by restrictions on leave, training, and movement.

Changes in the states of readiness are normally implemented only by the force CDR. However, in an emergency, a sector CDR may order a higher state of readiness but he must immediately inform the force headquarters. Changes in the states of readiness can be announced by radio using codeword(s) to denote the state of readiness. This radio announcement will be followed by a written message. The use of colored banners is another form of notification.

Evacuation Plan

A peacekeeping force may need to be evacuated in the event war breaks out or if the HN withdraws its consent t' the mandate. The evacuation may be ordered only by the appropriate authority, e. g., the UN Security Council, multinational organization, or allied governments. The force CDR is then responsible to the UN Secretary-General, or his equivalent in a non-UN force, for the safe and speedy evacuation of all members of the peacekeeping force, its dependents, accredited visitors, and observer group(s) in the area, and, if appropriate, all UN-affiliated organizations.

The force headquarters staff is responsible for ensuring the evacuation plan is current. This plan must include appropriate egress routes by ground to the nearest neutral country and by air or sea out of the theater of the peacekeeping operations.

Each national contingent CDR must consider, and plan for, the possibility that members of his force may need to be evacuated unilaterally. In this instance, the national contingent CDR must coordinate with the force headquarters to determine if 'the contingent's positions and tasks are to be handed over to another contingent or abandoned. In all instances, the evacuation plan must include specific instructions for destroying critical items, equipment, and other assets which cannot be removed.

Natural Disasters Force contingency plans need to include procedures to deal with earthquakes, floods, forest fires, hurricanes, and/or tornadoes if the peacekeeping force will operate in an area susceptible to any of these natural disasters.

Refugees and Displaced Civilians Members of any peacekeeping force must be aware of the possibility that they may have to deal with refugees and other displaced civilians. Therefore, appropriate planning actions to deal with this contingency must be completed as soon as possible.

ONGOING OPERATIONS

UNOSOM - UN Operation in Somalia, 1992, 3,000 member force initially authorized, only 500 deployed before US led relief operation "Restore Hope" deployed to the country. Initial mandate was to monitor and protect UN relief activities, anticipate expansion of this mandate as enlarged UN force relieves the US led force.

OPERATION "RESTORE HOPE" - While not a peacekeeping operation, this mission was deployed to bolster a previously established peacekeeping operation (SC Resolution 751) which was unable to insure safe delivery of food supplies. Authorized by SC Resolution 794, acting under the authority of Chapter VII, the Security Council authorized member states to "use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia." This US led force has received assistance (troops, logistics, or financial) from over 40 countries.

"RESTORE HOPE," CONT.

This operation differs from peacekeeping in that it is authorized under Chapter VII, with no functioning government in Somalia to either accept or reject to force's presence. The lack of a functioning government presents unique legal issues to the force including the potential for assumption of many civil affairs functions. Below is an excerpt from the "Operation Restore Hope" OPORDER giving the commander responsibility for many of these functions:

APPENDIX 1 TO ANNEX E, OPORD 001, OPERATION RESTORE HOPE

1. Operation Restore Hope will impose special responsibilities on commanders concerning legal actions and legal responsibilities toward the Somali population in areas under the commander's control. Commanders should ensure their level of legal and civil affairs staffing is sufficient in light of these special and unique considerations.

2. Command Responsibilities.

2A. Safety and security of the local population. In the area under his control, a commander must protect the population not only from attack by military units, but also from crimes, riots, and other forms of civil disobedience. To this end, commanders will:

2A1. Demand and enforce such obedience as may be necessary for the security of his forces and maintenance of law and order.

2A2. Where necessary, establish rules of law necessary to fulfill this obligation.

2A3. Detain those accused of criminal acts or other violations of public safety and security.

2A3A. Such detention shall include reasonable due process for the detainee under the circumstances.

2A3B. Persons so detained will not be detained or incarcerated together with persons entitled to prisoner of war (POW) status.

2A3C. The period of detention will continue until the accused person, along with available evidence of his crime, can be turned over to authorities of a follow-on peacekeeping organization or a properly constituted local government.

2B. Hygiene and Public Health. To the fullest extent possible, the commander has the duty of ensuring and maintaining, with the cooperation of international, national, and local authorities, medical services and public health and hygiene in the area under his control.

2B1. In particular, commanders must apply those prophylactic and preventive measures necessary to combat the spread of contagious diseases and epidemics among those refugee populations that can gather in secure areas.

2B2. The absence or ineffectiveness of international, national, or local medical or health organizations does not relieve the commander of this responsibility.

2C. Food and medical supplies. It is the specific purpose of Operation Restore Hope to provide and allow the passage of food, medical supplies, and other necessities of life to the Somali population. In those areas under the commander's control, it is his responsibility to ensure that required goods are in fact provided to the fullest extent of his ability. Ideally, this function will be fulfilled in cooperation with international relief organization. But failures on the part of those organizations do not relieve the commander of this responsibility.

3. Identification, classification, and treatment of detained persons. The nature of Operation Restore Hope will expose the commander to at least three legal classifications of persons who may come under his control. Each classification carries with it different rights and responsibilities. A suggested guide for commanders based on probable situations follows:

3A. Combatant vs noncombatant. This is the initial question. If a person or group of persons is captured while engaged in the type of activity normally associated with combatants, e.g., attack on a convoy, those persons should be accorded POW status.

3A1. A person or group of persons engaged in an activity normally associated with a civilian crime, e.g., attacking and beating a woman to steal food, would normally be classified noncombatants and detained a criminals.

3A2. In those situations where the actions of the person or group are unclear or ambiguous, those persons should be accorded POW status until such time as a tribunal convened to determine their status determines that POW status is not warranted.

3B. Refugees and displaced civilians. Such persons are clearly noncombatants and are generally entitled to the protection and treatment listed in paragraph 2.

3B1. Refugees may lose their status by committing a hostile or criminal act.

3B2. Refugees and displaced civilians are subject to reasonable controls necessary for the welfare of the force. For example, persons may be required to surrender their weapons as a condition of entry to a displaced civilians camp.

3B3. Commanders may not grant political asylum to any person. In those cases where a person requesting political asylum is reasonably believed to be in physical danger, a commander may grant temporary refuge pending a determination by U.S. State Department officials.

General Order Number One (Operation Restore Hope)

To establish guidance on the activities of U.S. personnel considered essential to the successful combined operations of U.S. and friendly forces and to preserving foreign relations **General Order Number One** is issued:

A. Applicability. This General Order is applicable to all U.S. military personnel of Operation Restore Hope and to civilians serving with, employed by, or accompanying the forces of Operation Restore Hope in USCENTCOM AOR. Commanders are directed to readdress this General Order to their units and ensure the widest dissemination to all levels of command.
B. Authority. Title 10 United States Code Section 164(C)(1)(F) and the Uniform Code of Military Justice (UCMJ), Title 10 United States Codes Sections 801-940.
C. Prohibited Activities.

(1). Introduction, purchase, possession, use, or sale of privately owned firearms, ammunition, or explosives. Individuals possessing any of these items on the effective date of this General Order may arrange for safekeeping of such items with their unit's Military Law Enforcement Activity.

(2). Entrance by non-moslems into a Mosque or other site of Islamic Religious significance, unless directed by superior authority or required by military necessity.

(3). Introduction, purchase, possession, use, sale, transfer, manufacture, or consumption of any alcoholic beverage.

(4). Introduction, purchase, possession, use, sale or transfer of the narcotic stimulant known as "KHAT."

(5). Gambling of any kind including, but not limited to sports pools, lotteries, and raffles.

(6). Removing, possession, selling, defacing, destroying archeological artifacts or national treasures.

(7). Selling, bartering, or exchanging currency other than at the official exchange rate.

(8). Taking or retention of individual souvenirs of the operation in Somalia.

(A) Explanation of prohibition:

-1- Private property cannot be legally confiscated. The wrongful taking of private property, even temporarily, is a violation of Article 121, UCMJ.

-2- Public property captured by U.S. personnel is property of the United States. Wrongful retention of such property by an individual is violation of Article 103, UCMJ.

-3- No weapon, munitions, military document or equipment captured or acquired by any means other that official issue may be retained for personal use or shipped out of the AOR for personal retention or control.

(B) Limited Exceptions:

-1- Souvenirs, other than weapons or munitions of any kind, that have been legitimately purchased are authorized.

-2- Property with minimal intrinsic value that has been abandoned, i.e., the public or private owner cannot be notified, may be retained by U.S. personnel as souvenirs upon approval of their unit commander. Individuals are not authorized to retain bayonets or other items of weaponry as souvenirs.

(9). Selling, reselling, loaning, or otherwise transferring to anyone, rationed or controlled items or relief supplies outside of official relief channels.

D. Further restrictions:

(1). Adopting as pets or mascots, caring for, or feeding any type of domestic animal (dogs, cats, monkeys, sheep, goats, or rodents) or any type of wild animal. These animals are infected with a variety of zoonotic diseases that can be transmitted to humans, and can harbor vectors capable of transmitting diseases to humans (including rabies, African tick typhus and leishmaniasis) that have a high potential for adversely affecting the health of the command.

(2). Providing food items directly to, or feeding civilian refugees any food substance unless under the direct supervision of a physician. Many foods, such as meals, ready to eat, present a intense caloric load to malnourished or starving people. If appropriate renourishment, consisting of rehydration and less intense food items, is not accomplished first, death is a possible outcome.

E. Punitive Order. Paragraph C of this General Order is Punitive in nature. Persons subject to the UCMJ may be punished hereunder. Civilians serving with, employed by, or accompanying the JTF in the USCENTCOM AOR may face criminal prosecution or adverse administrative action for violation of this General Order.

F. Individual Duty. All persons subject to this General Order are charged with the duty to become familiar with this regulation and local laws and customs. Operation Restore Hope places United States Armed Forces and civilian personnel into CENTCOM AOR countries where Islamic law and local customs prohibit or restrict certain activities which are generally permissible in western societies. All personnel shall avoid any action, whether or not specifically prohibited by this regulation, which might result in or reasonably be expected to create the appearance of a violation of this regulation or local laws or customs.

G. Unit commander responsibility. Unit commanders and supervisors are charged with ensuring that all personnel are briefed on the prohibitions and requirement of this General Order. Commanders and supervisors are expected to exercise good judgement in enforcing this General Order.

H. Confiscation of contraband. Items which are determined to violate this General Order constitute contraband and may be confiscated. Commander, supervisors, military customs inspectors, and other officials will enforce this General Order in their inspections of personnel and equipment prior to and during deployment to the AOR and upon redeployment from the AOR. Before destruction of contraband, commanders or Law Enforcement Personnel should coordinate with their Staff Judge Advocate.

I. Effective Date. This General Order is effective immediately.

J. Expiration. This General Order will expire when rescinded by Commander, JTF or higher authority.

K. Waiver Authority. Authority to waive or modify the prohibitions of this General Order is delegated to the JTF Chief of Staff. All waiver requests shall be coordinated through the JTF Staff Judge Advocate.

UNTAC - UN Transitional Authority in Cambodia (UN's largest and costliest PKO), 1992. 20,000 member military and civilian force from over 90 countries. The force with the most ambitious mandate of any prior force, will virtually administer the country pending UN organized elections. There are about 50 US personnel assigned to this force. Due to the fact that many elements of the Khmer Rouge are not complying with the terms of the cease-fire accord, the force is having trouble accomplishing its mission to supervise government functions and elections while rebuilding the country and disarming factions. The Security Council has imposed Chapter VII sanctions and embargoes against the Khmer Rouge to try and force compliance. The peacekeepers have been the targets of kidnappings and other forms of harassment, with some injury and loss of life. Annual cost nearly 1.3 billion.

UNPROFOR - UN Protection Force in Yugoslavia, 1992, 16,000 plus member force (including US MASH unit) to monitor cease-fire in Croatia. The initial deployment of this force to Croatia followed the traditional peacekeeping rules, mainly the consent of all the parties to the conflict. Although at the time of force deployment no SOFA had been entered into (still had not been entered into at the time of the US MASH deployment in late 1992), the parties have been following the model UN SOFA for peacekeeping operations. As the fighting escalated in Bosnia-Herzegovina, the Security Counsel expanded the force and mandate to include protection of relief shipments in Bosnia-Herzegovina. This has been done in many cases without the consent of the fighting factions in Bosnia and in conjunction with Chapter VII sanctions and embargoes. This has often made the peacekeepers targets by either side to the conflict, with the peacekeepers still operating under a very restrictive peacekeeping ROE. There have been numerous injuries and deaths among the peacekeepers serving in Bosnia.

The US task force consists of a MASH and logistical support elements (about 350 personnel). The US force is assigned to the UN and attached to HQ, UNPROFOR, Zagreb, with the same status as any members of the UN force. The UN has agreed that no part of the US force will not be deployed into Bosnia. The US forces operate under the UN ROE. The following additional guidance on ROE has been given to the US forces:

> ROE: . . . soldiers carrying out this mission will apply the UNPROFOR ROE insofar as it is consistent with the guidance below. Nothing in these rules negates a soldier's obligation to take all necessary and appropriate actions for unit and personal self-defense.
>
> A. Soldiers are authorized to carry weapons with loaded magazines when carrying out missions.
>
> B. Soldiers will use minimum force necessary under the circumstances, always acting under the direction of the senior officer or NCO present.
>
> C. If soldiers are fired upon, fire back if necessary in self-defense.
>
> D. If it reasonably appears that soldiers are about to be fired upon, weapons may be fired in self-defense.
>
> E. Concentrate use of weapons on targets only, avoiding danger to bystanders.
>
> F. Cease use of weapons when the threat is over.
>
> G. Allow anyone who signals a desire to surrender to do so. Retain Custody of detainees until they can be turned over to UNPROFOR. Treat detainees humanely.

ONUSAL - UN Observation Mission in El Salvador, 1992. 500 member military and civilian police force to monitor truce. Annual cost 58 million.

MINURSO - UN Mission for the Referendum in Western Sahara, 1991. Force of about 375 (30 US personnel) to monitor cease-fire and hold referendum for independence or joining Morocco. Annual cost 143 Million.

UNIKOM - UN Iraq-Kuwait Observation Mission, 1991. Force of over 500 personnel (20 US personnel) to monitor truce. Annual cost 33 Million.

UNAVEM II - UN Angola Verification Mission II, 1991. 440 personnel monitor peace accords and election. Annual cost 42 million.

MFO - Multinational Force and Observers, 1982. Consists of one US combat battalion, one US support battalion, and two combat battalions and support personnel from ten other countries.

UNIFIL - UN Interim Force in Lebanon, 1978. Current strength of about 6,000 personnel, mission to restore peace and security in Southern Lebanon. The US had observers assigned as part of this operation until the kidnapping and death of Marine LtCol William Higgins. The US and its personnel, not being perceived as neutral, became targets. This operation has nearly 140 peacekeepers die since its creation, the deadliest peacekeeping operation since the Congo, 1960-64. Annual cost 157 million.

UNDOF - UN Disengagement Observation Force (Golan Heights), 1974. Current strength of over 1,300 personnel, mission to supervise cease-fire between Israel and Syria. Annual cost 42 million.

UNFICYP - UN Peacekeeping Force in Cyprus, 1964. 2,200 personnel supervise cease-fire and buffer zone between Greek and Turkish Cypriots. Annual cost 31 million.

UNMOGIP - UN Military Observer Group in India and Pakistan, 1949. Force of about 40 personnel supervise cease-fire between India and Pakistan. During the initial years of this operation the US had observers assigned to it. The US presence was ended after complaints from India. Annual cost 5 million.

UNTSO - UN Truce Supervision Organization, 1948. 300 (35 US) personnel supervise Armistice Agreements and cease-fires in the Suez Canal area and the Golan Heights. Annual cost 31 million.

THE UNITED NATIONS

1. The Impact of UN Actions on the US

Art. II, section 2 of the US Constitution gives the President the duty (and implied authority) to faithfully execute the laws, including our international obligations. But, a later act of Congress would supersede a treaty (UN Charter) or principle of International law for domestic purposes.

Security Council decisions under Chapter VII (UN Charter) are legally binding on the US. Therefore, the President has the duty, and Constitutional authority, to carry out such decisions.

Securtiy Council recommendations (or authorizations), however, are not mandatory, and create no legal obligation on the US. These are not within the President's duty, and power, to "faithfully execute." The President can respond to resolutions that are within his own Constitutional authority generally, or within authority conferred by Congress.

Art. 43 (provides for forces) is mandatory, creating a legal obligation for states to negotiate agreements on the initiative of the Security Council "as soon as possible" (considering, of course, permanent members' right to veto). US domestic law, the UN Participation Act of 1945, requires Congressional approval of Art. 43 agreements. When Congress approves the agreement, the President needs no further authorization from Congress to make US forces available for UN action. But, Congress should eliminate "War Powers" issues when it approves the measure initially; otherwise, questions remain whether US domestic law allows the use of US forces.[17]

THE UN CHARTER

INTRODUCTOPY NOTE

The Charter of the United Nations was signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945. The Statute of the International Court of Justice is an integral part of the Charter.

Amendments to Articles 23, 27 and 61 of the Charter were adopted by the General Assembly on 17 December 1963 and came into force on 31 August 1965. A further amendment to Article 61 was adopted by the General Assembly on 20 December 1971, and came into force on 24 September 1973. An amendment to Article 109, adopted by the General Assembly on 20 December 1965, came into force on 12 June 1968.

The amendment to Article 23 enlarges the membership of the Security Council from eleven to fifteen. The amended Article 27 provides that decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members (formerly seven) and on all other matters by an affirmative vote of nine members (formerly seven), including the concurring votes of the five permanent members of the Security Council.

The amendment to Article 61, which entered into force on 31 August 1965, enlarged the membership of the Economic and Social Council from eighteen to twenty-seven. The subsequent amendment to that Article, which entered into force on 24 September 1973, further increased the membership of the Council from twenty-seven to fifty-four. The amendment to Article 109, which relates to the first paragraph of that Article, provides that a General Conference bi Member States for the purpose of reviewing the Charter may be held at a date and place to be fixed by a two-thirds vote of the members of the General Assembly and by a vote of any nine members (formerly seven) of the Security Council. Paragraph 3 of Article I 09, which deals with the consideration of a possible review conference during the tenth regular session of the General Assembly, has been retained in its original form in its reference to a "vote, of any seven members of the Security Council", the paragraph having been acted upon in 1955 by the General Assembly, at its tenth regular session, and by the Security Council.

CHARTER OF THE UNITED NATIONS

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED

to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and

to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and

to promote social progress and better standards of life in larger freedom,

AND FOR THESE ENDS

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[17]Taken from American Society of Internation Law Newsletter, December, 1992.

to practice tolerance and live together in peace with one another as good neighbors, and

to bite our strength to maintain inter-national peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples,

HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS

Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations.

CHAPTER I
PURPOSES AND PRINCIPLES

Article I

The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
4. To be a center for harmonizing the actions of nations in the attainment of these common ends.

Article 2

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.
2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.
3. All Members shah settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
4. All Members shall refrain in their inter-national relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.
5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.
6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.
7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

CHAPTER II
MEMBERSHIP

Article 3

The original Members of the United Nations shall be the states which, having participated in the United Nations Conference on International Organization at San Francisco, or having previously signed the Declaration by United Nations of 1 January 1942, sign the present Charter and ratify it in accordance with Article 110.

Article 4

1. Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.
2. The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.

Article 5

A Member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council. The exercise of these rights and privileges may be restored by the Security Council.

Article 6

A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled

from the Organization by the General Assembly upon the recommendation of the Security Council.

CHAPTER III
ORGANS

Article 7

1. There are established as the principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat.
2. Such subsidiary organs as may be found necessary may be established in accordance with the present Charter.

Article 8

The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs.

CHAPTER IV
THE GENERAL ASSEMBLY

Composition

Article 9

1. The General Assembly shall consist of all the Members of the United Nations.
2. Each Member shall have not more than five representatives in the General Assembly.

Functions and Powers

Article 10

The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.

Article 11

1. The General Assembly may consider the general principles of co-operation in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments, and may make recommendations with regard
to such principles to the Members or to the Security Council or to both.
2. The General Assembly may discuss any questions relating to the maintenance of inter-national peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member of the United Nations in accordance with Article 35, paragraph 2, and, except as provided in Article 12, may make recommendations with regard to any such questions to the state or states concerned or to the Security Council or to both. Any such question on which action is necessary shall be referred to the Security Council by the General Assembly either before or after discussion.
3. The General Assembly may call the attention of the Security Council to situations 'which are likely to endanger international peace and security.
4. The powers of the General Assembly set forth in this Article shall not limit the general scope of Article 10.

Article 12

1. While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.
2. The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council and shall similarly notify the General Assembly, or the Members of the United Nations il the General Assembly is not in session, immediately the Security Council ceases to deal with such matters.

Article 13

1. The General Assembly shall initiate studies and make recommendations for the purpose of:
   a. promoting international co-operation in the political field and encouraging the progressive development of international law and its codification;
   b. promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

2. The further responsibilities, functions and powers of the General Assembly with respect to matters mentioned in paragraph 1(b) above are set forth in Chapters IX and X.

Article 14

Subject to the provisions of Article 12, the General Assembly may recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations.

Article 15

1. The General Assembly shall receive and consider annual and special reports from the Security Council; these reports shall include an account of the measures that the Security Council has decided upon or taken to maintain international peace and security.

2. The General Assembly shall receive and consider reports from the other organs of the United Nations.

Article 16

The General Assembly shall perform such functions with respect to the international trusteeship system as are assigned to it under Chapters XII and XIII, including the approval of the trusteeship agreements for areas not designated as strategic.

Article 17

1. The General Assembly shall consider and approve the budget of the Organization.

2. The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly.

3. The General Assembly shall consider and approve any financial and budgetary arrangements with specialized agencies referred to in Article 57 and shall examine the administrative budgets of such specialized agencies with a view to making recommendations to the agencies concerned.

Voting

Article 18

1. Each member of the General Assembly shall have one vote.

2. Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. These questions shall include: recommendations with respect to the maintenance of international peace and security, the election of the non-permanent members of the Security Council, the election of the members of the Economic and Social Council, the election of members of the Trusteeship Council in accordance with paragraph 1(c) of Article 86, the admission of new Members to the United Nations, the suspension of the rights and privileges of membership, the expulsion of Members, questions relating to the operation of the trusteeship system, and budgetary questions. 3. Decisions on other questions, including the determination of additional categories of questions to be decided by a two-thirds majority, shall be made by a majority of the members present and voting.

Article 19

A Member of the United Nations which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The General Assembly may, nevertheless, permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member.

Procedure

Article 20

The General Assembly shall meet in regular annual sessions and in such special sessions as occasion may require. Special sessions shall be convoked by the Secretary-General at the request of the Security Council or of a majority of the Members of the United Nations.

Article 21

The General Assembly shall adopt its own rules of procedure. It shall elect its President for each session.

Article 22

The General Assembly may establish such subsidiary as it deems necessary for the performance of its functions.

CHAPTER V
THE SECURITY COUNCIL

Composition

Article 23

1. The Security Council shall consist of fifteen Members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council. The General Assembly shall elect ten other Members of the United Nations to be non-permanent members of the Security Council, due regard being specially paid, in the first instance to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution.

2. The non-permanent members of the Security Council shall be elected for a term of two years. In the first election of the non-permanent members after the increase of the membership of the Security Council from eleven to fifteen, two of the four additional members shall be chosen for a term of one #year. A retiring member shall not be eligible for immediate re-election.

3. Each member of the Security Council shall have one representative.

Functions and Powers

Article 24

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United

Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.

3. The Security Council shall submit annual and, when necessary, special reports to the General Assembly for its consideration.

Article 25

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

Article 26

In order to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources, the Security Council shall be responsible for formulating, with the assistance of the Military Staff Committee referred to in Article 47, plans to be submitted to the Members of the United Nations for the establishment of a system for the regulation of armaments.

Voting

Article 27

1. Each member of the Security Council shall have one vote.

2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.

3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

Procedure

Article 28

1. The Security Council shall be so organized as to be able to function continuously. Each member of the Security Council shall for this purpose be represented at all times at the seat of the Organization.

2. The Security Council shall hold periodic meetings at which each of its members may, if it so desires, be represented by a member of the government or by some other specially designated representative.

3. The Security Council may hold meetings at such places other than the seat of the Organization as in its judgment will best facilitate its work.

Article 29

The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions.

Article 30

The Security Council shall adopt its own rules of procedure, including the method of selecting its President.

Article 31

Any Member of the United Nations which is not a member of the Security Council may participate, without vote, in the discussion of any question brought before the Security Council whenever the latter considers that the interests of that Member are specially affected.

Article 32

Any Member of the United Nations which is not a member of the Security Council or any state which is not a Member of the United Nations, if it is a party to a dispute under consideration by the Security Council, shall be invited to participate, without vote, in the discussion relating to the dispute. The Security Council shall lay down such conditions as it deems just for the participation of a state which is not a Member of the United Nations.

CHAPTER VI
PACIFIC SETTLEMENT OF DISPUTES

Article 33

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, report to regional agencies or arrangements, or other peaceful
means of their own choice.

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

Article 34

The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.

Article 35

1. Any Member of the United Nations may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly.

2. A state which is not a Member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter.

3. The proceedings of the General Assembly in respect of matters brought to its attention under this Article will be subject to

the provisions of Articles 11 and 12.

Article 36

1. The Security Council may, at any stage of a dispute of the nature referred to in Article 33 or of a situation of like nature, recommend appropriate procedures or methods of adjustment.

2. The Security Council should take into consideration any procedures for the settlement of the dispute which have already been adopted by the parties.

3. In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

Article 37

1. Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.

2. If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.

Article 38

Without prejudice to the provisions of Articles 33 to 37, the Security Council may, if all the parties to any dispute so request, make recommendations to the parties with a view to a pacific settlement of the dispute.

CHAPTER VII
ACTION WITH RESPECT TO THREATS TO THE PEACE, BREACHES OF THE PEACE, AND ACTS OF AGGRESSION

Article 39

The Security Council shall determine the existence of and threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 40

In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with much provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call Upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Article 43

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

Article 44

When the Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide armed forces in fulfillment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces.

Article 45

In order to enable the United Nations to take urgent military measures, Members shall hold immediately available national air-force contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action shall be determined, within the limits laid down in the special agreement or agreements referred to in Article 43, by the Security Council with the assistance of the Military Staff Committee.

Article 46

Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee.

Article 47

1. There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.

2. The Military Staff Committee shall consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives. Any Member of the United Nations not permanently represented on the Committee shall be invited by the Committee to be associated with it when the efficient discharge of the Committee's responsibilities requires the participation of that Member in its work.

3. The Military Staff Committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council. Questions relating to the command of such forces shall be worked out subsequently.

4. The Military Staff Committee, with the authorization of the Security Council and after consultation with appropriate regional Agencies may establish regional sub-committees.

Article 48

1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.

2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

Article 49

The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

Article 50

If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.

Article 51

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

CHAPTER VIII
REGIONAL ARRANGEMENTS

Article 52

1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace nd security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

2. The Members of the United Nations entering into such arrangements Or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.

3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.

4. This Article in no way impairs the application of Articles 34 and 35.

Article 53

1. The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for Pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.

2. The term enemy state as used in paragraph 1 of this Article applies to any state which during the Second World War has been an enemy of any signatory of the present Charter.

Article 54

The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.

CHAPTER IX
INTERNATIONAL ECONOMIC AND SOCIAL CO-OPERATION

Article 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress' and development;

b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56

All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

Article 57

1. The various specialized agencies, established by intergovernmental agreement and having wide international responsibilities, as defined in their basic instruments, in economic, social, cultural, educational, health, and related fields, shall be brought into relationship with the United Nations in accordance with the provisions of Article 63.

2. Such agencies thus brought into relationship with the United Nations are hereinafter referred to as specialized agencies.

Article 58

The Organization shall make recommendations for the coordination of the policies and activities of the specialized agencies.

Article 59

The Organization shall, where appropriate, initiate negotiations among the states concerned for the creation of any new specialized agencies required for the accomplishment of the purposes set forth in Article 55.

Article 60

Responsibility for the discharge of the functions of the Organization set forth in this Chapter shall be vested in the General Assembly and, under the authority of the General Assembly, in the Economic and Social Council, which shall have for this purpose the powers set forth in Chapter X.

CHAPTER X
THE ECONOMIC AND SOCIAL COUNCIL

Composition

Article 61

1. The Economic and Social Council shall consist of fifty-four Members of the United Nations elected by the General Assembly.

2. Subject to the provisions of paragraph 3, eighteen members of the Economic and Social Council shall be elected each year for a term of three years. A retiring member shall be eligible for immediate re-election.

3. At the first election after the increase in the membership of the Economic and Social Council from twenty-seven to fifty four members, in addition to the members elected in place of the nine members whose term of office expires at the end of that year, twenty-seven additional members shall be elected. Of these twenty-seven additional members, the term of office of nine members so elected shall expire at the end of one year, and of nine other members at the end of two years, in accordance with arrangements made by the General Assembly.

4. Each member of the Economic and Social Council shall have one representative.

Functions and Powers

Article 62

1. The Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters to the General Assembly, to the Members of the United Nations, and to the specialized agencies concerned.

2. It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.

3. It may prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence.

4. It may call, in accordance with the rules prescribed by the United Nations, international conferences on matters falling within its competence.

Article 63

1. The Economic and Social Council may enter into agreements with any of the agencies referred to in Article 57, defining the terms on which the agency concerned shall be brought into relationship with the United Nations. Such agreements shall be subject to approval by the General Assembly.

2. It may coordinate the activities of the specialized agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the Members of the United Nations.

Article 64

1. The Economic and Social Council may take appropriate steps to obtain regular reports from the specialized agencies. It may

make arrangements with the Members of the United Nations and with the specialized agencies to obtain reports on the steps taken to give effect to its own recommendations and to recommendations on matters falling within competence made by the General Assembly.

2. It may communicate its observations on these reports to the General Assembly.

Article 65

The Economic and Social Council may furnish information to the Security Council and shall assist the Security Council upon its request.

Article 66

1. The Economic and Social Council shall perform such functions as fall within its competence in connection with the carrying out of the recommendations of the General Assembly.

2. It may, with the approval of the General Assembly, perform services at the request of Members of the United Nations and at the request of specialized agencies.

3. It shall perform such other functions as are specified elsewhere in the present Charter or as may be assigned to it by the General Assembly.

Voting

Article 67

1. Each member of the Economic and Social Council shall have one vote.

2. Decisions of the Economic and Social Council shall be made by a majority of the members present and voting.

Procedure

Article 68

The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions.

Article 69

The Economic and Social Council shall invite any Member of the United Nations to participate, without vote, in its deliberations on any matter of particular concern to that Member.

Article 70

The Economic and Social Council may make arrangements for representatives of the specialized agencies to participate, without vote, in its deliberations and in those of the commissions established by it, and for its representatives to participate in the deliberations of the specialized agencies.

Article 71

The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.

Article 72

1. The Economic and Social Council shall adopt its own rules of procedure, including the method of selecting its President.

2. The Economic and Social Council shall meet as required in accordance with its rules, which shall include provision for the convening of meetings on the request of a majority of its members.

CHAPTER XI
DECLARATION REGARDING NON-SELF-GOVERNING TERRITORIES

Article 73

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;

b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;

c. to further international peace and security;

d. to promote constructive measures of development, to encourage research, and to co-operate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article; and

e. to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.

Article 74

Members of the United Nations also agree that their policy in respect of the territories to which this Chapter applies, no less than in respect of their metropolitan areas, must be based on the general principle of good-neighborliness, due account being taken of the interests and well-being of the rest of the world, in social, economic, and commercial matters.

CHAPTER XII
INTERNATIONAL TRUSTEESHIP SYSTEM

Article 75

The United Nations shall establish under its authority an international trusteeship system for the administration and supervision of such territories as may be placed there under by subsequent individual agreements. These territories are herein after referred to as trust territories.

Article 76

The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:

a. to further international peace and security;

b. to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;

c. to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; and

d. to ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice, without prejudice to the attainment of the foregoing objectives and subject to the provisions of Article 80.

Article 77

1. The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements:

a. territories now held under mandate;

b. territories which may be detached from enemy states as a result of the Second World War; and

c. territories voluntarily placed under the system by states responsible for their Administration.

2. It will be a matter for subsequent agreement as to which territories in the foregoing categories will be brought under the trusteeship system and upon what terms.

Article 78

The trusteeship system shall not apply to territories which have become Members of the United Nations, relationship among which shall be based on respect for the principle of sovereign equality.

Article 79

The terms of trusteeship for each territory to be placed under the trusteeship system, including any alteration or amendment, shall be agreed upon by the states directly concerned # including the mandatory power in the case of territories held under mandate by a Member of the United Nations, and shall be approved as provided for in Articles 83 and 85.

Article 80

1. Except as may be agreed upon in individual trusteeship agreements, made under Articles 77, 79, and 81, placing each territory under the trusteeship system, and until such agreements have been concluded, nothing in this Chapter shall be construed in or of itself to alter in any manner the rights whatsoever of any states or any peoples or the terms of existing international instruments to which Members of the United Nations may respectively be parties.

2. Paragraph I of this Article shall not be interpreted as giving grounds for delay or postponement of the negotiation and conclusion of agreements for placing mandated and
other territories under the trusteeship system as provided for in Article 77.

Article 81

The trusteeship agreement shall in each case include the terms under which the trust territory will be administered and designate the authority which will exercise the administration of the trust territory. Such authority, hereinafter called the administering authority, may be one or more states or the Organization itself.

Article 82

There may be designated, in any trusteeship agreement, a strategic area or areas which may include part or all of the trust territory to which the agreement applies, without prejudice to any special agreement or agreements made under Article 43.

Article 83

1. All functions of the United Nations relating to strategic areas, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the Security Council.

2. The basic objectives set forth in Article 76 shall be applicable to the people of each strategic area.

3. The Security Council shall, subject to the provisions of the trusteeship agreements and without prejudice to security considerations, avail itself of the assistance of the Trusteeship Council to perform those functions of the United Nations under the trustee-ship system relating to political, economic, social, and educational matters in the strategic areas.

Article 84

It shall be the duty of the administering authority to ensure that the trust territory shall play its part in the maintenance of international peace and security. To this end the administering authority may make use of volunteer forces, facilities, and assistance from the trust territory in carrying out the Obligation towards the Security Council undertaken in this regard by the administering authority, as well as for local defence and the maintenance of law and order within the trust territory.

Article 85

1. The functions of the United Nations with regard to trusteeship agreements for all areas not designated as strategic, including the approval of the terms of the trusteeship agreements and of their alteration or amendment shall be exercised by the General Assembly.

2. The Trusteeship Council, operating under the authority of the General Assembly, shall assist the General Assembly in carrying out these functions.

CHAPTER XIII
THE TRUSTEESHIP COUNCIL

Composition

Article 86

1. The Trusteeship Council shall consist of the following Members of the United Nations:
   a. those Members administering trust territories;
   b. such of those Members mentioned by name in Article 23 as are not administering trust territories; and
   c. as many other Members elected for three-year terms by the General Assembly as may be necessary to ensure that the total number of members of the Trusteeship Council is equally divided between those Members of the United Nations which administer trust territories and those which do not.

2. Each member of the Trusteeship Council shall designate one specially qualified per-son to represent it therein.

Functions and Powers

Article 87

The General Assembly and, under its authority, the Trusteeship Council, in carrying out their functions, may:
   a. consider reports submitted by the administering authority;
   b. accept petitions and examine them in consultation with the administering authority;
   c. provide for periodic visits to the respective trust territories at times agreed upon with the administering authority; and
   d. take these and other actions in conformity with the terms of the trusteeship agreements.

Article 88

The Trusteeship Council shall formulate a questionnaire on the political, economic, social, and educational advancement of the inhabitants of each trust territory, and the administering authority for each trust territory within the competence of the General Assembly shall make an annual report to the General Assembly upon the basis of such questionnaire.

Voting

Article 89

1. Each member of the Trusteeship Council shall have one vote.
2. Decisions of the Trusteeship Council shall be made by a majority of the members present and voting.

Procedure

Article 90

1. The Trusteeship Council shall adopt its own rules of procedure, including the method of selecting its President.
2. The Trusteeship Council shall meet as required in accordance with its rules, which shall include provision for the convening of meetings on the request of a majority of its members.

Article 91

The Trusteeship Council shall, when appropriate, avail itself of the assistance of the Economic and Social Council and of the specialized agencies in regard to matters with which they are respectively concerned.

CHAPTER XIV
THE INTERNATIONAL COURT OF JUSTICE

Article 92

The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.

Article 93

1. All Members of the United Nations are ipso facio parties to the Statute of the International Court of Justice.
2. A state which is not a Member of the United Nations may become a party to the Statute of the International Court of Justice on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council.

Article 94

1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

Article 95

Nothing in the present Charter shall prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future.

Article 96

1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

CHAPTER XV
THE SECRETARIAT

Article 97

The Secretariat shall comprise a Secretary General and such staff as the Organization may require. The Secretary-General shall be appointed by the General Assembly upon the recommendation of the Security Council. He shall be the chief administrative officer of The Organization.

Article 98

The Secretary-General shall act in that capacity in all meetings of the General Assembly, of the Security Council, of the Economic and Social Council, and of the Trusteeship Council, and shall perform such other functions as are entrusted to him by these organs. The Secretary-General shall make an annual report to the General Assembly on the work of the Organization.

Article 99

The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.

Article 100

1. In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.

2. Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities.

Article 101

1. The staff shall be appointed by the Secretary-General under regulations established by the General Assembly.

2. Appropriate staffs shall be permanently assigned to the Economic and Social Council, the Trusteeship Council, and, as required, to other organs of the United Nations. These staffs shall form a part of the Secretariat.

3. The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

CHAPTER XVI
MISCELLANEOUS PROVISIONS

Article 102

1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.

Article 103

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Chatter shall prevail.

Article 104

The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.

Article 105

1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the

fulfillment of its purposes.

2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization.

3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose.

CHAPTER XVII
TRANSITIONAL SECURITY ARRANGEMENTS

Article 106

Pending the coming into force of such special agreements referred to in Article 43 as in the opinion of the Security Council enable it to begin the exercise of its responsibilities under Article 42, the parties to the Four Nation Declaration, signed at Moscow, 30 October 1943, and France, shall, in accordance with the provisions of paragraph 5 of that Declaration, consult with one another and as occasion requires with other Members of the United Nations with a view to such joint action on behalf of the Organization as may be necessary for the purpose of maintaining international peace and security.

Article 107

Nothing in the present Charter shall in-validate or preclude action, in relation tc any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action.

END OF UN CHARTER

TAB Z
NON-COMBATANT EVACUATION OPERATIONS (NEO)

References

DoD Directive 3025.14 of Nov. 5, 1990 (NEOs).
DoD Dir 2000.11 of 3 March 72 (Handling Requests for Political Asylum and Temporary Refuge).
Executive Order No. 12656 (Assignment of Emergency Preparedness Responsibilities), 3 C.F.R. 585 ('88 Compilation) 18 Nov 88.
Executive Order 11850, 3 C.F.R. 980 ('71-75 Compilation) 8 Apr 75, *reprinted in* FM 27-10 at C.1 p. 2 (56).
Vienna Convention on Diplomatic Relations, *open for signature* Apr. 8, 1961, 23 U.S.T. 3227, T.I.A.S. 7502, 500 U.N.T.S. 95.
DoD Directive 5515.8 of June 9, 1990 (Single-Service Assignment of Responsibility for Processing of Claims).
FMFM 8-1 (Special Operations) [See Chapter 7] 13 Aug 74.
MAJ Day, Legal Considerations in NEOs, 40 Naval L. Rev. 45, 1992.
Sec. 1013, JAGINST 5800.7c, JAGMAN, 3 Oct 90.
FM 90-29 (DRAG version) Non Combatant Operations, 20 May 1994.

NATURE AND CHARACTERISTICS OF NEOs

NEOs are operations directed by the Dep't of State, the Department of Defense, or other appropriate authority whereby noncombatants are evacuated from areas of danger overseas to safe havens or to the United States.

Recent examples:
Rwanda: (Distant Runner): 230 civilians.
Liberia: 60 civilians
Somalia (Eastern Exit): 300 civilians, US & Soviet Ambassadors extracted.

COMMAND AND CONTROL

Executive Order 12656.

Assigns primary responsibility for safety of U.S. citizens abroad to the Secretary of State.
- Department of State establishes and chairs the "Washington Liaison Group" (WLG) to oversee NEOs.
- WLG membership consists of representatives from various government agencies. (DOS, DOD, CIA, DIA, DOT, DHHS).
- Function of WLG is to ensure national-level coordination of government agencies in effecting a NEO.
- WLG also serves as coordinator with Regional Liaison Groups (RLG's).

Chief of Diplomatic Mission or principal officer of the Department of State is the lead official in threat area responsible for the evacuation of all U.S. noncombatants.
- Chiefs of Mission will give order for the evacuation of civilian noncombatants, except for Defense Attache System personnel and DIA personnel.
- Evacuation order of military personnel is given by CINC, but in reality the call is made by the Chief of Mission.
- Chief of Mission is responsible for drafting evacuation plan. (Usually done by RSO).

Secretary of Defense plays a supporting role in planning for the protection, evacuation and repatriation of U.S. citizens in threat areas.
- Within Department of Defense responsibility for NEO assigned under DOD Directive 3025.14, dtd 5 November 1990.
- DOD assigns members from service components and JCS to WLG.
- Department of the Army is executive agent for the repatriation of civilians following the evacuation. Accomplished through establishment of Joint Reception Center (JRC)/Repatriation Processing Center.

CINCs.
- Prepare and maintain plans for the evacuation of noncombatants from their respective AOs.
- Planning accomplished through liaison and cooperation with the Chiefs of Mission.
- Assist in preparing local evacuation plan.

LEGAL ISSUES INVOLVED IN NEOs

International Law

Use of Force
- Because it violates the territorial sovereignty of a nation, there is no consensus on the legal basis to use armed forces for this purpose.
  - **Custom and Practice of Nations** (pre 1949) clearly allowed NEOs.
  - **U.N. Charter**
    Article 2(4): No agreement on interpretation of ". . . threat or use of force against the territorial integrity or political independence of any state . . ."
    Article 51: No consensus on U.S. position that "inherent right" of self-defense includes customary pre-charter practice of intervention to protect citizens.

Sovereignty Issues

Violations of territorial integrity.
- Extent of territorial seas.
  - Rights of innocent passage.
  - Innocent passage poses no threat to territorial integrity. Air space, however, is inviolable--there is no right of innocent passage for aircraft. Only "transit" passage allows overflight over international straights.
- Rights and duties of neutral states.
- May render safe-haven without violating neutrality.
- Status of State Property on Foreign Soil.

Status of Personnel

- Captured Combatants
  - Treatment derives from Articles 2, 3,& 4 of the Third Geneva Convention.
  - U.S. policy is to treat all captured personnel as prisoners of war.
- Civilians seeking refuge. Temporary Refuge v. Asylum.
  U.S. Policy: DOD Directive 2000.11 dtd March 3, 1972 sets out procedures for:
  - Asylum/Temporary Refuge
    Immigration and Naturalization Service, Department of Justice is lead agency for granting asylum requests.
  - General policy:
    If applicant makes request at unit or installation located <u>within</u> territorial jurisdiction of a foreign country (to include territorial waters), then:
    Asylum may <u>not</u> be granted, but request is forwarded via immediate message to ASD (International Security Affairs) and applicant referred to appropriate diplomatic mission.
  - Temporary refuge will be granted (if requestor is in imminent danger), ASD (ISA) informed, and applicant will <u>not</u> be surrendered without Service Secretary approval.
  - If applicant makes request at unit, installation, or vessel in U.S. territorial waters or on the high seas, then:
    Applicant "received" and request for asylum forwarded to DoJ.
  - Do not surrender applicant to foreign power without higher headquarters approval (MilDep level).

Law of War Considerations

- Weapons and Targets.
  - Rule of Thumb: follow targeting guidance of Hague Regulations, Geneva Conventions, and 1977 Protocols REGARDLESS of whether NEO is "international armed conflict."

- Tactics.
  EO 11850 (RCA) only applies in armed conflict, but will probably use it in NEOs. Get clarification whether RCA is a method of warfare under 1993 Chemical Weapons Convention.

- Drafting ROE.
  - If possible, coordinate with Marine Security Guard Force, Host Nation Security, and Embassy Security.
  - Ensure right of self-defense is addressed adequately.

Search Issues

Search of Evacuee's Luggage and Person.
Baggage will be kept to a minimum and civilians will not be allowed to retain weapons.
Diplomatic Personnel. (Vienna Convention on Diplomatic Relations).
- Person and personal luggage are inviolable <u>if the Diplomat is accredited to the US</u> (which would be rare in a NEO). Even if they were accredited, luggage may be inspected if "serious grounds" exist to suspect that luggage is misused.
- "Accredited" diplomatic bag retains absolute inviolability.
- Force protection is paramount -- if diplomat refuses to be searched, CDR may refuse transportation (absent Chief of Mission override).

TAB AA
COMBATTING TERRORISM

a. Force Security/Terrorism Counteraction.[1]

When US forces deploy overseas, the HN has the ultimate responsibility to provide for their safety.[2] However, the CDR retains responsibility for the safety and security of US personnel and property. Consequently, when US forces deploy on an exercise, regardless of the exercise location, predeployment planning must include both discussion of the terrorist threat and extensive force security preparation.

Generally, SOFAs or other stationing arrangements grant US forces the authority to take those measures necessary to ensure the security of US installations and personnel.[3] Under such a provision, US forces may react immediately to any terrorist incident and need not await the action of HN authorities. If there exists no such agreement, US forces may still react immediately, under the principle of self-defense. In either instance, however, the CDR must cooperate with HN authorities. Stationing agreements also recognize the CDR's authority to patrol off the installation; however, this authority is limited.

As a member of the Crisis Management Team, the JA must provide essentially the same kind of legal advice to the CDR of a force deployed overseas as he would provide in the event of a terrorist incident occurring at a CONUS installation. The unit must be prepared to defend itself, and legal questions, such as limitations, if any, on the use of force, and on the use of deadly force, as well as the question of who may exercise jurisdiction over a particular incident, are issues that must be addressed prior to deployment.

b. Rules of Engagement.

The CDR of a deployed unit, in addition to providing for force security and terrorism counteraction, must ensure that the soldiers are operating under clear, concise rules of engagement, regardless of the deployment location. Soldiers must be aware of their right to defend themselves, even while participating in a peacetime exercise. They must also be aware, however, of any restraints on the use of force.

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[1] See generally Dep't of Army, Reg. No. 525-13, The Army Terrorism Counteraction Program (4 Jan. 1988); and Dep't of Army, Training Circular No. 19-16, Countering Terrorism on U.S. Army Installations (25 Apr. 1983).

[2] This basic principle of international law is recognized in NATO SOFA, Article VII(11), which states:

> Each Contracting Party shall seek such legislation as it deems necessary to ensure the adequate security and protection within its territory of installations, equipment, property, records, and official information of other Contracting Parties, and the punishment of persons who may contravene laws enacted for that purpose.

When U.S. forces deployed to Morocco on AFERDOU Exercise 87, a provision of the MOU with the FAR stated:

> The protection of the facilities provided for the accommodation of United States forces from external threat shall be the responsibility of the Kingdom of Morocco. The United States will be responsible for the internal security of the facilities and operations under its control during training.

[3] See generally NATO SOFA, Art. VII(10) and the German Supplementary Agreement, Art. 53(1); the Korean SOFA, Arts. III(1) and XXII(10); and the Japanese SOFA, Arts. III(1) and XVII(10). The 1987 U.S.-Honduran Protocol dealing with the exercise of criminal jurisdiction over U.S. forces in Honduras is typical. It states:

> United States military police may take all appropriate measures with respect to United States personnel necessary to ensure the maintenance and security on Honduran military facilities to which such personnel have been granted access.

Article 12A of Protocol I to the Military Assistance Agreement of May 20, 1954, Concerning the Exercise of Criminal Jurisdiction over U.S. Personnel Present in Honduras. Signed May 20, 1985; entered into force April 8, 1987 [hereinafter Protocol].

TERRORISM

I. REFERENCES

A. Army Reg. 525-13, the Army Terrorism Counteraction Program (4 January 1988).

B. DOD DIR. 2000.12, Protection of DOD Personnel and Resources Against Terrorist Acts (16 July 1986).

C. Army Reg 500-50, Emergency Employment of Army and Other Resources- Civil Disturbances (21 Apr. 1972).

D. Army Reg 500-51, Support to Civilian Law Enforcement (1 July 1983).

E. DOD DIR. 3025.12, Employment of Military Resources in the Event of Civil Disturbances (19 Aug. 1971).

F. Memorandum of Understanding Bewteen the Department of Defense, the Department of Justice, and the Federal Bureau of Investigation on Use of Federal Military Force in Domestic Terrorist Incidents (5 Aug. 1983).

G. Training Circular 19-16, Countering Terrorism in U.S. Army Installations (25 Apr. 1983).

H. FM 100-37, Terrorism Counteraction (July 1987).

I. U.S. State Department- Patterns of Global Terrorism 1988 (March 1989).

J. SECNAVINST 3300.2, Combatting Terrorism Program, 9 Jan 92.

K. FMFM 7-14, Combatting Terrorism, 5 Oct 90.

II. INTRODUCTION

A. Terrorist violence v. legitimate use of force - "one man's terrorist is another man's freedom fighter."

1. State action v. individual action.

2. Nexus between target and grievance.

3. Democratic opportunity for remedying the grievance.

B. Law of war.

1. Low intensity conflict.

2. Insurgency.

III. DEFINITIONS

A. Terrorism.

1. The unlawful use or threatened use of force or violence against individuals or property for coercing or intimidating governments or societies and often for achieving political, religious or ideological objectives. (DOD DIR. 2000.12).

2. The calculated use of violence or the threat of violence to attain goals, political, religious or ideological in nature. This is done through intimidation, coercion or instilling fear. Terrorism involves a criminal act that is often symbolic in nature and intended to influence an audiance beyond the immediate victims. (AR 525-13).

3. Premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine state agents, usually intended to influence an audiance. International terrorism is terrorism involving the citizens or territory of more than one country. (State Department Patterns of Global Terrorism- 1988).

B. Essential feature of terrorism is the severing of the link between the target of violence and the reason for the violence.

IV. AUTHORITY AND JURISDICTION

A. The most critical aspect of defining authority during an incident is identifying the incident as a terrorist action.

1. Terrorist incident- A distinct criminal act committed or threatened to be committed by a group or single individual in order to advance a political objective and greatly endangering safety or property. (DOD DIR. 3025.12).

a. Purpetrators are known through intelligence sources as terrorists.

b. Political ideology is expressed through slogans or papers.

c. Group is issuing special demands or expressing grievances relating to a terrorist group or philosophy.

d. Individuals are using military type uniforms or armaments.

B. Overall authority.

1. Lead agency concept.

a. Department of Justice- Domestic terrorist incident.

b. Department of State- OCONUS incidents.

c. Federal Aviation Administration Terrorist incidents aboard Aircraft in flight.

2. Jurisdiction is non-exlusive.

V. AUTHORITY OF THE INSTALLATION COMMANDER

A. Authority and responsibility to maintain good order and security on the installation.

1. Includes the initial response to an on-post terrorist incident.

B. Supreme Court has affirmed this inherent authority.

1. Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961).
"The authority of the commanding officer is commensurate with his responsibilty, subject to the limitations prescribed by law." 367 U.S. at 891.

2. Greer v. Spock, 424 U.S. 828 (1976).
"There is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command." 424 U.S. at 840.

VI. CONUS ON-POST INCIDENTS

A. Installation commanders will provide the initial and immediate response to any incidents ocurring on military installations. Contingency plans will address the use of force to isolate, contain and neutralize a terrorist incident within the capability of installation resources. (AR 525-13, para 5-1)

1. If a terrorist incident, the FBI will be notified immediatley and will assume jurisdiction if it is determined that such an incident is of significant federal interest. The determination is made by the special agent in charge. (SAC).

2. If the FBI assumes jurisdiction the Attorney General will assume primary responsibility for co-ordinating the federal law enforcement response.

3. If the FBI declines jurisdiction the military will take action to resolve the incident.

4. In all cases the command of the U.S. Army element will remain within military channels.

B. Reporting.

1. All terrorist incidents will be immediately reported telephonically to the Army Operations Center. (AOC).

2. Serious incident reports (SIR) involving terrorism will be reported IAW AR 190-46.

3. Terrorist Incident Reports (TIR) and Terrorist Threat Reports (TTR), to be prepared and submitted per AR 525-13.

C. Public Affairs

1. Installation Pubic Affairs Officer (PAO) is the initial release authority for a disturbance happening on post. Unitl the act is determined to be a terrorist incident the PAO will treat the disturbance as a

criminal incident.

2. Once the incident has been determined to be an act of terrorism and until another federal agency assumes overall responsibility POAs will act IAW AR 525-13 and AR 360-5, ch 3.

3. Except for cases involving public safety no public release of information regarding a terrorist incident may be made without approval of the Office of the Assistant Secretary of Defense for Public Affairs. (OASD(PA)).

VII. CONUS OFF-POST INCIDENTS

A. Use of Army personnel for civilian law enforcement purposes is generally prohibited.

1. Posse Comitatus Act.

B. Domestic terrorist incidents are treated as a form of civil distrubance.

1. Use of military troops to quell civil disturbance is predicated on specific approval by the preseident. 10 U.S.C. 331-334.

2. Decision to use military forces off post to respond to a terrorist incident will seldom, if ever, be answered at the local on installation level.

C. Military assistance

1. Army is authorized to loan equipment to civil authorities.

2. DOD Dir. 5525.5 and the implementing Army Regulation 500-51 establish uniform policies and procedures for providing support to federal state and local law enforcement officials.

VIII. RESPONSIBILITY FOR TERRORISM COUNTERATION OVERSEAS.

A. Department of State is the lead U.S. agency in countering terrorism directed against U.S. personnel and assets overseas. Actions by U.S. forces must therefore be coordinated with the head of the U.S. diplomatic mission.

B. Ultimate responsibility for terrorism counteraction overseas lies with the host nation as sovereign authority. This is implicitly recognized in status of forces agreements. See, e.g., NATO SOFA, art. VII(11).

1. U.S. forces may provide personnel and equipment to assist host nation authorities with the approval of the U.S. diplomatic mission.

2. Local agreements may be negotiated with host nations authorities to provide guidance on requets for mutual support and other considerations relative to terrorist incidents.

3. In the event U.S. forces are provided to assist local authorities, operational control will remain with the U.S. commander.

C. Nevertheless, the U.S. commander retains responsibility for the safety and security of personnel and property on the U.S. installation overseas.

1. The commander's antiterrorism and counterterrorism responsibilites are essentially the same as those of an installation commander in CONUS. (TC 19-16, page 8-5)

2. In the event of a terrorist incident the commander must notify both the host nation and the U.S. diplomatic mission.

3. The response to a terrorist incident on the overseas installation is normally a cooperative effort between the U.S. commander and the host nation authorities.

GLOSSARY

AAA	Army Audit Agency
AATF	Air Assault Task Force
ABCA	Australian, British, Canadian, American
ABN	Airborne
AC	Active Component
ACA	Airspace Control Authority
ACofS	Assistant Chief of Staff
ACMR	Army Court of Military Review
ACR	Armored Cavalry Regiment
ADA	Air Defense Artillery
ADC-M	Ass't Division Commander-Maneuver
ADC-S	Ass't Division Commander-Support
ADCON	Administrative Control
ADP	Automated Data Processing
ADT	Active Duty for Training
AF	Air Force
AFARS	Army Federal Acquisition Regulation Supplement
AG	Adjutant General
AID	Agency for International Development
AJAG	Assistant Judge Advocate General
ALO	Air Liaison Officer
ALOC	Air Lines of Communication
AMC	At My Command
ANGLICO	Air & Naval Gunfire Liaison Company
AO	Area of Operations
AOR	Area of Responsibility
APC	Armored Personnel Carrier
AR	Army Regulation
ARFOR	Army Forces
ARNG	Army National Guard
ARRC	Allied Rapid Reaction Corps
ARSOC	Army Special Operations Command
ARSOF	Army Special Operations Forces
ARTEP	Army Training and Evaluation Program
ASAP	As Soon As Possible
ASG	Area Support Group
ASIC	All Source Intelligence Center
ASP	Ammunition Supply Point
AT	Antiterrorism
AT	Antitank
ATC	Air Traffic Control
ATF	Alcohol, Tobacco, & Firearms
AVN	Aviation
AWACS	Airborne Warning and Control System
AWOL	Absent Without Leave
BCOC	Base Cluster Operations Center
BCTP	Battle Command Training Program
BDE	Brigade
BDOC	Base Defense Operations Center
BDU	Battle Dress uniform
BN	Battalion
BOMREP	Bombing Report
BSB	Base Support Battalion
BOS	Battlefield Operating Systems
BPS	Basic PSYOP Study
C2	Command & Control
C2I	Command, Control, & Intelligence
C3	Command, Control, & Communications
C3I	Command, Control, Communications, & Intelligence
C4	Command, Control, Communications, & Computers
CA	Civil Affairs
CAG	Civil Affairs Group
CALL	Center for Army Lessons Learned
CARE	Cooperative for Assistance & Relief Everywhere
CAS	Close Air Support
CAV	Cavalry
CCIR	Commander's Critical Information Requirements
CCP	Civilian Collection Point

CCT	Combat Control Team
CD	Counterdrug
CDC	Center for Disease Control
CDS	Container Delivery System
CE	Corps of Engineers
CENTCOM	Central Command
CEP	Circular Error Probable
CFA	Covering Force Area
CFL	Coordinated Fire Line
CFZ	Critical Friendly Zone
CG	Commanding General
CGSC	Command & General Staff College
CI	Civilian Internee
CIA	Central Intelligence Agency
CID	Criminal Investigation Division
CIF	Central Issue Facility
CIMIC	Civil-Military Cooperation
CINC	Commander in Chief
CJA	Command Judge Advocate
CJCS	Chairman, Joint Chiefs of Staff
CMCA	Court-Martial Convening Authority
CMO	Civil-Military Operations
CMOC	Civil-Military Operations Center
CO	Commanding Officer
CO	Conscientious Objector
COA	Course of Action
COCOM	Combatant Command
COMA	Court of Military Appeals
COMMZ	Communications Zone
COMSEC	Communications Security
CONOPS	Continuous Operations
CONPLAN	Concept Plan
CONUS	Continental United States
CONUSA	Continental United States Army
COR	Contracting Officer's Representative
COS	Chief of Station
COSCOM	Corps Support Command
CP	Command Post
CPX	Command Post Exercise
CS	Combat Support
CSB	Combat Support Battalion
CSE	Combat Support Equipment
CSM	Command Sergeant Major
CSR	Controlled Supply Rate
CSS	Combat Service Support
CT	Counterterrorism
CTF	Combined Task Force
CW	Chemical Weapons
CWC	Chemical Weapons Convention
DA	Department of the Army
DACG	Departure Airfield Control Group
DAD	Defense Appellate Division
DAO	Defense Attache Office
DART	Disaster Assistance Response Team
DC	Defense Counsel
DC	Dislocated Civilian
DCM	Deputy Chief of Mission
DCSLOG	Deputy Chief of Staff for Logistics
DCSOPS	Deputy Chief of Staff for Operations and Plans
DCSPER	Deputy Chief of Staff for Personnel
DEA	Drug Enforcement Administration
DFCP	DISCOM Forward Command Post
DIA	Defense Intelligence Agency
DIAM	Defense Intelligence Agency Manual
DISCOM	Division Support Command
DIVARTY	Division Artillery
DLI	Defense Language Institute
DMAIN	Division Main Area
DOC	Division Operations Center
DOC	Department of Commerce
DOD	Department of Defense

DOJ	Department of Justice
DOS	Department of State
DOS	Days of Supply
DOT	Department of Transportation
DRB	Division Ready Brigade
DREAR	Division Rear Area
DRF	Division Ready Force
DS	Direct Support
DSA	Division Support Area
DSJA	Deputy Staff Judge Advocate
DSOC	Division Support Operations Center
DSU	Direct Support Unit
DTG	Date Time Group
DTOC	Division Tactical Operations Center
DX	Direct Exchange
DZ	Drop Zone
EA	Engagement Area
E&E	Evasion & Escape
EAC	Echelons Above Corps
EAD	Echelons Above Division
EBS	Emergency Broadcast System
EDRE	Emergency Deployment Readiness Exercise
EEP	Embassy Evacuation Plan
ENDEX	End of Exercise
EO	Executive Order
EOC	Emergency Operations Center
EOD	Explosive Ordnance Disposal
EPW	Enemy Prisoner of War
EO	Equal Opportunity
EOD	Explosive Ordnance Disposal
ETA	Estimated Time of Arrival
EUCOM	US European Command
EW	Electronic Warfare
FA	Field Artillery
FA	Functional Area
FAA	Federal Aviation Administration
FAA	Forward Assembly Area
FAC	Forward Air Controller
FANS	Friendly/Allied Nation Support
FAO	Food and Agriculture Support
FAR	Federal Acquisition Regulation
FASCAM	Family of Scatterable Mines
FBI	Federal Bureau of Investigation
FBIS	Foreign Broadcast Information Service
FCA	Foreign Claims Act
FCZ	Forward Combat Zone
FDC	Fire Direction Center
FEBA	Forward Edge of the Battle Area
FEMA	Federal Emergency Management Agency
FID	Foreign Internal Defense
FIST	Fire Support Team
FLIR	Forward Looking Infrared
FLOT	Forward Line of Troops
FM	Field Manual
FN	Foreign Nation
FNS	Foreign Nation Support
FOA	Field Operating Agency
FOB	Forward Operating Base
FORSCOM	Forces Command
FSE	Fire Support Element
FSO	Fire Support Officer
FSOP	Field Standing Operating Procedures
FSU	Finance Support Unit
FTX	Field Training Exercise
FYI	For Your Information
G-1 (Division)	Ass't Chief of Staff, Personnel
G-2 (Division)	Ass't Chief of Staff, Intelligence
G-3 (Division)	Ass't Chief of Staff, Operations & Plans
G-4 (Division)	Ass't Chief of Staff, Logistics
G-5 (Division)	Ass't Chief of Staff, Civil Affairs
GAD	Government Appellate Division

GCMCA	General Court-Martial Convening Authority
GJA	Group Judge Advocate
GPS	Global Positioning System
GS	General Support
GSR	General Support Reinforcing
GSR	Ground Surveillence Radar
GSU	General Support Unit
GUARDRAIL	Special Electronic Mission Aircraft
HA	Humanitarian Assistance
HAHO	High Altitude High Opening
HALO	High Altitude Low Opening
H/CA	Humanitarian/Civic Assistance
HD	Heavy Drop
HE	High Explosive
HEAT (round)	High-Explosive Anti-Tank
HEMTT	Heavy Expanded Mobility Tactical Truck
HEP-T	High Explosive Plastic Tracer
HHB	Headquarters & Headquarters Battery
HHC	Headquarters & Headquarters Company
HHT	Headquarters & Headquarters Troop
HET	Heavy Equipment Transporter
HLZ	Helicopter Landing Zone
HMMWV	High-Mobility Multipurpose Wheeled Vehicle
HN	Host Nation
HNS	Host Nation Support
HOC	Humanitarian Operations Center
HPT	High Payoff Target
HQ	Headquarters
HQDA	Headquarters, Department of the Army
HSS	Health Service Support
HUMINT	Human Intelligence
HVT	High Value Target
I&S	Interrogation & Surveillence
IAW	In Accordance With
ICM	Improved Conventional Munitions
ICRC	International Committee of the Red Cross
ID Card	Identification Card
IDAD	Internal Defense and Development
IFF	Identification, Friend or Foe
IFV	Infantry Fighting Vehicle
IG	Inspector General
IMA	Individual Mobilization Augmentee
IMINT	Imagery Intelligence
INS	Immigration & Naturalization Service
IO	Investigating Officer
IPB	Intelligence Preparation of the Battlefield
IPOA	Intelligence Preparation of the Operational Area
IPW	Prisoner of War Interrogation
IR	Information Requirements
ISB	Intermediate Staging Base
ITV	Improved TOW Vehicle
JA	Judge Advocate
JAAP	Joint Airborne Advance Party
JAAT	Joint Air Attack Team
JAGSO	Judge Advocate General Service Organization
JCS	Joint Chiefs of Staff
JESS	Joint Exercise Simulation System
JIB	Joint Information Bureau
JIC	Joint Information Committee
JOPES	Joint Operations Planning System
JP-4	Jet Propulsion Fuel, Type 4
JRTC	Joint Readiness Training Center
JRX	Joint Readiness Exercise
JSAC	Joint State Area Command
JSCP	Joint Strategic Capabilities Plan
JSEAD	Joint Suppression of Enemy Air Defense
JSOC	Joint Special Operations Command
JSPS	Joint Strategic Planning System
JTF	Joint Task Force
KATUSA	Korean Augmentation to the US Army
KIA	Killed In Action

KTO	Kuwait Theater of Operations
LAAWS	Legal Automation Army-Wide System
LAN	Local Area Network
LAW	Light Antitank Weapon
LAPES	Low Altitude Parachute Extraction System
LBE	Load Bearing Equipment
LCE	Load Carrying Equipment
LD/LC	Line of Departure/Line of Contact
LEA	Law Enforcement Authority
LO	Liaison Officer
LOC	Lines of Communication
LOGPAC	Logistics Package
LOGSEC	Logistics Security
LOS	Line of Sight
LP	Listening Post
LRF	Laser Range Finder
LRS	Long Range Surveillance
LRSD	Long Range Surveillance Detachment
LRSU	Long Range Surveillance Unit
LSA	Life Support Area
LSC	Legal Services Command
LSC	Life Support Center
LSO	Legal Support Organization
LTACFIRE	Lightweight Tactical Fire Direction System
LZ	Landing Zone
MA	Mortuary Affairs
MAAG	Military Assistance Advisory Group
MAC	Military Airlift Command
MACOM	Major Army Command
MBA	Main Battle Area
MCA	Military Civic Action
MCC	Movement Control Center
MCM	Manual for Courts-Martial
MCS	Maneuver Control System
MECH	Mechanized
MEDEVAC	Medical Evacuation
MEDLOG	Medical Logistics
MEDRETE	Medical Readiness Training Exercise
METL	Mission Essential Task List
METT-T	Mission, Enemy, Terrain, Troops, Time Available
METT-T-P	METT-T Plus Political Factors
MFT	Mighty Fine Trial
MI	Military Intelligence
MIA	Missing In Action
MILGP	Military Group
MIL-TO-MIL	Military to Military
MJT	Military Judge Team
MLRS	Multiple Launch Rocket System
MMC	Materiel Management Center
MOBEX	Mobility Exercise
MOS	Military Occupational Specialty
MOPP	Mission-Oriented Protective Posture
MOUT	Military Operations on Urbanized Terrain
MP	Military Police
MPI	Military Police Investigations
MRE	Meal, Ready to Eat
MRL	Multiple Rocket Launcher
MSE	Mobile Subscriber Equipment
MSG	Military Support Group
MSR	Main Supply Route
MTF	Medical Treatment Facility
MTOE	Modified Table of Organization & Equipment
MTP	Mission Training Plan
MTT	Mobile Training Team
NAC	North Atlantic Council
NATO	North Atlantic Treaty Organization
NBC	Nuclear, Biological, Chemical
NCA	National Command Authority (President & SECDEF)
NEO	Noncombatant Evacuation Operation
NFA	No Fire Area
NFL	No Fire Line

NG	National Guard
NGF	Naval Gun Fire
NGO	Non-governmental Organization
NLT	No Later Than
NORAD	North American Air Defense Command
NOVAD	National Voluntary Organizations Active in Disaster
NSA	National Security Agency
NSC	National Security Council
NTC	National Training Center
NVD	Night Vision Device
O&M	Operations & Maintenance
OCOKA	Observation & Fields of Fire, Cover & Concealment, Obstacles, Key Terrain, and Avenues of Approach & Military Corridors
OCONUS	Outside Continental Limits of the US
ODA	Office for Disaster Assistance
ODT	Overseas Deployment Training
OFDA	Office of Foreign Disaster Assistance
OJT	On-the-Job-Training
OP	Observation Post
OPCOM	Operational Command
OPCON	Operational Control
OPLAN	Operations Plan
OPLAW	Operational Law
OPLAWYER	Operational Law Attorney
OPORDER	Operations Order
OPSEC	Operational Security
ORF	Operational Readiness Float
PA	Public Affairs
PAC	Personnel Administrative Center
PACOM	Pacific Command
PAO	Public Affairs Office
PCA	Personnel Claims Act
PCA	Per Curiam Affirmed
PCO	Peacetime Contingency Operation
PEC	Professional Education Center
PERSCOM	Personnel Command
PIR	Priority Intelligence Requirements
PJA	Post Judge Advocate
PKO	Peacekeeping Operation
PL	Phase Line
PLL	Prescribed Load List
PMO	Provost Marshal Office
POC	Point of Contact
POL	Petroleum, Oil, Lubricants
POLAD	Political Advisor
POM	Preparation for Overseas Movement
POMCUS	Pre-positioning of Material Configured to Unit Sets
PRC	Populace & Resources Control
PSC	Personnel Service Company
PSS	Personnel Service Support
PYSOP	Psychological Operations
PVO	Private Voluntary Organization
PW	Prisoner of War
PZ	Pickup Zone
PWRMS	Pre-positioned War Reserve Material Stocks
QSTAG	Quadripartite Standardization Agreement (see ABCA)
RAA	Rear Assembly Area
RAP	Rocket-Assisted Projectile
RC	Reserve Component
RCU	Remote Control Unit
RCZ	Rear Combat Zone
RCA	Riot Control Agent
REDCON	Readiness Condition
REFORGER	Return of Forces to Germany
REMFS	Rear Echelon Pukes
RFA	Restrictive Fire Area
RFL	Restrictive Fire Line
RJA	Regimental Judge Advocate
RLC	Regional Legal Center
ROC	Rear Operations Center
ROE	Rules of Engagement

ROM	Refuel on the Move
ROZ	Rear Operations Zone
RP	Release Point
RSO	Regional Security Officer
RSR	Required Supply Rate
S-1	Adjutant
S-2	Intelligence Officer
S-3	Operations and Training Officer
S-4	Supply Officer
S-5	Civil Affairs Officer
S&S	Supply & Service
SA	Security Assistance
SAC	Stand Alone Capability
SAC	Special Agent in Charge
SAM	Surface to Air Missile
SAMS	School of Advanced Military Studies
SAO	Security Assistance Organization
SAR	Search & Rescue
SCI	Sensitive Compartmented Information
SCM	Summary Court-Martial
SCMCA	Summary Court-Martial Convening Authority
S/D	Self-Defense
SECDEF	Secretary of Defense
SERE	Survival, Evasion, Resistance, Escape
SF	Special Forces
SFOB	Special Forces Operational Base
SFOD	Special Forces Operational Detachment
SGS	Secretary of the General Staff
SHAPE	Supreme HQ Allied Powers Europe
SIDPERS	Standard Installation/Division Personnel System
SITREP	Situation Report
SJA	Staff Judge Advocate
SLAR	Side-Looking Airborne Radar
SO	Special Operations
SOCOM	Special Operations Command
SOF	Special Operations Forces
SOFA	Status of Forces Agreement
SOMA	Status of Mission Agreement
SOP	Standing Operating Procedure
SME	Subject Matter Expert
SPCM	Special Court-Martial
SPCMCA	Special Court-Martial Convening Authority
SPT	Support
SOUTHCOM	Southern Command
SSCR	Single-Service Claims Responsibility
SSCRA	Soldiers' & Sailors' Civil Relief Act
STANAG	Standardization Agreement
STANAG	Standard NATO Agreement
STARC	State Area Command
SWO	Staff Weather Officer
TA	Theater Army
TAA	Tactical Assembly Area
TAACOM	Theater Army Area Command
TACAIR	Tactical Air
TAC CP	Tactical Command Post
TACFIRE	Tactical Fire Control
TACON	Tactical Control
TACSAT	Tactical Satellite
TAI	Target Area of Interest
TAJAG	The Assistant Judge Advocate General
TALO	Tactical Airlift Liaison Officer
TAMMC	Theater Army Material Management Center
TBD	To Be Determined
TC	Trial Counsel
TCP	Traffic Control Point
TCSB	Third Country Support Base
TDA	Table of Distribution & Allowance
TDS	Trial Defense Service
TEWT	Tactical Exercise Without Troops
TF	Task Force
THREATCON	Threat Condition

TMO	Transportation Movement Office
TOC	Tactical Operation Center
TOE	Table of Organization and Equipment
TOT	Time On Target (for Arty); Time Over Target for AF
TOR	Terms of Reference
TOT	Time on Target
TOW	Tube-launched, Optically tracked, Wire-guided
TPFDL	Time Phased Force Deployment List
TPL	Time Phase Line
TRADOC	US Army Training and Doctrine Command
TRP	Target Reference Point
TSOP	Tactical Standing Operating Procedure
TTP	Tactics, Techniques, & Procedures
TVA	Target Value Analysis
UBL	Unit Basic Load
UHF	Ultra High Frequency
UIC	Unit Identity Code
UMR	Unit Manning Report
UN	United Nations
UNHCR	UN High Commissioner for Refugees
UNICEF	UN International Children's Emergency Fund
UNODIR	Unless Otherwise Directed
USACAPOC	US Army Civil Affairs & Psychological Operations Command
USAIA	US Army Intelligence Agency
USAID	US Agency for International Development
USALSA	US Army Legal Services Agency
USAR	US Army Reserve
USARCS	US Army Claims Service
USAREUR	US Army Europe
USASOC	US Army Special Operations Command
USDA	US Department of Agriculture
USG	US Government
USIA	US Information Agency
USIS	US Information Service
UW	Unconventional Warfare
VFR	Visual Flight Rules
VHF	Very High Frequency
WCS	Weapons Control Status
WFZ	Weapons Free Zone
WHNS	Wartime Host Nation Support
WHO	World Health Organization
WIA	Wounded in Action
WO	Warning Order
WP	White Phosphorous
WRMS	War Reserve Material Stocks
WPR	War Powers Resolution
XO	Executive Officer

DEALING WITH THE PRESS (PAO GUIDANCE)

In May 1992, DOD and major news organizations reached agreement on guidelines that will apply to media coverage of U.S. military forces engaged in armed conflict. The rules listed below have been endorsed by DOD and most major news organizations, and will govern media coverage of future U.S. armed conflicts:

1. Open and independent reporting will be the principal means of coverage of U.S. military operations.

2. Press pools are not to serve as the standard means of covering U.S. military operations. Pools may sometimes provide the only feasible means of early access to a military operation. Pools should be as large as possible and disbanded at the earliest opportunity (within 24 to 36 hours when possible). The arrival of early access pools will not cancel the principle of independent coverage for journalists already in the area.

3. Even under conditions of open coverage, pools may be appropriate for specific events, such as those at extremely remote locations or where space is limited.

4. Journalists in a combat zone will be credentialed by the U.S. military and will be required to abide by a clear set of military security ground rules that protect U.S. forces and their operations. Violation of the ground rules can result in suspension of credentials and expulsion of the journalist involved from the combat zone. News organizations will make their best efforts to assign experienced journalists to combat operations and to make them familiar with U.S. military operations.

5. Journalists will be provided access to all major military units. Special operations restrictions may limit access in some cases.

6. Military public affairs officers should act as liaisons but should not interfere with the reporting process.

7. Under conditions of open coverage, field commanders should be instructed to permit journalists to ride on military vehicles and aircraft whenever feasible. The military will be responsible for the transportation of pools.

8. Consistent with its capabilities, the military will supply PAOs with facilities to enable timely, secure, compatible transmission of pool material and will make these facilities available whenever possible for filing independent coverage. In cases when government facilities are unavailable, journalists will, as always, file by any other means available. The military will not ban communications systems operated by news organizations, but electromagnetic operational security in battlefield situations may require limited restrictions on the use of such systems.

9. These principles will apply as well to the operations of the standing Department of Defense National Media Pool system.

Judge Advocates providing advice on media restrictions should read Nation Magazine v. U.S. Department of Defense, 762 F. Supp. 1558 (S.D.N.Y. 1991).

PUBLIC AFFAIRS OFFICE (PAO) GUIDANCE

Following is a guide for those times when you, or someone you advise, must or should talk with the press. You must always work through the PAO, as well as notify, and get approval from, your boss before talking to the press.[1] Once approval has been granted, use the pointers below in talking to the media.

Why Talk To The Media?

Organizations work a long time to achieve a reputation for a reliable product, a good service, and stability. It does this by delivering the same over and over again. That reputation is a fragile commodity for it can be destroyed by a single mishap. One bad news item is remembered forever, while 100 good news items seem to be forgotten.

Though it may seem unfair at times, our society cherishes the freedom of the press that encourages "headline news." That is, the press will print whatever news it can find by deadline, and if an edge can be put on the information to create a stir, all the better. This "selling" of the news--as opposed to "reporting" the news--results in biased articles. If only one side of a story is available, that is what is printed. The "No comment" gambit will not sit well with the viewing public (though it may be appropriate in limited cases).

[1] TJAG Policy Memo 91-2 to SJA s states, "Generally. no member of your office should, without your approval, prepare a written statement for publication or permit himself or herself to be quoted by the media on official matters within the purview of your office. Similarly, unless first cleared through the Executive, neither you nor any member of your office should be interviewed by, or provide statements to, representatives of the media on issues or subjects having Army-wide, national or international implications."

Management training stresses positive action as the best way out of a dilemma, and the media is your primary channel to the American people. As a senior uniformed leader in the Army, you are responsible for the management of Defense dollars and, more importantly, of American youth. Americans pay for the Army and send their sons and daughters to fill its ranks. They "own" the Army and are entitled to know the "how" and "why" it operates.

Men and women of the media are competent professionals as dedicated to their profession as you are to yours. They oftentimes have no prior military association; however, they will usually work hard to gather the facts and present an accurate story. Treat them with the respect you expect and never underrate their capability to gather information. They can be tenacious and may have sources of information not available to you.

Your command or agency has an important story to tell to the American people who support your activities. Your soldiers and employees and their activities are "news" to both local and national audiences. You are the most believable spokesman to represent them. Preparation and practice on your part will result in newsworthy, informative articles and programs that may be seen by millions of viewers and readers.

Preparing to Meet the Media

What you do before you meet the media is as important as what you do when you meet them. Often, it is the preparatory activities that will determine the success or failure of your media interview. By being prepared, you will not only be more confident and comfortable, but you will also be able to get your story across to the audience.

Some preparatory suggestions:

- Find out who the reporter is.
- Find out why you were asked for the interview.
- Establish ground rules on what will be covered.
- Set how much time will be allowed for the interview.
- Anticipate questions and think through your responses.
- Do your homework. (Make certain you are familiar with the facts supporting your position and that they're up-to-date. Even if you're the expert, a quick brush-up will help.
- Know the key points you want to make. (You might want to type them up on a card and put the card in a prominent place on your desk. Before the interview, review them often. Are they honest, meaningful and to the point?)
- Don't memorize a statement! (You'll look stilted/pompous).
- Question your own position. Have your PAO or other staff experts play devil's advocate. If possible, practice your responses before a television camera and view the play back with members of your staff to conduct a critique. Do not be thin skinned--it is better to correct errors before friends than commit them before 1.5 million viewers.
- Read the morning paper and listen to the radio/tv before your interview in case a late-breaking news story affects your command.

The "Five and Five" Rule

The Five and Five Rule is "Know the five best and worst things about your agency--and be able to discuss them in detail any time." Stay current--have your staff keep you up-to-date. Practice answering a question about a bad news subject and transition to a good news subject.

Specific suggestions if you're going on the air:

- Know the format and theme of the show. Know who will be in the audience--do they let reporters sit in the audience and ask questions? Who is the viewer audience? *It may be helpful to watch the show several times.*
- Arrive early to check the setting and your appearance.
- When you arrive, talk to the hosts or questioners. Offer subjects or points you'd like to discuss. Ask them what they'll be covering.

You're on!

This is your chance to tell your story accurately and forcefully. Many people are intimidated by all the blinding lights and the ominous, expressionless, one-eyed cameras staring directly at them. There's no need for anxiety. Think of the cameras and the microphones as your friends, and imagine that you are visiting friends in their living room because that's where you will be seen or heard--on the television set in someone's living room or on a car radio. If you've prepared well, all you will have to do is take advantage of a few techniques which will help you come across to the audience in a forceful yet friendly way.

First, your appearance:

- Check your appearance. (Be vain. Have yourself inspected. Remember, you're representing the entire Army.)
- Ask for makeup to help control perspiration and to avoid glare from the lights. (If you have a heavy beard, shave before you go).
- Don't wear sunglasses outdoors, or tinted glasses indoors.
- If seated, keep your jacket buttoned. To remove wrinkles in the front, pull the jacket down in the rear.

If you're in civilian clothes:

- Men should wear medium-tone gray, blue or brown suits. Women should wear solid, medium-color dresses. Avoid very light or very dark dresses (conservative street-length dresses or pantsuits are preferred). Never wear bold prints or patterns.
- Wear light-color shirts. However, avoid whites, since it is difficult for the technical crew to adjust contrasts.
- Avoid bow ties. They have a tendency to bob when you are talking.
- Wear over-the-calf socks. (That way, if you cross your legs, your shins won't outshine your shoes.)
- Keep jewelry simple. (That sparkling ring may look terrific at a dinner party, but on television it's going to detract). Military brass may be coated with soap to prevent glare.

Second, your action. (Or, what do I do with my hands?):

- In stand-up interviews, stand straight. (Don't lean into the microphone and don't rock back and forth). You may want to place one foot slightly forward of the other. This will help you keep from rocking or shifting back and forth.
- Hands should be relaxed at your side at the beginning of the interview. However, if you are comfortable, use them when talking. Effective use of hands is natural and provides action and emphasis.
- When seated, sit with the base of the spine back on the chair and lean slightly forward. Place your hands well forward on the arms of the chair or your knees. Don't put them in your lap.
- Warmth, friendliness and sincerity are important to the interview. Key tools are smiles, gestures and pauses, at appropriate times. But don't smile at serious matters or out of discomfort. Remember to keep an open face.
- Don't adopt the questioner's attitude, even on hostile questions. (Remember, the viewer/listener at home may be on your side.)
- Don't distract your home audience. (Don't pull up your socks, fiddle with your ring, or look at your watch hoping you've almost finished).
- Concentrate on the interviewer, and listen! (Avoid looking around the room: It will give you the "darting eye" look of a sinister villain). Look the interviewer in the face and use her/his name if possible.
- Keep your head up so you won't look guilty. It lets the light onto your face and prevents deep shadows around the eyes. (This is especially important if you wear military glasses: If the audience can' t see your eyes, they may not trust you!)
- Keep your hands off the mike. Ignore the mike and volume--that's what the sound technician is paid to do.
- If you have a real physical reason for preferring one profile or side (e.g. a hearing problem), make this known to the program staff.
- If possible, don't sit between two questioners. (It's not an inquisition, and your shifting head will make you feel and look guilty.)
- Be yourself! Concentrate on how to get ideas across--not just words.

Third, how do I say what I want to say?

- Welcome the reporter and the questions. Take the attitude that the reporter is your conduit to your audience and they are interested in what you have to say.
- Be relaxed, confident; you are the expert.
- Avoid jargon, acronyms and technical terms.
- Phrase your responses with the public in mind rather than bringing out how the Army benefited from a decision or action.
- Phrase your answers in terms and experiences your audience will relate to. Talk as though you were talking to your mother or father.
- Minimize the use of "we;" whenever possible, use "I."
- Keep your answers short! Give your "headline" first and then support your answers. Make the interviewer keep the conversation going, but don't just give a "yes" or "no." If you have answered the question, stop talking. Just because the reporter leaves the mike up doesn't mean you have to talk--that's what he gets paid to do. Otherwise, you may talk through your answer and wander into dangerous ground.
- Above all, be positive in your answers!
- Use pitch and rate changes for variety.
- Build in a "cut-off" with your answer if you wish to drop the topic.
- Don't be curt (even in response to the dumbest question).
- Don't restate the question in total or begin with gratuitous remarks such as, "I'm glad you asked that." Sometimes, however, you may wish to partially restate the question just to clarify what you are answering. Also you may restate the question if the audience does not hear the question.
- Pause before you speak. Take a second or two to think about your answer. Not only do rapid responses appear rehearsed, but many officials wish they had thought about an answer before answering. In electronic journalism, the pauses will be edited out and print reporters don't care.
- Answer only one question at a time. (If there are multiple questions, answer the one you want to answer and then ask what the other questions were).
- Use your key points when you have a chance. You can use one question as a springboard to your points by building on your answer. Remember the Five and Five rule.
- If you're not sure of the facts, say so in you response and promise to get them. (Then be sure to follow up).
- If you don't know the answer or can't discuss it for any reason, say so. If it's classified, don't get into a verbal fencing match; say it's classified. Never give a "no comment" response.
- Discuss only those activities and policies within the purview of your command or area of responsibility. Don't discuss hypothetical situations. Don't speculate.
- Don't be defensive-take the opportunity and use it to your benefit.
- Don't repeat a reporter's terminology or accept his "facts and figures" as truth unless you know they're accurate. Don't let reporters put words in your mouth or ideas in the minds of the audience.
- If it's a pretaped or print interview, be careful of "off-the-record" comments. Anything you say may be used--and probably

will be. Never go off the record with a reporter you don't know.

- Always assume the tape is rolling and the microphone is on! (Even during breaks, commercials, etc.).
- If you're confronted with a news conference or a multitude of reporters on a noisy street, don't shout. Television is an intimate medium and, although you may reach millions of people, you are really talking to groups of two to three in their living rooms.
- Never lie to a reporter. Not only could you get yourself in trouble, you may lessen the credibility of the whole Army.
- Have your PAO sit in on the interview and, if possible, tape it. This is a technique which news media representatives consider professional and which serves a very useful purpose: It provides an accurate record and protects you from being quoted out of context.

After It's All Over

- Don't demand to see the show or article in advance publication. You can ask, but they aren't under any obligation. If you demand, they may not give it to you and you may hurt your credibility and the chances of a favorable piece.
- Provide anything you promised you'd get back to them with.
- Be available for follow-up. Reporters often will have points they may want clarified or need additional information on.
- Have your staff available for corroboration and follow-up.
- Clarify any points you think may have been misunderstood, and provide additional information you think may be needed.
- Actively seek other opportunities to tell the Army story.

Public Speaking

(Or–Do I really have to accept that speaking engagement?)

Speaking engagements are one of the best methods to get your story across to a group of people. Why? Because you're physically with them and you can make on-the-spot adjustments based on feedback. Also, you have a better idea of who your audience is. They are a group because of some common interest, whether it be their children (e.g. PTA) or business (e.g. the local Chamber of Commerce). Your PAO will be able to give you a good idea of their interests in advance.

Manuscripts, which–depending upon the subject–may be a good idea, tend to cause strange things to happen to the psyche. Manuscripts have a tendency to make you formal, authoritative, even didactic or pedantic. Resist! How often do you become authoritative or pedantic to your friends over lunch? Remember, a lot of the people in the audience may be on your side. Don't alienate your friends. Keep these points in mind:

- Care about your talk and the audience. (If you don't care, neither will they!)
- Repetition is verbal underlining.
- Concentrate on your ideas and audience.
- Be in control. Know the key points but don't try to memorize them.
- Have confidence. You were invited because you are the expert and they want you to share some knowledge with them.
- Relax. Be comfortable. Enjoy the opportunity.
- Don't talk at your audience, but with them.
- Don't look down at your manuscript at the ends of sentences or at key points. Eye contact is essential to making a strong point.
- Make use of pauses. You may think you're slow but your audience won't. Pauses will give them time to reflect on what you're saying.
- End your speech on a high note. Saying "Thank you" is not necessary.

Tips for your speechwriters:

- Triple space the script. Use CAPS throughout.
- Underline key points.
- Leave a wide margin on the left-hand side. This will not only give you room to write last-minute thoughts or ideas, but will keep your eyes from scanning across the whole page for the sentence (your eye can take in 7 to 10 words at one glance).
- Leave a large margin at the bottom of the script so your eyes do not drop too low from the audience.
- Don't carry over a sentence to the next page. (This will allow you time to pause while you change pages.)
- Avoid jargon and acronyms. The audience won't understand.
- Be conversational. Use clear, simple and concise language.

A Media Survival Guide

Rear Admiral Brent Baker, the Navy's Chief of Information, offers nine recommendations for getting information out to the media accurately and without compromising security:

1. Generally, it is in the institution's best interest to deal honestly and in a timely manner with the media. If you do not play, you surrender to your critics who will be eagerly at hand.
2. Understand the media's obsession with speed, and through daily contact, keep working to win the battle of the first media perception.
3. Leaders must learn to take time to articulate their positions to the media. They must use short, simple language that the media will use and the public will understand.
4. Use the media to inform the public proactively, not just to react to critics.
5. Understand that the news is almost always skewed towards the side of those willing to talk to the media, and against those who say, "No comment."
6. Remember that CNN will correct the television record, while other networks rarely will do that because of time

constraints.

7. Realize that there are reporters who do want to be accurate and have balanced stories. Too often editors or television producers get in the way and interject the political or budget spin on an otherwise positive story about our people. Getting reporters out to the fleet, field, or factory floor is a beginning.
8. Play the media game. Understand there are times for a low profile, but more often, a media opportunity to tell your story should not be lost because of fear. We need to tell people, through the media, what we are about.
9. Don't be thinned skinned. We will not win every media engagement, but we must continue to communicate to our own people and to the public.

Summary

The best and easiest way to be relaxed when talking to the media or to a group of people is to do so, often. Generals who have spent their lives talking before hundreds and thousands of troops often clam up when confronted by the "camera, lights, action" of television or by a hostile group of reporters. There's no need to be defensive. They are our conduits to the American public.

Your PAO can give you the best advice before, during and after an interview. As soon as you've been asked for an interview, bring your PAO into the action. PAOs know the media and the news business and can give you sound advice on what you should and should not do.

If you go into the interview or speaking engagement with a positive attitude, and really care about your points, you'll do fine. Remember, we're talking about our organization and our soldiers and we have a terrific story to tell. Let's tell it.

As a quick recap, remember these points:

- Prepare--don't "wing it."
- Conversational--treat the mike and the interviewer as friends.
- Concentrate--forget yourself and concentrate on the questions and on your key ideas.
- Control--know the key points you want to make, and answer questions on your own terms, in your own way. Use the "five and five" rule.
- Confidence--you're the expert and you know what you're doing.
- Comfortable--relax and enjoy it. Forget about your hands and the mike and camera, and be natural.
- Concise--get your points across directly, quickly, and in language the audience will understand.
- Care-care about the Army, the audience, the interview, and your subject. If you don't, neither will anyone else.
- Relax. Be Honest. Be Sincere.
- Keep an open face.

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