

# Legal Lessons Learned From Afghanistan and Iraq



## Volume I

Major Combat Operations  
(11 September 2001 – 1 May 2003)



Center for Law and Military Operations  
The Judge Advocate General's Legal Center & School  
United States Army  
Charlottesville, Virginia

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LEGAL LESSONS LEARNED FROM  
AFGHANISTAN AND IRAQ: VOLUME I,

MAJOR COMBAT OPERATIONS  
(11 SEPTEMBER 2001 TO 1 MAY 2003)

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LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ:  
VOLUME I

MAJOR COMBAT OPERATIONS  
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# LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOLUME I

## MAJOR COMBAT OPERATIONS (11 SEPTEMBER 2001 TO 1 MAY 2003)

*The attack took place on American soil, but it was an attack on the heart and soul of the civilized world. And the world has come together to fight a new and different war, the first, and we hope the only one, of the 21<sup>st</sup> century. A war against all those who seek to export terror, and a war against those governments that support or shelter them.*

President George W. Bush, 11 October 2001<sup>1</sup>

*The United States is engaged in a comprehensive effort to protect and defend the homeland and defeat terrorism. Using all instruments of national power, the United States and its partners are attacking terrorists both at home and abroad, denying terrorists sanctuary and sponsorship, disrupting the finance of terror, and building and maintaining a united global front against terrorism.*

White House Progress Report on the Global  
War on Terrorism, September 2003<sup>2</sup>

### I. INTRODUCTION

The events of 11 September 2001 set in motion a series of U.S. military, diplomatic, and law enforcement responses that together constitute what has become known as the “Global War on Terrorism,” or GWOT. As the quotes above indicate, the GWOT takes place on many fronts—the seizing of terrorist financial assets, the forging and maintenance of an international coalition against terrorism, the arrest and indictment of known terrorists, and the use of military force against terrorists and their state sponsors. The focus of this Publication, however, is on the legal issues surrounding the GWOT military response.

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<sup>1</sup> The White House, *The Global War on Terrorism: The First 100 Days* at 3 (Dec. 2001), available at <http://www.whitehouse.gov/news/releases/2001/12/100dayreport.html>.

<sup>2</sup> The White House, *Progress Report on the Global War on Terrorism* at 2 (Sept. 2003), available at <http://www.whitehouse.gov/homeland/progress/foreword.html>.

LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOLUME I, MAJOR COMBAT OPERATIONS (11 SEPTEMBER 2001 TO 1 MAY 2003)

More specifically, the focus is on the lessons learned by military legal personnel involved in Operations ENDURING FREEDOM (OEF) (primarily Afghanistan) and IRAQI FREEDOM (OIF) (Iraq) from 11 September 2001 to the declared end of major combat operations on 1 May 2003.<sup>3</sup> These judge advocates (JAs) and enlisted paralegals faced the challenges and complexities of applying law to missions that oftentimes presented unique admixtures of war and law enforcement—as the GWOT’s seemingly incongruous grouping of the terms “war” and “terrorism” suggests—that did not always fit neatly into established legal paradigms. Whether determining the applicability of the law of armed conflict to non-state terrorist actors, applying traditional and new fiscal authorities to a military occupation, or assisting in the development of rules of engagement (ROE) for an enemy that blended into civilian populations, JAs and paralegals wrestled with cutting-edge legal issues during OEF and OIF. At the same time, legal personnel continued to provide less unique but equally important support services such as legal assistance, military justice, and personnel claims.

It is the intention of the Center for Law and Military Operations (CLAMO) to capture, to the extent possible, the legal lessons from all of these efforts. Located at The Judge Advocate General’s Legal Center and School (TJAGLCS) in Charlottesville, Virginia, CLAMO is far removed from the battlefields of Afghanistan and Iraq. Accordingly, it is not CLAMO’s place to criticize or praise or to take sides on contentious issues, but rather to describe the lessons as imparted by the legal personnel who actually served on the ground, and, when necessary to better understand the lesson, to elaborate upon the underlying legal issues.

These lessons have been imparted to CLAMO in a variety of ways. Unit legal offices as well as individual JAs and paralegals have provided written after action reports. CLAMO has traveled to units and conducted multi-day review conferences memorialized by recorded transcripts. CLAMO has conducted videotaped and audiotaped interviews with legal personnel in theater as well as those passing through TJAGLCS for further training, not to mention the scores of informal telephonic and in-person interviews and e-mail exchanges with personnel involved in OEF and OIF. Finally, CLAMO has collected a vast collection of primary documents from the Operations, ranging from legal annexes to information papers to ROE serials. Many of these documents appear as Appendices to this Publication.

Despite all these efforts, this source material does not represent the views of every single JA and paralegal who served in OEF and OIF. The sheer number of units, levels of command, and legal personnel involved made such an undertaking simply too difficult. Moreover, CLAMO’s attempt to organize an OEF review conference at TJAGLCS in December 2002 ultimately failed when many of the key JAs could not attend because of OIF planning efforts. Nonetheless, the source material for this Publication represents the richest assortment of primary references of any CLAMO lessons learned compilation to date. It is worth emphasizing, however, that this Publication is a lessons learned

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<sup>3</sup> For a discussion of the military operations and their context, to include the pronouncements by President Bush and Secretary of Defense Rumsfeld that 1 May 2003 marked the end of major combat operations in both Afghanistan and Iraq, see *infra* Section II.

compilation, not an historical recitation of JA and paralegal participation in OEF and OIF, and thus does not specifically cite all of the material supplied by the JAs and paralegals who contributed to this project.

Drawing on the Army's doctrinal breakdown of legal disciplines, the lessons are set forth in distinct categories: 1) International Law; 2) ROE; 3) Coalition Issues; 4) Information Operations, Civil Affairs, and Public Affairs; 5) Civil Law; 6) Claims; 7) Administrative Law; 8) Legal Assistance; 9) Military Justice; and 10) Personnel, Training, and Equipment.

Draft versions of these lessons were staffed back through the military legal community prior to publication. The comments of all who provided feedback undoubtedly made this a better product, one that hopefully will assist future legal personnel before they deploy into harm's way. It is for these legal personnel—the Army and Marine Corps JAs and paralegals supporting tactical level commanders and troops on the ground—that this Publication is written. Operational and strategic legal issues are discussed only to the extent that they are necessary to understand the context of tactical level legal lessons learned.

Publishing lessons well after they have been learned creates a time lag that CLAMO seeks to minimize by posting after action reports and other source legal documents, as soon as they are available, on classified and unclassified databases. The CLAMO unclassified database can be found at <http://www.jagcnet.army.mil/clamo>. The CLAMO classified database can be found on the Secure Internet Router Protocol Network (SIPRNET) at <http://www.us.army.smil.mil> as a legal community within the Army Knowledge Online–SIPRNET collaboration system.

As of this writing, the GWOT continues. While 1 May 2003 may have been an appropriate end point for this lessons learned compilation, OEF and OIF continue. Thus, so too does CLAMO continue to gather information and lessons from these Operations, and already has begun work on a follow-up Volume II that will describe the legal lessons learned from 1 May 2003 to 30 June 2004.

## II. THE MILITARY OPERATIONS AND THEIR CONTEXT

### A. PROLOGUE

On the morning of 11 September 2001, terrorists hijacked four commercial passenger airliners in the United States. The terrorists crashed two of the airplanes into the World Trade Center towers in New York City, one into the Pentagon, in Washington D.C., and one went down in a field near Pittsburgh, Pennsylvania. More than 3,000 people from over eighty different nations perished in the attacks.<sup>1</sup> The international community immediately voiced their support for the United States. On 12 September, the United Nations (UN) Security Council issued Resolution 1368, unequivocally condemning the “horrifying terrorist attacks” and regarding the acts, “like any act of international terrorism, as a threat to international peace and security . . . .”<sup>2</sup> That same day, the North Atlantic Treaty Organization (NATO) invoked Article V of the treaty for the first time in its history. In doing so, NATO recognized the individual and collective right of self defense, as described in Article 51 of the UN Charter,<sup>3</sup> to come to the aid of the United States through armed force, if necessary, to restore and maintain the security of the North Atlantic area.<sup>4</sup>

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<sup>1</sup> The terrorists hijacked two 767 planes after takeoff from Boston’s Logan International Airport. At 0845, American Airlines Flight 11 crashed into the north tower of the World Trade Center in New York City. At 0903, United Airlines Flight 175 crashed into the south tower. Forty minutes later, at 0943, a 757 en route from Washington’s Dulles Airport to Los Angeles crashed into the Pentagon. At 1000, the fourth and final airplane hijacked by terrorists that day, United Flight 93 en route from Newark, New Jersey to San Francisco, crashed near Pittsburgh. Three hundred forty-three firefighters and paramedics, twenty-three police officers, and thirty-seven Port Authority police officers died in the World Trade Center. Approximately 2,000 children lost a parent, including 146 children whose parent died in the Pentagon attacks. One business alone lost more than 700 employees, leaving at least fifty pregnant widows. At the Pentagon, 125 workers died, including fifty-four active duty service members. *See generally The Global War on Terrorism, The First 100 Days*, at <http://www.whitehouse.gov/news/releases/2001/12/100dayreport.html> (last visited 11 Mar. 2004).

<sup>2</sup> S.C. Res. 1368, U.N. SCOR, 55th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001).

<sup>3</sup> Article 51 of the UN Charter states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defense 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-defense 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.

U.N. CHARTER art. 51.

<sup>4</sup> Article V of the NATO Charter states:

The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.



On 18 September 2001, the U.S. Congress passed a Joint Resolution, by a vote of 98-0 in the Senate and 420-1 in the House of Representatives, authorizing the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks . . . or harbored such organizations or persons . . . .”<sup>5</sup> Working quickly to cut off terrorist funding, on 25 September 2001, President George W. Bush issued an Executive Order blocking the property of, and prohibiting transactions with, persons who commit, threaten to commit, or support terrorism.<sup>6</sup> Echoing the President's Executive Order, the UN Security Council issued a second resolution calling on all States to prevent and suppress financing of terrorist acts and to freeze funds and other assets of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the acts. The resolution also called on all States to prohibit their nationals or persons within their territories from making funds and other assets available for the benefit of terrorists.<sup>7</sup>

During a Pentagon press briefing on 25 September 2001, U.S. Secretary of Defense Donald H. Rumsfeld announced that the war against terrorism outside the U.S. would be known as Operation ENDURING FREEDOM (OEF).<sup>8</sup> The resulting Global War on Terrorism quickly led to the United States pursuing military action against first Afghanistan (OEF) and subsequently Iraq (Operation IRAQI FREEDOM (OIF)). International law affected OIF and OEF.<sup>9</sup> In both campaigns, the U.S. Government's asserted legal basis for the use of force derived from international legal norms, particularly those embodied in the UN Charter. In addition, the U.S. military and its coalition partners conducted operations in accordance with the international law of armed conflict. Military legal teams were deeply involved in OEF and OIF

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Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security .

CHARTER OF THE NORTH ATLANTIC TREATY ORGANIZATION art. V.

<sup>5</sup> Authorization to Use Military Force, Pub. L. 107-40, 115 Stat. 224 (Sept. 18, 2001). Congress declared that this section was intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution. *Id.* § 2(b).

<sup>6</sup> Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 25, 2001) (blocking property and prohibiting transactions with persons who commit, threaten to commit, or support terrorism).

<sup>7</sup> S.C. Res. 1373, para. 1, U.N. SCOR, 56th Sess, 5385th mtg., U.N. Doc S/RES/1373 (2001). The resolution also called upon States to refrain from providing any support to terrorists, take steps to prevent the commission of terrorists acts or provide safe havens, prevent movement of terrorists or terrorist groups by effective boarder controls, and find ways to intensify and accelerate the exchange of operational information. *Id.* paras. 2, 3. In addition, the resolution established a Committee of the Security Council, consisting of all the members of the Council, to monitor implementation of the resolution and called upon all States to report to the Committee, no later than ninety days from the date of the resolution's adoption, the steps taken to implement the resolution. *Id.* para. 6.

<sup>8</sup> See DoD News Briefing, Secretary Rumsfeld (Sept. 25, 2001), at [http://www.defenselink.mil/news/Sep2001/t09252001\\_t0925sd.html](http://www.defenselink.mil/news/Sep2001/t09252001_t0925sd.html) (lasted visited 11 Mar. 2004). The administration also announced that the U.S. military operations in homeland defense and civil support to U.S. federal, state, and local agencies would be called “Operation NOBLE EAGLE.” *Id.*

<sup>9</sup> For the Army, “[I]nternational law is the application of international agreements, international customary practices, and the general principles of law recognized by civilized nations to military operations and activities.” U.S. DEP’T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS 3-6 (1 Mar. 2000) [hereinafter FM 27-100] (stating further “Within the Army, the practice of international law also includes foreign law, comparative law, martial law, and domestic law affecting overseas intelligence, security assistance, counterdrug, and civil assistance activities.”).

at all operational phases and levels of command, including judge advocates (JAs) helping commanders accomplish their missions while observing international law.

## **B. BACKGROUND TO THE CONFLICTS**

Until recently, U.S. diplomatic and strategic goals with regard to Afghanistan and Iraq differed significantly. In Afghanistan, beginning in the 1950s and intensifying in the 1980s, the United States actively sought to contain Soviet political, economic, and military expansion through a variety of overt and covert means. With the fall of the Soviet Union, U.S. engagement in Afghanistan diminished significantly, and the focus switched mainly to combating the drug trade (Afghanistan was the world's largest producer of opium in 1999 and 2000).<sup>10</sup> By contrast, the U.S. interest in Iraq was relatively minor and benign. However, the replacement of the Shah of Iran—a close ally of the United States—with a radically anti-U.S. fundamentalist Muslim government in 1979 led the United States to initiate a policy of assisting Iraq as a bulwark against possible Iranian expansionism. This interest waned with the end of the 1980-88 Iran–Iraq War and the "mistaken" Iraqi attack on the USS Stark.<sup>11</sup> The Iraqi invasion of Kuwait in 1991, which the United States and its coalition partners reversed in the Persian Gulf War, and U.S. concerns regarding Iraq's weapons of mass destruction (WMD) compelled the United States to switch its focus to containing, and eventually reversing, Iraqi expansionism.

In the 1990s U.S. interests in Afghanistan and Iraq began to share some similarities as the result of the rise of Islamic fundamentalist terrorism directed against U.S. interests abroad, including attacks on U.S. forces in Saudi Arabia and U.S. embassies in Kenya and Tanzania. During this period, Afghanistan became one of the leading havens for the al Qaeda terrorist network, the organizer and sponsor of many of the attacks. At the same time, the United States recognized that Iraq under Saddam Hussein had both the motivation and the means to also engage in terrorism, possibly with WMD. Although linked by the goal of eliminating the actual and potential bases of operations and support of terrorists, each operation, however, encompassed its own unique set of historical precedents, geographic constraints, and opposing forces.

## **C. AFGHANISTAN (OEF)**

### ***1. Overview***

#### ***a. Geography***<sup>12</sup>

Afghanistan is a landlocked county, approximately the size of Texas, in Southern Asia, bordered by Pakistan, Iran, Turkmenistan, Uzbekistan, Tajikistan, and China. The terrain is mostly rugged high mountains running southwest to northeast in the eastern portion of the

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<sup>10</sup> U.S. Dep't of State, Bureau of South Asian Affairs, Background Note: Afghanistan, *at* <http://www.state.gov/r/pa/ei/bgn/5380pf.htm> (last visited 9 Mar. 2004) [hereinafter DOS Afghanistan Background Note].

<sup>11</sup> See *infra* note 81 and accompanying text.

<sup>12</sup> Adapted from *id.* For a more detailed analysis of Afghanistan, see U.S. DEP'T OF ARMY, AFGHANISTAN: A COUNTRY STUDY—AREA HANDBOOK SERIES (1986) [hereinafter Army Afghanistan Country Study].

country and desert plains in the north and southwest, with an arid to semiarid climate of hot summers and cold winters. The infrastructure of Afghanistan is extremely limited—only 25km of railways and 2800km of paved highways.<sup>13</sup> Afghanistan's population is approximately 29 million people,<sup>14</sup> with an additional 4 million Afghans living in Pakistan and Iran. Afghanistan's ethnically and linguistically mixed population includes the Pashtun<sup>15</sup> (38%), Tajik (25%), Hazara (19%), and Uzbek (6%). Dari (spoken by more than one-third of the population) serves as a common language, though the Taliban use Pashto. An estimated 84% of the population is Sunni Muslim, with the remainder predominantly Shia Muslim.<sup>16</sup>

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<sup>13</sup> Central Intelligence Agency, World Fact Book - Afghanistan, at <http://www.cia.gov/cia/publications/factbook/af.html> (last visited 9 Mar. 2004) [hereinafter CIA Fact Book—Afghanistan].

<sup>14</sup> *Id.*

<sup>15</sup> Although the name “Afghanistan” means “land of the Afghans,” the term “Afghan” usually refers to a Pashtu speaker or member of a Pashtun tribe. Army Afghanistan Country Study, *supra* note 12, at xxi.

<sup>16</sup> The following passage from “What You Need to Know About Islam—What’s the Difference Between Shia and Sunni Muslims” succinctly outlines the difference between the two branches of Islam.

Both Sunni and Shia Muslims share the most fundamental Islamic beliefs and articles of faith. The differences between these two main sub-groups within Islam initially stemmed not from spiritual differences, but political ones. Over the centuries, however, these political differences have spawned a number of varying practices and positions which have come to carry a spiritual significance. The division between Shia and Sunni dates back to the death of the Prophet Muhammad, and the question of who was to take over the leadership of the Muslim nation. Sunni Muslims agree with the position taken by many of the Prophet's companions, that the new leader should be elected from among those capable of the job.... The word "Sunni" in Arabic comes from a word meaning 'one who follows the traditions of the Prophet.' On the other hand, some Muslims share the belief that leadership should have stayed within the Prophet's own family, among those specifically appointed by him, or among Imams appointed by God Himself. . . . Throughout history, Shia Muslims have not recognized the authority of elected Muslim leaders, choosing instead to follow a line of Imams which they believe have been appointed by the Prophet Muhammad or God Himself. The word "Shia" in Arabic means a group or supportive party of people. . . . From this initial question of political leadership, some aspects of spiritual life have been affected and now differ between the two groups of Muslims. Shia Muslims believe that the Imam is sinless by nature, and that his authority is infallible as it comes directly from God. Therefore, Shia Muslims often venerate the Imams as saints and perform pilgrimages to their tombs and shrines in the hopes of divine intercession. Sunni Muslims counter that there is no basis in Islam for a hereditary privileged class of spiritual leaders, and certainly no basis for the veneration or intercession of saints. Sunni Muslims contend that leadership of the community is not a birthright, but a trust that is earned and which may be given or taken away by the people themselves. . . .

What You Need to Know About Islam—What's the Difference Between Shia and Sunni Muslims, at [http://islam.about.com/cs/divisions/f/shia\\_sunni.htm](http://islam.about.com/cs/divisions/f/shia_sunni.htm) (last visited 24 Mar. 2004).



**b. History**<sup>17</sup>

Afghanistan, often called the crossroads of Central Asia, has had a turbulent history, marked chiefly by a succession of foreign invasions and brutal rulers and failed attempts at modernization and reform. These include Alexander the Great, the Turks, the Arabs (who introduced Islam), the Persians, Genghis Khan and the founder of India's Moghul dynasty. In 1747, a Pashtun consolidated chieftainships, petty principalities, and fragmented provinces into what is today Afghanistan, ruled by a monarchy. Collision between the British and Russian Empires during the 19th century led to three Anglo-Afghan wars, the first of which resulted in the destruction of a British army. However, the second Anglo-Afghan war gave the British effective control over Afghanistan's foreign affairs until 1919 when the third Anglo-Afghan war ended with the British defeat. During the 1950s and 1960s Afghanistan solicited military and economic assistance from both the United States and the Soviet Union.<sup>18</sup>

In 1973, a coup by the former Prime Minister overturned the monarchy, initiating chronic political and economic instability. This was followed by a communist coup in 1978, supported covertly by the Soviet Union. The ineffectiveness of the communist regime in the face of widespread resistance led to an invasion in December 1979 by large numbers of Soviet airborne and ground forces. Although backed by an expeditionary force that grew as large as 120,000 Soviet troops, the Soviet-installed replacement communist regime was unable to establish authority outside the capital city of Kabul. Poorly armed at first, in 1984 Afghan freedom

<sup>17</sup> Adapted from DOS Afghanistan Background Note, *supra* note 10.

<sup>18</sup> Between 1954 and 1978, Afghanistan received more than \$1 billion in Soviet aid, including substantial military assistance. In the 1950s, the United States declined Afghanistan's request for defense cooperation but extended an economic assistance program focused on the development of Afghanistan's physical infrastructure—roads, dams, and power plants. *Id.*

fighters (mujahidin) began receiving substantial assistance in the form of weapons and training from the United States and other outside powers, particularly Stinger surface-to-air missiles, which were very effective in blunting the Soviet air advantage. By the mid-1980s, the Afghan resistance movement—aided by the United States, Saudi Arabia, Pakistan, and others—was exacting a high price from the Soviets, both militarily within Afghanistan and by souring the Soviet Union's relations with much of the Western and Islamic world.<sup>19</sup> Finally, in 1988, the Geneva Accords between the Governments of Pakistan and Afghanistan,<sup>20</sup> with the United States and the Soviet Union serving as guarantors, led to a full Soviet withdrawal from Afghanistan by February 1989.

Significantly, the mujahidin were neither party to the negotiations nor to the 1988 agreement and, consequently, refused to accept the terms of the Accords. As a result, the civil war continued after the Soviet withdrawal. In reaction to the anarchy and warlordism prevalent in the country, and the lack of Pashtun representation in the Kabul government, a movement of former mujahidin arose known as the Taliban (from "Talib" or "pupil"). The Taliban were dedicated to removing the warlords, providing order, and imposing a strict form of Islam on the country.<sup>21</sup> By the end of 1998, the Taliban occupied about 90% of the country. Only Pakistan, Saudi Arabia, and the United Arab Emirates (UAE) recognized the Taliban regime as the government of Afghanistan, however.<sup>22</sup>

From the mid-1990s the Taliban provided sanctuary to Osama bin Laden, a Saudi national who had fought with the mujahidin against the Soviets, and provided a base for his al Qaeda terrorist network. The UN Security Council repeatedly sanctioned the Taliban for these activities.<sup>23</sup> Bin Laden provided both financial and political support to the Taliban. Bin Laden and his al Qaeda network were charged with the bombing of the U.S. embassies in Nairobi and Dar Es Salaam in 1998, and in August of that year the United States launched a cruise missile attack against bin Laden's terrorist camp in Afghanistan (Operation INFINITE REACH).<sup>24</sup>

## **2. Operation ENDURING FREEDOM**

### ***a. Diplomatic and Legal Background***

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<sup>19</sup> During the war against the Soviet occupation, Pakistan served as the primary logistical conduit for the Afghan resistance. Iran also provided limited financial and military assistance to rebel leaders who pledged loyalty to the Iranian vision of Islamic revolution. (Iran still provides refuge to about 1.4 million Afghans.) *Id.*

<sup>20</sup> Bilateral Agreement Between the Republic of Afghanistan and the Islamic Republic of Pakistan on the Principles of Mutual Relations, in Particular on Non-Interference and Non-Intervention, April 14, 1988, 27 I.L.M. 581.

<sup>21</sup> The Taliban sought to impose an extreme interpretation of Islam upon the entire country and committed massive human rights violations, particularly directed against women and girls, in the process. Women were restricted from working outside the home, pursuing an education, were not to leave their homes without an accompanying male relative, and compelled to wear a traditional body-covering garment called the burka. DOS Afghanistan Background Note, *supra* note 10.

<sup>22</sup> The latter two countries withdrew recognition following the 11 September 2001 terrorist attacks, and Pakistan closed its border and downgraded its ties. *Id.*

<sup>23</sup> See, e.g., S.C. Res. 1267, U.N. SCOR, 54th Sess., 4051st mtg., U.N. Doc. S/RES/1267 (1999); S.C. Res. 1333, U.N. SCOR, 55th Sess., 4251st mtg., U.N. Doc. S/RES/1333 (2000).

<sup>24</sup> See Infinite Reach (20 Aug. 1998), at <http://www.globalsecurity.org/military/ops/infinite-reach.htm>.

Following the attacks of 11 September 2001, the United States identified al Qaeda as the group responsible and began marshalling its diplomatic and military forces to respond to this "act of war."<sup>25</sup> While some within the U.S. Government called for action against all terrorists groups and their state-sponsors, in particular Iraq, President Bush decided that the initial focus of U.S. efforts would be on eliminating bin Laden and al Qaeda in Afghanistan.<sup>26</sup> Subsequently, the United States began laying the legal and political framework for building a coalition to conduct Operation ENDURING FREEDOM in Afghanistan.

On 20 September 2001, President Bush instructed U.S. military forces to begin planning an attack on Afghanistan and then summarized his war plan before a joint session of Congress.<sup>27</sup> During that speech the President called on the Taliban to close all terrorist training camps and turn over bin Laden and his supporters to the appropriate authorities, actions that the Taliban rejected the next day.<sup>28</sup>

Although operational control remained with the United States, from the beginning OEF was designed and executed as a coalition military operation. Beginning with the British pledge of "total support" on 12 September, twenty-seven nations eventually deployed more than 14,000 troops in support of OEF.<sup>29</sup> The initial military plan for the campaign in Afghanistan, briefed to the President on 21 September by the Combatant Commander of Central Command (CENTCOM), General Tommy Franks, proposed that the United States would "destroy the al Qaeda network inside Afghanistan along with the illegitimate Taliban regime which was harboring and protecting the terrorists."<sup>30</sup> The basic plan was to directly attack Taliban military installations and al Qaeda terrorist camps with aircraft and cruise missiles, while using Special Forces to direct and support the existing Afghan Northern Alliance resistance forces with air-

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<sup>25</sup> President George W. Bush, Address to the Joint Session of Congress and the American People (September 20, 2001), at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html> [hereinafter Bush Address, 20 Sept. 2001].

<sup>26</sup> Frontline: Campaign Against Terror: Chronology, at <http://www.pbs.org/wgbh/pages/frontline/shows/campaign/etc/cron.html> (last visited 9 Mar. 2004) [hereinafter Frontline Chronology]. See also Bob Woodward & Dan Balz, "We Will Rally the World"—Bush and His Advisers Set Objectives, but Struggled With How to Achieve Them, WASH. POST, Jan. 28, 2002, at A01.

<sup>27</sup> Frontline Chronology, *supra* note 26.

<sup>28</sup> Bush Address, 20 Sept. 2001, *supra* note 25; Frontline Chronology, *supra* note 26.

<sup>29</sup> Operation Enduring Freedom: One Year of Accomplishment, at [www.whitehouse.gov/infocus/defense/enduringfreedom.html](http://www.whitehouse.gov/infocus/defense/enduringfreedom.html) (last visited 9 Mar. 2004). Most of these forces, however, were either support forces or used outside Afghanistan. For combat operations in Afghanistan, the United Kingdom was the largest contributor—submarine-launched Tomahawk TLAM missiles, aerial refueling and reconnaissance/Aerial Electronic Warfare (AEW) flights, and Royal Marine Commandos (3 Commando Brigade). Other notable contributions to combat operations in Afghanistan included: France (Mirage 2000 fighters and tanker aircraft based in Kyrgyzstan, and the aircraft carrier Charles de Gaulle and its air group); Australia (Special Forces and tanker aircraft based in Kyrgyzstan); Germany (Special Forces); Canada (Special Forces and 3rd Battalion, Princess Patricia's Light Infantry (3 PPCLI)); and Denmark, Netherlands and Norway (F-16 fighters (European Participation Air Forces)). Operation Enduring Freedom—Deployments, at [http://www.globalsecurity.org/military/ops/enduring-freedom\\_deploy.htm](http://www.globalsecurity.org/military/ops/enduring-freedom_deploy.htm) (last modified 16 Mar. 2004) [hereinafter OEF Deployments]; U.S. Central Command, International Contributions to the War on Terrorism, at <http://www.centcom.mil/Operations/Coalition/joint.htm> (last visited 9 Mar. 2004).

<sup>30</sup> Operation Enduring Freedom—Afghanistan, at <http://www.globalsecurity.org/military/ops/enduring-freedom.htm> (last modified 16 Mar. 2004) [hereinafter OEF Afghanistan].

delivered precision weapons. Simultaneously, humanitarian aid would be air-dropped to the Afghan people.

To execute this plan, two carrier battle groups (CVGBs)—the USS *Enterprise* and USS *Carl Vinson*—were directed to the Arabian Sea off the coast of Pakistan. They were joined by the USS *Piehu* Amphibious Ready Group (ARG), with the 15th Marine Expeditionary Unit (MEU) attached.<sup>31</sup> The aircraft carrier USS *Kitty Hawk* was also sent to the region from Japan (without most of its Carrier Air Wing) to serve as a floating platform for Special Operations Forces (SOF), including the Army's 160th Special Operations Aviation Regiment, Navy Sea, Air and Land forces (SEALs), and Air Force SOF.<sup>32</sup> The Air Force deployed B-52 heavy bombers from the 5th Bomb Wing (Minot Air Force Base (AFB)) and the 917th Bomb Wing (Barksdale AFB), and B-1 heavy bombers from the 28th Bomb Wing (Ellsworth AFB) and the 34th Bomb Wing (Mountain Home AFB) to Diego Garcia in the Indian Ocean. In addition, F-16, F-15, F-15E, and F-117 fighters were deployed to bases in countries in the Persian Gulf allied with the United States.<sup>33</sup> Special Forces and Central Intelligence Agency (CIA) agents began to infiltrate and link up with resistance groups in Afghanistan.

At the same time as the United States was developing its military response to the 11 September attacks, a parallel diplomatic and legal effort was underway to provide the foreign assistance and backing needed to accomplish OEF. At the urging of the United States, two UN Security Council Resolutions (1368 and 1373) followed in rapid succession after the attacks.<sup>34</sup> The first Resolution, adopted within twenty-four hours of the terrorist attacks on 11 September, condemned the attacks and recognized “the inherent right of individual or collective self-defense in accordance with [Article 51] of the Charter.”<sup>35</sup> In the second Resolution, the Security Council “Reaffirm[ed] the need to combat *by all means*, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts.”<sup>36</sup>

### ***b. Major Combat Operations***

At 1230 hours Eastern Daylight Time, 7 October 2001, the U.S. military began combat operations in Afghanistan. As stated in his letter to the Congress, the President ordered combat action under his authority to conduct U.S. foreign relations as Commander-in-Chief and Chief Executive.<sup>37</sup> That same day, Ambassador John Negroponte, U.S. Permanent Representative to the UN, informed the UN Security Council of the U.S. actions and its legal basis for doing so.

<sup>31</sup> OEF Deployments, *supra* note 29. On 15 October 2001, the USS *Theodore Roosevelt* CVGB arrived to relieve the *Enterprise* CVGB. The Bataan ARG, containing the 26th MEU, arrived on 17 November to relieve the *Piehu* ARG. The *Carl Vinson* CVGB was replaced by the USS *John Stennis* CVGB on 15 December. *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> S.C. Res. 1368, *supra* note 2; S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg. U.N. Doc. S.RES/ 1373 (2001) [hereinafter S.C. Res. 1373].

<sup>35</sup> S.C. Res. 1368, *supra* note 2, at 1 (stating further “[the Council] *Expresses* its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001 . . .”) (emphasis in original).

<sup>36</sup> S.C. Res. 1373, *supra* note 7, at 1 (emphasis added). See generally YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE ch. 10 (3d ed. 2001) [hereinafter DINSTEIN].

<sup>37</sup> See Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (Oct. 7, 2001), at [www.whitehouse.gov/news/releases/2001/10/2001109-6.html](http://www.whitehouse.gov/news/releases/2001/10/2001109-6.html). See also Exec. Order No.

In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America, together with other States, has initiated actions in the exercise of its inherent right of individual and collective self-defense following armed attacks that were carried out against the United States on September 11, 2001.<sup>38</sup>

Ambassador Negroponte explained that the United States was taking action "against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan" because it had obtained "clear and compelling information" that al Qaeda, supported by the Taliban regime, had played a central role in the 11 September attacks against the United States and that they continued to train and support terrorists who attack innocent people and target U.S. nationals and interest abroad.<sup>39</sup>

Combat operations began with simultaneous air strikes on Taliban military installations and al Qaeda terrorist camps in Kabul, Kandahar, Jalalabad, and other locations in Afghanistan. Forces used included Air Force B-52, B-1, and B-2 heavy bombers (the latter flew all the way from Whiteman AFB in Missouri) and F-16, F-15, F-15E, and F-117 fighters, carrier-based Navy F-14 and F/A-18 fighters, and submarine-launched Tomahawk cruise missiles. Two C-17 cargo aircraft (flying from Rhein-Main AFB in Germany) also began airdrops of humanitarian supplies to refugees inside the country.<sup>40</sup> Two weeks of around-the-clock attacks followed, at the end of which most al Qaeda training camps had been severely damaged, the Taliban air defenses destroyed, and "command and control" assets severely degraded.<sup>41</sup>

Toward the end of this period, the ground war began in earnest. On the night of 19 October, Army Rangers and Delta operatives executed Operation RHINO, a strike on the residence of Taliban leader Mullah Omar in the middle of Kandahar, center of the Taliban movement, and on an airfield south of the city. At the same time, A-teams from the 5th Special Forces Group began to be helicoptered in to link up with Northern Alliance forces.<sup>42</sup> One A-Team (Operational Detachment Alfa (ODA) 595) joined General Rashid Dostum 55 miles from the city of Mazar-e-sharif. A second team joined General Fahim Kahn to the south at Bagram airbase outside Kabul. These insertions were followed in early November by another team going to join forces under General Mohammed Atta, which linked up with forces under General Dostum.<sup>43</sup> These moves were accompanied by increasing bombardments of Taliban frontline

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13,239, 66 Fed. Reg. 64,907 (Dec. 14, 2001) (designating September 19, 2001, as the date of commencement of combatant activities in that zone for purposes of section 112 of the Internal Revenue Code (26 U.S.C. § 112)).

<sup>38</sup> Letter from John D. Negroponte, United States Permanent Representative to the United Nations, to Richard Ryan, President of the U.N. Security Council, 7 Oct. 2001, at [http://www.usembassy.it/file2001\\_10/alia/a1100807.htm](http://www.usembassy.it/file2001_10/alia/a1100807.htm).

<sup>39</sup> *Id.*

<sup>40</sup> Operation ENDURING FREEDOM—Operations, at <http://www.globalsecurity.org/military/ops/enduring-freedom-ops.htm> (last modified 16 Mar. 2004) [hereinafter OEF Operations]; Encyclopedia: U.S. Invasion of Afghanistan, at <http://www.nationmaster.com/encyclopedia/U.S.-Invasion-of-Afghanistan> (last visited 9 Mar. 2004) [hereinafter Encyclopedia: Afghanistan].

<sup>41</sup> Encyclopedia: Afghanistan, *supra* note 40.

<sup>42</sup> Frontline Chronology, *supra* note 26.

<sup>43</sup> *Id.* Special Forces Operational Detachment A are also known as "A detachments" or "A Teams." These teams are the basic building blocks of Special Forces operations. U.S. DEP'T OF ARMY, FIELD MANUAL 3-05.20, SPECIAL FORCES OPERATIONS para. 3-116 (26 June 2001).



positions by precision munitions dropped from Air Force heavy bombers and Navy aircraft, guided by Special Forces and CIA operatives. These strikes also included the use of 15,000 pound "daisy cutters" bombs and AC-130U gunships. The results shattered Taliban morale and led to increasing use of foreign fighters with al Qaeda to defend the regime, including such fighters taking over security in Afghan cities.<sup>44</sup>

On 9 November 2001, the Northern Alliance began its offensive with a push on Mazar-e-Sharif. After only one day of fighting the city fell to the forces of Generals Dostum and Atta, triggering the collapse of Taliban forces throughout northern Afghanistan. This included the immediate switching sides of numerous local commanders and their forces. Four days later, despite U.S. requests for them to stop short, the Northern Alliance army of General Fahim Khan moved into the capital city of Kabul. Only light resistance was encountered, the Taliban having fled the city the previous night.<sup>45</sup> At the same time, in western Afghanistan General Ismail Khan's forces took Herat, a key city near the Iranian border.

With the regime collapsing throughout Afghanistan, the remaining Taliban forces retreated to the northern city of Konduz (10,000 mainly Pakistani volunteers) and to Kandahar in their traditional homeland in southeastern Afghanistan, while al Qaeda forces concentrated in prepared cave complexes in the Tora Bora mountains thirty miles southeast of Jalalabad.<sup>46</sup> On 11 November, ODA 574 arrived in Oruzagan province to join Pashtun leader Hamid Karzai for their attack on Kandahar. After occupying the regional capital of Tarin Kowt, whose inhabitants had thrown out the Taliban, ODA 574 and less than fifty Pashtun soldiers were subjected to a fierce counterattack from over 1,000 Taliban soldiers. After four hours of air strikes directed by the A-team, the Taliban were beaten back and forced to retreat to Kandahar.<sup>47</sup> On 25 November, after two weeks of air strikes and ground combat, the Taliban forces in Konduz surrendered. While being held in the Qala-e-Jangi prison, they attempted a mass escape. In the ensuing battle, CIA operative Mike Spann, who was interviewing the prisoners, was killed, the first U.S. casualty of the war.<sup>48</sup>

Also on 25 November, the first extensive U.S. ground forces entered Afghanistan when Combined Task Force 58 (CTF-58) seized Forward Operating Base (FOB) Rhino, a dirt airfield at a former hunting camp near Kandahar in southern Afghanistan. Six CH-53E transport helicopters from the 15th and 26th Marine Expeditionary Unit (Special Operations Capable) (MEU(SOC)s) launched from the USS Peleliu, and after a nighttime refueling, landed Marine Company C 350 nautical miles away. A Marine KC-130 transport aircraft then landed additional Battalion Landing Team (BTL) 1/1 rifle companies. The next day carrier-based F-14s and Marine AH-1 attack helicopters flying from FOB Rhino destroyed a column of BMPs attempting to attack the base.<sup>49</sup>

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<sup>44</sup> Encyclopedia: Afghanistan, *supra* note 40.

<sup>45</sup> Frontline Chronology, *supra* note 26.

<sup>46</sup> Encyclopedia: Afghanistan, *supra* note 40.

<sup>47</sup> Frontline Chronology, *supra* note 26.

<sup>48</sup> Encyclopedia: Afghanistan, *supra* note 40.

<sup>49</sup> Combined Task Force 58, After Action Report 10 (2002) (on file with CLAMO) [hereinafter CTF 58 AAR]. BMP is a Russian acronym for a type of Soviet-made infantry combat vehicle. See BMP Amphibious Infantry Combat Vehicle, at <http://www.sovietarmy.com/vehicles/bmp.html> (reprinted from U.S. DEP'T OF ARMY, FIELD MANUAL 100-2-3, THE SOVIET ARMY; TROOPS ORGANIZATION AND EQUIPMENT (June 1991)).

On 1 December 2001, General Karzai's forces began to close on Kandahar from the north while forces of commander Gul Agha Sherizai moved in from the south. On 7 December, Kandahar fell, marking the end of the Taliban regime. However, Taliban leader Mullah Omar escaped prior to the capture of the city.<sup>50</sup> On 13 December, CTF 58 Marines from the 26th MEU(SOC) secured the city's airfield.<sup>51</sup> At the same time, the United States and the Northern Alliance stepped up attacks on the remnants of al Qaeda in the Tora Bora Mountains. In two weeks of heavy ground fighting and air strikes, hundreds of al Qaeda fighters were killed. By 17 December, the remainder fled to Pakistan, marking the end of the first phase of combat in Afghanistan.<sup>52</sup>

On 29 January 2002, 1,600 soldiers from the 101st Airborne Division (Air Assault) replaced the Marines of CTF-58 at Kandahar airport and formed Task Force (TF) RAKKASAN ("parachute" in Japanese).<sup>53</sup> On 1 March, the 101st Airborne, joined by elements from the 10th Mountain Division, the 160th Special Operations Regiment, Special Forces, Afghan soldiers, and 200 troops from Australia (TF 64), Denmark, France, Germany and Norway began Operation ANACONDA. Several hundred al Qaeda and Taliban fighters were attacked south of Gardez in eastern Afghanistan.<sup>54</sup> An intensive firefight in the rugged mountainous terrain, including mountains up to 12,000 feet, resulted in the first numerous U.S. casualties of the war.<sup>55</sup> Over 400 Taliban and al Qaeda fighters were killed.<sup>56</sup> The Operation concluded on 17 March.

At the end of March, the 5th Special Forces Group was replaced by the 3rd Special Forces Group. In mid-April, the 1-87th Infantry and 4-31st Infantry battalions of the 10th Mountain Division were replaced by 101st Airborne Soldiers. Combined Joint Task Force 180 (CJTF-180), commanded by 18th Airborne Corps Commander LTGEN Dan McNeill, assumed responsibility for U.S. forces in Afghanistan in mid-May 2002.<sup>57</sup>

### *c. Diplomatic, Legal, and Military Situation as of 1 May 2003*

Sponsored by the UN, Afghan factions opposed to the Taliban met in Bonn, Germany in early December 2001 and agreed on a political process to restore stability and governance to Afghanistan.<sup>58</sup> The meetings produced the "Bonn Agreement,"<sup>59</sup> an interim plan for the governance of Afghanistan. Under the Bonn Agreement, an Afghan Interim Authority (AIA) was formed and took office in Kabul on 22 December 2001. The AIA was composed of thirty members and headed by elected chairman Hamid Karzai. Following an "Emergency Loya Jirga"

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<sup>50</sup> Frontline Chronology, *supra* note 26.

<sup>51</sup> OEF Operations, *supra* note 40; CTF 58 AAR, *supra* note 49, at 15.

<sup>52</sup> Frontline Chronology, *supra* note 26.

<sup>53</sup> OEF Operations, *supra* note 40; OEF Deployments, *supra* note 29.

<sup>54</sup> OEF Operations, *supra* note 40.

<sup>55</sup> These occurred when a Navy SEAL who fell out of a helicopter was captured and killed, and seven Army and Air Force personnel sent to rescue him also died.

<sup>56</sup> Encyclopedia: Afghanistan, *supra* note 40.

<sup>57</sup> OEF Operations, *supra* note 40.

<sup>58</sup> DOS Afghanistan Background Note, *supra* note 10.

<sup>59</sup> Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, 41 I.L.M. 1032 (Jan. 4, 2002), available at <http://www.uno.de/frieden/afghanistan/talks/agreement.htm> (last visited 9 Jul. 2004) [hereinafter Afghanistan Provisional Arrangement].

in June 2002, the Interim Authority gave way to a Transitional Authority headed by now-President Karzai. The Transitional Authority renamed the government as the Transitional Islamic State of Afghanistan (TISA). As of 1 May 2003, TISA's authority beyond the capital, Kabul, was slowly growing. With Coalition support, TISA increased its capacity to secure Afghanistan's borders to maintain internal order.<sup>60</sup>

The Bonn Agreement included a request to the UN Security Council that the Council consider sending a UN-mandated force to Afghanistan.<sup>61</sup> The Council acted on the request by adopting Resolution 1386, authorizing the presence of an International Security Assistance Force (ISAF) under Chapter VII of the UN Charter.<sup>62</sup> The ISAF's mandate includes taking "all necessary measures" to create a secure environment in Kabul and its surrounding areas.<sup>63</sup> The Council extended the ISAF's mandate twice within the time period covered by this Publication.<sup>64</sup>

At the same time as the ISAF was established, a six-month rotation of Army units in Afghanistan was begun to provide security outside Kabul and to continue to eliminate the remaining al Qaeda and Taliban forces. As of 1 May 2003, elements of the 101st Airborne Division, 82nd Airborne Division, and the 10th Mountain Division had participated in continuing OEF operations in Afghanistan.<sup>65</sup> Although U.S. forces in Afghanistan support the ISAF's work in the Kabul region, the U.S. chain-of-command is entirely separate, and U.S. forces operate across Afghanistan, outside the ISAF's area of responsibility.<sup>66</sup> In the spring of 2001, the United States and the Afghan Government signed an international agreement clarifying the status of United States forces in Afghanistan.<sup>67</sup>

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<sup>60</sup>A new constitution was subsequently developed and adopted by a Constitutional Loya Jirga in early January 2004. See Pamela Constable, *Afghan Delegates Approve Charter: Following Bitter Debate, Assembly Clears Path To Democratic Elections*, WASH. POST, Jan. 5, 2004, at A01. Afghanistan is scheduled to hold presidential elections in June 2004.

<sup>61</sup> Afghanistan Provisional Agreement, *supra* note 59, at Annex I (calling for the establishment of an "International Security Force").

<sup>62</sup> S.C. Res. 1386, U.N. SCOR, 56th Sess., 4443rd mtg., U.N. Doc. S.RES/ 1386 (2001) [hereinafter S.C. Res. 1386] (providing for the establishment of an ISAF for six months under the leadership of Great Britain). See International Security Assistance Force—ISAF 4, at [http://www.globalsecurity.org/military/ops/oef\\_orbat\\_isaf4.htm](http://www.globalsecurity.org/military/ops/oef_orbat_isaf4.htm) (last modified 13 Aug. 2003).

<sup>63</sup> S.C. Res. 1386, *supra* note 62, paras. 1, 3.

<sup>64</sup> S.C. Res. 1413, U.N. SCOR, 56th Sess., 4541st mtg., U.N. Doc. S.RES/ 1413 (2002) (extending the ISAF's authority for six months beyond 20 Jun. 2002 under Turkish command); S.C. Res. 1444, U.N. SCOR, 57th Sess., 4651st mtg., U.N. Doc. S.RES/ 1444 (2002) (authorizing the ISAF to operate for an additional year beyond 20 December 2002 under joint Dutch and German command).

<sup>65</sup> See, e.g., Operation ENDURING FREEDOM—Order of Battle, at [http://www.globalsecurity.org/military/ops/oef\\_orbat-01.htm](http://www.globalsecurity.org/military/ops/oef_orbat-01.htm) (last modified 16 Mar. 2004).

<sup>66</sup> See generally NINA M. SERAFINO, CONGRESSIONAL RESEARCH SERVICE, PUB. NO. IB94040, PEACEKEEPING: ISSUES OF U.S. MILITARY INVOLVEMENT 4-5 (2d ed. 2003), at <http://www.ncseonline.org/nle/crsreports/03Apr/IB94040.pdf> (last visited 15 Mar. 2004) [hereinafter CRS Afghanistan Issue Brief].

<sup>67</sup> The agreement is on file in the CLAMO SIPRNET Database, see *infra* Section III.J.3.a.2 (discussing the SIPRNET and CLAMO equipment and resources). Note that Secretary of Defense Donald Rumsfeld declared that major combat operations had ceased in Afghanistan as of 1 May 2003 (the same day as they ceased in Iraq). CNN—Major Combat in Afghanistan has Ended, U.S. Defense Secretary Donald Rumsfeld Said Thursday, at <http://www.cnn.com/2003/WORLD/asiapcf/central/05/01/afghan.combat/> (last visited 9 Jul. 2004).

The legal basis underlying the United States' continued military presence in Afghanistan continues to be that of individual and collective self defense under Article 51 of the UN Charter.<sup>68</sup> Although the Taliban regime has fallen, and Al Qaeda's operations have been disrupted, U.S. military forces continue to operate to deny the enemy sanctuary in Afghanistan.<sup>69</sup> In addition, the United States is operating at the request of and under the consent of the new government of Afghanistan.<sup>70</sup> Finally, the U.S. has participated in international efforts to deliver humanitarian aid, train the fledgling Afghan National Army, and provide security to the Afghan Government and society.<sup>71</sup> U.S. Secretary of Defense Donald Rumsfeld testified before the Senate Armed Services Committee that "the United States and its international partners are making a maximum effort to assist Afghanistan's new government in economic, humanitarian, security, and other fields."<sup>72</sup> Thus, arguably, the legal authority provided under Chapter VII of the UN Charter as utilized in Security Council Resolutions 1386, 1413, and 1444 provides additional legal authority for U.S. activities.<sup>73</sup> In sum, the United States continues military operations in Afghanistan, with the consent of the Afghan government, under the inherent Article 51 right of individual and collective self-defense and in support of the ISAF's Chapter VII mandate.

## D. IRAQ (OIF)

### 1. Overview

#### a. Geography<sup>74</sup>

Iraq is a mostly landlocked county, approximately the size of California, bordered by Iran, Kuwait, Saudi Arabia, Jordan, Syria, and Turkey. The terrain is primarily broad plains, with deserts in the west, mountains in the north and marshes and a small coastline on the Persian Gulf in the southeast. The climate features mild-to-cool winters and dry, hot, cloudless summers. Much of Iraq's fairly extensive infrastructure is in disrepair due to war damage or lack of resources. Iraq's population is approximately 24.7 million people,<sup>75</sup> of which the two largest ethnic groups are Arabs and Kurds. Arabic and Kurdish are the most commonly spoken

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<sup>68</sup> See *supra* note 3 and accompanying text (explaining the U.S. Government's asserted legal basis for intervention in Afghanistan as the exercise of individual and collective self-defense under Article 51 of the UN Charter).

<sup>69</sup> See *Testimony on Operation Enduring Freedom, Hearing Before the Senate Armed Services Comm.*, 107th Cong. 3, July 31, 2002, at [http://www.senate.gov/~armed\\_services/statemnt/2002/July/Rumsfeld2.pdf](http://www.senate.gov/~armed_services/statemnt/2002/July/Rumsfeld2.pdf) (testimony of Donald H. Rumsfeld, U.S. Secretary of Defense) (referencing continuing U.S. military operations in Afghanistan: "Our goal in Afghanistan is to ensure that the country does not, again, become a terrorist training ground. That work, of course, is by no means complete. Taliban and Al Qaeda fugitives are still at large.").

<sup>70</sup> CIA Fact Book—Afghanistan, *supra* note 13.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 6.

<sup>73</sup> See CRS Afghanistan Issue Brief, *supra* note 66, at 4 ("U.S. troops provide some assistance to the ISAF, i.e., logistical intelligence, and quick reaction force support, but they do not engage in peacekeeping.").

<sup>74</sup> Adapted from Central Intelligence Agency, World Fact Book—Iraq, at <http://www.cia.gov/cia/publications/factbook/geos/iz.html> (last modified 18 Dec. 2003) [hereinafter CIA Fact Book—Iraq].

<sup>75</sup> *Id.*

languages. Most Iraqi are Muslims, the majority of whom are Shia Muslims, although there is a large Sunni Muslim population as well as very small communities of Christians and Jews.<sup>76</sup>



### ***b. History***<sup>77</sup>

Once known as Mesopotamia ("the land between the rivers"), Iraq was the site of flourishing ancient civilizations, including the Sumerian, Babylonian, and Parthian cultures. In the 700s Arab Muslims conquered Iraq, followed eventually by the Turks, becoming part of the Ottoman Empire. With the Ottoman Empire's defeat in World War I, Iraq came under British control, but was ruled by a constitutional monarchy. The king was assassinated in 1958 and in 1963 the Ba'ath Party took power.<sup>78</sup> In July 1979 Saddam Hussein took full control of the Iraqi government.<sup>79</sup>

The overthrow of the monarchy in Iran and the coming to power in 1979 of Ayatollah Khomeini—whom Saddam Hussein had expelled from Iraq in 1978—revived the historic hostility between the two countries. Believing Iran's military forces to be unprepared as a result of the revolutionary purges, in September 1980, following a number of border skirmishes, Iraq

<sup>76</sup> See *supra* note 16 for a discussion of the difference between Shia and Sunni Muslims.

<sup>77</sup> Adapted from U.S. Dep't of State, Bureau of Near Eastern Affairs, Background Note: Iraq, Oct. 2003, at <http://www.state.gov/r/pa/ei/bgn/6804pf.htm> [hereinafter DOS Iraq Background Note].

<sup>78</sup> The Ba'ath Party was a secular Pan-Arab organization begun in Syria in 1944 that became active in Iraq in the 1950s. The party was created in reaction to European colonialism and emphasized unity of the Arab people and eliminating the borders created in the Middle East by the victors of World War I. THABIT A.J. ABDULLAH, A SHORT HISTORY OF IRAQ 140, 164 (2003).

<sup>79</sup> DOS Iraq Background Note, *supra* note 77.

invaded Iranian territory. This began a bitter, costly, eight-year-long war, which devastated the economy of Iraq. Following the war, an ongoing rebellion by Kurdish elements in the northern mountains was quashed by, among other things, a mass chemical weapons attack on the city of Halabja that killed several thousand civilians.<sup>80</sup> During the war, Iraq also initiated an attack on the USS Stark, although it later claimed it was an accident and agreed to pay \$27.3 million in compensation to relatives of the thirty-seven Americans killed.<sup>81</sup>

After Iraq unlawfully invaded and occupied Kuwait in 1990, the UN Security Council adopted Resolutions 660 (demanding Iraq's withdrawal from Kuwait) and 678 (authorizing the use of "all necessary means" to expel Iraq from Kuwait).<sup>82</sup> With the explicit authority of the UN Security Council, the U.S.-led coalition launched Operation DESERT STORM on 17 January 1991, forcefully and rapidly ejecting Iraqi forces from Kuwait.

In April 1991, the Security Council adopted Resolution 687. This resolution formalized the cease-fire between Iraqi and coalition forces, and obliged Iraq to "unconditionally accept the destruction, removal, or rendering harmless *under international supervision*," of its chemical and biological weapons and long-range ballistic missile capabilities.<sup>83</sup> The Resolution also prohibited Iraq from acquiring or developing nuclear weapons.<sup>84</sup> Iraq was initially somewhat compliant, but over the next eight years, it became incrementally less observant of its obligations under Resolution 687, culminating with Iraq's cessation of all cooperation with the United Nations Special Commission (UNSCOM) and the International Atomic Energy Agency (IAEA) in 1998. When the Ba'ath regime refused to fully cooperate with the UN inspections, the Security Council employed sanctions to prevent further WMD development and compel Iraqi adherence to international obligations.<sup>85</sup> Continued noncompliance by Iraq with its UN obligations, particularly Iraq's refusal to allow weapons inspectors full freedom of action in dismantling Iraq's WMD program, caused those sanctions to remain in place until the coalition removed the Ba'ath regime in 2003. Under the UN oil-for-food program, however, Iraq was allowed to export oil and use the proceeds to purchase goods to address essential civilian needs, including food, medicine, and infrastructure spare parts.<sup>86</sup>

Intermittent combat between coalition forces and Iraq continued after the formal cessation of hostilities in 1991. In August 1992, in response to Saddam Hussein's attacks on Iraq's Kurdish minority in the northern part of the country and Shia Muslims in the southern part,

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<sup>80</sup> *Id.* Iraq also unleashed a barrage of missiles against Iranian cities and used chemical warfare against the Iranians. U.S. DEP'T OF ARMY, IRAQ: A COUNTRY STUDY—AREA HANDBOOK SERIES, Introduction (1989), at <http://lcweb2.loc.gov/frd/cs/iqtoc.html> (now managed by the Library of Congress, Federal Research Division).

<sup>81</sup> *Id.*

<sup>82</sup> S.C. Res. 660, U.N. SCOR, 44th Sess., 2932nd mtg., U.N. Doc. S.RES/ 660 (1990); S.C. Res. 678, U.N. SCOR, 45th Sess., 2963rd mtg., U.N. Doc. S.RES/ 678 (1990) [hereinafter S.C. Res. 678].

<sup>83</sup> S.C. Res. 687, U.N. SCOR, 45th Sess., 2981st mtg., U.N. Doc. S.RES/ 687 (1991) [hereinafter S.C. Res. 687] (emphasis added). Paragraphs C8(a)-(b) detail Iraq's obligations with respect to chemical and biological weapons and ballistic missiles with a range greater than 150km.

<sup>84</sup> *Id.* para. 12.

<sup>85</sup> United Nations Special Commission and the International Atomic Energy Agency were the UN bodies charged with supervising Iraq's compliance with Resolution 687.

<sup>86</sup> DOS Iraq Background Note, *supra* note 77. See S.C. Res. 986, U.N. SCOR, 49th Sess., 3519th mtg., U.N. Doc. S/RES/986 (1995).

in violation of UNSC Resolution 688,<sup>87</sup> "no-fly zones" were established over Iraq north of the 36th parallel and south of the 32nd (later expanded to the 33rd) parallel. The Combined Task Force (United States, United Kingdom, and Turkey) under Operations PROVIDE COMFORT (1992-96) and NORTHERN WATCH (1997-2003) enforced the northern no-fly zone from bases in Turkey.<sup>88</sup> Joint Task Force Southwest Asia (JTF-SWA) (United States, United Kingdom, France and Saudi Arabia) under Operation SOUTHERN WATCH (1992-2003) enforced the southern no-fly zone from bases in Persian Gulf countries and Navy aircraft carriers.<sup>89</sup> On 3 September 1996, the coalition conducted Operation DESERT STRIKE, consisting of sea- and air-launched cruise missile attacks, in response to Iraqi attacks on Kurdish areas in Northern Iraq.<sup>90</sup> On 16 December 1998, in response to Iraq bringing to a halt UN weapons inspections, the United States and Britain launched four days of air strikes with cruise missiles and aircraft, including the first combat use of the B-1 heavy bomber (Operation DESERT FOX).<sup>91</sup> Following these strikes the coalition began a four-year "low-profile" war of attrition against Iraqi air defense and other military targets that lasted until the beginning of Operation IRAQI FREEDOM.<sup>92</sup>

## 2. Operation IRAQI FREEDOM

### a. Diplomatic and Legal Background

Following Operation DESERT FOX, Iraq continued to deny access to UN weapons inspectors, resulting in growing concern that Saddam Hussein was reconstituting his chemical and biological weapons stockpiles and advancing his program for acquiring nuclear weapons. The events of 11 September 2001 led some within the U.S. Government to urge that the U.S. policy of containing Iraq be dropped and direct action taken immediately against Saddam Hussein's regime. However, as noted previously, the United States focused initially on Afghanistan.<sup>93</sup> Soon after the fall of the Taliban, however, President George W. Bush, in his State of the Union address on 29 January 2002, identified Iraq as part of "an axis of evil" and stated that the United States "would not permit the world's most dangerous regimes to threaten us with the world's most destructive weapons."<sup>94</sup>

In the face of continued Iraqi intransigence over revealing and destroying its WMD program, President Bush appeared before the UN General Assembly on 12 September 2002 to

<sup>87</sup> S.C. Res. 688, U.N. SCOR, 2982nd mtg., U.N. Doc. S/RES/688 (1991).

<sup>88</sup> Operation Northern Watch, at <http://www.eucom.mil/Directorates/ECPA/Operations/onw/onw.htm> (last visited 9 Mar. 2004).

<sup>89</sup> Operation Southern Watch, at <http://www.eucom.mil/Directorates/ECPA/Operations/osw/osw.htm> (last visited 9 Mar. 2004). A no-drive zone in southern Iraq was also established to prevent the regime from massing forces to threaten or again invade Kuwait. DOS Background Note - Iraq, *supra* note 77.

<sup>90</sup> Operation Desert Strike, at [http://www.globalsecurity.org/military/ops/desert\\_strike.htm](http://www.globalsecurity.org/military/ops/desert_strike.htm) (last modified 24 June 2003).

<sup>91</sup> Operation Desert Fox, at [http://www.globalsecurity.org/military/ops/desert\\_fox.htm](http://www.globalsecurity.org/military/ops/desert_fox.htm) (last modified 8 Sept. 2002).

<sup>92</sup> Attack on Iraq: Operation Dessert Fox and Operation Northern Watch, at <http://www.factmonster.com/spot/iraq1.html> (last visited 9 Mar. 2004).

<sup>93</sup> See *supra* note 26.

<sup>94</sup> American Friends Service Committee, Iraq War Timeline (Sept. 2003) (on file with CLAMO) [hereinafter Iraq War Timeline].

urge the UN to acknowledge the danger posed by Iraq or risk becoming irrelevant.<sup>95</sup> The President emphasized that:

[O]ur greatest fear is that the terrorists will find a shortcut to their mad ambitions when an outlaw regime supplies them with the technologies to kill on a massive scale. . . . In one place—in one regime—we find all these dangers, in their most lethal and aggressive forms, exactly the kind of aggressive threat the United Nations was born to confront. . . . In 1991, the Iraqi regime agreed to destroy and stop developing all weapons of mass destruction and long-range missiles, and to prove to the world it has done so by complying with rigorous inspections. Iraq has broken every aspect of this fundamental pledge. . . . If Iraq's regime defies us again, the world must move deliberately, decisively to hold Iraq to account. We will work with the U.N. Security Council for the necessary resolutions. But the purposes of the United States should not be doubted. The Security Council resolutions will be enforced—the just demands of peace and security will be met—or action will be unavoidable. And a regime that has lost its legitimacy will lose its power.<sup>96</sup>

President Bush had made it clear that, barring Iraq's unlikely compliance with its Resolution 687 obligations, the United States would seek UN authorization to use force against Iraq, but if UN approval was not forthcoming, the United States would not rule out the use of force.

President Bush's UN speech was followed by a Joint Resolution of Congress on 10 October 2002 authorizing the use of force against Iraq.<sup>97</sup> After intense U.S. and British diplomatic pressure, the UN Security Council passed Resolution 1441, which imposed tough new inspections on Iraq, precisely defined the actions that Iraq had to take to avoid being in material breach of the resolution, and threatened "serious consequences" in the event of Iraqi non-compliance.<sup>98</sup> In the Resolution, the Security Council stated that Iraq had been and remained in material breach of its obligations under Resolution 687 and subsequent Resolutions.<sup>99</sup> The Security Council gave Iraq "a final opportunity" to comply with its disarmament obligations and submit to an "enhanced" inspection regime, but it included no specific language automatically authorizing the use of force if Iraq failed to comply.<sup>100</sup> Shortly thereafter, weapons inspections resumed and Iraq made its "final declaration" concerning the status of its WMD.

The United States, however, believed that Iraq continued to defy the Security Council. President Bush made the U.S. Government's position on Iraq's perceived lack of compliance clear in his 28 January 2003 State of the Union Address.

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<sup>95</sup> *Id.*

<sup>96</sup> President George W. Bush, Address to the United Nations General Assembly, Sept. 12, 2002, *at* <http://www.whitehouse.gov/news/releases/2002/09/print/20020912-1.html> (last visited 16 Mar. 2004) [hereinafter President Bush UN Address].

<sup>97</sup> H.R.J. Res. 114, 107th Cong. (2002).

<sup>98</sup> S.C. Res. 1441, U.N. SCOR, 4644th mtg., U.N. Doc. S/RES/1441 (2002). Iraq War Timeline, *supra* note 94.

<sup>99</sup> *Id.* para. 1.

<sup>100</sup> *Id.* para. 2.



Almost three months ago, the United Nations Security Council gave Saddam Hussein his final chance to disarm. He has shown instead utter contempt for the United Nations, and for the opinion of the world. The 108 U.N. inspectors were [not] sent to conduct a scavenger hunt for hidden materials across a country the size of California. The job of the inspectors is to verify that Iraq's regime is disarming. It is up to Iraq to show exactly where it is hiding its banned weapons, lay those weapons out for the world to see, and destroy them as directed. Nothing like this has happened.<sup>101</sup>

Subsequent UN inspectors' reports noted progress in Iraqi cooperation, but also made clear Iraq's failure to accept its disarmament obligations. As a result, on 24 February 2003, the United States, Britain, and Spain proposed that the UN Security Council specifically authorize the use of force to enforce Resolution 1441 and the other resolutions requiring Iraqi disarmament. However, in the face of strong resistance by Russia, France and Germany, they were unable to secure the concurrence of a majority of UN Security Council members. Consequently, the U.S. decided to proceed with a "coalition of the willing" and attacked Iraq on 19 March 2003.<sup>102</sup>

The U.S. Government's asserted legal basis for the use of force in Iraq was straightforward--U.S. and coalition actions were a continuation of the actions authorized by the UN for the first Gulf War.<sup>103</sup> Resolution 678 authorized UN Member States to use "all necessary

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<sup>101</sup> President George W. Bush, State of the Union Address, Jan. 28, 2003, at <http://www.state.gov/r/pa/ei/wh/rem/17008pf.htm>. *But see* United Nations Monitoring Verification and Inspection Commission (UNMOVIC) Executive Chairman Dr. Hans Blix, Briefing of the United Nations Security Council, Feb. 14, 2003, at <http://www.un.org/Depts/unmovic/blix14Febasdek.htm>. Dr. Blix stated:

In my 27 January [2003] update to the Council, I said that it seemed from our experience that Iraq had decided in principle to provide cooperation on process, most importantly prompt access to all sites and assistance to UNMOVIC in the establishment of the necessary infrastructure. This impression remains, and we note that access to sites has so far been without problems, including those that had never been declared or inspected, as well as to Presidential sites and private residences.

*Id.* (citations omitted).

<sup>102</sup> Remarks by President Bush, Press Conference by President Bush and President Havel of Czech Republic Prague Castle, Prague, Czech Republic (Nov. 20, 2002), at <http://www.whitehouse.gov/news/releases/2002/11/20021120-1.html>. By early in the war, the coalition consisted of forty-six countries—Afghanistan, Albania, Angola, Australia, Azerbaijan, Bulgaria, Colombia, Costa Rica, Czech Republic, Denmark, Dominican Republic, El Salvador, Eritrea, Estonia, Ethiopia, Georgia, Honduras, Hungary, Iceland, Italy, Japan, Kuwait, Latvia, Lithuania, Macedonia, Marshall Islands, Micronesia, Mongolia, Netherlands, Nicaragua, Palau, Panama, Philippines, Poland, Portugal, Romania, Rwanda, Singapore, Slovakia, Solomon Islands, South Korea, Spain, Turkey, Uganda, Ukraine, United Kingdom, United States, and Uzbekistan. Contributions from Coalition member nations ranged from direct military participation, logistical and intelligence support, specialized chemical/biological response teams, over-flight rights, humanitarian and reconstruction aid, to political support. Adapted from Operation Iraqi Freedom: Coalition Members, Mar. 21, 2003, at <http://www.whitehouse.gov/news/releases/2003/03/20030321-4.html>.

<sup>103</sup> The inherent right of self defense, codified in Article 51 of the UN Charter, has also been cited as a basis for OIF. In his 2004 State of the Union Address President Bush stated that:

means to uphold and implement Resolution 660<sup>104</sup> and all *subsequent relevant resolutions* and to restore international peace and security in the area.”<sup>105</sup> Resolution 687 formalized the 1991 Gulf War cease-fire and placed corresponding obligations on Iraq with respect to its WMD capabilities.<sup>106</sup> Resolution 1441 declared Iraq in material breach of its obligations, giving it one final opportunity to comply.<sup>107</sup> Moreover, Resolution 1441 warned that Iraq would face “serious consequences” as a result of its continued violations of its obligations.<sup>108</sup> As stated above, in the view of the United States, Iraq had not complied with its obligations under Resolutions 687 and 1441. Because Iraq breached its obligations under Resolution 687 (which never terminated the authorization for the use of force in Resolution 678), the cease-fire was null and void and the authorization to use “all necessary means” to return peace and stability to the region contained in Resolution 678 remained in effect. Although an additional Security Council resolution explicitly authorizing the use of force would have been helpful, it was the U.S. position that such a resolution was not legally necessary.<sup>109</sup>

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Our greatest responsibility is the *active defense* of the American people. . . . As part of the offensive against terror, we are also confronting the regimes that harbor and support terrorists, and could supply them with nuclear, chemical, or biological weapons. The United States and our allies are determined: We refuse to live in the shadow of this ultimate danger. . . . After the chaos and carnage of September the 11th, it is not enough to serve our enemies with legal papers. The terrorists and their supporters declared war on the United States, and war is what they got. . . . From the beginning, America has sought international support for our operations in Afghanistan and Iraq, and we have gained much support. There is a difference, however, between leading a coalition of many nations, and submitting to the objections of a few. *American will never seek a permission slip to defend the security of our country* President George W. Bush, State of the Union Address (Jan. 20, 2004), at <http://www.whitehouse.gov/news/releases/2004/01/print/20040120-7.html> (emphasis added).

Article 51 states that “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an *armed attack* occurs against a Member of the United Nations.” Under Article 51, exercising the right of self-defense does not require explicit authorization, but it does require a predicate *armed attack*. Indeed, the U.S. exercised its inherent right of self-defense in Operation ENDURING FREEDOM without explicit Security Council authorization in response to the armed attacks of 11 September 2001.

Assuming Operation IRAQI FREEDOM was conducted wholly or partly in self-defense, it must have been *anticipatory* self-defense. The concept of anticipatory self-defense is not discussed in the UN Charter. The concept was recognized by most international legal experts as part of customary international law, but these experts disagree as to whether the concept was incorporated into, or superceded by, Article 51. (Nonetheless, the concept appears to be part of the National Security Strategy of the United States.) NATIONAL SECURITY COUNCIL, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 6, Sept. 2002, at <http://whitehouse.gov/nsc/nss.html>. The document states:

We will disrupt and destroy terrorist organizations by . . . defending the United States, the American people, and our interests at home and abroad by identifying and destroying the threat before it reaches our borders. While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defense by *acting preemptively* against such terrorists, to prevent them from doing harm against our people and country. *Id.* (citations omitted) (emphasis added).

<sup>104</sup> See S.C. Res. 660, *supra* note 82 (demanding that Iraqi forces leave Kuwait).

<sup>105</sup> See S. C. Res. 678, *supra* note 82, para. 2 (emphasis added).

<sup>106</sup> See S.C. Res. 687, *supra* note 83.

<sup>107</sup> See S.C. Res. 1441, *supra* note 98.

<sup>108</sup> *Id.* para. 13.

<sup>109</sup> In response to a reporter’s question (in Spanish) concerning apparent French opposition to a draft Security Council resolution specifically authorizing the use of force in Iraq, the U.S. UN Representative, Ambassador Negroponte, stated (in Spanish):

Critics of the U.S. Government's position argued that Resolution 1441 required a "two-step" process before force could lawfully be used against Iraq, in other words, that the resolution lacked "automaticity," which would presumably have allowed the United States to enforce the resolution without further explicit authorization from the Security Council.<sup>110</sup> They further argued that the U.S. Government's articulated position, in the absence of an explicit authorization of the use of force (as was the case in the first Gulf War in Resolution 678) depended upon its own interpretation of a Security Council Resolution. This, they contended, ran counter to the plain language of Article 39 of the UN Charter, particularly given the clearly different interpretations of co-equal permanent members of the Council:

The *Security Council* shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and *shall make recommendations, or decide what measures shall be taken . . . to maintain or restore international peace and security.*<sup>111</sup>

Further exploration of this topic would require an academic discussion beyond the scope of this Publication, but one author frames the general issue well.

Iraq has become an occasion to revisit the issue [of the preemptive use of force]. Iraq had not attacked the U.S., nor did it appear to pose an imminent threat of attack in traditional military terms. As a consequence, it seems doubtful that the use of force against Iraq could be deemed to meet the traditional legal tests justifying preemptive attack. But Iraq may have possessed WMD, and it may have had ties to terrorist groups that seek to use such weapons against the U.S. If evidence is forthcoming on both of those issues, then the situation necessarily raises the question that the Bush Administration articulated in its national security strategy, *i.e.*, whether the traditional law of preemption ought to be recast in light of the realities of WMD, rogue states, and terrorism. Iraq likely will not resolve that question, but it is an occasion to crystallize the debate.<sup>112</sup>

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In the first place, I do not agree with you that the majority of the [Security] Council is against [the proposed Resolution authorizing force]. As I said before, we believe that if it were not for the threat of a veto [from France and Russia], it would have been very possible to win passage of our resolution. But, in the second instance, as I said in English, we think that there is full authority in Resolution 1441, Resolution 687 and 678 with regard to the possible use of force [against Iraq].

United States Permanent Representative to the United Nations, John D. Negroponte, Public Remarks following Security Council Consultations on Iraq, 17 Mar. 2003, at [http://www.un.int/usa/03\\_035.htm](http://www.un.int/usa/03_035.htm).

<sup>110</sup> See Julia Preston, *Threats and Responses: United Nations; Security Council Votes, 15-0, For Tough Iraq Resolution; Bush Calls it a 'Final Test'*, N.Y. TIMES, 9 Nov. 2002, at A1 ("France led the way in insisting that military action could be authorized only in a second stage, after the weapons inspectors did their work and if and when they detected Iraqi violations of the inspections regime.").

<sup>111</sup> U.N. CHARTER art. 39.

<sup>112</sup> DAVID M. ACKERMAN, CONGRESSIONAL RESEARCH SERVICE, PUB. NO. RS21314, INTERNATIONAL LAW AND THE PREEMPTIVE USE OF FORCE AGAINST IRAQ 6 (2d ed. 2003).

*b. Coalition and Iraqi Forces*

In the late fall of 2002 and early winter of 2003, as diplomatic efforts to force Saddam Hussein to give up his WMD programs continued, the U.S. and its coalition allies, principally the United Kingdom, began to move forces to the region. After considerable debate within the Department of Defense and the U.S. Government, the Army's original plan for a phased introduction of a force comparable to that of the first Persian Gulf War (approximately 500,000 servicemembers)<sup>113</sup> was scaled back to approximately 125,000 to 200,000 servicemembers.<sup>114</sup> CENTCOM, which was controlling the forces in Afghanistan, was placed in overall command of this force as well. Subordinate to CENTCOM were the Coalition Forces Land Component Command, commanded by the Third Army Commander, LTGEN David McKiernan,<sup>115</sup> the Combined Forces Maritime Component Command (CFMCC) (naval), the Combined Forces Air Component Command (CFACC), and Coalition Forces Special Operations Component Command (CFSOCC). The CFLCC began planning for OIF during the summer of 2002. CENTCOM also conducted two exercises in the fall and winter of 2002, INTERNAL LOOK and LUCKY STRIKE. Each exercised the first four days of the war and the seizure of Baghdad.<sup>116</sup>

Subordinate to the CFLCC was the Army's V Corps and the Marines' I Marine Expeditionary Force (I MEF). V Corps, which consisted of the 3rd Infantry Division (Mechanized) (3ID), the 101st Airborne Division (Air Assault), and a brigade of the 82nd Airborne Division, was sent to Kuwait to attack from the south.<sup>117</sup> The U.S. plan also contemplated an attack from the north by the 4th Infantry Division (Mechanized) (4ID). However, the United States was unable to secure Turkey's approval for this approach and so the division was also sent to Kuwait, although it did not arrive in theater until toward the end of major combat.<sup>118</sup> Joining the Army in Kuwait was the I MEF, the Marine equivalent of the V Corps.<sup>119</sup> The I MEF consisted of the 1st Marine Division, TF Tarawa (a composite force sized between a brigade and a division), the 3rd Marine Air Wing and the British 1st Armored Division.<sup>120</sup> Deployed on the western border of Iraq was Special Operations TF 20, consisting of

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<sup>113</sup> W. MURRAY & MG R. SCALES, JR., *THE IRAQ WAR: A MILITARY HISTORY* 9 (2003) [hereinafter *Iraq War*].

<sup>114</sup> U.S. Forces Order of Battle—22 Feb., at [http://www.globalsecurity.org/military/ops/iraq\\_orbat\\_030224.htm](http://www.globalsecurity.org/military/ops/iraq_orbat_030224.htm) (last modified 24 Feb. 2003); U.S. Forces Order of Battle - 26 May, at [http://www.globalsecurity.org/military/ops/iraq\\_orbat\\_030526.htm](http://www.globalsecurity.org/military/ops/iraq_orbat_030526.htm) (last modified 27 May 2003).

<sup>115</sup> *Iraq War*, *supra* note 113, at 60. Coalition Forces Land Component Command was created in part to address a weakness encountered during Operation DESERT STORM, where there was not a unified land component command subordinate to CENTCOM. See summary notes from briefing by Colonel Richard Gordon, former CFLCC SJA, to the Army Judge Advocate General's Corps Graduate Course in Charlottesville, Va. 1 (20 Feb. 2004) (on file with CLAMO) [hereinafter *Gordon Briefing*].

<sup>116</sup> *Gordon Briefing*, *supra* note 115, at 2.

<sup>117</sup> *Iraq War*, *supra* note 113, at 62. The 3ID was the heaviest unit in OIF, consisting of 270 M-1 Abrams tanks and 200 M-2 Bradley fighting vehicles backed by AH-64 Apache attack helicopters and a brigade-sized artillery unit. The 101st Airborne was an infantry air assault division built around a large force of UH-60 Blackhawk transport helicopters and AH-64 Apache attack helicopters. *Id.* at 63-64.

<sup>118</sup> The 4ID was equipped and organized similarly to the 3ID, but with the added advantage of being a fully digitized formation, allowing its commanders and the individual units to have greatly increased situational awareness of their locations at all times. *Id.* at 63.

<sup>119</sup> *Id.* at 64.

<sup>120</sup> The 1st Marine Division contained three infantry regiments and one artillery regiment, with one brigade of M-1 tanks. TF Tarawa consisted of an infantry regiment and two MEUs, which included five infantry battalions and two

the Army's 5th Special Forces Group, a Ranger Regiment with one substitute battalion of the 82nd Airborne Division, and units of the British and Australian Special Air Services (SAS).<sup>121</sup> Finally, the 10th Special Forces Group infiltrated northern Iraq.<sup>122</sup>

The Navy sent four carrier battle groups to the region. The USS Harry S Truman and USS Theodore Roosevelt CVGBs were deployed to the western Mediterranean Sea to conduct attacks on Iraq from the west, while the USS Abraham Lincoln and USS Constellation CVGBs operated from the Persian Gulf. The USS Kitty Hawk also arrived in the Persian Gulf while the war was underway.<sup>123</sup> Coalition heavy bomber forces consisted of Air Force B-2 heavy bombers flying from the United States, B-1 heavy bombers temporarily based on the island of Diego Garcia in the Indian Ocean, and B-52 heavy bombers temporarily based at Mindenhall AFB in England. The Air Force sent F-15s, F-15Es, F-16s, F-117s, and A-10s to various bases in the Persian Gulf region. These fighter and attack aircraft were supplemented by Royal Air Force Tornado fighter-bombers and Royal Australian Air Force F/A-18s.<sup>124</sup>

The principal military forces facing the Coalition in Iraq were six divisions of the Republican Guard. Three divisions were located in northern and central Iraq under I Corps<sup>125</sup> while II Corps had three divisions in central Iraq.<sup>126</sup> In addition, there were 15,000 soldiers of the Special Republican Guard in Baghdad, mainly to guard against a coup. In theory, there also existed seventeen divisions of regular troops organized into five corps. However, these divisions existed mainly on paper, with serious shortages of equipment (and much of what existed was obsolete), personnel (most of whom were conscripts) and professional leadership (many of the senior officers had been executed or fired).<sup>127</sup> Finally, immediately prior to the beginning of the war, Saddam's eldest son, Uday, oversaw the creation of a force of irregulars (the "Fedayeen"), consisting of Ba'ath Party loyalists and foreign volunteers, who were armed with little more than small arms and rocket-propelled grenades (RPGs).<sup>128</sup>

### *c. Major Combat Operations*<sup>129</sup>

#### **1. Week One (19 March – 25 March)**

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M-1 tank companies, as well as light armored vehicles. The 3rd Marine Air Wing provided AH-1 Cobra attack helicopters, F/A-18 Hornet fighters and AV-8B Harrier V/STOL attack aircraft. *Id.* at 65-67. The British 1st Armored Division was an ad hoc organization consisting of the 7th Armored Brigade (the "Desert Rats"), the 16th Air Assault Brigade, and the 3rd Commando Brigade of the Royal Marines. *Id.* at 68-69.

<sup>121</sup> *Id.* at 70.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 71-72.

<sup>124</sup> *Id.* at 76-77.

<sup>125</sup> The Adnan Mechanized Division (around Mosul), the Baghdad Infantry Division (south of Baghdad) and the Abed Infantry Division. *Id.* at 83.

<sup>126</sup> The Medina Armored Division (south of Baghdad), the Nebuchadnezzar Infantry Division (near Tikrit), and the Hammurabi Mechanized Division (west of Baghdad). *Id.*

<sup>127</sup> *Id.* at 84.

<sup>128</sup> *Id.* at 85.

<sup>129</sup> Adapted from Army Magazine, Operation IRAQI FREEDOM, May 2003, at

<http://www.ausa.org/www/armymang.nsf/0/B792ABE493D2DE7C85256D0B00644C41?OpenDocument>.

On 19 March 2003, coalition forces began the war with air strikes by cruise missiles and F-117 stealth fighters. Targets included a suspected meeting of Saddam Hussein in Baghdad, as well as long-range artillery emplacements, air defense sites, and surface-to-surface missile sites. These air strikes continued throughout the early days of the war, culminating on the night of 21 March with a massive "shock and awe" attack designed to break the will of the Iraqis to fight for Saddam.

On 20 March, the 3ID entered southern Iraq at 0600 hours local time headed towards Baghdad to the north, meeting only slight resistance. SOF also began operations throughout western and southern Iraq. To the east of the 3ID, the I MEF and the British 1st Armored Division began their parallel drive north to seize and protect southern Iraq's oil fields. The next day the first elements of the 101st Airborne crossed into Iraq.

Within two days, the 3ID advanced almost 100 miles into Iraq. On 22 March, the 2nd Brigade of the 3ID encountered serious resistance for the first time, after bypassing urban areas and resistance, and penetrating 150 miles into Iraq, approximately halfway to Baghdad. At this point, Iraqi resistance also grew along the main supply route, especially at the town of Nasiriyah, which controlled a Euphrates River crossing. Here, Iraqi irregulars ambushed soldiers of the 507th Maintenance Company, resulting in five being taken prisoner and seven missing.<sup>130</sup> At the same time the 3rd Battalion, 187th Infantry Regiment, 101st Airborne, conducted an air assault into southern Iraq.

During these five days, Navy SEALs and coalition special forces seized Iraq's major gas and oil terminals in the northern Persian Gulf and airfields in western Iraq, while British Royal Marines seized the Faw peninsula and U.S. and Royal Marines captured the port of Umm Qasr. U.S. Marines and British Forces then closed in on Basra.

On 24 March, a massive sandstorm engulfed the area. By this time, elements of the 3ID had reached Karbala, within 50 miles of Baghdad. Attack helicopters of the 11th Aviation Regiment attacked Iraqi Republican Guard positions amid intense counterfire, resulting in the loss of one helicopter and damage to almost all of the remainder. Amidst the sandstorm, the 3ID battled elements of the Iraqi Republican Guard's Medina Division outside of Karbala. Troops from the 3/7th Cavalry Regiment repulsed an attack near Najaf. At the same time U.S. Marines launched a sustained operation to clear Nasiriyah. In Basra, Iraqi forces repressed an insurrection by its citizens. In addition, British troops broke up an attack outside the city, destroying twenty T-55 tanks and other armored vehicles.

At the end of Week One, SOF, Army Rangers and soldiers from the 82nd Airborne parachuted into a lightly defended airfield in northern Iraq and secured it. The next night, soldiers of the 173rd Airborne Brigade also conducted a night drop onto Bashur airstrip in the Kurdish-controlled area of Northern Iraq.

## **2. Week Two (26 March – 1 April)**

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<sup>130</sup> See *infra* Section III.A.6.a.

On 26 March, coalition air forces struck two separate columns of Republican Guard vehicles heading south out of Baghdad. Elements of the 3ID, including the 3/7th Cavalry Regiment, encircled Najaf, killing approximately 1,000 enemy troops in a three-day battle. The next day, the 3ID and the 101st Airborne paused in their advance to refit, although elements of the 3ID fought Iraqi irregulars at the town of Samawah. On 28 March, AH-64 Apache helicopters of the 101st Airborne attacked Iraqi troops near Karbala, destroying tanks, trucks and other equipment, with no losses, although two Apaches were damaged. The next day, the first suicide attack against U.S. forces killed four soldiers of the 3ID at a checkpoint at Najaf. Soldiers of the 82nd Airborne seized an airfield in southern Iraq for use as a forward base, also repulsing an attack by Iraqi irregular soldiers along Highway 8, the main supply route for coalition forces. In addition, AH-64 Apache helicopters of the 101st Airborne also began striking areas around Baghdad.

On 30 March, units of the 3ID pushed north to Hillah while the rest of the division pulled to within several miles of Karbala. A-10 attack aircraft began operating from Tallil Airfield in Iraq. The next day, soldiers of the 3ID near Karbala killed ten Iraqi civilians when the van in which the civilians were traveling failed to stop and was fired upon. At the same time, other elements of the 3ID clashed with Iraqi troops in house-to-house fighting in Hindiyah. Following this, the 3ID battled the Republican Guard's Medina Division outside Karbala. At the same time elements of the 101st Airborne besieged Najaf, subsequently entering the southern portion of the city.

To the east, U.S. Marines exchanged tank and artillery fire with Iraqi forces near Nasiriyah, then moved on al Kut. On the northern front, elements of the 1st Infantry Division (Mechanized) were airlifted to Bashur airstrip. Iraqi forces abandoned bunkers on a ridge near the Kurdish-controlled area in northern Iraq after heavy coalition air strikes.

### **3. Week Three (2 April – 19 April)**

On 2 April, the 3ID crossed the Euphrates River at Musayyib and closed to within 30 miles of Baghdad. The next day, part of the 3ID fought its way into Baghdad's international airport as another part drove to within 10 miles of the city. After a tank battle the following day, elements of the 3ID took over the entire Baghdad international airport and begin encircling the city. Troops of the 101st Airborne, meanwhile, pushed deeper into Najaf, while soldiers of the 82nd Airborne seized a water treatment plant in Samawah. On 4 April, the 101st Airborne began pulling out of Najaf to head north.

At the same time, U.S. Marines closed in on Baghdad from the southeast after crossing a canal and the Tigris River at Numaniyah, driving to within 15 miles of the city. After battling Iraqi defenders in a fierce fight, the Marines advanced to the edge of southeast Baghdad. During these three days, British troops clashed with irregular forces during a raid in Basra and U.S. Special Forces units and Kurdish militiamen captured the northern town of Bardarash.

On 5 April, in a reconnaissance in force, an armored column from the 3ID drove through southwestern Baghdad, encountering strong resistance but suffering no casualties. The next day, elements of the 3ID made a second sweep through Baghdad, this time advancing from the west.

U.S. aircraft also began landing at the Baghdad airport. On 7 April, the 2nd Brigade of the 3ID entered Baghdad and seized the Republican and Sijood presidential palaces, beginning "inside out" operations from within the city. That same day, U.S. warplanes dropped bombs on a building suspected of housing Iraqi leader Saddam Hussein and his two sons, but were unable to kill them. The next day soldiers of the 3ID continued to seek and destroy remaining pockets of Iraqi resistance in Baghdad.

While the 3ID was pressing on Baghdad from the west, U.S. Marines pushed further into eastern Baghdad, entering Baghdad's southeastern suburbs on 5 April. On 8 April, they captured the Rasheed military air base in eastern Baghdad. Finally, on 9 April, all coherent resistance in Baghdad collapsed. Residents turned out in the streets and, with the assistance of U.S. Marines, toppled statues and other icons of Saddam and his Ba'ath Party.

During the final days of major combat, the 101st Airborne began an operation to clear and secure Karbala, which had been bypassed on the way to Baghdad. On 6 April, the 2nd Brigade of the 101st Airborne finally took control of the city. The 3rd Brigade of the 101st also battled Iraqi defenders in Hillah. At the same time, soldiers of the 173rd Airborne Brigade began an operation to seize the oil fields in northern Iraq and the Governate of Kirkuk.<sup>131</sup> Finally, on 6 April, British troops entered the center of Basra and took control of the city the next day.

#### *d. Situation as of 1 May 2003*

On 1 May 2003, President Bush declared the end of major combat operations in Iraq, thus beginning the process of reorienting U.S. forces towards providing security and assisting in the reconstruction and transformation of Iraq.<sup>132</sup> Earlier, on 20 January 2003, President Bush had directed the formation of the Office of Reconstruction and Humanitarian Assistance (ORHA). The President charged ORHA with "establishing links with United Nations specialized agencies and with non-governmental organizations that will play a role in post-war Iraq."<sup>133</sup>

ORHA was led by LTGEN (ret.) Jay Garner, who arrived in Baghdad on 21 April 2003, twelve days after the capital was secured by Coalition forces. ORHA reported to General Tommy Franks, the CENTCOM Commander, and was comprised of representatives from several U.S. Government agencies, to include the Departments of Defense, State, Treasury, Justice, Agriculture, and Energy, as well as the Agency for International Development.<sup>134</sup> According to the National Security Advisor, Dr. Condoleeza Rice, the immediate focus of ORHA's efforts "were to help Iraqis restore the delivery of basic services—such as electricity, if necessary, water, basic medical care, and to make certain that civil servants are paid, for instance."<sup>135</sup> After

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<sup>131</sup> Memorandum For TJACLCS, International Law and Operations Department, CLAMO Draft Handbook—OIF/OEF, Major Brian Hughes (11 May 2004) (on file with CLAMO).

<sup>132</sup> President Bush Announces Major Combat Operations in Iraq Have Ended, May 1, 2003, *at* <http://www.whitehouse.gov/news/releases/2003/05/iraq/20030501-15.html>.

<sup>133</sup> *See* Iraqi Reconstruction—Introduction, *at* [http://www.globalsecurity.org/military/ops/iraq\\_recon\\_intro.htm](http://www.globalsecurity.org/military/ops/iraq_recon_intro.htm) (last modified 12 March 2004).

<sup>134</sup> Transitional Administration, *at* [http://www.globalsecurity.org/military/ops/iraqi\\_transition.htm](http://www.globalsecurity.org/military/ops/iraqi_transition.htm) (last visited 15 April 2004).

<sup>135</sup> *See* Dr. Condoleeza Rice Discusses Iraqi Reconstruction, Press Briefing by Dr. Condoleeza Rice, 4 April 2003, *at* <http://www.whitehouse.gov/news/releases/2003/04/20030404-12.html>.



this initial phase, the Coalition hoped that functions could be turned over to the Iraqis, and that ORHA could then shift to an advisory role.<sup>136</sup> Although outside the period of this Publication, ORHA was soon replaced by the Coalition Provisional Authority (CPA), headed by Ambassador L. Paul Bremer III. The authority of the CPA to administer Iraq until a government was reconstituted was acknowledged by the UN Security Council on 22 May 2003.<sup>137</sup>

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<sup>136</sup> *Id.*

<sup>137</sup> See S.C. Res. 1483, U.N. SCOR, 57th Sess., 4761st mtg., U.N. Doc. S/RES/1483 (2003). While the political system is in transition, the coalition and the Iraqi people have developed advisory and governing councils on the local, regional and national level to ensure that international efforts serve Iraqis of all religions, ethnicities, and gender effectively. An Iraqi Interim Administration, which includes the Interim Ministers and the Iraqi Governing Council (GC), is progressively assuming executive responsibilities within the framework of the CPA's temporary responsibilities and authorities in Iraq. Adapted from DOS Iraq Background Note, *supra* note 77. A new interim constitution was subsequently signed by the GC on 8 March 2004. See Rajiv Chandrasekaran, *Iraq Council Signs Charter*, WASH. POST, March 9, 2004, at A01. The handing over of authority to the new government of Iraq was set to occur on or before 30 June 2004. On 28 June 2004, the Coalition formally transferred sovereignty to an Interim Iraqi Government. See *The November 15 Agreement: Timeline to a Sovereign, Democratic and Secure Iraq*, at <http://www.iraqcoalition.org/government/AgreementNov15.pdf> (last visited 9 Mar. 2004).

### III. LESSONS LEARNED

#### A. INTERNATIONAL LAW

*[In the military context] international law is the application of international agreements, international customary practices, and the general principles of law recognized by civilized nations to military operations and activities.<sup>1</sup>*

International law (ILAW) considerations permeated Operations ENDURING FREEDOM (OEF) and IRAQI FREEDOM (OIF). In both operations, judge advocates (JAs) were deeply involved in addressing these issues at all operational phases and levels of command. JAs handled ILAW issues including the legal basis for the use of force, capitulation, parole and local cease fire agreements, detainee operations, war crimes investigations, negotiations with armed groups, the wear of nonstandard uniforms, and child soldiers on the battlefield. In both campaigns, the U.S. military and its coalition partners conducted operations in accordance with the international law of armed conflict (LOAC). JA experiences in OEF and OIF will undoubtedly provide abundant lessons for future operations.

#### ***1. Understand how the Legal Basis for the Use of Force and Related Policy Considerations Shape the Mission.***

As in past operations,<sup>2</sup> JAs found that understanding the legal basis for the use of force and related policy considerations helped them provide informed legal advice to commanders. Although JAs were not involved in decisions outside the Department of Defense (DoD), events at the UN and within the highest levels of the U.S. government impacted JAs involved in OEF/OIF mission planning and execution.<sup>3</sup>

JAs assist commanders with international legal issues relating to U.S. forces overseas, including the legal basis for conducting operations.<sup>4</sup> In addition, JAs provide briefings covering

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<sup>1</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS para. 3-6 (1 Mar. 2000) [hereinafter FM 27-100] (stating further, "Within the Army, the practice of international law also includes foreign law, comparative law, martial law, and domestic law affecting overseas, intelligence, security assistance, counterdrug, and civil assistance activities.").

<sup>2</sup> See CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN HAITI: LESSONS LEARNED FOR JUDGE ADVOCATES at 47 (1995) [hereinafter HAITI LESSONS LEARNED] (phrasing a lesson learned as "Understand the International Justification for Use of Force and the Impact of Domestic Legislation"); CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN THE BALKANS 1995-1998: LESSONS LEARNED FOR JUDGE ADVOCATES at 76 (13 Nov. 1998) [hereinafter BALKANS LESSONS LEARNED] (phrasing a lesson learned as "Know the International Legal Basis for the Mission and for the Use of Force"); CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN KOSOVO (1999-2001): LESSONS LEARNED FOR JUDGE ADVOCATES, at 97 (2001) [hereinafter KOSOVO LESSONS LEARNED] (posing a lesson learned as "Judge Advocates and Commanders Must Understand the International Legal Framework for the Military Mission").

<sup>3</sup> See *supra* Section II (discussing the events within the U.S. government and at the UN leading up to OEF and OIF).

<sup>4</sup> FM 27-100, *supra* note 1, paras. 3-6, 3-7.

the legal basis for the operation to deploying personnel.<sup>5</sup> The following quote helps explain why JAs should understand the legal basis for the use of force.

Though these issues [concerning the use of force] will normally be resolved at the national political level, it is nevertheless essential that judge advocates understand the basic concepts involved in a determination to use force. Using the mission statement provided by higher authority, the judge advocate must become familiar with the legal justification for the mission and, in coordination with higher headquarters, be prepared to brief all local commanders on the justification. This will enable commanders to better plan their missions, structure public statements, and conform the conduct of military operations to national policy. It will also assist commanders in drafting and understanding Rules of Engagement (ROE) for the mission, as one of the primary purposes of ROE is to ensure that any use of force is consistent with national security and policy objectives.<sup>6</sup>

As described in the previous Chapter, the United States invoked a detailed legal justification for the use of force in OEF and OIF.<sup>7</sup> JAs preparing for the initial deployments to Afghanistan briefed commanders and their staffs concerning how the legal basis for the use of force and related factors would likely impact the mission.<sup>8</sup>

A quote from a JA on the U.S. Third Army legal staff shows that JAs were present during early OIF mission planning and that commanders sought to integrate legal and policy considerations.

[U.S. Central Command (CENTCOM)] directed [the Coalition Forces Land Component Command (CFLCC)] to initiate planning for OIF in February 2002. The initial planning group was very small and access to the plan was limited to those with a strict need to know. I distinctly remember Lieutenant General Mikolashek [the Third Army Commander] turning to us and saying “We’re going to do this [militarily confront Iraq]. Get the plan ready.” *The general concept was to eliminate the [Iraqi] regime to remove the threat posed by its possession of weapons of mass destruction and its support of international terrorism.* In the execution, Coalition forces would seek to prevent as much collateral damage as possible to minimize loss of life and preserve critical infrastructure that would be

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<sup>5</sup> *Id.*

<sup>6</sup> INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, 2004 OPERATIONAL LAW HANDBOOK at 1 (2003) [hereinafter 2004 OPLAW HANDBOOK].

<sup>7</sup> *See supra* Section II.

<sup>8</sup> *See* Telephone Interview with COL Kathryn Stone, former Staff Judge Advocate, 10th Mountain Division (14 Apr. 2004) [hereinafter Stone Telephone Interview]. During a predeployment planning meeting with senior 10th Mountain Division commanders and staff officers, the SJA explained the legal basis for the use of force. At the time, the Division had elements deployed to Bosnia and the Sinai. The SJA explained that the U.S. would intervene in Afghanistan in self-defense under Article 51 of the UN Charter. The SJA explained that this was a wholly different mission than the UN Chapter 7 peacekeeping missions in Bosnia and the Sinai. Particularly, the Division would presumably have much more permissive rules of engagement, with forces likely declared hostile. She also explained that coalition partners would potentially join U.S. forces and that this would also create legal issues. *See id.* *See also infra* Section C (discussing legal issues related to coalition operations).

needed to distribute humanitarian aid and jump-start the post-regime government and economy.<sup>9</sup>

As OIF commenced, the CENTCOM Commander issued a message to coalition forces, demonstrating how legal and policy considerations worked into the Commander's intent. He stated:

The President of the United States – our Commander in Chief – in agreement with the leadership of our coalition partners has ordered the initiation of combat operations. Our objectives are clear. We will disarm Iraq and remove the regime that has refused to disarm peacefully. We will liberate the Iraqi people from a dictator who uses torture, murder, hunger, and terror as tools of oppression. We will bring food, medicines, and other humanitarian assistance to Iraqis in need. We will take care to protect innocent civilians and the infrastructure that supports them, and we will help the Iraqi people start anew to build a future of their own with a government of their choice.<sup>10</sup>

The CFLCC Commander, with drafting assistance from his Staff Judge Advocate, also delivered a message to his subordinate forces.<sup>11</sup> He stated:

You are about to remove the regime of Saddam Hussein and eliminate the threat of his weapons of mass destruction. He is a brutal dictator whose regime has a history of reckless aggression, ties to terrorism, attempts to dominate a vital region of the world and a history of developing and using weapons of mass destruction. There are no further options other than military operations. To date, nothing has restrained Saddam Hussein from pursuing his goals of intimidating neighboring states and attacking and tyrannizing his own people. *His continuing refusal to destroy weapons of mass destruction, to fully cooperate in inspections to verify compliance with United Nations' mandates or desist from acquiring new weapons provides no real alternative to the attack that we will execute.*<sup>12</sup>

## ***2. Anticipate the Potential Need for, and Understand the Legal Issues Involving, Capitulation Agreements, Local Cease-Fire Agreements, and Granting of Parole.***

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<sup>9</sup> Captain M. Scott Holcomb, *Perspective: View from the Legal Frontlines*, 4 CHI. J. INT'L L. 561, 564 (2003) [hereinafter, Holcomb, *View from the Legal Frontlines*].

<sup>10</sup> Message, 210457Z Mar 03, Commander, U.S. Central Command, subject: Iraqi Freedom.

<sup>11</sup> See E-mail from COL Karl M. Goetzke, former Staff Judge Advocate, Coalition Forces Land Component Command, to CPT Daniel Saumur, Deputy Director, Center for Law and Military Operations (14 Apr. 2004).

[In drafting the message for the CFLCC Commander] I looked at the text of multiple speeches that President Bush had delivered on the potential for war to ensure the message stuck to the previously expressed themes and rationale. . . .

*Id.*

<sup>12</sup> Message, 192000Z Mar 03, Commander, Coalition Forces Land Component Command, subject: COMCFLCC Sends (emphasis added).

One of the primary concerns during the OIF planning process involved the potential mass surrender and capture of Iraqi forces. The concern was whether combat maneuver forces speeding north to Baghdad would have sufficient time and resources to comply with Geneva Convention treatment standards for enemy prisoners of war (EPWs) that might come under coalition control.<sup>13</sup> The planned flow of forces into Iraq pursuant to the Timed Phased Force and Deployment Data (TPFDD) was front-loaded with combat units and did not schedule the arrival of combat support units more suited for EPW handling, such as military police, until well into the operation. Consequently, a massive intake of EPWs and the resulting logistically demanding legal obligations to feed, clothe, safeguard, and provide medical care had to the potential to bog down combat maneuver forces and jeopardize mission success.<sup>14</sup>

Recognizing that the TPFDD was unlikely to change, JAs, at the direction of their strategic and operational commanders,<sup>15</sup> offered a solution to the problem by proposing “new” approaches actually grounded in old law: the negotiation of capitulation agreements and local cease-fire agreements (LCFAs) with enemy commanders, and releasing EPWs pursuant to parole agreements. Each will be discussed in turn.

#### *a. Capitulation Agreements*

The initial CENTCOM planning concept for OIF in the spring 2002 timeframe included a desire to “co-opt” Iraqi forces. Co-option was a loosely defined term, not found in the law, generally understood by staff planners and commanders to mean that coalition forces would try to persuade Iraqi forces not to fight and perhaps even switch sides to join coalition forces.<sup>16</sup> In August 2002, JAs at CENTCOM, CFLCC, and Special Operations Command Central (SOCCENT) met to review the operator-proposed co-option plan. After much deliberation, they concluded that co-option would be defined as “enemy forces [changing] allegiance to a government-in-waiting or exiled government to become an opposition group *prior* to becoming enemy prisoners of war.”<sup>17</sup> The critical element of this legal analysis was the conclusion that once enemy forces fall into the hands of the detaining power, the Geneva Convention Relative to the Treatment of Prisoners of War (GPW) prohibits EPWs from renouncing their PW rights<sup>18</sup> and prohibits the detaining power from compelling an EPW to serve in or with the detaining power’s armed forces.<sup>19</sup> Because no government-in-waiting existed, co-option as defined did not appear to be a viable alternative for OIF.<sup>20</sup>

<sup>13</sup> See generally Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW].

<sup>14</sup> See Information Paper, CPT Michael S. Holcomb, subject: Legal Concept for Capitulated Forces (24 Nov. 2002) (on file in CLAMO classified “SIPRNET” Database). See *infra* Section J for an orientation to the CLAMO classified database. See also Holcomb, *View from the Legal Frontlines*, *supra* note 9, at 565-68.

<sup>15</sup> See E-mail from Michael S. “Scott” Holcomb, former Army CPT and Operational Law Attorney, Coalition Forces Land Component Command, to Maj Cody M. Weston, USMC, Center for Law and Military Operations (20 Apr. 2004) (containing Microsoft Word track changes comments to draft version of this Publication) (on file with CLAMO) [hereinafter Holcomb Comments] (“Each concept—co-option, capitulation, local cease-fire and parole—was developed because either the strategic or operational level Commander wanted it.”).

<sup>16</sup> See Holcomb, *View from the Legal Frontlines*, *supra* note 9, at 565.

<sup>17</sup> *Id.* at 566 (emphasis added).

<sup>18</sup> See GPW, *supra* note 13, art. 7.

<sup>19</sup> See *id.* art. 130.

<sup>20</sup> Holcomb, *View from the Legal Frontlines*, *supra* note 9, at 566.

Further research by these same JAs,<sup>21</sup> however, revealed another long-standing but seemingly forgotten LOAC concept: capitulation.<sup>22</sup> A “capitulation” is “an agreement entered into between commanders of belligerent forces for the surrender of a body of troops, a fortress, or other defended locality, or of a district of the theater of operations.”<sup>23</sup> A capitulation agreement can be oral or written, although written is preferred.<sup>24</sup> Capitulation is not synonymous with surrender; in fact, “a surrender may be effected without resort to a capitulation.”<sup>25</sup> Members of a force that surrender pursuant to a capitulation agreement receive EPW status and protections, but “special circumstances, such as the inability of the victor to guard, evacuate, and maintain large numbers of prisoners of war or to occupy the area in which enemy military forces are present, may justify . . . allowing the defeated force to remain in its present positions, to withdraw, or to disperse after having been disarmed . . . .”<sup>26</sup> Thus, to the JAs, the virtue of a capitulation agreement was the ability to minimize the operational impact on coalition forces of sustaining and protecting EPWs while at the same time complying with the LOAC.

The JAs outlined a plan for encouraging Iraqi forces to surrender and enter into capitulation agreements, described as follows by a CFLCC JA involved in the process.

Coalition forces would contact Iraqi units through various means including leaflet drops, radio broadcasts, and surrogates who would inform the commander of his opportunity to surrender with honor and preserve his unit. Iraqi units would receive these messages shortly before the air campaign started to give them time to perform the required actions, but not so much time that they would be subject to regime reprisals. If the unit performed certain observable actions, such as forming their vehicles in a square, then Special Forces would approach the unit and offer articles of capitulation for the surrender of the unit.

The capitulating Iraqi unit would then be monitored for compliance. Once the military attorneys agreed that this was legally supportable, we briefed the operational planners. SOCCENT planners then took the idea and produced a plan, calling for the Iraqi units to marshal their vehicles in identifiable formations, place white flags over their equipment, and move one kilometer from their equipment to protect them from air strikes. [We] then drafted the written articles of capitulation [included at Appendix A-1].<sup>27</sup>

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<sup>21</sup> See *id.* (“Reading a copy of a 1956 Army Field Manual, *The Law of Land Warfare*, we noted a passage on capitulation and began pursuing it as a possible course of action.”) (citation omitted).

<sup>22</sup> See, e.g., Hague Convention No. IV Respecting the Laws and Customs of War on Land and its Annex: Regulation Concerning the Laws and Customs of War on Land, art. 35, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter Hague IV].

<sup>23</sup> U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 470 (July 1956) (C1, 15 July 1976) [hereinafter FM 27-10, C1, 15 July 1976].

<sup>24</sup> See *id.* para. 474.

<sup>25</sup> *Id.* para. 470.

<sup>26</sup> *Id.* para. 475(b).

<sup>27</sup> Holcomb, *View from the Legal Frontlines*, *supra* note 9, at 567. For a discussion of capitulation agreements in the context of information operations, see *infra* Section D.

As it turned out, the ground war commenced before any significant leaflet drops could take place. Accordingly, very few capitulation agreements were signed.<sup>28</sup>

***b. Local Cease-Fire Agreements***

JAs also proposed another option as an alternative to capitulation: local cease-fire agreements (LCFAs). Whereas the idea of capitulation arose fairly early in the OIF planning process,<sup>29</sup> the idea of LCFAs did not reach the CFLCC/CENTCOM level until January/February 2003. At that time Special Forces (SF) JAs, working through SOCCENT, pointed out that capitulation agreements placed at least some GPW burdens on coalition forces and would not allow capitulated Iraqi forces to defend their own national interests, such as oil fields, against other Iraqi forces still engaged in hostilities.<sup>30</sup> Shortly thereafter, British military attorneys independently raised a concern that capitulation agreements might unlawfully bargain away GPW protections—in other words, they argued that once an enemy soldier receives EPW status, all the GPW protections attach and should not somehow be limited through an agreement. Thus, first SOCCENT and then British attorneys proposed LCFAs as a mechanism to avoid certain inflexibilities of capitulation agreements and the logistical problem of mass surrenders and captures.<sup>31</sup>

The term “LCFA” derived from the LOAC concept of a “local armistice.” According to Hague Convention (IV) of 1907, “an armistice suspends military operations by mutual agreement between the belligerent parties.”<sup>32</sup> A “general” armistice “suspends the military operations of the belligerent States everywhere;” a “local” armistice suspends military operations “only between certain fractions of the belligerent armies and within a fixed radius.”<sup>33</sup> Put another way, parties to an armistice retain all of their weapons and their integrity as a military unit, but they agree not to fight the other parties to the armistice. Like capitulation agreements, armistices can be written or oral, with a preference for written.<sup>34</sup> The general U.S. policy on local armistices is that “[c]ommanders of the forces concerned are presumed to be competent to conclude local armistices, and ratification upon the part of their governments is not required unless specially stipulated in the armistice agreement.”<sup>35</sup> Unlike capitulation agreements—and

<sup>28</sup> See *id.* One significant capitulation agreement involved the surrender of 16,000 Iraqi soldiers under the command of General Mohamad Jarawi to Colonel Curtis Potts, the commander of the 4th Brigade, 3rd Infantry Division. *Id.*

<sup>29</sup> But see *infra* text accompanying note 50 (criticizing the late arrival of capitulation at the tactical unit level).

<sup>30</sup> See Telephone Interview with Michael S. “Scott” Holcomb, former Army CPT and Operational Law Attorney, Coalition Forces Land Component Command (30 Mar. 2004) [hereinafter Holcomb Interview]; Telephone Interview with MAJ Michael L. Kramer, former Judge Advocate, 10th Special Forces Group (30 Mar. 2004) [hereinafter Kramer Interview]. Major Kramer also points out that it was an Army paralegal NCO, SFC Glenn Steimer, who first raised the LCFA idea. *Id.*

<sup>31</sup> See Holcomb Interview, *supra* note 30.

<sup>32</sup> Hague IV, *supra* note 22, art. 36.

<sup>33</sup> *Id.* art. 37.

<sup>34</sup> See FM 27-10, C1, 15 July 1976, *supra* note 23, para. 486. FM 27-10 further suggests that an armistice should contain stipulations covering the following matters: (1) precise date, day, and hour of commencement of the armistice; (2) duration of the armistice; (3) principal lines and all other marks or signs necessary to determine the locations of the belligerent troops; (4) relation of the armies with the local inhabitants; (5) acts to be prohibited during the armistice; (6) disposition of EPWs held by each side; and (7) consultative machinery, such as a commission composed of representatives of opposing forces established to supervise implementation of the armistice. *Id.* para. 487.

<sup>35</sup> *Id.* para. 484.

the critical distinction pointed out by the SF JAs and British military attorneys—members of an enemy force that has entered into an armistice are *not* considered EPWs, and thus no GPW legal obligations and logistical burdens attach.<sup>36</sup>

CENTCOM staff planners and JAs approved the LCFA concept, incorporating it, albeit late in the planning process, into the operational plan (the standardized LCFA from the OIF operational plan is included at Appendix A-2). Coalition forces ultimately negotiated very few LCFAs, as the bulk of Iraqi forces simply discarded their uniforms and blended back into the civilian population once the war commenced. Some Special Forces teams, for example, did enter into LCFAs with smaller Iraqi elements.<sup>37</sup>

### *c. Parole*

Another “old” LOAC term rediscovered during OIF was parole. Prior to the end of an armed conflict, EPWs may be released either temporarily or permanently from captivity upon their promise, or “parole,” not to engage in certain activities, such as, typically, a promise to refrain from all acts against the captor or from taking part in any further military operations.<sup>38</sup> Parole should be in writing and signed by the EPW.<sup>39</sup> Paroled EPWs are “bound on their personal honour scrupulously to fulfill, both towards the Power on which they depend and towards the Power which has captured them, the engagements of their paroles or promises.”<sup>40</sup> EPWs may only be released on parole, however, if their national laws or regulations allow them to accept parole; they cannot be compelled to accept liberty on parole or promise.<sup>41</sup> U.S. service

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<sup>36</sup> See Holcomb Interview, *supra* note 30; Kramer Interview, *supra* note 30.

<sup>37</sup> See Memorandum, Major Dean L. Whitford, former Group Judge Advocate, 5th Special Forces Group (Airborne) and Command Judge Advocate, Joint Special Operations Task Force–North (Task Force Dagger) (OEF); Command Judge Advocate, Combined Joint Special Operations Task Force–West and successor CJSOTF–Arabian Peninsula (OIF), for Major Daniel P. Saumur, Deputy Director, CLAMO, subject: Task Force Dagger OEF/OIF International Law AAR, para. 2 (17 June 2004) [hereinafter Whitford OEF/OIF International Law AAR] (on file with CLAMO). One particular agreement, that began as a capitulation but at various points in the negotiation process took on the flavor of an LCFA, involved the U.S. 4th Infantry Division and a paramilitary organization known as the Mujahedeen Khalq (MeK). For a more detailed discussion of the negotiations with the MeK and the subsequent controversy the agreement caused, see *infra* Section III.A.8. The blurring of the line between capitulation agreements and LCFAs seemed to be something of a trend during OIF, perhaps at times due to confusion over terminology and at times based on operators’ desires for something other than a capitulation or cease-fire arrangement. For example, planners from I Marine Expeditionary Force (I MEF) wanted Iraqi forces to surrender but did not want any GPW protections to attach and slow the momentum to Baghdad, but neither did they want a fully armed Iraqi force in their rear whom they had to trust to comply with the terms of an LCFA. So they attempted to create a “cease-fire” in which Iraqi forces completely disarmed but were not considered EPWs. See Transcript of After Action Review Conference, Office of the Staff Judge Advocate, Task Force Tarawa, and the Center for Law and Military Operations, Camp Lejeune, N.C., at 8, 48-63 (2-3 Oct. 2003) (on file with CLAMO) [hereinafter TF Tarawa AAR Transcript]. The SJA for Task Force Tarawa, a subordinate I MEF unit, argued that such a hybrid capitulation/LCFA arrangement was not legally supportable—enemy units can either capitulate and be considered EPWs, or they can enter into an LCFA and agree not to fight yet retain their arms. See *id.* at 8 (“The I MEF did not like the fact that they had to leave any men behind to watch these guys [capitulated Iraqi forces], so they used something [I] called ‘capitulation light’ which I argued against saying, ‘It’s non-existent from an historical or legal precedent . . . .’”).

<sup>38</sup> See GPW, *supra* note 13, art. 21; FM 27-10, C1, 15 July 1976, *supra* note 23, para. 186.

<sup>39</sup> See FM 27-10, C1, 15 July 1976, *supra* note 23, para. 186.

<sup>40</sup> GPW, *supra* note 13, art. 21.

<sup>41</sup> See FM 27-10, C1, 15 July 1976, *supra* note 23, para. 185(a).



members, for example, generally are prohibited from giving their parole to a detaining power.<sup>42</sup> Upon the outbreak of hostilities, parties to a conflict are required to notify each other of their respective national laws and regulations regarding the acceptance of liberty on parole or promise.<sup>43</sup>

Parole first arose as a concept during OIF planning as another proposed solution to the mass surrender/capture problem. The idea was that Iraqi forces that fell under coalition control as EPWs simply could be released on parole, thereby avoiding the logistical burden of EPW care and protection.<sup>44</sup> JAs pointed out, however, the practical difficulty of having each individual Iraqi soldier sign a parole agreement if U.S. forces were to capture or accept the surrender of large units. JAs also pointed out the legal concern of whether Iraqi law allowed their soldiers to accept parole—Iraq certainly had not satisfied the legal requirement of notifying coalition forces of any parole policy.<sup>45</sup> Thus, capitulation agreements and LCFAs were the instruments of choice for the anticipated mass surrender/capture scenarios.

The parole concept arose again once the war commenced and coalition forces began detaining Iraqi forces as EPWs in detention camps.<sup>46</sup> After diligent research, JAs were unable to find any Iraqi law on the issue of parole, and thus, particularly in light of Iraq's failure to provide notice of any policy, presumed that Iraqi law did not prohibit accepting parole.<sup>47</sup> Accordingly, near the end of April 2003 the coalition began a process of granting parole for a limited number of EPWs on a case-by-case basis, considering a variety of factors aimed at determining whether coalition interests were better served by retaining or releasing the prisoner.<sup>48</sup> Each released EPW

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<sup>42</sup> See *id.* para. 187(a). Temporary parole for U.S. service members is authorized in certain narrow circumstances for the purpose of being allowed to perform acts “materially contributing to the welfare” of the EPW or fellow prisoners. *Id.* para. 187(b).

<sup>43</sup> GPW, *supra* note 13, art. 21.

<sup>44</sup> See, e.g., Telephone Interview with LtCol William Perez, USMC, Deputy Staff Judge Advocate, II Marine Expeditionary Force, and former Staff Judge Advocate, Task Force Tarawa (31 Mar. 2004) (noting that operators first proposed the idea using the terminology “snatch and release,” which he recognized as implicating the legal concept of parole).

<sup>45</sup> See *id.*; Holcomb Interview, *supra* note 30. A classified CFLCC information paper on parole from December 2002 is included in the CLAMO SIPRNET Database, *supra* note 14.

<sup>46</sup> For a more detailed discussion of detention operations during OIF, see *infra* Section III.A.3.

<sup>47</sup> See Holcomb Interview, *supra* note 30.

<sup>48</sup> An unclassified listing of factors to consider was included in the classified CFLCC information paper referenced *supra* note 45:

1. Whether the Iraqi soldier was actively engaged in combat operations against U.S./Coalition Forces prior to surrender;
2. Whether the Iraqi soldier was part of a unit that surrendered or capitulated to U.S./Coalition Forces without any resistance;
- 3) Whether the Iraqi soldier has been vetted by C2 [coalition intelligence staff section] for potential war crimes violations;
- 4) Whether the Iraqi soldier is an officer, particularly of higher rank, or an enlisted soldier;
- 5) Whether the Iraqi soldier is an active member of the Baath Party; and

signed two copies of a standardized parole agreement (included at Appendix A-3) promising not to engage in any hostile actions against coalition forces. Coalition forces and the individual Iraqi soldier each retained a copy.<sup>49</sup>

Two lessons seem apparent from this discussion of capitulation agreements, LCFAs, and parole. First, OIF demonstrates that these seemingly arcane LOAC terms have modern relevance and should be incorporated into future JA training. Second, and related to the first, planners should anticipate the use of capitulation agreements, LCFAs, and parole well prior to executing future missions, providing subordinate units enough time to develop tactics, techniques, and procedures (TTPs) for implementation. In the words of the SJA for the 101st Airborne Division, “RSOI [reception, staging, onward movement, and integration] is not the optimal time to introduce and train new legal concepts like capitulation . . . [which] should be contemplated, developed, and addressed well in advance of RSOI.”<sup>50</sup>

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6) Whether the Iraqi soldier has a home/business/farm to return to that is near the EPW camp where currently detained.

<sup>49</sup> See Holcomb Interview, *supra* note 30.

<sup>50</sup> Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), Operation Iraqi Freedom Lessons Learned, at 5 (2003). The 101st SJA went to great lengths to emphasize this lesson, and it is worth repeating his additional comments. His comments will be followed by a response from a JA with an operational and strategic perspective. According to the 101st SJA:

#### **RECOMMENDATION**

Something as potentially dangerous as asking commanders to close with the enemy—declared hostile forces—in order to conduct negotiations during combat requires much more lead time than a few weeks prior to the initiation of hostilities. Capitulation agreements and the issues associated with them are complex matters on which no commander in the United States Army has trained. To ask that commanders implement the capitulation process requires a THOROUGH staff assessment of the enemy and friendly situation for which it is best suited, a THOROUGH development of TTPs by commanders that are incorporated into unit SOPs, and finally, HOME STATION TRAINING that will ensure U.S. Army units are set up for success when asked to accomplish this delicate and dangerous mission. TTPs must address:

(1) Developing the capitulation agreements. Considerations include: When would a commander want to modify a “standard” document? What types of modifications does a commander want to make? What types of modifications should a commander avoid?

(2) Entering the capitulation agreements. Considerations include: How does the commander verify a genuine offer to capitulate? How does the commander verify the individual making the offer to capitulate possesses the authority to execute an agreement on behalf of the entire unit (i.e., what if the commander and close staff have been killed)? Does the unit have an interpreter with which to communicate with the enemy? What type of security accompanies the negotiating party? To what level does the negotiating party require the enemy forces to disarm? How does the unit secure and/or defend against the enemy force before and during negotiations? What are the ROE while the negotiating party is forward, negotiating with enemy forces?

(3) Meeting our obligations under them. Considerations include: How do we tag enemy vehicles and equipment? How far from enemy vehicles and equipment do we require enemy forces to remain? Do we abandon, disable or destroy enemy vehicles? How do we establish the NFA over the enemy troops under our charge? From what threat should we be prepared to protect enemy forces? Chemical weapons attack? SSM attack? Sniper fire? What resources will we require to defend against those threats? Can we parole enemy forces? Does our intelligence

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assessment warn against paroling? How will we report logistics requirements for capitulated forces? How do we account for the capitulated personnel? What do we do with that accounting?

(4) Enforcing the compliance of enemy forces. What are the ROE for capitulated forces vice EPWs? Do we track paroled forces once they've left the battlefield? What are our actions upon a breach of the agreement? Is there a difference between a material breach of the agreement and a minor breach? Do we respond differently to different levels of breaches to the agreement?

(5) Training commanders and soldiers on the capitulation process. Considerations include: Has the unit published a capitulation SOP? Does the unit certify commanders on their negotiation abilities? Have we created battle drills to implement upon encountering an enemy force expressing a desire to capitulate?

### **DISCUSSION**

Again, while the mission was certainly accomplished as it pertains to capitulation, advance notice that higher headquarters was developing a capitulation process would have improved the training given to the commanders expected to implement it. Until we crossed the LD, commanders were raising serious concerns about attempting to accept capitulation agreements from forces that were engaging in perfidy in the North. Much of the advice given to commanders on how to initiate contact with enemy forces about entering cease fire or capitulation agreements did not represent the thorough staff consideration ordinarily given to matters of this importance. While we certainly have the lion's share of smart commanders and senior NCOs that can develop their own successful TTPs, it was never clear that they should devote the time and energy to doing so at such a late point in the game. At the same time as capitulation agreements received substantial emphasis, we were receiving reports of mass desertions and perfidy. The capitulation process seemed to never quite "fit in" to reality as it existed on the ground. Indeed, the division published a perfidy FRAGO that responded, in part, to a concern that by the late attention given to the strategic value in capitulation and in looking for opportunities to NOT fight the enemy we may have clouded the commander's understanding of the enormously broad authority he has to defend his unit. Finally, a frago was published directing that MSCs would not enter into capitulation agreements.

*Id.* at 15-16.

A CFLCC JA responds:

I have a different view [of the suggested lesson that higher commands should better anticipate use of capitulation agreements, LCFAs, and parole well prior to executing future missions] (and I think others at the Operational Level and Above would probably agree). Capitulation was developed in August 2002. The info paper was published on 24 Nov 02—and there was a preceding draft that was available as well as a powerpoint presentation. This concept was briefed repeatedly at numerous conferences (both operational and legal) from Sep 02 until the war started. In January 2002, capitulation was addressed at the V Corps conference (I believe every Division sent a representative). As for TTPs, those should be developed at the tactical level (hence the first T).

Holcomb Comments, *supra* note 15.

### 3. *Understand the Law and Regulatory Structure Governing Detainee Operations.*

Detainee operations occupied JAs in OEF and OIF more than any other ILAW issue,<sup>51</sup> and this Section provides a brief overview of pertinent legal authorities and implementing U.S. regulations. Of greatest importance are the 1949 Third Geneva Convention Relative to the Treatment of Prisoners of War (GPW) and the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC).<sup>52</sup> Additional Protocols I and II to the 1949 Geneva Conventions were signed in 1977, and both contain provisions potentially relevant to detainee operations, although the United States is not party to either Additional Protocol.<sup>53</sup> The International Committee for the Red Cross (ICRC) has published extensive commentaries to the Geneva Conventions and Additional Protocols.<sup>54</sup>

Implementing regulations for U.S. forces also apply. Policy guidance is found in DoD Directives 2310.1 (Program for Enemy Prisoners of War (EPOW) and Other Detainees)<sup>55</sup> and 5100.77 (DoD Law of War Program).<sup>56</sup> Chairman of the Joint Chiefs of Staff Instructions 3290.01A (Program for Enemy Prisoners of War, Retained Personnel, Civilian Internees, and

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<sup>51</sup> See, e.g., Interview with COL David L. Hayden, former Staff Judge Advocate, XVIIIth Airborne Corps, in Charlottesville, Va. (7 Oct. 2003) [hereinafter Hayden Interview] (videotape on file with CLAMO) (noting that detainee operations occupied at least twenty-percent of JA time during OEF); Transcript of After Action Review Conference, Office of the Staff Judge Advocate, Task Force Tarawa, and the Center for Law and Military Operations, Camp Lejeune, N.C. (2-3 Oct. 2003) [hereinafter TF Tarawa AAR Transcript] (on file with CLAMO). Some Marine commanders and their staffs saw JAs as impediments during OIF planning, but when they came to realize the potentially difficult issues detainee operations would likely present, they actively sought out JA involvement. *Id.* at 33. Marine units detained over two thousand Iraqi personnel during one day of combat at An-Nasiriyah, and Marine JAs were heavily involved in advising commanders on detainee treatment. *Id.* at 7.

<sup>52</sup> GPW, *supra* note 13; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter GC].

<sup>53</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 16 I.L.M. 1391; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 16 I.L.M. 1492. The United States is not a party to either Additional Protocol, although it is governed by them to the extent they codify customary international law. See Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U.J. INT'L L. & POL'Y 419 (1987) [hereinafter Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*]. See also *infra* Section C (noting that Australia and Great Britain are parties to the Additional Protocols and that this impacted coalition operations in OEF and OIF).

<sup>54</sup> See, e.g., COMMENTARY ON THE THIRD GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (Jean S. Pictet et. al. eds. 1958) [hereinafter GPW COMMENTARY]; COMMENTARY ON THE FOURTH GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (Jean S. Pictet et. al. eds. 1958) [hereinafter GC COMMENTARY]; COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Yves Sandoz et. al. eds. 1987).

<sup>55</sup> U.S. DEP'T OF DEFENSE, DIR. 2310.1, DOD PROGRAM FOR ENEMY PRISONERS OF WAR (EPOW) AND OTHER DETAINEES (18 Aug. 1994) [hereinafter DOD DIR. 2310.1]. The Secretary of the Army is the DoD executive agent for the administration of the DoD Enemy Prisoner of War/Detainee Program. *Id.* para. 1.2.

<sup>56</sup> U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (9 Dec. 1998) [hereinafter DOD DIR. 5100.77].

Other Detained Personnel)<sup>57</sup> and 5810.01B (Implementation of the DoD Law of War Program)<sup>58</sup> also provide guidance.

Operational guidance for all U.S. forces is in Army Regulation 190-8 (Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees) (AR 190-8).<sup>59</sup> Army Field Manuals 3-19.40 (Military Police Internment/Resettlement Operations)<sup>60</sup> and 27-10 (The Law of Land Warfare)<sup>61</sup> are also key references. Combatant commands, such as United States Central Command, may also provide command-specific guidance.<sup>62</sup> Interested persons may also wish to consult relevant scholarship<sup>63</sup> and study lessons learned<sup>64</sup> from prior operations.

#### **4. Detainee Operations in Iraq.**

*By the time we got in there [An-Nasiriyah], we were facing three Iraqi Brigades and 1000 Fedayeen. . . . They would show up in civilian clothes, acting like tourists. 1<sup>st</sup> day we ended up taking about 2000 males between the ages of 18-40 years as detainees who were coming in on buses claiming they were tourists. Kind of strange.*<sup>65</sup>

##### **a. Expect the Theater Level Internment Facility to Generate Complex Legal Issues, Particularly Those Associated with Detainee Status Determination.**

<sup>57</sup> JOINT CHIEFS OF STAFF, INSTR. 3290.01A, PROGRAM FOR ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES, AND OTHER DETAINED PERSONNEL (15 Oct. 2004).

<sup>58</sup> JOINT CHIEFS OF STAFF, INSTR. 5810.01B, IMPLEMENTATION OF THE DO D LAW OF WAR PROGRAM (25 Mar. 2002) [hereinafter JCSI 5810.01B]. JAs involved in future operations should also be aware that at the time this Publication was being drafted, United States Joint Forces Command was developing a joint detainee operations manual.

<sup>59</sup> U.S. DEP'T OF ARMY, REG. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES (1 Oct. 1997) [hereinafter AR 190-8]. "This is a multi-service regulation. It applies to the Army, Navy, Air Force and Marine Corps and to their Reserve components when lawfully ordered to active duty under the provisions of Title 10 United States Code." *Id.* at i. AR 190-8 is numbered by other U.S. military services as OPNAVINST 3461.6 (Navy), AFJI 31-304 (Air Force), and MCO 3461.1 (Marine Corps), but it is the same regulation.

<sup>60</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 3-19.40, MILITARY POLICE INTERNMENT/RESETTLEMENT OPERATIONS (1 Aug. 2001) [hereinafter FM 3-19.40].

<sup>61</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE (18 July 1956) [hereinafter FM 27-10].

<sup>62</sup> See U.S. CENTRAL COMMAND, REGULATION 27-13, CAPTURED PERSONS. DETERMINATION OF ELIGIBILITY FOR ENEMY PRISONER OF WAR STATUS (7 Feb. 1995) [hereinafter U.S. CENTCOM REG. 27-13].

<sup>63</sup> See, e.g., Major Geoffrey S. Corn & Major Michael L. Schmidt, "To Be or Not to Be, That is the Question" *Contemporary Military Operations and the Status of Captured Personnel*, ARMY LAW., June 1999, at 1. See also JENNIFER ELSEA, CONGRESSIONAL RESEARCH SERVICE, PUB. NO. RL31367, TREATMENT OF "BATTLEFIELD DETAINEES" IN THE WAR ON TERRORISM (2d ed., 17 Sept. 2003), at <http://www.fas.org/irp/crs/RL31367.pdf> [hereinafter TREATMENT OF "BATTLEFIELD DETAINEES" IN THE WAR ON TERRORISM].

<sup>64</sup> See, e.g., HAITI LESSONS LEARNED, *supra* note 2, at 63-70 (discussing detainee operations in Haiti); KOSOVO LESSONS LEARNED *supra* note 2, at 104-15 (discussing detainee operations in Kosovo). The Center for Law and Military Operations (CLAMO) also maintains unclassified and classified databases with many resources relevant to detainee operations. See *infra* Section J for orientation to both CLAMO databases. The Center for Army Lessons Learned (CALL), at <http://www.call.army.mil> (last visited 1 June 2004), also maintains databases with resources relevant to detainee operations. The CALL database is not specifically oriented to the legal aspects of military operations.

<sup>65</sup> TF Tarawa AAR Transcript, *supra* note 51, at 7-8 (emphasis added).

A theater level internment facility opened at Camp Bucca in Umm Qasr, Iraq, approximately one week after OIF commenced.<sup>66</sup> Once Camp Bucca opened, most detainees were transported and kept there.<sup>67</sup> Several JAs, including two Reserve Component JAs from the 12th Legal Support Organization, worked at Camp Bucca from early after its opening throughout major combat operations.<sup>68</sup> Several weeks after OIF started, the CFLCC began receiving pressure to initiate the detainee release process.<sup>69</sup> and JAs at Camp Bucca consequently conducted detainee status determinations and made release recommendations as appropriate.<sup>70</sup>

A brief discussion of the LOAC based detention categories and related status determination process places the general discussion in its legal context. The DoD dictionary defines a “detainee” as “any person captured or otherwise detained by an armed force.”<sup>71</sup> Not all detainees will be given Enemy Prisoner of War (EPW)<sup>72</sup> status. Such status confers certain

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<sup>66</sup> See Telephone Interview with CPT Michelle A. Hansen, former 3ID Chief of Operational Law (12 Apr. 2004).

<sup>67</sup> See briefing by COL Richard E. Gordon, former Staff Judge Advocate, Coalition Forces Land Component Command, to the Army Judge Advocate General’s Corps Graduate Course in Charlottesville, Va. (20 Feb. 2004) [hereinafter Gordon Briefing] (notes on file with CLAMO).

<sup>68</sup> Army Majors Alvin “Perry” Wadsworth Jr. and Craig J. Jacobsen. They were assisted by 12th LSO Paralegal NCO, SFC Beverly Smith. Majors Wadsworth and Jacobsen began working at Camp Bucca in early April 2003, and SFC Smith began working there in May 2003. See LTC Kirk G. Warner, 12th LSO Senior Deployed Judge Advocate, The 12th LSO Team in Support of Operation Iraqi Freedom, at 3-4 (2003) [hereinafter 12th LSO in Support of OIF].

<sup>69</sup> See Gordon Briefing, *supra* note 67. There was some reluctance to begin releasing detainees, as combat operations continued in northern Iraq. See *id.*

<sup>70</sup> See After Action Review Conference, 12th Legal Support Organization and Center for Law and Military Operations, Charlottesville, Va. (12-13 Feb. 2004) [hereinafter 12th LSO AAR]. Camp Bucca authorities wanted to reduce the number of detainees in custody. *Id.*

<sup>71</sup> See JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS, 12 Apr. 2001) (as amended 23 Mar. 2004), at <http://www.dtic.mil/doctrine/jel/doddict/data/d/index.html> [hereinafter DOD DICTIONARY].

<sup>72</sup> The GPW, *supra* note 13, art. 4 details who is entitled to EPW status and provides, in part:

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.<sup>72</sup>

*Id.* Article 4 also confers EPW status to other categories of personnel, such as, in certain circumstances, civilians accompanying armed forces. *Id.*

rights<sup>73</sup> to the EPW and places specific obligations<sup>74</sup> on the detaining power. EPWs also retain “combatant immunity.”<sup>75</sup> In addition, “[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities.”<sup>76</sup>

When the status of a detainee is in doubt, the GPW, Article 5 provides that the detainee shall receive EPW treatment until their status is determined by a “competent tribunal” (Article 5 tribunal).<sup>77</sup> The GPW does not provide guidance concerning the tribunal’s composition, operation, or standard of proof.<sup>78</sup> AR 190-8 provides implementing guidance.<sup>79</sup> Under AR 190-8, the person whose status is to be determined enjoys limited procedural rights, and status is determined by majority vote based on a preponderance of the evidence.<sup>80</sup> Possible determinations are; “(a) EPW, (b) Recommended [Retained Personnel], entitled to EPW protections . . . , (c) Innocent civilian who should be immediately returned to his home or released, [or] (d) Civilian Internee who for reasons of operational security, or probable cause incident to criminal investigation, should be detained.”<sup>81</sup>

The portion of AR 190-8 cited above mentions two additional detention categories— Retained Personnel (RP) and Civilian Internees (CIs). RP are medical and religious (chaplains) personnel detained with a view to their assisting EPWs.<sup>82</sup> CIs are civilians interred by an occupying power for reasons of imperative security.<sup>83</sup> AR 190-8 also discusses “other detainees”

<sup>73</sup> See generally GPW, *supra* note 13. The GPW accords EPWs rights not necessarily afforded to other categories of detained personnel. Some examples include the right to wear badges of rank and nationality (Article 40), protection against compelled labor according to rank (Article 49), and the right to a monthly monetary allowance based on rank (Article 60).

<sup>74</sup> See generally GPW, *supra* note 13. Some examples of these obligations include humane treatment (Article 13), medical care (Article 15), evacuation from the combat zone (Article 19), and providing food (Article 26) and shelter (Article 25).

<sup>75</sup> See FM 27-10, C1, 15 July 1976, *supra* note 23, paras. 80, 81. The GPW, *supra* note 13 does not explicitly mention the concept of “combatant immunity.”

<sup>76</sup> GPW, *supra* note 13, art. 118.

<sup>77</sup> GPW, *supra* note 13, art. 5.

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in [GPW] Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a *competent tribunal*.

*Id.* (emphasis added).

<sup>78</sup> The GPW, *supra* note, art. 5 mentions only that the tribunal must be “competent.” Thus, it would appear that the detaining power enjoys wide latitude in the operation of tribunals.

<sup>79</sup> See AR 190-8, *supra* note 59. The Article 5 tribunal shall be composed of three officers, one of whom must be a field grade officer. *Id.* para. 1-6c. The senior officer serves as the tribunal president, and another non-voting officer, preferably a JA, serves as the recorder. *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* para. 1-6e(10).

<sup>82</sup> See GPW, *supra* note 13, art. 33. While retained personnel (RP) are not considered EPWs, they enjoy the same rights and protections as EPWs and are subject to EPW camp discipline. *Id.*

<sup>83</sup> GC, *supra* note 52, art. 78 (“If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.”) (emphasis added). CIs have the right to appeal their initial status determination and have their status reviewed every six months, if possible. *Id.* In addition, CIs may not be interred with EPWs or other detained personnel. *Id.* art. 84. See also *id.* arts. 41-43 (providing alternate authority to inter civilians in certain

as those awaiting status determination and entitled to EPW treatment until their status is determined.<sup>84</sup>

An Article 5 tribunal is only required “[s]hould any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy belong to any of the categories enumerated in [GPW] Article 4 . . . .”<sup>85</sup> In other words, detained persons clearly entitled to CI, RP, or EPW status should be granted that status without a tribunal.<sup>86</sup> Likewise, should there be no doubt on the part of the detaining power that a detained person is an unprivileged belligerent<sup>87</sup>—spy, saboteur, brigand, mercenary—an Article 5 tribunal is unnecessary and the person need not be granted EPW status if further detained.

JAs at Camp Bucca used an informal screening process to make the initial determination whether to release a detainee or to conduct an Article 5 tribunal if

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circumstances). As with EPWs, Civilian Internees (CIs) must be given medical treatment, food, clothing, and shelter. *See generally id.*

<sup>84</sup> *See* AR 190-8, *supra* note 59, at 33 (“Persons in the custody of the U.S. Armed Forces who have not been classified as an EPW (article 4, GPW), RP (article 33, GPW), or CI (article 78, GC), shall be treated as EPWs until a legal status is ascertained by competent authority.”).

<sup>85</sup> *See* GPW, *supra* note 13, art. 5.

<sup>86</sup> *Cf.* Memorandum, Major Alvin “Perry” Wadsworth, 12th LSO, subject: OIF After Action Report – Detainee Outline: Articles 5 (GPW) and 78 (GC) para. B (2003) (on file with CLAMO).

The Geneva Convention, AR 190-8, paragraph 1-6, and CENTCOM REG 27-13 state that Article 5 Tribunals should be performed if there is doubt as to whether a person (read “detainee”) who has committed a belligerent act is entitled to EPW status IAW Article 4, GPW. The language appears to make a “belligerent act” a prerequisite to performing an Article 5 Tribunal. This created some confusion in OIF. Coalition forces captured 10,000 people, a vast majority of whom were dressed as civilians. . . . Without conducting a tribunal (or a screening interview) one could not determine whether they committed a belligerent act, much less what their appropriate status was, i.e., EPW, civilian internee, innocent civilian, or retained person. . . . There is no requirement for a service member to be wearing a uniform to be entitled to EPW status. A soldier captured while sleeping in pajamas at a friend’s home is still entitled to EPW status, even if he did not commit a belligerent act. On the other hand, a person dressed as a civilian cannot be given EPW status as a default measure simply because we do not know whether he committed a belligerent act. He can be treated as an EPW until his status is determined, but we do not want to give him EPW status and the immunity that comes with it without a proper examination of the circumstances of his case. A person’s status dictates what his rights are, how he should be treated, and whether he can be tried. Consequently, determining status is a key component of both the detention process and determinations about disposition – e.g., release/repatriation, hold for security reasons or criminal investigation, or try.

**Recommendation:** U.S. forces should implement the Tribunal process when a detainee’s status is in doubt regardless of whether there is evidence of a belligerent act. Both CFLCC and V Corps did this. . . . We decided that if status was in doubt and there was doubt as to whether a belligerent act had been committed then a Tribunal process was necessary. When status was in doubt, we either conducted an “Article 5 Screening” interview or an Article 5 Tribunal, the latter being more formal.

*Id.*

<sup>87</sup> *See generally* TREATMENT OF “BATTLEFIELD DETAINEES” IN THE WAR ON TERRORISM, *supra* note 63, at 11-15. Note that there is no separate detention category for unprivileged belligerents.



classification was not possible after the informal screening.<sup>88</sup> JAs conducted the informal screening based on LOAC principles and limited guidance in AR 190-8 and U.S. CENTCOM Regulation 27-13. Almost all detainees arrived at Camp Bucca with limited or incomplete information concerning the circumstances of their capture. Information from previous detainee interrogations was sometimes available, but, in most cases, no interrogation had been conducted.<sup>89</sup> In all cases, the initial screenings were conducted by JAs, using a list of prepared questions (example included at Appendix A-4). JAs proved particularly adept at conducting these screenings given their experience in questioning witnesses and conducting cross-examination. Because detainees were often untruthful, JAs had to be creative in searching for inconsistencies in the detainees' stories.<sup>90</sup> One JA noted that these screenings would have presented a good opportunity to collaborate with intelligence personnel in seeking information on war crimes and the location of missing U.S. personnel, but such collaboration did not occur.<sup>91</sup> The screening process moved quickly, identifying some personnel for immediate release. Personnel determined to be EPWs after the initial screening were further detained. When the recommendation was made to release a detainee, the detainee was asked to sign a parole agreement (at Appendix A-3) and given a small amount of money to defray their travel expenses for their trip home.

When a detainee's status was in continued doubt after the initial screening (not often the case), JAs conducted an Article 5 tribunal. These JAs took great care to ensure that the Article 5 tribunals were conducted in strict accordance with the GPW, AR 190-8, and U.S. CENTCOM Regulation 27-13. For this reason, Article 5 tribunals were much more formal and time/resource intensive than the initial screening. The 800th MP Brigade convened Article 5 tribunals at Camp Bucca.

Before tribunals began, JAs developed an Article 5 tribunal standard operating procedure. They also conducted training for personnel, including interpreters, who would be involved in conducting tribunals. Before each tribunal, detainees were advised of their rights in Arabic on a

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<sup>88</sup> See 12th LSO AAR, *supra* note 70.

<sup>89</sup> *Id.* Ineffective EPW tracking also caused problems. See Transcript of After Action Review Conference, Office of the Staff Judge Advocate, 3d Infantry Division, and the Center for Law and Military Operations, Fort Stewart, Ga., at 60 (18-19 Nov. 2003) (on file with CLAMO) [hereinafter 3ID AAR Transcript]. As one 3ID JA posed the problem:

By the time we'd get the EPW in our custody, it'd be through a different unit who's responsible for tracking them. It wasn't the same unit who captured them. So there was no way for us to get any information on any individual EPW to find out what they're role was, why they were captured or did they surrender or what type of war crimes they committed. For the most part, all that we had to fill out that bit of information was any information our interrogators got from the EPWs directly. So we basically had to ask the EPWs, "Why were you captured?" And the story was, "I was just on the side of the road." It was always something totally innocent. This really came back to haunt us later on, because we couldn't get any information across to anybody what was going on.

*Id.* at 60.

<sup>90</sup> For example, if the detainee said that he was a farmer, the JA would test his knowledge of information a farmer should know. See 12th LSO AAR, *supra* note 70.

<sup>91</sup> *Id.*

formal rights advisement form (example in English attached at Appendix A-5), which was read to them. The most problematic right was the right to call witnesses. In practice, this right was only granted if the witness was “immediately available” (i.e. present at Camp Bucca and quickly locatable).<sup>92</sup> Interestingly, most detainees did not want EPW status. This may have been due to a desire to be released, but it may also have stemmed from a misunderstanding of EPW status and the protections such status provides.<sup>93</sup>

Although neither the GPW nor AR 190-8 require that JAs sit on the Article 5 tribunal, in most cases, three JAs sat on the tribunal, and a fourth JA served as the recorder.<sup>94</sup> The tribunals sometimes took up to four or five hours to conduct, due in part to their anticipated use as a basis for later war crimes prosecution determinations.<sup>95</sup> After each tribunal, formal findings of fact were prepared, and the detainee was advised of the status determination. Personnel determined releasable were handled as described above. As during the initial screenings, detainees often fabricated stories, and force protection considerations always weighed heavily in status determinations.<sup>96</sup>

Handling detainee property at Camp Bucca also proved problematic. It was often difficult to return property to detainees because their belongings sometimes got lost or misdirected during transport to Camp Bucca, and some detainees had tampered with their documentation.<sup>97</sup> When Camp Bucca first opened, detainee property and currency were intermingled in a large metal cargo container. Although this situation was quickly remedied, some detainees inevitably left without being able to reclaim their property. One JA felt that this may have had a negative effect on the U.S. “IO campaign.”<sup>98</sup> In the future, U.S. forces should have a detailed plan to properly account for and return seized property.

Media relations also posed various challenges. In some cases, reporters confused matters by using incorrect terminology—combatant, non-combatant, unlawful combatant, belligerent,

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<sup>92</sup> *Id.* But see U.S. CENTCOM REG. 27-13, *supra* note 62, Appendix C, para. 3.c. (“A panel of three commissioned officers, at least *one of whom must be a judge advocate*, convened to make determinations of fact pursuant to GPW Article 5 and this regulation.”) (emphasis added).

<sup>93</sup> See 12th LSO AAR, *supra* note 70.

<sup>94</sup> *Id.* 12th LSO JAs worked with JAs assigned to the 800th MP Brigade and other commands. See *id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* Lost or mishandled detainee property can also generate claims. One JA commented:

The link between detainee property and the Foreign Claims Act is [big] . . . [Many] claims were from detainees who had [lost] their property. This costs the taxpayers money, undermines the locals’ trust in US forces, and encourages negligent, if not criminal behavior from the detaining soldiers. This is an easy fix (strict property accountability procedures at the lowest level, 100% searches of every shift of soldiers at detention facilities, etc).

E-mail from LTC Walter S. Weedman, Deputy Staff Judge Advocate, 4th Infantry Division, subject: CLAMO AAR Lessons Learned, para. 3 (13 May 2004) (on file with CLAMO) [hereinafter Weedman E-Mail]; see also CPT Michael D. Banks, V Corps JA, OIF Lessons Learned, 18th MP BDE, JAG Section, at 2 (1 Dec. 2003) [hereinafter Banks AAR] (on file with CLAMO) (“[Higher headquarters] need to issue guidance to capturing units, requiring them to receive training, in order to properly account for prisoner’s personal effects, bag them individually, tag the bags with the third section of the capture tag, and . . . document what was taken.”).

non-belligerent, terrorist, insurgent—to refer to detainees. In other cases, media members took pictures of detainees in violation of U.S. policy.<sup>99</sup> Although most media members agreed not to take or disseminate pictures of detainees, some violated this policy and were sent home.<sup>100</sup>

***b. Implement a Plan to Handle Detainees at the Division Level, and Expect that Soldiers and Marines who are not Military Police will Play a Significant Role in Detainee Operations.***

CFLCC plans did not initially call for the establishment of a theater-level detainment facility until forty days after combat began.<sup>101</sup> In addition, the Reserve Component Military Police unit tasked to operate the facility, the 800th Military Police (MP) Brigade, did not arrive in theater until after combat operations began.<sup>102</sup> This situation created several issues worth examining in further detail. The discussion will focus on the experience of the 3ID as an example. In the words of one 3ID JA:

[T]here were several EPW planning meetings [back in the United States]. The 800<sup>th</sup> MP Brigade came over and basically gave us the bad news that if we did have to take on a lot of EPWs, they were not going to be in theater to help us. So we were suddenly faced with the fact that the Division was now going to be conducting, probably, corps or even theater level EPW holding operations.<sup>103</sup>

3ID JAs began working immediately with the Division’s dedicated MP assets to begin training for detainee operations. One 3ID JA was dedicated exclusively to detainee operations,

<sup>99</sup> See Gordon Briefing, *supra* note 67.

<sup>100</sup> *Id.*

<sup>101</sup> See *id.*

<sup>102</sup> See 3ID AAR Transcript, *supra* note 89, at 67 (“As we were going over the berm, they [the 800th MP Brigade] said they were planning to be there 30 days after the conflict started, which was about 45 days too late I think.”).

<sup>103</sup> See *id.* at 19. See also Banks AAR, *supra* note 98, at 1.

AR 190-8 and FM 3-19.40 both specify that a traditional [Corps Holding Area (CHA)] is not to hold detainees for periods beyond 3 days. Camp construction, staffing, supply and maintenance are based on this assumption. As a result of the rapid battle flow during OIF, and the inability of Theater to build a [Theater Internment Facility (TIF)] during early stages of the battle, detainees remained in the custody of the Divisions, and in the CHA, for much longer periods of time than planned. This results in increased populations, lack of facilities, problems with sanitation, and a lack of [necessary supplies] at the CHA.

Recommendation: Need to adjust doctrine to plan for this sort of battle. Any future battle that involves rapid movement into a given area, coupled with the inability to build a TIF near the staging areas, will likely require planning for longer periods of detention, with an increase in the need for [necessary supplies] and better planning with respect to facilities and sanitation.

*Id.* See also Transcript of After Action Review Conference, Office of the Staff Judge Advocate, V Corps, and the Center for Law and Military Operations, Heidelberg, Germany (17-19 May 2004) (on file with CLAMO) [hereinafter V Corps AAR Transcript]. V Corps JA CPT Brian P. Adams worked with the 709th military police battalion at Tallil Air Force Base (a former Iraqi installation) conducting detainee operations. This temporary corps holding area received detainees from subordinate units (such as the 3ID) and made determinations to either release detainees or move them on a “first-in/first-out” basis to the theater internment facility at Umm Qasr, Iraq. See *id.*

and he worked with 3ID MPs to develop and implement an appropriate training program.<sup>104</sup> The training stressed basic LOAC principles and the detailed guidance in AR 190-8.<sup>105</sup> Training methods included briefings and situational training exercises.<sup>106</sup> JAs also developed and trained ROE for detainee operations (at Appendix A-6), including specific provisions addressing attempted escapes.<sup>107</sup> These ROE were printed on an ROE card specifically for EPW Camp Guards. Other specific training objectives included handling EPW deaths, food, EPW labor and pay, mail, and filling out EPW “capture cards.”<sup>108</sup>

Doctrinally, MPs handle detainee operations,<sup>109</sup> but this was small comfort to the Soldiers and Marines making first contact with detainees on the battlefield. AR 190-8 provides guidance for initial actions upon capture of an EPW.<sup>110</sup> It provides, among other things, that “[all] prisoners of war will, at the time of capture, be tagged using DD Form 2745.”<sup>111</sup> DD Form 2745 is commonly known as a “capture card.”<sup>112</sup> Improper use of the capture card proved problematic, as illustrated by the following 3ID JA quote.

The capture cards were the biggest problem in that they were not being filled out correctly. There’s a little blurb on the capture card that allows you to put circumstances of the capture, which maybe not for the Soldiers seems like an important thing, but that’s pretty much all we had to go on if we wanted to do any future prosecution for these detainees for any war crimes.

....

... when we first started getting the problem, we took several attempts to try to address this. FRAGO upon FRAGO, probably half a dozen FRAGOs came out from the [3ID] CG and the Chief of Staff reiterating the importance of getting information . . . As far as I could tell, they were basically ignored, because they were still getting a lot of detainees coming in with no information on them.<sup>113</sup>

Detainee operations were problematic partly because the only Soldiers who had received detailed training on detainee operations were MPs. Although other Soldiers received LOAC

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<sup>104</sup> See 3ID AAR Transcript, *supra* note 89, at 58. The dedicated JA was 3ID Assistant Operational Law Attorney CPT Jonathon DeJesus.

<sup>105</sup> See *id.* at 57-58.

<sup>106</sup> See *id.* at 57-59. Appendix A-6 also includes references and information concerning legal obligations associated with detainee operations.

<sup>107</sup> See *id.* at 58.

<sup>108</sup> See *id.* at 58-59.

<sup>109</sup> See, e.g., Gordon Briefing, *supra* note 67. See generally AR 190-8, *supra* note 59 (a Military Police regulation).

<sup>110</sup> See AR 190-8, *supra* note 59, at para. 2-1. See also FM 3-19.40, *supra* note 60, para. 3-1 (The [Military Police] units accept [detainees] from capturing units as far forward as possible. . .”).

<sup>111</sup> *Id.* para. 2-1a(1)(b). AR 190-8 does not discuss an equivalent to the EPW capture card for CIs.

<sup>112</sup> See, e.g., 3ID AAR Transcript, *supra* note 89, at 171.

<sup>113</sup> *Id.* at 60, 64. This problem was eventually solved after the time period covered by this Publication. V Corps, 1AD, and 3ID JAs developed a capture card printed on durable cardstock requiring the detaining unit to provide more detailed information. JAs then trained Soldiers to fill out the card correctly. *Id.* at 64. See also Gordon Briefing, *supra* note 67 (noting that units often did a poor job of documenting the circumstances in which EPWs were seized but that they should not be too harshly criticized for this because they were not MPs, and their mission often called for them to move rapidly forward).

training, they didn't necessarily know what specific measures to take when they captured a detainee. Non-MP Soldiers (and Marines) also guarded detainees.<sup>114</sup> A lesson for future operations would seem to be that personnel who are likely to guard detainees for extended periods should be identified and specifically trained as early as possible.<sup>115</sup> Another lesson appears to be that all Soldiers and Marines should be trained on actions upon initial EPW/detainee capture, to include properly completing capture cards (DD Form 2745).

***c. Conduct Small-Unit and Individual Level Detainee Related Training Stressing Basic LOAC Principles.***

JAs involved in OIF planning anticipated the need to handle detainees despite provisions for capitulation, parole, and local ceasefire agreements, and they factored their assumptions into unit training plans.<sup>116</sup> Marine JAs developed a "LOAC" card for individual Marines stressing, among other things, basic LOAC detainee principles.<sup>117</sup> Marines conducted detainee-related training at least two months before deploying to Kuwait, and Marine JAs produced training videotapes. These tapes were shown continuously aboard ship on a channel which became known as "JAG TV."<sup>118</sup> Marine and Army JAs also gave briefings and wrote information papers (example at Appendix A-7).<sup>119</sup>

***d. Anticipate Legal Issues Relating to Detainee Evacuation from the Combat Zone and Aeromedical Evacuation.***

The GPW mandates that EPWs must be evacuated from the combat zone.<sup>120</sup> This obligation generated several related concerns during OIF. The 3ID's experiences are again illustrative.

Although the 3ID anticipated detaining as many as 15,000 EPWs, they only detained about 1,500 throughout major combat operations.<sup>121</sup> Nevertheless, transporting EPWs proved

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<sup>114</sup> See TF Tarawa AAR Transcript, *supra* note 51, at 37 (noting that young enlisted Marine legal clerks were often tasked to be EPW Camp Guards); 3ID AAR Transcript, at 58 ("Eventually, chemical folks were doing the guard duties at the detention centers, so they really needed to be trained up [on detainee operations]."). See also Interview with CPT James C. Wherry, former V Corps JA, in Charlottesville, Va. (9 May 2004) (notes on file with CLAMO) [hereinafter Wherry Interview] (noting that detainees would often destroy or exchange capture tags, but that when detainees were told that preserving their capture tags would facilitate their release, the problem diminished).

<sup>115</sup> See Weedman E-mail, *supra* note 98, at para. 4.

4ID . . . stopped running detention facilities not manned by [military police] due to the inability to train soldiers quickly enough to be able to act and react properly to the myriad of detention issues encountered every day at the holding facilities.

*Id.*

<sup>116</sup> TF Tarawa Transcript, *supra* note 51, at 41 ("The Intel said, Most likely [enemy course of action], everyone's going to surrender or most dangerous [enemy course of action], they're going to violate every law of war to win, so we went with the most dangerous a opposed to the most likely (and hopeful) [for planning purposes].").

<sup>117</sup> *Id.* at 38-39.

<sup>118</sup> *Id.* at 39-41.

<sup>119</sup> See *id.* at 37-41. See Wherry Interview, *supra* note 114 (noting the importance of documenting training performed).

<sup>120</sup> See GPW, *supra* note 13, art. 19.

problematic. 3ID trial counsels advised their brigade commanders in formulating a plan to move EPWs from brigade to division holding areas in large tactical vehicles; however, “[t]here were also logistic concerns. How to move the EPWs from place to place during battle, because nobody in the [division] really had the [transportation] assets that they felt they could give away to allow us to accomplish this.”<sup>122</sup> Although the 3ID did provide vehicles for EPW transport to the division rear area, at one point, EPWs were being transported by Chinook helicopter.<sup>123</sup>

Another related concern was aeromedical evacuation of injured EPWs. In especially “hot” combat zones, the 3ID Commander prohibited EPW evacuation by helicopter.<sup>124</sup> 3ID JAs were involved in this question, and one stated “I think one of the lessons learned is that we need some more training . . . focus[ing] on what [the] EPW obligations are, as far as [medical] triaging, and what we’re allowed [and obligated] to do to transport [injured detainees].”<sup>125</sup>

***e. Expect that Displaced and Injured Civilians Will Seek Protection and/or Medical Treatment from U.S. Forces.***

Units in combat should also have a plan to deal with displaced and injured civilians on the battlefield. Although U.S. forces captured many Iraqis fighting in civilian clothes, in some instances, non-belligerent civilians surrendered to U.S. forces.<sup>126</sup> They often did so in search of medical treatment or protection from the fighting.<sup>127</sup> Entire families were sent to EPW collection points because there was no other place to send them.<sup>128</sup> There was apparently a plan to use civil affairs personnel to operate civilian collection points along the route to Baghdad, but the plan was not implemented.<sup>129</sup>

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<sup>121</sup> See 3ID AAR Transcript, *supra* note 89, at 58-59.

<sup>122</sup> *Id.* at 59.

<sup>123</sup> *Id.* at 61. The V Corps Commander stopped EPW transport by helicopter when he learned of it. *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> See, e.g., 3ID AAR Transcript, *supra* note 89, at 62.

<sup>127</sup> See *id.* at 62. 3ID JAs stated that some Iraqis feared that U.S. bombs might have a radiological effect on their children. This caused some mothers to bring their young infants to EPW collection points. *Id.* TF Tarawa also provided medical treatment to injured civilians. The SJA noted:

They [injured civilians] were coming in mostly because the Iraqi paramilitary, the [Fedayeen], were killing them or hurting them because they refused to fight or because they wouldn't let them use their house to fight out of. It was an unusual situation. They were being hurt by the [Fedayeen] and we were treating them because they weren't being sentries or running weapons or ammo for them [the Fedayeen].

TF Tarawa AAR Transcript, *supra* note 51, at 100.

<sup>128</sup> See 3ID AAR Transcript, *supra* note 89, at 62.

<sup>129</sup> See *id.* One 3ID JA observed:

For days on end the EPW cage became our holding area, not only for the EPWs and combatants, but also for children who needed formula, diapers, and things like that. And this was something that the Provost Marshal had to consider and this is something I had to consider, because we really didn't have much Civil Affairs help out there. *The problem there and the lessons learned there is that the Judge Advocate needs to learn more about the Civil Affairs aspect of it and be prepared to assume these type of roles.*

## 5. *Detainee Operations in Afghanistan.*

OEF generated many legal issues in the area of detainee operations. The enemy's composition and tactics tested established LOAC tenets with respect to detainee operations. JAs were at the forefront in helping commanders address their legal obligations in detainee operations.

### ***a. Be Prepared to Address Issues Concerning Detainee Status and Treatment in the Absence of Guidance from Higher Authorities, and Adapt Local Procedures to Implement Guidance from the Highest Levels of the United States Government.***

Enemy forces in Afghanistan were primarily Taliban regime elements and the al Qaeda terrorist organization.<sup>130</sup> The Taliban regime did not control all Afghan territory, nor did it enjoy wide international recognition as Afghanistan's legitimate government.<sup>131</sup> Al Qaeda is a transnational terrorist organization with no fixed location.<sup>132</sup> Taliban and al Qaeda forces sometimes fought together, and both groups essentially ignored the LOAC.<sup>133</sup>

The legal issues associated with detainee operations in Afghanistan were initially unsettled. The following discussion developing these legal issues in their operational context draws heavily upon the experiences of the 10th Mountain Division SJA, who was one of the first JAs to deploy with conventional forces in support of OEF.<sup>134</sup> In mid-December 2003, the 10th Mountain Division deployed a brigade combat team to Sherbergan in Northern Afghanistan.

One of the Northern Alliance generals, General Dostum, had captured over 3800 Taliban and Al Qaeda prisoners and was keeping them imprisoned in one of his prisons. These were not prisons that Americans are familiar with. Instead, picture mud cells with no sanitation, no electricity, no climate control, no creature comfort of any kind, packed with men and spread out over an area the size of about ten football fields. General Dostum was and still is a very powerful warlord who controls most of northern Afghanistan. He offered to let the United States screen his 3800 captives to see if we wanted any of them for intelligence purposes or for prosecution. *This was a unique opportunity that posed a lot of legal issues: what were our responsibilities for the prisoners' care, feeding, and welfare if we screened them even though they were not under U.S. control or jurisdiction? . . .*

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*Id.* at 63.

<sup>130</sup> See *infra*, Section II for a detailed discussion of combat operations in Afghanistan.

<sup>131</sup> See *id.*

<sup>132</sup> See *id.*

<sup>133</sup> See, e.g., Hayden Interview, *supra* note 51. See also Interview with MAJ Dean L. Whitford and SSG Jerome D. Klein, Group Judge Advocate and Legal NCOIC, 5th Special Forces Group, in Charlottesville, Va. (19 Aug. 2003) (videotape on file with CLAMO) [hereinafter 5th Group AAR] (noting that Taliban and al Qaeda fighters often feigned surrender to gain a military advantage over their opponents).

<sup>134</sup> Colonel (then Lieutenant Colonel) Kathryn Stone deployed to Uzbekistan in December 2001, moved into Afghanistan in February 2002, and redeployed to Fort Drum, New York on 31 May 2002, about the same time XVIIIth Airborne Corps JAs began arriving. See Interview with COL Kathryn Stone, former Staff Judge Advocate, 10th Mountain Division, in Charlottesville, Va. (7 Oct. 03) (audiotape on file with CLAMO) [hereinafter Stone Interview].

[W]e worked out a deal whereby General Dostum would get some extra help and equipment in exchange for our access to his prisoners. The CG was also concerned about this mission because it would place U.S. soldiers in great danger inside a prison fortress, similar to the one in which CIA Agent Michael Spann was killed during an uprising in Mazar-e-Sharif (MeS) in November. A battalion of 10<sup>th</sup> Mountain Division infantry, 1-87 Infantry, which was guarding Camp Stronghold Freedom in [Uzbekistan], had been sent to MeS as a Quick Reaction Force to help quell that uprising in November. The brigade commander and G-3 worked out in excruciating detail the techniques, tactics, and procedures (TTPs) that our soldiers would follow to conduct this screen, which was clearly a non-Mission Essential Task List (non-METL) mission that had never been trained for. I sent [10th Mountain JA Captain Chris] Soucie with the brigade combat team . . . I wanted a JAG to go with the brigade combat team for three important reasons: to protect the CG's equities, to ensure the Geneva Conventions principles were followed as a matter of U.S. policy, and to [liaise] with the International Committee of the Red Cross and the media.<sup>135</sup>

After U.S. personnel had gained access to the Northern Alliance detainees, the 10th Mountain SJA visited the prison where the detainees were being kept.<sup>136</sup> She found that the detainees were being treated humanely and that the procedures JAs had helped develop in Uzbekistan were being implemented "flawlessly."<sup>137</sup> She added:

I did not handle any legal issues while I was in Sheberghan. [CPT Soucie] had already taken care of all of them by the time I arrived, because at that point the screening procedure was in place and somewhat routine. One of his issues dealt with whether the press could photograph the prisoners, which was a tricky issue because, technically, the U.S. had no jurisdiction over General Dostum's prisoners at that point, yet Geneva Convention Article 13 prohibits photographing prisoners for the sake of public curiosity. We were also concerned about assuming any level of responsibility for ensuring compliance with the

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<sup>135</sup> Colonel Kathryn Stone, former Staff Judge Advocate, 10th Mountain Division, Personal Experience Monograph, at 13-14 (2003) (on file with CLAMO) [hereinafter Stone Monograph] (emphasis added). Colonel Stone wrote her monograph as a student at the Army War College in Carlisle Barracks, Pennsylvania. The Command Judge Advocate for the Joint Special Operations Task Force-North (Task Force Dagger) also commented:

Detainees taken into custody by Northern Alliance forces were treated as their [Northern Alliance] detainees even if the particular force was supported by U.S. special forces teams. Teams were given guidance by and through the [Special Operations Command Central] [C]ommander regarding actions to take in the event of LOAC violations by the supported forces. The supported Afghan forces screened detainees and would turn over any requested by the U.S. [such as U.S. citizen John Walker-Lindh]. . . . The bulk of the Northern Alliance detainees taken to Sherberghan were collected after the fall of Mazar-i-Sharif, Taloqan, and Konduz. Supported Afghan forces customarily would release after surrender local Afghans and detain only Al Qaida, foreign fighters, and militant Taliban.

Whitford OEF/OIF International Law AAR, *supra* note 37, para. 3.

<sup>136</sup> *Id.* at 6.

<sup>137</sup> *Id.*



Conventions regarding that group of prisoners since General Dostum, and not the U.S., had control and jurisdiction over them at that point. [CPT Soucie] properly advised that the photographs could be taken, but the press could not photograph either the method of operation, or a prisoner's face. Other issues that Chris handled dealt with the method of DNA collection ([collecting] hair [samples] and swabbing mouths); and whether we could provide on-the-spot medical treatment since we did not "own" the prisoners (we could). An interesting side note is that, about two weeks after the brigade completed the screening operation in Sheberghan, CENTCOM finally sent out a message detailing the procedures that we were supposed to follow. . . . Thankfully, what we had done was in compliance with CENTCOM's instructions, and we did follow CENTCOM's guidance in our future screening operations.<sup>138</sup>

As the U.S. began detaining personnel, the most difficult unsettled issue was the status of Taliban and al Qaeda detainees.<sup>139</sup> JAs sought guidance from CENTCOM and CFLCC headquarters in Kuwait.<sup>140</sup> Procedures slowly developed, but JAs advised that detainees should be treated in a manner consistent with the GPW and GC, and this is what happened.<sup>141</sup>

JAs from the XVIIIth Airborne Corps began arriving in May of 2002, and according to the former Combined Joint Task Force 180 (CJTF-180) Chief of Operational Law:

In Afghanistan, it [was] *simple* . . . [detainees were] not granted EPW status and although the US treats them in a manner consistent with the Geneva Conventions and humanely, they do not get all of the rights of the 3<sup>rd</sup> Geneva Convention.<sup>142</sup>

Although the legal issues involved in determining detainee status and treatment were complex,<sup>143</sup> it was simpler for JAs after 7 February 2002, because on that day, President Bush issued the following guidance:

- The President has determined that the Geneva Convention applies to the Taliban detainees, but not to the al-[Qaeda] detainees.
- Al-[Qaeda] is not a state party to the Geneva Convention; it is a foreign terrorist group. As such, its members are not entitled to POW status.

<sup>138</sup> *Id.* at 7-8.

<sup>139</sup> See Stone Telephone Interview, *supra* note 8.

<sup>140</sup> See Memorandum, Majors Nicholas F. Lancaster & J. "Harper" Cook, Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), for Record, subject: MAJ Lancaster (101st ABN DIV (AASLT) Operational Law) Comments on CLAMO OEF/OIF DRAFT Lessons Learned, para. 2 (18 May 2004) [hereinafter Lancaster & Cook Memorandum] (on file with CLAMO). ("Prior to CJTF-180 arriving in Bagram, there was very little guidance on detainee operations or policy through technical channels. The lesson for early deploying JAs is that they must be prepared to give advice with very little information.")

<sup>141</sup> See Stone Telephone Interview, *supra* note 8.

<sup>142</sup> MAJ Jeff A. Bovarnick, former Chief of Operational Law, CJTF-180, CJTF-180 Notes from the Combat Zone, at 4 (2003) (on file with CLAMO) [hereinafter Bovarnick CJTF-180 Notes]. By the time XVIIIth Airborne Corps JAs began handling detainee issues, presidential guidance settled questions of detainee status and treatment. See *infra* note 144 and accompanying text.

<sup>143</sup> For a discussion of these issues and their ultimate resolution, including subsequent detainee treatment at Guantanamo Bay, Cuba, see TREATMENT OF "BATTLEFIELD DETAINEES" IN THE WAR ON TERRORISM, *supra* note 63.

- Although we never recognized the Taliban as the legitimate Afghan government, Afghanistan is a party to the Convention, and the President has determined that the Taliban are covered by the Convention. Under the terms of the Geneva Convention, however, the Taliban detainees do not qualify as POWs.
- Therefore, neither the Taliban nor Al-[Qaeda] detainees are entitled to POW status.
- Even though the detainees are not entitled to POW privileges, they will be provided many POW privileges as a matter of policy.<sup>144</sup>

More guidance concerning criteria for potential detainee transport to Guantanamo Bay, Cuba (Guantanamo) for potential criminal prosecution came forth on 25 February 2002. These criteria are classified. The U.S Secretary of Defense retained the authority to decide which detainees to transport to Guantanamo.<sup>145</sup>

Although, as a policy matter, OEF detainees received EPW-like treatment,<sup>146</sup> the traditional LOAC detention categories (EPW, RP, and CI) were not used during OEF. Rather, persons detained were either classified as “persons under control” (PUCs) or simply as “detainees.” From December 2001 through June 2002, the majority of detainees were held at a classified location in Afghanistan, and at one point in January 2002, the detainee population at this classified location reached nearly 400 detainees.<sup>147</sup> Persons captured on the battlefield were initially brought to the classified location to establish their identity and determine if they met the criteria for potential transfer to Guantanamo.<sup>148</sup> During this phase, detained personnel were classified as “PUCs.”<sup>149</sup> Once the detainee’s identity had been established and he clearly did not meet the criteria for shipment to Guantanamo, the detainee was normally released.<sup>150</sup>

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<sup>144</sup> See Fact Sheet, the White House, Status of Detainees at Guantanamo at 1, 7 Feb. 2002, at <http://www.whitehouse.gov/news/releases/2002/02/print/20020207-13.html> [hereinafter White House Fact Sheet]; U.S. Secretary of Defense Donald H. Rumsfeld, News Briefing, 8 Feb. 2002, at <http://defenselink.mil/newsFeb002> (referencing President Bush’s decision of 7 Feb. 2002 with respect to al Qaeda and Taliban detainees). Although much of the legal analysis underlying the presidential decisions remains classified, see Office of the Staff Judge Advocate, JTF-160, Subj: LEGAL LESSONS LEARNED AT GTMO, at 3 (2002) (on file with CLAMO) (“Taliban do not meet the [GPW, Art. 4] criteria of militia who can receive POW status. . . . Taliban are not members of regular armed forces professing allegiance to a government or authority not recognized by the US. They do not possess the attributes of regular armed forces, which requires distinguishing themselves from the civilian population and conducting their operations in accordance with [the] laws and customs of war.”).

<sup>145</sup> See Transcript of After Action Review Conference, Office of the Staff Judge Advocate, XVIIIth Airborne Corps, Fort Bragg, N.C. (30 Sept. to 1 Oct. 2003) (on file with CLAMO) [hereinafter XVIIIth Airborne Corps AAR Transcript].

<sup>146</sup> See White House Fact Sheet, *supra* note 144.

<sup>147</sup> Lancaster & Cook Memorandum, *supra* note 140, para. 2.

<sup>148</sup> See Hayden Interview, *supra* note 51.

<sup>149</sup> The term “PUC” did not develop until the XVIIIth Airborne Corps arrived in Afghanistan. Detainees were being held at the classified Short Term Holding Facility long before the term “PUC” started being used.

<sup>150</sup> See *id.* A classified message clarified that persons other than the Secretary of Defense were authorized to release detainees at any point until the decision to transfer to Guantanamo had been made. See XVIIIth Airborne Corps AAR Transcript, *supra* note 145.

If a detainee met the criteria for potential transfer to Guantanamo, he was moved to the Detainment Facility at Bagram, Afghanistan (Bagram).<sup>151</sup> Once at Bagram, the detainee was assigned an Internment Serial Number (ISN) and became a “detainee” (versus a PUC).<sup>152</sup> Many of the detainees arrived malnourished, diseased, and in generally bad health.<sup>153</sup> For this reason, each detainee received an extensive medical screening and delousing.<sup>154</sup> Detainees did not like disrobing in general, but they especially opposed disrobing in front of females.<sup>155</sup> Avoiding needless provocation, Bagram staff made an effort to minimize detainee contact with females.<sup>156</sup> If after further interrogation at Bagram it was apparent that a detainee did not meet the criteria for shipment to Guantanamo, he was normally released.<sup>157</sup>

Although the final decision to transport a detainee to Guantanamo was made at the DoD level, JAs were also involved in issues concerning detainee transport. Although one country refused to allow the U.S. to detain personnel in its territory, it would allow short emergency or refueling flights on the way to Guantanamo, in accordance with the classified Status of Forces Agreement.<sup>158</sup>

***b. Expect to Face Issues Concerning Detainee Interrogation and Rules for the Use of Force.***

In Afghanistan, issues concerning detainee interrogation proved among the most sensitive and difficult questions JAs faced.<sup>159</sup> Detainees are a potential source of valuable information, and the motivation to extract that information through interrogation may sometimes create strong temptation to test the limits of the LOAC. Questions often concerned the legality of specific proposed interrogation techniques. The GPW, Article 17 prohibits the use of mental and physical torture and coercion during interrogation.<sup>160</sup> The GPW does not prohibit the detaining power from seeking information beyond the GPW, Art. 117 minimum (name, rank, etc.) given

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<sup>151</sup> See XVIIIth Airborne Corps AAR Transcript, *supra* note 145. Some detainees departed for Guantanamo directly from the classified Short Term Holding Facility location before the detention facility at Bagram began processing detainees for shipment to Guantanamo. See Lancaster & Cook Memorandum, *supra* note 140, para. 2.

<sup>152</sup> See XVIIIth Airborne Corps AAR Transcript, *supra* note 145.

<sup>153</sup> See Hayden Interview, *supra* note 51.

<sup>154</sup> See XVIIIth Airborne Corps AAR, *supra* note 145.

<sup>155</sup> See Hayden Interview, *supra* note 51.

<sup>156</sup> See *id.*

<sup>157</sup> See *id.*

<sup>158</sup> See Stone Interview, *supra* note 134.

<sup>159</sup> See, e.g., XVIIIth Airborne Corps AAR Transcript, *supra* note 145.

<sup>160</sup> GPW, *supra* note 13, art. 17. Note that the GPW did not apply to Taliban and Al Qaeda detainees because they were not considered EPWs. See *supra* note 144 and accompanying text (stating the U.S. position denying EPW status to Taliban and al Qaeda detainees); *but see* JCSI 5810.01B, *supra* note 58, para. 4.

The Armed Forces of the United States will comply with the law of war during all armed conflicts, however such conflicts are characterized, and, unless otherwise directed by competent authorities, the US Armed Forces will comply with the principles and spirit of the law of war during all other operations.

*Id.*

voluntarily or in exchange for privileges.<sup>161</sup> The GC, Article 31 contains a similar prohibition against the use of coercion to obtain information.<sup>162</sup> Torture is prohibited under all circumstances, regardless of the detainee's status.<sup>163</sup>

Although most of the specific issues JAs handled are classified, JAs advised within the spirit of the LOAC and implementing regulations.<sup>164</sup> Placing an experienced attorney at Bagram as the dedicated legal advisor helped resolve these and other difficult issues.<sup>165</sup> In this challenging environment, commanders and JAs must aggressively foster a climate of respect for the LOAC, and JAs should continuously review and monitor specific interrogation methods.

Legal issues also arose concerning rules for the use of force against detainees.<sup>166</sup> Reserve component guards brought differing standards based upon their military and/or civilian experience.<sup>167</sup> JAs developed more detailed standardized rules and training for the use of force at Bagram.<sup>168</sup>

***c. Consider Assigning a JA as the Command Liaison Officer to the International Committee of the Red Cross.***

The GPW, Article 8 allows for a designated "Protecting Power," (PP) such as a neutral country, whose duty it is to safeguard the interests of the Parties to a conflict.<sup>169</sup> Article 10 specifically provides that an organization, such as the ICRC, may act as the PP.<sup>170</sup> Under the GPW, the PP has many specific functions, such as receiving EPW complaints<sup>171</sup> and coordinating EPW relief shipments.<sup>172</sup> The GC also allows for the ICRC to act as the PP.<sup>173</sup> Both FM 27-10 and AR 190-8 recognize the "special" role of the ICRC.<sup>174</sup>

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<sup>161</sup> See GPW COMMENTARY, *supra* note 54, at 163-4 ("[A] [s]tate which has captured prisoners of war will always try to obtain information from them. Such attempts are not forbidden . . .") (citations omitted).

<sup>162</sup> GC, *supra* note 52, art. 31 ("No physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties.").

<sup>163</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, 1465 U.N.T.S. 85. See also AR 190-8, *supra* note 59, para. 2-1(d).

Prisoners may be interrogated in the combat zone. The use of physical or mental torture or any coercion to compel prisoners to provide information is prohibited. Prisoners may voluntarily cooperate with [psychological operations] personnel in the development, evaluation, or dissemination of [psychological operations] messages or products. Prisoners may not be threatened, insulted, or exposed to unpleasant or disparate treatment of any kind because of their refusal to answer questions. Interrogations will normally be performed by intelligence or counterintelligence personnel

*Id.* See generally U.S. DEP'T OF ARMY, FIELD MANUAL 34-52, INTELLIGENCE INTERROGATION, at 1-10 -1-12 (28 Sept. 1992) (highlighting pertinent sections of the Geneva Conventions).

<sup>164</sup> See *supra* Section III.A.3 (discussing the law and regulatory structure concerning detainee interrogation).

<sup>165</sup> See XVIIIth Airborne Corps AAR Transcript, *supra* note 145.

<sup>166</sup> See *id.*

<sup>167</sup> See *id.*

<sup>168</sup> See *id.*

<sup>169</sup> GPW, *supra* note 13, art. 8.

<sup>170</sup> *Id.* art. 10.

<sup>171</sup> *Id.* art. 18.

<sup>172</sup> *Id.* art. 75.

In the early stages of OEF, JAs from the 101st Airborne Division [101st] were involved in detainee operations and interacted directly with ICRC personnel.

One of the most pressing issues was the detention facility and daily visits by the ICRC. . . . CPT Nick Lancaster [a 101st JA] arrived [at the detention facility] on 20 January [2002] with the explicit task of advising the command on detention facility operations. From January through April 2002, the ICRC visited the [Short Term Detention Facility (at a classified location)] nearly every day. The 519th [Military Police Battalion], which was in charge of detention operations throughout Afghanistan at that time, assigned an officer to be the primary liaison to the ICRC. This officer met the delegates at the gate every morning and escorted them the entire time they were at the [detention facility]. This worked well because the MP officer was more familiar with the MP unit and personnel as well as their procedures, and could easily make any on the spot corrections necessary. At the end of each day the ICRC would outbrief the [Battalion] Commander or [Executive Officer] as well as CPT Lancaster and raise any issues encountered during that day's visit. Many of the issues were specific to particular detainees, e.g. "detainee 204 only has one blanket, or detainee 301 has lost his hat." Comments like these were best handled by the MP ICRC liaison. Any substantive legal or policy issues were addressed by CPT Lancaster or the 519th [battalion] leadership. . . . In addition to the daily visits by the ICRC, approximately once a month, the entire delegation would request a meeting with the [local] commander. . . . Prior to these sessions, CPTs Lancaster and Cook would prepare the Commanders with talking points and current expressions of US policy, as well as particular provisions of the Geneva Conventions that might come up. During the meetings, JAs would sit at the right hand of the Commanders in order to give advice and counsel.<sup>175</sup>

After the XVIIIth Airborne Corps arrived in theater, the Bagram detainment facility legal advisor also served as the CJTF-180 liaison to the ICRC on matters concerning detainee operations.<sup>176</sup> The ICRC was allowed routine, individual, and unsupervised access to any detainee at Bagram willing to meet with them.<sup>177</sup> The details concerning scheduled visits were arranged with the Bagram legal advisor.<sup>178</sup> Initially, command authority over the detainment facility at Bagram was unclear, and one JA felt that this lack of clarity made dealing with the ICRC more difficult.<sup>179</sup> Although the relationship with the ICRC was generally good, ICRC

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<sup>173</sup> See GC, *supra* note 52, arts. 9, 11.

<sup>174</sup> See FM 27-10, C1, 15 July 1976, *supra* note 23, paras. 203-207 ("The special position of the International Committee of the Red Cross in this [relief] field shall be recognized and respected at all times."); AR 190-8 *supra* note 59, para. 1-5(e).

<sup>175</sup> Lancaster & Cook Memorandum, *supra* note 140, para. 2.

<sup>176</sup> See XVIIIth Airborne Corps AAR Transcript, *supra* note 145.

<sup>177</sup> See Hayden Interview, *supra* note 51.

<sup>178</sup> See XVIIIth Airborne Corps AAR Transcript, *supra* note 145.

<sup>179</sup> See Stone Monograph, *supra* note 135, at 45.

representatives continually advocated for better detainment conditions.<sup>180</sup> The CJTF-180 SJA “drew a line in the sand” with the position that detainees would not be given better treatment than U.S. Soldiers.<sup>181</sup> After each ICRC visit to Bagram, the Bagram legal advisor wrote a report and posted it to the CJTF-180 SJA classified website.<sup>182</sup> The general lesson to be drawn appears to be that regular and open communications with the ICRC generally minimizes friction.<sup>183</sup>

***d. Facilitate the Flow of Information Concerning Detainee Operations.***

JAs in Afghanistan encountered consistent pressure to provide information on all aspects of detainee operations.<sup>184</sup> Requests for information generally came from higher headquarters, the ICRC, or the media, and inquiries often concerned sensitive topics.<sup>185</sup> One senior Army JA also believed that Taliban and al Qaeda detainees reported their combat injuries as detainee abuse to ICRC representatives in a calculated attempt to create difficulties for U.S. forces.<sup>186</sup> CJTF-180 JAs largely stopped the consistent pressure for information by proactively “pushing” detainee-related information “up the chain” of command. JAs wrote a weekly detainee status report and posted it to the CJTF-180 SJA classified website.<sup>187</sup> The information flow with the ICRC also improved with the appointment of a dedicated JA liaison.<sup>188</sup>

***e. Anticipate the Potential Capture of U.S. Citizens on the Battlefield.***

The U.S. detained citizens of many countries—Afghans, Saudis, Pakistanis, and many others—during OEF, and, in one instance, a U.S. citizen was detained.<sup>189</sup> U.S. Special Forces Soldiers captured U.S. citizen John Walker Lindh during the prison uprising at Mazar-e-Sharif in November 2001.<sup>190</sup> The 5th Special Forces Group (5th Group) Group Judge Advocate provided advice concerning the conditions of detention, legal status, and the investigation of the

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Relations with the ICRC developed gradually, and on 16 April [2002] we had a very productive meeting with all the players involved in operating the detention facility: military police, interrogators, intelligence analysts, and lawyers. We established baseline “rights” for the International Committee of the Red Cross (ICRC) representatives in their dealings with the detainees; and we finalized the techniques, tactics, and procedures (TTPs) for dealing with the detainees (e.g., rewards, frequency of showers, frequency of trips outside into the sun, etc.). These frequent azimuth checks as time went on proved very helpful to us and set well with the ICRC.

*Id.* at 43-44.

<sup>180</sup> See Hayden Interview, *supra* note 51.

<sup>181</sup> See *id.*

<sup>182</sup> The CJTF-180 classified website address is <http://www.cjtf180.army.smil.mil> (site not accessible from an unclassified internet terminal).

<sup>183</sup> JAs in OIF also worked in a liaison role with the ICRC. See, e.g., Wherry Interview, *supra* note 114.

<sup>184</sup> See Hayden Interview, *supra* note 51.

<sup>185</sup> See *id.*

<sup>186</sup> See Stone Interview, *supra* note 134. One objective may have been to “bog down” the U.S. military system with needless investigations. *Id.*

<sup>187</sup> See Hayden Interview, *supra* note 51. See also note 182 for the CJTF-180 classified website address.

<sup>188</sup> See *id.*

<sup>189</sup> See John C.K. Daly, United Press International, Revealed: the Nationalities of Guantanamo, 4 Feb. 2004, at <http://www.upi.com/view.cfm?storyID=20040204-051623-5923r>.

<sup>190</sup> See 5th Group AAR, *supra* note 133.

circumstances surrounding Walker Lindh's capture.<sup>191</sup> The 5th Group CJA also liaised with U.S. Department of Justice attorneys concerning Walker Lindh's criminal prosecution.<sup>192</sup> JAs should generally be alert to the possibility of detaining a U.S. citizen.<sup>193</sup>

### **6. Anticipate a Requirement for War Crimes Investigation.**

Early in OIF, as in previous conflicts such as the Balkans and Kosovo,<sup>194</sup> the subject of war crimes captured the attention of the world media and human rights groups. The U.S. military became involved in the investigation of war crimes and other atrocities alleged to have occurred both during OIF,<sup>195</sup> and previously under Saddam Hussein's regime.<sup>196</sup>

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<sup>191</sup> See *id.*

<sup>192</sup> See *id.*

<sup>193</sup> See Holcomb, *View from the Legal Frontlines*, *supra* note 9, at 563 (discussing issues involved in gathering evidence for Mr. Walker-Lindh's potential criminal prosecution).

<sup>194</sup> See KOSOVO LESSONS LEARNED, *supra* note 2, at 116-119; BALKANS LESSONS LEARNED, *supra* note 2, at 116-127.

<sup>195</sup> Examples of alleged war crimes committed by Iraq during OIF, reported by Human Rights Watch, included:

- A non-commissioned officer posing as a civilian (taxi driver) and detonating a car bomb killing himself and 4 US soldiers;
- Firing on US forces from a hospital in An Nasyriah that was marked with the Red Crescent; and storing weapons, ammunition, military uniforms, chemical suits and masks inside;
- Use of civilians as human shields to prevent military targets from attack;
- Employing execution squads to kill Iraqi civilians and soldiers perceived as disloyal to the regime;
- Abuse of EPW rights: by refusing ICRC access to EPWs and by filming and interrogating them before cameras; and,
- Laying of mines around a mosque in Kadir Karim and storage of mines inside the mosque.

Statement by Tom Malinowski, Washington Advisory Director, Human Rights Watch, to Senate Governmental Affairs Committee, *Human Rights Testimony on Prosecuting Iraqi War Crimes*, 10 Apr. 2003, at <http://hrw.org/press/2003/04/iraq041003tst.htm> [hereinafter Malinowski statement].

Examples of alleged war crimes committed by coalition forces during OIF included:

- Firing without provocation on protesters in Al-Falluja on 28 Apr. 2003 and 30 Apr. 2003: Human Rights Watch, *Violent Response: the U.S. Army in Al-Falluja* at <http://www.hrw.org/reports/2003/iraqfalluja/iraqfalluja.pdf> (last visited 13 Apr. 2004);
- Firing on two journalists in the Hotel Palestine in Baghdad on 8 Apr. 2003: Joel Campagna & Rhonda Roumani, *Permission to Fire? CPJ Investigates the Attack on the Palestine Hotel*, 27 May 2003, at [http://www.cpj.org/Briefings/2003/palestine\\_hotel/palestine\\_hotel.html](http://www.cpj.org/Briefings/2003/palestine_hotel/palestine_hotel.html); and
- Summary execution of a prisoner of war in Baghdad on 8 Apr. 2003: J.M. Kalil, Interview Fallout: Inquiry to focus on Marine; Las Vegas described how he hunted down, shot Iraqis after attack on unit, *LAS VEGAS REVIEW-JOURNAL*, 26 Apr. 2003.

<sup>196</sup> The allegations of crimes against humanity committed by the Iraqi regime were horrific, and were evidenced by mass gravesites uncovered from April 2003. See, e.g., Skynews, *Iraq: 1000 graves found*, at <http://www.sky.com/skynews/article/0,,30000-1088168,00.html> (last visited 24 Mar. 2004) (detailing the discovery on 21 Apr. 2003 of the graves of political prisoners in Baghdad). Allegations against the Iraqi regime, reported by Human Rights Watch, included:

- The execution of an estimated 100,000 Kurds during the 1988 Anfal campaign;

As a party to the Geneva Conventions, the United States has a responsibility to search for persons who have committed grave breaches of the Conventions and to prosecute them, regardless of nationality.<sup>197</sup> The United States fulfills this responsibility through three domestic mechanisms that allow prosecution of war crimes suspects: general courts-martial,<sup>198</sup> military commissions,<sup>199</sup> and federal courts.<sup>200</sup> Alternatively, the United States may assist in the prosecution of war crimes suspects at an international tribunal.<sup>201</sup>

DoD Directive 5100.77 sets out responsibilities for the reporting and investigation of possible, suspected or alleged violations of the law of war.<sup>202</sup> The directive delegates responsibility for DoD-wide reporting and investigation policy to the Secretary of the Army.<sup>203</sup> Combatant Commanders are responsible for ensuring that investigations and reporting requirements are completed.<sup>204</sup> The directive specifically designates that the command legal adviser is responsible, “to supervise the administration of those aspects of this program dealing with possible, suspected, or alleged enemy violations of the law of war.”<sup>205</sup>

Pursuant to Army policy, the U.S. Army Criminal Investigation Division (CID) has investigative jurisdiction over suspected war crimes in two instances. The first is when the suspected offense is a violation of the UCMJ.<sup>206</sup> The second is when the Department of the Army Headquarters directs the investigation.<sup>207</sup> War crimes investigations can also be

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- The arrest and indefinite imprisonment of 50,000–70,000 Shia during the 1980s, most of whom remain unaccounted for;
  - Systemic forced expulsion of over 120,000 Kurds, Turcomans and Assyrians from the Kirkuk region in a process of “Arabization”;
  - Political imprisonment, torture, summary and arbitrary executions of regime opponents; and,
  - Use of chemical weapons against Iran and the Kurd population in violation of international treaty obligations.

Malinowski statement, *supra* note 195.

<sup>197</sup> Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, art. 49, Aug. 12, 1949, 6 U.S.T. 3114; Geneva Convention for the Amelioration of the Conditions of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 50, Aug. 12, 1949, 6 U.S.T. 3217; GPW, *supra* note 13, art. 129; GC, *supra* note 52, art. 146.

<sup>198</sup> 10 U.S.C. § 818 (2000) (UCMJ art. 18). To invoke this provision; however, the suspect must be subject to UCMJ jurisdiction. For a general discussion of forum selection issues *see* THE JUDGE ADVOCATE GENERAL’S DEPARTMENT, UNITED STATES AIR FORCE, AIR FORCE OPERATIONS AND THE LAW: A GUIDE FOR AIR AND SPACE FORCES, 1st ed., 144-146 (2002).

<sup>199</sup> 10 U.S.C. § 821 (2000) (UCMJ art. 21) (authorizes the use of military commissions, tribunals or provost courts).

<sup>200</sup> War Crimes Act of 1997 (18 U.S.C. § 2401) (grants federal courts jurisdiction to prosecute any person inside or outside the United States for war crimes where a U.S. national or a member of the U.S. armed forces is either the accused or the victim). This is the appropriate U.S. forum for persons not subject to UCMJ jurisdiction.

<sup>201</sup> For example, through an ad hoc tribunal such as the International Criminal Tribunal for the Former Yugoslavia, created 25 May 1993 by S.C. Res. 827, U.N. SCOR, 47th Sess., 3217th mtg., U.N. Doc. S/Res/827 (1993).

<sup>202</sup> DoD DIR. 5100.77, *supra* note 56.

<sup>203</sup> *Id.* para 5.6.

<sup>204</sup> *Id.* para 5.8.4.

<sup>205</sup> *Id.* para 5.8.3.

<sup>206</sup> U.S. DEP’T OF ARMY, ARMY REGULATION 195-2, CRIMINAL INVESTIGATION ACTIVITIES, app. B (30 Oct. 1985).

<sup>207</sup> *Id.* para. 3-3a(7).



conducted with organic unit assets and legal support, using Army Regulation 15-6.<sup>208</sup> Finally, a commander may also have Reserve Component Judge Advocate General Service Organization (JAGSO) teams available to assist in the investigation. JAGSO teams perform judge advocate duties related to international law, including the investigation and reporting of violations of the law of war, the preparation for trials resulting from such investigations, and the provision of legal advice concerning all operational law matters.<sup>209</sup>

In early 2002, the Secretary of Defense gave the Secretary of the Army overall responsibility for the investigation of suspected war crimes and acts of terrorism. In turn, the Secretary of the Army directed that CID exercise overall investigative responsibility. CID organized the Criminal Investigation Task Force (CITF) to conduct worldwide criminal investigations to substantiate or unsubstantiate alleged or suspected war crimes or acts of terrorism. A JA was assigned as the legal advisor to this TF. Initially, an element of the CITF was established to conduct investigations in Afghanistan.<sup>210</sup>

During the period covered by this publication, several units commenced war crimes investigations in Iraq. However, most were not concluded before 1 May 2003, and, due to the operational tempo, many were not commenced until after this date.<sup>211</sup>

***a. Be Prepared to Support the War Crimes Investigation Unit.***

During OIF, a message assigned primary responsibility for the investigation of alleged war crimes for the Theater to the War Crimes Investigation Unit (WCIU), 3d Military Police (CID) Group.<sup>212</sup> Based in Kuwait, their role was to investigate and prepare cases for the prosecution of all war crimes, crimes against humanity, and atrocities committed by the Iraqi regime.<sup>213</sup>

In early April 2003, four JAs formed the legal support cell to the WCIU. The major tasks they undertook during the first month in that role included:

- Drafting a field guide of substantive war crimes offenses to assist CID;<sup>214</sup>
- Investigative and legal guidance in high profile matters including the ambush and subsequent treatment of members of 507<sup>th</sup> Maintenance Company,<sup>215</sup> and crimes by the “55 Most Wanted”;<sup>216</sup>

<sup>208</sup> U.S. DEP’T OF ARMY, ARMY REGULATION 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (30 Sept. 1996).

<sup>209</sup> See U.S. DEP’T OF ARMY, ARMY REGULATION 27-1, JUDGE ADVOCATE LEGAL SERVICES, ch. 11 (3 Feb. 1995).

<sup>210</sup> See Department of Defense Criminal Investigation Task Force, Power Point presentation (on file with CLAMO).

<sup>211</sup> Further information on war crimes investigations will be contained in Volume II of this Publication.

<sup>212</sup> 5th Group AAR, *supra* note 133.

<sup>213</sup> 12th LSO in Support of OIF, *supra* note 68, at 5.

<sup>214</sup> This took the form of a spreadsheet and was based on the elements of offenses contained in General Counsel of the Department of Defense, Military Commission Instruction: Crimes and Elements for Trials by Military Commission (draft released 28 Feb. 2003), at <http://www.au.af.mil/au/awc/awcgate/law/d20030228dmci.pdf>.

<sup>215</sup> On 23 Mar. 2003, thirty-three soldiers from the 507th Maintenance Company were ambushed in An Nasiriyah. Eleven soldiers were killed and six captured. Five of the captured soldiers later appeared on Iraqi television. The official U.S. Army account is at <http://www.army.mil/features/507thMaintCmpy/> (last visited 23 Mar. 2004).

- Leading and coordinating investigative efforts in An Nasiriyah, Iraq that ultimately led to the identification and detention of several potential war crimes suspects; and
- Providing guidance on the investigation of mass gravesites.<sup>217</sup>

There were several challenges to the effectiveness of the WCIU in this early stage. First, it was not clear in which forum any potential suspect would eventually be prosecuted. Accordingly, the JAs were required to provide legal guidance without the benefit of knowing either the precise elements of offenses or the particular evidentiary requirements. The approach taken by the WCIU was to use the offenses drafted for the military commissions as guidance, as these were unique to the war crimes environment.<sup>218</sup> However, the WCIU JA felt that the lack of jurisdictional certainty detracted from the effectiveness of investigations.<sup>219</sup> Resolving the question of forum needs to be high priority for JAs assigned to future WCIUs.

A practical challenge for the legal support cell was integration into the CID structure. The WCIU was essentially a CID activity and the existing CID structure of field agents and case managers did not anticipate close interaction between CID and JAs during the investigation phase. Rather, there was an expectation that the role of the JA would be purely to review the material collected once the investigation was complete.<sup>220</sup> JAs should be aware of this expectation when determining the best way to liaise with CID.

The effectiveness of the WCIU was also constrained by outside influences. Its location outside Iraq made it difficult to influence high-level decision-making on war crimes issues, and to contact witnesses and collect evidence. Resource constraints affected the speed with which investigative leads could be pursued.<sup>221</sup> Accordingly, while the WCIU had primacy over investigations in theory, other units formed their own war crimes investigation teams.<sup>222</sup> While frustrating, JAs should always be prepared for less than ideal conditions and plan accordingly.

***b. Be Prepared to Conduct Preliminary Investigations in the Absence of CID.***

During OIF, CID was unable to investigate all allegations of war crimes. Accordingly, some units conducted their own preliminary investigations. For example, Task Force (TF) Tarawa set up two teams to conduct preliminary investigations for reporting to CFLCC. A JA headed each team. The teams relied on close liaison with the local MPs and in particular with the Human Exploitation Team (HET).<sup>223</sup> While the TF Tarawa teams did not have the specialist CID expertise of the WCIU, their simple structure and close proximity to the location of the

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<sup>216</sup> These were the fifty-five high value members of the regime who appeared on the well-publicized “Personality Identification Playing Cards,” at <http://www.defenselink.mil/news/Apr2003/pipc10042003.html> (last visited 16 Mar. 2004).

<sup>217</sup> 12th LSO in Support of OIF, *supra* note 68.

<sup>218</sup> 12th LSO AAR, *supra* note 70.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Id.* Exacerbating the problem, for each media report alleging a war crime, a CID case file was opened and sent to WCIU for investigation. Many were unsubstantiated reports containing little factual information upon which to base an investigation. *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> TF Tarawa AAR Transcript, *supra* note 51, at 104.

incidents often enabled them to collect information and file reports quickly.<sup>224</sup> The incidents investigated by the TF Tarawa teams included the whereabouts of the ambushed members of 507<sup>th</sup> Maintenance Company and the discovery of a surface-to-air missile in a mosque near an airfield.<sup>225</sup>

While TF Tarawa investigated all alleged war crimes, the SJA, 101st Airborne Division, reported that while they investigated all allegations of war crimes by coalition forces, allegations of the enemy misusing religious, cultural, and other civilian properties became too numerous to investigate and track.<sup>226</sup> Other JAs encountered problems with Soldiers not trained to report the full circumstances of the suspected war crime, making it difficult to follow up on them. Moreover, the Group Judge Advocate, 5th Special Forces Group (Airborne) reported that reporting LOAC violations proved very difficult. The first alleged violation that he reported for OIF involved numerous radio transmissions while traveling with a team in constant movement.<sup>227</sup>

The experience of TF Tarawa was that many of the alleged war crimes reports were either false or less serious than initially reported.<sup>228</sup> They also found that all suspected war crimes mentioned in the Command Journal prompted a higher command request for follow up. This follow-up was time intensive and detracted from the time the JA could spend on other tasks. The TF Tarawa solution was to make the JA the information clearinghouse for all suspected war crimes. No report of a suspected war crime was made in the Command Journal without JA consent. This ensured that JA time was not wasted chasing “red herrings” that had already reached higher headquarters due to overzealous reporting.<sup>229</sup>

The importance of sufficient security was demonstrated by the experience of a Marine war crimes investigation team who traveled without a security element to investigate the killing of some non-embedded journalists. While the area was thought to be secure, the team was ambushed and the JA was wounded.<sup>230</sup> To avoid a similar outcome, each TF Tarawa team was supported by heavy security (a recon squad) when conducting an investigation. The lesson is that traveling with a security element is an essential requirement for conducting war crimes investigations in an environment such as Iraq.

### ***7. Be Prepared to Answer Questions on Service Member Wear of Nonstandard Uniforms or Civilian Clothes.***<sup>231</sup>

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<sup>224</sup> *Id.* at 102.

<sup>225</sup> *Id.* at 7, 102.

<sup>226</sup> See Interview with COL Richard O. Hatch, former Staff Judge Advocate, 101st Airborne Division, in Charlottesville, Va. (8 Oct. 03) (notes on file with CLAMO) [hereinafter Hatch Interview].

<sup>227</sup> Whitford OEF/OIF International Law AAR, *supra* note 37, para. 5.

<sup>228</sup> Only fifty-percent of matters reported had sufficient basis to prepare a report. TF Tarawa AAR Transcript, *supra* note 51, at 102.

<sup>229</sup> *Id.* at 117.

<sup>230</sup> *Id.* at 11-12, 101.

<sup>231</sup> For a thorough analysis of this issue, see W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493 (2004) [hereinafter *Special Forces' Wear of Non-Standard Uniforms*].

During OEF, Special Forces (SF)<sup>232</sup> service members were the first U.S. military forces to enter Afghanistan. Therefore, SF legal teams deployed early to support their units. For example, the Group Judge Advocate for the 5th Special Forces Group (Airborne) arrived in Uzbekistan on 9 October 2001, less than one month after the 9/11 terrorist attacks. He was followed shortly thereafter by the noncommissioned officer in charge (NCOIC) of the legal office.<sup>233</sup> In addition to the JAs and paralegals supporting the SF, JAs assigned to Civil Affairs (CA) units began deploying in December 2001 as part of the Coalition Joint Civil-Military Operations Task Force (CJCMOTF).<sup>234</sup> Legal personnel who deployed to support Special Operations Forces (SOF)<sup>235</sup> dealt with unique legal issues not normally encountered by JAs who support conventional forces. One of the most highly visible of these issues, and the one that caused the most debate in the legal community both inside and outside the Department of Defense (DoD), was that of SOF wearing either nonstandard uniforms or civilian clothing.

During OEF, many SF operated with allied indigenous forces in Afghanistan. At the request of the leaders of those forces, some dressed in indigenous attire to avoid being singled out and targeted by opposing forces because they were U.S. service members. For those SF supporting the Northern Alliance, for instance, this clothing included particular hats and scarves. In these instances, the SF wore indigenous clothing to blend in with the forces that they were supporting, not to appear as civilians.<sup>236</sup> The guidance and circumstances of wearing

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<sup>232</sup> Special Forces Soldiers are U.S. “Army forces organized, trained, and equipped to conduct special operations with an emphasis on unconventional warfare capabilities. Also called SF.” DOD DICTIONARY, *supra* note 71.

<sup>233</sup> See 5th Group AAR, *supra* note 133. Uzbekistan was the staging area for U.S. forces deploying to Afghanistan. *Id.* The 5th Special Forces Group legal team remained in Uzbekistan, at the Joint Special Operations Task Force (JSOTF) Headquarters, throughout most of their deployment. MAJ Whitford went forward with the Tactical Operations Center to Bagram Air Base, Afghanistan, during Operation ANACONDA in March of 2002. *Id.* Operation ANACONDA involved a force of about 2,000 Soldiers with a mission to root out Taliban and al Qaeda forces in the Pakitia province of Afghanistan. When it ended on 17 March 2002, eight U.S. service members had been killed and eighty-two wounded in action during the fighting. See Operation Anaconda, Global Security, at <http://www.globalsecurity.org/military/ops/oef-anaconda.htm> (last modified 16 Mar. 2004).

<sup>234</sup> See Colonel H. Allen Irish, *Are Soldiers in Civilian Clothes Protected under Geneva-Hague?*, at 28 (unpublished paper) (on file with CLAMO) [hereinafter *Are Soldiers in Civilian Clothes Protected under Geneva-Hague?*]. Colonel Irish was deployed in support of OEF as the Staff Judge Advocate (SJA) for the 352d Civil Affairs Command. A joint civil-military operations task force is defined in joint doctrine as follows.

A joint task force composed of civil-military operations units from more than one Service. It provides support to the joint force commander in humanitarian or nation assistance operations, theater campaigns, or a civil-military operations concurrent with or subsequent to regional conflict. It can organize military interaction among many governmental and nongovernmental humanitarian agencies within the theater. Also called JCMOTF.

JOINT CHIEFS OF STAFF, JOINT PUB. 3-57, JOINT DOCTRINE FOR CIVIL-MILITARY OPERATIONS para. GL-11 (8 Feb. 2001).

<sup>235</sup> Special Operations Forces are “[t]hose Active and Reserve Component forces of the Military Services designated by the Secretary of Defense and specifically organized, trained, and equipped to conduct and support special operations. Also called SOF.” DOD DICTIONARY, *supra* note 71, at 593-94.

<sup>236</sup> See *Special Forces’ Wear of Non-Standard Uniforms*, *supra* note 231, at 496-97. See also Memorandum, Major Dean Whitford, former Group Judge Advocate, 5th Special Forces Group (Airborne), Command Judge Advocate, Joint Special Operations Task Force–North (Task Force Dagger) (OEF) and Command Judge Advocate, combined Joint Special Operations Task Force–West; Combined Joint Special Operations Task Force–Arabian Peninsula (OIF), for Major Daniel P. Saumur, Deputy Director, CLAMO, para. 2 (17 June 2004) (on file with CLAMO) [hereinafter Whitford OEF/OIF Civilian Clothes AAR] (“there were additional reasons that counseled in favor of

nonstandard uniforms varied from team to team, affecting each group of ten to twelve service members differently. Moreover, the guidance focused on a limited time and purpose with a view toward fully conventional uniform wear as soon as possible.<sup>237</sup>

In addition, service members assigned to the CJCMOTF in Afghanistan initially wore civilian clothes while engaged in humanitarian relief efforts. The CJCMOTF Commander explained his decision to place personnel in civilian clothes in a 24 February 2002 letter to the Commander, Coalition Forces Land Component Command.<sup>238</sup> According to the CJCMOTF Commander, placing personnel in civilian clothes reduced the potential for violence directed against them. The commander did not want his personnel to be confused with U.S. forces engaged in offensive combat operations. Moreover, he believed that the wear of civilian clothes was a significant contributing factor to the CJCMOTF staff's high level of interaction with humanitarian relief organizations because it allowed them to adapt to the environment and blend in with other members of the international community.<sup>239</sup> Initially, the CFLCC Commander agreed with this reasoning for civil affairs Soldiers, specifically. He made this decision despite a recommendation from the CFLCC attorneys that all Soldiers, including those engaged in civil affairs missions, wear uniforms or at least modified uniforms.<sup>240</sup>

During February 2002, United States and British newspapers published complaints by some nongovernmental organizations (NGOs)<sup>241</sup> about United States and other coalition SOF operating in Afghanistan in civilian clothing.<sup>242</sup> These complaints culminated in a 2 April 2002 letter to U.S. National Security Advisor Dr. Condoleeza Rice from the heads of sixteen U.S.-based international relief organizations that were engaged in humanitarian relief efforts in Afghanistan. In the letter, the NGOs stated their concern over U.S. military personnel conducting humanitarian activity wearing civilian clothes. They argued that U.S. military forces

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wearing the attire of supported forces, mostly related to the purpose and nature of unconventional warfare, apart from target signature at a distance.”).

<sup>237</sup> Whitford OEF/OIF Civilian Clothes AAR, *supra* note 236, para. 2.

<sup>238</sup> See *Are Soldiers in Civilian Clothes Protected under Geneva-Hague?*, *supra* note 234, at 35 (quoting a letter from Brigadier General (BG) David E. Kratzer, CJCMOTF Commander, to Lieutenant General (LTG) Paul Mikolashek, Coalition Forces Land Component Commander (24 Feb. 2002). For a discussion of the CFLCC and OEF command structures, see *supra* Section II.

<sup>239</sup> See *Are Soldiers in Civilian Clothes Protected under Geneva-Hague?*, *supra* note 234, at 35.

<sup>240</sup> Holcomb, *View from the Legal Frontlines*, *supra* note 9, at 563-64 (“[T]he CFLCC Commander initially rejected the recommendation for civil affairs soldiers because, on balance, he thought doing so would save the lives of soldiers performing humanitarian assistance missions, [also] since the enemy did not comply with the law of war, any [U.S.] soldier who was captured was unlikely to receive treatment as a POW, regardless of his or her attire.”).

<sup>241</sup> Joint doctrine defines nongovernmental organizations as:

Transnational organizations of private citizens that maintain a consultative status with the Economic and Social Council of the United Nations. Nongovernmental organizations may be professional associations, foundations, multinational businesses, or simply groups with a common interest in humanitarian assistance activities (development and relief). “Nongovernmental organizations” is a term normally used by non-United States organizations. Also called NGOs.

DOD DICTIONARY, *supra* note 71, at 368.

<sup>242</sup> *Special Forces' Wear of Non-Standard Uniforms*, *supra* note 231, at 493 (citing Michelle Kelly & Morten Rostrup, *Identify Yourself: Coalition Soldiers in Afghanistan Are Endangering Aid Workers*, GUARDIAN (London), Feb. 1, 2002, at 19).

conducting humanitarian missions in civilian clothes and carrying weapons put NGO personnel at risk because it blurred the distinction between civilians and military forces.<sup>243</sup> Interestingly, contrary to the stated objection to the wear of civilian clothing by U.S. service members contained in the letter, other humanitarian relief organizations actually insisted that CJCMOTF personnel wear civilian clothes when meeting with their organizations because they did not want to be seen by the local population associating with the U.S. military.<sup>244</sup>

Prior to the April 2002 NGO letter, however, the issue seemed to have been all but resolved. In early March 2002, the CJCMOTF Commander directed all CJCMOTF personnel in Kabul and Mazar-eSharif to return to full uniform.<sup>245</sup> Some personnel in remote locations were permitted to stay in civilian attire as they were operating in areas devoid of NGOs. Following a review, U.S. Central Command (CENTCOM) supported this decision and issued guidance to commanders that allowed them to establish uniform policies based on local threat conditions and force protection requirements.<sup>246</sup>

As the operational setting matured, SF deployed to Iraq in support of Operation IRAQI FREEDOM generally wore nontraditional uniforms that clearly identified them as U.S. service members. The uniform usually included DCU (desert camouflage uniform) pants, a t-shirt, some form of load carrying equipment, and weapon. Moreover, they were required to adhere to Service grooming standards.<sup>247</sup>

The legal issue that lawyers struggled to answer was whether U.S. service members were in violation of the Law of Armed Conflict (LOAC) when they wore civilian clothing or when they wore non-standard uniforms.<sup>248</sup> Under the Geneva Convention Relative to the Treatment of Prisoners of War (GPW), to receive prisoner of war (POW) status service members must meet four basic conditions: “(1) operate under responsible command; (2) wear a *fixed distinctive sign*

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<sup>243</sup> See Humanitarian Leaders Ask White House to Review Policy Allowing American Soldiers to Conduct Humanitarian Relief Programs in Civilian Clothes, InterAction (2 Apr. 2002), at <http://www.reliefweb.int/w/rwb.nsf/0/a5434df6dbd62ca485256b8f006c3bd6?OpenDocument> (2 Apr. 2002).

<sup>244</sup> See *Are Soldiers in Civilian Clothes Protected under Geneva-Hague?*, *supra* note 234, at 25 n.79 and accompanying text.

<sup>245</sup> *Special Forces' Wear of Non-Standard Uniforms*, *supra* note 231, at 503 (“In early March 2002, the CJCMOTF commander, desiring to broker a compromise [with the NGOs who were complaining about CA personnel wearing civilian clothes], directed all Civil Affairs personnel in Kabul and Mazar-e-Sharif to return to full uniform.”).

<sup>246</sup> *Id.* The issue was also considered at the DoD-Joint Chiefs of Staff level, which issued guidance consistent with the CJCMOTF guidance. *Id.* at 503-04.

<sup>247</sup> See, e.g., Interview with Major Mark W. Holzer, former JA, 3rd Battalion, 5th Special Forces Group, in Charlottesville, Va. (1 Mar. 2004); Major Michael L. Kramer, former Judge Advocate, 10th Special Forces Group, presentation at the Staff Judge Advocate/Deputy Staff Judge Advocate Short Course in Charlottesville, Va. (13 June 2003) (Powerpoint Presentation on file with CLAMO); Major Stuart G. Baker, After Action Report, Operation IRAQI FREEDOM, at 4 (11 Sept. 2003) (“JSOTF-N [Joint Special Operations Task Force-North] faced significant rear-area threats while in Iraq, from both Iraqi intelligence agents and from Ansar al-Islam terrorists in our sector. This raised the issue of whether commanders could authorize the wear of civilian clothes for force protection purposes. Our higher headquarters established a policy that any wear of civilian clothes required its approval . . .”).

<sup>248</sup> Although there was some discussion as to whether the war in Afghanistan was an international armed conflict, under DoD policy, U.S. military personnel must comply with the spirit and principles of the law of war during all armed conflicts, no matter how the conflict is characterized. DOD DIR. 5100.77, *supra* note 56, para. 5.3.1. See also *Special Forces' Wear of Non-Standard Uniforms*, *supra* note 231, at 505-08 (discussing the nature of the armed conflict in Afghanistan).

*recognizable at a distance*; (3) carry arms openly during each engagement; and (4) conduct operations in accordance with the law of armed conflict (emphasis added).<sup>249</sup> It is generally understood that if members of an armed force comply with the above GPW requirements entitling them to POW status, they are considered “lawful combatants.”<sup>250</sup> One of these requirements is to wear a “distinctive” sign identifying the person as a member of an armed force; it does not require any particular type of uniform be worn.

After reviewing the LOAC issues involved, DoD settled on a policy that generally required service members to operate in standard uniforms during international armed conflict. The Combatant Commanders, however, were allowed to authorize “non-standard uniforms” if these uniforms satisfied the LOAC requirements to wear a distinctive, identifiable sign. According to policy:

A “non-standard uniform” distinguishes a combatant from civilians. Examples include: visible part of the standard uniform (i.e., wearing only DCU [desert camouflage uniform] bottom or top); and/or fixed, distinctive sign recognizable in daylight at a distance (a U.S. flag on shoulder sleeve or body armor, an armband, or distinct type of headgear) . . . . Wearing of a “non-standard uniform” is reserved for exceptional circumstances when required by military necessity.<sup>251</sup>

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<sup>249</sup> The GPW, *supra* note 13, art. 4, provides that those entitled to enemy prisoner of war status are:

persons belonging to one of the following categories, who have fallen into the power of the enemy:

- (1) Members of the armed forces of a Party to the conflict, as well as members of militias and volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
  - (a) That of being commanded by a person responsible for his subordinates;
  - (b) That of having a fixed distinctive sign recognizable at a distance;
  - (c) That of carrying arms openly;
  - (d) That of conducting their operations in accordance with the laws and customs of war.

*Id.* There is at least some argument that regular members of the armed forces of a party to the conflict must be considered as EPWs under paragraph (1) without regard to meeting the conditions outlines in paragraph (2) for members of other militias and other volunteer corps. For an analysis of this argument, see *Special Forces’ Wear of Non-Standard Uniforms*, *supra* note 231, at 509-10.

<sup>250</sup> See, e.g., Major William H. Ferrell, III, *No Shirt; No Shoes; No Status: Uniforms, Distinction, and Special Operations in International Armed Conflict*, 178 MIL. L. REV. 94, 99 n.17 (2003) [hereinafter *No Shirt; No Shoes; No Status: Uniforms, Distinction, and Special Operations in International Armed Conflict*] (“Although GPW uses the term POW instead of the terms ‘lawful combatant’ or ‘combatant immunity,’ is understood under the GPW and the accompanying commentaries that the term ‘POW’ applies only to lawful combatants that have fallen into enemy hands, and encompasses ‘combatant immunity.’” (citations omitted)).

<sup>251</sup> Talking Paper, Office of the Legal Counsel to the Chairman, Joint Chiefs of Staff, subject: SOF Uniform Issues, at 2 (26 Mar. 2003) [hereinafter OJCS, LC Talking Paper] (on file with CLAMO).

Whether wearing a full military uniform or the non-standard uniform described above, the service member would be considered a lawful combatant entitled to POW status under the GPW if captured.

Although the above DoD policy settled the issue for most service members, JAs must be prepared to provide legal advice to commanders and training to service members who may operate behind enemy lines in civilian clothes, as opposed to distinctive non-standard uniforms. How should these service members be treated under the LOAC if captured? The answer may depend on what the service member was doing when he or she was captured by the enemy.

First, it is not a war crime *per se* to operate behind enemy lines in civilian clothing. The Fourth Hague Convention provides that “it is especially forbidden . . . [t]o kill or wound treacherously individuals belonging to the hostile nation or army.”<sup>252</sup> Additional Protocol I of the Geneva Convention echoes this prohibition, defining perfidy to include killing, injuring or capturing an adversary by, among others, “feigning of civilian, non-combatant status.”<sup>253</sup> Generally speaking, therefore, it is not a war crime for military personnel to wear civilian clothing, unless done for the purpose of and with the result of killing, injuring, or capturing an adversary treacherously.<sup>254</sup> The intent to deceive, and not the wearing of civilian clothing, appears to be the gravamen of the prohibition.<sup>255</sup> A service member who commits this act is correctly defined as an “unlawful combatant” not entitled to POW status if captured because his or her combatant activities are illegal according to international law.<sup>256</sup>

But what about service members who wear civilian clothes behind enemy lines, but without the intent to deceive for the purpose of killing, injuring or capturing an adversary?

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<sup>252</sup> Hague IV, *supra* note 22, Annex art. 23(b).

<sup>253</sup> Protocol I, *supra* note 53, art. 37 provides:

It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy. The following acts are examples of perfidy:

- (a) the feigning of an intent to negotiate under a flag of truce or of a surrender;
- (b) the feigning of an incapacitation by wounds or sickness;
- (c) the feigning of civilian, non-combatant status; and
- (d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.

*Id.* Although the United States is not party to Additional Protocol I, it is bound to the extent the Protocol codifies customary international law. See *Special Forces' Wear of Non-Standard Uniforms*, *supra* note 231, at 522 n.65.

<sup>254</sup> See, e.g., *Special Forces' Wear of Non-Standard Uniforms*, *supra* note 231, at 522.

<sup>255</sup> See *No Shirt; No Shoes; No Status: Uniforms, Distinction, and Special Operations in International Armed Conflict*, *supra* note 250, at 30 (“one can think of many instances where U.S. servicemembers may be called on to defend themselves while wearing civilian clothes. For example, U.S. servicemembers could find their base camp under attack while in the midst of physical training . . . [t]hey obviously are not required to change from PT gear . . . into their uniforms before taking up arms to defend themselves.”).

<sup>256</sup> See *A Treatise on The Juridical Basis of the Distinction Between Lawful Combatant and Unprivileged Belligerent*, The Judge Advocate General's School, U.S. Army (1959) [hereinafter *Treatise on Lawful Combatants and Unprivileged Belligerents*] (on file with CLAMO).



These individuals may still jeopardize their status as combatants, even though they have not committed a war crime.<sup>257</sup> Under international law, ruses and “the employment of measures necessary for obtaining information about the enemy and the country are considered permissible.”<sup>258</sup> Therefore, the U.S. may use “spies and secret agents” to gather intelligence about the enemy without violating the LOAC.<sup>259</sup> Thus, service members operating in civilian clothing to blend into their surroundings risk being treated as spies<sup>260</sup> if captured. The LOAC generally allows these individuals to be prosecuted under state law.<sup>261</sup> In addition, service members who, while wearing civilian clothes, commit hostile acts about or behind enemy lines may be tried under state law, as well.<sup>262</sup>

These spies and saboteurs who are caught behind enemy lines in civilian clothing may be better termed “unprivileged belligerents,” because they have not committed unlawful acts, i.e., war crimes, under the LOAC simply by their wear of civilian clothes. However, they are not afforded the privileges of POW status, such as would make them lawful combatants, because they have not complied with the four GPW requirements.<sup>263</sup>

The authorization to wear non-standard uniforms or civilian attire is extremely limited, and unit- and mission-specific. Historically, authorization has been limited to certain intelligence activities or SF operating in denied areas in support of partisan activities.<sup>264</sup> Because of the risks inherent in these activities, DoD requires Combatant Commander authorization before service members may wear either non-standard uniforms or civilian attire.<sup>265</sup>

Given the LOAC requirements, JAs supporting intelligence activities and SF must be prepared to advise commanders on the international law requirements to be considered a lawful combatant entitled to POW status if captured. They must also be prepared to articulate the risks inherent in allowing service members to wear non-standard uniforms or operate in (nondistinct) civilian clothes in international armed conflict. If the commander receives authorization from the Combatant Commander for unit personnel to wear other than the full military uniform for a mission, JAs must ensure commanders and the service members, themselves, understand the LOAC requirements of distinction and are aware of the risks if captured.<sup>266</sup>

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<sup>257</sup> OJCS, LC Talking Paper, *supra* note 251, at 2.

<sup>258</sup> Hague IV. *supra* note 22, art. 24.

<sup>259</sup> FM 27-10, C1, 15 Jul. 1976, *supra* note 23, para. 51.

<sup>260</sup> See OJCS, LC Paper *supra* note 251, at 2.

<sup>261</sup> Hague IV, *supra* note 22, art. 29, provides that “[a] person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.”

<sup>262</sup> These acts include, “sabotage, destruction of communications facilities, intentional misleading of troops by guides, liberation of prisoners of war, and other acts not falling within Articles 104 [Aiding the Enemy] and 106 [Spies] of the Uniform Code of Military Justice and Article 29 [spies] of the Hague Regulations. FM 27-10, C1, 15 July 1976, *supra* note 23, para. 81.

<sup>263</sup> *Id.* at 8 n.15.

<sup>264</sup> See generally, *Special Forces’ Wear of Non-Standard Uniforms*, *supra* note 231, at 524-39 (discussing the historical state practices of SF wear of civilian attire, non-standard uniforms, and/or enemy uniforms).

<sup>265</sup> OJCS, LC Talking Paper, *supra* note 251, at 2.

<sup>266</sup> See *id.*

### **8. *Be Prepared to Deal with Non-State Actor Armed Groups (Militias).***

At first glance, OIF was a traditional military conflict between the U.S. led coalition and Iraqi government forces; however, that view misses part of the picture. There were also other armed groups, some friendly and some not, involved in the conflict. The common factors among these groups were that they were armed, and they did not represent a sovereign state.

For example, U.S. Special Forces (SOF) personnel fought with Kurdish militia members in Northern Iraq against Iraqi government forces and members of the Ansar-al-Islam terrorist organization. The U.S. also worked with two armed groups of Iraqi exiles (the Free Iraqi Freedom Fighters (FIFF) and the Free Iraqi Forces (FIF)), though both were of extremely minor military significance.<sup>267</sup> OEF presented similar issues because U.S. SOF personnel fought with Northern Alliance fighters against Taliban and al Qaeda forces.<sup>268</sup>

Working with friendly militia forces may present legal issues concerning ROE.<sup>269</sup> By contrast, militia forces declared hostile can be attacked like any other hostile force. The more unusual case is the militia that is neither friendly nor hostile. The Mujahedin-e Khalq (MeK) presented this profile in OIF. The U.S. approach to the MeK, and JA involvement in the process, present an interesting case study with several potential lessons for future operations.

The MeK is a political and military movement (some would say a cult) dedicated to the overthrow of the Islamic Government of Iran.<sup>270</sup> Saddam Hussein gave sanctuary to the MeK for many years and allowed it to conduct limited military operations against Iranian government forces from Iraqi territory.<sup>271</sup> The MeK was financially well off and armed with tanks and artillery stored at several compounds in Iraq.<sup>272</sup> The MeK's leadership and fighters are mostly women, and its opposition to the Iranian government stems largely from the Iranian government's perceived discrimination against women.<sup>273</sup>

When OIF planning originally called for the 4th Infantry Division (4ID) to enter Iraq through Turkey, 4ID operational plans specifically addressed the MeK.<sup>274</sup> This was the case, in part, because the MeK is on the U.S. State Department list of foreign terrorist organizations.<sup>275</sup> During the early stages of OIF, U.S. SOF forces negotiated a local ceasefire agreement with the

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<sup>267</sup> See 12th LSO AAR, *supra* note 70 (discussing both the FIF and the FIFF); See also MG David Barno, Commander, Task Force Warrior, Briefing on Free Iraqi Forces, Washington, D.C. (14 Mar. 2004), at [http://www.defenselink.mil/transcripts/2003/t03142003\\_t0314barno.html](http://www.defenselink.mil/transcripts/2003/t03142003_t0314barno.html).

<sup>268</sup> See 5th Group AAR, *supra* note 133.

<sup>269</sup> See *infra*, Section B (for a discussion of ROE issues in OEF and OIF).

<sup>270</sup> See generally Elizabeth Rubin, *The Cult of Rajavi*, N.Y. TIMES, 13 July 2003, at 26 (describing the thirty year history of the MeK) [hereinafter Rubin, *The Cult of Rajavi*].

<sup>271</sup> See Telephone Interview by CPT Daniel P. Saumur, Deputy Director, Center for Law and Military Operations, with LTC Flora D. Darpino, former Staff Judge Advocate, 4th Infantry Division (24 Feb. 2004) (notes on file with CLAMO) [hereinafter Darpino Interview].

<sup>272</sup> *Id.*

<sup>273</sup> See Rubin, *The Cult of Rajavi*, *supra* note 270.

<sup>274</sup> See Darpino Interview, *supra* note 271.

<sup>275</sup> See U.S. Department of State, Fact Sheet: Foreign Terrorist Organizations, at 2 (23 May 2003).

MeK, but eventually, the principal MeK compound north of Baghdad fell within the 4ID's area of responsibility.<sup>276</sup>

The 4ID received orders to bring the MeK fully under U.S. Control,<sup>277</sup> and the 4ID SJA was involved in a two-day negotiating session with the MeK leadership to accomplish this mission. 4ID JAs helped the 4ID Commander reach agreement with the MeK to avoid hostilities. The negotiations were long and difficult and made more so because the MeK would not "surrender."<sup>278</sup> The SJA assisted the 4ID commander by drafting prepared remarks, evaluating negotiating strategies, and drafting an "agreement" calling for the MeK to consolidate its personnel and weapons in separate locations and follow all further U.S. instructions.<sup>279</sup> The MeK signed the agreement on the second day of negotiations. The agreement with the MeK drew some criticism because the MeK had been designated a terrorist organization.<sup>280</sup> After the session ended, the 4ID observed that in these types of negotiations, the JAs can be of greatest assistance by:

- Taking the time to gather information and understand the other party's decision process;
- Arming the commander or lead negotiator with prepared remarks integrated into a carefully planned negotiating strategy; and
- Carefully observing the negotiations, like an assistant trial counsel at a court-martial, and providing recommendations to the lead negotiator throughout the process.<sup>281</sup>

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<sup>276</sup> See Darpino Interview, *supra* note 271. See also, MAJ Daniel G. Jordan, V Corps JA, OIF AAR Comment Input, at 3 (28 Apr. 2004) (on file with CLAMO).

A U.S. [Special Forces] commander (O-5) entered into a cease-fire agreement with this organization during the major combat operations phase of OIF. The MEK claimed that it had sent a letter to [U.S. Secretary of State] Powell on 6 FEB [2003], prior to major combat operations, saying that they would withdraw their forces to a spot in Iraq least likely to come into contact with U.S. forces and that they would not attack us or fire on us at all, even in self-defense. They maintained their assertion that they never fired on us, despite being bombed by us during the early part of the war. The SOF commander did not have the authority to enter into this agreement. The agreement contained a clause that allowed either side to get out of the agreement with 48-hour's notice. Having a U.S. unit enter into an agreement with this organization created a huge political and operational problem.

*Id.*

<sup>277</sup> See Darpino Interview, *supra* note 271.

<sup>278</sup> See *id.*

<sup>279</sup> See *id.* Although the 4th Infantry Division SJA was the senior JA present during the negotiations, senior V Corps and CFLCC JAs provided guidance during the negotiations. In addition, the dedicated V Corps Political Advisor participated in the second day of negotiations. See *id.*

<sup>280</sup> See Glenn Kessler, *U.S. Eyes Pressing Uprising in Iran: Officials cite Al Qaeda Links, Nuclear Program*, WASH. POST, 25 May 2003, at A1 (discussing the U.S. agreement with the MeK in the context of a larger purported disagreement between the Departments Defense and State).

<sup>281</sup> See Darpino Interview, *supra* note 271.

***9. Understand the United States' Obligations to Child Soldiers, both United States Service Members Considered Child Soldiers and Those Found on the Battlefield.***

During both operations service members were confronted with issues regarding children under the age of eighteen fighting them on the battlefield and with detaining some of these individuals. In addition, shortly before combat operations in Iraq, the United States became a part to an international agreement that required the parties to take measures to ensure that service members under the age of eighteen did not take a direct part in hostilities. In both cases, JAs found themselves providing legal advice and training on issues regarding child soldiers.

***a. Prior to Deployment, Ensure Commanders Understand the Implications of the Child Soldiers Protocol and Service Implementing Guidance on United States Service Members.***

On 23 January 2003, the Optional Protocol on the Involvement of Children in Armed Conflict (the Child Soldiers Protocol) entered into force in the United States.<sup>282</sup> The protocol requires the parties to “take all feasible measures to ensure that members of their armed forces who have not attained the age of eighteen years do not take a direct part in hostilities.”<sup>283</sup> The Senate ratified the treaty subject to certain understandings regarding the definitions of “feasible measures” and “direct part in hostilities.”

(A) the term “feasible measures” means those measures that are practical or practically possible, taking into account all the circumstances ruling at the time, including humanitarian and military considerations;

(B) the phrase “direct part in hostilities:” (i) means immediate and actual action on the battlefield likely to cause harm to the enemy because there is a direct causal relationship between the activity engaged in and the harm done to the enemy; and (ii) does not mean indirect participation in hostilities, such as

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<sup>282</sup> Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, July 5, 2000, S. TREATY DOC. NO. 106-37, 39 I.L.M. 285 (2000) [hereinafter Child Soldier Protocol]. On 10 January 2000, U.S. and United Nations (UN) negotiators agreed to the Child Soldier Protocol. Former President William J. Clinton signed the Protocol on 5 July 2000; the Senate gave its advice and consent to ratification of the Protocol on 18 June 2002; the State Department deposited it with the UN Secretary-General on 23 December 2002 and, according to article 10.2 of the Protocol, it entered into force thirty days after the date of deposit.

<sup>283</sup> *Id.* art. 1. The Protocol also provided that a state party permitting voluntary recruitment into their national armed forces under the age of 18 must maintain safeguards to ensure that:

- (a) Such recruitment is genuinely voluntary;
- (b) Such recruitment is carried out with the informed consent of the person’s parents or legal guardians;
- (c) Such persons are fully informed of the duties involved in such military service;
- (d) Such persons provide reliable proof of age prior to acceptance into national military service.

*Id.* art. 3

gathering and transmitting military information, transporting weapons, munitions, or other supplies, or forward deployment.<sup>284</sup>

Each year, the U.S. armed forces enlists approximately 12,000 service members who are seventeen years of age with the written consent of their parent or legal guardian.<sup>285</sup> About 2,300 of these service members are still seventeen when they finish basic training.<sup>286</sup> Prior to 2003, the United States had service members deployed to Afghanistan in support of OEF who were under the age of eighteen. These service members, however, were serving in combat support and combat service support positions performing sustainment operations only.<sup>287</sup>

In early January 2003, in anticipation of the 23 January effective date of the Child Soldiers Protocol, DoD directed the services to implement a plan to ensure compliance with the Protocol. The Department of Army directed commanders to immediately identify service members under the age of eighteen who were already serving overseas and take all “feasible measures” to ensure they did not take direct part in hostilities until they turned eighteen.<sup>288</sup> This included all service members deployed in support of both OEF and Operation IRAQI FREEDOM. The Third Infantry Division (3ID), for example, counted ten Soldiers who were seventeen years of age as they prepared to deploy for combat. Those Soldiers were immediately moved into positions at the brigade level that would not involve them in direct combat in Iraq.<sup>289</sup>

The Marine Corps also directed commanders to take all feasible measures to ensure Marines under eighteen years of age did not take part in hostilities. In addition, under the Marine Corps policy, commanders were directed to do the following.

[W]eigh the mission requirements against the practicability of diverting 17 year old Marines from combat. Factors to consider may include, but are not limited to: the tactical situation; the manpower need of the units; the danger to service member; the impact on unit cohesion if the service member were to be removed from the unit; the reasonable ability of the unit to exclude the 17 years old Marine

<sup>284</sup> See Executive Report of Committee, Treaty Doc. 106-37(a) Optional Protocol No. 1 to Convention on Rights of the Child on Involvement of Children in Armed Conflict, § 2(2)(A) and (B), 148 Cong. Rec. S5454 (daily ed. Jun. 12, 2002) [hereinafter Executive Report of Committee].

<sup>285</sup> Among other qualifications, a person must be at least seventeen years of age to enlist in the Regular Army, Regular Navy, Regular Air Force, Regular Marine Corps, or Regular Coast Guard. 10 U.S.C. § 505(a) (2000). In addition, the Service Secretary prescribes, among other qualifications, the age qualifications for enlistment of persons as Reserves of the armed forces. 10 U.S.C. § 12102(b) (2000). According to Department of Defense policy, the minimum age for enlistment in the Active and Reserve components is seventeen years of age. U.S. DEP'T OF DEFENSE, DIR. 1304.26, QUALIFICATION STANDARDS FOR ENLISTMENT, APPOINTMENT, AND INDUCTION para. E1.2.1.1. (21 Dec. 1993) (C1, 4 Mar. 1994).

<sup>286</sup> See Interview with the Honorable Marshall Billingsley, Deputy Assistant Secretary of Defense for Negotiations Policy, Armed Forces Radio and Television Network News, 4 July 2002, at <http://www.defenselink.mil/news/radio/Jul2002/> (4 July 2002).

<sup>287</sup> *Id.*

<sup>288</sup> See Message, 211720Z Jan 03, Deputy Chief of Staff, G-1, subject: Implementation of Army Procedures to Comply with Child Soldiers Protocol (Age 18 Standard for Participation in Combat) (providing that on 16 Jan. 2003 the Principal Deputy Under Secretary of Defense (Personnel and Readiness) directed the services to implement their plans to ensure compliance with the Child Soldier Protocol).

<sup>289</sup> Information Paper, Third Infantry Division, subject: Seventeen Years Old (17yo) [sic] Service Members participating in Direct Combat para. 4 (8 Feb. 2003) (copy on file with CLAMO).

from taking direct part in hostilities; and any other relevant criterion. The commander is responsible for determining the correct course of action, if any, based on his estimate of the situation and his understanding of the prevailing circumstances.<sup>290</sup>

On 4 April 2003, the Army announced a new policy that all Soldiers under eighteen years of age would not be assigned on a permanent change of station or deployed on temporary duty or temporary change of station to duty stations outside the continental United States (except Alaska, Hawaii, Puerto Rico, or U.S. territories or possessions). Commanders were required to ensure that all deployed Soldiers under the age of eighteen did not take direct part in hostilities and return them to home station if required.<sup>291</sup>

For future deployments, legal personnel must be aware of the Child Soldiers Protocol and the U.S. obligations under this treaty. Moreover, they need to ensure that commanders, with the support of their adjutants and personnel specialists, identify service members who are under the age of eighteen and comply with implementing Service policy on the status of these service members.

***b. Be Prepared to Answer Questions Regarding Children on the Battlefield.***

Over 300,000 children worldwide, some as young as ten years old, participate in armed conflict.<sup>292</sup> In 2001, both Afghanistan and Iraq were reported to have child soldiers serving in government forces and armed opposition groups.<sup>293</sup> This was supported by reports during OEF and OIF. In January 2002, the media widely reported that a fourteen-year-old boy killed U.S. Army Special Forces Sergeant Nathan Chapman, the first American service member killed by

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<sup>290</sup> Message, 231139Z Jan 03 (MARADMIN 030/03), Commandant of the Marine Corps, subject: 17 Year Old Marines in Combat, para. 4. This guidance follows the Senate's understanding pursuant to their Child Soldiers Protocol Treaty ratification that:

Any decision by any military commander, military personnel, or other person responsible for planning, authorizing, or executing military action, including the assignment of military personnel, shall only be judged on the basis of all the relevant circumstances and on the basis of that person's assessment of the information reasonably available to the person at the time of that person's planned, authorized, or executed the action under review, and shall not be judged on the basis of information that comes to light after the action under review was taken.

Executive Report of Committee, *supra* note 284, § 2(2)(C).

<sup>291</sup> Message Number 03-125, 2 Apr. 03, Total Army Personnel Command (TAPC-EPC-O), subject: Implementation of Child Soldiers Protocol (Soldiers Under the age of 18). Another Army message, issued in February 2004, reiterated this policy. *See* Message Number 04-088, 24 Feb 04, Human Resources Command (AHRC-EPO-P), subject: Child Soldiers Protocol ("In light of numerous deployment activities across the force, commanders must ensure soldiers under age 18 do not deploy and, if already deployed, return these soldiers to home station immediately or position them to ensure no direct participation in hostilities.").

<sup>292</sup> Department of State, The Optional Protocol to the United Nations Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Fact Sheet, 24 Dec. 2002, *at* <http://www.state.gov/r/pa/prs/ps/2002/16213.htm> [hereinafter Department of State Fact Sheet]

<sup>293</sup> Coalition to Stop the Use of Child Soldiers, Child Soldiers Global Report 2001, May 2001, *at* <http://www.child-soldiers.org/cs/childsoldiers.nsf/3f922f75125fc21980256b20003951fc/4f5b03971b1b6fc580256ae5003252df?OpenDocument> [hereinafter Child Soldiers Global Report 2001].

hostile fire in Afghanistan.<sup>294</sup> In Iraq, one unit found a child-size Iraqi regular force uniform and some very small AK-47s, which they passed to the Army's Criminal Investigation Division (CID).<sup>295</sup>

A number of international treaties prohibit the conscription or enlistment of children. As described in subsection a above, the United States is bound by the most restrictive, the Child Soldiers Protocol, which requires Parties to take all feasible measures to ensure that voluntary enlistees under eighteen do not take a direct part in hostilities, and limits conscription to those over the age of eighteen.<sup>296</sup> Neither Afghanistan nor Iraq was party to the Child Soldiers Protocol during the period covered by this Publication<sup>297</sup> and the Child Soldiers Protocol is not considered customary international law.

A lower threshold prohibiting conscripting or enlisting children under the age of fifteen years, however, is arguably customary international law and therefore applicable to Afghanistan and Iraq. Employing children under fifteen years of age as soldiers is considered a serious violation of the law of armed conflict in the Rome Statute of the International Criminal Court,<sup>298</sup> and is also prohibited by both the Convention on the Rights of the Child,<sup>299</sup> and Additional Protocol 1 to the Geneva Conventions (GP1).<sup>300</sup> Although the United States is not a party to any of these agreements, over 190 States are party to one or more of these instruments.<sup>301</sup>

### **1. Service members need to be trained on the use of force against child soldiers.**

Service members need to understand that any person, regardless of age, who is declared hostile, that is, a member of an identified military or paramilitary force designated as hostile by

<sup>294</sup> Center for Emerging Threats and Opportunities (CETO), Child Soldiers - Implications for U.S. Forces, Seminar Report 5, 23 Sept. 2002, at <http://www.ceto.quantico.usmc.mil/childsoldier/FINAL%20Report%20Complete.pdf> [hereinafter Child Soldiers - Implications for U.S. Forces].

<sup>295</sup> See 3ID AAR Transcript, *supra* note 89, at 53 (CPT Michelle A. Hansen, Operational Law Attorney, 3ID, commenting that “[w]e saw some evidence of child combatants. We actually had a uniform, it's very small, of an Iraqi regular forces uniform and some very small AK-47's that they found. I think they passed that one to CID . . .”).

<sup>296</sup> Child Soldiers Protocol, *supra* note 282.

<sup>297</sup> There are currently seventy parties to the Protocol (as of Apr. 2004). Iraq is not a party. Moreover, Afghanistan was not a party prior to and during the early stages of OEF, but subsequently acceded to the protocol on 24 Sept. 2003, setting a minimum age of twenty-two for service in the Afghanistan National Army.

<sup>298</sup> Rome Statute of the International Criminal Court, 17 July 1998, A/CONF. 183/9 Art 8(2)(b), at <http://www.un.org/icc/part1.htm>. There are ninety-two parties. The United States is not a party.

<sup>299</sup> Convention on the Rights of the Child, G.A. res. 44/25, annex 445 U.N. GAOR Spp. (No.49) at 167 U.N. Doc. A/44/49 (1989), art. 38 [hereinafter CRC]. There are 192 parties. Iraq is a party. The US is not a party, but adheres to the higher standard in the Child Soldier Protocol. Afghanistan ratified the CRC in 1994 but the Taliban authorities claimed to have annulled this in a general revocation of all international agreements. See Child Soldiers Global Report 2001, *supra* note 293.

<sup>300</sup> Protocol I, *supra* note 53, art. 77(2). There are 161 parties. The United States, Afghanistan, and Iraq are not parties.

<sup>301</sup> S.C. Res. 1539, U.N. SCOR, 58th Sess., 4948th mtg., U.N. Doc. S/RES/1539 (2004) called for a systemic and comprehensive monitoring mechanism to provide information on the use of child soldiers in violation of international law. It also proposed consideration of sanctions against States who fail to meet their international obligations.

proper military authority, may be engaged with deadly force under the rules of engagement (ROE).<sup>302</sup> Additionally, service members always have the right to use deadly force in self-defense when threatened with death or serious bodily injury.<sup>303</sup> Neither the Child Soldiers Protocol nor the age of the person prevents a service member from acting in accordance with the ROE when confronting a declared hostile force or acting in self-defense.

A U.S. service member who encounters an armed child in battle may be faced with the moral dilemma of self-protection versus traditional American social and cultural values concerning children.<sup>304</sup> A 2002 U.S. Marine Corps seminar on the child soldier phenomenon reported that children on the battlefield add confusion and ultimately increase the death toll.

[I]n many cases, they have years of combat experience and are more battle hardened than their older adversaries, having literally grown up fighting. Professional military forces are reluctant to fire upon children, which gives the children a greater advantage, especially if they are trained to shoot first and accurately.<sup>305</sup>

The lesson is that ROE training must include a discussion of child soldiers on the battlefield and child soldier scenarios should be incorporated into training vignettes. Service members need to understand that the ROE does not change, even when confronted by child soldiers.<sup>306</sup>

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<sup>302</sup> See CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3121.01A, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES para. A.6 (15 Jan. 2000) [hereinafter SROE].

<sup>303</sup> See, e.g., E-mail from Maj Kevin M. Chenail, USMC, Operational Law Attorney, International and Operational Law Branch, Judge Advocate Division, Headquarters, U.S. Marine Corps, to Capt Daniel J. McSweeney, USMC, Media Branch, Headquarters, U.S. Marine Corps (10 Dec. 2003) (on file with CLAMO) (noting that the “bottom line to get across to our Marines is that a threat is a threat is a threat regardless of age. A 12-year old with a weapon is just as dangerous as a 20-year old, maybe even more so based on reports and other information on their mentality. The fact that Child Soldiers are involved or are in the area should have no impact on ROE.”).

<sup>304</sup> Child Soldiers - Implications for U.S. Forces, *supra* note 294, at 6.

<sup>305</sup> *Id.* at 11.

<sup>306</sup> See, e.g., Child Soldiers - Implications for U.S. Forces, *supra* note 294. The report contains some military strategies to deal with opposing forces that contain child soldiers, which are worthy of consideration, to include the following.

- Targeting the adult leadership as the center of gravity;
- Considering demonstrative fire for shock to break up child soldier units;
- Securing child soldier recruitment zones such as schools and refugee camps;
- Considering non-lethal weapons;
- Public affairs initiatives to prepare the US public for child soldier deaths;
- Favorable treatment and encouragement of desertion;
- Good intelligence to ensure US soldiers understand the threat;
- Assistance in demobilization; and,
- Post-conflict treatment of US soldiers exposed to contact with child soldiers

*Id.* at 13-15. According to Lt Col William Perez, SJA, TF Tarawa, Marines noticed that the Saddam Fedayeen forced many children into combat roles. Often times, Marines used their scout snipers to take out the Fedayeen and avoid killing the children. Once the Fedayeen were killed, the children went home. See E-mail from Lieutenant Colonel William Perez, USMC, SJA, TF Tarawa, to Lieutenant Colonel Pamela M. Stahl, Director, Center for Law and Military Operations, subject: CLAMO Draft Handbook – OIF/OEF (18 Apr. 2004) (on file with CLAMO) (the



## **2. Be prepared to advise commanders on detaining child soldiers.**

During both OEF and OIF, children were captured on the battlefield and detained by U.S. Forces. For example, three of the detainees transported to Guantanamo Bay, Cuba (Guantanamo) were under the age of sixteen.<sup>307</sup> Ambassador Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues, described the circumstances of their capture.<sup>308</sup>

[They] were caught on a battlefield. These individuals were caught fighting. And we formed the conclusion at the time of their capture that they posed a threat.<sup>309</sup>

Additionally, in northern Iraq the 10th Special Forces Group (SFG) reported that some of the detainees at their holding facility claimed to be under the age of fifteen.<sup>310</sup> The 3ID had similar reports of Soldiers detaining individuals under eighteen.<sup>311</sup>

International legal obligations relating to the treatment of children in custody are contained in the CRC<sup>312</sup> and in GP1.<sup>313</sup> The United States is not a party to either of these instruments and does not consider the obligations contained therein to be customary international law.<sup>314</sup> Further, the United States has issued no specific policy guidance concerning treatment of

*Fedayeen Saddam* (Saddam's 'Men of Sacrifice') is a paramilitary force founded in 1995 and composed of young recruits loyal to Saddam Hussein).

<sup>307</sup> Department of Defense, News Release, *Transfer of Juvenile Detainees Completed*, 29 Jan. 2004 at <http://www.defenselink.mil/releases/2004/nr20040129-0934.html>. They were released on 29 Jan. 2004. *Id.* At Guantanamo, detainees under the age of sixteen are called "juvenile enemy combatants."

<sup>308</sup> Ambassador Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues, Remarks at the Foreign Press Center, Washington DC, 3 Feb. 2004, at <http://www.state.gov/s/wci/rm/29497pf.htm> [hereinafter Prosper Remarks].

<sup>309</sup> *Id.*

<sup>310</sup> E-mail from MAJ Michael L. Kramer, former JA, 10th Special Forces Group, to LTC Pamela M. Stahl, Director, Center for Law and Military Operations (13 Apr. 2004) [hereinafter Kramer E-mail] (on file with CLAMO).

<sup>311</sup> CPT Jonathan DeJesus, 3ID JA, narrative, "Jailhouse Law," at 2 (18 Mar. – 12 Apr. 2003).

<sup>312</sup> CRC, *supra* note 299. These obligations include:

- Providing necessary medical assistance and health care (arts. 24-5);
- Allowing children to practice their own religion and speak their own language (art. 30);
- Recognizing the right of children to rest and to engage in play and recreational activities appropriate to the age of the child (art. 31);
- Housing detained children separately from adults (art. 37);
- Allowing detained children to maintain contact with their family (art. 37); and,
- Taking all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of armed conflict (art. 39)

*Id.*

<sup>313</sup> Protocol I, *supra* note 53. The obligations of Protocol I include:

- children under 15 who take a direct part in hostilities are still entitled to special protections, whether or not they are EPWs (art. 77(3));
- children shall be held separate from adults (art. 77(4));
- no death penalty for children under 18 (art. 77(5)), and,
- no evacuation of children to a foreign country except for medical or safety reasons, and only with the consent of the child's parent or guardian (art. 78).

<sup>314</sup> The U.S. Senate consented to the ratification of the Child Soldier Protocol, *supra* note 282, on the understanding that "the United States assumes no obligations under the Convention on the Rights of the Child by becoming a party

detained children.<sup>315</sup> However, during both OEF and OIF the standards of treatment prescribed by these instruments were used as a guide for the treatment of children in U.S. custody.

While all detainees are treated humanely,<sup>316</sup> child detainees were treated differently due to their age. At Guantanamo, the three boys under sixteen were housed separately from the adults, in a house equipped with a video player and board games. There was a gap in the mesh covering the fence, so that they could see the ocean. Moreover, they were allowed two hours of exercise each day, and received instruction in reading, writing and math. Like all detainees, they received medical care and three meals a day.<sup>317</sup> The 10th SFG child detainees were also separated from the adults, and treated differently due to their age. In addition, a 10th SFG JA reported that the International Committee of the Red Cross (ICRC) paid particularly close attention to the condition of the detained children when they visited the detention center.<sup>318</sup>

JAs also should be aware of additional considerations concerning the release of child soldiers from detention. Article 7 of the Child Soldiers Protocol provides that State parties,

[s]hall cooperate in the implementation of the present Protocol, including in the prevention of any activity contrary thereto and in the rehabilitation and social reintegration of persons who are victims of acts contrary thereto.<sup>319</sup>

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to the Protocol.” Executive Report of Committee, *supra* note 284, § 2(1). Although the United States is not a party to Protocol I, *supra* note 53, it is bound by GPI to the extent that it codifies customary international law. The United States considers that the obligation not to evacuate children is customary law. *See* Matheson, *supra* note 53 (noting that although the U.S. is not party to either Additional Protocol, it does follow those provisions which codify customary international law).

<sup>315</sup> There is a Department of Defense policy, however, concerning the approval level for sending a child under 16 to Guantanamo: E-mail from LTC Diane Beaver, former SJA, JTF Guantanamo to LTC Pamela M. Stahl, Director, Center for Law and Military Operations (6 May 2004) [hereinafter Beaver E-mail] (on file with CLAMO).

<sup>316</sup> U.S. DEP’T OF ARMY, REG. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES, para. 1-5a(1) (1 Oct. 1997) [hereinafter AR 190-8] (“All persons captured, detained, interned, or otherwise held in U.S. Armed Forces custody during the course of conflict will be given humanitarian care and treatment from the moment they fall into the hands of U.S. forces until final release or repatriation.”). AR 190-8 has been adopted by the other U.S. military services as OPNAVINST 3461.6, AFJI 31-304, and MCO 3461.1, respectively. “This is a multi-service regulation. It applies to the Army, Navy, Air Force and Marine Corps and to their Reserve components when lawfully ordered to active duty under the provisions of Title 10 United States Code.” *Id.* at i.

<sup>317</sup> The Boy Prisoners of Guantanamo, *The Age*, 20 May 2003, at <http://www.theage.com.au/articles/2003/05/19/1053196523434.html> (last visited 5 Apr 2004). *See also* E-mail from LTC Michael Boehman, SJA, JTF Guantanamo to Squadron Leader Catherine Wallis, Royal Australian Air Force, Director Coalition Operations, Center for Law and Military Operations (15 Apr. 2004) [hereinafter Boehman E-mail] (on file with CLAMO) (“[W]e made a conscious decision to teach them in their native tongue because we wanted to give them a strong foundation to be contributing members of society when they returned to Afghanistan.”).

<sup>318</sup> Kramer E-mail, *supra* note 310.

<sup>319</sup> Child Soldier Protocol, *supra* note 282, art. 7. In 2000, the United Nations Security Council requested:

parties to armed conflict to include, where appropriate, provisions for the protection of children, including the disarmament, demobilization and reintegration of child combatants, in peace negotiations and in peace agreements and the involvement of children, where possible, in these processes.

S.C. Res. 1314, U.N. SCOR, 54th Sess., 4185th mtg., U.N. Doc. S/RES/1314 (2000).

Accordingly, the United States has an obligation to prevent a captured child soldier from rejoining the conflict. Ambassador Prosper indicated that this was a consideration in the release of the children detained at Guantanamo.<sup>320</sup>

The United States supports the demobilization and rehabilitation of child soldiers. In conflicts involving child soldiers, international organizations such as the United Nations Children's Fund (UNICEF) and nongovernmental organizations may set up demobilization and rehabilitation camps. However, this is unlikely to occur until after the combat operations phase has ended. For example, in Afghanistan, initiatives for the rehabilitation of child soldiers did not begin until early 2003.<sup>321</sup> Accordingly, demobilization and rehabilitation may not be a consideration for commanders during major combat operations.

In summary, the United States is under no legal obligation to treat child detainees differently than adults.<sup>322</sup> Nevertheless, JAs may want to refer to the CRC and GP1 for guidance on treatment of child detainees, even though the United States is not a party to these agreements. Moreover, JAs should expect international organizations, such as the ICRC, to be particularly interested in the treatment of children detainees. Finally, detained children should not be released where it is believed that they will rejoin the conflict.

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<sup>320</sup> Prosper remarks, *supra* note 308.

<sup>321</sup> In April, 2003 the United States Agency for International Development (USAID) awarded a \$2 million grant to an NGO consortium to assist particularly vulnerably children including former child soldiers. *Christian Childrens Fund, CCF Receives USAID Grant to Provide Assistance for Afghanistan's Most vulnerable Children*, Press Release, 13 Apr. 2003, at [http://www.christianchildresfund.org/about\\_ccf/Press\\_Releases/USAID\\_Afghanistan](http://www.christianchildresfund.org/about_ccf/Press_Releases/USAID_Afghanistan). See Boehman E-mail, *supra* note 317 (reporting that the child soldiers released from Guantanamo were placed in the UN's Child Soldier Program to assist with their reintegration into society).

<sup>322</sup> Note, however, that GC IV, Art. 68, states that the death penalty may not be pronounced on a protected person who was under eighteen years of age at the time of the offense.

## B. RULES OF ENGAGEMENT

*OPLAW provides vital links between the strategic and tactical levels of conflict. The strongest of these links are often rules of engagement (ROE). ROE enable mission accomplishment, force protection, and compliance with law and policy. While ROE are always commanders' rules, the interpretation, drafting, dissemination, and training of ROE are also the business of OPLAW JAs.<sup>1</sup>*

Judge Advocates (JAs) played a critical role in ROE development, dissemination, training, and interpretation during the periods of major combat operations in Operation ENDURING FREEDOM (OEF) and Operation IRAQI FREEDOM (OIF). The lessons they imparted demonstrated a sophisticated understanding of a difficult topic. Because much of the OEF and OIF ROE remain classified, however, it is impossible to fully discuss each lesson in this unclassified forum. That said, many of the lessons can be discussed adequately in unclassified terms. Moreover, even when a specific ROE answer is classified, merely describing the question and the circumstances under which it arose can be a valuable exercise.

### 1. Rules of Engagement Are Everywhere.

ROE came from a variety of sources during major combat operations in Afghanistan and Iraq. Some of these sources were readily apparent, such as the baseline *Standing Rules of Engagement for U.S. Forces* (SROE)<sup>2</sup> and mission-specific ROE authorization serials<sup>3</sup> issued by higher commands. Other sources were not so apparent, such as execute orders (EXORDS) or fragmentary orders (FRAGOs) containing ROE or ROE-like guidance (sometimes not even mentioning the phrase “rules of engagement”), and documents containing or referencing fire support control measures such as special instructions (SPINs) for air operations and the CENTCOM Collateral Damage Estimation Policy Methodology (CDEM) for pre-planned targeting. ROE also existed for different aspects of the overall mission—for example, base camp and enemy prisoner of war/detainee holding facility rules. Moreover, coalition partners and certain host nation personnel—such as Iraqi police forces or the Afghan National Army—followed their own ROE. Viewed as a whole, the ROE source documents for OEF and OIF presented a complex and potentially confusing picture.

#### a. Take a Broad View of the Term “Rules of Engagement.”

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<sup>1</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS para. 8.1 (1 Mar. 2000) [hereinafter FM 27-100]. The debate over who is responsible for ROE development, JAs or operators, has been a recurring one throughout recent operations and is not a unique lesson for either OIF or OEF. For a more detailed discussion of the topic, see Center for Law and Military Operations & International and Operational Law Branch, Judge Advocate Division, Headquarters, U.S. Marine Corps [also staffed through the International and Operational Law Division, Office of the Judge Advocate General, U.S. Army], “ROE” Rhymes with “We,” MARINE CORPS GAZETTE, Sept. 2002, at 78 (arguing that ROE development is a collaborative process involving both operator and JA input).

<sup>2</sup> CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3121.01A, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES (15 Jan. 2000) [hereinafter SROE].

<sup>3</sup> For a discussion of ROE serials, see *infra* note 8.

Part of the confusion, and arguably a solution, might be a definitional matter: namely, what is a rule of engagement? Reaching consensus on what ROE are seems a logical first step toward understanding what sources should be consulted for ROE guidance. The Department of Defense (DoD) Dictionary defines ROE as: “Directives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered.”<sup>4</sup> At first blush, this definition seems very broad and not terribly useful. In a prior publication, some Army and Marine Corps JAs suggested that in actuality the broad DoD ROE definition does serve a useful purpose.

This is a broad definition that seemingly embraces not only commonly understood tactical ROE, such as the individual [servicemember’s] decision to shoot in response to a threat, but also a wide variety of rules ranging from weapons alert conditions to geographical constraints to fire support control measures. Some may take issue with such an expansive definition, preferring instead to narrowly define ROE as only those directives that specifically address the decision to use force. Perhaps the more reasoned view is one that accepts the broad understanding but uses a more precise vocabulary to address the particular aspect of ROE addressed.

For example, [the famous order] at the Battle of Bunker Hill—“Don’t one of you fire until you see the whites of their eyes”—is often cited as a classic “ROE.” Some argue, however, that this was not an ROE at all but rather a fire control measure. Similarly, an order for U.S. ground forces not to enter country X might be considered ROE by some and a separate, geographical constraint by others. The better approach might be to accept both of these examples as ROE but to label more precisely how each rule governs “the circumstances and limitations under which United States forces will initiate and/or continue combat engagement.”

The reality is that ROE have a tremendous impact on both the planning and conduct of military operations. The necessity for staff interaction and coordination in ROE development cannot be overstated. The primary virtue of adopting a broader definition of ROE is that staff planners might more readily recognize when particular staff actions constitute ROE, or at least recognize when actions will have the effect of ROE.<sup>5</sup>

Put another way, one could argue that narrowly defining ROE may result in ignoring or not coordinating measures that, whether or not they technically constitute “ROE,” nonetheless

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<sup>4</sup> JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS (12 Apr. 2001) (as amended through 23 Mar. 2004), *available at* [http://www.dtic.mil/doctrine/jel/new\\_pubs/jp1\\_02.pdf](http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf) [hereinafter DoD Dictionary].

<sup>5</sup> Center for Law and Military Operations & International and Operational Law Branch, Judge Advocate Division, Headquarters, U.S. Marine Corps [also staffed through the International and Operational Law Division, Office of the Judge Advocate General, U.S. Army], *Rules of Engagement: What Are They and Where Do They Come From*, MARINE CORPS GAZ., Apr. 2002, at 59 [hereinafter *Rules of Engagement: What Are They and Where Do They Come From?*] (citations omitted).

will affect the degree of force used. The fact is, as described in more detail below, the rules governing the circumstances and limitations for using force during OEF and OIF appeared in scattered locations. Unless this reality is somehow changed for future operations, as some argue it should be,<sup>6</sup> JAs must be aware that ROE or ROE-like sources exist beyond just documents with the words “rules of engagement” in them.<sup>7</sup>

***b. Rules of Engagement Are Found in a Wide Variety of Sources, to Include Fire Support Control Measure Products.***

The intuitive place to look for ROE is in ROE serial message traffic.<sup>8</sup> For OEF, the Chairman, Joint Chiefs of Staff (CJCS), issued two ROE authorization serials with several “modifications” between November 2001 and December 2002.<sup>9</sup> For OIF, the CJCS issued just one ROE authorization serial, in March 2003.<sup>10</sup> These authorization serials did not, however,

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<sup>6</sup> See, e.g., E-mail from William B. “Barry” Hamill, Deputy Staff Judge Advocate, U.S. Central Command, to Maj Cody M. Weston, USMC, Center for Law and Military Operations (21 Jan. 2004) [hereinafter Hamill E-mail] (stating that the Central Command JA office objected to Joint Chiefs of Staff and DoD insertion of ROE measures into EXORDs); Lieutenant Colonel James K. Carberry, USMC & M. Scott Holcomb, *Target Selection at CFLCC: A Lawyer’s Perspective*, FIELD ARTILLERY, Mar.–June 2004, at 39, 42 [hereinafter *Target Selection at CFLCC*] (“One of the greatest challenges with targeting during OIF was navigating all the sources for the rules. . . . [T]he commander and his staff had to be familiar with many documents to make targeting decisions. . . . [S]erious thought should be devoted to simplifying and streamlining the process so all information is readily available . . .”) (on file with CLAMO).

<sup>7</sup> Recognizing that ROE can appear in a variety of forms, Army legal doctrine divides ROE into ten “ROE types”: (1) Hostility Criteria; (2) Scale of Force/Challenging Procedure; (3) Protection of Property and Foreign Nationals; (4) Weapons Control Status/Alert Conditions; (5) Arming Orders; (6) Approval to Use Weapons Systems; (7) Eyes on Target; (8) Territorial or Geographic Restraints; (9) Restrictions on Manpower; and (10) Restrictions on Point Targets and Means of Warfare. FM 27-100, *supra* note 1, para. 8.2.6. These ten ROE types originated from Lieutenant Colonel Mark Martins’ seminal ROE article, *Rules of Engagement for Land Forces: A Matter of Training, Not Lawyering*, 143 MIL. L. REV. 1, app., at 110-16 (1994). *But see infra* note 20 and accompanying text (pointing out that this same Army legal doctrine attempts to draw a distinction between ROE and fire support control measures).

<sup>8</sup> An ROE serial is a formal message either requesting or authorizing mission-specific supplemental ROE measures and guidance. As described in the SROE:

ROE messages will be numbered serially. Each unit will separately serialize its request and approval messages. For example, a combatant commander may respond to a subordinate unit’s ROE Request Serial One with its ROE Approval Serial Five, referencing the request in the approval message. The next request, a different unit’s ROE Request Serial Three, would receive ROE Approval Serial Six, and so forth.

SROE, *supra* note 2, encl. J, app. F, para. 1(c).

<sup>9</sup> The subject lines of these OEF ROE authorization serials are classified secret. As an interesting aside, some of the OEF ROE authorization messages did not appear as newly numbered serials, but as “modifications” to a serial. The use of such modifications caused some confusion among deployed JAs because under the SROE serialization system each new serial should contain all of the measures in effect for an operation, not require piecing together separate messages. See SROE, *supra* note 2, encl. J, app. F, para. 1(e) (Confidential). The OEF ROE can be found in the CLAMO SIPRNET Database, at <http://www.us.army.smil.mil>. The database is one of the legal knowledge communities within the “Collaborate” section of the site. The site requires registration. If not a member of the U.S. Army, an applicant will need the user name of an Army sponsor. Contact CLAMO if an Army sponsor is needed.

<sup>10</sup> The Commander, Central Command, issued a separate OIF ROE authorization serial shortly after the release of the CJCS message. Again, the subject lines are classified, and the messages can be found in the CLAMO SIPRNET

constitute the entire applicable ROE for OEF and OIF. Each serial contained a lengthy listing of other references containing other applicable ROE, from standing documents such as the SROE and the combatant commander's theater-specific ROE,<sup>11</sup> to mission-specific guidance ranging from Operation SOUTHERN WATCH ROE,<sup>12</sup> to maritime interdiction operations ROE, to Operation DESERT SPRING ROE.<sup>13</sup> Thus, the "ROE"-labeled material alone constituted many separate documents.

In addition to the authorization serials, ROE also appeared in less intuitive places—places that oftentimes did not even mention "ROE." Commanders in OIF used FRAGOs as the mechanism, for example, to describe and disseminate tactics, techniques, and procedures (TTPs) for checkpoint security, or to provide guidance on what levels of force to use in response to civilian looters and in the defense of property.<sup>14</sup> Commanders in OEF also used FRAGOs to communicate ROE-like measures, such as specific guidance on combat engagement near certain international borders and the use and employment of mines.<sup>15</sup> While the underlying rules found in the ROE serials did not change, these FRAGOs refined and amplified the ROE given evolving mission circumstances and changing threats.

Another source for ROE and ROE-like guidance was the classified SPINS, or "special instructions," for air operations. SPINS are issued through air component channels, typically taking the form of a large baseline document as supplemented by smaller document updates. SPINS contain measures such as pilot radio call signs and frequencies, combat search and rescue guidelines, and airspace control measures. Most significantly, SPINS are full of ROE guidance, often contained in a section labeled "ROE" that restates mission-specific ROE supplemental measures and provides specific ROE TTPs. Both the OEF and OIF SPINS had detailed ROE sections that governed the entire operational airspace, and thus were pertinent not only for JAs serving units with air assets (to include helicopters), but for JAs serving any unit that contemplated requesting nonorganic air assets to support their ground operations.<sup>16</sup>

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Database, *supra* note 9. Of historical note, the CJCS issued an OIF authorization serial in February 2003 that they subsequently retracted for revision and replacement by the March 2003 serial.

<sup>11</sup> The Commander, Central Command, issued classified theater-specific rules in 1995 that are still in effect today. These rules can be found in the CLAMO SIPRNET Database, *supra* note 9.

<sup>12</sup> Operation SOUTHERN WATCH (OSW) was the mission to monitor and control the no-fly zone in southern Iraq to ensure compliance with post-Gulf War United National Security Council Resolutions 687, 688, and 949. The first OSW sorties were flown in 1992 and continued up to the 2003 Iraq invasion.

<sup>13</sup> Operation Desert Spring is the post-Gulf War mission to maintain a forward U.S. military presence in Kuwait.

<sup>14</sup> OIF FRAGOs with ROE and other legal implications can be found in the CLAMO SIPRNET Database, *supra* note 9.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* The Command Judge Advocate, 5th Special Forces Group (Airborne), routinely briefed ROE/SPINS to Operational Detachment-Alpha (ODA) Teams.

When we briefed special forces ODAs on the OEF ROE, we covered the SPINS affecting air operations, particularly close air support. The teams needed to know the constraints governing the CFACC [Combined Forced Air Component Command] pilots. We discussed what language and information to use in calling for fires to fit the requests into ROE/SPIN categories and to expedite action. In building our ROE slides, we used CFACC briefing slides as a base. We briefed the aviators of the JSOAC-North, our subordinate air element during OEF, on the ROE using the CFACC-based slides. The aviators included DAPS/MH-60, MH-47, and AC-130 pilots. We also

As the importance of SPINS as an ROE source attests, generally speaking there was a close interrelationship between ROE and fire support coordinating measures (FSCM) during OEF and OIF. The DoD Dictionary defines FSCM as “measure[s] employed by land or amphibious commanders to facilitate the rapid engagement of targets and simultaneously provide safeguards for friendly forces.”<sup>17</sup> Harkening back to the DoD Dictionary ROE definition—“circumstances and limitations under which United States forces will initiate and/or continue combat engagement”<sup>18</sup>—it can become difficult to differentiate between what is a rule of engagement and what is a fire support control measure. For instance, an order not to fire within a certain area without the approval of a certain level of command might be viewed as a rule of engagement but in actuality is a classic example of a no-fire area (NFA),<sup>19</sup> a type of FSCM. The lesson for JAs seems to be to realize that while FSCM are not doctrinally ROE,<sup>20</sup> that FSCM can impact the ROE and have the same effect as ROE, as argued in this excerpt from the Army and Marine JA article quoted earlier.

For example, a restricted fire area (RFA) drawn within the fire support plan would constitute an “ROE” under the broader definition suggested and, even if the RFA fell outside the definition, would nonetheless have the same practical effect of an ROE. Given this fact, the fire support coordinator must understand the significance of his RFA in shaping the ROE and the necessary coordination that must then take place with the operations officer, staff judge advocate, air officer, and other relevant staff members. Similarly, the judge advocate must understand the wider implications of ROE self-defense provisions and the need to push coordination with, for example, an escort flight leader making a weapons posture determination (e.g., hold, free, tight)—itself an ROE broadly viewed or, at least, a decision having the effect of one. These are but two examples of virtually limitless possibilities in which diverse staff actions may create constraints or restraints that either are ROE or have the effect of ROE, highlighting the critical need for close staff interaction.<sup>21</sup>

Probably the most critical source document during OEF and OIF was CENTCOM’s Collateral Damage Estimation Policy Methodology (CDEM). The CDEM, a classified document

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used the CFACC knee-boards (similar to ROE cards) and provided them to the ODA team leaders for reference.

Memorandum, Dean L. Whitford, former Group Judge Advocate, 5th Special Forces Group (Airborne), Staff Judge Advocate, Joint Special Operations Task Force–North (Task Force Dagger) (OEF), and Staff Judge Advocate, Combined Joint Special Operations Task Force–West and successor CJSOTF – Arabian Peninsula (OIF), for Major Daniel P. Saumur, Deputy Director, CLAMO, subject: Task Force Dagger OEF/OIF ROE AAR para. 2 (14 June 2004) (on file with CLAMO) [hereinafter Whitford OEF/OIF ROE AAR].

<sup>17</sup> DoD DICTIONARY, *supra* note 4.

<sup>18</sup> See *supra* text accompanying note 4.

<sup>19</sup> An NFA is a “land area designated by the appropriate commander into which fires or their effects are prohibited.” DoD Dictionary, *supra* note 4.

<sup>20</sup> For example, Army legal doctrine states that “ROE are *not* the same as fire control measures. Fire control measures are implemented by commanders based on tactical considerations.” FM 27-100, *supra* note 1, para. 8.2.2 (emphasis in original).

<sup>21</sup> *Rules of Engagement: What Are They and Where Do They Come From?*, *supra* note 5, at 59-60.



that originated through fire support channels and had been in use in earlier forms since the beginning of Operation SOUTHERN WATCH, provided an analytical framework to quantitatively measure collateral damage. Different versions of the CDEM applied for OEF<sup>22</sup> and OIF.<sup>23</sup> As stated in the OIF CDEM, the purpose of the CDEM was to “provide[ ] standardized procedures for determining potential collateral damage, options available to mitigate that damage, and approval authorities for strikes based on anticipated collateral damage during the conduct of operations.”<sup>24</sup> As further evidence of the close relationship between FSCM and ROE, the CENTCOM ROE Serials for OEF and OIF expressly incorporated the relevant version of the CDEM by reference.<sup>25</sup> The CDEM is discussed in more detail in Section III.B.4 below.

As another example of the close FSCM/ROE relationship, both the OIF ROE and the fires appendix of the CENTCOM OIF operations plan provided guidance on “time-sensitive targets,” or TSTs. TSTs are doctrinally defined as “targets requiring immediate response because they pose (or will soon pose) a danger to friendly forces or are highly lucrative, fleeting targets of opportunity.”<sup>26</sup> The ROE spelled out certain targets that would meet the lucrative threshold but that would normally require a high-level authority to approve the target because of their sensitivity. If the target would disappear in the time required to obtain the requisite strike authority, however, the ROE delegated the strike approval authority to certain lower commanders. The TST methodology in the fires appendix then provided a detailed yet streamlined procedure for ensuring proper identification<sup>27</sup> of the target and mitigating CDEM/ROE collateral damage concerns.<sup>28</sup>

Perhaps the best summation of the FSCM/ROE relationship is the words of the V Corps International and Operational Law Chief, which describe his view of the relationship through an OIF lens.

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<sup>22</sup> U.S. Central Command, Collateral Damage Estimation Policy and Methodology (1 Aug. 2001) (available in the CLAMO SIPRNET Database, *supra* note 9).

<sup>23</sup> U.S. Central Command, Collateral Damage Estimation Policy and Methodology para. 1 (8 Mar. 2003) (available in the CLAMO SIPRNET Database, *supra* note 9) [hereinafter OIF CDEM]. Having two different versions of the CDEM in effect for different concurrent operations caused some measure of confusion among deployed JAs. *See, e.g.*, E-mail from CPT Olga O. “Marie” Anderson, Operational Law Attorney, Combined Joint Task Force 180, to Maj Cody M. Weston, USMC, Center for Law and Military Operations (18 Feb. 2004) (on file with CLAMO) (noting that several JAs serving in Afghanistan who had spent previous time in Iraq incorrectly assumed that the OIF CDEM applied to OEF, which at times created issues requiring resolution during the CJTF-180 targeting process).

<sup>24</sup> OIF CDEM, *supra* note 23, para. 1 (quoted language unclassified).

<sup>25</sup> The Marine Corps Task Force Tarawa SJA, recognizing the interplay between ROE and FSCM, worked with fire support officers to create a targeting decision flow chart merging the CENTCOM OIF ROE Serial and the CDEM. Prior to his doing so, Marine Corps JAs had been narrowly focused on the “ROE” documents while fire support officers had been narrowly focused on the CDEM. Transcript of After Action Review Conference, Office of the Staff Judge Advocate, Task Force Tarawa, and the Center for Law and Military Operations, Camp Lejeune, N.C., at 86-88 (2-3 Oct. 2003) (on file with CLAMO) [hereinafter TF Tarawa AAR Transcript]. The flow chart can be found in the CLAMO SIPRNET Database, *supra* note 9.

<sup>26</sup> DoD DICTIONARY, *supra* note 4.

<sup>27</sup> *See infra* text accompanying notes 57-74 (discussing “positive identification” under the OEF and OIF ROE).

<sup>28</sup> The OIF TST methodology is available in the CLAMO SIPRNET Database, *supra* note 9.

Most commanders at even brigade level still confuse fire control measures with ROE. And, consequently, they blame lawyers when FCM [fire control measures] prevent them from doing something they want to do operationally. JAGs need to do a better job of educating commanders on the differences and origins of each and that education needs to be at all levels. The ROE for OIF were really very basic and broad and easy to understand and apply. The FCM (collateral damage assessment, spins, RTL [restricted target list], PTL [priority target list]) were voluminous and complex. But, they reflected POTUS, SECDEF, CINC political and strategic intent and were critical to doing the job right. JAGs need to understand that the ROE is the easy part. *The rub comes at the confluence of ROE and FCM and it is there that we must be experts.*<sup>29</sup>

In addition to the various ROE serials, FSCM, and EXORDs and FRAGOs for combat operations in Afghanistan and Iraq, still more ROE sources existed for different aspects of the operation. For example, the rules for the use of force (RUF)<sup>30</sup> for U.S. pre-invasion forces

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<sup>29</sup> E-mail from LTC Jeffery R. Nance, Chief, International and Operational Law, V Corps, to LTC Pamela M. Stahl, Director, Center for Law and Military Operations (14 Oct. 2003) (on file with CLAMO) [hereinafter Nance E-mail] (emphasis added). Upon reading a draft version of this Publication and the quoted language from LTC Nance in the text, another Army JA added some additional thoughtful analysis.

There has been a lot of ink spilled in JA doctrine manuals, professional journals, and forums on whether FSCMs are or are not ROE. Outside of those rabbinical discussions, I have never encountered in any MDMP [Military Decision Making Process] effort or Targeting Board or ROE cell, any rationale why they should be treated any differently. As this section states, “FSCMs can impact the ROE and have the same effect as ROE.” What’s more, FSCMs and ROE have the same purpose—controlling the use of force to more effectively engage the enemy, to minimize collateral damage, and to prevent fratricide. When the JAG Corps finds itself in the position of explaining that “Commanders at even brigade level still confuse fire control measures with ROE,” perhaps the reality is that the JAG Corps has created a distinction without a difference, at least to our clients, the operators. If OIF or OEF offered some validation to the doctrinal importance of distinctly excluding FSCMs as a sub-set of ROE, it ought to be easy to put in this section. On the other hand, by doctrinally excluding from ROE (our professed area of expertise) the Rules’ application through FSCMs, the JAG Corps will create a blind spot in its training and practice.

Memorandum, MAJ Brian A. Hughes, former Night Battle Captain and Brigade Battle Captain, 173d Airborne Brigade, to Center for Law and Military Operations, subject: CLAMO Draft Handbook—OIF/OEF at 4 (11 May 2004) (on file with CLAMO).

<sup>30</sup> There is no doctrinal definition of “RUF,” and sometimes the differences between ROE and RUF can be difficult to distinguish and certainly can be open to interpretation. The following description is one interpretation that has been informally staffed between CLAMO and the operational law divisions of the Marine Corps and the Army.

While ROE and RUF both set guidelines on use of force for self-defense and mission accomplishment, they differ in their underlying concerns. . . . ROE are guidelines for the use of force reflecting a blending of political, legal, and military concerns. RUF serve the same purpose, but the political, legal, and military concerns typically are very different.

One could argue that these varying concerns merely create a distinction without a difference: whether RUF or ROE, we still are referring to what type of force Marines can use under which circumstances, and when. The differences in underlying concerns, however, can create a set of entirely different rules that should translate to entirely different mindsets for the Marines

staged in Kuwait were SROE-based and contained on a separate soldier's card.<sup>31</sup> Certain RUF for enemy prisoner of war (EPW) and detainee operations came from a joint service regulation.<sup>32</sup> JAs created separate ROE cards for base camp operations that, while based on the same underlying OEF or OIF ROE, contained guidance more relevant to a static, defensive posture.<sup>33</sup> Moreover, ROE/RUF existed for non-U.S. forces, whether coalition military forces or developing host nation forces, such as the Afghan National Army.<sup>34</sup> Even prior to arriving in

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employing them. ROE military concerns generally involve the tactical and operational implications of performing missions in situations in which host nation law enforcement and civil authorities are nonexistent, nonfunctional, or resistant to a U.S. military presence. In contrast, RUF military concerns generally presuppose a permissive military environment with a functional civil government capable of enforcing the law and maintaining order. Because RUF generally assume a nonhostile host with a generally friendly population, RUF primarily focus on using force in self-defense as a matter of force protection based on mere presence—rather than an assigned operational mission—or using force in the exercise of a very limited law enforcement or security mission. ROE policy concerns tend to focus on relations with foreign actors and furthering international political objectives. RUF policy concerns tend to focus on domestic or host nation political objectives and domestic or host nation public opinion.

Perhaps the most important distinction lies in the differing legal regimes. ROE are generally shaped by international legal obligations, such as the United Nations Charter, international treaties, and customary international law. RUF are generally shaped by domestic or host nation legal obligations.

Center for Law and Military Operations, *ROE v. RUF* (Nov. 2003) (unpublished manuscript, on file with CLAMO).

<sup>31</sup> The CFLCC Rules for the Use of Force Card is included at Appendix B-1.

<sup>32</sup> See U.S. DEP'T OF ARMY, REG. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES para. 3-6(f)(2) (1 Oct. 1997) (describing need to shout "halt" three times before using force, to include deadly force, to stop a fleeing prisoner).

<sup>33</sup> As an example, the ROE card for CJTF-180 base camp operations in Bagram, Afghanistan, is included at Appendix B-1. See also Interview with COL David L. Hayden, Staff Judge Advocate, XVIIIth Airborne Corps, in Charlottesville, Va., at 2 (7 Oct. 2003) [hereinafter Hayden Interview] (noting that ROE for base camp operations were more restrictive than ROE for combat operations) (notes on file with CLAMO).

<sup>34</sup> See, e.g., MAJ Jeff Bovarnick, Chief, Operational Law, CJTF-180, CJTF-180 Notes from the Combat Zone, at 4 (2003) (on file with CLAMO) [hereinafter Bovarnick CJTF-180 Notes].

ROE for the Afghan National Army. This new national army was built from nothing. As the force grew to multiple battalions, it was time to draft ROE. The ROE had to be simple and understandable, yet enable this new force to accomplish its mission. The initial version of the ANA ROE was drafted by MAJ Frank Vila, the former Chief of Ops Law for CJTF180. Through subsequent meetings with the Afghan Ministry of Defense, the current CJTF180 staff finalized the ROE and fielded them for training. Now, the ANA is performing combat operations along side US/Coalition forces with ROE drafted by US Army Judge Advocates.

ROE for coalition forces. Each coalition force has their own ROE. While many have been involved in peacekeeping/peace enforcement operations, the vast majority of the coalition forces have not engaged in combat operations since WWII. In joining the Global War on Terrorism, they join the coalition ready to help capture and kill Al Qaeda and Taliban. Fighting alongside the US, understandably they want to review the US ROE. Because of the classification of the ROE, we cannot simply hand it over. On a nation by nation basis, CENTCOM will determine what nation we can release redacted versions of the ROE to, usually reserved for those nations performing large combat operations with the US.

*Id.*

theater, transit RUF was an issue. Certain RUF applied while units moved from CONUS bases to CONUS ports of debarkation.<sup>35</sup> RUF coordination issues also arose for units moving through various foreign countries.<sup>36</sup> If sailing on Military Sealift Command or Navy ships to Kuwait for OIF, a different set of rules applied until arrival.<sup>37</sup>

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<sup>35</sup> JAs struggled with the issue of applicable RUF during CONUS transit. Most concluded that the relevant RUF baseline was U.S. DEP'T OF DEFENSE, DIR. 5210.56, USE OF DEADLY FORCE AND THE CARRYING OF FIREARMS BY DOD PERSONNEL ENGAGED IN LAW ENFORCEMENT AND SECURITY DUTIES (1 Nov. 2001) (C1, 24 Jan. 2002) and its implementing service regulations, such as U.S. DEP'T OF ARMY, REG. 190-14, CARRYING OF FIREARMS AND USE OF FORCE FOR LAW ENFORCEMENT AND SECURITY DUTIES (12 Mar. 1993) and U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 5500.29B, USE OF DEADLY FORCE AND THE CARRYING OF FIREARMS BY PERSONNEL OF THE DEPARTMENT OF THE NAVY IN CONJUNCTION WITH LAW ENFORCEMENT SECURITY DUTIES AND PERSONAL PROTECTION (28 Sept. 1992) (This was the instruction in effect during combat operations in Iraq and Afghanistan; it was replaced and updated by Secretary of the Navy Instruction 5500.29C on 27 Aug. 2003.). Headquarters, U.S. Marine Corps, Judge Advocate Division, weighed in with the following guidance for Marine units:

Bottom line, here is [our] preventive guidance (vice binding requirements), which we have provided to other units in the past:

- (1) Use MP, security, or CI [counterintelligence] Marines who are regularly involved in such duties, if possible, as your armed security (see SECNAVINST 5500.29B para 4g).
- (2) Make early, comprehensive, and ongoing liaison with local law enforcement. Run some scenarios by them. See what their response time is. See if they think our rules exceed their understanding of the law (which is where the local DA might chime in). Local law enforcement/DA opinion on this issue would not bind DOD, but it is good for situational awareness and assessment of risks. Brief the troops on what to do and what to expect if something happens—RUF scenario training that includes arrival of local law enforcement.
- (3) Issue OPNAV form 5512/2, signed by the commanders, to the Marines for open or concealed weapons (see SECNAVINST 5500.29B para 4j(2)). They can show these to any inquiring local authorities.
- (4) Check state law on self-defense, defense of others, and the status of military personnel—sometimes they are considered “law enforcement agents” with additional authority. See if our rules exceed state law. If we exceed state law, we run the risk of local criminal process if/when something happens. The debate here—some lawyers think we do not need to modify our rules to comply with local law, and that we should have a national standard. Their theory is that the defendant and/or DoJ on the defendant's behalf would make a motion in state court under 18 USC 1442 (a)(1) to remove the case to federal court, where it would ultimately be dismissed. My opinion is that if we can comply with state law without forfeiting force protection, let's do it. If complying with state law compromises force protection, then the risk of local criminal process is just another risk the commander needs to consider in making the decision whether, or how, to proceed. Maybe in that case they could arrange additional security from local law enforcement. (Added complications are that DOJ representation under 28 CFR section 50.15(a)(4) generally is not available in federal criminal proceedings, even when the defendant's actions occur within the scope of federal employment. Additionally, nothing precludes DOJ's Civil Division from investigating for possible civil rights violations, as happened in the JTF-6 border shooting incident.)

E-mail from LtCol Wendy A. Stafford, Branch Head, International and Operational Law Branch, Judge Advocate Division, Headquarters, U.S. Marine Corps, to Capt David B. Ashe, I Marine Expeditionary Force Operational Law Attorney (4 Feb. 2003) (on file with CLAMO) (citations in original).

<sup>36</sup> See, e.g., Office of the Staff Judge Advocate, 21st Theater Support Command, After Action Review Comments (2003).

## ***2. Have a Flexible and Proactive Rules of Engagement Training Plan.***

JAs played critical roles in ROE training during OEF and OIF. Two broadly applicable lessons emerge from their experiences.

### ***a. Understand that Training Still Can Take Place Despite Late-Arriving Mission-Specific Rules of Engagement.***

Many JAs voiced frustration that late promulgation of mission-specific ROE from the CJCS and CENTCOM for OEF and OIF created training difficulties.<sup>38</sup> The 3ID OIF experience is illustrative and typical of tactical-level JA after action comments.

One of the most difficult operational law issues during Fort-to-Port operations was ensuring service members understood the proper rules of engagement (ROE) throughout the movement of personnel and equipment to the various ports of debarkation (PODs) [sic—more accurate term in this paragraph’s context is port of embarkation (POE)]. Because the PODs were located in many different countries in Europe, each nation had slightly different requirements as to the amount of force US personnel could use to protect themselves and their equipment. They also varied as to who was responsible for particular areas at the PODs. In some countries, the host nation military was responsible for crowd control and patrolling the POD perimeter. In others, the host nation police force was responsible. It was critical, however, to ensure both the host nations as well as the US personnel understood that we would never relinquish our inherent right of self-defense.

*Id.* at 4. Subsequent comments from the 21st Theater Support Command further develop this issue.

[D]ifferences also existed between US ROE and allowable uses of deadly force in transited nations during the Fort-to-Port operations. For example, one significant Shipping Port of Embarkation (SPOE) utilized was Antwerp, Belgium. As a general rule, Belgian law allows the use of force to protect persons, but not property. Deadly force may be used to protect property only when the property being guarded is of an inherently dangerous nature, such as explosives, ammunition, or weapons. The rationale for this exception is that such inherently dangerous items pose a danger to life; thus, this is seen as a variation of the right to use force to protect others. [USAREUR REGULATION 525-13, ANTITERRORISM / FORCE PROTECTION: SECURITY OF PERSONNEL, INFORMATION AND CRITICAL RESOURCES, para. D-8 c., (1 Feb. 2000)] US operational ROE routinely permits the use of deadly force to protect property under a wider range of circumstances. Merging US ROE with host nation laws, and underscoring it all with an understanding of and appreciation for the internal political sensitivities several of these nations faced in supporting the US and the war, was often a tricky balancing act.

Memorandum, Office of the Staff Judge Advocate, 21st Theater Support Command, to Center for Law and Military Operations, subject: Review of the Draft Legal Lessons Learned from Afghanistan and Iraq: Volume I, Major Combat Operations (11 September 2001 – 1 May 2003), at 1 (14 May 2004) (on file with CLAMO) (citation in original).

<sup>37</sup> III Corps prepared a shipboard ROE orders annex, included at Appendix B-3. Marine Corps units deployed upon Navy amphibious vessels followed SROE-based rules disseminated through classified Naval Fleet operational task (OPTASK) messages. See TF Tarawa AAR, *supra* note 25, at 4.

<sup>38</sup> See, e.g., Major Thomas A. Wagoner, Staff Judge Advocate, 15th Marine Expeditionary Unit (Special Operations Capable), After Action Report of the 15th MEU(SOC) West Pac 01, at 2 (2002) (on file with CLAMO) [hereinafter 15th MEU(SOC) OEF AAR] (“The real world difficulty in working with the initial stages of Operation Enduring Freedom . . . was the lack of timely Rules of Engagement (ROE) from Central Command (CentCom) and higher authority . . .”); Interview with MAJ Dean Whitford, Command Judge Advocate, 5th Special Forces Group, in

Issue: Timely publishing of the ROE.

Discussion: The final Chairman of the Joint Chiefs of Staff (CJCS) ROE arrived after the division moved to tactical assembly areas (TAAs). Although a draft version of the ROE had been provided to 3ID(M) for comment several months earlier, the final ROE included new guidance on high collateral-damage targets. Late receipt of ROE caused confusion on a number of issues that were not clearly written. These matters were not resolved until hostilities began, meaning we could not train soldiers on the provisions.

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Charlottesville, Va. (Aug. 2003) (videotape on file with CLAMO) [hereinafter 5th Group AAR] (noting that OEF ROE “came late”); Interview with COL Richard O. Hatch, Staff Judge Advocate, 101st Airborne Division, in Charlottesville, Va. (8 Oct. 2003) (videotape on file with CLAMO) [hereinafter Hatch Interview] (stating that OIF higher ROE process too slow and that CFLCC ROE card did not appear until one week before invasion); Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), Operation Iraqi Freedom Lessons Learned, at 11 (2003) [hereinafter 101st OIF Lessons Learned] (on file with CLAMO) (stating that late dissemination of OIF ROE “negatively impacted both the ability to develop ROE materials that augment those issued by our higher headquarters and the ability to train commanders and soldiers on ROE prior to deployment”). The comments below from the 4th Infantry Division SJA describe the difficulties of disseminating late-arriving OIF ROE cards when the unit already had begun to deploy.

We received the final ROE at the same time as our personnel movement order. So, while we trained on the proposed ROE, there were changes we needed to get out. 4ID was scheduled to conduct a rolling start—units would move forward as they moved into country. We felt if we did not front load the information to best of our ability, we would never win a game of catch up. Unit[s] would move to contact without a briefing on the ROE.

. . . [T]he Chief of [Operational Law] immediately set up his own camcorder in our library and did a briefing with power point slides. We then rushed the tape to TA[S]C [Training and Audiovisual Support Center] and they made multiple copies. G3 issued a FRAGO that required every Mission (flight) Commander to show the film. To ensure this was done, a JA went to every manifest site and personally handed the mission commander the film.

For the cards, again, we were in the middle of our flow when it was issued. We made light paper copies of the CFLCC card, hoping that we would have a chance to distribute the heavy paper stock in Kuwait. Once the [advance echelon] hit the ground, we coordinated with CFLCC to get cards delivered to the base camp where the HQ was located. We then issued a FRAGO requiring each Base Camp . . . commander to come pick up the cards. . . .

As a double check, the SJA and [advance echelon] JAs (2) separated the cards by unit and numbers assigned based upon the Task Org. We then separated the cards into distinct box (yes MRE boxes). This way we could make sure all the cards were picked up. The method allowed the [trial counsel] to the Base Camp Cdr to figure out which units had not picked up their cards. As units flowed through the base camps, even when the HQ and Bdes had moved forward, they knew a box was waiting for them at their base camp in Kuwait.

While not a perfect solution, spot checks revealed the majority of units did have the heavy water resistant card, not the computer paper one that would fall apart easily.

E-mail from LTC Flora D. Darpino, Staff Judge Advocate, 4th Infantry Division, to LTC Pamela M. Stahl, Director, Center for Law and Military Operations (10 May 2004) (on file with CLAMO).

Recommendation: Subject to [POTUS or SECDEF] approval, we should make all efforts to ensure that the ROE are published early enough so that the information can be pushed down to the soldier pulling the trigger.<sup>39</sup>

Rather than wait until higher headquarters promulgated official ROE, however, JAs conducted training on foundational SROE self-defense principles, law of war principles, and on anticipated mission-specific ROE based on draft versions of the ROE for OEF<sup>40</sup> and OIF<sup>41</sup> that

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<sup>39</sup> 3d Infantry Division (Mechanized), After Action Report Operation Iraqi Freedom, at 286 (2003) (on file with CLAMO). The Group Judge Advocate, 5th Special Forces Group (Airborne), experienced similar problems.

We received the ROE for OEF Afghanistan operations on 7 October 2001 at almost the same time we received the order to fly out the next day. It was classified Top Secret and came through 101st Airborne Division (Air Assault) G3 pipeline because of its classification. I arranged to have the Group S-2 act as courier for the hard-copy document (we did not have it in electrons) after briefing the Group Commander and S-3 on the ROE that Sunday afternoon. We flew the next day, 8 October 2001, to Uzbekistan, arriving on 9 October 2001. The ROE classification was downgraded from Top Secret prior to briefing the ODAs, but with the first teams infiltrating Afghanistan on 19 October 2001, I had very little time to brief them, and even less time to request modifications that appeared necessary in light of mission planning and brief-back sessions.

Whitford OEF/OIF ROE AAR, *supra* note 16, para. 3. A JA at the CFLCC offers a different perspective from a higher level of command.

[U]ltimately there is only so much that can be done since the final decision to issue the ROE rests with our national leaders, as it should, and their decision making process will probably always be too slow for our liking. There are, however, ways to mitigate the effects of a late publication and this occurred during OIF. Throughout the ROE drafting process, which began in the spring of 2002, CENTCOM consistently coordinated with both JCS and their components . . . . In turn, the components communicated with their subordinate units. For our purposes, CFLCC coordinated with V Corps and I MEF. As a result, the higher commands knew what the lower commands wanted in the ROE, and the lower commands received feedback as to what they were likely to receive. Consequently, it was possible for units to train to what we thought the rules were going to be and I thought that occurred. CENTCOM also published a 50 slide presentation on the proposed ROE in late November '02 that was used during Internal Look, the CENTCOM-led exercise in early December [available in CLAMO SIPRNET Database, *supra* note 9]. CFLCC disseminated this information to V Corps and I MEF, and then V Corps hosted a conference in January 2003 in Heidelberg. At this conference, CDR Ken O'Rourke, the Chief of Operational Law at CENTCOM and a primary drafter of the ROE, gave the ROE briefing and he stated that the ROE "are not approved but these are the authorities that we hope to get." Following CDR O'Rourke's briefing, LTC Mark Martins [1st Armored Division SJA] volunteered to take the lead on producing a tactical level ROE brief [vignettes at Appendix B-2]. This brief was published around mid-February and was widely distributed . . . . Both CFLCC and V Corps then issued orders requiring ROE training . . . .

E-mail from Michael S. "Scott" Holcomb, former Army captain and Operational Law Attorney, Coalition Forces Land Component Command, to Maj Cody M. Weston, USMC, Center for Law and Military Operations (6 Apr. 2004) [hereinafter Holcomb Comments] (containing Microsoft Word track changes comments to draft version of this Publication) (on file with CLAMO).

<sup>40</sup> Of note, early draft versions of the OEF ROE were classified top secret; JAs without top secret clearances could not read the OEF ROE until eventually declassified to secret. *See* 15th MEU(SOC) OEF AAR, *supra* note 38, at 2.

<sup>41</sup> OIF ROE development took place through what has been referred to as the "London Process," in which key JAs and operators met in London in October and November 2002 to discuss possible ROE measures. These meetings should not be interpreted to suggest that any political decision regarding the invasion of Iraq had been made, only to

were available to JAs. Although an imperfect situation, most JAs agreed that much of the mission-specific ROE involved higher-level targeting decisions, and that adequate troop-level training in the absence of finalized ROE was possible.<sup>42</sup> For example, beyond standing self-defense rules, the typical issues to be addressed in mission-specific rules are what if any forces are declared hostile, for whom collective self-defense has been authorized, and if riot control agents are authorized. The draft ROE answered these questions and, even if draft ROE were not available, the answers were predictable given the pending missions.<sup>43</sup> Thus, while it may be possible for higher command to promulgate ROE earlier than was done for OEF<sup>44</sup> and OIF,<sup>45</sup> as recommended in the quote above, the lesson for tactical-level JAs is to expect late-arriving ROE and to provide training on known and anticipated ROE measures and principles.

***b. Understand the Purposes Behind Unclassified Rules of Engagement Cards and the Utility of Vignette Training.***

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suggest that the military planners were conducting prudent ROE planning in the event such a decision was made. The London Process was discussed by various JA presenters at the November 2003 XVIIIth Airborne Corps ROE Conference at Fort Bragg, North Carolina (presentations can be found in the CLAMO SIPRNET Database, *supra* note 9). Draft OIF ROE filtered down to units for comment and critique. *See, e.g.*, Major Thomas A. Wagoner, Staff Judge Advocate, 15th Marine Expeditionary Unit (Special Operations Capable), After Action Report for Operation Iraqi Freedom, at 1 (2003) [hereinafter 15th MEU(SOC) OIF AAR] (“When the 15th MEU arrived in 5th Fleet the ROE that was eventually to be used for Operation Iraqi Freedom (OIF) was already being staffed at Central Command (CentCom) and its major subordinate commands. . . . NavCent did ask [the MEU SJA] if [he] saw any glaring issues.”); 101st OIF Lessons Learned, *supra* note 38, at 11 (“the Deputy Staff Judge Advocate attended a conference [a V Corps ROE conference in Heidelberg, Germany, in January 2003] during which the operative ROE were discussed and tentatively approved”). *See also* Holcomb Comments, *supra* note 39.

<sup>42</sup> *See, e.g.*, Transcript of After Action Review Conference, Office of the Staff Judge Advocate, 3d Infantry Division, and the Center for Law and Military Operations, Fort Stewart, Ga., at 31 (18-19 Nov. 2003) (pointing out that the finalized ROE contained many rules not applicable at the troop level) (on file with CLAMO).

<sup>43</sup> *But see infra* text accompanying notes 75-83 (discussing new OEF ROE terminology of “likely and identifiable threat”).

<sup>44</sup> Viewed from the perspective of hindsight, the OEF ROE actually was produced in very short order, and for a very unique mission. *See* Hammill E-mail, *supra* note 6 (“[W]e went from a standing start after 9/11 to kinetic strikes in under 4 weeks for OEF. That is an amazing feat . . . . That rapidity of action in itself would not allow normal training cycles for some of the forces.”). The Command Judge Advocate, 5th Special Forces Group, provides a unique perspective on this issue.

From the time we were alerted until 7 October 2001, I attempted to get visibility on the ROE through the SOCCENT SJA . . . . Because of the Top Secret classification fo the draft ROE document, I could not even discuss the matter using our STU III telephone or SIPRNET email. [I was assured] that ‘it would include everything you need.’ It was a one-way process at that point, permitting me to request ROE based on our on-going planning, but not permitting my higher operational and technical chain to let me know the status of those requests.

In retrospect, in getting the first ROE document out within 30 days of 11 September 2001, SOCCENT, CENTCOM, and JCS legal did as best as could be done under the circumstances. I had about ten days on the ground in Uzbekistan to prepare the teams on the ROE, and those ten days were enough.

Whitford OEF/OIF ROE AAR, *supra* note 16, para. 4. *See also infra* note 83 and accompanying text.

<sup>45</sup> One problem with releasing unclassified ROE cards too early is that it might create a public perception that a political decision regarding military action has been made.



While the topic of the utility of ROE cards remains an ongoing debate,<sup>46</sup> ROE cards were used during both OEF and OIF and seem to be an expected JA product. Higher command (DoD, CENTCOM, CFLCC, service component) did not issue an official ROE card for OEF; rather, many units at the division level and below created their own cards based on the mission-specific ROE.<sup>47</sup> For OIF, however, the CFLCC issued an ROE card with the express intent that this would be the exclusive card units would use.<sup>48</sup> The OIF CFLCC ROE card and another sample unit OIF and OEF ROE card are included at Appendix B-1.<sup>49</sup>

<sup>46</sup> For a discussion of ROE cards in general, see CENTER FOR LAW AND MILITARY OPERATIONS, DEPLOYED MARINE AIR-GROUND TASK FORCE JUDGE ADVOCATE HANDBOOK 47-51 (2002) [hereinafter MAGTF HANDBOOK].

<sup>47</sup> The Combined Forces Air Component Command did issue a kneeboard (ROE card for pilots), however, that some JAs used in briefing the Army aviators, ODA teams, and AC-130 crews. See Whitford OEF/OIF ROE AAR, *supra* note 16, para. 6. According to the Group Judge Advocate, 5th Special Forces Group, “The special forces commander I advised did not expect ROE cards for the OEF Afghanistan operations. In light of classification issues and the nature of the operations, he expected thorough ROE training without committing time, resources, and risk to coming up with a card.” Whitford OEF/OIF ROE AAR, *supra* note 16, para. 5. All of the OEF cards available to CLAMO can be found in the CLAMO SIPRNET Database, *supra* note 9. It is not completely clear that all of these cards are unclassified; thus, only one clearly unclassified OEF card is included at Appendix B-1.

<sup>48</sup> See Message, 071300Z Mar 03, Commander, Coalition Land Forces Component Commander, subject: [classified] (available in CLAMO SIPRNET Database, *supra* note 9). The CFLCC SJA provides some interesting insights into the ROE card development process for OIF (the language comes from a summarized interview transcript and thus is not verbatim):

The ROE process was an ugly one. We had the ROE card from the original war. We took that as a model. A number of items on that card came directly from the Gulf War ROE card. Then we just tried to put in some other things. Problem we had is that CENTCOM wouldn't unclassify the ROE. . . . [The CFLCC CG wanted] two things added to it—PID (positive identification) and legalistic terminology that I didn't think should be in there. That was in the ROE but not on the card originally. People never understood it. . . . I realize there were people who were unhappy with the ROE card. Eventually they took the ROE card and finally released the ROE about one week before the fight. They had to give the card to the SECDEF—I was like this is just a simple card not for lawyers or the SECDEF. . . . I don't know the answers to the problem. This is a product that doesn't have to go all the way to the joint staff for approval. One thing that I'm happy with is that we had one card for the entire field. In the Gulf War we had many cards and some were incorrect. They were inconsistent. In this case we had one consistent card. . . . Lesson learned: go to CENTCOM early and say this is going to be a central card and have the CDR approve it—doesn't need to be cleared higher. . . . It's not a legal document. They turned it into a legal document. I wish I had done better.

Interview by MAJ Mark W. Holzer, Center for Law and Military Operations, with COL Richard E. Gordon, Staff Judge Advocate, Coalition Force Land Component Command, Camp Doha, Kuwait, summarized transcript at 3-4 (1 May 2003) (on file with CLAMO). It is also interesting to read the comments of a subordinate SJA in light of the comments above.

Late issue [of OIF ROE card]. Was issued too late to conduct meaningful training with the card. We had completed a number of weeks in country before we received the CFLCC ROE card so by the time we received the card we had already trained soldiers to be familiar with the ROE card that we had designed a month prior at Fort Bragg.

Not Soldier Friendly. The wording of the card was confusing. It was not written with the 18 year old E-1 in mind, which might have been ok if we restricted issue to key leaders who could understand the nuances; however, CFLCC mandated distribution to all soldiers. Examples of confusing nature of card: (1) PID [positive identification] is the first element on the card and it states that if PID is not established to call higher for guidance (how in fact would a soldier in

JAs agreed that the ROE cards were not intended to “check” the ROE “block,” but as training tools to be supplemented by more detailed classroom instruction and situational exercises and lane training.<sup>50</sup> JAs found that vignette-driven ROE scenarios were the best way to communicate ROE concepts into contextual application.<sup>51</sup> Sample OEF and OIF training vignettes and ROE scenarios are included at Appendix B-2. JAs conducted much of the training

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contact or near it do that?); (2) the card does not refer to self-defense until the backside of the card where it is buried in the language of deadly force and protection.

Background. When we indicated our concerns to CFLCC SJA they stated that they identified similar concerns to CENTCOM but the card could not be changed. We have received a number of comments on the confusing nature of the card and have done what we could to alleviate confusion through training. On the other hand, the training vignettes provided by CFLCC to accompany the card proved very useful and informative.

E-mail from LTC Thomas E. Ayres, Staff Judge Advocate, 82d Airborne Division, to COL Karl M. Goetzke, Staff Judge Advocate, Coalition Forces Land Component Command (29 Apr. 2003) (on file with CLAMO). *But see* Holcomb Comments, *supra* note 39 (explaining that the CFLCC Commander ordered that the PID term from the ROE be placed on the ROE card, and that the decision to put self-defense on the back of the card was intentional so that Soldiers and Marines would proactively focus on the declared hostile aspect of the ROE and not take a reactive self-defense posture).

<sup>49</sup> Several units expressed dissatisfaction with both the content and late arrival of the CFLCC OIF card and decided to create their own cards. For example, the 101st Airborne Division created their own ROE products (cards, briefs, vignettes) prior to the dissemination of the CFLCC ROE guidance, anticipating what the ROE would be. Once the CFLCC card arrived, all 101st Soldiers carried the CFLCC card in their left breast pocket but the subordinate units all retained the original ROE training materials to supplement the CFLCC card. Hatch Interview, *supra* note 38. *See also* RICK ATKINSON, *IN THE COMPANY OF SOLDIERS* 45-46 (2004) (describing COL Hatch’s concern at the time that Soldiers might be confused by late-arriving CFLCC ROE cards after they already had been trained based on the Division’s ROE cards).

<sup>50</sup> For example, Marine Corps Major Kevin M. Chenail, a CFLCC operational law attorney during the OIF combat phase who helped draft the CFLCC ROE card, pointed out in a 4 December 2003 briefing to Marine JAs preparing to deploy to Iraq that the intent of the card was to remind troops of pertinent ROE provisions that were to be explained more fully in additional unit-level training.

<sup>51</sup> *See, e.g.*, Nance E-mail, *supra* note 29 (stating that training vignettes/scenarios proved very useful); TF Tarawa AAR Transcript, *supra* note 25, at 39-41 (the Task Force Staff Judge Advocate office had created an ROE videotape for Marines to watch—many while flying or sailing to Kuwait—that was well-received largely because of the vignettes/scenarios used to explain ROE concepts). The SJA for the Coalition Joint Civil-Military Operations Task Force (CJCMOTF) in Afghanistan provided the following description of his ROE training techniques.

Given the semi-permissive environment, the CJCMOTF mission that required frequent interaction with civilians, and the operating procedures of the task force (initially in civilian clothing, moving in civilian vehicles, frequently in small elements in remote location), the tactical environment and mode of operation was far different than that faced by conventional units. Using TJAGSA training materials, I developed scenario-based training that focused on the types of situations I thought CJCMOTF personnel were most likely to face. During a mandatory training period devoted to ROE, after customary platform training, I divided the task force into small seminar groups (led by a designated officer or NCO I briefed beforehand) to work through the problems and then present them to the entire group. This proved to be a useful method of ROE training.

COL H. Allen Irish, Staff Judge Advocate, Coalition Joint Civil-Military Operations Task Force, Draft AAR Comments, at 3 (2004) [hereinafter CJCMOTF SJA AAR] (on file with CLAMO).

themselves, but also employed the “train-the-trainer” technique by providing instruction and materials to senior leaders who in turn briefed their own troops.<sup>52</sup>

A corollary training issue involved ROE classification. The ROE authorization serials initially were classified top secret for both OEF and OIF before being downgraded to secret.<sup>53</sup>

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<sup>52</sup> A 3ID JA provides a flavor of training techniques employed for OIF while that particular JA’s unit was preparing for the invasion in Kuwait.

I’d say there were three ways the units wanted to do it. One was, train the privates—we’d go into a big DFAC, a dining facility, and set up a projector and go. The other one was to train key leaders; and the third was we just handed the key leaders stuff, and they did it down. That wasn’t very common—the most common was that [we] would go into a DFAC and train. We probably trained between 4,000 soldiers; out of that, we probably did 3,000 of them that way. We did two or three 35-minute briefings, lots of examples, PowerPoint stuff.

Interview by MAJ Mark W. Holzer, Center for Law and Military Operations, with CPT Chester J. Gregg, 3d Infantry Division Operational Law Attorney, transcript at 8-9 (3 May 2003) (on file with CLAMO). *See also* CJCMOTF SJA AAR, *supra* note 51, at 3. Two OEF JAs emphasized the importance of JA involvement in ROE training.

One method of disseminating ROE that continues to prove its effectiveness is personal attention by JAs. In OEF, CPT Harper Cook personally briefed every soldier on ROE prior to his deployment in early January. Once he deployed, CPT Lancaster briefed every chalk during their H hour sequence. When he in turn deployed, other JAs from the 101<sup>st</sup> OSJA picked up the task of briefing the ROE. Soldiers arriving at Kandahar airfield received another briefing from CPT Cook or CPT Lancaster immediately after stepping off the plane. The TF Rakkasan commander directed that this initial briefing be given by a JA, as he wanted the first words a soldier received from his command to be delivered by an officer who understood the mission and could effectively convey critical information to soldiers as his personal representative. Immediately upon arrival, each planeload of soldiers was briefed on RAK 6’s standing guidance, and within 24 hours they received a full blown ROE briefing. This initial briefing was given to every person who arrived at Kandahar, including servicemen and women, civilian contractors, and even the media. This briefing was also given to the 3<sup>rd</sup> Princess Patricia’s Canadian Light Infantry (3PPCLI), the Canadian infantry battalion attached to the TF. ROE briefings were also given to units as they rotated through Kandahar later in the operation. CPT Cook also briefed every single pilot and soldier involved in Operation Anaconda prior to that operation in March 2002. While extremely time consuming, personal attention to ROE training by JAs cannot be matched as a method of ensuring soldiers understand and can apply the ROE. It is important to note that because the ROE was released so late in the planning for OIF, this method was not available for many units, although soldiers were briefed on the anticipated ROE as understood by their JAs.

Memorandum, MAJ Nicholas F. Lancaster, Judge Advocate, 101st Airborne Division and former Legal Advisor, Kandahar Detainee Facility, to Center for Law and Military Operations, subject: Comments on CLAMO OEF/OIF DRAFT Lessons Learned, at 2 (18 May 2004) [hereinafter Lancaster Memorandum] (on file with CLAMO). In addition, at least one special forces group required their service members to be briefed by the Task Force JA.

In OEF, judge advocates briefed special forces ODA teams of 10-12 members in isolation as part of the staff mission briefing schedule. Some incoming staff personnel and co-located units received ROE briefings from judge advocates, but the senior paralegal NCO shouldered a lot of the training responsibility for these personnel. It was the policy of Task Force Dagger that every special forces soldier deploying into Afghanistan, from initial infiltration through Operation Anaconda, be briefed by the Task Force SJA.

Whitford OEF/OIF ROE AAR, *supra* note 16, para. 8.

Many Marines and Soldiers did not have secret clearances. For this reason, and to prevent ROE cards from becoming controlled items, the cards had to be unclassified. The SROE states that ROE supplemental measures<sup>54</sup> are to be classified at least confidential when ROE supplemental numbers are linked to textual descriptions, but that the individual number or measure alone is unclassified.<sup>55</sup> Despite what the SROE says, it is not completely clear that merely removing the number from the text will make the measure unclassified in the context of all operations. One can imagine certain ROE measures that higher command might want to remain classified regardless of removing the supplemental number. Thus, a lesson for JAs is to coordinate with higher headquarters to determine what exactly in an ROE message is classified and what is not, and then to ensure that ROE training does not exceed the security levels of the audience. The OEF and OIF training presentations included in Appendix B-2 are examples of the level of detail and the type of content that were considered unclassified for OEF and OIF.<sup>56</sup>

### ***3. Understand the Relationships Between New and Standing ROE Terms: Positive Identification (PID), Hostile Act and Hostile Intent, Declared Hostile Forces, and Likely and Identifiable Threat (LIT).***

A critical lesson for JAs was the need to understand the distinctions and relationships between the following ROE terms: 1) declared hostile; 2) hostile act/hostile intent; 3) likely and identifiable threat; and 4) positive identification.

The latter term, “positive identification” (PID), is perhaps the best point to begin the discussion because PID was an overarching OEF and OIF ROE requirement. Although the term had appeared in ROE for air operations during Operation SOUTHERN WATCH,<sup>57</sup> the term first appeared for land forces in the OEF ROE, which required positive target identification prior to engagement.<sup>58</sup> PID then appeared in the OIF ROE, but this time, as expressed on the unclassified CFLCC ROE Card, with a definitional clarification: “PID is a *reasonable certainty* that the proposed target is a legitimate military target.”<sup>59</sup> This definition was the result of a series of meetings between operators and JAs at the CENTCOM level.<sup>60</sup>

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<sup>53</sup> See Holcomb Comments, *supra* note 39.

<sup>54</sup> The SROE contains a compendium of rules, or “supplemental measures,” that are associated with specific numbers. See SROE, *supra* note 2, encl. J.

<sup>55</sup> *Id.* encl. J, app. F, para. 1(a) (“The individual designation number or meaning is UNCLASSIFIED, but when the two are used together, they become CONFIDENTIAL.”) (all capitals in original).

<sup>56</sup> Another lesson, observed by CLAMO and other JAs, is the fact that even though these OEF and OIF briefs were unclassified, the fact that they originated on the SIPRNET made it difficult if not impossible to provide these briefs electronically on the unclassified NIPRNET to deploying JAs who did not yet have SIPRNET access.

<sup>57</sup> See *supra* note 12.

<sup>58</sup> See *supra* note 9 (discussing CLAMO SIPRNET Database and OEF ROE).

<sup>59</sup> The CFLCC ROE Card is included at Appendix B-1 (emphasis added). Some contended that the effort to more precisely define PID with the “reasonable certainty” qualifier simply added more confusion. See, e.g., E-mail from COL Patrick Lisowski, Staff Judge Advocate, III Corps, to LTC Stuart W. Risch, Director, Center for Law and Military Operations, et al. (21 Apr. 2003) [hereinafter Lisowski E-mail] (“Confusing ROE. Present format is written by and for lawyers so we can defend our commander’s and Soldier’s actions but we can still make them clearer (for example, ‘positive’ identification requires a ‘reasonable’ certainty”). Others found the language very useful. In fact, of those presenters at the 2003 XVIIIth Airborne Corps ROE Conference, *supra* note 41, who commented on PID and “reasonable certainty,” all opined that the term and its definition were both understandable and enabling.

<sup>60</sup> See Hammill E-mail, *supra* note 6.

The fact that the OEF and OIF ROE expressly added the PID requirement as an engagement criterion caused some confusion in applying more recognizable ROE terms like hostile act/intent and declared hostile forces.<sup>61</sup> Virtually all JAs understand that actions in self-defense are necessary under the SROE “when a hostile act occurs or when a force or terrorist(s) exhibits hostile intent.”<sup>62</sup> In other words, actions in self-defense are conduct-based. Similarly, virtually all JAs understand that a force “declared hostile” by appropriate authority can be engaged regardless of whether a hostile act has been committed or hostile intent is present.<sup>63</sup> In other words, engaging declared hostile forces is status-based. The question became how PID, an ROE term not found in the SROE,<sup>64</sup> related to these more traditional SROE terms. The

<sup>61</sup> See, e.g., Interview by MAJ Mark W. Holzer, Center for Law and Military Operations, with LTC Mark D. Dupont, Officer in Charge, V Corps Main, Iraq, transcript at 7 (30 Apr. 2003) (on file with CLAMO) [hereinafter Dupont Interview] (“The rules of engagement that were used in [OIF] were significantly different . . . than rules of engagement that I’ve used in training, for the last 15 years. They appropriate new terms and new concepts that were unfamiliar . . . the concept, for example, of positive identification created some issues.”). As an addition to LTC Dupont’s comments, some Army JAs recently have expressed a view that Army ROE training in general does not accurately reflect substantive ROE or ROE processes used in current operations. The concern seems to be that ROE annexes used at the Army’s Combat Training Centers (CTCs) are somewhat outdated in that they do not use the latest ROE terminology and, because they are unclassified, do not adequately train JAs on the workings of the classified SROE. A JA who served in OEF forcefully makes this point.

It cannot be stated too strongly that one of the greatest challenges early-deploying JAs had with the OEF ROE was that it does not resemble any ROE with which we had previously trained. Not only did it introduce legal concepts new to JAs such as PID and LIT [likely and identifiable threat, see *infra* text accompanying notes 75-83], but it also was missing some concepts contained in every Warfighter and CTC ROE in the last ten years such as observed v. unobserved fires. Apparently, and to their credit, the CTCs have reacted to this by including some of these concepts in current training rotation ROE.

Lancaster Memorandum, *supra* note 52, at 2. See also Office of the Staff Judge Advocate, 82d Airborne Division, Operations Iraqi Freedom & Enduring Freedom Recent Legal Developments, para. 2(d) (26 Jan. 2004) (opining that Army JA training should be improved to include “[i]nstruction on the SROE, particularly formats for requesting supplemental measures”); Interview with LTC James W. Herring, Jr., Chief, Doctrine Developments Department, The Judge Advocate General’s Legal Center and School, in Charlottesville, Va. (various discussions from Sept. 2003 to Feb. 2004) (opining that Army training ROE need to be revamped to more closely resemble real-world ROE) (LTC Herring was a former CTC JA).

<sup>62</sup> SROE, *supra* note 2, encl. A, para. (5)(f)(1).

<sup>63</sup> *Id.* para. (5)(i). A recurring comment from OIF JAs was the difficulty in communicating to young troops that they could actually engage somebody based merely on their membership in a declared hostile force. A JA from the 3d Infantry Division explained the problem as follows.

[O]ne of the big things that we tried to focus on was getting soldiers to realize that there's a difference between dealing with hostile forces and in dealing with hostile actor[s]. I remember in some of the classes we would give, we had a slide at the beginning that showed a tank and it said “enemy” on it. And it said, “This is a hostile force. What do you do when you see somebody who's a member of this hostile force?” And there's one soldier who would say, “You would shout a warning at them.” We were like, “Oh, no. We are in real trouble here.” So we spent a lot of time focusing on, “No. This guy is hostile. By his mere status, you can fire at him, even if he's sleeping or if he's eating his lunch or doesn't see that you're there.”

Transcript of After Action Review Conference, Office of the Staff Judge Advocate, 3d Infantry Division, and the Center for Law and Military Operations, Fort Stewart, Ga., at 30 (18-19 Nov. 2003) (on file with CLAMO) [hereinafter 3ID AAR Transcript].

<sup>64</sup> PID did appear, however, in prior Operation Southern Watch ROE and SPINS.

following excerpt from a Marine JA's OEF after action report offers one perspective on the question.

While on its face [PID] appears to be a simple requirement, this was truly the most difficult aspect of TF 58's and 26th MEU(SOC)'s participation in Operation Enduring Freedom from an ROE perspective. What does a Taliban or Al Qaida fighter look like? Can you determine the enemy's identity by the equipment they use? These and other questions were often unanswerable, even when based on the most current intelligence available.

. . . While I mention that this was the most difficult ROE issue . . . , the concept of accurately identifying targets prior to engagement was by no means foreign to our Marines. [Training] scenarios frequently incorporated individuals in civilian clothing that could not be easily recognized as members of a hostile force. As we began training with Serial Two aboard [ship], I emphasized the importance of being able to identify a hostile act/demonstration of hostile intent, vice the more difficult means of visually identifying a potentially hostile individual or force. In essence, Marines were focused on what an individual or force was doing (conduct based) and not so much what they looked like (visually based). *In the end, the positive identification requirement of Serial Two did not impose an insurmountable burden on our Marines since they would have naturally ensured positive identification prior to engaging a target, regardless of written language requiring such identification.*<sup>65</sup>

Stated another way, the express PID requirement has really always been an implicit requirement before engaging hostile forces. For instance, Iraqi military forces and certain paramilitary groups were declared hostile for OIF.<sup>66</sup> Whether or not the ROE stated so, one could not engage one of these hostile forces without first determining if, or "positively identifying" that, the target was a member of the hostile force.

Similarly, it also seems that PID has always been an implicit requirement before using force in self-defense. The actual PID ROE supplemental measures for both OEF and OIF did not expressly specify if PID was required when acting in self-defense—the supplementals simply stated, without further qualification, that PID was required before engaging targets. Some JAs argued that PID was not required in self-defense because, under the SROE, self-defense is an inherent right and, even if the right could be limited, supplemental ROE measures are not supposed to be the mechanism for doing so.<sup>67</sup> Most JAs agreed, however, that PID did apply to self-defense and that a hostile act/intent determination by its very nature satisfied the PID requirement; for example, a civilian firing a weapon at U.S. forces is committing a hostile act,

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<sup>65</sup> Major Ian D. Brasure, Staff Judge Advocate, 26th Marine Expeditionary Unit (Special Operations Capable), After Action Report: Operation Enduring Freedom/Operation Swift Freedom, para. (3)(b) (22 Mar. 02) (on file with CLAMO) [hereinafter 26th MEU(SOC) OEF AAR] (emphasis added).

<sup>66</sup> See *supra* note 10 (discussing CLAMO SIPRNET Database and OIF ROE).

<sup>67</sup> See SROE, *supra* note 2, encl. J, para. (2)(a). See also Dupont Interview, *supra* note 61, at 8 (stating that some operators were "confusing the issue, and they were also allowing positive identification to override self-defense, as opposed to self-defense being the override").

and seeing the civilian do so constitutes PID of the source of the threat.<sup>68</sup> On balance, perhaps the better view is that PID should apply, and probably always has implicitly applied, to self-defense. Otherwise, it would seem difficult to satisfy the basic law of war principle of distinction to engage targets when one is not at least reasonably certain of the source of the threat.<sup>69</sup> PID in the self-defense context does not require that the actual identity of the threat need be known—e.g., whether the threat is part of a certain enemy force— but rather that the general source of the threat be known.

A related issue was the criteria required to constitute PID.<sup>70</sup> The ROE serials for OEF and OIF were silent on the topic. Recurring questions included whether or not counter-battery radar systems constituted PID, or unmanned aerial vehicles providing real-time footage, human eyes-on, satellite imagery, human intelligence sources, or a variety of other means used to help identify potential targets. Interestingly, and a validation of the earlier lesson describing the close relationship between FSCM and ROE,<sup>71</sup> the answer appeared in the OEF and OIF SPINS.<sup>72</sup> The language from the SPINS then appeared verbatim in various command ROE presentations, seemingly for application beyond just air operations.<sup>73</sup> Although the language is classified, a former CFLCC JA offers the following unclassified guidance: “There was a laundry list of items for operators to use to determine if they had a reasonable certainty that the proposed target was a valid military objective. PID does not require perfection, it requires good sense and judgment.”<sup>74</sup>

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<sup>68</sup> See, e.g., TF Tarawa AAR Transcript, *supra* note 25, at 92-93 (discussing the TF Tarawa view that PID was required for self-defense counter-battery fires); Transcript of After Action Review Conference, Office of the Staff Judge Advocate, XVIIIth Airborne Corps, and the Center for Law and Military Operations, Fort Bragg, NC (30 Sept. to 1 Oct. 2003) (on file with CLAMO) [hereinafter XVIIIth Airborne Corps AAR Transcript] (discussing whether or not counter-battery radar systems constituted PID, tacitly revealing a belief that PID applied in a self-defense context).

<sup>69</sup> In the words of the SJA for the U.S. Army Field Artillery Center & Fort Sill:

The positive ID language is unnecessary and yet another example of making ROE unnecessarily complicated. PID (at least to a “reasonable certainty”) is already required under the LOW in the principle of discrimination. . . . Once you are reasonably certain that someone is going to commit a hostile act or is demonstrating hostile intent, you may engage them. . . . The PID requirement is confusing because it is redundant. Drafters of ROE need to stick to established terms and principles and if they do deviate, the drafter needs to allow time for the field JAs to digest and implement training.

E-mail from COL John C. Kent, Staff Judge Advocate, Headquarters, U.S. Army Field Artillery Center & Fort Sill, to LTC Pamela M. Stahl, Director, Center for Law and Military Operations (20 May 2004) (on file with CLAMO).

<sup>70</sup> This question seems just a slight variation on the recurring, mainly Army, question of what constitutes observed fire. Many Army training ROE orders annexes contain the provision that indirect fires and direct rotary-wing fires into populated or urban areas must be observed. See, e.g., CENTER FOR LAW AND MILITARY OPERATIONS, RULES OF ENGAGEMENT (ROE) HANDBOOK FOR JUDGE ADVOCATES app. B (containing sample Army ROE training annexes with such measures). The question that follows, if not answered in the annex, is what constitutes adequate observation, with the typical debate revolving around whether or not counter-battery radar systems (e.g., Q36/Q37) suffice. There is no set doctrinal or legal answer; it is an operator issue that the ROE (or SPINS or other FSCM) should answer based on the overall situation and mission.

<sup>71</sup> See *supra* Section B.1.b.

<sup>72</sup> See *supra* text accompanying note 16. Unfortunately, the specific guidance is classified and cannot be discussed in this forum.

<sup>73</sup> Sample classified presentations can be found in the CLAMO SIPRNET Database, *supra* note 9.

<sup>74</sup> Holcomb Comments, *supra* note 39.

Even more so than PID, the ROE term that generated the most discussion was “likely and identifiable threat” (LIT). LIT appeared only in the OEF ROE, not in the SROE or the subsequent OIF ROE. An OEF ROE serial stated that certain enemy forces who posed a likely and identifiable threat to friendly forces could be considered hostile and engaged and destroyed.<sup>75</sup> The OEF ROE did not expressly declare any forces hostile.<sup>76</sup> LIT caused a great deal of confusion for deployed JAs who had not been exposed to the term before, and who were unsure if the new term was merely another way of stating that forces had been declared hostile, or another way of restating SROE self-defense principles, or something else entirely. The following is a representative example of concerns shared by Army and Marine Corps tactical-level OEF JAs.

The single largest concern of the initial OEF ROE was the language concerning Taliban and Al Qaeda fighters. Instead of declaring these personnel hostile in simple terms that Marines have trained to . . . , the terms “likely or [sic] identifiable” were added. . . . All the subordinate commands in [Navy Central Command] immediately pressed for clarification from CentCom since the terms likely and identifiable are not used together in the CJCS SROE. . . . The SROE terms and concepts that we trained [to] were relatively well received and more importantly universally understood. I do not know why the CJCS was not followed on this critical aspect of the ROE.

. . . .

When lawyers can easily argue about what [LIT] means or doesn’t mean as far as engaging targets, we have failed because the 21-year-old Corporal doesn’t have the luxury of such an academic exercise.<sup>77</sup>

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<sup>75</sup> See *supra* note 9 (discussing CLAMO SIPRNET Database and OEF ROE).

<sup>76</sup> See *id.*

<sup>77</sup> 15th MEU(SOC) OEF AAR, *supra* note 38, at 2-3. Another Marine after action report made similar comments.

Upon 26th MEU(SOC)’s arrival in the 5th Fleet AOR, I immediately began requesting guidance and clarification on the intent and meaning of this new concept, “likely and identifiable threat.” My concerns were primarily that “likely and identifiable threat” was introducing an unfamiliar concept to our Marines immediately before the commencement of combat operations. I had trained our Marines on the concepts of hostile act, hostile intent and declared hostile, as well as other U.S. Standing ROE concepts, and was certain as to their ability to implement them in any context; however, on its face, “likely and identifiable threat” appeared to beg further elaboration and clarification.

. . . .

. . . If judge advocates and commanders have relative difficulty in defining ROE terms, it goes without saying that the Marines charged with implementing the ROE will likely have similar difficulties.

26th MEU(SOC) OEF AAR, *supra* note 65, at 2-3. See also XVIIIth Airborne Corps AAR Transcript, *supra* note 68 (expressing similar frustrations); Interview with COL Kathryn Stone, Staff Judge Advocate, 10th Mountain Division, in Charlottesville, Va. (7 Oct. 2003) (audiotape on file with CLAMO) (expressing concern over LIT term and dialogues with CENTCOM trying to determine its meaning).



Because the LIT term remains in effect under the OEF ROE as of the drafting of this Publication, and because there is at least the theoretical possibility that LIT could reappear in ROE for a future operation, it is useful to try to understand CENTCOM's intended LIT meaning. As described by CENTCOM JAs involved in the drafting of the OEF ROE,<sup>78</sup> OEF was a unique operation that required unique ROE. The operation contemplated early air strikes on preplanned targets, approved at the CENTCOM level and higher, in conjunction with small groups of Special Forces soldiers performing discretely assigned missions. OEF was not a full-scale war with a major ground presence on the order of the Persian Gulf War or OIF, nor was it a peace operation on the other end of the conflict spectrum. It was something in between.

Political and military concerns counseled against declaring forces hostile throughout Afghanistan on a number of counts, according to CENTCOM. First, it was difficult to determine who exactly was a hostile force in Afghanistan. The Taliban was an amorphously defined group comprised of the Taliban regime itself as well as their armed units, various members of which were not committed to any cause and willingly switched allegiances. Al Qaeda members similarly were difficult to define. Second, even if there was a clearly defined force to declare hostile, granting individual commanders and soldiers the authority to engage any positively identified member of an enemy force was not the most efficient or prudent means of accomplishing the mission's strategic and operational objectives. Rather, CENTCOM had a campaign plan that involved centralized targeting decisions and centrally assigned missions. Moreover, CENTCOM believed that it possessed the intelligence assets and strategic and operational perspective to best deconflict friendly from hostile targets. Thus, to CENTCOM, declaring forces hostile at the tactical level did not seem a viable option.<sup>79</sup>

But CENTCOM planners also realized that the mission called for something more robust than a pure self-defense posture. There was a concern that commanders, pilots, and individual service members should have the authority to engage targets that did not pose an immediate threat under a hostile act/intent analysis but if left alone might put friendly forces at risk. One of the contemplated scenarios was the ingress and egress of friendly forces during the conduct of assigned ground and air missions. What if the forces encountered sleeping Taliban soldiers or anti-aircraft systems along the route? The sleeping soldiers and anti-aircraft systems were not committing hostile acts or displaying hostile intent, yet they nonetheless posed a potential risk to

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<sup>78</sup> The LIT explanation is derived from various CLAMO discussions with and ROE briefings by CDR Kenneth O'Rourke and Mr. Barry Hammill, CENTCOM operational law attorneys during OEF. This ROE section was also staffed through CENTCOM prior to publication.

<sup>79</sup> The analysis in this paragraph is based upon Telephone Interview with Mr. William B. "Barry" Hammill, Deputy Staff Judge Advocate, U.S. Central Command (19 Dec. 2003) [hereinafter Hammill Interview]. The former 10th Mountain Division SJA offers a different perspective from the tactical level.

The SOF on the ground, working with Afghan forces, could easily tell friend from foe. In fact, it was the SOF on the ground who relayed this intel—friend or foe—to CENTCOM in most situations. To even suggest that a command headquarters thousands of miles away could tell friend from foe on the tactical battlefield . . . is representative of a dangerous trend in the age of instant email/VTC communications capabilities.

E-mail from COL Kathryn Stone, former Staff Judge Advocate, 10th Mountain Division, to LTC Pamela M. Stahl, Director, Center for Law and Military Operations (11 May 2004) (on file with CLAMO).

friendly forces that could quickly materialize if ignored. The LIT standard was created with this and other related scenarios in mind: CENTCOM wanted friendly forces to have the authority to engage potential—not yet imminent or actual—threats that might arise during the conduct of specifically assigned missions. Thus, LIT was neither a declaration of hostility nor a restatement of SROE self-defense principles; it was an aggressive, self-defense-based ROE measure that fell in between the two extremes.<sup>80</sup>

As the word “identifiable” in LIT suggests, the PID requirement still had to be satisfied under a LIT analysis. In other words, friendly forces had to positively identify targets as likely threats before engaging. A related question that arose during both OEF and OIF was the responsibility for LIT (OEF) and PID (OEF and OIF) determinations during close air support operations. The ROE serials were silent as to whether forces on the ground calling in air strikes had the final say on LIT and PID or whether pilots in the air did. The answer is actually intuitive and, yet another validation of the ROE/FSCM connection, was expressly stated in the SPINS: LIT and PID determinations are made by those encountering the threats—ground forces calling in air strikes to defend themselves under either a hostile act/intent rationale or LIT rationale have the final authority; conversely, air forces defending themselves under the same rationale against ground or air threats have the final authority.<sup>81</sup>

Several lessons seem to emerge from the confusion over ROE terms during OEF and OIF. It is first worth pointing out that none of the legal after action reports suggest that any of the ROE problems were insurmountable or resulted in the unnecessary deaths of service members. As one of the more strident LIT critics emphasized, “Despite my criticism of the amorphous concept of ‘likely and identifiable threat,’ TF 58 and 26th MEU(SOC) were never significantly hindered or restrained because of this requirement.”<sup>82</sup> That said, even CENTCOM attorneys concede that injecting new, perhaps overly legalistic, ROE terminology into an operation without sufficient time for operators and JAs to understand and train to the standard is

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<sup>80</sup> *Id.* Pictured along a line spectrum, with hostile act/intent self-defense at the left end and declared hostile at the right end, LIT would fall just to the right of self-defense. Hammill Interview, *supra* note 79. The Group Judge Advocate, 5th Special Forces Group provides an example.

[O]ne incident early on in OEF Afghanistan in October 2001 involved the positive identification of an anti-aircraft gun by a high-flying aircraft conducting reconnaissance of an infiltration route to be used that night by MH-47 Chinooks inserting a special forces team. The AAA was not a likely and identifiable threat to a fighter jet at high altitude, but it was a threat to the MH-47s. The incident raised the consciousness of targeteers and aviators on the LIT issues.

Whitford OEF/OIF ROE AAR, *supra* note 16, para. 9.

<sup>81</sup> This subject caused a heated debate at the 2003 XVIIIth Airborne Corps ROE Conference, with some ground force JAs complaining about the confusion and Air Force JAs responding that there should not have been confusion because the SPINS answered the question. Some JAs at the Conference, from both services, suggested that perhaps the cause of confusion could have been some individual pilots’ misinterpreting or misunderstanding the SPINS. *See also* Memorandum, Office of the Staff Judge Advocate, V Corps, to COL Marc Warren, Staff Judge Advocate, V Corps, subject: OSJA After Action Review, Operation Iraqi Freedom, para. 3 (on file with CLAMO) [hereinafter V Corps OSJA OIF AAR] (recommending that an Air Force JA be staffed within the Army corps-level Air Support Operations Center (ASOC) to help resolve joint interoperability issues such as this).

<sup>82</sup> 26th MEU(SOC) OEF AAR, *supra* note 65, at 3.

problematic and should be avoided if at all possible.<sup>83</sup> But it is foreseeable that future missions might require new ROE, and it is therefore incumbent upon operators and JAs to clearly craft and explain the ROE and for users to make every effort to understand the terms and their relationship to more traditional SROE terms, as this publication has attempted to do with LIT, PID, hostile act/intent, and declared hostile.

#### ***4. Understand the Relationship of Self-Defense and Tactical-Level Fires to Rules of Engagement and Fire Support Control Measures.***

Under the OEF and OIF ROE, certain categories of targets could not be engaged without the approval of certain high levels of command. The categories and approval levels are classified.<sup>84</sup> The CENTCOM CDEM,<sup>85</sup> both the OEF and OIF versions, set forth a targeting methodology that, in its simplest form, distilled targeting decisions into five unclassified, sequential questions, the fifth of which represents the issue at hand.

1. Can I positively identify the object or person I want to attack as a legitimate military target authorized for attack by the current rules of engagement?<sup>86</sup>
2. Is there a protected facility (i.e. No Strike), civilian object or people, or significant environmental concern within the effects range of the weapon I would like to use to attack the target?
3. Can I avoid damage to that concern by attacking the target with a different weapon or with a different method of approach?
4. If not, how many people do I think will be injured/killed by my attack?
5. *Do I need to call my higher commander for permission to attack this target?*<sup>87</sup>

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<sup>83</sup> See Hammill Interview, *supra* note 79. Mr. Hammill also points out that, in contrast to OIF, there was a very small window for ROE development and training between the events of 9/11 and the dropping of the first bombs in Afghanistan less than a month later. *Id.*

<sup>84</sup> See *supra* notes 9-10 (OEF and OIF ROE). One of the more visible applications of this ROE measure was the high-level decision not to target Taliban leader Mullah Omar during the early days of OEF. In a controversial magazine article, Seymour Hersh reported that General Tommy Franks, the CENTCOM Commander, decided not to authorize an immediate strike because of reservations expressed by the CENTCOM Staff Judge Advocate. Seymour M. Hersh, *King's Ransom: How Vulnerable Are the Saudi Royals*, NEW YORKER, Oct. 22, 2001. Hersh's account of how the targeting decision unfolded was later disputed, *See, e.g.*, John L. Miller, *Sly Sly: A Journalist's Latest Tricks*, NAT'L REV., Dec. 3, 2001, but the overall situation is illustrative of how certain targets required higher approval before engaging.

<sup>85</sup> See *supra* text accompanying notes 22-25.

<sup>86</sup> Of note, the first CDEM step does not ask whether a target is legitimate under the law of armed conflict (LOAC). This is subsumed within the CDEM question of whether the target is legitimate under the ROE; in other words, drafters of the ROE must only authorize targets in accordance with LOAC principles. But the ROE certainly can (and did for OEF and OIF) impose greater targeting restrictions for a variety of political or operational reasons. Understanding the distinction between LOAC and ROE is not a new lesson for JAs, but one worth repeating. For a discussion of this lesson in the context of Operation ALLIED FORCE, the Kosovo air war, see CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN KOSOVO, 1999-2001: LESSONS LEARNED FOR JUDGE ADVOCATES 50-51 (stating that "nothing stops a commander from placing a high[er] premium on minimizing collateral damage [than that required by the law of armed conflict]").

More specifically, the issue was to what extent self-defense and tactical-level fires (as opposed to more strategic- and operational-level, pre-planned fires) were, if at all, exceptions to Step Five, the requirement to obtain permission from a higher commander in certain circumstances. The CDEM raised this specific issue in an unclassified elaboration upon the five-step targeting methodology:

These five questions can often be answered by every warfighter within seconds—in some cases even instinctively. This methodology outlines a set of tools and techniques that can be used to determine collateral damage estimates in a consistent and repeatable form that can be easily briefed and understood up the various levels of chain of command. The methodology helps guide the user through complex issues and situations. However, no set of tools can cover all situations. *At the same time, methodologies that can be applied in a staff development process are not appropriate for the “heat of battle” in circumstances described . . . below.* But, in every case, the five questions can be asked and answered. The final question—“Do I need permission to attack this target?”—is not a collateral damage methodology question, but rather a rule of engagement issue which will vary depending upon the mission, objective, political context, risk to friendly forces, and overall battlefield situation.<sup>88</sup>

The CDEM then went on to provide classified guidance as to how the targeting methodology applied to “heat of battle” targeting decisions. An unclassified article written by two CFLCC JAs may be instructive in this unclassified forum. The authors state:

At CFLCC’s request to CENTCOM, the collateral damage methodology did not apply to immediate target engagements under the inherent right of self-defense. This exception, like that in the ROE, permitted the ground commander to approve strikes as necessary in self-defense.

This exception did not, however, eliminate the requirements to positively identify all targets, use force proportional to the threat and minimize collateral damage to the extent feasible, given the situation at the time. If a target did not satisfy the self-defense exception or if approval was required by a higher commander, the ground commander was required to request approval from the commander or government official with the strike authority.

Like the ROE self-defense exception, this [the CDEM self-defense exception] was an area that caused some confusion and consternation among commanders. Primarily, the confusion stemmed from the imprecise nature of this concept and the lack of defined parameters. This is an area of the targeting process that needs to be refined for future conflicts.<sup>89</sup>

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<sup>87</sup> OIF CDEM, *supra* note 23, para. 2 (emphasis added).

<sup>88</sup> *Id.* para. 2(e) (emphasis added).

<sup>89</sup> *Target Selection at CFLCC*, *supra* note 6, at 41.

Elsewhere in the article the authors further explore the parameters of self-defense fires, tactical-level heat of battle fires, and FSCM.

Forces in contact can always engage the enemy under the inherent right of self-defense even if the authority to strike a certain target is withheld to a higher commander. The problem, as is often the case, lies in the interpretation of “in contact.” What are the boundaries for self-defense fires, and how should “in contact” be defined? Naturally, if you are being fired upon, you can return fire. But what if the enemy is not firing at you but you are within range? More likely than not, you can engage the enemy.

However, what if the enemy is within range, not firing at you and located next to a protected site that is on a restricted target list and cannot be struck without higher command approval? This is a difficult question that must be answered by the commander on the ground, using his best judgment as to whether or not to seek approval from higher headquarters to conduct the strike or approve the strike under the inherent right of self-defense. If the ground commander orders the strike in self-defense, he must be able to articulate the reasons for his decision.<sup>90</sup>

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<sup>90</sup> *Id.* at 40. This discussion of self-defense fires should be distinguished from the procedures for pre-planned targeting. Although not a lesson in itself, the following description of pre-planned targeting procedures at the CFLCC level, a command involved in both OEF and OIF, may prove useful in illustrating the role that JAs play in the process.

The CFLCC JA’s major role during operations was to review target nominations. All pre-planned targets were reviewed for compliance with the Law of War, ROE and collateral damage methodology. In the process, each target was vetted for military necessity, proportionality, collateral damage and the presence of restricted/no-strike targets in close proximity to the fixed-wing aircraft’s desired mean point of impact (DMPI) for precision-guided munitions. The CFLCC JA was responsible for conducting this analysis and raising any potential concerns to the DOCC [Deep Operations Coordination Cell].

In addition, the CFLCC JA forwarded the analysis to his counterpart at CFACC [Coalition Forces Air Component Commander]. This was crucial because the perspective of the air component often differed from that of the ground component, especially with regards to the importance of a target to the ground forces. Furthermore, the analysis helped the air component select the appropriate ordnance and angle of attack.

*CFLCC DOCC.* At the CFLCC, the DOCC was responsible for targeting. The JA was a member, and readily available to help with any targeting issues. In addition to around-the-clock support to current operations, the JA participated in the daily effects board (DEB) and the candidate target list (CTL) review.

During the daily effects board meeting, the deputy commanding general for operations (DCG-O) reviewed the battle damage assessment (BDA) and approved targeting objectives and provided guidance for them. The JA, while a standing member of the DEB, was largely a passive observer. At times, the DCG-O or other staff members asked questions regarding the ROE or collateral damage methodology; however, a discussion of legal issues during the DEB was the exception rather than the rule.

The operational law attorney earned his pay during the CTL review. The CTL consisted of the target nominations from the CFLCC and its subordinate commands, V Corps and I MEF. This list

As these excerpts indicate, the relationship of self-defense and tactical-level fires to ROE and FSCM is not a simple one, and no clear answers emerged out of OEF or OIF.<sup>91</sup>

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contained CFLCC target nominations to CFACC for shaping the battlefield. The DOCC JA reviewed every proposed target on the CTL for legal sufficiency.

There was rarely a question as to the legitimacy of CFLCC's proposed targets as the vast majority were Iraqi military units. There were, however, often concerns about collateral damage, especially when seeking to destroy a target in an urban area.

With sophisticated software and imagery, the JA reviewed the proposed targets and their potential for excessive collateral damage. Protected sites were of special concern: schools, mosques, bridges, hospitals and water treatment facilities. Knowing that medical supplies were scarce and most of the water in Iraq is polluted, Coalition Forces took great care to avoid any harm to these facilities.

After noting all the protected sites near a potential target, the JA advised the deputy DOCC chief about the collateral damage considerations. The deputy then decided whether or not to raise the issue to the DCG-O or the DOCC chief to remove the proposed target from that day's CTL or to forward the target to CFACC with a notation of the collateral damage concerns.

More often, the target nominations were forwarded to CFACC with an explanation of the collateral damage considerations. The explanation included the proximity and function of the concerned facility. For example, a hospital 400 meters or a water treatment plant 200 meters away from the DMPI would be noted. The CFACC then used this information to help select the proper weapon with which to engage the target.

*Target Selection at CFLCC, supra* note 6, at 41-42 (emphasis in original) (citations omitted). The "sophisticated software and imagery" mentioned in the excerpt no doubt referred at least partially to the Automated Deep Operations Coordination System (ADOCS). ADOCS is a computer software application that helps coordinate battlespace functional areas by, among other tools, integrating imagery and terrain data with battlefield geometries to aid in situational awareness and mission planning. For more information on ADOCS, see GlobalSecurity.Org, Automated Deep Operations Coordination System (ADOCS), at <http://www.globalsecurity.org/military/systems/ground/adocs.htm> (last visited 26 May 2004). See also Memorandum, MAJ Daniel G. Jordan, former V Corps Operational Law Attorney, to Acting Deputy Staff Judge Advocate, Headquarters, V Corps, subject: OIF AAR Comment Input, para. 1 (28 Apr. 2004) (noting the utility of using ADOCS in the V Corps targeting process); V Corps OSJA OIF AAR, *supra* note 81, para. 3.

<sup>91</sup> The fact that the CDEM provided classified guidance did not mean that the issue was not open to interpretation. At the 2003 XVIIIth Airborne ROE Conference, JAs from all services provided, in a classified forum, differing views of how "heat of battle" targeting decisions related to OEF and OIF ROE and CDEM targeting approval authorities. As the Group Judge Advocate, 5th Special Forces Group explained:

The most difficult part of training OEF ROE to the special forces teams was the idea that targeting authority was not based on the identity of the particular targets so much as the team's situation vis-à-vis the target. Reservations of targeting authority to higher levels made it extremely important for team members calling for fires to use the right terms in order to avoid any delays. In addition to using terms like "positively identified" and "likely and identifiable threat" in the request, the team members needed to indicate the situation requiring the fires so that approval was obtained at the most immediate level possible.

Whitford OEF/OIF ROE AAR, *supra* note 16, para. 11.

**5. *Be Prepared to Apply Combat-Oriented Rules of Engagement to Changing Mission Circumstances: Tactics, Techniques, and Procedures (TTPs), and the Examples of Warning Shots and Defense of Property.***

Prior to the end of major combat operations on 1 May 2003, the ROE for OEF and OIF remained relatively static. The OEF ROE underwent a few slight modifications as the operation progressed, while the initial OIF ROE serial did not change at all. The issue that arose was how to implement existing combat ROE to missions transitioning more toward stability and support operations. For example, on 1 May 2003, forces were still declared hostile in Iraq and the LIT standard still applied in Afghanistan, yet soldiers were engaging very few targets under either standard because defining the “enemy” had become even more elusive as forces discarded uniforms and blended back into the civilian populations. In the context of OIF, the fact that forces remained declared hostile had little practical value for service members on the ground; forces in effect displayed evidence of their “hostile” status by committing hostile acts or displaying hostile intent.<sup>92</sup>

Although the ROE serials changed very little, the tactics, techniques, and procedures (TTPs) for implementing the ROE did change significantly. Higher commands issued classified FRAGOs to provide TTPs for specific recurring situations, such as checkpoint security operations, responses to looting, and maintaining order in areas under U.S. control.<sup>93</sup> Subordinate units in turn developed their own, more detailed TTPs tailored to their specific tactical circumstances.<sup>94</sup>

One example of the intersection between ROE and TTPs was the issue of warning shots. The OEF and OIF ROE serials were silent as to whether or not warning shots were authorized. JAs disagreed if the SROE authorized warning shots in the absence of higher restriction.<sup>95</sup> The issue reached a head in the context of vehicle checkpoint operations in Iraq, where several incidents resulted in the deaths of U.S. soldiers and the shooting of Iraqi civilians.<sup>96</sup> JAs from 3ID argued that warning shots, particularly those using tracers so that the vehicle could see the shots during daylight, would be a useful TTP to both ward off fast-approaching vehicles and to help develop a hostile act/intent picture if the vehicle continued to approach.<sup>97</sup> In response, the CFLCC issued a classified FRAGO on checkpoint security that included guidance on warning shots.<sup>98</sup> Other classified FRAGOs discussed whether or not warning shots were authorized in the

<sup>92</sup> See, e.g., 3ID AAR Transcript, *supra* note 63, at 24-25.

<sup>93</sup> These FRAGOs can be found in the CLAMO SIPRNET Database, *supra* note 9.

<sup>94</sup> Sample TTPs are included in the CLAMO SIPRNET Database, *supra* note 9.

<sup>95</sup> The majority view seems to be that the SROE does authorize warning shots because, among other reasons, a supplemental measure in the number range normally reserved for restrictive measures gives commanders the ability to restrict warning shots. See SROE, *supra* note 2, encl. J. In other words, given the SROE’s fundamentally permissive regime, the fact that a commander has the power to restrict warning shots suggests that warning shots are otherwise authorized. For a general discussion of warning shots under the SROE, see MAGTF HANDBOOK, *supra* note 46, at 54.

<sup>96</sup> See, e.g., CNN, *U.S. Investigates Checkpoint Shooting*, Apr. 1, 2003, at <http://www.cnn.com/2003/WORLD/meast/04/01/sprj.irq.van.shooting/> (last visited 23 Dec. 2003) (CFLCC warning shot guidance came down prior to this news article).

<sup>97</sup> 3ID AAR Transcript, *supra* note 63, at 34-35. The 3ID JAs first argued that warning shots were authorized under the SROE, but higher command disagreed. *Id.* at 35-36.

<sup>98</sup> The FRAGO is included in the CLAMO SIPRNET Database, *supra* note 9.

context of other aspects of the operation, such as maintaining order in areas under U.S. control and in response to looting.<sup>99</sup>

In general terms, the issue of warning shots raised heated debate among OEF and OIF JAs.<sup>100</sup> An unclassified Marine Corps JA after action report provides a flavor of the arguments.

The warning shot against Iraqis for the most part only served to heighten tensions and increase the amount of fire. This is directly inverse to their stated goal of being a lesser means of force to preclude a Marine from needing to use deadly force by scaring the enemy into realizing that the Marine will indeed pull the trigger. In the vast majority of cases the warning fire was ineffective and did not serve its stated purpose. The constant theme of reporting is that the enemy did not know that US forces were firing warning shots and interpreted the fire as aimed at them. This in turn brought return fire against the Marines. The threat of force was well noted by Iraqis in An Nasiriyah and warning shots did nothing to assist the [Marine Expeditionary Unit] in minimizing collateral damage or keeping the peace.

The one group that reported success with warning shots was the LAR [Light Armored Reconnaissance] Company. They explained that the warning shots fired from their chain guns at vehicles coming towards them with unknown intentions tended to stop the vehicles so they could be searched. They surmised that the size of the LAR was a large part of the success in that vehicles clearly saw who was firing at them and rather than risk getting shot they stopped for Marine forces. This as compared to infantry forces who were usually unable to see the intended beneficiaries of the warning shots and vice versa.<sup>101</sup>

Another example of ROE requiring adaptation and further amplification was defense of property. The OEF and OIF ROE serials contained some measure of guidance on the issue of what property could be defended with deadly force, stating that such property would be subsequently “designated.”<sup>102</sup> For OIF, CENTCOM issued a classified FRAGO listing the designated property.<sup>103</sup> This issue reached a head in the context of the looting that occurred in Baghdad in the wake of its fall to U.S. forces.<sup>104</sup> In response, the CFLCC issued a classified FRAGO containing further guidance on defense of property in general, and looting in particular.<sup>105</sup>

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<sup>99</sup> *See id.*

<sup>100</sup> JAs at the 2003 XVIIIth Airborne ROE Conference offered impassioned views on both sides of the warning shot argument that cut across all services. If any consensus at all was reached, it seemed to be that warning shots are a dangerous tool that can have unintended consequences, but that they might be effective in certain limited circumstances, such as in checkpoint security operations.

<sup>101</sup> 15th MEU(SOC) OIF AAR, *supra* note 41, at 7.

<sup>102</sup> For a general discussion of defense of property ROE issues, see MAGTF HANDBOOK, *supra* note 46, at 60-63.

<sup>103</sup> Included in CLAMO SIPRNET Database, *supra* note 9.

<sup>104</sup> *See, e.g.,* Byron Pitts, *On the Scene: Looting in Baghdad*, CBS News, Apr. 8, 2003, at <http://www.cbsnews.com/stories/2003/04/08/iraq/scene/main548382.shtml> (last visited 23 Dec. 2003).

<sup>105</sup> Included in CLAMO SIPRNET Database, *supra* note 9.



Although reference to classified answers is undoubtedly unsatisfactory, the issues of warning shots and defense of property help demonstrate how ROE do not necessarily need to change and how TTPs and FRAGOs can provide guidance in light of changing circumstances.<sup>106</sup>

### ***6. Resolve Cross-Border Targeting and Pursuit Criteria Earlier in Planning.***

Another issue with, unfortunately, a classified answer was the problem of cross-border target engagement. The issue was most pronounced in OEF, as JAs struggled with the ROE for engaging targets fleeing from Afghanistan into Pakistan along a border that in places is ill-defined. More precisely, tactical-level JAs opined that the OEF ROE serials provided insufficient guidance on the circumstances, hot pursuit or otherwise, under which al Qaeda or Taliban forces seeking sanctuary in Pakistan could be engaged and/or pursued.<sup>107</sup> A dialogue with higher command eventually resolved the issue.<sup>108</sup> But clearly the lesson learned is to resolve the issue of cross-border ROE sooner rather than later.

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<sup>106</sup> One could argue that perhaps the ROE could have been more exhaustive and organized to begin with. *See, e.g.*, Lisowski E-mail, *supra* note 59 (opining that an ROE lesson learned is to “[a]ddress ROE in order of priorities (who is hostile, who is protected, where can we go, what is protected, what can we shoot, with what, arty into populated areas, mines, RCA, warning shots), same way each time, not haphazardly and in bits and pieces in separate sections, as done presently.”).

<sup>107</sup> *See, e.g.*, Hayden Interview, *supra* note 33 (noting that the ROE were insufficiently clear on the issue of hot pursuit into Pakistan); Office of the Staff Judge Advocate, Combined Task Force 82, Mid-Point AAR, at 4 (1 Jan. 2003) [hereinafter 82d Mid-Point OEF AAR] (“Under which circumstances US/Coalition forces could engage targets in Pakistan is a much-discussed topic. The ROE in this regard are not straightforward; the Judge Advocate’s task is to make them as clear as possible for commanders.”). The issue also received some attention in the press. *See, e.g.*, Rowan Scarborough, *US Rules Let al Qaeda Flee*, WASH. TIMES, Dec. 21, 2001, available at [http://www.restoringamerica.org/archive/war/rules\\_let\\_alqaeda\\_flee.html](http://www.restoringamerica.org/archive/war/rules_let_alqaeda_flee.html).

<sup>108</sup> OEF guidance on Afghanistan–Pakistan cross-border ROE can be found in the CLAMO SIPRNET Database, *supra* note 9.

### C. COALITION ISSUES

Squadron Leader Catherine Wallis<sup>1</sup>

*Almost every time military forces have deployed from the United States it has been as a member of – most often to lead – coalition operations.*<sup>2</sup>

Both Operation ENDURING FREEDOM (OEF) and Operation IRAQI FREEDOM (OIF) were multinational operations,<sup>3</sup> consisting of multiple willing States,<sup>4</sup> and led by the United States. Multinational operations pose unique challenges, as the respective capabilities, political will and national interests of each partner will impact on its role in the coalition. The challenge for commanders is to synchronize the contributions of coalition partners so as to project focused capabilities that present no seams or vulnerabilities to an enemy for exploitation.<sup>5</sup> The JA is involved in this synchronization process through identifying the legal “friction points” between coalition partners and proposing solutions to eliminate or reduce their impact on the operation. Both the United States and foreign governments place high importance on this process.<sup>6</sup>

Resolving coalition issues can be challenging and frustrating, as complex legal and policy issues may be exacerbated by language difficulties, lack of interoperability in communications, and differences in training.<sup>7</sup> Further, it cannot be expected that

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<sup>2</sup> General Robert W RisCassi, *Principles for Coalition Warfare*, JOINT FORCE QUARTERLY, Summer 1993.

<sup>3</sup> OEF and OIF are examples of multinational operations and coalition action. Multinational operation is a collective term to describe military actions conducted by forces of two or more nations, usually undertaken within the structure of a coalition or alliance: JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 307 (12 Apr. 2001) (as amended through 17 Dec. 2003) [hereinafter DoD Dictionary]. Coalition Action is multinational action outside the bounds of established alliances, usually for single occasions or longer cooperation in a narrow sector of common interest: *Id.*

<sup>4</sup> For force compositions *see, supra*, Road to War, note 29& 102.

<sup>5</sup> *See* JOINT CHIEFS OF STAFF, JOINT PUB. 3-16, JOINT DOCTRINE FOR MULTINATIONAL OPERATIONS I-4 (5 Apr. 2000) [hereinafter JOINT PUB. 3-16].

<sup>6</sup> *See* JOINT PUB. 3-16 at I-12 (Nations cannot operate effectively together unless their forces are interoperable); Ministry of Defence (UK) OPERATIONS IN IRAQ: LESSONS FOR THE FUTURE (11 Dec. 2003) at [http://www.mod.uk/publications/iraq\\_futurelessons/index.html](http://www.mod.uk/publications/iraq_futurelessons/index.html) (UK forces must be organized, trained and resourced for interoperability with partners.); Minister for Defence (Australia):

The memberships of allied groups and coalitions will vary, depending on the nature of the threat and the nature of the necessary response. These coalition parties will be operating under varied domestic and international legal obligations. This dilemma highlights the critical importance of ongoing constructive engagement by Australians, including our military lawyers, with the forces of our allies and coalition partners.

Minister for Defence (Australia) Senator Robert Hill, speech to the Defence Legal Service Conference (28 Jan. 2004) at <http://www.minister.defence.gov.au/HillSpeechtpl.cfm?CurrentId=3478>.

<sup>7</sup> The challenges of operating in a coalition are expressed in Joint doctrine.

coalition partners will have the same level of legal support as deployed U.S. forces.<sup>8</sup> Most coalition partners do not have paralegal support, and their attorneys may be higher (or lower) ranking than one might expect, or may even be deployed civilian attorneys.

***1. Early and Frequent Interaction Improves the Likelihood of Mission Success.***

One way of approaching management of coalition legal issues and policy constraints is through:

- a. early and ongoing liaison to identify any differences;

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Often the Multinational Force Commander (MNFC) will be required to accomplish the mission through coordination, communication, and consensus. In addition to traditional command concepts. Political sensitivities must be acknowledged and often the MNFC (and subordinates) must depend on their diplomatic as well as warrior skills.

JOINT PUB. 3-16, *supra* note 5 at I-1. One of the key difficulties in communications is lack of coalition access to the SIPRNET. *See, e.g.*, E-mail from MAJ Philip Wold USAF, former Chief, Operations Law, 9 AF/USCENTAF to SQNLDR Catherine Wallis, Royal Australian Air Force, Director, Coalition Legal Operations, Center for Law and Military Operations (7 Apr. 2004) (on file with CLAMO) [hereinafter Wold E-mail]:

A large amount of operational information--obviously classified--is transmitted via SIPRNET on US systems. However, access to the SIPRNET is strictly controlled. If you anticipate that the SIPRNET / US classified computer systems are going to form the core for how information is transmitted, an effort must be made to have sufficiently authorized coalition members have access to the systems if they want to have access to the same kind of information / situational awareness as their counterparts.

*Id.* This was also an important issue for Combined Joint Special Operations Task Force – West (OIF):

The most critical issue was access to or use of SIPRNET or other classified means or modes of operational tracking, planning, and execution. This was never satisfactorily resolved in terms of clear authority. JCS and CENTCOM issued clear authority down only so far as the component commands (e.g., CJSOCC, CFLCC, CFACC), and subordinate combined commands such as ours had extreme difficulty in obtaining clear guidance on permissible applications. Our situation was enhanced by SOCOM authorities, but the problems were systemic. We established firewalls, protocols, reporting and investigation requirements where problems arose, and successfully prosecuted the mission without loss of life or injury due to lack of communication. Clearer rule and authority on the sharing of classified information and access to classified systems are needed for task forces such as our combined joint special operations task force established over three US SF battalions, one UK SAS, and one AUS SAS.

E-mail from MAJ Dean Whitford, Staff Judge Advocate, Joint Special Operations Task Force Dagger (OEF) and Staff Judge Advocate, Combined Joint Special Operations Task Force – West (OIF) to SQNLDR Catherine Wallis, Royal Australian Air Force, Director, Coalition Legal Operations, Center for Law and Military Operations (14 May. 2004) (on file with CLAMO) [hereinafter Whitford E-mail]

<sup>8</sup> *See* THE JUDGE ADVOCATE GENERAL'S DEPARTMENT, UNITED STATES AIR FORCE, AIR FORCE OPERATIONS AND THE LAW: A GUIDE FOR AIR AND SPACE FORCES, 1<sup>st</sup> Ed. (2002) 339-340 [hereinafter USAF OPLAW] (also discussing the different roles and rank structures of other legal services).

- b. resolution of those differences where possible; and
- c. where resolution is impossible, ensuring that the differences are not overstated and that action is taken to ensure that the differences are properly factored into the planning and execution of missions.<sup>9</sup>

The development of relationships between coalition attorneys is an important aspect of this process. During OEF and OIF several coalition partners had both deployed legal staff and legal “reach back” capabilities. Some of these coalition attorneys were located at Coalition Forces Land Component Command (CFLCC), Coalition Forces Special Operations Component Command (CFSOCC) and Combined Forces Air Component Command (CFACC); others came into contact with U.S. JAs because their units were co-located with U.S. forces.<sup>10</sup> Some coalition attorneys made contact with U.S. JAs on a daily basis, particularly during mission planning stages.<sup>11</sup>

Several attorneys reported that developing good relations with coalition partner attorneys as early as possible was of great benefit to the overall success of the operation. For example, the senior Australian attorney in OIF commented that attending Central Command (CENTCOM) conferences with his United States and UK counterparts immediately prior to OIF, allowed them to “hit the ground running” on commencement of operations, both in terms of preparation for specific issues and more generally because of the rapport developed between them.<sup>12</sup> A USAF JA reported that:

on any number of occasions we were able to discuss developing situations and ensure all parties were aware of potential coalition limitations before

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<sup>9</sup> E-mail from SGNLDR Chris Hanna, Royal Australian Air Force, former Legal Officer Strategic Operations Division, to SGNLDR Catherine Wallis, Royal Australian Air Force, Director, Coalition Legal Operations, Center for Law and Military Operations (21 Apr. 2004) (on file with CLAMO).

<sup>10</sup> See, e.g., MAJ Nicholas F. Lancaster, Chief, Operational Law Division, 101<sup>st</sup> Airborne Division, MEMORANDUM FOR RECORD, SUBJECT: MAJ Lancaster (101<sup>st</sup> ABN DIV (AASLT) Operational Law) Comments on CLAMO OEF/OIF DRAFT Lessons Learned, 18 May 2004 (on file with CLAMO) (hereinafter Lancaster AAR) (reporting that the JAs in Kandahar shared an office with the Canadian JA assigned to 3<sup>rd</sup> Princess Patricia’s Canadian Light Infantry). Also Whitford E-mail, *supra* note 7 (reporting that, with regard to Task Force Dagger, in OEF, the US JAs merely were co-located with their coalition counterparts; while in OIF, there was a combined joint special operations TF headquarters for three U.S. SF battalions, one U.S. infantry battalion, one U.K. SAS, and one AUS SAS).

<sup>11</sup> See, e.g., E-mail from COL Kathryn Stone, former Staff Judge Advocate, 10th Mountain Division to SGNLDR Catherine Wallis, Royal Australian Air Force, Director, Coalition Legal Operations, Center for Law and Military Operations (22 Mar. 2004) (on file with CLAMO) [hereinafter Stone E-mail] (reporting almost daily contact with the UK and Canadian attorneys). See also E-mail from MAJ John Bridley, Australian Army, former Command Legal Officer, Special Operations Command to SGNLDR Catherine Wallis, Royal Australian Air Force, Director, Coalition Legal Operations, Center for Law and Military Operations (11 Mar. 2004) (on file with CLAMO) [hereinafter Bridley E-mail] (reporting that he “would visit [the U.S. JAs] every day and a half, and could E-mail phone & usually met for a meal every day”).

<sup>12</sup> GPCAPT Paul Cronan, Royal Australian Air Force, former J06, Headquarters Australian Theatre, Interview with SGNLDR Catherine Wallis, Royal Australian Air Force, Director, Coalition Legal Operations, Center for Law and Military Operations (18 Feb. 2004) [hereinafter Cronan interview]

they became “showstoppers” because of this proximity and our interaction.<sup>13</sup>

Accordingly, JAs should become familiar with the legal resources of the coalition partners in their area of responsibility and ensure that lines of communication are open to deal with substantive issues as they arise.<sup>14</sup>

***2. Some Coalition Partners Will Not Be Permitted to Use the Full Range of Weapons that May Be Available to U.S. Forces.***

The weapons capabilities available to each force may be different. This may be due to one, or a combination, of three reasons. First, the coalition partner may have different legal obligations, such as being a signatory to a treaty to which the United States is not a party and which the United States does not consider customary international law (legal reasons). Second, the United States and the coalition partner may both be legally bound by a provision of international law, by treaty or custom, but may interpret their obligations differently (interpretation of law). Finally, the difference may not result from law at all, but from the application of domestic policy (policy reasons). The two weapon capabilities that are most affected by these differences are anti-personnel landmines (APL) and riot control agents (RCAs).

***a. Anti-Personnel Landmines (APL)***

The key international legal document concerning APL is the Ottawa Treaty.<sup>15</sup> The Ottawa Treaty prohibits States party from developing, producing, acquiring, stockpiling, retaining or transferring APL, either directly or indirectly, and from assisting, encouraging or inducing any of these prohibited activities.<sup>16</sup> Most of our coalition

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<sup>13</sup> Wold E-mail, *supra* note 7. Similarly, a junior Australian attorney advised that the coalition attorneys he met with provided an excellent sounding board for issues and problems: E-mail from FLTLT Robert Kalnins, Royal Australian Air Force, former Legal Officer, Task Group 633.2 to SQNLDR Catherine Wallis, Royal Australian Air Force, Director, Coalition Legal Operations, Center for Law and Military Operations (29 Mar. 2004) (on file with CLAMO) [hereinafter Kalnins E-mail].

<sup>14</sup> A novel approach was taken by MAJ Dean Whitford, former Staff Judge Advocate, Combined Joint Special Operations Task Force – West (OIF), and MAJ John Bridley, Australian Army, former Command Legal Officer, Special Operations Command:

We also formed a local bar association, which made for somewhat of a novelty, but encouraged contact among all the attorneys either stationed or passing through our command, including base support, civil affairs, coalition, and even civilian attorneys serving in line positions.

Whitford E-mail, *supra* note 7.

<sup>15</sup> Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Landmines and on Their Destruction, 18 Sep. 1997, 36 I.L.M. 1507. [hereinafter Ottawa Treaty].

<sup>16</sup> *Id.* art 1(1). The treaty defines "Anti-personnel mine" as:

a mine designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons. Mines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, that are equipped

partners have ratified the Ottawa treaty.<sup>17</sup> However, the United States is not a party and does not consider the Ottawa Treaty to be customary international law. Rather, the United States is subject to the provisions of Amended Protocol II to the Certain Conventional Weapons Convention,<sup>18</sup> and domestic policy,<sup>19</sup> which does not prohibit the use of APL but sets out restrictions on their use. As a result, the United States could employ APL during OEF and OIF, but most coalition partners could not.

When the employment of APL arises in coalition operations it is important for JAs to understand the parameters of the APL prohibition for the particular coalition partner. These parameters will not necessarily be the same for each partner, as they will depend on interpretation and policy.

The question of what constitutes “assistance” is the most complicated aspect of APL use in coalition operations. The prohibition on assistance may impact on a mission in many subtle but important ways, such as on coalition partner ability to be involved in air-to-air refueling, transport, or even mission planning. Where U.S. forces are reliant on the provision of these types of services from a coalition partner, it is imperative that “workarounds” are established early so as to not to interfere with the mission.<sup>20</sup> While several major partners have issued unclassified guidance on their national interpretation of their obligations,<sup>21</sup> there is insufficient detail in these documents for mission planning.

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with anti-handling devices, are not considered anti-personnel mines as a result of being so equipped.

*Id.*, art 2.

<sup>17</sup> There are 141 States party including Afghanistan, Australia, Canada, Denmark, Germany, Italy, Japan, Norway, Poland, Ukraine, and the UK (at 30 Mar. 2004). For current statistics see <http://www.icbl.org/treaty/> (last visited 30 Mar. 2004).

<sup>18</sup> Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (and Protocols), 10 October 1980, 19 I.L.M. 1523 [hereinafter UNCCW]; Amended Protocol II to the Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (ratified by the United States on 24 May 1999).

<sup>19</sup> The policy in effect during OEF and OIF was President William Jefferson Clinton, Statement at the White House, (16 May 1996) available in LEXIS, News library, ARCNWS file. The current U.S. policy is outlined in U.S. Department of State, Landmine Policy White Paper (27 Feb. 2004) at <http://www.state.gov/t/pm/rls/fs/30047.htm>.

<sup>20</sup> In relation to U.S. Special Forces operating with U.K. and AS Special Forces during OEF and OIF, MAJ Whitford reported:

guidelines were established ahead of time to avoid assistance issues where, for example, a coalition officer might be the fires coordinator on duty. It also recognized the difference between calling fires (use function) and clearing fires (safety function).

Whitford E-mail, *supra* note 7.

<sup>21</sup> In relation to APL *see* Landmines Act 1998 (UK) (as long as the UK military member does not actually lay the APL, the statute does not prohibit participation in the operation); Anti-Personnel Mines Convention Implementation Act 1997 (Canada) (can participate in an operation with a State that uses APL but may not actively assist). Declaration to the Ottawa Convention by Australia:

Australia will interpret the word "assist" to mean the actual and direct physical participation in any activity prohibited by the Convention but does not include

In many cases, the precise national interpretation and policy may be classified, as is the case for both the UK and Australia.<sup>22</sup> JAs should seek the assistance of coalition attorneys to advise on their State's current position in these grey areas.

***b. Riot control agents (RCAs)***

The permissible use of RCAs during armed conflict was topical during both OEF and OIF.<sup>23</sup> The key document is the Chemical Weapons Convention (CWC), which requires that RCAs are not used “as a method of warfare.”<sup>24</sup> However, the term “method of warfare” is not defined. The United States is a party to the CWC, as are all our major coalition partners.<sup>25</sup> Accordingly, the interoperability issue arises due to interpretation and policy rather than law.

The United States interpretation of its obligations under the CWC is contained in classified and unclassified policy.<sup>26</sup> United States RCA policy distinguishes between war and military operations other than war (MOOTW) and between offensive and defensive use in war. RCAs may be used in armed conflicts such as OEF and OIF, where permission is granted through the chain of command. The types of circumstances where approval may be granted include:

- To control rioting EPWs;
- To reduce or avoid civilian casualties, where enemy forces use civilians to mask or screen attacks;
- During rescue missions for downed aircrew and passengers and escaping prisoners;
- In rear echelon areas to protect convoys from civil disturbances, terrorists and paramilitary activities; and
- For security operations for the protection or recovery of nuclear weapons.<sup>27</sup>

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permissible indirect support such as the provision of security for the personnel of a State not party to the Convention engaging in such activities.

<sup>22</sup> While the national policy may be classified, it may nevertheless be releasable to the United States. Copies of policies releasable to the United States are on file with the International and Operations Law Department, The Judge Advocate General's Legal Center and School.

<sup>23</sup> See, e.g., Kerry Boyd, *Military Authorized to Use Riot Control Agents in Iraq*, ARMS CONTROL TODAY, May 2003 at [http://www.armscontrol.org/act/2003\\_05/nonlethal\\_may03.asp](http://www.armscontrol.org/act/2003_05/nonlethal_may03.asp)

<sup>24</sup> Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction, 13 January 1993, 32 I.L.M. 800 [hereinafter CWC], art.1(5).

<sup>25</sup> 161 States have ratified the CWC. Major non-signatories (at Apr. 2004) include Iraq, North Korea, Syria, Lebanon, and Egypt.

<sup>26</sup> Executive Order No. 11850, Renunciation Of Certain Uses In War Of Chemical Herbicides And Riot Control Agents 40 F.R. 16187, 8 Apr. 1975, 50 U.S.C. Section 1511 [hereinafter Ex Ord. No. 11850], and Chairman of the Joint Chiefs of Staff Instruction 3110.07B (16 Feb. 2001, classified SECRET). See also White House memorandum for the Secretary for Defense, Use of Riot Control Agents to Protect or Recover Nuclear Weapons. (10 Jan. 1976)

<sup>27</sup> Ex Ord. No. 11850, *supra* note 26. Australia has a similar viewpoint regarding permissible use of RCAs during armed conflict:

CS (tear) gas was approved for use on OIF.<sup>28</sup> Secretary of Defense Donald Rumsfeld indicated that there were circumstances when use of RCAs would be appropriate in war.

<sup>29</sup> The examples he cited were:

when you are transporting dangerous people in a confined space.. [like an airplane, or].. “when there are enemy troops, for example, in a cave in Afghanistan, and you know that there are women and children in there with them, and they are firing out at you, and you have the task of getting at them. And you would prefer to get at them without also getting at women and children, or non-combatants.”<sup>30</sup>

An alternative interpretation of the term “method of warfare’ is that the CWC places a total prohibition on the use of RCAs in an armed conflict. The UK subscribes to this latter interpretation, indicating that UK forces would not be involved in operations using RCAs in Iraq, nor transport RCAs.<sup>31</sup>

As with APL, these differences in national viewpoints may impact on coalition operations. It is critical that JAs understand these differences and assess the potential impact on their particular mission.

### ***3. Different National Rules of Engagement Will Impact U.S. Operations.***

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This does not mean riot control agents cannot be used at all in times of conflict; however, use of such agents should be authorised by the Chief of the Defence and only then in specific circumstances. When considering the use of riot control agents, specialist legal advice should be sought. Situations where the use of riot control agents may be considered are:

- a. to control rioting prisoners of war (PWs);
- b. rescue missions involving downed aircrew or escaped PWs;
- c. protection of supply depots, military convoys and other rear echelon areas from civil disturbances and terrorist activities;
- d. civil disturbance where the ADF is providing aid to the civil power; and
- e. during humanitarian evacuations involving Australian or foreign nationals.

ROYAL AUSTRALIAN AIR FORCE, OPERATIONS LAW FOR RAAF COMMANDERS, DI(AF) AAP 1003, par. 9.16 (2nd ed., forthcoming 2004).

<sup>28</sup> As reported by Nicholas Wade & Eric Schmitt, *Bush Approves Use of Tear Gas in Battlefield*, NEW YORK TIMES 2 Apr. 2003.

<sup>29</sup> Hon. Donald Rumsfeld, Secretary of Defense, Testimony before the 108<sup>th</sup> Congress House Armed Services Committee, 5 Feb. 2003, at <http://armedservices.house.gov/schedules/2003.html#feb03>

<sup>30</sup> *Id.*

<sup>31</sup> Defence Minister Hoon (UK) briefed the Press that RCAs “would not be used by the United Kingdom in any military operations or on any battlefield” (27 Mar. 2003) at

[http://www.operations.mod.uk/telic/press\\_27march.htm](http://www.operations.mod.uk/telic/press_27march.htm). For a good general discussion of the issues surrounding use of RCA see Barbara H. Rosenberg, *Riot Control Agents and the Chemical Weapons Convention*, Open Forum on the Challenges to the Chemical Weapons Ban, 1 May 2003 available at <http://www.fas.org/bwc/papers/rca.pdf>



For both OEF and OIF, each coalition partner was subject to national ROE. These ROE were different than U.S. ROE (to varying extents) and reflected the individual law and policy of each coalition partner.<sup>32</sup> This raises interoperability issues when coalition partners operate in the same geographical area, and/or on the same mission as U.S. forces. One ground mission example concerns U.S. Special Forces, who possessed weapons that were not in the U.K. or Australian inventory, but were considered operationally significant for a mission during OIF. Accordingly, some individual U.S. Special Forces personnel were attached to U.K. and Australian teams to provide that particular capability.<sup>33</sup> Working this closely it was imperative that JAs, planning staff and commanders understood the differences between the various national ROE and the impact that these differences could have on the operation.

*a. Understand and Resolve ROE Classification Issues.*

One or more coalition partners may request a copy of the U.S. ROE. However, ROE classification precludes access without approval from higher authority, which in this case was CENTCOM.<sup>34</sup> Conversely, U.S. JAs may request a copy of a coalition partner's ROE but access may not be granted.

Where information sharing is permitted, early coalition access to U.S. ROE greatly improves interoperability. This is because independently drafted national ROE will contain not only differences resulting from different national law and policy, but also differences resulting from different drafting styles or circumstances. For example, identification criteria or the circumstances where deadly force may be employed may differ from the U.S. ROE, not from any disagreement with the U.S. perspective, but purely because the drafters chose different words. While the former differences cannot be avoided, the latter create extra (and often unnecessary) hurdles to interoperability.

This is illustrated by the contrasting experience of Australian forces in OEF and OIF. For both operations, Australia provided small numbers of specialist forces that

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<sup>32</sup> Coalition national ROE for OEF and OIF can be viewed on SIPRNET at <http://www.centcom.smil.mil>. This is in contrast to the situation in Kosovo, where common NATO ROE was used. *See* CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN KOSOVO, 1999-2001: LESSONS LEARNED FOR JUDGE ADVOCATES 127-35 (15 Dec. 2001). [hereinafter KOSOVO LESSONS LEARNED]

<sup>33</sup> Whitford E-mail, *supra* note 7.

<sup>34</sup> *See* MAJ Jeff Bovarnick, Chief, Operational Law, CJTF-180, CJTF-180 Notes from the Combat Zone, at 4 (2003) (on file with CLAMO).

[T]he vast majority of the coalition forces have not engaged in combat operations since WWII. In joining the Global War on Terrorism, they join the coalition ready to help capture and kill Al Qaeda and Taliban. Fighting alongside the United States, understandably they want to review the U.S. ROE. Because of the classification of the ROE, we cannot simply hand it over. On a nation by nation basis, CENTCOM will determine what nation we can release redacted versions of the ROE to, usually reserved for those nations performing large combat operations with the United States

operated closely with U.S. forces rather than in a separate AO.<sup>35</sup> For OEF, the short planning time frame resulted in no prior visibility of the U.S. ROE. Therefore, on arrival in theater, the Australian ROE was not consistent. The inconsistencies then became an additional issue requiring resolution during the operation. Australian attorneys described this as playing “catch up” and felt it impacted negatively on their operational ability.<sup>36</sup> In contrast, during the more deliberate planning for OIF, UK and Australian attorneys were invited to attend a number of CENTCOM sponsored ROE conferences.<sup>37</sup> The UK and Australia were then able to draft their ROE with knowledge of the likely U.S. ROE, ensuring that the ROE could be as consistent as possible, prior to the commencement of operations.

In some circumstances where access to U.S. ROE is not granted there may be other solutions. For example, in OEF the United States worked alongside Afghan forces trained by U.S. Special Forces. However, there was no permission to share U.S. ROE with Afghan forces. The solution was that U.S. forces assisted in the creation of Afghan ROE that was sufficiently similar to the U.S. ROE to allow participation in joint operations.<sup>38</sup>

***b. Review Coalition ROE for Differences That Affect Interoperability.***

*Lessons learned from recent multinational exercises and operations reflect significant differences in how various countries understand and view the application of military force through the ROE. These factors can severely limit or expand a Multinational Commander's ability to use a national contingent's capabilities.*

*The United States places an importance on the ROE that other nations may not share, attaches meaning to terms with which other nations' forces may not be familiar, and implements ROE within a context of doctrine that may differ markedly from that of other nations. When operating with forces from non-English-speaking countries, these differences will be accentuated.*<sup>39</sup>

While the precise ROE differences during OEF and OIF cannot be discussed at this security classification, the areas where differences occur are common to many

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<sup>35</sup> For details of the Australian contribution see Department of Defence website for OP Slipper (Afghanistan) at <http://www.defence.gov.au/opslipper/> (last visited 17 Mar. 2004) and OP Falconer (Iraq) at <http://www.defence.gov.au/opfalconer/default.htm> (last visited 17 Mar. 2004).

<sup>36</sup> Cronan interview, *supra* note 12.

<sup>37</sup> *Id.*

<sup>38</sup> E-mail from COL David L. Hayden, former Staff Judge Advocate, XVIIIth Airborne Corps, to SQNLDR Catherine M. Wallis, Royal Australian Air Force, Director, Coalition Legal Operations, Center for Law and Military Operations (5 Mar. 2004) (on file with CLAMO) [hereinafter Hayden E-mail]. The OEF ROE can be found in the CLAMO SIPRNET Database.

<sup>39</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS 8.4.2 (1 Mar. 2000) [hereinafter FM 27-100].

coalition operations. Two common points of difference are self-defense and use of force terminology.

Self-defense is subject to different national interpretations. For the United States:

A commander has the authority and obligation to use all necessary means available and to take all appropriate action to defend that commander's unit and other US forces in the vicinity from a hostile act or hostile intent. Force used should not exceed that which is necessary to decisively counter the hostile act or intent and ensure the continued safety of US forces or other persons and property they are ordered to protect. US forces may employ such force in self-defense only so long as the hostile force continues to present an imminent threat.<sup>40</sup>

But some States require specific ROE to authorize self-defense. Others believe that the right of self-defense is inherent but have different criteria for when the right is triggered.<sup>41</sup> Differences in interpretation may also arise in relation to the ability of commanders to limit soldiers acting in self-defense, the ability (or requirement) to fire warning shots and the ability to act in defense of coalition forces in the absence of specific ROE.<sup>42</sup> Unit self-defense rules in relation to protection of property may also differ.<sup>43</sup> Where self-defense is a primary basis for the use of force, it is important to avoid the assumption that the coalition partner has the same understanding of the term as

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<sup>40</sup> DOD DICTIONARY, *supra* note 3. Also see CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3121.01A, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES (15 Jan. 2000) [hereinafter SROE]

<sup>41</sup> For an example of the interoperability issues this may raise see KOSOVO LESSONS LEARNED, *supra* note 32 at 129-30 (concerning the French interpretation that only a hostile act (not hostile intent) may trigger self-defense).

<sup>42</sup> The precise self-defense rules of many States are classified. However, the range of responses considered to be self-defense can be explained in general terms through an example:

A man approaches a coalition position and fires at the position. Before any person returns fire, he lowers the weapon so that it points toward the ground and runs away. The man is not part of a declared hostile force and coalition forces must act in accordance with self-defense in responding to this situation.

Three different self-defense responses to this situation are:

- Shoot the man immediately – he continues to be a threat to life and may be killed in self-defense.
- Potentially shoot the man, but not immediately – he continues to be a threat to life but the soldier must use graduated force to remove the threat, such as calling him to stop and/or firing a warning shot, prior to making a decision to shoot.
- Cannot shoot the man – as the weapon is not pointing at any person he is no longer a threat to life and therefore cannot be killed in self-defense. He can, however, be arrested and if he becomes a threat to life in the course of the arrest he may be killed.

While U.S. Forces would adopt the first response, certain coalition forces would adopt one of the two other responses.

<sup>43</sup> For example, U.K. law does not permit the use of lethal force to defend property unless the situation is also life threatening.

U.S. forces. One solution is to discuss the mission in advance and clarify how each partner would respond to particular situations.<sup>44</sup>

The use of force terminology in the ROE may also be different. Each national ROE serial may use different terminology for the use of force such as hostile act, declared enemy, hostile intent, or likely and identifiable threat. This particular difference is more likely where there is no sharing of ROE information between coalition partners in the planning stage. For example, on OEF, the United States introduced the new term “likely and identifiable threat” in the ROE.<sup>45</sup> As this was a new term,<sup>46</sup> never seen previously by coalition partners, coalition partner OEF ROE did not contain this term. Where this type of difference occurs, each nation may have different requirements for the use of force on the same operation.

Further, use of force terms used in U.S. doctrine do not necessarily have the same meaning in the doctrine of the coalition partner. For example, the United States and the United Kingdom have different doctrine concerning “hostile intent.” U.S. doctrine defines hostile intent as:

The threat of imminent use of force by a foreign force or terrorist unit against the United States, U.S. forces, or other designated persons or property.<sup>47</sup>

According to U.S. doctrine, the use of lethal force is always authorized in response to a demonstration of hostile intent.<sup>48</sup> In contrast, U.K. doctrine describes hostile intent in the following terms:

The ROE profile must give guidance on events that can be interpreted as a demonstration of hostile intent. These may include: Detection of heavy jamming of communications emanating from hostile or potentially hostile territory. Units moving into weapon launch positions and preparing to fire, launch or release weapons against forces, shipping, aircraft or territory of

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<sup>44</sup> For example, COL Kathryn Stone, former SJA, 10th Mountain Division, related the following incident during OEF:

Once, the Brits came to me and outlined a plan for a hut-to-hut search for weapons in a particular village. We walked through the ROE – what they could and could not do – and they were satisfied.

Stone E-mail, *supra* note 11.

<sup>45</sup> The OEF ROE can be found in the CLAMO SIPRNET Database.

<sup>46</sup> See Lessons Learned: Rules of Engagement; Understand the Relationships Between New and Standing ROE Terms: Positive Identification (PID), Likely and Identifiable Threat (LIT), Hostile Act and Hostile Intent, and Declared Hostile Forces, *supra*.

<sup>47</sup> SROE, *supra* note 40.

<sup>48</sup> *Id.*

own or designated friendly nations. Repeated and extensive harassment of own or allied forces.<sup>49</sup>

Further, use of force in response to hostile intent is not automatically authorized, but must be specifically authorized in the ROE.<sup>50</sup> Thus, while the U.S. meaning of hostile intent is constant and use of force in response is always permitted, the U.K. meaning is mission specific and use of force in response must be specifically authorized. JAs must ensure that they understand the coalition partner's meaning of use of force terminology in advance of a mission.<sup>51</sup>

The key lesson is that it is important for the JA to identify ROE differences and assess the impact that they may have on a particular operation or mission.<sup>52</sup> MAJ Thomas Cluff USAF, former JA, Combat Plans Division, Combined Air Operations Center, described the role of USAF JAs in understanding and disseminating coalition ROE to US planning staff:<sup>53</sup>

The US JAGs assigned to combat plans and strat had a round table discussion early on with the UK and AUS JAGs concerning each country's ROE and approval authorities for the various types of targets. We also discussed UK and AUS political sensitivities, which helped us to better

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<sup>49</sup> United Kingdom Ministry of Defence, Joint Service Publication 398 app. A1 (partially classified document) [hereinafter UK JSP 398] (Unclassified portions of this document were supplied by a U.K. attorney to MAJ Michael L Roberts, US Army, Exchange Officer, The Defence Legal Service, Australia)  
<sup>50</sup> *Id.*

<sup>51</sup> See MAJ Michael L. Roberts, *A Call for Multinational ROE Doctrine*, unpublished manuscript, 16-18 (on file with CLAMO) (discussing the confusion that arises from a lack of standardization of ROE terminology).

<sup>52</sup> See, e.g., Interview with COL Kathryn Stone, former Staff Judge Advocate, 10th Mountain Division, in Charlottesville, Va. (7 Oct. 2003) (audiotape on file with CLAMO) [hereinafter Stone interview]. (you needed to be cognizant of coordinating and understanding the different ROE in effect for various units). A useful checklist for identifying issues concerning ROE is contained in America/Britain/Canada/Australia (ABCA), *Coalition Operations Handbook* 13-11, 1 Nov. 2001.

1. Are there generic ROE that all nations have agreed to?
2. What is the impact on each participating nation of the ROE?
3. How does each nation disseminate ROE to its soldiers?
4. Have the ROE been distributed to the soldiers and training conducted prior to deployment?
5. What are the key differences in ROE across the coalition?
6. Are there national "red cards" or points of contention concerning ROE that the commander must know?
7. Are there ROE on the use of indirect fire?
8. Is there a dichotomy between force ROE on the use of indirect fire and national force protection?
9. Does each nation have a common or clear understanding of the terms used in the ROE?
10. Has the use of certain systems or equipment – such as defoliants, riot control agents, land mines – been evaluated for its impact in relation to the ROE?

*Id.*

<sup>53</sup> Comments of MAJ Thomas J Cluff USAF, former JA, Combat Plans Division, Combined Air Operations Center in E-Mail from MAJ Philip Wold USAF, former Chief, Operations Law, 9 AF/ USCENTAF to SQNLDR Catherine Wallis, Royal Australian Air Force, Director, Coalition Legal Operations, Center for Law and Military Operations (12 Apr. 2004) (on file with CLAMO).

understand their ROEs. Of course, this also helped develop good working relationships b/f OIF began. Because of their small numbers, they were not as involved in combat plans as we were. We were able to use our knowledge of their ROE to spot/resolve/explain coalition unique targeting concerns to US planners.<sup>54</sup>

Further, identifying differences ensures that coalition partners are not placed in politically difficult situations.<sup>55</sup> Where there are multiple partners involved, this process can become complicated. During OIF, CJTF-7 maintained an ROE matrix for all countries in theater to assist in planning.<sup>56</sup>

Differences in ROE may also have positive consequences. For example, MAJ Whitford, Staff Judge Advocate, Joint Special Operations Task Force Dagger (OEF) and Staff Judge Advocate, Combined Joint Special Operations Task Force – West (OIF), reported in relation to working with U.S., U.K. and Australian Special Forces:

One thing to note is that this can be a strength of combined operations. Difference[s] between ROE permitted us to employ national forces where the use of another national force might raise issues. There were situations where U.S. ROE was more constrained or was not as clear on a particular point and where a coalition force clearly could execute the mission or take a particular action. The other helpful thing to watch for is expansive coalition ROE that include detailed guidance on the law of war as applied to the particular operation, something U.S. ROE does not include. These applications can be extremely helpful in analyzing particular situations as they arise.<sup>57</sup>

#### ***4. Be Aware of the Potential Impact of Different National Approaches to Targeting.***

*We need to understand going in the limitations that our coalition partners will place upon themselves and upon us. There are nations that will not attack targets that my nation will attack. There are nations that do not share with us a definition of what is a valid military target, and we need to know that up front.*<sup>58</sup>

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<sup>54</sup> *Id.*

<sup>55</sup> This consideration did affect OEF planning and operations: Hayden E-mail, *supra* note 38.

<sup>56</sup> MAJ Patricio Tafoya U.S.M.C. Judge Advocate CJTF 7, Notes from III Corps Pre-deployment Conference, (12-14 Nov. 2003) (on file with CLAMO). MAJ Dean Whitford reported that he “had copies of all three ROE side by side in a six-sided binder at my desk at all times, and did a read-through of each with coalition members of the command.”: Whitford E-mail, *supra* note 7.

<sup>57</sup> *Id.*

<sup>58</sup> Lieutenant General Michael Short USAF, Commander of Allied Air Forces, Southern Europe, quoted in Amnesty International, NATO/FRY, “Collateral Damage” or Unlawful Killings? Violations of the Laws of War by NATO During Operation Allied Force, AI Index: EUR 70/18/00 (June 2000), available at <http://www.web.amnesty.org/ai.nsf/index/EUR700182000> [hereinafter Amnesty report].

Each coalition partner is likely to have different targeting rules as a result of differences in law and policy. Due to security classification these differences may only be discussed in general terms, however, as with ROE, the important lesson is to be aware of where differences may occur and the potential impact on U.S. operations.

Commonly, there will be differences in the national assessments of particular targets. One method of characterizing these differences is by source: intelligence, law or policy.

#### *a. Intelligence*

Each coalition partner will apply his own intelligence information to a potential target. Different intelligence assessments will affect the permissibility of a target as this assessment forms the factual basis to which the law and policy are applied. For example, whether a particular building is or is not an ammunition factory, or the particular role of an individual in the enemy regime. Intelligence differences are particularly a factor in assessing Time Sensitive Targets (TSTs).<sup>59</sup> Intelligence differences can be reduced through information sharing, but this is often not permissible due to classification.

#### *b. Law*

Differences may occur due to differing treaty obligations, or due to different interpretations of the obligations contained in those treaties. For example, even among signatories to GP1<sup>60</sup> there are differences of opinion concerning the definition of a military objective in Art. 52(2) GP1.<sup>61</sup>

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<sup>59</sup> A Time Sensitive Target (TST) is a target requiring immediate response because it poses (or will soon pose) a danger to friendly forces or is a highly lucrative, fleeting target of opportunity: DOD DICTIONARY *supra* note 3. In Iraq, some TST U.S. targeting decisions were made alone, with coalition partners only being able to check a GO/NO GO box without being privy to some of the information in the U.S. decision matrix. Where coalition forces are involved in a shooting or supporting role, sharing targeting information fully may result in more GO than NO GO boxes: E-mail from SGNLDR Patrick Keane, Royal Australian Air Force, former Legal Officer, Combined Air Operation Center to SGNLDR Catherine Wallis, Royal Australian Air Force, Director, Coalition Legal Operations, Center for Law and Military Operations (18 Feb. 2004) (on file with CLAMO) Note however, that there is no operational impact where the boxes are being used solely to deconflict friendly coalition forces.

<sup>60</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 U.N.T.S. 48, [hereinafter GP1]. Although the United States is not a Party to the 1977 Protocol I Additional to the Geneva Conventions, it is bound by this article to the extent that it codifies customary law.

<sup>61</sup> Article 52(2) provides, in part,

Military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers definite military advantage.

*Id.* States may come to different conclusions regarding whether certain objects are military objectives. Objects that are commonly disputed include television and radio stations. See KOSOVO LESSONS LEARNED *supra* note 32 at 51-53. See further Theodore Meron, *The Humanization of International Law*, 94 AM. J. INT'L L. 239, 276-77 (2000).

*c. Policy*

Some targets may not be politically acceptable to some coalition partners despite their permissibility under international law. These may either be prohibited outright or require national government approval before engagement.<sup>62</sup>

As a result of the interaction of the above factors some targets were permissible for some coalition partners and not permissible for others. The type of targets in OIF that were particularly susceptible to variations in national viewpoint were symbols of the regime such as royal palaces and statues of Saddam Hussein,<sup>63</sup> communications facilities such as television and radio stations,<sup>64</sup> and civilian (non-uniformed) officials of the Iraqi regime.<sup>65</sup>

For JAs involved in targeting it is important to be aware of the impermissible and problematic target types for each coalition partner and the way in which this may impact on a particular mission.<sup>66</sup> Recognize that an impermissible target influences not only a coalition partner's ability to deliver a weapon onto that target but may also affect the level of permissible support that may be given to U.S. engagement of the target. For example, if the target is impermissible then that coalition partner may also be prohibited

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<sup>62</sup> The Australian targeting requirements are a good illustration of this point.

Australia received targets on the U.S.-developed strike lists but assessed them according to Australia's own legal obligations. Several target categories were subject to Australian ministerial approval before they could be engaged.

Department of Defence (Australia) THE WAR IN IRAQ: ADF OPERATIONS IN THE MIDDLE EAST 2003 13 (23 Feb. 2004) at <http://www.defence.gov.au/publications/lessons.pdf>

<sup>63</sup> Widely reported as destroyed for psychological affect. *E.g.* BBC News, *UK force 'destroy' Saddam statues*, (29 Mar. 2003) at <http://www.drumbeat.mlaterz.net/March%202003/UK%20forces%20'destroy'%20Saddam%20statues%20032903a.htm>

<sup>64</sup> See discussion Anthony Dworkin, *Iraqi Television: A Legitimate Target?* Crimes of War Project (27 Mar. 2003) at <http://www.crimesofwar.org/special/Iraq/brief-tv.html>

<sup>65</sup> For example, the non-uniformed regime officials who appeared on the "Personality Identification Playing Cards" at <http://www.defenselink.mil/news/Apr2003/pipc10042003.html> (last visited 16 Mar. 2004). The United States announced that these 55 individuals could be "pursued, killed or captured": Brig Gen Brooks, as reported in Associated Press, *U.S. Distributes Most Wanted List* (11 Apr. 2003) at <http://www.foxnews.com/story/0,2933,83894,00.html>

<sup>66</sup> An example of the way in which targeting was approached for a ground mission during OEF was provided by COL Kathryn Stone, former SJA 10<sup>th</sup> Mountain Division, and illustrates both the need for consultation and the role played by national assessments of intelligence and policy.

the Brits wanted to lay aerial fire on a particular hilltop. Again, they walked me through their intelligence and plan, and I opined no legal objection. At first, I had said no, because we were not sure about what was around that hilltop (concern over collateral damage). But, once we realized the grid location was the same (i.e., we had already done our homework, and realized this was not a new site), we approved the targeting.

Stone E-mail, *supra* note 11.



from refueling strike aircraft, providing airborne early warning and control or participating in the planning for that particular mission. Where U.S. forces are reliant on these services from a coalition partner, it is imperative that “workarounds” are established early so as to preclude mission interference. These may include exclusion from missions involving certain target types, establishing alternative target approval chains to avoid placing staff officers in potentially awkward positions, or simply briefing U.S. plans staff in advance of any potential difficulties or sensitivities.

### ***5. Coalition Arrangements for Detainees Must Be Finalized Early.***

In both OEF and OIF, two coalition partners, the UK and Australia, were very concerned with arrangements for the handling of detained persons in a coalition environment.<sup>67</sup> For both operations, there were sound practical reasons for not operating separate national facilities. However, in operating coalition facilities or assigning detainee responsibility to only one partner, there were a number of issues that needed to be addressed.

First, there were different national interpretations of determining enemy prisoner of war (EPW) status and for the procedures involved. The issue did not concern *treatment*, as all coalition partners agreed that the detainees were to be *treated* as EPWs. Status was more problematic. Due to the nature of OEF, detained persons included Taliban, Al Qaeda and foreigners supporting the Taliban. National interpretations potentially differed both on whether a particular category of person, such as a Taliban soldier, was an EPW, and also as to when an Art. 5 Tribunal was required.<sup>68</sup> The UK withheld its position from the public due to security classification, but expressed the view that it was for each State to make its own determination as to status.<sup>69</sup>

Secondly, the UK in particular needed to address its human rights obligations, especially with regard to the death penalty. These obligations arise under European

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<sup>67</sup> See Interview with COL David L. Hayden, Staff Judge Advocate, XVIIIth Airborne Corps, in Charlottesville, Va., at 2 (7 Oct. 2003) [hereinafter Hayden Interview] (notes on file with CLAMO).

<sup>68</sup> For detail of the U.S. position see International Law Lesson: Detainee operations, *infra*

<sup>69</sup> Mr Hoon, Secretary of State for Defence (UK) in the House of Commons (12 Feb. 2002):

**Ann Clwyd:** To ask the Secretary of State for Defence, .....if he will specify the appropriate guidance to the UK forces operating in Afghanistan to ensure compliance with the UK's international legal obligations; and if prisoners captured in Afghanistan by UK forces will be accorded prisoner of war status under the Geneva Convention.

**Mr. Hoon:** I am withholding the specific details of the guidance referred to, in accordance with Exemption (1a) of the Code of Practice on Access to Government Information. Whether any detainee is a prisoner of war depends on the facts of each individual case. It is for the Detaining Power in the first instance to take a view.

at

[http://www.publications.parliament.uk/pa/cm200102/cmhansrd/vo020212/text/20212w09.htm#column\\_17](http://www.publications.parliament.uk/pa/cm200102/cmhansrd/vo020212/text/20212w09.htm#column_17)

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human rights law and domestic legislation, which places prohibitions on transferring persons to a jurisdiction where they may be subject to the death penalty.<sup>70</sup>

Finally, a State that captures an EPW retains responsibility for that EPW under GPW and the capturing State must have a method of tracking all detainees (as potential EPW), even if they are transferred to a coalition partner facility.<sup>71</sup>

During OEF there were early negotiations with the UK and Australia concerning detainees. No State, other than the United States, had adequate facilities to handle detainees. The OEF solution was that the United States would take detainees into U.S. custody, even if detention occurred during a multinational mission, but, in principle, the United States would not take detainees seized during a unilateral (no U.S. participation)

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<sup>70</sup> Relevant treaties, legislation and case law include: Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty CETS No.114 (28 Apr. 1983), Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty in all Circumstances CETS No.187 (3 May 2002), Art IV Extradition Treaty (UK-U.S.), Human Rights Act 1998 (UK), *Soering v UK* (1989) EHRR 439 (finding that, where the death penalty was likely to be imposed, extradition to the United States was a likely breach of the European Convention on Human Rights). COL Stone, 10<sup>th</sup> Mountain Division SJA, indicated that this was an important consideration in her area during OEF.

Because the United States had set up GTMO and the potential for Tribunals, with the possibility of the death penalty, the UK Commander was worried that if his troops picked up detainees, his Government would not permit him to turn them over to U.S., even if the detainee was Osama bin Laden himself.

Stone E-mail, *supra* note 11.

<sup>71</sup> Art 12:

Prisoners of War may only be transferred by the Detaining Power to a Power which is party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody. Nevertheless, if that Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with.

There was also a question, which remains unresolved, regarding the legal obligations of a State that transports EPWs on behalf of another State. Under GPW, obligations are placed on Detaining Powers and Accepting Powers. It is not clear whether a coalition partner who merely transports an EPW on behalf of the Detaining Power is an agent of the Detaining Power or becomes obligated under GPW as an Accepting Power for the period of transportation: *See* E-mail from SGNLDR Belinda Crooks-Burns, Royal Australian Air Force, former Legal Officer 86WG to SGNLDR Catherine Wallis, Royal Australian Air Force, Director, Coalition Legal Operations, Center for Law and Military Operations (9 Mar. 2004) (on file with CLAMO). Other detainee issues that arose in the coalition context and merit further research include procedures for the investigation of the death of an EPW under circumstances where the cause of death is unknown or cannot be determined, what special conditions of combat prevent taking of prisoners of war and the treatment of surrendered places or forces under local cease-fire agreements or articles of capitulation: Whitford E-mail, *supra* note 7.

mission. The U.K. made plans to take their detainees home if necessary, but that eventuality never occurred.<sup>72</sup>

However, there remained difficulties associated with information and handling when detainees were captured on multinational missions. MAJ Lancaster, former Chief, Operational Law, 101<sup>st</sup> Airborne Division, reported:

One problem there never was a good solution for was the issue of providing information on detainees captured in operations with coalition participation. When coalition forces were part of an operation that resulted in the capture of detainees, they sometimes expressed a need for information on those detainees, however once the detainees were inside the STHF [short term handling facility], almost no information was permitted to be shared. This also greatly hampered intelligence gathering, as members of the capturing units were never allowed inside the STHF, and the MI personnel that handled most interrogations rarely left their JIF.<sup>73</sup>

For OIF, the United States, UK, and Australia negotiated a trilateral arrangement establishing procedures for the transfer of EPWs, civilian internees, and civilian detainees.<sup>74</sup> Key aspects of the arrangement included:

- the ability to transfer these persons as mutually determined;
- a requirement for the accepting power to return the person to the detaining power on request;
- release or removal outside Iraq solely by mutual agreement;
- full rights of access by the detaining power, while the person is in the custody of the accepting power;
- sole responsible of the detaining power for classification of potential EPWs;
- primary jurisdiction of the detaining power over pre-capture offences but with favorable consideration to a request by the accepting power to waive jurisdiction; and
- costs met by the detaining power.

This was a workable solution that addressed the three major issues and may provide a model for future operations. The lesson for JAs is to recognize that the detainee issue is of particular importance to a number of our regular coalition partners. Therefore, detainee-handling arrangements need to be finalized as early as possible in an operation.

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<sup>72</sup> Hayden interview, *supra* note 67; Hayden E-mail, *supra* note 38.

<sup>73</sup> Lancaster AAR, *supra* note 10.

<sup>74</sup> AN ARRANGEMENT FOR THE TRANSFER OF PRISONERS OF WAR, CIVILIAN INTERNEES, AND CIVILIAN DETAINEES BETWEEN THE FORCES OF THE UNITED STATES OF AMERICA, THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, AND AUSTRALIA (23 Mar. 2003) (on file with CLAMO).

## **6. *Develop a Plan to Coordinate Investigations.***

During OEF and OIF JAs were required to conduct, or provide advice on, a range of investigations, including accident investigations<sup>75</sup> and war crimes investigations.<sup>76</sup> When working in a coalition, incidents that give rise to investigations may involve members of more than one coalition partner. For example, the accidental bombing in April 2002 of a Canadian unit by a U.S. F-16 in Afghanistan and the 23 March 2003 shoot down of a U.K. warplane by a U.S. Patriot missile battery near the Iraq–Kuwait border.<sup>77</sup>

Each coalition partner will have their own national requirements for investigations and for this reason it may not be possible for all partners to adopt the same policy. A V Corps JA described the impact of these differences.<sup>78</sup>

What should and should not be reported through legal channels and command channels was a constant source of tension. While this issue remains unresolved I feel it is important that JAs discuss what incidents each coalition partner will investigate and what information will be released. For example blue on blue incidents, check point shootings, and engagement of apparently unarmed civilians, were all issues that coalition partners each had distinctly different approaches to the identification, investigations, and release of information. Coalition partners felt no obligation to follow CJTF7 SOP absent some affirmative agreement from their national element.<sup>79</sup>

While there is no simple solution, the lesson suggested is that early discussion of procedures for handling incidents may minimize the impact of national policy differences on the operation.<sup>80</sup>

## **7. *Understand the Limitations on Coalition Exchange Personnel in U.S. Units.***

The United States has a number of permanent exchange positions with other States. When a U.S. unit deploys, those foreign exchange personnel may also deploy with the U.S. force. These foreign personnel may or may not come from States who are members of the coalition. Conversely, U.S. personnel on exchange with coalition

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<sup>75</sup> See Administrative Law lesson, Plan to Provide Proactive Advice and Assistance to Commanders and Investigating Officers on a Large Number of Accident Investigations, including Friendly Fire Incidents, *infra*.

<sup>76</sup> See International Law Lesson, Anticipate a Requirement for War Crimes Investigation, *supra*.

<sup>77</sup> See Michael Moran, “*Friendly Fire*” Is All Too Common: British Know Better Than Most the Dangers of Teaming With U.S. Military, MSNBC, (Mar. 23, 2003) at <http://msnbc.msn.com/id/3340194>

<sup>78</sup> E-mail from LTC Jonathan Kent, Chief, Administrative and Civil law, V Corps to SQNLDR Catherine M. Wallis, Royal Australian Air Force, Director, Coalition Legal Operations, Center for Law and Military Operations (6 Apr. 2004) (on file with CLAMO).

<sup>79</sup> *Id.*

<sup>80</sup> See Wold E-mail, *supra* note 7 (reporting that “not discussing how these types of incidents will be handled beforehand just makes the job tougher later on.”)

partners may deploy to the AO as part of their exchange country force. This occurred during both OEF and OIF.

One issue that may not be readily apparent to commanders is that these exchange personnel must comply with their own domestic law while they are on operations. Accordingly, problems may arise if an exchange officer has domestic law that is more restrictive than the exchange nation law. For example, issues may arise for coalition personnel serving with U.S. forces in the areas of use of APL, use of RCAs, use of lethal force or pursuit across international borders. Conditions may be placed on the activities of these personnel by their government.<sup>81</sup> For example, an Australian soldier on exchange with a U.S. unit would not be permitted to use APL, and may have needed to be excluded from a particular mission that involved APL use.

It is important that commanders are advised of the limitations of their exchange personnel from the outset in order to ensure that this issue does not derogate from the success of the operation.

#### ***8. Liaise with Coalition Partners to Reduce the Impact of Differing Standards of Behavior.***

During both OEF and OIF, some coalition elements were situated on U.S. controlled bases. For example, at Bagram Air Force Base, the U.S. Base Commander had coordinating authority over the location of coalition forces on the base, as well as their conduct and security.<sup>82</sup> These coalition elements will need to be able to access orders and publications that apply to them as “tenants.” This may be coordinated through the respective national attorneys.

Coalition partners are responsible for the discipline of their own force. Operating in close proximity to coalition partners exacerbates issues arising from the different policy approaches of each nation. While U.S. forces are generally subject to overarching orders detailing minimum standards of behavior, such as CENTCOM General Order No. 1a, coalition partners may not necessarily issue such orders or may issue orders that are more or less strict.<sup>83</sup>

For example, U.S. forces in both OEF and OIF were subject to CENTCOM General Order No. 1a, which prohibits several forms of conduct including the consumption of alcohol in some countries. However, some coalition partners faced no such restriction. During OEF, soldiers were tempted to drink alcohol around coalition

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<sup>81</sup> An example of these restrictions (classified SECRET) is held on file with CLAMO. *See also* Comments by GEN Peter Cosgrove, Chief of Defence Force (Australia), as reported in Cynthia Banham, *We learnt our lesson in Iraq, says ADF*, THE SYDNEY MORNING HERALD (24 Feb. 2004) at <http://www.smh.com.au/articles/2004/02/23/1077497517476.html> (Australian personnel on exchange with the U.S. or UK forces needed to abide by Australian rules: “we just needed to ensure that our officers - working very usefully with coalition forces - knew what the differences were, conveyed those to their superiors, and that that was factored into their tasking.”)

<sup>82</sup> Hayden E-mail, *supra* note 38.

<sup>83</sup> *See further* USAF OPLAW, *supra* note 8 at 346.

forces, and this became a growing discipline problem in some areas.<sup>84</sup> Also reported was dissatisfaction amongst CENTCOM forces, which were subject to restrictions on the purchase of antique firearms and other weapons and souvenirs,<sup>85</sup> while coalition forces on the same base were not.<sup>86</sup> In contrast, one JA reported that the coalition forces in his area had quite a harsh approach to motor vehicle accidents, resulting in more severe action against the individual than the United States would have taken in similar circumstances.<sup>87</sup>

While the United States cannot impose its standards on coalition forces, liaison on these issues is appropriate as behavioral standards may affect internal discipline or the coalition relationship with the local population. Local coalition commanders may well be sympathetic to these issues and ensure consistent standards are applied.<sup>88</sup>

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<sup>84</sup> Hayden E-mail, *supra* note 38.

<sup>85</sup> See Administrative law lesson, Ensure there is a clear and unambiguous policy on retaining individual war trophies and that service members understand that policy, *infra*.

<sup>86</sup> Stone E-mail, *supra* note 11.

<sup>87</sup> Hayden E-mail, *supra* note 38.

<sup>88</sup> See Kalnins E-mail, *supra* note 13 (reporting that the coalition attorneys met weekly to discuss camp management of common issues including alcohol and other disciplinary matters).

#### D. INFORMATION OPERATIONS, PUBLIC AFFAIRS, AND CIVIL AFFAIRS

*“Information operations” are actions taken to affect adversary information and information systems, while defending one’s own information and information systems. . . . IO are conducted through the integration of many capabilities and related activities. . . . IO-related activities include . . . public affairs (PA) and civil affairs (CA) activities.<sup>1</sup>*

*IO may involve complex legal and policy issues . . . [and] IO planners must understand the different legal limitations that may be placed on IO across the range of military operations.<sup>2</sup>*

In both Operation ENDURING FREEDOM (OEF) and Operation IRAQI FREEDOM (OIF) legal personnel provided advice and assistance to those military personnel charged with attaining information superiority for coalition forces. Judge advocates (JAs) were members of information operations (IO) cells, providing key advice to a sophisticated IO planning process. This process, known as “effects-based planning,” combined the traditional lethal targeting process with that of IO planning to produce a desired effect on a target. In addition to IO planning, legal teams assisted embedded media and helped civil affairs (CA) personnel liaison with the local population and the many international organizations and nongovernmental organizations (NGOs) that operated in both Afghanistan and Iraq. Legal personnel learned many lessons from their work in assisting commanders to gain information superiority.

##### ***1. Be Prepared to Provide Legal Advice During Information Operations Planning and to Understand How Judge Advocate Missions Contribute to Information Operations.***

War planners in both OEF and OIF used IO in a multitude of ways to enable military operations.<sup>3</sup> JAs at all levels of command often played an important role in IO planning, advising commanders and their staffs on the legal issues associated with IO. As JAs quickly discovered, campaigns that give primacy to IO are legally intensive.<sup>4</sup>

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<sup>1</sup> JOINT CHIEFS OF STAFF, JOINT PUB. 3-13, JOINT DOCTRINE FOR INFORMATION OPERATIONS para. I-3g (9 Oct. 1998) [hereinafter JOINT PUB. 3-13].

<sup>2</sup> *Id.* para. I-1a.

<sup>3</sup> For joint doctrine on IO, *see id.* *See also* U.S. DEP’T OF ARMY, FIELD MANUAL 3-13, INFORMATION OPERATIONS: DOCTRINE, TACTICS, TECHNIQUES, AND PROCEDURES (28 Nov. 2003) (describing Army IO doctrine) [hereinafter FM 3-13]; U.S. DEP’T OF NAVY, 3-40.4, MARINE AIR-GROUND TASK FORCE INFORMATION OPERATIONS [hereinafter MCWP 3-40.4].

<sup>4</sup> *See, e.g.*, Office of the Staff Judge Advocate, 82d Airborne Division, Operation Iraqi Freedom (OIF), After Action Report (AAR), at 2 (copy on file with CLAMO) [hereinafter 82d Airborne OIF AAR] (“Legal review was required of numerous information operations products, dissemination methodology, and miscellaneous initiatives.”); Transcript of After Action Review Conference, Office of the Staff Judge Advocate, Task Force Tarawa, and the Center for Law and Military Operations, Camp Lejeune, N.C., at 14 (2-3 Oct. 2003) [hereinafter TF Tarawa AAR Transcript] (providing that the JA played an important role in planning a US Marine Corps unit’s use of IO to remove an Islamic fundamentalist who had declared himself governor of a province in Iraq).

Army doctrine provides that IO is part of the Judge Advocate General's Corps (JAGC) Operational Law support to commanders.<sup>5</sup> In the Marine Corps, the JA is not listed as a formal member of any Marine doctrinal IO staff, but can be included in IO planning if invited by the IO Officer to provide expert advice and opinions.<sup>6</sup> During both operations, JAs assigned to the brigade operational law team (BOLT) provided IO advice to the maneuver brigades. Operational law attorneys generally provided support to IO cells and IO working groups (IOWGs) at division level and above. At those echelons, staff judge advocates (SJAs) should consider assigning a separate JA to the IO cell, because meetings may be conducted simultaneously with other G-3 meetings that an operational law attorney must attend, such as targeting meetings.<sup>7</sup> The V Corps SJA, for example, assigned a separate JA to the V Corps IO Cell.

In order for the IO cell to efficiently sustain offensive and defensive IO during hostilities and follow-on operations, an SJA with operational law knowledge must be readily available to answer over-the-shoulder questions and to be tasked to produce IO products that are legal in nature. The IO cell operates continuously and plans at high-velocity during hostilities and follow-on operations, and the need for legal advice is likewise continuous and required rapid response. Being embedded in the IO cell allows the SJA IO representative to focus on IO legal questions and products.<sup>8</sup>

In Afghanistan and Iraq, JAs also provided legal advice to psychological operations (PSYOP) teams, public affairs (PA) officers, and CA personnel as part of IO planning. To do so, they had to understand both the legal issues involved and the IO planning process. In addition, legal teams recognized how their own missions contributed to the IO campaign and included them in the IO planning cycle.

***a. To Participate in Information Operations Planning, Understand the Information Operations Planning Methodology, including the Military Decision Making Process and the Targeting Process.***

Similar to other mission planning, IO planners used the military decision-making process (MDMP) to plan and synchronize IO.<sup>9</sup> Consequently, JAs had to be thoroughly familiar with the MDMP to effectively participate in the IO cells and working groups.<sup>10</sup>

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<sup>5</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS paras. 2.4(a) and 3.2 (1 Mar. 2000).

<sup>6</sup> MCWP 3-40.4, *supra* note 3, para. A-3. See also Major Thomas A. Wagoner, *Marine Information Operations in the Peacekeeping Realm*, at 16 (2004) (unpublished) (on file with CLAMO) [hereinafter *Marine Information Operations in the Peacekeeping Realm*].

<sup>7</sup> See generally *id.* para. 5.5.4.

<sup>8</sup> Memorandum, Captain Noah V. Malgeri, Current Operations Cell, Office of the Staff Judge Advocate, V Corps, for COL Marc Warren, Staff Judge Advocate, V Corps, para. 6 (15 May 2004) (comments from Captain Arby Nelson, OSJA, V Corps representative to the V Corps IO Cell) (on file with CLAMO).

<sup>9</sup> See JOINT PUB. 3-13, *supra* note 1, ch. V (providing joint doctrine on the IO planning process). See also FM 3-13, *supra* note 2, ch. 5 (outlining the Army's MDMP for IO planning); MARINE CORPS WARFIGHTING PUBLICATION 5-1, MARINE CORPS PLANNING PROCESS (5 Jan. 2001) (C1, 24 Sept. 2001).

<sup>10</sup> Commanders use the IO mission statement, IO concept of support, IO objectives, and IO tasks to describe and direct IO. The IO mission statement is a short paragraph or sentence describing what the commander wants IO to accomplish and its purpose; the concept of support is a statement of where, when, and how the commander intends



In addition, units in both OIF and OEF generally used effects-based planning, synchronizing lethal and nonlethal fires, which included offensive IO effects.<sup>11</sup> These effects-based planning meetings used the doctrinal targeting process of decide, detect, deliver, and assess (D3A).<sup>12</sup> Therefore, JAs also needed to be familiar with doctrine on the targeting process to effectively participate in IO planning.<sup>13</sup>

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to focus the IO element of combat power to accomplish the mission; the objectives are defined and obtainable aims that the commander intends to achieve using IO; and the IO tasks are developed to support accomplishment of one or more objectives. See FM 3-13, *supra* note 2, paras. 5-1 to 5-8. Using the MDMP process, the IO cell conducts mission analysis to define the tactical problem and determine feasible solutions. During mission analysis the staff: analyzes the higher headquarters order; conducts the intelligence preparation of the battlefield; determines specified, implied, and essential tasks; reviews available assets; determines constraints; identifies critical facts and assumptions; conducts a risk assessment; determines initial commander's critical information requirements; determines the initial Intelligence, Surveillance, and Reconnaissance (ISR) annex; plans use of available time; writes the restated mission; conducts a mission analysis briefing; approves the restated mission; develops the initial commander's intent; issues the commander's guidance and warning order (WARNO); and reviews facts and assumptions. *Id.* para. 5-31. After the mission analysis briefing, the staff develops courses of action (COAs) for analysis and comparison based on the restated mission, commander's intent, and planning guidance. During COA, the G-7 develops or refines the following IO products to support each COA: IO concept of support; IO objectives; IO tasks to support each IO objective; IO input work sheets; IO synchronization matrix; IO-related target nominations; and the critical asset list. The staff then conducts a COA analysis (war-gaming) comparison. The staff then makes a recommendation to the commander in a COA decision briefing. The IO concept of support for the approved COA becomes the IO concept of support for the operation. The G-3 then issues a warning order (WARNO), which contains the IO contributions to the commander's intent and concept of operations; IO tasks requiring early initiation; and a summary of the IO concept of support and IO objectives. Finally, the staff refines the approved COA and issues an operations order or operations plan (OPORD/OPLAN). See generally *id.* paras. 5-12 to 5-130. Joint doctrine on the IO planning process is similar to the above-described Army process. See JOINT PUB. 3-13, *supra* note 1, ch. V.

<sup>11</sup> According to joint doctrine, a principle of targeting is that it is "effects-based."

In achieving the [Joint Forces Commander's] objectives, targeting is concerned with producing specific effects. Targeting analysis considers all possible means to achieve desired effects, drawing from any available forces, weapons, and platforms. The art of targeting seeks to achieve desired effects with the least risk, time, and expenditure of resources.

JOINT CHIEFS OF STAFF, JOINT PUB. 3-60, JOINT DOCTRINE FOR TARGETING para. I-4 (17 Jan. 2002) [hereinafter JOINT PUB. 3-60]. See also U.S. DEP'T OF ARMY, FIELD MANUAL 6-0, MISSION COMMAND: COMMAND AND CONTROL OF ARMY FORCES para. 6-105 (11 Aug. 2003).

<sup>12</sup> In the decide phase, the targeting team addresses targeting priorities and briefs high pay-off target lists, the intelligence collection plan, target selection standards, and the attack guidance matrix to the commander for decision. In the detect phase, the targeting team develops the information needs for target detection. These needs are expressed as priority intelligence requirements (PIR) and intelligence requirements (IR). Targets and suspected targets are then passed to the targeting team by a number of means, to include intelligence from subordinate units, the IOWG, etc. The deliver function of the targeting process then executes the target attack guidance and supports the commander's battle plan once the high pay-off targets have been located and identified. Tactical decisions that must be made in this phase include when to attack, the desired effect, degree of damage, or both, and the attack system to be used. Based on these decisions, a unit is then assigned to conduct the attack. Finally, to complete the targeting cycle, a combat assessment is made of the executed mission, to include a battle damage assessment, munitions effect assessment, and a reattack recommendation (if any). See JOINT PUB. 3-60, *supra* note \_\_\_\_, para. C-2; U.S. DEP'T OF ARMY, FIELD MANUAL 6-20-10, THE TARGETING PROCESS ch. 2 (8 May 1996) (also referred to as MARINE CORPS REFERENCE PUBLICATION 3-1.6.14, THE TARGETING PROCESS (8 May 1996).

<sup>13</sup> The I Marine Expeditionary Force Deputy IO Chief also advocated modifying their Targeting Board into an information effects board, in particular when hostilities ceased and the units move into a permissive area, see Lessons Learned (By Phase), OEF/OIF, Deputy IO Chief, I Marine Expeditionary Force, at 13 (12 May 2003) (on file with CLAMO) [hereinafter I MEF IO Lessons Learned].

During OIF, the distinction between lethal (sometimes called “kinetic”) and non-lethal (“non-kinetic”) strikes featured prominently. During the war, a JA participated in the Coalition Forces Land Component Command (CFLCC)<sup>14</sup> effects board that met daily to plan and coordinate the IO campaign.<sup>15</sup> At these meetings, IO objectives were nominated for targeting. The coalition, for instance, targeted for destruction those radio and TV stations that were playing anti-coalition messages.<sup>16</sup> Similar to other nominated targets, the JA had to analyze whether these stations were lawful targets under the Law of Armed Conflict (LOAC).

The lesson is that to be effective participants in IO planning and execution, JAs must understand their service’s planning process. Moreover, JAs must be integrated into effects-based planning to ensure nominated targets are fully analyzed under the LOAC.

***b. Be Prepared to Provide Legal Advice to Information Operations Cells.***

As recognized in joint doctrine, IO may involve complex *legal* issues. Therefore, joint doctrine requires that all IO planners consider the following broad areas.

(1) Domestic and international criminal and civil laws affecting national security, privacy, and information exchange. (2) International treaties and agreements and customary international law, as applied to IO. (3) Structure and relationships among US intelligence organizations and general interagency relationships, including nongovernmental organizations.<sup>17</sup>

In addition, specific legal issues often include: a law of war analysis of the intended wartime targets; special protection for international civil aviation, international banking, and cultural or historical property; and actions expressly prohibited by international law or convention.<sup>18</sup>

Because of these legal considerations, JAs were integral to IO planning and execution during both Operations.<sup>19</sup> For example, as described in subsection a, above, JAs provided LOAC

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<sup>14</sup> For a discussion of the CFLCC and the OIF command structure, see *supra* Section II.

<sup>15</sup> Interview with Colonel Richard E. Gordon, Staff Judge Advocate, Coalition Forces Land Component Command, in Charlottesville, Va. (25 Feb. 2004) (on file with CLAMO) [hereinafter Gordon Interview].

<sup>16</sup> 3d Infantry Division (Mechanized), After Action Report, Operation IRAQI FREEDOM, at 269 (2003) (on file with CLAMO) [hereinafter 3ID AAR].

<sup>17</sup> JOINT PUB. 3-13, *supra* note 1, para. I-1.

<sup>18</sup> *Id.* para. I-4a. The Army JA’s IO-related responsibilities also include: advising the G-7 (assistant chief of staff, information operations) on the legality of IO actions being considered during planning; reviewing IO plans, policies, directives, and ROE issued by the command to ensure their consistency with U.S. DEP’T OF DEFENSE, DIRECTIVE 5100.77, DOD LAW OF WAR PROGRAM (9 Dec. 1998) [hereinafter DoD Dir. 5100.77] and the law of war; ensuring that IO law of war training and dissemination programs are consistent with DOD Directive 5100.77 and the law of war obligations of the US; and advising the deception working group on the legality of military deception operations and the possible implications of treaty obligations and international agreements on it. FM 3-13, *supra* note 2, para. F-32.

<sup>19</sup> To provide legal advice to IO planners, JAs should review Chapter 19, Information Operations, in the Operational Law Handbook for a summary of the specific *legal* aspects of IO. That Chapter summarizes the applicable laws relating to IO and is an excellent starting point for researching legal issues. It contains an explanation of the

advice when IO planners proposed targeting enemy radio and television stations. Moreover, JAs analyzed proposed IO targets under the rules of engagement (ROE). For instance, prior to the start of the ground war in Iraq, the coalition could not target certain communication nodes because they were operating under the ROE for Operation SOUTHERN WATCH.<sup>20</sup> It wasn't until the transition to OIF ROE that these assets could be targeted.<sup>21</sup> In addition, key representatives in the IO process that JAs often advised during operations in both Iraq and Afghanistan were PSYOP teams, CA, and PA personnel.

***c. Judge Advocates Should Review Psychological Operations Themes and Products For Legal Issues.***

The PSYOP representative integrates, coordinates, deconflicts, and synchronizes the use of PSYOP with other IO tools and missions. These PSYOP missions included operations planned to convey selected information to influence the enemy combatants and the local civilian population.<sup>22</sup> For example, JAs reviewed leaflet messages and messages to be broadcast over loudspeakers.<sup>23</sup>

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elements of offensive and defensive IO and related activities, outlines the international legal considerations in IO, and discusses foreign and domestic law, and law enforcement aspects of IO. INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, 2004 OPERATIONAL LAW HANDBOOK 355-67 (2003).

<sup>20</sup> Operation SOUTHERN WATCH was the name of the mission to monitor and control the airspace south of the 33d parallel in Iraq after the first Gulf War, see <http://www.eucom.mil/Directorates/ECPA/index.htm>?<http://www.eucom.mil/Directorates/ECPA/Operations/osw/osw.htm&2> (last visited 2 Apr. 2004).

<sup>21</sup> See I MEF IO Lessons Learned *supra* note 12, at 1.

<sup>22</sup> See generally U.S. DEP'T OF ARMY, FIELD MANUAL 3-05.30, PSYCHOLOGICAL OPERATIONS paras. 8-5 to 8-8 (19 June 2000). See also JOINT CHIEFS OF STAFF, JOINT PUB. 3-53, DOCTRINE FOR JOINT PSYCHOLOGICAL OPERATIONS para. I-6 (5 Sep. 2003). Currently, the Marine Corps has no organic PSYOP capability, but relies on the Army's 4th Psychological Operations Group. To address this issue, the Marine Corps is proposing adding a small PSYOP detachment at the I and II Marine Expeditionary Force (MEF) with smaller teams that could deploy with the Marine Expeditionary Units (MEUs). *Marine Information Operations in the Peacekeeping Realm*, *supra* note 6, at 10.

<sup>23</sup> See generally Gordon Interview, *supra* note 14. A good example of problems that may occur when dropping leaflets over a wide area is explained by Captain Charles L. "Jack" Pritchard, Jr., 1st Brigade Combat Team, 3rd Infantry Division. Captain Pritchard writes that when he went to the unit EPW cage, he discovered that most of the individuals were people in civilian clothes who had "surrendered" because they were confused by leaflets that PSYOP had dropped on the city and believed that the Americans wanted them to come out of their homes and surrender. 1st Brigade Combat Team, 3rd Infantry Division, Judge Advocate narrative, at 6 (2003) (on file with CLAMO) [hereinafter 1BCT, 3ID Narrative]. In addition, before raiding a hospital where Iraqi enemy forces held personnel from the 507th Maintenance Company, TF Tarawa PSYOP personnel announced over loudspeakers that the raid was about to begin and that medical personnel should come out. See TF Tarawa AAR Transcript, *supra* note 4, at 104-05.

At least one review of PSYOP operations during combat in Iraq concluded that the United States and Britain had "considerable success" in developing PSYOP products that caused inaction among the Iraqi military and helped expedite surrenders. The PSYOP effort involved 58 EC-130E Commando Solo sorties, 306 broadcast hours of radio, and 304 television hours. Teams prepared approximately 108 radio messages and over 80 different leaflets. During combat operations, coalition forces flew over 150 leaflet missions, dropping nearly 32 million leaflets. See ANTHONY H. CORDESMAN, THE IRAQ WAR: STRATEGY, TACTICS, AND MILITARY LESSONS 511-12 (2003); Assessment and Analysis Division, U.S. Air Force Central Command, OPERATION IRAQI FREEDOM—BY THE NUMBERS, at 8 (30 Apr. 2003) (on file with CLAMO).

During OIF, a pre-D-day IO objective was to convince Iraqi soldiers not to fight and urge units to capitulate using, among other products, leaflet drops.<sup>24</sup> This effort continued throughout the war.<sup>25</sup> To meet this objective, commanders expected their JAs to be the primary point of contact for all capitulation issues, to include securing capitulation agreements and ensuring that units complied with capitulation instructions.<sup>26</sup> Additionally, JAs anticipated that a successful IO campaign would result in more individual surrenders, which would then require additional legal advice on detention operations and treatment of enemy prisoners of war (EPWs).<sup>27</sup> In one case, an EPW volunteered to tape a message to be broadcast to the Iraqi people stating that U.S. forces were not in Iraq to kill them. Fortunately, the unit's S-2 (intelligence officer) knew to obtain an opinion from his JA.<sup>28</sup>

***d. Be Prepared to Assist in Integrating Public Affairs and Civil Affairs Mission Planning Into the Overall Information Operations Campaign.***

PA supported IO through print and electronic products, news releases, press conferences, and media facilitation.<sup>29</sup> For example, combat cameras were used to show the Iraqi people that coalition forces were not looting the country and were, in fact, bringing humanitarian aid to the people. Moreover, when the Iraqi minister of information began claiming that U.S. troops were nowhere near Baghdad, combat camera

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<sup>24</sup> See generally 3ID AAR, *supra* note 15, at 269 (stating that during the pre-war phase, IO consisted of e-mail and leaflet drops, but that the leaflet drops, in particular, were negated when they were collected and those who read them were punished).

<sup>25</sup> See Gordon Interview, *supra* note 14.

<sup>26</sup> 82d Airborne OIF AAR, *supra* note 4, at 2; see also comments by CPT Michael S. "Scott" Holcomb, Coalition Forces Land Component Command, Operational Law Attorney, at III Corps Deployment Conference, Fort Hood, Tex. (12-14 Nov. 2003) (stating that before the war leaflets containing information on capitulation agreements were to be a big part of the IO campaign, but because units began crossing the line of departure shortly after the air campaign began there was little time to drop the leaflets) (notes on file with CLAMO). For more information on capitulation agreements, see *supra* Section III.A.1.

<sup>27</sup> See, e.g., 82d Airborne OIF AAR, *supra* note 4, at 2.

<sup>28</sup> 1BCT, 3ID Narrative, *supra* note 22, at 6. In the narrative, Captain Jack Pritchard, 1BCT JA writes that, after discussion with his SJA, he found little issue with this, as the identity of the EPW would remain undisclosed and there would be no public humiliation or risk of harm. "The only issue . . . raised was the [Geneva] Conventions' prohibition on using EPWs against their own military. As this prohibition was intended to prevent the unwilling use of EPWs against their own military as fighting soldiers, [they] agreed the use of the EPW's voice would not violate the prohibition." *Id.* See GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR art. 130, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. 3364, 75 U.N.T.S. 135 (providing that it is a grave breach of international law to compel an EPW to serve in the forces of the hostile power); *id.* at art. 13 (providing that EPWs must be protected against insults and public curiosity). See also U.S. DEP'T OF ARMY, REG. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES, para. 2-1(d) (1 Oct. 1997) ("Prisoners may voluntarily cooperate with PSYOP personnel in the development, evaluation, or dissemination of PSYOP messages or products.").

<sup>29</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 3-61.1, PUBLIC AFFAIRS TACTICS, TECHNIQUES AND PROCEDURES para. 9-14 (1 Oct. 2000) [hereinafter FM 3-61]. PA assists IO by providing factual information that enables people to make informed decisions. *Id.* para. 9-24. See also JOINT CHIEFS OF STAFF, JOINT PUB. 3-61, DOCTRINE FOR PUBLIC AFFAIRS IN JOINT OPERATIONS para. III-7 (14 May 1997) (providing that joint PA does not direct or manipulate public actions or opinion, but provides timely and accurate information to the public).

was able to show that he was lying to the Iraqi people by broadcasting footage of U.S. troops in Baghdad.<sup>30</sup>

In addition, the CA representative to the IO cell synchronized CA activities with the IO themes and mission.<sup>31</sup> In both OIF and OEF, CA missions to positively influence the local population required JAs to assist in CA mission planning and execution, in particular as major combat operations wound down and stability operations began.<sup>32</sup>

***e. Legal Teams Should Integrate Their Own Missions that Contribute to the Information Operations Campaign into the IO Planning Process.***

Finally, legal teams played an important role in IO through their own missions such as paying claims and compensating Iraqis for requisitioned property.<sup>33</sup> As the SJA for the 82d Airborne Division wrote:

JAs aggressively pursued and investigated foreign claims under the Foreign Claim Acts (FCA) in order to effectuate the purpose of the FCA. This engendered support from the local populace for US forces in spite of activities which resulted in loss to locals . . . . JAs similarly investigated the payment of private property requisitioned during combat operations.<sup>34</sup>

Legal teams need to ensure that their missions are integrated into the overall IO planning process. These missions should be listed as tasks that contribute to a specific objective in the IO campaign and briefed to the commander as part of the IO plan. Incorporating legal tasks into the IO plan will serve to highlight how the legal team’s work contributes to the overall unit mission and to educate other staff members on the roles and missions of their legal team.

***2. Anticipate That Legal Teams Will Provide Legal Advice to Commanders on Issues Concerning Embedded Media and May be Required to Provide Logistical Support to Embedded Journalists.***

In February 2003, the Department of Defense (DoD) issued public affairs guidance on embedding media during possible future operations in the U.S. Central Command (CENTCOM)<sup>35</sup> area of responsibility. According to the policy, members of the media were to have “long-term, minimally restrictive access to U.S. air, ground and naval forces through embedding . . . .” Additionally, the embedded media were to “live,

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<sup>30</sup> 3ID AAR *supra* note 15, at 269.

<sup>31</sup> U.S. DEP’T OF ARMY, FIELD MANUAL 3-05.401, CIVIL AFFAIRS TACTICS, TECHNIQUES, AND PROCEDURES para. 1-28 (23 Sept. 2003). *See also* JOINT CHIEFS OF STAFF, JOINT PUB. 3-57.1, JOINT DOCTRINE FOR CIVIL AFFAIRS para. II-8.c (14 Apr. 2003).

<sup>32</sup> *See, e.g.*, 82d Airborne OIF AAR, *supra* note 4, at 2.

<sup>33</sup> *See infra* Section III.F (discussing the IO benefit of the claims program).

<sup>34</sup> 82d Airborne OIF AAR, *supra* note 4, at 2.

<sup>35</sup> For a discussion of CENTCOM and the overall command structure, *see supra* Section II.

work and travel as part of the units with which they are embedded to facilitate maximum, in-depth coverage of U.S. forces in combat and related operations.”<sup>36</sup>

The presence of embedded media resulted in various issues for the legal teams. For instance, with hundreds of journalists traveling throughout Iraq looking for stories, JAs reported that they had to be vigilant in ensuring that EPWs and the bodies of deceased individuals were not photographed. Although journalists were warned not to film or photograph EPWs and the deceased, and in most cases they did not, some journalists had to be sent home for violating this guidance.<sup>37</sup> Moreover, judge advocates were sometimes asked by journalists to comment on particular events. During the early part of OIF, some judge advocates provided journalists with comments without approval from their SJAs and commented on areas of practice with which they may not have been familiar. This caused higher headquarters OSJAs to react to these stories by providing clarifying comments.<sup>38</sup>

In addition, the DoD policy allowed commanders the discretion to assign an escort to the embedded journalist.<sup>39</sup> During OIF, many BOLT JAs and enlisted paralegals were assigned the task of escorting embedded media personnel.<sup>40</sup> This allowed the JAs and paralegals to coordinate media activities and assist the IO campaign by ensuring that the journalists were present to record and report on important events.<sup>41</sup> Because of their escort duties, however, both JAs and enlisted paralegals had to be well

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<sup>36</sup> Message, 101900Z Feb 03, SECDEF, subject: Public Affairs Guidance (PAG) on Embedding Media During Possible Future Operations/Deployments in the U.S. Central Command (CENTCOM) Area of Responsibility (AOR) (on file with CLAMO) [hereinafter PAG on Embedding Media].

<sup>37</sup> Gordon Interview, *supra* note 14. See also Memorandum from Major John H. Cook, 101st Airborne Division (Air Assault) (18 May 2004) (on file with CLAMO).

<sup>38</sup> Memorandum, Major Jennifer C. Santiago, Office of the Staff Judge Advocate, V Corps, for the Staff Judge Advocate, subject: After Action Review, para. 2.d (26 Mar. 2004) (on file with CLAMO). See also Memorandum, The Judge Advocate General, for Staff and Command Judge Advocates and LSO/MSO Commanders, subject: Relations with News Media – POLICY MEMORANDUM 00-6 (providing that Army legal personnel should obtain the approval of their staff judge advocate before preparing a written statement for publication or permitting himself or herself to be quoted by the media on official matters within the purview of the office and that legal personnel must receive clearance from the Executive Officer, Office of The Judge Advocate General, USA, before being interviewed by, or providing statements to, representatives of the media on issues or subjects having Army-wide, national, or international implications).

<sup>39</sup> PAG on Embedding Media, *supra* note 35, para. 3F.

<sup>40</sup> In the 3rd Infantry Division, several brigade JAs and paralegals noted that they were assigned the responsibility to escort embedded journalists. The 1st Brigade, 3rd Infantry Division, for example, had one PAO representative, an enlisted Soldier. This Soldier, however, was performing his own PAO mission, writing stories, and was not providing oversight of the embedded journalists. See Transcript of After Action Review Conference, Office of the Staff Judge Advocate, 3d Infantry Division, and the Center for Law and Military Operations, Fort Stewart, Ga., at 98-99 (18-19 Nov. 2003) (on file with CLAMO) [hereinafter 3ID AAR Transcript].

<sup>41</sup> See, e.g., 1BCT, 3ID Narrative, *supra* note 22, at 5. In the narrative, Captain Jack Pritchard describes an incident where he and an enlisted paralegal, Corporal Jason K. Maples, took a CBS camera crew to a Sensitive Site Exploitation (SSE) location, where the United States suspected there were chemical, nuclear, or biological weapons, or the means to produce them, so that if something was found the media could broadcast it to the world, proving that Saddam Hussein had lied about his capabilities. While at the site, they came across two EPWs. Before they could be stopped, the camera crew filmed the EPWs. Captain Pritchard was able to convince the journalist not to broadcast clear pictures of the EPWs' faces or other identifying images.

versed in the rules regarding what information may be released to the media.<sup>42</sup> JAs reported that it was not always clear what type of access to afford these journalists. Consequently, JAs should ensure that commanders issue clear guidance on such issues as access to command posts and sensitive or classified information.

Performing media escort duties also proved very time consuming for the legal teams. In one brigade alone there were ten embedded journalists.<sup>43</sup> Moreover, because of the logistical requirements that went along with providing escort duties, members of the BOLT were sometimes displaced to accommodate the travel needs of journalists.<sup>44</sup> Corporal Jason K. Maples, 1st Brigade, 3ID, enlisted paralegal, described these duties.

When we were in Kuwait, they embedded these media people with us and I was in charge of both the food/water supply as well as travel . . . . So when we were driving the convoys when we came into Iraq, we would take detours and look at a guard post where 4 soldiers were killed and watch them as they did it. And we had to review all of the stuff they took out, making sure they didn't take any shots that they're not allowed to show on TV, especially with the showing of faces of EPWs . . . . But we didn't get much support from the brigade to feed and move these people around. They were traveling in their own civilian HMMWVs they brought with them and their own gasoline and their own rations, but not enough for a whole complete battlefield experience. We ended up towing their vehicles behind us on our HMMWVs.<sup>45</sup>

In future operations, legal teams can anticipate that journalists will again be embedded in their units. Therefore, to properly advise the PAO and their commanders, legal teams must be versed in the PAO guidance regarding journalists on the battlefield and ensure that their actions are in accordance with the LOAC.

### ***3. Both Judge Advocates Assigned to Civil-Military Operations Centers and Those Assigned to Conventional Forces Are Key Players in Civil Affairs Missions.***

Civil-military operations are conducted “to minimize civilian interference with military operations, to maximize support for operations, and to meet the commander’s legal responsibilities and moral obligations to civilian populations within the commander’s area of control.”<sup>46</sup> A commander may establish a civil-military operations center (CMOC) to facilitate coordination with other agencies, departments, organizations, the local population, and the host nation.<sup>47</sup> A joint civil-military operations task force

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<sup>42</sup> See PAG on Embedding Media, *supra* note 35, para. 4 (outlining the “ground rules” for embedded media and specifically providing the categories of information that are, and are not, releasable).

<sup>43</sup> 3ID AAR Transcript, *supra* note 39, at 100.

<sup>44</sup> See MAJ Robert F. Resnick, Chief, Criminal Law, 3d Infantry Division, Operation Iraqi Freedom After Action Review para. 2c(3) (25 Apr. 2003) (on file with CLAMO).

<sup>45</sup> 3ID AAR Transcript, *supra* note 39, at 98-99.

<sup>46</sup> JOINT PUB. 3-57, *supra* note 30, para. I-1a.

<sup>47</sup> *Id.* para. IV-3d. A CMOC may be formed to:

- Carry out guidance and JFC [joint forces commander] decisions regarding CMO;

(JCMOTF) also may be formed subordinate to a joint task force (JTF) to consolidate and coordinate all CMO in a theater of operation. The JCMOTF allows the joint forces commander to focus on warfighting while the JCMOTF focuses on CMO.<sup>48</sup>

During OEF, a Coalition JCMOTF (CJCMOTF) was formed and lead elements began arriving in Kabul in late 2001. This marked the first time that a JCMOTF had been deployed as part of a contingency operation.<sup>49</sup> Initially, there was no JA position on the ad hoc joint manning document.<sup>50</sup> As the task force began planning for deployment, however, the leadership realized that there would be substantial issues facing the CJCMOTF and decided to add a JA in December 2001.<sup>51</sup> The JA did not arrive, however, until early March, resulting in the CFLCC having to detail a JA to the CJCMOTF for the interim period.<sup>52</sup>

The CJCMOTF, headquartered in Kabul, also fielded a number of six-person teams, called Coalition Humanitarian Liaison Cells, which were located in a number of key cities around Afghanistan and in Islamabad, Pakistan. The CJCMOTF had a variety of special missions, to include identifying and conducting humanitarian assistance operations throughout the country in support of coalition forces.<sup>53</sup>

Similar to JAs assigned to conventional forces, JAs operating with CA units and those providing legal advice to CMOCs and the JCMOTF were involved in operational planning groups. As joint doctrine recognizes “[m]any aspects of CMO require scrutiny by legal experts.”<sup>54</sup> Therefore, JAs must understand the organization’s mission and participate in mission development.<sup>55</sup> In commenting that the JA must understand the mission from the operator’s point of view, the SJA for the CJCMOTF in Afghanistan stated, “[t]his is particularly true in a civil-military operations setting, since civil affairs

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- Exchange information;
  - Perform liaison and coordination between military capabilities and other agencies, departments, and organizations to meet the need of the populace;
  - Provide a partnership forum for military and other participating organizations; and
  - Receive, validate, and coordinate requests for support to the NGO and regional and international organizations.

*Id.*

<sup>48</sup> *Id.* para. 8b.

<sup>49</sup> After Action Review Comments, CJCMOTF–Kabul (Colonel H. Allen Irish) 1 (2004) (on file with CLAMO) [hereinafter CJCMOTF–Kabul AAR]. The CJCMOTF was initially organized around a small National Guard command and control element, the 122d Rear Operations Center, Georgia Army National Guard, augmented by elements of the 377th Theater Support Command and the 352d Civil Affairs Command, and commanded by BG David Kratzer. *Id.*

<sup>50</sup> Joint doctrine does reflect an SJA in a notional JCMOTF. See JOINT PUB. 3-57, *supra* note 30, para. II-8c.

<sup>51</sup> The CJCMOTF issued a Request for Forces (RFF) with a by-name request for then Lieutenant Colonel H. Allen Irish, Staff Judge Advocate, 352d Civil Affairs Command. *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> JOINT PUB. 3-57, *supra* note 30, para. II-9.

<sup>55</sup> In the planning phase, JAs provide advice in the preparation and review of CMO plans for consistency with U.S. law, Department of Defense guidance, and the rules and principles of international law, including treaties. *Id.* para. II-9a.



operators frequently view issues with enormous legal ramifications as being ‘civil affairs,’ rather than ‘legal’ issues, and may not seek legal guidance.”<sup>56</sup>

JAs working with a CJCMOTF or CMOC confronted many of the same legal issues that JAs handled in conventional units. Similar to those assigned to other units, JAs assigned to CA units had to be well-versed in fiscal law, because a primary mission of these organizations was to conduct humanitarian assistance operations. The CA commander expected the JA to provide thorough and timely legal advice on the fiscal authority to conduct proposed operations.<sup>57</sup> In addition, because a CJCMOTF or a CMOC is located in areas that make them more accessible to the local population than other military facilities, they frequently received claims presented by the local population against United States or Coalition forces. JAs assigned to these organizations also investigated many of these claims.<sup>58</sup> In addition to the more typical JA legal missions, JAs assigned to CA units also handled unique issues, such as the wear of non-standard uniforms and civilian clothes by special operations forces.<sup>59</sup>

The CMOCs and the CJCMOTF were also the primary interface between the U.S. military and International Organizations and NGOs in and around the area of operations.<sup>60</sup> Both JAs assigned to these organizations, and JAs supporting conventional units were key players in dealing with international organizations and NGOs. Therefore, it was essential that JAs understood how international organizations and NGOs who were present in the theater operated and any operational and protocol issues that guided U.S. interaction with them. Prior to deployment, the legal team should train on the roles and missions of major International Organizations and NGOs, such as the International Committee of the Red Cross. Moreover, they should attempt to discover which organizations are operating in the theater and review information about those organizations, including their missions and their political orientation.<sup>61</sup> It is always important to be aware of which NGOs are considered “friendly” to U.S. military operating in their area, which are neutral, and which may not want contact with U.S. military personnel. It is similarly important to understand the posture International Organizations and NGOs take internally toward working with military personnel involved in humanitarian activities.<sup>62</sup>

<sup>56</sup> CJCMOTF-Kabul AAR, *supra* note 48, at 2 (comments from Colonel H. Allen Irish, JA, U.S. Army Reserve).

<sup>57</sup> These JAs, for example, must thoroughly understand the rules regarding Overseas Humanitarian, Disaster and Civic Aid (OHDACA) funds. *Id.* at 2. For a thorough analysis of fiscal considerations in OEF and OIF, see *infra* Section III.E.

<sup>58</sup> See CJCMOTF-Kabul AAR, *supra* note 48, at 2 (describing a particular claim in which the JA had to investigate an accident between a CJCMOTF officer and an Afghan driving a donkey cart which resulted in the death of the Afghan. The JA investigated the claim and developed a mechanism to settle the claim with the next-of-kin, the 16-year-old wife of the decedent. Eventually, the money was paid to the father-in-law after the wife agreed to provide him power-of-attorney). For a thorough discussion of claims in OIF and OEF, see *infra* Section III.F.

<sup>59</sup> See *supra* Section III.A.4. for a discussion of this issue.

<sup>60</sup> See, e.g., CJCMOTF-Kabul AAR, *supra* note 48, at 2.

<sup>61</sup> *Id.* at 3-4. The Army’s Combat Training Centers currently train members of brigade combat teams on how to interact with major International Organizations and NGOs through the use of role players.

<sup>62</sup> Some NGOs may be hostile to military involvement in areas they consider central to their missions, such as emergency relief and humanitarian assistance. It is always helpful, however, to foster cooperation with NGOs operating in the AOR. The CJCMOTF in Afghanistan established a weekly NGO forum in which a number of

The CJCMOTF and CMOCs also interacted extensively with personnel from the U.S. Agency for International Development (USAID) and Department of State. In Afghanistan, for instance, the CJCMOTF SJA drafted a Memorandum of Agreement that established the principles under which Department of State and USAID operatives would reside with CJCMOTF personnel and conduct operations in conjunction with the task force (Appendix D-1).<sup>63</sup> Therefore, JAs must have a clear understanding of the interagency process, in particular how a U.S. Embassy is manned and operated, and how the USAID, its Disaster Response Assistance Teams (DART), and other U.S. Government agencies operate and integrate with U.S. military forces.<sup>64</sup>

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NGOs participated. NGO antagonism can prove costly. Their vocal opposition to CJCMOTF personnel operating in civilian attire was raised to the highest level of the U.S. Government and the UN, creating additional political problems for the CJCMOTF commander. E-mail, COL H. Allen Irish, former CJCMOTF SJA in Afghanistan, to LTC Pamela M. Stahl, Director, CLAMO (16 Mar. 2004) (on file with CLAMO). Legal issues concerning CJCMOTF personnel wearing civilian attire are addressed in Section III.A.4, *supra*.

<sup>63</sup> *Id.* at 4. Colonel H. Allen Irish, former CJCMOTF SJA in Afghanistan, writes that “[u]nfortunately, the staffing of the MOA took an inordinately long time to accomplish. In a contingency operation setting, the bureaucratic process is often very frustrating to JAs ‘at the tip of the spear.’” *Id.*

<sup>64</sup> For more information on interagency operations in complex contingency operations, see CENTER FOR LAW AND MILITARY OPERATIONS, UNITED STATES GOVERNMENT INTERAGENCY COMPLEX CONTINGENCY OPERATIONS ORGANIZATIONAL AND LEGAL HANDBOOK (24 Feb. 2004).

## E. CIVIL LAW

*Civil law is the body of law containing the statutes, regulations, and judicial decisions that govern the rights and duties of military organizations and installations with regard to civil authorities. The practice of civil law includes contract law, fiscal law, environmental law, as well as many other specialized areas of law.*<sup>1</sup>

Civil law issues challenged and at times frustrated judge advocates (JAs) during major combat operations in Iraq and Afghanistan. A multitude of complex fiscal, contract, and environmental questions arose—ranging from how to fund the military occupation of Iraq, to what could be done with captured enemy currency, to what role JAs should play in deployment contracting, to what extent domestic environmental laws and policies applied in combat operations. The legal analyses that JAs crafted to support their commanders within the bounds of the law provide a rich source of lessons learned for future operations.

### ***1. Develop Judge Advocate Fiscal Law Expertise and Integrate Fiscal Analysis into Staff Planning.***

A recurring theme in Operation ENDURING FREEDOM (OEF) and Operation IRAQI FREEDOM (OIF) legal after action reports is the importance of understanding fiscal law,<sup>2</sup> defined as the “application of domestic statutes and regulations to the funding of military operations, and support to non-federal agencies and organizations.”<sup>3</sup> Not only did fiscal law questions abound during both operations, but the answers were often difficult and required coordination with higher levels of command. Of the multitude of requests to CLAMO for operational law assistance, by far the most represented legal discipline was civil law—in particular, fiscal law.<sup>4</sup> One Marine Corps JA who handled

<sup>1</sup> U.S. DEP’T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS para. 3-6 (1 Mar. 2000) [hereinafter FM 27-100].

<sup>2</sup> See, e.g., MAJ Jeff Bovarnick, Chief, Operational Law, Combined Joint Task Force 180, CJTF-180 Notes from the Combat Zone, at 6 (2003) (on file with CLAMO) [hereinafter Bovarnick CJTF-180 Notes] (“Almost daily, a new fiscal law issue comes up, but there are many recurring issues”); Interview with Maj Thomas Wagoner, former Staff Judge Advocate, 15th Marine Expeditionary Unit (Special Operations Capable), in Charlottesville, Va. (2 Dec. 2003) (“Fiscal law—it ain’t sexy, but it’s what the boss wants to know.”). Additionally, Col William D. Durrett, the SJA for I Marine Expeditionary Force, opined at the November 2003 XVIIIth Airborne Corps Rules of Engagement Conference that fiscal law issues were numerous during his initial deployment to Iraq, and that developing a sophisticated understanding of fiscal law was a priority for his unit’s redeployment to Iraq in Spring 2004.

<sup>3</sup> FM 27-100, *supra* note 1, para. 3-6. Of note, several of the fiscal lessons discussed in this Chapter also involve an analysis of how *international* law relates to domestic fiscal statutes and regulations. See *infra* Sections III.C.2.b.1 and III.C.2.b.3.

<sup>4</sup> The general consensus among the CLAMO staff is that fiscal law questions comprised at least one-third of all requests for assistance from the field during the periods of major combat hostilities in OEF and OIF. A former CLAMO JA put the percentage even higher:

Early after 9/11 the requests dealt a lot with military/civilian relationships, posse comitatus, general [domestic operational law]. Once the war started in Afghanistan the

many fiscal issues while deployed to Iraq during the period of major combat hostilities made the following comment in anticipation of his redeployment to Iraq in Spring 2004:

I'm attempting to gain a detailed understanding of fiscal law prior to returning to OIF II. I've found very few Marines who understand the big picture of fiscal law, from funding sources, statutory basis or restrictions, to the mechanics of actually spending the physical money in a deployed environment. I'm determined to learn it.<sup>5</sup>

In addition to understanding fiscal law, a corollary lesson is the need to integrate fiscal law expertise into staff planning. It takes fiscal knowledge to spot fiscal issues. As suggested in various after action reports, a fiscally savvy JA should always be present in tactical operations centers and should at least be a “back-bencher” at every staff meeting.<sup>6</sup> Furthermore, some suggest that this fiscal JA should be a strong-willed personality given that fiscal issues at times require advising “no” to a commander’s proposed course of action.<sup>7</sup>

## ***2. Understand To What Extent Operations and Maintenance Appropriations Can Be Used to Provide Development (Humanitarian) Assistance and Security Assistance as Contemplated Under the Foreign Assistance Act.***

The most common fiscal issue out of OEF and OIF—and out of all prior operations for which CLAMO has produced a lessons learned publication, for that matter<sup>8</sup>—was which “pot of money” could be used for what purposes. In more precise

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fiscal law questions skyrocketed. This ran through OIF planning, waned during the war, but picked up again post-conflict. I would venture the number to be as high as 70-75%.

Of course the number of fiscal law questions we received may not be an indicator of its importance. Crim Law questions could have outnumbered fiscal law 100-1, but the folks in the field may have known all the answers. I doubt this is the case . . . .

E-mail from Mr. Alton L. Gwaltney, III, former Director, Training and Support, Center for Law and Military Operations, to Maj Cody M. Weston, Director, Joint Operations, Center for Law and Military Operations (5 Jan. 2004) (on file with CLAMO).

<sup>5</sup> E-mail from Maj Gregory G. Gillette, Deputy Staff Judge Advocate, I Marine Expeditionary Force, to LTC Daria P. Wollschlaeger, Chair, International and Operational Law Department, The Judge Advocate General’s Legal Center and School (TJAGLCS), and Maj Cody M. Weston, Director, Joint Operations, Center for Law and Military Operations (17 Dec. 2003) (on file with CLAMO). It is telling that a seasoned attorney such as Maj Gillette, who was a recent graduate of the TJAGLCS Judge Advocate Officer Graduate Course, recognized the need for greater fiscal law understanding.

<sup>6</sup> See, e.g., Transcript of After Action Review Conference, Office of the Staff Judge Advocate, XVIIIth Airborne Corps, Fort Bragg, N.C. (30 Sept. to 1 Oct. 2003) (on file with CLAMO) [hereinafter XVIIIth Airborne Corps AAR Transcript].

<sup>7</sup> See *id.* But see Bovarnick CJTF-180 Notes, *supra* note 2, at 6 (“The Fiscal Law attorney could easily make enemies on the staff by constantly saying no; however, the judge advocate will quickly become an ally by working through the issue and finding a way to accomplish the mission with the proper funding source.”).

<sup>8</sup> See CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN KOSOVO, 1999-2001: LESSONS LEARNED FOR JUDGE ADVOCATES 157-59 (15 Dec. 2001); CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN CENTRAL AMERICA: HURRICANE MITCH

terminology, the issue was how not to run afoul of The Purpose Statute requirement that congressional “[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.”<sup>9</sup>

This issue most often manifested itself in the context of whether Operation & Maintenance (O&M) dollars could be used to fund certain aspects of the operations. Although Congress provides the Department of Defense (DoD) over 100 separate appropriations in a typical fiscal year, tactical units (ordinarily, Army Corps, Marine Expeditionary Force, and subordinate units) generally only receive O&M appropriations, which are to be used for all day-to-day and “necessary and incident” operational expenses for which another funding source does not exist.<sup>10</sup> Two of the more common activities for which other funding sources exist, yet in which DoD units often find themselves involved, are development assistance (providing education, nutrition, agriculture, family planning, health care, environment, and other programs to resolve internal political unrest and poverty) and security assistance (providing supplies, training, and equipment to friendly foreign militaries).<sup>11</sup> Under the Foreign Assistance Act (FAA),<sup>12</sup> Congress determined that these activities, development assistance and security assistance, are State Department, not DoD responsibilities.<sup>13</sup> Thus, the predominant fiscal issue during OEF and OIF was to what extent O&M dollars could be used to fund activities that appeared to approach State Department security assistance and development assistance under the FAA, and, if O&M dollars could not be used, what alternative funding sources were available. The remainder of this section will discuss some specific illustrative applications of this general issue during OEF and OIF.

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RELIEF EFFORTS, 1998-1999: LESSONS LEARNED FOR JUDGE ADVOCATES 68-81 (15 Sept. 2000); CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN THE BALKANS 1995-1998: LESSONS LEARNED FOR JUDGE ADVOCATES 145-49 (13 Nov. 1998); CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995: LESSONS LEARNED FOR JUDGE ADVOCATES 138-42 (11 Dec. 1995) [hereinafter HAITI LESSONS LEARNED].

<sup>9</sup> 31 U.S.C. § 1301(a) (2000).

<sup>10</sup> The General Accounting Office (GAO), which oversees federal government expenditures and accounting, has set forth a three-part test for determining whether an expenditure is proper:

1. An expenditure must fit an appropriation (or permanent statutory provision), or must be for a purpose that is necessary and incident to the general purpose of an appropriation;
2. The expenditure is not prohibited by law; and
3. The expenditure is not otherwise provided for, in other words, does not fall within the scope of some other appropriation.

*Secretary of the Interior*, B-120676, 34 Comp. Gen. 195 (1954).

<sup>11</sup> See 22 U.S.C. §§ 2151 *et seq.* (2003) (The Foreign Assistance Act).

<sup>12</sup> *Id.*

<sup>13</sup> For a more detailed explanation of the Foreign Assistance Act and its fiscal impact on the DoD, see INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, 2004 OPERATIONAL LAW HANDBOOK 219-41 (2003) [hereinafter 2004 OPLAW HANDBOOK].

*a. Operation ENDURING FREEDOM Applications*

Issues regarding the proper DoD role within the FAA fiscal framework arose during OEF in three primary areas: 1) military provision of humanitarian assistance to the local Afghan population; 2) training and support for the Afghan National Army; and 3) support for coalition military forces. Each will be discussed in turn.

**1. Humanitarian Assistance**

The development assistance prong of the FAA includes activities often referred to by the military as humanitarian assistance. For OEF, CENTCOM issued a message outlining humanitarian assistance fiscal guidance (at Appendix E-1).<sup>14</sup> The message stated that three statutes constituted the possible legal authorities for military provision of humanitarian assistance for the purposes of OEF:

1. 10 U.S.C. § 401 (humanitarian and civic assistance (HCA)), funded by service O&M or, if a “minimal” expenditure (known as *de minimis* HCA), by unit O&M (CENTCOM delegated to the Combined Joint Task Force 180 (CJTF-180)<sup>15</sup> commander the authority for determining the appropriate minimal amount<sup>16</sup>);
2. 10 U.S.C. § 2557 (excess nonlethal supplies for humanitarian relief); and
3. 10 U.S.C. § 2561 (humanitarian relief and other humanitarian purposes worldwide). Funding for activities under 10 U.S.C. §§ 2557 and 2561 would come from the Overseas Humanitarian, Disaster, and Civic Aid (OHDACA) appropriation (in other words, not O&M).<sup>17</sup>

The message set forth, as a policy matter, eleven approved categories of permissible humanitarian assistance, specifying the legal authorities and appropriations for each, as well as providing other requirements and guidance. The categories were:

1. Public health surveys and assessments;
2. Water supply/sanitation;
3. Well drilling;
4. Medical support and supplies;
5. Construction and repair of rudimentary surface transportation systems and public facilities;
6. Electrical grid repair;

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<sup>14</sup> Message, 152020Z Jul 02, U.S. Central Command, subject: USCINCCENT Guidance for Humanitarian Assistance During Operation Enduring Freedom (OEF) [hereinafter CENTCOM OEF HA Guidance].

<sup>15</sup> For a description of CJTF-180 and the OEF command structure, see *supra* Section II.C.2.b.

<sup>16</sup> CENTCOM OEF HA Guidance, *supra* note 14, para. 2(A)(7)(A). For a discussion of *de minimis* HCA using unit O&M versus pre-planned, or regular, HCA using service O&M, see *infra* note 20.

<sup>17</sup> CENTCOM OEF HA Guidance, *supra* note 14, para. 2.

7. Humanitarian mine action mine awareness training;
8. Mine display boards;
9. Essential repairs/rebuilding for orphanages, schools, or relief warehouses;
10. Animal husbandry/veterinarian training; and
11. Victim assistance training for mine victims.<sup>18</sup>

Although further requirements, guidance, and details for each category are found in the CENTCOM message itself (at Appendix E-1), for the purposes of this lesson, the point is that fiscal restrictions were (and are) in place regarding the unfettered use of O&M for humanitarian assistance. Thus, JAs played an important role in ensuring that proposed military humanitarian-assistance-appearing activities comported with the CENTCOM and congressional fiscal rules. If the proposed activity did not fit the rules, the JA had to advise the commander that the activity was not legally supportable. But JAs first struggled to find creative ways to support their commanders within the bounds of fiscal law.

One particular fact pattern from OEF is illustrative. The SJA for the 10th Mountain Division faced a situation where an operator-proposed raid tactic raised a humanitarian assistance fiscal issue. Pursuant to raids into rural areas to locate weapons caches or enemy personnel, operators wanted to distribute various supplies to the locals in nearby villages to help keep the objective area clear of civilians and to facilitate intelligence collection. Recognizing a fiscal issue, the SJA raised the issue through the chain of command, ultimately resulting in a dialogue with the Office of the Legal Counsel to the Chairman, Joint Chiefs of Staff. The SJA set forth the facts and his initial analysis as follows:

Units air assault into an area that is usually rural. Inevitably there is a village nearby and crowds begin to form. Our CA/Psyops [Civil Affairs/Psychological Operations] teams air assault as well with interpreters and they move to the crowd to ID their intent and attitude. CA will explain we're here to find bad guys or things (caches) and we need either their help or for them to stay clear.

....

What we're looking to do is get an assortment of supplies, plywood, hammers, nails, tin roofing rolls, school supplies, cooking oil and the like, purchased with O&M funds, to give our CA teams additional tools to keep the interest of the villagers and to persuade them that it's far more interesting and beneficial to them to stay with our CA team and away from the objective area. . . .

The obvious benefit to the commander is incalculable. First, it removes a level of confusion and chaos in and around the objective area—which can

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<sup>18</sup> *Id.* para. 3(H).

be significant when crowds form and they do form quickly. Second, it allows our forces to focus on the objective. Third, it keeps the local nationals safe from potential harm as it's extremely difficult to sort the good guys from the bad guys. Fourth, if the bad guys are present, they cannot then use the civilians as a mask or protection. Fifth, if we demonstrate our "good will" the now cooperative elders are often very willing to lead us to the jackpot—bad guys or caches. All of these lines lead directly to mission accomplishment—finding the bad guys or caches with minimum disruption to the local populace.<sup>19</sup>

The fiscal issue was readily apparent: the provision of supplies to the local populace appeared to be a form of humanitarian assistance that would not be authorized unless it satisfied the CENTCOM guidance or somehow could be classified as an operational expense appropriately funded with O&M. Giving the supplies away did not seem to fit any of the eleven CENTCOM-approved humanitarian assistance categories—the only category that allowed materials to be given away was "medical support and supplies" under the statutory authority of 10 U.S.C. § 2557, whereas the other categories all contemplated the provision of some type of training or rudimentary repair work. Thus, the proposed raid tactic appeared to violate the CENTCOM fiscal policy.<sup>20</sup>

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<sup>19</sup> E-mail from LTC Charles N. Pede, Staff Judge Advocate, 10th Mountain Division, to LTC Kelly D. Wheaton, Office of Legal Counsel to Chairman, Joint Chiefs of Staff (8 Aug. 2002, 0638 EST) (on file with CLAMO) [hereinafter Pede E-mail].

<sup>20</sup> As a *legal* matter, OHDACA funds under the statutory authority of 10 U.S.C. § 2561 could have been used to provide the supplies under the broad heading of "other humanitarian purposes," but the CENTCOM categories imposed a more restrictive fiscal *policy*. See E-mail from LTC Kelly D. Wheaton, Office of Legal Counsel to Chairman, Joint Chiefs of Staff, to LTC Charles N. Pede, Staff Judge Advocate, 10th Mountain Division (9 Aug. 2002) (on file with CLAMO) [hereinafter Wheaton E-mail] ("In theory, HA [OHDACA] funds could be used to purchase the basic supplies/equipment that you need . . . . I recognize that the HA program [§ 2561] is not currently executed in this manner. That is a process/policy issue, however, not a legal issue.").

One might argue (incorrectly), as a legal matter, that the provision of the supplies would have been an authorized form of HCA under 10 U.S.C. § 401, and that the unit could therefore have made minimal expenditures out of unit O&M to purchase the supplies. This is known as *de minimis* HCA. Another HCA option is pre-planned or regular HCA, whereby service (as opposed to unit) O&M can be requested to fund activities whose costs exceed minimal expenditures. The problem with this oft-misapplied argument, however, is that HCA, whether *de minimis* or pre-planned/regular, only consists of four statutorily authorized activities, activities that do not contemplate simply providing materials: 1) medical, dental, and veterinary care provided in rural or underserved areas; 2) construction of rudimentary surface transportation systems; 3) well drilling and construction of rudimentary sanitation facilities; and 4) rudimentary construction and repair of public facilities. 10 U.S.C. § 401(e). The 10th Mountain Division SJA recognized this HCA limitation as part of his analysis: "De minimis: we are reading 401 as limited to medical/dental/vet/construction efforts incidental to operations, performed by soldiers. I would love to entertain a plausible argument that would allow us to purchase the goods I identified to give them away as described." E-mail from LTC Charles N. Pede, Staff Judge Advocate, 10th Mountain Division, to LTC Kelly D. Wheaton, Office of Legal Counsel to Chairman, Joint Chiefs of Staff (8 Aug. 2002, 1550 EST) (on file with CLAMO). But, again, the HCA legal analysis is immaterial given that the CENTCOM fiscal policy appeared to disallow providing the supplies. Additionally, as a practical matter, pre-planned HCA is unlikely to be sufficiently responsive to commanders on the ground because of the lead time required to meet high-level staffing requirements. See U.S. DEP'T OF DEFENSE, DIR. 2205.2, HUMANITARIAN AND CIVIC ASSISTANCE (HCA) PROVIDED IN CONJUNCTION WITH MILITARY OPERATIONS para. 5 (6 Oct. 1994).



But the 10th Mountain SJA's description of the benefits of the proposed raid tactic suggests an alternative analysis: that the unit provided the supplies to facilitate mission accomplishment, and that any humanitarian benefit was merely incidental. Accordingly, unit O&M arguably was an appropriate funding source because the expenses were necessary and incident to operations and the assigned mission. In the SJA's words:

Clearly, the goods have a secondary effect. The only reason the goods work to keep the crowds away is because they want what we have to offer. It could thus be viewed as HA materials because of its residual nature, but that is only a secondary effect and shouldn't operate to the detriment of the commander trying to accomplish the mission—perhaps roughly akin to throwing out the baby with the bathwater. Suppose it could be viewed as a subterfuge, but only if the commander was viewed as more interested in rebuilding a town than finding the bad guy—and this will just never be the case. It is truly a means to an end.<sup>21</sup>

This analysis did not persuade the Office of Legal Counsel to the Chairman, Joint Chiefs of Staff. The Office opined that this particular linking of O&M funds to mission accomplishment was tenuous and could lead down a slippery slope of fiscal analysis, particularly in a situation where other appropriations exist for the proposed activity.<sup>22</sup> In the raid fact pattern, using O&M funds to in effect provide humanitarian assistance would not be authorized because the expenditure is otherwise provided for within the scope of the OHDACA appropriation (irrespective of the CENTCOM fiscal policy category restrictions<sup>23</sup>). As stated by the Chairman's Legal JA:

[T]he Constitution requires that a high standard be applied when determining that authority exists to dispose of USG property. Under basic fiscal law, an appropriation is available for expenditure when the expenditure bears a logical relationship to the purpose of the appropriation to be charged, the expenditure is not prohibited, and the expenditure is not otherwise provided for in another appropriation. In this instance, assuming that we can get past the first requirement (logical relationship to the appropriation to be charged), and I think that a strong case can be made, there is still the difficulty that the OHDACA appropriation (funding HA activities) "otherwise provides for" what you want to do. OHDACA funds, expended under the authority of 10 U.S.C. 2561, would be available to pay for the items that the commander wants to provide as part of the raid TTP [tactics, techniques, and procedures]. The fact that OHDACA funds/HA items are not available as a practical matter [the CENTCOM fiscal policy] doesn't change the legal analysis. Additionally, authorizing expenditure of O&M funds for this purpose would establish a dangerous

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<sup>21</sup> Pede E-mail, *supra* note 19.

<sup>22</sup> Wheaton E-mail, *supra* note 20.

<sup>23</sup> For a discussion of the distinction between development assistance fiscal laws versus the CENTCOM humanitarian assistance fiscal policy, see *supra* note 20.

precedent that would be hard to distinguish in the future. In other words, what is the limit on what DoD can purchase with O&M appropriations and give away on the rationale that doing so furthers the mission?<sup>24</sup>

In general terms, the argument of justifying O&M expenditure for any activity that supports the military mission seems to be a logic that, taken to its extreme, would violate the separation of powers principle that underlies fiscal law: Congress (legislative branch) raises revenue and provides funds for federal agency operations, and the military (executive branch) must find affirmative congressional authority before obligating and expending appropriated funds.<sup>25</sup> In other words, the mere executive branch issuance of a military mission statement does not constitute independent fiscal authority to spend O&M funds in support of the mission when the mission begins to stray from “operations and maintenance” as traditionally understood by Congress.<sup>26</sup> This very issue reappeared

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<sup>24</sup> Wheaton E-mail, *supra* note 20.

<sup>25</sup> See U.S. CONST., art. I, § 8. See also *United States v. MacCollum*, 426 U.S. 317, 321 (1976) (“The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.”).

<sup>26</sup> See COL Richard D. Rosen, *Funding Non-Traditional Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL. L. REV. 1 (1998). COL Rosen states:

Thus, an agency may not expend its appropriations in a manner not contemplated by Congress. This means that, unless otherwise authorized by statute, neither DOD nor the military services may use their Operations and Maintenance (O&M) accounts to pay for activities unrelated to the operation or maintenance of the armed forces. The problem posed by “non-traditional” missions is that they are, in significant part, unrelated to the actual cost of operating and maintaining the U.S. military. While costs associated with U.S. military participation in the operations may be payable as ordinary O&M expenses (e.g., transportation and food for U.S. forces), absent special statutory authority, other mission-essential costs generally may not (e.g., *humanitarian supplies*, support to coalition militaries).

*Id.* at 9 (citations omitted) (emphasis added). COL Rosen further states:

To operational lawyers, the proposition that presidential spending authority exists independent of Congress is particularly alluring. During military operations, intense pressure exists to find fiscal tools—any fiscal tools—to accomplish the mission. The notion that either congressional inaction or congressionally prescribed prohibitions may be disregarded is indeed seductive. If the proposition is sustainable, it would greatly simplify the operational lawyer’s job, ensuring that, at least in situations the President deems essential to national security, funding authority will always be available.

The arguments of those who assert such authority have gradually filtered into the legal offices of the national security establishment. As a result, DOD operational lawyers and their agency counterparts on the other side of the Potomac have engaged in discussions over whether the President has the inherent power to spend money in the absence of appropriation or in spite of an express limitation on spending authority.

Of course, it is one thing to advocate such a power in the pristine environment of the law review or the law school, and another to advise civilian and military decision-makers to rely on such authority for military operations. And while operational lawyers may have considered the proposition, they have not (in my experience) relied (at least entirely) on an independent presidential spending authority.

during OIF in the context of whether O&M funds could be used to fulfill the international legal obligations of an occupying power, and is discussed later in this section.<sup>27</sup>

The OEF raid fact pattern raises fundamental yet profound fiscal issues, and demonstrates that reasonable minds can reach different conclusions. Accordingly, the lesson seems clear: JAs should understand the considerations that go into determining which pot of money is appropriate for activities that approach the realm of development/humanitarian assistance and be able to implement that understanding in fashioning fiscal law arguments to support the commander.

## **2. Security Assistance: Funding the Afghan National Army**

Another OEF example of the proper DoD role within the FAA fiscal framework was the military provision of training and support to the newly formed Afghan National Army (ANA). Recall that Congress has assigned the primary responsibility for training and supporting friendly foreign militaries, or security assistance, to the State Department.<sup>28</sup> Accordingly, O&M funds could not be used for ANA security assistance. Instead, State Department funds (often referred to as “Title 22 funds” because the FAA falls under Title 22 of the U.S. Code) had to be used. In essence, when a DoD unit is being funded by Title 22 funds, the DoD assets (personnel and materials) can be used to accomplish State Department missions (in this instance, security assistance). Included at Appendix E-2 is a CJTF-180 information paper outlining the various Title 22 funding authorities and appropriations used for supporting the ANA.<sup>29</sup> As described by an OEF JA, the procedures for funding ANA support worked as follows:

It is DoS [Department of State] money that has been given to DoD to conduct security assistance. It is administered by OMC-A [Office of Military Cooperation–Afghanistan] (which is a DoD billet). The head is MG Eikenberry and they are located at the US Embassy.

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In preparing this article, I had hoped to identify a sound legal basis for advising military decision-makers to rely on an inherent presidential authority—at least when the President finds an operation essential to national security. Much to my chagrin, however, neither the Constitution nor the nation’s experience supports such a conclusion. Congress’ power to appropriate—while not plenary—is certainly exclusive.

*Id.* at 13.

<sup>27</sup> See *infra* Section III.E.2.b.1.

<sup>28</sup> See *supra* text accompanying notes 11-13.

<sup>29</sup> For a classified discussion of the fiscal analyses behind the initial determinations of how ANA support would be funded, see MAJ Karen H. Carlisle, *This Is Not Your Father’s Fiscal Law: Funding the Global War on Terrorism* 37-40 (2003) (unpublished manuscript, on file in CLAMO SIPRNET Database, at <http://www.us.army.smil.mil>. (The Database is one of the legal knowledge communities within the “Collaborate” section of the site. The site requires registration. If not a member of the U.S. Army, an applicant will need the user name of an Army sponsor. Contact CLAMO if an Army sponsor is needed.)).

All support to the ANA is paid for out of these [DoS] funds. The SOP is as follows: If CTF-82<sup>30</sup> identifies a support need for the ANA they should then confirm with OMC-A-Comptroller that funding is available and that CTF-82 will be reimbursed for the support provided. CTF-82 then submits the request for support to JLC [Joint Logistics Command] (cc CJTF180 LOGOPS). JLC sources and tasks the appropriate support organization to provide the support and the support is then provided to the ANA. After the support is provided, JLC reports the costs of support to CJTF180-CJ8 (cc CJTF180 LOGOPS). CJTF180-CJ8 then receives a fund cite from OMC-A-Comptroller and prepares and submits the necessary cost transfer documentation to ARCENT<sup>31</sup> for processing.<sup>32</sup>

In addition to the lesson of understanding that training support to the ANA required DoS, not O&M, funds, an issue arose regarding how actual ANA operational missions would be funded once the forces had been trained. After an extensive dialogue between CJTF-180 and CENTCOM JAs, the decision was that, in the short-term, the ANA would not conduct actual operational missions, but rather conduct two Title 22-funded training exercises not designed to lead to any combat engagement with hostile forces but, because of the location of the exercise, might result in unintended contact.<sup>33</sup> Subsequently, and beyond the chronological scope of this Publication, the ANA did begin to conduct actual operations using Title 10 funds (so named because the majority of DoD funding authorities exist within Title 10 of the U.S. Code).<sup>34</sup> The lesson appears to be that, in order to avoid delays in employing forces trained through a security assistance program, JAs should help proactively resolve how the forces will be funded once they are ready for operations.

### **3. Support to Coalition Partners: Acquisition and Cross-Servicing Agreements**

Another example of an authorized DoD role in the provision of security assistance is the concept of providing logistical support to coalition partners through a type of international agreement known as an Acquisition and Cross-Servicing Agreement (ACSA). Recalling the general rule that O&M funds can only be used for the operation and maintenance of DoD forces, an ACSA provides a flexible and quick mechanism to provide logistical support to foreign militaries on a cash reimbursement, replacement-in-

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<sup>30</sup> Combined Task Force 82, a subordinate command to CJTF-180.

<sup>31</sup> Army Central Command. For a description of the OEF command structure, see *supra* Section II.C.2.b.

<sup>32</sup> Office of the Staff Judge Advocate, Combined Task Force 82, Mid-Point AAR, at 6 (1 Jan. 2003) (citations added) (on file with CLAMO).

<sup>33</sup> See Interview with COL David L. Hayden, Staff Judge Advocate, XVIIIth Airborne Corps, in Charlottesville, Va., at 3 (7 Oct. 2003) (videotape on file with CLAMO) [hereinafter Hayden Interview]; Telephone Interview with CPT Robert McGovern, CJTF-180 Fiscal Law Attorney (8 Jan. 2004) [hereinafter McGovern Interview].

<sup>34</sup> McGovern Interview, *supra* note 33.

kind, or exchange of equal value basis.<sup>35</sup> The statutory basis for this support is in Title 10, not Title 22.<sup>36</sup>

An issue that arose during OEF was what to do when a coalition force arrived in theater without an ACSA yet nonetheless needed DoD logistical support. One illustrative example, among several similar situations that occurred, was the arrival of forces from the United Arab Emirates (UAE), a country with which the U.S. does not have an ACSA.<sup>37</sup> UAE forces arrived in Afghanistan with very little organic support and turned to CJTF-180 for assistance. CJTF-180 JAs requested guidance from CENTCOM; in the meantime, while the fiscal issues were being resolved, the CJTF-180 commander authorized provision of basic life support materials—food, water, shelter, emergency medical care—to the UAE forces, with specific instructions to carefully account for all costs. Ultimately, CENTCOM, in coordination with the DoS, negotiated a mission-specific agreement (not an ACSA, which would have had general applicability beyond just the OEF mission) with the UAE that outlined the type and amount of support the U.S. would provide and to what extent the UAE would reimburse the costs.<sup>38</sup> The lesson here seems to be to anticipate the arrival of coalition partners with whom the U.S. does not have an ACSA and to proactively push the issue higher for resolution.<sup>39</sup>

#### ***b. Operation IRAQI FREEDOM Applications***

The primary fiscal issue during the early months of OIF, the scope of this Publication, was how to fund the operation as it transitioned from a traditional O&M-funded combat mission to something less than full-scale combat, an evolving situation that quickly began to look like a military occupation. As the level of combat settled, the need to create a stable and secure environment called for measures that appeared to approach the realm of security assistance and development assistance as contemplated by the FAA, activities for which O&M ostensibly is not intended. In the words of a 3d Infantry Division JA, funding was needed “to hire, train, and equip the [Iraqi] police force; clear the rubble from government buildings and city streets; hire sanitation workers and other municipal employees; clean up the courts and hire judicial personnel” and to reestablish “power, water, sewer, police, and fire support for Baghdad.”<sup>40</sup>

The question became what money, if any, was available to fund these necessities in the interim period before Congress had a chance to speak to the issue in a new appropriations act and while the military was the only presence on the ground with the capability to implement effective change. The fiscal options that JAs pursued fell into three general areas: 1) an argument to use O&M to fulfill the international legal

<sup>35</sup> See 2004 OPLAW HANDBOOK, *supra* note 13, at 233-34.

<sup>36</sup> 10 U.S.C. §§ 2341-2350 (2000).

<sup>37</sup> This UAE example was recounted in the McGovern Interview, *supra* note 33, as well as the XVIIIth Airborne Corps AAR Transcript, *supra* note 6.

<sup>38</sup> The Agreement is on file in the CLAMO SIPRNET Database, *supra* note 29.

<sup>39</sup> The most current ACSA listing can be found on the SIPRNET at <http://j4.js.smil.mil/projects/acsa/acsa.htm> (last visited 8 Jan. 2004).

<sup>40</sup> 3d Infantry Division (Mechanized), After Action Report, Operation IRAQI FREEDOM, at 289 (2003) (on file with CLAMO) [hereinafter 3ID AAR].

obligations of an occupying power; 2) traditional DoD humanitarian assistance funds; and 3) Iraqi currency captured on the battlefield. What follows is a discussion of each.

### **1. Occupation Law and the Use of Operations and Maintenance Appropriations to Provide Reconstruction Aid**

Several DoD civilian attorneys and military JAs argued that O&M could be used for development assistance-type and security assistance-type activities because these activities would help stabilize the situation in Iraq, a task which appeared to fit within the military mission and, moreover, was an obligation of an occupying power. The typical argument went like this: 1) the U.S. is an occupying power in Iraq, whether *de facto* or *de jure*;<sup>41</sup> 2) occupying powers are required under international law to restore and maintain public order and safety and to provide food and medical care to the population;<sup>42</sup> 3) fulfilling this requirement is necessary and incident to military operations; and, thus 4) O&M is an appropriate funding source, even for activities that otherwise normally would fall under the purview of DoS-funded development and security assistance. In fact, the DoD Office of the General Counsel subscribed to this view, as stated in the following e-mail excerpt:

“Availability of DoD Appropriations for Post-Conflict Activities

DoD appropriations are available for:

(1) planning and preparing for activities that DoD reasonably anticipates that it may be required to perform during the post-conflict phase of [Iraq] operations;

(2) responding to emergencies and protecting the civilian populace, civil infrastructure and natural resources; and

(3) other actions that are reasonably necessary to fulfill DoD’s responsibilities, including those duties that occupying armed forces must perform under international law.”<sup>43</sup>

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<sup>41</sup> See U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 355 (18 July 1956) (C1, 15 July 1976) (setting forth the U.S. understanding of the international legal standard for a military occupation).

<sup>42</sup> See, e.g., Hague Convention No. IV Respecting the Laws and Customs of War on Land and its Annex: Regulation Concerning the Laws and Customs of War on Land, art. 43, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter Hague IV] (“[t]he authority of the legitimate power having passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety”); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, art. 55 (“[t]o the fullest extent of the means available to it, the Occupying Power has the duty of ensuring the food and medical supplies of the population”).

<sup>43</sup> E-mail from Mr. Matt Reres, Deputy General Counsel (Ethics and Fiscal), Office of the General Counsel, U.S. Army, to MAJ Alton L. Gwaltney, III, Director, Training and Support, Center for Law and Military Operations (19 Mar. 2003) (quoting guidance from the Office of General Counsel, Department of Defense (“Below [the quoted language] is what I received from DOD OGC.”)) (on file with CLAMO) [hereinafter

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19 March 2003 Reres E-Mail]. The genesis of this e-mail is of some interest. The Staff Judge Advocate for Task Force Tarawa, a Marine Corps unit involved in the invasion of Iraq, sent a request for information to CLAMO in early March 2003 on the very issue of whether O&M could be used to fund the development and security assistance-like aspects of an occupation. Having raised the issue out of academic interest at a recent luncheon with the Army Deputy General Counsel (Ethics and Fiscal), CLAMO JAs felt comfortable posing the TF Tarawa practical application of the issue to him. This is the e-mail CLAMO sent which elicited the reply quoted in the text:

We met about 10 days ago during the fiscal law luncheon at TJAGSA. I work at the Center for Law and Military Operations. I don't know if you are familiar with our operation, but one of our key tasks is providing direct support to deployed JAs. As I mentioned during the lunch meeting, we have been wrestling with the issue of how an occupation of Iraq would be funded. While previously this may have been an academic exercise, more recently, it has become a recurring question at many levels of command.

To assist in framing the issue, the IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War contains provisions regarding the obligations of an "occupying power." Included amongst these obligations are the requirements to provide food, water, safety, public health and hygiene, and education facilities/opportunities for children. Note that these obligations fall on the occupying power, which, more likely than not, means the State in general and not the military specifically. In other words, if we occupy Iraq, the U.S. government (not the military) will incur legal obligations (which, at least in the early days, only the military will be in a position to provide). As we turn to domestic fiscal law, we know that Congress has said that development and security assistance are the purview of the State Department. Many of the activities of an occupation look a lot like the types of activities Congress envisions under foreign assistance. Of course they also look a lot like activities for which Congress provides specific funding to the military through 2561.

That said, we believe a strong argument could be made that the military mission in a GC IV occupation is to perform all of the duties of the occupying power because, at least initially, only the military will be in a position to do so. State Department resources will no doubt trickle in, and while Congress may ultimately want the State Department and Title 22 money paying for the Iraq rebuilding effort, the initial occupation is a necessary part of the overall military mission.

I guess this leaves the initial question of whether O&M could be used to fund the military occupation of Iraq? . . . We would appreciate any thoughts that you or your counterparts within the OGC DOD or JCS have.

E-mail from MAJ Alton L. Gwaltney, III, and Maj Cody M. Weston, Center for Law and Military Operations, to Mr. Matt Reres, Deputy General Counsel (Ethics and Fiscal), Office of the General Counsel, U.S. Army (18 Mar. 2003) (on file with CLAMO) [hereinafter CLAMO Occupation E-mail].

It is unclear to what extent the 19 March 2003 Reres E-mail, *supra*, passing on DoD authorization for the use of O&M, filtered down to deployed units other than Task Force Tarawa. The SJA for 3d Infantry Division recalls that 3d Infantry Division commanders were advised on 23 March 2003 that O&M could be used to fund the development and security assistance aspects of an occupation; however, the Office of Legal Counsel to the Chairman, Joint Chiefs of Staff, issued an e-mail to numerous subordinate addressees providing the same advice as late as 15 May 2003. See Lieutenant Colonel Mark Martins, *No Small Change of Soldiering: The Commander's Emergency Response Program (CERP) in Iraq and Afghanistan*, ARMY LAW., Feb. 2004, at 1, 4 n.24 [hereinafter *No Small Change of Soldiering*].

An after action report from an attorney who served both with the Office of Reconstruction and Humanitarian Assistance (ORHA)<sup>44</sup> in Iraq and later with the DoD Office of the General Counsel went so far as to criticize those who did not subscribe to this view.

It is my impression that commanders and their counsel had only a limited understanding of occupation law, in particular the occupying power's responsibility to preserve order. This impacted planning and fiscal decisions. . . . DoDGC prepared an outline but it was not widely disseminated. DoDGC had prepared other analyses on specific issues, but these were not disseminated widely.

Commanders, on advice of their counsel, sometimes had divergent views about what was permissible under occupation law. DoDGC's more expansive views about what was permissible were not widely disseminated.

Some commanders, their comptrollers, and their fiscal lawyers did not initially accept the legal conclusion that projects they undertook to meet their obligations of an occupying power could be funded from operations and maintenance (O&M) accounts. Many resisted that conclusion because of the long-time legal limitations on the military's provision of humanitarian assistance, not understanding that those limitations were not appropriate during a military occupation.<sup>45</sup>

This criticism is correct to the extent that many military JAs involved in OIF during the period of major combat operations did not reach the conclusion that O&M could be used to fund development assistance-type and security assistance-type aspects of an occupation.<sup>46</sup> Indeed, CENTCOM's fiscal guidance was that, in the realm of

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<sup>44</sup> ORHA was a progenitor of the Coalition Provisional Authority (CPA) and initially charged with responsibility for the reconstruction of Iraq. See *supra* Section II.D.2.d.

<sup>45</sup> LtCol Brett D. Barkey, USMCR, former attorney with Office of Reconstruction and Humanitarian Assistance and Office of the General Counsel, Department of Defense, Operation Iraqi Freedom After Action Report, at 2 (2003) (on file with CLAMO).

<sup>46</sup> For example, CENTCOM issued guidance in March 2003 that humanitarian assistance activities during operations in Iraq were to be funded with traditional humanitarian assistance appropriations, not with O&M (save for *de minimis* HCA, see *supra* note 20). Message, 222048Z Mar 03, U.S. Central Command, subject: USCINCCENT Guidance for Humanitarian Assistance During Operation Enduring Freedom (OEF) and Operation Iraqi Freedom (OIF) (on file in CLAMO SIPRNET Database, *supra* note 29) [hereinafter CENTCOM OEF and OIF Humanitarian Assistance Guidance]. See also *No Small Change of Soldiering*, *supra* note 43, at 4-5 (citations omitted) ("Uncertainty concerning the nature and scope of projects that could be funded under this authority [O&M for occupation obligations], combined with the conservative mechanisms and habits of financial management, inhibited direct expenditure of O&M funds to locally purchase goods or services for humanitarian requirements."). Furthermore, most of the criticism from subordinate CENTCOM units was not that O&M was disallowed, or at least assumed to be disallowed, but that captured Iraqi currency could not be used, at least initially. The Marine Corps' Task Force Tarawa, see *supra* note 43, stands out as one unit that did reach the conclusion that O&M could be used, but the TF never actually used O&M for development or security assistance-type activities, instead predominantly using captured Iraqi currency and humanitarian assistance funding. Telephone Interview



development assistance, traditional humanitarian assistance authorities and appropriations should be used.<sup>47</sup> That is not necessarily to say, however, that all of these JAs based their opinions on slavish adherence to “long-time legal limitations.” Many JAs used a more nuanced counterargument to using O&M to fund these occupation activities: 1) it is true that international law imposes obligations on the occupying power; 2) the occupying “power” refers to the state (the U.S. Government), not the U.S. military; 3) U.S. domestic law thus must be consulted for fiscal guidance on how the international obligations will be funded and implemented, whether by DoD or another agency like DoS; and, 4) Congress has created separate authorizations and appropriations for development and security assistance that should be used, rather than O&M, until Congress states otherwise.<sup>48</sup>

These conflicting viewpoints suggest the lesson that JAs at all levels should have a more proactive fiscal posture. Subordinate JAs should anticipate activities where the use of O&M might be questionable and push the issue higher for resolution and coordination. Higher-level JAs should either anticipate the issue themselves or seek to resolve and coordinate a uniform answer. The guidance should then be widely disseminated.

This discussion should not be interpreted to mean that O&M funds were not used at all in Iraq as the mission transitioned to include stability and support operations. JAs advised commanders that O&M funds certainly were appropriate to continue the prosecution of the war, and were appropriate when any development or security assistance-type effect was a secondary consequence of a more traditional military activity. For example, an Army JA advised that unit O&M funds and assets could be used to unearth a large quantity of Iraqi gasoline discovered buried in the ground and to distribute it to Iraqi motorists lined up at gasoline stations. These lines were impeding the free movement of Army tactical vehicles around Baghdad. Thus, the JA advised that O&M could be used because the motivation to distribute the gasoline was to facilitate military tactical movement, and the humanitarian benefit to the local population merely was an incidental consequence.<sup>49</sup> For another example, a Marine Corps JA advised that unit O&M could be used under a force protection rationale to purchase soccer balls for a Marine Corps-sponsored Iraqi soccer league: the league made the area safer for Marines by fostering goodwill with the local population and by keeping athletic Iraqi males off the

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with LtCol William Perez, USMC, Deputy Staff Judge Advocate, II Marine Expeditionary Force, and former Staff Judge Advocate, Task Force Tarawa (8 Jan. 2004) [hereinafter Perez Interview]. For a discussion of the use of captured Iraqi currency to fund aspects of the occupation, see *infra* Section III.E.2.b.3.

<sup>47</sup> See CENTCOM OEF and OIF Humanitarian Assistance Guidance, *supra* note 46.

<sup>48</sup> See, e.g., *No Small Change of Soldiering*, *supra* note 43, at 4 n.24 (“Still, authority to use DOD funds [to fund an occupation] attenuates as Congress undertakes to discharge the U.S. treaty obligation with legislation and funding apportioned to various executive branch agencies, thereby relieving DOD of the necessity of doing so.”); CLAMO Occupation E-mail, *supra* note 43.

<sup>49</sup> Interview with COL Lyle Cayce, Staff Judge Advocate, 3d Infantry Division, in Charlottesville, Va. (7 Jan. 2004) (videotape on file with CLAMO) [hereinafter Cayce Interview]. *But see supra* text accompanying notes 19-24 (describing a very similar OEF fiscal fact pattern where JCS Legal reached a different conclusion, demonstrating how reasonable minds can disagree over the complexities of fiscal law).

street.<sup>50</sup> As with many of the fiscal issues in OEF and OIF, reasonable minds might disagree on this analysis.

## **2. Traditional Humanitarian Assistance Funding Sources**

There were, however, other funding options for the occupation. As noted above, CENTCOM's fiscal guidance for activities whose primary purpose approached the realm of development assistance was to use traditional DoD humanitarian assistance statutory authorities and funding appropriations.<sup>51</sup> Much like the 2002 guidance for OEF,<sup>52</sup> unit O&M could be used for *de minimis* HCA under 10 U.S.C. § 401, while OHDACA was to be used for other humanitarian purposes under 10 U.S.C. § 2561. The comptroller for I Marine Expeditionary Force (I MEF) explained how this worked for his unit in Iraq:

Funds for humanitarian assistance came from a few sources. The first source was [OHDACA]. This funding was centrally controlled by the 352 Civil Affairs Command (an Army unit). To use any of this money, a process existed where the I MEF would have to submit a HA project nomination package. The 352 decides whether or not the project rates to be funded with OHDACA funds. The 358 Civil Affairs Brigade, supporting the I MEF, was the agency that managed this process. If a project was approved the 352 would execute the money at its level as well as with its own contingency contractors. The next source of money for humanitarian assistance (HA) operations was operations and maintenance funding (O&M) [actually HCA under 10 U.S.C. § 401]. O&M was to be used for HA [sic] operations only as a last resort as per the I MEF CG. HA [sic] projects funded by O&M could not exceed \$2,500 (Deminimus).<sup>53</sup>

The problem with these traditional humanitarian assistance options was that OHDACA funds were limited and required lead time for project approval, and that *de minimis* HCA, as the name suggests, only supported minimal HCA activities.<sup>54</sup> Commanders and JAs thus looked to a third possibility, one that initially stirred a fair amount of consternation: captured Iraqi currency.

## **3. Captured Iraqi Currency**

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<sup>50</sup> See Transcript of After Action Review Conference, Office of the Staff Judge Advocate, Task Force Tarawa, and the Center for Law and Military Operations, Camp Lejeune, N.C., at 149, 155 (2-3 Oct. 2003) (on file with CLAMO) [hereinafter TF Tarawa AAR Transcript]; Perez Interview, *supra* note 46.

<sup>51</sup> See *supra* note 46 and accompanying text.

<sup>52</sup> See *supra* text accompanying notes 14-18.

<sup>53</sup> Maj M.J. Steele, Forward Deployed Comptroller, I Marine Expeditionary Force, Operation Iraqi Freedom Lessons Learned and After Action Report, at 16 (6 Aug. 2003) (on file with CLAMO) [hereinafter I MEF Comptroller AAR].

<sup>54</sup> See, e.g., *id.* at 16 (stating that, to be effective, humanitarian assistance projects required "massive amounts of money").

Army and Marine Corps units captured well over one billion dollars of Iraqi currency during OIF.<sup>55</sup> A CFLCC policy was in place for both OEF and OIF dictating that any captured enemy currency would be turned in to Army Finance personnel for accounting and management.<sup>56</sup> The February 2003, 336<sup>th</sup> Finance Command Standard Operating Procedure for captured enemy currency, including sample receipts and forms, is included at Appendix E-3. The issue became how this captured currency could be used to support operations.

Beginning in the first week of May 2003, and thus beyond the chronological scope of this book, the money began filtering back down to operational units through an ORHA-managed account known as the Commander's Discretionary Fund (CDF),<sup>57</sup> which the Coalition Provisional Authority (CPA) later managed and renamed the Commander's Emergency Response Program (CERP) fund.<sup>58</sup> Money in this fund could be used for "reconstruction assistance" for the Iraqi people, defined as "the building, repair, reconstitution, and reestablishment of the social and material infrastructure in Iraq."<sup>59</sup> The CPA passed the money through CJTF-7, who in turn parceled out the money

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<sup>55</sup> See 3ID AAR, *supra* note 40, at 289 ("the division confiscated almost 1 billion dollars from Baghdad palaces"); TF Tarawa AAR Transcript, *supra* note 50, at 122-23; *No Small Change of Soldiering*, *supra* note 43, at 3.

<sup>56</sup> The SJA for the 101st Airborne Division noted that the currency collection process required JA involvement in addition to Finance personnel, something that could have been anticipated with better planning.

Finance could have . . . war-gamed the process by which captured currency would flow on the battlefield. If the system required SJA implementation, it could have been coordinated well ahead of the turn-in of the first dinars [Iraqi currency]. The system, then, should have been incorporated in the base order or OPLAN.

When V Corps published its FRAGO on captured currency, the document appeared to assign Finance as the primary proponent to handle captured currency. As implemented, however, units were utilizing their trial counsels to supervise the processing of captured currency. When trial counsel became involved, their questions naturally flowed to the DREAR SJA Cell. The DREAR SJA Cell, then, not Finance, developed the process by which captured money would flow from the units to Finance. The FRAGO did not contemplate reality as it evolved on the ground.

Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), Operation Iraqi Freedom Lessons Learned, at 22 (2003) (on file with CLAMO). See also Jim Dwyer, *Iraqis Show Psychic and Physical Scars of Saddam's Reign*, INT'L HERALD TRIB., Apr. 8, 2003, at 3 (describing the 101st SJA storing seized currency in empty cardboard boxes that had held MREs (Meals Ready to Eat)).

<sup>57</sup> See Message, 070220L May 03, Headquarters, U.S. Army V Corps, subject: Fragmentary Order 104M to Operation Order Final Victory (establishing a "Brigade Commander's Discretionary Recovery Program to Directly Benefit the Iraqi People") (on file in CLAMO SIPRNET Database, *supra* note 29).

<sup>58</sup> See Message, 192346 June 03, Headquarters, Combined Joint Task Force 7, subject: Fragmentary Order 89 (Commander's Emergency Response Program (CERP) Formerly the Brigade Commander's Discretionary Fund) to CJTF-7 OPOD 03-036 (on file in CLAMO SIPRNET Database, *supra* note 29) [hereinafter FRAGO 89].

<sup>59</sup> *Id.* para. 3.B.4. FRAGO 89 further stated that reconstruction assistance included but was not limited to:

[W]ater and sanitation infrastructure, food production and distribution, healthcare, education, telecommunications, projects in furtherance of economic, financial,

to subordinate units in discrete amounts and with spending guidance.<sup>60</sup> The focus of this book, however, is on the period before the CDF and CERP became available to commanders.

During that period, many JAs expressed concerns over their inability to immediately use the funds for the benefit of the Iraqi people. JAs argued that international law authorized using captured enemy currency for military purposes, to include fulfilling the obligations of an occupying power.<sup>61</sup> The comments of the 3d Infantry Division SJA were representative of the frustration of the many JAs who shared this view.

The Division's use of captured money (both dinars and dollars) was unnecessarily restricted, resulting in delays in reconstruction efforts in Baghdad. An unnecessarily restrictive policy regarding the use of this money delayed SASO [stability and support operations] efforts. The division confiscated dinars and proposed to use the money to purchase water for the local population, eliminating the need for locals to transit through a checkpoint to retrieve water. This request followed a car bombing at a U.S. checkpoint that killed four soldiers. Incredibly, concerns at higher headquarters regarding policy issues related to the use of the money delayed this force protection measure.

Later, the division confiscated almost 1 billion dollars from Baghdad palaces. We had the legal authority under customary and codified international law to spend the money. Higher authorities again instructed division to not use the money to fund projects fulfilling obligations as an occupying power under international law, or responding to legitimate needs within Baghdad. Our failure to act quickly with this money negatively impacted the local population's views and support for U.S.

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management improvements, transportation, and initiatives which further restore of [sic] the rule of law and effective governance, irrigation systems installation or restoration, day laborers to perform civic cleaning, purchase or repair of civic support vehicles, and repairs to civic or cultural facilities.

*Id.*

<sup>60</sup> *Id.* para. 3. A more complete discussion of the CDF and CERP will be included in a forthcoming CLAMO publication compiling lessons learned from OEF and OIF after 1 May 2003. For an excellent discussion of the origins of the CERP and its detailed workings, see *No Small Change of Soldiering*, *supra* note 43.

<sup>61</sup> See, e.g., MAJ Robert F. Resnick, Chief, Criminal Law, 3d Infantry Division, Operation Iraqi Freedom After Action Review at 6 (25 Apr. 2003) (on file with CLAMO) ("CENTCOM/CFLCC unduly restricted the Division's use of captured money (both dinars and dollars) from the regime. I believe the law was much more clear than did CENTCOM regarding our ability to use this money for SASO [stability and support operations] projects. CENTCOM's conservatism in this area jeopardized all that we achieved."); TF Tarawa AAR Transcript, *supra* note 50, at 122. Hague IV, *supra* note 42, art. 53, states, "An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and generally, all movable property belonging to the State which may be used for operations of the war."

troops. . . . They soon saw us as being unable or unwilling to get anything done.

Recommendation: War plans should not restrict for policy reasons the expenditure of confiscated money or other funds for critical projects. Higher officials must understand that their reticence on this issue delayed and perhaps even jeopardized SASO.<sup>62</sup>

The Marine Corps experience with captured enemy currency paints the problem from a slightly different perspective, because, as shown in this quote from the I MEF Comptroller, Marine Corps units actually used the captured currency for a period of time and then witnessed negative consequences when they no longer could.

During the course of the war and after hostilities ceased, a large amount of U.S. and Iraqi money was physically captured from bank robbers and Iraqi bad guys trying to flee the country. Initially we were told we could not use this money for HA purposes and were told to turn it over to the Army Finance Command. We never got around to turning the money in and at some point Gen McKiernan, CFLCC Commander, gave authorization to us to spend this money to the benefit of the Iraqi people. We, in fact, started doing that. Several millions of dollars were used in direct benefit of the Iraqi people. Mostly schools, police stations, and utility facilities were repaired or built with this money.

At some point down the road CJTF-7 came back and said we can no longer use the money we captured and to turn it in. . . . This source of funds was extremely valuable to us since our other HA funding sources were extremely limited. Turning it off like HHQ [higher headquarters] did reduced our capability to conduct effective HA operations since most of the HA issues centered around providing local utilities to the population centers and to do this massive amounts of money was needed. Money the Marines on the ground didn't have. The CPA was supposed to take the lead on getting public utilities up and running, ensuring schools were established, and other public type facilities were up and running. In everyone's opinion, the CPA has failed to do this. To date, the Iraqi

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<sup>62</sup> 3ID AAR, *supra* note 40, at 288-89. The "policy reasons" the 3d Infantry Division SJA referred to involved a fiscal law concern that using captured Iraqi currency would constitute an unlawful augmentation of DoD funds. Cayce Interview, *supra* note 49. DoD, in consultation with the Office of Management and Budget, eventually determined that using the enemy currency was not an unlawful augmentation because the funds never entered the U.S. Treasury system and thus never "augmented" a congressional appropriation as miscellaneous receipts. *See No Small Change of Soldiering*, *supra* note 43, at 3 n.17. *See also* 10 U.S.C. § 3302(b) (2000) ("[A]n official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim."). The very thought of considering the miscellaneous receipts issue raises again the issue discussed *supra* text accompanying notes 41-48 regarding the relationship between U.S. domestic fiscal law and international legal obligations.

people still complain and protest the fact that they have no electricity or running water.<sup>63</sup>

The frustration of Army and Marine Corps JAs and comptrollers seems very understandable in light of the instability they encountered on the ground. But it is also understandable for higher commands to have policy reasons for centrally managing the money—for instance, having a transparent centralized system better able to withstand public scrutiny than an ad hoc system in which individual units capture money and spend it on their own, and the desire to more effectively allocate the funds from a higher command with a broader perspective on overall operational requirements.<sup>64</sup> The lesson in all of this seems apparent: anticipate the capture of enemy currency and have a plan instituted that can more quickly accommodate military necessities and policy concerns.

### ***3. Understand the Relationship Between Construction Appropriations, Combat and Contingency Construction, Procurement Appropriations, and Operating and Capital Leases: Prefabricated Structures, Relocatable Buildings, and Nontactical Vehicles.***

Another “pot of money” lesson involved understanding the relationship between construction appropriations, procurement appropriations, contingency construction, and leasing. Generally speaking, O&M dollars may not be used for construction projects exceeding \$750,000; rather, military construction (MILCON) appropriations must be used.<sup>65</sup> Similarly, O&M dollars may not be used to purchase investment end items or systems exceeding \$250,000 or any centrally managed item (such as tactical or nontactical vehicles) regardless of cost; rather, procurement appropriations must be used.<sup>66</sup>

A possible exception to the general construction rule just mentioned is the use of O&M dollars for construction during combat or declared contingency operations.<sup>67</sup> The availability of this exception has fluctuated over the past several years. In February 2000 the Army Deputy General Counsel (Ethics and Fiscal) issued a policy memorandum stating that O&M could be used in such circumstances if the structures were “clearly intended to meet a temporary operational requirement to facilitate combat or contingency operations.”<sup>68</sup> In February 2003 the DoD Deputy General Counsel (Fiscal) issued a

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<sup>63</sup> I MEF Comptroller AAR, *supra* note 53, at 16.

<sup>64</sup> Indeed, a 30 April 2003 memorandum from the President to the Secretary of Defense directed DoD to consult with various U.S. agencies to develop a transparent and well-documented system to govern the use, accounting, and auditing of seized Iraqi funds. See *No Small Change of Soldiering*, *supra* note 43, at 3 n.17.

<sup>65</sup> See 10 U.S.C. § 2805(c) (2000). For a more detailed discussion of the fiscal rules governing military construction, see 2004 OPLAW HANDBOOK, *supra* note 13, at 242-46.

<sup>66</sup> See, e.g., Department of Defense Appropriations Act for Fiscal Year 2004, Pub. L. No. 108-87, § 8040, 117 Stat. 1054, 1081 (30 Sept. 2003) [hereinafter 2004 DoD Appropriations Act]; U.S. DEP’T OF DEFENSE, DOD FINANCIAL MANAGEMENT REGULATION, vol. 2A, ch. 1, para. 010201(D)(1) (June 2002) [hereinafter DoD FMR, vol. 2A, ch. 1].

<sup>67</sup> See 10 U.S.C. § 101(a)(13) (2000) (defining contingency operation).

<sup>68</sup> Memorandum, Deputy General Counsel (Ethics and Fiscal), Office of the General Counsel, Department of the Army, subject: Construction of Contingency Facility Requirements (22 Feb. 2000) (often referred to as the “Reres Memo” after the name of the Deputy General Counsel who wrote it) [hereinafter Reres

policy memorandum clarifying the DoD position, also authorizing the use of O&M for temporary contingency construction.<sup>69</sup> Congress effectively countermanded the 2003 DoD policy in its April 2003 Emergency Wartime Supplemental Appropriation by stating that MILCON funds had to be used for all operations regardless of the intended temporary use of the construction.<sup>70</sup> Then, in November 2003, Congress carved out a broad exception to this rule by providing temporary authority for the use of O&M for urgent operational construction requirements of a temporary nature in support of OIF and the Global War on Terrorism.<sup>71</sup>

An example from OIF illustrates the interplay between these construction and procurement rules. During its planning for the invasion of Iraq, the I Marine Expeditionary Force (I MEF) identified a need for more bridging assets to cross the numerous rivers along its attack route through the eastern regions of Iraq.<sup>72</sup> To meet the shortfall, Navy Seabees in support of I MEF proposed the expenditure of unit O&M funds to purchase prefabricated, ready-to-assemble bridge kits manufactured by a British company. Depending on bridge size, the bridges cost upwards of several million dollars apiece, well above the \$250,000 procurement end item threshold and well above the \$750,000 construction threshold. Recognizing a fiscal issue, the I MEF SJA and Comptroller debated whether the bridges constituted construction materials under a construction analysis or major investment end items under a procurement analysis—in

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Memorandum]. To qualify under the policy, projects had to: 1) be clearly intended to meet a temporary operational requirement; 2) be intended for such use to facilitate combat or contingency operations; and 3) not be used for the purpose of satisfying requirements of a permanent nature at the conclusion of combat or contingency operations.

<sup>69</sup> Memorandum, Deputy General Counsel (Fiscal), Office of the General Counsel, Department of Defense, subject: Availability of Operation and Maintenance Appropriations for Construction (27 Feb. 2003) [hereinafter DoD Contingency Construction Memorandum]. The Memorandum authorized the use of O&M funds for construction when: 1) the construction was necessary to meet an urgent military operational requirement of a temporary nature; 2) the construction would not be carried out with respect to a military installation as defined under 10 U.S.C. § 2801; and 3) the United States had no intention of using the construction after the operational requirement had been satisfied.

<sup>70</sup> See Emergency Wartime Supplemental Appropriations for the Fiscal Year 2003, Pub. L. No. 108-11, § 1901, 117 Stat. 587 (2003).

<sup>71</sup> See Emergency Supplemental Appropriation for Defense and for the Reconstruction of Iraq and Afghanistan for Fiscal Year 2004, Pub. L. No. 108-106, § 1301, 117 Stat. 1209 (2003). Under Section 1301 of the Appropriation, O&M funds can be used for military construction projects during Fiscal Year 2004 when the Secretary of Defense determines that: 1) the construction is necessary to meet urgent military operational requirements of a temporary nature involving the use of the Armed Forces in support of OIF or the Global War on Terrorism; 2) the construction is not carried out at a military installation where the United States is reasonably expected to have a long-term presence; 3) the United States has no intention of using the construction after the operational requirements have been satisfied; and 4) the level of construction is the minimum necessary to meet the temporary operational requirements. The funding authority is limited to \$150 million, and DoD must issue quarterly reports to Congress detailing the use of the authority. For a more detailed discussion of the combat and contingency construction exception, see Major James M. Dorn, *So How Are We Supposed to Pay for This? The Frustrating and Yet Unresolved Saga of Combat and Contingency-Related, O&M Funded Construction*, ARMY LAW., at 35 (Sept. 2003) (note that the article was published prior to the November 2003 supplemental appropriation).

<sup>72</sup> The details of this bridging example derive from Telephone Interview with Col Karl Woods, former acting Staff Judge Advocate, I Marine Expeditionary Force (11 Jan. 2004) and Telephone Interviews with Maj M.J. Steele, former Deployed Comptroller, I Marine Expeditionary Force (12-13 Jan. 2004).

other words, were the bridges separate construction “building” projects or were they separate “things” to be procured? The SJA and Comptroller recommended three legally defensible alternative courses of action to the commander: 1) classify the bridging kits as investment end items and seek procurement funding and purchase through the Marine Corps Systems Command (MARCORSYSCOM); 2) consider the kits a cost of bridge construction and seek MILCON funds; or 3) consider the kits a cost of bridge construction, but use unit O&M under the combat/contingency construction exception.<sup>73</sup> The commander chose the first option, and I MEF obtained the bridges through MARCORSYSCOM and procurement dollars.

Another type of structure that caused a construction versus procurement fiscal debate is what is known as a “relocatable building.” A relocatable building is “a building designed to be readily moved, erected, disassembled, stored, and reused.”<sup>74</sup> Additionally, to be considered a relocatable building, “the estimated funded and unfunded costs for average building disassembly, repackaging (including normal repair and refurbishment of components), and nonrecoverable building components, including typical foundations, may not exceed 20 percent [30 percent under Army regulations<sup>75</sup>] of the building acquisition cost.”<sup>76</sup> Relocatable buildings typically are considered personal property,<sup>77</sup> and thus can be funded with unit O&M dollars or, if over the \$250,000 investment end item threshold, with procurement dollars. However, relocatable buildings used in place of permanent construction when the duration of the required use is unknown must be considered real property and funded under a construction analysis.<sup>78</sup> The issue JAs faced was whether a structure could be classified as a relocatable building; if so, whether the structure was personal or real property; and, depending on the answer, how the structure should be funded.

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<sup>73</sup> This issue arose in December 2002, prior to the February 2003 DoD Contingency Construction Memorandum, *supra* note 69, and prior to the subsequent congressional appropriations that spoke to contingency construction, *supra* notes 70-71. The I MEF SJA, in consultation with fiscal law experts at the The Judge Advocate General’s School, U.S. Army, argued that I MEF should subscribe to the Army contingency funding analysis memorialized in the February 2000 Reres Memorandum, *supra* note 68, which was in effect at the time.

<sup>74</sup> U.S. DEP’T OF DEFENSE, INSTR. 4165.56, RELOCATABLE BUILDINGS para. C(2)(a) (13 Apr. 1988) [hereinafter DOD INSTR. 4165.56].

<sup>75</sup> See U.S. DEP’T OF ARMY, REG. 420-18, FACILITIES ENGINEERING MATERIALS, EQUIPMENT, AND RELOCATABLE BUILDING MANAGEMENT para. 5-2(c) (3 Jan. 1992) [hereinafter AR 420-18]. The relevant Navy regulation is U.S. DEP’T OF THE NAVY, CHIEF OF NAVAL OPERATIONS INSTR. 11010.33B, PROCUREMENT, LEASE AND USE OF RELOCATABLE BUILDINGS (14 July 1988).

<sup>76</sup> DOD INSTR. 4165.56, *supra* note 74, para. C(2)(a).

<sup>77</sup> See *id.* para. D(3) (“Relocatable buildings shall be accounted for as personal property, unless these facilities are authorized for procurement using construction procedures. In this case, the buildings shall be accounted for as real property.”).

<sup>78</sup> See *id.* See also AR 420-18, *supra* note 75, para. 5-2(f) (“Relocatable buildings may be used instead of conventional permanent construction, particularly overseas, when the requirement duration is unknown. In such cases, the project will be programmed by using proper military construction procedures and totally funded from military construction appropriations . . .”).



An example will help explain.<sup>79</sup> Army engineers proposed building a structure at the Karshi Kharnabad (K2) base camp in Uzbekistan that was to be an improvised conglomeration of conex-type boxes, or trailers, purchased from commercial vendors specifically for the project, and that were to be fitted with electrical wiring and plumbing once linked together. The total project cost was approximately \$3 million. The fiscal law JA for CJTF-180 argued that this structure should be considered a relocatable building because when completed it would be a “thing,” or personal property, that could be picked up and moved if required. Thus, as a piece of personal property exceeding \$250,000, procurement appropriations should be used.<sup>80</sup> A CFLCC fiscal JA disagreed, concluding that the structure was not a relocatable building because it was intended for more than temporary use and was not readily disassembled and moved. Thus, the structure was real property and should be analyzed through a construction lens. And, again because the structure was not intended for temporary use, the combat contingency exception for construction would not apply and MILCON funds should be used. As the higher command, the CFLCC opinion controlled.

Both of these examples involved the *purchase* of structures. Another option that might have been considered, and that triggers different fiscal rules, is *leasing*. Generally speaking, O&M funds can be used for “operating leases” of equipment and facilities.<sup>81</sup> An operating lease is defined in the negative as any lease that is not a “capital lease.”<sup>82</sup> A capital lease, which would be considered an investment and thus not funded by O&M (i.e., funded by procurement or MILCON appropriations),<sup>83</sup> exists when any one of the following four criteria is met:

1. The lease transfers ownership of the property to the lessee by, or at, the end of the lease term;
2. The lease contains an option to purchase the leased property at a bargain price;

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<sup>79</sup> This example is drawn from Telephone Interview with CPT Robert McGovern, former Fiscal Law Attorney, Combined Joint Task Force 180 (14 Jan. 2003) [hereinafter McGovern Interview]. *See also* XVIIIth Airborne Corps AAR Transcript, *supra* note 6.

<sup>80</sup> The CJTF-180 Fiscal JA did not actually use the phrase “relocatable building,” but that was essentially his argument. From this premise, he then argued that O&M funds should be used, citing a provision in the Federal Acquisition Regulation authorizing simplified acquisition procedures for supplies not exceeding \$5 million when a contracting officer reasonably believes that only offers of commercial items will be received. *See* McGovern Interview, *supra* note 79 (referring to GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 1.602-3 para. 13.500(a) (get date) [hereinafter FAR]). Because the FAR deals with contracting procedures, *see infra* Section III.E.5, this analysis seems unrelated to the separate question of which appropriation to use.

<sup>81</sup> *See* DOD FMR, vol. 2A, ch. 1, *supra* note 66, para. 010201(D)(1) (listing, *inter alia*, “rental charges for facilities and equipment” as an “expense[ ] . . . consumed in operating and maintaining the Department of Defense”).

<sup>82</sup> *See* U.S. DEP’T OF DEFENSE, DOD FINANCIAL MANAGEMENT REGULATION, vol. 4, ch. 6, para. 060207(G) (Aug. 2000) [hereinafter DOD FMR, vol 4, ch. 6].

<sup>83</sup> *See* DoD FMR, vol. 2A, ch. 1, *supra* note 66, para. 010201(C) (“Costs budgeted in the Procurement and Military Construction appropriations are considered investments.”).

3. The lease term is equal to or greater than 75 percent of the estimated economic life of the leased property; or
4. The present value of rental and other minimum lease payments, excluding that portion representing executory costs to be paid by the lessor, equals or exceeds 90 percent of the fair value of the leased property.<sup>84</sup>

Thus, O&M funds could have been used for operating leases of the bridging kits and the conex-type boxes in the two above examples. As a practical matter, however, the commercial vendors probably would not have wanted to enter into leases with the military units, having no desire to receive the used equipment back at the expiration of the leases. The construction versus procurement analysis employed by the JAs in the examples was therefore appropriate.

But one recurring example during OEF and OIF of items that were obtained through operating leases rather than purchase was commercial nontactical vehicles. Units determined that more vehicles were needed to meet the transportation requirements of dispersed and fluid areas of operations.<sup>85</sup> Yet vehicles are supposed to be purchased with procurement dollars because, even though they typically do not exceed the \$250,000 investment item threshold, they are considered centrally managed items.<sup>86</sup> The purchase of vehicles is centrally managed because Congress sets a cap on the number of vehicles that each service can acquire in a given fiscal year.<sup>87</sup> Accordingly, to avoid violating the congressional cap, units in OEF and OIF used O&M-funded operating leases to acquire the use of nontactical vehicles.<sup>88</sup> These leases often were very expensive, however, and units had to wade through the detailed procedural rules and restrictions governing nontactical vehicle operating leases, such as what level of command can approve the lease depending on its length.<sup>89</sup>

Special Forces teams, for example, ran straight into these purchase constraints after infiltrating northern Afghanistan. Vehicles were needed for mobility, but time and

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<sup>84</sup> DoD FMR, vol. 4, ch. 6, *supra* note 82, para. 060207(E).

<sup>85</sup> *See, e.g.*, LTC Paul S. Wilson, Deputy Staff Judge Advocate, 101st Airborne Division (Air Assault), Thoughts on Contracting (6 Jan. 2004) (Microsoft Word document contained in E-mail from LTC Richard M. Whitaker, Staff Judge Advocate, 101st Airborne Division (Air Assault), to LTC Pamela M. Stahl, Director, Center for Law and Military Operations (8 Jan. 2004)) [hereinafter Wilson E-mail] (“we leased a number of vehicles at various points during the course of the year”).

<sup>86</sup> *See supra* text accompanying note 66.

<sup>87</sup> *See, e.g.*, 2004 DoD Appropriations Act, *supra* note 66, 117 Stat. 1063 (authorizing the Army to purchase four new vehicles required for personnel security, not to exceed \$180,000 per vehicle).

<sup>88</sup> *See, e.g.*, Wilson E-mail, *supra* note 85.

<sup>89</sup> *See* U.S. DEP’T OF DEFENSE, REG. 4500.36-R, MANAGEMENT, ACQUISITION, AND USE OF MOTOR VEHICLES paras. C3.2.4.2 to C3.2.4.3 (29 Mar. 1994) ) (C1, 30 Sept. 1996) (dividing leases into short- (60 days or less) and long-term (greater than 60 days) leases, requiring, *inter alia*, approval of the head of the DoD component or designee for long-term lease of commercial vehicles outside the United States). The Army implementing regulation provides additional guidance and restrictions. *See* U.S. DEP’T OF ARMY, REG. 58-1, MANAGEMENT, ACQUISITION, AND USE OF MOTOR VEHICLES paras. 3-10 to 3-11 (28 Jan. 2000) (placing further restriction on, *inter alia*, leases that exceed twelve months).

mission constraints kept them from using airdropped government or commercial vehicles. Leasing vehicles from local Afghans was not an option. Purchasing local vehicles would allow them to blend in with the friendly forces.<sup>90</sup> It seems to follow then, that in addition to the lesson that JAs should understand the rules regarding vehicle leasing, perhaps a lesson is that some type of exception be created for the purchase of nontactical vehicles during combat or contingency operations.

#### ***4. A Streamlined Rewards Program Can Aid Mission Accomplishment.***

A DoD rewards program was in place during OEF and OIF that authorized cash payments to individuals who provided information or nonlethal assistance to coalition forces leading to the capture of wanted personnel, weapons, or documents.<sup>91</sup> Although the funding source was O&M,<sup>92</sup> lower-level tactical units did not, per CENTCOM guidance, have payment authority; rather, only certain higher commands could authorize payments up to certain amounts. The first level of authority was a Rewards Authorization Officer (RAO) at CFLCC (the CFLCC SJA), who could authorize all rewards up to \$2,500. CENTCOM could approve rewards higher than \$2,500 and up to \$50,000. Any higher payments had to be forwarded to the Secretary of Defense for approval. These payment authorities, as well as further implementing details and sample forms, can be found in the April 2003 CFLCC Rewards Program Standard Operating Procedure included at Appendix E-4. An additional rewards program using CERP funds was instituted specifically for OIF, but is beyond the chronological scope of this Publication.<sup>93</sup>

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<sup>90</sup> Memorandum, Major Dean Whitford, former Group Judge Advocate, 5th Special Forces Group (Airborne) and Staff Judge Advocate, Joint Special Operations Task Force – North (Task Force Dagger) (OEF), for Major Daniel P. Saumur, Deputy Director, CLAMO, subject: Task Force Dagger OEF/OIF Civil Law AAR, para. 2 (17 Jun. 2004) (on file with CLAMO) [hereinafter Whitford Civil Law AAR].

<sup>91</sup> See Message, 151330Z Mar 03, U.S. Central Command, subject: CFC DoD Rewards Program in USCENTCOM AOR (Revision 2) (on file in CLAMO SIPRNET Database, *supra* note 29). This program should not be confused with a weapons buyback program, which involves O&M-funded cash payments to local nationals who turn in weapons to U.S. forces. Weapons buyback programs have been instituted in some prior U.S. operations. See, e.g., HAITI LESSONS LEARNED, *supra* note 8, at 72-75.

<sup>92</sup> More precisely, the money came from Emergency and Extraordinary Expenses (EEE) funds, special funds within the O&M appropriation available for the Secretary of Defense and service secretaries under the statutory authority of 10 U.S.C. § 127 (2000). See Message, 241944Z May 02, Chairman, Joint Chiefs of Staff, subject: Implementation of the DoD Rewards Program, para. 2.A (on file in CLAMO SIPRNET Database, *supra* note 29); Message, Apr 03, Chairman, Joint Chiefs of Staff, subject: Revised Implementation of the DoD Rewards Program (Corrected Copy), para. 1.B (on file in CLAMO SIPRNET Database, *supra* note 29).

<sup>93</sup> Message, 011947 July 03, Combined Joint Task Force 7, subject: Fragmentary Order 250 (Amendment to the Commander's Emergency Response Program (CERP) Formerly the Brigade Commander's Discretionary Fund) to CJTF-7 OPOD 03-036 (on file in CLAMO SIPRNET Database, *supra* note 29); Message, 222351 July 03, Combined Joint Task Force 7, subject: Fragmentary Order 480 (C1 to FRAGO 250M—Amendment to Commander's Emergency Response Program) to CJTF-7 OPOD 03-036 (on file in CLAMO SIPRNET Database, *supra* note 29). The CERP Rewards Program delegated CERP-funded reward payment authority to lower levels than the DoD Rewards Program: \$2,500 per division; \$1,000 per brigade; and \$250 per battalion. *Id.*

Most JAs agreed that the DoD Rewards Program largely was a success.<sup>94</sup> One complaint, however, was that withholding payment authority at higher levels created an administrative burden that delayed more effective implementation of the program.<sup>95</sup> The lesson seems to be that a rewards program can aid mission accomplishment, but that consideration perhaps should be given to delegating payment authorities to lower tactical levels.

### ***5. More Judge Advocates Arguably Should Become Involved in Deployment Contracting.***

The civil law lessons in this chapter thus far have all largely dealt with fiscal law. But a significant component of civil law is contract law, the “application of domestic and international law to the acquisition of goods, services, and construction” that entails “battlefield acquisition, contingency contracting, bid protests and contract dispute litigation, procurement fraud oversight, commercial activities, and acquisition and cross-servicing agreements.”<sup>96</sup> Interestingly, beyond the lesson involving ACSAs in this chapter<sup>97</sup> and the discussion of battlefield acquisition in the administrative law chapter,<sup>98</sup> after action reports from the period of major combat operations in OEF and OIF were relatively silent on substantive contract law lessons. The few substantive contract law comments to be found in the reports merely offered the general admonition that JAs should be familiar with the contents of the Federal Acquisition Regulation,<sup>99</sup> without going into much greater detail.<sup>100</sup> Moreover, CLAMO received very few requests for contract law assistance from deployed JAs.<sup>101</sup>

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<sup>94</sup> See, e.g., Hayden Interview, *supra* note 33.

<sup>95</sup> See, e.g., Cayce Interview, *supra* note 49 (noting that payments as low as \$20 could lead to significant intelligence, but the delays in obtaining the requisite CFLCC approval resulted in some wasted intelligence opportunities). JAs from the 4th Infantry Division expressed similar frustrations.

The DoD Rewards Program . . . was not, in our humble opinion, a success. While clothed in the best of intentions, the program proved to be a procedural nightmare of the highest order, and consequently was rarely utilized by the Fourth Infantry Division. Case in point: we wanted to reward two Iraqi nationals who found the remains of a downed U.S. pilot and, after burying him draped in an American flag, informed other U.S. soldiers entering their town of the whereabouts of his remains. This occurred in April. The reward request was drafted and submitted that same month. When in July the reward had still not been approved, and was found to be hopelessly mired in the process, we used CERP to pay the reward. The CERP Small Rewards Program provided a much more efficient means of paying rewards. The flexibility of the program provided quick payment, which yielded better intelligence for the Fourth Infantry Division and fostered a stronger civil-military relationship.

Office of the Staff Judge Advocate, 4th Infantry Division, Staffing Comments, at 3 (13 May 2004) (on file with CLAMO).

<sup>96</sup> FM 27-100, *supra* note 1, para. 3-6 (citation omitted).

<sup>97</sup> See *supra* Section III.E.2.a.3.

<sup>98</sup> See *infra* Section III.G.1.

<sup>99</sup> See FAR, *supra* note 80.

<sup>100</sup> See, e.g., Bovarnick CJTF-180 Notes, *supra* note 2, at 6 (“The contract attorney must ensure that all contracting solicitations and awards are conducted with full and open competition between contractors/bidders as required by the Federal Acquisition Regulation and also oversee administration of

The scarcity of contract lessons could simply reflect that JAs were well-versed in contract law and that few lessons were worth mentioning, or that contracting needs are not as pronounced during combat operations as they are during stability and support operations. But other evidence suggests that perhaps the scarcity relates to a need for greater JA involvement in contracting. For example, after the period of major combat operations, the General Counsel for the CPA in Iraq specifically requested more JAs with contracting experience to augment the CPA.<sup>102</sup> While this request undoubtedly was at least in some measure a response to greater contracting needs in a post-combat environment, it is telling that the request was for more JAs, not for more non-JA contracting officers. When 1st Infantry Division deployed to Turkey prior to major combat operations in Iraq, however, a similar shortage occurred. The Division requested JAs with contracting expertise in three separate locations. At the time, the Division did not have any assigned JAs with contracting expertise. Instead the Division had to “borrow” two JAs from other higher units and send one JA without any contracting experience.<sup>103</sup> Anecdotal evidence also suggests that many non-JA contracting officers are frustrated over the lack of contracting knowledge by many young JAs.<sup>104</sup>

A Marine Corps after action report offers the following comments on the need for an increased JA role in contracting.

[T]he USMC continues to underutilize SJAs in the field of contracting. Numerous times during [training] and deployments the Marine Corps had to pay the full price of contracts when an exercise was cancelled or a contract was written unfavorably towards the US Government. While the contracts were not adhesive in nature their damage clauses were written in only the favor of the contracting agents. We continue to employ [Staff Noncommissioned Officers] and Supply Officers to negotiate and sign contracts based on their [Marine Occupational Specialty] and supply skills. While these Marines should continue to be the primary contractors the Marine Corps should invest some [Professional Military Education] and resident schooling to certify SJAs as contracting “capable.” If nothing else they could review the contracts and make corrections more in line with a negotiated contract and not simply something we have to pay.

The second aspect that could be beneficial was more operational in nature. During operations in An Nasiriyah [a city in Iraq] only 4 or 5

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contracts to ensure both government and contractor compliance with contractor obligations.”); XVIIIth Airborne Corps AAR Transcript, *supra* note 6.

<sup>101</sup> Cf. text accompanying note 4 (noting the large number of requests to CLAMO for fiscal law assistance).

<sup>102</sup> See E-mail from LTC Michael J. Benjamin, Chair, Contract and Fiscal Law Department, The Judge Advocate General’s Legal Center and School, to Maj Cody M. Weston, USMC, Director, Joint Operations, CLAMO (23 Jan. 2004) (on file with CLAMO).

<sup>103</sup> Interview with LTC Michael J. Benjamin, Chair, Contract and Fiscal Law Department, The Judge Advocate General’s Legal Center and School, in Charlottesville, Va. (23 Mar. 2004) (information gathered from his discussions with a contract JA deployed in the theater).

<sup>104</sup> *Id.* (based on his discussions with several non-JA contracting officers).

“contracting specialists” from the Civil Affairs Group could sign the most basic of agreements with local contractors. When 3 and then the 4th contractor left the area the [unit] was left to wait for expertise to be brought in to work with the local Iraqis to negotiate any contracts for labor or goods and materials. This was incredibly wasteful and took initiative away from work projects because the logistical expertise was too busy with its primary function of filling urgent requests for transportation and logistical functions. Things as simple as buying paint and brushes needed a contractor and disbursing agent, who we were lucky enough to have present. Having even one more contracting qualified officer would help in situations where the [unit] is away from formal contracting agents.<sup>105</sup>

Based on this evidence, it seems at least arguable that the Army and Marine Corps should consider building a larger pool of JAs with contracting expertise and then using their skills to a greater extent during operations. An after action report from the 82d Airborne Division, a unit with recent deployments to both Afghanistan and Iraq, reaches a similar general conclusion.

Contract Law: Given today's deployed environment there needs to be more of an emphasis, even at [JA Officer's Basic Course], on Contract Law. Instruction should include an orientation on the concepts of LOGCAP [logistics civilian augmentation program], the Sand Table standards, CREST [contingency real estate support teams] teams (and their capabilities), and fiscal legal constraints. In OIF2, we either had to create an FOB [forward operating base] where there was previously nothing, or refurbish damaged buildings to serve as Headquarters. Given this, there are many very expensive building and renovation contracts, which range from contracting for an entire tent city, to inexpensive minor projects like installing windows, running wire and installation and maintenance of ECUs [electronic control units]. With many of these types of contracts, JA's at the division level are asked to ensure that the process complies with the FAR, as well meets the units' requirements. This is more important in a large deployment as LOGCAP is overburdened and units are forced to go outside to other vendors and negotiate a contract on their own. More commonly, JA's are asked to assist or review general services contracts like rubbish removal, portable toilet maintenance and supplies. Additionally, JA's will be called in to help solve a contract dispute.<sup>106</sup>

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<sup>105</sup> Maj Thomas A. Wagoner, Staff Judge Advocate, 15th Marine Expeditionary Unit (Special Operations Capable), After Action Report for Operation Iraqi Freedom, at 6 (2003) (on file with CLAMO).

<sup>106</sup> Office of the Staff Judge Advocate, 82d Airborne Division, Operations Iraqi Freedom & Enduring Freedom Recent Legal Developments, para. 6(a) (26 Jan. 2004) (on file with CLAMO). The V Corps Operational Law Chief offered a slightly different perspective.

Everyone needs some basic knowledge in fiscal law and contracting. But, we do not need specialists in these areas at the tactical level. We need generalists—operational lawyers! I think the specialists should be saved for the strategic level of command. That is where the big fiscal/contracting issues ought to be handled. When we had something

## 6. *At Least Some Measure of Environmental Stewardship Is Required in Combat Operations.*

Another component of the civil law legal discipline is environmental law, “the body of law containing the statutes, regulations, and judicial decisions relating to [military] activities affecting the environment to include navigable waters, near-shore and open water and other surface water, groundwater, drinking water supply, land surface or subsurface area, ambient air, vegetation, wildlife, and humans.”<sup>107</sup> The primary issue faced by JAs was to what extent domestic U.S. environmental statutes and regulations applied to overseas combat operations. The law and policy in this area are relatively straightforward and outlined in a variety of secondary sources.<sup>108</sup> The lesson for JAs is to understand that, even in combat operations, at least some measure of environmental stewardship is required. As an example of specific application of environmental law

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big in this area come up we always referred it to CFLCC and if they could not answer, they would forward to CENTCOM.

E-mail from LTC Jeffery R. Nance, Chief, International and Operational Law, V Corps, to LTC Pamela M. Stahl, Director, Center for Law and Military Operations (14 Oct. 2003) (on file with CLAMO). A JA who served with the 173d Airborne Brigade in Iraq had the following insightful thoughts.

Every AAR notes that JAs need to become more involved in contracting. The AARs do not, however, address the root of the problem: What is the appropriate role of the JA in the contracting process—at solicitation, formation, execution, and in breach? JAG doctrine, of course, provides that “legal counsel must participate fully in the acquisition process” (FM 27-100, paragraph 3.6). A contracting officer (KO) at Brigade and Division-level, however, negotiates and executes dozens of contracts a week, and there is no way, given limited time and competing demands, for a JA to provide anything like comprehensive legal advice on each contract. The KO, on the other hand, attends at least 16 weeks of contracting classes, including 2 weeks of contract law, with continuing education requirements just like JAGs, and at least 24 semester credit hours in business at an accredited university. KOs do not need a JAG to check every contract, and to the extent the AAR and doctrine imply that, it distorts a JA’s decision on where to allocate scarce legal resources. On the other hand, contract law does require legal review when significant dollar thresholds are breached (\$150-200,000 in OIF), and KOs often want legal advice on complex or novel issues or to provide ammunition to convince a commander that a pet project is crossing some legal line. If JAs are not experts in addressing these issues, it is no wonder—since the KO, the subject matter expert, isn’t either. Certainly more attention could be paid to contingency contracting in such forums as the OPLAW short course, but the focus must go beyond reviewing FAR. After all, the KO is already familiar with what is in the books. The first step in fixing the problem would be to conduct a dialogue with contracting command to determine where they need better support.

Memorandum, MAJ Brian A. Hughes, former Night Battle Captain and Brigade Battle Captain, 173d Airborne Brigade, to Center for Law and Military Operations, subject: CLAMO Draft Handbook—OIF/OEF (11 May 2004), at 3-4 (on file with CLAMO).

<sup>107</sup> FM 27-100, *supra* note 1, para. 3-6 (citation omitted).

<sup>108</sup> See, e.g., CENTER FOR LAW AND MILITARY OPERATIONS, DEPLOYED MARINE AIR-GROUND TASK FORCE JUDGE ADVOCATE HANDBOOK 143-48 (2002); Major Karen V. Fair, *Environmental Compliance in Contingency Operations: In Search of a Standard?*, 157 MIL. L. REV. 112 (1998); 2004 OPLAW HANDBOOK, *supra* note 13, at 193-209.

analysis during a combat operation, included at Appendix E-5 is a 3rd Infantry Division legal information paper regarding trash disposal in Iraq.<sup>109</sup>

**7. *Be Prepared to Address a Wide Variety of Issues Regarding Civilians Accompanying the Force, Such as Uniforms and Weapons.***

The phrase “civilians accompanying the force” generally refers to two distinct categories of individuals, each governed by separate regulatory guidance: 1) DoD civilians; and 2) DoD civilian contractor employees.<sup>110</sup> Many issues arose regarding civilians accompanying the force during the period of major combat operations in Afghanistan and Iraq, ranging from training requirements and predeployment processing, to the wearing of uniforms and carrying of weapons, to status under the law of armed conflict, to administrative control and discipline, to criminal jurisdiction and applicability of status of forces agreements.<sup>111</sup> These issues, however, will be addressed in Volume II rather than this Publication. The issues are memorialized as a lesson here in Volume I to alert the reader to the general concern, but a more detailed discussion is reserved for Volume II for two reasons. First, the lesson seems to have become more pronounced as more DoD civilians and civilian contractors became involved in the stability and support operations that followed major combat operations. Second, the regulatory scheme governing civilians accompanying the force is in a rapid state of flux as of this writing.<sup>112</sup>

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<sup>109</sup> The SJA for the 101st Airborne Division relates another environmental issue.

[T]he environmental issue that we dealt with involved spreading fuel as a dust abatement measure at one of our Forwarding Arming and Refueling Points. We tried several things after we lost about 4 helicopters to brown outs on take offs and landings. Because we were in the middle of combat operations and didn't have legal research or reach back capability at the time, we simply ensured that a record was made of the location, what and how much we dispersed, etc., with a view towards subsequent remediation, if required. I've attached a photo we had the Engineers take to document that operation.

E-mail from COL Richard O. Hatch, former Staff Judge Advocate, 101st Airborne Division, to LTC Pamela M. Stahl, Director, Center for Law and Military Operations (19 Apr. 2004) (on file with CLAMO). The Group Judge Advocate, 5th Special Forces Group (Airborne), pointed to another environmental concern.

Another lesson is that environmental hazards requiring action may exist at deployed location facilities or installations. At one deployment location early on in OEF, we encountered potentially health-damaging chemical contamination and arranged for a CHPPM site survey [U.S. Center for Health Promotion and Preventive Medicine]. The unknown risks might otherwise have led to relocation of the staging and headquarters elements, resulting in significant operational disruption. As it was, CHPPM recommended mitigating measures, averting any operational pause.

Whitford OEF/OIF Civil Law AAR, *supra* note 90, para. 3.

<sup>110</sup> See generally Major Lisa L. Turner & Major Lynn G. Norton, U.S. Air Force, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1 (2001).

<sup>111</sup> The 2004 OPLAW HANDBOOK, *supra* note 13, provides an excellent overview of the recurring issues regarding civilians accompanying the force. *Id.* at 123-30.

<sup>112</sup> For example, as of this writing, two draft DoD regulations are being staffed: U.S. DEP'T OF DEFENSE, DIR. 4XXX.AA, MANAGEMENT OF CONTRACTOR PERSONNEL DURING CONTINGENCY OPERATIONS and U.S.



Thus, waiting to cover these issues in Volume II hopefully will provide a better opportunity to discuss them more fully against a more settled legal backdrop.

For present purposes, it useful to briefly outline the regulatory schemes governing DoD civilians and contractors accompanying the force as it existed as of 1 May 2003, and to highlight the guidance on perhaps the two most common issues during OEF and OIF, the wearing of military uniforms and the carrying of weapons. For DoD civilians deployed to support military operations overseas, the umbrella regulation is DoD Directive 1404.10, *Emergency-Essential (E-E) DoD U.S. Citizen Civilian Employees*.<sup>113</sup> The Army implementing regulations, also referenced by Marines, are Department of the Army (DA) Regulation 690-11, *Planning for Use and Management of Civilian Personnel in Support of Military Contingency Operations*,<sup>114</sup> and DA Pamphlet 690-47, *DA Civilian Employee Deployment Guide*.<sup>115</sup> An “emergency-essential” employee is a direct-hire DoD employee who fills an “E-E civilian position” and who is expected to sign a “DoD Civilian Employee Overseas Emergency-Essential Position Agreement.”<sup>116</sup> An “E-E civilian position” essentially is a position that is located overseas during a crisis in support of a military operation, that is required to ensure the success of combat operations, and that cannot be converted to a military position.<sup>117</sup>

Regarding uniforms and weapons for E-E employees, DoD Directive 1404.10 states that “[i]t is not a violation of the law of war for an E-E employee to wear a uniform or to carry a weapon for personal defense while accompanying a military force” and that civilian employees “may be issued a weapon for personal defense on request by the employee, *if approved by the DoD Component commander, theater commander, or other authorized official.*”<sup>118</sup> DA Pamphlet 690-47 goes further to state that “only government issued sidearms/ammunition are authorized” and that “familiarization training will be conducted in accordance with FM 23-35 [the then-existing Army training manual on pistol handling and marksmanship].”<sup>119</sup> The Pamphlet also states that “Organization Clothing and Individual Equipment (OCIE) will be issued to emergency-essential personnel and other civilians who may be deployed in support of military operations.”<sup>120</sup>

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DEP’T OF DEFENSE, INSTR. 4XXX.BB, MANAGEMENT OF CONTRACTOR PERSONNEL DURING CONTINGENCY OPERATIONS.

<sup>113</sup> U.S. DEP’T OF DEFENSE, DIR. 1404.10, EMERGENCY-ESSENTIAL (E-E) DOD U.S. CITIZEN CIVILIAN EMPLOYEES (10 Apr. 1992) [hereinafter DOD DIR. 1404.10].

<sup>114</sup> U.S. DEP’T OF ARMY, REG. 690-11, PLANNING FOR USE AND MANAGEMENT OF CIVILIAN PERSONNEL IN SUPPORT OF MILITARY OPERATIONS (14 Sept. 1990) [hereinafter AR 690-11]. This regulation subsequently was updated 26 May 2004, with an effective date of 26 June 2004.

<sup>115</sup> U.S. DEP’T OF ARMY, PAM. 690-47, DA CIVILIAN EMPLOYEE DEPLOYMENT GUIDE (1 Nov. 1995) [hereinafter DA PAM. 690-47].

<sup>116</sup> See DOD DIR. 1404.10, *supra* note 113, para. E2.1.4.

<sup>117</sup> See *id.*, para. E2.1.5.

<sup>118</sup> *Id.* para. 6.9.8 (emphasis added).

<sup>119</sup> DA PAM. 690-47, *supra* note 115, para. 1-12. The current version of FM 23-35 is U.S. DEP’T OF ARMY, FIELD MANUAL 3-23.35, COMBAT TRAINING WITH PISTOLS, M9 AND M11 (25 June 2003).

<sup>120</sup> DA PAM. 690-47, *supra* note 115, para. 1-13. Appendix C to DA PAM. 690-47 lists out the OCIE available for issue.

The regulatory scheme governing contractors, however, is different. There really does not exist any comprehensive DoD-level guidance;<sup>121</sup> the regulation most on point is DoD Instruction 3020.37, *Continuation of Essential DoD Contractor Services During Crises*,<sup>122</sup> but it does not provide answers to many of the questions raised during OEF and OIF, to include the questions regarding wearing uniforms and carrying weapons. Army and Marine Corps JAs thus consulted the service-level guidance of DA Regulation 715-9, *Contractors Accompanying the Force*,<sup>123</sup> and DA Pamphlet 715-16, *Contractor Deployment Guide*.<sup>124</sup> For uniforms, Regulation 715-9 states, “Contractors accompanying the force are not authorized to wear military uniforms, except for specific items required for safety or security, such as: chemical defense equipment, cold weather equipment, or mission specific safety equipment.”<sup>125</sup> For weapons, DA Pamphlet 715-16 states that only the “Theater Commander” may authorize issuance of sidearms to contractors, only for use in personal self-defense, and only after the contractor has received weapons handling and familiarization training in accordance with military regulations.<sup>126</sup> The Pamphlet further clarifies that “the acceptance of self-defense weapons by a contractor employee is voluntary and should be in accordance with the gaining theater and the contractor’s company policy regarding possession and/or use of weapons.”<sup>127</sup>

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<sup>121</sup> See *supra* note 112 (listing out draft regulations attempting to fill the contractor regulatory void).

<sup>122</sup> U.S. DEP’T OF DEFENSE, INSTR. 3020.37, CONTINUATION OF ESSENTIAL DoD CONTRACTOR SERVICES DURING CRISES (6 Nov. 1990) (C1, 26 Jan. 1996).

<sup>123</sup> U.S. DEP’T OF ARMY, REG. 715-9, CONTRACTORS ACCOMPANYING THE FORCE (29 Oct. 1999) [hereinafter AR 715-9].

<sup>124</sup> U.S. DEP’T OF ARMY, PAM. 715-16, CONTRACTOR DEPLOYMENT GUIDE (27 Feb. 1998) [hereinafter DA PAM. 715-16]. See also U.S. DEP’T OF ARMY, FIELD MANUAL 3-100.21, CONTRACTORS ON THE BATTLEFIELD (3 Jan. 2003) (prior to 3 Jan. 2003, the Field Manual in effect was 100-10-2, CONTRACTING SUPPORT ON THE BATTLEFIELD (4 Aug. 1999)).

<sup>125</sup> AR 715-9, *supra* note 123, para. 3-3(e).

<sup>126</sup> DA PAM. 715-16, *supra* note 124, paras. 5-3(a)-(b).

<sup>127</sup> *Id.* para. 5-3(c).

## F. CLAIMS

*The Claims Program supports commanders by preventing distractions to the operation from claimants, promoting the morale of [DoD] personnel by compensating them for property damage suffered incident to service, and promoting good will with the local population by providing compensation for personal injury or property damage caused by Army or DoD personnel.*<sup>1</sup>

Judge advocates (JAs) in Afghanistan and Iraq wrestled with a variety of claims issues, particularly those involving foreign claimants. The foreign claims issues essentially revolved around a competing tension. On the one hand, commanders believed that the payment of legitimate claims helped win the hearts and minds of the populace and enhanced their units' force protection postures.<sup>2</sup> On the other hand, the foreign claims statutory and regulatory scheme often either disallowed payment or required a lengthy procedural process before payment. Caught in the middle of this tension, JAs struggled to reconcile the law with operational necessities.<sup>3</sup> Several lessons emerge from their efforts.

### ***1. Coordinate with the Single-Service Claims Authority and Resolve Potential Claims Processing Issues Prior to Deployment.***

Pursuant to Department of Defense (DoD) directive, the Department of the Air Force had single-service claims responsibility for Afghanistan and Iraq during the periods of major combat activity in both countries.<sup>4</sup> In other words, only claims personnel at the Air Force single-service claims office—the 9th Air Force/Central Command Air Forces (CENTAF) at Shaw Air Force Base, South Carolina, and at Prince Sultan Air Base, Saudi Arabia<sup>5</sup>—had the authority to

<sup>1</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS para. 3.7 (1 Mar. 2000) [hereinafter FM 27-100].

<sup>2</sup> See, e.g., Interview with COL David L. Hayden, Staff Judge Advocate, XVIIIth Airborne Corps, in Charlottesville, Va. (7 Oct. 2003) (videotape on file with CLAMO) [hereinafter Hayden Interview] (noting that paying valid claims is a key component of force protection because it helps maintain good relations with the local populace); Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), Operation Iraqi Freedom Lessons Learned (2003) [hereinafter 101st OIF Lessons Learned] (explaining how foreign claims procedural delays had “greatly injur[ed] our relationship and credibility with the local populace”).

<sup>3</sup> See, e.g., Hayden Interview, *supra* note 2, at 2 (arguing that the U.S. claims scheme is “overly technical,” and that the ability to pay claims can reap “huge dividends” for the commander).

<sup>4</sup> See U.S. DEP'T OF DEFENSE, DIR. 5515.8, SINGLE-SERVICE ASSIGNMENT OF RESPONSIBILITY FOR PROCESSING OF CLAIMS para. 3 (9 June 1990) [hereinafter DoD DIR. 5515.8] (assigning exclusive geographic responsibility to each service for the processing of tort claims for and against the United States). Under the Directive, the Air Force is responsible for, *inter alia*, claims involving the United States Central Command (CENTCOM) in countries not otherwise assigned to another military service; thus, because Afghanistan and Iraq are in the CENTCOM area of responsibility and not otherwise assigned, the Air Force had single-service claims responsibility. *Id.* para. E1.1.3. Of note, the DoD Office of the General Counsel subsequently reassigned claims responsibility in Iraq from the Department of the Air Force to the Department of the Army. See Memorandum, General Counsel, Dep't of Defense, to Sec'y of the Army, subject: Claims Responsibility—Iraq (17 June 2003) [hereinafter DoD Iraq Claims Responsibility Memo].

<sup>5</sup> The Air Force eventually established a claims presence in Iraq, at the Baghdad International Airport, prior to the 17 June 2003 reassignment of single-service claims responsibility to the Army pursuant to the DoD Iraq Claims Responsibility Memo, *supra* note 4. See Transcript of After Action Review Conference, Office of the Staff Judge Advocate, 3d Infantry Division, and Center for Law and Military Operations, Fort Stewart, Ga., at 109 (18-19 Nov. 2003) (on file with CLAMO) [hereinafter 3ID AAR Transcript].

adjudicate and pay foreign claims that arose during the operations and to appoint foreign claims commissions (FCCs) to adjudicate and pay the claims.<sup>6</sup>

Many legal after action reports criticized this claims framework on two primary counts. One complaint was that processing claims through Shaw Air Force Base and the few Air Force claims attorneys on the ground proved overly time-consuming and burdensome, significantly impeding commanders' abilities to win the hearts and minds of the local population by paying legitimate claims.<sup>7</sup> Secondly, some contended, for a variety of reasons, that the Air Force was not the appropriate service for processing claims arising from ground operations: 1) the Air Force claims regulation was too focused on claims arising from air operations;<sup>8</sup> 2) the Air Force too broadly interpreted what constituted a noncompensable combat claim under the Foreign Claims Act (FCA), discussed below in more detail;<sup>9</sup> and 3) the Air Force was not on the ground to face disgruntled claimants.<sup>10</sup>

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<sup>6</sup> The Foreign Claims Act, 10 U.S.C. § 2734 (2000), was the relevant claims statute for Afghanistan and Iraq. One of the primary virtues of the Act is the ability of a duly appointed FCC to pay, within certain dollar limits, claims more quickly in-country without the delays associated with forwarding the claim to a higher claims office. *See* 10 U.S.C. § 2734(a). To determine the relevant statutory authority for claims arising during overseas operations, the first question is whether an international agreement with claims provisions, such as the NATO Status of Forces Agreement, exists with the country in question. If so, the agreement's claims provisions are followed pursuant to the U.S. domestic statutory authority of the International Agreement Claims Act, 10 U.S.C. 2734a (2003). For example, the United States negotiated a classified agreement with Uzbekistan in the early days of Operation ENDURING FREEDOM (OEF) which contained the framework to be followed in the event of any claims involving U.S. forces in Uzbekistan. (The agreement can be found in the CLAMO SIPRNET Database, *at* <http://www.us.army.smil.mil>. The Database is one of the legal knowledge communities within the "Collaborate" section of the site. The site requires registration. If not a member of the U.S. Army, an applicant will need the user name of an Army sponsor. Contact CLAMO if an Army sponsor is needed.) If no applicable international agreement with claims provisions exists, as was the case for Iraq and Afghanistan, then the Foreign Claims Act is the statutory authority most likely to apply during overseas operations. For a more detailed discussion of the interrelationships between single-service claims responsibility, international agreements, and domestic claims statutes, see CENTER FOR LAW AND MILITARY OPERATIONS, DEPLOYED MARINE AIR-GROUND TASK FORCE JUDGE ADVOCATE HANDBOOK 149-62 (2002).

<sup>7</sup> *See, e.g.*, 101st OIF Lessons Learned, *supra* note 2, at 7 ("[I]t was a logistical nightmare trying to negotiate claims without authority to pay them or attempting to communicate to the claimant that they would have to wait for someone else to pay them. It was equally difficult to coordinate with the Air Force for a representative to pay the claim."); Interview by MAJ Mark W. Holzer, Center for Law and Military Operations, with LTC Mark D. Dupont, Officer in Charge, V Corps Main, Iraq, transcript at 14 (30 Apr. 2003) [hereinafter Dupont Interview] ("[s]ending claims back to Shaw AFB is not as responsive as it needs to be"); Interview with Maj Joseph A. Lore, USMC, Deputy Staff Judge Advocate and Staff Judge Advocate, 1st Marine Division, in Charlottesville, Va. (5 Nov. 2003) [hereinafter Lore Interview]; Interview with LTC Jeffery R. Nance, Chief, International and Operational Law, V Corps, in Charlottesville, Va. (8 Oct. 2003) (videotape on file with CLAMO) [hereinafter Nance Interview].

<sup>8</sup> *See, e.g.*, 101st OIF Lessons Learned, *supra* note 2, at 7 ("The Air Force used their own regulation to process claims, and it simply did not contemplate many of the type of events that gave rise to many ground force claims.").

<sup>9</sup> *See, e.g.*, Dupont Interview, *supra* note 7, at 14 ("[T]here is an assumption at Shaw AFB that because it happened in Afghanistan during combat operations [it is] therefore not payable as a claim and makes life more difficult when . . . you have to go through an administrative hassle through Shaw."). For a more detailed discussion of the FCA combat claims exception, see *infra* Section III.F.2.

<sup>10</sup> As stated in an Operation IRAQI FREEDOM (OIF) After Action Report:

CFLCC has been trying to get single-service responsibility for payment of claims transferred from the Air Force to the Army. We have attempted to become an Air Force FCC but have been unable to do so because CFLCC has asked the Air Force not to appoint any FCCs until after the issue as to which branch will have single-service responsibility has been resolved. We have been told that

The claims procedures changed, however, as operations progressed. During the initial phases of Operation ENDURING FREEDOM (OEF), Army JAs at Combined Joint Task Force 180 (CJTF-180)<sup>11</sup> in Afghanistan did not have authority to pay claims as foreign claims commissions (FCCs).<sup>12</sup> Rather, they investigated claims as unit claims officers (UCOs),<sup>13</sup> electronically forwarding the claims paperwork to Air Force claims personnel for approval or denial. If approved, the Air Force would e-mail a payment voucher and settlement agreement to the UCO, who in turn would obtain the cash payment from the CJTF-180 finance office and deliver it to the claimant. The same procedure was in place for major combat operations in Iraq.<sup>14</sup> The detailed Air Force claims processing guidance is included at Appendix F-1.

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all claims sent to higher headquarters are also being held until this issue is resolved. This delay has left those of us on the ground unable to pay foreign claims, greatly injuring our relationship and credibility with the local populace.

Claims are purportedly a vehicle with which we foster goodwill between U.S. forces and the local populace. *U.S. Army forces rely heavily on their relationships with local communities for security, for intelligence, and for supplies—much more so than the Air Force.* As a result, we are the logical choice for a claims payment authority.

101st OIF Lessons Learned, *supra* note 2, at 19 (emphasis added). See also CPT Brian P. Adams, Claims Attorney, Office of the Staff Judge Advocate, V Corps, AAR “Operation Iraqi Freedom,” para. 2 (2004) (on file with CLAMO) [hereinafter Adams V Corps OIF AAR] (“The Army was obviously in a much better position to support the foreign claims mission with judge advocates spread throughout the country, whereas the Air Force had three judge advocates in Iraq to handle claims.”).

<sup>11</sup> For a discussion of CJTF-180 and the OEF command structure, see *supra* Section II.C.2.b.

<sup>12</sup> Under the FCA, an FCC composed of one or more officers or employees of the armed forces may settle and pay a claim in an amount not more than \$100,000. 10 U.S.C. § 2734(a). Service FCA implementing regulations provide more restrictive FCC settlement and payment authorities. See U.S. DEP’T OF ARMY, REG. 27-20, CLAIMS paras. 10-9(c)-(d) (14 Nov. 2002) [hereinafter AR 27-20] (\$15,000 for one-member JA FCC; \$2,500 for one-member non-JA FCC; and \$50,000 for three-member FCC); U.S. DEP’T OF AIR FORCE, INSTR. 51-501, TORT CLAIMS para. 4-9 (9 Aug. 2002) [hereinafter AFI 51-501] (a detailed listing of personnel deemed FCCs by virtue of their positions, with settlement and payment authorities of varying amounts, and granting the listed FCCs authority to appoint subordinate JAs or civilian attorneys as FCCs); U.S. DEP’T OF NAVY, OFFICE OF THE JUDGE ADVOCATE GENERAL INSTR. 5800.7D, MANUAL OF THE JUDGE ADVOCATE GENERAL (JAGMAN) para. 0813(f)(2) (15 Mar. 2004) [hereinafter JAGMAN] (\$5,000 for one-officer non-JA FCC; \$10,000 for one-officer JA FCC; \$10,000 for three-officer FCC; and \$20,000 for three-officer FCC containing at least one JA). A sample FCC appointment letter is included at Appendix F-2.

<sup>13</sup> See AR 27-20, *supra* note 12, para. 2-2(d)(1)(a) (14 Nov. 2002) (commanders can appoint commissioned officers, warrant officers, noncommissioned officers, or qualified civilian employees to investigate claims incidents). A sample UCO appointment letter is included at Appendix F-3.

<sup>14</sup> The procedure is outlined in Standard Operating Procedures for Foreign Claims, 9 Air Force–U.S. Central Command Air Forces (16 Mar. 2003) [hereinafter CENTAF Claims SOP] (at Appendix F-1). The SJA for the Coalition Joint Civil-Military Operations Task Force in Afghanistan provides a description of how he effected this process.

The location of the CJCMOTF in downtown Kabul made it much more accessible to ordinary Afghans than other military facilities, so many potential claims were brought to the CJCMOTF for redress, whether the CJCMOTF was involved in the incident giving rise to the claim or not. The USAF had single-service claims authority for Afghanistan and was initially reluctant to delegate claims adjudication authority to me or other Army personnel as an FCC. I developed a procedure whereby I successfully handled a number of claims, mostly small, by gathering the appropriate information, and providing it, along with analysis and a recommendation, to the claims authority at Shaw AFB for adjudication (using scanned documents, primarily). Once adjudicated, Shaw

Eventually, on 18 July 2002, the Staff Judge Advocate (SJA) for U.S. Central Command Air Forces (CENTAF), appointed an Army CJTF-180 JA as a one-member FCC, with the authority to adjudicate and pay claims of \$5,000 or less arising in Afghanistan.<sup>15</sup> Finally, on 17 June 2003, pursuant to a request from U.S. Central Command, the DoD Office of the General Counsel reassigned single-service claims responsibility for Iraq from the Air Force to the Army.<sup>16</sup>

The fact that the claims procedures changed in both Afghanistan and Iraq in response to the battlefield realities suggests lessons for future operations. First, perhaps a ground force with troops and JAs in-country is better suited to have single-service claims responsibility for ground-intensive operations.<sup>17</sup> Second, earlier appointment of FCCs on the ground—to include appointment of FCCs from services other than the single-service claims authority—might facilitate more efficient claims processing. Moreover, predeployment coordination between the single-service claims office and JAs who will be deployed in theater is critical.<sup>18</sup> At a minimum,

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would send me the documentation necessary to make disbursement, and I would effect payment using a Class A agent. This was, although unwieldy, a workable solution. Particularly given our CMO mission, I believed it was important for CJCMOTF to address, in a timely and reasonable matter, legitimate claims presented by Afghans. I recommend, however, that DOD be willing to reassign single service claims responsibility quickly where changed circumstances dictate (as has apparently happened in Iraq) to allow prompt processing of claims by the principal service operating in that country. There was one significant claim resulting from an accident involving a CJCMOTF officer and an Afghan driving a donkey cart, which resulted in the death of the Afghan. I devoted a substantial amount of time ascertaining the facts of the case, the relevant local law, assigning an appropriate valuation of the claim, etc. I coordinated this extensively with Shaw to ensure that they were comfortable with my approach. Once we had determined the adjudication of the claim, I had to develop some mechanism to settle the claim with the NOK (the 16-year-old wife of the decedent). Eventually, we paid the amount to the father-in-law after the wife agreed to provide him power-of-attorney. Adding to the difficulty was the fact that the family would not allow her to meet face to face with a male officer, so I enlisted the assistance of a female officer (a civil affairs-trained Veterinary Corps Officer) to meet with the wife and ascertain her intent.

COL H. Allen Irish, Staff Judge Advocate, Coalition Joint Civil-Military Operations Task Force, Draft AAR Comments, at 3 (2004) (on file with CLAMO).

<sup>15</sup> Memorandum, Staff Judge Advocate, U.S. Central Command Air Forces, to CPT James T. Hill, subject: Appointment as Foreign Claims Commission and Delegation of Claims Authority (18 July 2002) (on file with CLAMO). Claims in excess of \$5,000 still had to be forwarded through the Air Force.

<sup>16</sup> See DoD Iraq Claims Responsibility Memo, *supra* note 4.

<sup>17</sup> JAs at the U.S. Army Claims Service suggest that it may be possible to expedite changing single-service claims responsibility during the operations planning process through a Secretary of Defense execute order instead of the usual memorandum request process, assuming coordination has occurred beforehand between the affected services, the combatant command, the joint staff, and the office of the Secretary of Defense. E-mail from COL Mark S. Ackerman, Executive Officer, U.S. Army Claims Service, to LTC Pamela M. Stahl, Director, Center for Law and Military Operations (11 May 2004) (containing Microsoft Word track changes comments to draft version of this Publication) (on file with CLAMO) [hereinafter USARCS Comments].

<sup>18</sup> See, e.g., Interview by MAJ Mark W. Holzer, Center for Law and Military Operations, with COL Richard E. Gordon, Staff Judge Advocate, Coalition Force Land Component Command, Camp Doha, Kuwait, transcript at 4 (1 May 2003) (on file with CLAMO) [hereinafter Gordon Interview] (“The [A]ir [F]orce was adamant that they would not allow the [A]rmy to become the single service claims authority in Iraq. Now they say we can be the SSCA in Iraq. . . . So now we’re working to make the [A]rmy the SSCA. This will help. I wish we could have done this earlier.”); Memorandum, CPT A. J. Balbo, II, to Staff Judge Advocate, 3d Infantry Division, subject: Operation Iraqi Freedom—AAR Regarding DISCOM [Division Support Command] BOLT [Brigade Operational Law Team], at 5 (22 Apr. 2003) (on file with CLAMO) [hereinafter Balbo AAR] (“Although it is true that the Air Force retained

JAs should familiarize themselves with the applicable claims regulations of the relevant single-service claims authority.<sup>19</sup>

## ***2. Be Prepared to Address the Difficulties Caused by the Foreign Claims Act Combat Activities Exception.***

A recurring issue for both OEF and OIF was the definition of “combat” claims. Under the FCA, claims arising “from action by an enemy or result[ing] directly or indirectly from an act of the armed forces of the United States in combat” are not payable.<sup>20</sup> Many JAs struggled with the determination of what claims were noncompensable combat claims and, as mentioned earlier, disagreed with the Air Force’s interpretation of what constituted a combat claim.

During the period of major hostilities in Afghanistan and Iraq, the Air Force single-service guidance for claims arising out of combat activities was memorialized in a CENTAF standard operating procedures (SOP) document:

(1) Combat activities are those activities resulting directly or indirectly from action by the enemy, or by the US Armed Forces engaged in armed conflict, or in immediate preparation for impending armed conflict. . . . It doesn’t necessarily include only those activities that result in shots being fired. A simple recon mission, for example, may be a combat activity under the FCA. [Note: a claim may be payable arising from an accident or malfunction of an aircraft, including its airborne ordnance, indirectly related to combat, and occurring while preparing for, going to, or returning from a combat mission. 10 U.S.C. § 2734(b)(3).]

(2) 10 U.S.C. § 2734 and AFI 51-501 do not include as combat activities **all** activities occurring in a “combat zone” as mentioned in DA PAM 27-162, para 10-3(b). FCA claims in Afghanistan, for example, are not automatically excluded because they arose in a combat zone.<sup>21</sup>

A 4 April 2003 CFLCC<sup>22</sup> information paper on Iraq claims appeared to superimpose a more restrictive rule over the CENTAF claims SOP: “All [FCA] claims arising within the combat zone of Iraq, that is, within the boundaries of Iraq during the period of the war, are automatically classified as combat activity claims, and therefore are prohibited.”<sup>23</sup> When single-service claims responsibility for Iraq switched to the Army in June 2003, the Coalition Joint Task

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single-service responsibility . . . contact information for the appropriate authority remained elusive. . . . As for foreign claims, higher headquarters must provide further guidance as to how they will be paid.”)

<sup>19</sup> The Air Force regulation is AFI 51-501, *supra* note 12. Of note, the Air Force authorized Army JAs to refer to Army claims regulations to supplement AFI 51-501; in the event of a conflict, the AFI was controlling. See CENTAF Claims SOP, *supra* note 14, at “Processing a Claim Under the FCA” para. 1. The Army regulation is AR 27-20, *supra* note 12. The Navy and Marine Corps regulation is the JAGMAN, *supra* note 12.

<sup>20</sup> 10 U.S.C. § 2734(b)(3) (2000).

<sup>21</sup> CENTAF Claims SOP, *supra* note 14, paras. 4(b)(1)-(2) (emphasis in original) (bracket in original).

<sup>22</sup> Coalition Forces Land Component Commander. For a discussion of the CFLCC and the OIF command structure, see *supra* Section II.D.2.b.

<sup>23</sup> Information Paper, CPT James E. Pietrangelo, III, CFLCC Operational Law Judge Advocate, subject: Solatia Payments/Compensation for Iraqi Civilians Accidentally Injured/Killed by U.S. Forces during the War, para. 2(b) (4 Apr. 2003) (on file with CLAMO) [hereinafter CFLCC Claims Information Paper].

Force 7 (CJTF-7)<sup>24</sup> claims SOP for Iraq<sup>25</sup> mirrored the CENTAF claims SOP combat activities language quoted above, but added language that made the combat exception arguably broader than the Air Force interpretation yet narrower than the CFLCC outright prohibition. The CJTF-7 SOP included a sentence stating that “[t]here is a rebuttable presumption that any claims arising [in Iraq] prior to 1 May 2003 are excludable as combat claims.”<sup>26</sup> The CJTF-7 SOP further added, “Combat activity for ground forces includes activities going to or returning from a combat mission.”<sup>27</sup>

Given the prohibition on paying combat claims, claims paid in Afghanistan and Iraq had to be either noncombat claims or claims arising from negligent or wrongful acts of service members or civilian employees. “Noncombat” is a term of art in claims parlance, defined as “activities essentially military in nature, having little parallel in civilian pursuits (e.g., sonic booms, aircraft accidents, and vehicle maneuver damages).”<sup>28</sup> The term does not simply mean “not combat.” Prior to the 1 May 2003 presidential declaration of major combat hostilities ending in Iraq,<sup>29</sup> very few, if any, claims were paid, although some were filed and investigated.<sup>30</sup> In Afghanistan, however, even though the Secretary of Defense did not officially declare the end of major combat hostilities until the same date that the President declared it for Iraq,<sup>31</sup> JAs paid more claims as the mission shifted away from combat and more towards stability and support operations.<sup>32</sup>

The lessons here are unclear. Many JAs argue that excluding combat claims runs afoul of the spirit and intent of the FCA, which is “to promote and maintain friendly relations through

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<sup>24</sup> For a discussion of CJTF-7 and the OIF command structure, see *supra* Section II.D.2.b.

<sup>25</sup> Coalition Joint Task Force 7, Standard Operating Procedures for Foreign Claims in Iraq (2003) [hereinafter CJTF-7 Claims SOP].

<sup>26</sup> *Id.* para. 5(b).

<sup>27</sup> *Id.* para. 5(b)(1).

<sup>28</sup> This language is found in both the CENTAF Claims SOP, *supra* note 14, para. 3(e), and the CJTF-7 Claims SOP, *supra* note 25, para. 2(e). Slightly more detailed definitions of noncombat activities can be found in the glossaries of AR 27-20, *supra* note 12, at 91, and AFI 51-501, *supra* note 12, at 45.

<sup>29</sup> See *supra* Section II.D.2.d.

<sup>30</sup> In an interview on 22 April 2003, nine days before the President declared an end to major hostilities in Iraq, the SJA for the 3d Infantry Division described the claims situation on the ground (quote from interviewer’s notes).

Local claims for combat related damage have been filed, however, these claims will all be denied. Local claims for taking over private residences for CPs [command posts] have also been filed. The residents were apparently looted at some time, however, it is unclear who did the looting and when it occurred. Civil Affairs has passed along requests for ex gratia payments for damages—at this time none are being considered for payment.

Interview by MAJ Mark W. Holzer, Center for Law and Military Operations, with COL Lyle W. Cayce, Staff Judge Advocate, 3d Infantry Division, at 8 (22 Apr. 2003) (notes on file with CLAMO) [hereinafter 2003 Cayce Interview].

<sup>31</sup> See *supra* Section II.C.2.c.

<sup>32</sup> See MAJ Jeff Bovarnick, Chief, Operational Law, CJTF-180, CJTF-180 Notes from the Combat Zone, at 6 (2003) (on file with CLAMO) [hereinafter Bovarnick CJTF-180 Notes] (“As operations in Afghanistan shift away from combat operations, the combat activity bar to payment of claims has become less a factor, with the result that more claims are payable.”).



the prompt settlement of meritorious claims.”<sup>33</sup> A broad reading of the combat exception, so the argument goes, results in complaints and difficulties with host nation inhabitants when seemingly legitimate claims go unpaid; on the other hand, a narrow reading of the exception is a “force multiplier” and helps “win the hearts and minds” when more claims are paid.<sup>34</sup> A counterargument is that Congress did not intend for the FCA to be the statutory mechanism for rebuilding a country in the middle of or in the wake of combat—such a large undertaking should be a separate legislative and political undertaking, not unlike the Marshall Plan to rebuild Germany in the aftermath of World War II. Thus, one lesson might be that Congress should reconsider the combat exception under the FCA so that JAs will have greater flexibility and authority to pay claims in combat. Barring such a legislative change, it seems the lesson for JAs is to understand the FCA combat exception and the nuances of the “combat” definition and be able to articulate to commanders and local nationals why combat claims cannot be paid. In the alternative, JAs should seek non-FCA fiscal authorities and sources for “claims” payments, discussed in the next Section.

### ***3. Consider Alternative Approaches for Foreign Claims: Solatia, Non-DoD Claims Sources, and Contractual Remedies.***

The claims difficulties discussed in the prior two sections combined with commanders’ desires for claims to nonetheless be paid caused JAs to seek alternative remedies for Afghan and Iraqi claimants.

One method was to recast a claim as something other than a claim—in other words, to take an issue that presented itself as a “claim” and look at it through a different, nonclaims legal lens. For example, at least one claim was resolved as a contractual matter. The 101st Airborne Division encountered a situation in which the owner of a soda factory demanded compensation after soldiers from another Army unit had used the factory as a temporary command headquarters and consumed large amounts of soda. The SJA for the 101st opined that the situation was best viewed not as an excluded combat claim, but as a contract for soda that had

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<sup>33</sup> 10 U.S.C. § 2734(a) (2000). An after action report from 82d Airborne Division JAs in Afghanistan stated the following.

We spent much discussion trying to define combat operations. It became quite clear that the command saw the Foreign Claims process as a tool to retain the hearts and minds of the local populace whose property we damaged during normal maneuvers around the country. While many of these maneuvers were conducted in the pursuit of terrorists, much of the damage occurred when no bad guys were found and no rounds were fired. For instance, [a] village might be searched out of abundance of caution rather than because of intel of known terrorists and be found to be a friendly village. We argued that damage incurred in such operations did not meet the AR 27-20 [the Army claims regulation] definition, nor the Webster’s definition, of combat. We further argued that paying claims incurred in such operations met the intent and spirit of the Foreign Claims Act. Such claims were routinely paid.

Office of the Staff Judge Advocate, Combined Task Force 82, Mid-Point AAR, at 8 (1 Jan. 2003) (included in CLAMO SIPRNET Database, *supra* note 6) [hereinafter 82d Mid-Point OEF AAR].

<sup>34</sup> Many JAs used the terms “force multiplier” and “winning the hearts and minds” when referring to the need to pay more foreign claims more efficiently. *See, e.g.*, Interview with COL Richard O. Hatch, Staff Judge Advocate, 101st Airborne Division, in Charlottesville, Va. (8 Oct. 2003) (videotape on file with CLAMO) [hereinafter Hatch Interview]; Lore Interview, *supra* note 7.

not been properly executed. A potential remedy for an improperly executed contract is for the appropriate level contracting officer to officially endorse, or “ratify,” a contract after the fact.<sup>35</sup> Using this procedural tool, the 101st SJA worked through contracting, rather than claims, channels to ratify what was arguably a contract, and the factory owner was paid for the consumed soda.<sup>36</sup>

Another method used to assuage claimants when the claims process proved ineffective was to provide otherwise authorized DoD humanitarian assistance to the claimant. Various funding sources were available in Afghanistan and Iraq for the provision of humanitarian assistance (HA) and humanitarian and civic assistance (HCA).<sup>37</sup> These funds could be tapped into for HA/HCA projects—such as building construction, road repairs, medical treatment, and providing food—in place of or in addition to claims payments. For example, in the words of CTF-82 JAs in Afghanistan, “When claims were not approved because of the proximity or connection to combat, we attempted [to] coordinate provision of humanitarian rations through civil affairs.”<sup>38</sup> Another illustrative example is a claim that arose when several Afghani children wandered onto a training range where Afghan National Army (ANA) soldiers were firing mortars under the supervision of U.S. soldiers.<sup>39</sup> Two of the children died and several were injured when a mortar impacted near them.<sup>40</sup> While the children’s families all eventually received claims payments under the FCA, CJTF-180 arranged an HA project to build a school in the local area with the children’s names on a plaque.<sup>41</sup> The verbal promise to the families to build the school helped soften the blow of the families’ losses as the claims investigation proceeded.<sup>42</sup>

JAs also explored the possibility of non-DoD entities paying Afghan and Iraqi claimants. For Afghanistan, a claims information paper suggested, “In order to compensate local nationals for injuries or deaths that are not compensable under the Foreign Claims Act, CJTF180 must

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<sup>35</sup> See GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 1.602-3 (2004) [hereinafter FAR]. The FAR spells out the criteria for contract ratification and who is authorized to do so up to what dollar amounts.

<sup>36</sup> 101st OIF Lessons Learned, *supra* note 2, at 7 (referring to the incident as “the now famous Kuffa [sic—actual spelling “Kufa”] Kola claim”). The Kufa soda claims problem actually appeared in the U.S. national media. See, e.g., Paul Bedard & Julian E. Barnes, *Washington Whispers*, U.S. NEWS AND WORLD REP., Apr. 21, 2003, at 6. While the 101st OIF Lessons Learned referred to the eventual payment of this claim as a “contract ratification,” it seems perhaps more precise to classify this example as an “extraordinary contractual action,” whereby takings may be compensated as informal commitments in the absence of any preexisting contract. See FAR, *supra* note 35, para. 50.302-3.

<sup>37</sup> For a more detailed discussion of HA and HCA fiscal issues, see *supra* Sections III.E.2.a.1 and III.E.2.b.2.

<sup>38</sup> 82d Mid-Point OEF AAR, *supra* note 33, at 8.

<sup>39</sup> Interview with CPT Greer Martin, Claims Attorney, CJTF-180, in Charlottesville, Va. (13 Nov. 2003) [hereinafter Martin Interview].

<sup>40</sup> *Id.*

<sup>41</sup> The incident was a compensable noncombat activity claim under the FCA. A noncombat claim did not require a finding of negligence under the CENTAF Claims SOP, *supra* note 14, para. 3(e). The only issue was causation: was the presence of U.S. soldiers in a training capacity sufficient to establish causation when ANA soldiers actually sighted and fired the mortars? The FCC on the ground concluded that this was sufficient causation for the U.S. to pay the claim, with \$1,500 going to the families of the deceased children and \$500 to the families of the injured children. Greer Interview, *supra* note 39.

<sup>42</sup> Greer Interview, *supra* note 39. See also Transcript of After Action Review Conference, Office of the Staff Judge Advocate, XVIIIth Airborne Corps, Fort Bragg, N.C. (30 Sept. to 1 Oct. 2003) (on file with CLAMO) (hereinafter XVIIIth Airborne Corps AAR Transcript).

explore other sources of funds, possibly through Department of State channels.”<sup>43</sup> Similarly, the CFLCC for Iraq suggested that “Iraqi civilians could apply to OGAs [Other Government Agencies] for any funds that may be available to compensate them for accidental injuries or deaths caused by U.S. Forces during the war . . . [or] could also file suit in U.S. or post-war Iraqi courts, or apply to the post-war Iraqi government for compensation.”<sup>44</sup> At least until the end of major combat hostilities in Iraq and Afghanistan in May 2003, however, claims were not being paid from these non-DoD sources.<sup>45</sup>

Perhaps the most debated nonclaims alternative for Iraqi and Afghan claimants was solatia.<sup>46</sup> A solatium payment is not intended to be a claims substitute, but rather a “nominal payment made immediately to a victim or the victim’s family to express sympathy, *when local custom exists for such payments*.”<sup>47</sup> The payments come from unit Operation and Maintenance (O&M) funds, not claims funds, with commanders determining the appropriate amount if not specified in local regulations.<sup>48</sup> The Air Force claims regulation recognizes only three countries as having a custom of solatia: Japan, Korea, and Thailand.<sup>49</sup> The Army claims regulation is more ambiguous, stating that solatia payments are customary in “certain countries, particularly those within Asia and the Middle East.”<sup>50</sup> The official Air Force single-service stance was that solatia payments were not authorized in Afghanistan<sup>51</sup> and Iraq,<sup>52</sup> and, when single-service responsibility for Iraq transferred to the Army in June 2003, the Army Claims Service concurred.<sup>53</sup>

Disagreeing with the pronouncement that solatia payments were not customary, the I Marine Expeditionary Force (I MEF), the major Marine Corps command in Iraq, independently determined that a custom existed within the Arab culture and Iraq for solatia payments.<sup>54</sup> So as

<sup>43</sup> Information Paper, CJTF-180 Claims Attorney (no author listed), subject: Solatia Payments in Afghanistan, para. 8 (n.d.) (on file with CLAMO) [hereinafter CJTF-180 Solatia Information Paper].

<sup>44</sup> CFLCC Claims Information Paper, *supra* note 23, para. 3.

<sup>45</sup> Telephone Interview with Douglas A. Dribben, U.S. Army Claims Service (12 Nov. 2003) [hereinafter Dribben Interview].

<sup>46</sup> *See, e.g.*, Gordon Interview, *supra* note 18, at 4 (“Solatia—everyone wanted it. There are about 20 opinions out there [on the propriety of solatia payments].”).

<sup>47</sup> AFI 51-501, *supra* note 12, para. 4.20 (emphasis added).

<sup>48</sup> *Id.* para. 4.21.

<sup>49</sup> *Id.* para. 4.22.

<sup>50</sup> U.S. DEP’T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES para. 10-10(a) (1 Apr. 1998).

<sup>51</sup> *See* CJTF-180 Solatia Information Paper, *supra* note 43, para. 6 (“The AFLSA/JACT, the Air Force agency responsible for Air Force claims, has determined that a custom for [solatia] payment does not exist in Afghanistan. The U.S. Army Claims Service agrees with this finding.”). The CJTF-180 Solatia Information Paper also discounted the argument of those who contended that the Afghan practice of paying “diya” or “blood money” constituted evidence of a solatia custom. Under Sharia law, diya is “a payment in lieu of retaliation in the case of murder or other crimes involving physical harm, or as compensation for a loss in the case of an accidental homicide,” and is not used as a gratuitous expression of remorse, like solatia, but as “an obligation to make the injured person or the victim’s family whole based on the value of a life.” *Id.* para. 7.

<sup>52</sup> *See* CFLCC Claims Information Paper, *supra* note 23, para. 2(a) (“Solatia payments are not authorized in Iraq at any time. . . . [A] prior local custom does not exist in Iraq.”).

<sup>53</sup> Dribben Interview, *supra* note 45.

<sup>54</sup> The basis for this finding was an analysis by the Marine Corps Forces Central Command (MARCENT) SJA, which was referenced in the official I MEF Comptroller solatia memorandum.

not to appear to contravene the finding of the single-service claims authority, the I MEF solatia payment memorandum pointed out that “solatia payments are separate and apart from claims and are not affected by the single service claims responsibility of a particular service.”<sup>55</sup> The memorandum went on to authorize solatia payments of up to \$2,500 per victim.<sup>56</sup> Accordingly, Marine Corps JAs made a number of solatia payments in Iraq during the period of active hostilities, but were always careful to inform victims that they still could file a claim for the underlying incident.<sup>57</sup> JAs provided the I MEF Comptroller copies of all source documents

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While the issue of solatia payments within Iraq is one of first impression, reference (c) [the MARCENT SJA opinion] determines that a custom exists within the Arab culture and Iraq, which would permit, and suggests, that solatia payments should be made. This determination considers: the smallest efforts by a foreigner to learn the Arabic language and culture earn disproportionate amounts of acceptance, kudos and appreciation; etiquette is critical in Arabia; Iraq’s population base consists of an Arab majority (71%), followed by Kurds (18%), with the remaining population a mixture of Turkomans, Assyrians, and Armenians; in Arab culture, sensitivity to insults and slights [sic] (real or perceived) can go a long way into winning the acceptance of the local population; saving face, by apologizing and/or offering a solatia payment for wrongs, could be crucial to the Phase IV task of winning the hearts and minds of local Iraqis; by acknowledging a particular problem/wrong (real or perceived), and making a legitimate and immediate effort to make some sort of reparation (no matter how small), produces exponential results; in Arab culture, identifying the potential problem and made [sic] an attempt to reconcile it is often more important than the actual value of a gift or compensation; within the Arab culture, a receiver may even attempt to refuse the offered compensation, (a part of the ballet of courtesy indicating that one should not have taken the trouble, but one should insist the gift or compensation be accepted), and; with the tactical situation on the ground in Iraq, in light of the decade plus economic embargo, together with the now plunging Iraqi dinar, even a few dollars can go a long way in sustaining a family.

Memorandum, Major M.J. Steele, Deployed Comptroller, I Marine Expeditionary Force (I MEF), to I MEF Deputy Disbursing Officers, subject: Process for Making Solatia Payments in Iraq, para. 3 (16 Apr. 2003) (on file with CLAMO) [hereinafter I MEF Solatia Memorandum]. See also Hatch Interview, *supra* note 34 (opining that solatia payments are indeed customary in Iraq, despite the contrary opinions of the Air Force and Army claims services).

<sup>55</sup> *Id.* para. 1. The relevant language from an Army claims regulation states, “Although solatia payments are usually administered under the supervision of a command claims service, they are essentially a theater command function, whose propriety is based on a local finding that solatia payments are consistent with prevailing customs.” DA PAM. 27-162, *supra* note 50, para. 10-10(b). The Air Force claims regulation states that while solatia payments are drawn from the Operation and Maintenance funds of the unit involved in an incident regardless of the assignment of SSCR, the Air Force claims office should be notified in the event of a solatium payment. AFI 51-501, *supra* note 12, paras. 4.21–4.22. The claims faculty instructor at The Judge Advocate General’s Legal Center and School teaches that, because solatia are not paid out of claims allocations and because the DoD directive on single-service responsibility only applies to certain listed claims statutes, not solatia, see DOD DIR. 5515.8, *supra* note 4, para. 4.2, unit commanders have the power to make their own determinations as to solatia propriety. Telephone Interview with MAJ Eugene E. Baime, Claims Instructor, The Judge Advocate General’s Legal Center and School (12 Nov. 2003). MAJ Baime cautions, however, that JAs nonetheless should inform the single-service claims authority when commanders intend to pay solatia. *Id.* As of the writing of this Publication, the U.S. Army Claims Service still opines that solatia payments are not customary and traditional in Iraq, but that, “since solatia is not a claims expenditure allowance issue, whether the payment is called solatia, solatia-like, CERP, etc., is truly irrelevant.” USARCS Comments, *supra* note 17.

<sup>56</sup> I MEF Solatia Memorandum, *supra* note 54, para. 4(b).

<sup>57</sup> Telephone Interviews with Maj Kevin S. “Scott” Woodard, USMC, Deputy Staff Judge Advocate, I Marine Expeditionary Force (various discussions in October 2003) [hereinafter Woodard Interviews]; Lore Interview, *supra* note 7. Many of the incidents were clearly combat-related, however, and would have not have been payable under the FCA. The Marine Corps’ Task Force Tarawa only paid two solatia claims. Transcript of After Action Review Conference, Office of the Staff Judge Advocate, Task Force Tarawa, and the Center for Law and Military

related to the transaction, to include a Standard Form (SF) 1034 (Public Voucher for Purchases and Services other than Personal) documenting the payment amount—as the solatia memorandum emphasized, “[a]ccountability of all source documents is just as important as the capability to win the hearts and minds of Iraqi victims.”<sup>58</sup>

Another nonclaims alternative, related to solatia and worth mentioning briefly even though chronologically outside the scope of this book, is a concept that became known as “solatia-like” payments using seized Iraqi government funds.<sup>59</sup> In broad terms, seized Iraqi funds were consolidated into a “pot of money” first referred to as Commander’s Discretionary Funds, and later as Commander’s Emergency Response Program (CERP) funds. These funds had no specific Congressional purpose attached to them and were available to use for reconstruction efforts in Iraq.<sup>60</sup> Many JAs advised that these funds could be used to pay what were in effect claims, thereby avoiding the problem of the combat exception under the FCA and the fact that solatia had not been officially sanctioned by any command other than I MEF, not to mention the budgeting benefit of using funds other than the unit’s own O&M.<sup>61</sup>

#### **4. Understand the Advantages, Disadvantages, and Regulatory Requirements of Using Local Currency for Claims Payments.**

Both Army and Air Force regulations require foreign claims payments to be made in the local currency of the country where claims incidents occur unless higher claims authorities authorize an exception.<sup>62</sup> For two primary reasons, however, JAs did not pay claims or solatia in the local currency during the period of major combat hostilities in Afghanistan and Iraq. First,

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Operations, Camp Lejeune, N.C., at 163 (2-3 Oct. 2003) (on file with CLAMO) [hereinafter TF Tarawa AAR Transcript] (“We actually only paid two. And [the approval authority] was held [at] the CG’s or the Chief of Staff’s and the SJA’s approval.”).

<sup>58</sup> I MEF Solatia Memorandum, *supra* note 54, para. 4(h).

<sup>59</sup> See, e.g., LTC Sharon E. Riley, Staff Judge Advocate, 1st Armored Division, Current Operations, Operation Iraqi Freedom, PowerPoint presentation, at slide 9 (Oct. 2003) (on file with CLAMO) (using the term “solatia-like” to describe the payment of claims out of CERP funds).

<sup>60</sup> For a more detailed discussion of fiscal lessons learned generally, and seized Iraqi currency and CERP funds in particular, see *supra* Sections III.E and III.E.2.b.3.

<sup>61</sup> See, e.g., E-mail from MAJ Laura K. Klein, Advanced Operational Law Studies Officer, Center for Law and Military Operations (at the time serving as a JA with the 173d Airborne Brigade in northern Iraq), to Maj Cody M. Weston, USMC, Director, Joint Operations, Center for Law and Military Operations (14 Nov. 2003) (on file with CLAMO) (“solatia issue is interesting . . . CERP funds did the trick for so long”). The use of CERP funds to make solatia-like payments grew in acceptance during the period after the chronological scope of this Publication. In fact, in February 2004, a CJTF-7 JA memorandum officially opined that CERP funds were an appropriate source for payments to “alleviate losses resulting from the death or serious bodily harm suffered by a family member.” Memorandum, MAJ Loren J. Randall, Administrative Law Attorney, CJTF-7, to CJTF-7 C8, subject: Use of Commander’s Emergency Response Program Funds to Promote Social and Economic Order, para. 3(d) (24 Feb. 2004) (on file in CLAMO SIPRNET Database, *supra* note 6). Of interest, the Memorandum also opined that “CERP should not be used where claims are cognizable under the Foreign Claims Act.” *Id.* para. 5.

<sup>62</sup> See AFI 51-501, *supra* note 12, para. 4.19.1 (“Claims are adjudicated, approved, and paid in the currency of the country where the incident occurred. . . . Do not pay in a currency other than that of the country where the incident occurred without permission of AFLSA/JACT.”); AR 27-20, *supra* note 12, para. 10-9(b) (“Payment will be made in the currency of the country in which the incident occurred or in which the claimant resided at the time of the incident, unless the claimant requests payment in U.S. dollars or another currency and such request is approved by the Commander, USARCS.”).

unit finance officers did not have ready access to a steady supply of local money.<sup>63</sup> Second, the afghani and the dinar, the respective currencies of Afghanistan and Iraq, fluctuated wildly in value; U.S. dollars were more stable, and the local citizens preferred payment in dollars.<sup>64</sup>

Despite the utility of dollars, JAs in Afghanistan argued that local currency should be used, not so much to satisfy claims regulations, but for broader policy reasons.

Through our Information Operations [IO] Working Group, CTF 82 identified that continued use of US Dollars would work to undermine the Afghan currency and government. In addition to the obvious [benefits] of using Afghanis, the OSJA [Office of the Staff Judge Advocate] noted that the Claims AR requires payment in local currency and yet we had no ability to do so. . . . OSJA became the principal proponent therefore to start using the new Afghan currency. We argued this assisted legitimizing the currency and the government; contrarily, our use of US Dollars tends to portray a message that we do not value the Afghan government or currency.<sup>65</sup>

### ***5. Anticipate Having Difficulties Determining Applicable Local Law and Obtaining Interpreter Support.***

Both Army and Air Force regulations require that FCA claims be adjudicated in accordance with local laws, customs, and standards, with some allowance for reference to general U.S. tort principles.<sup>66</sup> An issue for JAs in Afghanistan and Iraq was determining what exactly those local laws, customs, and standards were.

The CENTAF Claims SOP mentioned earlier<sup>67</sup> directed that unit claims officers (UCOs) prepare a “seven-point memorandum”<sup>68</sup> for the analysis of each claim, containing, among other items, a discussion of any local law that the UCO applied in processing the claim. Language from one such memorandum, analyzing an incident in Afghanistan involving exploding fragments from the destruction of a weapons cache killing a donkey, illustrates the difficulties JAs had with local law.

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<sup>63</sup> See, e.g., 82d OEF Mid-Point AAR, *supra* note 33, at 8 (“We asked Finance to issue us Afghan currency for our future claims payment trip, but they do not have access to same.”); Bovarnick CJTF-180 Notes, *supra* note 32, at 6 (“[t]he finance office on post is not currently equipped to pay in anything but dollars”); Hatch Interview, *supra* note 34 (noting that claims paid in Iraq in U.S. dollars); Woodard Interviews, *supra* note 57 (noting that solatia payments in Iraq paid in U.S. dollars).

<sup>64</sup> See, e.g., Woodard Interviews, *supra* note 57; Bovarnick CJTF-180 Notes, *supra* note 32, at 6 (“claimants seem perfectly happy to accept dollars”); Hayden Interview, *supra* note 2, at 2 (claims paid in dollars due to lack of stable currency).

<sup>65</sup> 82d OEF Mid-Point AAR, *supra* note 33, at 8-9.

<sup>66</sup> See AFI 51-501, *supra* note 12, paras. 4.17 to 4.17.1.2 (stating that an FCA settlement authority should follow “the laws, customs and standards of the country where an incident occurs,” except that joint and several liability does not apply, and that causation is determined based upon general principles of U.S. tort law); AR 27-20, *supra* note 12, paras. 10-5(a)-(b) (stating that an appropriate award under the FCA be based on application of “the law and custom of the country in which the incident occurred to determine which elements of damage are payable and which individuals are entitled to compensation,” but that certain U.S. tort principles remain generally applicable).

<sup>67</sup> CENTAF Claims SOP, *supra* note 14 and accompanying text.

<sup>68</sup> See AFI 51-501, *supra* note 12, para. 1.8.5. A sample memorandum is found at Appendix F-4.

Shuria, or Islamic religious law, is the only widely recognized law in Afghanistan. However, Shuria is not applied uniformly throughout the country. Additionally, U.S. claims officers and judge advocates do not have sufficient training in Shuria to apply it. Accordingly, I have used general tort principles to analyze this claim.<sup>69</sup>

To the extent possible, units hired interpreters to help solve the problem. These interpreters were particularly useful in determining damage amounts. The UCO for the donkey claim above declared damages of \$330, but only after first consulting with his interpreter, who “opined that this was a reasonable valuation of the donkey.”<sup>70</sup> At least one unit in Iraq went so far as to hire Iraqi lawyers to assist in determining local law.<sup>71</sup> A recurring problem, however, was an overall lack of timely interpreter support, as discussed in the following excerpt from the 101st Airborne OSJA after action report.

During decisive operations, members of the DREAR SJA Cell were dispatched to meet with local nationals for a plethora of missions. These included, but are not limited to, foreign claims, accident investigations, LOAC violation investigations, contracting issues, and reclamation of seized property. One individual even needed a death statement for his grandson who was struck and killed by a US transportation truck. A number of documents produced as work product for these issues had to be translated into Arabic. Again, these missions were often delayed or overcome by events when neither of the two interpreters assigned to the entire DREAR were available to assist. Each and every time we addressed foreign nationals we needed an interpreter and often one could not be found for hours. This not only caused long delays in being able to help people, it also strained relations with the public because many times they did not understand why we were making them wait.<sup>72</sup>

The 101st after action report went on to suggest a possible solution.

The availability of Arab linguists has been a substantial problem throughout the military, receiving national media attention. While little can be done at division level to remedy this problem, perhaps higher headquarters could work an intensive recruiting and screening program to identify and hire interpreters from in theater well in advance of crossing the LD. A centralized, well-populated pool of interpreters for use by several designated sections would eliminate the scramble for an interpreter and would expedite our dealings with locals.<sup>73</sup>

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<sup>69</sup> Memorandum for Record, CPT Daniel M. Froehlich, CTF-82 Operational Law Attorney, subject: Foreign Claims Investigation, Landa Khel—Donkey, para. 4(e) (17 Nov. 2002) (on file with CLAMO).

<sup>70</sup> *Id.* para. 5.

<sup>71</sup> See Hatch Interview, *supra* note 34.

<sup>72</sup> 101st OIF Lessons Learned, *supra* note 2, at 18. See also Adams V Corps OIF AAR, *supra* note 10, para. 3 (“There were very few soldiers in the OSJA that could read or write Arabic. This caused difficulties when trying to adjudicate claims because of documents in Arabic that were submitted to support the claimant’s claim.”).

<sup>73</sup> 101st OIF Lessons Learned, *supra* note 2, at 18.

**6. Understand the Level of Coordination and Planning Required Before Launching Claims Investigation and Payment Convoys.**

Many claims investigations and deliveries of claims payments involved traveling far from base camps, either in vehicle convoys or via helicopter.<sup>74</sup> Because force protection obviously was a primary concern in Afghanistan and in Iraq, JAs faced the issue of how to safely reach outlying claimants.

Military JAs typically must rely on organic unit transportation assets to move about the battlefield. In fact, Army doctrine states that “[e]mbedded legal personnel depend on the units to which they are assigned or attached for transportation.”<sup>75</sup> This dependence extends beyond just vehicles and aircraft, however, and includes all of the other logistical and combat support required to move a convoy. As a JA in Afghanistan stated:

The doctrinal technique for claims payments in a combat zone is for maneuver elements to supply forces for, plan, and execute the mission, with the JA claims investigator/payment official coming along for the ride. This technique allows the JA to focus on claims while the maneuver commander’s unit plan for and provides communication, security, navigation, logistics support, etc.<sup>76</sup>

Thus, a clear lesson is that JAs must closely coordinate with and foster good relationships with the operators and logisticians who provide convoy support and execute convoy missions. Similarly, JAs should understand that significant lead time may be required before launching a claims convoy because of the detailed coordination and mission planning that must take place.<sup>77</sup>

An OEF JA after action report offers one frequently used solution to the difficulties of planning and executing claims convoys: combining claims missions with other required missions, such as civil affairs and psychological operations.

Coordination with civil affairs team[s] in order to investigate claims has been the key to success. Most foreign claims will be reported through civil affairs. The civil affairs can also assist to arrange the security convoy and interpreters to conduct the claims investigation. As many claims were incurred out of convoy range, the investigation and payment also required coordination for rotary wing movement. When claims were investigated or paid in areas that were otherwise inaccessible, the command saw the movement as an opportunity to consolidate the investigation or payment trip with other Information Operation type activities. For instance, it was common to combine Humanitarian Daily Ration distribution, CA project assessments, donated material distribution, Psyop newspaper and

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<sup>74</sup> See, e.g., Bovarnick CJTF-180 Notes, *supra* note 32, at 7 (“Claims judge advocates have numerous opportunities to get outside the wire; including payment missions to remote mountain villages.”).

<sup>75</sup> FM 27-100, *supra* note 1, para. 4.4.2.

<sup>76</sup> 82d OEF Mid-Point AAR, *supra* note 33, at 7.

<sup>77</sup> A sample claims convoy mission order and execution checklist (classified) is available in the CLAMO SIPRNET Database, *supra* note 6, under Operations/Aghanistan/AARs/82d AAR/Tabs 5a and 5b. For a more detailed discussion of soldier skills and leadership skills lessons learned for legal personnel, see *infra* Section III.J.



handbill distribution, and de minimis medical screening and health care into rotary wing investigation or payment trips.<sup>78</sup>

An OIF JA provides a slightly different perspective: “3ID DMAIN [Division Main] JAs frequently went into Baghdad without any operator/logistician support. JAs were the convoy commanders, and 27Ds provided ALL security. Sometimes it is impractical to rely on tailing onto convoys with others because they simply don’t want you along!”<sup>79</sup>

### ***7. Consider the Possibility of Filing Personnel Claims from Theater Rather than Waiting Until Redeployment.***

In addition to foreign claims issues, JAs confronted the issue of how best to process personnel claims of our own U.S. servicemembers: whether to file the claim after redeployment or whether to file from theater.

The Military Personnel and Civilian Employees’ Claims Act (MPCECA) is the statutory authority for settling personal property claims of military personnel and civilian employees incident to service.<sup>80</sup> Unlike the FCA, under which appointed FCCs can pay many foreign claims immediately on the ground,<sup>81</sup> MPCECA claims payments are typically made through the Defense Finance and Accounting Service via the home station claims office.<sup>82</sup> An MPCECA claim must be presented within two years of accrual.<sup>83</sup>

Units in Afghanistan and Iraq took different approaches to the issue. Marine Corps JAs in Iraq generally decided not to process any personnel claims, instead advising Marines to file the paperwork with installation claims attorneys upon return to the States.<sup>84</sup> Army JAs in

<sup>78</sup> 82d OEF Mid-Point AAR, *supra* note 33, at 7.

<sup>79</sup> USARCS Comments, *supra* note 17 (comments from LTC Charlotte R. Herring, former Officer-in-Charge, Division-Main, 3d Infantry Division) (emphasis in original).

<sup>80</sup> 31 U.S.C. § 3721 (2000).

<sup>81</sup> See *supra* note 6 and accompanying text.

<sup>82</sup> See AR 27-20, *supra* note 12, para. 11-2 (Army MPCECA settlement authorities); U.S. DEP’T OF AIR FORCE, INSTR. 51-502, PERSONNEL AND GOVERNMENT RECOVERY CLAIMS para. 1.2 (1 Mar. 1997) (Air Force MPCECA settlement authorities); U.S. DEP’T OF NAVY, OFFICE OF THE JUDGE ADVOCATE GENERAL INSTR. 5890.1 at encl. 5, para. 7 (17 Jan. 1991) (Navy and Marine Corps MPCECA settlement authorities).

<sup>83</sup> 31 U.S.C. § 3721(g).

<sup>84</sup> The Task Force Tarawa SJA actually attempted, unsuccessfully, to obtain the authority to pay personnel claims in theater without having to go through higher Marine Corps channels.

We recognized we would have personal claims because a sand storm could just damage people’s stuff. And so we requested from Headquarters Marine Corps . . . to be delegated the adjudicating authority. . . . And they said, No. And they sent us down . . . this ten-page document that if the Marine filled out they said we will give him his claim, but it was a ten-page . . . document. The Marines just didn’t have the time to be doing that. And the bottom line of what happened was Marines realized how much more money they were making with combat pay and the tax-free pay and they said, I’ll just buy myself a new one. And so there were no claims filed. Unfortunately, Headquarters Marine Corps made it harder than it needed to be.

I kept on, well, how much? How about just \$1,000, to settle a \$1,000 worth? No [Headquarters said], we will still do this ourselves. You scan it and fax it. I go, you know how difficult it is to

Afghanistan similarly processed very few personnel claims.<sup>85</sup> By contrast, many Army units in Iraq processed a number of personnel claims by having soldiers prepare the forms (DD 1842 and 1844) locally. A unit claims attorney would adjudicate the claim, scan the documents, and then send them electronically to the relevant home station for processing and electronic payment through the Defense Finance and Accounting Service.<sup>86</sup> The 101st Airborne Division, for example, prepared and adjudicated over one thousand personnel claims arising during the period of major combat operations.<sup>87</sup> The typical personnel claim filed from Iraq was for lost equipment and clothing from the displacement of units during rapid combat operations and from tent fires.<sup>88</sup>

Efficiently processing personnel claims sooner rather than later undoubtedly contributes to troop morale.<sup>89</sup> Whether or not filing claims from theater is viable will depend upon operational commitments. The lesson seems to be that JAs should at least consider, prior to deployment, the possibility of filing personnel claims and establishing a relationship with the relevant claims settlement authority to facilitate smoother processing once deployed. Processing claims while deployed might also have the added benefit of reducing the claims workload upon redeployment.

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scan something and fax it to you. You're not the only thing we're working on here. I have a staff of four.

TF Tarawa AAR Transcript, *supra* note 57, at 162.

<sup>85</sup> See, e.g., 82d OEF Mid-Point AAR, *supra* note 33, at 9 (“We have only done 1 personal claim.”).

<sup>86</sup> See, e.g., Balbo AAR, *supra* note 18, at 5 (describing 3ID process of soldiers remitting claims forms to the D-Rear, and the D-Rear scanning the forms and e-mailing them to Fort Stewart, Georgia, for settlement). The Balbo AAR also noted that the D-Rear had to be used because the claims office at Fort Stewart did not have classified e-mail (SIPRNET) capability, the primary means of communication for forward units in Iraq. Thus, forward units e-mailed forms to the D-Rear on the SIPRNET, where the D-Rear scanned the documents and e-mailed them on the unclassified e-mail system (NIPRNET) to Fort Stewart. Because of unreliable NIPRNET connections and less than robust scanning capability, it could take several weeks before the D-Rear could e-mail the forms to Fort Stewart. *Id.* For a more detailed discussion of the SIPRNET, NIPRNET, and other equipment/technology issues, see *infra* Section III.J.3.

<sup>87</sup> See 101st OIF Lessons Learned, *supra* note 2, at 7.

<sup>88</sup> See, e.g., Balbo AAR, *supra* note 18, at 5; 101st OIF Lessons Learned, *supra* note 2, at 7; TF Tarawa AAR Transcript, *supra* note 57, at 161-62.

<sup>89</sup> See, e.g., Hatch Interview, *supra* note 34; 82d OEF Mid-Point AAR, *supra* note 33, at 9 (“The right thing is to process them NOW . . . [t]he rationale for waiting up to 6 months to take care of a soldier problem is lost on us.”) (emphasis in original); 3ID AAR Transcript, *supra* note 5, at 101-05 (noting that even if soldiers did not have anything to spend the claims money on in the combat zone, that simply having a loss compensated was a morale booster as a matter of principle). At least one JA pointed out the danger, however, of Soldiers filing unreasonable personnel claims, suggesting that “high dollar items not noted on an inventory sheet maintained, and updated, by the first sergeant” be considered “per se ‘unreasonable.’” E-mail from LTC Walter S. Weedman, Deputy Staff Judge Advocate, 4th Infantry Division, to LTC Pamela M. Stahl, Director, Center for Law and Military Operations (13 May 2004) (containing comments from CPT Fredrick Horton, Jr.). The JA further suggested that commands publish guidance on what will be deemed unreasonable, such as multiple video game systems in the combat environment. *Id.*

***8. Take Preventive Measures to Minimize Personnel Claims for Damage to Property Left Behind at the Home Station.***<sup>90</sup>

A recurring issue noted by the U.S. Army Claims Service (USARCS) is the number of personnel claims arising from property left behind at the home station and how these numbers could be reduced with prior planning. The two most common claims involve automobiles damaged or stolen while in base storage lots<sup>91</sup> and personal gear stolen or removed without accountability from barracks rooms. Many base storage lots are not secure and leave the vehicles exposed to the weather for extended periods. Similarly, barracks can be broken into, and gear is easily misplaced when relocated for Reservists moving into the barracks rooms. USARCS believes that the best solution is that funding—whether installation funds or contingency Operations & Maintenance funds—be provided for commercial storage of personal property. At a minimum, a third party in the chain of command should conduct a detailed inventory of all personal gear prior to deployment.

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<sup>90</sup> The information in this Section is based upon Telephone Interview with Mr. Joseph A. Goetzke, Deputy Chief, Personnel Claims and Recovery Division, U.S. Army Claims Service (25 Feb. 2004).

<sup>91</sup> JAs from the 21st Theater Support Command emphasized the significance of the automobile claims issue.

[W]e are only now beginning to feel the full extent of [this issue]. There was extensive discussion at the [U.S. Army Claims Service Europe] Claims CLE in December 2003 about the likelihood that POVs that had been stored in outdoor parking lots for a year or more would give rise to a host of claims. When a car is not driven for such a long period of time, dry rot can set in and radiators can chalk up, causing a variety of complications that cannot be dismissed as “normal wear and tear.” Cars do not normally sit for 12 to 18 months without being driven.

Memorandum, Office of the Staff Judge Advocate, 21st Theater Support Command, to Center for Law and Military Operations, subject: Review of the Draft Legal Lessons Learned from Afghanistan and Iraq: Volume I, Major Combat Operations (11 September 2001 – 1 May 2003), para. 1(g) (14 May 2004) (on file with CLAMO).

## G. ADMINISTRATIVE LAW

*The practice of administrative law includes advice to commanders . . . involving many specialized legal areas, including military personnel law, government information practices, investigations, relationships with private organizations, labor relations, civilian employment law, military installations, and government ethics.*<sup>1</sup>

During both Operation ENDURING FREEDOM (OEF) and Operation IRAQI FREEDOM (OIF) judge advocates (JAs) found that administrative law issues often consumed a great deal of attorney and paralegal time. From issues concerning enemy property and war trophies, to investigations with high media interest, JAs provided the advice and expertise needed to assist the commander in completing the mission.

### ***1. Judge Advocates Must Understand and Apply International Law, Federal Statutes, and Implementing Department of Defense and Service Regulations when Providing Advice on Seizing and Disposing of Enemy Property.***

International law specifically forbids the destruction or seizure of an enemy's property, unless required by the "necessities of war."<sup>2</sup> Moreover, under U.S. law public property captured or seized from the enemy, private property validly captured on the battlefield, and abandoned property becomes the property of the United States.<sup>3</sup> It is a crime under the Uniform Code of Military Justice for a service member to fail to turn over such property to the proper authorities or to dispose of the property for personal profit.<sup>4</sup>

#### ***a. Units Must Have a Mechanism to Account For Seized Enemy Property.***

United States Central Command General Order 1A (CENTCOM GO 1A) (at Appendix G-1),<sup>5</sup> applicable in both OEF and OIF, reflected the above international and domestic law. The order provided that public and private property could be seized by order of a commander if based on military necessity and that seized public property became the property of the United States. Private property was required to be processed, secured, and stored for later return to the lawful owner.<sup>6</sup>

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<sup>1</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS para. 3.5 (1 Mar. 2000).

<sup>2</sup> See Annex to Hague Convention No. IV Regulations Respecting the Laws and Customs of War on Land, art. 23, para. (g) (1907).

<sup>3</sup> U.S. Const., art. I, § 8, cl. 11; see also 10 U.S.C. § 2579(b)(2) (2000) (providing that, generally, enemy material captured or found abandoned must be turned over to the United States or allied military personnel).

<sup>4</sup> See 10 U.S.C. § 903 (2000) (Art. 103, UCMJ) (regarding captured or abandoned enemy public property); *id.* § 908 (Art. 108, UCMJ) (regarding the loss, damage, destruction, or wrongful disposition of U.S. military property).

<sup>5</sup> Commander, U.S. Central Command, Gen. Order No. 1A (29 Dec. 2000) [hereinafter CENTCOM GO 1A].

<sup>6</sup> *Id.* at para. 2k(1).

Prior to combat operations in Iraq, the CFLCC<sup>7</sup> anticipated that units might seize private property. Therefore, they issued a “Property Control Record Book” containing receipts with carbon copies and instructions for use.<sup>8</sup> As expected, private property deemed essential to mission accomplishment was seized during combat operations. This property included privately owned vehicles, gravel, and other Class IV material.<sup>9</sup> As a consequence, even during decisive operations legal teams met with local nationals who were seeking to reclaim their seized property. In addition, JAs investigated and coordinated payment for this property for many weeks after major combat operations.<sup>10</sup>

Legal personnel need to ensure that units can account for private property seized on the battlefield to ensure efficient processing of local national claims. Printing and distributing receipt books for use by service members when seizing private property is an effective way to ensure accountability. Such books must be distributed down to the unit level in sufficient time to allow for dissemination and training.<sup>11</sup>

<sup>7</sup> Coalition Forces Land Component Command. For a discussion of the CFLCC and the OIF command structure, see *supra* Section II.

<sup>8</sup> The book provided the following instructions to the commanders.

1. Treat civilians and their property with dignity and respect. Obey the law of war and respect the lives and property of the local population.
2. If required by military necessity, you are authorized to seize property in combat. COMBAT OPERATIONS DO NOT GIVE YOU LICENSE TO LOOT. Seizing private or public property for personal use or mere convenience is unlawful.
3. Use this Property Control Record to document seizure of property on the battlefield by U.S. Armed Forces. Fill out the forms completely, legibly, and accurately. Describe the property in as much detail as possible. Get photographs if you can!
4. After you have completed this form, give Copy 1 (white) to the property owner, if available. Forward Copy 2 (blue) to your battalion S-4. Copy 3 (pink) stays with the property that was seized and Copy 4 (green) remains attached to this book. Fill in the Seizure Record inside the back cover.
5. Direct questions about use of this form to the nearest Judge Advocate.

PROPERTY CONTROL RECORD BOOK, CFLCC (on file with CLAMO). The control book required the issuer to place his or her social security number on the receipt, which caused some consternation when it was fielded. At least one division issued guidance to disregard the request for a social security number. See Transcript of After Action Review Conference, Office of the Staff Judge Advocate, 3d Infantry Division, and the Center for Law and Military Operations, Fort Stewart, Ga., at 44-45 (18-19 Nov. 2003) (on file with CLAMO) [hereinafter 3ID AAR Transcript].

<sup>9</sup> See Office of the Staff Judge Advocate, 82d Airborne Division, After Action Report (AAR) Operation Iraqi Freedom (OIF), at 2 (2003) (on file with CLAMO) [hereinafter 82d Airborne OIF AAR]. Class IV is a category of supply for construction materials. See JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DoD DICTIONARY OF MILITARY AND ASSOCIATED TERMS (12 Apr. 2001) (as amended 23 Mar. 2004), at <http://www.dtic.mil/doctrine/jel/doddict/data/d/index.html>.

<sup>10</sup> See, e.g., 82d Airborne OIF AAR, *supra* note 9, at 2.

<sup>11</sup> There is at least some indication that the receipt books were not distributed down to company level in a timely manner. Therefore, JAs should ensure that the receipt books are printed for distribution in sufficient time to get them to the warfighter. See, e.g., 4th Brigade Combat Team, 3D Infantry Division, narrative at 1 (on file with CLAMO) (describing the JA’s efforts on 26 Mar. 2003 during a sandstorm to link up with the Division Main Command Post to get battlefield acquisition receipt books for his unit); Memorandum, CPT Brian Chapuran, Group Judge Advocate, 36th Engineer Group, to Staff Judge Advocate, U.S. Army Infantry Center and Ft. Benning, subject: After Action Review—Operation Iraqi Freedom, para. 4 (1 Jul.

***b. Be Prepared to Answer the Commander's Questions Related to the Disposition of Enemy Property.***

Disposition of enemy military property quickly became a major issue for JAs in both operations because many units and individual service members wanted to retain this property as souvenirs.<sup>12</sup> The rules on retention of enemy property as souvenirs generally can be classified into two broad categories, each with its own separate regulatory scheme: (1) historical artifacts; and (2) war trophies. During both OIF and OEF, JAs needed to understand these rules to properly advise commanders.

**1. Be prepared to provide detailed advice and guidance on unit historical artifacts.**

First, enemy material seized on the battlefield may be designated as historical artifacts.<sup>13</sup> In the Army, the Chief of Military History (CMH) has overall responsibility for the designation and recovery of historical artifacts in combat and military operations other than war.<sup>14</sup> Generally, the CMH deploys military and civilian personnel to recover historical artifacts.<sup>15</sup> The recovery team is responsible for identifying, collecting, registering, and returning to the United States all significant historical artifacts, in coordination with unit commanders.<sup>16</sup> In the Marine Corps, commanders in the field and their supporting legal advisors coordinate with the Marine Corps Museums Branch Activity, Marine Corps Combat Development Command, who is responsible for designating captured enemy material as historical artifacts.<sup>17</sup>

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2003) (on file with CLAMO) (stating that he [CPT Chapuran] had never dealt with these receipt books before and he did not find out about them until a few days prior to his unit's move into Iraq; therefore, he had to arrange to have the books forwarded on a logistics package (LOGPAC) and distributed to his subordinate units).

<sup>12</sup> See also *supra* Section F (discussing the disposition of Iraqi currency).

<sup>13</sup> The Army defines the term "historical artifact" as follows.

Any object that has been designated by appropriate authority as being historically significant because of its association with a person, organization, event, or place, or because it is a representative example of military equipment that has been accessioned into the Army Historical Collection. Artifacts will cease to perform their original function.

U.S. DEP'T OF ARMY, REG. 870-20, ARMY MUSEUMS, HISTORICAL ARTIFACTS, AND ART 45 (11 Jan. 1999) [hereinafter AR 870-20].

<sup>14</sup> *Id.* para. 1-4(b).

<sup>15</sup> *Id.* para. 4-4(a). Local commanders are responsible for providing force protection and support services to these individuals. *Id.* para. 4-4(b).

<sup>16</sup> *Id.* para. 4-4(e). The specific Customs and Border Protection procedures for importing historical artifacts into the United States are outlined in an e-mail from Robert J. Colbert, Bureau of Customs and Border Protection, to LtCol Laurie Powell, U.S. Marine Corps Forces Central Command (MARCENT), subject: Information: War Trophies Point of Contact with Customs and Border Protection (13 May 2003) (on file with CLAMO).

<sup>17</sup> See U.S. MARINE CORPS, ORDER P5750.1G, MANUAL FOR THE MARINE CORPS HISTORICAL PROGRAM 4006 (28 Feb. 1992) (C1, 21 Nov. 1994)

During OEF, units were required to request permission through their Service Component Commanders to CENTCOM for authorization to transport enemy equipment out of the CENTCOM area of responsibility (AOR) for historical display purposes. The request had to include confirmation from the appropriate official that the requested item was of historic value and would be accepted as an historic artifact or designated as an historic artifact.<sup>18</sup> A detailed flow chart of how captured property was disposed of during OEF is at Appendix G-2. CENTCOM published similar guidance for OIF.<sup>19</sup> Although in the latter operation, CENTCOM specifically allowed only unserviceable captured enemy equipment to be transported out of the AOR as historic artifacts.<sup>20</sup> Appendix G-3 contains an example of a Marine Corps unit's request to retain captured Iraqi property.

Judge advocates should assist their commanders in drafting requests to designate enemy equipment as historical artifacts. The request must make clear that the equipment is for unit, not individual, retention. Additionally, the request should contain information regarding why a particular piece of enemy equipment has historical importance and value to the unit. This is especially true if the equipment is not unique, such as an AK-47.<sup>21</sup>

## **2. Know the alternate means of disposing of enemy property under the Spoils of War Act.**

A second way in which the United States may dispose of enemy property is under the Spoils of War Act of 1994.<sup>22</sup> The act authorizes the United States to transfer movable enemy property to any other party—including any government, group, or person—by sale, grant, loan or in any other manner, to the same extent that property of the same type owned by the United States may be transferred.<sup>23</sup> The act also provides that spoils of war may be returned to previous owners from whom the enemy took such property. During OIF, captured serviceable Iraqi military equipment was secured for future use in training and equipping the Iraqi National Defense Force, in effect returning this equipment to the Iraqi people.<sup>24</sup>

<sup>18</sup> Message, 042021Z Mar 02, USCENTCOM, subject: USCENTCOM Legal Guidance for Operation Enduring Freedom (Disposition of Captured Enemy Equipment), para. 1.D to 1.E (on file with CLAMO) [hereinafter CENTCOM OEF Captured Enemy Equipment Message].

<sup>19</sup> Message, 181636Z Apr 03, USCENTCOM, subject: Legal Guidance for OIF (Disposition of Captured Enemy Equipment), paras. 1.D to 1.F (on file with CLAMO) [hereinafter CENTCOM OIF Captured Enemy Equipment Message].

<sup>20</sup> *Id.* para. 1.D.

<sup>21</sup> *See, e.g.*, E-mail from Maj. Ian D. Brasure, USMC, Staff Judge Advocate, 26th Marine Expeditionary Unit (Special Operations Capable), to Maj. Kevin M. Chenail, USMC, Office of the Staff Judge Advocate, Coalition Forces Land Component Command (3 Apr. 2003) (on file with CLAMO). Major Brasure also stated that during OEF it was helpful in obtaining historical artifact status to point out that a particular weapon, such as an AK-47, was so commonplace on the battlefield that it was not useful for Afghan follow-on forces. *Id.*

<sup>22</sup> Pub. L. 103-236, title V, § 552, 108 Stat. 482, Apr. 30, 1994 (codified at 50 U.S.C. §§ 2201-2205).

<sup>23</sup> 50 U.S.C. § 2201 (2000). Such property cannot be transferred to countries that support terrorism. *Id.* § 2202.

<sup>24</sup> *See* CENTCOM OIF Captured Enemy Equipment Message, *supra* note 19, at para. 1.C.

**3. Ensure there is a clear and unambiguous policy on retaining individual war trophies and that service members understand that policy.**

Finally, a second law enacted the same year as the Spoils of War Act authorizes the Secretary of Defense to prescribe regulations allowing service members to retain as a souvenir enemy material captured or found abandoned.<sup>25</sup> These souvenirs are commonly referred to as “war trophies.” Congress provided the following explanation in enacting this law.

The United States recognizes that battlefield souvenirs have traditionally provided military personnel with a valued memento of their service in a national cause. At the same time, it is the policy and tradition of the United States that the desire for souvenirs in a combat theater not blemish the conduct of combat operations or result in the mistreatment of enemy personnel, the dishonoring of the dead, distraction from the conduct of operations, or other unbecoming activities.<sup>26</sup>

During the period covered by this Publication, however, the Secretary of Defense had not implemented this law,<sup>27</sup> although a 1969 multi-service regulation outlines the procedures for the control and registration of war trophies, including firearms. The regulation includes procedures for importing these items into the United States.<sup>28</sup>

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<sup>25</sup> 10 U.S.C. § 2579 (2000). The statute outlines specific requirements for captured weaponry. To be retained as a souvenir, the weapon must be in a category agreed upon by the Secretary of Defense and the Secretary of the Treasury; the weapon must be rendered unserviceable; and a charge may be assessed to cover the cost of rendering the weapon unserviceable. *Id.* § 2579(b)(5).

<sup>26</sup> *Id.* § 2579(a). The law requires that at the time the property is turned over to appropriate officials, the service member may request that he or she be allowed to retain it. An officer appointed to review such requests then determines whether the object is appropriate for retention as a war trophy. If so, the object is given to the service member. *Id.* §§ 2579(b)(2) & (3).

<sup>27</sup> In early February 2004, the Secretary of Defense implemented the 1994 law by Memorandum, The Secretary of Defense, to Commander, U.S. Central Command, subject: War Souvenirs (11 Feb. 2004). The Commander, CENTCOM then issues guidance for the CENTCOM area of responsibility. CENTCOM Message, 181630Z Mar 04, subject: CTC FRAGO 09-528 War Souvenirs in the ITO (requiring each component and combined/joint task force commander to designate officials to whom all captured, found abandoned, or otherwise acquired enemy material should be turned over to for review and decision on retention as a war trophy, and providing that items approved for retention must be nonlethal, relatively inexpensive, not otherwise prohibited by law or regulation, and not suitable for future use by the Iraqi National Defense Forces). Finally, CJTF-7 implemented the CENTCOM message on 23 Apr. 2004. Fragmentary Order 674 [War Souvenirs] to CJTF-7 Operational Order 04-01, 232250DAPR04 (designating each company commander, or person in the grade of lieutenant colonel or above, or contractor officer representatives in the grade of captain or above who service contracts with employees likely to submit items as reviewing officers able to approve retention of war trophies authorized by the fragmentary order).

<sup>28</sup> U.S. DEP'T OF ARMY, REG. 608-4, CONTROL AND REGISTRATION OF WAR TROPHIES AND WAR TROPHY FIREARMS (28 Aug. 1969). Weapons falling under the purview of the National Firearms Act cannot be retained as war trophy firearms, to include: shotguns with a barrel less than 18 inches; a weapon made from a shotgun modified to an overall length of less than 26 inches or with a barrel of less than 18 inches; a rifle with a barrel less than 16 inches; a weapon made from a rifle modified to an overall length of less than 26 inches or a barrel less than 16 inches; and a machine gun. *Id.* para. 6. *See also* 27 C.F.R. § 478.114(c) (2003) (providing that firearms determined by the Secretary of Defense to be war trophies may be imported into the United States by service members under such provisions and procedures as the Department may



The law was an attempt by Congress to resolve war trophy issues that occurred during Operation DESERT STORM.<sup>29</sup> Unfortunately, it seems that every CLAMO lessons learned handbook to date contains a section similar to this one; that is, that there must be clear guidance on retention of war trophies.<sup>30</sup> It seems that we have not yet gotten it right.

The authority for service members to retain personal war trophies quickly became an issue in both OEF and OIF. CENTCOM GO 1A generally prohibited service members from taking or retaining individual souvenirs or trophies.<sup>31</sup> Understandably, however, many service members deployed in support of both operations wanted to bring home souvenirs. Although the Secretary of Defense had not implemented the statute authorizing war trophies, Appendix X to Annex E to USCENTCOM CAMPAIGN PLAN OPERATION ENDURING FREEDOM purported to authorize service members to retain some war trophies, including military clothing, insignia, and items of military equipment captured from enemy stocks. Ultimately, it was determined that the campaign plan was incorrect, as CENTCOM did not intend to waive the prohibition on war trophies contained in CENTCOM GO 1A.<sup>32</sup> To clarify the issue, CENTCOM published a message reiterating that under the general order, service members deployed in support of OEF could not retain individual war trophies.<sup>33</sup>

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issue). The Customs Service is authorized to release a firearm without an import permit from ATF where a properly executed DD Form 603, Registration of War Trophy Firearms, is presented certifying that the firearm is a war trophy. See U.S. DEP'T OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, ATF P 5300.4, FEDERAL FIREARMS REGULATIONS REFERENCE GUIDE (2000).

<sup>29</sup> As the Desert Storm Assessment Team reported, “[o]nly sex seems to arouse as much passion in ordinary human beings as does the lust to acquire war trophies.” UNITED STATES ARMY LEGAL SERVICES AGENCY, DESERT STORM ASSESSMENT TEAM’S REPORT TO THE JUDGE ADVOCATE GENERAL OF THE ARMY para. III.6. (22 Apr. 1992) (on file with CLAMO).

<sup>30</sup> See, e.g., CENTER FOR LAW AND MILITARY OPERATIONS, LAW OF MILITARY OPERATIONS IN HAITI, 1994-1995: LESSONS LEARNED FOR JUDGE ADVOCATES 127 (11 Dec. 1995) (declaring a lesson learned to be advising the commander to announce clear and straightforward guidance on war trophies); CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN KOSOVO, 1999-2001: LESSONS LEARNED FOR JUDGE ADVOCATES 146 (15 Dec. 2001) (advising that a lesson learned is to understand the distinction between war trophies and historical artifacts).

<sup>31</sup> See CENTCOM GO 1A, *supra* note 5, at para. 2k. GO 1A recognizes, however, that private or public property may be seized in accordance with international law on order of the commander, when based on military necessity, and that such property becomes the property of the United States. *Id.* paras. 2k(1) & (2).

<sup>32</sup> See E-mail from Maj John R. Woodworth, USMC, Staff Judge Advocate, 24th Marine Expeditionary Unit (Special Operations Capable), to Maj Todd J. Enge, USMC, Operational Law Attorney, U.S. Central Command (1 Dec. 2001) (on file with CLAMO) (pointing out that although CENTCOM GO 1A prohibited war trophies, APPX 4 to Annex E to USCENTCOM CAMPAIGN PLAN OPERATION ENDURING FREEDOM appeared to authorize retention of some items of military equipment); E-mail from Maj Todd J. Enge, Operational Law Attorney, U.S. Central Command, to Maj John R. Woodworth, USMC, Staff Judge Advocate 24th Marine Expeditionary Unit (1 Dec. 2001) (on file with CLAMO) [hereinafter Enge E-mail] (answering Maj Woodworth’s inquiry by stating that CENTCOM GO 1A prohibition on war trophies controlled and that the campaign plan for OEF was incorrect and needed to be changed).

<sup>33</sup> CENTCOM OEF Captured Enemy Equipment Message, *supra* note 18, at para. 1.B. The message provided the following.

Under no circumstances may captured enemy weapons, munitions, or military articles of equipment obtained or acquired by any means other than through official issue be

The general order, however, “did not preclude the lawful acquisition of souvenirs that can be legally imported into the United States.”<sup>34</sup> Therefore, service members could purchase souvenirs from local vendors and take them back to the United States, so long as they did not violate U.S. customs laws.<sup>35</sup> Based on this provision, two additional issues surfaced regarding war trophies.

The first issue was whether the provision in CENTCOM GO 1A authorizing the “lawful acquisition of souvenirs” meant that service members could lawfully purchase enemy military equipment from local vendors and bring the equipment home. The CENTCOM position was that CENTCOM GO 1A prohibited service members from retaining enemy equipment as war trophies, no matter how that equipment was obtained.<sup>36</sup> Adding to the confusion, in early May 2003, the CFLCC commander issued a memorandum reaffirming the CENTCOM GO 1A prohibition on the retention of weapons, ammunition, and items of military equipment, but authorized service members assigned or attached to CFLCC to retain as personal mementos certain other items of enemy property. These items presumably were not “military equipment” prohibited by CENTCOM GO 1A.<sup>37</sup> At the same time, other commands issued much more narrow guidance, causing confusion at subordinate levels when service members learned that others were allowed to retain war trophies.<sup>38</sup> Moreover, many units were confused as to what constituted prohibited “items of military equipment” under the CFLCC memorandum.<sup>39</sup>

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retained for personal use or shipped out of the USCENTCOM AOR for personal retention or control. All captured enemy equipment is considered property of the U.S. Government. Any attempts to wrongfully withhold, retain, or dispose of such property is a violation of the Uniform Code of Military Justice.

*Id.*

<sup>34</sup> CENTCOM GO 1A, *supra* note 5, para. 2k(4).

<sup>35</sup> *See, e.g.*, Interview with COL Kathryn Stone, former Staff Judge Advocate, 10th Mountain Division, in Charlottesville, Va. (7 Oct. 03) (audiotape on file with CLAMO) [hereinafter Stone Interview]. United States customs information and regulations can be found on the U.S. Customs and Border Protection website at [www.cbp.gov](http://www.cbp.gov).

<sup>36</sup> *See* Enge E-mail, *supra* note 32 (“The only way any captured enemy equipment (i.e., helmets & duce gear) and/or weapons (i.e., AKs and bayonets) can come out of the AOR is as historical artifacts . . . . The otherwise lawful souvenir language in GO-1A was intended to refer to things like rugs, hats, & other [similar items] . . . not military equipment.”).

<sup>37</sup> Memorandum, Commander, Coalition Forces Land Component Command, to All Commanders, subject: War Souvenirs (7 May 2003). The memorandum specifically allowed service members to retain: (1) helmets and head coverings; (2) uniforms and uniform items such as insignia and patches; (3) canteens, compasses, rucksacks, pouches, and load bearing equipment; (4) flags; (5) military training manuals, books, and pamphlets; (6) posters, placards, and photographs; and (7) other items that pose no safety risk, and are not otherwise prohibited. *Id.* at para. 3.

<sup>38</sup> *See, e.g.*, After Action Report, Operation IRAQI FREEDOM, Major Stuart Baker, Deputy Group Judge Advocate, 10th Special Forces Group, to Group Judge Advocate, 10<sup>th</sup> Special Forces Group (Airborne), para. 6.d (1 Sep. 2003) (on file with CLAMO) [hereinafter Baker OIF AAR].

<sup>39</sup> *See, e.g.*, MAJ Mark W. Holzer Interview with COL Lyle W. Cayce, Staff Judge Advocate, 3rd Infantry Division (Mechanized), in Iraq, at 8 (22 Apr. 2003) (on file with CLAMO).

The second issue occurred in Afghanistan when service members wanted to purchase firearms that were not enemy equipment from local vendors as souvenirs and take them home.<sup>40</sup> Although GO 1A authorized the “lawful acquisition of souvenirs,” as discussed above, it also specifically prohibited the “purchase, possession, use or sale of privately owned firearms . . . .”<sup>41</sup> Antique firearms, however, are not considered firearms for purposes of the Gun Control Act of 1968, which regulates the importation of firearms.<sup>42</sup> To be an antique, the firearm must have been manufactured before 1899.<sup>43</sup> Therefore, service members were allowed to purchase firearms and take them home to the United States if they produced a purchase receipt and signed an affidavit swearing that the firearm was manufactured in or before 1898.<sup>44</sup>

It is also worth noting that service members could acquire souvenirs as gifts from friendly forces. Many special forces team members, for example, received customary gifts from the Afghan forces they supported and fought alongside during OEF. Some of these gifts were items of military equipment. The gifts were generally treated as received from a foreign government and reviewed under the rules limiting the value of gifts that can be accepted personally from a representative of a foreign government.<sup>45</sup> Nevertheless, receipt of firearms as gifts were considered to be prohibited under the CENTCOM GO 1A ban on privately owned weapons.<sup>46</sup>

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<sup>40</sup> Stone Interview, *supra* note 35.

<sup>41</sup> CENTCOM GO 1A, *supra* note 5, para. 2a. Even if not prohibited by the general order, the service member must comply with U.S. laws and regulations on importing firearms. Under 18 U.S.C. § 925(a)(4), the Secretary of Defense may authorize military personnel to import into the U.S. personally owned firearms if the member is on active duty outside the United States within the 60-day period immediately preceding the importation; the firearm is intended solely for the personal use of the member; and the firearm is suitable for sporting purposes or registered as a war trophy firearm. *See also* 27 C.F.R. § 478.114 (2003) (authorizing the Director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives to issue a permit allowing the importation of firearms into the United States to the place of residence of any military member in accordance with 18 U.S.C. § 925 (2000) and providing procedures to apply for a permit, ATF Form 6—Part II, to import the firearm); U.S. DEP’T OF DEFENSE, REG. 5030.49, DoD CUSTOMS INSPECTION PROGRAM para.1002b (27 May 1977) (implementing the statute and requiring that any such importation must be in accordance with applicable Federal and state laws of the service member’s place of residence); DEP’T OF DEFENSE, REGULATION 4500.34-R, PERSONAL PROPERTY TRAFFIC MANAGEMENT REGULATION (Oct. 1991) (providing shipment procedures).

<sup>42</sup> Pub. L. 90-618, Title I, § 102, 82 Stat. 1214 (Oct. 22, 1968) (codified at 18 U.S.C. §§ 921-930 (2000)).

<sup>43</sup> 27 C.F.R. § 478.11(b) (2003).

<sup>44</sup> *See* CJTF-180—BaseOps—SJA Information Paper, subject: Information Paper on Acquisition and Importation of Antique Firearms and Replicas of Antique Firearms, para. 2.a (19 Aug. 2002) (providing that the prohibition in CENTCOM GO 1A on the introduction, purchase, possession, or sale of privately owned firearms has been waived insofar as it applies to antique firearms and replicas legally obtained in Afghanistan) (on file with CLAMO). The Legal Assistance Office assisted service members in drafting and signing these affidavits. *See* Transcript of After Action Review Conference, Office of the Staff Judge Advocate, XVIIIth Airborne Corps, and the Center for Law and Military Operations, Fort Bragg, N.C. (30 Sept. to 1 Oct. 2003) (on file in CLAMO) [hereinafter XVIIIth Airborne Corps AAR Transcript]. There was some difference of opinion, however, regarding whether CENTCOM GO 1A still intended to prohibit these firearms, even if they were not considered firearms under the Gun Control Act of 1968. *See* Stone Interview, *supra* note 35.

<sup>45</sup> *See* U.S. DEP’T OF DEFENSE, REG. 5500.7, JOINT ETHICS REGULATION, para. 2-300b (30 Aug. 1993) (C4, 6 Aug. 1996) [hereinafter JER].

<sup>46</sup> Memorandum, Major Dean Whitford, former Group Judge Advocate, 5th Special Forces Group (Airborne) and Staff Judge Advocate, Joint Special Operations Task Force – North (Task Force Dagger),

A lesson learned from both operations is that the policy on retention of war trophies must be decided prior to hostilities and service members must be briefed on that policy. Even then, legal personnel should be alert to problems that may arise during hostilities with service members attempting to retain personal war trophies. As one JA put it: "I believe that we adequately covered property issues in the initial ROE training. However, in the euphoria of victory, soldiers lost themselves, and their training, in the moment."<sup>47</sup>

## ***2. More Investigations Are a Reality of Modern Warfare<sup>48</sup> and Legal Teams Must Be Prepared to Advise Commanders on All Aspects of Administrative Investigations.***

Legal teams in both Operations routinely reported that administrative investigations took up much of their time at all levels of command and that many investigations had high public and media interest.<sup>49</sup> These investigations included commander's inquiries, informal and formal AR 15-6 or JAGMAN investigations,<sup>50</sup> safety investigations,<sup>51</sup> legal (collateral) investigations and the Army's consequent family presentation requirements,<sup>52</sup> reports of survey,<sup>53</sup> line of duty investigations,<sup>54</sup> and inspector general investigations.<sup>55</sup> In addition to the more familiar types of command

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Operation Enduring Freedom, for Major Daniel P. Saumer, Deputy Director, CLAMO, Subject: Task Force Dagger OEF/OIF Administrative Law AAR, para. 2 (17 Jun. 2004) (on file with CLAMO) [hereinafter Whitford Administrative Law AAR].

<sup>47</sup> MAJ Robert F. Resnick, Chief, Criminal Law, 3d Infantry Division, Operation Iraqi Freedom After Action Review para. 2d(1)(a) (25 Apr. 2003) (on file with CLAMO).

<sup>48</sup> 82d Airborne OIF AAR, *supra* note 9, at 2 ("More lethal weapons, more interaction with civilians, media embeds, use of training areas and completion of realistic training at Intermediate Staging Bases, and more geographically dispersed commanders and units on the battlefield invariably equate to more command directed investigations."); Interview with Colonel Richard O. Hatch, former Staff Judge Advocate, 101st Airborne Division (Air Assault), in Charlottesville, Va. (8 Oct. 2003) (videotape on file with CLAMO) [hereinafter Hatch Interview].

<sup>49</sup> *See, e.g.*, MAJ Jonathan A. Kent, Deputy Staff Judge Advocate, CJTF-7, briefing at III Corps Deployment Conference, Fort Hood, Tex. (12-14 Nov. 2003) (briefing slides and notes on file with CLAMO) [hereinafter Kent Briefing] (noting that AR 15-6 investigations are high-paced and often media-intensive); *see also* Hatch Interview, *supra* note 48.

<sup>50</sup> U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (11 May 1988) (C1, 30 Sep. 96) [hereinafter AR 15-6]; U.S. DEP'T OF NAVY, OFFICE OF THE JUDGE ADVOCATE GENERAL INSTR. 5800.7D, MANUAL OF THE JUDGE ADVOCATE GENERAL (JAGMAN) (14 Mar. 2004) [hereinafter JAGMAN].

<sup>51</sup> U.S. DEP'T OF DEFENSE, INSTR. 6055.7, ACCIDENT INVESTIGATION, REPORTING, AND RECORD KEEPING (3 Oct 2000) [hereinafter DoDI 6055.7]; U.S. DEP'T OF ARMY, REGULATION 385-40, ACCIDENT REPORTING AND RECORDS (1 Dec. 94) [hereinafter AR 385-40].

<sup>52</sup> DoDI 6055.7, *supra* note 49, para. E4.6; AR 385-40, *supra* note 51, para. 1-8; U.S. DEP'T OF ARMY, REG. 600-34, FATAL TRAINING/OPERATIONAL ACCIDENT PRESENTATIONS TO THE NEXT OF KIN (2 Jan. 2003) [hereinafter AR 600-34].

<sup>53</sup> U.S. DEP'T OF ARMY, REG. 735-5, POLICY AND PROCEDURES FOR PROPERTY ACCOUNTABILITY (10 Jun. 2002) [hereinafter AR 735-5]; U.S. MARINE CORPS, ORDER P4400.15E, CONSUMER-LEVEL SUPPLY POLICY MANUAL (21 June 1999) [hereinafter MCO P4400.15E].

<sup>54</sup> U.S. DEP'T OF ARMY, REG. 600-8-4, LINE OF DUTY POLICY, PROCEDURES, AND INVESTIGATIONS (15 April 2004).

<sup>55</sup> U.S. DEP'T OF ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES (29 Mar. 02).

investigations, JAs should be prepared to advise their commanders on the investigatory requirements for service members who may be missing as a result of hostile action.

JAs were required to provide advice and assistance to commanders and investigating officers on a multitude of command investigations. Routine investigations typically involved such incidents as range accidents, weapons discharges, loss of sensitive items, and alleged minor disciplinary offenses.<sup>56</sup> In addition, JAs spent many hours advising commanders on high-profile investigations, such as the Walker-Lindh investigation,<sup>57</sup> the 507th Maintenance Company investigation,<sup>58</sup> and Friendly Fire incidents involving coalition forces. More often than not, commanders took the position that when in doubt—investigate. Therefore, JAs also should be prepared to assist in investigating incidents that normally may not require an investigation, such as combat deaths.<sup>59</sup>

To properly advise commanders, JAs should be thoroughly familiar with their service regulations on conducting command investigations. Moreover, JAs and enlisted paralegals must maintain situational awareness; they need to continually check command situational reports (SITREPS) and be alert to other incoming reports and information regarding incidents that may require investigation.<sup>60</sup> Further, during combat operations, expect information flow to be a problem.<sup>61</sup> Normally, legal personnel should have access

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<sup>56</sup> See, e.g., Hatch Interview, *supra* note 48.

<sup>57</sup> Interview with MAJ Dean L. Whitford and SSG J.D. Klein, former Command Judge Advocate and Legal NCOIC, 5th Special Forces Group, in Charlottesville, Va. (19 Aug. 2003) (videotape on file with CLAMO) [hereinafter 5th Group AAR]. As the Command Judge Advocate for 5th Special Forces Group, MAJ Whitford provided legal advice to his commander on several high-profile investigations in Afghanistan, including the John Walker-Lindh investigation, the U.S. citizen found with Taliban Forces in Afghanistan, and the related investigation into the prison uprising.

<sup>58</sup> During combat operations on 23 Mar. 2003, the 507th Maintenance Company was ambushed in An Nasiriyah, Iraq, and several members were either taken prisoner or killed. The U.S. Army also conducted a war crimes investigation into the treatment of the 507th Soldiers by Iraqi military personnel. The AR 15-6 investigation only addressed the period of time up to the ambush; the war crimes investigation addressed the events occurring after the ambush. See After Action Review Conference, 12th Legal Support Organization, U.S. Army Reserve, and the Center for Law and Military Operations, at Charlottesville, Va. (12-13 Feb. 2004) (videotapes on file with CLAMO) [hereinafter 12th LSO AAR].

<sup>59</sup> Army regulation provides that damage or injury as a direct result of action by an enemy force is not an Army accident, it is a combat loss. Therefore, safety and collateral investigations are not required. AR 385-40, *supra* note 49, para. 2-5(a). In OIF, the 3rd Infantry Division investigated combat deaths when the commander deemed it necessary to develop the facts. Comments by COL William A. Hudson, Jr., former Staff Judge Advocate, 3d Infantry Division, at the III Corps Deployment Conference, Fort Hood, Tex. (12-14 Nov. 2003) (notes on file with CLAMO). In addition, the Army investigated the death of a reporter for the Reuters News Agency who was shot and killed by a U.S. Soldier after the reporter stepped out of his car and pointed a camera at the Soldier, who mistook the camera for a weapon. See Kent Briefing, *supra* note 47.

<sup>60</sup> For example, the 4th Infantry Division SJA reviewed the Serious Incident Reports every twelve hours, then met with the Chief of Staff to decide whether an investigation was required. Comments by LTC Flora D. Darpino, former Staff Judge Advocate, 4th Infantry Division, at the III Corps Deployment Conference, Fort Hood, Tex. (12-14 Nov. 2003) (notes on file with CLAMO) [hereinafter Darpino Comments].

<sup>61</sup> See, e.g., Kent Briefing, *supra* note 49; After Action Report—Operation Iraqi Freedom, Captain John P. Morgenstern, Office of the Staff Judge Advocate, V Corps, para. 1.a (undated) (on file with CLAMO) [hereinafter Morgenstern AAR] (“[m]any of the difficulties encountered during OIF in investigating and

to a reliable e-mail system to draft appointment orders and disseminate them to JAs and investigating officers. During combat, however, appointing an investigating officer to conduct an investigation is difficult. The constant movement of command posts and subordinate units, and the requirement to share lines of communication with other staff personnel mean that access to communications systems may not be possible.<sup>62</sup> Moreover, once appointed, investigating officers often had problems completing the investigations because of logistical issues, such as access to transportation and communications equipment.<sup>63</sup>

Legal teams also became the primary points of contact for numerous agencies and other interested parties desiring status reports and copies of investigative reports.<sup>64</sup> Because of the large number of incidents and the difficulties involved in conducting investigations during combat operations, legal personnel must have a system to track ongoing investigations.<sup>65</sup> Such a system should also annotate incidents that were not investigated and the reasons why. Moreover, JAs may want to consider briefing ongoing investigations, in particular high-profile investigations, at the command's Battle Update Briefs (BUBs).<sup>66</sup> Further, because of daily Public Affairs press briefings, JAs must work closely with the PAO to ensure appropriate information is released to the press.<sup>67</sup>

In addition, legal personnel should maintain positive control of the *original* investigation. They should consider keeping all original investigations in the SJA office; otherwise, the investigations may be lost. This is not as easy as it may seem. It proved very difficult in both operations to obtain originals or even hard copies of the completed report from investigating officers who were located all over the battlefield.<sup>68</sup> JAs may want to consider adding language to appointment memoranda directing the investigating

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reporting accidental deaths were caused by problems with communication and transportation inherent during war.”).

<sup>62</sup> See, e.g., Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), Operation Iraqi Freedom Lessons Learned, at 25 (2003) (on file with CLAMO) [hereinafter 101st Airborne OIF Lessons Learned] (providing that in the 101st Airborne Division, the Division REAR SJA Cell drafted memoranda appointing investigating officers who were located virtually anywhere in Iraq, requiring JAs from other command posts or units to provide the follow-on advice to the investigating officers); 3rd Infantry Division After Action Review, at 285-86 (2003) (on file with CLAMO) [hereinafter 3ID AAR] (stating that during hostilities, the DMAIN could not communicate with the DTAC, DREAR, or BOLTs through e-mail or DNV (digital nonsecure voice terminal) for over five days making communication impossible at times when they needed to discuss or resolve significant legal issues or pass important legal information and advice to subordinates or superiors).

<sup>63</sup> Hatch Interview, *supra* note 48.

<sup>64</sup> See, e.g., Office of the Staff Judge Advocate, 4th Infantry Division, Staffing Comments, at 4 (13 May 2004) (on file with CLAMO) [hereinafter 4ID Staffing Comments].

<sup>65</sup> For example, once in theater, V Corps developed a tracking system for all of their legal opinions that allowed them to monitor actions, develop trends, and answer questions from higher headquarters on the details of investigations. A copy of the database, named “Judge Advocate General’s Legal Information Tracking System,” or “JAGLITS,” is on file with CLAMO.

<sup>66</sup> Hatch Interview, *supra* note 48.

<sup>67</sup> See, e.g., MAJ Jeff Bovarnick, Chief, Operational Law, CJTF-180, CJTF-180 Notes from the Combat Zone, at 5 (2003) (on file with CLAMO) [hereinafter Bovarnick CJTF-180 Notes]; Interview with Colonel Richard E. Gordon, Staff Judge Advocate, Coalition Forces Land Component Commander, in Charlottesville, Va. (25 Feb. 2004).

<sup>68</sup> 101st Airborne OIF Lessons Learned, *supra* note 62, at 25.

officer to provide the SJA office with the original report of investigation upon completion. Moreover, legal teams found it helpful to begin separating out the classified documents immediately upon approval of the investigation, as doing so saved time later on when packing the investigations for redeployment.<sup>69</sup>

***a. Consider Advising Commanders to Conduct a Commander's Inquiry When an AR 15-6 or JAGMAN Investigation Is Not Required.***

When appropriate, JAs should consider recommending that the commander conduct a more informal commander's inquiry. Army JAs commented that many times commanders wanted to conduct an AR 15-6 investigation when a more informal commander's inquiry would have sufficed.<sup>70</sup> Commander's inquiries also may be used to quickly gather facts and collect evidence during combat operations.<sup>71</sup> The commander can then use the information gathered during the inquiry to decide whether to appoint a more formal investigation.

***b. Plan to Provide Proactive Advice and Assistance to Commanders and Investigating Officers on a Large Number of Accident Investigations, including Friendly Fire Incidents.***

Similar to garrison operations, units in both theaters were required to conduct two separate investigations into many accidents: a safety investigation and a legal investigation. Accident investigations are demanding and require the JA to constantly track the investigations to ensure that they are being conducted in a thorough and timely manner.<sup>72</sup> Moreover, legal personnel assigned to support units must be prepared for an influx of transportation-related accidents. At least one unit identified investigating officers early to streamline the appointment process.<sup>73</sup>

First, JAs provided general advice and assistance to safety investigating officers. The sole purpose of a safety investigation is to prevent accidents; they are intended to collect and analyze information to determine the cause(s) of the accident and make recommendations for corrective action.<sup>74</sup> JAs should understand the differences between a safety investigation and a legal investigation, and work with investigating officers to facilitate sharing of appropriate factual evidence to assist in the timely completion of both.

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<sup>69</sup> 4ID Staffing Comments, *supra* note 64, at 2.

<sup>70</sup> *See, e.g.*, Hatch Interview, *supra* note 48; 101st Airborne OIF Lessons Learned, *supra* note 62, at 25.

<sup>71</sup> *See, e.g.*, 101st Airborne OIF Lessons Learned, *supra* note 62, at 25; 5th Group AAR, *supra* note 57 (recommending that someone must immediately collect all evidence during fast-paced combat operations).

<sup>72</sup> During OIF, for example, the C-1 at CJTF-7 tracked all accident investigations at CJTF-7. Nevertheless, the JA had to constantly monitor the progress of the investigation. *See* Kent Briefing, *supra* note 49.

<sup>73</sup> The 3rd Corps Support Command, V Corps, prepositioned/identified investigating officers in order to streamline the process. *See* Interview with LTC James J. Diliberti, former Deputy Staff Judge Advocate, V Corps, in Charlottesville, Va. (9 Oct. 2003) (videotape and notes on file in CLAMO) [hereinafter Diliberti Interview].

<sup>74</sup> DoDI 6055.7, *supra* note 51, para. E4.4.

Second, JAs and enlisted paralegals were very involved in the conduct of legal, or collateral, investigations. The Department of Defense (DoD) calls them “legal investigations;”<sup>75</sup> the Army calls these investigations “collateral investigations;”<sup>76</sup> the Navy and Marine Corps uses the term “JAGMAN investigations;”<sup>77</sup> and the Air Force calls them “accident investigations.”<sup>78</sup> These investigations are used to inquire into all the facts and circumstances surrounding accidents as well as to obtain and preserve all available evidence for use in litigation, claims, disciplinary action, or adverse administrative action.<sup>79</sup> DoD requires a legal (i.e., collateral) investigation for the following accidents: on-duty Class A accidents,<sup>80</sup> those where anticipated disciplinary or adverse administrative action against any individual may result; those with probable high public interest; and suspected cases of friendly fire.<sup>81</sup> In a joint environment, JAs need to be familiar with sister service regulations on conducting these investigations.

In both Afghanistan and Iraq, legal personnel had to be proactive to ensure that collateral investigations were completed in a thorough and timely manner. If the combatant commander planned to direct a subordinate commander to conduct the investigation, JAs assisted subordinate commanders in identifying who and what they needed for the investigation. Once identified, the combatant commander could then authorize that support in his original memorandum directing the subordinate commander to appoint an investigation.<sup>82</sup> The JA also needed to assist in the selection of an appropriate investigating officer or board of officers<sup>83</sup> and the assignment of proper subject matter experts (SMEs). In at least one instance, a JA was assigned as a SME on ROE.<sup>84</sup>

Additionally, JAs had to ensure that information and evidence was gathered quickly, to include computer chat room discussions. For example, much of the targeting dialogue during combat is reflected in the MIRC chat room exchanges, and the local record of the dialogue is lost when a user logs off. Moreover, physical evidence such as shrapnel removed from injured personnel may be critical evidence inadvertently discarded by medical personnel unaware of the possibility of a friendly fire incident.<sup>85</sup>

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<sup>75</sup> *Id.* para. E.4.6.

<sup>76</sup> AR 385-40, *supra* note 51, para. 1-8; AR 600-34 *supra* note 52.

<sup>77</sup> JAGMAN, *supra* note 50.

<sup>78</sup> DEP’T OF AIR FORCE, INST. 51-503, AIRCRAFT, MISSILE, NUCLEAR, AND SPACE ACCIDENT INVESTIGATIONS (5 Apr. 2000).

<sup>79</sup> DoDI 6055.7 *supra* note 51, para. E4.6.

<sup>80</sup> Class A accidents are those with a total cost of damages to government and other property in an amount of \$1 million or more; where a DoD aircraft is destroyed; or where an injury and/or occupational illness results in a fatality or permanent total disability. *Id.* para. E2.1.3.1.

<sup>81</sup> *Id.* para. E4.6.3.

<sup>82</sup> The combatant commander may have access to needed subject matter experts and equipment that the subordinate commander does not.

<sup>83</sup> The commander should not simply use a duty roster to make the selection.

<sup>84</sup> See XVIIIth Airborne Corps AAR Transcript, *supra* note 44 (noting that MAJ Jeff Bovarnick served as the ROE SME for one investigation in Afghanistan).

<sup>85</sup> See, e.g., 5th Group AAR, *supra* note 57 (noting that there may be useful information in e-mail traffic that could be lost through deletion if not immediately gathered and preserved); Whitfort Administrative Law AAR, *supra* note 46, para. 3; 12th LSO AAR, *supra* note 58 (comments by LTC Kirk G. Warner that



However, they also needed to ensure that U.S. personnel did not start to “investigate” the accident before an investigating officer had been appointed. In other words, it was important to differentiate between evidence collection and safeguarding, and the actual investigation.<sup>86</sup>

Because many investigations were quite complex, JAs also had to be prepared to assist in analyzing and processing a multitude of information.<sup>87</sup> Moreover, both JAs and enlisted paralegals were sometimes required to coordinate much of the administrative and logistical requirements of the investigating officer or board of officers and others, to include gathering documents and arranging for board travel, places to work, and somewhere to live.<sup>88</sup>

One type of collateral investigation that is often sensitive and results in high-level scrutiny from both higher headquarters and the media are accidents involving suspected cases of friendly fire. There were several possible friendly fire accidents in both OEF and OIF, to include accidents among coalition forces.<sup>89</sup> Commanders often expected

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information in computer chat rooms must be backed up and archived immediately after any incident that may require an investigation).

<sup>86</sup> Interview with COL David L. Hayden, former Staff Judge Advocate, XVIIIth Airborne Corps, in Charlottesville, Va. (7 Oct. 2003) (videotape on file in CLAMO).

<sup>87</sup> The JA may even be assigned the duties of editor for the investigative report.

<sup>88</sup> Telephone Interview with LtCol Joseph Falvey, Office of the Staff Judge Advocate, U.S. Central Command (Sept. 2002) [hereinafter Falvey Interview]. During OEF, for example, the Commander, CENTCOM, directed the CJTF-180 Commander to appoint investigations under DoD Instruction 6055.7 in high-profile cases, such as the Deh Rawood investigation. In that case, an AC-130 gunship fired on an Afghan compound after receiving fire. The Afghans alleged that it was small arms fire from the celebration of a wedding. In this case, the CENTCOM commander also tasked the service components with providing SMEs to the board and to pay their expenses. These experts included a doctor, ROE expert, fire coordination officer, intelligence officer, public affairs officer, navigator, gunship pilot, and operations officer. The commander also assigned two court reporters to the board. The board, consisting of one Air Force Brigadier General, used the procedures in AR 15-6 as a guide. The Army procedures were used because the CJTF-180 commander was an Army general and, thus, more familiar with these procedures. *Id.* See also XVIIIth Airborne Corps AAR Transcript, *supra* note 44; 82d Airborne OIF AAR, *supra* note 9, at 3-4 (“Investigations uniformly and consistently required a legal advisor for the investigating officer, the leg work of a paralegal noncommissioned officer or specialist to gather evidence and statements, and legal review and advice to the command by a JA at completion.”).

<sup>89</sup> In Afghanistan, for example, a B-52 bomber dropped a 2,000 pound precision-guided Joint Direct Attack Munition (JDAM) killing three U.S. Soldiers. See SFC Kathleen Rhem, USA, *Third U.S. Service Member Succumbs to ‘Friendly Fire’ Wounds*, American Forces Information Service News Article, at [www.defenselink.mil/news/Dec2001/n12052001\\_200112053.html](http://www.defenselink.mil/news/Dec2001/n12052001_200112053.html) (Dec. 5, 2001). Friendly fire accidents occurred during OIF, as well, including an incident in which several Marines were killed when an Air Force A-10 accidentally fired on them. See Lieutenant General James T. Conway, Commanding General, First Marine Expeditionary Force, Briefing on the First Marine Expeditionary Force in Iraq, United States DoD News Transcript, Sept. 9, 2003, at [www.defenselink.mil/transcripts/2003/tr20030909-0658.html](http://www.defenselink.mil/transcripts/2003/tr20030909-0658.html). Friendly fire accidents also occurred between coalition forces, such as the accidental bombing in April 2002 of a Canadian unit by an American F-16 in Afghanistan and the 23 March 2003 shoot down of a British warplane by a U.S. Patriot missile battery near the Iraq–Kuwait border. See Michael Moran, “Friendly Fire” Is All Too Common: British Know Better Than Most the Dangers of Teaming With U.S. Military, MSNBC, at <http://msnbc.msn.com/id/3340194> (Mar. 23, 2003) By the end of April 2003, U.S. and U.K. casualties in OIF totaled 169 deaths. Estimates were that eleven of those deaths were the result of friendly fire, or 6.5 percent of the deaths. In contrast, during Operation DESERT STORM, 25.6 percent of

their legal personnel to be intimately involved in these cases.<sup>90</sup> DoD requires that the combatant commander convene a legal (i.e., collateral) investigation in cases of suspected friendly fire.<sup>91</sup> During OEF, for example, an American F-16 accidentally bombed a Canadian unit training in a field in Afghanistan, killing four and wounding eight. The accident resulted in two separate investigation boards, both of which physically traveled to Kandahar as part of their investigations. A TF Rakkasan JA made the arrangements for both visits and served as the primary task force representative to both boards.<sup>92</sup> Furthermore, during OIF, the Commander, CENTCOM, appointed a legal investigation into an incident where a Patriot missile shot down a British Royal Air Force Tornado ground attack plane.<sup>93</sup> The CFLCC SJA served as the legal advisor to the investigating officer, as well as the legal advisor to another friendly fire incident. In both cases, the SJA and his staff were heavily involved in writing and editing the report of investigation to ensure it was accurate and complete.<sup>94</sup>

In some cases, the CENTCOM Commander directed a subordinate commander to appoint the investigating officer.<sup>95</sup> In U.S. Marine Corps cases, 1st Marine Expeditionary Force (I MEF) directed that a preliminary inquiry be conducted to quickly gather information to forward through command channels to CENTCOM. In those cases, a JA conducted the inquiry.<sup>96</sup> In cases where the combatant commander did not direct the

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those killed in action resulted from friendly fire. Andrew F. Krepinevich, *Operation Iraqi Freedom: A First-Blush Assessment*, Center for Strategic and Budgetary Assessments, Washington, D.C. (2003).

<sup>90</sup> See, e.g., 2nd Brigade Combat Team, 3rd Infantry Division (Mechanized), narrative, at 8 (on file with CLAMO), which provides an account of one such investigation. On 4 Apr. 2003, the 2d BCT JA traveled with the brigade executive officer to investigate a fratricide escorted by a tank.

They arrive at the site of the shooting and one of the tanks in the area [was] engulfed in flames. It must have been destroyed recently because 4-64 wanted to keep the scene intact. There was a small explosion and that was enough to get the group to move away from the tank. Moments later, the whole thing blew . . . Everyone arrived safely at 4-64 and the witnesses were questioned . . . [i]t was apparent that the fratricide was having a big impact on the unit.

*Id.*

<sup>91</sup> DoDI 6055.7, *supra* note 50, para. E4.7.

<sup>92</sup> Memorandum, Major Nicholas F. Lancaster, Chief Operational Law Division, 101st Airborne Division (Air Assault) for Record, subject: MAJ Lancaster (101st ABN DIV (AASLT) Operational Law) Comments on CLAMO OEF/OIF Draft Lessons Learned, para. 4 (18 May 2004) (on file with CLAMO).

<sup>93</sup> See 12th LSO AAR, *supra* note 58 (comments by LTC Kirk G. Warner that the Commander, CENTCOM appointed an investigation into the shoot down of the British warplane).

<sup>94</sup> Colonel Karl M. Goetzke was the CFLCC SJA.

<sup>95</sup> See, e.g., Falvey Interview, *supra* note 88 (noting in one suspected friendly fire incident, the Commander, CENTCOM, directed the CENTAF Commander appoint an investigation).

<sup>96</sup> See, e.g., Transcript of After Action Review Conference, Office of the Staff Judge Advocate, Task Force Tarawa, and the Center for Law and Military Operations, Camp Lejeune, N.C., at 111-113 (2-3 Oct. 2003) (in which LtCol Bill Perez, Staff Judge Advocate for Task Force Tarawa stated that the JA normally conducted a preliminary inquiry within 24 to 48 hours and forwarded it to CENTCOM, who then directed an investigation down through 1 MEF to the Commander, TF Tarawa).

investigation, JAs advised their commanders to appoint a collateral investigating officer.<sup>97</sup>

***c. Army Judge Advocates Must Remember the Requirement to Conduct Family Presentations to the Next of Kin on Training and Operational Accident Investigations and Be Prepared to Answer Myriad Questions From the Command and Department Headquarters Level.***

The collateral investigations and consequent Army requirement for a family presentation for all training and operational accidents proved tremendously time-intensive.<sup>98</sup> The Army requirement to conduct family presentations grew out of a 1992 public law requiring Service Secretaries to ensure that fatality reports and records pertaining to members of the Armed Forces who die in the line of duty are made available to family members.<sup>99</sup> The Army initially implemented the family presentation requirement for fatal training and operational accidents by message in March of 2001.<sup>100</sup> The Army regulation providing more thorough guidance on the requirement to conduct these briefings became effective on 2 February 2003, shortly before OIF commenced.<sup>101</sup> Therefore, commanders and G-1 personnel were many times unaware of the requirements to conduct family presentations.<sup>102</sup> As JAs quickly learned, they must be familiar with the requirements to brief the primary next of kin on all fatal training and operational accident investigations and to answer questions from the Department of the Army level on the progress of these investigations.

The Adjutant General (TAG) has overall proponency for these presentations. Nevertheless, JAs routinely commented that TAG personnel contacted them directly, instead of going through G-1 channels, to determine the status of the collateral investigations and for an explanation as to why the investigation was not yet complete.<sup>103</sup>

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<sup>97</sup> Army policy also requires a collateral investigation be conducted on all suspected friendly fire accidents. AR 385-40, *supra* note 51, para. 2-4q. In addition, the GCMCA must appoint all investigations into Class A accidents (which include all on-duty soldier deaths) and all friendly fire investigations must be forwarded, upon completion, to the next higher Army headquarters for review. AR 15-6, *supra* note 50, para. 2-1(a)(3). The SJA for 3ID reported that despite requesting through SJA channels that the Commander, CENTCOM, appoint the investigation into 3ID suspected cases of friendly fire, none was ever appointed. Therefore, the Commander, 3ID appointed AR 15-6 investigations at his level for every case of friendly fire. *See* 3ID AAR, *supra* note 62, at 288. *See also* Memorandum, CPT Jack Pritchard, 1st Brigade Legal Advisor, 3d Infantry Division, to the Staff Judge Advocate, 3d Infantry Division, subject: Operation Iraqi Freedom After Action Review, para. 3(c)(5) (17 Apr. 2003) (providing that to capture the facts in a timely fashion, battalion commanders were forced to appoint investigating officers, with the BOLT OIC performing the legal review on the resulting reports of investigation and forwarding them to Division or higher).

<sup>98</sup> *See* Diliberti Interview, *supra* note 73.

<sup>99</sup> Pub. L. 102-484, div. A, title X, § 1072, Oct. 23, 1992, 106 Stat. 2508 (10 U.S.C. § 113, note).

<sup>100</sup> ALARAC Message, 011252Z MAR 01, CDRPERSCOM, subject: Providing Results of Fatal Training Accident Investigations to Soldiers' Next of Kin (NOK).

<sup>101</sup> *See* AR 600-34, *supra* note 52.

<sup>102</sup> *See, e.g.*, 3ID AAR Transcript, *supra* note 8, at 69-70 (comments by MAJ Jamie D. Eaker, Chief, Administrative Law Division, Office of the Staff Judge Advocate, 3ID).

<sup>103</sup> *See, e.g., id.*; Diliberti Interview, *supra* note 73 (both remarking that personnel from the Casualty and Memorial Affairs Office routinely requested status updates from the JAs and not the G-1 personnel); 4ID

Under the regulation, the collateral investigation must be completed within thirty days of the date of the fatal training or operational accident, although the appointing authority can grant delays in ten-day increments for good cause.<sup>104</sup> As discussed earlier in this section, the communications and other logistical problems involved in appointing investigating officers and investigating accidents made this thirty-day requirement very challenging, if not impossible, to meet during combat operations.<sup>105</sup>

The issue of what constituted a fatal “operational” accident in a combat zone proved problematic for both personnelists and JAs.<sup>106</sup> For example, in April of 2002 four 10th Mountain Division Soldiers were killed when they attempted to defuse a booby-trapped weapons cache. TAG personnel initially decided that this was an operational accident that required a collateral investigation and family presentation. The 10th Mountain Division SJA, with the support of the commanding general, argued that these were combat-related deaths; TAG personnel ultimately agreed.<sup>107</sup> It appears that a policy clarification of this issue is needed; however, until clarified, JAs should be prepared to articulate to TAG personnel why a Soldier’s death in a combat zone is or is not an operational death in order to determine whether a collateral investigation and family presentation is required.

In addition, the SJA is required to redact the collateral report of investigation in accordance with the Privacy Act<sup>108</sup> and Freedom of Information Act<sup>109</sup> and prepare the required copies for the primary next of kin and others.<sup>110</sup> Often, this was a time consuming and tedious process because many of the investigations are technical and some contained classified information. Moreover, in at least one instance, TAG

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Staffing Comments, *supra* note 64, at 2 (“The SJA office became the *only* point of contact for TAG personnel, ranging from Department of the Army Casualty Assistance to Human Resource Command. Quite frequently, the G1 was never even contacted regarding HRC and casualty assistance matters . . . .”); Morgenstern AAR, *supra* note 61, para. 1.a (there was confusion at the Casualty and Memorial Affairs Office in Washington, D.C. as to respective roles of SJA and C-1 casualty affairs personnel in tracking the accidental death cases.”).

<sup>104</sup> AR 600-34, *supra* note 52, para. 3-5.

<sup>105</sup> One JA noted that because the division or corps commander, as the General Court-Martial Convening Authority (GCMCA) was the approval authority for all fatal training and operational accidents, it was very difficult to get the investigation approved. The commander was oftentimes traversing the battlefield; short of getting on a plane and flying into combat to get the report of investigation approved, it was sometimes impossible to meet the 30-day suspense. *See* Diliberti Interview, *supra* note 73. *See also* E-mail from Colonel Kathryn Stone, former Staff Judge Advocate, 10th Mountain Division, subject: CLAMO Draft Handbook – OIF/OEF, para. 3 (11 May 2004) (on file with CLAMO) [hereinafter Stone E-Mail] (relating that TAG personnel initially informed COL Stone that mailing the report of investigation through the APO mail system was not acceptable and that it needed to be Federal Expressed to the TAG offices in Washington D.C.; however, in the austere environment of Afghanistan in early 2002, Federal Express was not an option).

<sup>106</sup> AR 600-34, *supra* note 52, Glossary, defines “operational related death” as a death “associated with active duty military exercise or activity occurring in a designated war zone or towards designated missions related to current war operations or military operations other than war, contributing directly or indirectly to the death of the soldier.”

<sup>107</sup> Stone E-mail, *supra* note 105, para. 3.

<sup>108</sup> 5 U.S.C. § 552a (2000).

<sup>109</sup> 5 U.S.C. § 552 (2000).

<sup>110</sup> AR 600-34, *supra* note 52, para. 4-3h(5).

personnel requested that the JAs in theater attempt to have the investigation translated into Spanish for delivery to a family member.<sup>111</sup> Additionally, JAs found that keeping a copy of the redacted report of investigation was useful because of the many requests for copies pursuant to Congressional Inquiries, the media, and others.<sup>112</sup>

Ultimately, some units did not have to grapple with the issue of providing a family presentation while still deployed, as they redeployed before the investigations were completed.<sup>113</sup> One division appointed the rear staff judge advocate, a reserve colonel, as the family presentation briefer for all division primary next of kin briefings.<sup>114</sup> At least one brigade commander actually traveled back to the United States for a family presentation.<sup>115</sup>

***d. Work Hand-in-Hand With G4 Personnel to Properly Account for Government Property.***

U.S. property accountability is always an issue during combat operations, and OEF and OIF were no exceptions. To avoid confusion over what property a unit actually brought into theater, a commander should appoint a separate forward and rear Property Book Officer (PBO). This will assist in accounting for property in theater.<sup>116</sup> During combat, Army policy provides that unserviceable property will be designated as a combat loss, without investigation. This designation allows the PBO to drop the property from the property book.<sup>117</sup> The Marine Corps also provides that commanders should not initiate investigations into lost, damaged, or destroyed property when no fault or negligence is indicated.<sup>118</sup> JAs should provide legal advice to the PBO and G-4 personnel on the regulatory procedures to account for U.S. Government property on the battlefield. Once procedures have been established, however, G-4 personnel should take the lead on property issues.<sup>119</sup>

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<sup>111</sup> See Diliberti Interview, *supra* note 73.

<sup>112</sup> 4ID Staffing Comments, *supra* note 64, at 2.

<sup>113</sup> See, e.g., 3ID AAR Transcript, *supra* note 8, at 71 (comments by MAJ Jamie D. Eaker, Chief, Administrative Law Division, Office of the Staff Judge Advocate, 3ID that the division ultimately conducted six family presentations once they returned to Fort Stewart, Ga.).

<sup>114</sup> Comments by COL Richard O. Hatch, former Staff Judge Advocate, 101<sup>st</sup> Airborne Division (Air Assault) at III Corps Deployment Conference, Fort Hood, Tex. (12-14 Nov. 2003) (notes on file with CLAMO).

<sup>115</sup> The Commander of the 12th Aviation Brigade flew back to the United States to conduct a family presentation briefing. See Diliberti Interview, *supra* note 73.

<sup>116</sup> Kent Briefing, *supra* note 49.

<sup>117</sup> U.S. DEP'T OF ARMY, REG. 710-2, INVENTORY MANAGEMENT SUPPLY POLICY BELOW THE WHOLESALE LEVEL para. 2-46 (31 Oct. 1997).

<sup>118</sup> MCO P4400.15E, *supra* note 53, para. 6001.1(1).

<sup>119</sup> In at least one division, for example, the SJA was the proponent of a FRAGO detailing the process by which units would submit information regarding abandoned equipment to the DREAR SJA Cell to consolidate and submit to the CG for abandonment authorization. The SJA recommended that the OSJA should hand off the process to the PBO and G-4 once the SJA is sure that it is legally sufficient. Those sections should handle the process. See 101st Airborne OIF Lessons Learned, *supra* note 62, at 23.

If the property is not designated a combat loss, Army regulations generally require a report of survey be initiated.<sup>120</sup> Even with the authority to designate property as a combat loss, Army JAs reported that many commanders were careful not to simply “write off” government property through the combat loss procedures. As a result, reports of survey investigations were required in many cases.<sup>121</sup> As with other types of investigations, because of the nature of the battlefield, survey officers found it difficult to gather evidence and make determinations regarding whether a person’s negligence resulted in the loss of or damage to property.

JAs must also keep in mind that even in the case of combat loss, however, an investigation may be required for accountability purposes. Investigations were often required for losses of weapons, sensitive equipment, or government funds. A problem encountered in conducting such investigations by Task Force Dagger during OEF was the classification level of evidence. Use of classified information in reports of survey was avoided by including a statement in the findings that “additional classified information supporting the findings and recommendations is set forth in a memorandum in the secure files of the Group Judge Advocate’s office” at the home installation.<sup>122</sup>

Moreover, brigade JAs noted that once the survey officer completed the investigation, it was helpful for the JA to review the report of survey to ensure forms were signed and all pertinent documents were included before forwarding the survey to higher command. This saved time and increased processing efficiency.<sup>123</sup> In at least one brigade, battalion commanders were delegated the authority both to appoint and to approve reports of survey. The JA found that he had to be vigilant in ensuring that the legal review was accomplished before the battalion commander approved the report. Furthermore, if the Soldier appealed the report of survey findings, the appellate authority (brigade commander) had to look to another JA to provide the legal review, as required by Army regulation.<sup>124</sup>

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<sup>120</sup> AR 735-5, *supra* note 53, para. 14-23(b). The Marine Corps property accountability procedures are somewhat different. According to Marine Corps policy, nonaccountable Marines will generally only be indebted to the U.S. Government when: (1) the United States has suffered loss of money or property through the offenses of selling or otherwise disposing of, or willfully damaging or losing military property, willfully and wrongfully hazarding a vessel, larceny, wrongful appropriation, robbery, forgery, arson, or fraud for which persons have been convicted by court-martial; and (2) when the United States suffers a loss of money and competent authority administratively determines that the loss occurred through fraud, forgery, or other unlawful acts as described in subsection (1). See JAGMAN, *supra* note 48, para. 0167; MCO P4400.15E, *supra* note 53, para. 6000.3. An accountable individual, on the other hand, may be held financially liable through administrative means when the Commandant of the Marine Corps(L) certifies that an indebtedness exists. An accountable individual is an individual detailed to duty involving financial responsibility for government property or funds in that individual’s custody. See MCO P4400.15E, *supra* note 53, paras. 6000.2 and 6000.5. Marine Corps policy also sets forth investigative procedures for administrative determinations of indebtedness. See MCO P4400.15E, *supra* note 53, para. 6001.

<sup>121</sup> See, e.g., Kent Briefing, *supra* note 49; Diliberti Interview, *supra* note 73.

<sup>122</sup> Whitford Administrative Law AAR, *supra* note 46, para. 5.

<sup>123</sup> 4ID Staffing Comments, *supra* note 64, at 4.

<sup>124</sup> Captain Michael D. Banks, Brigade Judge Advocate, 18th Military Police Brigade, V Corps, OIF Lessons Learned, at 20 (1 Dec. 2003) (on file with CLAMO). See AR 735-5, *supra* note 53, para. 13-49b(1) (requiring the legal review for an appeal of a report of survey to be accomplished by an attorney who did not perform the legal review for the approval authority).

***e. Maintain a Close Liaison with the Inspector General and Provide Legal Reviews of All Inspector General Investigations, as Required.***

As in garrison, JAs should maintain close contact with their unit's Inspector General (IG). Incidents that could become high-profile issues for the command may originate from an IG complaint.<sup>125</sup>

***f. Be Prepared to Advise Commanders on Their Responsibilities to Conduct Investigations When Personnel May be Missing as a Result of Hostile Action.***

Judge advocates deployed in support of combat operations must be familiar with the law and implementing DoD policy on investigating the circumstances of personnel who may be missing as a result of hostile action.<sup>126</sup> These requirements apply to service members and any U.S. citizen who is an employee of DoD or a DOD civilian contractor, as determined by the Undersecretary of Defense for Policy.<sup>127</sup> Moreover, if service members or others are placed in a missing status, such as the status of prisoner of war (PW), legal personnel must be prepared to assist in their repatriation.

**1. Investigative requirements when a service member becomes missing as a result of hostile action.**

When a commander suspects that a service member who is absent may be a casualty whose absence is involuntary, the commander must place the person in an interim status called "Duty Status—Whereabouts Unknown" or "DUSTWUN."<sup>128</sup> This is usually accomplished within twenty-four hours of the person's whereabouts becoming unknown.<sup>129</sup> A commander uses the DUSTWUN status during armed conflict when hostilities prevent the commander from immediately being able to determine a service member's status or when search and rescue efforts are ongoing.<sup>130</sup> DUSTWUN is a temporary status and is not a missing category. Only the Service Secretary (or his delegee), and not the unit commander, may make a determination of actual status in these cases.<sup>131</sup>

Once placed in the temporary DUSTWUN status, the immediate commander must make a preliminary assessment of the facts and circumstances of the service member's absence. The report of the preliminary assessment must be forwarded to the Service

<sup>125</sup> For example, the alleged assault of a detainee by a battalion commander in the 4th Infantry Division originated from an IG complaint by members of his unit. See Kent Briefing, *supra* note 49.

<sup>126</sup> 10 U.S.C. §§ 1501-1513 (2000), implemented by DEP'T OF DEFENSE, INSTR. 2310.5, ACCOUNTING FOR MISSING PERSONS (31 Jan. 2000) [hereinafter DoDI 2310.5].

<sup>127</sup> DoDI 2310.5, *supra* note 126, para. E2.1.2.7.

<sup>128</sup> DEP'T OF DEFENSE, INSTR. 1300.18, MILITARY PERSONNEL CASUALTY MATTERS, POLICIES, AND PROCEDURES para. E2.1.1.16 (18 Dec. 2000) [hereinafter DoDI 1300.18].

<sup>129</sup> U.S. DEP'T OF ARMY, REG. 600-8-1, ARMY CASUALTY OPERATIONS/ASSISTANCE/INSURANCE para. 8-4(a) (20 Oct. 1994).

<sup>130</sup> DoDI 1300.18, *supra* note 128, para. 6.2.1.

<sup>131</sup> *Id.* para. 6.2.2.4.

Secretary no later than ten days after receiving information that the service member may be missing.<sup>132</sup> If the commander is recommending that the person be placed in a missing status, the commander must transmit an advisory copy of the preliminary assessment and recommendation to the Theater Component Commander as well.<sup>133</sup> In some cases, the commander may be able to make a preliminary assessment without investigation, such as when evidence is obtained through news coverage or diplomatic channels that enables a commander to make the preliminary assessment regarding the person's whereabouts and status without further inquiry.<sup>134</sup> Once the unit commander forwards the preliminary assessment to the Service Secretary, all other boards of inquiry to determine the individual's status are conducted at the service department level.<sup>135</sup> JAs in theater, however, must anticipate that they will be required to assist unit commanders in answering requests for information from those boards.

Prior to OEF and OIF, the military departments had not implemented the DoD Instruction on persons missing as a result of hostile action.<sup>136</sup> In March and April of 2003, several Soldiers, Marines, and Airmen were placed in a DUSTWUN status when they became absent during combat, including several members of the 507th Maintenance Company ambushed in An Nasiriyah on 23 March 2003 and several Marines fighting near An Nasiriyah. All service members originally placed in a DUSTWUN status were accounted for and the services did not have to conduct boards of inquiry.<sup>137</sup> On 30 April 2003, the Assistant Secretary of the Army (Manpower and Reserve Affairs) delegated to the TAG the authority to conduct boards of inquiry and make death and personnel status determinations in accordance with the law and DoD policy.<sup>138</sup> Therefore, as with fatal training and operational accidents, Army legal teams may be working with TAG personnel on inquiries into Soldiers missing as a result of hostile action.

## **2. Repatriation of Prisoners of War.**

Once U.S. PWs were rescued from enemy captivity, JAs had to be prepared to provide advice to Repatriation Teams, as well as personal legal assistance to the returning

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<sup>132</sup> The commander forwards the preliminary assessment using DD Form 2812, Commander's Preliminary Assessment and Recommendation Regarding Missing Persons. U.S. DEP'T OF DEFENSE, INSTR. 2310.4, REPATRIATION OF PRISONERS OF WAR (POW), HOSTAGES, PEACETIME GOVERNMENT DETAINEES AND OTHER MISSING OR ISOLATED PERSONNEL, para. E3.1.3 (21 Nov. 2000) [hereinafter DoDI 2310.4]. The Service Secretary may extend the 10-day suspense upon request and for good cause for a maximum of 10 days. *Id.* para. E3.4.

<sup>133</sup> *Id.* para. E3.1.2.2.

<sup>134</sup> *Id.* para. E3.1.4.

<sup>135</sup> *Id.* para. E4.

<sup>136</sup> Telephone Interview with COL Rafe Foster, Command Judge Advocate, Human Resources Command (Apr. 2003).

<sup>137</sup> Six of the Soldiers in a DUSTWUN status as a result of the 507th Maintenance Company ambush on 23 March 2003 were rescued; the United States recovered the remains of the other Soldiers. U.S. forces also recovered the remains of all Marines initially placed in a DUSTWUN status, as well as those of two Air Force officers missing after their F-15E aircraft crashed.

<sup>138</sup> See Memorandum from Honorable Reginald Brown, Assistant Secretary of the Army (Manpower and Reserve Affairs), to The Adjutant General, subject: Delegation of Authority for Determination of Status for Missing and Deceased Personnel (30 Apr. 2003) (on file with CLAMO).



PWs. Therefore, JAs must be familiar with DoD policy on repatriation<sup>139</sup> and the myriad issues surrounding PW repatriation.

Eight Army PWs were repatriated in April 2003 during OIF.<sup>140</sup> Seven of these PWs were repatriated at the same time; therefore, a Repatriation Team was established for these PWs.<sup>141</sup> The team consisted of a team leader, medical personnel, psychologists, a public affairs officer (PAO), JA, chaplain, and counterintelligence and the criminal investigation debriefing teams.<sup>142</sup>

The JA representative to the Repatriation Team<sup>143</sup> served several roles, which had the potential to involve conflicts of interest on the part of the JA. Consequently, an early assessment of the needs of individual PWs is vital when a JA serves as a member of the Repatriation Team. In particular, if the JA suspects a PW may have engaged in criminal activity while in captivity, such as misconduct as a prisoner under article 105, UCMJ,<sup>144</sup> a separate defense counsel should be made available to the PW.

In addition, the JA appointed to the Repatriation Team provided personal legal assistance to the individual PWs, including advice related to the Joint Ethics Regulation rules on acceptance of gifts, speaking and writing engagements, and honoraria.<sup>145</sup> The JA also provided legal advice to the team on classification issues related to materials and information generated during the debriefings and to criminal investigation division (CID) agents on debriefing questions, elements of suspected war crimes, and evidence

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<sup>139</sup> See DODI 2310.4, *supra* note 132.

<sup>140</sup> These Soldiers included PFC Jessica Lynch, PFC Patrick Miller, SPC Joseph Hudson, SPC Edgar Hernandez, SPC Shoshana Johnson, SGT James Riley, all from the 507th Maintenance Company, and CW2 Ronald Young and CW2 David Williams from the 1st Battalion, 227th Regiment, 1st Cavalry Division. See CFLCC Repatriation Team After Acton Report (JAG), List of Recovered Prisoners of War (Repatriated) (17 Apr. 2003) (on file with CLAMO) [hereinafter CFLCC Repatriation Team AAR].

<sup>141</sup> PFC Jessica Lynch, 507th Maintenance Company, had been previously repatriated.

<sup>142</sup> See CFLCC Repatriation Team AAR, *supra* note 140, para. 1.

The POWs were secured by elements of the Marine 3d LAR BN in Samarra, Iraq and flown by helicopter to the Numaniyah airfield southeast of Baghdad and then by C-130 to Kuwait. The POWs were taken to the Camp Doha TMC [troop medical clinic] for initial triage and treatment. The Repatriation Team assembled shortly thereafter and moved within hours with the POWs to a secure wing of Kuwaiti Armed Forces Hospital (KAFH). The wing and hospital were secured by MPs at all times. The POWs remained at KAFH for treatment, therapy, decompression and debriefing from early morning hours of 14 April until mid-day on 16 April when they along with the Repatriation Team were flown to Landstuhl Regional Medical Center, Germany for further treatment/decompression and debriefing.

*Id.*

<sup>143</sup> LTC Kirk G. Warner, the JA assigned to the Repatriation Team, deployed as the team leader, 12th Legal Support Organization, U.S. Army Reserve.

<sup>144</sup> 10 U.S.C. § 904.

<sup>145</sup> See JER *supra* note 45, para. 7-206a. For example, the Kuwaiti Government wanted to bestow a gift of jewelry on the female PW and similar gifts on the male PWs. Ultimately, the Kuwaitis were persuaded to provide each with a medal or coin more appropriate to the circumstances, see JER 2-300(b) for a discussion of acceptance of gifts from foreign governments.

viability.<sup>146</sup> In regard to advising CID agents, the JA reported that it was vital to the process that he be familiar with summaries of intelligence debriefings from other PWs and members of the PW's unit, physical evidence from the capture site, and other evidence that could assist the CID agents in focusing their investigation.<sup>147</sup> The JA developed a sample outline for CID debriefings to aid the evidence collection process (at Appendix G-4).

***3. Be Prepared to Answer a Multitude of Questions Related to the Practice of Administrative Law, Including Eligibility to Travel on Military Aircraft, Conscientious Objector Status, Asylum, Surviving Sons and Daughters, and "No Sex" Policies. Anticipate the Most Likely Issues Based on Past Deployments and Draft Information Papers and Policy Memoranda Addressing Those Issues for Use During Deployment.***

Administrative law attorneys prepared information papers on a wide variety of administrative law issues (examples of information papers prepared by the OSJA, Third Infantry Division, for their unit's deployment to Iraq are at Appendix G-5). These information papers proved valuable, in particular for those JAs unfamiliar with the administrative law practice. Brigade Operational Law Team JAs assigned to the 4th Infantry Division, for example, found that the information papers drafted by the Division OSJA were a necessity for quick reference on a variety of issues.<sup>148</sup> Many OSJAs, such as V Corps, populated their websites with information papers for easy access by other legal personnel.<sup>149</sup>

Travel by non-DoD personnel aboard military aircraft was a common issue in both operations.<sup>150</sup> Persons wanting to travel by U.S. military airlift included coalition forces,<sup>151</sup> U.S. civilians not accompanying the force,<sup>152</sup> and foreign nationals.<sup>153</sup>

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<sup>146</sup> CFLCC Repatriation Team AAR, *supra* note 140, paras. 2(c) and (d).

<sup>147</sup> *Id.* para. 3.

<sup>148</sup> 4ID Staffing Comments, *supra* note 64, at 6.

<sup>149</sup> Transcript of After Action Review Conference, Office of the Staff Judge Advocate, V Corps, and the Center for Law and Military Operations, Heidelberg, Germany (17-19 May 2004) (on file with CLAMO) [hereinafter V Corps AAR Transcript].

<sup>150</sup> *See, e.g.*, Bovarnick CJTF-180 Notes, *supra* note 67, at 6 (providing that with the constant military flights, many non-DoD personnel requested travel on military aircrafts. The JAs had to provide oversight to ensure the rules regarding travel by military airlift were not violated); Baker OIF AAR, *supra* note 38, para. 5.g. (stating that on several occasions, civilians not associated with the coalition forces requested to be allowed to leave Iraq on U.S. military aircraft, including an American citizen who had come to Iraq before the war and wanted to leave when hostilities began and a British journalist injured by a landmine and his two companions).

<sup>151</sup> Generally, coalition forces are required to provide reimbursement for the cost of U.S. military airlift under an Acquisition and Cross-Servicing Agreement (ACSA) or a Cooperative Military Airlift Agreement (CMAA) under 10 U.S.C. § 2350c (2003). *See* U.S. DEP'T OF DEFENSE, REG. 4515.13-R, AIR TRANSPORTATION ELIGIBILITY para. C2.2.8.5. (Nov. 1994). General officers reporting directly to service component commanders of combatant commands may also authorize transportation of foreign nationals (O-6 and below, or civilian equivalent) when in the commander's overseas area of responsibility, and when the commander decides that such travel is in the primary interest of the DoD. *Id.* para. C10.8.

<sup>152</sup> A theater surgeon may authorize the evacuation by military airlift of a U.S. civilian if the surgeon determined that an emergency involving immediate threat to life, limb, or sight exists, adequate care is not available locally, and commercial airlift is not available. *Id.* para. C5.6.2.2.1. As implemented by

Moreover, prior to and during deployments, JAs also can anticipate that service members may request conscientious objector status.<sup>154</sup> Although JAs did not report a “run” on such cases, most units had several service members who requested conscientious objector status. Units generally deployed these service members into theater while their cases were being processed.<sup>155</sup>

There are several other administrative law matters that generally become issues during military operations. JAs should consider preparing information papers on such issues as marriages of U.S. citizens overseas,<sup>156</sup> granting political asylum,<sup>157</sup> surviving sons and daughters,<sup>158</sup> and siblings deployed overseas.<sup>159</sup>

Additionally, JAs found that they had to be prepared to answer commanders’ questions on issuing “no sex” orders. In virtually every deployment, some commanders

Department of Army policy, the Major Command (MACOM) commander may approve civilian aeromedical transportation under the above medical emergencies. For other specific emergency situations, the MACOM must notify Headquarters, Department of the Army, G-3. DEP’T OF ARMY, REG. 95-1, FLIGHT REGULATIONS, paras. 3-10c. to 10d. (1 Sep. 1997). During the early part of OIF, Army JAs found it difficult to determine who the MACOM was for CJTF-7. Therefore, requests were forwarded to the Commander, CENTCOM. Later, the Commander, CFLCC was designated a MACOM. *See* Kent Briefing, *supra* note 49.

<sup>153</sup> The joint forces commander may approve emergency medical military airlift if a foreign national’s injury or illness is directly related to U.S. Government operations within the area. Otherwise the emergency request must be forwarded through the Aeromedical Evacuation Coordination Center through the local diplomatic post and the Department of State. *Id.* para. C5.6.2.2.2

<sup>154</sup> *See* 50 U.S.C. App. § 456(j) (2000), *implemented by* U.S. DEP’T OF DEFENSE, DIR. 1300.6, CONSCIENTIOUS OBJECTION (20 Aug. 1971) (C4, 11 Sept. 1975); U.S. DEP’T OF ARMY, REG. 600-43, CONSCIENTIOUS OBJECTION (15 May 1998); U.S. MARINE CORPS, ORDER 1306.16E, CONSCIENTIOUS OBJECTORS (21 Nov. 1986).

<sup>155</sup> For example, 3ID only had three Soldiers who requested conscientious objector status. The Division deployed these Soldiers pending the outcome of their applications. All three Soldiers’ applications were ultimately disapproved and they went into combat. 3ID AAR Transcript, *supra* note 8, at 77.

<sup>156</sup> Local marriage laws must be consulted in these cases. Moreover, if a service member marries a foreign national, the foreign national must comply with U.S. immigration laws in order to enter the United States.

<sup>157</sup> Military personnel cannot grant asylum. *See generally* U.S. DEP’T OF DEFENSE, DIR. 2000.11, PROCEDURES FOR HANDLING REQUESTS FOR POLITICAL ASYLUM AND TEMPORARY REFUGE (3 Mar. 1972); U.S. DEP’T OF ARMY, REG. 550-1, PROCEDURES FOR HANDLING REQUESTS FOR POLITICAL ASYLUM AND TEMPORARY REFUGE (1 Oct. 1981); U.S. DEP’T OF NAVY, SEC’Y OF THE NAVY INSTR. 5710.22, PROCEDURES FOR HANDLING REQUESTS FOR POLITICAL ASYLUM AND TEMPORARY REFUGE (7 Oct. 1972) (C1, 15 Aug. 1973); U.S. DEP’T OF AIR FORCE, INSTR. 51-705 HANDLING REQUESTS FOR POLITICAL ASYLUM AND TEMPORARY REFUGE (19 Jul 1994).

<sup>158</sup> 50 U.S.C. App. §§ 451 & 456(0) (2000); *implemented by* U.S. DEP’T OF DEFENSE, DIR. 1315.7, MILITARY PERSONNEL ASSIGNMENTS para. 5.10 (9 Jan. 1987) [hereinafter DoDD 1315.7]; U.S. DEP’T OF DEFENSE, DIR. 1315.15, SPECIAL SEPARATION POLICIES FOR SURVIVORSHIP (26 Sep. 1988); U.S. DEP’T OF ARMY, REG. 635-200, ENLISTED PERSONNEL ch. 5, sec. 2 (19 Dec. 2003); U.S. DEP’T OF ARMY, REG. 614-30, OVERSEAS SERVICE para. 3-7 (30 Aug. 2001) [hereinafter AR 614-30]; U.S. DEP’T OF ARMY, REG. 614-100, OFFICER ASSIGNMENTS, DETAILS, AND TRANSFERS ch. 6, sec. 7 (20 Sep. 2000); U.S. MARINE CORPS, ORDER P1300.8R, MARINE CORPS PERSONNEL ASSIGNMENT POLICY ch. 6 (4 Oct. 1994) (C1-8, 24 Nov. 1998) [hereinafter MCO P1300.8R].

<sup>159</sup> *See* DoDD 1315.7, *supra* note 158, para. 4.9 (providing that concurrent assignment of service members of an immediate family to the same military unit or ship is not prohibited, but requests for reassignment to a different unit or ship may be approved for all but one service member based on military requirements); *implemented by* AR 614-30, *supra* note 155, para. 3-7; MCO P1300.8R, *supra* note 158, para. 6009.

will want to issue punitive no sex orders to maintain good order and discipline. While some commanders did issue such orders, such as the 82d Airborne Division Commander, others chose not to, such as the Commander, 4th Infantry Division.<sup>160</sup>

Finally, JAs generally anticipated other issues that required command policy memoranda. For example, commanders issued policies on service member use and treatment of enemy property to preclude intentional or wonton destruction of property by soldiers. Policies were issues prohibiting service members from buying and selling from local nationals to maintain good order and discipline, protect the force, and avoid local inflation of consumer goods through an influx of U.S. currency.<sup>161</sup> OSJAs may also want to consider a policy precluding service member from throwing items from vehicles, such as candy, meals ready to eat (MREs), because of safety and force protection issues.<sup>162</sup>

#### ***4. Be Prepared to Advise Commanders on Eligibility for Medical Care.***

Another common issue for JAs was entitlement to DoD medical care. During OIF, a JA was assigned to the 30th Medical Brigade, V Corps—the largest medical brigade in theater during combat operations. According to the JA, her largest contribution to the brigade mission, and the issue that took the most time, was assisting in developing the CFLCC and V Corps Rules of Care and answering numerous questions regarding entitlement to medical care.<sup>163</sup> The CFLCC Rules of Care, for instance, contained categories of individuals who could receive care from U.S. military medical treatment facilities in theater.<sup>164</sup> The CFLCC patient care matrix (at Appendix G-6) was developed to assist personnel in determining who was entitled to what type of medical care based on category of patient.

Generally, during combat operations non-coalition personnel were not entitled to full medical care by the U.S. military. These personnel were treated only for injuries that

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<sup>160</sup> The 4th ID Commander considered and rejected such an order as not necessary for good order and discipline. Darpino Comments, *supra* note 58. CENTCOM did propose a General Order Number 2, which contained a no sex with local nationals order, but the order was not implemented. *See* Kent Briefing, *supra* note 49.

<sup>161</sup> *See, e.g.*, 1st Brigade Combat Team, 3rd Infantry Division, Judge Advocate narrative, at 16 (2003) (on file with CLAMO).

<sup>162</sup> V Corps AAR Transcript, *supra* note 149.

<sup>163</sup> *See* Interview with Captain Kirsten M. Mayer, JA, 30<sup>th</sup> Medical Brigade, and Sergeant Dia Kelly, NCO, 30<sup>th</sup> Medical Brigade, by Lieutenant Colonel Judith Robinson, Center for Army Lessons Learned Assessment Team, in Baghdad, Iraq, at 1 (31 May 2004) (on file with CLAMO) [hereinafter CPT Mayer Interview].

<sup>164</sup> For example, emergency essential civilian employees who require treatment for disease or injury sustained overseas during hostilities may be provided care at no cost to the employee. DEP'T OF DEFENSE, DIR. 1404.10, EMERGENCY-ESSENTIAL (E-E) DOD U.S. CITIZEN CIVILIAN EMPLOYEES, para. 6.9.6 (10 Apr. 1993). U.S. Government contractors are provided emergency medical and dental care at a level commensurate with that afforded government employees and military personnel. Deployed contractors, however, generally do not receive routine medical and dental care from the military unless this support is specifically included in the contract. DEP'T OF ARMY, PAM. 715-16, CONTRACTOR DEPLOYMENT GUIDE, para. 8-1 (27 Feb. 1998). Generally, local national civilians were not entitled to medical care unless it was an emergency, generally defined as treatment to preserve life, limb or eyesight, and it did not compromise mission accomplishment.

threatened their life, limbs, or eyesight.<sup>165</sup> Nevertheless, U.S. military medical personnel ordinarily treated individuals injured by coalition forces, regardless of their injuries. Additionally, as the operation continued and more contract personnel entered the theater, the issue of providing medical care to DoD contractor personnel arose. Although the largest DoD contractor in theater, KBR (Kellogg, Brown and Root), brought its own health care, most contractors did not. Moreover, it proved very difficult, if not impossible, to locate these contractors' agreements with the U.S. Government to discern whether the provision of medical care was provided for in the contract.<sup>166</sup> This issue will be addressed in more detail in Volume II of this Publication.

The lesson here is that JAs must anticipate that non-DoD personnel—from local nationals, to DoD contractors, to other U.S. Government Agency personnel, to coalition forces—will request medical care and treatment from U.S. military medical personnel. JAs must be prepared to assist their commanders in determining who is entitled to medical care. A matrix, such as the one developed by CFLCC, is an excellent way to inform commanders and medical personnel of who is entitled to care and for what injuries.

***5. Ensure that Public and Private Financial Disclosure Forms are Timely Filed or, in the Alternative, a Proper Extension Is Granted.***

JAs must anticipate whether their unit's general officer(s) will be required to file a Standard Form (SF) 278, Public Financial Disclosure Report, while in theater.<sup>167</sup> If so, they may want to recommend to the general officer that he wait to file until he returns from deployment. The Joint Ethics Regulation establishes a due date for the SF 278 of 15 May.<sup>168</sup> To make the collection process easier, the Army Standards of Conduct Office (SOCO) recommends that each Command adhere to an internal deadline of 15 April. If a filer is stationed in an area designated as a combat zone by Executive Order on the filing due date (15 May), the SF 278 filing date may be extended until 180 days after the later of the last day of the individual's service in the combat zone, or the last day of the individual's hospitalization as a result of injury received or disease contracted while serving in the combat zone.<sup>169</sup> This extension is automatic—there is no need to file a formal request. The fact that the extension was exercised, however, must be prominently

<sup>165</sup> See CFLCC Rules of Care, Appendix G-6.

<sup>166</sup> See V Corps AAR Transcript, *supra* note 149 (comments from Captain Kirsten M. Mayer, JA, 30th Medical Brigade, V Corps).

<sup>167</sup> The SF 278 requires general officers, among others, to report their financial interests in order to determine whether those interests conflict with their official duties. See *generally*, JER, *supra* note 45. Ordinarily, these reports are required to be made available for public inspection thirty days after they are filed. *Id.* para. 7-208

<sup>168</sup> See *id.* para. 7-203c. JAs also need to be cognizant of any new filers, as they are often difficult to track, in particular Reserve Component officers on active duty.

<sup>169</sup> 50 U.S.C. App. 101 § (g)(2)(A)(2000). EXEC. ORDER NO. 12,744, 56 Fed. Reg. 2,663 (Jan. 21, 1991) designated the Persian Gulf, Red Sea, Gulf of Oman, part of the Arabian Sea that is north of 10 N latitude and west of 68 E longitude, Gulf of Aden, Iraq, Kuwait, Saudi Arabia, Oman, Bahrain, Qatar, the United Arab Emirates, to include the airspace above the designated areas, as combat zones. EXEC. ORDER NO. 13,239, 66 Fed. Reg. 64,907 (Dec. 14, 2001), designated Afghanistan, including the airspace above, as a combat zone beginning 19 Sept. 2001.

annotated on the form when it is eventually submitted. Additionally, Army ethics counselors should notify SOCO of the extension for accountability purposes as soon as possible.<sup>170</sup> Although some general officers took advantage of the automatic extension, at least one general officer filed his SF 278 while in Iraq.<sup>171</sup>

Similarly, the deadline for filing the Office of Government Ethics (OGE) Form 450, Confidential Financial Disclosure Report,<sup>172</sup> may be extended up to ninety days following an individual's service in a combat zone or away from his permanent duty station in support of the Armed Forces following a declaration by the President of a national emergency, or the individual's hospitalization as a result of injury received or disease contracted while serving during a national emergency.<sup>173</sup> Unlike the SF 278, however, those required to file the OGE Form 450 must request this extension; it is not automatic. The extension must be granted by the agency reviewing official, who is normally the commander's ethics counselor. The ethics counselor should retain a copy of the grant of extension along with a list of all personnel to whom the extension was granted. Moreover the extension must be annotated on each filer's OGE Form 450 when filed.<sup>174</sup>

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<sup>170</sup> See E-mail from MAJ Kurt A. Takushi, Professor, Administrative and Civil Law, The Judge Advocate General's Legal Center and School, Charlottesville, Va., to Lieutenant Colonel Pamela M. Stahl, Director, CLAMO, Subj: SF 278 (19 Dec. 2003) [hereinafter Takushi E-mail].

<sup>171</sup> See 3ID AAR Transcript, *supra* note 8, at 78 (noting that the 3ID Commander filed his SF 278 while deployed to Iraq because his wife had all needed documents to complete the form).

<sup>172</sup> Similar to the SF 278, the OGE Form 450 requires certain government employees to report their financial interests in order to determine if those interests conflict with their official duties. Generally, persons required to file the OGE Form 450 include commanders of installations and bases, and those employees whose official duties require them to participate personally and substantially in taking official action in contracting or procurement activities. For additional information on who is required to file an OGE Form 450 see JER, *supra* note 45, para. 2-300a.

<sup>173</sup> 5 C.F.R. § 2634.903(d) (2003); see also JER *supra* note 45, para. 7-303(b) (providing that the OGE Form 450 must be submitted to the ethics counselor by 30 November of each year).

<sup>174</sup> Administratively, the ethics counselor should also ensure that extensions are mentioned in the monthly reports due to SOCO after the OGE Form 450 deadline. See Takushi E-mail, *supra* note 170.

## H. LEGAL ASSISTANCE

*Legal Assistance is the provision of personal civil legal services to [military members], their family members, and other eligible personnel.*<sup>1</sup>

Legal assistance is the commander's tool to help military service members and their families resolve their personal legal problems,<sup>2</sup> and it is an especially important legal mission during a deployment.<sup>3</sup> Personal legal issues left unresolved may not only reduce combat effectiveness, but they may also grow into disciplinary issues requiring greater command attention.<sup>4</sup> Operations ENDURING FREEDOM (OEF) and IRAQI FREEDOM (OIF) demonstrated that aggressive preventive legal assistance programs help reduce legal assistance issues during military operations.

### ***1. Provide Effective and Efficient Legal Assistance Services to Large Groups of Personnel Before Deploying.***

Placing service members' legal affairs in order is one of many tasks units should accomplish prior to deploying. Recent operations have shown that many legal assistance tasks can be accomplished en masse as part of Soldier Readiness Processing (SRP).<sup>5</sup> SRP has such manifest value that it has become Army doctrine.<sup>6</sup> Service members must receive a legal briefing concerning wills and powers-of-attorney (POAs) and be afforded the opportunity to make or update them before deployment.<sup>7</sup> Legal assistance counseling must also be available.<sup>8</sup>

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<sup>1</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS para. 3-13 (1 Mar. 2000) [hereinafter FM 27-100]. One JA commented "JAs should familiarize themselves with those groups of individuals entitled to legal assistance as well as the limitations placed thereon." E-mail from CPT Fredrick Horton Jr., 4th Infantry Division OSJA, subject: Legal Assistance Feedback para. 1 (13 May 2004) (on file with CLAMO) [hereinafter Horton E-Mail].

<sup>2</sup> FM 27-100, *supra* note 1, para. 3-14.

<sup>3</sup> See INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, 2004 OPERATIONAL LAW HANDBOOK, at 323 (2003) [hereinafter 2004 OPLAW HANDBOOK] ("From an operational standpoint, the legal assistance [program] must ensure that [service members'] 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 efficiently as possible.").

<sup>4</sup> See *id.* at 323.

<sup>5</sup> The term "SRP" is often used interchangeably with other similar terms, such as "EDRE" (Emergency Deployment Readiness Exercise), "SRC" (Soldier Readiness Check), "CRC" (Contingency Readiness Check), and others. These terms all refer to the same or similar method of processing large groups of personnel. For clarity, this Publication will use the term "SRP" throughout.

<sup>6</sup> FM 27-100, *supra* note 1, para. 3-14. See also U.S. DEP'T. OF ARMY, REG. 600-8-101, PERSONNEL PROCESSING (IN-, OUT-, SOLDIER READINESS, MOBILIZATION, AND DEPLOYMENT PROCESSING), at 10 (18 July 2003) [hereinafter AR 600-8-101] (describing SRP operations).

<sup>7</sup> AR 600-8-101, *supra* note 6, para. 4-6(b) (providing that wills and other legal documents will be drafted onsite when appropriate); U.S. DEP'T OF NAVY, OFFICE OF THE JUDGE ADVOCATE GENERAL INSTR. 5801.2, NAVY-MARINE CORPS LEGAL ASSISTANCE PROGRAM para. 7-2a (1) (a) (11 Apr. 1997) ('A legal assistance attorney will individually and privately interview each client who requests a will (it is recognized that in some emergency situations or under field conditions, "individually and privately" may involve the attorney and client meeting at a table in a gymnasium or in a mess tent, for example, vice in a private office, however, in all circumstances there must be a one-on-one meeting between attorney and client).'). See generally U.S. DEP'T OF NAVY, OFFICE OF THE JUDGE ADVOCATE GENERAL INSTR. 5800.7C, MANUAL OF THE JUDGE ADVOCATE GENERAL ch. VII (3 Oct. 1990) (C4, 15 Mar. 2004) [hereinafter JAGMAN] (describing generally the Navy/Marine Corps legal assistance program).

SRP legal processing brings inherent tension between the need to advise large numbers of service members and the duties of confidentiality<sup>9</sup> and diligence.<sup>10</sup> For OEF and OIF, legal assistance personnel overcame these challenges by incorporating lessons learned from past operations and developing effective new approaches.

The U.S. Army's Third Infantry Division (3ID) legal assistance office (LAO) implemented a comprehensive and innovative legal assistance program for OIF, and this chapter draws heavily upon the 3ID's experiences as an example. The 3ID LAO processed thousands of active and reserve component Soldiers for deployment.<sup>11</sup> Nevertheless, 3ID legal personnel<sup>12</sup> provided individualized attention with acceptable privacy. 3ID Judge Advocates (JAs) conducted SRP briefings for large groups of Soldiers dealing with basic legal assistance topics such as wills and POAs,<sup>13</sup> and the Service members Civil Relief Act (SCRA).<sup>14</sup> After receiving their initial legal briefing, personnel moved to the SRP legal station, where paralegal Soldiers conducted initial screening. Soldiers with no legal needs were quickly identified and moved on to the next non-legal station, but others were able to execute POAs at a table near the front of the SRP line. Two dedicated JAs also prepared wills at computer workstations. Modular dividers provided a private atmosphere for will consultation and execution.<sup>15</sup> Although the primary purpose of SRP legal operations was to execute POAs (and wills as appropriate), JAs also

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<sup>8</sup> See AR 600-8-101, *supra* note 6, para. 4-6. The regulation does not specifically state that Soldiers must be able to consult with an attorney on site.

<sup>9</sup> See U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS rule 1.6 (1 May 1992) [hereinafter AR 27-26] (providing that an Army attorney owes a duty of confidentiality to his or her client); U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM para. 4-8 (21 Feb. 1996) [hereinafter AR 27-3]; U.S. DEP'T OF NAVY, OFFICE OF THE JUDGE ADVOCATE GENERAL INSTR. 5803.1B, PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL, rule 1.6 (11 Feb. 2000) (C1, 12 Dec. 2002) [hereinafter JAGINST 5803.1B] (providing that Navy and Marine Corps attorneys owe a duty of confidentiality to their clients). Note that the Army and Navy/Marine Corps confidentiality provisions are extremely similar.

<sup>10</sup> See AR 27-26, *supra* note 9, rule 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client and in every case will consult with a client as soon as practicable and as often as necessary after undertaking representation."). See also *id.* rule 8.5(f) ("Every Army lawyer subject to these Rules is also subject to rules promulgated by his or her licensing authority or authorities.").

<sup>11</sup> See Transcript of After Action Review Conference, Office of the Staff Judge Advocate, 3d Infantry Division, and the Center for Law and Military Operations, Fort Stewart, Ga., at 117 (18-19 Nov. 2003) (on file with CLAMO) [hereinafter 3ID AAR Transcript]. The augmented 3ID LAO processed thousands of Soldiers and prepared over 6,700 powers-of-attorney and 1,200 wills. *Id.*

<sup>12</sup> Legal personnel from the 174<sup>th</sup> Legal Support Organization (LSO) (an Army Reserve legal unit) provided invaluable assistance by augmenting 3ID SRPs with experienced legal personnel. *Id.* at 116-118.

<sup>13</sup> Legal personnel conducting briefings explained what wills and POAs are and when they may be required, but they also explained that Soldiers should not grant a general POA when a special POA would suffice. JAs explained that many Soldiers may not need a will if they are unmarried with no dependents and have few assets. See *id.*

<sup>14</sup> Service members Civil Relief Act, 50 U.S.C. §§ 510-594 (2003) [hereinafter SCRA]. The purpose of the SCRA is to postpone or suspend some of the civil obligations of military personnel to allow them to give full attention to their military duties. The SCRA was formerly titled the Soldiers' and Sailors' Civil Relief Act (SSCRA) of 1940. Although the former SSCRA became the SCRA within the time period covered by this Publication, the Act will be referred to as the SCRA throughout this Publication. For a more detailed discussion of the 2003 SCRA, see John T. Meixell, *Service members Civil Relief Act Replaces Soldiers' and Sailors' Civil Relief Act*, ARMY LAW., Dec. 2003, at 38, available at <https://www.jagcnet.army.mil/laawsxxi/cds.nsf> [hereinafter *Service members Civil Relief Act Replaces Soldiers' and Sailors' Civil Relief Act*].

<sup>15</sup> 3ID AAR Transcript, *supra* note 11, at 118.



provided individual advice on minor legal matters. The limitations of the SRP setting prohibited legal counseling on all but minor legal issues. Clients with issues requiring more privacy, research, or time were given regular office appointments with a legal assistance attorney.<sup>16</sup>

## **2. Implement a Comprehensive Preventive Law Program.**

Deployed legal personnel handled many of the same legal assistance issues they commonly see in garrison.<sup>17</sup> In addition, most of the issues which arose during deployment were issues frequently encountered during previous deployments.<sup>18</sup> With the exception of some uncommon issues discussed in Section 7 below, the vast majority of legal assistance issues were predictable and, usually, avoidable through preventive handling.

### ***a. Identify Issues Deployed Legal Personnel Will Likely Face.***

JAs and paralegals laid the foundation for an effective preventive law program by identifying the legal issues they would likely face during deployment.<sup>19</sup> Clients deployed to OEF and OIF commonly presented issues related to wills, POAs, rental property, state and federal income taxes, the SCRA, and family law.<sup>20</sup> By correctly identifying these issues before deployment, legal personnel were able to deliver targeted preventive legal services.

### ***b. Go Beyond the Soldier Readiness Processing Paradigm in Delivering Preventive Information and Services to Legal Assistance Clients.***

Service members and their families preparing for a deployment face myriad demands on their scarce time. With this in mind, legal personnel executed realistic plans to deliver basic preventive legal information and services. Many Soldiers did not understand that they might not require a will or a general POA.<sup>21</sup> JAs explained the remedies available to service members

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<sup>16</sup> *Id.* at 120.

<sup>17</sup> *See, e.g.*, Interview with LTC Sharon E. Riley, Staff Judge Advocate, 1st Armored Division, in Charlottesville, Va. (10 Oct. 2003) (videotape on file with CLAMO) [hereinafter Riley Interview].

<sup>18</sup> *See, e.g.*, Interview with COL David L. Hayden, former Staff Judge Advocate, XVIIIth Airborne Corps, in Charlottesville, Va. (7 Oct. 03) (videotape on file with CLAMO) [hereinafter Hayden Interview].

<sup>19</sup> *See, e.g.*, 3ID AAR Transcript, *supra* note 11, at 132-33 (noting that the legal issues the 3ID thought it would face were, for the most part, the issues it actually faced during deployment).

<sup>20</sup> *See id.*

<sup>21</sup> *See* Interview with COL Richard O. Hatch, former Staff Judge Advocate, 101<sup>st</sup> Airborne Division, in Charlottesville, Va. (8 Oct. 03) (videotape on file with CLAMO) [hereinafter Hatch Interview]; 3ID AAR Transcript, *supra* note 11, at 115. *See also* AR 27-3, *supra* note 9, para. 4-8 (providing that clients desiring to execute a general POA should be warned of the potentially serious consequences of its misuse). With regard to POAs, one Army legal assistance practitioner recommends:

- Soldiers should consider POAs of 18-month duration rather than the standard 12-month. [This would protect soldiers unexpectedly deployed longer than 12 months].
- Soldiers may consider executing revocations to keep with them in case of abuse.
- Special POAs should be recommended over general, particularly for soldiers more recently married.
- Soldiers should receive some guidance on maintaining some oversight over their accounts, banking, and credit as [unclassified internet] access will likely be available.

under the SCRA<sup>22</sup> and the applicability of tax filing deadline extensions. Legal briefers also made time available during and after their presentations for questions.<sup>23</sup>

Legal personnel found many innovative ways to provide preventive information and on-the-spot legal services away from the LAO and outside the SRP setting. They reduced commonly encountered legal assistance issues to basic preventive law themes and executed communications strategies to deliver legal information to service members and their families. One way of looking at it would be as a preventive law “information operations” campaign. Army legal doctrine suggests time-tested methods such as SRP processing, legal briefings, radio and television advertisements, bulletin-board postings, and newspaper articles.<sup>24</sup> JAs successfully used all these tools, but they went beyond these traditional strategies to deliver the preventive law message. For example, legal assistance attorneys took the time to brief Family Readiness Groups (FRGs) and to perform on-the-spot will counseling and POA preparation and execution at the FRG briefings.<sup>25</sup> FRG briefings focused on wills, POAs, and remedies available under the SCRA.<sup>26</sup> Attorneys and paralegals also followed unit briefings with an opportunity to execute legal documents.<sup>27</sup> In addition, LAOs increased their staffing and expanded office hours to accommodate clients.<sup>28</sup>

*c. Take Preventive Measures Within the Military and Civilian Communities.*

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- A state notary in [theater] my help decrease the possibility of a POA not being accepted. POAs involving real estate transactions are more carefully scrutinized and this may be an easy way of ensuring the soldier obtains the right outcome the first time.

Horton E-mail, *supra* note 1, para. 4. *See also* Memorandum, Majors Nicholas F. Lancaster & J. “Harper” Cook, Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), for Record, subject: MAJ Lancaster (101st ABN DIV (AASLT) Operational Law) Comments on CLAMO OEF/OIF DRAFT Lessons Learned, para. 5a (18 May 2004) (on file with CLAMO) [hereinafter Lancaster & Cook Memorandum] (“Dear John” letters are one of the most common [legal assistance] problem[s] a soldier faces. We need to highlight our role in (1) Revoking POAs (2) Letters to creditors (3) Divorce counseling.”).

<sup>22</sup> *See generally* *Service members Civil Relief Act Replaces Soldiers’ and Sailors’ Civil Relief Act*, *supra* note 14 (providing an overview of the SCRA).

<sup>23</sup> 3ID AAR Transcript, *supra* note 11, at 120.

<sup>24</sup> AR 27-3, *supra* note 9, para. 3-4.

<sup>25</sup> *See* 3ID AAR Transcript, *supra* note 11, at 116. There is great value in briefing Soldiers and FRGs on the same preventive legal information. While a Soldier may listen to a briefing and think that they do not need a will or a POA, his or her spouse would have the opportunity to receive the same information during the FRG briefing and provide their own input into the family decision process. For the 3ID, an attorney always performed the briefing and worked with an accompanying paralegal to execute wills and POAs. *Id.*

<sup>26</sup> *Id.* at 115 (noting that FRG briefing attendees were normally interested in the SCRA 6% ceiling on pre-service debt, wills, POAs, and landlord-tenant issues).

<sup>27</sup> *See id.* (noting that the 3ID had sufficient notice before deployment to be able to brief every active duty and reserve component Soldier by incorporating legal briefings into predeployment unit training schedules and that these briefings occurred outside the SRP paradigm and provided an additional opportunity for Soldiers to receive basic legal information and ask questions).

<sup>28</sup> *See id.* The 3ID LAO opened on evenings and weekends, with a priority placed upon will preparation and execution and POAs. These expanded hours allowed working spouses who were not able to attend FRG briefings to receive legal assistance.

A comprehensive preventive legal assistance program goes beyond educating service members and their families. Prior to deployment, legal personnel worked hard to educate themselves and engage other military organizations, local businesses, and the civilian legal community.

Most units had at least several months notice before deploying. This provided the time to send attorneys to participate in formal legal assistance training offered at the Army Judge Advocate General's Legal Center and School (TJAGLCS) and the Air Force Judge Advocate General School. Lawyers also took the opportunity before deploying to engage in self-study to reinforce their subject matter knowledge.<sup>29</sup> In addition, active component legal personnel had the opportunity to work closely with their reserve component counterparts and take advantage of their often greater legal assistance experience and ties to the community.<sup>30</sup>

JAs took steps to ensure that the legal documents they prepared would be accepted on the installation and in the local community. Although federal law provides that military POAs are exempt from the requirements of state law,<sup>31</sup> experience shows that businesses sometimes refuse to accept military POAs.<sup>32</sup> Legal assistance attorneys minimized this problem by contacting businesses in the local community (such as banks) and explaining the nature of military POAs.<sup>33</sup> During OIF, one LAO found that the base finance office would not provide family members a copy of the service member's tax Form W-2 in order to allow the family member to file joint tax returns.<sup>34</sup>

JAs also engaged the local bench and bar. For example, the Fort Stewart LAO took advantage of its relationships with a supportive local legal community by working with local judges and attorneys to establish procedures to handle landlord-tenant<sup>35</sup> and probate<sup>36</sup> issues. These relationships worked to the benefit of military members and their families.<sup>37</sup>

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<sup>29</sup> See, e.g., CPT Nathalie S. Kline, Group Legal Advisor, 24th Corps Support Group, Operation Enduring Freedom/Operation Iraqi Freedom After Action Review, at 2 (20 Apr. 2003) (on file with CLAMO) [hereinafter 24th CSG AAR] (noting that each Brigade Operational Law Team (BOLT) member read through the Operational Law Handbook, *supra* note 3, before deploying).

<sup>30</sup> See 3ID AAR Transcript, *supra* note 11, at 4 (noting that the 174th LSO JAs were highly experienced in the areas of administrative law and legal assistance).

<sup>31</sup> 10 U.S.C. § 1044b(a) (2004).

<sup>32</sup> See e.g., 3ID AAR Transcript, *supra* note 11, at 121 (noting that businesses in the local community were sometimes reluctant to accept military POAs, but upon further investigation, the problem sometimes proved to be that clients were not presenting the original POA).

<sup>33</sup> See *id.*

<sup>34</sup> 3ID AAR Transcript, *supra* note 11, at 122. The Fort Stewart Finance Office's position was that a family member needed a special POA to obtain a copy of the service member's Form W-2. Eventually, the Fort Stewart LAO was able to persuade the Finance Office to release the Form W-2 to family members with a general POA. The LAO also found that family members could print a copy of the form W-2 from the Defense Finance and Accounting Service's website at <http://www.dfas.mil>. Using the website requires knowing the service member's user identification and password. *Id.*

<sup>35</sup> See 3ID AAR Transcript, *supra* note 11, at 122-23. Fort Stewart's acting chief of legal assistance before and during OIF, CPT Gary P. McNeal, describes the steps the LAO took after a local judge brought up the issue of landlord-tenant law.

A local judge brought up the issue of dispossessory writs [the means under Georgia law to evict a tenant in non-payment of his or her rent]. The local courts were getting petitions from landlords

### ***3. Be Prepared to Conduct Legal Research While Deployed.***

Deployed legal personnel should be prepared to conduct legal research. Although this lesson has broad application, it came up frequently in the legal assistance context. Legal personnel are now able to conduct much of their legal research on the Internet. While this technology provides tremendous benefit to the military attorney practicing in an office environment, dependence upon it poses obvious challenges to deployed legal practitioners with limited or unreliable automation capabilities.

Legal personnel preparing for deployment should be aware that the military uses two separate “Internet” systems; one for unclassified communications and another for classified communications. The unclassified system is officially titled the “Unclassified but Sensitive Internet Protocol Router Network,” and it is normally called the NIPRNET. The classified system is officially titled the “Secure Internet Protocol Router Network,” and it is normally

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for these writs for non-payment of rent. In many cases, the Soldier had left the apartment with a significant other or family member who then stopped paying the rent without the knowledge of the Soldier. We briefed the judge on the [SCRA] provisions involving leases. A landlord must file a military affidavit showing whether a defendant is in the military service as part of the petition for the writ. If the defendant is in the military service, then the court must appoint an attorney to represent their interest if they are not present. The local courts were not using the affidavits or appointing attorneys on behalf of Soldier defendants. We drafted an affidavit which the local courts adopted and started using. In addition, the local court agreed to grant a three month stay in cases involving Soldiers and notify housing that there was a case pending. If the matter could not be cleared up within that time frame, the court would appoint a JAG to represent the interests of the Soldier. The JAG could appear pro hac vice as long as a [member of the Georgia Bar] signed the motion to appear, and the JAG could then request up to a six month stay of proceedings. This program worked very well, and we never had to go to court to request the stay. All matters were resolved within the three month time frame.

*Id.* (quote from speaker’s notes from accompanying PowerPoint presentation) (on file with CLAMO).

<sup>36</sup> 3ID AAR Transcript, *supra* note 11, at 130-31. The Fort Stewart LAO also engaged the local bench and bar with respect to probate law. CPT McNeal describes the steps his office took.

[We] worked with the local Bench and Bar to create a system to handle casualty assistance, especially should the need arise if there were mass casualties. The local probate judge provided a class on probate procedure and related matters, and made herself available for questions at any time. The judge assisted quite often in helping us with a variety of probate questions. The Mayor who is an attorney created a list of local attorneys who were willing to provide assistance pro bono if necessary. JAGs did the initial client counseling, and the probate paperwork. We could then call the Mayor for a referral, and personally walked the file to that attorney’s office, and introduce the client to them. They would then handle the court appearance, and keep us up to date on any issues we needed to be involved with. This system works very well, and though we did not thankfully have to use it for mass casualty issues, we have used it several times to assist clients with local probate matters before the court. For issues that needed to go to court out of state, we networked with other LAOs to get referral lists, and helped the clients to secure representation. Many casualty assistance issues were handled by JAGs without the need to go to court. These included vehicle title questions, tax issues, and family law questions when step-children were involved.

*Id.* (quote from speaker’s notes from accompanying PowerPoint presentation) (on file with CLAMO).

<sup>37</sup> See 3ID AAR Transcript, *supra* note 11, at 130.

called the SIPRNET. Deployed personnel normally find that NIPRNET access is much more limited than SIPRNET access.<sup>38</sup> This is important in the legal research context because many commonly used legal research websites (to include JAGCNET)<sup>39</sup> are not available on the SIPRNET.<sup>40</sup>

Deployed legal personnel should bring hard copies of commonly used regulations,<sup>41</sup> but they should also electronically store redundant copies of frequently used resources.<sup>42</sup> Many of these resources are now available in CD and/or DVD format.<sup>43</sup>

Deployed legal personnel fortunate enough to have reliable telephone and unclassified Internet connections used them to conduct legal research. Legal personnel used their communications resources to “reachback” to their home installation or to non-deployed subject matter experts to seek guidance concerning difficult issues. The unclassified Internet was also a useful resource for conducting legal research.<sup>44</sup> Deployed legal personnel made the best use of modern technology to meet their clients’ expectation to provide quick and accurate legal advice.

#### ***4. When Deployed, Be Prepared to Deliver Legal Assistance Services to Clients Dispersed Throughout the Theater of Operations.***

Although an aggressive preventive law program will help reduce legal assistance problems during a deployment, issues inevitably arise while deployed.<sup>45</sup> Faced with this reality and the prospect of long deployments, legal personnel quickly began providing legal assistance services in the deployed theater. Legal personnel overcame the familiar challenge of delivering legal information and services to dispersed and busy personnel.<sup>46</sup> They accomplished the

<sup>38</sup> See 3ID AAR Transcript, *supra* note 11, at 141.

<sup>39</sup> “JAGCNET” is the Army JAG Corps’ unclassified legal information website at <http://www.jagcnet.army.mil>.

<sup>40</sup> See *infra* Section J for a detailed discussion of the NIPRNET, SIPRNET, and other automation issues for deployed legal personnel.

<sup>41</sup> JAs will best know their specific needs, but deployed Army personnel performing legal assistance may wish to bring, at minimum, a hard copy of AR 27-3, *supra*, note 9. See also 24th CSG AAR, *supra* note 29, at 2 (noting that the 24th CSG Group Judge Advocate brought hardcopies of relevant regulations to Iraq).

<sup>42</sup> See, e.g., 3ID AAR Transcript, *supra* note 11, at 186. 3ID JAs “packaged” redundant electronic copies of regulations and forms. See also 24th CSG AAR, *supra* note 29, at 1 (stating that DL Wills and Hotdocs [legal assistance document preparation software] were installed on laptop computers). For a more detailed discussion of technology and resources in a deployed environment, see *infra* Section J.

<sup>43</sup> See *infra* Section J for a detailed discussion of CD and DVD compilations specifically designed for deployed legal personnel.

<sup>44</sup> Because Internet site addresses and content are constantly changing, a detailed discussion of the Internet resources used during OEF and OIF would be of little use in future contingencies; however, the Army JAG Corps website at <http://www.jagcnet.army.mil>, *supra* note 39, contains a constantly updated list of legal assistance weblinks. Deployed JAs should maintain and update their personal list of website “favorites” for quick access to Internet resources.

<sup>45</sup> See, e.g., Interview with COL Kathryn Stone, former Staff Judge Advocate, 10<sup>th</sup> Mountain Division (7 Oct. 03) (audiotape on file with CLAMO) [hereinafter Stone Interview] (noting that JAs in Afghanistan and Uzbekistan provided a great deal of legal assistance while deployed because Soldiers arrived without having gone through SRP processing and because not all issues can be anticipated or handled before long deployments).

<sup>46</sup> See, e.g., Hatch Interview, *supra* note 21. COL Hatch explained that legal assistance attorneys kept busy until forces began crossing from Kuwait into Iraq and that legal assistance operations dropped off until the seizure and occupation of Baghdad. COL Hatch believes that this pattern is attributable to the fact that Soldiers engaged in

mission by traveling to units to conduct briefings and producing information papers concerning new issues.

Commanders expect deployed legal personnel to resolve legal assistance issues quickly so that Soldiers and Marines can focus on their mission. This sometimes requires going to clients to provide individual legal assistance. An example from Afghanistan illustrates the point. During OEF, the Legal NCOIC for the 5th Special Forces Group flew to a forward operating base to execute a POA for a Special Forces team member in the team's area of operations (AO). Due to operational security concerns, the commander had not generally allowed support personnel to enter the forward AO, but the commander made an exception to allow a Soldier to resolve his personal legal problem. Sending the legal NCOIC forward allowed the Soldier to keep focused on his combat mission.<sup>47</sup>

Some deployed legal personnel also had to provide legal assistance as an additional duty when operating with dispersed units. Group and Command JAs and those attached to Brigade Operational Law Teams (BOLTs) found that they had to provide legal assistance.<sup>48</sup> Some of the larger deployed units brought dedicated legal assistance personnel, but others did not.<sup>49</sup> The lesson here is that legal personnel deployed to support dispersed units should plan to provide legal assistance to members of the command. Legal personnel were able to use legal assistance software to process wills and POAs expeditiously.<sup>50</sup>

### ***5. Be Prepared to Manage Potential Conflicts-of-Interest.***

Many JAs found themselves working as the sole command attorney or in a small group of attorneys far from dedicated legal assistance or trial defense JAs.<sup>51</sup> This predictably created potential conflicts-of-interest,<sup>52</sup> but JAs found effective ways to provide legal assistance while avoiding conflicts.

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combat are too busy to worry about their personal problems and that, conversely, Soldiers engaged in stability operations, though busy, have enough time begin to worry about their problems at home again. *See id.*

<sup>47</sup> *See* Interview with MAJ Dean L. Whitford and SSG Jerome D. Klein, Command Judge Advocate and Legal NCOIC, 5th Special Forces Group, in Charlottesville, Va. (19 Aug. 2003) (videotape on file with CLAMO) [hereinafter 5th Group AAR].

<sup>48</sup> *See, e.g.*, 24th CSG AAR, *supra* note 29, at 3 (noting that Soldiers expected the CJA to provide legal assistance services, and that the CJA did so when it did not conflict with her duty to provide legal advice to the command).

<sup>49</sup> *See, e.g.*, 3ID AAR Transcript, *supra* note 11, at 129 (noting that the 3ID did not bring dedicated legal assistance attorneys). Other units, such as V Corps, kept their legal assistance personnel at the Corps rear command post. *See* Interview with LTC James J. Diliberti, former Deputy Staff Judge Advocate, V Corps, in Charlottesville Va. (9 Oct. 2003) (audiotape on file with CLAMO).

<sup>50</sup> *See, e.g.*, Transcript of After Action Review Conference, Office of the Staff Judge Advocate, Task Force Tarawa, and the Center for Law and Military Operations, Camp Lejeune, N.C., at 76 (2-3 Oct. 2003) (on file with CLAMO) (noting that DL Wills [a widely-used military will preparation program] proved extremely helpful in preparing wills and that TF Tarawa processed POAs forward).

<sup>51</sup> *See* 5th Group AAR, *supra* note 47 (noting that the 5th Group CJA deployed with the group headquarters element and that one JA deployed with each of the geographically dispersed battalions); 24th CSG AAR, *supra* note 29, at 4 (stating that one JA primarily worked with the brigade before, during, and after major combat operations). *See also*, Lancaster & Cook Memorandum *supra*, note 21, para. 5c ("Every JA needs to be prepared to provide legal assistance.").

<sup>52</sup> *See, e.g.*, 3ID AAR Transcript, *supra* note 11, at 129-30. The 3ID acting chief of legal assistance recommended after the conflict that dedicated legal assistance attorneys deploy with the division rear headquarters element. Other

The first step to avoiding conflicts is to study applicable service regulations and relevant state bar guidance.<sup>53</sup> Note that service regulations do not provide a “combat exception” from conflict rules, and even if they did, state bar guidance would still apply.<sup>54</sup>

JAs must also remember that their client is normally their military service (such as the Department of the Army) and not their individual commander.<sup>55</sup> Likewise, if JAs enter into an attorney-client relationship with an individual Soldier or Marine, they may not be able provide legal advice to their commander.<sup>56</sup> Confidentiality obligations may even prohibit discussion of an issue with a commander.<sup>57</sup> No regulation prohibits an attorney from establishing an attorney-client relationship with an individual Soldier or Marine, but command JAs should exercise care to prevent them from being conflicted from giving legal advice to their commander.

Deployed legal personnel anticipated conflicts and made plans to avoid them. The 5th Special Forces Group implemented an effective strategy while deployed to Iraq. The Group JA remained at the group headquarters, and each subordinate battalion dispersed with a Command JA.<sup>58</sup> Legal NCOs at the group and battalion headquarters screened clients and were able to handle many simple issues, such as POA execution, without attorney involvement. In situations with little likelihood of a conflict, such as a simple will preparation, the JA present provided the service. In other situations when a potential conflict existed, another JA within the Group would assist the client. For example, if a Soldier in the first battalion needed assistance, the JA with the second battalion would provide it, and vice versa. The 3ID used the same arrangement between its JAs deployed with separate brigades.<sup>59</sup> Marine JAs deployed with Marine Expeditionary Units (MEUs) often establish similar relationships with the accompanying Amphibious Squadron

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units did this successfully but found that these attorneys were often too far away from clients to provide quick legal assistance counseling or services. *See id.*

<sup>53</sup> *See* AR 27-26, *supra* note 9, rule 1.7 (providing rules governing conflicts-of-interest for Army legal personnel); U.S. DEP’T OF NAVY, OFFICE OF THE JUDGE ADVOCATE GENERAL, PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL (11 Feb. 2000) (providing rules governing conflicts-of-interest for Navy and Marine Corps legal personnel).

<sup>54</sup> *See supra* note 53.

<sup>55</sup> *See* AR 27-26, *supra* note 9, at 1.4 (rule 1.13 also states “Except when representing an individual client . . . an Army lawyer represents the Department of the Army acting through its authorized officials.”); JAGINST 5803.1B, *supra* note 9, para. 6(a) (“The executive agency to which assigned ([the Department of the Navy] in most cases) is the client served by each covered USG attorney unless detailed to represent another client by competent authority.”).

<sup>56</sup> *See, e.g.,* AR 27-26, *supra* note 9, rule 1.7 (providing general conflict guidance for Army JAs); JAGINST 5803.1B, *supra* note 9 (providing general conflict guidance for Navy/Marine JAs).

<sup>57</sup> AR 27-26, *supra* note 9, rule 1.6 (discussing generally the duty of confidentiality for Army attorneys).

<sup>58</sup> 5th Group AAR, *supra* note 47. The Group Judge Advocate deployed with the Group Headquarters, which was co-located with the Joint Special Operations Task Force (JSOTF) Headquarters. The battalion JAs were augmentees. One was the Group’s Individual Mobilization Augmentee. Another was a CLAMO Advanced Operational Law Fellow, and another was provided by the Air Force upon request by the JSOTF Commander. *See id.*

<sup>59</sup> *See* 3ID AAR Transcript, *supra* note 11, at 129-30. In situations where BOLTs had two JAs, one JA could advise the Soldier, and the other JA could advise the command.

Navy JA.<sup>60</sup> Trial defense attorneys also provided limited legal assistance, although their availability should never be assumed.<sup>61</sup>

## ***6. Have a Plan Concerning Tax Assistance.***

Units took different approaches to providing tax assistance. The XVIIIth Airborne Corps Office of the Staff Judge Advocate decided not offer tax preparation services in Afghanistan and to counsel Soldiers to take advantage of available tax filing deadline extensions upon return to their home station.<sup>62</sup> The 3ID found that family members with POAs were able to file tax returns at the Soldier's home station.<sup>63</sup> 3ID JAs also prepared a tax information paper (at Appendix H-1). If a deployment will take place during tax-filing season, service members will likely expect legal personnel to offer tax-preparation assistance. Deployed legal personnel should have a plan to manage this issue.<sup>64</sup>

## ***7. Expect to Confront Unusual Legal Assistance Issues.***

The majority of the legal assistance issues encountered during OEF and OIF were predictable, with some key exceptions. Deployed legal personnel encountered unusual issues including casualty assistance, immigration, and foreign national adoption and marriage questions.

### ***a. Casualty Assistance***

Casualty assistance was an unusual issue during OEF and OIF in the sense that very few legal personnel had experience dealing with service member deaths. The potential for mass casualties due to the probable use of weapons of mass destruction in Iraq added new considerations to casualty assistance planning.

Effective preventive law measures and the absence of weapons of mass destruction on the battlefield ensured generally smooth handling of legal matters in cases of service member

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<sup>60</sup> See CENTER FOR LAW AND MILITARY OPERATIONS, DEPLOYED MARINE AIR-GROUND TASK FORCE JUDGE ADVOCATE HANDBOOK 174 (2002) (suggesting also that Marines may be able to work with a legal assistance officer at their home station by telephone or e-mail).

<sup>61</sup> See U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 6-8(c) (6 Sept. 2002) ("When the senior defense [counsel] determines that USATDS counsel are not fully employed in performing the defense mission, they will assist the SJA in performing other legal services."); Hatch Interview, *supra* note 21 (noting that attached trial defense JAs provided legal assistance to Soldiers).

<sup>62</sup> See, e.g., MAJ Jeff A. Bovarnick, Chief, Operational Law, CJTF-180, CJTF-180 Notes from the Combat Zone, at 7 (2003) (on file with CLAMO) (noting that the primitive communications infrastructure in Afghanistan would have made executing a tax assistance program extraordinarily difficult).

<sup>63</sup> 3ID AAR Transcript, *supra* note 11, at 124 (noting that the Fort Stewart LAO filed 5,700 state and federal tax returns during the 2003 tax filing season, despite the 3ID's deployment to Iraq); *but see supra* note 34 and accompanying text (noting that some 3ID family members initially had problems obtaining the service member's Form W-2 but that the problem was resolved).

<sup>64</sup> See Riley Interview, *supra* note 17 (noting that despite the availability of tax filing deadline extensions, Soldiers wanted to be able to file their taxes as soon as possible so that their families could use their tax refund). After the time period covered by this Publication, several units provided tax preparation and electronic filing services in the combat theater. See the upcoming Volume II of this Publication for further discussion of this topic.



deaths.<sup>65</sup> Legal personnel at the deceased's home station found that, in most cases, family members had wills and POAs and a basic understanding of the legal issues consequent to a service member death.<sup>66</sup> JAs also helped family members secure civilian counsel to assist with the probate process.<sup>67</sup>

Administrative law JAs should anticipate the need to provide advice concerning investigations and family presentations.<sup>68</sup> In the legal assistance context, this would most likely impact the home station legal assistance attorney. Legal assistance attorneys might assist the family by providing the status of an ongoing investigation and/or helping a family decide whether to request a family presentation.

Legal assistance attorneys also needed to be prepared to provide advice in circumstances of imminent death. During the time period covered by this Publication, in most circumstances when death was imminent, retirement for physical disability provided greater benefits for a service member's family than those benefits generally available upon death.<sup>69</sup> This created the need to quickly medically retire a service member. Though beyond the chronological scope of this Publication, it is important to note that as of December 2003, the military will no longer be retiring service members medically in cases of imminent death.<sup>70</sup>

### ***b. Immigration, Adoption, and Marriage***

Many service members wanted to take advantage of changes in U.S. naturalization policy consequent to a Presidential Executive Order allowing expedited naturalization for non-citizen U.S. military members. Others inquired about marrying or adopting a foreign national.

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<sup>65</sup> See 3ID AAR Transcript, *supra* note 11, at 130-31.

<sup>66</sup> See *id.*

<sup>67</sup> See *id.* at 130-31.

<sup>68</sup> See *supra*, Section G (explaining that Army Regulation 600-34 requires that, upon request, a deceased Soldier's family must receive a briefing explaining the circumstances of a Soldier death occurring during operations).

<sup>69</sup> See generally THE CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, LAW AND MILITARY OPERATIONS IN KOSOVO, 1999-2001: LESSONS LEARNED FOR JUDGE ADVOCATES 165 (2001).

<sup>70</sup> See Memorandum, Charles S. Abell, Principal Deputy to the Under Secretary of Defense for Personnel and Readiness, Subject: Change to Imminent Death Processing Policy in DoD Instruction 1332.38 (23 December 03), stating in part:

Section 645 of the National Defense Authorization Act for FY 2004 expanded Section 1448(d), 10 USC, to provide a Survivor Benefit Plan (SBP) annuity for the surviving dependent children of a member who dies while on active duty but is not yet eligible for retirement, instead of the surviving spouse . . . Sub-paragraph E3.P1.6.4 of DoD Instruction 1332.28, Physical Disability Evaluation, has allowed the Services to expeditiously refer members to the Disability Evaluation System when "competent medical authority determines that a Service member's death is expected within 72 hours." However, as a result of the recent expansion of SBP eligibility, *this process is no longer appropriate.*

*Id.* (emphasis added).

Executive Order 13,269<sup>71</sup> expedites the naturalization of aliens and noncitizen nationals serving on active duty military status during the global war on terrorism. The Order makes aliens and noncitizen nationals serving honorably on active duty during the period beginning 11 September 2001, and terminating on an as yet undetermined date, eligible for immediate citizenship. Although the Executive Order provides the legal authority for expedited citizenship, the details concerning processing citizenship applications overseas were initially unclear.

As units in Iraq transitioned to stability operations, deployed JAs quickly found themselves facing large numbers of service members interested in becoming citizens while deployed.<sup>72</sup> JAs in Iraq did not resolve this issue until after the time period covered by this Publication.<sup>73</sup> JAs in Afghanistan began assisting service members in the naturalization process shortly after the executive order became effective in 2002. CJTF-180 JAs organized a “Citizenship Day” at several locations in Afghanistan to assist non-citizen service members.<sup>74</sup> Another potential issue related to citizenship is the non-citizen status of military dependents.<sup>75</sup>

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<sup>71</sup> 67 Fed. Reg. 45,287 (July 8, 2002); For an in-depth discussion of contemporary immigration issues as they relate to military personnel and their dependents, see Lieutenant Colonel Pamela M. Stahl, *The Legal Assistance Attorney’s Guide to Immigration and Naturalization*, 177 MIL. L. REV. 1 (2003), available at <https://www.jagcnet.army.mil/laawsxxi/cds.nsf> [hereinafter *The Legal Assistance Attorney’s Guide to Immigration and Naturalization*].

<sup>72</sup> See Hatch Interview, *supra* note 21 (noting that large numbers of Soldiers expressed interest in expedited citizenship and that Soldiers instinctively went to JAs for assistance rather than to their servicing personnel office); see also Riley Interview, *supra* note 17 (observing that the number of non-citizen Soldiers assigned or attached to the 1AD was over 2,000 and that JAs played a large part in helping Soldiers prepare for citizenship). 1AD JAs began laying the groundwork to assist Soldiers complete the path to citizenship. See *id.*

<sup>73</sup> Look for more detailed discussion of service member naturalization in the forthcoming Volume II of this Publication.

<sup>74</sup> CJTF-180 LA JA CPT James T. Hill organized the successful “Immigration Day” event on 16 September 2002. Before the event, CPT Hill’s staff posted flyers at the U.S. base at Bagram and at smaller bases nearby. After the event, he wrote a detailed after action review (included at Appendix H-2). The biggest challenges were helping service members fill out numerous forms and taking photographs and fingerprints. See CPT James T. Hill, CJTF-180, Legal Assistance Attorney, Memorandum For Record: Citizenship Day After Action Review (23 Sept. 2002). In his after action review, CPT Hill referenced two publications which were of great help in answering questions from Soldiers. *Id.* at 6. See United States Citizenship and Immigration Services, *A Guide to Naturalization* (February 2004), at <http://uscis.gov.graphics/services/natz/English.pdf>; Office of Citizenship Services, United States Citizenship and Immigration Services, *Naturalization Information for Military Personnel* (4 Mar. 2004), at <http://uscis.gov.graphics/services/natz/militarybrochure7.pdf>. The pamphlet also states:

Recent legislation has called for additional benefits to members of the military. These benefits will go into effect on October 1, 2004.

- **No fees** will be charged when you file for naturalization.
- The naturalization process will be made available overseas to members of the Armed Forces at U.S. embassies, consulates, and where practical, military installations abroad.

*Id.* at 2.

<sup>75</sup> Although a detailed discussion of this issue is beyond the scope of this Publication, see *The Legal Assistance Attorney’s Guide to Immigration and Naturalization*, *supra* note 71, at 31-33 for detailed discussion of the effect of a service member’s deployment upon a dependent’s petition for removal of conditional permanent resident status. Legal assistance attorneys should be prepared to field immigration law questions relating to military dependents.

JAs also received infrequent inquiries from personnel interested in marrying or adopting foreign nationals. Inquiries concerning marriage typically came from service members who worked with female Iraqi employees of the U.S. military.<sup>76</sup> Adoption inquiries typically came from military personnel who had developed personal relationships with orphaned Iraqi children. Although neither marriage nor adoption were specifically prohibited, personnel almost uniformly backed away from the bureaucratic and cultural obstacles to adoption and marriage.<sup>77</sup> Although the issue of marriage to foreign nationals has garnered some media attention,<sup>78</sup> it has not consumed significant JA time.

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<sup>76</sup> See Riley Interview, *supra* note 17.

<sup>77</sup> See *id.*

<sup>78</sup> See, e.g., Julian Borger, *U.S. Soldier Left Patrol Duty to Marry Iraqi*, THE GUARDIAN UNLIMITED, 3 Dec. 2003, available at <http://www.guardian.co.uk/Iraq/Story/0,2763,1098393,00.html>.

## I. MILITARY JUSTICE

*Military Justice is the administration of the Uniform Code of Military Justice (UCMJ), and the disposition of alleged violations by judicial (courts-martial) or nonjudicial (Article 15, UCMJ) means.<sup>1</sup>*

*The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.<sup>2</sup>*

The UCMJ<sup>3</sup> and implementing regulations<sup>4</sup> place high due process standards on the military justice (MJ) system. During times of conflict, as always, military members deserve the highest protections. Judge advocates (JAs) worked with commanders during Operations ENDURING FREEDOM (OEF) and IRAQI FREEDOM (OIF) to exercise swift and sound justice in austere conditions.

Service members deployed during OEF and OIF deserve immense credit for their service, but, as in every deployment, a small minority of military members discredited themselves by their misconduct. In the words of one JA, “Wherever there are troops, there will be criminal activity.”<sup>5</sup> The Manual for Courts-Martial (MCM) mandates that commanders address misconduct quickly,<sup>6</sup> while observing due process standards.

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<sup>1</sup> U.S. DEP’T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS para. 3-3 (1 Mar. 2000) [hereinafter FM 27-100].

<sup>2</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, PREAMBLE, para. 3 (2002 Edition) [hereinafter MCM].

<sup>3</sup> 10 U.S.C. §§ 801-941 (2002) [hereinafter UCMJ].

<sup>4</sup> See U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE (6 Sept. 2002) [hereinafter AR 27-10]; U.S. DEP’T OF AIR FORCE, INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE (26 Nov. 2003) [hereinafter AFI 51-201]; U.S. DEP’T OF AIR FORCE, INSTR. 51-202, NONJUDICIAL PUNISHMENT (7 Nov. 2003) [hereinafter AFI 51-202]; U.S. DEP’T OF NAVY, OFFICE OF THE JUDGE ADVOCATE GEN. INSTR. 5800.7C, MANUAL OF THE JUDGE ADVOCATE GENERAL (JAGMAN) (C4, 15 Mar. 2004) [hereinafter JAGMAN].

<sup>5</sup> Office of the Staff Judge Advocate, Combined Task Force-82, Mid-Point AAR, at 5 (1 Jan. 2003) [hereinafter 82d Mid-Point OEF AAR].

<sup>6</sup> See MCM, *supra* note 1, at R.C.M. 303 (“Upon receipt of information that a member of the command is accused or suspected of committing an offense or offenses triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses.”). R.C.M. 303 is only one example of the many obligations the MCM places upon commanders to expeditiously handle suspected UCMJ violations. See also U.S. DEP’T. OF ARMY, REG. 600-20, ARMY COMMAND POLICY, para. 4-6a. (13 May 2002) (“Military authority is [to be] exercised *promptly*, firmly, courteously and fairly.”) (emphasis added).

Deployed MJ is challenging,<sup>7</sup> but units successfully handled MJ during OEF and OIF. Although MJ “shut down” during the heat of battle,<sup>8</sup> it continued during the buildup to combat operations and resumed almost immediately after heavy combat ended.<sup>9</sup> The logic in conducting MJ while deployed is that service members “need to see the results of misconduct”<sup>10</sup> to deter future misconduct. During the period covered by this Publication, units handled almost all minor misconduct in the deployed theater; however, they generally sent service members suspected of more serious offenses back to the United States or Germany for prosecution due to austere deployed conditions and mission requirements.

### ***1. Capitalize on Lessons Learned from Past Deployments to Select Jurisdictional Alignments and Military Justice Procedures Best Suited to the Unit and Mission.***

Dividing a unit into a deployed main body and a non-deployed rear detachment creates MJ jurisdictional and processing challenges. Fortunately, past operations have shown how to effectively manage these challenges.<sup>11</sup> During OEF and OIF, Army commanders considered the four following deployment-tested courses of action to manage these challenges. Each approach has advantages and disadvantages.<sup>12</sup>

- Transfer rear detachment jurisdiction to another General Court-Martial Convening Authority (GCMCA);

<sup>7</sup> See, e.g., Interview with MAJ Robert F. Resnick and CPT Charles L. Pritchard, Chief of Criminal Law and Senior Trial Counsel, Third Infantry Division, in Charlottesville, Va. (20 Nov. 2003) (videotape on file with CLAMO) [hereinafter Resnick and Pritchard Interview] (noting that many factors made processing MJ difficult during OIF, including sometimes unreliable communication and automation equipment, geographically dispersed JAs and commanders, and the fast-moving pace of operations). See also E-mail from MAJ Laura K. Klein, Advanced Operational Law Studies Officer, Center for Law and Military Operations (at the time serving as a JA with the 173d Airborne Brigade in northern Iraq), to LTC Pamela M. Stahl, Director, Center for Law and Military Operations (22 Oct. 2003) (“[Commanders] know and understand the logistical challenges in the field vs. garrison—multiply the [article] 15, chapter, court-martial witness/investigation challenges faced in garrison by 100 in a field environment.”).

<sup>8</sup> See, e.g., Interview with COL Richard O. Hatch, former Staff Judge Advocate, 101st Airborne Division, in Charlottesville, Va. (8 Oct. 03) (notes on file with CLAMO) [hereinafter Hatch Interview] (noting that JAs and commanders were too busy to handle MJ during combat).

<sup>9</sup> See, e.g., CPT Dennis C. Carletta, Trial Counsel, Third Infantry Division, Division Artillery/ Brigade Operational Law Team (BOLT), Operation Iraqi Freedom After Action Review, at 5 (24 Apr. 2003) (on file with CLAMO) (noting that MJ actions resumed during stability and support operations for a “variety” of wartime infractions).

<sup>10</sup> Resnick and Pritchard Interview, *supra* note 7. See also MCM, *supra* note 1, R.C.M. 1001(g) (discussing the “generally accepted” sentencing philosophy of general deterrence).

<sup>11</sup> See generally INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, 2004 OPERATIONAL LAW HANDBOOK, at 169 (2003) [hereinafter 2004 OPLAW HANDBOOK] (discussing military justice in a deployed setting). See also Interview with COL Lyle Cayce, former Staff Judge Advocate, Third Infantry Division, in Charlottesville, Va. (7 Jan. 2004) (videotape on file with CLAMO) [hereinafter 2004 Cayce Interview] (mentioning CLAMO’s series of Lessons Learned Publications for Judge Advocates in which CLAMO discusses MJ lessons learned and noting that deploying JAs regularly refer to these Publications when considering possible jurisdictional alignment options).

<sup>12</sup> See THE CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, LAW AND MILITARY OPERATIONS IN THE BALKANS (1995-1998): LESSONS LEARNED FOR JUDGE ADVOCATES, 170 (1998) (discussing four available court-martial jurisdictional alignment options for deploying units) [hereinafter BALKANS LESSONS LEARNED].

- Leave the “division flag” (GCMCA) behind (a rear detachment general officer assumes command);
- Set up a rear provisional command with GCMCA (requires Secretary of the Army approval); and
- Change nothing and shuttle military justice actions between the home station and the deployed setting.

JAs commonly use the term “jurisdiction” to refer broadly to the closely related concepts of “venue” and “jurisdiction.”<sup>13</sup> The following JA quote clarifies the distinction:

The term *jurisdiction* is sometimes used imprecisely to describe *venue* (which commander should act as a convening authority in a case), not to describe a court-martial’s legal authority to render a binding verdict and sentence [jurisdiction]. Under the UCMJ [Rule for Court-Martial 601(b) (discussion)] any [convening authority] may refer any case to trial. However as a matter of policy JAs should ensure the [convening authority] with administrative control (ADCON) over the accused servicemember exercises primary UCMJ authority.<sup>14</sup>

As detailed below, Army and Marine JAs implemented formal and informal measures to clarify matters of MJ venue/jurisdiction (hereinafter “jurisdiction” generally) during OEF and OIF.<sup>15</sup>

#### ***a. Operation ENDURING FREEDOM***

Initial OEF deployments happened so quickly after 11 September 2001 that there was scarce time to plan jurisdictional alignments.<sup>16</sup> In fact, there was “very little” MJ during the

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<sup>13</sup> Telephone Interview with MAJ Christopher T. Fredrikson, Professor of Criminal Law, The Army Judge Advocate General’s Legal Center and School (12 Apr. 2004).

<sup>14</sup> Major Bradley J. Huestis, *Deployment Justice*, at 9 (2003) (unpublished article on file with CLAMO) (citations omitted) (emphasis added). See also 2004 OPLAW HANDBOOK, *supra* note 11, ch. 10 (discussing MJ in the deployed setting). One OSJA further comments that:

There is no single source of authority for commanders, G1, G3, and OSJA personnel on this topic. Instead, each staff proponent receives different implementing guidance from its own technical chain, often resulting in a unit that is created without the true legal authority to handle disciplinary cases in a punitive manner. To this day, units continue to create what they believe are proper provisional rear commands [in accordance with Army Regulation] 220-5, but they fail to take the necessary steps to ensure the “commanders” of such units possess actual UCMJ authority. [Headquarters, Department of the Army] should publish a single, official source of definitive guidance on this issue.

E-mail from Colonel Kevan F. Jacobson, Staff Judge Advocate, 21st Theater Support Command, subject: Review of the Draft Legal Lessons Learned from Afghanistan and Iraq: Volume I, Major Combat Operations (11 September 2001 – 1 May 2003), para. 1c (14 May 2004) (emphasis added) (on file with CLAMO) [hereinafter Jacobson E-Mail]. See the upcoming Volume II of this Publication for further discussion of this topic.

<sup>15</sup> This chapter focuses on issues of jurisdiction/venue associated with courts-martial. These issues should not be confused with the related issue of authority to impose nonjudicial punishment. Nonjudicial punishment authority is discussed in AR 27-10, *supra* note 4, at para. 3-7.

initial combat operations phase.<sup>17</sup> Following this initial phase, Combined Joint Task Force-180 (CJTF-180), commanded by an Army lieutenant general, was formed in May 2002 as the combined joint operational headquarters in Afghanistan.<sup>18</sup> The CJTF-180 CG requested GCMCA status from the Secretary of Defense.<sup>19</sup> The Secretary approved the request on 8 October 2002, almost six months after it had been submitted. The lesson here appears to be to expect requests for approval of GCMCA status for a joint task force commander to proceed with great deliberation.<sup>20</sup> After the CJTF-180 commanding general (CG) gained GCMCA status, special and summary court-martial jurisdictional alignments were created within the command.<sup>21</sup>

Elements of the 82d Airborne Division (82d) began deploying to Afghanistan in June 2002 after months of pre-deployment planning. In late August 2002, the 82d CG deployed to Afghanistan and brought his MJ flag with him. Prior to deploying, the 82d had considered several jurisdictional alignment options, including seeking GCMCA status for the 82d rear detachment commander at Fort Bragg.<sup>22</sup> The CG did not pursue this option, primarily because the future status of the 82d in Afghanistan was initially uncertain.<sup>23</sup> Based on his Staff Judge Advocate's (SJA's) recommendation, the 82d CG decided to manage all court-martial actions from Afghanistan. Technology made this manageable.<sup>24</sup>

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<sup>16</sup> Telephone Interview with COL Kathryn Stone, former Staff Judge Advocate, 10th Mountain Division (14 Apr. 2004). The 10th Mountain Commander took his MJ flag with him to Afghanistan and, as such, COL Stone remained the SJA for home station (Fort Drum, New York) MJ actions. Coordinating these actions from Uzbekistan (initially) and then Afghanistan with poor communications resources and, at times, a lack of first hand case knowledge, proved challenging. Soldiers often arrived with orders simply assigning them to the "CENTCOM AOR" with no indication of where they would be assigned. Once in theater, COL Stone briefed all arriving unit commanders that soldiers would be assigned to a local GCMCA if a case of minor misconduct occurred or sent back to their home station in instances of more serious misconduct. JAs tried to maintain a UCMJ summary and special courts-martial jurisdictional alignment chart, but this proved impractical. Despite these challenges, MJ operations generally caused few problems during this initial combat phase. This may have been due to the intense focus on combat operations. *See id.*

<sup>17</sup> *See* Interview with COL Kathryn Stone, former Staff Judge Advocate, 10th Mountain Division, in Charlottesville, Va. (7 Oct. 2003) (audiotape on file with CLAMO) [hereinafter Stone Interview].

<sup>18</sup> *See supra*, Section II (describing OEF military operations).

<sup>19</sup> UCMJ, *supra* note 3, art. 22(a) (2002) ("General courts-martial may be convened by . . . [following a list of specifically designated positions and types of commanders] any other commanding officer designated by the Secretary concerned . . ."). Because CJTF-180 is a joint command, the Secretary of the Defense was the proper authority to approve this request.

<sup>20</sup> Interview with COL David L. Hayden, former Staff Judge Advocate, XVIIIth Airborne Corps, in Charlottesville Va. (8 Oct. 2003) (videotape on file with CLAMO) [hereinafter Hayden Interview] (noting that the slow progress of this request was disconcerting).

<sup>21</sup> *Id.*

<sup>22</sup> *See* 82d Mid-Point OEF AAR, *supra* note 5, at 9-10.

<sup>23</sup> The 82d CG at the time was scheduled to change command in October 2002. This also played a significant part in his decision not to create a provisional rear command. *Id.* at 10.

<sup>24</sup> *See* 82d Mid-Point OEF AAR, *supra* note 5.

[T]he SJA assured the GCMCA that technology allowed us to accomplish all the required [MJ] tasks from a distance. . . . Conducting UCMJ related actions for cases being processed at Fort Bragg while deployed proved workable. Nearly all actions were scanned by the OSJA Rear [Bragg] to the OSJA Forward [Afghanistan] for action by the GCMCA. Thus, [r]eferral packets, Chapter 10 [administrative separation in lieu of court-martial] requests, and Pre-Trial Agreements were all scanned and emailed to the SJA, printed off by the SJA, acted upon and signed by the GCMCA, then scanned again and emailed back to the OSJA Rear. The original documents were

Shortly after his arrival in Afghanistan, the 82d CG learned that Combined Task Force 82 (CTF-82) (consisting of the 82d division headquarters and a brigade task force from the 82d) would remain in theater as an Army two-star command subordinate to CJTF-180.<sup>25</sup> At the behest of the 82d CG, his SJA prepared a request to the Secretary of the Army<sup>26</sup> to designate the CTF-82 Commander as a GCMCA. Even though the CG believed it was not likely that CTF-82 would convene a court-martial in the deployed theater, he sought GCMCA status in large part to enable him to appoint investigating officers in special circumstances in accordance with Army Regulation 15-6.<sup>27</sup> When the CTF-82 CG's request for GCMCA status was approved, he promulgated a MJ Policy (at Appendix I-1) creating special and summary court-martial jurisdictional alignments within the command.<sup>28</sup> This document required continuous review and updating because subordinate task forces were comprised of many units from different locations. The language also had to be general enough to account for frequent rotations of subordinate units.<sup>29</sup>

The CTF-82 CG returned briefly to Fort Bragg, and on 8 October 2002, he relinquished command of the 82d (while retaining command of CTF-82).<sup>30</sup> This required staff sections, including the SJA, to provide two separate staffs.<sup>31</sup> In response to this challenge, the 82d Deputy SJA at Fort Bragg served as the SJA to the new 82d CG, while the lieutenant colonel who normally served as the 82d SJA remained in Afghanistan as the CTF-82 SJA.<sup>32</sup> This command

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also mailed back to Fort Bragg. Post Trial Recommendations and Final Actions were emailed in word documents for the SJA or SJA and CG signature, then scanned and emailed back. The one caveat was that for final action in order to meet the requirement to have the Record of Trial available for GCMCA review, the [record of trial] was burned to a CD by the OSJA Rear and mailed to OSJA Forward. We believe the system worked well overall and no case suffered undue delay as a result of the measures taken while deployed.

*Id.* at 10.

<sup>25</sup> *Id.*

<sup>26</sup> Because CTF-82 was an Army command, the Secretary of the Army was the proper authority to approve this request. See *supra* note 19 (discussing Secretarial authority to appoint GCMCAs).

<sup>27</sup> Although any general officer may initiate an investigation under Army Regulation 15-6, the Regulation states:

Only a *general court-martial convening authority* may appoint a formal investigation or board . . . or an informal investigation or board . . . for incidents resulting in property damage of \$1,000,000 or more, the loss or destruction of an Army aircraft or missile, an injury and/or illness resulting in, or likely to result in, permanent total dis[a]bility, or the death of one or more persons.

U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS para. 2-1a(3) (30 Sept. 1996) [hereinafter AR 15-6] (emphasis added).

<sup>28</sup> 82d Mid-Point OEF AAR, *supra* note 5, at 10. See also AR 27-10, *supra* note 28, para. 5-2(a)(2) (“*Contingency Commands*. Commanders exercising GCM authority may establish deployment contingency plans that, when ordered into execution, designate provisional units under [Army Regulation] 220-5, whose commanders are determined by the GCM authority to be empowered under [UCMJ] Article 23(a)(6) to convene SPCM [special courts-martial].”) (emphasis in original).

<sup>29</sup> See 82d Mid-Point OEF AAR, *supra* note 5, at 10.

<sup>30</sup> See *id.*

<sup>31</sup> See *id.*

<sup>32</sup> See *id.*



structure remained in place until the end of major hostilities (and beyond) in Afghanistan on 1 May 2003.<sup>33</sup>

Although neither CJTF-180 nor CTF-82 convened any general or special courts-martial in Afghanistan, they did handle a moderate volume of less serious misconduct, including one summary court-martial.<sup>34</sup> Cases involving more serious misconduct were transferred to the United States for prosecution due, in part, to the austere conditions in Afghanistan.<sup>35</sup> The command structure and jurisdictional alignments in Afghanistan had reached a mature state by the fall of 2002. Meanwhile, U.S. forces gathered in the Persian Gulf.

## ***b. Operation IRAQI FREEDOM***

### **1. Coalition Forces Land Component Command (CFLCC)**

The Coalition Forces Land Component Command (CFLCC) was the combined OIF (and OEF) land component command and was commanded by an Army lieutenant general. To achieve unity of command for OIF ground forces, the CFLCC Commander also commanded the U.S. Third Army and U.S. Army Forces Central Command (ARCENT). CFLCC headquarters was located at Camp Doha, Kuwait, throughout the time period covered by this Publication.

The CFLCC Commander elected to bring his Third Army MJ flag with him to Kuwait.<sup>36</sup> Thus, he was the GCMCA for all subordinate units not organic to a unit commanded by a GMCA or attached to such a unit for MJ jurisdictional purposes. As such, the CFLCC Commander did not act as the GCMCA for large units like the Third Infantry Division and the First Marine Expeditionary Force (each had their own GCMCA in theater), but he acted as the GCMCA for all other subordinate Army units not attached to a unit commanded by a GCMCA. Unlike other large deployed units, CFLCC did not publish a policy creating special and summary court-martial jurisdictional alignments within the deployed command.<sup>37</sup>

Although CFLCC commanded all OIF ground forces, the CFLCC/Third Army permanent legal staff, which had deployed from Fort McPherson, Georgia, was small.<sup>38</sup> Thus, when Reserve Component legal personnel from the 12th Legal Support Organization (12th LSO) arrived in Kuwait in early March 2003, they were quickly integrated into CFLCC legal operations, including MJ.<sup>39</sup> One 12th LSO JA became the chief of military justice for CFLCC.<sup>40</sup>

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<sup>33</sup> *See id.*

<sup>34</sup> At the mid-point of its deployment, the CTF-82 legal staff had processed seventeen summarized nonjudicial punishment (NJP) proceedings, seventy-three Company Grade NJP proceedings, and fifty-seven Field Grade NJP proceedings. *See id.* at 11.

<sup>35</sup> *See id.*

<sup>36</sup> *See* After Action Review Conference, 12th Legal Support Organization and Center for Law and Military Operations, Charlottesville, Va. (12-13 Feb. 2004) (videotapes on file with CLAMO) [hereinafter 12th LSO AAR].

<sup>37</sup> This lack of a jurisdictional memorandum created some confusion for CFLCC JAs. Although a draft jurisdictional alignment memorandum existed, it was never published. Nevertheless, CFLCC JAs used this unpublished memorandum as a guide to resolve special and summary court-martial jurisdictional issues. *Id.*

<sup>38</sup> There are only eight military attorneys permanently assigned to the Office of the Staff Judge Advocate for U.S. Third Army/ ARCENT at Fort McPherson, Georgia.

<sup>39</sup> 12th LSO AAR, *supra* note 36.

Even before the invasion of Iraq, CFLCC had several courts-martial pending, although none were tried within the period covered by this Publication.<sup>41</sup>

CFLCC differed from other major deployed units in that a sizable CFLCC contingent of active duty military personnel were permanently assigned to Camp Doha, Kuwait. Most deployed units planned to return service members suspected of serious misconduct to their home-station for prosecution, but at least for those Soldiers assigned to Camp Doha, Kuwait was their “home station.” Despite the lack of a courtroom or confinement facility in Kuwait,<sup>42</sup> CFLCC held three UCMJ Article 32 pretrial investigations for several Soldiers permanently assigned to Camp Doha.<sup>43</sup> In addition, the CFLCC CG selected general and special courts-martial panels before combat operations began.<sup>44</sup>

Combat operations tested the CFLCC MJ plan. CFLCC JAs coordinated MJ actions with (at times) up to six geographically dispersed brigade command judge advocates (CJAs). In most cases, these CJAs were not experienced MJ practitioners and relied upon CFLCC for advice and guidance.<sup>45</sup> Perhaps the larger lesson is that SJAs should consider committing experienced personnel to MJ operations in the deployed theater, even when experienced legal personnel are in high demand. One CFLCC JA stated, the “focus on criminal law needs to be there, even during war.”<sup>46</sup>

## **2. U.S. Army Europe and V Corps**

The Army’s V Corps is based in Heidelberg, Germany, and commanded by a lieutenant general. V Corps’ advance elements began deploying to Qatar in October 2002, and by late February 2003, virtually the entire V Corps SJA Office had deployed to Kuwait with the Corps.<sup>47</sup> Before deploying, the V Corps CG weighed his jurisdictional alignment options, and he decided to request that the Secretary of the Army create a rear provisional unit and that the commander of that unit be designated a GCMCA. The Secretary of the Army granted both requests, with the provisional unit being designated “V Corps Rear (Provisional)” and commanded by a brigadier general.<sup>48</sup>

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<sup>40</sup> MAJ Sebastien “Phil” Lenski had over four years of previous active duty MJ experience, including duty as a Trial Defense Counsel at Fort Richardson, Alaska, and as the Chief of MJ at Fort Jackson, SC. *See id.*

<sup>41</sup> See the upcoming Volume II of this Publication for a detailed discussion of the courts-martial that were held in Iraq and Kuwait beginning in June 2003.

<sup>42</sup> Both these deficiencies were later rectified. *Id.*

<sup>43</sup> *Id.* (noting that these investigations were held in full chemical protective gear).

<sup>44</sup> The CFLCC Commander selected more than one panel during OIF because the constant rotation of personnel through Kuwait quickly made panel selections obsolete. *Id.*

<sup>45</sup> *Id.* (noting that although most of these CJAs were reserve component JAs, active duty JAs frequently also lacked sufficient MJ experience to act independently).

<sup>46</sup> *See id.*

<sup>47</sup> *See* Interview with LTC Jeffery R. Nance, former Chief of Operational Law, V Corps, in Charlottesville, Va. (8 Oct. 2003) (videotape on file with CLAMO) [hereinafter Nance Interview].

<sup>48</sup> The request and approval memoranda are at Appendices I-2 and I-3. When the Secretary of the Army approved the creation of the V Corps Rear (Provisional) Command with a commander having GCMCA status, he did the same for the 21<sup>st</sup> Theater Support Command, the 1<sup>st</sup> Infantry Division (at the time both of these units were preparing for possible deployment to Turkey), and the Southern European Task Force (SETAF).

Military case law calls attention to the potential jurisdictional pitfalls inherent in handling courts-martial during deployments.<sup>49</sup> With these challenges in mind, V Corps JAs took great care to help convening authorities lay a careful processing trail for all pending courts-martial by taking the following measures.

- The V Corps Rear Commander memorialized his assumption of command by formal memorandum (at Appendix I-4);
- U.S. Army Europe and Seventh Army revised the existing U.S. Army Europe (USAREUR) GCMCA area jurisdiction policy to account for the creation of new subordinate provisional units (memorandum included at Appendix I-5);
- The V Corps Rear Commander promulgated a policy aligning special and summary courts-martial jurisdictions within his Command (at Appendix I-6); and
- The V Corps Commander requested, in writing and by individual case name, that the V Corps Rear Commander take jurisdiction of courts-martial at the post-trial phase, and the V Corps Rear Commander similarly memorialized his acceptance of jurisdiction (at Appendices I-7 and I-8).<sup>50</sup>

Although the Secretary of the Army approved the creation of V Corps Rear as a provisional command with GCMCA on 30 January 2003,<sup>51</sup> the V Corps Rear Commander did not immediately take command. During the interim, V Corps courts-martial continued with the panel previously selected by the V Corps Commander.<sup>52</sup> V Corps JAs carefully monitored the status of deployable panel members to ensure the availability of a court-martial panel at all times. The V Corps Commander did not transfer jurisdiction of those cases in which charges had been preferred prior to 21 February 2003, although he later transferred jurisdiction for post-trial matters. This required the V Corps CG to take action on cases while deployed, and reliable communications made this possible.<sup>53</sup> The V Corps Rear Commander subsequently selected a court-martial panel and began referring cases to trial in his own capacity.<sup>54</sup>

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<sup>49</sup> See, e.g., *United States v. Newlove*, No. 20020536 (Army Ct. Crim. App. Aug. 20, 2003). A recitation of the details of the case is not crucial to understanding the holding: a unit commander and a rear provisional commander both with GCMCA status are separate convening authorities and cannot exercise their authority interchangeably.

<sup>50</sup> Note that the V Corps Commander (a lieutenant general) asked the V Corps Rear Commander (a brigadier general) to accept jurisdiction and take action “*as you deem appropriate*” (emphasis added). It would seem advisable to include this language to avoid any appearance of unlawful command influence. See MCM, *supra* note 1, R.C.M. 104 (defining unlawful command influence).

<sup>51</sup> See *supra* note 48 and accompanying text.

<sup>52</sup> See Interview with MAJ Tiernan Dolan, former Senior Trial Counsel, V Corps, in Charlottesville, Va. (22 Jan. 2004) (notes on file with CLAMO) [hereinafter Dolan Interview].

<sup>53</sup> *Id.* (noting that the V Corps CG took actions such as considering requests for administrative separation in lieu of court-martial, expert witness requests, and panel member excusals). See also *supra* note 24 (discussing the use of technology to handle the same challenge between the deployed 82d Airborne CG in Afghanistan and the garrison Staff Judge Advocate at Fort Bragg, North Carolina). See also *infra* note 74 (discussing the use of technology in the Akbar case).

<sup>54</sup> See Dolan Interview, *supra* note 52.

Due to careful forethought and proactive measures, V Corps courts-martial continued with few problems. The most difficult MJ challenge was carefully monitoring rear detachment special and summary court-martial jurisdictional alignments as units deployed. In the words of one V Corps JA, “You need to do it early and often.”<sup>55</sup>

Throughout OIF, the V Corps Rear (Provisional) command handled all general and special courts-martial, but deployed JAs handled less serious misconduct in the deployed theater.<sup>56</sup> Deployed JAs also faced challenges trying to manage jurisdictional alignments. Before combat operations began, deployed V Corps JAs attempted to maintain a jurisdiction book to track alignments, but with the great quantity of attachments and fast-moving events, the task quickly became prohibitively difficult. In the event of a serious incident of misconduct, the V Corps SJA plan was to seek to attach the accused Soldier to the nearest unit commanded by a general court-martial convening authority, if the Soldier was not already attached to or a member of such a unit.<sup>57</sup>

### **3. The First Armored Division**

The Army’s First Armored Division (1AD) is headquartered in Wiesbaden, Germany, and commanded by a major general. Although 1AD did not participate in combat operations before 1 May 2003, the unit received orders to deploy to Iraq well before then. 1AD JAs began deploying to Iraq in late April 2003. 1AD and V Corps Rear JAs worked together to resolve many MJ issues before the division deployed.<sup>58</sup> Unlike some other large Army units in Europe, the 1AD CG decided not to establish a rear provisional unit. Instead, he took advantage of the existing V Corps Rear jurisdictional structure. This proved relatively easy, as 1AD normally falls within the V Corps command structure. The U.S. Army Europe Commander published a memorandum through his SJA (at Appendix I-9) establishing that non-deployed 1AD units and Soldiers would fall under the V Corps Rear jurisdictional alignment structure.<sup>59</sup> The 1AD Commander then used the process described above to request that the V Corps Rear Commander accept jurisdiction of all 1AD cases at the post-trial stage, which the V Corps Rear Commander did.<sup>60</sup> The 1AD Commander kept jurisdiction of cases in which charges had been preferred but transferred cases once they reached the post-trial phase.<sup>61</sup>

1AD deployed during the investigation of two murder cases.<sup>62</sup> After nearly all 1AD JAs had departed, V Corps Rear JAs took responsibility for these two cases and brought them to court-martial with the benefit of pre-trial agreements.<sup>63</sup> Although the defense counsel in both cases asked the government to produce many deployed witnesses, all witness availability issues

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<sup>55</sup> *See id.*

<sup>56</sup> *See* Interview with LTC James J. Diliberti, former V Corps Deputy Staff Judge Advocate, in Charlottesville, Va. (9 Oct. 2003) (audiotape on file with CLAMO).

<sup>57</sup> *See id.*

<sup>58</sup> *See* Dolan Interview, *supra* note 52.

<sup>59</sup> *See id.*

<sup>60</sup> *Id.*

<sup>61</sup> *See* Dolan Interview, *supra* note 52.

<sup>62</sup> *See id.*

<sup>63</sup> *See id.*

were resolved without motion litigation.<sup>64</sup> Nonetheless, JAs must be sensitive to the difficulty involved in producing deployed court-martial witnesses.

#### **4. The Third Infantry Division**

The Army's Third Infantry Division (Mechanized) (3ID) is headquartered at Fort Stewart, Georgia, and commanded by a major general. 3ID's Second Brigade (2BDE) deployed to Kuwait in September 2002, as part of Operation Desert Spring,<sup>65</sup> where it remained until the rest of the Division joined it in Kuwait in January 2003. During Operation Desert Spring, the 2BDE conducted MJ as a deployed special court-martial convening authority (SPCMCA), sending serious cases of misconduct back to Fort Stewart for prosecution. Before deploying to Kuwait, the 3ID CG decided to bring his UCMJ flag with him. Establishing a rear provisional command was not necessary because, at the time OIF planning was occurring, Secretary of the Army General Order #10 (at Appendix I-10) designated the Fort Stewart Installation Commander as a GCMCA. Normally, the 3ID Commander is also the Fort Stewart Installation Commander, and a colonel commands the Fort Stewart Garrison (managing the daily operation of Fort Stewart).<sup>66</sup> When the 3ID CG deployed, he transferred command of the Installation to the Garrison Commander, who immediately became a GCMCA by virtue of General Order #10. The Garrison Commander took action on existing courts-martial in his capacity as the acting Installation Commander until the 3ID Commander returned to Fort Stewart.<sup>67</sup>

When the 3ID reconstituted in Kuwait, the 3ID CG issued a policy memorandum (attached at Appendix I-11) revising the special and summary court-martial jurisdictional alignment for forces in the deployed theater. In garrison, jurisdictional alignment normally followed the five brigade structure of the division, but the revised jurisdictional alignment followed the deployed Brigade Combat Team (BCT) structure.<sup>68</sup> Although the 3ID handled

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<sup>64</sup> *See id.*

<sup>65</sup> *See* GlobalSecurity.org, at [http://www.globalsecurity.org/military/ops/desert\\_spring.htm](http://www.globalsecurity.org/military/ops/desert_spring.htm) (last visited 13 Apr. 2004) (noting that Operation Desert Spring was part of an ongoing operation in Kuwait that provided a forward presence and control and force protection over Army Forces in Kuwait).

<sup>66</sup> *See* E-Mail from MAJ Robert Resnick, Chief of Military Justice, Third Infantry Division, to CPT Daniel Saumur, Deputy Director, Center for Law and Military Operations (27 Jan. 2004) (on file with CLAMO) [hereinafter Resnick 27 Jan. 2004 E-mail]. On a typical large Army installation, the installation commander is a major general. The garrison commander, typically a colonel, is responsible for day-to-day management of the installation and reports to the installation commander.

<sup>67</sup> *See id.*

Our [Fort Stewart] installation commander was a [colonel] who remained [at Fort Stewart] and served as the GCMCA. The [3ID] CG relinquished installation command and took the division [MJ] flag with him. . . . Thus, for the desert, we used the 3ID jurisdiction. Fort Stewart, and the installation commander, was able to proceed on everything without transferring jurisdiction as the [Garrison Commander] was the installation commander and had that authority. When the CG returned and reassumed the installation, he had that jurisdiction, and [the 3ID CG reassumed installation command].

*Id.*

<sup>68</sup> *See* E-mail from MAJ Robert Resnick, Chief of Military Justice, Third Infantry Division, to CPT Daniel Saumur, Deputy Director, Center for Law and Military Operations (21 Jan. 2004).

significant amounts of minor misconduct during the deployment, it did not try any general or special courts-martial in the deployed theater before it redeployed in August of 2003.<sup>69</sup>

### **5. The 101<sup>st</sup> Airborne Division**

The 101st Airborne Division (Air Assault) (101st) is based at Fort Campbell, Kentucky, and commanded by a major general. Before deployment, the 101st CG chose to bring his MJ flag with him to Iraq. As at Fort Stewart, the Fort Campbell Garrison Commander (a colonel) became the acting Installation Commander and acquired GCMCA status by virtue of Secretary of the Army General Order #10.<sup>70</sup> Before deploying, the 101st CG issued a policy designating rear provisional units (at Appendix I-12).<sup>71</sup>

Unlike other large deployed units, the 101st had an extremely serious act of alleged misconduct before the invasion of Iraq. In the early hours of 23 March 2003, grenades were rolled into each of three tents occupied by the leadership of the 1st Brigade. In addition, two officers were hit by small arms fire as they emerged from their tents. In the attack, two officers were killed,<sup>72</sup> and fifteen others wounded, including the First Brigade Trial Counsel.<sup>73</sup> The alleged perpetrator, Army Sergeant Hasan Akbar, was returned to Fort Campbell for prosecution due, in part, to the lack of a confinement facility in Kuwait and the need to focus on military operations.<sup>74</sup>

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The CG is the only GCMCA for the Division. All Brigade commanders are SPCMCA, subordinate to the CG. Thus, in Garrison, everything worked out with Brigade jurisdiction. Companies were assigned to battalions which were assigned to brigades. In deployment, per [Army doctrine], we have the [brigade combat teams]. The issue there is that battalions from DISCOM [Division Support Command], DIVARTY [Division Artillery], and DIVENG [Division Engineers] get sliced over to the maneuver brigades. This changes the UCMJ alignment for those units from their organic brigade to the BCT commander. The organic brigade commanders would have preferred to keep UCMJ jurisdiction, but with their battalions dispersed, it was not feasible. As to the CG's authority, as the GCMCA and as the commander, this clearly falls under his authority. These are his subordinate units. [The Department of the Army] determined who to slice to the [brigade combat teams].

*Id.*

<sup>69</sup> See Resnick and Pritchard Interview, *supra* note 7.

<sup>70</sup> See *supra* note 66 and accompanying text (explaining the process by which an acting garrison commander acquires GCMCA status in the absence of the installation commander, by virtue of Secretary of the Army General Order #10).

<sup>71</sup> See Interview with COL Richard O. Hatch, former Staff Judge Advocate, 101<sup>st</sup> Airborne Division, in Charlottesville, Va. (20 Feb. 2004) (notes on file with CLAMO) [hereinafter Supplementary Hatch Interview] (noting that the JA proposed jurisdictional alignment scheme served as the framework document for creating the rear detachment unit structure).

<sup>72</sup> Air Force Major Gregory Stone and Army Captain Christopher Seifert.

<sup>73</sup> CPT Andras M. Marton, although seriously injured, is recovering and remained on active duty at the time this Publication was being drafted. See also Supplementary Hatch Interview, *supra* note 71 (noting that a 139th LSO JA, MAJ Roger Nell, deployed to replace CPT Andras M. Marton).

MAJ Nell deployed as the 1st Brigade Trial Counsel, a position he had previously held while on active duty.

<sup>74</sup> The case against SGT Akbar had not gone to trial as of the writing of this Publication. See Hatch Interview, *supra* note 8. CFLCC and V Corps JAs assisted with the Akbar pre-trial confinement process. SGT Akbar was initially confined at the U.S. Army confinement facility at Mannheim, Germany, but when it appeared that the Akbar case might be handled as a capital case, SGT Akbar was transferred the U.S. Army confinement facility at Fort Knox, Kentucky. See Supplementary Hatch Interview, *supra* note 71. See also Memorandum, Majors Nicholas F.

Although the 101st CG made the decision not to try any general or special courts-martial in the deployed theater during the time period covered by this Publication, the 101st did handle some minor to moderately severe misconduct with nonjudicial punishment, summary courts-martial, and administrative reprimands.<sup>75</sup> Special and summary court-martial jurisdiction

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Lancaster & J. “Harper” Cook, Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), for Record, subject: MAJ Lancaster (101st ABN DIV (AASLT) Operational Law) Comments on CLAMO OEF/OIF DRAFT Lessons Learned, para. 5 (18 May 2004) (on file with CLAMO)

The 101<sup>st</sup> Chief of Justice [COJ] and [Deputy Staff Judge Advocate (DSJA)] were made aware of the situation a couple hours later at the [Division Rear Command Post]. By the time the sun came up, the DSJA, LTC Rich Whitaker, and COJ, CPT Lancaster, along with the Senior Defense Counsel, MAJ Dan Brookhart, were at the crime scene. While CPT Lancaster walked the scene with [Army Criminal Investigators], MAJ Brookhart counseled the accused for the first time. Later that night, all three 101<sup>st</sup> JAs traveled to Camp Virginia, Kuwait, where CPT Lancaster and MAJ Brookhart represented the government and defense respectively at the [pretrial confinement] hearing. The hearing was held in a tent at Camp Virginia. That night Akbar was transported to Camp Doha and held in a temporary confinement facility until he could be flown to Mannheim Germany. V Corps JAs were of great assistance by providing a military magistrate, CPT Jeannie Smith, a place to conduct the hearing, and assisting the 101<sup>st</sup> with several [U.S. Army Europe] specific forms required in order to get Akbar into confinement in Mannheim. Much of this coordination was done over the partially reliable [tactical] phone and the rest was accomplished by scanning and email, as there was no fax capability with the 101<sup>st</sup>.

When it came time for the Article 32 [pretrial] Investigation, the 101<sup>st</sup> was faced with a decision on where to hold the hearing. The decision was made to hold the hearing at Fort Knox, close to the confinement facility, and CPT Cook, at the time the rear COJ, was tapped to represent the government. The 101<sup>st</sup> flew a handful of witnesses back to testify live along with many of the victims who were already stateside undergoing treatment for their wounds. The rest of the witnesses testified via [video teleconference (VTC)] from Quarayah West airfield in northern Iraq. The logistics of this hearing were an enormous undertaking. For the VTC portion alone, more than 20 witnesses, scattered throughout northern Iraq, had to be brought to Q-west and provided life support during the hearing. The VTC itself was a device the 326 Engineer battalion deployed with for the purpose of “tele-engineering.” It was basically a VTC in a box. Without this device, it would have been impossible to conduct the [pretrial investigation] the way it was done. Before recognizing the ability to use the Engineers equipment, the possibility of using the Army’s tactical VTC capability was explored and rejected. The signal battalion’s equipment was simply not up to the task, nor was there enough bandwidth to make using their devices feasible. The JAG Corps ought to explore whether we might purchase a few of these systems for use in future operations. Another big technology winner during the [pretrial investigation] was the digital recording capability possessed by our head court reporter and crimlaw NCOIC, SFC Byrnes. She was able to record testimony and then post it digitally to a secure website, where other court-reporters back at Campbell could download it and immediately begin typing. This technology enabled completion of the [pretrial investigation] transcript in days rather than weeks. Division sized units must deploy with a court reporter and their assigned recording technology.

The entire pre-trial process in US v. Akbar is a case-study in how to conduct deployed military justice from a technology standpoint, and our experience echoes that of every other deployed unit in that scanning and emailing capability was absolutely essential. Without the ability to scan and email documents, military justice would revert back to stone tablets and chisels in a deployed environment.

*Id.*

<sup>75</sup> See Hatch Interview, *supra* note 8.

followed the functional deployed brigade structure, and the CG selected deployed general and special courts-martial panels in late April 2003.<sup>76</sup>

## **6. Marine Corps Units**

Due to their expeditionary mission and structure, deployed Marine units took a different approach to GCM jurisdictional alignment than did the Army units described above. The experience of Task Force Tarawa (TF Tarawa) is illustrative. TF Tarawa was formed specifically for the deployment to Iraq and consisted of the 2nd Marine Expeditionary Brigade (2d MEB) headquarters and attached units. A Marine brigadier general commanded TF Tarawa, which fell under the 1st Marine Expeditionary Force (I MEF) during the deployment to Iraq.<sup>77</sup> A MEF is roughly equivalent to an Army Corps and is commanded by a major general.<sup>78</sup> The TF Tarawa and I MEF<sup>79</sup> Commanders were statutory<sup>80</sup> GCMCAs, and both brought their UCMJ flags to Iraq.<sup>81</sup> During peacetime, the 2nd MEB is a notional headquarters unit embedded within the 2nd MEF (II MEF) at Camp Lejeune, North Carolina. In Iraq, the 2nd MEB/TF Tarawa took command of attached elements of the 2nd Marine Aircraft Wing (II MAW) and 2nd Fleet Service Support Group (2d FSSG). Both the II MAW and the 2d FSSG are normally part of II MEF, and their Commanding Generals have statutory GCMCA status. Nevertheless, by the TF Tarawa Operational Plan Legal Annex, all Marines attached to TF Tarawa fell under the GCM convening authority of the TF Tarawa CG.<sup>82</sup> The TF Tarawa CG promulgated a policy providing that subordinate commanders retained special and summary court-martial convening authority over the Marines under their operational control.

The Marines were able to avoid the home station GCM jurisdictional alignment challenges Army units encountered because nearly all Marine Corps installations with large deployable units have a non-deployable installation commander (normally a major general) with GCMCA status. This eliminates the need to create a rear provisional command or have a garrison commander assume command as an acting installation commander. Due to the expeditionary nature of the Marine Corps, Marine JAs are comfortable dealing with the jurisdictional implications of deployments and complicated task organizations. GCMCA jurisdiction generally follows the functional arrangement described above, and potential

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<sup>76</sup> See *id.* (noting that although the 101st CG did not want to convene a special or general court-martial in theater, he took the time to pick SPCM and GCM panels, at the urging of his SJA, to ensure panels were available in case they were needed).

<sup>77</sup> Transcript of After Action Review Conference, Office of the Staff Judge Advocate, Task Force Tarawa, and the Center for Law and Military Operations, Camp Lejeune, N.C., at 5 (2-3 Oct. 2003) (on file with CLAMO) [hereinafter TF Tarawa AAR Transcript].

<sup>78</sup> Telephone Interview with LtCol William Perez, USMC, former Staff Judge Advocate, Task Force Tarawa (28 Jan. 2004) [hereinafter Perez Interview].

<sup>79</sup> Although a MEF is normally commanded by a major general, I MEF was commanded by a lieutenant general during OIF. *Id.*

<sup>80</sup> See UCMJ, *supra* note 3, art. 22(a)(5) (2002) (“General courts-martial may be convened by— . . . (5) the commanding officer of . . . an Army Group, an Army, an Army Corps, a division, a separate brigade, or a corresponding unit of the Army or Marine Corps.”) (emphasis added).

<sup>81</sup> See Perez Interview, *supra* note 78.

<sup>82</sup> Several months before deploying, the II MAW, II FSSG, and 2d MEB Staff Judge Advocates met to discuss and settle these jurisdictional issues informally. See *id.*



jurisdictional conflicts are almost always resolved informally.<sup>83</sup> TF Tarawa's experience followed standard Marine practice and functioned well.<sup>84</sup>

Although the TF Tarawa deployment involved very little misconduct,<sup>85</sup> commanders administered some nonjudicial punishment aboard ship, in Kuwait, and in Iraq.<sup>86</sup> In one more serious case, a male Marine was suspected of sexually assaulting a female Marine in Kuwait. The male marine was returned to Camp Lejeune for trial. By the time charges were preferred against the suspected Marine, his CG had returned to Camp Lejeune and was able to take action as the GCMCA.<sup>87</sup>

## ***2. Be Prepared to Address Military Justice at the Home Station.***

During a deployment, the command's attention is focused on operations in the forward setting, but past experience demonstrates that JAs must make preparations to handle military justice at the deploying unit's home station.<sup>88</sup> As discussed above, these preparations should include clarifying command relationships for non-deployed personnel, establishing rear detachment jurisdictional alignments, and (as necessary) transferring active court-martial cases to a rear detachment GCMCA.

Deployed units were able to focus on the combat mission, while successfully handling MJ in the rear, by taking the following additional measures.

- Developing habitual relationships with reserve component legal personnel and integrating them into deployment planning;
- Leaving experienced active duty legal personnel at the home station; and
- Taking measures to dispose of ongoing MJ matters before deployment.

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<sup>83</sup> Telephone Interview with Maj Ernest H. Harper, USMC, Professor of Criminal Law, Judge Advocate General's Legal Center and School (28 Jan. 2004).

<sup>84</sup> See Perez Interview, *supra* note 78.

<sup>85</sup> See *id.*

<sup>86</sup> See *id.* See also CENTER FOR LAW AND MILITARY OPERATIONS, DEPLOYED MARINE AIR-GROUND TASK FORCE (MAGTF) JUDGE ADVOCATE HANDBOOK at 89 (2002) (discussing nonjudicial punishment administration while aboard ship) [hereinafter MAGTF HANDBOOK]. A senior Marine JA deployed to OIF adds:

Because Marines and Sailors do have the right to refuse [nonjudicial punishment] even in a combat environment (despite not having the right to refuse when attached to or embarked in a vessel), the [Marine Logistics Command] determined that the presence of an [Legal Services Support Section] capable of trying court-martial cases in the field was essential to preventing the potential wholesale refusal of nonjudicial punishment.

E-mail from LtCol Bruce Landrum, USMC, to LTC Pamela Stahl, Director, CLAMO (7 May 2004) (on file with CLAMO). Lt Col Landrum stated that a Marine Legal Services Support Section (LSSS), deployed to Kuwait during OIF with the 1st FSSG (part of I MEF). Elements of another LSSS deployed as part of the Marine Logistics Command, also in Kuwait. *Id.*

<sup>87</sup> See Perez Interview, *supra* note 78.

<sup>88</sup> See, e.g., BALKANS LESSONS LEARNED, *supra* note 12, at 178 (discussing the challenges associated with handling rear detachment military justice actions).

Most units deployed the great majority of their active duty legal personnel.<sup>89</sup> In many cases, reserve component<sup>90</sup> personnel stepped in to help handle legal affairs at the home station. For example, members of the 174th Legal Support Organization (LSO) helped manage legal affairs at Fort Stewart during 3ID's deployment to Iraq.<sup>91</sup> Likewise, the 139th LSO and 3397th Garrison Support Unit (GSU) managed legal affairs at Fort Campbell during the 101st's absence.<sup>92</sup> The 174th and 139th LSOs and the 3397th GSU were successful, in large measure, because they had habitual relationships with the Fort Stewart and Fort Campbell SJA Offices.<sup>93</sup> In addition, they were activated in time to work with deploying active duty JAs before the 3ID and 101st deployed.<sup>94</sup> Although some of the 174th LSO JAs were experienced civilian criminal law advocates, they were sometimes unfamiliar with the details of court-martial practice and with the details of ongoing cases.<sup>95</sup> They successfully overcame these challenges by working with active duty JAs to discuss cases and court-martial practice.<sup>96</sup>

Some SJAs also chose to leave experienced active duty JAs at the home station to manage MJ matters. For instance, the V Corps Senior Trial Counsel remained in Germany and managed MJ matters for the V Corps Rear Command.<sup>97</sup> Similarly, the 3ID Deputy Staff Judge Advocate did not deploy to Iraq. He stayed at Fort Stewart to help manage legal affairs at Fort Stewart, including MJ.<sup>98</sup> In addition, an experienced active duty trial counsel remained at Fort Campbell to manage MJ affairs.<sup>99</sup> The lesson appears to be that units should leave at least one experienced active duty MJ practitioner<sup>100</sup> at the home station to manage MJ. As mentioned above, 101st JAs helped prepared the Akbar case for trial while the division was deployed, and V Corps JAs tried two murder cases while the Corps was deployed.<sup>101</sup> The gravity of these cases certainly called for handling by experienced MJ practitioners.

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<sup>89</sup> See Dolan Interview, *supra* note 52; Hatch Interview, *supra* note 8; Transcript of After Action Review Conference, Office of the Staff Judge Advocate, 3d Infantry Division, and Center for Law and Military Operations, Fort Stewart, Georgia, at 1 (18-19 Nov. 2003) [hereinafter 3ID AAR Transcript].

<sup>90</sup> The term "Reserve Component" is used in this Publication to refer both to National Guard and Army Reserve Soldiers.

<sup>91</sup> It is important to note that many Reserve Component legal personnel also deployed to Iraq and Afghanistan, often for long periods of time, and were involved in all aspects of military operations. See, e.g., LTC Kirk G. Warner, 12th Legal Support Organization Senior Deployed Judge Advocate, The 12th LSO Team in Support of Operation Iraqi Freedom (7 February to 12 October 2003) (2003) (on file with CLAMO).

<sup>92</sup> See Supplementary Hatch Interview, *supra* note 71.

<sup>93</sup> See *id.*; 3ID AAR Transcript, *supra* note 89, at 5.

<sup>94</sup> See 3ID AAR Transcript, *supra* note 89, at 5; Supplementary Hatch Interview, *supra* note 71.

<sup>95</sup> See 3ID AAR Transcript, *supra* note 89, at 5.

<sup>96</sup> See *id.*

<sup>97</sup> See *supra* text accompanying note 52.

<sup>98</sup> See 3ID AAR Transcript, *supra* note 89, at 1.

<sup>99</sup> See Supplementary Hatch Interview, *supra* note 71. CPT J. "Harper" Cook remained in charge of MJ at Ft. Campbell. Although several of the reserve component trial counsels actually outranked him, the deployed 101st SJA was comfortable with this arrangement, and it generally worked well. See *id.*

<sup>100</sup> Reserve Component JAs and legal personnel typically do not have experience conducting courts-martial unless they have been on active duty. This generally proved true during OIF. See 12th LSO AAR, *supra* note 36.

<sup>101</sup> See *supra*, note 72 and accompanying text (describing the circumstances of the Akbar case).

Before a deployment, mission constraints often factor more heavily into case disposition than they otherwise might.<sup>102</sup> Commanders resolve MJ matters on a case-by-case basis, weighing many factors, including the merits and equities of the case, the SJA's advice, and mission requirements. As described above, witness availability and deployment of active legal personnel can make trying courts-martial challenging. In addition, non-deployed personnel pending court-martial or administrative separation are often disciplinary challenges.<sup>103</sup> Commanders preparing to deploy were able to minimize these potential distractions by resolving many cases through pre-trial agreements, requests for discharge in lieu of court-martial, and administrative separations.<sup>104</sup> Commanders and SJAs should be careful not to hold wholesale MJ "fire sales," but taking reasonable measures to expeditiously resolve cases proved advisable during OEF and OIF.<sup>105</sup>

### ***3. Be Prepared to Draft and Implement Effective General Orders Number One.***

General orders (GOs) proscribe specified conduct by members of a command.<sup>106</sup> In past operations, general officers in command have issued a "GO #1" to prohibit certain conduct, such as the consumption of alcohol and the taking of war trophies.<sup>107</sup> Although GOs #1 will vary slightly from operation to operation, JAs need not start from scratch in drafting them. Examples from past operations may provide useful templates.<sup>108</sup>

<sup>102</sup> *Id.* See also Dolan Interview, *supra* note 52.

<sup>103</sup> See, e.g., Supplementary Hatch Interview, *supra* note 71 ("Do not underestimate the amount of work these Soldiers will cause to rear detachment [officers-in-charge] and stay-behind trial counsels."). Many of these Soldiers committed further misconduct while the division was deployed. *Id.*

<sup>104</sup> V Corps JAs approached defense counsel in many cases and explicitly stated that they were willing to dispose of cases more generously (to the accused) than they otherwise might. In some instances, defense counsel may have mistaken these overtures as the government's unwillingness or inability to prove the case rather than a straightforward desire to dispose of the case expeditiously. Defense counsel should evaluate the merits of a case with great care before advising their client concerning his or her best course of action. See Dolan Interview, *supra* note 52. The 101st CG wanted to try to separate Soldiers with disciplinary problems, as appropriate, to fill "slots" with other personnel. See Supplementary Hatch Interview, *supra* note 71.

<sup>105</sup> See Supplementary Hatch Interview, *supra* note 71.

<sup>106</sup> UCMJ, *supra* note 3, art. 92c(1)(a) (2002) ("General orders or regulations are those orders or regulations generally applicable to an armed force which are properly published by the President or the Secretary of Defense, of Transportation, or of a military department, and those orders or regulations generally applicable to the command of the officer issuing them throughout the command or by a particular subdivision thereof which are issued by (i) an officer having general court-martial jurisdiction; (ii) a general or flag officer in command; or (iii) a commander superior to (i) or (ii).").

<sup>107</sup> See, e.g., BALKANS LESSONS LEARNED, *supra* note 12, at 175 (discussing the importance of "artfully and thoughtfully" drafting a general order number one).

<sup>108</sup> One OSJA added the following comments with respect to drafting General Orders #1.

GOs #1 should also be tailored to the particular geographic location and cultural environment in which the unit will operate. Coordination with G5, and US forces personnel permanently stationed in that location (e.g., Defense Attaches, MILREPs, FAOs, etc.) are critical prior to issuing a GO #1. A good example of this was the USAREUR GO #1, used for US Army personnel deployed to Turkey (a USEUCOM AOR) in support of OIF. The USAREUR GO #1 . . . mirrored the CENTCOM/CFLCC GO #1 re: the prohibition on "pornographic" materials, and contained two major exceptions to the prohibition: "AFRTS broadcasts and commercial videotapes distributed and/or displayed through AAFES or MWR outlets located within the USEUCOM AOR," and "within the areas exclusively under the jurisdiction of the United States." The intent of the prohibition seemed to be to avoid offending local national personnel, presumably

The difficulty with GOs #1 comes often not in their drafting but in their implementation. Although prosecution for violation of a GO does not require specific knowledge of the existence of the order,<sup>109</sup> at least one court has held that as a matter of fairness, military members should not be punished for violating a GO of which they had no knowledge.<sup>110</sup> Thus, it is incumbent upon Commanders and JAs to educate members of the command (including, if applicable,

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because Islam disdains such displays of flesh and debauchery. Yet such items were freely sold to permanent party personnel without incident, and the modern Turkish culture is much more accepting of these items than other [Islamic] nations. The fact that pornography is undefined in the GO aside, this language also created issues for enforcing the prohibition when soldiers purchased magazines and/or DVDs at the AAFES BX on Incirlik AB (apparently prohibited if deemed to be “pornography,” since they are neither broadcasts nor commercial videotapes). Incirlik AB is a Turkish airbase, not US, on which US forces are stationed. Therefore, it is not under the exclusive jurisdiction of the United States.

Jacobson e-mail, *supra* note 14, para. 1d.

<sup>109</sup> See UCMJ, *supra* note 3, art. 92(3)b(1) (2002).

<sup>110</sup> See *United States v. Charles Anthony Bright*, 20 M.J. 661, 663 (N.M.C.M.R. 1985) (“It is abundantly clear that the courts are not willing to give punitive effect to general orders (the knowledge of which is conclusively presumed) when there is inadequate notice of such effect, . . . *fundamental fairness* dictates that the intended punitive effect be nullified.”) (emphasis added).

civilians accompanying the force) about GO #1.<sup>111</sup> The solution to this challenge is to comprehensively brief members of the command during pre-deployment preparations.<sup>112</sup>

Although U.S. Central Command published GO #1A (at Appendix G-1),<sup>113</sup> many subordinate general officers in command chose to issue their own supplemental GO #1.<sup>114</sup> JAs preparing for future contingencies should refer to these and other general orders from previous operations.<sup>115</sup>

#### ***4. Be Prepared to Handle Military Justice in a Joint Environment.***

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<sup>111</sup> See, e.g., BALKANS LESSONS LEARNED, *supra* note 12, at 177 (“[J]udge advocates and commanders must continually educate Soldiers on the provisions of GO #1.”). Issues may also arise concerning the applicability to civilians accompanying the force. See 101st Airborne Division (Air Assault), Operation Iraqi Freedom Lessons Learned, at 14 (2003).

##### 4. ISSUE

Civilians crossing the berm into Iraq were required to sign statements acknowledging that [CENTCOM] General Order #1 applied to them.

##### RECOMMENDATION

Do better research prior to deployment into whether or not the language in the waiver existed already in the contracts of civilians. If higher headquarters still feel compelled to reinforce particular areas of a civilian’s employment contract, then some type of training should be scheduled to emphasize those areas. As an absolute last resort, signing waivers should occur before deployment, not hours before [crossing the line of departure (LD)].

##### DISCUSSION

Hours before the scheduled LD of the Division, higher headquarters circulated a document for the signature of every civilian that would travel across the berm into Iraq. These signatures were required prior to allowing civilians across the border. Higher headquarters gave G1 responsibility for compliance. A frantic several hours ensued where G1 personnel attempted to identify 1) what civilians we had with us, 2) where they were currently located, 3) whether or not each individual civilian would travel into Iraq, and 4) how to get the document to the civilian for a signature. The requirement, which was completely unforeseen by anyone on division staff, surfaced so late as to serve as a serious distractor from operational planning and preparation and to offend many, if not most, of the civilian employees who already understood the “rules” under which they were serving their country.

*Id.* at 14. See also Hatch Interview, *supra* note 8.

<sup>112</sup> See Hatch Interview, *supra* note 8; AR 27-100, *supra* note 1, para. 3-5 (noting the importance of predeployment briefings concerning GO #1).

<sup>113</sup> See Headquarters, United States Central Command, Gen. Order No. 1A (19 Dec. 2000) (on file with CLAMO) (hereinafter CENTCOM GO-1A). CENTCOM GO-1A predated both OEF and OIF. Several amendments have also been published and are on file with CLAMO.

<sup>114</sup> Two examples are included at Appendices I-13 and I-14. Subordinate general officers in command may wish to publish their own GOs to prohibit conduct not prohibited by GOs issued by higher military authority, or merely to reemphasize preexisting GOs with their personal authority.

<sup>115</sup> For examples of General Orders #1 from past operations other than OEF or OIF, see the 2004 OPLAW HANDBOOK *supra*, note 11, ch. 10. See also CENTER FOR LAW AND MILITARY OPERATIONS, DEPLOYED JUDGE ADVOCATE RESOURCE LIBRARY, FIFTH EDITION, Disc One (2003). This is a two-CD set of documents and resources useful to deploying JAs. See *supra*, Section J for an explanation of how to order the CLAMO CD set.

Due to the increasingly joint nature of military operations,<sup>116</sup> JAs must be ready to advise commanders on the implications of handling MJ in a joint environment. JAs in Iraq and Afghanistan faced this challenge. This lesson has perhaps its greatest application in the special operations community. The experience of the Army's 5th Special Forces Group (5th Group) in Afghanistan and Iraq illustrates the lesson.<sup>117</sup> During OEF and OIF, the 5th Group formed the core of a joint special operations task force (JSOTF), incorporating members of other military services, and commanded by an Army colonel (the 5th Group Commander).

Prior to deployment, the JSOTF Commander, with the advice of his Command Judge Advocate (CJA), decided to keep MJ along service command lines.<sup>118</sup> In other words, the JSOTF/5th Group Commander would handle MJ matters for Army personnel, and cases involving members of other services would be turned over to the appropriate service for handling. Interestingly, the 5th Group Commander requested special court-martial convening authority from United States Army Special Operations Command (USASOC), but the request was denied.<sup>119</sup>

The greatest number of non-Army members of the JSOTFs were Air Force (AF) personnel. The JSOTF Commander was well-positioned to handle potential misconduct by AF members in Iraq because one of the JAs attached to the JSOTF in Iraq was an Air Force JA.<sup>120</sup> Before deploying, the JSOTF CJA and the AF JA mentioned above made detailed plans to handle potential investigations and misconduct involving AF personnel. The 5th Group CJA made similar plans with appropriate Navy JAs. Thus, he was ready to handle misconduct by any JSOTF military personnel. As it turned out, there was minimal misconduct during OEF and OIF.<sup>121</sup>

The 5th Group Legal Noncommissioned Officer brought copies of the UCMJ and service-specific MJ regulations with him to Afghanistan and Iraq.<sup>122</sup> This highlights the larger lesson that JAs need not make themselves experts in the MJ regulations of other services. Rather, they need only know where to look for guidance and deconfliction.<sup>123</sup> JAs should carefully compare the regulations of one service with those of another. A commander offering

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<sup>116</sup> See JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS (12 Apr. 2001) (as amended 17 Dec. 2003), available at <http://www.dtic.mil/doctrine/jel/doddict/data/d/index.html> [hereinafter DO D DICTIONARY] (defining the term "joint" as "activities, operations, organizations, etc., in which elements of two or more Military Departments participate"). In his Arrival Message to the Army upon his swearing in as the 35th Army Chief of Staff, GEN Peter J. Schoomaker reflected upon how the Army has changed in the last twenty years. He stated (drawing upon his involvement in the failed attempt to rescue U.S. Hostages in Iran in 1980), "We did not know that we were at the start of an unprecedented movement to *jointness* in every aspect of our military culture . . . a movement that must continue." See GEN Peter J. Schoomaker, Arrival Message (1 Aug. 2003), at <http://www.army.mil/leaders/csa/messages/1aug03.htm> (emphasis added).

<sup>117</sup> The 5th Group deployed for OEF, returned to its home station at Fort Campbell, Kentucky, and deployed again for OIF. See Interview with MAJ Dean L. Whitford and SSG Jerome D. Klein, Command Judge Advocate and Legal NCOIC, 5th Special Forces Group, in Charlottesville, Va. (19 Aug. 2003) (videotape on file with CLAMO) [hereinafter 5th Group AAR].

<sup>118</sup> See *id.*

<sup>119</sup> See *id.*

<sup>120</sup> See *id.*

<sup>121</sup> See *id.*

<sup>122</sup> See *id.*

<sup>123</sup> See AR 27-10, *supra* note 4; AFI 51-201, *supra* note 4; JAGMAN, *supra* note 4.

nonjudicial punishment generally must follow the applicable service regulation of the servicemember being offered nonjudicial punishment.<sup>124</sup> For example, if an Army Commander wishes to offer nonjudicial punishment to an AF member, the servicing JA should reference both the AF and Army regulations, but the commander must follow the AF nonjudicial punishment regulation.<sup>125</sup> Those seeking a more detailed understanding of joint MJ issues may find relevant scholarship informative.<sup>126</sup>

### ***5. Summary Courts-Martial Offer Deployed Commanders an Effective and Flexible Disciplinary Tool.***

Commanders did not convene any special or general courts-martial in Iraq or Afghanistan during the period covered by this Publication.<sup>127</sup> However, they used other available disciplinary measures—administrative reprimands, nonjudicial punishment, and summary courts-martial—to address less serious misconduct. Common misconduct included violations of GO #1 (especially alcohol consumption), violations of prohibitions against sexual activity (“no-sex orders”), military offenses (especially disrespect), and drug offenses (to a limited extent).<sup>128</sup> Deployed units found that summary courts often proved the best way to handle minor misconduct.

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<sup>124</sup> AR 27-10, *supra* note 4, states:

An Army commander is not prohibited from imposing nonjudicial punishment on a military member of his or her command solely because the member is a member of another armed [S]ervice. . . . An Army Commander may impose punishment upon a member of another Service only under the circumstances, and according to the procedures, prescribed by the member’s parent service.

*Id.* para. 3-8c. AFI 51-202, *supra* note 4, states:

The multiservice commander, when imposing [nonjudicial punishment] on an Air Force member, follows this instruction, including the guidance applicable to joint force commanders . . . Before initiating any [nonjudicial punishment] action, ensure the multiservice commander has command authority over the member involved, the appellate authority is identified, and administrative processing issues are understood.

*Id.* para. 2.6 (citations omitted). *See also* JAGMAN, *supra* note 4:

[A] multiservice commander or officer in charge to whose staff, command or unit members of the naval service are assigned may impose nonjudicial punishment upon such individuals. A multiservice commander, alternatively, may designate one or more naval units, and shall for each such naval unit designate a commissioned officer of the naval service as commanding officer for the administration of discipline under article 15, UCMJ.

*Id.* para. 0106d.

<sup>125</sup> *See supra*, note 124.

<sup>126</sup> *See, e.g.*, Major Mark W. Holzer, *Purple Haze: Military Justice in Support of Joint Operations*, ARMY LAW., 1 (July 2002); Captain William H. Walsh & Captain Thomas A. Dukes, Jr., *Note & Comment: The Joint Commander as Convening Authority: Analysis of a Test Case*, 46 A.F.L. REV. 195 (1999).

<sup>127</sup> *See, e.g.*, Hatch Interview, *supra* note 8.

<sup>128</sup> *See* Hayden Interview, *supra* note 20; 3ID AAR Transcript, *supra* note 89, at 147-48 (see *infra* Section G.3 for a discussion of “no-sex” orders). Almost all units noted that misconduct was very uncommon, especially during the combat phase of operations. *See, e.g.*, Hatch Interview, *supra* note 8.

“The function of a summary court-martial is to promptly adjudicate minor offenses<sup>129</sup> under a simple procedure.”<sup>130</sup> UCMJ Article 24 details who may convene a summary court-martial,<sup>131</sup> and Rule for Court-Martial 1301<sup>132</sup> gives further guidance. Implementing service regulations also apply.<sup>133</sup>

Summary courts offer a streamlined procedure and a flexible range of punishments. Most significantly, the accused at a summary court-martial does not have the right to counsel, although representation by military or civilian defense counsel is not prohibited.<sup>134</sup> In addition, the summary court officer need not be a military judge or JA.<sup>135</sup> This generally relaxed due process is balanced by the accused’s right to decline trial by summary court-martial.<sup>136</sup> The potential for injustice is also moderated by relatively light authorized punishments.<sup>137</sup>

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<sup>129</sup> The MCM defines minor misconduct.

Whether an offense is minor depends on several factors: the nature of the offense and the circumstances surrounding its commission; the offender’s age, rank, duty assignment, record and experience; and the maximum sentence imposable for the offense if tried by general court-martial. Ordinarily, a minor offense is an offense which the maximum sentence imposable would not include a dishonorable discharge or confinement for longer than 1 year if tried by a general court-martial. The decision whether an offense is “minor” is [ultimately] a matter of discretion for the commander.

MCM, *supra* note 1, part V, para. 1(e).

<sup>130</sup> MCM, *supra* note 1, R.C.M. 1103(b).

<sup>131</sup> The UCMJ provides:

[A] summary court-martial may be convened by— (1) any person who may convene a general or special court-martial; (2) the commanding officer of a detached company or other detachment of the Army; (3) the commanding officer of a detached squadron or other detachment of the Air Force; or (4) the commanding officer or officer in charge of any other command when empowered by the Secretary concerned.

UCMJ, *supra* note 3, art. 24(a) (2000).

<sup>132</sup> See MCM, *supra* note 1, R.C.M. 1301 (concerning Summary Courts-Martial).

<sup>133</sup> See *supra* note 4 (citing the implementing MJ regulation for each military service); see also U.S. DEP’T OF ARMY, PAM. 27-7, GUIDE FOR SUMMARY COURT-MARTIAL TRIAL PROCEDURE (15 Jun. 1985); Faculty, The Judge Advocate General’s School, *Summary Court-Martial, Using the Right Tool for the Job*, ARMY LAW., 52 (July 2002).

<sup>134</sup> MCM, *supra* note 1, part V, para. (e) (and discussion). *But see*, AR 27-10, *supra* note 4, para. 5-22(b) (“*except when military exigencies require otherwise*, the [summary court-martial officer] will grant the accused an opportunity to consult with qualified defense counsel before the trial date . . .”) (emphasis added). MJ practitioners should note the distinction between the opportunity to consult with defense counsel before trial and the right to be represented by defense counsel at trial. Note also that AR 27-10 does not state that consultation with defense counsel need be in person. Consultation by telephone would seem to satisfy the rule.

<sup>135</sup> MCM, *supra* note 1, part V, para. (a) (“A summary court-martial is composed of one commissioned officer on active duty.”).

<sup>136</sup> MCM, *supra* note 1, R.C.M. 1303.

<sup>137</sup> *Id.* at R.C.M. 1301, para. (d) (and discussion). Under this rule, confinement cannot exceed thirty days, or hard labor without confinement cannot exceed forty-five days. Other permissible punishments include restriction to specified limits for up to 60 days, reduction to the lowest enlisted grade, and forfeiture of two-thirds of one month’s pay. For Soldiers in the rank of E-5 and above, the sentence may not include confinement or hard labor without confinement, and reduction may only be to the next lowest grade. *Id.*



The 3ID used summary courts extensively in Iraq.<sup>138</sup> Given the lack of a confinement facility in theater, executing sentences to confinement proved impractical.<sup>139</sup> Confinement would have required two military escorts to bring the Soldier to the Army Confinement Facility in Mannheim, Germany, and to reverse the process at the end of the period of confinement. Commanders did not want to “reward” Soldiers for their misconduct with a “free trip” to Germany.<sup>140</sup> One remedy to this paradox was approving sentences of hard labor without confinement.<sup>141</sup> This allowed punishment to be executed in theater and acted to deter other misconduct because Soldiers saw the potentially unpleasant results.<sup>142</sup>

Hard labor without confinement proved an especially effective punishment for several reasons. The authorized punishment of extra duty as a result of nonjudicial punishment might appear equally appropriate. “Extra duties [as a result of nonjudicial punishment] involve the performance of those duties in addition to those normally assigned.”<sup>143</sup> Although the definition of hard labor without confinement is similar,<sup>144</sup> in practice, 3ID JAs viewed the latter as qualitatively different (worse) than the former and gave those Soldiers sentenced to hard labor without confinement the most unpleasant tasks to perform.<sup>145</sup> It is important to note that everyone in Iraq was working extremely long hours, and someone had to perform those unpleasant jobs.<sup>146</sup> Other authorized summary court punishments were situationally inappropriate. Restriction to specified limits had little meaning when everyone was restricted to base camps, and monetary forfeitures would likely only hurt family members. At least for the 3ID, summary courts were the tool of choice to rectify common misconduct such as disrespect and malingering. Performing unpleasant tasks in the desert had a strong tendency to deter further misconduct.<sup>147</sup>

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<sup>138</sup> See Resnick and Pritchard Interview, *supra* note 7.

<sup>139</sup> There is now a confinement facility at Camp Arifjan, Kuwait, capable of separately housing officer and enlisted pre-trial and post-trial confinees of both sexes for up to six months.

<sup>140</sup> See Resnick and Pritchard Interview, *supra*, note 7.

<sup>141</sup> See *id.*; see also MCM, *supra* note 1, R.C.M. 1003(b)(6) (and discussion) (defining hard labor without confinement and providing rules for calculating the equivalency of confinement and hard labor without confinement).

<sup>142</sup> See Resnick and Pritchard Interview, *supra* note 7.

<sup>143</sup> MCM, *supra*, note 1, part V, para. 5c(6).

<sup>144</sup> See *id.* R.C.M. 1003(b)(6) (discussion) (describing hard labor without confinement as “performed in addition to other regular duties.”). With the 3ID, common punishments following a summary court sentence of hard labor without confinement included filling sandbags and cleaning latrines. See Resnick and Pritchard Interview, *supra* note 7.

<sup>145</sup> See Resnick and Pritchard Interview, *supra* note 7. *But see* 12th LSO AAR, *supra* note 36 (explaining why the 12th LSO did not like summary-courts, as summarized below). JAs should work with commanders responsible for the execution of punishments of hard labor without confinement to ensure that punishments are carried out legally. The punishment certainly must not be of a nature to cause physical harm or the undue risk thereof. This was an important concern in the hot desert conditions of Iraq. For this reason, some JAs disfavored hard labor without confinement (and therefore summary-courts) because Soldiers were only able to work outside for about ten minutes of each daylight hour. In addition, other Soldiers were taken away from their tasks to oversee Soldiers performing hard labor. See 12th LSO AAR, *supra* note 36.

<sup>146</sup> See 12th LSO AAR, *supra* note 36.

<sup>147</sup> See *id.*

## **J. PERSONNEL, TRAINING, AND EQUIPMENT/RESOURCES**

Deployments to both Afghanistan and Iraq in support of Operation ENDURING FREEDOM (OEF) and Operation IRAQI FREEDOM (OIF) introduced new lessons learned in the field of personnel, training, and equipment. For the first time since Operations DESERT SHIELD and STORM, both small contingency unit legal teams and entire unit Offices of the Staff Judge Advocate (OSJA) deployed as a whole. Deployments to both OIF and OEF revealed that the Judge Advocate General's Corps (JAGC) is on the cutting edge of new technologies and that legal personnel are generally well-trained to support their legal mission. These large-scale deployments, however, also exposed holes in the area of equipment authorizations for OSJA assets. Further, the deployments revealed that legal personnel must be highly trained in basic Soldier skills, as the legal mission in today's contemporary operational environment requires legal personnel to traverse the battlefield to accomplish their mission.

### ***1. Personnel***

#### ***a. Ensure that Legal Personnel Have Appropriate Security Clearances Prior to Deployment.***

The daily operations during OEF and OIF required that most legal personnel have at least a Secret security clearance; some personnel must have a Top Secret or higher clearance. Access to the Tactical Operations Center (TOC) and intelligence briefings required the judge advocate (JA) and paralegal in attendance to have a Top Secret/Sensitive Compartmented Information (TS/SCI) clearance.<sup>1</sup> Given the length of time it takes for a background investigation,<sup>2</sup> it is almost impossible to obtain a TS/SCI clearance when met with a short suspense to deploy. Therefore, it is imperative that Staff Judge Advocates (SJAs) quickly identify personnel that need to update or apply for a TS/SCI. The key positions that may require a TS/SCI include the SJA; Deputy SJA; Chief, International and Operational Law; and the Operational Law paralegal. At the very least, these personnel must have an interim TS clearance. An interim clearance can only be obtained, however, after a service member's background investigation has been initiated.<sup>3</sup> Therefore, service members must immediately forward completed forms to

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<sup>1</sup> See, e.g., Interview with Colonel Richard O. Hatch, former Staff Judge Advocate, 101st Airborne Division (Air Assault), in Charlottesville, Va. (8 Oct. 2003) (videotape on file with CLAMO) [hereinafter Hatch Interview]; Transcript of After Action Review Conference, Office of the Staff Judge Advocate, XVIII Airborne Corps, and the Center for Law and Military Operations, Fort Bragg, N.C. (30 Sept. to 1 Oct. 2003) (on file with CLAMO) (comments by Colonel Malinda Dunn, Corps Staff Judge Advocate); After Action Report, Operation Enduring Freedom, Maj Thomas A. Wagoner, USMC, Staff Judge Advocate, 15<sup>th</sup> Marine Expeditionary Unit (Special Operations Capable), at 2, 10 (2002) (on file with CLAMO) [hereinafter Wagoner OEF AAR] (noting that Marine Corps legal clerks need a Secret clearance to do their job, to include assisting with rules of engagement issues).

<sup>2</sup> See, e.g., U.S. DEP'T OF ARMY, REG. 380-67, PERSONNEL SECURITY PROGRAM, para. 2-304 (9 Sept. 1988) (outlining the Army requirements for a background investigation to obtain a Top Secret security clearance).

<sup>3</sup> *Id.* para. 3-401.

their OSJA/Unit/Installation Security Officer to send to the Defense Security Service (DSS) for processing.<sup>4</sup>

***b. Ensure that Office Personnel Have Tactical Drivers Licenses.***

Both JAs and paralegals routinely commented that legal teams must have military drivers licenses that enable them to drive high-mobility multipurpose wheeled vehicles (HMMWVs) and other office military vehicles. All legal personnel assigned to the V Corps tactical operations center, for instance, had to have a license to take turns driving the HMMWV while on the move.<sup>5</sup>

***c. Anticipate That Enlisted Soldiers and Marines Will Be Selected for Additional Duties Within the Headquarters Units.***

When it came to delegating additional duties and responsibilities for Army personnel during the deployments to Afghanistan and Iraq, commanders, sergeants major, and first sergeants often selected paralegals for those positions of greater responsibility. This was due in part to the quality of Soldiers in the JAGC. Paralegal noncommissioned officers (NCOs) were assigned duties such as camp mayor, public affairs liaison,<sup>6</sup> and convoy commander, in addition to performing their legal mission. Junior paralegals also performed additional duties, such as guard duty, “community improvement,” and other routine details.<sup>7</sup>

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<sup>4</sup> To obtain the electronic forms (SF-86, Security Clearance Background Investigation Questionnaire, DD 1879, Department of Defense Request for Personnel Security Investigation) online to apply for a clearance, go to the following website and download the ESPQ program and fill out the questionnaire: [www.dss.mil/espq/index.htm](http://www.dss.mil/espq/index.htm).

<sup>5</sup> See, e.g., Memorandum, Major Daniel G. Jordan, V Corps Tactical Operational Center Judge Advocate, for Acting Deputy Staff Judge Advocate, Headquarters, V Corps, subject: OIF AAR Comment Input, para. 3.c (28 Apr. 2004) (on file with CLAMO); Memorandum, Captain Noah V. Malgeri, Current Operations Cell, Office of the Staff Judge Advocate, V Corps, for COL Marc Warren, Staff Judge Advocate, V Corps, subject: OSJA After Action Review, Operation Iraqi Freedom, para. 7 (15 May 2004) (on file with CLAMO) (“All members should have a HMMWV license: The long convoy necessitated maximum use of different drivers and T/Cs.”).

<sup>6</sup> See Transcript of After Action Review Conference, Office of the Staff Judge Advocate, 3d Infantry Division (Mechanized), and the Center for Law and Military Operations, Fort Stewart, Ga., at 99 (18-19 Nov. 2003) (on file with CLAMO) [hereinafter 3ID AAR Transcript] (comments by MSG Shannon Boyer, Chief Paralegal NCO, OSJA, 3ID, and Corporal Jason K. Maples, enlisted paralegal, OSJA, 3ID, about embedded media).

<sup>7</sup> See, e.g., *id.* at 89, 93 (comments by MSG Shannon Boyer, Chief Paralegal NCO, OSJA, 3ID, that he decided to deploy “lean and mean” because this was a combat mission— “[t]his wasn’t to go hang out over in Kuwait and see what happens for six months. One brigade took too many enlisted paralegals and some did hardly any Operational Law, Law of War, or other legal work, but ended up being “gophers in the TOC.”); Chief Warrant Officer Two (CW2) Dorene L. Matheis, Legal Administrator, OSJA, 3ID, Legal Administrator Lessons Learned (23 Jan. 2004) (on file with CLAMO) [hereinafter Matheis AAR]; CW2 Donnell O. McIntosh, Jr., Legal Administrator, OSJA, 1st Armored Division, Legal Administrator Lessons Learned (14 Sep. 2003) (on file with CLAMO); After Action Report, Sergeant First Class Luis Millan, Deputy Chief Paralegal NCO, Office of the Staff Judge Advocate, V Corps, at 1 (undated) (on file with CLAMO) [hereinafter Millan AAR] (“Each section was tasked to provide soldiers for “Community Improvement” and Force Protection. Count on losing one paralegal during the week in support of these taskings.”).

Having paralegals perform headquarters duty without interrupting the legal mission may open avenues to obtain much needed resources. Integrating paralegals into the headquarters will make OSJAs part of the team, which in turn may allow the offices access to needed supplies, as well as access to vehicles and other military equipment. In addition, having a senior paralegal NCO in a key position within the headquarters can ensure that unit paralegals are able to give the needed attention to their legal mission, while at the same time pulling their fair share of the duties within the headquarters unit.

Marines Corps JAs also had their junior legal personnel (Marine Occupational Specialty 4421) pulled for other duties. For example, the SJA for the 15<sup>th</sup> Marine Expeditionary Unit (Special Operations Capable) commented:

My clerk was tasked to guard duty and other associated duties for a Lance Corporal in an operational setting with a HQ [headquarters] element. This wasn't bad, just a fact of doing business, something that should be considered in time allocation. The JA will do much of the paperwork himself as his clerk who may normally do most of that work will be up all night on guard duty.<sup>8</sup>

Many of the Marine Corps legal clerks were heavily involved in enemy prisoner of war (EPW) handing, as well.<sup>9</sup> Because of these associated tasks, Marine Corps JAs sometimes opted to leave their junior Marines in Kuwait to help with legal issues, such as typing military justice documents and putting investigations into proper formats.<sup>10</sup> As with the Army JAGC, the Marines recognized that bringing at least some of their clerks forward, even if they were often pulled for other duties, was beneficial. As one Marine Corps JA pointed out, "they've got to gain experience somewhere . . ."<sup>11</sup> In addition, similar to Army legal teams, Marine Corps legal personnel are self-sufficient, in that they have their own vehicles and life support equipment. Therefore, junior enlisted Marines were brought forward to assist in office set up and with driving, as well.<sup>12</sup>

***d. Deploy Selected Noncommissioned Officers and the Legal Administrator or Automation Noncommissioned Officer Early.***

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<sup>8</sup> After Action Report, Operation Iraqi Freedom, Maj Thomas A. Wagoner, USMC, SJA, 15<sup>th</sup> Marine Expeditionary Unit (Special Operations Capable), at 3 (2003) (copy on file with CLAMO) [hereinafter Wagoner OIF AAR].

<sup>9</sup> Transcript of After Action Review Conference, Office of the Staff Judge Advocate, Task Force Tarawa, and the Center for Law and Military Operations, Camp Lejeune, N.C., at 37 (2-3 Oct. 2003) [hereinafter TF Tarawa AAR Transcript].

<sup>10</sup> *Id.* at 34 (comments from Maj David Bligh, Deputy Staff Judge Advocate, TF Tarawa).

<sup>11</sup> *Id.* (Lt Col William Perez, Staff Judge Advocate, TF Tarawa, noting that he had a legal chief and two clerks, and that he did not think that he needed the two clerks to perform his legal mission; however, they have to gain experience somewhere, so perhaps he would bring one clerk on future deployments).

<sup>12</sup> *Id.* at 35 (Col Robert S. Sokoloski, Staff Judge Advocate, 2d Marine Division, noted that the reason junior Marines were brought forward is because Marine Corps legal support is self-sufficient; they have their own vehicles and have their own people putting up tents).

During both OEF and OIF, SJAs deployed paralegal noncommissioned officers (NCOs) with the advance party to assist with legal operations setup.<sup>13</sup> Both work and sleep tents had to be set up, OSJA equipment had to be located and retrieved from conexes, and HMMWVs had to be serviced—NCOs make this happen.

In addition, the legal administrator or automation NCO should deploy early. With many sections and a multitude of automation and telecommunications systems to include key command and control (C2) systems for commanders, it was an extremely difficult job for a unit G-6 or Director of Information Management (DOIM) to maintain the unit's key automation and telecommunications systems during the fight. Unfortunately, many times OSJA personnel were not a high priority for automation work orders and communication issues when their systems went down. Legal personnel also must consider the implications of G-6 personnel working on some of the JAGC software applications, as it may compromise the attorney/client confidentiality because these programs would allow viewing of legal documents such as client cards. If G-6/DOIM personnel have access to confidential attorney-client information, the OSJA should have them sign a confidentiality and non-disclosure agreement (sample at Appendix J-1).<sup>14</sup>

Given the above, the Legal Administrator or automation NCO should deploy with the OSJA, if possible with the advanced party. These Soldiers give the OSJA an expert in troubleshooting and maintaining OSJA automation assets. In addition, they are able to act as liaison officers with the G-6/DOIM personnel and, using the proper automation jargon, may be permitted to use G-6/DOIM assets to repair and supplement OSJA equipment.<sup>15</sup>

Unlike the Army, with smaller teams and fewer assets, the Marine JAs did not ordinarily deploy the Legal Admin officer (the equivalent of the Army's Legal Administrator).<sup>16</sup> Therefore, the JA and enlisted Marine had to provide their own automation support, or attempt to obtain assistance from the unit G-6/S-6.

***e. Establish Immediate Contact with Other Legal Personnel in Theater.***

When possible, prior to deployment legal personnel should obtain a roster of higher headquarters and subordinate unit OSJA members and schedule a meeting, either

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<sup>13</sup> See Interview with Colonel David L. Hayden, former Staff Judge Advocate, XVIII Airborne Corps, in Charlottesville, Va. (7 Oct. 2003) (videotape on file with CLAMO) [hereinafter Hayden Interview].

<sup>14</sup> The agreement was drafted by the Office of The Judge Advocate General Technology Office, U.S. Army. According to an Army General Counsel opinion, the G6 has statutory responsibility for the security and confidentiality of data on Army information systems. The solution to protecting information used by Army organizations is to properly train systems administrators about data confidentiality requirements. "Confidentiality or non-disclosure agreements . . . provide administrative control and accountability to prevent unauthorized disclosure of confidential or sensitive information." Memorandum, Mr. Steven Morello, General Counsel for the Department of the Army, for Chief Information Officer/G6 (5 Feb. 2004) (on file with CLAMO).

<sup>15</sup> See, e.g., Hatch Interview, *supra* note 1.

<sup>16</sup> See generally, TF Tarawa AAR Transcript, *supra* note 9, at 33-35.

in person or through VTC.<sup>17</sup> This will facilitate coordination among legal technical channels once deployed into theater. If this is not possible, both Army and Marine Corps legal teams reported that it was imperative that they established immediate contact with higher headquarters legal personnel once they deployed into theater. On many occasions, legal personnel were able to contact their counterparts to seek opinions and perspectives on legal issues, and thus obtain answers to legal issues that may already have been considered by other units.<sup>18</sup>

In addition, OSJAs that receive notice predeployment that other units will be attached to their command should immediately contact legal personnel assigned to those units to integrate them into the legal team. Legal and Soldier predeployment training at those attached units, for example, should mirror the OSJA's training schedule.<sup>19</sup> Moreover, OSJAs should review the attached unit's legal standard operating procedures (SOPs), reporting requirements, and unit training, including rules of engagement (ROE) training, for compliance with command standards.<sup>20</sup>

***f. Reserve and National Guard Legal Personnel Must Be Integrated Into Legal Operations.***

For the first time since Operations DESERT SHIELD and STORM, many OSJAs at both corps and division deployed to theaters as a whole, leaving few active duty assets to cover operations in garrison. This, in turn, led to U. S. Army Reserve (USAR) legal personnel playing an extremely vital role in maintaining garrison operations. In addition, many USAR and Army National Guard legal personnel were mobilized and deployed to both Afghanistan and Iraq. Ultimately, it was the training that they received at their units, the Combat Training Centers (CTC), and during yearly rotations at sponsoring active duty OSJAs that better prepared them for their legal missions. Furthermore, this training allowed a smooth transition when it came to deployment operations.<sup>21</sup>

First, active duty legal personnel must continue to foster a habitual relationship with USAR legal personnel who may back-fill the garrison legal office. OIF and OEF proved that reserve legal personnel must be trained on how to perform their mission

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<sup>17</sup> See, e.g., After Action Review Comments – OSJA, 21st Theater Support Command (forward), Operation Iraqi Freedom – Republic of Turkey, at 5 (2003) (on file with CLAMO) [hereinafter 21st TSC AAR].

<sup>18</sup> See, e.g., After Action Report, Operation IRAQI FREEDOM, Major Stuart Baker, Deputy Group Judge Advocate, 10th Special Forces Group, to Group Judge Advocate, 10th Special Forces Group, at 2 (1 Sep. 2003) (on file with CLAMO).

<sup>19</sup> See, e.g., 3d Infantry Division (Mechanized), After Action Report, Operation IRAQI FREEDOM, at 282-83 (2003) (on file with CLAMO) [hereinafter 3ID OIF AAR] (noting that the 3ID SJA and Chief Legal NCO must make temporary duty trips to the Fort Benning legal office to ensure integration of the legal team into Fort Stewart's OSJA).

<sup>20</sup> Interview with LTC Flora D. Darpino, Staff Judge Advocate, 4th Infantry Division, by Lieutenant Colonel Judith Robinson, OIF Study Group Collector, Center for Army Lessons Learned, in Tikrit, Iraq, at 2 (26 May 2003) (copy on file with CLAMO) [hereinafter Darpino Interview].

<sup>21</sup> See After Action Review Conference, 12th Legal Support Organization, U.S. Army Reserve, and the Center for Law and Military Operations, in Charlottesville, Va. (12-13 Feb. 2004) (audiotapes on file with CLAMO) [hereinafter 12th LSO AAR].

individually and collectively as if they will be called to active duty at any time.<sup>22</sup> It is imperative that active duty OSJAs integrate their reserve counterparts into any training that they may receive. As the former Staff Judge Advocate for the 101<sup>st</sup> Airborne Division noted, the 174th and 139th Legal Support Organizations and the 3397th Garrison Support Unit were successful in back-filling departing active duty legal personnel “in large measure because they had habitual relationships with the Fort Stewart and Fort Campbell SJA Offices.”<sup>23</sup> In addition, USAR legal personnel, especially those at the more senior grades, must ensure that they are accessible to back-fill deploying SJA offices to provide the appropriate level of leadership.<sup>24</sup>

In addition to USAR legal personnel who back-filled deployed OSJA members at home station, many Reserve Component legal personnel, both USAR and National Guard members, deployed to Afghanistan and Iraq. Because many times deployed SJA offices had no visibility over what legal assets had deployed into their area of operations, the OSJA found it difficult to integrate Reserve Component legal personnel into their commands. Although SJA offices did their best to attempt to locate these JAs and enlisted paralegals and make them part of the OSJA team, sometimes they were not successful.<sup>25</sup> The lesson in this regard is that, absent a better personnel system that allows SJAs to easily identify legal assets assigned or attached to their units, both Active and Reserve Component legal personnel who deploy must continue to attempt to locate their counterparts to coordinate the legal mission.

Finally, Army JAs learned that it is still very difficult to mobilize Reserve Component legal personnel for active duty. As one SJA reported, “[e]ven when just one soldier wanted to come, and the Reserve units wanted him to come, and the active units wanted him to come, it took individualized monitoring.”<sup>26</sup> The best course of action in

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<sup>22</sup> For example, CW2 Dorene L. Matheis, Legal Administrator, OSJA, 3ID, commented that:

Training, integration, and hand off to USAR personnel needs as much lead-time as possible; at least 30 days. The GSU that back-filled our office was mobilized approximately 10 days before we deployed. It was inadequate for proper hand-off of the myriad of issues that a legal administrator is handling in garrison at any given time, not to mention establishing the necessary personal contacts throughout the installation. Factor in personal and office/soldier preparation time for the deploying legal administrator, and movement to station and in-processing for the USAR legal administrator and we were left with little to no time left for a decent transition. Likewise, the USAR needs to emphasize AT and other training opportunities at the installation they are designed to back-fill.

Matheis AAR, *supra* note 7, at 4.

<sup>23</sup> E-mail from Colonel Richard O. Hatch, former SJA, 101st Airborne Division, to Lieutenant Colonel Pamela M. Stahl, Director, Center for Law and Military Operations, at 2 (19 Apr. 2004) (on file with CLAMO).

<sup>24</sup> 3ID AAR Transcript, *supra* note 6, at 95.

<sup>25</sup> See, e.g., Darpino Interview, *supra* note 20, at 2.

<sup>26</sup> E-mail from Colonel Patrick W. Lisowski, Staff Judge Advocate, III Corps, to Colonel Christopher M. Maher, Staff Judge Advocate, U.S. Army Forces Command, and others, subject: Lessons Learned – Ten Places for Suggested Improvements, at 2 (21 Apr. 2003) (on file with CLAMO).

such situations seems to have been to call everyone involved and personally coordinate the mobilization.<sup>27</sup>

***g. Prepare Rear Detachment Legal Centers for Deployment.***

Senior JAs and paralegal NCOs must ensure that their offices are prepared for the deployment of large numbers of personnel. Division chiefs need to ensure that those attorneys and paralegals staying behind in their sections understand the filing systems and know how to retrieve work product.<sup>28</sup> Moreover, master binders of important contacts, recurring issues and their solutions, and reporting requirements proved helpful.<sup>29</sup> Further, if additional Reserve personnel are needed to back-fill positions, SJAs should begin requesting them as soon as possible. V Corps OSJA, for example, began requesting Reserve back-fills in December, but the first Reserve legal personnel did not arrive until May.<sup>30</sup>

JAs also found that formal staff processing tended to dissolve when the commanding general, chief of staff, and staff principals were deployed. They needed to be vigilant in ensuring that actions needing legal review did not “slip through” to the commander without such review. SJAs and acting SJAs might find it helpful to provide an acting commander with a general office legal orientation briefing.<sup>31</sup>

***2. Training***

***a. Senior Leaders Must Devise a Comprehensive Predeployment Training Program to Prepare Legal Teams for Deployment.***

*Initially, it wasn't about legal work, it was about surviving.*<sup>32</sup>

According to Army doctrine, the SJA, in conjunction with the DSJA, Chief Paralegal NCO, and Legal Administrator, trains the SJA section for wartime deployment.<sup>33</sup> In today's contemporary operational environment all legal personnel must

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<sup>27</sup> *Id.* (noting that the “[m]ost successful course of action was to call everyone involved (which took a long time to figure out) and find out exactly what piece of paper each of them needed, and promise beer or first borns.”).

<sup>28</sup> *See, e.g.*, Memorandum, Major Paul J. Perrone, Jr., Battle Major, V Corps Rear, for Lieutenant Colonel Jonathan Kent, Chief, Administrative Law, V Corps Office of the Staff Judge Advocate, para. 10 (30 April 2004) (on file with CLAMO) [hereinafter Perrone Memo] (“although we did have in place an archival system for our work-product, I neglected to stress forcefully enough the importance of reviewing prior work before acting on something, and thus created many situations where the attorneys were ‘reinventing the wheel’ in resolving an action”).

<sup>29</sup> *Id.*

<sup>30</sup> Transcript of After Action Review Conference, Office of the Staff Judge Advocate, V Corps, and the Center for Law and Military Operations, Heidelberg, Germany (17- 19 May 2004) (on file with CLAMO) [V Corps AAR Transcript].

<sup>31</sup> Interview with Lieutenant Colonel Richard C. Gross, Acting SJA, V Corps.

<sup>32</sup> Telephone Interview with CW2 Dorene L. Matheis, Legal Administrator, OSJA, 3ID (Jan. 2004).

<sup>33</sup> *See* U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS para. 5.7 (1 Mar. 2000) [hereinafter FM 27-100].



be trained Soldiers and Marines. They must have acute situational awareness and the basic Soldier skills and training to react and counteract during an attack. As the Chief Paralegal NCO for the Third Infantry Division stated, “[w]e’re now out in the frontline, in the foxholes, humping, rucking, and doing all that. We’re no longer automatically back at the TOC [tactical operations center].”<sup>34</sup>

This training begins with a comprehensive home station training program. In preparation for deployment, OSJAs instituted a pre-deployment training schedule for all office personnel on legal matters, staff operations, and Soldier skills.<sup>35</sup> Legal personnel often commented that JAs and paralegals must train together, rather than have separate training programs.<sup>36</sup> Additionally, all personnel need to go through predeployment training and preparation, even if they are not initially planning to deploy. Many times, OSJAs had to bring legal personnel forward into theater to replace personnel who had to leave, or because of increasing mission requirements. Getting replacements or additional personnel into theater goes more smoothly when they have already gone through predeployment training.<sup>37</sup>

As soon as possible, legal teams need to become familiar with the operational order (OPORD) that will guide their mission. This will inform their own planning and assist in predeployment training.<sup>38</sup> Also, legal personnel must understand staff operations, including the military decision-making process (MDMP). Moreover, many OSJAs drafted their own fragmentary orders (FRAGOs), which required them to learn the proper format for FRAGOs and how to staff them.<sup>39</sup>

By necessity, programs must contain training on combat lifesaving skills, map reading and land navigation, convoy operations, Single Channel Ground and Air Radio System (SINCGARS) communication, reading a Signal Operating Instruction (SOI), weapon’s proficiency, and driving and performing preventive maintenance on a HMMWV and other military vehicles.<sup>40</sup> In addition, because of the dangerous

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<sup>34</sup> 3ID AAR Transcript, *supra* note 6, at 88 (quoting MSG Shannon Boyer, Chief Paralegal NCO, OSJA, 3ID).

<sup>35</sup> *See, e.g.*, Major Mark W. Holzer Interview with Colonel Lyle W. Cayce, Staff Judge Advocate, 3ID, in Iraq, at 1 (22 Apr. 2003) (on file with CLAMO) [hereinafter 2003 Cayce Interview] (noting that the training included deployment contracting and fiscal law, Muslim customs and culture, and division fires systems and integration into the staff process to conduct targeting and other battle drills).

<sup>36</sup> V Corps AAR Transcript, *supra* note 30 (Comments from SFC Luis Millan, Deputy Chief Paralegal NCO, OSJA, V Corps).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *See, e.g., id.* (Captain Noah Nalgeri, Office of the Staff Judge Advocate, V Corps, commenting that as a battle captain in the V Corps Main Headquarters, he drafted and staffed FRAGOs).

<sup>40</sup> Colonel William A. Hudson, Staff Judge Advocate, 3d Infantry Division, stated:

[I]t’s amazing that the reason the JAG was so swift pulling out of the courthouse and going to Baghdad is the fact that they knew how to drive, they didn’t screw around and they did it and did it right. The convoy operation was key. In the convoy up and the convoy back, we didn’t have any breakdowns of vehicles in the JAG. I think that’s a testament to how we took care of our own . . . .

environment in which legal personnel often operated, they needed to be trained on various weapon systems, such as the 50 caliber machine gun and other crew served weapons. They also needed to be taught how to react to direct fire, basic squad movements and tactics, and proper building of a fighting position.<sup>41</sup> Moreover, for forward deployed legal personnel (and later for legal teams conducting the judicial reconstruction mission), advanced tactics training was necessary. Paralegals were sometimes called upon to clear and secure buildings, pull security for convoys on the move, and deal with civilians on the battlefield in hostile situations.<sup>42</sup>

The predeployment training program must also include planning sessions during which the entire office participates in packing and load planning.<sup>43</sup> All legal personnel should know what equipment the SJA office has, and what equipment and supplies should be packed to conduct 24-hour operations in a deployed environment. This is especially important if a small number of legal personnel are deploying separately and may otherwise be unaware of their equipment and supply needs.<sup>44</sup> In addition, OSJAs should ensure that their SIPR laptops are packed, stored, and moved together so that time is not wasted once personnel arrive in theater trying to locate these computers.<sup>45</sup>

In addition to home station predeployment training, JAs and enlisted paralegals routinely commented that their time at the combat training centers (CTCs) was a vital training experience.<sup>46</sup> For example, one JA advised that if the unit plan calls for one enlisted paralegal to go, send four for the experience.<sup>47</sup> The same is true for JAs. Time at the CTC with the brigade also assists legal personnel in establishing a relationship with the Brigade Commander and staff, which may prove invaluable when requesting equipment, supplies, and other support during deployments.<sup>48</sup> In addition, V Corps legal personnel routinely commented that the eighteen-day Victory Scrimmage that all V Corps deploying OSJA personnel attended in January 2003 was a critical component of their preparation for deployment. During the exercise, V Corps legal personnel were able

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3ID AAR Transcript, *supra* note 6, at 195.

<sup>41</sup> See AAR Comments Operations DESERT SPRING/IRAQI FREEDOM, Captain Chester J. Gregg, Judge Advocate, 2d Brigade, 3ID, at 4 (25 Apr. 2003) (on file with CLAMO) [hereinafter Gregg AAR].

<sup>42</sup> See, e.g., *id.*; V Corps AAR Transcript, *supra* note 30.

<sup>43</sup> See, e.g., V Corps AAR Transcript, *supra* note 30; After Action Review, Operation IRAQI FREEDOM, MAJ Robert F. Resnick, Chief, Criminal Law, OSJA, 3ID, at 1 (25 Apr. 2003) [hereinafter Resnick AAR].

<sup>44</sup> See, e.g., Corporal Brandi M. Ferguson, OSJA, 3ID, Operation Iraqi Freedom After Action Review, at 1-2 (30 Apr. 2003) (on file with CLAMO) [hereinafter Ferguson OIF AAR] (recommending that everyone pack all of the items that are on the mandatory packing lists).

<sup>45</sup> V Corps AAR Transcript, *supra* note 30.

<sup>46</sup> See, e.g., Ferguson OIF AAR, *supra* note 44, at 1-2 (“[t]he War Fighting Exercises were a great way in which to train soldiers for a possible Combat/Hostile situation.”).

<sup>47</sup> Interview with Captain Pat Parson, Judge Advocate, 2d Armored Cavalry Regiment, by Lieutenant Colonel Judith Robinson, OIF Study Group Collector, Center for Army Lessons Learned, in Baghdad, Iraq, at 3 (14 May 2003) (on file with CLAMO).

<sup>48</sup> See, e.g., MAJ Jeff A. Bovarnick, Chief, Operational Law, CJTF-180, CJTF-180 Notes from the Combat Zone, at 1 (2003) (on file with CLAMO) (“pre-deployment training and preparation for the specific deployment is essential. Schoolhouse and exercise training give you the fundamental tools to work with, but situational awareness of the operation and staff integration are the final keys to success for judge advocates and paralegals.”).

to integrate into their various headquarters staff sections, work out staffing routines, finalize packing lists, and identify various other issues.<sup>49</sup>

The lesson is that senior trainers need to go beyond Common Task Training (CTT) to train for warfare. For training updates based on current operations to aid in developing effective training for OSJA personnel, trainers should seek advice from legal personnel assigned to the CTCs, contact CLAMO for the latest legal lessons learned, and check with the Center for Army Lessons Learned (CALL) for updates on Army-wide lessons learned from current operations.

***b. Ensure Noncommissioned Officers Receive Operational Law Training to Help Judge Advocates Maintain 24 Hour Operations.***

During OEF and OIF, Army paralegal NCOs and their Marine Corps counterparts were called upon to perform many operational law tasks. These NCOs briefed troops on Law of War (LOW), Code of Conduct, and Rules of Engagement (ROE).<sup>50</sup> They also helped JAs cover 24-hour operations and overlapping meetings.<sup>51</sup> Therefore, it was important that these NCOs had operational law training to provide briefings and spot potential legal issues while manning the TOCs.

Given many NCOs' operational law mission, it is imperative that SJAs and chief paralegal NCOs ensure these NCOs receive operational law training through home station NCO Professional Development Classes. V Corps, for example, conducted law of armed conflict training for their paralegals.<sup>52</sup> Paralegals also should be afforded the opportunity to receive schoolhouse training in operational law. For example, paralegals involved in supporting operational legal issues should attend operational law courses at the Army's Judge Advocate General's Legal Center and School, such as the Operational Law and Law of War short courses.<sup>53</sup> In addition, the Marine Corps has opened their

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<sup>49</sup> See, e.g., Perrone Memo, *supra* note 28, para. 7; V Corps AAR Transcript, *supra* note 30 (comments from SFC Robert M. Garcia, Shift NCOIC, Office of the Staff Judge Advocate, V Corps Rear Headquarters).

<sup>50</sup> See, e.g., Hatch Interview, *supra* note 1.

<sup>51</sup> See, e.g., Hayden Interview, *supra* note 13; Resnick AAR, *supra* note 43, at 2 ("Operational Law maintains 24-hour ops in the JOC [Joint Operations Center]. Currently, the captains and enlisted pull night shift duties for a full month. This duty emphasizes the point that all deployed personnel are operational law attorneys and paralegals as each must be aware of all current operational law issues."). According to Lt Col William Perez, USMC, Staff Judge Advocate, TF Tarawa:

Our legal chief does need to know it [operational law]. That's a Staff NCO. We train him. We bring the legal chief forward. As far as the legal clerks, no. And maybe you should do phase training based upon rank, because I thought – and this came out be true that if there is an ROE question for a Staff NCO, the Staff Sergeant (squad leader) doesn't want to talk to the SJA. But he'll talk to the legal chief. So he needs to know ROE real well and needs to know the scenarios.

See TF Tarawa AAR Transcript, *supra* note 9, at 36

<sup>52</sup> See V Corps AAR Transcript, *supra* note 30.

<sup>53</sup> The Judge Advocate General's Legal Center and School (TJAGLCS) website is located at [www.jagcnet.army.mil/TJAGLCS](http://www.jagcnet.army.mil/TJAGLCS). ATRRS information and dates of courses are located on this website.

basic operational law training to legal chiefs.<sup>54</sup> Moreover, when authorized on the MTOE,<sup>55</sup> SJAs should send their eligible NCOs to the battle staff course at Fort Bliss or via teleconference whenever possible.<sup>56</sup>

***c. A Rigorous Physical Fitness Program is Crucial for Handling the Challenges of Deployment.***

From our first moments on the ground in Kuwait when we pulled team boxes off the pallets and threw them into trucks to dragging them through customs inspections on the way out, all members of the team were routinely confronted with physical tasks – simply moving around in your Kevlar and body armor can be exhausting. Coping with the extreme heat also requires physical fitness. It is absolutely necessary that all service members remain in good physical condition. Iraq remains a dangerous environment. Every soldier must be prepared to respond to emergency situations.<sup>57</sup>

Physical readiness is extremely important for survival in war. Deployments to Afghanistan and Iraq presented a climate that many of our troops were not used to— extreme heat. Soldiers and Marines worked exceedingly long hours in the heat for seven days a week. Some days were eighteen hour work days. Legal personnel also wore chemical suits and flak vests for extended periods of time; some personnel found it impossible to conduct physical training. Limited physical training, the stress of a combat deployment, irregular eating habits, and close quarters often resulted in minor ailments sweeping through offices.<sup>58</sup> Moreover, those deployed to Afghanistan sometimes had to hike difficult mountain trails to investigate and pay claims.<sup>59</sup> To add to matters, dust-like sand and the large swarms of biting insects made mission accomplishment even more challenging. It was good physical readiness that helped minimize casualties.<sup>60</sup>

The lesson here is that leaders must enforce a rigorous physical training program in garrison.<sup>61</sup> This will better prepare Soldiers and Marines for the challenges of deployment, including extreme climates and long, exhausting work days. Moreover, once in theater, organized physical fitness should continue, if possible.

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<sup>54</sup> TF Tarawa AAR Transcript, *supra* note 9, at 35.

<sup>55</sup> The duty MOS on the MTOE will reflect a 2S identifier for a Battle Staff NCO authorized position.

<sup>56</sup> The Battle Staff NCO course is located at the United States Army Sergeants Major Academy at Fort Bliss, Texas. The website for the course is <http://usasma.bliss.army.mil/BSNCOC>.

<sup>57</sup> See 12th LSO AAR, *supra* note 21.

<sup>58</sup> See, e.g., V Corps AAR Transcript, *supra* note 30.

<sup>59</sup> Hayden Interview, *supra* note 13.

<sup>60</sup> See, e.g., Hatch Interview, *supra* note 1 (noting that a robust predeployment PT program was critical to build stamina base for months of 18-20 hour deployment work days).

<sup>61</sup> See U.S. DEP'T OF ARMY, FIELD MANUAL 21-20, PHYSICAL FITNESS TRAINING (30 Sept. 1992) (C1, 1 Oct. 1998) (providing guidance on developing a proper physical training program for their section).

***d. Immediately Identify Personnel Who Will Deploy and the Positions They Will Fill so that They Can Be Trained at Homestation and at The Judge Advocate General's Legal Center and School.***

Legal personnel consistently commented that their predeployment preparations were made easier when they knew when they would deploy and what duty position they would fill. The sooner they knew what duty position they would fill the sooner they could begin thinking through what resources and equipment was necessary to accomplish their mission. It is particularly important that the BOLTs are identified early so that they can train together as a team during the many exercises that often lead up to a deployment.

Positions such as the Chief, Contract and Fiscal Law; Chief of Claims; and Chief, International and Operational Law are key when deployed in the contemporary operational environment. During the first months of deployment to OEF and OIF, OSJAs addressed unfamiliar issues such as handling foreign claims, negotiating foreign contracts, processing detainees, and advising on capitulation of enemy forces. SJAs and Chief Paralegal NCOs must identify key positions early and ensure that they are trained properly. SJAs and chief paralegal NCOs should ensure that legal personnel have the opportunity to train at The Judge Advocate General's Legal Center and School, the center for Army legal training.

***e. Prior to Deployment, Legal Personnel Should Be Trained on the Country's Law and Legal System.***

JAs deploying in support of OIF, in particular, voiced concern that they had not anticipated they would need to know Iraqi law and understand its legal system. Once major combat operations wound down and stability operations began, however, JAs quickly discovered that they would play an integral role in rebuilding the Iraqi justice system. To do so, they needed to know what that justice system was—the penal and civil codes.<sup>62</sup> A V Corps JA assigned to work on the Phase IV, post-combat plan noted that he began searching for Iraqi law while in theater in March of 2003 on the Internet.<sup>63</sup> One Marine Corps JA recommended that JAs should have assembled an inter-service task group to gather available information on Iraqi law, and hired Iraqi lawyers to assist in the effort. The information gathered could then have been disseminated to all JAs in theater.<sup>64</sup>

The lesson here is that JAs must anticipate that once combat operations wind down, stability operations may involve the U.S. military in enforcing the rule of law and in judicial reconstruction. Commanders will expect their JAs to be the expert in these

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<sup>62</sup> See, e.g., After Action Report, Operation Iraqi Freedom, Maj Kevin M. Chenail, USMC, Operational Law Attorney, Coalition Forces Land Component Command, at 1 (2003) (on file with CLAMO) [hereinafter Chenail OIF Lessons Learned]. During the early part of OIF, CLAMO was helpful in finding translations of the Iraqi penal code for JAs in theater.

<sup>63</sup> See V Corps AAR Transcript, *supra* note 30 (comments from CPT Travis W. Hall, Office of the Staff Judge Advocate, V Corps).

<sup>64</sup> *Id.*

areas. Therefore, prior to deployments JAs should identify local law and be familiar with the system of justice in their area of operations (AO).

### **3. Equipment and Resources**

#### ***a. Work to Increase OSJA Table of Organization and Equipment Organic Transportation and Communication Assets Prior to Deployment and Ensure the Office Deploys with Sufficient Equipment and Supplies.***

*The division MTOE recognizes that 42 soldiers (19 officers and 23 enlisted) will deploy with the DMAIN [Division main headquarters] and DREAR [Division rear headquarters]. The assumption behind the current MTOE is that these SJA personnel with associated equipment will be transported by three vehicles on the MTOE or by other sections in the DMAIN or DREAR. The assumption that other sections have sufficient assets to transport our personnel and equipment is untrue.<sup>65</sup>*

It is extremely difficult to deploy a division or corps level SJA office without the proper equipment. Current MTOEs for division OSJAs do not provide adequate vehicles and radios for an entire SJA office to accomplish its legal mission.<sup>66</sup> V Corps also reported that they did not have enough vehicles and space for personal A and B bags and office equipment to support the number of personnel deployed. They had three HMMWVs and one 5-ton truck, but needed at least five HMMWVs and two 5-ton trucks and trailers.<sup>67</sup> Providing legal assistance and trial defense services, investigating claims and criminal cases, as well as accomplishing a variety of additional tasks required mobility and communications. It is imperative that OSJAs work with the G-3 force structure and materiel personnel to increase communication and transportation assets.

Availability of transportation and communication assets was a problem during operations. OSJAs reported that they did not have sufficient equipment to support the legal missions of the DMAIN, DREAR, and the Brigade Operational Law Teams

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<sup>65</sup> See 3ID OIF AAR, *supra* note 19, at 284 (2003). MSG Shannon Boyer, Chief Paralegal NCO, OSJA, 3ID, commented that the 3ID OSJA had three vehicles, no radios, and no tents. Basically, they “begged, borrowed and stole vehicles . . . [I]luckily, I only took 27 deltas and we barely found enough transportation for those 27. If I had taken all 54, it couldn’t happen.”). *Id.* at 90-91.

<sup>66</sup> According to MSG Shannon Boyer, Chief Paralegal NCO, 3ID:

The equipment part of the SJA office is totally broken. If you pull up my MTOE—I pulled up 1st Cav’s MTOE; I pulled them all up. I’m entitled to 3 vehicles for all these soldiers (54 total soldiers / 27 who deployed). No radios. The SJA for the Division can’t even communicate . . . no tents . . . Basically, what helped a lot of people, we begged, borrowed, and stole vehicles.

3ID AAR Transcript, *supra* note 6, at 90-91; 101st Airborne Division (Air Assault), Operation Iraqi Freedom Lessons Learned, at 6 (2003) (on file with CLAMO) [hereinafter 101st OIF AAR] (providing that every SJA element in a deployed environment needs its own radios and transportation assets); Darpino Interview, *supra* note 20, at 2.

<sup>67</sup> Millan AAR, *supra* note 7, at 2.

(BOLTs). Each has separate missions and responsibilities and each was expected to carry out those missions in a timely manner, simultaneously across the unit's AO. Because of a lack of assigned equipment, OSJA and BOLTs had to rely on borrowed equipment from other sections to accomplish their missions. This proved extremely difficult as the overall mission moved to more offensive operations. Although current doctrine provides that brigades will support the BOLTs,<sup>68</sup> instead of providing the equipment, brigade leadership often told the BOLTs to request support from the higher headquarter OSJAs. The OSJAs, however, did not have sufficient equipment to support their own mission; therefore, they could not support the brigades.<sup>69</sup> Nevertheless, BOLTs reported that if they were integrated into the brigade prior to the deployment, they were more likely to receive needed support. BOLT legal personnel routinely advised that they must go to the field with the brigade before deployment. This will show the brigade personnel that the lawyers and paralegals are part of the brigade team and will more likely result in the brigades providing needed support to their BOLTs.<sup>70</sup>

### **1. Transportation**

The mission of today's legal team takes them all over the battlefield to address issues, conduct investigations, or perform on the spot counseling or negotiations.<sup>71</sup> BOLT personnel needed a means of transportation to accomplish their many missions, yet there were no vehicles organic to the BOLT. During OIF, many BOLTs were able to obtain their own HMMWVs only because prepositioned vehicles were available in Kuwait.<sup>72</sup> At the Division and Corps levels, OSJAs routinely reported that they had insufficient vehicles to accomplish their mission. Both the V Corps and 3ID SJA Offices, for example, were only authorized three HMMWVs. They found, however, that between the DMAIN and DREAR, they required five HMMWVs and two larger trucks. Similar to some BOLTs, 3ID was able to obtain additional vehicles only because of the prepositioned assets in Kuwait.<sup>73</sup> Like their Army BOLT counterparts, Marine Corps legal personnel do not have their own vehicles. They, like the rest of the Marine Corps staff, had to obtain a vehicle through their Motor transport officer.<sup>74</sup>

<sup>68</sup> See, e.g., FM 27-100, *supra* note 33, para. 4.4.2 (providing that "embedded legal personnel depend on unit to which they are assigned or attached for transportation.").

<sup>69</sup> See, e.g., 3ID OIF AAR, *supra* note 19, at 284; Staff Sergeant Horace G. Estes, After Action Report, Operation Iraqi Freedom, at 2 (26 Apr. 2003) (recommending that the BOLT JA and NCOIC must be proactive in getting equipment from the brigades).

<sup>70</sup> See, e.g., Interview with Captain Kirsten Mayer, Command Judge Advocate, 30th Medical Brigade, and Sergeant Dia Kelly, paralegal, 30th Medical Brigade, by Lieutenant Colonel Judith Robinson, Center for Army Lessons Learned, in Baghdad, Iraq, at 2 (31 May 2003); see also comments by MSG Shannon Boyer, Chief Paralegal NCO, OSJA, 3ID, that "luckily we had two months sitting in the desert out at the camps, to where they [the brigades] went, 'oh, Captain Gregg, Captain Balbo [BOLT JAs], you're right. You do need a vehicle.'" 3ID AAR Transcript, *supra* note 6, at 91.

<sup>71</sup> See 101st OIF AAR, *supra* note 66, at 6.

<sup>72</sup> 3ID OIF AAR, *supra* note 19, at 284.

<sup>73</sup> *Id.* Similarly, the 101<sup>st</sup> Airborne Division SJA Office only had two vehicles. COL Hatch Interview, *supra* note 1.

<sup>74</sup> E-mail from Lieutenant Colonel William Perez, USMC, SJA, TF Tarawa, to Lieutenant Colonel Pamela M. Stahl, Director, Center for Law and Military Operations, subject: CLAMO Draft Handbook – OIF/OEF (18 Apr. 2004) (on file with CLAMO).

In addition to HMMWVs, OSJAs and BOLTs reported that they needed some way to transport all of their equipment. Legal personnel, especially at the Division level and above, often found it difficult to rely on other sections to transport their office equipment, supplies, and personal gear. Therefore, they needed either a 2 ½ or 5 ton vehicle or a trailer.<sup>75</sup> Finally, OSJAs needed global positioning systems (GPS) for their vehicles to allow the DMAIN and DREAR elements to know where legal personnel were when on the move.<sup>76</sup>

## **2. Communications Equipment**

OSJA MTOEs need to reflect dedicated SINCGARS radios for all vehicles and cell phones or iridium satellite phones for the DMAIN, DREAR, and each of the BOLTs. Many SJA vehicles were without SINCGARS radios. With enormous distances between Command Posts (CPs) and frequent jumps, there was little to no communication between legal personnel when OSJA components were moving. This hampered the OSJA's ability to fully support the command. Moreover, with no organic communications assets, many legal missions were delayed for long periods of time or simply cancelled.<sup>77</sup> Without radio communications, almost all communication between the DMAIN, DREAR, and the BOLTs was accomplished via Secure Internet Protocol Router Network (SIPRNET) and very limited Unclassified but Sensitive Internet Protocol Network (NIPRNET).<sup>78</sup>

In addition, the Digital Nonsecure Voice Terminal (DNVT) phones and phone lines proved to be a very unreliable means of communication. The system was at times down or of such poor quality that it was virtually useless.<sup>79</sup> Some staff sections had the luxury of having either dedicated cell phones or iridium satellite phones to communicate with their subordinate elements. OSJA personnel, however, had to attempt to borrow these assets.<sup>80</sup> One unit deployed to Turkey noted that the SJA was the only member of the legal team who had a cellular phone. A minimum of three cellular phones, however, would have ensured the OSJA could perform its mission at the headquarters and while traveling to remote sites to provide legal services.<sup>81</sup> In addition, the 82d Airborne Division SJA found that an iridium phone was "absolutely essential" to provide

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<sup>75</sup> See, e.g., Millan AAR, *supra* note 7, at 2 ("We required at least five HMMWVs and two 5-ton trucks w/trailers. This way we could load one ISU (Individual Storage Unit) on top of each 5-ton truck and store any additional equipment in the trailers."); Gregg AAR, *supra* note 41, at 2.

<sup>76</sup> 3ID OIF AAR, *supra* note 19, at 284 (noting that on more than one occasion during deployment Soldiers became lost and that the Army should purchase GPS devices as unit property and issue a GPS device to every Soldier).

<sup>77</sup> 101st Airborne AAR, *supra* note 66, at 6.

<sup>78</sup> See, e.g., 3ID OIF AAR, *supra* note 19, at 285-286. All Army legal personnel must ensure that they have AKO-S (Army Knowledge On-Line – Secret) e-mail accounts prior to deployment.

<sup>79</sup> See, e.g., 3ID AAR Transcript, *supra* note 6, at 141 (noting that they had DNVT phones, but they either did not work very well, were off the hook, or were busy for days at a time).

<sup>80</sup> See, e.g., Office of the Staff Judge Advocate, 82d Airborne Division, Operation Iraqi Freedom (OIF), After Action Report (AAR), at 5 (2003) (on file with CLAMO) [hereinafter 82d Airborne OIF AAR].

<sup>81</sup> 21at TSC AAR, *supra* note 17, at 2.



worldwide satellite phone communications.<sup>82</sup> These phones were standard for all convoy operations. Because the OSJA was required to organize numerous ground and rotary convoys for requisitioned property, claims, and other investigations, they needed the iridium phone. Moreover, these phones would be very helpful to facilitate other communications and coordinate on myriad issues worldwide.<sup>83</sup> This need for iridium phones was echoed by the 3ID SJA.<sup>84</sup>

### **3. Other Equipment and Supplies**

OSJAs must deploy with sufficient tent space for legal operations and personnel life support. Although sufficient tents for life support at the staging and assembly areas were generally available, the legal offices often reported that they did not have sufficient tentage for life support and legal operations once they left these areas.<sup>85</sup> OSJAs also needed permanent or fixed storage boxes to store equipment when personnel took off their load carrying equipment and Kevlar helmets and an area in which to secure other non-sensitive items while attending meetings and training.<sup>86</sup> Moreover, many units found that they needed generators, as it was not always easy to gain access to the generators brought by the headquarters and headquarters companies.<sup>87</sup>

In addition, OSJAs and BOLTs must begin coordinating early for other supplies and equipment, such as desks, computers, and printers. A Marine Corps JA assigned to the Coalition Forces Land Component Command (CFLCC)<sup>88</sup> had the following comment on Army equipment and supplies.

Going in I thought of the Army to be as big (personnel) and wealthy as the Air Force. Though never lacking in the fundamentals to accomplish the mission, I was surprised by the limited assets (primarily in terms of OSJA

<sup>82</sup> 82d Airborne OIF AAR, *supra* note 80, at 5.

<sup>83</sup> *Id.*

<sup>84</sup> See 2003 Cayce Interview, *supra* note 35, at 6; Millan AAR, *supra* note 7, at 4 (stating that V Corps OSJA deployed with four Temper Tents (GP Mediums), two for the Main and two for the Rear, which were not sufficient for their needs).

<sup>85</sup> See, e.g., Resnick AAR, *supra* note 43, at 4; 3ID OIF AAR, *supra* note 19, at 284 (noting that the 3ID MTOE provided the OSJA with one crew tent and three HEX tents, which were inadequate for their needs); Ferguson OIF AAR, *supra* note 44, at 3 (stating that the 3ID DMAIN had to basically supply themselves with their own life support when hostilities began and recommending that the OSJA not rely on the unit to provide areas for sleeping).

<sup>86</sup> Millan AAR, *supra* note 7, at 2. In addition, the V Corps OSJA Deputy Chief Paralegal NCO learned that sharing the OSJA individual storage unit (ISU) with other staff sections could cause problems. They had allowed other sections to store some of their equipment in the OSJA ISU during field exercises. However, during the deployment to OIF, some of these sections were not co-located with the OSJA, causing problems for both sections. *Id.*

<sup>87</sup> See, e.g., Resnick AAR, *supra* note 43, at 4 (“It is imperative to have at least minimal power at each camp location. Individuals should have the ability to heat water for personal hygiene (shaving water) or a hot beverage, to read (work or pleasure), or simply to have light by which to dress. This is a tremendous morale issue as well.”); Gregg AAR, *supra* note 41, at 2 (noting that there is always power in the vicinity of the TOC (tactical operations center), but when separated from the TOC a separate power source is necessary); V Corps AAR Transcript, *supra* note 30.

<sup>88</sup> For a discussion of the CFLCC and the OIF command structure, see *supra* Section II.

office equipment—i.e., very few computers, no copier till much later, and a few printers). The enlisted personnel did remarkable work improving those assets every week. When I first arrived, there was a staff of 16 with 8 laptops. . . . There were many occasions of standing in the office waiting for any of the machines.<sup>89</sup>

Other equipment and supplies were also needed. V Corps OSJA, for example, discovered that they required road maps, additional batteries, additional flashlights, tow cables or straps, additional fuel cans and straps to tie these down with, extension cords with Iraqi adaptors, and electrical appliances, such as coffee makers, water heaters, bug lights, and fans.<sup>90</sup> V Corps OSJA found that if they had someone appointed as a Field Ordering Officer (FOO), they could purchase many needed items of equipment locally.<sup>91</sup> Moreover, OSJAs need to remember to pack supplies and equipment for trial defense service (TDS). Further, OSJAs must plan for the life support of panel members and witnesses if they intend to conduct courts-martial while deployed. Cots, for instance, were generally in short supply, and finding additional cots for visiting panel members and witnesses was problematic.<sup>92</sup>

Although the OSJA typically provides equipment for the DMAIN and DREAR, many BOLTs had to rely on the brigade headquarters and headquarters company for these items. One BOLT learned from its deployment to the National Training Center that supplies and equipment are a scarce commodity and, unless legal personnel know what they need, they won't know what to ask for from the headquarters and headquarters company. The BOLT began actively tracking its supply and equipment status prior to deployment and presented a complete list of desired supplies to the headquarters and headquarters company commander and first sergeant early on and continued to press for supplies on a daily basis.<sup>93</sup>

In addition, equipment brought from the OSJA may not be compatible with the brigade equipment. For example, many printers obtained by the OSJA and brought with the BOLTs quickly ran out of ink. The brigade may not have the correct ink cartridges to resupply the BOLT.<sup>94</sup> Further, paper is often in short supply, so legal personnel must be judicious with what they have. A Marine Corps JA recommended that color paper be packed during deployments, as well as quality lamination paper. This will facilitate printing of rules of engagement (ROE) cards, if necessary.<sup>95</sup>

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<sup>89</sup> Chenail OIF Lessons Learned, *supra* note 62, at 3.

<sup>90</sup> Millan AAR, *supra* note 7, at 3.

<sup>91</sup> *Id.*, at 4.

<sup>92</sup> *Id.*

<sup>93</sup> See Operation Iraqi Freedom After Action Review, CPT Jack Pritchard, 1st Brigade Legal Advisor, 3d Infantry Division, at 1 (17 Apr. 2003) (on file with CLAMO) [hereinafter Pritchard AAR]; see also Captain Brian Banks, Brigade Judge Advocate, OIF Lessons Learned, 18th Military Police Brigade, JAG Section, at 24 (1 Dec. 2003) (on file with CLAMO) [hereinafter Banks OIF Lessons Learned] (recommending that the BOLT have at least a two months supply of office supplies).

<sup>94</sup> Gregg AAR, *supra* note 41, at 1.

<sup>95</sup> Wagoner OEF AAR, *supra* note 1, at 12 (recommending that at least seven different colors be brought for all the operations that could take place, including corrections that need a new color).

***b. Plan for the specific challenges of your environment.***

*Our personnel took great care with their equipment, protecting it during travel, servicing often, and vigilantly cleaning.*<sup>96</sup>

In the heat and dust of Iraq and Afghanistan, systems breaking and malfunctioning were a daily occurrence. As with almost all equipment, however, if service members fail to take care of the automation equipment, it will break sooner rather than later. Therefore, in both operations it was extremely important that Soldiers and Marines develop a daily regimen to perform preventive maintenance on their automation equipment, just as they would on their weapons and vehicles.

The sand in both Afghanistan and Iraq was very fine and powdery and almost invisible to the human eye when carried with the air and wind. This powder would often get in the exposed opening of computers and cause damage to internal components. Hard drives, motherboards, printer heads, and especially floppy drives were extremely susceptible to this sand. Floppy drives, in particular, proved to be of no use at all because of the constant exposure of internal components to the elements when a disk had to be inserted or taken out of the drive for the purpose of saving and loading files. Therefore, legal personnel had to find ways to protect their equipment.<sup>97</sup> These measures included:

- Daily backups of equipment;
- Saran Wrap or plastic keyboard covers to protect keyboard from sand and water;
- Covering computer vents with commercial home dryer sheets to prevent micro particles of sand from getting in computers and damaging major components;
- Canned air and anti-static wipes;<sup>98</sup> and
- Shaving brushes to clean exposed computer parts.<sup>99</sup>

***c. Plan as if You Will Not Have Access to Automation.***

Not certain of when equipment would arrive and given the intense heat and surplus dust, legal personnel had to plan ahead.<sup>100</sup> Moreover, even when equipment had arrived the “reality of a deployment is that there are many people operating in a small

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<sup>96</sup> Matheis AAR, *supra* note 7, at 4.

<sup>97</sup> *Id.*

<sup>98</sup> *See, e.g.*, 3ID AAR Transcript, *supra* note 6, at 184 (comments by CW2 Dorene L. Matheis, Legal Administrator, 3ID). There were many home remedies recommended that did not work, including covering the entire computer with saran wrap (which caused computers to overheat) and putting pantyhose over them (which did not keep the sand out). *Id.* at 183-84.

<sup>99</sup> Task Force Rakkasan Brigade Operational Law Team Interim Deployment AAR, at 1 (11 Mar. 2003) (on file with CLAMO) [hereinafter TF Rakkasan AAR]; 3ID AAR Transcript, *supra* note 6, at 184 (comments by CPT Chester Gregg, Brigade Judge Advocate, 2nd Brigade, 3ID, that the best thing to keep computers clean was old horse hair shaving brushes).

<sup>100</sup> *See, e.g.*, Ferguson OIF AAR, *supra* note 44, at 2 (noting that OSJA, 3ID shipped their B bags and other equipment in connexes about a week before they deployed, but that these items did not arrive until about a month after 3ID personnel arrived in country).

space while also sharing scarce resources and accessing a computer to perform legal research is not always possible.”<sup>101</sup> According to one service member, ninety-five percent of the information legal personnel needed to do their jobs during a deployment is in the Operational Law Handbook<sup>102</sup> and the Legal Automation Army-Wide System (LAAWS) CDs.<sup>103</sup>

Legal personnel should develop a battle box<sup>104</sup> containing hardcopies of reference materials. To determine which references should be taken in hardcopy, it proved helpful for legal personnel to meet and discuss the issue and compile an overall inventory, which had the added benefit of reducing unnecessary redundancy within the section.<sup>105</sup> A JA who deployed with V Corps suggested that each division chief scrub the inventory then disseminate it to JAs and let them know which references BOLTs should take in hardcopy, as well.<sup>106</sup> Many legal teams reported that, at a minimum, they needed the Manual for Courts-Martial, a Title 10 notary stamp, hard copies of commonly used regulations and handbooks (in particular the latest Operational Law Handbook), and blank forms (especially blank General and Special Power of Attorney forms, Article 15 Forms, and Sworn Statement forms) for use in case there are issues with obtaining automation.<sup>107</sup> JAs practicing administrative law must have access to the appropriate regulations and guides to advise summary court officers, article 32 investigating officers, and administrative investigating officers and boards.<sup>108</sup> JAs should have several investigation folders prepared to hand out to investigating officers that include sufficient numbers of rights waiver certificates and sworn statement forms.<sup>109</sup>

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<sup>101</sup> Perrone Memo, *supra* note 28, para. 4.a.

<sup>102</sup> INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, 2004 OPERATIONAL LAW HANDBOOK 355-67 (2003).

<sup>103</sup> TF Rakkasan AAR, *supra* note 99, at 1.

<sup>104</sup> A military slang term used to describe a box made out of a durable material in which supplies, regulations, and other tools used by a specific section is carried for ease of transport and ease of access.

<sup>105</sup> Perrone Memo, *supra* note 28, para.4.b.

<sup>106</sup> *Id.*

<sup>107</sup> *See, e.g.*, TF Rakkasan AAR, *supra* note 99, at 2 (“[E]veryone needs to personally carry with them a binder full of GPOAs [general powers of attorney] and common SPOAs [special powers of attorney]. As we know, “NO SEAL IS REQUIRED,” however, I hand carried POAs, a seal, and carbon paper to do POAs on the spot for anyone.”); Perrone Memo, *supra* note 28, para. 4.a.

<sup>108</sup> After Action Report—Operation Iraqi Freedom, Captain John P. Morgenstern, Office of the Staff Judge Advocate, V Corps, para. 2 (undated) (on file with CLAMO) [hereinafter Morgenstern AAR].

<sup>109</sup> *See, e.g.*, TF Rakkasan AAR, *supra* note 99, at 2; Morgenstern AAR, *supra* note 108, para. 2. One Marine Corps JA deployed with four 7-cube mount out boxes of publications and forms, including the JAGMAN, LEGADMINMAN, operational law course publications, and port information from previous floats.

I went heavy on the physical books based on the worst case scenario of not having connectivity in austere environments or being away from the ship for extended periods of time. Based on my experience during this float I would recommend taking less books and relying more on CD Rom technology such as the CLAMO Operational Law CD . . . . I found 90% of the documents or information I needed on my [CLAMO CD] and was easily able to use it during operations in Afghanistan. . . . In addition the Army JAGCNET site as well as the improving USMC JA website combined with consistent Internet reliability makes carrying so many of the standard pubs obsolete for embarkation.

In the event that there are automation assets available through other sections and channels, SJA personnel should have, at a minimum, the LAAWS CD set and the Deployed Judge Advocate Resource Library (CLAMO) CD set<sup>110</sup> to continue the legal mission.<sup>111</sup> According to legal personnel who deployed in support of OEF and OIF, both CD sets were extremely valuable for mission accomplishment.<sup>112</sup> In addition, legal personnel may want to bring two sets of CDs because harsh conditions often necessitate back up copies.<sup>113</sup>

***d. Expect SIPRNET Access and Plan Ahead to Obtain Access to the NIPRNET.***

During the initial stages of OEF and OIF, staff sections communicated with commanders and garrison using the Tactical Web (TACWEB) via the Secret Internet Protocol Router Network (SIPRNET).<sup>114</sup> Having access to the SIPRNET sometimes proved invaluable. The SJA for 3ID, for example, was able to glean information from the DoD's Early Bird publication via the SIPRNET that had not yet reached him through official channels. It was through this publication that he learned the enemy was fighting in civilian clothes and was able to relay the information to higher and subordinate headquarters.<sup>115</sup>

Access to the Unclassified but Sensitive Internet Protocol Router Network (NIPRNET),<sup>116</sup> however, was limited. One JA in the V Corps tactical operations center, for example, noted that that was one NIPRNET access point for over 200 personnel. To use the NIPRNET, personnel were required to sign up on a roster and wait several hours.<sup>117</sup> Unlike the SIPRNET, the NIPRNET did not provide a secure channel of

Wagoner OEF AAR, *supra* note 1, at 6.

<sup>110</sup> See, e.g., 21st TSC AAR, *supra* note 17, at 3 (noting that the Rules of Engagement Handbook, OPLAW handbook, JAAWS CD-ROM, and CLAMO CD-ROM are vitally important materials).

<sup>111</sup> Those JAs and paralegals practicing military justice need access to the Manual for Courts-Martial, relevant service regulations on military justice, a Military Rules of Evidence hornbook, an Officer Basic Course Criminal Law Deskbook, and the Crimes and Defenses Deskbook. V Corps Rear (Provisional) Military Justice After Action Report, Major Bradley J. Huestis, Chief, Criminal Law, V Corps, at 2 (undated) (on file with CLAMO).

<sup>112</sup> Request for Deployed Judge Advocate Resource Library CDs can be made via e-mail by sending the number of CDs needed for a command and a shipping address to CLAMO@hqda.army.mil or via SIPRNET at CLAMO@hqda.army.smil.mil. International and Operational Law can be reached via their SIPRNET address at TJAGLCS-ILAW@hqda.army.smil.mil. The e-JAWS CD or DVD can be ordered via the Internet by logging on to JAGCNET www.jagcnet.army.mil and clicking on the e-JAWS link

<sup>113</sup> Wagoner OIF AAR, *supra* note 8, at 3.

<sup>114</sup> SIPRNET is the Department of Defense's secret network, which operates over the same lines as the NIPRNET, but with a limited/protected/closed Internet protocol addresses. Both networks contain encryption measures that allow use to only those with proper access.

<sup>115</sup> See 2003 Cayce Interview, *supra* note 35, at 6.

<sup>116</sup> NIPRNET is the Department of Defense's unclassified network which contains the World Wide Web or the Internet.

<sup>117</sup> V Corps AAR Transcript, *supra* note 30 (comments from Major Daniel G. Jordan, Tactical Command Post Judge Advocate, Office of the Staff Judge Advocate, V Corps).

communication. Unfortunately for JA personnel, access to the NIPRNET was necessary to conduct legal research. The SIPRNET, because it is military and DoD driven and fairly new, does not contain the NIPRNET's vast array of legal resources.<sup>118</sup> For example, the SIPRNET does not have access to the World Wide Web which has an unlimited amount of sites to conduct research. In many cases, JA personnel had to use another section's NIPRNET lines to accomplish their legal mission. With the limited number of lines and the vast number of service members who wanted access to the NIPRNET for the purpose of sending e-mails to family members, trying to use the NIPRNET was extremely difficult.

The problem with NIPR was that it was very slow. It was like a 28.8 dial-up connection, at best. Whenever it was at its best, it was that slow. So that posed a problem when we were trying to use our claims solution where we would scan the files in and then you have a large document to try to send back home. One, you had to hope you had a NIPR NET line. Well, you got that. Then you had to hope that the line would be open. Then you had to hope that it would stay open long enough for you to transfer that file. It didn't always happen that smoothly or it could be very, very time consuming. I would spend literally hours trying to download files that someone sent me on email.<sup>119</sup>

The lesson is that legal administrators and paralegal NCOICs need to coordinate with their G-6 prior to deployment and let them know that NIPRNET access is necessary for JAs and paralegals to conduct legal operations. At a minimum, all JA sections, offices, or BOLTs should have at least one SIPRNET and one NIPRNET drop at their workstation. Prior coordination and establishing a working relationship with unit G-6 or DOIM personnel is vital to ensuring that SJA personnel are equipped with the necessary tools to complete their mission.<sup>120</sup>

*e. Standardize Information Management: Tracking, Storing, and Filing.*

At bigger offices there were a large number of JAs and paralegals preparing work product while deployed. These offices found that they must have standardized information tracking, storing, and filing systems.<sup>121</sup> For example, once in theater, V Corps developed a tracking system for all of their legal opinions that allowed them to

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<sup>118</sup> A resource on the SIPRNET available to legal personnel is the CLAMO database on the SIPRNET. The classified CLAMO database is located in the Knowledge Collaboration Center (KCC) on Army Knowledge Online – Secret (AKO-S) at the following web site: [www.us.army.smil.mil](http://www.us.army.smil.mil). All users must apply for an AKO-S account prior to getting access to the database. Members of the U.S. Armed Forces, other than the Army, must have an Army sponsor prior to getting access to AKO-S. Contact CLAMO at [CLAMO@hqda.army.mil](mailto:CLAMO@hqda.army.mil) if you are having trouble getting access to AKO-S.

<sup>119</sup> 3ID AAR Transcript, *supra* note 6, at 185 (comments from CW2 Dorene L. Matheis, Legal Administrator, 3ID).

<sup>120</sup> *See, e.g.*, Matheis AAR, *supra* note 7, at 1.

<sup>121</sup> *See, e.g.*, Perrone Memo, *supra* note 28, para. 5 (“[o]ne constant frustration seemed to be the haphazard manner in which we saved files that someone else would eventually have to retrieve and work on in order to complete the action.”).

monitor actions, develop trends, and answer questions from higher headquarters on the details of legal actions.<sup>122</sup> BOLTs also experienced problems maintain accountability over actions. Given the complexity of many task organized brigades and the dispersal of subordinate units, actions could easily become lost. Therefore, BOLTs needed to maintain a tracking and storage system, as well.<sup>123</sup>

In addition, OSJAs found that they had to have a system for identifying, consolidating, and disseminating important information. This was made easier in most cases by unit websites. Many OSJAs had their own section of the unit website wherein they posted information for general use, such as information papers, important fragmentary orders, and situational reports.<sup>124</sup> Hence, it was imperative that OSJAs had someone schooled in website management. Although unit websites were an excellent tool for posting information, reviewing and identifying important information on the website proved time intensive. Therefore, OSJAs should assign specific personnel to review and retrieve information pertinent to legal operations from websites, as well as from various meetings and video teleconferences.<sup>125</sup>

To maintain accountability of actions legal offices also needed to have a standardized storage and filing system. An excellent recommendation by a V Corps JA is that the Field Standard Operating Procedure (FSOP) should provide for how documents will be saved and stored in a central location on each computer or on the network accessible drive. This will ensure that another member of the OSJA can easily locate and retrieve the document, when necessary.<sup>126</sup> In addition, there must be sufficient space for files to be stored, in particular as the mission expands and section files become more voluminous.<sup>127</sup>

***f. The Judge Advocate Warfighting System (JAWS) Continues to Improve.***

Army JAGC doctrine states that every BOLT shall be equipped with a Rucksack Deployable Law Library System, now called the Judge Advocate Warfighting System (RDL and JAWS respectively).<sup>128</sup> Deployment of the new JAWS proved that automation experts are clearly thinking towards the future force in providing the best possible equipment for operations that deal with extreme weather conditions and the elements. The ruggedized notebook is a proven commodity for legal personnel, especially in an area of operations where the equipment's worst enemies are heat and sand.<sup>129</sup>

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<sup>122</sup> A copy of the database, named "Judge Advocate General's Legal Information Tracking System," or "JAGLITS," is on file with CLAMO.

<sup>123</sup> Banks OIF Lessons Learned, *supra* note 93, at 19.

<sup>124</sup> V Corps AAR, *supra* note 30.

<sup>125</sup> V Corps, for example, assigned OSJA Joint Operations Center (JOC) personnel to review the V Corps website for important information and draft daily situational reports that included this information. *See id.*

<sup>126</sup> *Id.*

<sup>127</sup> *See, e.g.,* After-Action Review: Operational Iraqi Freedom, Sergeant Darienne LaVine, Noncommissioned Officer In Charge, Military Justice Division, V Corps, para. 4 (undated) (on file with CLAMO),

<sup>128</sup> FM 27-100, *supra* note 33, para 4.4.

<sup>129</sup> The Panasonic tough book was the laptop suggested in the JAWS specifications.

Marine Corps JAs also commented that they needed a standardized mobile JA box.<sup>130</sup> Recommendations from those Marine Corps JAs who deployed were that the Marine Corps procure a quality computer system like the Army JAGC's that is truly transportable by one person, to include laptop with NIPR and SIPR hard drives, digital camera, scanner, and printer.<sup>131</sup> Marine Corps JAs who deployed with large units commented that the Army's JAWS was not sufficient, however. One Marine Corps task force used the Air Force JAGC configuration, but instead of one regular laptop, they brought two ruggedized laptops. They also replaced the transcription equipment with an extra digital camera. The box also had a laser printer, a fax, a scanner/copier, printer cartridges, several regulations and other publications, the CD Rom library, voice activated recorder, office supplies, power strips, a converter box, and converter plugs.<sup>132</sup> The Air Force configuration is contained within a very large carrying case on wheels, however, and proved too large for Marine Corps legal personnel to hand-carry easily during combat operations. Therefore, when Marines embarked on ships, they broke the equipment down into separate carrying cases.<sup>133</sup>

Deployments to both OEF and OIF reflect that there are still issues with some of the JAWS' components. Additionally, there should be some items added to the specifications that would make the system more durable when used in an austere environment. The following components proved to be invaluable or would have been extremely helpful if OSJA personnel would have had them during their deployment in both operations.

### **1. CD-ROMs and CD Burners / Zip Drives and Zip Disk**

Reports from all who deployed indicated that floppy disks (3.25" disk) and floppy disk drives were of little use. They lacked durability in the heat of the desert and protection from the sandy dust in the air. In addition, they had very little storage capacity (only 1.44MB of information stored).<sup>134</sup> This posed a problem when trying to store most presentations and photographs, and when conducting backups of hard drives.<sup>135</sup> CDs, on the other hand, were durable and produced larger storage limits. CDs had their problems too, however. They tended to scratch, and very few computers were equipped with CD writer drives that allowed files to be saved to a CD. The same could be said of Zip disks and Zip Drives.<sup>136</sup> Again, they proved to be extremely durable and had a larger storage

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<sup>130</sup> See, e.g., Chenail OIF Lessons Learned, *supra* note 62, at 3.

<sup>131</sup> *Id.*

<sup>132</sup> TF Tarawa AAR Transcript, *supra* note 9, at 82 - 84.

<sup>133</sup> *Id.* at 83.

<sup>134</sup> See, e.g., 82d Airborne OIF AAR, *supra* note 80, at 5; TF Rakkasan AAR, *supra* note 99, at 2; Gregg AAR, *supra* note 41, at 2.

<sup>135</sup> It was extremely important to save files to a disk and back up drives daily given the large quantities of hard drives that crashed because of the heat and dust.

<sup>136</sup> A zip drive is defined as "a high-capacity floppy disk drive developed by Iomega Corporation. Zip disks are slightly larger than conventional floppy disks, and about twice as thick. They can hold 100 or 250 MB of data. Because they're relatively inexpensive and durable, they have become a popular media for backing up hard disks and for transporting large files." See definition at <http://www.webopedia.com>



capacity than floppy disks. Like CD writer drives, however, zip drives were not always available.

Given the above, laptops must, at a minimum, be equipped with an internal CD writer drive. This would allow legal personnel to save files and backup files for future use. Moreover, an external zip drive should be added as a backup to a failed CD writer. This would provide an additional means to store files should problems occur with the CD writer drive.

## **2. USB Portable Storage Device (more commonly known as Thumb Drives)**

If there was one item of equipment that legal personnel thought was the single best piece of automation equipment for deployments to both Afghanistan and Iraq, it was the thumb drive.<sup>137</sup> With conditions of extreme heat and excessive dust, legal personnel discovered a new means of storing and transferring data during a time when automation systems constantly failed. The thumb drive—compact, lightweight and relatively inexpensive—was the most durable and reliable piece of data storage equipment used in the desert. It allowed users to store and carry large files<sup>138</sup> on a durable medium that had both read and write capabilities. Legal personnel found the thumb drives particularly useful during times when they did not have access to their individual workstation, but they had access to another computer. Files could be placed on any thumb drive, plugged into the Universal Serial Bus (USB) port of any computer and used on that computer.

Legal personnel also used thumb drives to store classified documents from a classified computer. The advantage of using a thumb drive on a classified system was that these drives were easy to carry. They could be worn around the neck or placed in the individual's pocket. OSJA security managers need to ensure that users understand that thumb drives used to store classified documents must be treated as hard drives when it comes to storing any classified information.<sup>139</sup> Also, they took up minimum space when stored in a GSA-approved classified storage container. Some offices, such as the OSJA for the 82d Airborne Division, used these devices exclusively to store and transfer data.<sup>140</sup>

## **3. All-In-One Printer/Copier/Scanner (All-in-One)**

Many deployed OSJAs found that the Canon BJ-85 printer/scanner and the HP 350 printers, though portable, were not equipped to perform in the desert environment. The excessive dust in the air caused these printers to jam constantly to the point that they

<sup>137</sup> See, e.g., 3ID AAR Transcript, *supra* note 6, at 182; TF Tarawa Transcript, *supra* note 9, at 83-84.

<sup>138</sup> As of the date of Publication, the specifications allow the larger drives to store up to 512Mbs of information.

<sup>139</sup> E-mail from CW2 Eddie R. Hernandez, Legal Automation Army-Wide System Office, Office of the Judge Advocate General, to Colonel George L. Hancock, Jr., Chief, Legal Technology Resources Office, Office of The Judge Advocate General, para. 6 (14 May 2004) (on file with CLAMO) [hereinafter CW2 Hernandez E-mail].

<sup>140</sup> 82d Airborne OIF AAR, *supra* note 80, at 5.

were not able to be used at all.<sup>141</sup> Some legal administrators found that a small all-in-one was a great investment. Though not compact like the bubble jet printers/scanners, they were extremely durable and they had the added dimension of being used as a backup copier. They also offered flatbed scanner capability and unlike the BJ-85s, they were compatible with Optical Character Recognition (OCR) software.<sup>142</sup> Moreover, the scanning capability proved essential to transmit legal documents, such as court-martial documents, investigations, and legal assistance correspondence.<sup>143</sup> One JA at the V Corps Rear Headquarters observed the following.

The benefits of a scanner were clearly evident once we set-up the dual V Corps-CJTF-7 headquarters in Baghdad, as the CPA (Coalition Provision Authority) JOC (Joint Operations Center) had a digital sender. The ability to electronically send critically important documents within minutes of a request proved many times to me that a digital scanner was something that we could no longer deploy without in the future.<sup>144</sup>

An alternative to scanning and e-mailing documents, however, may be to simply upload the scanned documents to JAGCNet for retrieval by OSJA personnel in the Rear.<sup>145</sup>

#### **4. USB Port Expander**

Most computers have one or two Universal Serial Bus (USB) ports.<sup>146</sup> Most peripherals, because of ease of use and hot-plug and plug-and-play capability, use USB

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<sup>141</sup> See, e.g., Matheis AAR, *supra* note 7, at 2.

<sup>142</sup> Optical character recognition, or OCR, is defined as:

The branch of computer science that involves reading text from paper and translating the images into a form that the computer can manipulate (for example, into ASCII codes). An OCR system enables you to take a book or a magazine article, feed it directly into an electronic computer file, and then edit the file using a word processor.” All OCR systems include an optical scanner for reading text, and sophisticated software for analyzing images. Most OCR systems use a combination of hardware (specialized circuit boards) and software to recognize characters, although some inexpensive systems do it entirely through software. Advanced OCR systems can read text in large variety of fonts, but they still have difficulty with handwritten text.

The potential of OCR systems is enormous because they enable users to harness the power of computers to access printed documents. OCR is already being used widely in the legal profession, where searches that once required hours or days can now be accomplished in a few seconds.

See definition at [www.webpoedia.com](http://www.webpoedia.com).

<sup>143</sup> 82d Airborne OIF AAR, *supra* note 80, at 5 (noting that “a flat bed scanner which allowed large volume, high quality scanning and faxing of documents proved invaluable” for scanning and e-mailing documents to the Rear, including court-martial documents and legal assistance correspondence).

<sup>144</sup> Perrone Memo, *supra* note 28, para. 3.a .

<sup>145</sup> CW2 Hernandez E-mail, *supra* note 139, para. 12.

<sup>146</sup> The USB “is an *external bus* standard that supports *data transfer rates* of 12 Mbps. A single USB port can be used to connect up to 127 *peripheral devices*, such as *mice*, *modems*, and *keyboards*. USB also supports *Plug-and-Play* installation and *hot plugging*.” See definition at [www.webpoedia.com](http://www.webpoedia.com)

ports rather than the pin ports that are on the back of systems. USB ports have no device conflicts when used. Rather than unplug one device, like a keyboard or mouse to plug in another—such as a digital camera, a printer, or a scanner—the user can plug a port expander into one port and add four to eight more USB ports to that single computer. This allows the user to use all peripherals at once.<sup>147</sup>

### **5. Optical mouse**

The dust in the desert often clogged the sensors on the trackball of regular computer mice. Some of the deployed legal administrators were proactive when it came to this problem and rather than have personnel clean the mice every few uses, they either purchased or brought along optical mice.<sup>148</sup> Optical mice, unlike trackball mice, detect movement based off an optical sensor rather than movement of a ball on a dusty mouse pad or desk. Though more expensive than the normal trackball type mouse, optical mice, because of their durability and low maintenance, were definitely a sound investment for deployment in the desert.

### **6. 8 Port 10/100 LAN Hubs**<sup>149</sup>

At times the legal section of a unit was the odd-man-out when it came to availability of lines for NIPRNET and SIPRNET use. It was not uncommon for sections that had more than one workstation to receive only one Local Area Network (LAN) line.<sup>150</sup> OSJAs should plan accordingly. It is possible to share the line with more than one computer if a hub is attached to the line. The hub, which only needs to be a small eight port hub (for portability), allows other users to tap into the line provided by the G-6 and have access to either the SIPRNET or the NIPRNET.

### **7. Additional Laptops**

The current configuration of the JAWS has a single Panasonic tough book laptop computer with two swappable hard drives. One hard drive is for use on the SIPRNET and the other for the NIPRNET. During both operations, however, legal personnel found that the constant swapping of hard drives to maintain data integrity<sup>151</sup> exposed them to excessive heat and dust. This, in turn, took its toll on the drives, causing many of the

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<sup>147</sup> 3ID AAR Transcript, *supra* note 6, at 190.

<sup>148</sup> *See, e.g.*, TF Rakkasan AAR, *supra* note 99, at 2 (providing that CW2 Quincy Mays, Legal Administrator, 101st Airborne Division (Air Assault), purchased optical mice for their team prior to deployment).

<sup>149</sup> A hub is a common device used to connect segments of a Local Area Network LAN. It consists of several ports allowing many users to branch segments off of one line. 10/100 refers to the connection strength of the twisted pair cable used to connect workstations to a hub.

<sup>150</sup> *See* Subsection 3.d, *supra* for a general discussion of NIPRNET and SIPRNET.

<sup>151</sup> *See* AR 380-19, INFORMATION SYSTEMS SECURITY, ch. 2 (1 Aug. 1990) (outlining general computer security requirements).

hard drives to crash. The only viable solution for the hard drive dilemma was to have two dedicated computers, one for NIPRNET and the other for SIPRNET.<sup>152</sup>

### **8. Other equipment**

HP Cameras fared even worse than the printers. The telescoping lens gummed up immediately after exposure to desert conditions, resulting in a failure to focus, thus rendering them useless.<sup>153</sup> One legal team noted that their camera melted from heat exposure.<sup>154</sup> A more ruggedized digital camera is needed.<sup>155</sup>

SJA Offices also found that every RDL must contain a Title 10 Seal. As legal assistance assets became more and more geographically dispersed, every JA and paralegal needed access to these seal.<sup>156</sup>

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<sup>152</sup> See, e.g., 3ID AAR Transcript, *supra* note 6, at 182-83. CW2 Dorene Matheis, Legal Administrator, 3ID, stated:

We took lots of hard drives, lots of mice, and I was glad that we did. We actually killed all of our hard drives and a few from the G-6, so I can't even try to say how many you should take per machine. I would say you want at least two or three extra hard drives per machine. And part of that is because of the desert environment: the heat, the sand. And a large part of it is due to the drive swapping. The expectation was that we would have one machine and two hard drives: one SIPR and one NIPR. That's just bad. We'll never do that again. That's my pitch every time I get a chance to say something about how the machines faired. . . . My recommendation is that each BOLT have, and they did, at least two machines. The expectation is 24-hour ops. You're going to have one or two people in the TOC at any given time, so two machines should be sufficient.

*Id.*

<sup>153</sup> See, e.g., *id.* at 186 (the telescoping zoom lens . . . malfunctioned on every single one of them); Pritchard AAR, *supra* note 93, at 6 ([t]he zoom lens got sand in it and failed to retract. This then defeated the camera's ability to focus. CPT Pritchard brought his own digital camera, a \$50.00 camera with no zoom, and it worked perfectly.”).

<sup>154</sup> 12th LSO AAR, *supra* note 21.

<sup>155</sup> Per a message on the Legal Administrator Forum on JAGNET, CW2 Eddie Hernandez of the Legal Army Automation World Wide System Team added the Olympus C-720 digital camera to the JAWS specifications. According to CW2 Hernandez, this has been tested as a better and more durable camera than the HP cameras that are already in the JAWS boxes.

<sup>156</sup> See, e.g., TF Rakkasan, *supra* note 99, at 2.

# APPENDICES

**APPENDIX A-1: CAPITULATION AGREEMENT**

IN ENGLISH

THIS AGREEMENT, MADE ON THE DATE INDICATED BELOW, DOCUMENTS THE SURRENDER OF THE \_\_\_\_\_(UNIT) LOCATED AT \_\_\_\_\_(GRID) ACCORDING TO THE TERMS CONTAINED IN THIS AGREEMENT.

AS TO ENEMY FORCES:

THE UNDERSIGNED SURRENDERS WITHOUT CONDITIONS OR EXCEPTIONS ALL MILITARY, PARAMILITARY, AND SECURITY FORCES UNDER HIS COMMAND, AND CIVILIANS ACCOMPANYING THOSE FORCES, ACCORDING TO THE FOLLOWING TERMS:

1. ALL COMBAT ACTIVITIES WILL CEASE IMMEDIATELY.
2. ALL PERSONNEL WILL OBEY THE ORDERS AND DIRECTIONS OF U.S. FORCES.
3. UNLESS OTHERWISE DIRECTED, THE UNDERSIGNED WILL ENSURE THAT THE FOLLOWING ACTIONS OCCUR AND ACKNOWLEDGES RESPONSIBILITY AND ACCOUNTABILITY FOR CONTINUED ADHERENCE TO THESE TERMS:
  - a. ALL PERSONNEL WILL REMAIN IN PLACE AND IN UNIFORM.
  - b. ALL PERSONAL AND CREW-SERVED WEAPONS WILL BE COLLECTED AND SECURED, WITH AMMUNITION SEPARATED FROM THE WEAPONS.
  - c. ALL VEHICLES WILL REMAIN MARSHALLED IN SQUARES, IN THE OPEN, SIDE-BY-SIDE, IN MULTIPLE ROWS, IN NO GREATER THAN BATTALION SIZE.
  - d. ALL GUN BARRELS WILL REMAIN TURNED OVER THE REAR DECK OF THE VEHICLE IN A UNIFORM DIRECTION. ALL HATCHES WILL BE OPEN.
  - e. ALL UNITS WILL BE MARKED WITH PROMINENT WHITE FLAGS.
  - f. NO MANPAD SYSTEMS WILL BE VISIBLE FROM THE AIR.
  - g. ALL RADARS AND COMMUNICATION DEVICES MUST BE TURNED OFF.
  - h. ALL TOWED ARTILLERY AND ADA WILL BE RIGGED FOR TRAVEL.
  - i. ALL AIRCRAFT AND ASSOCIATED VEHICLES WILL BE PARKED NOSE TO NOSE IN PARKING AREAS. RUNWAYS WILL NOT BE BLOCKED.
  - j. ALL MINES, BOOBY TRAPS, AND SITES CONTAINING DANGEROUS FORCES AND MATERIEL (AMMUNITION, EXPLOSIVES; AND CHEMICAL, BIOLOGICAL, RADIOLOGICAL, OR NUCLEAR DEVICES OR MATERIALS) WILL BE MARKED AND IDENTIFIED TO U.S. FORCES.
  - k. ALL COMMUNICATION, COMPUTER, AND CRYPTOLOGICAL DEVICES; AND ALL DOCUMENTS, FILES, AND RECORDS OF WHATEVER TYPE OR MEDIA WILL BE PRESERVED AND IDENTIFIED TO U.S. FORCES.
  - l. NO CONTACT WILL BE MADE OR ATTEMPTED WITH OTHER IRAQI MILITARY, PARAMILITARY, OR SECURITY FORCES OR PERSONNEL.
  - m. NO PROPERTY WILL BE DESTROYED, DISABLED, OR HIDDEN.

- n. ALL SURRENDERED PERSONNEL WILL REMAIN SUBJECT TO THE ORDERS OF THE UNDERSIGNED AND TO THE ORDERS OF THOSE OFFICERS SUBORDINATE TO THE UNDERSIGNED FOR THE PURPOSES OF COMPLIANCE WITH THIS AGREEMENT AND COMPLIANCE WITH THE ORDERS AND DIRECTIONS OF U.S. FORCES.
- 4. THE UNDERSIGNED SPECIFICALLY ACKNOWLEDGES THAT COMPLIANCE WITH THIS AGREEMENT IS A CONTINUING OBLIGATION, AND THAT ANY VIOLATION OF THE TERMS OF THIS AGREEMENT IS A MATERIAL BREACH THAT MAY CAUSE THE U.S. FORCES COMMANDER TO RESCIND (TERMINATE) THE AGREEMENT. ANY RESUMPTION OF COMBAT ACTIVITY BY THE SURRENDERED FORCE WILL CAUSE RESUMPTION OF COMBAT OPERATIONS BY U.S. FORCES AGAINST THE SURRENDERED FORCE. ANY RESUMPTION OF COMBAT ACTIVITY BY PERSONNEL WHO HAVE SURRENDERED CONSTITUTES A VIOLATION OF THE LAW OF WAR FOR WHICH ALL THOSE INVOLVED WILL BE HELD ACCOUNTABLE AS WAR CRIMINALS.
- 5. THE UNDERSIGNED WILL MONITOR THE HEALTH, WELFARE, AND SAFETY OF ALL PERSONNEL UNDER HIS CONTROL AND WILL IMMEDIATELY ADVISE U.S. FORCES OF ANY REQUIREMENT FOR HUMANITARIAN ASSISTANCE.

AS TO U.S. FORCES:

- 1. SURRENDERED PERSONNEL WILL BE TREATED HUMANELY IN ACCORDANCE WITH THE GENEVA CONVENTIONS. THOSE MEETING THE REQUIREMENTS OF THE THIRD GENEVA CONVENTION WILL BE ACCORDED STATUS AS PRISONERS OF WAR.
- 2. NECESSARY ACTIONS WILL BE TAKEN TO PROTECT THE SAFETY OF SURRENDERED PERSONNEL.

SIGNED AT \_\_\_\_\_ THIS \_\_\_\_ DAY OF 2003.

FOR THE CAPITULATING UNIT: \_\_\_\_\_(SIGNATURE)

PRINTED NAME AND UNIT: \_\_\_\_\_

FOR U.S. FORCES: \_\_\_\_\_(SIGNATURE)

PRINTED NAME AND UNIT: \_\_\_\_\_

**APPENDIX A-2: LOCAL CEASE FIRE AGREEMENT**

UNCLASSIFIED

HEADQUARTERS, V CORPS (FWD)  
CAMP VIRGINIA, KUWAIT  
191200ZMARCH03

**TAB H TO APPENDIX 7 (CAPITULATION AND CEASE FIRE) TO ANNEX C  
(OPERATIONS) TO V CORPS OPLAN COBRA II**  
LOCAL CEASE FIRE AGREEMENT (U)

**LOCAL CEASE-FIRE AGREEMENT (CFA)**

The undersigned, each acting under their respective military authority, hereby agree to a local cease-fire between (Coalition Unit Commander / Unit)\_\_\_\_\_, and (Iraqi Unit Commander / Unit) \_\_\_\_\_ within Iraq. This cease-fire agreement is intended to ensure a complete cessation of hostilities and prohibits all acts of armed force between the signatories and their successors to this agreement. The signatories do individually, collectively, and mutually agree to accept and to be bound and governed by the conditions and terms of this cease-fire agreement as set forth in the following articles. The conditions and terms of this agreement are intended to be purely military in character and pertain solely to the forces of the signatories.

ARTICLES

1. The signatories shall order and enforce a complete cessation of all hostilities against each other in Iraq by all armed forces under their control, including all units and personnel of the ground, naval, and air forces, effective immediately. The Iraqi Unit Commander's forces shall remain in uniform.
2. In order to prevent the occurrence of incidents which might lead to a resumption of hostilities, the Iraqi Unit Commander shall ensure that the forces under his command remain within the following geographic limits:  

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3. Absent prior agreement between both sides, Iraqi Unit Commander's forces shall remain within the geographic limits specified within Article 2.
4. During the period of this cease-fire agreement, Iraqi forces under the command of the Iraqi Unit Commander shall display white flags on all mechanized equipment, to include an artillery pieces, as a flag of truce.
5. During the period of this cease-fire agreement, Iraqi forces under the command of the Iraqi Unit Commander shall:



- a. Not fire upon, or commit any hostile act towards, any coalition forces.
  - b. Not destroy or damage any of the Iraqi unit's vehicles or equipment.
  - c. Not destroy or damage any government or private property (e.g. public infrastructure, oil pumping / refining / storage / transportation facilities).
  - d. Place all towed artillery and air defense artillery pieces in a passive travel mode.
  - e. Turn off all radars.
  - f. Keep military personnel in uniform at all times.
6. Failure to order and enforce a complete cessation of all hostilities, or failure to completely comply with any requirements contained in Articles 3, 4 or 5 listed above, shall constitute a serious violation of this cease-fire agreement. A serious violation of this agreement may lead to denouncement of the cease-fire and recommencement of hostilities.
7. For mutual protection of forces the Unit Commanders will provide each other with the location of all land mines in the immediate vicinity of the units to which the cease-fire applies.
8. Responsibility for compliance with, and enforcement of, the terms and provisions of this cease-fire agreement is that of the signatories hereto and their successors in command. The unit commanders of the opposing forces shall establish within their respective commands all measures and procedures necessary to ensure complete compliance with all of the provisions of this agreement by all elements under their command. They shall actively cooperate with one another in requiring observance of both the letter and the spirit of all of the provisions of this agreement.
9. The respective commanders agree that this local cease-fire agreement does not surrender or capitulate troops under their control and that the respective units remain belligerents that may recommence hostilities. The respective commanders agree that, except in the case of a serious violation identified in paragraph 6 of this agreement, hostilities will not recommence without appropriate notice to the other commander. Appropriate notice will in no case be less than 48 hours.
10. The Articles of this cease-fire agreement shall remain in effect until expressly superseded either by mutually acceptable amendments and additions or by provision in an appropriate agreement for a peaceful settlement between both sides.
11. The present terms of this cease-fire agreement come into force upon signature of both parties.
12. Both signatories and their successors must mutually agree to any amendments and additions to this cease-fire agreement.

LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOLUME I, MAJOR COMBAT OPERATIONS (11 SEPTEMBER 2001 TO 1 MAY 2003)

13. Done in \_(city)\_, Iraq, in two copies, each in the English and Arabic, the English text being authentic.

Coalition Unit Commander \_\_\_\_\_ Date: \_\_\_\_\_

Iraqi Unit Commander \_\_\_\_\_ Date: \_\_\_\_\_

**APPENDIX A-3: PAROLE AGREEMENT**

UNCLASSIFIED

Tab B (Draft Parole Form)

**DRAFT PAROLE FOR IRAQI FORCES**

You are a Prisoner of War. You are being offered parole. Parole is a promise not to take up arms and fight against U.S./Coalition forces. In exchange for your promise, you will be released from U.S./Coalition custody. If you violate the terms of your parole, you may be prosecuted for war crimes.

Read the agreement below. If you agree with these terms for your parole, sign your name.

---

**PAROLE AGREEMENT**

I, (NAME) \_\_\_\_\_, knowingly, willingly, and voluntarily enter into this parole agreement with U.S./Coalition forces. On my personal honor, I promise not to engage in any hostile actions against U.S./Coalition forces, including but not limited to combat activities and reconnaissance. I understand that I may return to my unit, but I may only perform administrative and/or medical duties. I will keep a copy of this parole agreement on my person at all times. If I violate my parole, I may be prosecuted for committing a war crime. I promise to scrupulously comply with this agreement.

SIGN YOUR NAME \_\_\_\_\_

RANK \_\_\_\_\_

IDENTITY NUMBER \_\_\_\_\_

## **APPENDIX A-4: DETAINEE SCREENING QUESTIONS**

### **INITIAL QUESTIONS RE: SCREENING TRIBUNALS**

1. We are going to explain to you what is going to happen here today.
2. You claim that you are a civilian.
3. We need to investigate that claim in order to determine whether you are in fact a civilian.
4. It is a complicated process, and your case needs to be investigated according to the rules.
5. This is the first stage of the process.
6. We are going to ask you some questions. You do not have to answer any questions, but if you do not, it will be much more difficult to investigate your case and will take much longer.
7. We will not be making a final decision on your case today.
8. After this, you will be returned to your compound. This does not mean that you will stay here.
9. After we investigate your claim, we will move onto the next stage of the investigation.
10. Do you understand what I have explained to you?

### **AREAS TO FOCUS ON IN INITIAL SCREENINGS**

- Internment #?
- Speak English?
- DOB? Where were you born?
- Where do you live? How long?
- Family? Brother and sisters? Relatives in Military?
- Any relatives or friends captured with you? Who? (use to cross check story)
- Occupation? Ask specific questions re: job to see if they are lying.
- Prior Military service? Dates? What did you do? Have release papers? Where are they?
- Look at documents they had on them when captured. Money? Is it large amount?
- Look at Capture card if one exists
- How were you captured? Place? Time? With who? (Make them get very specific)
- Know members of Bath party? Feyadeen?
- Check arms for tattoos.

**NOTE:** They are used to lying, so need to be creative in finding inconsistencies in story

**APPENDIX A-5: GPW ARTICLE 5 RIGHTS ADVISEMENT**



REPLY TO  
ATTENTION OF

DEPARTMENT OF THE ARMY  
HEADQUARTERS, CJTF-7  
BAGHDAD, IRAQ  
APO AE 09014



Office of the Staff Judge Advocate

Name: \_\_\_\_\_

ISN: \_\_\_\_\_

Special Detention Facility

Subject: Geneva Convention Status

Dear \_\_\_\_\_

It has been determined that your status under Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949 (GPW) is in doubt. Accordingly, a Tribunal under Article 5 of the GPW to determine your status has been scheduled for \_\_\_\_\_.

You have the following rights at the Article 5 Tribunal:

- (1) You have the right to be present at all open sessions of the Tribunal;
- (2) You have the right to testify or not to testify.
- (3) You do not have the right to legal counsel, but you may have a personal representative assist you at the hearing if the personal representative is immediately available.
- (4) You have the right to present evidence, including the testimony of witnesses who are immediately available.
- (5) You have the right to examine and cross-examine witnesses, and examine evidence. However, sensitive information may be masked or reviewed by the Tribunal in closed session.

The following procedures apply at Tribunal hearings:

- (1) All evidence, including hearsay evidence, is admissible.
- (2) The Tribunal hearing is not adversarial. A recorder may present evidence to the Tribunal. The Tribunal may question detainees and other witnesses with the consent of the President of the Tribunal. Witnesses will testify under an oath or affirmation to tell the truth.
- (3) A detainee will be granted the status of prisoner of war unless it is established by a preponderance of the evidence that he is not entitled to such status. The standard for determining the truth of facts is proof by a preponderance of evidence.
- (4) The Tribunal's decisions are determined by a majority of voting members.

If you wish to have evidence, witnesses or a personal representative at the Tribunal, you have three days from the date of this notice to deliver a written request to the Camp Commander of your detention facility. The Tribunal will attempt to accommodate reasonable requests for persons who are immediately available.

FOR THE COMMANDER:

Marc L. Warren  
Colonel, U.S. Army  
Staff Judge Advocate

**APPENDIX A-6: 3ID DETAINEE REFERENCES AND ROE**

DA Pam 27-10. Treaties Governing Land Warfare (GPW), Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 Hague Convention Number IV Respecting the Laws and Customs of War on Land, October 18, 1907, *reprinted in DA PAM 27-1.*

Protocols Additional to the Geneva Conventions of August 12, 1949 and Relating to the Protection of Victims of International Armed Conflict

PROTOCOLS TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (1979).

DEP'T OF DEFENSE DIRECTIVE 5100.77, DOD LAW OF WAR PROGRAM (9 Dec 1998).

DEP'T OF DEFENSE DIRECTIVE 2310.1, DOD PROGRAM FOR ENEMY PRISONERS OF WAR AND OTHER DETAINEES (18 August 1994).

JOINT CHIEFS OF STAFF INSTRUCTION 3290.01, PROGRAM FOR ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES, AND OTHER DETAINED PERSONNEL (20 Mar. 1996).

III INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY TO THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (Pictet ed. 1960)[hereinafter Pictet].

FINANCE COMMANDER

Defense Finance and Accounting Service—Indianapolis (DFAS-IN) 37-1.  
FM 14-100.  
DA Pamphlet (Pam) 37-100-95.

FM 27-10, THE LAW OF LAND WARFARE (1956) w/ C1 (1976)

FM 19-40, ENEMY PRISONERS OF WAR, CIVILIAN INTERNEES, AND DETAINED PERSONS (1976)

AR 190-8, OPNAVINST 3461.6, AFI 31-304, MCO 3461.1, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES, (1 Oct 1997)

AR 190-47

DOD 1325.4

DA PAM 27-161-2, INTERNATIONAL LAW, VOLUME II (1962).

JA 442, OPLAW HANDBOOK, Chapter 5 (2000).

Howard S. Levie, 59 INTERNATIONAL LAW STUDIES, PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT (1977)

Howard S. Levie, 60 INTERNATIONAL LAW STUDIES, DOCUMENTS ON PRISONERS OF WAR (1979)

DA Form 1124. Individual Receipt Voucher Personal Deposit Fund. October 1952.  
 DA Form 1125-R. Summary Receipt and Disbursement Voucher Personal Fund. April 1986.  
 DA Form 1128. Petty Cash Voucher—Personal Deposit Fund. 1 September 1960.  
 DA Form 1129-R. Record of Prisoners' Personal Deposit Fund (LRA). April 1986.  
 DA Form 1130-R. Statement of Prisoner's Personal Deposit Fund and Request for Withdrawal of Personal Funds (LRA). April 1986.  
 DA Form 1131-R. Prisoner's Cash Account—Personal Deposit Fund (LRA). April 1986  
 DA Form 1132-R. Prisoner's Personal Property List—Personal Deposit Fund (LRA). April 1986.  
 DA Form 1134-R. Request for Withdrawal of Personal Property (LRA). April 1986.  
 DA Form 1135-R. Personal Property Permit (LRA). April 1986.  
 DA Form 2028. Recommended Changes to Publications and Blank Forms. 1 Feb 1974.  
 DA Form 2662-R - EPW ID Card  
 DA Form 2663-R - Fingerprint Card  
 DA Form 2664-R - Weight Register  
 DA Form 2665-R - Capture Card  
 DA Form 2666-R - EPW Address  
 DA Form 2667-R - EPW Letter  
 DA Form 2668-R - EPW Postcard  
 DA Form 2669-R - Death Certificate  
 DA Form 2670-R - Mixed Medical Commission Certificate  
 DA Form 2671-R - Medical Repatriation Certificate  
 DA Form 2672-R - Officer Retained Personnel  
 DA Form 2673-R - Enlisted Retained Personnel  
 DA Form 2674-R - Strength Report (NOT ON LAAWS)  
 DA Form 2675-R - Work Injury / Disability  
 DA Form 2677-R. United States Army Civilian Internee Identity Card (LRA). Nov 1986.  
 DA Form 2678-R. Civilian Internee NATL-Internment Card (LRA). November 1986.  
 DA Form 2679-R - Civilian Internee Letter  
 DA Form 2680-R. Civilian Internee NATL-Post Card (LRA). November 1986.  
 DA Form 3078. Personal Clothing Request. May 1993.  
 DA Form 3955. Change of Address and Directory Card. 1 February 1979.  
 DA Form 3997. Military Police Desk Blotter. 1 December 1998.  
 DA Form 4137 - Property Documentation  
 DA Form 4237-R - Detainee Personnel Record  
 DD Form 629 - Receipt for Prisoner  
 DD Form 2745 - EPW Tag (NOT ON LAAWS, NOT R, ORDER FROM DA)

AFZP-JAO

10 February 2003

INFORMATION PAPER

SUBJECT: Nutritional requirements for Iraqi enemy prisoners of war.

1. Purpose. To inform 3ID (M) commanders and senior leaders of the minimum nutritional requirements for Iraqi EPWs under the Geneva Convention.
2. Overview. The Geneva Convention Relative to the Treatment of Prisoners of War (GPW) became recognized as U.S. federal law on 21 October 1950. Article 26 of the GPW requires that the basic daily food ration for EPWs "shall be sufficient in quantity, quality and variety to keep prisoners of war in good health and to prevent loss of weight or the development of nutritional deficiencies. Account shall also be taken of the habitual diet of the prisoners."
3. According to the U.S. Food and Drug Administration, the average caloric intake for an active adult American male is approximately 3,000 calories daily. Similar information about the average caloric requirement for an active adult Iraqi male is not available, but a study by the World Health Organization indicates that the average Iraqi requirement of 2,500 calories per day has decreased to 1,225 calories per day. Intelligence on the living conditions, supply, morale, and general disposition of Iraqi military personnel in Southern Iraq further indicates that Iraqi soldiers are not well fed. Also, almost 97% of Iraq's population is Muslim. The Muslim faith forbids the consumption of pork or pork products.
4. A typical Meal-Ready-to-Eat (MRE) contains approximately 1,250 calories. Currently, MREs are available in over 24 different varieties of meals, including many non-pork and vegetarian varieties
5. Based upon the above facts and assumptions, one (1) MRE can provide an Iraqi EPW with the necessary nutrition IAW the Geneva Convention. In order to account for the habitual diet of Iraqi EPWs, pork MREs should not be issued.
6. Point of contact is CPT Jonathan DeJesus, 3rd Infantry Division (Mechanized), D-Main, Operational Law Cell. DNVT 584-0840.



AFZP-JAO

15 February 2003

## INFORMATION PAPER

SUBJECT: Authority to use public vehicles for transportation of EPWs.

1. Purpose. To provide 3ID(M) commanders with guidance on the confiscation, seizure, or requisition of Iraqi public or private property for use in EPW operations.
2. Overview. The authority of the military to take and use property varies depending on the ownership of the property, the type of property, and whether the taking occurs on the battlefield or under military occupation.
3. There are three methods to acquire property.
  - a. Confiscation is the permanent taking of enemy public property found on the battlefield. When required by military necessity, confiscated property becomes the property of the capturing state. Since the property belongs to the state, no compensation is required. Thus, a commander may acquire the supplies of an enemy armed force and its government, such as buses, trucks, or other vehicles.
  - b. Seizure is the temporary taking of private or state property on the battlefield. If private personal property is taken, it must be returned when no longer required, or else the user must compensate the owner for the period it was used. If private property must be seized, give a receipt for the property and record the condition of the property and the circumstances of seizure.
  - c. Requisition is the taking of private or state property or services needed to support the military force during occupation. Unlike seizure, requisition can only occur upon the order of the local commander. Users must compensate the owner as soon as possible. Requisitions apply to both personal property and services.
4. Conclusion. Unit commanders may acquire enemy public property during battlefield operations through confiscation. CFLCC guidance prohibits seizure or requisition of civilian private property, including vehicles, without a company level commander's authorization. In these circumstances, a receipt must be given to the owner. Before using these acquisition techniques, however, commanders must consider the impact that the seizing of private property has on the local populace and the difficulty in accurately computing compensation. Units likely to seize property should train on seizure, recordation, and reporting procedures.
5. Point of contact is CPT Jonathan DeJesus, 3rd Infantry Division (Mechanized), D-Main, Operational Law Cell. DNVT 584-0840.

AFZP-JAO

20 February 2003

INFORMATION PAPER

Subject: Care of dead EPWs and civilian internees

- References:
- (a) Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949.
  - (b) Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949
  - (c) Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949
  - (d) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, 12 August 1949.
  - (e) Joint Chiefs of Staff Instruction 3290.01, "Program for Enemy Prisoners of War, Retained Personnel, Civilian Internees, and Other Detained Personnel." 20 March 1996.
  - (f) DoD Directive 2310.1, "DoD Program for Prisoners of War and Other Detainees." 18 August 1994
  - (g) DoD Directive 5100.77, "DoD Law of War Program." 10 July 1979.
  - (h) AR 190-8, "Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees." 1 October 1997
  - (i) FM 3-19.40, "Enemy Prisoners of War, Civilian Internees, and Detained Persons" 1976
  - (h) FM 27-10, "The Law of Land Warfare," July 1956

1. Purpose. The purpose of this information paper is to inform 3ID(M) commanders of their obligations regarding the treatment of dead EPWs and civilian internees in their custody.

2. Overview. The Geneva Convention regulates the treatment of Enemy Prisoners of War (EPW) and civilian internees (CI) who die while in the custody of U.S. Armed Forces as a result of international armed conflict. Army regulations and field manuals reinforce the law and provide guidance on how to comply with the Conventions. In addition to a general prohibition on mistreatment of dead bodies, commanders must ensure that the dead receive proper burial, inquiries and investigations are conducted to determine the cause of death, and the proper authorities are notified of the death of the EPW of CI.

3. Examination of remains. The bodies of all EPWs or CIs must be examined as soon as possible after their death. CIs must receive a medical examination that is certified by a doctor. An EPW shall receive a careful examination, preferably medical, to confirm death, establish identity, and enable a report to be made. For both EPWs and CIs, a death certificate shall be drafted showing the cause of death and the conditions under which it occurred. An official record of the death shall be drafted, and a duly certified copy of such record shall be transmitted without delay to the International Committee of the Red Cross (ICRC).

4. Investigation of death. Every death or serious injury of an EPW or CI must be immediately followed by an official investigation. The ICRC must be immediately informed of such incidents. Statements shall be taken from all witnesses, especially other EPWs or CIs, and the final report shall be forwarded to the ICRC.

5. Remains. After all examinations and investigations, the deceased EPW or CI shall receive an honorable burial or cremation. If possible, the burial or cremation will be conducted according to the practices and religion of the deceased. If the EPW or CI has an identity disc or "dog tag", one should remain on the body or with the ashes.

a. Burial. All graves will be marked, maintained, and respected. Ideally, graves should be segregated by nationality. Bodies shall be buried in individual graves unless unavoidable circumstances require the use of collective graves.

b. Cremation. Bodies shall not be cremated except for imperative reasons of hygiene or for motives based on the religion of the deceased. If the body is cremated, the circumstances and reasons for cremation shall be stated in detail in the death certificate or on the authenticated list of the dead. The ashes of internees shall be retained for safe-keeping by the detaining authorities and shall be transferred as soon as possible to the next of kin on their request.

c. Graves registration. An official graves registration service must be set up to ensure subsequent exhumations and to ensure the identification of bodies or ashes, location of the site of the graves, and the possible transportation to the home country. As soon as circumstances permit, the graves registration service shall transmit this information to the ICRC.

6. Death Certificates. Death certificates must be drafted for every deceased EPW or CI. These records should include:

- a. Designation of the Protecting Power (ICRC or home nation of the deceased);
- b. Army, regimental, personal or serial number;
- c. First and Last name;
- d. Date and place of birth;
- e. Information from the identity card or disc;
- f. Date and place of capture or death;
- g. Information about wounds, illness, or cause of death;
- h. Place and date of burial.

7. Reporting. As soon as possible the above mentioned information shall be forwarded to the National Prisoner of War Information Center, which shall transmit this information to the Power on which these persons depend through the ICRC. Parties to the conflict shall prepare and forward to each other certificates of death or duly authenticated lists of the dead. They shall likewise collect and forward through the same bureau one identity disc, last wills or other

documents of importance to the next of kin, money, and all articles of an intrinsic or sentimental value which are found on the dead. All articles shall be sent in sealed packets, accompanied by statements giving all information necessary for the identification of the deceased owners, as well as a complete list of the contents of the parcel.

8. Commanders can obtain administrative assistance with reporting, addresses, and forms from the unit personnel office. The following forms may assist the commander with treatment of the dead EPWs and CIs.

a. DA Form 2669-R - Death Certificate

b. DA Form 2670-R - Mixed Medical Commission Certificate

c. DA Form 1129 - R -Record of Prisoners' Personal Deposit Fund.

d. DA Form 1130-R. Statement of Prisoners' Personal Deposit Fund and Request for Withdrawal of Personal Funds.

e. DA Form 1131-R. Prisoners' Cash Account-Personal Deposit Fund.

f. DA Form 1132-R. Prisoners' Personal Property List-Personal Deposit Fund.

9. The point of contact for this information paper is CPT Jonathan DeJesus, 3rd Infantry Division (Mechanized), D-Main, Operational Law Cell. DNVT 584-0840.

AFZP-JAO

22 February 2003

## INFORMATION PAPER

SUBJECT: Use of Riot Control Agents against Enemy Prisoners of War

- References:
- (a) Geneva Convention, Relative to the Treatment of Prisoners of War, August 12, 1949.
  - (b) Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925.
  - (c) Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, January 13, 1993.
  - (d) 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954.
  - (e) Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, April 10, 1972.
  - (f) Convention on Prohibitions or Restrictions of the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, October 10, 1980.
  - (g) Executive Order 11850, 1975.
  - (h) DoD Directive 5100.77, "DoD Law of War Program." July 10, 1979.
  - (i) AR 190-8, "Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees." October 1, 1997
  - (j) FM 3-19.40, "Enemy Prisoners of War, Civilian Internees, and Detained Persons" 1976 (formerly FM 19-40)
  - (k) FM 27-10, "The Law of Land Warfare," July 1956

1. Purpose. The purpose of this information paper is to inform 3ID(M) commanders of their authority to use Riot Control Agents (RCA) to quell disturbances with Enemy Prisoners of War (EPW).
2. Overview. The 1993 Chemical Weapons Convention (CWC) was ratified as U.S. law in 1997. In general, the CWC prohibits the development or use of chemical weapons, and also restricts the use of RCAs as a "method of warfare."
3. Executive Order 11850 clarifies U.S. policy on the use of RCAs, and allows their use in defensive military modes to save lives. Since RCAs in this capacity are not being used against combatants, they are not being used as a "method of warfare." EPWs have the legal status of a non-combatant, and accordingly RCAs can be used against them. Therefore, the use of RCAs is permissible in the following situations:

- (a) Controlling riots in areas under direct and distinct U.S military control, including rioting of EPWs;
- (b) Escaping EPWs in remotely controlled areas;

AFZP-JAO

SUBJECT: Use of Riot Control Agents against Enemy Prisoners of War

- (c) Dispersing civilians where the enemy uses them to mask or screen an attack;
  - (d) Rescue missions for downed pilots or passengers;
  - (e) For police actions in our rear areas.
4. Current U.S. Army doctrine permits the use of two (2) types of Riot Control Agents, O-chlorobenzylidene malonitrile (CS) and Oleoresin capsicum (OC).
  5. Use of RCAs in accordance with the above federal guidelines and Army doctrine is IAW V Corps and CFCLCC guidance.
  6. The point of contact for this information paper is CPT Jonathan DeJesus, 3rd Infantry Division (Mechanized), D-Main, Operational Law Cell. DNVT 584-0840.

AFZP-JAO

24 February 2003

## INFORMATION PAPER

SUBJECT: Use of Enemy Prisoners of War for Labor and Services

- References:
- (a) Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949.
  - (b) Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949
  - (c) Joint Chiefs of Staff Instruction 3290.01, "Program for Enemy Prisoners of War, Retained Personnel, Civilian Internees, and Other Detained Personnel." 20 March 1996.
  - (d) DoD Directive 2310.1, "DoD Program for Prisoners of War and Other Detainees." 18 August 1994
  - (e) DoD Directive 5100.77, "DoD Law of War Program." 10 July 1979.
  - (j) AR 190-8, "Enemy Prisoners of Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees." 1 October 1997
  - (k) FM 3-19.40, "Enemy Prisoners of War, Civilian Internees, and Detained Persons" 1976
  - (l) FM 27-10, "The Law of Land Warfare," July 1956

1. Purpose. The purpose of this information paper is to inform 3ID(M) commanders and senior leaders of the restrictions on using EPWs for labor and services.

2. Overview. The law of war regulates use of EPWs as a source of labor and services for military forces. Generally, EPWs may be used as a source of labor, but the work that they may perform is limited.

3. Labor Restrictions. The following restrictions apply when employing EPWs:

- a. Officers cannot be compelled to work.
- b. NCOs can only be required to supervise the work of enlisted personnel.
- c. Retained medical and religious personnel may not be compelled to carry out any work other than that concerned with their medical or religious duties.
- d. Any EPW cannot be compelled to engage in work that is purely military in nature and purpose, by its nature unhealthy or dangerous, or labor that is considered humiliating or degrading for members of the US armed forces.

1.) These prohibitions do not include unpleasant, necessary tasks that are connected to administering and maintaining the facility. Therefore, EPWs may perform labor and tasks such as the construction of field latrines or the preparation of food for other EPWs.

2.) EPWs may volunteer for any labor or tasks regardless of these restrictions.

e. The duration of the daily labor of EPWs, including travel time to work sites, shall not be excessive and must be comparable to the work hours of United States civilians engaging in similar functions. Furthermore, EPWs shall receive at least one hour of rest during a period of daily labor. EPWs will receive extra rest and rations for any work exceeding these limitations. EPWs will also be granted at least one full day of rest for every week of labor, and eight consecutive days of paid rest for each year.

f. EPWs may be employed in other essential work if qualified civilian labor is unavailable. The camp commander must organize and manage the EPW population in a manner that permits proper, ready employment of each EPW.

g. Commanders must be aware that while some work may be authorized, consideration must be given to the perception of involving EPWs in certain tasks. If any doubt exists as to whether work is authorized, the commander must request that the SJA review the proposed tasks.

4. Compensation. If an EPW is compelled to work, he must be paid. This pay is in addition to the monthly advance required by the Geneva Conventions. Compensation for work is authorized from US Army appropriated funds, canteen funds, or EPW funds.

a. EPWs shall be paid a fair working rate determined by the Camp Commander that is at least one-fourth of one Swiss franc for a full working day. EPWs performing skilled or semi-skilled labor, including interpreters and retained personnel shall also be paid a fair rate commensurate with their skill level. The working pay of any prisoners' representative shall be paid out of the fund maintained by canteen profits.

b. EPWs who are injured or become ill as a result of labor must receive medical attention and may file a claim against the United States for such injuries or illnesses.

c. The Geneva Conventions state that the detaining power shall grant EPWs a monthly advance of pay in the following minimum amounts:

1.) Category I - Enlisted EPWs below the rank of Sergeant will be paid 8 Swiss francs.

2.) Category II - NCOs will be paid 12 Swiss francs.



3.) Category III - Warrant officers and commissioned officers below the rank of major will be paid 50 Swiss francs.

4.) Category IV - Majors, Lieutenant Colonels, and Colonels will be paid 60 Swiss francs.

5.) Category V - General Officers will be paid 75 Swiss francs.

d. The camp commander must create an account for every EPW reflecting all advances, work pay, transfers of currency, or other monetary transactions.

5. Use of civilian persons for labor is discouraged. Any use of civilian labor must first be approved by the camp commander after authorization from Division Headquarters and consultation with the SJA.

6. Point of contact is CPT Jonathan DeJesus, 3rd Infantry Division (Mechanized), D-Main, Operational Law Cell. DNVT 584-0840.

**3ID(M) USE OF FORCE FOR EPW GUARDS**

**NOTHING IN THESE RULES LIMITS YOUR INHERENT AUTHORITY AND OBLIGATION TO TAKE ALL NECESSARY AND APPROPRIATE ACTION TO DEFEND YOURSELF AND US FORCES!!!**

1. **OBLIGATION TO PROTECT.** Under the Laws of War, you are obligated to protect EPWs under your control. To ensure the protection and security of EPWs in the holding area, EPWs are subject to the UCMJ, camp regulations and military orders. The camp commander will ensure that all EPWs understand the meaning of the English word "HALT."

2. **ESCALATION OF FORCE.** Never use more force than necessary to maintain discipline and compliance with EPW camp rules. Situation permitting, use the following steps to deal with EPWs.

- a. SHOUT verbal warnings to "HALT" or "KIF"
- b. SHOW weapon and demonstrate intent to use it
- c. SHOVE, restrain EPW with non-lethal techniques or chemical irritants.
- d. SHOOT to remove threat.

\* WHEN ENFORCING CAMP DISCIPLINE, GUARDS WILL USE THE MINIMUM FORCE NECESSARY TO MAINTAIN DISCIPLINE AND COMPLIANCE WITH CAMP RULES. DEADLY FORCE IS NOT AUTHORIZED EXCEPT FOR SELF-DEFENSE OR DEFENSE OF OTHERS. NO WARNING SHOTS WILL BE FIRED. FIRE WITH REGARD TO SAFETY OF NEARBY EPWS AND PERSONNEL.

3. **DISORDER / RIOT.** In the event of disorderly or rioting detainees, apply the following rules for the use of force.

- a. Shout "HALT" or "KIF" three times, thereafter
- b. Use Non-lethal force, after authorization by unit designated representative.
- c. Use of riot control agents to stop a riot is authorized
- d. Use of deadly force in defense of guards or others held hostage by EPWs is authorized.

4. **ESCAPE.** In the event of attempted escape, apply the following rules:

- a. Shout "HALT" or "KIF" three times, thereafter
- b. Use least amount of force to halt detainee
- c. If there is no other effective means of preventing escape, deadly force may be used.
  - 1.) In an attempted escape from a fenced enclosure, a prisoner will not be fired at unless he has cleared the outside fence and is making further effort to escape.
  - 2.) EPWs attempting to escape outside a fenced enclosure will be fired on if they do not halt after the third warning.

5. **REPORT ALL INCIDENTS.** Report all disturbances to the EPW Camp Commander using the SALUTE+ format

- a. SIZE. How many detainees were involved
- b. ACTIVITY. Description of event
- c. LOCATION. Explanation of where in the facility the event is taking place.
- d. UNIT. Identification of EPWs involved, to include full name(s) and internment serial number
- e. TIME. Time and date of disturbance.
- f. EQUIPMENT. Weapons or gear used by EPWs

g. +. Security, discipline, or other actions taken to quell disturbance or prevent escape.

### EPW Matrix & Definitions

	Protection	Medical Care	ID Card	Relief agency visit	Complaints	Food / Water	Clothing	Shelter	Religious Activities	Reporting to EPW Agency	Tribunal to Determine Status	Mail	Capture Card	Compensation	Representation	Repatriation	Parole
<b>GPW Article</b>	12 - 16	13,15 20,30 31,46	17	125	78	26, 34	27	21 - 25	34, 38	122	5	70 - 77	70	60 - 63	79	109, 110, 118	21
<b>Immediately after capture</b>	X	X	X	X	X												
<b>Within the shortest possible time</b>						X	X	X	X	X	X						
<b>Day 7</b>												X	X				
<b>Day 30</b>														X			
<b>6 Months (Day 180)</b>															X		
<b>End of Hostilities</b>																X	
<b>No Obligation, but permissible at any stage</b>																	X

**- SECURITY AND SAFETY OF EPWs, GUARDS, AND OTHER PERSONNEL IS ALWAYS THE MAIN CONCERN !!!**

**Article 5 Tribunal** - U.S. policy is to convene a 3 member panel which will make a factual determination of the status of the detainee. The panel does not determine punishment. It is also U.S. policy to treat all detainees with the same status as EPWs until their status has been determined.

**Capture Card** - A baseline of recorded data that should be maintained about an EPW. The recommended form contains fourteen (14) items: (1) power on which the prisoner depends, (2) name, (3) first names (in full), (4) first name of father, (5) date of birth, (6) place of birth, (7) rank, (8) service number, (9) address of next of kin, (10) taken prisoner on: (or) coming from (camp number, hospital), (11) (a) good health (b) not wounded (c) recovered (d) convalescent (e) sick (f) slightly wounded (g) seriously wounded, (12) present address is: [prisoner number and

LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOLUME I, MAJOR COMBAT OPERATIONS (11 SEPTEMBER 2001 TO 1 MAY 2003)

name of camp], (13) date, and (14) signature. Prisoners are only required to fill in items two, three, five, seven, and eight. If, for example, the prisoner is concerned that his family may suffer repercussions due to his capture or surrender, he is not required to provide his father's name or address of next of kin. GPW Article 70.

**Clothing** - Adequate clothing must be provided considering climate. EPWs may use their own uniforms.

**Compensation** - The detaining power shall grant all EPWs a monthly advance of pay based upon their rank. Article 60 of GPW establishes the amounts. EPWs shall also be paid for their labor, special skills, or services, at least one Swiss franc for a day's worth of labor. Labor rates should be established prior to the commencement of labor activities. EPWs can also receive monies from abroad, and may send their monies abroad. The detaining power can maintain control of the money by creating accounts for each EPW. Payments by the detaining power can be in the form of credits to the EPWs account.

**Detainees** - Persons in custody who have not been classified as an EPW, RP, or CI. All detainees shall be treated as EPWs until a legal status is ascertained by competent authority, such as an Article 5 Tribunal.

**Detaining Power** - Party who secures capture of EPW and thus gains responsibility for their treatment and security under the Geneva Convention.

**Enemy Prisoner of War** - A detained person as defined in Articles 4 and 5 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949. In particular, one who, while engaged in combat under orders of his or her government, is captured by the armed forces of the enemy. As such, he or she is entitled to the combatant's privilege of immunity from the municipal law of the capturing state for war like acts which do not amount to breaches of the law of armed conflict. A prisoner of war may be, but is not limited to, any person belonging to one of the following categories who has fallen into the power of the enemy: a member of the armed forces, organized militia or volunteer corps; a person who accompanies the armed forces without actually being a member thereof; a member of a merchant marine or civilian aircraft crew not qualifying for more favorable treatment; or individuals who, on the approach of the enemy, spontaneously take up arms to resist invading forces.

**EPW Branch Camp** - A subsidiary camp under supervision and administration of the main EPW camp.

**EPW Camp** - A camp set up by the U.S. Army for the separate internment and complete administration of EPWs. Camps shall not be located near military targets and should be clearly marked with the letters PW, PG, or other recognizable and visible marking.

**Food Accommodations** - Basic food rations shall be sufficient in quantity, quality, and variety to keep EPWs in good health while preventing the loss of weight or development of nutritional deficiencies. Account shall be taken for the habitual diet of the EPW, therefore no pork MREs or meals should be fed to Muslims. EPWs may use their own foodstocks and prepare their own food.

**GPW** - Geneva Convention Relative to the Treatment of Prisoners of War. August 12, 1949 (GENEVA CONVENTION III). Entry into Force: 21 October 1950

**ID Cards** - Identification cards are only required to contain name, rank, serial number, and date of birth. The Convention also allows a party to place any other information that it wishes on the card and specifically mentions the owner's signature or fingerprints as examples. The EPW must keep the ID Card in his possession at all times. As far as possible, the card should measure 6.5 X 10 cm. GPW Article 17.

**Mail** - No later than one week after capture, an EPW shall be able to write directly to his family, and shall also be entitled to receive mail. At a minimum, the capture card shall be mailed to notify the family. The detaining party can limit mail to 2 letters and 4 cards each month. No postage is required. Telegrams may also be permitted. Censorship with all communications is authorized, but must be conducted as quickly as possible.

**Medical Care** - The GPW requires that all wounded and sick shall be collected, cared for, and generally provided humane treatment. Medical inspections must be conducted at least once a month. GPW also requires that EPWs

suffering from serious disease or injury must be admitted to a medical unit that can provide such care. In addition to these protections, the Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (GWS) mandates any wounded and sick “shall not willfully be left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created.”

**Military Activities** - Activities intended primarily or exclusively for military operations as contrasted with activities intended primarily or exclusively for other purposes.

**Military Nature** - Term that applies to those items or those types of construction that are used exclusively by members of the Armed Forces for operational purposes (e.g., arms, helmets). The purposes are in contrast to items or structures that may be used either by civilian or military.

**Parole** - Parole is used in the international law sense of releasing a prisoner of war (PW) in return for a pledge not to bear arms.

**Personal Effects** - An EPW shall be allowed to retain personal effects. Personal effects the EPW may retain include the following:

- a. Clothing.
- b. Mess equipment (knives and forks excluded)
- c. Badges of rank and nationality.
- d. Decorations.
- e. Identification cards or tags.
- f. Religious literature.
- g. Articles that are of a personal use or have a sentimental value to the person.
- h. Protective mask.

**Prisoner of War Information Center (PWIC)** - A TOE organization established to collect information pertaining to EPW, RP and CI and to transmit such information to the National Prisoner of War Information Center.

**Protection** - Protection from violence, intimidation, insults, and public curiosity. This includes protection on the battlefield and intrusions from the press.

**Relief Agency** - A non-governmental agency such as the International Committee for the Red Cross or Doctors Without Borders.

**Religious** - EPW's shall have complete latitude in practicing their religious faith and may be attended to other EPWs.

**Repatriation** - Releasing an EPW back to his host nation. EPW must be repatriated as soon as hostilities end. However, the Detaining power cannot force an EPW to repatriate. Also, repatriation is required before cessation of hostilities for:

- a. Seriously sick and wounded EPWs whose recovery is expected to take more than 1 year (Art. 110, GPW);  
\*
- b. Incurably sick and wounded (Art. 110, GPW); or \*
- c. Permanently physically or mentally disabled (Art. 110, GPW)

\* No sick or wounded EPW may be repatriated against his will.

\*\* Retained personnel are to be repatriated as soon as they are no longer needed to care for the prisoners of war.

**Reporting Requirements** - The name, rank, date of birth, and service number. The detaining power has a duty to report, if available, the following additional information: father's first name, mother's maiden name, name and address of person to be notified, name of camp and postal address, information regarding transfers, releases, repatriations, escapes, admissions to hospitals, deaths, and information about the prisoner's state of health. Of these items, the only information that the prisoner is not under a duty to provide and may not be readily available to the detaining power is the information about the next of kin. If a prisoner is concerned for the safety of his or her family, the prisoner is not required to provide this information. GPW Article 122.

LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOLUME I, MAJOR COMBAT OPERATIONS (11 SEPTEMBER 2001 TO 1 MAY 2003)

**Retained Personnel** - Enemy personnel who come within any of the categories below are eligible to be certified as retained personnel (RP).

- a. Medical personnel who are members of the medical service of their armed forces.
- b. Medical personnel exclusively engaged in the—
  - ( 1 ) Search for, collection, transport, or treatment of, the wounded or sick.
  - (2) Prevention of disease.
  - (3) Staff administration of medical units and establishments exclusively.
- c . Chaplains attached to enemy armed forces
- d. Staff of National Red Cross societies and other voluntary aid societies duly recognized and authorized by their governments. The staffs of such societies must be subject to military laws and regulations.
- e. Of note, retained status is not limited to doctors, nurse, corpsman, etc. It also includes, for example, the hospital clerks, cooks, and maintenance workers.

\* Retained personnel are to be repatriated as soon as they are no longer needed to care for the prisoners of war.

**Shelter** - EPWs may be interned only on land and afforded every guarantee of hygiene and healthfulness. Except in rare cases, they shall not be interned in penitentiaries. EPWs interned in unhealthy or dangerous areas shall be removed as soon as possible to a more favorable location.

**APPENDIX A-7: 3ID DETAINEE INFORMATION PAPER**

AFZP-JA

28 January 2003

SUBJECT: 3d Infantry Division (Mech.) program for Enemy Prisoners of War (EPW) and Other Detainees

- References:
- (a) DoD Directive 2310.1, "DoD Program for Prisoners of War and Other Detainees," August 18, 1994
  - (b) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, August 12, 1949
  - (c) Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949
  - (d) Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949
  - (e) Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949
  - (f) DoD Directive 5100.77, "DoD Law of War Program," July 10, 1979
  - (g) FM 27-10, "The Law of Land Warfare," July 1956

1. PURPOSE

This Directive:

1.1. Recites the intent of the Department of Defense and Department of the Army regarding the treatment of EPWs, including enemy sick or wounded, retained personnel, civilian internees (CIs), and other detained personnel (detainees). Detainees include, but are not limited to, those persons held during operations other than war.

1.2. Establishes the policy of the 3d Infantry Division (Mech.) for the treatment of EPWs and detainees during international armed conflict.

2. POLICY

It is DoD and 3d Infantry Division (Mech.) policy that:

2.1. The 3d Infantry Division (Mech.) shall comply with the principles, spirit, and intent of the international law of war, both customary and codified, to include the Geneva Conventions (references (b) through (e)).

2.2. The 3d Infantry Division (Mech.) soldiers shall be given the necessary training to ensure they have knowledge the Division's obligations under the Geneva Conventions

(references (b) through (e)) and as required by DoD Directive 5100.77 and FM 27-10, “The Law of Land Warfare,” (references (f) and (g)).

2.3. Captured or detained personnel shall be accorded an appropriate legal status under international law. Persons captured or detained may be transferred to or from the care, custody, and control of the U.S. Military Services, including the 3d Infantry Division (Mech.), only on approval of the Assistant Secretary of Defense for International Security Affairs (ASD(ISA)) and as authorized by the Geneva Conventions Relative to the Treatment of Prisoners of War and for the Protection of Civilian Persons in Time of War (references (d) and (e)).

2.4. Persons captured or detained by the 3d Infantry Division (Mech.) shall normally be handed over for safeguarding to the U.S. Army Military Police, or to detainee collecting points or other holding facilities and installations operated by U.S. Army Military Police as soon as practical. Third Infantry Division (Mech.) must be prepared to handle 50,000 EPWs and detainees for a period of not less than thirty (30) days. After 30 days, those EPWs and detainees should be transferred to 18<sup>th</sup> Airborne Corps assets. It is foreseeable that, due to projections of vast amounts of EPWs and detainees, this mission will need to be repeated.

2.5. Detainees may be interviewed for intelligence collection purposes at facilities and installations operated by U.S. Army Military Police, but any soldier may ask EPWs and detainees any question at any time.

### 3. RESPONSIBILITIES

3.1. The Brigade Combat Team (BCT) Commanders shall ensure that their soldiers are appropriately trained in the handling and processing of EPWs, to include enemy wounded and sick, CIs, and other detainees.

3.2. The Division Support Command (DISCOM), G3 shall develop a cooperative plan, in conjunction with the Division Provost Marshall and elements of 18<sup>th</sup> Airborne Corps, for the successful administration, maintenance, and support of EPW internment facilities, capable of providing at least the minimum levels required by international law and pertinent Army Regulations, including AR 190-8.

### 4. TREATMENT OF EPWs AND DETAINEES

4.1. Status v. Treatment. During the initial stages of combat operations, the capture of a wide array of individuals is likely. Regardless of the nature of the conflict, all suspected enemy personnel should initially be accorded the protections of the Geneva Convention Relative to the Treatment of Prisoners of War (GPW), at least until their status is determined. In this regard, remember that “status” is a legal term, while “treatment” is descriptive. In other words, treat all EPWs and detained personnel pursuant to the terms of the GPW, and avoid classifying their status.

- a. Status: Until proper questioning and investigation determines the status of detainees not readily discernable as enemy combatants, their status is uncertain.



b. Treatment: The basic requirements for treatment are:

1. Treat each detainee humanely and with respect.
2. Apply the protections of the Geneva Convention to all detainees.
3. Ensure that all sick or wounded detainees are provided prompt medical care. Order of treatment is based solely on triage or reasons of detainee's medical emergency.
4. Protect detainees from violence, intimidation, insults, and public curiosity. Protect and defend detainees against attack as if they were a friendly force.
5. Treat all detainees equally, regardless of ethnicity, nationality, religion, political opinions, appearance, title, or membership.
6. Use deadly force only as a last resort when all lesser means of force have failed or when less than deadly force is inappropriate under the circumstances.
7. Identity card maintained by the detainee.
8. Inventory, maintenance, and respect for personal effects of detainees. Personal articles will be taken if they pose a security threat.

4.2. Processing EPWs and Detainees. It is the responsibility of the units on the ground to ensure that the following procedures are used in processing EPWs and Detainees.

(a) **SEARCH** for weapons documents. Person must be allowed to maintain protective gear (after thorough search of items). ALL other equipment and personal items must go to S2 for exploitation.

(b) **SILENCE**. Do not allow detainees to talk. Gag only when necessary, and pay CLOSE attention to these individuals. Silenced groups cannot plot to resist or escape.

(c) **SEGREGATE** the detainees by rank, sex, military from civilian, hostile from cooperative, etc. Disrupting chain of command will further lessen the chances for organized resistance. Additional categories of separation are defined in AR 190-8.

(d) **SAFEGUARD** detainees from danger on the battlefield, and from any reprisals by U.S. forces or other detainees. It is our obligation to protect them from harm. We also need to safeguard any intelligence they may have.

(e) **SPEED**. Ensure all detainees are evacuated to rear in timely manner, given the tactical and logistical situation. Remember, detainees are a drain on front-line units, and intel from them is time-sensitive.

(f) **TAG**. Ensure all items found on detainee are recorded and placed in the same bag, along with a capture tag. Do not allow detainees to "sterilize" themselves by throwing away notebooks, money, cell phones, etc.! Place one tag on detainee, one with gear. This will also serve as a temporary receipt for the confiscated gear.

ENSURE the following information is on the capture tag:

- Date and Time of capture
- Place of capture (Grids, town, street corners, bldg., etc.)
- Circumstances of capture (gave up, fought, ran away, etc.)
- ALL documents/items found on
- Capturing unit

BE AS DETAILED AS POSSIBLE WITH ALL ENTRIES. PROPER BAGGING OF GEAR AND RECORDING OF CAPTURE DATA WILL GREATLY INCREASE THE INTELLIGENCE VALUE OF THE DETAINEE.

## 5. PREPARATION AND ADMINISTRATION OF EPW CAMPS

5.1. Several tasks that must be completed in order to meet the requirements set forth by the Geneva Conventions, AR 190-8, "Enemy Prisoners of Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees," and Field Manual 27-10, "Law of Land Warfare." These sources require that EPWs and detainees receive adequate quarters, food, and clothing, and that medical treatment be available within the camps. Additionally, EPW internment camps must not be located near the battlefield nor collocated with any targets presenting a military value. It is the responsibility of the 3d Infantry Division (Mech.) to insure the safety of the EPWs and detainees.

5.1.1. Quarters. There should be a minimum of four separate living quarters, or sleeping tents, to ensure that male officers, female officers, male enlisted, and female enlisted are housed separately. EPW living quarters will be in similar condition as those for the forces of the Detaining Power, in this case 3d Infantry Division (Mech.), who are billeted in the same area. Blankets or some other form of heat should be provided if necessary.

5.1.2. Hygiene. Latrines and shower facilities shall be provided by the Detaining Power. There shall also be sufficient soap and toilet paper available for the EPWs and detainees. Moreover, they shall be provided laundry capabilities similar to those enjoyed by the Detaining Power billeted in the same area.

5.1.3. Food. The basic daily food rations shall be sufficient in quantity, quality, and variety to keep EPWs and detainees in good health. EPWs and detainees shall, as far as possible, be associated with the preparation of their meals and special consideration should be given regarding religious dietary needs of the prisoners. Sufficient drinking water shall be supplied.

5.1.4. Clothing. Underwear and footwear shall be supplied in sufficient quantities by the Detaining Power, which shall make allowance for the climate of the region.

5.1.5. Uniforms of the enemy armed forces captured by the Detaining Power should, if suitable for the climate, be made available to clothe EPWs and detainees.

5.1.6. Regular replacement and repair of the aforementioned items shall be assured by the Detaining Power.

5.1.7. Medical Care. Every camp shall have an adequate infirmary where EPWs and detainees may have the attention they require. Isolation wards shall, if necessary, shall be set aside for cases of contagious or mental diseases. The Detaining Power shall take sanitary measures necessary to ensure the cleanliness and healthfulness of camps and to prevent epidemics. Medical inspection of prisoners of war shall be held at least once a month. They shall include the checking and the recording of the weight of each prisoner of war.

## 6. FISCAL ISSUES

6.1 Deploying units normally use “generic” O & M funds to support their operations. Operation and maintenance appropriations pay for the day-to-day expenses of training, exercises, contingency missions, and other deployments. These funds may be categorized as “mission funds,” “con-ops funds,” or by some other title. Regardless of the title applied to these funds, the majority of funds deployed units receive are O & M funds.

6.2. It is the intent of 3d Infantry Division (Mech.) to utilize O & M funds for the costs of the administration, maintenance, and support of EPW internment camps.

## 7. ARTICLE 5 TRIBUNALS

7.1. Based upon previous experience in this region, it is likely that the status of many detainees will not be evident. In such cases, it is necessary to appoint a tribunal in accordance with Article 5 of the GPW. Upon the recommendation of the Staff Judge Advocate, 3d Infantry Division (Mech.), the commander of the 3d Infantry Division (Mech.) will appoint the Article 5 Tribunal.

7.1.1. An Article 5 Tribunal is required to “determine the status of any person not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces, and who asserts that he or she is entitled to treatment as a prisoner of war, or concerning whom any doubt of a like nature exists.” AR 190-8, para. 1-6b.

7.1.2. The status of “prisoner of war” is the highest and most preferred status that may be afforded to captured persons.

7.1.3. All captured persons whose status as a “prisoner of war” is in doubt shall be afforded treatment as prisoners of war until their actual status has been determined by an Article 5 Tribunal.

7.1.4. Uniformed members of the enemy armed forces when captured on the battlefield are clearly entitled to prisoner of war status. Conducting an Article 5 Tribunal for these individuals is not necessary.

**APPENDIX B-1: OEF AND OIF ROE CARDS**

**Bagram Airfield ROE Card, Afghanistan (2002)**

**ROE CARD—Bagram Airfield**

**Nothing in these rules limits the right of the individual soldiers to defend themselves or the right and responsibility of leaders to defend their units.**

1. Use common sense and experience in response to any threat.
2. Defend yourself, your fellow soldiers and other U.S./coalition personnel against hostile acts or demonstrated hostile intent.
3. Any use of force must be necessary and proportional to counter a hostile act (an attack) or demonstrated hostile intent (a threat of imminent use of force).
4. Use of deadly force to protect against serious bodily injury or death, or to protect mission essential property designated by the commander.
5. Use non-deadly force to protect other property.
6. Do not cause unnecessary suffering.
7. Care for all wounded under U.S. control, whether friend or foe.
8. Treat all persons with dignity and respect.
9. Respect civilians and their property, and do not steal.
10. Obey the Law of War and report all suspected violations, by either friend or foe, of the Law of War through command channels.

If the situation permits, issue a challenge:

-In English: “AMERICAN FORCES, STOP OR I WILL FIRE”


-In Farsi: “Askaree Amrikee. Dresh ya fire may kenoom”

-In Urdu: “Amriki Forge. Ruck Jow! Warna goli ma-roon go”

-In Arabic: “AI kowat al Amrikiya. Kef ow atlook al nar”

Use proportional force to control the situation.

Attack to disable or destroy when it is the only prudent way to prevent or end a hostile act or demonstration of hostile intent.



**CFLCC RULES FOR USE OF FORCE**

**NOTHING IN THESE RULES LIMITS YOUR INHERENT AUTHORITY AND OBLIGATION TO TAKE ALL NECESSARY AND APPROPRIATE ACTION TO DEFEND YOURSELF, YOUR UNIT, AND OTHER US FORCES.**

1. **HOSTILE FORCES:** NO forces have been declared hostile.
2. **HOSTILE ACTORS:** You may engage persons who commit hostile acts or show hostile intent with the **minimum force** necessary to counter the hostile act or demonstrated hostile intent and to protect US Forces.
 

**Hostile act:** An attack or other use of force against US Forces or a use of force that directly precludes/impedes the mission/duties of US Forces.

**Hostile intent:** The threat of **imminent** use of force against US Forces or the threat of force to preclude/impede the mission/duties of US Forces.
3. You may use force, up to and including deadly force, against hostile actors:
  - a. In self-defense;
  - b. In defense of your unit, or other US Forces;
  - c. To prevent the theft, damage, or destruction of firearms, ammunition, explosives, or property designated by your Commander as vital to national security. (Protect other property with less than deadly force.)

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**CFLCC RULES FOR USE OF FORCE**

**NOTHING IN THESE RULES LIMITS YOUR INHERENT AUTHORITY AND OBLIGATION TO TAKE ALL NECESSARY AND APPROPRIATE ACTION TO DEFEND YOURSELF AND OTHER US FORCES.**

4. **ESCALATION OF FORCE:** When possible, use the following degrees of force against hostile actors:
  - a. **SHOUT:** verbal warnings to HALT or "KIFF" (pronounced "COUGH").
  - b. **SHOVE:** physically restrain, block access, or detain.
  - c. **SHOW:** your weapon and demonstrate intent to use it.
  - d. **SHOOT:** to remove the threat of death/serious bodily injury or to protect designated property. **IF YOU MUST FIRE:**
    - (1) Fire only aimed shots. **NO WARNING SHOTS.**
    - (2) Fire no more rounds than necessary.
    - (3) Fire with due regard for the safety of innocent bystanders.
    - (4) Take reasonable efforts not to destroy property.
    - (5) Stop firing as soon as the situation permits.
5. **CROWDS:** Control civilian crowds, mobs, or rioters interfering with US Forces with the minimum necessary force. When circumstances permit, attempt the following steps to control crowds:
  - a. Repeated warnings to HALT or "KIFF" (pronounced COUGH).
  - b. Show of force, including riot control formation.
  - c. Blocking of access, or other reasonable use of force necessary under the circumstances and proportional to the threat.
6. **DETAINEES:** You may stop, detain, search, and disarm persons as required to protect US Forces. Detainees will be turned over to the Military Police or Kuwait Police ASAP.
7. Treat all persons with respect and dignity.

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**CFLCC RUF CARD, KUWAIT (2002)**

<p style="text-align: center;"><b><u>CFLCC ROE CARD</u></b></p> <p><b>1. On order, enemy military and paramilitary forces are declared hostile and may be attacked subject to the following instructions:</b></p> <p>a. Positive Identification (PID) is required prior to engagement. PID is a reasonable certainty that the proposed target is a legitimate military target. If no PID, contact your next higher commander for decision.</p> <p>b. Do not engage anyone who has surrendered or is out of battle due to sickness or wounds.</p> <p>c. Do not target or strike any of the following except in self-defense to protect yourself, your unit, friendly forces, and designated persons or property under your control:</p> <ul style="list-style-type: none"><li>• Civilians</li><li>• Hospitals, mosques, churches, shrines, schools, museums, national monuments, and any other historical and cultural sites</li></ul> <p>d. Do not fire into civilian populated areas or buildings unless the enemy is using them for military purposes or if necessary for your self-defense. Minimize collateral damage.</p> <p>e. Do not target enemy Infrastructure (public works, commercial communication facilities, dams), Lines of Communication (roads, highways, tunnels, bridges, railways) and Economic Objects (commercial storage facilities, pipelines) unless necessary for self-defense or if ordered by your commander. If you must fire on these objects to engage a hostile force, disable and disrupt but avoid destruction of these objects, if possible.</p> <th data-bbox="769 554 1385 1535"><p style="text-align: center;"><b><u>CFLCC ROE CARD</u></b></p><p>2. The use of force, including deadly force, is authorized to protect the following:</p><ul style="list-style-type: none"><li>• Yourself, your unit, and friendly forces</li><li>• Enemy Prisoners of War</li><li>• Civilians from crimes that are likely to cause death or serious bodily harm, such as murder or rape</li><li>• Designated civilians and/or property, such as personnel of the Red Cross/Crescent, UN, and US/UN supported organizations.</li></ul><p>3. Treat all civilians and their property with respect and dignity. Do not seize civilian property, including vehicles, unless you have the permission of a company level commander and you give a receipt to the property's owner.</p><p>4. Detain civilians if they interfere with mission accomplishment or if required for self-defense.</p><p>5. CENTCOM General Order No. 1A remains in effect. Looting and the taking of war trophies are prohibited.</p><p><b><u>REMEMBER</u></b></p><ul style="list-style-type: none"><li>• Attack enemy forces and military targets.</li><li>• Spare civilians and civilian property, if possible.</li><li>• Conduct yourself with dignity and honor.</li><li>• Comply with the Law of War. If you see a violation, report it.</li></ul><p>These ROE will remain in effect until your commander orders you to transition to post-hostilities ROE.</p><p style="text-align: right;">AS OF 311330Z JAN 03</p></th>	<p style="text-align: center;"><b><u>CFLCC ROE CARD</u></b></p> <p>2. The use of force, including deadly force, is authorized to protect the following:</p> <ul style="list-style-type: none"><li>• Yourself, your unit, and friendly forces</li><li>• Enemy Prisoners of War</li><li>• Civilians from crimes that are likely to cause death or serious bodily harm, such as murder or rape</li><li>• Designated civilians and/or property, such as personnel of the Red Cross/Crescent, UN, and US/UN supported organizations.</li></ul> <p>3. Treat all civilians and their property with respect and dignity. Do not seize civilian property, including vehicles, unless you have the permission of a company level commander and you give a receipt to the property's owner.</p> <p>4. Detain civilians if they interfere with mission accomplishment or if required for self-defense.</p> <p>5. CENTCOM General Order No. 1A remains in effect. Looting and the taking of war trophies are prohibited.</p> <p><b><u>REMEMBER</u></b></p> <ul style="list-style-type: none"><li>• Attack enemy forces and military targets.</li><li>• Spare civilians and civilian property, if possible.</li><li>• Conduct yourself with dignity and honor.</li><li>• Comply with the Law of War. If you see a violation, report it.</li></ul> <p>These ROE will remain in effect until your commander orders you to transition to post-hostilities ROE.</p> <p style="text-align: right;">AS OF 311330Z JAN 03</p>
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**CFLCC ROE CARD, IRAQ (2003)**

**101<sup>ST</sup> AIRBORNE ROE CARD, IRAQ (2003) (FRONT OF CARD)**



**ROE DURING HOSTILITIES**



**NOTHING IN THESE RULES PROHIBITS YOU FROM EXERCISING YOUR INHERENT RIGHT TO DEFEND YOURSELF and OTHER ALLIED FORCES.**

**FIRING AT COMBATANTS**

1. Fire at all members of forces DECLARED HOSTILE. You may immediately fire upon any force that you know to be hostile.
2. You may use necessary force, including deadly force, against any person, vehicle, or aircraft that commits a hostile act, or exhibits hostile intent.
3. Employ only observed fire, unless unobserved fire is necessary for the immediate defense of friendly forces receiving fire or is approved by designated authority (See ROE Annex).
4. Do not use incendiary weapons such as napalm or white phosphorous against targets in populated areas. Tracer and illumination rounds and smoke are authorized in all areas.
5. You may employ command-detonated claymores when authorized by the Division Commander. Keep claymores under continuous observation, and remove them when no longer necessary.
6. You may use Riot Control Agents (RCA), i.e., pepper spray or CS, when authorized by your Brigade Commander. Only use RCA in noncombatant situations, such as riot control against civilians, or when civilians are used as human shields, or to control EPWs in rear areas.

**USING FORCE AGAINST CIVILIANS**

1. You may stop civilians and check their identities, search for weapons and seize any found. Detain civilians when necessary to accomplish your mission or for their own safety. Use the Four S's when dealing with civilians demonstrating some form of hostile intent.
  1. **SHOUT** verbal warning to halt! In English: "HALT! DON'T MOVE! HANDS UP!"  
 In Farsi: "Askaree Amriekk. Dresh ya fire may kenoom!"  
 In Urda: "Amriki Forge. Ruck Jow! Warna goli ma-roongo!"  
 In Arabic: "Al Kawat al Amrikiya. Kef ow atlook al nar!"
  2. **SHOW** weapon and intent to use it.
  3. **SHOVE** Use non-lethal physical force.
  4. **SHOOT** to eliminate the threat. Fire only aimed shots. Stop firing when the threat is neutralized.
2. Do not fire upon civilian infrastructure facilities (i.e., communication, water treatment, power) unless such facilities are being used in a manner that threatens the security of the force.
3. You may fire upon civilian vehicles carrying enemy forces, weapons, or supplies.
4. You may confiscate the property of hostile forces, except captives' personal property and equipment necessary for their protection and welfare.
5. Seize PRIVATE property only if it has a military use (e.g., weapons, ammunition, communication equipment, or transportation) & your commander authorizes the seizure based on military necessity. Give the owner a receipt. Check to see if PUBLICLY owned property can substitute. **TAKING WAR TROPHIES IS PROHIBITED.**



101<sup>ST</sup> AIRBORNE ROE CARD, IRAQ (2003) (BACK OF CARD)



ROE DURING HOSTILITIES



TRAINING SCENARIOS

1. **Facts:** An enemy unit maneuvers within your weapon range. **Response:** Shoot to eliminate the threat and accomplish the mission.
2. **Facts:** An unarmed enemy soldier sees you and does nothing but stare at you. **Response:** Shoot to eliminate the threat. The soldier is a member of a Hostile Force and is lawful target.
3. **Facts:** An armed soldier sees you and throws his hands up to surrender. **Response:** Take the soldier prisoner, and treat as an EPW. (Note: aircraft are not in the position to accept surrender, in the foregoing scenario, a 101<sup>st</sup> ABD aircraft could fire upon the enemy soldier).
4. **Facts:** The enemy has placed an armored unit in an urban area. The enemy unit is not firing at friendly forces, and we have no observed fires capability on the target area. **Response:** Request authority to fire.
5. **Facts:** Same facts as above, except the unit is an enemy rocket artillery unit, currently firing on friendly forces. **Response:** Fire upon the enemy using the most proportionate system reasonably available.
6. **Facts:** A civilian deliberately drives a vehicle at friendly forces. **Response:** Shoot to eliminate the threat.
7. **Facts:** Your unit comes under fire, you notice a young civilian woman who appears to be pointing to the location where friendly troops are concealed, based on her actions, those locations are then targeted. **Response:** Shoot to eliminate the threat (the woman has become a combatant).
8. **Facts:** You observe a group of Bedouins near your perimeter, as they move closer you notice they are armed. **Response:** Four S's. They are not members of a force Declared Hostile, so you should respond with minimum force. If they demonstrate Hostile Intent, you should immediately shoot to eliminate the threat.
9. **Facts:** As the operation progresses, large numbers of refugees flow on almost all high speed avenues of approach. One such group is blocking your passage, and has become an angry mob. **Response:** Four S's. They are not members of a force Declared Hostile and there is no indication of hostile intent.
10. **Facts:** Same facts as above, in this scenario, however, the mob begins to hurl rocks and move toward your unit with clubs. **Response:** Four S's, however, you might quickly be forced to employ deadly force.



**APPENDIX B-2: OEF AND OIF ROE TRAINING SCENARIOS/VIGNETTES**

**CJTF-180 HIP-POCKET ROE TRAINING SCENARIOS, AFGHANISTAN**  
**(APRIL 2002)**

[Scenario 1 redacted by Editors]

**Scenario 2**

- Unidentified armed person climbing the fence to enter perimeter without authority.
- Use of force authorized
- Discussion: Trying to enter with a weapon displays hostile intent. Use the necessary force proportionally to respond to the threat.

**Scenario 3**

- Person outside perimeter aiming a weapon toward the perimeter.
- Use of force authorized
- Discussion: Pointing a weapon demonstrates hostile intent. You don't have to wait until they pull the trigger.

**Scenario 4**

- Armed persons outside perimeter. Weapons holstered, slung, carried at port arms or over the shoulder.
- Use of force not authorized / Don't Shoot
- Discussion: There are lots of armed folks in the area who may not be hostile. Very common for Afghan men to carry arms. Local leaders and their men, who openly carry arms, have been performing outer security at the airfield

**Scenario 5**

- Person outside perimeter aiming a weapon toward US forces, US civilians, designated NGO persons outside the perimeter.
- Use of force authorized
- Discussion: Pointing a weapon demonstrates hostile intent. Defense of others is permitted. Again, you don't have to wait until the shot is fired.

**Scenario 6**

- Rounds impacting inside perimeter. Source unidentified.
- Don't Shoot until source identified.
- Discussion: Firing into a heavily populated area must be aimed or observed fires to avoid civilian casualties. Once you identify the source of the fire and it is hostile (as opposed to accidental), you can take it out.

### **Scenario 7**

- Angry crowd trying to enter the perimeter.
- Don't Shoot / You must use the minimum force only.
- Discussion: Try to de-escalate if possible. Use RCAs and non-lethal methods, if feasible, to encourage their departure. Request host nation support (if available). If the crowd presses on, despite these methods, or otherwise displays hostile acts or intent, you may engage.

### **Scenario 8**

- Angry crowd outside compound. Armed personnel in the crowd of women and children shoot at and wound or kill a soldier inside the perimeter.
- Use of force authorized / shoot if you can identify the source of the fire. Use snipers or other accurate and precise deadly force to limit chance of injuring civilians. You can also use RCA to disperse the crowd and gain a shot at the hostile forces.

### **Scenario 9**

- Angry crowd trying to enter the perimeter. Rocks and bottles thrown.
- Use of force is authorized to disperse the crowd. Shooting may be defensible but may not be the best option.
- Discussion: Rocks and bottles can kill or cause serious injuries and deadly force in response would be legally supportable. However, other means than deadly force, like non-lethal methods or host nations support, may be better tactical alternatives and may help keep the situation from turning deadly.

### **Scenario 10**

- Vehicle driving fast toward entry point.
- Use of force authorized / tactically shooting may be your only option
- Discussion: A vehicle purposefully speeding directly at you is a hostile act. You may engage. You should anticipate attack and stay alert at all times.

### **Scenario 11**

- Vehicle parks at perimeter, driver walks away.
- Search & Move the vehicle (after EOD sweep)
- Discussion: As a force protection measure, you may forcefully search and move the vehicle. You may need host nation support.

### **Scenario 12**

- Person entering the control point. Can you detain and search them?
- Yes
- Discussion: As a force protection measure, you may detain & search anyone entering or leaving the area.

### **Scenario 13**

- Child peeks head over the wall and watches for 15 seconds. He is seen yelling to someone outside the wall.
- No force authorized.
- Observation alone is not a hostile act/hostile intent. If he then climbs over the wall, use of force is authorized to subdue the child.

**Scenario 14**

- You observe an Afghani woman being beaten by 2 men. She is clearly being injured by this attack.
- You may intervene if she is in danger of losing life or limb. You must use the minimum force only.
- You can protect yourself, other U.S. forces and personnel, coalition forces, and designated NGO's. You may only stop civilian-on-civilian violence if there is a possibility of death or loss of limb.

**Scenario 15**

- Woman being beaten gets up and runs to your perimeter, begging in a foreign language to be let in.
- Detain her. Apply security procedures for searching and detaining.
- You do not know what her intent is. She may be a genuine victim or a spy attempting to gain access to the compound. Obvious cultural sensitivities apply to handling a female detainee. Consult chain of command immediately.

## **CFLCC ROE Pocket Card Vignettes, Iraq (February 2003)**

### ***Soldier ROE Pocket Card Vignettes***

These vignettes clarify and reinforce the Law of Land Warfare and the Rules of Engagement (ROE) summarized in the Combined Forces Land Component Command (CFLCC) ROE Card of 31 Jan 03. Small unit leaders are encouraged to use the vignettes in situational training exercises and brief backs to build understanding of the ROE and create confidence that the ROE can be applied quickly and decisively under stress. For operational security, units and specific location names are fictitious.

***Situation 1:*** You are in the lead element of your Division's Cavalry Squadron, advancing toward the outskirts of a city. The CFLCC ROE Card is in effect. Suddenly you see three uniformed enemy soldiers jump up and out of a foxhole and begin running away, toward a building on the edge of the city. They are carrying small arms. What do the ROE allow you to do?

***Response 1:*** Attack the enemy soldiers. According to the CFLCC ROE Card, enemy military forces are declared hostile and may be attacked. The three enemy soldiers are not presently surrendering, and they are not out of combat due to sickness or wounds. There is no duty to warn, no requirement to observe a hostile act or hostile intent, and no reason to use lesser force before firing. Limit destruction to what your mission requires. Aimed rifle shots and machine gun fire will minimize collateral damage to the nearby city.

***Situation 2:*** Same as Situation 1, except that your element has just crossed the international border into enemy territory, and three individuals running away from their fighting position and from you are wearing the uniforms of Border Guard Forces, a paramilitary organization with the primary mission of serving as a tripwire against military incursions into enemy territory. The three members of the BGF are carrying small arms. What do the ROE allow you to do?

***Response 2:*** Attack these paramilitary forces. According to the CFLCC ROE Card, enemy paramilitary forces are also declared hostile and may be attacked. The three BGF are not presently surrendering, and they are not out of combat due to sickness or wounds. There is no duty to warn, no requirement to observe a hostile act or hostile intent, and no reason to use lesser force before firing. Limit destruction to what your mission requires.

***Situation 3:*** You are an AH-64 Apache helicopter pilot returning from an attack on an enemy artillery battalion, and your gunship remains armed with some air-to-ground rockets and 30 mm chain gun ammunition. During the return flight, you clearly identify an enemy military convoy of 12 vehicles carrying troops and supplies. What do the ROE allow you to do?

***Response 3:*** Attack the convoy with the rockets and the chain gun. According to the CFLCC ROE Card, Enemy military forces are declared hostile and may be attacked. No

signs of surrender are visible from the convoy, and none of the vehicles are marked with a Red Cross or Red Crescent. There is no duty to warn, no requirement to observe a hostile act or hostile intent, and no reason to use lesser force before firing. Limit destruction to what your mission requires.

**Situation 4:** Your company's mission is to establish blocking positions on the outskirts of a small city in order to prevent enemy forces in the city from impeding the advance of your brigade to the northwest. One of the avenues of approach to be blocked is a road that intersects your brigade's route of advance after crossing a bridge over a river. As you approach the bridge, you are able to identify an Enemy ZU-23 Anti-Aircraft gun on the bridge. The gun is manned, but silent. There are no friendly aircraft currently in the vicinity, though your company commander mentioned when issuing the operation order that close air support would be on station later in the day. What do the ROE allow you to do?

**Response 4:** Disable, disrupt, or destroy the ZU-23, but without damaging the bridge. Under the CFLCC ROE Card, Enemy lines of communication (LOCs) must not be targeted unless necessary for self-defense or unless ordered by your commander. LOCs are structures such as roads, highways, bridges, tunnels, and rail systems used for transportation. Report your sighting of the ZU-23 to higher. The ROE allow you to immediately engage both it and the enemy soldier manning it with small arms and any other weapon available that will leave the bridge and road intact for traffic. Artillery fire risks damaging the bridge and should not be used unless approved by higher headquarters or necessary for self-defense.

**Situation 5:** You are a platoon leader, and your platoon's current position is on the outskirts of a large town. Your battalion's mission is to block enemy forces in the town in order to prevent them from impeding the advance of 2d battalion to the north. The squad leader of 3d Squad radios you to report that he has identified a major power generation facility in the city. He proposes that the mortar fire be used to destroy the facility, which because it is nighttime, appears empty of workers. He says that the section of town powered by the facility may be hiding enemy forces, and "it'll be harder to hide 'em if we get rid of their power." Can you do this under the ROE?

**Response 5:** No. Under the CFLCC ROE Card, you must not target the power generation facility unless necessary for self-defense or if ordered by your commander. A higher commander has reserved the authority to target infrastructure, such as public works, commercial communication facilities, and dams. Report to higher that your platoon has confirmed the location of the power generation facility.

**Situation 6:** Same as in Situation 5, except that your squad leader proposes "taking out" an oil refinery. Can you do this under the ROE?

**Response 6:** No. Under the CFLCC ROE Card, you must not target the oil refinery unless necessary for self-defense or if ordered by your commander. A higher commander has reserved the authority to target economic objects, such as commercial storage facilities

and pipelines. Report to higher that your platoon has confirmed the location of the oil refinery.

**Situation 7:** You are a member of an infantry squad. Moving near the outskirts of a city, you see an enemy hospital that is flying the Red Crescent and notice that it is being used by an observation post. The enemy soldiers have binoculars, and when you are able to see them, they are surveying the terrain and speaking on the radio. You know that an enemy artillery battery is located in the city. What do the ROE allow you to do?

**Response 7:** Notify higher immediately of the situation. Under the CFLCC ROE Card, hospitals are not to be attacked except in self-defense. Placing an OP in the hospital, a protected place, is forbidden under the Law of Land Warfare, and will cause the hospital to lose its protected status after it is warned and given a reasonable time to comply. When higher headquarters notifies your company commander that the hospital has been warned and that reasonable time for compliance has passed with the OP still in position, attack the enemy soldiers. Limit destruction to what your mission requires.

**Situation 8:** Same situation as in Situation 7, except that the enemy soldiers in the hospital are firing at you. What do the ROE allow you to do?

**Response 8:** Return fire with aimed fire. There is no duty to warn before returning fire in self-defense. Limit destruction to what your mission requires.

**Situation 9:** Your battalion commander wants to move rapidly past a town. As you move to within 300 meters west of the town on your advance northward, you are able to see an enemy OP on the third floor of a three story residential building. The only people you see in the building are the enemy soldiers on the third floor, but you have seen civilians running away along neighboring lanes. What do the ROE allow you to do?

**Response 9:** Fire upon the Enemy OP. The CFLCC ROE Card says, "Do not fire into civilian populated areas or buildings unless they are being used for military purposes or if necessary for your self-defense." Unlike the situation in which a Red Crescent is being misused, there is no duty to warn prior to engaging. Minimize collateral damage.

**Situation 10:** Despite your battalion's efforts to remain out of the town, your platoon has been given the mission to clear the three story residential building on the edge of the town because now an enemy machine gun is firing intermittently on the lead battalion elements, halting the battalion's advance. The only people you see in the building are the enemy soldiers firing from the third floor. The last civilian you saw was a boy running away from the building along a neighboring lane 10 minutes ago. What do the ROE allow you to do?

**Response 10:** Attack the enemy machine gun position. The ROE allow you to fire into civilian buildings when they are being used for military purposes and when necessary for self-defense. Suppressive fires aimed at the enemy soldiers visible on the third floor and

your platoon's room-by-room clearing procedures should minimize collateral damage and loss of civilian life.

**Situation 11:** Your company has moved to within a kilometer of a city with a population of more than 50,000. You are in M2 Bradley Fighting Vehicles. As you move along the outskirts of the city, a crowd of about 200 people in civilian clothes approaches, blocking the road. They come within 200 meters, shouting insults in broken Arabic and broken English. Some of the people have sticks, hammers, and clubs, and plastic soda bottles that appear to have gasoline in them, but you see no firearms. What do the ROE allow you to do?

**Response 11:** The CFLCC ROE Card tells you not to harm civilians unless necessary to defend yourself or others, or to protect designated property. Though the crowd is unfriendly and has the means to inflict harm from very close range, it is not yet necessary to harm the civilians, given the protection afforded by the M2s and the standoff range you enjoy. If the civilians move in front of your formation and interfere with your ability to accomplish your mission, you have the authority to detain them. Use the minimum force necessary, but understand that you may escalate to use of deadly force immediately if an individual in the crowd produces a weapon. Techniques such as warning the crowd through an interpreter, exhibiting weapons, and detention, may be useful, but there is no "step-ladder" of measures that you must take if the crowd veers toward violence that threatens you or a comrade.

**Situation 12:** Same as in Situation 11, except that now you see that the crowd has surrounded a single civilian. They are beating him senseless with the sticks and clubs. From what he can hear, your interpreter explains that the individual being beaten was trying to come to you with information about enemy forces in the town. What do the ROE allow you to do?

**Response 12:** Under the CFLCC ROE Card, you have the authority to use the force necessary, up to and including deadly force, against individuals or groups who are causing death or seriously bodily harm to the civilian without a lawful justification (i.e., self-defense). You are not required to intervene, however, if doing so would endanger our soldiers.

**Situation 13:** You are in a screening force, moving rapidly northward ahead of the main body of your brigade. In the brigade and division operations orders, your mission was deemed so time-essential that your troop commander was given the authority to enter capitulation agreements and bypass surrendering enemy formations. Your mission is to reach an airfield 10 kilometers ahead by evening. Several hundred enemy soldiers who are on foot—a few of them armed with rifles—approach you, many of them waving white flags or pieces of cloth. The others have their hands up, where you can see them. The disheveled men appear demoralized, and the rifles interspersed in the loose formation are slung over the backs of the soldiers carrying them. One who is wearing officer rank waves to get your attention, approaches you with hands in the air, and then

begins to talk to you in English. He says that he and his battalion want to surrender. What do you do?

**Response 13:** The CFLCC ROE Card says, “use the force necessary, up to and including deadly force, to protect and defend EPWs.” Under the Geneva Conventions, the United States is obligated to evacuate prisoners of war “as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger.” (GPW, Art. 19) In this case, the Brigade’s plan—following Army doctrine—is for the MP platoon and one of the companies in 3d battalion to coordinate evacuation of enemy prisoners of war (EPWs) through a holding area in the Brigade Support Area, to a holding area at Division level, and then to Corps. You remember your training on the 5 “S’s”—Search, Silence, Segregate, Safeguard, and Speed to the Rear—but if your troop were to stop right now and complete the 5 “S’s” with such a large body of prisoners, you would fail to reach your objective by evening. Your troop commander in this situation has the authority to leave the EPW in place or direct them to the rear. Before leaving the prisoners, the commander should ensure that they have food and water, and render medical care, if required. Another option is to sign a capitulation agreement with the enemy commander, explaining that his battalion will not be targeted, that its capitulated status will be communicated to all United States and coalition forces, and that it must stay in a specified grid coordinate near but not interfering with your brigade’s route of march while the MPs move forward to this location. The commander may have pre-printed copies of a capitulation agreement, translated into Arabic, for that purpose. You destroy the enemy weapons (e.g., by running over them with a tank), provide the capitulating force some water, give emergency treatment to stabilize an enemy soldier who has been carried on a stretcher, and question the commander and two members of his staff who know how the enemy Army is attempting to defend the airfield. After reporting the situation to your brigade headquarters, you then move northward, leaving the enemy soldiers at the location of their surrender. In all cases, you will treat prisoners humanely.

**Situation 14:** Your platoon is moving to secure a bridge across a river in the center of a town. You come under fire from several enemy soldiers who are not wearing uniforms and who are positioned with small arms in a building to your front. After a brief exchange of fire, all of the civilians surrender. When they exit the building, one of them speaks for the others and demands that they be given status as enemy prisoners of war. What do you do?

**Response 14:** Do the five S’s—Search the captured individuals, and seize valuable information and weapons; Silence them; Segregate them into groups in such a way that they are easier to control; Safeguard them; and Speed them to the rear. In other words, treat them as EPW s. The determination of whether they actually are EPW s as a matter of status under the Law of Land Warfare will be made at higher headquarters (the CFLCC Commander will appoint tribunals that have the specific purpose of determining status of captured persons). In all cases, you will treat prisoners humanely.

**Situation 15:** You are with your squad near a town whose population has been left short of shelter and food due to operations against enemy forces there. The United Nations



High Commissioner for Refugee and CARE, the humanitarian relief organization, have established a food distribution point 200 meters from your squad's position. Though your commander has not assigned you the mission of providing point security for the humanitarian workers, he has directed you to intervene if you see that the workers are threatened. You see a civilian truck approach the food distribution point and the muzzle of a rifle thrust out of a vehicle window and pointed toward one of the relief workers. Two men exit the truck and begin taking food supplies from the distribution point and loading them in the back the truck. What do the ROE allow you to do?

**Response 15:** Under the CFLCC ROE Card, the use of force, including deadly force, is authorized to protect "designated civilians and/or property, such as personnel of the Red Cross/Crescent, UN, and US/UN supported organizations." In this case, you may fire aimed shots at the thieves or use any other force appropriate to the situation to protect the relief workers and their supplies.

**Situation 16:** Your unit has paused to await refueling. A fuel specialist says that a nearby Enemy Army fuel storage site contains fuel that is compatible with your unit's vehicles. What do the ROE allow you to do?

**Response 16:** Your unit may use the fuel. The fuel is public military property and can be confiscated and used if "demanded by the necessities of war" (Hague Regulations, Article 23). No compensation is necessary. If the fuel were private property, it could be seized if necessary for military operations; compensation for private property will be made at the conclusion of hostilities. Under the CFLCC ROE Card, you must treat all civilians and their property with respect and dignity and you must not take civilian property, including vehicles, without the permission of a company level commander and without a receipt (if possible) so that the owner can be reimbursed.

**Situation 17:** While convoying along an MSR, you see enemy soldiers pushing civilians into the highway to block your movement. As the civilians resist, some enemy soldiers begin firing into the crowd. May you engage the enemy soldiers?

**Response 17:** Yes. You may engage enemy soldiers at any time, because they are a declared hostile force (unless surrendering or out of combat due to wounds or illness). You may also intervene on behalf of enemy or third-country civilians who are threatened with death or serious bodily harm by other civilians or military forces. You should render emergency medical care to the wounded civilians.

**Situation 18:** You are riding in the second HMMWV of a convoy. The convoy stops because a group of civilians is blocking the road. Per standing operating procedure that had been used along this stretch of road earlier in the day, the vehicles in the convoy move into a herringbone formation to improve observation and security, and designated soldiers dismount with their weapons into a perimeter around the vehicles until the convoy commander resolves the situation. Four men from the group of civilians dash up from behind a soldier who is dismounting, and while three men subdue him, the other

takes the soldier's M16. The four of them begin to run away. What do the ROE allow you to do?

**Response 18:** Under the CFLCC ROE Card, you must not harm civilians unless necessary to defend yourself or others or to protect designated property. Because the four men are now running away, harming them is no longer immediately necessary to defend yourself or others. However, weapons are inherently dangerous objects and are designated property that may be defended, if necessary, with deadly force. Use the force necessary to recover the weapon. Report the incident to higher and recommend that standing operating procedure for security at convoy halts be randomly altered to defend against similar tactics by civilians in the future.

**Situation 19:** Same as Situation 18, except that the four civilian men dash in and grab an EPW who is in the back seat of a HMMWV, wrestle him out of the vehicle, and take the canteen your unit had issued him after capture. The four then begin to run away. What do the ROE allow you to do?

**Response 19:** Under the CFLCC ROE Card, you must not harm civilians unless necessary to defend yourself or others or to protect designated property. Because the four men are now running away, harming them is not necessary to defend yourself or others. Nor is the canteen designated property that can be defended with deadly force. Pursue only if the four civilians can be subdued and the canteen recovered without use of deadly force. Report the incident to higher.

**Situation 20:** Yesterday, a 6-year old girl approached U.S. soldiers with a small package in her outstretched arms. As the soldiers unwittingly accepted the package from her, the grenade it contained exploded, killing two soldiers and the child. You are in a parked HMMWV when you see a small boy walking toward the vehicle. It appears that he is carrying a small box. He continues to move toward you, intent on giving or showing you the box. What do you do?

**Response 20:** Under the CFLCC ROE Card, you must not harm civilians unless necessary to defend yourself or others or to protect designated property. If time permits and the boy is far enough away, use measures short of deadly force to defend yourself and determine the boy's true intentions: shout at him to stay away, display your weapon. If the situation permits, keep your distance by moving the HMMWV while you continue to warn the boy through an interpreter. If none of these measures causes the boy to stop or if at some point the boy moves suddenly to toss the box toward you, then you are authorized to shoot him.

**Situation 21:** You and your squad are attempting to conceal your approach on foot toward a building that you have been ordered to clear. As you stoop behind a wall to avoid being seen by the enemy soldiers defending the building, a young boy approaching from the other direction sees one of your squad mates and begins shouting and pointing toward his location. The enemy soldiers defending the building begin to fire at your

squad mate. The boy then sees you and is about to begin shouting and pointing in your direction. What do the ROE allow you to do?

**Response 21:** Under the CFLCC ROE Card, you must not harm civilians unless necessary to defend yourself or others or to protect designated property. Civilians are protected from intentional targeting so long as they do not take an active part in the hostilities. Here the boy is directing enemy fire on friendly forces. He has made himself a legitimate target and you may fire at him just as you would an enemy soldier.

**Situation 22:** You and your squad are clearing a building that has been reported to contain preschool age children and their teachers as well as several enemy soldiers who have been ranging your company with effective machine gun fire. As you enter a room on the second floor you immediately notice that behind four children and an adult woman is an enemy soldier with a carbine of some sort. After looking startled at the entry of you and your squad mate, he raises his carbine and is about to fire at your squad mate. What do you do?

**Response 22:** Immediately shoot center of mass at the Enemy soldier until he is no longer a threat. This situation raises the problem of the enemy using civilians as human shields, a practice that clearly violates the law of war. The CFLCC ROE Card directs “do not harm civilians unless necessary to defend yourself or others.” This requires that you make every reasonable effort to avoid civilian casualties and, if time and circumstances permit, to attempt less-than-lethal means and graduated force (warning, display of weapon, etc.) before resorting to deadly force. If riot control agents have been issued, this is one of the few situations in which they are authorized. In the close quarters firefight depicted here, however, you do not have the luxury of using graduated force. Do not endanger yourself or your squad with hesitation. Shoot immediately. If the civilians being used as human shields continue to interfere with your mission of clearing the building, you have the authority to detain them temporarily, question them, and, if necessary, transport them to a holding area.

What follow-up measures are necessary in this situation? At the earliest opportunity, report this as an enemy law of war violation to higher. Brigade, Division, Corps, and CFLCC standing operating procedures require this information to be reported. A law of war violation by the enemy can be expected to have significant media and information operations impact. Higher headquarters will seek to document such a violation (and when violations in other combat settings are captured on aircraft gun tapes, UAV footage, or other images, to gather up the visual evidence). A response team may be assembled to secure the scene and gather preliminary facts, with a formal investigation to follow as appropriate. Information Operations Working Groups will seek to disseminate examples of enemy law of war violations as well as examples of U.S. adherence to the law of war and the ROE, restraint, and respect for civilian lives. Media representatives, combat camera crews, and other enablers embedded in our combat forces will provide channels and means with which to achieve this dissemination.

*Index of Soldier Vignettes*

<i>Situation</i>	<i>Rule Highlighted</i>
1	Identified hostile force—Enemy regulars.
2	Identified hostile force—Enemy paramilitary.
3	Identified hostile force—air to ground attack on convoy.
4	Targeting lines of communication.
5	Targeting infrastructure.
6	Targeting economic objects.
7	Improper use of Red Crescent; duty to warn.
8	Self defense against attack from Enemy soldiers in hospital.
9	Enemy OP in building; no duty to warn. Minimize collateral damage.
10	Fire into civilian building. Minimize collateral damage.
11	Use of force against unfriendly crowd; authority to detain.
12	Use of force against civilians harming other civilians.
13	Surrender; capitulation; bypass.
14	Civilians fighting then surrendering; EPW status.
15	Protection of designated civilians; food distribution point.
16	Seizure of public property.
17	Identified hostile force; protection of civilians from death, serious bodily harm.
18	Use of force against civilians to protect designated property.
19	Use of force against civilians to recover non-designated property.
20	Use of force against civilians in self-defense; boy with package.
21	Use of force against civilian taking active part in hostilities.
22	Use of force against civilians used as human shields.

**APPENDIX B-3: III CORPS SHIPBOARD ROE**  
**FOR ANTI-TERRORISM SECURITY**

**UNCLASSIFIED**

III Corps and Fort Hood, Fort Hood Texas  
Fort Hood, Texas 76544

**ANNEX 1 TO FRAGO 087 (Rules of Engagement for Shipboard Anti-terrorism Security)**

References:

- a. DoDI 55210.56 (1 Nov 01)
- b. AR 190-14 (12 Mar 93)
- c. FORSCOM Warning Order ISO Operation Enduring Freedom Serial 177B, DTG 081355Z Jan 03 Part I, 081356Z Jan 03 Part II, 081357Z Jan 03 Part III.
- d. III (US) Corps Order 03-02 (PHANTOM VICTORY)

Time Zone Used Throughout the Order: Local.

- 1. SITUATION. See III Corps Base Order.
- 2. MISSION. See III Corps Base Order.
- 3. EXECUTION.
  - a. (U) Concept of the Operation.

(1) (U) Units shipping military weapons systems and equipment by sea may be required to provide anti-terrorism and force protection security elements aboard ships. Units will provide 10-15 personnel security detachments (SD). SDs will provide embarked security from designated SPOE into designated AOR and will remain aboard until they reach the SPOD.

(2) (U) The size of the security element may depend on the size of the

ship. In general, follow the same rules and procedures as outlined in the 4th MEB MSC Shipboard Security SOP (enclosed).

(3) (U) The Coast Guard and port officials have the primary mission for vessel security and protection in domestic waters. The threat level in U.S. ports is significantly less than the threat level in foreign ports. Before using deadly force in U.S. domestic waters, shipboard security must determine that the intended target is a declared hostile force, has committed a hostile act, or exhibited hostile intent. Do not mistake U.S. citizens for terrorists.

(4) (U) The threat level in foreign ports is significantly higher. Recall the USS Cole incident. You should receive specific information about the threat level for specific foreign ports. Follow the guidance of local port officials and local ROE when entering foreign ports.

b. (U) Self-defense.

(1) (U) NOTHING IN THESE RULES LIMIT A COMMANDER'S INHERENT AUTHORITY AND OBLIGATION TO USE ALL NECESSARY MEANS AVAILABLE AND TO TAKE ALL APPROPRIATE ACTION IN SELF-DEFENSE TO DEFEND ITS UNIT AND OTHER U.S. FORCES.

(2) (U) Applicability. The following rules for the use of force apply to all Army forces providing vessel security in support of OPERATION PHANTOM VICTORY. These ROE apply to a tasker related to FORSCOM Warning Order ISO Operation Enduring Freedom Serial177B, DTG 081355Z Jan 03 Part I, 081356Z Jan 03 Part II, 081357Z Jan 03 Part III. Except as augmented by supplemental ROE for specific missions, these ROE remain in effect until rescinded or until superseded by ROE at the AOR of destination.

c. (U) Rules for Use of Force.

(1) (U) Whenever force is used, use the minimum force necessary and proportional to the threat. Use deadly force as a last resort. SDs will ensure a 200m protective zone of the vessel is maintained once the vessel enters international/foreign waters. Vessels that enter this protective zone will be provided appropriate warnings. SD personnel will follow the escalation of force procedures in paragraph "g" below (situation permitting).

(2) (U) Soldiers may use force up to and including DEADLY FORCE:

(a) (U) In self-defense, in response to an immediate threat of death or serious bodily injury.

(b) (U) In defense of persons under their protection.

(c) (U) To prevent the theft, damage, or destruction of firearms, ammunition, explosives or property designated by the commander as vital to national security.

(3) (U) Fire weapons as a last resort. If necessary to fire weapons:

(a) (U) Fire aimed shots.

(b) (U) Fire no more rounds than necessary. Stop firing once the threat is terminated.

(c) (U) Take all reasonable measures to avoid injury to anyone other than your target and damaging property unrelated to the threat.

d. (U) Actions on the Vessel in Domestic Waters

(1) (U) The Coast Guard has primary responsibility for vessel protection while the vessel is in domestic waters. SD personnel will comply with Coast Guard guidance with respect to force protection while in domestic waters.

(2) (U) The general provisions of AR 190-14 apply, to include the inherent right of self-defense.

e. (U) Actions on the Vessel in International/Foreign Waters.

(1) (U) SD personnel are responsible for force protection once the vessel enters international waters until the vessel reaches the SPOD.

(2) (U) SD personnel will take all reasonable steps to ensure they identify potential threats as posing a risk of harm or injury prior to firing live rounds at a target.

(3) (U) SD personnel will use the minimum force necessary to terminate the threat.

(4) (U) Soldiers may stop, search, and disarm persons as required to protect the force. Turn detainees over to proper authorities. Respect civilians and their property

f. (U) Identification of Threats. The following actions by other vessels may indicate a hostile force, hostile act, or hostile intent:

(1) (U) Maintain a constant bearing and decreasing range in the direction of the vessel SDs are providing force protection with no signs of changing course or speed.

(2) (U) Employ erratic speeds and courses but continue to close on the vessel for which SDs are providing force protection.

(3) (U) Fail to heed the verbal commands of the vessel to stay well clear of the protected vessel.

g. (U) Escalation of Force.

(1) (U) Use verbal commands. Announce to the threatening vessel via radio or loud hailer the identity of your vessel and order the threatening vessel to immediately change direction.

(2) (U) If available, use flares by firing across the bow of a ship and repeat verbal warning.

(3) (U) Warning shots are prohibited at the port. Warning shots are permissible once the vessel is in international/foreign waters SUBJECT TO THE LIMITATIONS BELOW.

(a) (U) Fire across the bow. Use tracer rounds if available.

(b) (U) The warning shots should not pose a risk of injury to innocent persons or property.

(c) (U) Shoot at propulsion systems if possible. Do not shoot at the wheelhouse.

h. (U) Procedures after firing a weapon:

(1) (U) Give first aid as soon as it is safe to do so.

(2) (U) Record the details of the incident:

(3) (U) Date, time, locations.

(4) (U) Unit and personnel involved.

(5) (U) The events leading up to the firing.

(6) (U) The reason personnel opened fire.



- (7) (U) The weapon fired.
- (8) (U) The specific result of the engagement.
- (9) (U) Immediately notify your chain of command.

i. (U) Coordinating Instructions.

(1) (U) Subordinate Unit Developing and Requesting Supplemental ROE

- (a) (U) Subordinate commanders may impose upon their own forces more, but not less, restrictive ROE.
- (b) (U) In the event circumstances require modification of ROE, Commanders will forward requests for supplemental rules through command channels. The approval level is the command level that implemented that ROE.

(2) (U) Dissemination and Tracking of ROE.

- (a) (U) Commanders at all levels will ensure their soldiers know, understand, and follow the ROE. The ROE stress mission accomplishment while minimizing civilian casualties, property destruction and the unnecessary use of deadly force.
- (b) (U) Commanders must notify their servicing Judge Advocates (JA) of preferred changes in ROE necessitated by changes in the tactical situation. Requested ROE changes are not effective unless, and until, approved by the original imposing command authority.
- (c) (U) Staff Judge Advocate (SJA) personnel will track ROE change requests to higher headquarters.

(3) (U) ROE Training Requirements. Soldiers guarding weapons systems and ammunition will be trained in the use of deadly force.

(4) (U) Privately owned weapons. Soldiers are not permitted to use or possess privately owned weapons, ammunition, or explosives.

ACKNOWLEDGE

LISOWSKI  
COL, SJ

**APPENDIX D-1: CJTF-180 AND DoS MOU**

MEMORANDUM OF UNDERSTANDING  
BETWEEN  
COMBINED/JOINT TASKS FORCE – 180  
AND  
THE U.S. DEPARTMENT OF STATE

1. PURPOSE

This memorandum of Understanding (MOU) describes services, supplies and other support to be provided by Combined/Joint Task Force – 180 (CJTF-180) to the U.S. Department of State (State). This MOU establishes specific procedures and responsibilities concerning the working relationship between CJTF-180, its subordinate Components, and State. The parties agree that nothing in this MOU shall in any way limit CJTF-180's ability to conduct current or future contingency or civil-military operations.

2. BACKGROUND

Authorities for this MOU include:

- b. 31 U.S.C. 1535 (the Economy Act)
- c. 22 U.S. C. 4805(a) (the Diplomatic Security Act)
- d. President's Letter of Instruction
- e. Department of Defense Instruction (DODI) 4000.19, Interservice and Intragovernmental Support (9 Aug 95)
- f. Federal Travel Regulation, Chapter 301-11
- g. DOD 4515.13-R, Air Transportation Eligibility (Nov 94)
- h. DOD Directive 4500.56, Use of Government Aircraft and Air Travel (Apr 99)
- i. DOD 4500.36-R, Management, Acquisition, And Use of Motor Vehicles (Sep 1996)

3. DESCRIPTION OF THE PARTIES AND THEIR AREAS OF RESPONSIBILITY.

CJTF-180 is the primary headquarters for prosecuting OPERATION ENDURING FREEDOM (OEF) missions within Afghanistan. Its primary vehicle for providing Humanitarian Assistance (HA) in Afghanistan is the Combined Joint Civil Military Operation Task Force (CJCMOTF). The CJCMOTF is OPCON to CJTF-180. CJCMOTF operates and maintains two CMOCs in the theatre, which command a number of Coalition Humanitarian Liaison Cells (CHLCs) in various locations throughout Afghanistan. The CHLCs outside of Kabul are collocated with assets from both the Combined Joint Special Operations Task Force (CJSOTF), and Combined Task Force Mountain (CTF-MTN). These tactical forces are the principal providers for force protection and

life support (e.g., water, food and billeting) to CJCMOTF assets collocated with the respective units.

Pursuant to this MOU, Department of State personnel assigned to the Embassy in Afghanistan or sent TDY from Washington, D.C. may be assigned on a rotational basis to CJTF-180 teams as needed and where appropriate to represent the Department of State. Persons so assigned shall remain under COM authority. The numbers, length of assignment, and locations of these officers shall be as mutually agreed and coordinated with CJTF-180.

The parties agree that a close working relationship between CJTF-180 and representatives of the Department of State will enhance the ability of the U.S. Government to pursue U.S. national security objectives in Afghanistan. Assigning Department of State personnel as part of CJTF-180 teams and stationing at CHLC locations will facilitate this close working relationship. Such stationing will enhance the ability of the Department of State to pursue its mission, including meeting with political leaders of all kinds to learn their intentions and influence their conduct; providing diplomatic reporting on their activities and observations; and resolving disputes among regional leaders. At the same time, DOS personnel can provide to the CJTF-180 valuable assistance and insight in assessing the political and economic implications of military planning and strategy and in providing advice on political and international issues.

#### 4. RESPONSIBILITIES:

##### a. General.

- (1.) The more specific provisions or conditions contained elsewhere in this agreement, qualify the following summary of certain basic provisions of the agreement.
- (2.) COMCJTF-180 or his designated representative is the decision authority for all requests for support under this MOU. Only advance written requests for support or for changes to the existing support agreement will be accepted. As other duties, responsibilities, covenants or promises have been made that are not specifically included in this agreement unless agreed to by the commander, COMCJTF-180.
- (3.) The responsibility for administrative and logistical services and support not specifically provided for in this agreement shall remain with State.

b. CJTF-180 agrees to provide all services, supplies, utilities, facilities, and assistance as outlined in this agreement. State representatives will be afforded the same level of support as all other CJTF-180 personnel at a given location.

c. State agrees to follow all COMCJTF-180 rules and regulations with respect to all services provided. This not only applies to the manner and provisions of such services, but also to any specific financial procedures necessary to reimburse CJTF-180 for those services.

#### 4. AREAS OF AGREEMENT:

The Parties agree to comply with the following conditions:

a. Itinerary.

- (1.) State will coordinate any activities or missions it plans to conduct pursuant to this agreement with the COMCJTF-180 and staff well in advance of planned travel.
- (2.) Prior to departure from Kabul, State will provide a detailed proposed itinerary to the Commander, CJCMOTF for approval, along with an outline of activities it plans to conduct at the designated location.
- (3.) No state personnel will proceed to any location pursuant to this MOU without having received prior approval for travel from the COMCJTF-180 or his properly designated representative, regardless of mode of transport or under whose authority transportation is acquired.

b. Safety and Security.

- (1.) State personnel will become familiar with and comply with U.S. military safety and force protection guidelines, as provided by CJTF-180.
- (2.) While resident at a given location, State personnel will comply with all guidance and direction provided to them by the senior Officer-in-Charge (OIC) on all matters of security. The determination of what matters falls within the scope of this provision is solely within the discretion of the senior military officer present.
- (3.) CJTF-180 assets operating at a given location will incorporate State personnel into established evacuation plans.
- (4.) State personnel will hold at least a Secret security clearance issues by the Department of State. Verification of clearance will be provided to the CJTF-180 CJ-2.
- (5.) State personnel will wear civilian clothing with a DOS identifier attached in a conspicuous manner when necessary based on the specific threat in a given location.
- (6.) State personnel are not authorized to carry weapons.
- (7.) All local movements of State personnel will be coordinated prior to departure with the appropriate CJTF-180 Component or staff element. State personnel will be permitted to move as needed in support of their mission, subject to para. 5.c. below. State agrees that its personnel will comply with any and all restrictions on movements or travel imposed upon CJTF-180 personnel, including convoy requirements, curfews, no-travel zones, etc. unless specifically exempted from such requirement by the COM CJTF-180 or his designated representative.
- (8.) CJTF-180 shall have security responsibility for all State Department personnel when assigned to and operating under the security guidelines of CJTF-180 assets.

COMCJTF-180's designated representative will serve as principle point of contact with the COM in dealing with security issues. COMCJTF-180's designated representative will be the primary liaison to the Department of State for overall coordination of security issues and will coordinate directly with the COM. The COM will retain security responsibly for these personnel while they are in Kabul.

c. Transportation.

- (1.) State will submit all requests for transportation support to CJTF-180 in conjunction with their detailed proposed itinerary. Such requests will provide passenger information and sizes and weights of all pieces of luggage or cargo for which transportation is required, in accordance with guidance provided by CJCMOTF.
- (2.) CJTF-180 will provide State personnel ground transportation upon initial arrive at a given location if available. Such ground transportation will be coordinated with CJTF-180 as part of the itinerary requirement above. CJTF-180 will provide ground transportation in support of State's mission to the maximum extent possible, but their determination as to whether and how such services are to be provided are final.
- (3.) All use of military transportation will be in compliance with DOD Directive 4500.56 and DOD Regulation 4500.36-R.
- (4.) Any military-provided air or ground transportation used in support of State operations will be provided on a cost reimbursable basis as provided below.

d. State will be responsible for medical care and treatment for all State personnel. The parties agree that CJTF-180 personnel may provide emergent medical services as required by circumstances.

e. State personnel will obtain and bring adequate currency to provide for all anticipated and emergency expenses while in residence at a CJTF-180 location, as those locations do not have and cannot provide check casing or other finance services.

6. EXPENSES AND REIMBURSEMENT:

- a. State will reimburse CJCMOTF for all support in accordance with DOD Instruction 4000.19.
- b. State will fund base pay, travel (except as provided in d. and e., below), per diem, allowances and other permitted expenses for assigned State personnel under applicable regulations.
- c. CJTF-180 will provide State personnel with basic living requirements, such as lodging, water, sanitary and bathing facilities, and utilities, on the same basis as those services are provided to military personnel at those locations. Reimbursement will be made on a per person basis.

- d. For air transportation provided by military aircraft not controlled or chartered by CJCMOTF, reimbursement will be in accordance with DOD 4515.13-R.
- e. State agrees to reimburse CJTF-180 for ground transportation provided either to or at the CHLC/CMOC location.
- f. CJTF-180's resource management officer (CJ8) will coordinate with the State counterpart official to ensure procedures are in place for processing a direct fund cite via the appropriate means for all anticipated support provided under this agreement.

7. COMMUNICATIONS AND INFORMATION TECHNOLOGY (IT) EQUIPMENT:

- a. State personnel will deploy with their own IT and telecommunications equipment (e.g., computers, printers, radios, telephones).
- b. State's specific list of IT and telecommunications equipment will be coordinated with CJTF-180 prior to departure to a given location, and will be compatible with CJTF-180 equipment insofar as practicable.
- c. State personnel will be permitted to use CJTF-180 communications equipment in emergent situations only.

8. PROGRAM COORDINATION:

- a. While deployed pursuant to this agreement, State personnel will, in advance of travel, coordinate the purpose of individual site visits with the CJTF-180 and the appropriate commander at whose location they are to reside.
- b. State personnel will provide information to CJTF-180 regarding their activities within the CJTF-180 Combined Joint Operating Area (CJOA), including, but not limited to , needs assessments, plans, policies, and initiatives.
- c. CJTF-180 and State personnel will freely exchange past and future assessments and evaluations of an unclassified nature conducted at locations within Afghanistan. Classified assessments may be shared by CJTF-180 as determined by the CJ2, CJTF-180. State Personnel will share classified assessments and evaluations and provide policy, political, and other relevant advice as requested and appropriate.
- d. The affected CJTF-180 Component Commander will submit regular reports to the CJ9 of CJTF-180 on Department of State activities within the CJOA.

9. EFFECTIVE DATE, MODIFICATION AND TERMINATION

This MOU will become effective on the date of the last party's signature. This MOU will remain in effect unless revoked by either party upon a thirty-day notice to the other party. CJTF-180

and State will review this MOU for currency and applicability. The parties may amend this agreement in writing at any time, upon 30 day written notice by either party. Administrative and organizational changes may be implemented following coordination between COMCJTF-180 and State.

U.S. Department of State

CJTF-180

By: originally signed

By: originally signed

Robert Finn  
U.S. Ambassador to Afghanistan

Dan K. McNeill, Lt Gen  
Commander, CJTF-180

Date: August 4, 2002

Date: 15 August 2002

**APPENDIX E-1: CENTCOM GUIDANCE FOR HUMANITARIAN ASSISTANCE FUNDING DURING OPERATION ENDURING FREEDOM**

\* UNCLASSIFIED \*

PTTUZYUW RUCAACC2942 1962107-UUUU—RUEASRT RUERPHB.  
ZNR UUUUU  
P R 152020Z JUL 02

FM MACDILL AFB FL//CCJ5-CMO/CCJ5-E//

TO RUEOEGA/COMCFLCC DOHA KUWAIT KU  
RUERHNA/COMCJTF180 BAGRAM AFG//CC/C9//  
INFO RUEHNR/KUSLO NAIROBI KE//DR//  
RUEHMS/USOMC MUSCAT MU  
RUEHAM/MAP AMMAN JO  
RUEHIL/ODRP ISLAMABAD PK  
RUEHAE/AMEMBASSY ASMARA//CCLNO//  
RUEHDS/USDAO ADDIS ABABA ET  
RUEHDJ/USLO DJIBOUTI DJ  
RUEHYN/USDAO SANAA YM  
RUEHTA/AMEMBASSY ALMATY  
RUEHTA/USDAO ALMATY KZ  
RUEHEK/AMEMBASSY BISHKEK  
RUEHAH/AMEMBASSY ASHGABAT  
RUEHNT/AMEMBASSY TASHKENT  
RUEKJCS/JOINT STAFF WASHINGTON DC//J4/NMCC//  
RUEKJCS/SECDEF WASHINGTON DC//OSD/DSCA/SOLIC PKHA//  
RUEASRT/COMUSARCENT-CDRUSATHIRD FT MCPHERSON GA//AFRD-  
DCG/G5//  
RUCAICL/COMUSMARCENT HQ MACDILL AFB FL//G-3/ALD/G-4/G-5//  
RUFTTSA/COMUSMARCENT//G-3/ALD/G-4/G-5/CAT//  
RUCAICS/COMSOCCENT MACDILL AFB FL//SOCJ3/S0CJ5//  
RHRMAKS/COMUSNAVCENT  
RUEOBBA/COMUSCENTAF SHAW AFB SC//LG/A5-DOXEO/AI-SCX//  
RUSBST/MSG DET AMEMB KABUL AF//OMC CHIEF//  
RUCAACC/USCINCCENT MACDILL AFB FL//SUPR/CCJ5-E/CCJ5-CMO/CAT//  
RUERHNA/96 CA BN CDR FT BRAGG NC//ACOP-CAB//  
RUERJFA/352ND CA CMD RIVERDALE MD//AACP-CAC//  
BT



UNCLAS

**SUBJ: USCINCCENT GUIDANCE FOR HUMANITARIAN ASSISTANCE  
DURING OPERATION ENDURING FREEDOM (OEF)**

REF/A/DOC/IO USC SECTIONS 401, 2557 AND 2561//  
REF/B/DIRECTIVE/DODD 2205.2/HUMANITARIAN AND CIVIC ASSISTANCE  
(HCA) PROVIDED IN CONJUNCTION WITH MILITARY OPERATIONS//  
REF/C/MEMO/PDASD SOLIC/OPERATION ENDURING FREEDOM  
HUMANITARIAN PROJECTS IN AFGHANISTAN/NOTAL//  
AMPN/REF A IS CURRENT TITLE 10 LEGISLATIVE AUTHORITY TO CONDUCT  
HA/HCA ACTIVITIES. REF B ESTABLISHES DOD POLICY AND ASSIGNS  
RESPONSIBILITIES FOR THE CONDUCT OF HCA ACTIVITIES. REF C  
PROVIDES SPECIFIC POLICY GUIDANCE FOR DOD HA/HCA ACTIVITIES IN  
AFGHANISTAN//

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RMKS/1.

GENERAL GUIDANCE FOR HUMANITARIAN ASSISTANCE PROJECTS DURING  
OEF:

1.A. THE OFFICE OF SPECIAL OPERATIONS AND LOW INTENSITY CONFLICT  
HAS PROVIDED POLICY GUIDANCE AND DEFENSE SECURITY  
COOPERATION AGENCY HAS AUTHORIZED CENTCOM TO CONDUCT  
HUMANITARIAN PROJECTS IN CONJUNCTION WITH OEF.

1.B. OVERSEAS HUMANITARIAN, DISASTER AND CIVIC AID (OHDACA)  
FUNDS WILL BE MADE AVAILABLE FOR HUMANITARIAN ASSISTANCE  
(OTHER) (HA OTHER) AND HUMANITARIAN ASSISTANCE PROGRAM EXCESS  
PROPERTY (HAP EP) PROJECTS. OHDACA FUNDING IS A TWO-YEAR  
APPROPRIATION. THE EXPIRATION DATE FOR FUNDS ISSUED IN FY02 IS 30  
SEPTEMBER 2003. THE OHDACA FUNDS ADDRESSED IN THIS MESSAGE ARE  
TO BE USED ONLY FOR PROJECTS SUPPORTING OEF.

1.C. CONDUCT OF HUMANITARIAN ASSISTANCE IN CONJUNCTION WITH  
CONTINGENCY OPERATIONS IS AN ISSUE REQUIRING COMPONENT AND  
SUBORDINATE COMMANDERS TO BE WELL VERSED IN THE LEGAL  
AUTHORITIES AND POLICY GUIDANCE FOR EXECUTION OF SUCH  
PROJECTS, AS WELL AS EXPENDITURE OF APPROPRIATED FUNDS.

1.D. IAW REF C, THE FOLLOWING POLICY GUIDANCE APPLIES TO THE  
EXPENDITURE OF OHDACA FUNDS AND THE EXECUTION OF ALL HA  
PROJECTS DURING OEF:

1.D. (1) PROJECTS MUST ADVANCE DOD SECURITY GOALS: IMPROVE DOD  
ACCESS (TO REGIONS AND TO PEOPLE) AND INFLUENCE; REINFORCE

SECURITY AND STABILITY; GENERATE GOOD WILL FOR DOD TO ENHANCE OUR ABILITY TO SHAPE THE OPERATING ENVIRONMENT.

1.D. (2) PROJECTS MUST BE HUMANITARIAN IN NATURE. ECONOMIC DEVELOPMENT ASSISTANCE IS NOT THE SAME AS HUMANITARIAN ASSISTANCE.

1.D. (3) PROJECTS THAT IMPROVE CAPACITY TO ADDRESS HUMANITARIAN NEEDS ARE PREFERRED OVER PROJECTS THAT ONLY PROVIDE SHORT-TERM BENEFITS. HOWEVER, DOD PROJECTS SHOULD NOT BE “NATION-BUILDING” OR “FOREIGN ASSISTANCE” ACTIVITIES THAT GO BEYOND ADDRESSING BASIC HUMANITARIAN NEEDS OF LOCAL, CIVILIAN POPULATIONS.

1.D. (3) (A) EXAMPLES OF GENERALLY INAPPROPRIATE PROJECTS INCLUDE EXTENDING ELECTRICAL POWER TO AN AREA THAT HAS NOT PREVIOUSLY HAD POWER OR IMPROVING A ROAD TO INCREASE COMMERCE IN A PARTICULAR AREA.

1.D. (4) PROJECTS SHOULD INVOLVE U.S. MILITARY FORCES. DOD HUMANITARIAN ASSISTANCE AUTHORITIES ARE NOT GRANT AUTHORITIES. WHILE CONTRACTING OUT CERTAIN EFFORTS MAY BE APPROPRIATE, DOD’S ROLE SHOULD NOT BE REDUCED TO SIMPLY PROVIDING FUNDING. AT A MINIMUM, U.S. FORCES SHOULD ENGAGE IN INITIAL AND FINAL ASSESSMENTS AND PERIODIC MONITORING OF THE PROJECT, AND WORK TO ENSURE THERE IS LOCAL RECOGNITION OF DOD’S EFFORT.

1.D. (5) THERE CAN BE NO DISCRIMINATION OF RECIPIENTS BASED ON RACE, ETHNICITY, RELIGIOUS PREFERENCE, ETC.

1.D. (6) PROJECT MANAGERS SHOULD ENSURE THAT HOST NATION CAPACITY EXISTS TO MAINTAIN ANY EQUIPMENT DOD PROVIDES.

1.D. (7) PROJECT MANAGERS SHOULD VERIFY THAT ANY HUMANITARIAN MATERIALS PROVIDED ARE USED APPROPRIATELY.

1.D. (8) GOODS AND SERVICES PROVIDED, OTHER THAN EXCESS PROPERTY AND HUMANITARIAN DAILY RATIONS, ARE ONLY TO BE TRANSFERRED TO HOST GOVERNMENT ENTITIES. INTERNATIONAL ORGANIZATIONS AND NON-GOVERNMENTAL ORGANIZATIONS MAY BE INVOLVED, IN COORDINATION WITH THE HOST GOVERNMENT, IN THE OPERATION OF FACILITIES CONSTRUCTED OR IN THE DISTRIBUTION OF HUMANITARIAN ASSISTANCE. FOR EXAMPLE, AN NGO OR OTHER PRIVATE ORGANIZATION MAY NOT HAVE OR RECEIVE TITLE TO A SCHOOL, CLINIC, OR OTHER BUILDING TO BE REPAIRED OR CONSTRUCTED AS A DOD HUMANITARIAN PROJECT. ALTHOUGH A PRIVATE ORGANIZATION MAY OPERATE IN SUCH A BUILDING, FORMAL OWNERSHIP OF IT SHOULD REMAIN WITH AN ENTITY OF THE HOST GOVERNMENT (FOR EXAMPLE, THE MINISTRY OF HEALTH). THERE SHOULD BE NO DIRECT BENEFIT TO AN NGO—THE BENEFICIARIES OF DOD PROJECTS SHOULD BE THE CIVILIAN POPULATION.

1.D. (9) PROJECTS (INCLUDING CONSTRUCTION) MUST BE RUDIMENTARY AND SHOULD NOT EXCEED \$300,000 PER PROJECT. U.S. MILITARY PERSONNEL SHOULD, AT A MINIMUM, CONDUCT AN INITIAL SITE SURVEY,

PROVIDE PERIODIC MONITORING OF THE PROJECT, AND CONDUCT A FINAL QUALITY ASSURANCE CHECK.

1.D. (10) ANY ONE CATEGORY OF AUTHORIZED HA PROJECTS (SEE PARAGRAPH 3.I. BELOW) COULD CONSUME DOD'S ENTIRE HUMANITARIAN BUDGET, SO THERE SHOULD BEAN EFFORT TO ENSURE THERE IS A BALANCE IN THE TYPES OF PROJECTS UNDERTAKEN.

1.D. (11) PROJECTS SHALL BE COORDINATED WITH UN AND U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT REPRESENTATIVES IN THE REGION, TO THE DEGREE POSSIBLE. THERE SHOULD BE NO DUPLICATION OF CIVILIAN AGENCY EFFORTS.

1.D. (12) PROJECTS THAT EFFECTIVELY IMPROVE THE CAPACITY OF THE HN TO ADDRESS PROBLEMS ARE PREFERRED TO PROJECTS THAT SIMPLY PROVIDE SERVICES.

1.D. (13) PROJECTS SHOULD BE SUSTAINABLE. THE U.S. GOVERNMENT IS GENERALLY UNABLE TO MAINTAIN OVERSIGHT OF PROJECTS FOR LONG PERIODS OF TIME. BECAUSE MANY HA PROJECTS ARE INTENDED TO BENEFIT A POPULATION AFTER DIRECT U.S. MILITARY INVOLVEMENT ENDS, IT IS IMPORTANT TO INCORPORATE ACTIVITIES TO SUSTAIN THESE PROJECTS. EXAMPLES OF SUSTAINMENT ACTIVITIES INCLUDE SERVICE CONTRACTS AND COORDINATION WITH OTHER ORGANIZATIONS THAT ARE WILLING AND ABLE TO PROVIDE LONG-TERM SUPPORT.

1.D. (14) MINIMIZE UNINTENDED CONSEQUENCES. DURING THE PLANNING PHASE OF A PROJECT, IT IS IMPORTANT TO CONSIDER ALL POSSIBLE OUTCOMES, BOTH POSITIVE AND NEGATIVE. THE MOST PROBABLE AND PROBLEMATIC ISSUES SHOULD BE IDENTIFIED DURING THE PLANNING PHASE AND STEPS SHOULD BE TAKEN TO MITIGATE THEIR IMPACT.

2. LEGAL AUTHORITY: DOD HUMANITARIAN ASSISTANCE PROJECTS ARE SANCTIONED UNDER THREE LEGAL AUTHORITIES, 10 USC SECTIONS 401, 2557 AND 2561.

**2.A. 10 USC SECTION 401 ESTABLISHES THE HCA PROGRAM:**

2.A. (1) AUTHORIZES U.S. FORCES, IN CONJUNCTION WITH ONGOING MILITARY OPERATIONS, TO PERFORM SMALL SCALE RUDIMENTARY HUMANITARIAN PROJECTS.

2.A. (2) ACTIVITIES MUST PROMOTE THE SECURITY INTERESTS OF THE U.S. AND THE COUNTRIES IN WHICH ACTIVITIES ARE CARRIED OUT, AS WELL AS THE OPERATIONAL READINESS SKILLS OF PARTICIPATING U.S. FORCES.

2.A. (3) U.S. MILITARY UNITS MAY CARRY OUT PROJECTS SUCH AS RUDIMENTARY REPAIR OF SCHOOLS, PUBLIC BUILDINGS, OR MEDICAL CLINICS, AND/OR THE PROVISION OF BASIC MEDICAL CARE IN RURAL AREAS, UNDER THIS AUTHORITY.

2.A. (4) IF A PROJECT IS EXECUTED THROUGH THE HCA PROGRAM, U.S. MILITARY FORCES MUST PROVIDE THE ACTUAL LABOR.

2.A. (5) U.S. FORCES MAY UTILIZE LOCAL NATIONALS (LN) AS NEEDED TO PERFORM PROJECTS. THIS IS PERMISSIBLE SO LONG AS THE U.S. FORCES ARE BEING ASSISTED BY LN OR ARE PERFORMING SUPERVISORY DUTIES.

IN ALL CASES U.S. FORCES WILL ONLY BE EMPLOYED TO CONDUCT ACTIVITIES THAT ENHANCE THEIR OPERATIONAL READINESS SKILLS.

2.A. (6) CONSUMABLE SUPPLIES, BUILDING MATERIALS AND OTHER INCREMENTAL COSTS INCURRED FOR PROJECTS UNDER SECTION 401 ARE TO BE FUNDED FROM OPERATIONS AND MAINTENANCE ACCOUNTS.

2.A. (7) ALTHOUGH 10 USC SECTION 401(C) (4) PERMITS THE INCURRING OF "MINIMAL EXPENDITURES" OUT OF FUNDS OTHER THAN THOSE APPROPRIATED IN SECTION 401(C) (1), THESE EXPENDITURES MUST DIRECTLY SUPPORT HCA ACTIVITIES AS DEFINED IN 10 USC SECTION 401(A) AND IN PARAGRAPH 2.A. (2) OF THIS MESSAGE.

2.A. (7) (A) USCINCCENT HEREBY DELEGATES THE AUTHORITY FOR DETERMINATION OF APPROPRIATE "MINIMAL EXPENDITURES" PURSUANT TO 10 USC SECTION 401(C) (4) TO THE COMMANDER, CJTF-180, OR DESIGNATED REPRESENTATIVE.

2.A. (7) (B) ALL COSTS INCURRED UNDER THIS PARAGRAPH MUST BE IN DIRECT SUPPORT OF HCA PROJECTS AS DEFINED IN 10 USC SECTION 401(A). ALL COSTS INCURRED UNDER THIS PARAGRAPH MUST ALSO MEET THE DEFINITION OF "MINIMAL EXPENDITURES" (AS DEFINED IN ENCLOSURE 1 TO REF B ("DE MINIMIS HCA")). FUNDS EXPENDED FOR THESE ACTIVITIES WILL BE ORGANIZATIONAL AND WILL NOT BE REIMBURSED.

2.A. (8) APPROVED HCA PROJECTS ARE FUNDED WITH O&M; OHDACA SHALL NOT BE USED TO EXECUTE HCA ACTIVITIES. ALL O&M FUNDS USED WILL COME FROM SERVICE O&M. O&M FUNDING USED WILL NOT LIKELY BE REIMBURSED. O&M FUNDING IS A ONE-YEAR APPROPRIATION.

2.B. 10 USC SECTION 2557 PROVIDES THE AUTHORITY TO MAKE AVAILABLE FOR HUMANITARIAN RELIEF PURPOSES, THROUGH THE STATE DEPARTMENT, NON-LETHAL EXCESS SUPPLIES OF THE DOD. THESE SUPPLIES ARE AVAILABLE IN EXCESS PROPERTY WAREHOUSES AND CAN BE ACCESSED THROUGH THE CENTCOM HA PROGRAM MANAGER.

2.C. 10 USC SECTION 2561 PROVIDES AUTHORITY FOR DOD TO CARRY OUT BROADER AND MORE EXTENSIVE HUMANITARIAN ASSISTANCE PROJECTS.

2.C. (1) PROJECTS THAT USE CONTRACTORS (FOR BASIC BUILDING AND REPAIRS), INCLUDE THE PURCHASE OF END ITEMS OTHER THAN THOSE USED IN CONNECTION WITH SECTION 401 HCA ACTIVITIES, OR INVOLVE THE PROVISION OF TRAINING OR TECHNICAL ASSISTANCE FOR HUMANITARIAN PURPOSES MAY BE CARRIED OUT UNDER THIS AUTHORITY.

2.C. (2) TRANSPORTATION OF HUMANITARIAN RELIEF MAY ALSO BE

PROVIDED UNDER SECTION 2561.

2.C. (3) APPROVED INFRASTRUCTURE IMPROVEMENTS SHALL BE LIMITED TO RUDIMENTARY CONSTRUCTION AND BASIC REPAIRS.

2.C. (4) PAYMENT OF SALARIES AND OTHER SUPPORT COSTS FOR LOCAL ADMINISTRATION (POLICE, FIRE, AND MEDICAL PERSONNEL) IS NOT AUTHORIZED.

3. SPECIFIC GUIDANCE:

3.A. EXPENDITURES MAY NOT EXCEED SPENDING LIMITS SET FORTH IN THIS MESSAGE.

3.B. COMPONENT COMMANDERS WILL ENSURE APPROPRIATE SUBORDINATE COMMANDS ESTABLISH ACCOUNT PROCESSING CODES FOR THE VARIOUS APPROVED COST CATEGORIES.

3.C. COMMANDER, COMBINED/JOINT TASK FORCE-180 (CJTF-180) HAS INITIALLY BEEN PROVIDED \$2M IN OHDACA FOR HA (OTHER) PROJECTS TO BE EXECUTED IAW 10 USC SECTION 2561, CINC GUIDANCE AND THE IMPLEMENTATION PLAN.

3.D. TRANSPORTATION OF HAP EP WILL BE PAID FOR FROM OHDACA FUNDS HELD BY THE CENTCOM HA PROGRAM MANAGER.

3.E. SERVICING JUDGE ADVOCATES MUST CONDUCT LEGAL REVIEW OF ALL REQUESTS FOR OHDACA FUNDS OR HUMANITARIAN AND CIVIC ASSISTANCE FUNDS PRIOR TO PROJECT APPROVAL.

3.F. NO END ITEM OF EQUIPMENT OR SINGLE SYSTEM ACQUIRED WILL EXCEED THE EXPENSE-INVESTMENT THRESHOLD, CURRENTLY \$100K.

3.G. HUMANITARIAN CIVIC ASSISTANCE MAY NOT TO BE PROVIDED DIRECTLY OR INDIRECTLY TO ANY INDIVIDUAL, GROUP, OR ORGANIZATION ENGAGED IN MILITARY OR PARAMILITARY ACTIVITY.

3.G. (1) UNITS WILL ESTABLISH SPECIFIC PROCEDURES TO ENSURE COMPLIANCE WITH INTENT OF THE UTILIZATION OF FUNDS.

3.G. (2) OHDACA FUNDS ISSUED PURSUANT TO THIS GUIDANCE MAY NOT BE USED TO EXECUTE PROJECTS IN GEOGRAPHIC LOCATIONS OUTSIDE AFGHANISTAN WITHOUT FURTHER INTERAGENCY APPROVAL. PARA 3.J. ADDRESSES CENTCOM'S ACTION TO SEEK EXPANSION OF PROJECT APPROVAL AUTHORITY BEYOND AFGHANISTAN.

3.H. APPROVED HUMANITARIAN ASSISTANCE CATEGORIES -PROJECTS TO BE EXECUTED MUST BE LEGALLY PERMISSIBLE (SEE REF A) AND FIT WITHIN ONE OF THE FOLLOWING APPROVED CATEGORIES:

3.H. (1) PUBLIC HEALTH SURVEYS AND ASSESSMENTS: THESE TYPES OF PROJECTS ARE NECESSARY TO ASSESS MEDICAL NEEDS AND REQUIREMENTS OF INDIGENOUS POPULATIONS IN ORDER TO DETERMINE WHAT PROGRAMS ARE REQUIRED TO PROVIDE MEDICAL CARE TO THOSE IN DIRE NEED. PROJECTS IN THIS CATEGORY MAY BE CONDUCTED UNDER SECTION 2561 AND WILL NOT INCLUDE ACTUAL MEDICAL TREATMENT. IF TREATMENT PROGRAMS RESULT FROM THE SURVEYS, SUCH PROGRAMS WILL BE CONDUCTED UNDER THE AUTHORITY AND FUNDING OF SECTION 401.

3.H. (2) WATER SUPPLY/SANITATION: DOD ASSISTANCE MAY BE REQUIRED TO SUPPORT RUDIMENTARY REPAIRS OF WATER SUPPLY/DISTRIBUTION AND SANITATION/SEWAGE SYSTEMS. THE AUTHORITY USED FOR SUCH RUDIMENTARY REPAIRS MAY BE EITHER SECTION 2561 OR SECTION 401, ASSUMING ALL THE REQUIREMENTS OF THE RELEVANT STATUTE CAN BE MET.

3.H. (3) WELL DRILLING: PROJECTS MAY BE JUSTIFIED UNDER SECTION 401 (IF ACCOMPLISHED BY U.S. FORCES) OR SECTION 2561 (IF CONTRACT LABOR OR MATERIALS ARE USED), ASSUMING ALL REQUIREMENTS OF THE RELEVANT STATUTE CAN BE MET.

3.H. (4) MEDICAL SUPPORT AND SUPPLIES: PROVISION OF DIRECT MEDICAL CARE BY U.S. MILITARY PERSONNEL IN UNDER-SERVED AREAS WILL BE CARRIED OUT USING SECTION 401 AUTHORITY AND O&M FUNDING OF THE INCREMENTAL COSTS OF SUPPLIES AND MATERIALS. COMPONENT COMMANDERS SHOULD EXPLORE OPPORTUNITIES TO STOCK PUBLIC HEALTH FACILITIES WITH MEDICAL SUPPLIES USING THE DOD EXCESS PROPERTY PROGRAM, UNDER SECTION 2557, AUTHORITY, PRIOR TO EXPENDITURE OF FUNDS FOR THE PURCHASE OF NEW ITEMS. PROJECTS THAT MERELY PURCHASE A PIECE OF EQUIPMENT UNDER SECTION 2561 SHOULD BE LIMITED. PROVISION OF MEDICAL EQUIPMENT SHOULD IN ANY EVENT BE CAREFULLY EVALUATED IN ADVANCE TO ENSURE THAT EQUIPMENT IS PROVIDED TO PUBLIC FACILITIES, AND CAN BE PROPERLY MAINTAINED AND OPERATED BY LOCAL PERSONNEL IN THE FUTURE.

3.H. (5) CONSTRUCTION AND REPAIR OF RUDIMENTARY SURFACE TRANSPORTATION SYSTEMS AND PUBLIC FACILITIES: PROJECTS IN THIS CATEGORY MAY BE JUSTIFIED UNDER SECTION 401 (IF ACCOMPLISHED BY U.S. FORCES) OR SECTION 2561 (IF CONTRACT LABOR OR MATERIALS ARE USED) ASSUMING ALL REQUIREMENTS OF THE RELEVANT STATUTE CAN BE MET.

3.H. (6) REPAIR ELECTRICAL GRIDS: PROVIDE ASSISTANCE THROUGH RUDIMENTARY REPAIRS TO ELECTRICAL SYSTEMS. IMPROVEMENTS WILL ENHANCE SERVICE, BUT SHOULD NOT PROVIDE REPAIRS TO A LEVEL GREATER THAN IN PRE-WAR AFGHANISTAN. PROJECTS IN THIS CATEGORY MAY BE JUSTIFIED UNDER EITHER SECTION 401 (IF ACCOMPLISHED BY U.S. FORCES) OR SECTION 2561 (IF CONTRACT LABOR OR MATERIALS ARE USED), ASSUMING ALL REQUIREMENTS OF THE RELEVANT STATUTE CAN BE MET.

3.H. (7) HUMANITARIAN MINE ACTION (HMA) MINE AWARENESS TRAINING: SECTION 401(E) WOULD BE USED AS THE AUTHORITY TO CONDUCT TRAIN-THE-TRAINER MINE AWARENESS TRAINING IN SUPPORT OF THE ESTABLISHMENT OF A MINE RESOURCE CENTER, CONSISTENT WITH USUAL PROCEDURES FOR HMA ACTIVITIES (INCLUDING HUMAN RIGHTS VERIFICATION OF ANY SECURITY FORCE MEMBERS TO BE TRAINED AND SECDEF DEPLOYMENT ORDER IF NECESSARY). MINE AWARENESS IS THE ONLY HMA ACTIVITY AUTHORIZED WITHOUT PRIOR COORDINATION AND APPROVAL FROM THIS HEADQUARTERS.

3.H. (8) MINE DISPLAY BOARDS: MINE DISPLAY BOARDS CAN BE USED AS PART OF A MINE AWARENESS CAMPAIGN, AT PARAGRAPH 3.I. (7), DEVELOPED BY HDTC AND PROVIDED USING OHDACA HD FUNDS TO BE PROVIDED BY DSCA WITHIN THE USUAL PARAMETERS OF SECTION 401(C). MINE BOARDS ARE CURRENTLY IN PRODUCTION.

3.H. (9) ESSENTIAL REPAIRS/REBUILDING FOR ORPHANAGES / SCHOOLS / RELIEF WAREHOUSES: THESE PROJECTS CAN BE ACCOMPLISHED UNDER EITHER SECTION 401 (IF REPAIRS ARE ACCOMPLISHED BY U.S. FORCES) OR SECTION 2561 (IF CONTRACT LABOR OR MATERIALS ARE USED), ASSUMING ALL REQUIREMENTS OF THE RELEVANT STATUTE CAN BE MET.

3.H. (10) ANIMAL HUSBANDRY/VETCAP: VETERINARIAN TRAINING MAY BE PROVIDED TO THE INDIGENOUS FARMERS AND HERDSMEN IN FARM ANIMAL CARE, PRODUCTION, ANIMAL HUSBANDRY, AND ANIMAL SCIENCES USING SECTION 401 (IF ACCOMPLISHED BY U.S. FORCES) OR SECTION 2561 (IF CONTRACT LABOR OR MATERIALS ARE USED), ASSUMING ALL REQUIREMENTS OF THE RELEVANT STATUTE CAN BE MET. IF ACTUAL MEDICAL CARE AND VACCINATION PROGRAMS ARE DEVELOPED, THEY WILL BE EXECUTED UNDER SECTION 401.

3.H. (11) VICTIM ASSISTANCE TRAINING FOR MINE VICTIMS: PROVIDE TRAINING IN PRIMARY CARE AND ADVANCED LIFE SUPPORT FOR MINE VICTIMS UNDER THE AUTHORITY OF SECTION 2561. ADDITIONALLY, DIRECT MEDICAL TREATMENT PROVIDED UNDER SECTION 401 AUTHORITY. HUMAN RIGHTS VERIFICATION OF ANY SECURITY FORCE MEMBERS TO BE TRAINED MUST BE CONDUCTED WITHIN CURRENT GUIDANCE.

3.I. AUTHORITY FOR DEVELOPMENT, APPROVAL, PRIORITIZATION AND EXECUTION OF ALL HA AND HCA PROJECTS IN AFGHANISTAN IS HEREBY DELEGATED TO THE COMMANDER, CJTF-180, OR DESIGNATED REPRESENTATIVE.

3.J. PROJECTS OUTSIDE OF AFGHANISTAN IN THE CENTCOM AOR, WILL BE SUBMITTED THROUGH THE COUNTRY TEAM TO USCENTCOM HA PROJECT MANAGER. THIS INCLUDES BOTH PROJECTS RELATED TO OPERATION ENDURING FREEDOM (OEF) AND NON-OPERATION ENDURING FREEDOM PROJECTS. IN ORDER TO SUPPORT OEF OBJECTIVES THROUGHOUT THE AOR AND TO FURTHER EXPEDITE EXECUTION OF OEF RELATED PROJECTS OUTSIDE OF AFGHANISTAN, CCJ5 IS SEEKING EXPANSION OF APPROVAL AUTHORITY FOR HA AND HCA PROJECTS TO INCLUDE PAKISTAN, KYRGYZSTAN, UZBEKISTAN, TAJIKISTAN, YEMEN AND DJIBOUTI.

3.K. PROJECT EXECUTION MAY NOT EXCEED AVAILABLE FUNDS.

#### 4. PLANS & REPORTS:

4.A. CJTF-180 WILL SUBMIT A HUMANITARIAN ASSISTANCE IMPLEMENTATION PLAN, AND OTHER REPORTS AS REQUIRED. THE IMPLEMENTATION PLAN MUST INCLUDE PRIORITIZATION OF PROJECTS WITHIN THE SPECIFIED FUNDING LIMIT. THE INITIAL IMPLEMENTATION PLAN IS TO BE PROVIDED TO CCJ5 NLT 30 DAYS FROM RECEIPT OF THIS MESSAGE.

4.B. MONTHLY PROJECT EXECUTION STATUS REPORTS MUST BE SUBMITTED BY CJTF-180 TO THE CENTCOM HA PROGRAM MANAGER NLT THE 5TH DAY OF EACH MONTH.

4.C. MONTHLY PROJECT EXECUTION STATUS REPORTS MUST PROVIDE THE FOLLOWING INFORMATION: PROJECT DESCRIPTION, LOCATION, ESTIMATED COST, ACTUAL COST, FUNDS OBLIGATED, ACTUAL FUNDS EXPENDED, LEGAL AUTHORITY FOR EACH ACTIVITY EXECUTED (E.G., 401 OR 2561, ETC.) APPROVAL DATE, START DATE OF PROJECT, PROJECTED END DATE, CURRENT PROJECT STATUS AND PROJECT POC, TEL/FAX, AND EMAIL ADDRESS.

4.D. CJTF-180 WILL PROVIDE HQ CENTCOM WITH DETAILED INFORMATION ON EACH APPROVED PROJECT AT THE TIME OF APPROVAL. THE FOLLOWING FORMAT WILL BE USED.

4.D. (1) COUNTRY.

4.D. (2) PRIORITY RANKING WITHIN THE COUNTRY.

4.D. (3) TYPE OF ACTIVITY UNDER CONSIDERATION (I.E., HA (OTHER), HCA, HAP EP).

4.D. (4) PURPOSE.

4.D. (5) LOCATION OF PROJECT/PROPOSED RECIPIENTS (PROVIDE INFORMATION SUCH AS THE ORGANIZATION, LOCALE, AND POPULATION TO BENEFIT FROM THE EQUIPMENT OR ACTIVITY).

4.D. (6) DETAILED DESCRIPTION OF PROJECT (DESCRIBE THE PROPOSED PROJECT IN SUFFICIENT DETAIL TO PERMIT A THOROUGH UNDERSTANDING OF IT. COMPLEX PROJECTS, SUCH AS THE ESTABLISHMENT OF A DISEASE ERADICATION PROGRAM WILL REQUIRE A MORE EXTENSIVE DESCRIPTION.

PROJECTS INCLUDING CONTRACTED SERVICES WILL REQUIRE EXPLANATION OF PLANNED U.S. MILITARY OVERSIGHT).

4.D. (7) PROJECT INTEGRATION AND COORDINATION (DISCUSS COORDINATION WITH THE UN AND U.S. COUNTRY TEAM AND OTHER ORGANIZATIONS AND ACTIVITIES (HN, IO, NGO)).

4.D. (7) (A) EXPLAIN HOW THE PROJECT IS COORDINATED AND INTEGRATED WITH ONGOING PROGRAMS. DISCUSS THE ROLE OF NON-DOD PARTICIPANTS IN THE PROJECT AND COORDINATION ACTIVITIES THAT HAVE OCCURRED TO ENSURE LOCAL OWNERSHIP, APPROPRIATENESS, SUSTAINABILITY, CAPACITY BUILDING, AND MITIGATION OF UNINTENDED CONSEQUENCES.

4.D. (7) (B) EXPLAIN HOW THE PROJECT FITS INTO THE OVERALL PROGRAM FOR THE COUNTRY/LOCATION AS IT PERTAINS TO THE NEEDS THAT WILL BE ADDRESSED BY THE PROJECT. EXPLAIN HOW THE SPECIFIC PROJECT INTEGRATES INTO CINCENT PLANS, OTHER USG AND HN EFFORTS; HOW U.S. MILITARY ASSETS WILL BE EMPLOYED, AND HOW PROJECT/PROGRAM EFFECTIVENESS WILL BE EVALUATED.

4.D. (8) DISCUSS ANY PROBABLE NEGATIVE OUTCOMES THAT MAY RESULT FROM THIS PROJECT AND STEPS THAT HAVE BEEN TAKEN TO MITIGATE THEM. EXAMPLES INCLUDE UNREALISTIC EXPECTATIONS, COMPETITION WITH LOCAL PROGRAMS, INTERFERENCE WITH ONGOING RESEARCH



PROGRAMS, AND MISINTERPRETATION OF PROJECTS BY THE PRESS OR ANTI-TALIBAN GROUPS.

4.D. (9) IF EXCESS PROPERTY, PROVIDE A LIST OF THE TYPE AND QUANTITY OF DOD NON-LETHAL EXCESS PROPERTY TO BE PROVIDED AND SPECIFIC ORGANIZATIONS/FACILITIES WHERE EQUIPMENT WILL BE MANAGED/DELIVERED (THE CENTCOM HA PROGRAM MANAGER WILL FUND AND ARRANGE FOR SHIPMENT OF ALL EP).

4.D. (10) PLANNED TIME FRAME OF EXECUTION AND ESTIMATED DURATION OF PROJECT.

4.D. (11) TYPES AND NUMBERS OF U.S. FORCES PARTICIPATING.

4.D. (11) (A) UNIT DESIGNATION AND TOTAL NUMBER OF U.S. PERSONNEL PARTICIPATING.

4.D. (11) (B) SPECIAL UNIT CAPABILITIES AND SKILLS IF REQUIRED (SPECIFICALLY, LIST THE TYPE OF SPECIALISTS REQUIRED TO EFFECTIVELY PLAN AND EXECUTE THE MISSION AND DISCUSS WHERE THOSE SPECIALISTS WILL COME FROM TO INCLUDE CONTRACTED SUPPORT).

4.D. (12) COST ESTIMATE BREAKDOWN INCLUDING EXPLANATION OF OTHER FUNDING SOURCES IF APPLICABLE.

4.D. (13) NARRATIVE JUSTIFICATION. INCLUDE THE BENEFIT TO THE DOD AND OTHER NATIONAL SECURITY/FOREIGN POLICY OBJECTIVES. EXAMPLES INCLUDE: HOW THE PROJECT ENHANCES EFFORTS TO ASSURE ALLIES AND FRIENDS OF THE UNITED STATES' STEADINESS OF PURPOSE. PROVIDES ACCESS, ENHANCES THE ENVIRONMENT, IMPROVES STABILITY, AVERTS A LARGER SCALE DOD COMMITMENT OF FORCES, DEVELOPS RECIPIENT NATION CAPACITY, AND/OR CONTRIBUTES TO MIL-TO-MIL OR MIL-TO-CIV RELATIONSHIPS.

4.D. (14) PLANNED EVALUATION OF ACTIVITIES.

4.D. (15) IN-COUNTRY POINT OF CONTACT'S NAME, PHONE NUMBER, FAX NUMBER AND E-MAIL ADDRESS, CLASSIFIED AND UNCLASSIFIED.

5. ALL QUESTIONS RELATED TO THE EXECUTION OF HA/HCA/HMA ACTIVITIES (ALL 10 USC SECTIONS 401, 2557 AND 2561) SHOULD BE REFERRED TO THE HA PROGRAM MANAGER:

PEGGIE MURRAY/MAJ/USAFR/HQ USCENTCOM/CCJ5-E/DSN 651-6652  
COMMERCIAL 813-827-6652

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## **APPENDIX E-2: FUNDING AFGHAN NATIONAL ARMY INFORMATION PAPER**

CJTF180-SJA  
09 FEBRUARY 2003

Information Paper

SUBJECT: Authorized Funding Sources for the Afghan National Army (ANA)

1. **Purpose.** This information paper identifies the authorized funding sources available to support and sustain the ANA and recommend best course of action (COA) to support the ANA. Also, this paper compares Department of State (DoS) funding options under U.S. Code Title 22 with Department of Defense (DoD) funding under USC Title 10.
2. **References.** Foreign Assistance Act of 1961 (FAA), 75 Stat. 434, (22 USC 2151-2349aa-9); Arms Export Control Act of 1976 (AECA), 90 Stat. 734, Title 22, Chapter 39 (22 USC 2751-2796c); Foreign Military Financing (FMF) Funds, Title 22, Chapter 39 (22 USC 2763); Afghan Freedom Support Act, Title 22, Chapter 82 (22 USCS 7532); Presidential Draw Down Funds, Title 22 (22 USC 2318(a)(1)); The Purpose Statute, Title 10 (10 USC 1301(a)); CINC Initiative Funds (CIF), 10 USC 166a; Acquisition and Cross Servicing Agreements (ACSA), 10 USC 2341-2350; 2003 Operational Law Handbook, Chapter 14.
3. **BLUF:** Foreign Military Financing (FMF) Funds and Afghan Freedom Support (AFS) Funds provide the best funding source for the provision of continued training and support for the Afghan National Army (ANA). O&M Funds may not be used to provide sustained funding support to the ANA.

### **4. Background Facts.**

a. **Security Assistance (Title 22):** Part II of the Foreign Assistance Act (FAA) (commonly referred to as “Security Assistance” (SA)) permits the U.S. government to provide “supplies, training and equipment to friendly foreign militaries.” Congress charged DoS with the primary responsibility for all FM Security Assistance programs.

b. DoD has an important and substantial secondary role executing the FAA’s Title 22 Security Assistance mission. Specifically, under the FM the U.S. military provides most of the training, education, supplies and equipment to friendly foreign militaries.

c. DoS retains strategic policy responsibility *and funding authority* for SA programs.

### **5. Law/Analysis.**

a. Title 10:

(1) Security Assistance & O&M Funding: DoS is the principal U.S. agent for foreign assistance. Use of Title 10 Operational & Maintenance (O&M) funds by the U.S. military for the specific purpose of conducting Security Assistance is not authorized. O&M funds were not appropriated by Congress for SA purposes and as a result, the use O&M funds for SA purposes is a violation of U.S. law.

(2) 1984 GAO Honduras Opinion: In 1984, the U.S. military conducted operations in Honduras in support of the “contra” rebels in Nicaragua. During the mission, U.S. military forces provided, among other things, military training to Honduran armed forces. This training activity was Funded with DoD O&M money. The Government Accounting Agency (GAO) investigated the above stated expenditures and concluded that all “costs pertaining to training of Honduran armed forces... should have been financed as security assistance to Honduras.” Based on this, the GAO found that the “use of DoD O&M funds for such activities was unauthorized” and, as such, were a violation of the Purpose Statute (10 USC 1301 (a)) because Congress specifically authorized and funded DoS and not DoD to conduct Security Assistance. Since the authority and funding already provided to the DoS was specific in nature concerning Security Assistance, the DoD was prohibited from spending its general O&M funds to perform similar kinds of activities.

(3) DoD authority for Security Assistance Mission: Based on the 1984 opinion, DoD sought and received authorization to conduct only *limited* operations and activities that could be described as Security Assistance. Furthermore, these *activities must compliment, supplement and support and not duplicate* the FAA Security Assistance program. To ensure DoD operations and activities complement and do not duplicate or frustrate DoS Security Assistance programs, DoD authorizing legislation usually: 1) Limits the funding levels to relatively small amounts; 2) Requires coordination and approval by the DoS and US Embassy in the target nation; and 3) Requires reporting of activities to Congress.

(4) Approved DoD Funding – (CINC Funds & EEE Funds): Approved DoD programs that permit funding for SA-type activities are CINC Initiative Funds (CIF) and Emergency and Extraordinary Expense (EEE) Funds. However, these funding options are limited and provide only temporary solutions to the problem of providing sustained ANA support (CIF funds = \$2 million per FY worldwide and EEE funds = \$30 million worldwide). These funds also require Congressional notification.

(5) ACSA Agreements: There is also the DoD Acquisition Cross Servicing Agreements program (10 USC 2341-2350). ACSA agreements are international agreements for the provision of reciprocal military logistical support. However, the U.S. has entered a limited number of ACSAs and they are primarily with

NATO countries. Currently, there is no ACSA agreement between the U.S. and Afghanistan.

b. Title 22:

(1) Security Assistance & Title 22 Funds: Security Assistance is the provision of defense articles, military training and other defense related services, by grant or loan, credit or cash sales in furtherance of national policies and objectives. The goal of the program is to: 1) Promote peace and security through effective self help and mutual aid; 2) Improve the ability of friendly countries to deter and defeat aggression; and 3) Create an environment of security and stability in developing countries. Two programs are currently available for achieving the SA goals of the U.S. in Afghanistan: Foreign Military Financing and the Afghanistan Freedom Support Act.

(2) Foreign Military Financing (FMF) Funds: (22 USCA 2763-64; Title 22 USC, Ch. 39). FMF currently provides all funding for U.S. SA activities in Afghanistan. The FMF program permits eligible governments to receive Congressionally appropriated grants and loans to help them purchase U.S. defense articles, services or training (or design and construction services) through the Foreign Military Sales (FMS) program, the Foreign Military Construction (FMC) program or Direct Commercial Sales (DCS).

(a) FMF Funds are DoS money given to DoD to administer. In Afghanistan, the FMF program is administered by the Office of Military Cooperation-Afghanistan (OMC-A). OMC-A is a DoD billet that is charged with the mission of training and equipping the Afghan National Army (ANA). All costs associated with support and training the ANA are paid with FMF Funds IAW CJTF180's Policy Memorandum for the Provision of LSSS to the ANA (Policy #33 on CJTF180 SCJS web page "Policies" link).

(b) The FMF Funding Limit is \$100 million per FY.

(3) Afghan Freedom Support (AFS) Act: (22 USGS 7531, Title 22 USC, Ch. 82). The AFS Act was enacted on 13 Jan 03 and it derives its funding authority from the Presidential Emergency Draw Down Authorities (PDDA) codified in 22 USC 2318(a)(1). Under the AFS Act, US military forces may support 1) the development of a civilian controlled and centrally governed standing Afghanistan army; 2) the creation and training of a professional civilian police force; and 3) a multinational security force in Afghanistan. To meet the Afghan SA requirement, POTUS may draw down defense articles, defense services and military education and training if an unforeseen emergency arises that requires immediate military assistance that cannot be met under any other section. The AFS Act specifically designated Afghanistan as just such a military

emergency.

(a) AFS Funding Limit of \$300 Million: The “Military Emergencies” provision of the PDDA is normally \$100 million per FY. However Jan 03 AFS Act specifically authorizes the President to draw down a total of \$300 million for SA to Afghanistan. The \$300 million is not limited to a FY, but will expire in September 2006.

**6. Recommendation.** COMCJTF180 request, through CENTCOM:

a. Additional FMF funding; or

b. Additional funding to support the development, training, support and deployment of the ANA pursuant to the AFS Act.

CPT R. McGovern/587-5639

**APPENDIX E-3: 336TH FINANCE COMMAND CAPTURED ENEMY CURRENCY SOP**

DEPARTMENT OF THE ARMY  
United States Army Forces Central Command  
Coalition Forces Land Component Command  
336th Finance Command  
APO AE 09366

AFRC-SBLA-FC

20 February 2003

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Captured Enemy Currency Standing Operating Procedure

1. References.

- a. Department of Defense Financial Management Regulation (DODFMR), Volume 5, Chapter 2, 30 October 2002, Disbursing Offices, Officers, and Agents.
- b. Department of Defense Financial Management Regulation (DODFMR), Volume 5, Chapter 10, 30 October 2002, Collections.

2. Purpose. This memorandum establishes the standing operating procedures for collecting captured currency for soldiers deployed ISO Operations TBD and Enduring Freedom. These procedures do not apply to currency found on a live enemy prisoner of war (EPW) or detainee.

3. Procedures.

- a. Personnel taking possession of captured currency are responsible for counting, safeguarding, and turning in the currency to an authorized agent.
- b. To accept any collections/captured currency, an individual must be appointed as a Deputy Disbursing Officer, Disbursing Agent, or Collection Agent. Finance Support Team leaders and Paying Agents cannot accept captured currency or sign Cash Collection Vouchers unless they are appointed as indicated above. If the mission requires receiving collections/captured currency, coordinate for one of these appointed individuals to participate.

c. Agents authorized to accept captured currency will meet the unit conducting the turn-in of funds at a coordinated location. Verify the ID Cards of all present.

d. The unit turning in the funds will record the details regarding the capture in memorandum format with good points of contact information (phone number, radio freq/call signs/etc.) as shown in Enclosure 1. The Disbursing/Collection Agent will maintain the original of the memorandum as part of the supporting documents for the transaction.

e. The Disbursing/Collection Agent will issue a receipt to the unit that turned in the currency to establish an audit trail. This receipt can be a preformatted receipt as shown in Enclosure 2 or a memo. The Disbursing/Collection Agent must sign it.

f. The Disbursing/Collection Agent will keep this money separate from their other money. They will place it in a small box or envelope in their safe/cash box and will not use it. The currency is not initially taken into the Agent or Finance Officer's accountability; it is only turned in for control and safekeeping. Keep it separate and do not use it for any purposes.

g. The Disbursing/Collection Agent will forward details with all supporting documents of the capture through the finance chain of command to the Commander, 336th Finance Command requesting disposition instructions for the captured currency.

h. If it is determined that the currency will be taken into the Finance Officer's accountability, process a cash collection voucher, DD Form 1131, citing the accounting classification 21R1060 S99999. List as many details as possible on the DD Form 1131 to assist in identifying the funds and attach all supporting documents.

4. Point of Contact is the 336th FINCOM Finance and Accounting Policy Division at DSN 318-825-1128/1129.

EDGAR E. STANTON III  
Brigadier General, USA  
Commanding

3 Encls

1. Sample Memorandum
2. Sample Receipt
3. Sample Blank Receipt

Enclosure 1  
Sample Memorandum

20 August 2003

MEMORANDUM FOR COMMANDER, 336th FINCOM

SUBJECT: Captured Enemy Currency

1. This is to certify that I, SSG Jose Grant, 111-55-3333, of 2nd PLT B Co. 1/6 INF found the money—\$1,000.00—in question at location LC 87654321 in the vicinity of Base Camp Echo, Iraq. The money was found along with a cache of enemy weapons. The enemy quickly retreated upon our attack and left behind the money and equipment. I have turned the money into A DET, 4th Finance BN on 20 Aug 2003 at 1200 hrs at location LC 87444300. This is all the information I know regarding this money.

*Jose Grant 20 Aug 2003*

JOSE GRANT

SSG, USA PL T SGT 2nd PLT B Co.1/6 IN

Phone # 444-1122



Enclosure 2  
Sample Receipt

RECEIPT FOR CAPTURED CURRENCY			
<b>ORGANIZATION / INDIVIDUAL (TURNING IN FUNDS)</b> SSG Jose Grant, 111-55-3333, of 2nd PLT B Co. 1/6 INF Echo Base IRAQ, APO AE 09034 Phone # 444-1122			
<b>FINANCE OFFICE (MAILING ADDRESS OF FAO ACCEPTING FUNDS)</b> A DET 4th FINANCE BN DSSN 6583 APO AE 09034 CAMP Virginia Kuwait			
<b>CURRENCY INVENTORY:</b>			
TYPE/COUNTRY	AMOUNT	EXCHANGE RATE (AS APPLICABLE)	Total In U.S. DOLLARS
U.S. DOLLARS	\$1,000.00	N/A	\$1,000.00
			<b>GRAND TOTAL IN U.S. DOLLARS:</b>
<b>CCO / DISBURSING OFFICER PRINTED NAME &amp; SIGNATURE</b>  <i>Jill C. Clifford</i> JILL C. CLIFFORD 1LT FC CCO			<b>DATE</b>  20 AUG 2003
<b>ACCOUNTING CLASSIFICATION (AS APPLICABLE)</b> Fill in only if/when it is decided the money will become a part of the Finance Officer's Accountability. Use accounting classification 21R1060 S99999			
<b>PRINTED NAME SIGNATURE OF INDIVIDUAL TURNING IN FUNDS</b> <i>Jose Grant</i> JOSE GRANT SSG USA PLT SGT			<b>TOTAL AMOUNT IN U.S.</b> \$\$\$ \$1,000.00

Enclosure 3

LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOLUME I, MAJOR COMBAT OPERATIONS (11 SEPTEMBER 2001 TO 1 MAY 2003)

Sample Blank Receipt

RECEIPT FOR CAPTURED CURRENCY			
ORGANIZATION / INDIVIDUAL (TURNING IN FUNDS)			
FINANCE OFFICE (MAILING ADDRESS OF FAO ACCEPTING FUNDS)			
CURRENCY INVENTORY:			
TYPE/COUNTRY	AMOUNT	EXCHANGE RATE (AS APPLICABLE)	Total In U.S. DOLLARS
		GRAND TOTAL IN U.S. DOLLARS:	
CCO / DISBURSING OFFICER PRINTED NAME & SIGNATURE			DATE
ACCOUNTING CLASSIFICATION (AS APPLICABLE)			
PRINTED NAME SIGNATURE OF INDIVIDUAL TURNING IN FUNDS			<b>TOTAL AMOUNT IN U.S. \$\$\$</b>

FYI from the Office of the Staff Judge Advocate. V Corps:

The collection agent to whom captured currency is surrendered is ILT Thomas Nicot who works at Finance at OBJ Dagwood. His office is located next to the post office. He has no direct phone, however, if you need to speak to him, you can reach him through Finance Forward. Contact MAJ Eric Zellars who can get a message to LT Nicot at DNVT 584-6332. All captured currency must be turned over. There exists no *de minimus* exception. All the necessary forms and procedures are given in the Captured Currency SOP.

**APPENDIX E-4: CFLCC REWARDS PROGRAM SOP****CFLCC REWARDS PROGRAM -SOP (14 APR 03)****Concept**

CFLCC implements the CFC DoD Rewards Program in CFLCC AO. See COMCFLCC FRAGO 042 to OPORD 03-032. The current Coordinator of CFLCC's Rewards Program is COL Richard Gordon, CFLCC SJA.

The Rewards Program involves Rewards Authorization Officers (RAOs), a Reward Disbursement Officer, Paying Agents (PAs), and Certifying Officers (COs).

RAOs are responsible for determining whether a reward is warranted under DoD guidelines for information or non-lethal assistance leading to the capture of wanted personnel, weapons, or documents, and how much the reward will be. Currently, COL Gordon is the only RAO. CFLCC will nominate additional RAOs from CFLCC HQ as the need arises. The Rewards Disbursement Officer (RDO) is responsible for reviewing RAOs' requests for funds; certifies fund availability; requests the reward cash from Finance; and maintains a document register and verifies payments are completed before forwarding monthly reports to CENTCOM. LTC Dave Dolf, with CFLCC C8, will serve as the only RDO. MAJ Carter Johnson, with CFLCC C8, will serve as the Program Liaison, who is the POC for disbursement of funds, goods, and services for this Program. PAs are responsible for physically obtaining the reward money from Finance after the RDO requests it and for delivering the reward money or payment in-kind to the reward recipient out in the field. MSCs will appoint PAs for their sectors. PAs are accompanied to the reward recipient's location by COs, who certify that the payment is proper, including that the proper reward recipient actually receives the money or payment in-kind. The MSCs will appoint COs for their sectors.

RAOs, PAs, COs, and the RDO must be specifically appointed for this Program. RAOs are nominated by CFLCC and appointed by CENTCOM. CFLCC appoints the RDO, and informs CENTCOM of that appointment. CFLCC or the MSCs appoint PAs and COs. PAs and COs must have appointment orders and signature cards for this Program on file at the servicing Finance Office/Unit. If PAs draw money from ARCENT-KU Finance, they must be appointed paying agents to MAJ Annemarie Delgado. If PAs draw money from 336<sup>th</sup> Finance, they must be appointed paying agents to LTC Paul Gautreaux.

MSCs should submit names of their PAs and COs to CFLCC SJA POC, CPT Pietrangelo, DSN 318-438-8006, SIPR [james.pietranaelo@swa.arcnet.smil.mil](mailto:james.pietranaelo@swa.arcnet.smil.mil) or NIPR [james.pietranaelo@kuwait.army.mil](mailto:james.pietranaelo@kuwait.army.mil). MSCs should also provide the names, phone numbers, and email addresses of POCs for the Program at their level to CFLCC SJA POC.

All officers having duties in connection with the CFLCC Rewards Program will THOROUGHLY understand their duties and responsibilities, and will be familiar with CFLCC FRAGO 042 as well as USCENTCOM MSG, 151330Z MAR 03 SUBJ: CFC DOD REWARDS PROGRAM IN USCENTCOM AOR (REVISION 2).

### **Rewards Process**

1. An individual in the CFLCC AO provides information or non-lethal assistance that leads to the capture of wanted persons, weapons, or documents.
2. The unit contacts an RAO and recommends the individual for a reward. Rewards are not available to U.S., Allied, or Coalition personnel. Rewards are not mandatory. The unit provides the RAO with information about the capture and about the individual who provided the information/non-lethal assistance (name, SSN, DOB, PCB, family members, occupation, etc), and a desired pay date and place. All information will be handled so as to provide maximum protection of the identity of the individual providing the information/assistance. Whenever possible, the unit will take pictures of captured weapons or documents and provide copies of those to the RAO. Units should not compromise security when dealing with captured persons, weapons, or documents in order to make a reward request.
3. Upon receiving the information from the unit, the RAO assigns a number to the case, using his or her initials followed by a sequential number, beginning with 1. For example, the first request that COL Gordon reviews will be assigned the case number RG-1. The next request will be assigned case number RG-2. Next, the RAO determines in his or her discretion whether the reward is warranted under DoD criteria, and how much it should be. See CFLCC FRAGO 042, para. 3.D.8. and following for validation criteria. The RAO may approve rewards up to \$2,500. For rewards higher than \$2,500 and up to \$50,000, the RAO forwards the request to CFLCC C3, who will forward it to CCJ3 for approval by the CDRUSCENTCOM or DCDRUSCENTCOM. Rewards greater than \$50,000 go to the SECDEF for approval through CFLCC C3. Regardless of whether the RAO authorizes or denies the reward request, the RAO will reduce his or her decision to writing in an MFR. See attached MFR sample for an authorized reward. The case number and name of the reward recipient shall remain unclassified to the extent possible, to allow completion of an unclassified SF 1034 in cases where a reward is authorized. If the RAO authorizes a reward, he or she will provide the authorization to the RDO, and will include in the MFR the date the authorization was provided to the RDO and the name of the RDO. The RAO then ensures that a CO and PA are contacted to make the reward payment.
4. The CO prepares an SF 1034 for the servicing Finance Office/Unit. He or she signs it after the RDO has provided a fund cite. The CO and PA take the SF 1034 to the servicing Finance Office/Unit and the PA signs for the cash on a DA 1081. If no PAs are available, and the reward recipient can travel to the Finance Office/Unit location, Finance may pay the reward directly to the reward recipient.

5. The PA, accompanied by the CO, transports the cash or payment in-kind to the reward recipient's location. The CO ensures that the proper recipient receives the cash/in-kind and signs for it on the SF 1034. If the recipient refuses to sign, the CO will write "Payee refused to sign" and both the CO and PA will sign.
6. NLT 2 days after return from paying the reward, the PA will clear his or her account with the Finance Office/Unit by providing the original SF 1034. The CO will ensure the RAO and RDO receive a copy of the signed SF 1034. The RAO will attach a copy of the SF 1034 to his or her decision memo and retain the decision memo and all supporting documents for one year.
7. All officers involved in the Rewards Program will take measures to provide maximum protection of the identity of individuals providing information/assistance.
8. On a regular basis, CFLCC will provide recommendations to USCENTCOM concerning composition of the wanted list. Negative reports are required. MSCs will provide their own recommendations to CFLCC.
9. On a regular basis, CFLCC will provide information to USCENTCOM concerning operational results of the Rewards Program. MSCs will provide their own feedback to CFLCC.
10. As needed, CFLCC will submit recommendations to modify the Rewards Program and provide feedback on problems incurred in the operation of the Program. MSCs will submit their own recommendations and feedback.
11. The RDO will submit requests as necessary to CCJ8 for funds to cover anticipated reward disbursements.
12. On a monthly basis, the RDO will submit the report listed at para. 10.E. of the USCENTCOM MSG mentioned above through CFLCC C3 to CCJ8. See attached sample report format. The RDO will also forward copies by fax or mail of all unclassified obligating documents.
13. On a monthly basis, all RAOs will submit reports to the Program Coordinator listing all case numbers and their disposition (i.e., if reward was paid and how much, if it was denied, etc.).

RICHARD E. GORDON  
COL, JA  
CFLCC Rewards Program Coordinator

MEMORANDUM FOR RECORD

SUBJECT: Reward Authorization Statement; Case No. \_\_\_\_\_

1. Purpose. To provide Reward Disbursement Officer a signed statement that below reward has been validated IAW *CFC DoD Rewards Program in USCENTCOMAOR (Revision 2)*, 151330Z MAR 03.
2. Validation. I have reviewed the below reward and hereby declare the reward is valid and proper IAW *CFC DoD Rewards Program in USCENTCOM AOR (Revision 2)*, 151330Z MAR 03.
3. Reward Information.
  - a. Name of Reward Recipient (plus any other necessary bio info to verify identity, such as SSN, DOB, POB, occupation, family members, etc.):
  - b. Amount of Reward Authorized:
  - c. (If amount is greater than \$2,500, provide authorization reference)
  - d. Desired Place and Date of Payment:
  - e. Unit Requesting Reward/Unit POC:
  - f. Justification for Reward: (Include details and dates of assistance and resulting capture, and attach as much supporting documentation as available; see validation criteria beginning at para. 3.D.8., CFLCC FRAGO 042)
4. Date Authorization Provided to RDO and name of RDO:
5. Certifying Officer & Paying Agent Assigned:
6. POC for this memorandum is (Reward Authorization Officer's name and contact info).

SIGNATURE BLOCK

MEMORANDUM FOR CCJ8, USCENTCOM

SUBJECT: CFLCC MONTHLY REPORT -CFC 000 REWARDS PROGRAM

1. PURPOSE: Provide monthly report to CC NL T the 31st of each month.

2. INFORMATION:

a. Amount Funded: (Original amount of the MIPR plus any increases or decrease due to returning funds to USCENTCOM) b. Status of Funds:

c. Beginning Balance:

d. List of Authorized Disbursements: (By date and dollar amount and obligating document number)

e. Current Balance:

f. Anticipated Date Funds Will Be Exhausted:

g. Funds Projection: (Projection of anticipated expenses during the next quarter).

3. (REQUIREMENT: FORWARD (BY FAX OR MAIL) COPIES OF UNCLASSIFIED OBLIGATING DOCUMENTS.

4. POC for this report is (Name and contact info).

SIGNATURE BLOCK

## **APPENDIX E-5: TRASH DISPOSAL ENVIRONMENTAL POLICY**

### **Information Paper**

AFZP-JA 26 April 2003

INFORMATION PAPER

**SUBJECT:** Environmental Policy Regarding Trash Disposal in Iraq

#### **REFERENCES:**

- (a) 42 U.S.C. § 4321-4370 (1969), National Environmental Policy Act
- (b) Executive Order 12,114, 44 Fed. Reg. 1957 (1979)
- (c) Department of Defense Directive 6050.7, Environmental Effects Abroad of Major Department of Defense Actions, 31 March 1979
- (d) Department of Army, AR 200-2 Environmental Effects of Army Actions, 23 December 1988
- (e) Field Manual (PM) 3-100.4, Environmental Considerations in Military Operations (1 June 2000)

1. **PURPOSE.** To describe the legal obligations owed by the 3d Infantry Division (Mech) to the Iraqi environment, particularly regarding solid waste disposal in the field, while deployed in support of Operation Iraqi Freedom.

2. **BACKGROUND.** The 3d Infantry Division (Mech.) occupies territory both in and around the city of Baghdad. Due to mission constraints and the conditions of the territory occupied, most units do not have access to running water, sewage facilities, or trash collection points. The long-term outlook regarding redeployment or construction of more permanent structures is unknown at this time.

3. **POLICY.** American armed forces must always exercise environmental stewardship regarding operations conducted outside of the U.S. or its territories. As a general rule, however, domestic environmental statutes have no extraterritorial application overseas. Other statutes apply to major federal actions occurring outside of the U.S., but only if those actions have significant environmental impact *inside* the U.S. Therefore the location of the impact, and not the action itself, determines the applicability of certain environmental protections.

4. **PLANNING CONSIDERATIONS.** Military planners should consider three general rules that dictate the interpretation and compliance with all other rules.



A. Based upon operational realities and necessities, forces should take all reasonable steps to act as good environmental stewards;

B. Forces should respect treaty obligations and the sovereignty *of* other nations. This means, at a minimum, exercising restraint in applying U.S. laws within foreign nations unless Congress has expressly provided otherwise; and,

C. Any acts contemplated by DoD officials that require formal communications with foreign governments concerning environmental agreements and other formal arrangements with foreign governments must be coordinated with the Department of State (DoS).

## 5. STATUTORY CONSIDERATIONS.

A. National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370 (1973). Although domestic statutes generally do not apply in overseas operations, the considerations contained within NEPA do apply if the operation results in environmental impact *inside* the U.S. It should be noted that NEPA does not prohibit actions; instead it creates a documentation requirement that ensures decision makers consider the environmental impact of federal actions. The required documents are usually referred to as either environmental assessments (EA) or environmental impact statements (EIS). The production of those documents can cause substantial delay in planned federal actions.

B. Executive Order No. (EO) 12,114 creates “NEPA-like” rules for overseas operations, but only applies to major federal actions that create significant effects on the environment outside of the U.S. The Department of Defense (DoD) implemented the provisions of EO 12,114 with Directive 6050.7, which is in turn implemented by the Army in AR 200-2, Environmental Effects of Army Actions. There are four types of environmental events described within the EO.

1. Major federal actions that do significant harm to the global commons;
2. Major federal actions that significantly harm the environment of foreign nation that is not involved in the action;
3. Major federal actions that are determined to be significantly harmful to the environment of a foreign nation because they provide to that nation: (1) a product, or involve a physical project that produces a principal product, emission, or effluent, that is prohibited or strictly regulated by Federal law in the United States because of its toxic effects to the environment create a serious public health risk; or (2) a physical project that is prohibited or strictly regulated in the United States by Federal law to protect the environment against radioactive substances;
4. Major federal actions outside the United States that significantly harm natural or ecological resources of global importance designated by the President or, in the case of such a resource protected by international agreement binding on the United States, designated for protection by the Secretary of State.

C. If one of the aforementioned conditions listed in paragraph B above is implicated, military leaders should seek either an exemption to the requirement or, alternatively, draft an environmental study for review.

D. The Participating Nation Exception. Most overseas contingency operations do not generate the first, third, or fourth types of environmental events listed above in paragraph B. Accordingly, a premium is placed upon the interpretation of the second type of environmental event. Therefore, the threshold issue is whether the host nation is participating in the operation. If the nation is participating, then **no study or review is technically required**. Kuwait provides a good example of a nation whose actions are participatory. In that case, Kuwait's status as a participatory nation obviated the need to generate an EIS or to seek an exemption.

E. General Exemptions. DoD Directive 6050.7 enumerates ten situations that are excused from the procedural and other requirements necessitated under EO 12,114. The applicable general exemption in this case is reprinted below.

E2.3.3.1.3. Actions taken by or pursuant to the direction of the President or a cabinet officer in the course of armed conflict. The term "armed conflict" refers to: hostilities for which Congress has declared war or enacted a specific authorization for the use of armed forces; hostilities or situations for which a report is prescribed by section 4(a) (1) of the War Powers Resolution, 50 U.S.C.A. § 1543(a) (1) (Supp. 1978); and other actions by the armed forces that involve defensive use or introduction of weapons in situations where hostilities occur or are expected. This exemption applies as long as the armed conflict continues.

F. Additional Exemptions. In addition to the general exemptions mentioned above, the Department of Defense is authorized to establish additional exemptions that apply to Department operations. The applicable exemption in this operation, a case-by-case exemption based upon national security considerations, excuses the preparation of environmental documentation. That exemption states:

E2.3.3.2.1. In these circumstances, the head of the DoD component concerned is authorized to exempt a particular action from the environmental documentation requirements of this enclosure after obtaining the prior approval of the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics), who, with the Assistant Secretary of Defense (International Security Affairs), shall consult, before approving the exemption, with the Department of State and the Council on Environmental Quality. The requirement for prior consultation is not a requirement for prior approval.

6. **ANALYSIS.** Unlike the relationship enjoyed with Kuwait, the relationship with Iraq is not based upon mutual trust and cooperation; coalition forces did not enter Iraq with its consent. Therefore, the participating nation exemption is not available in this case. Unless another exemption applies, an environmental study or review is required in accordance

with AR 200-2 and DoD Directive 6050.7. In this instance, the exemption pertaining to armed conflict obviates the requirement to supply an EA or EIS. Additionally, DoD's authority to create additional exemptions that are in the best interests of national security provide an alternate avenue. In either case, an echelon above Division must take affirmative steps to secure such exemptions.

7. **ACTION.** Given current conditions and mission requirements, there exist three reasonable alternatives to dispose of solid waste in Iraq—burning, burial, or transport. Obviously, a more permanent presence in Iraq would necessitate more traditional means of waste disposal, including sewage facilities and landfills. The following methods provide functional and secure methods for trash disposal in an operational environment.

A. Burning—The most expedient and efficient method for disposing of solid waste, burning presents a minimal impact to the Iraqi environment.

B. Burial—Burying waste in any location other than a designated landfill causes a number of problems. The possibility and likelihood that the waste would eventually be uncovered makes burial of waste the most environmentally unfriendly of the possible options. Furthermore, there are political implications weighing against burying waste haphazardly throughout Iraq. IAW FM 3-100.4, burying trash is a perfectly acceptable alternative, however.

C. Transport—Collecting the trash and storing it until resources permit its transportation to an appropriate location present too much of a danger at this time because of security and logistical concerns. Obviously, regular trash collection and sewage operation is the desired end state, however.

8. **RECOMMENDATION.** Iraq's current relationship with the U.S. does not satisfy the requirements for the participating nation exemption to EO 12,114. Accordingly, military planners must seek an exception to policy, or draft an environmental study for review. Two exemptions apply in this situation—one pertaining to armed conflict and the case-by-case exemption based upon national security interests. Based upon the foregoing information and analysis, solid waste should be disposed of by burning until such time as more traditional waste disposal means become available.

9. POC is CPT A. J. Balbo at 302-584-0839.

**APPENDIX F-1: CENTAF CLAIMS SOP (16 MAR 2003)**

UNCLASSIFIED  
9 AF-USCENTAF

STANDARD OPERATING PROCEDURES  
FOR FOREIGN CLAIMS

**PURPOSE**

Provide information regarding the processing of tort claims in USCENTCOM AOR countries where the Air Force has single-service claims responsibility (SSCR) under DoDD 5515.3.

**REFERENCES**

- (a) 10 U.S.C. § 2734, Foreign Claims Act (FCA)
- (b) DoDD 5515.3, “*Single-Service Assignment of Responsibility of Processing Claims*”
- (c) AFI 51-501, “*Tort Claims*”
- (d) AR 27-20, “*Claims*”
- (e) DA PAM 27-162, “*Claims Procedures*”

**DISCUSSION**

1. **Settlement Authority:** IAW AFI 51-501, 9 AF-USCENTAF/JA may deny claims of \$50k or less and pay claims filed in any amount when payment is for \$50k or less.

–With two exceptions (363 AEW/JA and CJTF-180), settlement authority has not been delegated and no other Foreign Claims Commission (FCC) has been appointed. Requests for FCC appointment should be submitted to Col Edward J. Monahan, 9 AF-USCENTAF/JA at the address below. Any request will be considered on a case-by-case basis.

2. **Army:** IAW AR 27-20, para 1-21 (a), claims resulting from USA or DA activities in a country where SSCR is with another service, will be investigated by the Army and referred to that service for settlement.

3. **Basic Requirements for All Claims**

**a. Proper claimant**

b. In writing (unless local custom dictates otherwise—not yet found in the AOR)

(1) A Standard Form (SF) 95 is NOT required. Any form of writing that contains the necessary information is sufficient. The SF 95 may be used—instructions are provided in Arabic. Attachment 1 is a Navy form 5800.1 in both English and Arabic that is also acceptable.

NOTE: WE DO NOT HAVE TRANSLATION SERVICES AVAILABLE HERE. ANY CLAIM FORWARDED MUST BE TRANSLATED PRIOR TO FORWARDING.

SF 95. Claim for Damage, Injury, or Death

c. Demand for a sum certain

- (1) Must be made and paid in local currency
- (2) Payment in USD requires higher HQ approval

d. Within two years of incident

e. Caused by:

- (1) Noncombat activities
- (2) Negligent or wrongful act of military member or civilian employee

---Noncombat activities are those activities essentially military in nature, having little parallel in civilian pursuits (e.g., sonic booms, aircraft accidents, and maneuver damages).

---A common mistake is assuming that every activity that doesn't equal combat is a noncombat activity and payable under the FCA

4. **Non-payable claims.** Claims not payable include, but are not limited to:

a. Claims that are contractual in nature

b. Claims arising out of combat activities

(1) Combat activities are those activities resulting directly or indirectly from action by the enemy, or by the US Armed Forces engaged in armed conflict, or in immediate preparation for impending armed conflict. See AR 27-20 and AFMAN 51-505, para 5.12 (Draft). A simple recon mission, for example, may be a combat activity under the FCA. [Note: a claim may be payable arising from an accident or malfunction of an aircraft, including its airborne ordnance, indirectly related to combat, and occurring while preparing for, going to, or returning from a combat mission. 10 U.S.C. § 2734 (b)(3).]

(2) 10 U.S.C. § 2734 and AFI 51-501 do not include as combat activities **all** activities occurring in a “combat zone” as mentioned in DA PAM 27-162, para 10-3(b). FCA claims in Afghanistan, for example, are not automatically excluded because they

arose in a combat zone.

## PROCESSING A CLAIM UNDER THE FCA

1. Investigate IAW AFI 51-501. Army may use AR 27-20 and DA PAM 27-162 for guidance. If conflict exists, the AFI is controlling.

a. IAW AR 27-20, para 2-2(d)(1)(a), Army units should appoint Unit Claims Officer (UCO), in writing, to investigate any claims incident. The UCO should coordinate with their supporting Judge Advocate. A sample appointment order is included as Attachment 2.

DA Form 1208, below, may be used to assist the UCO with the investigation (but is not a substitute for the memorandum).

### DA Form 1208, Report of Claims Officer

b. At a minimum, the investigation should include an interview with the claimant and any witnesses to the incident and proof of the claimant's loss (normally the responsibility of the claimant). While the claimant must prove he has suffered damages, we do not expect claimants in the AOR to have the same type of evidence available in CONUS, such as receipts. Inquiry into the local market or economy may be necessary to obtain a value of the loss.

2. Complete seven-point memorandum IAW AFI 51-501. Army UCOs may provide a memo substantially IAW DA PAM 27-162, para 2-64. At a minimum, provide claimant's name, address, amount of claim, date and place of incident, facts of the incident, any applicable local law, and opinion and recommendation. Include any exhibits—photos, statements, etc. Sample memorandum is at Attachment 3.

3. Forwarding. Forward the completed file to the POCs below. Fax or scan/email—do not mail the original yet.

### 4. Payment.

a. If approved, a voucher and settlement agreement will be emailed. Do NOT use DA Form 1666 for the settlement agreement.


b. Take voucher to finance office for payment IAW with service finance guidelines.

5. Settlement Agreements. DO NOT MAKE PAYMENT TO THE CLAIMANT UNTIL HE/SHE HAS SIGNED THE AGREEMENT.

6. Forward completed claim, copy of settlement agreement and all *original* documents, to include a copy of the paid voucher to:  
9 AF-USCENTAF/JA

524 SHAW DRIVE; SHAW AFB SC 291

**APPENDIX F-2: FOREIGN CLAIMS COMMISSION APPOINTMENT LETTER**



DEPARTMENT OF THE AIR FORCE  
UNITED STATES CENTRAL COMMAND AIR FORCES (USCENTAF)  
SHAW AIR FORCE BASE, SOUTH CAROLINA

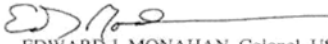
11 OCT 2002

MEMORANDUM FOR CAPTAIN DAVID G. MARTIN, USA

FROM: HQ USCENTAF/JA  
524 Shaw Drive  
Shaw AFB SC 29152

SUBJECT: Appointment as Foreign Claims Commission and Delegation of Claims Authority

1. Pursuant to AFI 51-501, Captain David G. Martin, US Army Judge Advocate General's Corps, CJTF-180, is appointed a Foreign Claims Commission for claims filed under the Foreign Claims Act in Afghanistan and may deny claims of \$5,000.00 or less or settle claims filed in any amount when payment is for \$5,000.00 or less. This appointment is effective 1 November 2002.
2. Effective 15 November 2002, Captain James Hill's designation as a one member Foreign Claims Commission is terminated.

  
EDWARD J. MONAHAN, Colonel, USAF  
Staff Judge Advocate



**APPENDIX F-3: UNIT CLAIMS OFFICER APPOINTMENT LETTER**

DEPARTMENT OF DEFENSE  
COMBINED/JOINT TASK FORCE (CJTF-180)  
BAGRAM AIRFIELD, AFGHANISTAN APO AE 09354

11 September 2002

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Duty Appointment

1. Effective 12 September 2002, 1LT Joe Jones, Unit Mailing Address, DSN phone number, is assigned the following duty:

UNIT CLAIMS OFFICER

2. Authority: AR 27-20, para 2-2d(1)(a).

3. Purpose: As indicated in the applicable directives.

4. Period: 12 September 2000 until officially released or relieved from appointment of assignment.

5. Special Instructions: This memorandum supersedes all previous appointments to this assignment. Unit claims officer will coordinate all claims investigation activities with CPT James Hill, OIC of the CJTF 180-SJA Claims Office.

FRED E. SMITH  
CPT, AR  
COMMANDING

**APPENDIX F-4: SEVEN-POINT CLAIMS MEMORANDUM**

DEPARTMENT OF DEFENSE  
COMBINED/JOINT TASK FORCE (CJTF-180)  
BAGRAM AIRFIELD, AFGHANISTAN APO AE 09354

11 September 2002

MEMORANDUM FOR RECORD

SUBJECT: Foreign Claims Investigation, [editor's deletion]

1. **Identifying Data**

- a. Claimant: [editor's deletion].
- b. Date, time and place of incident: 24 Aug 02, 0815L, BAF, ECP 1A.
- c. Amount of claim / date request filed: \$396.24 / 2 Sep 02.
- d. Description of claim: motor vehicle accident.

2. **Jurisdiction.** This request is presented for consideration under the provisions of the Foreign

**Claims Act, 10 U.S.C. Section 2734, as implemented by Chapter 4, Air Force Instruction (AFI) 51-501. This claim was filed in a timely manner.**

3. **Facts.** The traffic accident occurred on BAF at the above date and time between an Afghan civilian bus and an American LMTV. SGT Bryan Shelton was the driver of the LMTV, and SGT Cardoza was his passenger. [Editor's deletion], an employee of the claimant, drove the bus. The events which culminated in the accident occurring are as follows: (1) SGT Shelton was headed south through lane 8 of the vehicle staging area when to the west he saw a green bus turning left (east) into the staging area from Disney Drive; (2) SGT Shelton came to a complete stop to see what the driver of the bus was going to do; (3) the bus hit the LMTV on the right front passenger side while attempting to make a left hand turn into lane 1 of the staging area (encI2).

4. **Legal Analysis.** [Claimant's] negligence was the cause of the accident. SGT Shelton, SGT Cardoza, and a 3rd party witness, SPC Woodson, all said in their sworn statements that the LMTV had come to a complete stop when the claimant's bus collided into the LMTV's passenger side (encl 2). Further, the accident investigator found that

[claimant's] failure to properly judge the bus's turning radius was the cause of the accident.

5. **Damages.** Claimant's bus sustained damage to the front grill and to the right headlight. Claimant is seeking \$396.24 in damages.

6. **Recommendation.** That the claim be denied because U.S. personnel were not negligent.

7. POC for this memorandum is the undersigned at 318-231-4603 or via email at BAF-CJTF180-SJA-CLAIMS (SIPR).

JAMES T. HILL  
CPT, JA  
Foreign Claims Commissioner

2 Encls

1. SF 95, 2 Sep 02
2. Police Report, 24 Aug 02

**APPENDIX G-1: CENTCOM GO1A**

UNITED STATES CENTRAL COMMAND  
OFFICE OF THE COMMANDER IN CHIEF  
7115 SOUTH BOUNDARY BOULEVARD  
MACDILL AIRFORCE BASE, FLORIDA 33621-5101

CCJA

19 DEC 2000

GENERAL ORDER NUMBER 1A (GO-1A)

**TITLE:** Prohibited Activities for U.S. Department of Defense Personnel Present Within the United States Central Command (USCENTCOM) AOR.

**PURPOSE:** To identify conduct that is prejudicial to the maintenance of good order and discipline of all forces in the USCENTCOM AOR.

**AUTHORITY:** Title 10, United States Code, Section 164(c) and the Uniform Code of Military Justice (UCMJ), Title 10, United States Code, Sections 801-940.

**APPLICABILITY:** This General Order is applicable to all United States military personnel, and to civilians serving with, employed by, or accompanying the Armed Forces of the United States, while present in the USCENTCOM AOR *except for* personnel assigned to: Defense Attache Offices; United States Marine Corps Security Detachments; sensitive intelligence and counterintelligence activities that are conducted under the direction and control of the Chief of Mission/Chief of Station; or other United States Government agencies and departments.

**1. STATEMENT OF MILITARY PURPOSE AND NECESSITY:** Current operations and deployments place United States Armed Forces into USCENTCOM AOR countries where local laws and customs prohibit or restrict certain activities which are generally permissible in western societies. Restrictions upon these activities are essential to preserving U.S. / host nation relations and combined operations of U.S. and friendly forces. In addition, the high operational tempo combined with often-hazardous duty faced by U.S. forces in the region makes it prudent to restrict certain activities in order to maintain good order and discipline and ensure optimum readiness.

**2. PROHIBITED ACTIVITIES:**

a. Purchase, possession, use or sale of privately owned firearms, ammunition, explosives, or the introduction of these items into the USCENTCOM AOR.

b. Entrance into a Mosque or other site of Islamic religious significance by non-Moslems unless directed to do so by military authorities, required by military necessity, or as part of an official tour conducted with the approval of military authorities and the host nation. This

provision may be made more restrictive by Commanders when the local security situation warrants.

c. Introduction, possession, sale, transfer, manufacture, or consumption of any alcoholic beverage within the countries of Kuwait and Saudi Arabia. In all other countries of the USCENTCOM AOR, U.S. military and civilian personnel will conform to their respective component restrictions on alcohol, and follow appropriate deportment in respecting host-nation laws and customs. Because of the high operational tempo and the various threats faced by U.S. forces in the region, it is prudent to exercise active control over certain activities in order to maintain good order and discipline and ensure optimum readiness. Accordingly, in all locations where alcohol is not prohibited by this General Order, Commanders and unit chiefs are directed to exercise discretion and good judgment in promulgating and enforcing appropriate guidelines and restrictions, regularly reviewed to ensure they are commensurate with current or foreseen operations and threats.

d. Introduction, purchase, possession, use, sale, transfer, manufacture, or consumption of any controlled substances, or drug paraphernalia. Prescription drugs must be accompanied by the original prescription label of the prescribing medical facility or authority.

e. Introduction, possession, transfer, sale, creation or display of any pornographic or sexually explicit photograph, video tapes, movie, drawing, book, magazine, or similar representations. The prohibitions contained in this subparagraph shall not apply to AFRTS broadcasts and commercial videotapes distributed and/or displayed through AAFES or MWR outlets located within the USCENTCOM AOR. This prohibition shall also not apply within the areas exclusively under the jurisdiction of the United States, such as aboard United States Government vessels and aircraft.

f. Gambling of any kind, including sports pools, lotteries and raffles, unless permitted by host-nation laws and applicable service or component regulations.

g. Removing, possessing, selling, defacing or destroying archeological artifacts or national treasures.

h. Selling, bartering or exchanging any currency other than at the official host-nation exchange rate.

i. Adopting as pets or mascots, caring for, or feeding any type of domestic or wild animal.

j. Proselytizing of any religion, faith or practice.

k. Taking or retaining individual souvenirs or trophies, except as noted below:

(1) Private or public property may be seized during exercises or operations only on order of the Commander, when based on military necessity. Such property will be collected, processed, secured, and stored for later return to the lawful owner. The wrongful taking of

private property, even temporarily, is a violation of Article 121, Uniform Code of Military Justice.

(2) Public property seized by U.S. Armed Forces is the property of the United States. The wrongful retention of such property is a violation of Article 108, Uniform Code of Military Justice.

(3) No weapon, munitions, or military article of equipment obtained or acquired by any means other than official issue may be retained for personal use or shipped out of the USCENTCOM AOR for personal retention or control.

(4) This prohibition does not preclude the lawful acquisition of souvenirs that can be legally imported into the United States.

3. PUNITIVE ORDER: Paragraph 2 of this General Order is punitive. Persons subject to the UCMJ may be punished thereunder. Civilians serving with, employed by, or accompanying the Armed Forces of the United States in the USCENTCOM AOR may face criminal prosecution or adverse administrative action for violation of this General Order.

4. INDIVIDUAL DUTY: All persons, military and civilian, subject to this General 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. Acts of disrespect or violations of host nation laws, regulations, and customs may be punished under applicable criminal statutes and administrative regulations.

5. UNIT COMMANDER RESPONSIBILITY: Commanders, Security Assistance Office Chiefs, and military and civilian supervisors are charged with ensuring that ALL PERSONNEL are briefed on the prohibitions and requirements of this GENERAL ORDER. Commanders and supervisors are expected to exercise discretion and good judgment in enforcing this General Order. Component Commanders may further restrict their forces as they deem necessary.

6. CONFISCATION OF OFFENDING ARTICLES: Items determined to violate this General Order may be considered contraband and may be confiscated by command or law enforcement authorities if found in the USCENTCOM AOR. Before destruction of contraband, Commanders or law enforcement personnel will coordinate with their servicing judge advocate.

7. EFFECTIVE DATE: This General Order is effective immediately. Individuals or commanders may arrange for safekeeping of personal firearms with their unit's military law enforcement activity. Military customs and other pre-clearance officials will enforce this General Order in their inspections of personnel and equipment prior to departure to the AOR and return to CONUS.

8. EXPIRATION: This General Order will expire when rescinded by the Commander in Chief, U.S. Central Command, or higher authority. Although this General Order is published during peacetime conditions, it will remain in effect in the event of hostilities or armed conflict. Should such conditions prevail, this General order may be supplemented by additional guidance.

9. WAIVER AUTHORITY: Authority to waive or modify the prohibitions of Paragraph 2 of this General Order is delegated to the Deputy Commander in Chief, USCENTCOM.

/s/ Tommy R. Franks  
General, U.S. Army

DISTRIBUTION:

A

**UNITED STATES CENTRAL COMMAND**  
OFFICE OF THE DEPUTY COMMANDER IN CHIEF AND CHIEF OF STAFF  
7115 SOUTH BOUNDARY BOULEVARD  
MACDILL AIRFORCE BASE, FLORIDA 33621-5101

CCJA

19 DEC 2000

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Partial Waiver of USCENTCOM General Order Number 1A

1. In accordance with USCENTCOM General Order Number 1A, paragraph 9, the provisions of that order with regard to the prohibition of introduction, possession, sale, transfer, or consumption of alcoholic beverages within the countries of Kuwait and Saudi Arabia are waived, in part, as set forth below:

a. Chiefs of Security Assistance Offices in Kuwait and Saudi Arabia may issue directives authorizing those personnel assigned to the SAO to possess and consume alcoholic beverages.

(1) Such personnel will be provided guidance on appropriate and responsible use of such beverages. This guidance shall include explicit prohibitions on the unauthorized introduction, sale, resale, or transfer of alcohol to unauthorized personnel, including personnel otherwise subject to the alcohol restrictions of USCENTCOM General Order Number 1 A.

(2) Chiefs of Security Assistance Offices in Kuwait and Saudi Arabia will consult with the appropriate Commander or senior representative of the operating forces prior to issuing or substantively changing alcohol directives.

b. Personnel assigned to Headquarters, USCENTCOM and the Headquarters of all USCENTCOM Component Commands, while present in a non-operational status in Kuwait and Saudi Arabia, may possess and consume alcoholic beverages in certain limited situations, as follows:

(1) when participating in official events with Security Assistance personnel, U.S. Embassy Personnel, or host-nation official personnel; or

(2) when they are guests in the homes of Security Assistance personnel, U.S. Embassy personnel, or host-nation official personnel; and

(3) when physical and operational security considerations permit. Under no circumstance may individuals operate motor vehicles after consuming alcoholic beverages pursuant to this limited waiver provision.

2. Prohibitions within USCENTCOM General Order Number 1A concerning the unauthorized introduction, sale, transfer of alcohol to unauthorized personnel, including personnel otherwise subject to the alcohol restrictions of USCENTCOM General Order Number 1A, remain in effect.



3. Within this Headquarters, travel approval authorities may, on an individual basis, restrict the consumption of alcohol otherwise authorized pursuant to this waiver.
4. Commanders of Component Commands may similarly restrict the consumption of alcohol by personnel assigned to their commands otherwise authorized pursuant to this waiver.
5. Where personnel subject to this waiver are collocated with those who are not, every effort must be made to minimize the potential for conflict between the two groups.

/s/ M.P. DeLong  
Lieutenant General

**DISTRIBUTION:**

Commander, U.S. Air Forces Central Command, Shaw AFB, SC 29152-5000  
Commander, U.S. Army Forces Central Command, Ft McPherson, GA 30330-5000  
Commander, U.S. Naval Forces Central Command, FPO AE, 09501-6008  
Chief, Office of Military Cooperation, Bahrain, Box: 270, American Embassy Manama, FPO 09834-5100  
Commander, U.S. Liaison Office, Djibouti, American Embassy, ATTN: USLO Department of State, 2150 Djibouti Place, Washington, DC 20521-2150  
Chief, Office of Military Cooperation, Egypt, ATTN: USOMC-C, Unit 64901, APO AE 09839-4901  
Chief U.S. Liaison Office, Eritrea, American Embassy, Asmara, Department of State Pouch Room, Washington, DC 20521-7170  
U.S. Defense Attache, Ethiopia, USDAO Addis Ababa, Ethiopia, Department of State, Washington, DC 20521-2030  
Chief, Military Assistance Program Office, Jordan, Unit 70207, Box: 3, APO AE 09892-0107  
U.S. Defense Attache, Kazakhstan, American Embassy Almaty, Department of State Pouch Room, Washington DC 20521-7030  
Chief, U.S. Liaison Office, Kenya, Department of State, 8900 Nairobi Place, Washington, DC 20521-8900  
Chief, Office of Military Cooperation, Kuwait, American Embassy Kuwait, ATTN: OMC-K, Unit 69000, Box 25, APO AE 09880-9000  
U.S. Defense Attache, Kyrgyzstan, American Embassy Bishkek, Department of State Pouch Room, Washington, DC 20521-7040  
Chief, Office of Military Cooperation, Muscat, Oman, American Embassy-OMC, Unit 73000, APO AE 09890-3000  
Chief, Office of Defense Representative, Pakistan, American Embassy Islamabad/ODRP, Unit 62200, Box 2, APO AE 09812-2200  
Chief, U.S. Liaison Office, Qatar, ARCENT-QA, ATTN: USLO, APO AE 09898  
Chief, U.S. Military Training Mission, Riyadh, Saudi Arabia, USMTM, Unit 61300, Box 1, APO AE 09803-1300  
Chief, Security Assistance Office, Seychelles, c/o U.S. Liaison Office, Kenya, Department of State, 8900 Nairobi Place, Washington, DC 20521-8900

LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOLUME I, MAJOR COMBAT OPERATIONS (11 SEPTEMBER 2001 TO 1 MAY 2003)

U.S. Defense Attache, Tajikistan, c/o American Embassy Almaty, Department of State Pouch Room, Washington DC 20521-7030

U.S. Defense Attache, Turkmenistan, American Embassy Ashgabat, Department of State Pouch Room, Washington, DC 20521

Chief, U.S. Liaison Office, United Arab Emirates, Department of State, 6010 Abu Dhabi Place, Washington, DC 20521-6010

U.S. Defense Attache, Uzbekistan, American Embassy Tashkent, Department of State Pouch Room, Washington, DC 20521-7100

U.S. Defense Attache, Yemen, USDAO Sanna, Department of State, Washington, DC 20521-6330

**UNITED STATES CENTRAL COMMAND**  
**OFFICE OF THE DEPUTY COMMANDER IN CHIEF AND CHIEF OF STAFF**  
**7115 SOUTH BOUNDARY BOULEVARD**  
**MACDILL AIRFORCE BASE, FLORIDA 33621-5101**

CCJA

19 DEC 2000

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Partial Waiver of USCENTCOM General Order Number 1A

1. In accordance with USCENTCOM General Order Number 1A, paragraph 9, the provisions of the prohibition at paragraph 2.a. concerning the introduction, purchase, possession, use or sale of privately owned firearms or ammunition while in the USCENTCOM AOR, are waived for personnel assigned to Security Assistance Organizations (SAOs) insofar as it applies to firearms intended solely for use in sports or hobbies. Firearms owned or acquired for personal protection will only be obtained through established military channels, subject to required training and certification.

2. In those areas where this waiver applies, any introduction, purchase, possession, use or sale of privately owned firearms or ammunition will be dependent upon consistency with host country law, will require the personal approval of the respective SAO Chief, and will comply with the United States Bureau of Alcohol, Tobacco and Firearms rules for importation into the United States.

/s/ M.P. Delong  
Lieutenant General, USMC

DISTRIBUTION:

A

**UNITED STATES CENTRAL COMMAND**  
OFFICE OF THE DEPUTY COMMANDER IN CHIEF AND CHIEF OF STAFF  
7115 SOUTH BOUNDARY BOULEVARD  
MACDILL AIRFORCE BASE, FLORIDA 33621-5101

CCJA

19 DEC 2000

MEMORANDUM FOR CHIEF, U.S. MILITARY TRAINING MISSION, SAUDI ARABIA

SUBJECT: Partial Waiver of USCENTCOM General Order Number 1A

In accordance with USCENTCOM General Order Number 1A, paragraph 9, the provisions of that order with regard to gambling are waived as they relate to bingo games conducted by Security Assistance Organizations (SAOs) in Saudi Arabia (USMTM and OPM-SANG). Component commanders may authorize the participation of their personnel in such SAC-run bingo games, as they may deem appropriate.

/s/ M.P. Delong  
Lieutenant General, USMC

**UNITED STATES CENTRAL COMMAND**  
**OFFICE OF THE COMMANDER IN CHIEF**  
7115 SOUTH BOUNDARY BOULEVARD  
MACDILL AIRFORCE BASE, FLORIDA 33621-5101

CCJA

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Partial Waiver of USCENTCOM General Order Number 1A

1. In accordance with USCENTCOM General Order Number 1A, paragraph 9, the provisions of that order with regard to adopting and caring for animals is partially waived as set out below:

a. Personnel who, prior to 7 November 1996, owned and were caring for a domestic pet, such as a cat or dog, within the USCENTCOM AOR may, if authorized, continue to do so.

b. Permanent party personnel may, if authorized by their receiving command, ship domestic pets from their previous assignments or may otherwise acquire domestic pets.

c. In all such cases, personnel must obtain the approval of the Component/Joint Task Force (JTF) Commander or, for non-Component or non-JTF forces, their Unit Chief.

2. Component/JTF Commanders and Unit Chiefs shall continuously review circumstances to determine whether further restrictions are appropriate in light of current health, cultural, and safety concerns, and shall specifically consider whether evacuation efforts would be hampered by the presence of household pets.

//ORIGINAL SIGNED//

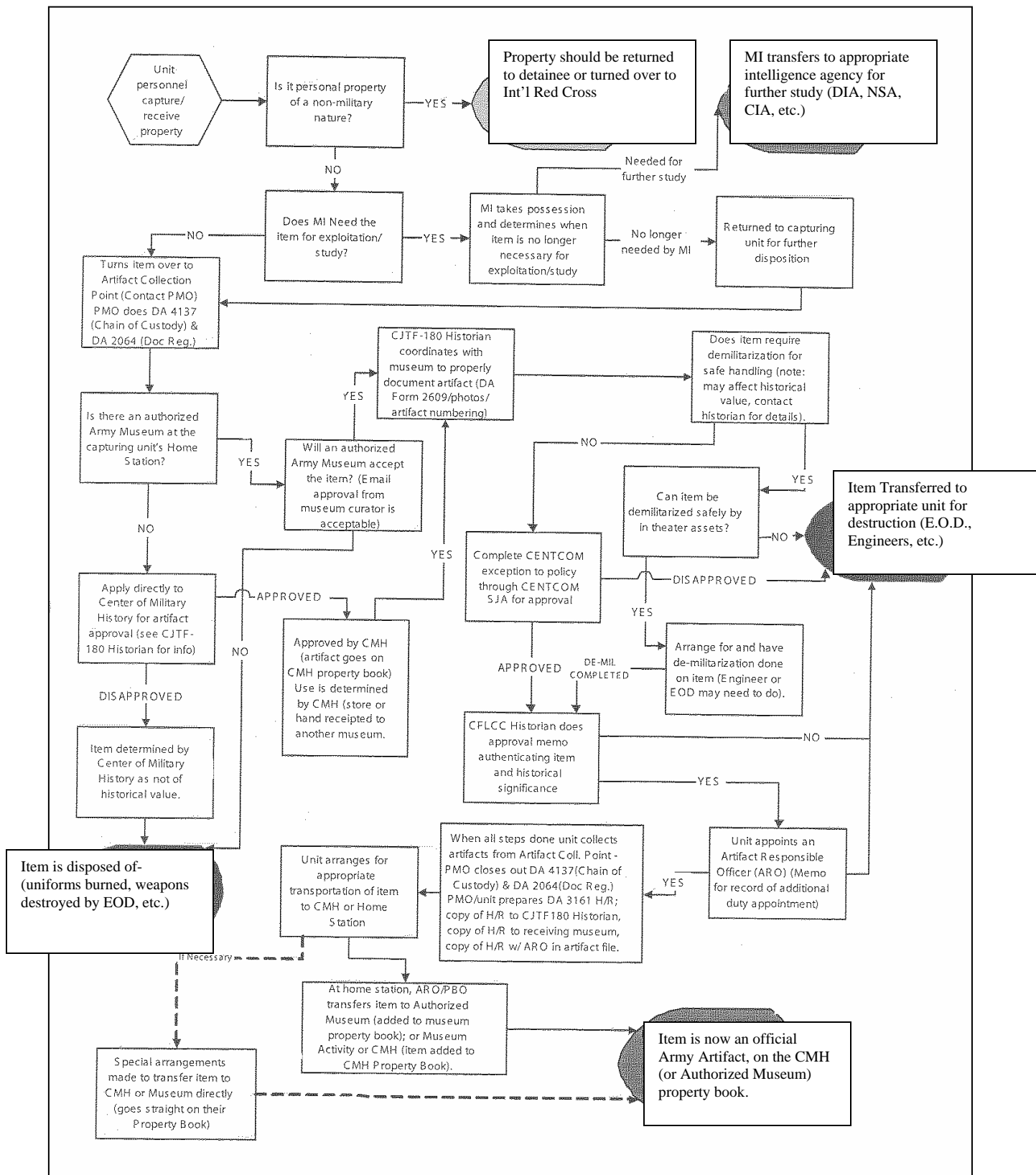
M. P. Delong  
Lieutenant General

DISTRIBUTION:

A

NOTE: The original of this document is maintained at USCENTCOM/CCJA.

**APPENDIX G-2: DISPOSITION OF ENEMY PROPERTY  
OPERATION ENDURING FREEDOM**



**APPENDIX G-3: RETENTION OF ENEMY EQUIPMENT**

UNITED STATES MARINE CORPS  
U.S. MARINE FORCES CENTRAL COMMAND  
NAVAL SUPPORT ACTIVITY, BAHRAIN  
UIC 44900  
FPO AP 99613-4900

IN REPLY REFER TO:

5800

SJA

21 May 03

From: Commander, U.S. Marine Forces Central Command

To: Commanding General, Task Force Tarawa

Subj : MARCENT APPROVAL FOR RETENTION OF CAPTURED ENEMY EQUIPMENT  
(TASK FORCE TARAWA)

Ref: (a) MCO 5BOO.6A Control and Registration of War Trophies  
(b) DoD 4500.9-R Customs and Border Clearance Policies And Procedures  
(c) MCO P5750.1G Manual for Marine Corps Historical Program  
(d) E-mail dtd 13 May 03 from Robert J Colbert, U.S. Customs Service

Encl: (1) CG, TF TARAWA msg 051800Z MAY 03 requesting unit retention of captured  
enemy equipment  
(2) Marine Corps Historical Center (TF TARAWA) approval ltr of 16 May 03

1. The request contained in enclosure (1) was forwarded to Commander, United States Central Command, recommending approval for those items listed in enclosure (2). The approved items, in enclosure (2), meet the criteria for retention by the unit as historical artifacts or training equipment as set forth in references (a) through (c).

2. Reference (d) details current requirements of the U.S. Customs Service for importation of captured enemy equipment into the U.S. for those items captured during Operation Iraqi Freedom.

3. Upon approval or disapproval of the requested items by Commander, United States Central Command, you will be required to complete coordination with the U.S. Customs Service 5 days prior to arrival at port of entry.

4. Point of contact for this matter is my Staff Judge Advocate, Lieutenant Colonel R.E. Pinder, USMC, DSN (318) 360-0703/E-mail at pinderre@marcent.usmc.smil.mil. /s/ E.B. HAILSTON

**DEPARTMENT OF THE NAVY**  
**HEADQUARTERS UNITED STATES MARINE CORPS**  
**MARINE CORPS HISTORICAL CENTER**  
**WASHINGTON NAVY YARD**  
**1254 CHARLES STREET**  
**WASHINGTON, D.C. 20374-5040**

16 May 2003

From: Lt Col Jeffrey Acosta USMCR, Field Historian, MARCENT EFCAT  
To: Commander, US Marine Corps Forces, Central Command

Subj: REQUEST TO RETAIN CAPTURED IRAQI HISTORICAL PROPERTY  
(TFTARAWA)

Ref: (a) CENTCOM GENERAL ORDER 1A (GO1A)  
(b) Msg COMUSMARCENT (Secret) DTG 300927ZAPR03  
(c) I MEF FRAGO 346-03  
(d) MCO P5750.1G  
(e) LOI to U Col Jeffrey Acosta USMCR from the Director, US Marine Corps Historical Division dtd 18 Feb 03  
(f) CG, TF TARAWA msg 051800Z MAY 03

1. The following artifacts requested in Ref (f) are recommended for retention by the TF TARAWA as unit and US Marine Corps historical property for both historic display and training purposes in accordance with Refs (a)-(d). Authority from the US Marine Corps History and Museums Division to authorize the collection of US Marine Corps historic property and artifacts is contained in Ref (f).

2. The following captured Iraqi military artifacts are recommended for retention by the TF TARAWA and the listed commands as historic artifacts for unit displays:

A. RPK Assault Rifle	A13752	For HQ 2d MEF	Ref (f) Para 3.A.1
B. RPG-7 Launcher	305	For HQ 2d MEB	Ref (f) Para 3.B
C. AK-47 Rifle	R00425	For HQ MCB CLNC	Ref (f) Para 4
D. AK-47 Rifle	AV-1528	For 2d Intel Bn	Ref (f) Para 5
E. AK-47 Rifle	56-127134657	For 8th Com Bn	Ref (f) Para 6
F. AK-47 Rifle	AV1528	For 4th RECON Bn	Ref (f) Para 9
G. ZPU-4	330232	For 2d Force Recon Bn	Ref (f) Para 10
H. 106 mm Recoilless Rifle	E322	For HQ 2d MARDIV	Ref (f) Para 17
I. RPG-7	9418	For 2/8	Ref (f) Para 18
J. ZPU	70667	For 3/2	Ref (f) Para 19
K. FN GPMG	GX298	For 1/10	Ref (f) Para 20
L. RPK Med MG	24584	For 1/2	Ref (f) Para 21



APPENDIX G-3: RETENTION OF ENEMY EQUIPMENT

M. RPG Grenade Launcher	8281974	For HQ RCT-2	Ref (f) Para 23
N.AK-47	2320	For 2nd LAV Bn	Ref (f) Para 24

3. The following captured Iraqi equipment is recommended for retention by the US Marine Corps History and Museums Division in accordance with Ref (c) for training purposes and placed on loan to the TF TARAWA and its Major Subordinate Commands as requested by Ref (f). The gaining units must contact the Registrar, US Marine Corps History and Museums Division within 30 days after returning to the United States to complete the required loan agreements:

A. Shinwa Portable Radio	5E31249	Ref (f) Para 7.A
B. Racal Mobile HF Transceivers	08769	Ref (f) Para 7.B
C. HF Man Pack Radio	4159	Ref (f) Para 7.C
D. TC-10 Telephone Switchboard	Unk	Ref (f) Para 7.D
E. Iraqi Sound Powered Phones	0607196	Ref (f) Para 7.E
F. Racal Mobil VHF Radio	85-7636	Ref (f) Para 7.F
G. PRC-349 Squad Radio	Unk	Ref (f) Para 7.I
H. Thomson Mobile HF TRC 90	33045	Ref (f) Para 7.H
J. Thomson TRC-382	Unk	Ref (f) Para 7.I
K. R-105-VHF Radio	Unk	Ref (f) Para 7.J
L. PRC-349 Squad Radio	Unk	Ref (f) Para 14
M. Thomson Mobile TRG-90	33045	Ref (f) Para 14.B
N. 60mm "Jaleel" Light Mortar	9289	Ref (f) Para 12.B
O. 60 mm "Commando" Mortar	1123	Ref (f) Para 15.D
P. SA-7 A GRAIL Trigger	390-5278	Ref (f) Para 15.H
Q. SA- 7 A GRAIL Trigger	262-5278	Ref (f) Para 15.I
R. AK-47	9097	Ref (f) Para 11
S. AK-47	C05281	Ref (f) Para 13.A
T. 60mm "Al Jaleel" Mortar	8637	Ref (f) Para 13.B
U. AK-47	C05281	Ref (f) Para 15.B
V. AK-47	613891	Ref (f) Para 18.B
W. AK-47	7025645	Ref (f) Para 19.B
X. AK-47	2634896	Ref (f) Para 20.B
Y. AK-47	8933547	Ref (f) Para 21.C
Z. RPK Medium MG	UJ3701987	Ref (f) Para 23.C
AA. DSHK-38/Model 38/46	0663	Ref (f) Para 25.D

4. Your Points of Contact are Lt Col Jeffrey Acosta USMCR, Field Historian, COMUSMARCENT EFCAT (E-Mail: acostaj@marcent.usmc.mil); Lt Col Laurie Powell USMC, DSJA, COMUSMARCENT (E-mail: powelll@marcent.usmc.mil); Ms Jennifer Castro, Registrar of Collections. US Marine Corps History and Museums Division (E-mail: castrojl@nt.quantico.usmc.mil).

/s/ J. ACOSTA

**APPENDIX G-4: SAMPLE OUTLINE FOR CID DEBRIEFING**

1. Details of Unit Personnel, Command Structure and Mission
2. Details of Pre-mission preparation and Unit Personnel Assignments
3. Details of Events leading to Capture.
4. Actions from Contact to Capture, including Survival/Evasion.
5. Weapon, Vehicle, and Communication Equipment, including COMSEC Status (Pre and Post capture)
6. Details of other casualties and US personnel condition/status
7. Observations of Enemy Personnel and other Hostiles
8. Treatment at Capture (Medical, Custody, Movement, Safekeeping, Personal Effects)
9. Descriptions of Capturing and Internment Personnel
10. Interrogations, Information Disclosed and Techniques (Statements, Recordings, Video, Media, Photographs)
11. Acts of POWs and Enemy while Interred, including continued treatment, food, water, hygiene, sanitation, resistance, escape.
12. Narrative of time and observations while in captivity (location, people, conversations overheard, contact, times, situations); Who was in Charge?
13. Reports of other captives (Other US or Coalition personnel, Kuwaiti, Missing Persons), prisons, WMD, Tactical issues (e.g. Saddam/Regime status) and Caches.
14. List of Witnesses (name, descriptions) and Documents
15. ICRC Contact and Documents Completed
16. Overall Treatment (Medical, General, Food...)
17. Threats, Sexual Assaults, Humiliation, Harm's Way, Other Suspected LOAC violations.
18. Remaining Observations or Information of Note including focus on information learned from other debriefings to corroborate/refute and other personnel/treatment.

**APPENDIX G-5: 3ID INFORMATION PAPERS**

AFZP-JA

6 February 2003

**INFORMATION PAPER****SUBJECT:** Refugee Status and Temporary Refugee Status**REFERENCES:**

- (a) 1967 Protocol Relating to the Status of Refugees (U.S. is a signatory)
- (b) The Judge Advocate General's School, Operational Law Handbook (2002)

1. **PURPOSE.** This information paper addresses the treatment, under codified and customary international law, of persons claiming refugee or temporary refugee status.

2. **REFUGEE STATUS.** If displaced persons qualify for "refugee status" under U.S. interpretation of international law, then such refugees should be treated similarly to aliens within the U.S. In many instances, this treatment is often similar, if not identical, to that received by American nationals. The most basic of these protections is the right to be shielded from danger.

A. Refugee is defined as any person:

1. who has a well-founded fear of being persecuted for reasons of race, religion, nationality, social group, religion, or political association;
2. who is outside the nation of his nationality, and, according to U.S. interpretation of international law presents himself at the borders of the U.S. territory; and
3. is without the protection of his own nation.

B. Harsh conditions, general strife, or adverse economic conditions **are not** considered "persecution." Individuals fleeing such conditions do not fall within the category of refugee. Military commanders will not grant refugee status.

3. **TEMPORARY REFUGE.** Protection given for humanitarian reasons to a national of any country under conditions of urgency in order to secure life or safety of the requester against imminent danger. Temporary refuge is **NOT** a customary law right. In appropriate cases, however, the U.S. shall grant refuge in foreign countries or on the high seas of any country. **This is the most the U.S. military should ever bestow.**

A. Political Asylum. Military personnel are never authorized to grant asylum. The U.S., however, shall give foreign nationals full opportunity to have their requests considered on their merits. Requests for asylum must be coordinated through the host nation, American Embassy, or consulate.

LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOLUME I, MAJOR COMBAT OPERATIONS (11 SEPTEMBER 2001 TO 1 MAY 2003)

B. Requests in Foreign Territories. All requests for either political asylum or temporary refuge will be treated as requests for temporary refuge. The senior Army officer on the ground may grant refuge if he feels the individual is in imminent danger of death or serious bodily injury. Imminent danger **does not** include threats or speculation of future harm. During the application process, the applicant will be protected, and the refuge will end only when directed by higher authority.

3. POC is CPT A. J. Balbo at (312) 438-5167.

AFZP-JA

6 April 2003

**INFORMATION PAPER****SUBJECT:** Siblings Deployed Overseas**REFERENCES:**

- (a) AR 614-30, Overseas Service, 30 August 2001
- (b) AR 614-100, Officer Assignments, Details, and Transfers, 20 September 2000
- (c) AR 614-200, Enlisted Assignments and Utilization Management, 12 July 2001

1. **PURPOSE.** This paper examines the limitations of deploying family members overseas in the same units.
2. **BLUF.** IAW AR 614-30, Ch. 3-7, if a soldier has an immediate family member assigned to the same unit that is scheduled for deployment, and if that soldier requests reassignment from that unit, then the soldier is ineligible for deployment unless that request is disapproved. In other words, soldiers remain eligible for overseas deployment unless they request reassignment from the unit
3. **DEFINITIONS.**
  - (i) Immediate Family Member. Parents, step-parents, parents by adoption, individuals who stood in as parents for at least five years prior to deployment, brothers, sisters, step-siblings, half-siblings, siblings by adoption, spouses, children, children by adoption, step-children, and illegitimate children if parenthood is determined.
  - (ii) Unit. A battalion, squadron, or an element with 500 authorized Army personnel.
4. Approval authority for such actions is Headquarters, Department of the Army.
5. Soldiers or commanders with questions pertaining to AR 614-30 are encouraged to seek out the nearest legal advisor.
6. POC is CPT A. J. Balbo at 302-584-0739.

AFZP-JA

2 April 2003

## INFORMATION PAPER

**SUBJECT:** Accident Investigations

### REFERENCES:

- (d) AR 385-40, "Accident Reporting and Records," 1 November 1994
- (b) DA Pam 385-40, Accident Investigation and Reporting

1. **PURPOSE.** This paper examines the methods for reporting and recording accident investigations in the deployed environment.
2. **DEFINITIONS.** An Army accident is defined as an unplanned event, or series of events, that results in injury/illness to either Army or non-Army personnel, and/or damage to Army or non-Army property as a direct result of Army operations (caused by the Army). In addition, a recordable accident (over \$2000 damage to Army property, or a workday lost by Army personnel), when there is no degree of fault by the Army (military or civilian), will be reported and recorded in the Army Safety Management Information System (ASMIS).
3. The Army has two categories of accident investigation reports, limited use reports, and general use reports. Additionally, commanders may initiate collateral investigations to obtain and preserve all available evidence for use in subsequent administrative or legal actions.

A. Limited Use. These are internal communications of DA whose **SOLE** purpose is prevention of subsequent DA accidents. **They are required for all flight and fratricide/friendly fire accidents.**

- (i) The purpose of Limited Use investigations is to establish and encourage a frank and open exchange of information without fear of recrimination or other adverse action
- (ii) All persons who provide information to accident investigators in this category under a promise of confidentiality may be assured that DA will use its best efforts to honor the promise if the record containing the information becomes the subject of a request under the Freedom of Information Act (FOIA), and will not voluntarily disclose this information.
- (iii) Limited Use investigations may also be used in accidents involving other complex weapons systems, equipment or military-unique items, and military-unique equipment/operations/exercises when the determination of causal factors is vital to the national defense.
- (iv) Reports shall not be used as evidence or to obtain evidence for any disciplinary action, in determining line-of-duty status, before any evaluation board, or to determine liability in administrative claims for or against the Government.

B. General Use. These reports are also intended for accident prevention purposes and will not be used for administrative or disciplinary actions within DoD.

(i) Portions of these reports which contain privileged material, such as investigative findings, analyses, and recommendations, are generally not releasable to the public, to any agency outside of DoD, or to persons within DoD unless they have a need to know such information for accident prevention purposes.

(ii) Witnesses will be advised that their statements cannot be used against them for disciplinary purposes. Promises may not be given, however, that these statements will not be disclosed in response to a valid FOIA request.

4. Accident classes are used to determine the appropriate investigative and reporting procedures. Accident classes are as follows.

A. Class A accident - An Army accident in which the resulting cost of property damage is \$1,000,000 or more; an Army aircraft or missile, is missing, lost, or abandoned; or an injury and/or occupational illness results in a fatality or permanent disability.

B. Class B accident - An Army accident in which the resulting cost of property damage is \$200,000 or more, but less than \$1,000,000; an injury or occupational illness that results in permanent partial disability; or when five or more personnel are hospitalized as inpatients as the result of a single occurrence.

C. Class C accident - An Army accident in which the resulting cost of property damage is \$10,000 or more, but less than \$200,000; a nonfatal injury that causes any loss of time of work other than the date of the accident; or a nonfatal occupational illness that causes the loss of one day of work.

D. Class D accident - An Army accident in which the resulting total cost of property damage is \$2000 or more, but less than \$10,000.

Note – nonfatal injuries/illnesses (restricted work activity, light duty, or profile) will only be recorded in ASMIS in conjunction with recordable property damage accidents.

E. Class E – aviation incident – An Army accident in which the resulting damage cost and injury severity do not meet the criteria for a Class A-D accident (\$2000 or more damage, lost time/restricted activity case). A class E aviation incident is recordable when the mission (either operational or maintenance) is interrupted or not completed.

5. Combat losses **DO NOT** constitute Army accidents. A combat loss is defined as damage or injury incurred as a direct result of action by an enemy force. Damage or injury resulting from evasive actions taken to avoid enemy fire also constitutes combat losses.

6. The following accidents will be investigated by a board consisting of a **minimum of three** members. These members should be officers, warrant officers, or DA safety or occupational specialists.

A. All class A and B accidents, except those involving off-duty military fatalities/injuries not involving military operations.

B. Any accident, regardless of class, that an appointing authority believes may involve a potential hazard serious enough to warrant an accident investigation by a multi-member board.

C. Class C aircraft accidents (flight, flight-related, or aircraft ground) will be investigated by a board of at least one officer, warrant officer, or DA safety or occupational specialist.

LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOLUME I, MAJOR COMBAT OPERATIONS (11 SEPTEMBER 2001 TO 1 MAY 2003)

7. Class C (non aircraft), Class D, and Class E accidents will be investigated by **one or more** officers, warrant officers, NCOs, supervisors or DA safety or occupational specialists.
8. Preservation of accident scenes. Consult the Military Police and/or Criminal Investigation Division for cooperation in securing accident scenes. DA PAM 385-40, Army Accident Investigation and Reporting, also contains additional details and information.
9. POC is D-Rear legal at 302-584-0839.



AFZP-JA

3 April 2003

**INFORMATION PAPER****SUBJECT:** Surviving Sons and Daughters**REFERENCES:**

(e) AR 600-235, Ch. 5-4, 1 November 2000

(f) AR 614-30, Ch. 3-7, 30 August 2001

1. **PURPOSE.** This paper examines the requirements for approving requests for separation under the Surviving Sons and Daughters section of AR 600-235. This paper also discusses the possibility of reassigning qualifying soldiers.
2. IAW AR 600-235, Ch. 5-4, the General Court-Martial Convening Authority (GCMCA) will approve requests for separation for the convenience of the Government for soldiers who qualify under this section.
3. Separation under this section is **not** authorized --
  - (1) During a period of war or national emergency declared by the Congress.
  - (2) When a soldier who qualified under this section has waived status as surviving son or daughter. A soldier who has been advised of this section and who enlists, re-enlists, or otherwise voluntarily extends his/her active duty period after the date of notification of the family casualty on which the surviving status is based, will be considered to have automatically waived his/her rights for separation under this section. *A person who has waived such status may request reinstatement of that status; however, reinstatement will not necessarily provide a basis for separation under this section.*
  - (3) When a soldier has court-martial charges pending or under review, is serving a sentence, or is being processed for involuntary administrative separation for cause.
4. Surviving son or daughter status applies **only** if any son or daughter in a family whose parent or one or more sons or daughters served in the Armed Forces of the United States and --
  - (1) was killed in action;
  - (2) died as a result of wounds, accident, or disease while serving in the U.S. Armed Forces;
  - (3) is in a captured or missing-in-action status; or

(4) is permanently 100 percent physically disabled or 100 percent mentally disabled due to service connection, as determined by the Department of Veterans' Affairs or one of the military services, and is not gainfully employed because of such disability.

5. All soldiers seeking a separation under this section must submit a written request and must include the following information: name, grade, SSN, branch of service, relationship, and date of death or disability of the family member upon whom the request is based. Any Veterans' Affairs claim number should be included, if appropriate.

6. Reassignment of surviving sons and daughters. IAW 614-30, Ch. 3-7, if a soldier acquires or retains surviving son or daughter status, and if that soldier is being deployed to an area designated as hostile fire/imminent danger or where duties involve combat with the enemy, then that soldier is ineligible for overseas deployment unless the soldier waives the assignment restriction.

7. Soldiers or commanders with questions about separation or reassignment under this provision should contact the nearest judge advocate for details.

8. POC is CPT A. J. Balbo at 302-584-0739.

AFZP-JA

6 February 2003

**INFORMATION PAPER****SUBJECT:** Displaced Civilians on the Battlefield**REFERENCES:**

- (c) 10 USC § 401
- (d) 10 USC § 2551
- (e) 10 USC § 2547
- (f) DoD Directive 2505.2

1. **PURPOSE.** This information paper addresses the treatment, under codified and customary international law, which should be extended to displaced civilians on the battlefield.

2. **HUMANITARIAN AND CIVIC ASSISTANCE (HCA).** During the course of operations, and depending upon the situation, the military may be authorized to render humanitarian assistance in varying degrees to a populace. The funding of such HCA activities depends to a large degree on the amount of assistance actually performed.

a. Legislative Authority for HCA. Congress imposed certain restrictions on the conduct of HCA by the U.S. military. The Secretary of State must approve HCA projects, and the security interests of both the U.S. and the receiving nation must be promoted. The mission also must serve the basic economic and social needs of the people involved. HCA must complement but not duplicate any other form of social or economic assistance. The aid may not be provided to any individual, group, or organization engaged in military or paramilitary activity.

i. HCA funds are used to pay for expenses incurred as a “direct result” of the HCA activity. These expenses include: consumable materials, equipment leasing, supplies, and necessary services.

ii. HCA funds cannot compensate expenses that likely would have been incurred whether or not the HCA was provided.

b. De Minimus HCA. Opportunities to provide limited and low-cost HCA may present themselves to units. For example, a young child in a village may require minor medical attention to set a broken bone. 10 USC § 401(c)(2) authorizes the unit commander to permit the treatment of the child by the assigned doctor or medic. The costs associated with this treatment would likely be minimal and would be paid for from the units O&M funds. Only HCA amounting to “minimal expenditures” may be provided. It is the responsibility of the unit commander to consider the amount of resources expended and time required.

3. POC is CPT A. J. Balbo at (302) 438-5167.

## **APPENDIX G-6: CFLCC MEDICAL RULES OF CARE**

### **RESPONSIBILITIES: ALWAYS PROVIDE TREATMENT FOR THE PRESERVATION OF LIFE, LIMB OR EYESIGHT (LLE). THESE RULES APPLY TO ALL PERSONNEL RENDERING TREATMENT WITHIN CFLCC.**

1. Further information on determining eligibility and extent of care can be found in the patient care matrix.
2. Emergency care is medical treatment to save LLE as determined by the appropriate medical authority
3. Routine care is non-emergent preventative and primary care.
4. Medical support, service, evacuation and hospitalization is the primary responsibility of an individual's nation or service component, but there are no restrictions on providing emergency care to save LLE.
5. US personnel will not use host nation (HN) or occupied nation (ON) medical facilities unless in an emergency, or if prior agreements are in place. Unit surgeon and the CFLCC Surgeon will be notified immediately regarding these situations.

### **MEDICAL TREATMENT UNDER THE LAW OF WAR/GENEVA CONVENTIONS**

1. Enemy Prisoners of War (EPW), civilian internees and detainees are entitled to treatment and evacuation that is in accordance with US treatment protocols and policies. All other civilians, displaced persons, or personnel not assigned/attached to coalition forces are generally not entitled to routine care, but may receive emergency care to preserve LLE.
2. **EPW and Retained medical personnel are to be given the same care that is given to US Personnel. Triage and treatment decisions are to be based on medical criteria alone, without regard to nationality.**
3. Retained medical personnel and medical supplies/equipment may be used to treat EPW/Detainees, but will **not** be used to treat US/Coalition personnel unless in case of an emergency situation.
4. **Local nationals with an injury or disease that is a direct result of coalition forces action are not generally entitled to treatment and evacuation. The Medical Treatment Facility (MTF) will discharge or transfer these persons to an appropriate civilian facility as soon as possible. Local nationals will not receive routine care in a US MTF without express direction. This does not preclude limited emergency care to preserve LLE.**
5. Units will not use military medical equipment for civilian humanitarian relief without prior approval from Commander, CFLCC. An exception is authorized as an emergency measure to discharge the duty of a commander toward the civilian population consistent with military and legal requirements. Certain units when authorized, and availability permits, may distribute military supplies for civilian relief.
6. Units may provide minimal expenditures of incidental Humanitarian and Civil Assistance (HCA) medical services as in paragraph (5) in conjunction with operations on a minimal basis. Authority to determine what is minimal rests with CFLCC. Units will get approval from the CFLCC Surgeon prior to these operations.
7. Units will limit dental care to treatment necessary to relieve suffering and impairment of an individual's ability to perform assigned missions. Routine dental care will be rendered according to a patient's eligibility for non-emergent care, and as operations permit.
8. CFLCC will provide veterinary services to all US forces to support food inspections and military working dogs. Veterinary support may also be authorized by the CFLCC Surgeon for animals owned by the local population or found in the area of operations, as deemed necessary for civil affairs operations or to control disease. Veterinary services may be provided to coalition forces and/or civilian contractors as directed by the CFLCC Surgeon.
9. Units will decontaminate **NBC** casualties at the lowest level equal to where treatment is available and/or IAW service doctrine. Generally units will conduct full casualty decontamination before medical treatment or evacuation to the MTF, but medical personnel may perform necessary treatment to preserve LLE before the completion of decontamination procedures.

UNCLASSIFIED as of: 121800Z JAN 03

**PATIENT CARE MATRIX**

<b><u>Category of Patient</u></b>	<b><u>Documents Required</u></b>	<b><u>Emergency Care</u></b>	<b><u>Standard Evacuation</u></b>	<b><u>Sick call</u></b>	<b><u>Additional Information</u></b>
US Service Personnel	ID Card	YES	YES-Strategic to CONUS	Yes; aid station and higher levels	Assess to determine treatment in hospital or sending back to aid station; educate as to sick call procedures in area; evac as necessary
Coalition Forces in support of operations	ID card or travel orders	YES	YES; Routine Strategic to Turkey or LRMC	Yes	Stabilize patient and refer to their appropriate MTF. Approve Strat.evac with CFLCC
Enemy Prisoners of War (EPW)/ Retained Medical or Religious Personnel	ID card or determination by Art. 5 tribunal as to EPW status	YES	Yes, subject to limitation of keeping EPWs in Occupied Nation (ON)	Yes; at Camps	<b>EPWs are to be treated to the same standard as US/Coalition soldiers at all times, though they may be physically segregated</b>
Civilians: if local national/ TCN contractors, non-affiliated civilian interpreters, local hires	Valid ID card, if available	YES	Emergency cases only, subject to limitations; emergent tactical within AO/ON	NO	<b>Treatment to preserve LLE if mission accomplishment not compromised.</b> Stabilize and refer to local facility as soon as possible
Civilian Contractors	Valid ID Card/Passport, Copy of Contract	YES	Yes; Emergent Strategic Evac. to Turkey/LRMC	Dependent on care established in contract	Review contract to verify care entitlements/extent and if routine care is authorized
Federal Civilian Employees (DoD/DA/DoS)	Valid ID Card and Orders	YES	Yes; Emergent Strategic Evac to Turkey/LRMC	Yes	Non-Emergency care is subject to availability; evac to CONUS as required
Designated Non Government Organizations/ Private Volunteer Org. (Red Cross)	Picture ID and/or orders	YES	Emergency cases only. Emergent tactical within AOR	NO	Non-Emergency care is subject to availability or contract. Notify the CFLCC Surgeon about transfers to other facilities
Detainees/Persons Under Confinement	N/A	YES	Routine tactical within AO, subject to EPW limitations	Yes	Treat the same as EPWs, transfer to detainee collection point as soon as possible
DoD/DoS Affiliated Translators and/or AAFES	Picture ID and/or orders	YES	Yes; Emergent Strategic Evac to Turkey/LRMC	No, unless contract requires	Review contract for entitlement/extent. Initial health screen may be authorized by CFLCC
DoS Designees	Picture ID and/or orders	YES	Yes, Evac. to appropriate MTF	Yes	Treatment is based on MOU; to same level as US forces.
United Nations (UN) Personnel	UN ID card	YES	Emergent tactical evac within AOR: Use UN resources	No	Refer to local hospital for routine care unless otherwise directed by CFLCC Surgeon
Retired (US) Service Members (regardless of present employer)	Valid ID Card	YES	Yes, Strategic to CONUS if required	Yes	Non-emergent care is subject to availability.
Other Persons	N/A	YES	Yes, Only emergency tactical evac. within AO	No	Emergency care to save LLE. Contact CFLCC to determine further care or evacuation level

**APPENDIX H-1: 2002 3ID 2D BCT TAX ISSUES Q&A**

- Q: Will there be a tax center provided to soldiers of the 2d BCT?  
A: No. Mission requirements do not allow for the personnel required to staff a tax center.
- Q: What happens if I'm deployed until after 15 April 2002? Will my taxes be late?  
A: No. Military members deployed to Kuwait are entitled to special extensions of time to file their taxes.
- Q: How long do I get to file once I am redeployed to Fort Stewart?  
A: You get at least 180 days from the day you redeploy from Kuwait. You will also get an additional day to file for every day you are deployed during the 2002 tax-filing season (1 Jan 03 to 15 April 03). For example, if you are deployed during the entire tax season (105 days) you will get  $180 + 105 = 285$  days to file your taxes without any kind of penalty or interest.
- Q: Does my spouse get the same extension of time to file?  
A: Yes, it also applies to all spouses of military members deployed to Kuwait.
- Q: Do I have to take any special action to get the time extension to file?  
A: Yes. You have to write "Operation Desert Storm Combat Zone" on all correspondence to the IRS, including your 1040 tax form. The reason you use "Desert Storm" is because that authorization was approved for Kuwait by President Bush in 1991 and has never been closed.
- Q: What if I want to file now so I can get a refund?  
A: If your spouse is at Fort Stewart, he or she can file for you (or sign for you if it's a joint return) with a power of attorney. The tax center at Fort Stewart is also available to assist your spouse. If you have already given your spouse a general power of attorney, it will suffice, but the IRS Form 2848 is designed for just that purpose. You can get the 2848 from the legal section during the weekly rodeos beginning 1 January 2003, or online at [www.irs.gov/formspubs/](http://www.irs.gov/formspubs/).
- Q: Are there ways to file my taxes online?  
A: Yes, there is free filing online through the IRS e-file system if your adjusted gross income (AGI) is less than \$28,000. The website is [www.free1040taxreturn.com](http://www.free1040taxreturn.com). If you AGI is greater than \$28,000 the filing costs \$9.95.
- Q: What about my state taxes? Do I get the same extension?  
A: Maybe? Some states follow the Federal rules, other have their own rules for deployed soldiers. Contact your state tax office or your JAG to find out the specific rules for your state

**APPENDIX H-2: CJTF-180 CITIZENSHIP DAY AFTER ACTION  
REVIEW**

**MEMORANDUM FOR RECORD**

**SUBJECT: Citizenship Day After Action Review (25 September 2002)**

1. The following captures the significant issues encountered while organizing and executing Citizenship Day.
2. **Choosing the right day to schedule the event.** On 15 August 2002, COL Hayden instructed me to organize and execute an “Immigration Day.” At first, I decided September 11<sup>th</sup> would be the perfect day to schedule the event for the obvious symbolism. However, it soon became evident that a multitude of events were scheduled for soldiers on that day, so I changed the date to Monday September 16.  
*Be sure to choose a day when no other major events on post are scheduled. Check the events calendar in the “Freedom Watch” newsletter located on the PAO web page to ensure you avoid any conflicts.*
3. **Choosing the right name.** At first we were going to call the event “Immigration Day.” However, we later chose the name “Citizenship Day” because of the negative connotations associated with the word “immigration.”
4. **Location.** The only location on post large enough to hold the event was the Bagram Chapel. The Chapel holds approximately 80 people and had plenty of room to set up a fingerprinting and picture location. I briefly considered holding the event in the Bowie building conference room, but decided against it once I determined the room was too small and that it could not be reserved for the entire day.  
*Three weeks prior to holding the event, contact the Chaplain via email at [baf-chaplain](mailto:baf-chaplain@af.mil) (SIPR). Do not schedule the event until after you have a suitable location.*
5. **Organizing the day’s events.** The biggest challenge to implementing Citizenship Day was organizing the day’s events. It was difficult to predict how much time would be needed to instruct the applicants to fill out each form. I spoke with CPT Lazenby, TF82 JA, who had organized a Citizenship Day in Kandahar, and he informed me that approximately 50 applicants attended and it took 12 hours to complete. He also gave me an estimated time line of how long it would take to complete each task. I integrated CPT Lazenby’s input into my schedule and it is posted below. However, we only had 9 soldiers attend and completed all tasks two hours ahead of schedule. Nonetheless, I recommend that the events are initially planned based upon the schedule posted below, as it allows plenty of wiggle room if a large number of applicants attend.  
*It is important that you inform the soldiers at the beginning of the day what to expect. After everyone had signed-in, I gave a prepared speech. Basically I put out information that screened out soldiers that could not be helped (because they had already applied) and informed*

*those soldiers with any arrests or criminal records that there would be long delays in their applications.*

6. **Fingerprinting.** The INS regulations require that an MP take the fingerprints. Because the MPs could task out only one person to assist us, we trained our 27Ds to take the fingerprints and planned to have the MP just sign-off on them. However, because only 9 applicants attended, we decided it would be easier to just have the MP handle all the fingerprinting issues.

*Recommend the LAO representative contact and coordinate with CID to train-up the 27Ds on fingerprinting (POC Mr. Rodriguez 303.640.8044). Although we did not need the 27Ds to fingerprint on the day of the event, they would have been required to fingerprint if the turnout was much larger. In addition, coordinate with the PMO about 3 weeks before the event to ensure they can have a person available on Citizenship Day (POC MAJ Deville, 303-587-5638).*

7. **Pictures.** Coordinated with PAO to take the pictures (POC COL King, 303-587-5639). COL King initially informed me that the PAO did not have the equipment to process the pictures. However, CPT Lazenby informed me that the PAO in Kandahar processed their pictures. Consequently, I contacted the Kandahar PAO and had them coordinate with our PAO to train them up on the process. Once this occurred, our PAO agreed to take the pictures.

*It turned out that the photo paper was the only item the PAO initially lacked to take the pictures. Fortunately, by the time Citizenship Day occurred, they were able to obtain 4 pieces of photo paper (10 pictures can fit on one piece of photo paper). Consequently, I recommend the photo paper be ordered several weeks before the scheduled day. In addition, the LAO representative may want to consider taking the pictures him or herself. The only items needed are a digital camera (which the claims office has), a color printer (which the SJA Admin office has) and photo paper. The most difficult part of the process is ensuring the pictures meet the INS strict quality and size requirements.*

8. **In-processing.** As each applicant came in the door they were handed an in-process form. The form asked several questions including the applicant's alien registration number, email address, Bagram mailing address, approximate re-deployment date, an address of a person in the U.S. who could easily contact them, whether they brought their check for \$260.00, and the location of the INS Office at which they wanted to be interviewed at (we gave them a list of INS offices as they came in the door). The in-processing form was then given to CPT Noll who used the information to type up the N400 cover letter, a request to finance to allow the soldier to withdraw \$260.00 (if the applicant did not bring a check), and the fax cover letter for the G325B.

*The INS cover letter must be sent with the application, but the fax coversheet can be discarded after the fax is sent. The cover letters, the finance memo, the in-process sheet, and the INS office list are posted below.*

*Some soldiers may not have a check or money order on the day of the event. We advertised in our flyer that the soldiers must bring the INS fee for \$260.00. However, in the event a soldier failed to bring the fee, we asked finance if the applicants could withdraw this amount. Finance informed us that normally a soldier can only withdraw \$200.00 for casual pay each week, but if we wrote a memo for each applicant explaining why they needed the extra funds, that they would approve it. In addition, we coordinated with the Post Office to ensure that they had plenty of money orders. The Post Office normally does not have money orders, but they ordered a batch specifically for our Citizenship Day.*



9. **The INS forms.** The core of what we did on Citizenship Day was instructing the applicants on how to fill out the INS forms line by line. The following are the significant issues we encountered regarding each form.

a. **N426.** This form is self-explanatory. The applicant fills out the first page and a Personnel Officer completes the second page. The Personnel Officer verifies the applicant's date of service and states whether the applicant has served "honorably." Next, the Personnel Officer signs the form and uses a Title 10 Stamp to certify the information contained therein is correct. You must coordinate through the Personnel Officer at PSB (2<sup>nd</sup> Floor of Motel 6: 640-0381) who will access the necessary information from their SIPERS system.

*After the applicants complete page 1 of the form, recommend that you have a 27D collect them immediately and bring them to the PSB office for processing. Also, be sure to coordinate with the PSB ahead of time so that they know to expect them.*

b. **N400.** The most significant issue we had with the N400 was Part 10G which asks "Are you a male who lived in the U.S. at any time between your 18<sup>th</sup> and 26<sup>th</sup> birthdays in any status except as a lawful non immigrant." At first it was not understood what this question was asking. Finally we determined that the question was asking whether the applicant, between his 18<sup>th</sup> and 26<sup>th</sup> birthdays was an immigrant, or alternatively whether the applicant was in the U.S. on a tourist visa or student visa during this time. In addition, if the applicant was an immigrant between his 18<sup>th</sup> and 26<sup>th</sup> birthdays then he was required to register with the selective service. However, an exception to this rule states that if the individual joined the military they were not required to register. Consequently, if the individual had a selective service number, we entered it in the appropriate block in Part 10G, and if they did not, we wrote "NA." In addition, if the applicant registered for the selective service, and did not know their number we looked it up on the selective service website the next day.

Part 7 of the N400 was another section that caused some confusion. Part 7 asks how many trips the applicant has taken out of the country in the last 5 years. At first, it was not clear whether a "deployment" was considered a "trip." I consulted the INS "Guide to Naturalization" and determined that time spent on a deployment is not considered a "trip" outside the U.S..

*The instructions for the N400 require that all the information be written in capital letters. We did not instruct the applicants to do this and consequently they had to fill out the N400s twice. In addition, unlike the other forms, the N400 has a set of instructions that come with it. Recommend that you read these instructions from front to back before Citizenship Day. Further recommend that you read the N400 instructions to the applicants while they are filling out this form.*

c. **G325B.** You must fax one copy of the G325B to Fort Meade after the applicants complete the first page. Once the personnel at Fort Meade have the form, they run a background check to determine if the person has a military criminal file. If the applicant does, it will take approximately 60 days from the day you faxed the form to receive the file. Further, if the applicant has a military criminal file, it must be included in the application. Also, if the applicant does not have a military criminal file, in approximately 7 days you will receive a faxed memo with a statement to that effect that must be included with the application. The POC at Fort Meade is Mrs. Tina Bishop and her fax number and phone number (DSN) are as follows: 312-622-2706 (fax); 312-622-7068 (phone).

*You must coordinate with another staff section and request to use their fax machine. Further, we faxed the G325Bs as soon as the applicants completed the form. Then, for the next four days we periodically checked to see if Fort Meade sent us anything. It only took four days for Fort Meade to process the forms and fax us the results. However, be prepared for much longer delays if a large number of applicants attend.*

*The second page of the G325B does not need to be completed. I am not sure why this second page is even with the G325B. Fort Meade does not make any alternations to the second page. Just send 2 copies of the first page of the G325B and 1 copy of the memo you receive from Fort Meade with the application.*

*If the applicant's background check reveals that he or she has a criminal file, Mrs. Bishop will ask you whether you want it sent to you. If the applicant is going to be here for the next couple of months, than I recommend that you request that it be sent so you can send the application to the INS at a latter date.*

10. **Advertising for the day's events.** Approximately three weeks before Citizenship Day, we started advertising. We posted numerous flyers all over post, advertised it on our web page, and started announcing the event at the shift change briefs. In addition, about a week before the event, we submitted an article to be published in the Freedom Watch which is attached below.

*One problem that we ran into with posting the flyers is that they would be torn down a day or so after we posted them. Consequently, every couple of days I would send CPL Griffiths out to post a new set of flyers. The flyer is attached below.*

*We attribute the low turnout to ineffective advertising. In Kandahar, the JA's took flyers to the ISG of every unit and strongly recommended that they have their non-citizen soldiers attend. The result was that their turnout was huge. Consequently, I recommend that this approach be taken the next time a Citizenship Day is organized.*

#### 11. **Supplies and equipment.**

a. **Clip Boards.** We ordered 50 clipboards approximately four weeks prior to the day's events. About four days prior to Citizenship Day we went to the Supply Office to check their status and we were informed that the clipboards had not been ordered yet. I pressured the Supply Officer into finding some clipboards, and eventually he was able to obtain 29 of them. Because we were expecting a turnout of approximately 50 individuals, we decided to set up 4 additional tables to accommodate those applicants who would not have a clipboard. However, we only had 9 applicants attend so the clipboards were not needed.

*It is difficult to get supplies on Bagram. Often times, you are dealing with Supply Officers who are incompetent, disorganized, and who just do not care about your needs. Further, supplies are scarce here by virtue of our remoteness. Consequently, once you order an item from supply, you need to bother the Supply Officer at least once a week about the items status. If you do not do this, your supplies will not be ordered.*

*Recommend ditching the clipboards all together. They are inconvenient and the Chapel is large enough that you can easily fit 7 or 8 tables that would provide plenty of room for the applicants to sit.*

b. **INS packets.** As each applicant walked in the door, we handed them a large mailing envelope which contained an INS checklist and all the INS Forms. Each envelope already had a

label with the send address on it, and we instructed each applicant to write his or her return address in the left hand corner.

*The biggest challenge to putting the packets together was obtaining the paper, toner, and printer to print the forms. We made approximately 50 packets and printed out a total of 1500 pages. In addition, we made 20 extra copies of each form to compensate for the mistakes the applicants would inevitably make. Further, it took us approximately 6 hours and 2 toner cartridges to print out all the documents.*

c. **Pens.** The pens are probably the easiest supply item to obtain, but nonetheless be sure to order them several weeks in advance.

d. **Scratch paper.** Recommend that a packet of printer paper be brought for the applicants to use as scratch paper. This is particularly important when they are writing their addresses and employers over the last 5 years.

*Most applicants do not get their employer and residence information correct on the first try. We anticipated this and instructed the applicants to write this information first on scratch paper and then transfer it to the N-400.*

e. **Bottled water.** The day before the event be sure to obtain plenty of water from the SSA for the applicants. The SSA has bottled water that can be signed for on special occasions. Further, the Chapel has a refrigerator where you can store the water.

f. **Reserve a truck.** Recommend that you reserve an automobile from the TMP to use on the night before and the day of the event. You are going to need to transport several tables, a computer and a printer to and from the location for set up and take down. Without a truck, it will take several extra hours to accomplish this task.

*The folks at the TMP can be difficult to work with. Their policy is that you reserve an automobile 24 hours in advance and even then they do not guarantee that they will reserve one for you. Consequently, I recommend notifying the TMP at least one week in advance of the day that you need it. Also, be very polite to the TMP folks, they can be arbitrary and capricious if they perceive you as being pushy.*

g. **Computer and printer.** We borrowed CPT Noll's computer and printer to print out the cover letters, fax memos, and finance memos. We also stored all the forms on his computer just in case we needed to print more out. Further, we saved the INS "Guide to Naturalization" on the hard drive so we could look up the answers to questions that we did not know.

*The INS "Guide to Naturalization" turned out to be an invaluable resource. An applicant will most certainly ask you a question that you do not know and the INS Guide will probably have the answer.*

h. **FD 258 fingerprint cards.** The fingerprint cards were the most difficult item to obtain. We contacted the American embassies in Kabul, Pakistan, and Germany, and they all told us that they did not have any FD258s. In addition CID and the MPs informed us that they did not have the fingerprint cards readily available to them. Fortunately, a few days before the event, the Bagram PMO and JAs in Kandahar cumulatively were able to obtain 90 FD258s for us.

*Recommend before the next Citizenship Day that you coordinate with personnel in the rear to obtain the FD258s. In addition, have enough fingerprint cards to complete two per*

*applicant. The INS strongly recommends that two fingerprint cards per applicant are included just in case one of them is faulty.*

12. **Read the “Military Members 10 Step Guide to Naturalization”**. This resource is posted on the CJTF180 SJA web page and includes links to all the INS Forms, the INS photo specifications, the INS “Guide to Naturalization”, and instructions on how to fill out each form.

*Strongly recommend that you thoroughly read this before you get started. It will explain the process from start to finish. In addition, read the “INS Guide to Naturalization” as a research tool to obtain more detailed information.*

13. **Conclusion**. The day’s events went much more smoothly than anticipated. Our turnout was not very large, but it was a good dry run that ironed out the bugs. In addition, minimal follow-up was required because most of the work was completed on the day of the event. The most important lesson learned from the process was that our advertising was ineffective. As stated above, to remedy this, you need to task out a 27D with informing the 1SG of each unit of the importance to have their non-citizen soldiers attend Citizenship Day.

14. POC for this memorandum is the undersigned.

JAMES T. HILL  
CPT, JA  
Legal Assistance Attorney

**APPENDIX I-1: CTF 82 MILITARY JUSTICE POLICY MEMORANDUM**



REPLY TO  
ATTENTION OF:

**DEPARTMENT OF DEFENSE**  
 COALITION TASK FORCE (CTF)-82  
 OPERATION ENDURING FREEDOM  
 BAGRAM AIRFIELD, AFGHANISTAN  
 APO AE 09354

CTF-82-CG

MEMORANDUM FOR RECORD

SUBJECT: CTF82 Military Justice Policy Memorandum

1. Effective immediately, commanders of the following units (and any units that replace them under CTF82) will exercise Special Court-Martial Convening Authority over individuals noted in parenthesis:

- a. CDR, TF Devil - All individuals assigned or attached to TF Devil (CTF82 IN TF) deployed in support of Operation Enduring Freedom.
- b. CDR, TF Tiger - All individuals assigned or attached to TF Tiger (CTF82 AVN TF) deployed in support of Operation Enduring Freedom.
- c. CDR, TF Dragon - All individuals assigned or attached to TF DRAGON (Bagram Air Field Base Ops) deployed in support of Operation Enduring Freedom.
- d. CDR, 63 EOD BN (All individuals assigned or attached to 63 EOD BN deployed in support of Operation Enduring Freedom)

2. Pursuant to Rule for Courts-Martial 401(a), authority to refer cases to special courts-martial empowered to adjudge a bad conduct discharge is withheld by the general court-martial convening authority.

3. Effective immediately, commanders of the following units (and any units that replace them under CTF82) will exercise Summary Court-Martial Convening Authority and Field Grade Non-Judicial Punishment Authority over the listed units (and any units that replace them under CTF82) in addition to the units they command.

<u>Commander</u>	<u>Unit</u>
CDR, 2-504 IN	All elements assigned or attached to TF 2-504
CDR, 3-504 IN	All elements assigned or attached to TF 3-504 and HHC, 1st BDE, 82d ABN DIV
CDR, 2-505 IN	All elements assigned or attached to TF 2-505
CDR, 307 FSB (LTF)	All elements assigned or attached to TF Devil LTF, Q36 DET E/101 FA, C/3/4 ADA, C/307 EN(-), C/313 MI, 21 MP CO(-), C/82 SIG, 82 SSB(-), 488 QM CO, 229 FSC, 51 SIG BN(-), 24 OD CO, 54 QM CO
CDR, 1-17 CAV	All elements assigned or attached to TF 1-17
CDR, 3-229	All elements assigned or attached to TF ANGEL, HHC CTF82, LRSD-E/313 MI
CDR, 82 ASB	All elements assigned or attached to AVN SPT TF
CDR, 769 EN BN	All elements assigned or attached to TF DRAGON

LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOLUME I, MAJOR COMBAT OPERATIONS (11 SEPTEMBER 2001 TO 1 MAY 2003)

CTF-82-CG

SUBJECT: CTF82 Military Justice Policy Memorandum

4. Authority to impose nonjudicial punishment on commissioned officers, warrant officers, and enlisted soldiers above the grade of E-7 is reserved to the Commanding General, CTF82. All misconduct committed by commissioned officers, warrant officers, or enlisted soldiers above the grade of E-7 will be reported through the Office of the Staff Judge Advocate to the Commanding General for appropriate disposition.
5. Pretrial confinement is not authorized until the CTF82 SJA is notified and concurs with the efforts to place the accused in pre-trial confinement. The officer ordering confinement will get the approval of the Special Courts-Martial Convening Authority before a soldier is placed in pretrial confinement. A commander who places an accused in the status of arrest in quarters or restriction in any form pending charges will immediately notify the trial counsel for that jurisdiction of the date restriction was imposed and the conditions of the restriction.
6. Jurisdiction over members of coalition forces attached to CTF82 will remain with their parent unit and follow national command lines.
7. This authority remains in effect until rescinded or further modified.

JOHN R. VINES  
Major General, USA  
Commanding

**APPENDIX I-2: REQUEST FOR ESTABLISHMENT OF V CORPS REAR  
PROVISIONAL GCMCA**



REPLY TO  
ATTENTION OF

DEPARTMENT OF THE ARMY  
HEADQUARTERS, V CORPS  
OFFICE OF THE STAFF JUDGE ADVOCATE  
UNIT 29355  
APO AE 09014



AETV-JA


12 November 2002

MEMORANDUM THRU Office of the Judge Advocate, USAREUR & Seventh Army,  
APO AE 09014

FOR Office of The Judge Advocate General, HQDA (DAJA-CL), 1777 North Kent Street,  
Rosslyn, VA 22209-2194

SUBJECT: Request for Designation as General Court-Martial Convening Authority (GCMCA)

1. I request that, effective upon the establishment of V Corps Rear (Provisional), the Commander, V Corps Rear (Provisional) be designated as a General Court-Martial Convening Authority pursuant to Article 22(a)(8), UCMJ, and AR 27-10, paragraph 5-2a(1).
2. At a minimum, a Colonel will serve as the Commander, V Corps Rear (Provisional).
3. This designation is necessary due to possible contingency operations.
4. The point of contact for this action is Colonel Marc L. Warren, Staff Judge Advocate, V Corps. You may reach him at DSN 314-370-5839/5844.

  
WILLIAM S. WALLACE  
Lieutenant General, U.S. Army  
Commanding





**APPENDIX I-4: V CORPS REAR PROVISIONAL ASSUMPTION OF COMMAND**



DEPARTMENT OF THE ARMY  
HEADQUARTERS, V CORPS REAR (PROVISIONAL)  
UNIT 29355  
APO AE 09014



REPLY TO  
ATTENTION OF

AETV-R-CG

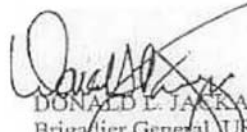
21 February 2003

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Assumption of Command By Authority of AR.600-20, paragraph 2-5c.

1. The undersigned assumes command of V Corps Rear (Provisional), UIC: WAT6HD, APO AE 09014, effective 21 February 2003.

2. Victory Corps!

  
DONALD L. JACKA, JR.  
Brigadier General, USA  
Commanding

DISTRIBUTION:  
A

**APPENDIX I-5: DESIGNATION OF USAREUR GCMCAS**

**DEPARTMENT OF THE ARMY**  
HEADQUARTERS, UNITED STATES ARMY EUROPE AND SEVENTH ARMY  
OFFICE OF THE JUDGE ADVOCATE  
UNIT 29351  
APO AE 09014-0010

REPLY TO  
ATTENTION OF:

AEAJA-MC

FEB 21 2003

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: USAREUR General Court-Martial Convening Authorities

1. Reference. Memorandum, Headquarters, United States Army Europe and Seventh Army, AEAJA-MC, 10 May 2001, subject: USAREUR General Court-Martial Convening Authority Area Jurisdiction Revision.
2. Effective on the event reflected below, General Court-Martial Convening Authority will be exercised as stated below:
  - a. **V Corps Rear (Provisional)**. The Commander, V Corps Rear (Provisional) will be the GCMCA for the V Corps area, as described in the reference, paragraph 1b(1). This provision is effective upon the assumption of command by the V Corps Rear (Provisional) Commander.
  - b. **1<sup>st</sup> Infantry Division Rear (Provisional)**. The Commander, 1<sup>st</sup> Infantry Division Rear (Provisional) will be the GCMCA for the 1<sup>st</sup> Infantry Division area as described in the reference, paragraph 1b(3). As an exception to the reference, the Commander, 1<sup>st</sup> Infantry Division Rear (Provisional) will also exercise GCMCA authority over U.S. Army personnel assigned or attached to Task Force Falcon, Operation Joint Guardian. These provisions are effective upon the assumption of command by the 1<sup>st</sup> Infantry Division Rear (Provisional) Commander.
  - c. **21<sup>st</sup> Theater Support Command Rear (Provisional)**. The Commander, 21<sup>st</sup> Theater Support Command Rear (Provisional) will be the GCMCA for the 21<sup>st</sup> Theater Support Command area as described in the reference, paragraph 1b(4). This provision is effective upon the assumption of command by the 21<sup>st</sup> Theater Support Command Rear (Provisional) Commander.
  - d. The Commander, USAREUR is the appellate authority for non-judicial punishment pursuant to Art. 15 UCMJ, from the 1<sup>st</sup> Armored Division, 1<sup>st</sup> Infantry Division Rear (Provisional), 1<sup>st</sup> Infantry Division/ARFOR(T), V Corps Rear (Provisional), and 21<sup>st</sup> Theater Support Command Rear (Provisional) jurisdictions.
3. Effective 21 February 2003, GCMCA for all U.S. Army personnel located in Turkey who are OPCON to COMUSEUCOM is transferred to the Commander, 1<sup>st</sup> Infantry Division/ARFOR(T). This designation does not apply to U.S. Army personnel located in Turkey who are OPCON to COMUSCENTCOM or COMUSSOCOM.


AEAJA-MC

SUBJECT: USAREUR General Court-Martial Convening Authorities

4. This assignment is effective until either modified or rescinded. The reference above remains in effect, except as modified by this memorandum.

5. Questions may be addressed to the Military and Civil Law Division, DSN 370-8775; FAX DSN 370-3096 or civilian 06221-57-3096.

FOR THE COMMANDER:



DAVID L. POINTER  
COL, JA  
Judge Advocate

DISTRIBUTION:

HQ, USAREUR/7A

DCS, G-3

DCS, G-1

DCS, G-8

COMMANDER, 1st PERSCOM

STAFF JUDGE ADVOCATE,

HQ, V CORPS

HQ, 21st TSC

HQ, 1AD

HQ, 1ID

HQ, USASETAF

HQ, TFE

HQ, TFF

**APPENDIX I-6: V CORPS REAR (P) COURTS MARTIAL JURISDICTION**



REPLY TO  
ATTENTION OF

DEPARTMENT OF THE ARMY  
HEADQUARTERS, V CORPS REAR (PROVISIONAL)  
APO AE 09014



AETV-CG

2 FEB 2003

MEMORANDUM FOR See Distribution

SUBJECT: Designation of Special and Summary Courts-Martial Jurisdiction

1. Effective 21 February 2003, the Commander, US Army Europe and Seventh Army, transferred the area jurisdiction formerly exercised by the Commander, V Corps as a General Court-Martial Convening Authority (GCMCA) to the Commander, V Corps Rear (Provisional). This transfer of authority applies only to US Army personnel remaining in the jurisdiction as outlined by UR 27-10 and other applicable USAREUR directives.
2. The enclosure to this memorandum aligns units for the administration of military justice within the V Corps Rear (Provisional) area of jurisdiction. Special Court-Martial Convening Authorities (SPCMA) exercise jurisdiction over Summary Court-Martial Convening Authorities (SCMCA) listed below them. SCMCA's exercise jurisdiction over the units listed below them. Area jurisdiction applies within the Federal Republic of Germany.
3. Each SPCMA identified in this enclosure will periodically review the units within his/her jurisdiction and report changes through their servicing legal center to Headquarters, V Corps Rear (Provisional), ATTN: AETV-JA-CLD.
4. Any unit or soldier in the V Corps Rear (Provisional) area of jurisdiction not otherwise accounted for in the enclosure will be aligned for the exercise of military justice under the Base Support Battalion Commander in whose community the unit or soldier is located.

Encl  
as

  
DONALD L. JACKA  
Brigadier General, USAR  
Commanding

Distribution:  
A

**V CORPS REAR (PROVISIONAL):  
SPECIAL AND SUMMARY COURTS-MARTIAL AUTHORITIES**

**REAR AREA FORCES: COMMANDER, V CORPS REAR (Provisional)  
(GCMCA)**

**I. 104<sup>th</sup> Area Support Group (SPCMCA) (Hanau)**

**A. 414<sup>th</sup> Base Support Battalion (SCMCA) (Hanau)**

- 1. HHC, 414<sup>th</sup> Base Support Battalion**
  - \* HHC, 130<sup>th</sup> Engineer Brigade Rear Detachment**
  - \* HHC, 16<sup>th</sup> Corps Support Command Rear Detachment**
- 3. Hanau Resident CID, 5<sup>th</sup> Military Police Battalion**
- 4. Hanau Dental Clinic**
- 5. US Army Health Clinic, 209<sup>th</sup> General Dispensary**
- 6. HHC, 104<sup>th</sup> Area Support Group**
- 7. 133<sup>rd</sup> Preventive Medicine Detachment**
- 8. 66<sup>th</sup> Military Intelligence Detachment**
- 9. 72<sup>nd</sup> Medical Detachment**

**B. 39<sup>th</sup> Finance Battalion (SCMCA) (Hanau)**

- 1. HHD, 39<sup>th</sup> Finance Battalion**

**C. 55<sup>th</sup> Personnel Services Battalion(SCMCA) (Hanau)**

- 1. Detachment A, 55<sup>th</sup> Personnel Services Battalion**
- 2. HHD, 55<sup>th</sup> Personnel Services Battalion**
- 3. HHC, 55<sup>th</sup> Postal Company**

**II. 66<sup>th</sup> Military Intelligence Group (SPCMCA) (Darmstadt)**

**A. 2<sup>nd</sup> Military Intelligence Battalion (SCMCA) (Darmstadt)**

- 1. HSC, 2<sup>nd</sup> Military Intelligence Battalion**
- 2. A Company, 2<sup>nd</sup> Military Intelligence Battalion**
- 3. B Company, 2<sup>nd</sup> Military Intelligence Battalion**
- 4. HHC, 66<sup>th</sup> Military Intelligence Group**
- 5. Communications Platoon, 102<sup>nd</sup> Signal Battalion**

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\* Asterisked units are rear detachment elements of deployed parent units and fall under the numbered unit above them for UCMJ purposes.

**III. 26<sup>th</sup> Area Support Group (SPCMCA) (Heidelberg)**

**A. 233<sup>rd</sup> Base Support Battalion (SCMCA) (Darmstadt)**

1. 413<sup>th</sup> Signal Company
2. 64<sup>th</sup> Replacement Detachment
3. HHC, 22<sup>nd</sup> Signal Brigade Rear Detachment (Provisional)
4. HHC, 32<sup>nd</sup> Signal Battalion Rear Detachment (Provisional)
5. HHC, 440<sup>th</sup> Signal Battalion Rear Detachment (Provisional)
6. HHC, 41<sup>st</sup> Field Artillery Brigade Rear Detachment (Provisional)
7. HHC, 165<sup>th</sup> MI Battalion (Provisional)
8. HHD, 233<sup>rd</sup> Base Support Battalion
  - \* 2<sup>nd</sup> Platoon, 55<sup>th</sup> Postal Company
  - \* Stars and Stripes
  - \* Detachment A, 39<sup>th</sup> Finance Battalion
  - \* Detachment B, 55<sup>th</sup> Personnel Services Battalion, Forward
  - \* 560<sup>th</sup> Military Police Company
  - \* D Battery, 5-7<sup>th</sup> Air Defense Artillery
  - \* E Battery, 5-7<sup>th</sup> Air Defense Artillery
  - \* U.S. Army Health Clinic – Babenhausen
  - \* 77<sup>th</sup> Maintenance Company
  - \* Detachment A, 55<sup>th</sup> Personnel Services Battalion
  - \* 596<sup>th</sup> Maintenance Company)
  - \* 71<sup>st</sup> Ordnance Detachment
  - \* HHC, 165<sup>th</sup> MI Battalion
  - \* Darmstadt CID Office
  - \* U.S. Army Dental Clinic - Babenhausen
9. Darmstadt Health Clinic
10. Darmstadt Dental Clinic

**B. Armed Forces Network Europe (SCMCA) (Frankfurt)**

1. HHD, Armed Forces Network

**C. Northern European Veterinary Detachment (SCMCA) (Darmstadt)**

1. Griesheim Veterinary Clinic

**D. 411<sup>th</sup> Base Support Battalion (SCMCA) (Heidelberg)**

1. 18<sup>th</sup> Engineer Brigade
2. HHC, 26<sup>th</sup> Area Support Group
3. HHC, USAREUR & 7<sup>th</sup> Army
4. 529<sup>th</sup> Military Police Company
5. Detachment 4, 18<sup>th</sup> Military Intelligence Group
6. 60<sup>th</sup> Engineer Detachment

7. 527<sup>th</sup> Military Intelligence Detachment
8. US Army Cryptologic Support Group
9. US Army Contracting Command, Europe
10. HHC, 7<sup>th</sup> Army Reserve Command
11. Heidelberg Detachment, Region IV, 650<sup>th</sup> Military Intelligence
12. Joint Headquarters Centre, U.S. Army NATO

**E. Special Troops Battalion, V Corps (Provisional) (SCMCA) (Heidelberg)**

1. HHC, V Corps
2. 503<sup>rd</sup> Chemical Detachment
3. 3<sup>rd</sup> ATC Battalion, 58<sup>th</sup> Aviation, E Company Forward
4. A Company, 302<sup>nd</sup> Military Intelligence Battalion
5. HHB, V Corps Artillery

**F. 43<sup>rd</sup> Signal Battalion (SCMCA) (Heidelberg)**

1. HHC, 43<sup>rd</sup> Signal Battalion
2. 181<sup>st</sup> Signal Company

**G. Army Materiel Command, Europe (SCMCA) (Heidelberg)**

1. Army Materiel Command, Europe

**H. 202<sup>nd</sup> MP Group (CID) (SCMCA) (Heidelberg)**

1. HHD, 202<sup>nd</sup> MP Group (CID)

**I. Defense Threat Reduction Agency (SCMCA) (Darmstadt)**

1. Defense Threat Reduction Agency

**IV. 1<sup>st</sup> Personnel Services Command (SPCMCA) (SCMCA) (Heidelberg) (The Commander, 1<sup>st</sup> PERSCOM, is the SPMCA and SCMCA for all soldiers assigned to the units listed below).**

1. HHC, 1<sup>st</sup> PERSCOM
2. USAREUR Band and Chorus
3. Detachment B, 510<sup>th</sup> Personnel Services Battalion
4. 412<sup>th</sup> Engineer Command Forward
5. B Team, 249<sup>th</sup> Engineer Battalion
6. Detachment 1, U. S. Army Engineering and Housing Support Center

**V. 266<sup>th</sup> Finance Command (SPCMCA) (Schwetzingen)**

**A. 208<sup>th</sup> Finance Battalion (SCMCA) (Schwetzingen)**

**1. HHC, 266<sup>th</sup> Finance Command**

**VI. 100<sup>th</sup> Medical Detachment (Veterinary Services) (SPCMCA) (Heidelberg)**

**A. 93<sup>rd</sup> Medical Battalion (SCMCA) (Heidelberg)**

**1. HHD, 93<sup>rd</sup> Medical Battalion**

**B. Heidelberg Dental Activity (SCMCA) (Heidelberg)**

**1. Heidelberg Dental Activity Special Troops**

**C. Heidelberg Medical Activity (SCMCA) (Heidelberg)**

**1. HHC, Heidelberg Medical Activity**

**D. 30<sup>th</sup> Medical Brigade Rear (Provisional) (SCMCA)(Heidelberg)**

**1. HHC, 30<sup>th</sup> Medical Brigade**

**VII. The following V Corps units are located in IID area jurisdiction: 12<sup>th</sup> Aviation, 69<sup>th</sup> Air Defense Artillery, 1- 7 Field Artillery and 11<sup>th</sup> Aviation Regiment. Unless otherwise indicated, the Division Support Command will act as the SPCMCA for each unit; GCMCA will be with IID.**

**A. 3<sup>rd</sup> Battalion, 58<sup>th</sup> Aviation Regiment (SCMCA) (Giebelstadt)**

**1. HHC, 12<sup>th</sup> Aviation Brigade Rear Detachment)**

**B. Division Support Command (SCMCA) (Schweinfurt)**

**1. HHB, 69<sup>th</sup> Air Defense Artillery Rear Detachment**

**C. 2<sup>nd</sup> Brigade, 1<sup>st</sup> Infantry Division (SPCMA) (Schweinfurt)**

**1. HHB, 1-7 Field Artillery Battalion Rear Detachment**

**D. 2<sup>nd</sup> Squadron, 6<sup>th</sup> Cavalry Regiment (SCMCA)**

**1. HHC, 11<sup>th</sup> Aviation Regiment Rear Detachment**



**APPENDIX I-7: V CORPS COMMANDER FORWARDING OF**  
**POST-TRIAL RESPONSIBILITIES**



REPLY TO  
ATTENTION OF

DEPARTMENT OF THE ARMY  
HEADQUARTERS, V CORPS  
OFFICE OF THE STAFF JUDGE ADVOCATE, UNIT 29355  
APO AE 09014



AETV-CG


21 FEB 2003

MEMORANDUM FOR Commander, V Corps Rear (Provisional), APO AE 09014

SUBJECT: Forwarding Post Trial Responsibilities

Due to deployment operations, it would be impractical for me to act as the convening authority for the Post Trial actions of certain individuals. For that reason, I am forwarding the following cases to you for action under Paragraph 5-32, AR 27-10 and R.C.M. 1107(a). I request that you accept jurisdiction over the personnel listed below and handle their Post Trial actions, as you deem appropriate:

- |                    |                |   |
|--------------------|----------------|---|
| a. SPC<br>AE 09165 |                | HHD/A Detachment, 39 <sup>th</sup> Finance Battalion, APO |
| b. SPC             |                | 596 <sup>th</sup> Maintenance Company, APO AE 09175       |
| c. SGT<br>09175    | Names and SSNs | E Company, 51 <sup>st</sup> Infantry Regiment, APO AE     |
| d. SGT<br>AE C     | Deleted        | B Detachment, 39 <sup>th</sup> Finance Battalion, APO     |
| e. SFC             |                | 1, 502d Engineer Company, APO AE 09165                    |
| f. SPC<br>09165    |                | , HHB, 5-7th Air Defense Artillery, APO AE                |

  
WILLIAM S. WALLACE  
Lieutenant General, USA  
Commanding

**APPENDIX I-8: V CORPS REAR (P) ACCEPTANCE OF POST-TRIAL RESPONSIBILITIES**



REPLY TO  
ATTENTION OF

DEPARTMENT OF THE ARMY  
HEADQUARTERS, V CORPS REAR (PROVISIONAL)  
UNIT 29355  
APO AE 09014



24 FEB 2003

AETV-R-CG

MEMORANDUM FOR Commander, V Corps, APO AE 09014

SUBJECT: Post Trial Responsibilities

Pursuant to your request on 21 February 2003, I accept jurisdiction over the personnel listed below and will handle their Post Trial actions.

- |      |                                |   |
|------|--------------------------------|---|
| a.   | SPC<br>AE (                    | IHD/A Detachment, 39 <sup>th</sup> Finance Battalion, APO |
| ✓ b. | SPC                            | 596 <sup>th</sup> Maintenance Company, APO AE 09175       |
| c.   | SGT<br>0917-<br>Names and SSNs | E Company, 51 <sup>st</sup> Infantry Regiment, APO AE     |
| d.   | SGT<br>AE ( Deleted            | B Detachment, 39 <sup>th</sup> Finance Battalion, APO     |
| e.   | SFC                            | 502d Engineer Company, APO AE 09165                       |
| ✓ f. | SPC<br>09165                   | HHB, 5-7th Air Defense Artillery, APO AE                  |

  
DONALD L. JACKA, JR.  
Brigadier General, USA  
Commanding

**APPENDIX I-9: COURT-MARTIAL JURISDICTION – 1ST AD DEPLOYMENT**



DEPARTMENT OF THE ARMY  
HEADQUARTERS, UNITED STATES ARMY EUROPE AND SEVENTH ARMY  
OFFICE OF THE JUDGE ADVOCATE  
UNIT 29361  
APO AE 09014-0010

REPLY TO  
ATTENTION OF:

ABAJA-MC (03/287)

2 May 2003

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Court-Martial Jurisdiction—1<sup>st</sup> Armored Division Deployment

Reference.

a. Memorandum, Headquarters, United States Army Europe and Seventh Army, ABAJA-MC, 10 May 2001, subject: USAREUR General Court-Martial Convening Authority Area Jurisdiction Revision.


b. Memorandum, Headquarters, United States Army Europe and Seventh Army, ABAJA-MC, 21 February 2003, subject: USAREUR General Court-Martial Convening Authorities.

2. Effective immediately CG, V Corps Rear (Provisional) is the GCMCA for the 1<sup>st</sup> Armored Division area as described in reference a, paragraph 1(b)(2). As previously stated in reference b, CG, V Corps Rear (Provisional) is also the GCMCA for the V Corps area as described in reference a, paragraph 1(b)(1). This provision modifies reference b, paragraph 2a. Reference b remains in effect, except as modified by this memorandum.

3. This assignment is effective until either modified or rescinded.

4. Questions may be addressed to the Military and Civil Law Division, DSN 370-8775, FAX DSN 370-3096 or civilian 06221-57-3096.

FOR THE COMMANDER:

  
DAVID V. POINTER  
COL, JA  
Judge Advocate

DISTRIBUTION:

SJA, 21<sup>st</sup> TSC  
SJA, V Corps  
SJA, 1<sup>st</sup> ID  
SJA, 1<sup>st</sup> AD  
SJA, SETAF

**APPENDIX I-10: GENERAL ORDER #10**

GENERAL ORDERS }

No. 10 }

HEADQUARTERS  
DEPARTMENT OF THE ARMY  
WASHINGTON, DC, 9 April 1981

**GENERAL COURTS-MARTIAL.** The Commanders of the following command and installations are designated by me, pursuant to the Uniform Code of Military Justice, Article 22(a)(6), to convene general courts-martial effective 1 May 1981.

US Army Communications-Electronics Command

Fort Bragg

Fort Campbell

Fort Carson

Fort Lewis

Fort Ord

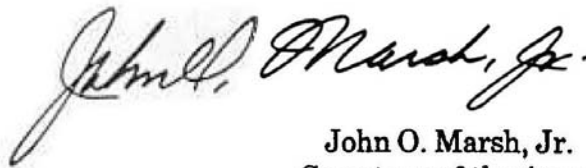
Fort Polk

Fort Riley

Fort Stewart

Headquarters, Fort Huachuca

[DAJA-CL]



John O. Marsh, Jr.  
Secretary of the Army

**DISTRIBUTION:**

*Active Army, ARNG, USAR:* To be distributed in accordance with DA Form 12-4 requirements for Department of Army General Orders.

**APPENDIX I-11: 3ID DEPLOYED UCMJ JURISDICTIONAL ALIGNMENT**

AFZP-CG

15 February 2003

MEMORANDUM FOR Major Subordinate Commanders

SUBJECT: UCMJ Jurisdiction during Kuwait deployment

1. This memorandum modifies the Fort Stewart Supplement to AR 27-10 and creates new UCMJ jurisdictional alignments for the 3d Infantry Division (Mechanized). This change will be effective immediately and will remain in effect throughout the campaign, or until modified.
2. Brigade Combat Team (BCT) commanders will serve as the Special Court-Martial Convening Authority for all units assigned, attached, or OPCON to their BCT. Battalion commanders will serve as the Summary Court-Martial Convening Authority for their personnel as well as for units or individual personnel under the control of the battalion pursuant to the BCT alignment. If questions arise regarding who should serve as the Summary Court-Martial Convening Authority, the BCT commander will designate a battalion commander to serve as the Summary Court-Martial Convening Authority for units or individuals. Units will process any Article 15s under this same scheme.
3. This alignment modifies the existing UCMJ relationship established in the Fort Stewart Supplement to AR 27-10. UCMJ authority for many soldiers will not include their actual company, battalion, or brigade commander. In those situations, the UCMJ chain should make an effort to consider the views of the chain of command.
4. This UCMJ alignment is necessary to ensure the efficient processing of military justice actions in this deployed environment and creates no rights or benefits for accused soldiers. The Staff Judge Advocate has the authority to approve exceptions to this policy on a case-by-case basis as is necessary to properly process an action.
5. POC for this action is COL Lyle Cayce at 584-0840.

/s/  
BUFORD C. BLOUNT  
Major General, USA  
Commanding

LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOLUME I, MAJOR COMBAT OPERATIONS (11 SEPTEMBER 2001 TO 1 MAY 2003)

Encl

BCT JURISDICTION ALIGNMENT

1BCT -	2BCT -	24th CSG -
2-7 IN(M)	3-15 IN(M)	HHC/13 CSB
3-7 IN(M)	1-64 AR	62 DS Sup Co
3-69 AR	4-64 AR	24th OD Co
C/1 CAV	E/9 CAV	40 POL Co
11 EN	1-9 FA	258 RAOC
3d FSB	10 EN	
3/A/1-3 ADA	26th FSB	
1/D/1-3 ADA	B1/3 ADA	DIVARTY -
A/123d SIG	3/C/1-3 ADA	
A/103d MI	2/SENT/HHB 1-3 ADA	1-39 FA
1/3 MP Co	B/103 MI	C/3-13 FA
1/92 CHEM PLT (DECON)	B/123d SIG	
	2/92 CHEM CO (DECON)	
3 BCT -	1/6/92 CHEM (RECON)	
1-15 IN(M)	4 BCT (AVN) -	
1-30 IN(M)		
2-69 AR	1-3 ATKHB	
2-70 AR	2-3 GASB	
D/10 CAV	603d ASB	
1-10 FA	C/(CGS)/2/3/2/HHC/103d MI	
1-41 FA	D/156 AVN (ATS)	
317 EN	336 FFTG DET	
A/11 EN	3-7 CAV	
299 EN CO		
203d FSB	DISCOM -	
C/1-3 ADA		
1/B/1-3 ADA	703d FSB	
3/SENT/HHB/1-3 ADA	DRear	
C/103d MI		
D/1-3 MI	ENG BDE -	
C/123d SIG	937 EN GRP	
HQ/3d MP Co	94 EN BN (CBT HWY)	
3/3 MP Co	535 EN Co	
4/3 MP Co	459 EN Co	
5/3 MP Co	671 EN Co	
1/6/3 MP Co	DMain	
92d CHEM Co	HHC, 3d ID	
3/92 CHEM (DECON)	Division Troops	
5/92 CHEM (SMK)		

**APPENDIX I-12: 101ST AIRBORNE DIVISION DESIGNATION OF  
PROVISIONAL COMMANDS**



**DEPARTMENT OF THE ARMY  
HEADQUARTERS, 101ST AIRBORNE DIVISION (AIR ASSAULT) AND FORT CAMPBELL  
FORT CAMPBELL, KENTUCKY 42223-5000**

REPLY TO  
ATTENTION OF:

AFZB-CG

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Designation of Provisional Commands

1. The following units are hereby designated provisional commands UP AR 220-5, paragraph 2-5a. These provisional commands will be discontinued upon the completion of worldwide contingency missions, or earlier if directed by me or my successor in command:

- a. 101<sup>st</sup> Airborne Division (Rear)(Provisional)
- b. United States Army Garrison Support Brigade (Provisional)
- c. 716<sup>th</sup> Military Police Battalion (Rear)(Provisional)
- d. Echo Company, 327<sup>th</sup> Infantry Regiment (Provisional)
- e. Echo Company, 502d Infantry Regiment (Provisional)
- f. Echo Company, 187<sup>th</sup> Infantry Regiment (Provisional)
- g. Echo Company, 101<sup>st</sup> Division Artillery (Provisional)
- h. Echo Company, 101<sup>st</sup> Division Support Command (Provisional)
- i. Echo Company, 101<sup>st</sup> Aviation Regiment (Provisional)
- j. Echo Company, 159<sup>th</sup> Aviation Regiment (Provisional)
- k. Echo Company, 101<sup>st</sup> Corps Support Group (Provisional)

LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOLUME I, MAJOR COMBAT OPERATIONS (11 SEPTEMBER 2001 TO 1 MAY 2003)

- l. Echo Company, 101<sup>st</sup> Soldier Support Battalion (Provisional)
  - m. Echo Company, 106<sup>th</sup> Transportation Battalion (Provisional)
  - n. Echo Company, 129<sup>th</sup> Combat Support Battalion (Provisional)
  - o. Echo Company, 561<sup>st</sup> Combat Support Battalion (Provisional)
  - p. Echo Company, 86<sup>th</sup> Combat Support Hospital (Provisional)
  - q. Foxtrot Company, 311<sup>th</sup> Military Intelligence Battalion (Provisional)
  - r. Echo Company, 716<sup>th</sup> Military Police Battalion (Provisional)
  - s. Echo Company, 501<sup>st</sup> Signal Battalion (Provisional)
  - t. Echo Company, 2d Battalion, 44<sup>th</sup> Air Defense Artillery Regiment (Provisional)
  - u. Echo Company, 326<sup>th</sup> Engineer Battalion (Provisional)
  - v. Echo Company, 101<sup>st</sup> Airborne Division (Provisional)
2. Appropriate orders will be published citing this memorandum and AR 220-5, paragraph 2-5a, as authority for the designation of these commands. USR reporting requirements will continue IAW AR 220-1.
3. Each MUC and SUC will reassign all non-deploying soldiers to their respective provisional companies. Each MUC and SUC will select a commissioned officer to assume command of the provisional unit in accordance with AR 600-20, paragraph 2-5a.
4. Effective immediately, the following companies are attached to the 101<sup>st</sup> Airborne Division (Rear)(Provisional):
- a. Echo Company, 327<sup>th</sup> Infantry Regiment (Provisional)
  - b. Echo Company, 502d Infantry Regiment (Provisional)
  - c. Echo Company, 187<sup>th</sup> Infantry Regiment (Provisional)
  - d. Echo Company, 101<sup>st</sup> Division Artillery (Provisional)
  - e. Echo Company, 101<sup>st</sup> Division Support Command (Provisional)
  - f. Echo Company, 101<sup>st</sup> Aviation Regiment (Provisional)
  - g. Echo Company, 159<sup>th</sup> Aviation Regiment (Provisional)



- h. Echo Company, 86<sup>th</sup> Combat Support Hospital (Provisional)
  - i. Foxtrot Company, 311<sup>th</sup> Military Intelligence Battalion (Provisional)
  - j. Echo Company, 501<sup>st</sup> Signal Battalion (Provisional)
  - k. Echo Company, 2d Battalion, 44<sup>th</sup> Air Defense Artillery Regiment (Provisional)
  - l. Echo Company, 326<sup>th</sup> Engineer Battalion (Provisional)
  - m. Echo Company, 101<sup>st</sup> Airborne Division (Provisional)
  - n. The Sabaulaski Air Assault School
5. Effective immediately, the following companies are attached to the 129th Combat Support Battalion:
- a. Echo Company, 101<sup>st</sup> Corps Support Group (Provisional)
  - b. Echo Company, 101<sup>st</sup> Soldier Support Battalion (Provisional)
  - c. Echo Company, 106<sup>th</sup> Transportation Battalion (Provisional)
  - d. Echo Company, 129<sup>th</sup> Combat Support Battalion (Provisional)
  - e. Echo Company, 561<sup>st</sup> Combat Support Battalion (Provisional)
6. Effective immediately, the 3397<sup>th</sup> Garrison Support Unit is attached to the United States Army Garrison Support Brigade (Provisional).
7. Effective upon deployment of all General Officers of the 101<sup>st</sup> Airborne Division (Air Assault), Headquarters and Headquarters Company, Fort Campbell United States Army Garrison is attached to the United States Army Garrison Support Brigade (Provisional).
8. Effective immediately, Echo Company, 716<sup>th</sup> Military Police Battalion (Provisional) is attached to the 716<sup>th</sup> Military Police Battalion (Rear)(Provisional).
9. Effective upon deployment of all General Officers of the 101<sup>st</sup> Airborne Division (Air Assault), the following units are attached to the Fort Campbell Installation:
- a. 101<sup>st</sup> Airborne Division (Rear)(Provisional)

LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOLUME I, MAJOR COMBAT OPERATIONS (11 SEPTEMBER 2001 TO 1 MAY 2003)

- b. 129<sup>th</sup> Combat Support Battalion
- c. United States Army Garrison Support Brigade (Provisional)
- d. 716<sup>th</sup> Military Police Battalion (Rear)(Provisional)

10. The POCs for this memorandum are CPT J. Harper Cook at 798-0721 or CPT Nicholas Lancaster at 798-0906.

DAVID H. PETRAEUS  
Major General, USA  
Commanding

DISTRIBUTION:

A

**APPENDIX I-13: CJTF-7 GENERAL ORDER #1**

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REPLY TO  
ATTENTION OF

**HEADQUARTERS**  
COMBINED JOINT TASK FORCE SEVEN  
BAGHDAD, IRAQ  
APO AE 09303

CJTF7-CG

23 July 2003

MEMORANDUM FOR SEE DISTRIBUTION

**SUBJECT:** CJTF-7 GENERAL ORDER NUMBER 1 -- Prohibited Activities for U.S. Department of Defense Personnel Present With Combined Joint Task Force Seven (CJTF-7) in Iraq

1. **PURPOSE:** To identify and proscribe conduct that is prejudicial to the maintenance of good order and discipline in Iraq.
2. **AUTHORITY:** Title 10, United States Code, Section 164(c) and the Uniform Code of Military Justice (UCMJ), Title 10, United States Code, Sections 801-940.
3. **APPLICABILITY:** This General Order is applicable to all United States military personnel while present in Iraq, as well as to all civilians serving with, employed by, or accompanying the Armed Forces of the United States while present in Iraq, *except for* personnel assigned to Defense Attaché Offices, United States Marine Corps Security Detachments, sensitive intelligence and counterintelligence activities that are conducted under the direction and control of the Chief of Mission/Chief of Station, and United States Government agencies and departments other than the Department of Defense and its subordinate military departments. This General Order is expressly applicable to all United States military personnel assigned or attached to, or serving with, the Coalition Provisional Authority. USCENCOM General Order 1A, 19 December 2000, enclosed, remains applicable in the USCENCOM Area of Operational Responsibility (AOR).
4. **STATEMENT OF MILITARY PURPOSE AND NECESSITY:** Current operations place United States Armed Forces in countries where local customs prohibit or restrict certain activities that are generally permissible in western societies. Restrictions upon these activities are essential to preserving U.S. / local relations and combined operations of U.S. and friendly forces. In addition, the high operational tempo combined with hazardous duty faced by U.S. forces under arms in the region makes it prudent to restrict certain activities in order to maintain good order and discipline and ensure optimum readiness.

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CJTF7-CG

SUBJECT: CJTF-7 GENERAL ORDER NUMBER 1 -- Prohibited Activities for U.S. Department of Defense Personnel Present With Combined Joint Task Force Seven (CJTF-7) in Iraq

5. **PROHIBITED ACTIVITIES:** Introduction, possession, sale, transfer, manufacture or consumption of any alcoholic beverage.

6. **PUNITIVE ORDER:** Paragraph 5 of this General Order is punitive. Persons subject to the Uniform Code of Military Justice may be punished under the Code. Civilians serving with, employed by, or accompanying the Armed Forces of the United States in the CJTF-7 Area of Operations may face criminal prosecution or adverse administrative action for violation of this General Order.


7. **UNIT COMMANDER RESPONSIBILITY:** Commanders and leaders will ensure that all personnel are briefed on the prohibitions and requirements of this General Order. Copies of this General Order will be prominently displayed in areas where personnel gather, such as unit bulletin boards and dining facilities.

8. **CONFISCATION OF OFFENDING ARTICLES:** Items determined to violate this General Order may be considered contraband and may be confiscated by command or law enforcement authorities. Before destruction of contraband, commanders or law enforcement personnel will coordinate with their servicing Judge Advocate.

9. **EFFECTIVE DATE:** This General Order is effective immediately and will remain in effect until rescinded. Military customs and other pre-clearance officials will enforce this General Order in their inspections of personnel and equipment prior to departure from the CJTF-7 Area of Operations and return to home station.

10. **WAIVER AUTHORITY:** Authority to grant exceptions to Paragraph 5 is delegated to Division Commanders and to the CJTF-7 Deputy Commanding General. Blanket waivers are not authorized.

Encl

  
RICARDO S. SANCHEZ  
Lieutenant General, U.S. Army  
Commanding

DISTRIBUTION:

A

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**APPENDIX I-14: CJTF-180 GENERAL ORDER #1**



REPLY TO  
ATTENTION OF:

**DEPARTMENT OF DEFENSE**  
COMBINED/JOINT TASK FORCE (CJTF)-180  
OPERATION ENDURING FREEDOM  
BAGRAM AIRFIELD, AFGHANISTAN  
APO AE 09354

CJTF-180-SCJS

5 AUG 2003

MEMORANDUM FOR All CJTF-180 Personnel

SUBJECT: CJTF-180 Policy Memorandum #1, CJTF-180 Standards, Change #4

1. General. This policy details standards of behavior for all United States (US) military personnel; US civilians serving with, employed by, or accompanying the Armed Forces of the United States; and coalition forces performing duties within the CJTF-180 Combined/Joint Operations Area (CJOA). This policy supplements CENTCOM's General Order Number 1A. For issues not addressed by this policy, personnel are expected to use common sense while accomplishing the mission and protecting the security of personnel and property.
2. Applicability. Except where specifically stated, this policy applies to all US military personnel; U.S. civilians serving with, employed by, or accompanying the Armed Forces of the United States; and coalition forces (military and civilian accompanying the military) performing duties in the CJOA. United States and coalition forces commanders are expected to enforce the provisions of this policy.
3. Punitive Order. Paragraphs 4-8 of this policy are punitive:
  - a. United States forces may face administrative action or judicial or nonjudicial action under the Uniform Code of Military Justice for violations of this policy.
  - b. United States civilians serving with, employed by, or accompanying the force, and individual coalition soldiers or civilians who violate this policy may be subject to administrative action, to include redeployment.
4. Prohibited Activities:
  - a. Alcohol. United States military personnel and civilian personnel serving with, employed by, or accompanying the United States Armed Forces are prohibited from introducing, possessing, selling, transferring, manufacturing, or consuming alcohol. Coalition forces authorized by their command to consume alcohol will do so only within their discrete camp area, will not allow consumption to detract from mission accomplishment, and will not introduce, sell, or transfer alcohol to the US military or civilian personnel.
  - b. Sex. Intimate or sexual relations between individuals who are not married to each other are prohibited.

CJTF-180-SCJS

SUBJECT: CJTF-180 Policy memorandum #1, CJTF-180 Standards, Change #4

c. Smoking. Smoking in tents or building is prohibited.

d. Fires. Fires, grills, and burn pits are prohibited except at authorized dining facilities (DFACs), the south landfill, and in designated classified material burn areas. Base commanders may grant exceptions to this prohibition. Units requesting exceptions will submit a memorandum through their chain on command to their Base Commander.

e. Tents. Steps and 4'x4' stoops are acceptable additions to living tents. All other outside construction or add-ons, such as vestibules, patios, or decks, are prohibited. Fire lanes between billeting tents will be maintained free of obstacles at all times. Unless approved by the Base Commander, signs anywhere within 50 meters of a living tent are prohibited. In order to maintain field sanitation, meals from the DFAC will not be consumed in the living tents. Quiet hours in tents begin at 1830Z and end at 0200Z daily. During quiet hours, sound will be kept to a minimum; volume on televisions, stereos, and other electronic devices will be kept low or turned off.

f. Real Estate. Occupying or modifying any terrain or building without the express permission of the Base Commander or the Deputy Commander is prohibited. Permits must be obtained from the base engineers prior to digging on base.

g. Unit Property. Supplies or property not belonging to an individual's own unit are not to be taken, relocated, or borrowed from anywhere on the base without express coordination with the Base Defense Operations Command (BDOC).

h. Minefields. Damaging or removing minefield markings is prohibited. Entering an area that has not been cleared of mines is prohibited for all personnel except mine-clearing personnel in performance of their duties.

i. Electricity. Rewiring, tampering with, or altering any electrical hook-up without express permission of the base engineers is prohibited.

## 5. Appearance and Uniforms:

a. Appearance. Military forces are expected to maintain high standards of military bearing and appearance. These standards are indicative of a professional and disciplined force.

b. Customs and Courtesy. Use proper military courtesy such as greetings and salutes between and among US and coalition forces. These measures are indicative of coalition and joint teamwork and are visible signs of discipline, respect, and professionalism.

CJTF-180-SCJS

SUBJECT: CJTF-180 Policy Memorandum #1, CJTF-180 Standards, Change #4

c. Uniform. The only authorized uniforms are the duty uniform (desert camouflage uniform (DCU) or force equivalent), and the physical training (PT) uniform (Army or force equivalent). Civilian personnel will wear the DCU, or will wear conservative civilian work attire.

(1) The duty uniform will be complete and worn in accordance with (IAW) regulations, unless relaxed by an individual's chain of command for purposes of work details. Sleeves will be worn down. The modified uniform can be worn only at the work site. Civilians issued military uniforms will wear the complete uniform properly and will not mix issue items with civilian clothes.

(2) The PT uniform will be complete and worn IAW regulation, unless a modification is authorized by the senior representative of a service or force (e.g. Army may wear the brown T-shirt instead of PT shirt). The reflective belt will be worn while conducting PT outdoors.

(3) Civilian clothes. CJTF-180 personnel are not authorized to wear civilian clothes on or off base unless dictated by the military mission. Shopping trips off base do not justify the wear of civilian clothes. Standing exceptions to this rule are for individuals working at the US Embassy where the Chief of Mission will establish guidelines for attire, and Air Force and Coalition personnel who do not have an assigned physical training uniform. All other exceptions must be approved in writing by the CG, CJTF-180

(4) Shirts. Shirts will be worn at all times outdoors. Tank tops, sleeveless shirts, or other garments exposing the upper body and torso will not be worn by anyone. Exceptions can be made for wear of coalition uniform during physical training, and areas designed by individual camp commanders (O-5 or Above) for MWR activities such as swimming, sunbathing, or volleyball within a defined area not accessible to local nationals.

## 6. Safety and Force Protection:

### a. Weapons:

(1) Positive personal control. Personnel issued a weapon will maintain positive personal control of their weapon at all times. "Positive personal control" means the weapon is carried by the person or is under the control (guard) of a known individual. When outdoors, a person must carry a weapon at all times, except while conducting PT in a physical fitness facility, conducting physical training on the approved run route, or conducting personal hygiene. Pistols will not be carried in the waistband, pockets, or a pack of any sort.



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SUBJECT: CJTF-180 Policy Memorandum #1, CJTF-180 Standards, Change #4

(2) Rounds. Individuals assigned an M249 Squad Automatic Weapon (SAW) will keep the round in the bandolier. For other individual weapons, rounds will be loaded in the magazine and the magazine will be locked into the weapon. No rounds will be chambered. Weapons will be placed in a "safe" mode.

b. Vehicle Operations Standards:

(1) Seat belts. When available, seat belts will be worn when traveling in vehicles.

(2) A ground guide will be used for backing all military or civilian vehicles or when maneuvering in confined or restricted areas.

(3) Open-air vehicles and Heavy equipment. All personnel will wear ballistic helmet/approved safety helmet/hard hat and protective eyewear when driving or riding in any open-air vehicle (such as a gator or 4-wheeler). Personnel operating heavy equipment (such as a forklift or other construction equipment) will wear the ballistic or approved safety helmet.

(4) Speed Limit and Traffic Regulations. The base-wide maximum speed limit is 15 miles per hour/25 kilometers per hour; poor visibility or weather conditions may dictate slower driving. Drivers of vehicles will adhere to all traffic signs and traffic regulations on base. All traffic regulations are designed for the safety, good order, and discipline of US and coalition forces.

c. Pedestrians. Pedestrians will use pedestrian walkway, and use a perpendicular path when crossing a road. At Bagram Airfield, pedestrian traffic on Disney Road is limited to the West Side for walking and running. Where a walkway does not exist, walk on the shoulder facing traffic. Never place yourself between a wall and vehicle traffic. For safety purposes, PT is encouraged from 1300Z to dusk and from dawn to 0330Z.

d. Security. Maintain individual and unit security at all times.

(1) Vehicle searches. All vehicles departing from or returning to Bagram Airfield are subject to search.

(2) Badges and Escorts. Vendors and contractors must have their access badge visible at all times. Contracted host nation laborers without security badges will always have a coalition security detachment present consisting of at least one service member for each ten laborers. CJTF-180 badges must be displayed at all times when inside the JOC compound. CJTF-180 badges will not be worn exposed outside the JOC compound. Badge policy outside of Bagram will be established by the base/compound commander.

7. US Convoy Procedures:



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SUBJECT: Policy Memorandum #1, CJTF-180 Standards, Change #4

a. All US units must abide by the convoy procedures set forth herein. Individual units may set more stringent standards for their own convoys.

b. Weapons requirement. Vehicles departing all CJOA bases must travel in a convoy with a minimum of two vehicles and one rifle or other long-barreled weapon per vehicle, communications capability between vehicles (radio, light signals, hand signals, etc.), and when available, communications capability with their departure and arrival points.

c. Protective Equipment. Occupants must wear flak vests and have helmets, and load bearing equipment readily accessible. Commanders must determine if protective masks NBC gear is required IAW their regional threat assessment. Weapons status will, at minimum, remain IAW paragraph 6(a), but will be adjusted based on the threat.

d. Food and Water. All personnel will have three days supply of food and water in their vehicle.

e. Convoy Commander Responsibilities. The designated convoy commander must:

(1) Ensure travel is coordinated with the unit's higher headquarters.

(2) Request travel 24 hours in advance and provide a closing report.

(3) Ensure compliance with all convoy procedures in this paragraph.

(4) Prior to travel, brief members of the convoy on all actions for contingencies (collision, contact, ambush, vehicle breakdown, etc.)

8. Interaction with Host Nation Citizens:

a. Respect. Treat all local nationals with respect – it is a combat-multiplier that assists in mission accomplishment and security.

b. Designated Market Areas. It is prohibited to make any unofficial purchases from host nation civilians outside the designated market areas. The Senior Base Commander has exclusive authority for sanctioning any vendor operations on base and periodically will publish a memorandum listing current designated market areas. Any personnel observing a host nation civilian selling items outside of a designated market area may initiate "detain and report" procedures (see paragraph 8d below).

c. US Property:

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SUBJECT: CJTF-180 Policy Memorandum #1, CJTF-180 Standards, Change #4

(1) US personnel are prohibited from giving host nation civilians any property belonging to the U.S. government (such as Meals Ready-to-Eat (MRE's), beverages, scrap wood, or other supplies) unless authorized by the Base Commander.

(2) Consult the Rules of Engagement (ROE) for procedures to protect mission essential items (weapons, ammunitions, vehicles, and classified material).

d. Detain and Report Procedures. Below are the standard operating procedures for detaining and reporting suspicious activity involving host nation civilians. The following steps need not be completed in order, nor must all steps be carried out if the situation is resolved peacefully.

(1) Stabilize the situation (i.e., resecure US /coalition property, disarm personnel who are not authorized to carry a weapon, etc).

(2) Obtain the assistance of nearby coalition soldiers.

(3) Attempt to detain the individual without using force.

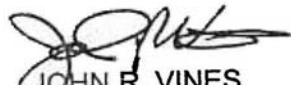
(4) Report the suspicious or prohibited activity to the Base Provost Marshal who will then coordinate with host nation officials.

e. Use of Force:

(1) At all times in dealing with host nation civilians, personnel should protect themselves and the safety of other coalition forces. Do not risk your own safety or the safety of others to detain a host nation civilian. Do not pursue individuals across open fields, as the threat of landmines is high.

(2) Personnel must conform to the rules of engagement governing the use of force. Service members must be prepared to use force if the civilian demonstrates hostile intent or commits a hostile act.

9. The CJTF-180 CJOA is designated a combat zone. Safety and force protection is of the utmost importance. All personnel must maintain high standards of professionalism and remain alert at all times. Just as with the rules of engagement, use your best judgment in dealing with a difficult situation. I am confident that coalition forces will continue to exercise the same good judgment that they have exercised thus far in this operation.

  
JOHN R. VINES  
Major General, USA  
Commanding

**APPENDIX J-1: CONFIDENTIALITY AND NON-DISCLOSURE AGREEMENT**

Confidentiality, Client Protection, Data Protection

Privacy Act Statement

AUTHORITY: PRIVACY ACT OF 1974 (5 USC 552(A)), AR 340-21

**PRINCIPAL PURPOSE: TO ENSURE NONLAWYER EMPLOYEES WHO HAVE ACCESS TO CONFIDENTIAL ATTORNEY-CLIENT INFORMATION ARE AWARE OF THE CONFIDENTIALITY RESPONSIBILITIES IN ACCORDANCE WITH ARMY REGULATION 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS.**

**ROUTINE USE: THE INFORMATION WILL BE USED TO DOCUMENT AN EMPLOYEE'S KNOWLEDGE OF THE ATTORNEY-CLIENT CONFIDENTIALITY RULES AND OBLIGATION TO ABIDE BY THESE RULES.**

**DISCLOSURE: VOLUNTARY. NO CRIMINAL OR CIVIL PENALTIES WILL FOLLOW FROM REFUSAL TO SIGN THE CONFIDENTIALITY AGREEMENT. HOWEVER, FAILURE TO SIGN THE CONFIDENTIALITY AGREEMENT MAY RESULT IN TERMINATION OF EMPLOYMENT.**

1. **DUTIES:** In connection with my support of the United States Army, as either a Federal Employee, a military service member, a contract employee, an intern, or an unpaid worker, I acknowledge that I may have access to attorney-client privileged information. I understand that attorney-client information is all information concerning a client represented by a military or civilian Army attorney, or an attorney contracted to perform services for the Army. I understand that Army attorneys have a professional responsibility to treat attorney-client information as confidential. I understand that Army attorneys are obligated to ensure that nonlawyer assistants comply with this obligation. I understand that when I am administering, maintaining, supporting, working with, or otherwise have access to Army legal office data files or data files containing attorney-client privileged information, that I may not review for my own personal or private business interest attorney-client information located in these files.

2. **RULES:** AR 27-26, Rule 1.6, states that lawyers must ensure that all information related to a client's representation is kept confidential. AR 27-26, Rule 5.3, provides the guidelines for nonlawyer assistants and states a nonlawyer assistant's conduct must be compatible with the professional obligations of a lawyer. As such, the obligation to ensure attorney-client confidentiality under Rule 1.6 is imputed to the nonlawyer assistant. Information Technology personnel who provide services to Army lawyers are considered nonlawyer assistants and fall within Rule 5.3.

3. **NON-DISCLOSURE:** I will never disclose, directly or indirectly, attorney-client privileged information to anyone or use such confidential attorney-client information for any purposes, whatsoever. There is no time limit, and my responsibility is forever.

LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOLUME I, MAJOR COMBAT OPERATIONS (11 SEPTEMBER 2001 TO 1 MAY 2003)

- a. I understand that if I am requested to disclose attorney-client information, I must notify the attorney or legal office for whom the information is maintained.
- b. I understand that if I disclose attorney-client information, the attorney representing the client may be obligated to notify the client of such disclosure.
- c. I also understand that I must advise the attorney or legal office immediately in the event that I know or have reason to believe that any person who has had access to attorney-client information has violated or intends to violate the terms of this Confidentiality and Non-Disclosure Agreement.
- d. I understand that I must inform the attorney or legal office of any suspected compromise of the information system that contains attorney-client information.

4. **ACKNOWLEDGEMENT:** I acknowledge by my signature below that I have read and understand the confidentiality rules and this Confidentiality and Non-Disclosure Agreement. I understand that disclosing attorney-client information may result in termination of my employment or other adverse administrative action, as well as civil and criminal court sanctions.

Employee Name Printed:

Signature:

Position and Organization:

Date:

Witness Name:

Witness Signature:

## DEDICATION

This publication is dedicated to **Colonel (retired) David E. Graham**, The Judge Advocate General's Corps, U.S. Army. The Center for Law and Military Operations exists through the vision and dedication of Colonel Graham. As Chief, International and Operational Law Division, Office of The Judge Advocate General, Department of the Army, Colonel Graham developed and implemented The Center for Law and Military Operations as a center of excellence for U.S. Army and Marine Corps operational law attorneys. Colonel Graham also served as its Director, guiding the mission and functions of the center, until his retirement in November 2002 after over thirty years of active duty service.

## ACKNOWLEDGEMENTS

The Center for Law and Military Operations—assuming full responsibility for any errors contained in this publication—gratefully acknowledges the assistance of all the judge advocates, legal administrators, and paralegals of the U.S. Army and U.S. Marine Corps who contributed their time and effort to this report. While too numerous to name, these legal teams' after action reports, lessons learned compilations, individual journals, and CLAMO conferences and interviews were essential to an understanding of the complex legal issues in both Operations ENDURING FREEDOM and IRAQI FREEDOM upon which these lessons learned are based. It is the hope of the CLAMO team that legal personnel will find these lessons valuable in preparing for their own deployments in support of future operations.

# Center for Law and Military Operations

