

THE LAW OF AIR, SPACE, AND CYBER OPERATIONS

Fourth Edition

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FOREWORD

Since the Third Edition of *Air Force Operations and the Law* was published in 2014, we have witnessed the steady reemergence of great power competition, and the erosion of the United States' comparative military advantage. Accordingly, the 2018 National Defense Strategy has called upon the Air Force to contribute to joint all-domain operations in an effort to *compete, deter and win*.

We, as a JAG Corps, must continually ask ourselves: how can we contribute to the success of this mission? More fundamentally, how do we establish the conditions for our own success?

The JAG Corps Flight Plan is the blueprint from which we draw the answers to these questions. **Through the Law**, we *maintain a ready and disciplined force* and *maximize operational freedom*. These goals are underpinned by **Leadership**, which fosters *knowledge management, professional development and training*.

The Fourth Edition of the manual saw the addition of the Space Force and is reflected in the updated title: *The Law of Air, Space, and Cyber Operations*. This edition, which has been heavily revised, embodies the JAG Corps Leadership's commitment to these principles, and to the broader professionalization of the Operations and International Law domain.

The Law of Air, Space, and Cyber Operations simplifies the complex. It captures generations of JAG Corps experience for the next generation of JAG Corps personnel. It is designed to help you find the answers you need to maximize operational freedom for your commanders. Whether advising on precision targeting, the employment of hypersonic or directed energy weapons, or the legal boundaries of activities in the cyber domain, you can draw knowledge from this publication. If command seeks assistance in implementing an international agreement, or maximizing jurisdiction over an Airman under a Status of Forces Agreement, you can rely on this publication to outline the fundamental legal principles.

These topics are just the tip of the iceberg. This publication concisely covers the increasingly broad array of missions which the United States Air and Space Forces are charged with executing.

Despite global uncertainty, and in the face of an uncommon variety of threats, both old and new, the fundamental JAG Corps mission remains unchanged: *Provide the Air Force, commanders, and Airmen with professional, full-spectrum legal support, at the speed of relevance, for mission success in joint and coalition operations*.

The Law of Air, Space, and Cyber Operations will support you in this mission, and our nation's mission to *compete, deter and win*.



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THE LAW OF AIR, SPACE, AND CYBER OPERATIONS

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Chapter 1

INTERNATIONAL USE OF FORCE BY THE UNITED STATES AIR FORCE

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BACKGROUND

Before the United States (U.S.) uses military force in or against another country, it must identify its justification under international and domestic laws governing the use of force.¹ Applicable international laws include the United Nations (UN) Charter and principles of customary international law. Domestic laws include, but are not limited to, the Constitution, applicable laws passed by Congress, such as the War Powers Resolution of 1973, as well as relevant authorizations, if any, on the use of military force.

In practice, decisions regarding whether or not the U.S. Air Force (USAF) will use force are generally made at the national level by the President and Secretary of Defense (SecDef), usually through coordinated interagency consultations. Practitioners should have an understanding of the legal basis for the use of force. However, the decision to use force will likely be communicated to the USAF from higher authorities in the form of an order or similar direction.

Using the mission statement provided by higher authority, practitioners should become familiar with the legal justification and purpose of the mission and, in coordination with higher headquarters, be prepared to assist all local commanders in understanding that justification. This will enable commanders to better plan their missions, structure public statements, and ensure the conduct of military operations conforms to national policy. It can also assist commanders in drafting and understanding the governing rules of engagement (ROE). As noted in Chapter 15, one of the primary purposes of ROE for the mission, is to ensure that any use of force is consistent with national security and policy objectives.

INTERNATIONAL LAW

In examining the applicable international law on the use of force, it is important to note that, historically, the application of international law to war has been divided into two parts. The first addresses the law concerning the resort to the use of force. The second provides rules and guidance on how to conduct the war. This chapter addresses the first issue, known also as the *jus ad bellum* or “right to war.” The second issue, known also as *jus in bello*, will be addressed in Chapter 2.

***Jus ad Bellum* Criteria**

Principles of *jus ad bellum* include the need for a just cause, proportionality, and necessity. The UN Charter, discussed below, provides the modern treaty framework reflecting just cause principles. Proportionality weighs the nature of the contemplated action against the justification for taking action. For example, if force is used in self-defense, then it must be proportionate to the nature of the threat such that it is sufficient to restore order without being excessive.² Proportionality in *jus ad bellum* is not the same as proportionality in *jus in bello*. As the DoD LAW OF WAR MANUAL explains, “in *jus ad bellum*, proportionality refers to the principle that the overall goal of the State in resorting to war should not be outweighed by the harm that the war is expected to produce” whereas “the principle of proportionality in *jus in bello* generally refers to the obligations to take

¹ See President Barack Obama, Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations, December 2016, Part I, p. 3 (“When using military force overseas, the United States complies with domestic law—including relevant constitutional and statutory authorities—and international law. In doing so, the Administration regularly informs Congress and the public of the status and circumstances of its use of military force overseas”).

² DoD LAW OF WAR MANUAL (June 2015), updated December 2016, § 1.11.1.2.

feasible precautions in planning and conducting attacks and to refrain from attacks in which the expected loss of civilian life, injury to civilians, and damage to civilian objects incidental to the attack would be excessive.”³ The principle of necessity requires that no reasonable means of alternative redress are available.⁴ Similar to the principle of proportionality, necessity in *jus ad bellum* is distinct from the concept of military necessity in *jus in bello*.⁵

The United Nations (UN) Charter

The UN Charter provides the modern treaty framework for *jus ad bellum*.⁶ The Charter was initially signed on June 26, 1945 as a product of the United Nations Conference on International Organization. Today, 193 countries are signatories to the charter, including the United States.⁷ Having ratified the Charter, the United States is bound by its provisions. Under the Charter framework, the Security Council may determine the existence of any threat to the peace, breach of the peace, or act of aggression, and may decide what measures shall be taken under the Charter to restore international peace and security.

The UN Charter prohibits certain uses of force. Article 2(4) provides: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.” The prohibition on the use of force is closely linked to the principle of respect for State sovereignty, which is a basic legal concept in customary international law expressed in Article 2(1) of the Charter (“The Organization is based on the principle of sovereign equality of all its Members”).⁸

The UN Charter provides three exceptions to the prohibition against the international use of force. First, a receiving State may consent to the use of force within its territories. Second, a sending State may use force pursuant to UN Security Council authorization. Third, as recognized in customary international law and reflected in Article 51 of the Charter of the UN, force may be used by a sending State in individual or collective self-defense.

Consent

The use of force on the territory of another State with the consent of that State is not a violation of the Article 2(4) prohibition. If the State consents, there can be no violation of its territorial integrity or political independence. A State may request assistance from another State (or the United Nations) to deal with an internal armed conflict or other security situation which it is unable to resolve independently.

³ *Id.* § 3.5.1.

⁴ *Id.* § 1.11.1.3.

⁵ *Id.* § 1.11.1.3.

⁶ Charter of the United Nations with the Statute of the International Court of Justice annexed thereto, 26 June 1945, 59 Stat. 1031, T.S. 993, 3 Bevens 1153, (as amended, 17 December 1963, 16 U.S.T. 1134; T.I.A.S. 5857; 557 U.N.T.S. 143 20 December 1965, 19 U.S.T. 5450; T.I.A.S. 6529 and 20 December 1971, 24 U.S.T. 2225; T.I.A.S. 7739) (entry into force 24 October 1945, for the United States same date) [UN Charter].

⁷ The status of the UN Charter is available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-1&chapter=1&clang=_en

⁸ *Military and Paramilitary Activities (Nicaragua v. United States)*, 1986 ICJ 14, para. 212.

UN Security Council Authorization

Chapter VII of the Charter of the UN is entitled “Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression.” The provisions in this Chapter of the Charter give the Security Council authority to determine what measures should be employed to address acts of aggression or other threats to international peace and security. The Security Council must first, in accordance with Article 39, determine the existence of a threat to the peace, breach of the peace, or act of aggression. If it finds such a threat, the Security Council then has the power under Article 41 to employ measures short of armed force, including a wide variety of diplomatic and economic sanctions against the target State, to compel compliance with its decisions in order to restore international peace and security. Should those measures prove inadequate (or should the Security Council determine that measures not involving armed force would prove inadequate), the Security Council has the power to authorize member States to use armed force in accordance with Article 42.

Examples of UN Security Council resolutions to restore international peace and security include:

1. Security Council Resolution 678 (1990) authorized member States cooperating with the government of Kuwait to use “all necessary means” to enforce previous resolutions. It was passed in response to the 1990 Iraqi invasion of Kuwait.
2. Security Council Resolution 1386 (2001) authorized the establishment of an International Security Assistance Force (ISAF) to assist the Afghan Interim Authority. Additionally, this resolution authorized member States participating in the ISAF to “take all necessary” measures to fulfill its mandate.
3. Security Council Resolution 1511 (2003) authorized “a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq.”
4. Security Council Resolution 1529 (2004) authorized member States participating in the Multinational Interim Force in Haiti to “take all necessary measures” to fulfill its mandate. Specifically, the Multinational Interim Force was tasked with restoring peace and security in Haiti following the resignation and departure of former President Jean-Bertrand Aristide.
5. Security Council Resolution 1851 (2008) authorized States to undertake all necessary and appropriate measures in Somalia for the purposes of suppressing piracy and armed robbery at sea.
6. Security Council Resolution 1973 (2011) authorized member States “to take all necessary measures...to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory.”
7. Security Council Resolution 2240 (2015) authorized States acting nationally or through regional organizations to use “all measures” commensurate with the specific circumstances in confronting migrant smugglers or human traffickers off the coast of Libya.

Regional Arrangement Enforcement Actions

Chapter VIII, Article 52, of the Charter of the UN recognizes the existence of regional arrangements among States that deal with such matters relating to the maintenance of international peace and security. Regional arrangements, such as the Organization of American States, the Organization of African Unity, the Gulf Cooperation Council and the League of Arab States

(known as the “Arab League”), attempt to resolve regional disputes peacefully, prior to the issue being referred to the UN Security Council. However, these regional arrangements do not have the authority to unilaterally authorize the use of force.⁹

Self-Defense

Article 51 of the Charter provides:

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....

The use of force in self-defense must adhere to the customary international law *jus ad bellum* principles of proportionality and necessity, as discussed above.¹⁰ The United States has long held that the right to use force in self-defense applies to any illegal use of force. Many other States, including U.S. allies, distinguish between uses of force that are unlawful under Article 2(4) and an “armed attack” that would authorize the use of force in self-defense under Article 51.¹¹

Anticipatory Self-Defense

It is well accepted in international law that the inherent right to self-defense, as referenced in Article 51, includes the right to use force in anticipatory self-defense to prevent an imminent attack.¹² Anticipatory self-defense was first expressed in the 1837 *Caroline* case and subsequent correspondence between then-U.S. Secretary of State Daniel Webster and British Foreign Secretary Lord Ashburton.¹³ Secretary Webster posited that a State need not suffer an actual armed attack before taking defensive action, but may engage in anticipatory self-defense if the circumstances leading to the use of force are “instant, overwhelming, and leaving no choice of means and no moment for deliberation.”

Assessing whether an attack is imminent may involve numerous factors, including that nature and immediacy of the threat, the probability of attack, whether the anticipated attack is part of a pattern of continuing armed activity, the likely scale of attack and the injury likely to result, and whether there may be other opportunities to act in self-defense that could result in less collateral damage.¹⁴ The absence of specific evidence about the attack does not preclude it from being considered imminent, provided that there is a reasonable and objective basis for concluding as such. In addition, the traditional conception of what constitutes imminent for purpose of self-defense must be interpreted flexibly in light of modern-day capabilities and methods.¹⁵ Whether a particular threat qualifies as imminent will depend on the facts and circumstances.

⁹ UN Charter, Art. 53.

¹⁰ DoD LAW OF WAR MANUAL, § 1.11.1.

¹¹ *Id.* § 1.11.5.2.

¹² *Id.* § 1.11.5.1.

¹³ Letter of Secretary of State Daniel Webster to Special Minister Ashburton, dated 27 July 1842, cited in Yale Law School’s Lillian Goldman Law Library Avalon Project at https://avalon.law.yale.edu/19th_century/br-1842d.asp (link active as of 4 March 2020.)

¹⁴ President Barack Obama, Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations, Part I, § II.B.3. (December 2016).

¹⁵ *Id.*

Protection of Nationals

The right to self-defense includes the right of a State to use force to protect its citizens outside the international border. The United States has asserted this right to protect its citizens abroad if their lives are placed in jeopardy and a host State is either unable or unwilling to protect them. This right is the legal basis for noncombatant evacuation operations. The right to use force to protect citizens abroad also extends to those situations in which a host State is an active participant in the activities posing a threat to another State's citizens (e.g., the government of Iran's participation in taking U.S. embassy personnel hostage in that country and Ugandan President Idi Amin's support of terrorists who kidnapped Israeli nationals and held them at the airport in Entebbe). A State need not await actual violence if a threat against its national is imminent.¹⁶

Collective Self-Defense

“Collective” self-defense is a term to describe the use of force in defense of other nation states. Collective self-defense requires that all conditions for the exercise of an individual State's right of self-defense are met and the threatened State has requested assistance.¹⁷ This consent does not, as the International Court of Justice (ICJ) states for the right of self-defense under customary international law, need to be declared in the form of an explicit request.¹⁸ Collective defense treaties, such as the North Atlantic Treaty (which established NATO); the Inter-American Treaty of Reciprocal Assistance (the Rio Treaty); the Security Treaty Between Australia, New Zealand, and the United States (ANZUS); and other similar agreements do not provide an international legal basis for the use of U.S. force, *per se*. These treaties simply establish a commitment among the parties to engage in collective self-defense, in specified situations, and the framework through which such measures are to be taken. For example, Article 5 of the North Atlantic Treaty provides 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.”

The United States has entered into bilateral military assistance agreements with numerous countries around the world. These are not defense agreements and thus impose no commitment on the part of the United States to come to the defense of the other signatory in any given situation.

Humanitarian Intervention

Certain States, including the United Kingdom, have recently asserted a fourth possible justification under international law for the use of force: humanitarian intervention. Humanitarian intervention involves a State using force against the territorial integrity or political independence of another State not on the basis of consent, self-defense, or Security Council authorization, but for humanitarian purposes. The UN Charter does not expressly address humanitarian intervention. The United States does not recognize humanitarian intervention as an independent legal basis for the use of force.¹⁹

¹⁶ DoD LAW OF WAR MANUAL, § 1.11.5.3.

¹⁷ UN Charter, Art. 51; *Military and Paramilitary Activities (Nicaragua v. United States)*, *supra* note 2, para. 196 (“[T]here is no rule permitting the exercise of collective self-defense in the absence of a request by the State which regards itself as the victim of an armed attack.”); DoD LAW OF WAR MANUAL, § 1.11.5.5.

¹⁸ DoD LAW OF WAR MANUAL, § 1.11.5.5.

¹⁹ *Id.* § 1.11.4.4.

DOMESTIC LAW AND THE USE OF FORCE

Constitutional Authority and the War Powers Act

Article II of the Constitution vests broad authority in the President as the Chief Executive and Commander in Chief, to include the authority to direct the use of military force overseas. Presidents have relied on this authority for military engagements in Panama in 1989, Bosnia and Kosovo in 1995 and 1999, Libya in 2011, and Yemen in 2016, to name a few examples. The Department of Justice's Office of Legal Counsel has surmised that the President may exercise this authority to protect the national interest, even without Congressional approval.²⁰

In addition to the authority granted to the Executive under Article II, Article I grants to the Congress the power to declare war, to raise and support armies, to provide and maintain a navy, and to make all laws necessary and proper for carrying into execution. In 1973, Congress passed the War Powers Resolution (WPR).²¹ The stated purpose of the WPR is to fulfill the intent of the framers of the Constitution and ensure the collective judgment of both the Congress and the President are applied to the introduction of and/or use of the U.S. armed forces. When the President is acting under his constitutional authority, the WPR requires the President to consult with Congress, in every possible instance, before introducing armed forces into hostilities or in situations where imminent involvement in hostilities is clearly indicated by the circumstances, and when U.S. armed forces are introduced into hostilities, to continue consultations until the forces have been removed.

Specifically, the President is required to report within 48 hours if armed forces are introduced into the following:

1. Hostilities or situations where imminent involvement in hostilities is clearly indicated by the circumstances;
2. The territorial airspace or waters of a foreign nation while equipped for combat (excluding supply, repair, or training missions); or
3. In numbers which substantially enlarge the number of armed forces equipped for combat already in that nation.

The report shall include the circumstances necessitating the introduction of armed forces, the constitutional and legislative authority upon which he bases his action, and the estimated scope and duration of the involvement or hostilities. The President is required to provide this report at least every six months so long as the circumstances necessitating the report continue to exist.

Within 60 days of reporting, unless Congress has declared war, enacted authorization for the use of force, or has extended the 60 day period, or if Congress cannot meet as a result of an armed attack (in which case there is a 30 day extension), the President is then required to terminate the use of the armed forces with respect to the situation which gave rise to the reporting requirement.

No President has yet conceded the constitutionality of the WPR.²² Nevertheless, Presidents routinely submit reports to Congress "consistent with" (not "pursuant to") the WPR.

²⁰ See, for example, the Office of Legal Counsel's Opinion on Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, dated February 12, 1980, available at <https://www.justice.gov/olc/opinion/presidential-power-use-armed-forces-abroad-without-statutory-authorization>

²¹ Public Law 93-148 codified at 50 U.S.C. §§ 1541-1548.

²² Congressional Research Service, *The War Powers Resolution: Concepts and Practice*, at 6 (March 8, 2019).

Congressional Authorization

Apart from the President's constitutional authority, prolonged use of force may be permitted through congressional authorization. Examples are the 2001 Congressional Authorization for Use of Military Force (AUMF) against terrorist groups and the 2002 AUMF against Iraq.

REFERENCES

Charter of the United Nations with the Statute of the International Court of Justice annexed thereto, 26 June 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, (as amended, 17 December 1963, 16 U.S.T. 1134; T.I.A.S. 5857; 557 U.N.T.S. 143 20 December 1965, 19 U.S.T. 5450; T.I.A.S. 6529 and 20 December 1971, 24 U.S.T. 2225; T.I.A.S. 7739) (entry into force 24 October 1945, for the United States, same date)

War Powers Resolution, Public Law 93-148, 50 U.S.C. §§ 1541-1548

Letter of Secretary of State Daniel Webster to Special Minister Ashburton, dated 27 July 1842, cited in https://avalon.law.yale.edu/19th_century/br-1842d.asp

Chapter 2

LAW OF WAR

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BACKGROUND

This chapter focuses primarily on law of war¹ provisions applicable to the conduct of hostilities, also known as *jus in bello*. After introducing sources of law, it considers general principles contained in the law of war and concludes by addressing laws with particular relevance to aerial warfare.

We note at the outset that rules for the conduct of aerial warfare are largely derived from the general principles of the law of war. Therefore, it is imperative that legal advisors for air operations become familiar with these principles and how they are applied.

APPLICABILITY OF THE LAW OF WAR TO AIR FORCE OPERATIONS

U.S. policy is that DoD Components will comply with the law of war during all armed conflicts, however such conflicts are characterized.² In all other military operations, the United States will continue to act consistent with the law of war's fundamental principles and rules.³ The main purposes of the law of war are, (1) protecting combatants, noncombatants, and civilians from unnecessary suffering; (2) providing certain fundamental protections for persons who fall into the hands of the enemy; (3) facilitating the restoration of peace; (4) assisting military commanders in ensuring the disciplined and efficient use of military force; and (5) preserving the professionalism and humanity of combatants.⁴ Air Force policy on the law of war states, "The Air Force will ensure its personnel understand, observe, report, and enforce the law of war, and abide by U.S. Government law of war obligations in all military operations."⁵ This policy is consistent with DoD policy for the application of the law of war.⁶

SOURCES OF THE LAW OF WAR

The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.⁷

Treaties

The United States is a party to numerous international agreements with provisions that apply to aerial operations. The body of international agreements applicable to armed conflict may be divided into two groups: Hague and Geneva law.

Hague Law deals generally with the means and methods of warfare within armed conflicts. It includes the Hague Conventions of 1899 and 1907. More recent international agreements have focused on specific issues, such as a comprehensive ban on chemical weapons (Chemical Weapons

¹ The terms "law of war", the "law of armed conflict" (frequently abbreviated to "LOAC"), and "international humanitarian law" (frequently abbreviated to "IHL") are often used interchangeably.

² See DoD LAW OF WAR MANUAL (June 2015), updated December 2016, 1070.

³ DoDD 2311.01, *DoD Law of War Program* (2 July 2020), para. 1.2.

⁴ DoD LAW OF WAR MANUAL, 15.

⁵ AFPD 51-4, *Operations and International Law* (24 July 2018), 3.

⁶ See DoDD 2311.01, paras. 1.2.a and 1.2.b.

⁷ See DoDD 2311.01, para. G.2.

Convention 1993), and bans and restrictions on some conventional weapons (Conventional Weapons Convention 1980 and its protocols).

Geneva Law deals generally with reducing suffering of both combatants and civilians caused as a result of armed conflict. It consists of:

- Geneva Convention I (relating to the wounded and sick in the armed forces)
- Geneva Convention II (relating to wounded, sick, and shipwrecked armed forces at sea)
- Geneva Convention III (relating to the treatment of prisoners of war)
- Geneva Convention IV (relating to the protection of civilians)
- Additional Protocol I (AP I) to the Geneva Conventions (relating to the protection of victims of international armed conflicts) (The United States is a signatory to AP I but has not ratified it)
- Additional Protocol II (AP II) to the Geneva Conventions (relating to the protection of victims of non-international armed conflicts) (The United States is a signatory to AP II but has not ratified it)
- Additional Protocol III (AP III) to the Geneva Conventions (relating to adoption of a distinctive emblem) (The United States ratified AP III on 8 March 2007)⁸

By signing AP I and AP II, but not ratifying them, the United States is not bound by the terms and obligations set forth in the protocols but is obliged to “refrain from acts which would defeat the object and purpose” of the same.⁹

Since the drafting of AP I and AP II, the international community has sought to expand protections for certain classes of people, including a grant of special protections to United Nations (UN) peacekeeping personnel (the 1994 UN Safety Convention), and a prohibition on the use of children as combatants (the 2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict).

The United States has not, however, ratified a number of international agreements. Notable examples include AP I and II, the 1982 UN Convention on the Law of the Sea (UNCLOS), the 1997 Ottawa Treaty banning anti-personnel mines, and the 2008 Oslo Treaty on cluster munitions. As a result, allies and coalition partners of the United States may at times operate under different laws relating to armed conflict.

Customary International Law

All nations are bound by customary international law. The U.S. Supreme Court ruled that customary international law is part of U.S. law.¹⁰

⁸ The Geneva Conventions are frequently abbreviated as GC I, GC II, GC III, and GC IV; the Additional Protocols are abbreviated as AP I, AP II, and AP III. The Geneva Conventions were adopted in 1949, Additional Protocols I and II in 1977, and Additional Protocol III in 2005. Full citations are provided in the references part of this Chapter.

⁹ Vienna Convention on the Law of Treaties, Art. 18. The United States is not a party to the Vienna Convention on the Law of Treaties (the treaty was signed by the United States but not subsequently ratified), but considers Art. 18 to be customary international law.

¹⁰ *The Paquete Habana*, 175 U.S. 677 (1900).

Customary law arises from the practice of states coupled with the acceptance of the practice as law. Evidence of custom may be found in international agreements, declarations of international organizations, judicial decisions of international tribunals, and other acts of states. In addition, general legal practices common to the major legal systems of the world and opinions of leading jurists may provide evidence of customary law.

The point at which a consistent practice of some states becomes customary international law binding on all states is open to interpretation. As the United States has not ratified several treaties, whether their provisions are customary international law is relevant, particularly when working in an alliance or coalition with states party to such treaties. U.S. policy statements and practice may aid in determining the U.S. position on what is customary international law. In cases of doubt, Airmen should consult a judge advocate for guidance.

BASIC PRINCIPLES OF THE LAW OF WAR

The basic law of war principles are military necessity, distinction (sometimes referred to as discrimination), humanity (sometimes referred to as unnecessary suffering), proportionality, and honor (sometimes referred to as chivalry).¹¹

Military Necessity

The principle of military necessity justifies the use of force required to accomplish the mission. Military necessity does not authorize acts otherwise prohibited by the law of war. This principle must be applied in conjunction with other law of war principles.¹²

Decisions by military commanders or other persons responsible for planning, authorizing, or executing military action must be made in good faith and based on their assessment of the information available to them at the time.¹³

According to the preamble to Hague Convention IV:

Military necessity does not authorize all acts in war that are not expressly prohibited. Codification of the law of war into specific prohibitions to anticipate every situation is neither possible nor desirable. As a result, commanders and others responsible for making decisions must make those decisions in a manner consistent with the spirit and intent of the law of war.

Where an express prohibition has been stated, neither military necessity nor any other rationale of necessity may override that prohibition.¹⁴ In contrast to express prohibitions, most codified portions of the law of war are written broadly in order to encompass as many situations as possible. Considerable discretion is left to the commander, which they are expected to exercise in good faith. In such cases, commanders and others responsible for planning, deciding upon or

¹¹ See DoD LAW OF WAR MANUAL, § 2.1.

¹² Following the Lieber Code, the United States has defined military necessity in its law of war manuals. For example, the DoD LAW OF WAR MANUAL, § 2.2 states “Military necessity may be defined as the principle that justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of war.”

¹³ See DoD LAW OF WAR MANUAL, § 5.3.2.

¹⁴ Such as the denial of quarter, contained in Art. 23(d) of the Annex to Hague IV; misuse of the distinctive emblems of the Red Cross or Red Crescent, as prohibited in Art. 44, GC I, and Art. 38, AP I; or the torture or murder of a prisoner of war, as prohibited by Art. 17 and 13, respectively, GC III.

executing military operations necessarily have to reach decisions based on their assessment of the information from all sources available to them at the relevant time.¹⁵

Distinction

The principle of distinction is the international law obligation of parties to a conflict to distinguish between combatant forces and the civilian population along with military objectives¹⁶ and civilian objects.¹⁷ The principle of distinction was recognized in the 1863 Lieber Code¹⁸ and in subsequent law of war manuals.¹⁹ Civilians are obligated to refrain from combatant activities.²⁰ Civilians are not combatants and thereby do not enjoy combatant immunity, and may lose protection from attack during such time as they directly participate in hostilities.²¹ If captured, a civilian who takes a direct part in hostilities may be prosecuted under the domestic law of an enemy state for his or her belligerent acts. Military force may be directed only against military objectives and not against civilian objects.²²

Responsibility of Governments and Non-State parties to a conflict. The principle of distinction applies to military forces engaged in offensive or defensive operations and to governments in providing protection for their civilian population and civilian objects. Each government and its military forces, as well as non-state parties to a conflict, are obligated to separate their military or other fighting forces and military objectives from the civilian population and civilian objects, to take steps to protect the civilian population (or civilians within its control) through affirmative steps such as evacuation from the vicinity of military operations and/or air raid precautions, and to avoid actions that otherwise might place the civilian population

¹⁵ This standard is referred to as the Rendulic rule; for its background, see *United States v. List*, XI IMT (1948), 1296. The Rendulic rule is consistent with U.S. domestic law; see *Tennessee v. Garner*, 490 U.S. 386, 388, 396-97 (1989). This standard was also applied in the judgment of the European Court of Human Rights in *Case of McCann and Others v. the United Kingdom*, 17/1994/464/545 (27 September 1995), 54, para. 200.

¹⁶ The United States, although not a party to AP I, has through Art 1(3) of the Convention on Chemical Weapons Protocol III on Incendiary Weapons, adopted the definition of “military objectives,” which mirrors the language of Art. 52 of AP I which states ‘military objectives are “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 a definite military advantage.”’

¹⁷ Consider AP I art. 48 “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

¹⁸ Lieber Code, Art. 20-23.

¹⁹ DoD LAW OF WAR MANUAL, § 2.5 states, “distinction obliges parties to a conflict to distinguish principally between the armed forces and the civilian population, and between unprotected and protected objects.”

²⁰ Civilians include all persons who do not belong to the categories of combatants referred to in Article 4(A), (1), 4(A)(2), 4(A)(3), and 4(A)(6) of GC III.

²¹ See DoD LAW OF WAR MANUAL, § 5.8 Civilians Taking a Direct Part in Hostilities for further discussion. The ICRC’s interpretive guidance is informative; however; the United States and other states have not adopted this guidance as reflecting customary international law.

²² DoD LAW OF WAR MANUAL, § 5.6.3 adopts the same definition of military objectives as found in Art 1(3) Convention Chemical Weapons Protocol III on Incendiary Weapons, and Art. 52 of AP I and states ‘military objectives are “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 a definite military advantage.”’

at risk from lawful military operations by the opposing force.²³ Employment of voluntary or involuntary human shields to protect military objectives or individual military units or personnel is a fundamental violation of the principle of distinction.

'Hors de combat'. Opposing forces who are deemed *'hors de combat'*, meaning out of the fight (for example those surrendering, those who have not yet fallen into enemy hands but who are unable to continue to fight due to wounds or sickness, or those shipwrecked or parachuting from a disabled aircraft), are protected from intentional attack. Their injury or death as the result of intentional attack constitutes a grave breach of the law of war when done with the knowledge that the targeted combatant is *hors de combat*.²⁴

Humanity

The right of a party to a conflict is not unlimited in its selection and use of means or methods of war.²⁵ The principle of humanity²⁶ requires avoiding the employment of arms, projectiles, or material of a nature to cause unnecessary suffering, also referred to as superfluous injury, is codified in Article 23 of the Annex to Hague IV, which especially forbids employment of “arms, projectiles or material calculated to cause unnecessary suffering...” and the destruction or seizure of “the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.”

AP I, Art. 25 states in paragraph 2: “It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.” Unnecessary suffering and superfluous injury are regarded as synonymous. Each refers to damage to objects as well as injury to persons. In determining whether a means or method of warfare causes unnecessary suffering, a balancing test is applied between lawful force dictated by military necessity to achieve a military objective and the injury or damage that may be considered superfluous to achievement of the stated or intended objective. Humanity is used in an objective rather than subjective sense. That is, the measurement is not that of the victim affected by the means, but rather in the sense of the design of a particular weapon or in the employment of weapons.

The fact that a weapon causes injury or death to combatants does not mean that a weapon causes unnecessary suffering. Military necessity acknowledges that employment of weapons in military operations can lead to death or injury of combatants and others either directly or incidental to the destruction of military objectives. The act of combatants killing or wounding enemy combatants in battle is a legitimate act under the law of war if accomplished by lawful means or methods. The prohibition of unnecessary suffering does not limit the bringing of overwhelming firepower on an opposing military force in order to subdue or destroy it. However, certain means of warfare are prohibited from use on the battlefield, either because they are regarded as causing unnecessary suffering or for policy reasons. These means include poison,²⁷ chemical weapons,²⁸ biological (or

²³ See, for example, Art. 27, Annex to Hague IV; Art. 5, Hague IX; Art. 28, GC; and Art. 51(7), AP I.

²⁴ The Geneva Conventions list the most serious war crimes as “grave breaches” of the conventions. See, Art. 50, GC I; Art. 51, GC II; Art. 130, GC III; and Art. 147, GC IV.

²⁵ Art. 22, Annex to Hague IV; and Art. 35, para. 1, AP I.

²⁶ Sometimes referred to as unnecessary suffering.

²⁷ Prohibited in Art. 23(a) to the Annex to Hague IV. The prohibition is much older, as evidenced by Art. 16 of the Lieber Code.

²⁸ The Chemical Weapons Convention prohibits the possession, research, development, manufacturing, acquisition, stockpiling, transfer or use of chemical weapons.

bacteriological) weapons,²⁹ munitions containing fragments not detectable by x-ray,³⁰ and blinding laser weapons.³¹

The law of war also prohibits the design or modification and employment of a weapon for the purpose of increasing or causing suffering beyond that required by military necessity. In conducting the balancing test necessary to determine the legality of a weapon, its effects cannot be weighed in isolation. Each must be examined against comparable weapons in contemporary use, their effects on combatants, *and* the military necessity for the weapon under consideration. This determination is made at the national level in the research, development, and acquisition process, so commanders know that weapons, weapons systems, and munitions issued to them for battlefield use do not violate this aspect of the prohibition on unnecessary suffering, that is, that those weapons and munitions are lawful for their intended purposes.³²

The prohibition of means or methods of warfare of a nature to cause unnecessary suffering also prohibits the intentional attack of combatants *hors de combat* (*i.e.* no longer in the fight), unlawful destruction of civilian objects, and unlawful injury to civilians not taking a direct part in hostilities.

Proportionality

The principle of proportionality³³ requires that combatants must refrain from attacks in which the expected loss of civilian life, injury to civilians, and damage to civilian objects incidental to the attack would be excessive in relation to the concrete and direct military advantage expected to be gained.³⁴ AP I, although not binding on the United States, requires commanders to take feasible precautions in planning and conducting attacks to reduce the risk of harm to civilians and other persons and objects protected from being made the object of attack.³⁵ Proportionality may be viewed as a fulcrum for balancing military necessity and unnecessary suffering. The military advantage anticipated is intended to refer to the advantage anticipated from those actions

²⁹ The United States unilaterally renounced use of biological weapons on 25 November 1969. The Biological Weapons Convention prohibits the possession, research other than for prophylactic purposes, development, manufacturing, acquisition, stockpiling, transfer or use of biological weapons.

³⁰ Protocol I, Convention on the Prohibition or Restrictions of the Use of Certain Conventional Weapons.

³¹ *Id.* at Protocol IV. The nations participating in its negotiation did not conclude that blinding as such or a blinding laser weapon caused unnecessary suffering, but decided for policy reasons to prohibit their use. For a historical record, see Office of The Judge Advocate General of the Army, Memorandum of Law: Travaux Préparatoires and Legal Analysis of Blinding Laser Weapons Protocol (20 December 1996).

³² DoDD 5000.1, *The Defense Acquisition System* (20 November 2007) para. E1.1.15 provides that the acquisition and procurement of DoD weapons and weapon systems shall be consistent with all applicable domestic law and treaties and international agreements, customary international law, and the law of war. An attorney authorized to conduct such legal reviews in the Department shall conduct the legal review of the intended acquisition of weapons or weapon systems.

³³ The concept of proportionality in self-defense under the *jus ad bellum* should not be confused with this law of war principle of proportionality, which attempts to minimize collateral damage during operations under the *jus in bello*.

³⁴ DoD LAW OF MANUAL, § 5.12. See also AP I art.57(2)(a)(iii) requiring that those who plan or decide upon an attack to refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

³⁵ See DoD LAW OF WAR MANUAL, § 2.4.1.2.

considered as a whole, and not only from isolated or particular parts thereof. Generally, “military advantage” is not restricted to tactical gains, but is linked to the full context of a war strategy.³⁶

Proportionality serves as a means for determining whether a nation, military commander, or others responsible for planning, deciding upon, or executing a military operation have acted with wanton disregard for the civilian population.³⁷ A military commander must not only consider the possible or reasonably foreseeable adverse effect on an enemy civilian population of an attack he is planning, but also the possible effect of elements such as billeting his forces in a populated area, the location of supply points, or the emplacement of defensive positions. Thus, the balancing required by the principle of proportionality is a responsibility shared by commanders engaged in offensive or defensive operations.

Proportionality does not prohibit destruction for which there is military necessity nor does it prohibit injury to civilians. It seeks to ensure such injury or damage is not excessive in relation to the military advantage of conducting a lawful military operation. Proportionality constitutes acknowledgment of the unfortunately inevitable, but lawful, incidental or collateral damage or injury in war to civilians not taking a direct part in hostilities, or to civilian objects.

The final determination of whether a specific attack is proportional is the sole responsibility of the commander. Depending on circumstances, the responsible commander may be any commander from the joint forces air component commander (JFACC) down to the individual flight or aircraft commander—regardless, the decision may not be delegated. Targeteers, weaponeers, air planners, and judge advocates should offer well-reasoned advice, but the decision always remains with the responsible commander. If the commander can clearly articulate in a reasonable manner what the military importance of the target is and why the anticipated civilian collateral injury and damage is outweighed by the military advantage to be gained, this will generally satisfy a “reasonable military commander” standard.

Honor

The principle of honor has long been a basis for the law of war. Some express prohibitions have their foundation in the principle of honor.

Honor demands a certain amount of fairness in offense and defense, and a degree of mutual respect and trust between opposing forces. It denounces and forbids dishonorable means, expedients, or conduct that would constitute a breach of trust.³⁸ Certain acts of dishonorable conduct are known as perfidy. Perfidy consists of committing a hostile act under the cover of a legal protection. An example of perfidy is the use of a white flag, or flag of truce, to lure an enemy into a position to

³⁶ DoD, Final Report to the Congress: Conduct of the Persian Gulf War (April 1992), 613.

³⁷ Thus, in its codification of the principle of proportionality, AP I makes it a grave breach to launch “an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects....” (Art. 85(3)(b) [emphasis added]), or to launch “an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects....” (Art. 85(3)(c)). These provisions are similar to the Art. 147, GC, which makes it a grave breach to cause “extensive destruction...of property...not justified by military necessity and carried out unlawfully and wantonly.”

³⁸ U.S. War Department, Rules of Land Warfare (1914), para. 9; and U.S. War Department, Field Manual 27-10, Rules of Land Warfare (1940), para. 4c.

be attacked.³⁹ Perfidy also takes the form of pretending to be a civilian, incapacitated by wounds, or otherwise pretending to have a protected status.

Honor does not prohibit lawful acts, such as ruses and use of the element of surprise in military operations.

THE LAWS OF AERIAL WARFARE

The laws of aerial warfare apply the general principles of the law of war to distinctive aspects of the air domain including issues related to military aircraft and aircrew, means and methods of aerial warfare, and measures short of attack.⁴⁰

Military Aircraft

Characterizing Military Aircraft. In 1923, the Commission of Jurists at The Hague drafted the 1923 Hague Rules of Air Warfare. These rules were not adopted by any nation; nevertheless, the practices of air forces are often consistent with certain rules contained therein. These rules stated that military aircraft must bear an external mark indicating nationality and military character,⁴¹ be under command of a person duly commissioned or enlisted in military service and be crewed by military personnel.⁴² State practice has not established a requirement for an exclusively military crew.

Just as there is a requirement that combatants wear a distinctive sign or emblem, military aircraft must be marked on the exterior with the appropriate distinctive signs of their nationality and military character. It may, however, be possible to meet the requirement to distinguish military aircraft from civilian objects without markings, such as where a particular kind of aircraft is only operated by the military of a particular state. Nevertheless, distinctive markings assist in distinguishing friend from foe and serve to reduce the risk of misidentification of neutral or civil aircraft. Accordingly, military aircraft may not bear markings of the enemy or markings of neutral aircraft while engaging in combat.

Aircraft may be used for military purposes without bearing military markings. For example, a civil aircraft might be chartered to carry troops or supplies. Such an aircraft may be a valid military target for the purposes of the law of war. There is no requirement that such an aircraft

³⁹ The misuse of, and refusal to recognize, a flag of truce is prohibited by Art. 23(f) of the Annex to Hague IV, and Art. 37, para. a, AP I; *see also* Art. 114 and 117, Lieber Code.

⁴⁰ For further discussion of Air Law, *see* Chapter 4.

⁴¹ 1923 Hague Rules of Aerial Warfare, Part II, Art. 3.

⁴² *Id.* Art. 14. The requirement for an exclusively military crew cannot be regarded as reflecting international law given the allowance for considering the recognition of civilian members of military aircraft crews in Art. 4(A)(4), GC III.

be marked as a military aircraft unless used to take a direct part in hostilities.⁴³ Military aircraft, like warships, are entitled to sovereign immunity.⁴⁴

State Aircraft and Civil Aircraft. The principal international agreement on aviation, the Convention on International Civil Aviation (Chicago Convention), establishes two separate classes of aircraft: civil and state.⁴⁵ Specifically, Article 3 of the Chicago Convention provides the following:

1. This Convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft.⁴⁶
2. Aircraft used in military, customs and police services shall be deemed to be state aircraft.⁴⁷
3. No state aircraft of a contracting state shall fly over the territory of another state or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof.⁴⁸
4. The contracting states undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft.⁴⁹

A civil aircraft may, however, be attacked if it becomes a military objective.⁵⁰ Military aircraft engaged exclusively in specified medical functions are subject to a separate legal regime under the 1949 Geneva Conventions.⁵¹

Chicago Convention Inapplicable to Military Aircraft. The provisions of the Chicago Convention, as well as the standards, practices and procedures that the International Civil Aviation Organization (ICAO) establish, do not apply to military aircraft; however, the U.S. Government issued a detailed statement of its position on the impact of Article 3 of the Chicago

⁴³ *Id.* Art. 13.

⁴⁴ Aircraft, like ships, have the nationality of their country of registry although U.S. military aircraft are not "registered." All civil aircraft registered in states party to the Chicago Convention are required to be marked with symbols and designations of their respective nationalities; *see* Convention on International Civil Aviation, December 7, 1944, Art. 17 & 20, 61 Stat. 1180, 1185, 15 U.N.T.S. 295, 308. The 1919 Paris Convention required all aircraft, state and civil, to possess the nationality of the state in which they were registered. 1919 Paris Convention, Art. 6. *See* MATTE at 112. State aircraft are also marked to indicate their nationality. The attribution of nationality to aircraft reflects the legal relationships between the state whose "flag" the aircraft carries and that craft. Thus, the flag state is responsible for the international good conduct of the aircraft when it operates beyond the flag state's national boundaries. The flag state generally exercises jurisdiction over its aircraft and asserts on behalf of the aircraft the privileges and immunities to which it is entitled when in international airspace or in the airspace of other states. The flag state also has jurisdiction over the personnel who operate the craft. *See* FEDELE at 13-14.

⁴⁵ Chicago Convention, Art. 3.

⁴⁶ *Id.* Art. 3(a).

⁴⁷ *Id.* Art. 3(b).

⁴⁸ *Id.* Art. 3(c).

⁴⁹ *Id.* Art. 3(d).

⁵⁰ *See* Art. 52(2) AP I for the definition of a military objective.

⁵¹ *See* GC I Art. 36; GC II Art. 39-40; GC III Art. 22. *See also* AP I Art. 24-31.

Convention to military and other state aircraft.⁵² The essence of the statement is that U.S. state aircraft will fly with due regard for the safety of civil aircraft.

Military Aircrew

Combatant Status. Military aircrew are combatants and entitled to participate in hostilities. Further, while civilians are not entitled to participate in hostilities, those accompanying the force on military aircraft are entitled to prisoner of war status.⁵³ Should civilians participate directly in hostilities, they are not protected from prosecution under the domestic law of the enemy if captured. Military aircrew should conduct any role or mission that requires direct or active participation in hostilities in international armed conflict. Both military aircrew and civilian crew (except those civilians directly participating in hostilities) on military aircraft are entitled to prisoner of war status on capture by the enemy.⁵⁴

Uniform. Military aircrew on the ground are required to distinguish themselves from the civilian population in the same manner and in the same circumstances, as other combatants.⁵⁵ The wearing of flying clothing distinctive to and bearing identifying marks or insignia of the armed forces satisfies this requirement.

Downed Aircrew. When an aircraft is disabled and the occupants escape by parachute, they shall not be attacked on their descent.⁵⁶ This protection is not afforded to paratroopers descending from an aircraft; it is recognized that a paratrooper can form an intent to surrender while in descent, but for practical purposes, it is difficult to conceive how that intent would be communicated effectively to the enemy on the ground. While in descent, downed aircrew are *hors de combat*. A person descending from a disabled aircraft who takes part in hostilities (*e.g.*, fires a weapon at the enemy) or attempts to escape loses protection and may be attacked.

Downed aircrew on the ground are subject to immediate capture and retain combatant status. On reaching the ground in territory controlled by the adversary, they should be given the opportunity to surrender before being made the object of attack. They may be attacked if they take part in hostilities, resist capture, undertake evasion or escape, or are behind their own lines. Their prisoner of war status and the protections thereby afforded begins with their surrender or capture.⁵⁷

There is no specific law that prohibits the use of civilian clothing or enemy uniform by downed aircrew when seeking to evade capture in enemy territory. However, if downed aircrew engage in hostilities while dressed in civilian clothing they may violate the prohibition against perfidy. If they collect intelligence information while out of uniform, or give the appearance of having done so, they risk being treated as a spy under the domestic law of the enemy if captured. The lack of a military uniform or other distinctive symbol establishing combatant status *per se*

⁵² Department of State Airgram CA-8085, 13 February 1964, quoting U.S. Inter-Agency Group on International Aviation (IGIA) Doc. 88/1/1C, MS, Department of State, file POL 31 U.S., reprinted in WHITEMAN DIGEST OF INTERNATIONAL LAW, Vol. 9 at 430-31.

⁵³ GC III Art. 4(A)(4). Such a definition would not extend to refugees being evacuated on military aircraft, who would normally retain their protected civilian status.

⁵⁴ *Id.* Art. 4A(1)-(4).

⁵⁵ 1923 Hague Rules of Aerial Warfare, Part II, Art. 15. See also AP I Art. 44(3).

⁵⁶ FM 27-10 para. 30. See also 1923 Hague Rules of Aerial Warfare, Part II, Art. 20.

⁵⁷ "The present Convention shall apply...from the time they fall into the power of the enemy and until their final release and repatriation." GC III Art. 5. See LESLIE C. GREEN, Aerial Considerations in the Law of Armed Conflict, in ESSAYS ON THE MODERN LAW OF WAR 577, 579 (1999).

does not deprive downed aircrew of their right to prisoner of war status on capture, but it will increase the possibility that such status may be denied.

Military aircrew forced to land in neutral territory due to navigational failure, combat damage, mechanical failure or other emergencies are subject to internment by the neutral state for the duration of the conflict.⁵⁸

Means and Methods of Warfare

Attacks on Military Objectives on the Ground. The general principles of the law of war apply to air attack upon military objectives on the ground; however, there are few aspects of the law that are specific to this form of attack. Most discussion in this area revolves around the application of general principles to specific technologies. The practical application of the law of war principles to air attack on military objectives on the ground merits some further discussion because of the unique capabilities of air weapons.

The reach and ubiquity of air power allows it to strike at military objectives deep within the territory of an adversary, perhaps located in or near the civilian population. Technological advances have greatly increased the accuracy of certain air delivered weapons, decreasing the risk of collateral damage when compared with the early years of air power. The same advances have to some extent created false impressions of the infallibility of air power and unrealistic expectations of the ability to limit collateral damage. Air attacks on military objectives on the ground are held to the same legal standard as other means and methods of warfare, not a higher standard.

The aerial bombardment of towns, villages, dwellings or buildings, which are undefended, is prohibited.⁵⁹ An undefended city in this sense means only those in the immediate zone of ground operations, which can be seized and occupied by advancing ground forces without the use of force. The prohibition does not prevent otherwise lawful attacks upon military objectives present within the civilian population. The prohibition merely reflects the general protection afforded to civilians and civilian objects. The prohibition must be read in the context of the central principles of military necessity, unnecessary suffering, distinction, proportionality, and chivalry discussed earlier.

Air weapons used to attack military objectives on the ground come in many varieties, with varying degrees of accuracy. The law of war does not require the use of a specific weapon based upon relative accuracy. Neither does it require the use of precision guided munitions; non-precision guided munitions may be lawfully employed depending upon the circumstances of a specific attack. The selection of weapons for a particular attack will be governed by the general principles of the law of war.

Air attacks upon military objectives on the ground may fall into two broad categories: pre-planned attacks upon previously identified targets and immediate attacks upon emerging targets. In pre-planned attacks, the majority of the effort to ensure a successful attack in accordance with the law of war is carried out in advance of the attack. The identification of a target as a military objective and the assessment of relative military advantage against the extent of any collateral damage may be carried out collectively by a number of personnel

⁵⁸ Hague V Art. 11.

⁵⁹ Hague IV Reg. Art. 25 provides that “the attack or bombardment, by whatever means, of towns, villages, dwellings or buildings which are undefended is prohibited.” The negotiating record shows that the words ‘by whatever means’ were inserted specifically to regulate bombing attacks by air.

during the planning process. The aircrew or operator actually carrying out the attack may be unaware of the relevant factors that have been considered and the assessment that has occurred. In the absence of clear information to the contrary, aircrew are entitled to rely upon the information provided to them identifying the target as a military objective and assessing the relative military advantage and collateral damage risk.

For attacks upon emerging targets, the obligation to identify the target and assess military advantage and collateral damage risk may fall more heavily upon the aircrew carrying out the attack or on the parties directing or controlling that attack. It is important from the perspective of the law of war to ensure that the target identification and assessment of relative military advantage against the extent of any collateral damage is properly carried out by the aircrew, by those directing the particular attack, or collectively between them.

Surrender by Enemy Ground Forces. Identifying when an enemy combatant has surrendered or is otherwise *hors de combat* poses a particular challenge for air platforms. It may be difficult for aircrew or aircraft operators to determine whether an enemy combatant is dead, injured, or merely taking cover. An intentional attack upon an enemy combatant when done with the knowledge that the targeted person is *hors de combat* constitutes a grave breach of the law of war.⁶⁰ It would not be unlawful if the attacker merely suspected or was aware of a probability that the targeted person was *hors de combat*. There is no internationally recognized means to indicate an intention to surrender to an airborne attacker and there are practical difficulties involved in accepting the surrender.⁶¹

Attacks on Air Targets. While the general principles of the law of war apply to attack upon airborne targets, few aspects of the law are specific to air-to-air combat.

Attack upon air targets in modern air warfare may be conducted beyond the visual range of the attacker. Identification of the target as a military objective may occur using electronic and other means. For example, the airfield that was the point of origin of an airborne radar contact combined with its course and speed may provide enough information to be sufficiently certain that it is an enemy military aircraft. The criteria used to determine that an airborne target is in fact a military objective may be specified in rules of engagement.⁶² These criteria may be set by commanders to specify the degree of confidence that must exist before attacking an airborne target. Other measures that may be taken to decrease the risk of attacking an aircraft that is not being used for military purposes by the adversary include the declaration of no fly zones or air defense identification zones. By publicly declaring zones that will be hazardous for civil aircraft to enter, the belligerents provide warning to civilian aircrew. Aircraft that fail to heed such warnings are at risk of attack.

Surrender by Enemy Aircraft. Surrender by an airborne enemy aircraft is technically possible but usually impracticable. It is difficult for the attacking pilot to know when the opponent has surrendered. Likewise, it is difficult for the attacking pilot to enforce the surrender. If surrender is offered in good faith in circumstances where it can be enforced, then it should be respected and accepted. Rocking the aircraft's wings, lowering the landing gear and other signals (such as flashing of navigational lights) are sometimes cited as indications of a desire

⁶⁰ GC I Art. 50; GC II Art. 51.

⁶¹ During operation IRAQI FREEDOM, the United States air-dropped leaflets advising Iraqi Army units how to indicate surrender, such as parking vehicles in a square formation with weapons pointing inwards and encamping the soldiers openly at a safe distance from the vehicles.

⁶² For further discussion on Rules of Engagement, see Chapter 15.

to surrender, but they cannot be regarded as conclusive evidence of surrender.⁶³ Moreover, when aerial combat is conducted beyond visual range, such gestures are futile. Consequently, only an appropriate radio communication—duly transmitted to the enemy (preferably on an ICAO distress frequency) may be deemed an effective message of surrender. The capture of enemy aircrew and aircraft may provide a greater military advantage than the destruction of the aircraft.

Attacks upon Civil Aircraft. Civil aircraft⁶⁴ are usually civilian objects and subject to those protections afforded to civilian objects under the law of war. A civil aircraft may, however, become a military objective if it satisfies the definition of what constitutes a military objective.⁶⁵

The Chicago Convention obliges signatories to refrain from attacking civil aircraft in flight in peacetime conditions.⁶⁶ There is, however, no special protection afforded in law to civilian airliners. The prohibition against attacking a civil aircraft does not restrict attacks upon military objectives in accordance with the law of war or prohibit acts necessary in self-defense. Notwithstanding that an aircraft has become a military objective, the civilian crew or passengers of a civil aircraft may remain subject to protection provided that they are not directly participating in hostilities. This may be relevant in weighing military advantage against the collateral damage anticipated.

Measures Short of Attack: Interception, Diversion, Search, and Capture

There is little treaty or customary international law in relation to the interception, search, diversion or capture of aircraft. However, a body of law exists in relation to these practices at sea. Some legal references purport to apply identical principles *mutatis mutandis* (i.e., with the necessary changes having been made) to the air.⁶⁷ It is difficult to identify a body of state practice to warrant a conclusion that the maritime law practices of interception, visit, search, diversion, and capture apply in full to the air environment as a matter of law.

The full application of such principles to the air environment is fraught with practical difficulties. The regime of visit, search and capture is tenable at sea, particularly given the possibility of disabling a ship or conducting a boarding. In the air environment, any use of force against an aircraft to enforce compliance with instructions or warnings is likely to destroy the aircraft and kill those on board. There are some treaty provisions that place obligations on civil aircraft, without restricting the manner in which belligerents may conduct air operations.

⁶³ Instances are cited of Royal Air Force pilots in the Battle of Britain inviting surrender by drawing alongside Luftwaffe pilots and pointing to the ground. This simple message appeared to have the desired effect on at least two occasions. See J. M. SPAIGHT, *The Battle of Britain 1940*, 77.

⁶⁴ The term civil aircraft is used here in the context of the Chicago Convention.

⁶⁵ See earlier paragraph above regarding distinction and the test for a military objective.

⁶⁶ Under civil aviation law, civil aircraft in flight are subject to protection. Art. 3bis of the Chicago Convention provides as follows: The contracting states recognize that every state must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of states set forth in the Charter of the United Nations. Chicago Convention, Art. 3bis.

⁶⁷ THE SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (12 June 1994) purports to state international law but in fact transposes many maritime practices to the air environment in the absence of a body of state practice. The military legal manuals of some nations rely heavily upon the SAN REMO MANUAL as authority for the applying law of the sea practices to aircraft. See, e.g., UK JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT, 2004 Edition, paras. 12.74 – 12.103.

Interception. In the course of an armed conflict, a party may opt to merely intercept an aircraft rather than attack it. An interception could be effected in a variety of ways, including closing to visual range or to a distance where the target aircraft is within the range of weapons systems. The purpose of interception may be to warn off a civil aircraft from entering an area of active operations, to facilitate identification of an unidentified aircraft, to force an aircraft to divert and to land at a specific airfield, or to get into a position in order to attack the aircraft. Interception is a method that may be used to assist in the obligation to take reasonable measures to distinguish between military objectives and civilian objects and the obligation to take reasonable measures to protect the civilian population. A civil aircraft failing to comply with military instructions may become a military objective and subject to attack.

Under international law, military aircraft may navigate freely in both their own national airspace and international airspace.⁶⁸ Subject to limited restriction,⁶⁹ military aircraft are free to intercept aircraft in international airspace in both armed conflict and peacetime. Though military aircraft are entitled to exercise freedom of navigation in international airspace, as a matter of practice the interception of an aircraft may be viewed as a hostile act or at least as a threat to air safety, depending upon the manner and location in which it is conducted.

In relation to civil aircraft, the international civil aviation legal regime sets out procedures that are binding upon civil pilots in the event of interception.⁷⁰ These procedures are not binding upon state aircraft as to the manner in which civil aircraft may be intercepted.⁷¹ However, they do provide procedures that must be known and understood by pilots of civil aircraft, thereby reducing the risk of accident or misunderstanding.

As a general rule, military aircraft may not intercept an aircraft if doing so would require entry into the national airspace of another state.⁷²

Diversion and Search of Civil Aircraft. The full scheme of the right of visit and search that may be exercised by military vessels and aircraft in relation to foreign ships under the law of the sea does not expressly apply to civil aircraft.⁷³ However, during armed conflict military aircraft

⁶⁸ The restrictions on air navigation for civil aircraft in the Chicago Convention do not apply to state aircraft. *See* Chicago Convention, Art. 3(a). Hence, military aircraft and other state aircraft may navigate freely within international airspace. In the national airspace of the state of the intercepting military aircraft, the freedom of navigation of military aircraft may be affected by national legal regimes.

⁶⁹ Under the Chicago Convention, the contracting states undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft. Chicago Convention, Art. 3(d).

⁷⁰ *See* ICAO, Manual Concerning Interception of Civil Aircraft, ICAO Doc. 9433-AN/926 (2d Ed. 1990) (issued pursuant to Chicago Convention, Art. 12.)

⁷¹ The Chicago Convention and its subordinate legislation regime do not apply to state aircraft.

⁷² Under Art. 3(c) of the Chicago Convention, a state aircraft may not enter the airspace of another state without consent.

⁷³ *See*, for example, UNCLOS, Art. 110. While the right to visit foreign vessels applies *mutatis mutandis* to military aircraft, UNCLOS does not contain any equivalent right in relation to the visit of civil aircraft. Section V of THE SAN REMO MANUAL sets out quite detailed rules for the interception, visit, search, diversion and capture of civil aircraft, which are clearly based upon law of the sea principles. While some sections of THE SAN REMO MANUAL accurately state international law, these provisions in relation to aircraft far exceed the development of law in the air environment.

may divert civil aircraft for the purpose of search or inspection.⁷⁴ This power to order civil aircraft to divert for landing and search is merely a reflection of the law of war principle that states may take all lawful measures justified by military necessity. There is no distinction in this regard between civil aircraft of adversary states and civil aircraft of neutral states.

The law of war does not authorize interference with aircraft of neutral states outside the scope of military necessity. A civil aircraft that fails to comply with directions given by a belligerent state is at risk of attack. Failure to comply with direction does not render a civil aircraft as a military objective. However, it may provide evidence that the civil aircraft is in fact being used for a military or hostile purpose.

Capture of Civil Aircraft and Goods. Civil aircraft from the state of the adversary may be seized and put to use by a belligerent.⁷⁵ Neutral civil aircraft engaged in activity in violation of their neutral status are also liable to capture.

⁷⁴ 1923 Hague Draft, Part II, Art. 49 provides that private aircraft are liable to visit and search and to capture by belligerent military aircraft and Art. 50 provides that belligerent military aircraft have the right to order public non-military and private aircraft to alight in or proceed for visit and search to a suitable locality reasonably accessible. The Chicago Convention requires the pilots of civil aircraft to comply with the instructions given by states to divert and land at a designated airfield where the state reasonably concludes that the aircraft is being used for a purpose inconsistent with the aims of the convention. Chicago Convention, Art. 3bis. While the detailed nature of THE SAN REMO MANUAL provisions exceeds the development of international law, Part V of THE SAN REMO MANUAL states that civil aircraft are to comply with such orders given by military aircraft.

⁷⁵ Hague IV Reg., Arts. 52 & 53.

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Chapter 3

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INTRODUCTION

The Law of War is the *lex specialis* governing armed conflict that regulates the conduct of armed forces, the manner of hostilities, the protection of war victims, belligerent occupation, and the relationship between combatants, noncombatants and civilians.¹ DoD personnel comply with the law of war during all armed conflicts however they are characterized and in all other military operations.² Military members can be prosecuted under the UCMJ or federal law for violating the Law of War. Civilians can also be prosecuted under U.S. or international laws for such violations.

HISTORICAL BACKGROUND

In the United States the modern principle of individual responsibility for violations of the law of war was initially expressed in the Lieber Code (also known as General Order No. 100), which was promulgated during the U.S. Civil War.³ Many of the principles of the Lieber Code were adopted at the international level through the Hague Conventions of 1899 and 1907.⁴ The Fourth Hague Convention of 1907 required the Contracting Powers to issue instructions to their armed land forces ensuring they respect the laws and customs of war specified in the convention's annex.⁵

Prosecution of World War II War Criminals

After World War II, Allied nations undertook a program to punish those responsible for atrocities committed during the war. In particular, the Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (usually referred to as the Nuremberg Charter or London Charter), established the Nuremberg Tribunals to try three separate categories of crime: war crimes, crimes against humanity, and crimes against peace. Similarly, the International Military Tribunal for the Far East was established. These tribunals resulted in the joint trial of 24 senior German leaders in Nuremberg and the joint trial of 28 senior Japanese leaders in Tokyo. In addition, 12 subsequent trials of other German leaders and organizations in Nuremberg were conducted under international authority and before panels of civilian judges, and thousands of trials were conducted in various national courts, many of these by British military courts and U.S. military commissions.

1949 Geneva Conventions

Building upon and partly superseding the 1899 and 1907 Hague Conventions, the 1949 Geneva Conventions more thoroughly codified specific international rules pertaining to the trial and punishment of those who commit war crimes, particularly in international armed conflicts. Since the adoption of the 1949 Geneva Conventions, many armed conflicts have taken the form of non-international armed conflicts (NIACs). Civil wars, insurgencies, and internal or cross-border

¹ DoD LAW OF WAR MANUAL (June 2015), updated December 2016, 7-8.

² DoDD 2311.01, *DoD Law of War Program* (2 July 2020), para. 1.2.a.

³ General Orders No 100: Instruction for the Government of Armies of the United States in the Field, Art. 47 [hereinafter Lieber Code].

⁴ The Hague Convention of 1899 produced three treaties and three additional declarations, dealing with different facets of the law of war. The Hague Convention of 1907 produced 13 treaties (12 of which entered into force) and one declaration.

⁵ Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulation Concerning the Laws and Customs of War on Land art. 1, October 18, 1907, 36 Stat. 2227, T.S. 539, 1 Bevans 631 [hereinafter Hague IV].

conflicts with a non-state armed group are all examples of what could constitute a NIAC. In practice, the United States in certain cases will apply the rules applicable in international armed conflict to NIACs.⁶ Whether the conflict is non-international or international, there is arguably little distinction in terms of the resultant suffering from the victims' point of view. However, States have been reluctant to recognize the application of the law of international armed conflict during a NIAC, primarily on the ground that this appears to grant legitimacy to the non-State actors involved and could grant combatant immunity to them, even when the non-State actors have not signed and do not abide by the Geneva Conventions themselves.

International/Ad Hoc Tribunals

War crimes, crimes against humanity, genocide, and crimes against peace have been prosecuted in the past by special international tribunals established to address allegations that such crimes were committed during specific periods or in connection with specific conflicts. In general, these tribunals apply international law. The statute governing each tribunal typically stipulates the specific types of crimes to be addressed by the tribunal, as well as the standards for culpability.⁷ The temporal and territorial extent of the tribunal's jurisdiction may also be specified,⁸ as well as the rules applicable to situations in which another national court or tribunal has tried the defendant.⁹ The decisions of these tribunals are not binding on the United States and its courts, but they do provide useful examples of the application of international law and, as such, have been cited with approval from time to time by U.S. courts.¹⁰

International Criminal Tribunal for the Former Yugoslavia (ICTY). On 25 May 1993, the United Nations Security Council (UNSC) established the first international war crimes tribunal since the Nuremberg and Far East trials following World War II.¹¹ The ICTY was created in response to mass atrocities taking place in Croatia and Bosnia and Herzegovina.¹² Its objective was to assist in restoring peace and stability in the Balkan region through the administration of justice. Pursuant to the statute of the ICTY, the tribunal was granted the authority to try persons for serious violations of international humanitarian law committed in the former Yugoslavia since 1991, including grave breaches of the Geneva Conventions,

⁶ DoD LAW OF WAR MANUAL, *supra* note 1, § 17.1. The 1949 Geneva Conventions share Common Article 3, which imposes the minimum humanitarian requirements for “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.” However, most of the Conventions’ provisions directly apply only to international armed conflicts.

⁷ The ICTY Statute, for example, at Arts. 2-5 grants the tribunal the power to prosecute grave breaches of the Geneva Conventions of 1949; violations of the laws or customs of war; genocide, and crimes against humanity. Art. 7 of the Statute also specifies standards for individual criminal responsibility. UN Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on May 17, 2002)*, May 25, 1993 [hereinafter ICTY Statute].

⁸ The ICTY Statute Art. 8, for example, provides that “[t]he territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The temporal jurisdiction of the International Tribunal shall extend to a period beginning on 1 January 1991.”

⁹ See ICTY Statute Art. 10.

¹⁰ See, e.g., *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283 (11th Cir. 2002).

¹¹ UN Security Council Resolution 808 decided a tribunal should be established and Resolution 827 actually established the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, now known as the ICTY.

¹² UN International Criminal Tribunal for the former Yugoslavia, *About the ICTY*, <https://www.icty.org/en/about> (last visited May 4, 2020).

violations of the laws or customs of war, genocide, and crimes against humanity. The Statute of the ICTY also established individual command responsibility under a theory of superior or command responsibility.¹³

International Criminal Tribunal for Rwanda (ICTR). On 8 November 1994, the UNSC created the ICTR.¹⁴ The primary objective under the statute of the ICTR was to restore regional peace and stability in Rwanda through the administration of justice. The ICTR was the first international tribunal to deliver verdicts in relation to genocide,¹⁵ and the first to recognize rape as a means of perpetrating genocide.¹⁶

The International Criminal Court (ICC)

The UN General Assembly convened a diplomatic conference in Rome, Italy, from 15 June to 17 July 1998. The conference adopted an international convention, the Rome Statute, which established the ICC, the first permanent international tribunal with jurisdiction over individuals accused of genocide, crimes against humanity, war crimes and other violations of international humanitarian law. In voting to set up the ICC, the international community made it clear that impunity was no longer possible for those who commit atrocities.

Through the ICC, the international community can hold *individuals* responsible for their actions under the authority of international law, without regard to whether an individual is acting in a private or official capacity. For instance, Article 28 of the Rome Statute specifically states that military commanders and other superiors may be held criminally liable for failing to properly exercise control over their forces.

The ICC's jurisdiction under the Rome Statute extends to the crimes of genocide, crimes against humanity, and war crimes. In 2017, this was expanded when parties to the ICC agreed to activate the ICC's jurisdiction over the crime of aggression, meaning the ICC can hold leaders individually criminally responsible for waging aggressive war.¹⁷ The ICC claims jurisdiction over all individuals who are nationals of the parties or who allegedly commit crimes within the territory of a state party or on a vessel or aircraft that is registered to a state party.¹⁸ The ICC may also assert jurisdiction over persons who allegedly commit crimes anywhere else on an *ad hoc* basis.¹⁹ Member states are obligated to assist the ICC in its investigation and prosecution of crimes within the ICC's jurisdiction, including detaining individuals sought by the ICC.²⁰ Non-party states may also be requested to do so.

¹³ ICTY Statute Art. 7.

¹⁴ S.C. Res. 955 (ICTR Statute).

¹⁵ *Prosecutor v. Akayesu*, Case No. ICTR 96-4, Judgment (September 2, 1998).

¹⁶ International Residual Mechanism for Criminal Tribunals, *The ICTR in Brief*, <https://unictr.irmct.org/en/tribunal> (last visited May 12, 2020).

¹⁷ Coalition for the International Criminal Court, *The Crime of Aggression*, <http://www.coalitionfortheicc.org/explore/icc-crimes/crime-aggression> (last visited May 12, 2020).

¹⁸ Rome Statute of the International Criminal Court Art. 12(2), July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

¹⁹ *Id.* Art. 12(3) (a non-state party can accept the ICC's jurisdiction solely for the alleged crimes in question).

²⁰ *See Id.* Arts. 86 (state party's general obligations to cooperate), 87 (ICC's requests for cooperation by a state party), 89 (surrender of persons to the ICC by member states), 90 (competing requests between the ICC and other nations), and 93 (other forms of cooperation by state parties).

Despite early support for a permanent international court, in May 2002, the United States withdrew its signature from the Rome Statute for a number of reasons, including the need to ensure that its service members were protected from prosecution by a court that is unaccountable to the American people and has no obligation to respect the constitutional rights of U.S. citizens.²¹ Following this withdrawal, the United States established a number of bilateral immunity agreements under Article 98 of the Rome Statute of the ICC (also known as “Article 98 Agreements”). These Agreements provide that neither party to the accord would bring the other’s current or former government officials, military or other personnel before the jurisdiction of the Court. Additionally, the American Service-members’ Protection Act of 2002²² ensures that service members are not subject to the jurisdiction of the ICC for their participation in any military operations.

DEFINITION AND CLASSIFICATION OF WAR CRIMES

The Nuremberg Categories

The Charter of the International Military Tribunal, annexed to the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis,²³ defined the following crimes as falling within the International Military Tribunal’s jurisdiction:

1. **Crimes Against Peace:** namely, planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.
2. **War Crimes:** namely, violations of the laws or customs of war. Such violations include, but are not limited to, murder, ill-treatment, or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.
3. **Crimes against Humanity:** murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.²⁴

Grave Breaches and Simple Breaches of the Law of War

The 1949 Geneva Conventions’ codification of war crimes gave rise to a distinction between those crimes known as “grave breaches” and other acts violating other customs or rules of war. To constitute a grave breach, there must first be an international armed conflict: *i.e.*, Common

²¹ This was the view expressed by then-Secretary of Defense Donald H. Rumsfeld when it was announced on 7 May 2002 that the Bush administration was withdrawing from the ICC Treaty.

²² 22 U.S.C. §§ 7421-33, as amended.

²³ 82 U.N.T.S. 280 (entered into force August 8, 1945) Art. 6(a).

²⁴ See Charter II of the International Military Tribunal, Art. 6 (a), annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis. See generally Oppenheim, 257.

Article 2 of the 1949 Geneva Conventions must apply. Further, the victim must be a protected person in one of the conventions.

There are “less serious” violations, which are breaches of the law of war but do not attract universal jurisdiction. As one commentator explained, “There is a distinction between those who commit ‘grave breaches’ and those who merely commit acts contrary to the provisions of the present convention or ‘all other breaches’ which are also referred to as ‘simple breaches’ or ‘minor violations’.”²⁵ The responsibility for the enforcement of these simple breaches resides entirely with either the violator’s state or the state in whose territory the breach occurred, if the accused is in that state’s custody.

Grave Breaches. Examples of grave breaches include the following: willful killing; torture or inhumane treatment (including biological experiments); willfully causing great suffering or serious injury to body or health; taking of hostages; extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly; compelling a prisoner of war (POW) or other protected person of war to serve in the armed forces of a hostile power; and willfully depriving a POW or other protected person of the rights to a fair and regular trial.²⁶ These are crimes of such seriousness as to invoke universal jurisdiction.²⁷ Universal jurisdiction entitles any state to exercise jurisdiction over any perpetrator, regardless of his or her nationality or the place where the offence was committed. Other “serious violations” can also attract universal jurisdiction.

Simple Breaches. The Geneva Conventions do not define ‘simple’ breaches, but they are regarded as violations of the law of war that may not rise to the level of being a war crime.²⁸ Some simple breaches are more than technical violations of the law of war, and may be treated as war crimes, and are punishable as such. A distinction can be drawn between crimes established by treaty and crimes that breach customary international law; treaties only bind parties thereto, while customary international law has universal jurisdiction; no nation can opt out of its reach. Examples of simple breaches that would be regarded as war crimes include: making use of forbidden arms or ammunition; treacherous request for quarter; maltreatment of dead bodies; firing on localities which are undefended and without military significance; perfidy; poisoning of wells or streams; pillage or purposeless destruction; compelling prisoners of war to perform prohibited labor; killing without trial spies or other persons who have committed hostile acts; compelling civilians to perform prohibited labor; and violation of surrender terms.²⁹

Common Article 3 of the 1949 Geneva Conventions

Common Article 3 of the 1949 Geneva Conventions contains minimum standards applicable to the parties to a NIAC, which has been interpreted to include conflicts with a non-state actor.³⁰ Although nothing in Common Article 3 discusses war crimes or individual criminal liability,

²⁵ Jesse Medlong, *All Other Breaches: State Practice and the Geneva Conventions’ Nebulous Class of Less Discussed Prohibitions*, 34 MICH. J. INT’L L. 831 (2013).

²⁶ See Geneva Conventions (hereinafter GC) I, Art. 50; GC II, Art. 51; GC III, Art. 130; and GC IV, Art. 147. See also DoD LAW OF WAR MANUAL, *supra* note 1 § 18.9.3.1.

²⁷ See GC I, Art. 49; GC II, Art. 50; GC III, Art. 129; and GC IV, Art. 146.

²⁸ Dep’t of the Army Field Manual 27-10, *The Law of Land Warfare* (July 1956), para. 504, lists examples of breaches of the Geneva Conventions that are not considered grave breaches and are therefore listed as “other types of war crimes” otherwise known as simple breaches.

²⁹ *Id.*

³⁰ See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

the ICTY has held that violations of Common Article 3 can be prosecuted in respect of both international and non-international armed conflicts. Moreover, the Rome Statute establishing the ICC provides for the prosecution of violations of Common Article 3 in NIACs. Under U.S. domestic law³¹, individuals may be prosecuted for grave breaches of Common Article 3 in a NIAC, as defined therein.³²

War Crimes under U.S. Law

As noted above, the term “war crime” is often used to describe the most serious violations of the law of war, otherwise known as “grave breaches.” While U.S. doctrine also uses the term war crime to describe every violation of the law of war³³, the term war crime is most often used to refer to particularly serious violations of the law of war, therefore including but not limited to grave breaches. For example, this is generally the usage when the term war crime is defined for the purposes of a particular criminal statute. U.S. law³⁴ defines a “war crime” as follows:

- (1) Any conduct defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;
- (2) Any conduct prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907; The following is conduct prohibited by these Articles and therefore constitutes a war crime under U.S. domestic law:
 1. Employing poison or poisoned weapons.
 2. Killing or wounding treacherously, individuals belonging to the opposing military forces.
 3. Killing or wounding an enemy who, having laid down his or her arms to, or having no longer means of defense, surrendered.
 4. Declaring that no quarter will be given.
 5. Employing arms, projectiles, or material calculated to cause unnecessary suffering.
 6. Improper use of the distinctive emblems of the Geneva Convention, of a flag of truce, of the National flag or of the military insignia and uniform of the adversary.
 7. Destroying or seizing the enemy’s property, unless the destruction or seizure be imperatively demanded by the necessities of war.
 8. Declaring abolished, suspended, or inadmissible in a court of law the rights and actions of the nationals of the hostile party.

³¹ 18 U.S.C. § 2441(c)(3) (2006).

³² The jurisdiction under 18 U.S.C. § 2441 is not comprehensively universal: jurisdiction requires the nexus of a U.S. national or member of the U.S. armed forces as victim or perpetrator.

³³ See DoD LAW OF WAR MANUAL, *supra* note 1, ch. 18. Also, note that the United Kingdom’s 1958 law of war manual stated, “The term war crime is the technical expression for violations of the laws of warfare, whether committed by members of the armed forces or civilians.” United Kingdom War Office, *Manual of Military Law, Part III: The Law of War on Land* (1958).

³⁴ 18 U.S.C. § 2441 (c)(1)-(4) – War Crimes.

9. Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war.
 10. Attacking or bombarding, by whatever means, towns, villages, dwelling or buildings which are undefended.
 11. In sieges and bombardments, failing to take all necessary steps to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes; and
 12. Pillaging of a town or place.
- (3) Any conduct which constitutes a grave breach of Common Article 3 when committed in the context of, and in association with, an armed conflict not of an international character; the following conduct is defined as a grave breach and is prohibited under Common Article 3; torture, cruel or inhuman treatment, performing biological experiments, murder, mutilation or maiming, intentionally causing serious bodily injury, rape, sexual assault or abuse and the taking of hostages.³⁵
- (4) Any conduct of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.

Other Treaties

Violations of other treaties to which the United States is a party may also create bases for individual criminal liability. For instance, the Convention on the Prevention and Punishment of the Crime of Genocide defines the crime of genocide as killing and other acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group³⁶ “whether committed in time of peace or in time of war.”³⁷

³⁵ 18 U.S.C. § 2441(d)(1)(A-I).

³⁶ See Convention on the Prevention and Punishment of the Crime of Genocide, Art. II, December 9, 1948, entered into force January 12, 1951 (codified in 18 U.S.C. § 1091 (2009)).

³⁷ *Id.* Art. I (codified in 18 U.S.C. § 1091).

U.S. TREATY OBLIGATIONS

The United States must comply with the following treaty obligations with respect to war crimes:

1. To enact laws to ensure effective punishment of those committing or ordering to be committed grave breaches of the Geneva Conventions;³⁸
2. To search for and either prosecute or extradite those who have committed grave breaches of the Geneva Conventions;³⁹
3. To take measures necessary for the suppression of violations of the law of war that do not amount to grave breaches⁴⁰ (*i.e.*, simple breaches);
4. To provide accused persons the safeguards of a proper trial and defense;⁴¹ and
5. To pay compensation, when appropriate, for the grave breaches committed by members of its armed forces.⁴²

U.S. law and policy operate in conjunction to meet these obligations. For example, Congress has provided general courts-martial with requisite authority to try and punish individuals committing war crimes.⁴³ In addition, the 1996 War Crimes Act⁴⁴ established federal jurisdiction over circumstances involving members of the U.S. armed forces or U.S. nationals who commit certain war crimes or are victims of said crimes, as defined in the Act.

U.S. DEPARTMENT OF DEFENSE POLICY

It is the policy of the U.S. DoD to ensure that the law of war obligations of the United States are observed and enforced by all DoD components.⁴⁵ More generally, DoD policy provides the following:

1. Members of the DoD are to comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations;⁴⁶
2. The law of war obligations of the United States are observed and enforced by DoD Components and DoD contractors assigned to or accompanying deployed Armed Forces;⁴⁷

³⁸ See GC I Art. 49; GC II Art. 50; GC III Art. 129; GC IV Art. 146.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Hague IV Art. 3 (establishing that a belligerent party, which violates the convention, shall, if the case demands, be liable to pay compensation). See also GC I Art. 51; GC II Art. 52; GC III Art. 131; GC IV Art. 148 (each identical article prohibiting a High Contracting Party from absolving itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect to grave breaches).

⁴³ *Jurisdiction of general courts-martial*, UCMJ Art. 18; 10 U.S.C. § 818 (2016).

⁴⁴ 18 U.S.C. § 2441.

⁴⁵ See generally DoDD 2311.01, *DoD Law of War Program* (2 July 2020), *supra* note 2.

⁴⁶ *Id.* para. 1.2.a.

⁴⁷ *Id.* para. 4.2.

3. An effective program to prevent violations of the law of war is to be implemented by the DoD Components. Such programs must include, but are not limited to, law of war dissemination and periodic training;⁴⁸ prompt reporting of “reportable incidents”;⁴⁹ assessments of incidents needed to determine appropriate responses;⁵⁰ and appropriate accountability actions.⁵¹ The reporting and investigating requirements under this policy ensure that the United States can fulfill its treaty commitments to enforce the law of war.⁵²

Reporting Violations

All military and U.S. civilian employees, contractor personnel, and subcontractors assigned to or accompanying a DoD component must report reportable incidents through their chain of command.⁵³ Such reports may be made through other channels, such as the military police, a judge advocate, or an inspector general. Reports made to officials other than those specified in this paragraph must, nonetheless, be accepted and immediately forwarded through the recipient’s chain of command.⁵⁴

The commander of any unit that obtains information about an alleged violation of the law of war must assess whether the allegation is based on credible information and thus constitutes a reportable incident. The unit commander must immediately report reportable incidents through the applicable chain of command, to the Combatant Commander, through the most expeditious means available.⁵⁵ The authority who receives information about a reportable incident can take a series of actions, to include taking measures to preserve on-scene evidence, direct an assessment, and fulfil separate service reporting requirements.⁵⁶

⁴⁸ *Id.* para. 1.2.c(1).

⁴⁹ *Id.* para. 1.2.c(4). In DoDD 2311.01, *supra* note 2, para. G.2, a “reportable incident” is defined as “an incident that a unit commander or other responsible official determines, based on credible information, potentially involves: a war crime; other violations of the law of war; or conduct during military operations that would be a war crime if the military operations occurred in the context of an armed conflict. The unit commander or responsible official need not determine that a potential violation occurred, only that credible information merits further review of the incident.” DoDD 2311.01, section 4, contains detailed guidance on the reporting responsibilities of U.S. military and civilian personnel. See also AFD 51-4, *Operations and International Law* (July 24, 2018) [hereinafter AFD 51-4] and AFI 51-401, *The Law of War* (August 3, 2018) [hereinafter AFI 51-401].

⁵⁰ *Id.* para. 1.2.c(5).

⁵¹ *Id.* para. 1.2.c(6).

⁵² For example, under the four Geneva Conventions of 1949, the United States is obligated to search for persons alleged to have committed, or ordered to have committed, grave breaches of the Geneva Conventions, and to prosecute such persons before its own courts or to hand over such persons to other States party to the Geneva Conventions for trial. GC I Art. 49, GC II Art. 50, GC III Art. 129, and GC IV Art. 146. The United States is also obligated to take measures to suppress acts contrary to the Geneva Conventions other than those defined as grave breaches.

⁵³ DoDD 2311.01, para. 4.1.b, provides: “Contracts must require contractor employees to report reportable incidents to the commander of the unit they are accompanying or the installation to which they are assigned, or to the combatant commander.”

⁵⁴ *Id.* para. 4.1.c.

⁵⁵ *Id.* para. 4.2.

⁵⁶ *Id.* para. 4.2.a.

Investigating Violations

The allocation of responsibility between DoD and the Department of Justice (DoJ) for investigation and prosecution of war crimes committed by or against DoD personnel is set forth in a 1984 memorandum of understanding (MOU) between the DoD and the DoJ regarding responsibility for investigating and prosecuting crimes generally.⁵⁷ Under the MOU, the DoD is responsible for investigating most crimes committed on a military installation or during military operations, and, if the crime was committed by a person subject to the Uniform Code of Military Justice (UCMJ), the military department concerned will take the lead in prosecuting the offender.⁵⁸ The DoJ will be responsible for prosecution where the suspect is not subject to the UCMJ.⁵⁹

Legal Advisers

Each head of a DoD component must make qualified legal advisors available at appropriate levels of command to provide advice about law of war compliance during planning and execution of exercises and operations.⁶⁰ Each combatant commander must also direct the command staff judge advocate to advise on the implementation of the law of war program, including advising command staff responsible for investigations or operational reporting on reportable incidents.⁶¹

METHODS OF ENFORCEMENT

In the event of a violation of the law of war by a belligerent in an international armed conflict, a State may resort to one or more of the following methods to respond:⁶²

1. Publication of the facts, with a view to influencing public opinion against the offending belligerent;
2. Protests and demands to the offending party, including demands for compensation⁶³ or the punishment of enemy persons who have violated the law;
3. Solicitation of the good offices, mediation, or intervention of neutral States for the purpose of making the enemy observe the law of war;
4. Petition to the UN Security Council;⁶⁴

⁵⁷ See DoDI 5525.07, Implementation of the Memorandum of Understanding Between the Department of Justice and the Department of Defense Relating to the Investigation and Prosecution of Certain Crimes (18 June 2007).

⁵⁸ DoD is required to notify DoJ of any significant cases in which the subject or victim is not a Service member or dependent. *Id.* Encl. 2, para. C.2(a).

⁵⁹ *Id.* Encl. 2, para. C.2(b).

⁶⁰ DoDD 2311.01, *supra* note 2, para. 2.6.c.

⁶¹ *Id.* para. 2.9.c.

⁶² DoD LAW OF WAR MANUAL, *supra* note 1, § 18.10.

⁶³ Hague IV, *supra* note 5, Art. 3 states: “A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.”

⁶⁴ UN Charter Art. 34 provides that the UN Security Council “may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.”

5. Punishment of captured offenders as war criminals,⁶⁵ either through national or international tribunals;
6. Subjecting the offending belligerent to retorsion;⁶⁶ and
7. Subjecting the offending belligerent to reprisals.

REPRISALS

Reprisals are acts taken against a party that would otherwise be unlawful, in order to persuade that party to cease violating the law.⁶⁷ They are extreme measures of coercion, to include the use of force, used to help enforce the law of war by seeking to persuade an adversary to cease violations.⁶⁸ Reprisals should be distinguished from revenge, retaliation and collective punishment, as reprisals are not intended as a punishment against individuals with respect to past acts but rather as an incentive to force a party to comply with the law of war.

Under the law of war treaties signed following World War II, the international community has sought to limit the circumstances in which reprisals can be used. Notwithstanding these limitations, there is no customary international law prohibition on reprisals *per se*, and recent State practice indicates that States have yet to relinquish the possibility of exercising a right of reprisal in response to serious violations of the law of war to prevent further violations.

PROSECUTION OF WAR CRIMES UNDER U.S. LAW

A war crime under the law of war will also likely constitute a crime under U.S. domestic law, including the UCMJ. For example, the premeditated murder of a protected person by a U.S. service member, in violation of Article 32, GC IV, would also be punishable as murder under Article 118 of the UCMJ. Accordingly, persons subject to the UCMJ are ordinarily charged with violations of a specific provision of the UCMJ rather than a violation of the law of war.⁶⁹

Other Federal Crimes

Various provisions of U.S. criminal law can also be employed in prosecuting violations of the law of war. For example, the War Crimes Act authorizes the prosecution of individuals for certain

⁶⁵ Enemy privileged belligerents, who become prisoners of war on capture, may not be punished for belligerent acts but may be punished for violations of the law of war. *See U.S. v. Lindh*, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002): “Lawful combatant immunity, a doctrine rooted in the customary international law of war, forbids prosecution of soldiers for their lawful belligerent acts committed during the course of armed conflicts against legitimate military targets...” (citing GC III Arts. 87 and 99). Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.” *Id.* at 554 (citing *Ex Parte Quirin*, 317 U.S. 1, 30-31 (1942)).

⁶⁶ *See* GC I COMMENTARY at 342. Reprisals should be distinguished from retorsion, which is the withdrawal of benefits afforded by one belligerent to its enemy or to the armed forces or citizens of its enemy, where the withdrawn benefits exceed the benefits and protections required by the law of war. Thus, withdrawal of these extra benefits would not violate the law of war since the benefits were not required to be given in the first place.

⁶⁷ *See* GC IV COMMENTARY at 227.

⁶⁸ DoD LAW OF WAR MANUAL, *supra* note 1, § 18.18.

⁶⁹ MANUAL FOR COURTS-MARTIAL, R.C.M. 307(c)(2)(D) (2019) [hereinafter MCM].

war crimes if the victim or the perpetrator is either a U.S. national⁷⁰ or a member of the U.S. Armed Forces, whether inside or outside the United States. U.S. federal law also criminalizes acts of torture, attempts to commit torture, and conspiracy to commit torture outside the United States where the offender is a U.S. national or is located within the United States.⁷¹ Regardless of the nationality of the victim, the statute can be used to penalize torture committed or attempted outside the United States, which is considered a grave breach of the 1949 Geneva Conventions.⁷²

Other relevant provisions of U.S. law can be used to prosecute genocide;⁷³ murder or manslaughter of foreign officials, official guests, or internationally protected persons;⁷⁴ piracy;⁷⁵ and various acts involving biological weapons,⁷⁶ chemical weapons,⁷⁷ or nuclear weapons.⁷⁸ A number of these provisions limit their application to offenses committed within the United States or by or against citizens of the United States, but others, such as piracy, apply regardless of the location of the offense or the nationality of the offender or his or her victim(s).⁷⁹

Prosecution of Civilians and Former Military Members

1. ***Military Extraterritorial Jurisdiction Act of 2000 (MEJA)***. This law permits the U.S. government to prosecute individuals who committed certain offenses outside the United States while employed by or accompanying the U.S. armed forces; or while a member of the U.S. armed forces subject to the UCMJ.⁸⁰ Under MEJA, the U.S. government can assert jurisdiction over offenses that cannot otherwise be prosecuted under the UCMJ or other U.S. law, such as violations committed outside the United States by civilians accompanying the U.S. armed forces (*e.g.*, contractors and civilian employees) or by persons who were military members at the time of the offense but have since been discharged from the U.S. armed forces.⁸¹ Although not directed solely at war crimes,

⁷⁰ A “national of the U.S.” refers to a citizen of the United States, or a person who, though not a citizen of the United States, owes permanent allegiance to the United States. *See* 8 U.S.C. § 1101 (2014).

⁷¹ 18 U.S.C. § 2441. Note that 18 U.S.C. § 2340(1) (2004) defines torture as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.” 18 U.S.C. § 2340(2) defines “severe mental pain and suffering.”

⁷² 18 U.S.C. § 2340A(a) authorizes imprisonment up to twenty years, or if any person dies as a result of the torture, life in prison or death.

⁷³ *Id.* § 1091.

⁷⁴ *Id.* § 1116.

⁷⁵ *Id.* § 1651.

⁷⁶ *Id.* § 175.

⁷⁷ *Id.* § 229.

⁷⁸ *Id.* § 831.

⁷⁹ *Id.* § 1651.

⁸⁰ *Id.* § 3261(a). MEJA cannot be used against a member of the Armed Forces who is subject to the UCMJ unless (i) such member ceases to be subject to the UCMJ or (ii) an indictment or information charges that the member committed the offense with one or more other defendants, at least one of whom is not subject to the UCMJ. 18 U.S.C. § 3261(d).

⁸¹ Military retirees who continue to receive retired pay or hospitalization remain subject to the UCMJ. UCMJ Art. 2(a)(4), (5), 10 U.S.C. § 802(a)(4), (5).

MEJA broadens the circumstances under which the United States can prosecute U.S. civilians for violations of the law of war committed outside U.S. territory.⁸²

Foreign nationals, as well as U.S. citizens, who are employed by or accompanying U.S. forces, may be charged with offenses under MEJA. However, MEJA does not apply to offenses committed by persons who are nationals of, or ordinarily resident in, the country in which the offense occurred.⁸³

2. **UCMJ.** Section 2(a)(10), UCMJ, states that “in time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field” are subject to the UCMJ.⁸⁴ The term “in the field” has been construed to mean a military operation with a view toward engaging the enemy or a hostile force.⁸⁵ As such, only qualifying contingency operations conducted for the purpose of engaging an enemy or hostile force in combat qualify as the basis for this extended UCMJ jurisdiction. Military contingency operations conducted for other purposes, such as disaster relief, humanitarian assistance, or other non-combat missions, do not qualify for this UCMJ jurisdiction. Disciplinary authority over civilians is governed by the UCMJ, the Manual for Courts-Martial (MCM), and a SecDef Memorandum issued on March 10, 2008.⁸⁶

As a matter of DoD policy, when an offense that could be charged under the UCMJ or MEJA occurs, DoD consults with DoJ on who will exercise federal jurisdiction. However, while the notification and decision is pending, commanders and military criminal investigators should continue to investigate the alleged crime. Commanders should also ensure that any preliminary military justice procedures that would be required in support of UCMJ jurisdiction over civilians continue to be accomplished during the concurrent DoJ notification process. Commanders should be prepared to act should U.S. federal criminal jurisdiction prove unavailable to address the alleged criminal behavior.⁸⁷

⁸² Federal crimes that could be charged under MEJA to address war crimes include murder (18 U.S.C. § 1111), manslaughter (18 U.S.C. § 1112), attempt to commit murder or manslaughter (18 U.S.C. § 1113), kidnapping (18 U.S.C. § 1201), hostage taking (18 U.S.C. § 1203), malicious mischief (18 U.S.C. §§ 1361-1369) and various forms of sexual abuse (18 U.S.C. §§ 2241-2245).

⁸³ 18 U.S.C. § 3267 defines the terms “employed by the Armed Forces outside the U.S.” and “accompanying the Armed Forces outside the U.S.” and excludes persons who are “a national of or ordinarily resident in the host nation.” As a matter of DoD policy, persons with dual citizenship who are citizens of the host nation are not subject to MEJA. DoDI 5525.11, Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members, para. 6.1.7 (3 March 2005).

⁸⁴ 10 U.S.C. § 802(a)(10).

⁸⁵ *U.S. v. Smith*, 10 C.M.R. 350 (A.B.R. 1952); 14 Op. Att’y Gen. 22 (1872) (“The words ‘in the field’ imply military operations with a view to an enemy. When an army is engaged in offensive or defensive operations, it is safe to say that it is an army ‘in the field.’”); William Winthrop, *Military Law and Precedents* (2nd. Ed., 1920) at 100.

⁸⁶ Robert Gates, Secretary of Defense, DTM-08-009, “UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations,” (10 March 2008) incorporating Change 1, September 23, 2010 [hereinafter UCMJ Jurisdiction Over Civilians Letter]. The letter also specifies who within DoD can convene a court-martial to pursue charges against a civilian or impose non-judicial punishment on a civilian. *Id.* Attachment 2.

⁸⁷ UCMJ Jurisdiction Over Civilians Letter, Attachment 2.

PROSECUTION OF WAR CRIMES UNDER INTERNATIONAL LAW

Forum Considerations Connected With Status of the Accused

1. Ordinarily, U.S. service members should be tried by court-martial under appropriate provisions of the UCMJ or, if separated from the military, in federal court under applicable federal law, such as the War Crimes Act.⁸⁸
2. Civilians who commit war crimes while serving with or accompanying U.S. forces outside the United States can be charged under the War Crimes Act or other federal law and tried in federal court. Where those crimes occur outside the United States, MEJA may provide the necessary jurisdiction, and, in time of war, civilians serving with or accompanying an armed force also may be tried by court-martial for violations of the UCMJ.⁸⁹
3. The United States may only prosecute enemy prisoners of war or retained personnel captured in an international armed conflict who commit war crimes (either pre-capture or while detained) in the same military tribunals that are used to try offenses committed by U.S. service members (*i.e.*, courts-martial).⁹⁰
4. Persons who are not entitled to POW status include unprivileged belligerents in an international armed conflict subject to the Geneva Conventions and any enemy belligerent captured in a conflict that is not such an international armed conflict. Thus, the United States may prosecute such persons by court-martial for violations of the law of war. Such persons may also be prosecuted in federal civilian courts for violations of U.S. law (including the War Crimes Act) if the offenses were committed in the United States or by U.S. citizens, committed against U.S. persons or property, or otherwise subject to U.S. jurisdiction (*e.g.*, some crimes committed outside the United States are subject to U.S. jurisdiction even though lacking any connection with U.S. persons or property).
5. An accused who meets the definition of an “alien unprivileged enemy belligerent” under the terms of the U.S.C.⁹¹ may also be tried before a military commission for offenses that are triable by military commission under the terms of the Act.⁹²

⁸⁸ 18 U.S.C. § 2441. Where the United States and a foreign national both claim jurisdiction over a service member, “[a]s a matter of policy, efforts should be made to maximize the exercise of court-martial jurisdiction over persons subject to the UCMJ to the extent possible under applicable agreements.” MCM, *supra* note 69, II-10 (discussion of R.C.M. 201(d)).

⁸⁹ UCMJ Art. 2(a)(10), 10 U.S.C. § 802.

⁹⁰ GPW Art. 102. As civilians accompanying enemy forces would be entitled to status as POW, this provision would appear to limit trial of such civilians to courts-martial.

⁹¹ An “unprivileged enemy belligerent” is an individual who, not being entitled to treatment as a POW, “(A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of the alleged offense....” 10 U.S.C. § 948a(7) (2009). This definition is for the purposes of the Military Commissions Act (MCA) and care should be taken in applying the same test under the international law of war.

⁹² One example is spying, which is not a crime under the law of war, but is punishable under the MCA: 10 U.S.C. § 950t(27) (2018).

Punishments

If applicable U.S. law does not stipulate a specific punishment, punishments for violations of the law of war must be proportionate to the seriousness of the offense. The death penalty may be adjudged, but under GC III, a POW in an international armed conflict must be informed as soon as possible of the offenses, which are punishable by the death sentence under the law of the detaining State.⁹³ In addition, the death sentence cannot be pronounced on a prisoner of war in an international armed conflict unless the attention of the court has been particularly called to the fact that since the accused is not a national of the detaining power, he is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will.⁹⁴ Similar rules under GC IV apply to civilians in occupied territory who are charged with offenses by the occupying power.⁹⁵

CRIMINAL RESPONSIBILITY

Individual Responsibility

Any person who commits an act, which constitutes a crime under international law, is responsible for such crime and may be punished.⁹⁶ The fact that the law of the perpetrator's country does not impose a penalty for an act, which constitutes a crime under international law, does not relieve the person who committed the act from responsibility under international law.⁹⁷ Moreover, the fact that a person who committed an act, which constitutes a crime under international law, acted as a Head of State or other governmental official does not relieve him or her from responsibility under international law.⁹⁸ Finally, the fact that a person acted pursuant to the order of his or her government or of a superior does not relieve him or her from responsibility for acts that violate international law.⁹⁹

The rights and responsibilities of combatants and others derived from international law must be distinguished from their enforcement, which is a matter of state responsibility. Simply put, the obligations of combatants do not necessarily parallel those of their state or the party to the conflict to which they belong.¹⁰⁰ As an example, breaches of military discipline (including breaching applicable rules of engagement) which are punishable may not necessarily constitute violations of the law of war.

⁹³ GC III Art. 100. The Protecting Powers shall also be informed. Other offenses shall not thereafter be made punishable by the death penalty without the concurrence of the State of whose armed forces the prisoner is a member.

⁹⁴ *Id.* see also *Id.* Art. 87.

⁹⁵ GC IV Art. 68.

⁹⁶ See Principle I of the Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal [hereinafter Nuremberg Principles], UN GAOR, 5th sess., Supp. No. 12, at 11-14, UN Doc. A/1316 (1950).

⁹⁷ *Id.* Principle II.

⁹⁸ *Id.* Principle III. For example, in April 2012, the former President of Liberia, Charles Taylor, was convicted of war crimes by the Special Court of Sierra Leone.

⁹⁹ *Id.* Principle IV.

¹⁰⁰ R.R. Baxter, *So-Called 'Unprivileged Belligerency: Spies, Guerrillas, and Saboteurs'*, BYIL 323, 323 (1951).

Command Responsibility

1. **General.** Under the doctrine of command responsibility, commanders may be held liable for the criminal acts of their subordinates or other persons subject to their control, even if the commander did not personally participate in the underlying offenses.¹⁰¹ Thus, for instance, if the subordinates of a commander commit massacres or other atrocities against the civilian population of occupied territory or prisoners of war, the commander may be held responsible. Such responsibility may arise directly when the acts in question have been committed pursuant to an order of the commander concerned that clearly directs that such acts be carried out.¹⁰² Responsibility may also arise if the commander has actual knowledge,¹⁰³ or should have known, on the basis of reports received by him or through other means, that troops or other persons subject to the commander's control are about to commit or have committed a war crime, and he or she fails to take the

¹⁰¹ The U.S. Supreme Court, in *In Re Yamashita*, affirmed that a military commander could be held liable for crimes committed by those under his or her command, but did not outline the standard that was to apply in determining when a commander would be liable. After World War II, the Nuremberg tribunal case of *United States v. List et al.* commonly referred to as “The Hostages Case” seemed to introduce a more lenient standard where a commander would only be responsible if he failed to discover his subordinates’ actions from information already available to him. A different standard has been used in more recent international criminal tribunals. The ICTY and ICTR Statutes provide that acts committed by a subordinate do not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof. Finally, the Military Commissions Act, which provides for the prosecution of offenses by military commissions, includes the following standard of command responsibility that incorporates both the *United States v. List et al.* standard and the later international tribunal standards:

Any person punishable under this chapter who—

- (1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission;
- (2) causes an act to be done which if directly performed by him would be punishable by this chapter; or
- (3) is a superior commander who, with regard to acts punishable under this chapter, knew, had reason to know, or should have known, that a subordinate was about to commit such acts or had done so and who failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof, is a principal. 10 U.S.C. § 950q.

¹⁰² Ordering the commission of an offense is punishable under Art. 77 of the UCMJ. The “should have known” standard of command responsibility is not expressly included in Art. 77. Therefore, command responsibility may result in a commander being treated as a principal to offenses considered violations of the law of war in circumstances in which he or she would not be treated as a principal for those offenses under the UCMJ. However, in such circumstances, the substantive offense of failure to obey an order or regulation, or dereliction of duty under Art. 92 of the UCMJ, likely would apply as a separate offense that could be brought against the commander. *See also* ICTY Statute Art. 7(1), and ICTR Statute Art. 6(1)—both provide that a “person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to [the applicable articles of] the present Statute, shall be individually responsible for the crime.”

¹⁰³ Actual knowledge can be established by direct or circumstantial evidence. Factors to be considered in determining whether there is sufficient circumstantial evidence include the number of illegal acts; the type of illegal acts; the scope of illegal acts; the time during which the illegal acts occurred; the number and type of troops involved; the logistics involved, if any; the geographical location of the acts; the widespread occurrence of the acts; the tactical tempo of operations; the *modus operandi* of similar illegal acts; the officers and staff involved; and the location of the commander at the time. *See Prosecutor v. Delalić*, Case No. IT-96-21-T, Judgment, 386 (ICTY Trial Chamber, November 16, 1998) [hereinafter *Čelibići Trial Case*].

necessary and reasonable steps to ensure compliance with the law of war or to punish violators thereof.¹⁰⁴

2. **Standard for Culpability.** The theory of command responsibility is premised on the duty of the commander to maintain order and discipline within his command and to ensure compliance with applicable law by those under his command or control. Such a duty may derive from orders, directives or guidance issued by higher command, even if those orders, directives or guidance are not punitive in nature.¹⁰⁵ However, a commander is not strictly liable for all offenses committed by subordinates. The commander's personal dereliction must have contributed to or failed to prevent the offense.¹⁰⁶

NON-INTERNATIONAL ARMED CONFLICT (NIAC)

General

A NIAC is an armed conflict between either the armed forces of one or more States and organized or unorganized dissident or insurgent forces who are not acting on behalf of another State, or among two or more dissident and insurgent forces, none of which is acting on behalf of a State.¹⁰⁷ Unless recognized by the affected state as a belligerent (thereby elevating the struggle to an international armed conflict), such dissidents or insurgents do not have the right under international law to engage in belligerent acts. Rather, they are unprivileged belligerents who do not enjoy combatant immunity under international law. If captured by a State, they can be prosecuted under the criminal laws of the capturing State for acts committed against that State or its citizens, even if those acts would not rise to the level of war crimes in an international armed conflict. For example, an unprivileged belligerent could be prosecuted for acts committed in the course of normal military operations, such as wounding or killing an enemy belligerent or seizing, damaging or destroying enemy military property. This is true even if the unprivileged belligerent could show that his or her belligerent acts, if committed by a lawful combatant, would be permitted by the law of war. The status of the armed forces of a State against which the dissident or insurgent forces are fighting is managed under the prevailing municipal law (or any Status of Forces Agreement for armed forces from other states that might be assisting). Since States have historically denied

¹⁰⁴ The “should have known” standard stems from *U.S. v. List et al.*, *supra* note 103.

¹⁰⁵ See, e.g., the duties to prevent, report, and investigate violations of the law of war imposed under DoDD 2311.01E, *supra* note 2, and regulations, orders and directives issued pursuant to DoDD 2311.01E.

¹⁰⁶ Command responsibility is analogous in some respects to a violation of Art. 92 of the UCMJ, which authorizes punishment for failure to obey orders or regulations or for dereliction of duty by military personnel and other persons subject to the UCMJ, including a duty imposed “by treaty, statute, regulation, lawful order, standard operating procedure or custom of service.” MCM, *supra* note 69, pt. IV, para. 16.c. In the case of dereliction, punishment may be imposed for negligent as well as willful failure to perform the duty, as well as culpably inefficient performance of the duty. *Id.* para. 16.c.(3)(c). Mere ineptitude is not sufficient, however. *Id.* para. 16.c.(3)(d). Punishments under Art. 92 may include confinement, forfeiture of pay and, except in the case of culpably inefficient dereliction of duty, punitive discharge. *Id.* para. 16.e. Charges under Art. 92 may also form the basis for adverse administrative actions. While these are significant consequences, maximum punishments under Art. 92 are much shorter than those available if a commander were charged as a principal to serious law of war violations by subordinates under a theory of command responsibility.

¹⁰⁷ Traditionally, a NIAC occurs within a single State and involves dissidents or insurgents rebelling against the government of that State. The U.S. Supreme Court has indicated that the definition is broader, and includes any conflict other than a conflict between nations. *Hamdan v. Rumsfeld*, 548 U.S. 557, 628-31 (2006).

the application of LOAC to internal disputes within their own sovereign purview, international law is silent as to any right to engage in belligerent acts against the dissidents or insurgents, and consequently does not provide combatant immunity as a matter of international law. However, neither does international law seek to criminalize belligerent acts of State armed forces against the dissident or insurgent forces, provided those acts otherwise comply with the law of war.

Applicable International Law

Few treaties relevant to the law of war expressly apply to NIACs, although some clearly apply implicitly.¹⁰⁸ Only one article in each of the Geneva Conventions is relevant to the prosecution of war crimes in NIACs. Common Article 3 explicitly prohibits the following in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties:

1. Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
2. Taking of hostages;
3. Outrages upon personal dignity, in particular humiliating and degrading treatment; and
4. The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees, which are recognized as indispensable by civilized peoples.

Although these crimes represent serious violations of international law, they are not recognized as grave breaches under international law.¹⁰⁹ As a result, they are not expressly subject to the provisions of each of the Geneva Conventions that explicitly address war crimes. That said, U.S. domestic law recognizes criminal liability for certain grave breaches of Common Article 3 pursuant to the War Crimes Act.¹¹⁰

Moreover, Article 1 of the Certain Conventional Weapons Convention (CCW),¹¹¹ as amended, expressly applies to NIACs.¹¹² The United States ratified this amendment on 21 January 2009. Article I (3) of Amended CCW Protocol II also explicitly applies to “armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties.” Article 14(1) of Amended CCW Protocol II explicitly requires parties to take “all appropriate steps, including legislative and other measures” to “prevent and suppress” infractions of the Protocol,

¹⁰⁸ For example, the Genocide Convention bans acts of genocide “whether committed in time of peace or time of war” and whether they are committed by “constitutionally responsible rulers, public officials or private individuals,” but does not expressly refer to NIAC.

¹⁰⁹ Grave breaches are widely understood to be committed only in international armed conflict. *See, e.g., Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, para. 71 (October 2, 1995). Accordingly, notwithstanding the inclusion of offenses called “Grave Breaches of Common Article 3” in the War Crimes Act, these offenses are not grave breaches under international law.

¹¹⁰ 18 U.S.C. § 2441.

¹¹¹ The 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, adopted at Geneva, October 10, 1980, [hereinafter CCW], 1342 U.N.T.S. 137.

¹¹² Amendment to Article 1 of the 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 (CCW), December 21, 2001.

which would include criminalizing violations of Amended CCW Protocol II. The United States has complied with this requirement by enacting the Expanded War Crimes Act of 1997.¹¹³

Other law of war treaties that expressly address NIACs include AP II,¹¹⁴ which governs the conduct of military operations in NIACs and the protection of those who are *hors de combat*, and the 1954 Hague Convention,¹¹⁵ which governs the protection of cultural property in armed conflicts.¹¹⁶ Neither of these treaties expressly states that a violation of its provisions would be treated as a crime under international law. The United States is not a party to AP II, in that it has signed but not ratified AP II. The 1954 Hague Convention entered into force with respect to the United States on 13 March 2009.¹¹⁷

Neither Common Article 3 nor AP II expressly states that violations of their provisions are to be treated as war crimes. However, the United States has taken the position that violations of Common Article 3 are violations of the law of war triable by international tribunals such as the ICTY.¹¹⁸

U.S. Law

By amending the War Crimes Act, the United States has expressly criminalized violations of Common Article 3. The War Crimes Act, as amended, serves to ensure that serious violations of Common Article 3 committed by or against nationals of the United States that do not otherwise fall under the UCMJ or other federal criminal law (*e.g.*, a crime committed abroad by a United States national who is not subject to the UCMJ) can be prosecuted in a U.S. federal court.

The War Crimes Act also applies to violations of Articles 23, 25, 27 and 28 of the Hague Regulations. It is not clear whether violations of these Articles in a NIAC would attract the application of the Act. The Hague Regulations do not expressly apply to such conflict, though as the Nuremberg Tribunal found in 1945, the Hague Regulations reflect customary international law. Accordingly, it is possible that the War Crimes Act applies the cited Articles to all armed conflicts, howsoever characterized.

¹¹³ Pub. L. 105-118, Title V, § 583, 111 Stat. 2436 (1997).

¹¹⁴ 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, 1125 U.N.T.S. 609 [hereinafter AP II].

¹¹⁵ Convention for the Protection of Cultural Property in the Event of Armed Conflict, done at The Hague, May 14, 1954.

¹¹⁶ Only certain provisions of the 1954 Hague Convention expressly apply to NIACs. Chapter Four of the 1999 Second Protocol to the 1954 Hague Convention does provide for criminal responsibility for violations of its provisions, but these provisions do not expressly apply to NIACs. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Art. 3, March 26, 1999, 38 I.L.M. 769 (1999).

¹¹⁷ The United States has neither signed nor ratified any of the protocols to the 1954 Hague Convention.

¹¹⁸ See, *e.g.*, *War Crimes Act of 1995: Hearing on H.R. 2587 Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary*, 104th Cong., 2d sess. 12-13 (1996) (testimony of Michael J. Matheson, Principal Deputy Legal Advisor to the Dept. of State) available at <https://2009-2017.state.gov/s/I/65717.htm>. The ICTY has taken the same position with respect to Common Article 3. See, *e.g.*, *Prosecutor v. Tadić*, *supra* note 111, para. 128.

PEACETIME OPERATIONS¹¹⁹

U.S. forces may be involved in a broad spectrum of peacetime activities, such as peacekeeping and humanitarian assistance, that do not involve the waging of war, but which may lead to the application of military force, either in self-defense or in connection with a specific objective of the activity. In these operations other than war, it is unlikely that the law of war would apply as a matter of international law,¹²⁰ although, as noted above, the United States applies the law of war to all military operations as a matter of policy. In all cases, the UCMJ will continue to apply to the activities of the military members of U.S. armed forces, regardless of the nature of the operation.

¹¹⁹ Often referred to as “military operations other than war” or simply “operations other than war.”

¹²⁰ In cases in which the law of war does not apply as a matter of international law, it would be incorrect to characterize misconduct committed by or against U.S. personnel as a “war crime,” regardless of the seriousness of the misconduct. Of course, certain offenses under international law, such as genocide, can be committed both in peacetime and during war.

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Chapter 4

AIR LAW

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BACKGROUND

This chapter surveys a wide array of general international law topics relevant to air law and air operations during peacetime, including the characterization of airspace over national territory, territorial seas, and the high seas.

Air law (or aviation law) is derived primarily from two multilateral treaties: the 1944 Convention on International Civil Aviation (Chicago Convention)¹ and the 1982 United Nations Convention on the Law of the Sea (UNCLOS).² The Chicago Convention was adopted to facilitate the safe and orderly development of international civil aviation.³ Although the Chicago Convention only applies to civil aircraft,⁴ it contains key provisions along with UNLCOS which are relevant to state aircraft, including military aircraft (*e.g.*, definitions of national and international airspace).

UNCLOS reaffirms the traditional law and customs of the sea, but also contains important innovations contributing to the progressive development of international law.⁵ Although the United States is not a party to UNCLOS, it considers the navigation and overflight provisions to reflect customary international law.⁶ The legal regime recognized and established by the treaty serves as a foundation of international legitimacy supporting the global mobility of U.S. forces and is therefore of critical importance to U.S. national security. The treaty's key provisions include identifying the right of overflight over the high seas, and the right of transit passage over international straits and through archipelagos such as Indonesia. Though earlier treaties on the law of the sea existed, major defects included the failure to define the breadth of the territorial sea and the edge that simultaneously marks the boundary between national and international airspace.⁷

¹ Convention on International Civil Aviation, 7 December 1944, 61 Stat. 1180, T.I.A.S. 1591, 15 U.N.T.S. 295 (hereinafter Chicago Convention). The treaty entered into force in 1947 and as of 2020 has 191 participating State parties. A copy of the Chicago Convention is available at https://www.icao.int/publications/Documents/7300_cons.pdf (last visited 5 Apr 20).

² United Nations Convention on the Law of the Sea, 10 December 1982, 21 I.L.M. 1261 (hereinafter *UNCLOS*). A copy of UNCLOS is available at https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (last visited 5 Apr 20).

³ Chicago Convention, Preamble.

⁴ Chicago Convention, Art. 3(a): “This Convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft.”

⁵ Opened for signature on 10 December, 1982, UNCLOS entered into force in 1994 and as of 2020, has 168 participating State parties. The United States signed UNCLOS but did not ratify the treaty because it initially objected to provisions concerning deep seabed mining. Nevertheless, the United States accepts UNCLOS as reflecting either customary international law or an appropriate “balance of interests” worthy of recognition. Statement on United States Oceans Policy, 10 March 1983, 19 Weekly Comp. Pres. Doc. 383, *reprinted in* 22 I.L.M. 464 (1983). The United States follows UNCLOS and it has worked “both diplomatically and operationally to promote the provisions of [UNCLOS] as reflective of customary international law.” William H. Taft IV, Legal Advisor, U.S. Department of State, “Written Statement Before the Senate Armed Services Committee on 8 April 2004, Concerning Accession to the 1982 Law of the Sea Convention and Ratification of the 1994 Agreement Amending Part XI of the Law of the Sea Convention” available at <https://www.govinfo.gov/content/pkg/CHRG-108shrg99782/pdf/CHRG-108shrg99782.pdf> (last visited 7 Apr 20).

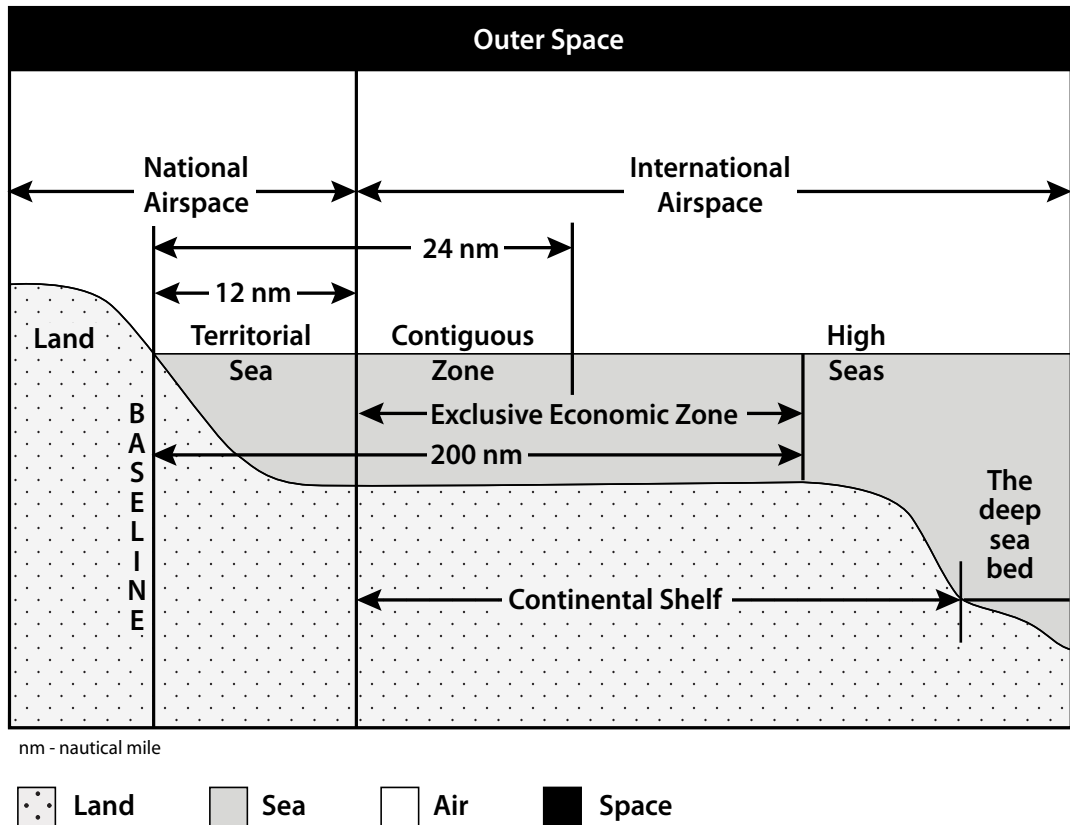
⁶ NWP 1-14, *The Commander's Handbook on the Law of Naval Operations* (August 2017), 1-1.

⁷ For example, the Convention on the High Seas of April 29, 1958, 13 U.S.T. 2312; T.I.A.S. 5200; 450 U.N.T.S. 82, Article 1, defined the “high seas” but did not identify the geographic width of the “territorial sea.”

AIRSPACE AND AIR NAVIGATION

Airspace is divided laterally into two regions: national and international airspace. These two regions are determined by the status of the land and/or the status of the water beneath them. In short, national airspace is that airspace above a State's land territory and territorial sea, while international airspace is airspace over international waters and non-sovereign land territory.⁸ It is therefore critical to know the exact status of the land or water to be overflown.

Figure 4.1. Legal Boundaries of Land, Sea, Air and Space



National Airspace

The Chicago Convention and UNCLOS codify the customary norm that every State enjoys complete and exclusive sovereignty over the airspace above its territory, with the exception of special navigation rights reserved to the international community.⁹ National airspace consists of the airspace above a State's land territory as well as its national waters.¹⁰ Terms synonymous with national airspace include "territorial airspace" or "sovereign airspace." National waters include

⁸ Chicago Convention, Art. 1; UNCLOS, Art. 2; and DoD LAW OF WAR MANUAL (June 2015), updated December 2016, § 14.2.1.

⁹ Chicago Convention, Art. 1 and UNCLOS, Art. 2. The exceptions are discussed herein.

¹⁰ Chicago Convention, Art. 2 and UNCLOS, Art. 2.

internal waters, territorial seas, and archipelagic waters.¹¹ National waters are under the territorial sovereignty of coastal and island States, subject to the right of innocent passage, transit passage, and archipelagic sea lane passage.¹² The right of innocent passage does not apply to the overflight of aircraft.¹³

Internal Waters. Internal waters are those waters landward of the baseline from which the territorial sea is measured.¹⁴ Lakes, rivers, harbors, some canals and bays, and lagoons are examples of internal waters.

Territorial Sea. A State's territorial sea extends seaward to a maximum breadth of 12 nautical miles from its baseline. Every island has its own territorial sea and, like mainland, has a baseline from which it is calculated. Rocks are islands that cannot sustain human habitation or economic life of their own. Provided they remain above water at high tide, they may possess a territorial sea. However, rocks do not possess an exclusive economic zone or continental shelf.¹⁵

Contiguous Zones. A contiguous zone is an area extending seaward from the baseline up to 24 nautical miles in which the coastal nation may exercise the control necessary to prevent or punish infringement of its customs, fiscal, immigration, and sanitary laws and regulations that occur within its territory or territorial sea.¹⁶ Ships and aircraft enjoy high seas freedoms, including overflight, in and above the contiguous zone.¹⁷

Exclusive Economic Zones. Exclusive economic zones (EEZs) are resource-related zones adjacent to a State's coast and extending beyond its territorial sea.¹⁸ They may extend up to 200 nautical miles from the baselines used to measure the territorial sea.¹⁹ In the EEZ, States enjoy the right to exercise the traditional high seas freedoms of navigation and overflight, of the laying of submarine cables and pipelines, and of all other traditional high seas uses by ships and aircraft that are not resource related.²⁰

¹¹ UNCLOS, Art. 2(1) and DoD LAW OF WAR MANUAL, § 14.2.1.1.

¹² UNCLOS, Art. 2(3).

¹³ Chicago Convention, Art. 3.

¹⁴ UNCLOS, Art. 8. Territorial seas and all other maritime zones are measured from baselines. In general, the baseline from which maritime claims of a nation are measured is the low-water line along the coast as marked on the nation's official large-scale charts. *Id.* Art. 5. Where it is impracticable to use the low-water line, as where the coastline is deeply indented or where there is a fringe of islands along the coast in its immediate vicinity, the coastal or island nation may instead employ straight baselines. *Id.* Art. 7. UNCLOS Part II, Section II (Articles 3-16) provides additional specific guidance for determining and measuring territorial sea limits with respect to reefs, mouths of rivers, bays, roadsteads, ports, low tide elevations and states with opposite or adjacent coasts.

¹⁵ *Id.* Art. 121.

¹⁶ *Id.* Art. 33.

¹⁷ DoD LAW OF WAR MANUAL, § 14.2.1.2.

¹⁸ UNCLOS, Art. 55.

¹⁹ *Id.* Art. 57.

²⁰ UNCLOS, Art. 58(1) and DoD LAW OF WAR MANUAL, § 14.2.1.2.

High Seas. The high seas form the largest part of international waters, comprising the part of the oceans that are not included in the EEZ, in the territorial sea or internal waters of a coastal State, or in the archipelagic waters of an archipelagic State.²¹ When a coastal or island State has not proclaimed an EEZ, the high seas begin at the seaward edge of the territorial sea.²²

Archipelagic Waters. An archipelagic nation is a nation that is constituted wholly of one or more groups of islands.²³ The national airspace of archipelagic States is the airspace above its islands, the territorial sea, and the archipelagic waters.²⁴

International Airspace

International airspace includes the airspace above land areas not subject to national sovereignty, such as Antarctica, and international waters. International waters consist of the maritime zones defined in UNCLOS: the contiguous zones, exclusive economic zones, and the high seas.²⁵

AIRCRAFT

Aircraft Defined. International law defines aircraft as machines that “can derive support in the atmosphere from the reactions of the air other than the reactions of the air against the earth’s surface.”²⁶ This definition includes both heavier-than-air and lighter-than-air objects, but excludes objects more properly viewed as projectiles, which do not derive support from the reactions of the air (*e.g.*, rockets). Under the Chicago Convention, there are two categories of aircraft: state and civil. The convention defines aircraft used in military, police and customs services as state aircraft.²⁷ Civil aircraft are aircraft which are not state aircraft and possess the nationality of the state in which they are registered.²⁸

Military Aircraft Defined. There is no settled definition of military aircraft in international law. However, as a general rule, military aircraft include all aircraft operated by commissioned units of the armed forces of a nation bearing the military markings of that nation, and commanded by a member of the armed forces.²⁹ Military aircraft may be manned or unmanned. International custom regarding national markings on military aircraft was developed to preclude any abuse or confusion as to who exercises control over the aircraft.³⁰ However, state practice has not established a requirement for an exclusively military crew.

²¹ UNCLOS, Art. 86.

²² U.S. DEP’T OF NAVY, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, para. 1.6.3.

²³ UNCLOS, Art. 46

²⁴ *Id.* Arts. 46 and 49.

²⁵ DoD LAW OF WAR MANUAL, § 14.2.1.2.

²⁶ Chicago Convention, Annex 7.

²⁷ *Id.* Art. 3.

²⁸ *Id.* Art. 17.

²⁹ DoD LAW OF WAR MANUAL, § 14.3.3.

³⁰ *Id.* para. 14.3.3.2.

Status of Military Aircraft. As military aircraft are state aircraft within the meaning of the Chicago Convention, they enjoy sovereign immunity from foreign searches, inspections, and taxation.³¹ Local officials may not board military aircraft of another State without the consent of the aircraft commander. The territorial sovereign may not arrest or seize foreign military aircraft lawfully in its territory, but it may order the aircraft to promptly leave. U.S. military aircraft commanders should not authorize boarding, search, seizure, inspection, or similar exercises of jurisdiction by foreign authorities, except by direction of the appropriate service headquarters or the U.S. embassy in the country concerned.³²

Additionally, consistent with international custom and practice, U.S. policy provides that military aircraft are not required to pay en route navigation fees or other charges imposed for transiting flight information regions (FIRs) in international airspace.³³ U.S. policy also provides that military aircraft are not required to pay navigation and overflight fees for flights in or through another state.³⁴ Finally, military aircraft are not required to pay landing or parking fees or other use fees at foreign government airports.³⁵ Landing and parking fees may be paid at non-governmental airports.³⁶ Disputes have arisen with some host nations on the issue of landing and parking fees. The United States uses the Interagency Working Group on Aviation Fees to determine whether it will regard an airport to be a government or non-governmental airport. Where fees are payable, U.S. military aircraft, as with all U.S. state aircraft, will pay reasonable fees based on International Civil Aviation Organization standards or some lesser negotiated sums for parking and landing. Reasonable fees for services requested (*e.g.*, fuel and routine maintenance fees) are routinely paid regardless of the type of airport.

³¹ The 1919 Paris Convention was the only air law instrument to expressly codify the rule that military aircraft are entitled to “the privileges which are customarily accorded to foreign ships of war.” Convention Relating to the Regulation of Aerial Navigation, 13 October 1919, 297 L.N.T.S. 173 (1922), Art. 32. Although this provision was not included in the Chicago Convention, Professor John Cobbs Cooper, the chairman of the committee who drafted and reported Article 3 of the Chicago Convention, stated:

It is felt that the rule stated in the Paris Convention that aircraft engaged in military services should, in the absence of stipulation to the contrary, be given the privileges of foreign warships when in national port is sound and may be considered as still part of international air law even though not restated in the Chicago Convention.

John Cobb Cooper, “A Study on the Legal Status of Aircraft” in Ivan A. Vlastic, ed., *Explorations in Aerospace Law* (Montreal: McGill U. Press, 1968) 205 at 243. The UNCLOS confirms that military and other government aircraft enjoy sovereign immunity the same as a warship. See UNCLOS, Art. 42(5) (addressing international responsibility of state of registry for loss or damage caused by aircraft entitled to sovereign immunity during transit passage), Art. 236 (like warships, military and other government aircraft are expressly immune from provisions regarding the protection and preservation of the marine environment).

³² DoD FOREIGN CLEARANCE MANUAL (30 September 2019), para. C2.2.5.

³³ *Id.* para. C2.1.7.2.

³⁴ *Id.* para. C2.1.7.1.1.

³⁵ *Id.* para. C2.1.7.1.2

³⁶ *Id.* para. C2.1.7.3.

Status of Civil Aircraft Chartered by the Department of Defense (DoD). The United States regularly charters civil aircraft to provide air transportation and other services. Such aircraft retain their status as civil aircraft unless the U.S. Government specifically designates them as state aircraft.³⁷ The United States normally does not make such a designation. Unless designated as state aircraft, aircraft chartered by the DoD are subject to the rules and regulations applicable to international civil aviation. Although many Status of Forces Agreements, base rights, and other agreements grant civil aircraft chartered by the DoD the same privileges of access, exit, and freedom from landing fees and other similar charges enjoyed by U.S. military aircraft, such agreements do not have the effect of declaring chartered aircraft to be military or any other form of state aircraft. Consequently, civil aircraft chartered by the DoD are not immune from landing or similar fees or from foreign search and inspection.³⁸

Civil and Public Aircraft under U.S. Legislation. Designating an aircraft as a “state aircraft” has ramifications for international navigation. For the purposes of U.S. federal air transport legislation—and for navigation within U.S. territory—aircraft are either “civil” or “public.”³⁹ The term “public aircraft” generally includes those aircraft owned and operated by the armed forces, or those aircraft chartered by the armed forces and specifically designated as “public.”⁴⁰ If an aircraft is contracted to support an Air Force mission (for example, to support close air support training at an Air Force range), and is designated a public aircraft, the Air Force becomes responsible for oversight of the operation, to include airworthiness, aircrew qualification and training, maintenance and procedures, and safety standards.⁴¹ Unlike civil aircraft operations, public aircraft operations are not subject to Federal Aviation Administration (FAA) oversight.⁴²

Foreign State Aircraft. The U.S. Government does not impose air navigation charges on foreign state aircraft visiting or transiting the United States. Foreign state aircraft are not charged landing and parking fees at U.S. Government airports (military airfields). The U.S. Government has no control over the fees charged at non-U.S. Government (*e.g.*, state or municipally operated) airports, where foreign aircraft generally are charged parking and landing fees.⁴³

³⁷ DoD LAW OF WAR MANUAL, § 14.3.1.

³⁸ DoD FOREIGN CLEARANCE MANUAL, para. C2.1.8 and SecState Message, “U.S. Government Policy on Aviation-Related Fees,” 011542Z August 2007 (STATE 106799) (on file with HQ AF/JAO)

³⁹ 49 U.S.C. § 40102(a)(16): “‘civil aircraft’ means an aircraft except a public aircraft.”

⁴⁰ 49 U.S.C. § 40125(c).

⁴¹ AFPD 10-36, *Contracted Air Support for Adversary Air and Close Air Support Training* (5 June 2017).

⁴² FAA Advisory Circular 00-1.1B, *Public Aircraft Operations – Manned and Unmanned* (21 September 2018), para. 7.1

⁴³ *Id.* SecState Message (STATE 106799).

AIR NAVIGATION

National Airspace

As has been previously noted, every nation has complete and exclusive sovereignty over its national airspace. The unauthorized or improper entry of foreign aircraft into a State's national airspace is a violation of that State's sovereignty. There is no customary right of innocent passage for foreign aircraft to fly over any portion of another State's land territory, internal waters, territorial sea, or archipelagic waters analogous to the right of innocent passage enjoyed by surface ships.⁴⁴ Launching and recovery of aircraft by ships undergoing innocent passage are likewise not allowed.⁴⁵ Except for overflight of international straits and archipelagic sea lanes discussed below, all States have complete discretion in regulating or prohibiting flights within their national airspace.⁴⁶

Under the Chicago Convention, civil aircraft on scheduled international air service require "special permission" from the overflown state to transit that State's airspace.⁴⁷ This permission is often granted through the extensive use of multilateral and bilateral international agreements concerning overflight, landing and traffic rights.⁴⁸ Civil aircraft on non-scheduled international air service are not required to obtain prior permission to overfly or land in the territory of another state.⁴⁹ However, the state overflown may require the aircraft to land for inspection and may impose regulations, obligations, or limitations it considers desirable.⁵⁰ Furthermore, no civil aircraft engaged in international navigation may transport munitions, implements of war, or other prohibited cargo over the territory of any state without the special permission of that state.⁵¹

The Chicago Convention mandates that no state aircraft, to include its military aircraft, may overfly or land in the territory of another State without authorization by special agreement.⁵² Such situations often occur on an ad hoc basis and absent a standing agreement, a state aircraft wishing to enter a foreign State's national airspace must obtain special authorization; identify itself; seek or confirm permission to land or transit; and obey all reasonable orders to land, turn back, or fly a prescribed course and/or altitude. This special authorization is referred to as a diplomatic flight clearance.⁵³

⁴⁴ Chicago Convention, Art. 3.

⁴⁵ UNCLOS, Art. 19(2).

⁴⁶ DoD LAW OF WAR MANUAL, § 14.2.1.

⁴⁷ Chicago Convention, Art. 6.

⁴⁸ See also *International Air Services Transit Agreement*, Art. 1 ("Transit Agreement"). For States that are parties to both the Chicago Convention and Transit Agreement, the "special permission" referenced in Chicago Convention Art. 6 is granted for non-stop transit and non-traffic stops. As of 2020, there are 133 State parties to the Transit Agreement.

⁴⁹ Chicago Convention, Art. 5.

⁵⁰ *Id.* Arts. 5 and 16.

⁵¹ *Id.* Art. 35.

⁵² *Id.* Art. 3(c).

⁵³ The procedures for U.S. military aircraft to obtain diplomatic clearances to enter a foreign State's national airspace are found in the DoD FOREIGN CLEARANCE GUIDE. The procedures for foreign state aircraft to obtain diplomatic clearance to enter U.S. airspace is available at <https://www.state.gov/diplomatic-aircraft-clearance-procedures-for-foreign-state-aircraft-to-operate-in-united-states-national-airspace/> (last visited 5 April 2020).

Aircraft in Distress. Aircraft in distress are entitled to special consideration and must be allowed entry and emergency landing rights.⁵⁴ State aircraft in distress are permitted under principles of customary international law to make emergency landings in the territory of another State without permission of that State.⁵⁵ Aircrew must be treated humanely and the aircraft permitted to depart. A state aircraft on the ground as a result of distress continues to enjoy sovereign immunity. This immunity precludes search, inspection or detention of the aircraft without *consent*. As noted earlier, U.S. military aircraft commanders will not authorize boarding, search, seizure, inspection, or similar exercises of jurisdiction by foreign authorities except by direction of the appropriate service headquarters or the U.S. embassy in the country concerned. Moreover, U.S. consular officials shall be free to communicate with the aircrew and vice versa. The U.S. consular post must be informed if any U.S. persons are detained. Consular officials have the right to visit any detained U.S. citizens.⁵⁶

Right of Assistance Entry (RAE). Unauthorized entry into national airspace is normally considered a breach of a coastal or archipelagic State's sovereignty. However, all ship and aircraft commanders have an obligation to assist those in danger of being lost at sea.⁵⁷ This long recognized duty to render emergency assistance to those in danger or distress at sea permits entry by foreign ships, or under certain circumstances, aircraft into the coastal or archipelagic state's national airspace over the territorial sea or archipelagic waters without its consent. The customary international law of RAE is more fully developed for vessels than for aircraft and applies only when the location of danger or distress is reasonably well known. It does not extend to entering the airspace over the territorial sea to conduct an area search, which requires the consent of the coastal state. Moreover, the efforts to render emergency assistance must be in good faith and not as a subterfuge. Operational commanders should notify the appropriate State's authorities of the entry to promote international comity, avoid misunderstanding, and alert local rescue and medical assets.⁵⁸ Specific guidance for using military aircraft during RAE missions is found in CJCSI 2410.01D, *Guidance for the Exercise of Right-of-Assistance Entry*, para. 6(c)(2).⁵⁹

Violation of National Airspace. If a U.S. military aircraft violates foreign national airspace (or a violation is alleged to have occurred), the DoD Foreign Clearance Manual outlines the procedures to be followed to report violations.⁶⁰

⁵⁴ Chicago Convention, Art. 25.

⁵⁵ William R. Slomanson, *Fundamental Perspectives on International Law*, 6th Ed. (Boston, MA: Wadsworth Cengage Learning), 329.

⁵⁶ Vienna Convention on Consular Relations, 24 April 1963, 21 U.S.T. 77; T.I.A.S. 6820; 596 U.N.T.S. 261, Art. 36.

⁵⁷ UNCLOS, Art. 98.

⁵⁸ CJCSI 2410.01D, *Guidance for the Exercise of Right-of-Assistance Entry* (31 August 2010), para. 6(c)(4).

⁵⁹ *Id.* para. 6(c)(2). Another important document with regard to the right of assistance entry is the Statement of Policy by the Department of State, the Department of Defense and the United States Coast Guard Concerning the Exercise of the Right of Assistance Entry of 8 August 1986. *See Id.* which implements the policy statement.

⁶⁰ DoD FOREIGN CLEARANCE MANUAL, para. C2.2.4.

International Airspace

International airspace is open to the aircraft of all States and includes the airspace over contiguous zones, EEZ, the high seas, and territories not subject to national sovereignty (*e.g.*, Antarctica). The International Civil Aviation Organization (ICAO) performs an important function in promoting the safety of navigation of civil aircraft in international airspace. ICAO publishes “Rules of the Air,” which are mandatory for civil aircraft in international airspace.⁶¹

While the ICAO Rules of the Air are not compulsory for state aircraft, the Chicago Convention requires that state aircraft operate with due regard for the safety of navigation of civil aircraft.⁶² This obligation is identical to the obligation to show due regard in the UNCLOS. U.S. military aircraft as a matter of policy follow ICAO flight procedures on routine point-to-point flights

⁶¹ Chicago Convention, Art. 12 (“Over the high seas, the rules in force shall be those established under this Convention. Each contracting State undertakes to insure the prosecution of all persons violating the regulations applicable.”). The “Rules of the Air” are contained in Annex 2 of the Chicago Convention.

⁶² *Id.* Art. 3(d). The position of the United States Government on the effect of Article 3 on the relationship of the Chicago Convention to state aircraft was stated in 1964:

The Chicago Convention expressly excludes state aircraft from its scope and thus from the scope of ICAO responsibility. The United States intends that its state aircraft will follow the ICAO procedures set forth in Annex 2 to the greatest extent practicable; however, the United States considers that state aircraft of any nation are subject to control and regulation exclusively by that nation (unless operating within airspace over which another nation has sovereignty). With respect to State aircraft, contracting States need not undertake any commitment, and the United States does not undertake any commitment, to other nations as to the rules and regulations which any specific state aircraft or class of state aircraft will follow, except when issuing regulations for their state aircraft, that ‘they will have due regard for the safety of navigation of civil aircraft.’ (Article 3(d), Chicago Convention).

In the application of these principles to all areas of civil/military coordination,...it is the position of the United States that when aircraft used in the military services of contracting States, are operating in international airspace in which another State is responsible, under ICAO arrangements, for the provision of civil air traffic services, States operating such aircraft should in their discretion, and the United States will in its discretion, advise the other States of the procedures being utilized by such aircraft. The State providing air traffic services can thus better judge what information concerning aviation activities in the area should be given to the authorities operating such state aircraft and what information or air traffic clearances should be given to civil aircraft in the vicinity. While contracting States operating such state aircraft should consider any information so received to determine whether, and the extent to which, they should utilize the information in controlling these aircraft activities, no State is required to obtain the concurrence of any other State when issuing rules, regulations or operating instructions for its state aircraft operating in international airspace....

Because the Chicago Convention does not apply to state aircraft, contracting States are under no obligation to give to ICAO the notification of differences contemplated by Article 38 of the Convention when state aircraft are not complying with international Standards established by ICAO; nor is there any requirement to notify ICAO of noncompliance by state aircraft with international Recommended Practices and Procedures.

Department of State Airgram CA-8085, 13 February 1964, *quoting* U.S. Inter-Agency Group on International Aviation (IGIA) Doc. 88/1/1C, MS, Department of State, file POL 31 U.S., *reprinted in* WHITEMAN DIGEST OF INTERNATIONAL LAW, Vol. 9 at 430-31.

through international airspace, which satisfies the requirement of due regard.⁶³ When U.S. military aircraft conduct classified missions or politically sensitive operations, aircraft flight commanders need not follow ICAO flight procedures but may operate under due regard, in which they will conduct their own air traffic control for purposes of separating their aircraft from other air traffic.⁶⁴ Additional guidance regarding due regard flight procedures is contained in DoDI 4540.01, *Use of International Airspace by U.S. Military Aircraft and for Missile and Projectile Firings*.

International Straits. UNCLOS extends territorial seas up to 12 nautical miles from a State's baseline, effectively closing over 100 international straits that are narrower than 24 nautical miles and are absorbed in the territorial seas of the coastal states over which there is no right to overflight. Such straits include the Straits of Gibraltar, Bab el Mandeb, Hormuz, and Malacca.⁶⁵ UNCLOS introduced a new legal regime—transit passage—which allows both ships and aircraft to enjoy passage through these straits. Transit passage is available for straits used for international navigation through the territorial sea between one part of the high seas or an EEZ, and another part of the high seas or EEZ.⁶⁶ All aircraft, including military aircraft, enjoy the right of unimpeded transit passage through the airspace above international straits overlapped by territorial waters.⁶⁷ Such transits must be continuous and expeditious in the normal modes of operation, and the aircraft involved must refrain from the threat or the use of force against the sovereignty, territorial integrity, or political independence of the nation or States bordering the strait; the aircraft must otherwise refrain from any activity other than those incident to their normal modes of continuous and expeditious transit.⁶⁸ The exercise of the right of overflight by aircraft engaged in the transit passage of international straits may not be suspended during peacetime.⁶⁹ UNCLOS, however, imposes two obligations on all aircraft engaged in transit passage. First, civil aircraft must observe the “Rules of the Air” established by ICAO while state aircraft must operate with due regard for the safety of navigation.⁷⁰ Secondly, civil and state aircraft must at all times monitor the radio frequency assigned by the ICAO designated air traffic control authority or the appropriate international distress radio frequency.⁷¹

⁶³ DoDI 4540.01, *Use of International Airspace by U.S. Military Aircraft and for Missile and Projectile Firings* (2 June 2015), incorporating Change 1, 22 May 2017, Encl. 3, para. 3(b).

⁶⁴ DoD LAW OF WAR MANUAL, § 14.1.1.4.

⁶⁵ UNCLOS does not purport to affect the existing legal regime in straits in which passage is regulated by long-standing international conventions in force specifically relating to such straits. UNCLOS, Art. 35(c). For example, transit passage does not apply to the Bosphorus and Dardanelles straits which are governed by the Montreux Convention of 1936.

⁶⁶ UNCLOS, Art. 37.

⁶⁷ UNCLOS, Art. 38.

⁶⁸ *Id.* Art. 39. The importance of the right of transit passage over an international strait was illustrated during the 1986 Operation EL DORADO CANYON mission. U.S. Air Force F-111s and KC-135s operating from England and bound for Libya were denied overflight access over continental Europe by the French, Spanish, Italian, and German governments. As a result, the fighter-bombers and their tankers had to take a circuitous route from the United Kingdom south over the Atlantic Ocean, through the Strait of Gibraltar, and eastward over the Mediterranean Sea before turning south to attack Libya. The right of transit passage ensured the United States access to Libya that would have otherwise been denied. Walter J. Boyne, “El Dorado Canyon,” *Air Force Magazine* (March 1999) available at <https://media.defense.gov/2016/Mar/09/2001475953/-1/-1/0/0399CANYON.PDF> (last visited 7 Apr 2020).

⁶⁹ *Id.* Art. 44.

⁷⁰ *Id.* Art. 39.

⁷¹ *Id.*

Archipelagic Sea Lanes. All aircraft, including military aircraft, enjoy the right of archipelagic sea lanes passage while transiting over archipelagic waters and adjacent territorial seas via all routes normally used for international overflight. The legal regime of archipelagic sea lanes passage is substantially the same as the legal regime for transit passage. Archipelagic sea lanes passage is defined under international law as the exercise of the freedom of overflight for the sole purpose of continuous, expeditious, and unobstructed transit through archipelagic waters, in the normal mode of operation by the aircraft involved.⁷² Archipelagic States may not legally require prior approval or notification for exercise of the right of archipelagic sea lane passage.⁷³ UNCLOS imposes the same two obligations on all aircraft engaged in archipelagic sea lanes passage as it does for transit passage.⁷⁴ Whether flying in accordance with ICAO rules and procedures, or flying with due regard, no diplomatic clearance need be sought from an archipelagic nation for archipelagic sea lanes passage. Archipelagic sea lanes passage cannot be suspended for any reason.⁷⁵ Additionally, there is no right of overflight through airspace over archipelagic waters outside of archipelagic sea lanes.⁷⁶

SPECIAL NAVIGATION ISSUES

Excessive Maritime Claims

The United States will protest excessive maritime claims and assert freedom of overflight in the airspace above international waters. As announced in President Ronald Reagan's U.S. Oceans Policy Statement of 10 March 1983:

The United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in [UNCLOS]. The United States will not, however, acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.

Further, *The Commander's Handbook on the Law of Naval Operations* notes:

When States appear to acquiesce in excessive maritime claims and fail to exercise their rights actively in the face of constraints on international navigation and overflight, those claims and constraints may, in time, be considered to have been accepted by the international community as reflecting the practice of States and as binding upon all users of the seas and superjacent airspace. Consequently, it is incumbent upon maritime States to protest diplomatically all excessive claims of coastal States and to exercise their navigation and overflight rights in the face of such claims.⁷⁷

⁷² *Id.* Art. 53(3).

⁷³ DoD FOREIGN CLEARANCE MANUAL, para. DL1.5. *See also* UNCLOS Arts. 54 and 44 and NWP 1-14 para. 2.5.4.1.

⁷⁴ UNCLOS, Art. 54 (incorporating by reference the provisions of Arts. 39, 40, 42 and 44).

⁷⁵ *Id.* Arts. 54 and 44.

⁷⁶ *Id.* Art. 1(1).

⁷⁷ U.S. DEP'T OF NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, para. 2.8.

The Freedom of Navigation (FON) Program implements U.S. policy to challenge excessive maritime claims.⁷⁸ Commanders and judge advocates should refer to combatant commander theater-specific guidance and appropriate operational orders (OPORDs) for specific guidance on the planning and execution of FON operations in a particular area of operations.

Security Zones

Some coastal States, including North Korea and Vietnam, have claimed the right to establish military security zones, beyond the territorial sea, of varying breadth, in which they purport to regulate or prohibit the activities of warships and military aircraft of other States. This includes such restrictions as prior notification or authorization for entry, limits on the number of foreign ships or aircraft present at any given time, prohibitions on various operational activities, or complete exclusion. International law does not recognize the right of coastal States to establish zones in peacetime that would restrict the exercise of non-resource-related high seas freedoms beyond the territorial sea. Accordingly, the United States does not recognize the peacetime validity of any claimed security or military zone seaward of the territorial sea that purports to restrict or regulate the high seas freedoms of navigation and overflight.

Air Defense Identification Zones

International law permits States establishing air defense identification zones (ADIZ) in the international airspace adjacent to their territorial airspace. Security zones are distinguishable from ADIZs, as the latter are merely a reporting and identification regime for civil aircraft used by coastal and island states. ADIZs are legally justified on the basis that a nation has the right to establish reasonable conditions of entry into its national airspace.⁷⁹ Accordingly, an aircraft approaching national airspace may be required to identify itself while in international airspace as a condition of entry approval. ADIZ regulations published by the United States apply to aircraft bound for U.S. territorial airspace and require the filing of flight plans and periodic position reports. Some States, however, purport to require all aircraft penetrating an ADIZ to comply with ADIZ procedures, whether or not they intend to enter national airspace. The United States does not recognize the right of a coastal or island nation to apply its ADIZ procedures to foreign aircraft in such circumstances.⁸⁰ Accordingly, U.S. military aircraft not intending to enter national airspace need not identify themselves or otherwise comply with ADIZ procedures established by other States, unless the United States has specifically agreed to do so.

Flight Information Regions

A flight information region (FIR) is a defined area of airspace within which flight information and alerting services are provided.⁸¹ FIRs are allocated to States by ICAO for the safety of civil aviation and encompass both national and international airspace. The FIR system ensures the provision of air traffic control and flight service to civilian air traffic. Coastal States often favor having FIRs allocated for reasons of prestige and the ability to charge flight service fees. Some States, however,

⁷⁸ DoDI S-2005.01, *Freedom of Navigation Program (FON) Program* (U) (20 October 2014) [this is a controlled document]; for further unclassified discussion of the FON Program, see U.S. DEP'T OF NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, para. 1.3.

⁷⁹ Chicago Convention, Art. 11 generally permits a contracting state to establish laws and regulations relating to the admission to its territory of aircraft engaged in international navigation. See also DoD LAW OF WAR MANUAL, § 14.2.4.1.

⁸⁰ DoD LAW OF WAR MANUAL, § 14.2.4.1.

⁸¹ *Id.* para. 14.2.3.

purport to require all military aircraft in international airspace within their FIRs to comply with FIR procedures, whether or not they utilize FIR services or intend to enter national airspace. The United States does not recognize the right of a coastal nation to apply its FIR procedures to foreign military aircraft in such circumstances. Accordingly, U.S. military aircraft not intending to enter national airspace need not identify themselves or otherwise comply with FIR procedures established by other States, unless the United States has specifically agreed to do so.⁸²

Warning Areas

Any nation may declare a temporary warning area on the high seas to advise other States of the conduct of activities that, although lawful, are hazardous to navigation and/or overflight. The United States and other States routinely declare such areas for missile testing, gunnery exercises, space vehicle recovery operations, and other purposes entailing some danger to other lawful uses of the high seas by others. Notice of the establishment of such areas must be promulgated in advance, usually in the form of a “notice to mariners” (NOTMAR) and “notice to airmen” (NOTAM).⁸³ Ships and aircraft of other States are not required to remain outside a declared warning area but are obliged to refrain from interfering with activities in it. Consequently, U.S. ships and aircraft may operate in a warning area declared by a foreign nation, collect intelligence, and observe the activities involved, subject to the requirement of due regard for the rights of the declaring nation to use the high seas for such lawful purposes.⁸⁴ The ships and aircraft of other States in a U.S.-declared warning area may do the same.

SELF-DEFENSE AND ARMED CONFLICT

In the event of imminent or actual hostilities, a State may find it necessary to take measures in self-defense that affect the status of international airspace and air navigation. A State may suspend provisions of the Chicago Convention during times of war, whether the State acts as a belligerent or neutral; a State may also suspend these provisions if it declares a state of national emergency and notifies ICAO of this fact.⁸⁵ Moreover, where countries are involved in international armed conflict, the law of war applies. Concepts such as neutrality may become relevant and may affect airspace and navigation rights/duties during the conduct of hostilities.

United Nations and Other Collective Action

Freedom of navigation in international airspace and the sovereignty of States with respect to their own national airspace may be impacted by action taken by the United Nations (UN) through the UN Security Council.⁸⁶ For instance, UN Security Council Resolution 816 tasked member states to enforce a “no-fly” zone in the airspace over the Republic of Bosnia-Herzegovina, clearly interfering with sovereign rights to national airspace. Furthermore, the use of the words “all

⁸² U.S. DEP’T OF NAVY, THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, para. 2.7.2.2.

⁸³ *Id.* para. 2.6.3.

⁸⁴ *Id.*

⁸⁵ Chicago Convention, Art. 89. The primary multilateral agreement granting civil aircraft on scheduled international air service the rights of overflight and landing in other states stipulates that “[i]n areas of active hostilities or of military occupation, and in time of war along the supply routes leading to such areas, the exercise of such privileges shall be subject to the approval of the competent military authorities.” *Air Services Transit Agreement*, Art. 1.

⁸⁶ UN Charter, Art. 43 obligates member states to assure “rights of passage” through national airspace for military aircraft engaged in actions undertaken pursuant to decisions of the UN Security Council.

necessary means” in UN Security Council Resolution 678 of 29 November 1990, dealing with the UN Security Council’s previous demand that Iraq withdraw from Kuwait (under UN Security Council Resolution 660 of 2 August 1990), gave the coalition forces the right to interfere with the use of international and national airspace insofar as it related to forcing the Iraqi forces to leave Kuwait. Regional security organizations may also, in certain circumstances, have the right to affect the use of international or national airspace.

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Chapter 5

SPACE LAW

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INTRODUCTION—WHAT SPACE BRINGS TO THE FIGHT

Space provides benefits for security, economics, and society, which is why the 2017 National Security Strategy asserts, “The United States considers unfettered access to space to be a vital interest. Any harmful interference with or an attack upon critical components of our space architecture that directly affects this vital U.S. interest will be met with a deliberate response at a time, place, and manner of our choosing.”¹ Combatant commanders must integrate space capabilities across all joint operations. Under joint doctrine, the space operations and associated capabilities that enhance unified action are: (1) Space Situational Awareness; (2) Space Control; (3) Position, Navigation, and Timing; (4) Intelligence, Surveillance, and Reconnaissance; (5) Environmental Monitoring; (6) Missile Warning; (7) Nuclear Detonation Detection; (8) Spacelift; and (9) Satellite Operations.² While some of these missions are self-explanatory, Space Situational Awareness, Space Control, and Position, Navigation, and Timing are further described below:

Space Situational Awareness (SSA) is the requisite foundational, current, and predictive knowledge characterization of space objects and the space environment on which space operations depend. SSA is enabled through the U.S. Space Surveillance Network, a network of optical sensors and radars positioned around the world. SSA is dependent on integrating space surveillance, collection, and processing; environmental monitoring, processing and analysis; status of U.S. and cooperative satellite systems; United States and multinational space readiness; and analysis of the space domain. It also incorporates the use of intelligence sources to provide insight into adversaries’ use of space capabilities and their threats to our space capabilities while in turn contributing to the Joint Force Commander’s ability to understand adversary intent.³

Space control operations support freedom of action in space for friendly forces, and when directed, defeat adversary efforts that interfere with or attack U.S. or allied space systems. It consists of offensive space control (OSC) and defensive space control (DSC). OSC operations consist of offensive operations conducted for space negation (*i.e.*, deceive, disrupt, degrade, deny, or destroy).⁴ DSC operations consist of all active and passive measures taken to protect friendly space capabilities from attack, interference, or unintentional hazards. DSC operations, particularly the prevention and negation of space control activities, can raise significant legal and policy questions.⁵

Position, Navigation, and Timing (PNT) systems provide military users with precise and accurate geolocation, navigation, and time reference services. Space-based PNT systems, or Global Navigation Satellite Systems (GNSS), such as the U.S.’s Global Positioning System (GPS), have become essential to both military and civilian operations. Accordingly, the United States must protect Assured PNT through the synergy of cyberspace, space, and electromagnetic warfare operations.⁶

¹ *National Security Strategy of the United States*, December 2017, available at <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf> (last visited 4 May 2020).

² JOINT PUBLICATION 3-14, *Space Operations* (10 April 2018) [hereinafter JP 3-14]. See also Air Force Doctrine Annex 3-14, *Counterspace Operations* (27 August 2018). Annex 3-14 identifies four space operations functions: Space Situational Awareness; Counterspace Operations; Space Support to Operations; and Space Service Support.

³ JP 3-14, at ch. 2, § A.2.

⁴ *Id.* at ch. 2, § A.3

⁵ *Id.*

⁶ *Id.* at ch. 2, § A.4.

THE LEGAL AND POLICY FRAMEWORK

Just as there are legal regimes which apply to air, land, and sea operations, there is a legal regime which applies to space operations. The legal regime for space is based on international law, particularly emanating from four core treaties that outline the fundamental principles of space law. Space law incorporates general principles of international law, including the United Nations (UN) Charter, the law of war and several international arms control agreements that directly impact military space activities. While the international legal regime imposes a few significant constraints, it is generally permissive with regard to military operations in space. However, a significant body of U.S. law, regulation, and policy places domestic constraints on space operations and must be considered.

The Core Space Treaties

The major principles applicable to space activity stem from four core space treaties—the Outer Space Treaty, the Rescue and Return Agreement, the Liability Convention, and the Registration Convention. All of the major space-faring States are party to these core treaties. These treaties apply to all space activities of the Parties; but they do not distinguish between military and non-military space activities. Some of the provisions of the Outer Space Treaty are now considered part of customary international law, meaning that they may bind even non-party States to the treaties.

It is notable that international law has no established boundary between airspace and outer space. Although States generally accept that there is a limit to the sovereign airspace above their territory, they have been unable to arrive at a consensus establishing where airspace ends and outer space begins as a matter of international law. Historically, the United States has opposed establishing a predetermined boundary under international law because once such a boundary is established, it could limit freedom of action and might preclude the ability to take advantage of evolving space technologies and capabilities. Notwithstanding the lack of an internationally-recognized legal line of demarcation between airspace and outer space, the U.S. Unified Command Plan (UCP) was changed in 2019 to establish U.S. Space Command as a Geographic Unified Combatant Command with an area of responsibility (AOR) that begins at 100 km above the surface of the Earth. Hence, as an example, the airspace over the Pacific Ocean falls within the AOR of USINDOPACOM, but at 100km and above the AOR belongs to USSPACECOM. The extent to which this demarcation in the UCP will affect other areas of state practice or the development of customary international law remains to be seen.

The Outer Space Treaty. The Outer Space Treaty is the cornerstone of the space legal regime.⁷ It contains broad principles regarding use and exploration of outer space, including the applicability of the UN Charter and other international law to space activity. The treaty imposes international obligations upon States and makes States responsible and liable for the activities of their nationals in outer space, whether governmental or non-governmental actors carry out those activities. The Outer Space Treaty also specifically prohibits certain military activities in space. All the remaining space-specific treaties are derived from and expand upon the general principles set out in this treaty.

⁷ *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*, 27 January 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205 (entry into force 10 October 1967, for the United States same date) [Outer Space Treaty].

The Rescue and Return Agreement. The Rescue and Return Agreement addresses the rescue of spacecraft personnel and the retrieval of space objects found outside the territory of the launching State. Specifically, it obligates State Parties to the Agreement to return any recovered personnel or objects to the launching State.⁸

The Liability Convention. This treaty renders States internationally liable for damage their space objects cause to other space objects or to objects in airspace or on the surface of the Earth. It describes the circumstances under which States may be held liable for such damage, and sets out procedures to follow in pursuing a claim for damages.⁹

The Registration Convention. To assist States in identifying responsibility over space objects, the Registration Convention requires a launching State to provide certain data to the UN as soon as practicable on every object the State launches into space. The UN publishes the data in a register available to the public via the Internet at <http://www.unoosa.org/oosa/en/SORegister/index.html>. This will be discussed further, later in this chapter.¹⁰

Telecommunications Law and the International Telecommunications Union

International telecommunications law is a specialized body of law with a significant impact on space operations. The International Telecommunications Union (ITU) has established three international treaties to which virtually all spacefaring States are parties: The Constitution of the ITU; the Convention of the ITU; and the Radio Regulations.¹¹ Through these governing documents, the ITU coordinates international telecommunications by regulation of the electromagnetic spectrum of frequencies used to communicate with satellites and of orbital slots in geostationary orbit. Military satellites are generally exempt from ITU rules, pursuant to Article 48 of the Constitution.

Disarmament Law and Other Agreements Impacting Military Space Operations

The 1963 *Limited Test Ban Treaty* forbids nuclear weapons tests or any other nuclear explosion under water, in the air, and in outer space.¹²

The Environmental Modification Convention (ENMOD). ENMOD prohibits military or hostile use of environmental modification techniques having widespread (encompassing an area on the scale of several hundred square kilometers), long-lasting (lasting for a period of months, or approximately a season), or severe effects (involving serious or significant disruption or harm to human life, natural and economic resources, or other assets) for purposes of destroying,

⁸ *Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space*, 22 April 1968, 19 U.S.T. 7570, T.I.A.S. No. 6599, 672 U.N.T.S. 119 (entry into force 3 December 1968, for the United States same date).

⁹ *Convention on International Liability for Damage Caused by Space Objects*, 29 March 1972, 24 U.S.T. 2389, T.I.A.S. No. 7762, 961 U.N.T.S. 187 (entry into force 1 September 1972, for the United States 9 October 1973).

¹⁰ *Convention on Registration of Objects Launched into Outer Space*, 14 January 1975, 28 U.S.T. 695, T.I.A.S. No. 8480, 1023 U.N.T.S. 15 (entry into force 15 September 1976, for the United States same date).

¹¹ *Constitution and Convention of the International Telecommunication Union*, December 22, 1992, T. Doc 104-34 (entry into force 1 July 1994, for the United States 26 October 1997); *Radio Regulations of the International Telecommunication Union* (2012).

¹² *Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water*, 5 August 1963, 14 U.S.T. 1313, 480 U.N.T.S. 43, T.I.A.S. 5433 (entry into force 10 October 1963, for the United States same date).

damaging, or injuring another State.¹³ The treaty applies on earth, in the atmosphere, and in outer space. This treaty does not prohibit environmental modification techniques used for purposes other than to destroy, damage, or injure another State, even if the techniques may have a severe environmental impact, and is intended to apply during times of armed conflict. Additionally, it has not been interpreted to outlaw the use of nuclear weapons.

Treaty on Measures for the Further Reduction and Limitation of Strategic Offensive Arms (New START). New START was signed by the United States and Russia in April 2010 and entered into force in February 2011.¹⁴ New START requires the United States and Russia to make specific reductions in their numbers of ICBMs and ICBM launchers, SLBMs and SLBM launchers, heavy bombers, ICBM warheads, SLBM warheads, and heavy bomber nuclear armaments. Unless extended, New START will remain in force for 10 years from the date it entered into force. New START impacts space operations in two ways. First, first stages of ICBMs accountable under the Treaty are used for space lift purposes. In the event that such first stages are incorporated into space launch vehicles, it will be necessary to comply with the relevant provisions of New START. Second, it prohibits interference with national technical means of verification (NTM), which implicitly includes satellites. The Treaty does not contain any constraints on testing, development or deployment of current or planned U.S. missile defense programs or long-range conventional strike capabilities.

Launch Notification Agreements. The 1971 Accidents Measures Agreement, the 1988 Ballistic Missile Launch Notification Agreement, and the 2000 Pre- and Post-Launch Notification System (PLNS) Memorandum of Understanding (MOU) are some of the bilateral agreements between the United States and Russia that require advance notice of ballistic missile and space object launches. The purpose of these agreements is to prevent a party from mistaking accidental launches, test launches, and unidentified objects as hostile launches. The United States is also a subscribing State to the Hague Code of Conduct Against Ballistic Missile Proliferation (HCOC). The HCOC is not a treaty, but subscribing States agree to various measures in order to curb the proliferation of ballistic missiles. Parties to the HCOC also agree to exchange pre-launch notifications of their ballistic missile and space vehicle launches and test flights.

United States Space Policies

National Space Policy. Presidential Policy Directive 4 of June 28, 2010, the National Space Policy, states that the United States considers space systems of all nations to have the rights of passage through, and conduct of operations in, space without interference. The United States will view purposeful interference with space systems, including supporting infrastructure, as an infringement of a nation's rights.¹⁵ The Policy notes that, in accordance with international law and consistent with the principle of "peaceful purposes," space may be used for national and homeland security activities. The policy also states that the United States will employ a variety of measures to help assure the use of space for all responsible parties and, consistent with the inherent right of self-defense, deter others from interference and attack, defend its

¹³ *Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques*, 18 May 1977, 31 U.S.T. 333 (entry into force 5 October 1978, for the United States 17 January 1980).

¹⁴ *Treaty on Measures for the Further Reduction and Limitation of Strategic Offensive Arms ("New START")*, 8 April 2010, U.S.-Russia, T. Doc 111-5 (entry into force 5 February 2011).

¹⁵ National Space Policy (2010), available at <https://www.space.commerce.gov/policy/national-space-policy/> (last visited 4 May 20).

space systems while contributing to the defense of allied space systems, and, if deterrence fails, defeat efforts to attack them.¹⁶ In a turn from the previous National Space Policy (2006), which declared that the United States would oppose the development of new legal regimes or other restrictions that would prohibit or limit United States access to or use of space, the 2010 National Space Policy states that the United States will consider arms control proposals and concepts if they are equitable, verifiable, and will enhance the national security of the United States and its allies. Finally, the 2010 National Space Policy requires approval from the head of the sponsoring department or agency (for DoD, the SecDef) to waive the space debris mitigation guidelines.

Space Policy Directive 1. Signed on December 11, 2017, SPD-1 expressly amended the 2010 Space Policy to include specific goals for civil space exploration, namely, the goals of returning humans to the Moon for long-term exploration and utilization, followed by human missions to Mars.¹⁷

Space Policy Directive 2. Signed on May 24, 2018, SPD-2 calls for streamlining regulations on commercial use of space and sets forth the policy that executive branch regulations promote economic growth; minimize uncertainty for taxpayers, investors, and private industry; protect national security, public safety, and foreign policy interests; and encourage American leadership in space commerce.¹⁸

Space Policy Directive 3. Signed on June 18, 2018, SPD-3 calls for the United States to develop a new approach to space traffic management (STM) that addresses current and future operational risks. It must set priorities for SSA and STM technological innovation, encourage growth in the commercial space sector, incorporate national security considerations, and promote best safety practices.¹⁹

Space Policy Directive 4. Signed on February 19, 2019, SPD-4 calls for the establishment of the U.S. Space Force and other national security measures, such as directing the SecDef and Director of National Intelligence to take steps to enhance collaboration and increase unity of effort.²⁰ The Space Force was established on December 20, 2019, upon the President's signature of the National Defense Authorization Act for Fiscal Year 2020.

National Space Strategy. The 2018 National Space Strategy is available to the public only in an abbreviated form as a Fact Sheet.²¹ It builds upon the 2017 National Security Strategy, emphasizing peace through strength in the space domain. The National Space Strategy recognizes that our competitors have turned space into a warfighting domain and affirms that any harmful interference with or attack upon critical components of the U.S. space architecture that directly affects this vital interest will be met with a deliberate response at a time, place, manner, and domain of our choosing. It prioritizes unfettered access to, and freedom to operate in space, in order to advance security, economic, and scientific interests.

¹⁶ *Id.* 3.

¹⁷ The Space Council Directives are available at <https://www.space.commerce.gov/policy/national-space-council-directives/> (last visited 4 May 20).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Fact Sheet, 2018 United States National Space Strategy, available at <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-unveiling-america-first-national-space-strategy/> (last visited 4 May 20).

DoD Space Policy. The 2012 DoD Space Policy (DoDD 3100.10) establishes DoD policy and assigns DoD responsibilities for space-related activities in accordance with the National Space Policy.

Standing Rules of Engagement. The U.S. Standing Rules of Engagement (SROE) contains a classified annex, Enclosure E, concerning space operations.²²

MAJOR LEGAL PRINCIPLES AND THEIR IMPLICATIONS FOR MILITARY SPACE ACTIVITIES

The Right to Freedom in Space

The Outer Space Treaty declares outer space, including the Moon and other celestial bodies, to be free for use and exploration by all States, even those that are not a party to the treaty.²³ Therefore, unless authorized by international law, no State or group of States may prohibit another State or group of States from accessing space or any areas on celestial bodies. In addition, unlike airspace over sovereign territory, States are free to operate in space even though their satellites “overfly” the territories of other States. However, the right of space objects to pass without authorization through foreign airspace en route to or from space is not widely accepted. The Freedom Principle forms the foundation of U.S. space policy’s emphasis on operating freely in space without interference, and is generally regarded as having been established as a principle of customary international law even before it was codified in the 1967 Outer Space Treaty.

Use of Space for Peaceful Purposes

The preamble to the Outer Space Treaty recognizes that it is in the common interest of all mankind to use space for peaceful purposes and Article IV of the treaty requires that the Moon and other celestial bodies be used exclusively for peaceful purposes. Notably, however, nothing in the Outer Space Treaty declares that space itself must be used for peaceful purposes, nor does it define “peaceful purposes.” Since 1962, even before the Outer Space Treaty was negotiated, the United States has worked to achieve international acceptance of the view that “peaceful” equates to non-aggressive activities, as opposed to “non-military.” The United States’ interpretation has become the majority interpretation. Thus, intelligence collection, missile early-warning, and transmission of military communications and navigation signals to, from, and through space all constitute non-aggressive, peaceful, and therefore lawful activities. The United States consistently bolsters this interpretation in its national policies, such as the 2010 National Space Policy which states that peaceful purposes allows for “space to be used for national and homeland security activities.” Furthermore, because Article 51 of the UN Charter recognizes the inherent right of States to engage in individual or collective self-defense, military use of force in space in response to an aggressor would not violate the peaceful purposes tenet of the treaty.

Militarization and Weaponization of Space

As explained above, nothing in the Outer Space Treaty prohibits the militarization of space generally, according to the majority view. Indeed, space has been used for military reconnaissance purposes since the beginning of the space age. Article IV of the Outer Space Treaty provides specific rules on militarization and weaponization. The Moon may not be militarized. In addition to declaring that the Moon and other celestial bodies are to be used “exclusively for peaceful

²² CJCSI 3121.01B, *Standing Rules of Engagement* (13 June 2005).

²³ Outer Space Treaty, Art. I.

purposes,” Article IV specifies that States shall not establish military bases, installations, and fortification and shall not conduct military maneuvers on the Moon or other celestial bodies.²⁴ Military personnel are not necessarily banned from the Moon and other celestial bodies, as Article IV expressly does not prohibit military personnel for scientific research “or other peaceful purposes.” With regard to the weaponization of space, Article IV expressly prohibits stationing or placing nuclear weapons or other weapons of mass destruction in orbit. This prohibition does not extend to nuclear weapons transiting through outer space (such as on an intercontinental ballistic missile) nor does it extend to conventional weapons.

National Appropriation of Space is Prohibited

The Outer Space Treaty prohibits national appropriation of outer space, including the Moon and other celestial bodies, whether by claim of sovereignty, by means of use or occupation, or by any other means.²⁵ In light of this prohibition, claims of ownership of orbits, orbital slots, or certain portions of the radio frequency spectrum are not legally supportable.²⁶ Some States do sell or lease orbital slots or radio frequencies registered with the ITU, but such activities are widely accepted as the type of “use” of space that is protected under Article I, and not a type of “appropriation” that is prohibited under Article II. Any appropriation of space by a non-governmental entity would be considered a prohibited “national” appropriation because Article VI of the Outer Space Treaty automatically attributes the conduct of non-governmental actors to the appropriate State, as addressed further below.

The prohibition of the appropriation of space is applicable to military uses that might contemplate the establishment of “keep out zones” or “buffer zones” around satellites in orbit. Any zone that would purport to appropriate space through the assertion of sovereignty, through means of use or occupation, or any other means would violate Article II. However, the identification of zones for safety or security purposes is not necessarily an unlawful appropriation of space. Currently there is no international consensus on how close is too close, or what distance between satellites might be regarded as escalatory when conducting rendezvous and proximity operations.

International Law Applies to Space Activities

As stated above, the Outer Space Treaty specifically requires that space activities be conducted in accordance with international law, including the UN Charter and its rules governing the use of force.²⁷ The body of law applicable to space activities includes general principles of customary international law (*e.g.*, the right to engage in anticipatory self-defense), general principles of international humanitarian law, and applicable terms of status of forces, facilities and access, or other relevant international agreements. The law of war must therefore be considered during operational planning and targeting processes.

Interference with Space Activities of Others

Outer Space Treaty. Article IX of the Outer Space Treaty requires that State parties to the treaty conduct their activities in space with “due regard to the corresponding interests” of all other State parties to the treaty. Additionally, it requires States “to undertake appropriate international consultations” with other State parties to the treaty prior to engaging in space activities

²⁴ Outer Space Treaty, Art. IV.

²⁵ *Id.* Art. II.

²⁶ *Id.*

²⁷ *Id.* Art. III.

that “would cause potentially harmful interference” with the other State’s space activities. However, “due regard” is undefined and there is no State practice establishing what space activities the “due regard” principle might prohibit, if any, or under what circumstances such activities might be prohibited. The consultation provision has never been invoked and, in any event, does not actually prohibit harmful interference; it just requires appropriate consultations before proceeding. Generally, Article IX is not regarded as being a legal obstacle to forms of interference like laser dazzling or jamming.

ITU Constitution and Convention. The ITU Constitution and Convention declare that the radio frequency spectrum and the geostationary orbit are limited natural resources to which all States are authorized equitable access.²⁸ Thus, one purpose of the ITU is to prohibit harmful interference with the communications of another State. Therefore, under the ITU Constitution and Convention and the Radio Regulations, once a State registers its use of an orbital slot or radio frequency, it is entitled to use that slot or frequency indefinitely and without harmful interference. Article 45 of the Constitution requires States to use radio frequencies in such a manner as not to cause harmful interference with the ITU-compliant radio services or communications of others. Details regarding access to and use of the radio frequency spectrum are contained in the Radio Regulations, which are legally binding international agreements. While the ITU does not purport to regulate military communications, it does require that a military observe “so far as possible” measures for preventing harmful interference. Indeed, the Frequency Management Manual requires that all spectrum users give due regard to the rights of other spectrum users.²⁹ Finally, status of force agreements and basing rights agreements may impose restrictions on use of frequencies within particular countries.

National Technical Means of Verification. Numerous arms control treaties, such as New START, prohibit interference with national technical means of verification (NTM). NTM satellites are undefined in such treaties. The treaties are silent as to their application when the parties are in an armed conflict. As in any situation involving an armed conflict, the applicable ROE must be consulted.

General International Law. Interference with space activities may implicate provisions of general international law, which are applicable to outer space activities pursuant to Article III of the Outer Space Treaty. Interference may, under some circumstances, amount to a prohibited threat or use of force. For example, interference with an NTM satellite might be regarded as a precursor to a nuclear strike, constituting a violation of Article 2(4) of the UN Charter (in addition to a breach of any disarmament treaty that might be applicable). By contrast, interference that is temporary and reversible is generally not likely to be regarded as a prohibited use of force, although State practice on this point is not well established.

An additional principle that is relevant to military uses of outer space is the customary international law principle of non-intervention. It involves the right of every sovereign State to conduct its affairs without outside intervention and prohibits States from directly or indirectly intervening in the internal or external affairs of other States. As articulated by the International Court of Justice in *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, a prohibited intervention consists of two elements: it must be an intervention bearing on matters in which each State is permitted to decide freely; and it must involve

²⁸ *Constitution and Convention of the International Telecommunication Union*, VII.

²⁹ *Manual of Regulations and Procedures for Federal Radio Frequency Management (NTIA Manual)*, incorporated by reference in 47 C.F.R. § 300.1, at 2.1, available at <https://www.ntia.doc.gov/page/2011/manual-regulations-and-procedures-federal-radio-frequency-management-redbook>.

an element of coercion.³⁰ It does not necessarily have to involve a use of force. A violation of the principle of non-intervention can constitute an internationally wrongful act, which may justify the lawful use of proportionate countermeasures. Due to limited State practice, it is not well established how and under what circumstances this principle applies to space activities.

U.S. Law and Policy. U.S. law and policy also address interference with space activities. 18 U.S.C. § 1367, for example, makes it a felony to intentionally or maliciously interfere with the operation of telecommunication or weather satellites or to hinder or obstruct any satellite transmission. While Section 1367 specifically exempts authorized law enforcement and intelligence activities, it does not expressly exempt other military or national security actions from its purview (although, the law does not apply extraterritorially and an argument can be made that there is an implicit national security exception for defense activities, provided the proper high-level approval is given for such activities). Also, 47 U.S.C. § 502 makes it a crime to knowingly and willfully violate any rule, regulation, restriction, or condition made or imposed by the ITU.

States are Responsible and Liable for Their Space Activities

Article VI of the Outer Space Treaty holds States responsible for their national space activities, including the activities of non-governmental entities. This means any internationally wrongful act in space is directly imputed to a State, thereby implicating the general international law principles of State responsibility. The Registration Convention provides one means of determining which State is responsible for a particular space object, by requiring States to establish a national registry to record every object the State launches into space. There is no exception for military space objects. The Registration Convention also requires the UN to maintain a registry and for each State to forward data to the UN for inclusion in the registry “as soon as practicable” on every object the State launches into space. The minimum data to be provided to the UN is the name of the launching State, the registration number or other designator of the object, the date and territory or location of the launch, the basic orbital parameters, and the general function of the object.³¹ Although the treaty defines “launching State” as the State that launched or procured the launch and the State from whose territory or facility the object was launched—a definition that could result in more than one “launching State”—only one State may register the object.

The Outer Space Treaty also requires the “appropriate State” to provide authorization for, and continuing supervision of, non-governmental activities in space. The State of registration under the Registration Convention is strong evidence of which State is “the appropriate” State, though other factors may be involved. For example, if there are multiple launching States and the object is not registered, “the appropriate” State might be decided by determining which State’s nationals have ownership or operation and control of the object. One way in which the United States satisfies its obligation to authorize and supervise its space activities is through the licensing process. Depending on the function and operations of the satellite, various U.S. agencies are involved, including the Federal Aviation Administration (for launches), the Federal Communications Commission (for communications links with satellites), and the Commerce Department’s National Oceanic and Atmospheric Administration (NOAA) (for remote sensing satellites).

³⁰ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Merits)* [1986] ICJ Rep. 14, para. 205.

³¹ Convention on Registration of Objects Launched into Outer Space, Art. IV.

The Liability Convention sets out the ways in which States may be held internationally liable for damage caused by their space objects.³² The treaty establishes a bifurcated legal regime for determining liability for such damage. Launching States are absolutely liable for damage their space objects cause on earth or to aircraft in flight. For all other locations (including outer space), a launching State is only liable if the damage is “due to its fault or the fault of persons for whom it is responsible.” The Liability Convention uses the same definition of “launching State” as the Registration Convention; thus, more than one State may potentially be held liable (joint and several liability). A launching State can be exonerated from absolute liability if it can establish that the damage resulted either wholly or partially “from gross negligence or from an act or omission done with intent to cause damage” on the part of a claimant State. The treaty does not distinguish between military and non-military space objects. Damage caused during times of armed conflict to the space objects of non-belligerent parties could potentially be addressed under this treaty, although claims arising from combat activities are not ordinarily payable. The Liability Convention addresses damages caused by space objects on a state-to-state level, and does not preclude resorting to other channels, such as an individual right of action in a domestic court, for relief.

Protection of Spacecraft Personnel and Space Objects

The Outer Space Treaty requires that States retain jurisdiction and control over their space objects and personnel when in outer space.³³ Additionally, States retain responsibility for their space objects regardless of their location. The Rescue and Return Agreement embodies the concept of State jurisdiction and control. The treaty requires that Parties immediately rescue foreign spacecraft personnel who land in their territory, and safely and promptly return them to the launching State. The treaty also provides a measure of protection for space objects; a State party to the treaty must retrieve objects in its territory when requested by the launching State, but only to the extent practicable. The Outer Space Treaty and Rescue and Return Agreement do not give a launching State any authority to enter the territory of another State to recover its space objects, even if the space object is in the territory of a State that is a party to this treaty. Additionally, the treaties do not impose a requirement to return an object in the same condition in which it was found; therefore, the foreign State can inspect the object, reverse engineer it, or take it apart prior to returning it. The launching State is responsible for costs of the recovery and return.

The space treaties do not protect commercial space objects from being targeted if they otherwise constitute valid military objectives, such as being used to aid a belligerent in the prosecution of war. Nevertheless, the potential for fratricide or adversely impacting a neutral or other non-belligerent State should be considered when determining whether to target such a space object. Some provisions of U.S. law are also relevant. For example, 18 U.S.C. § 7 extends the special maritime and territorial jurisdiction of the United States to U.S.-registered space objects when those objects are in the atmosphere or in outer space. The statute also covers all places outside the jurisdiction of any nation with respect to an offense by or against a U.S. national.

Under such circumstances, the United States could enforce violations of its federal criminal laws in outer space. Likewise, U.S. military personnel will be subject to the Uniform Code of Military Justice while in space, just as they are everywhere on earth.

³² Convention on International Liability for Damage, Arts. II - IV.

³³ Outer Space Treaty, Art. VIII.

Space Debris

International law does not prohibit or otherwise specifically address the creation of space debris, nor does it require that objects be de-orbited or transferred to another orbit prior to the end of their useful life. Space debris is inevitable; all operations in space create some amount of space debris. Because of the nature of the physical environment in space, much of this debris will remain in orbit for dozens, hundreds, or thousands of years, depending on the altitude. Even small pieces of debris, including debris that is too small to be tracked by current sensors, can potentially disable or destroy an operational satellite. For these reasons, the United States and other space-faring States have developed voluntary guidelines to limit the creation of new debris.

The Inter-Agency Debris Coordination Committee (IADC) is an international governmental forum for the coordination of activities related to the issues regarding orbital debris. It is comprised of member agencies, including the European Space Agency (ESA) and national space agencies from 11 space-faring States, to include NASA. The IADC issued guidelines in 2002 suggesting ways to limit debris released during normal operations, to minimize the potential for on-orbit break-ups, to dispose of spacecraft at the end of the mission, and to prevent on-orbit collisions. The IADC issued revised guidelines in 2007.³⁴

The UN Committee on the Peaceful Uses of Outer Space (COPUOS) used these guidelines as a basis to draft similar guidelines, which the UN General Assembly then adopted in 2007. The COPUOS Space Debris Mitigation Guidelines call upon member States and international organizations to voluntarily implement the guidelines at the national level to the greatest extent feasible. In 2019, COPUOS adopted 21 Long Term Sustainability guidelines that encouraged States to implement space debris mitigation measures, such as the 2007 Space Debris Mitigation Guidelines, within their national regulatory frameworks.³⁵

The United States adopted its own United States Government (USG) Debris Mitigation Standard Practices back in 2001, which influenced the aforementioned international guidelines. The USG Orbital Debris Mitigation Standards apply to all U.S. Government Departments and Agencies conducting space operations, including the Department of Defense. DoDD 3100.10, *Space Policy*, implements this guidance by providing that “DoD will promote the responsible, peaceful, and safe use of space, including following the U.S. Government (USG) Orbital Debris Mitigation Standard Practices.” The 2010 National Space Policy declares that the United States will strengthen measures to mitigate orbital debris, lead the continued development and adoption of international and industry standards, follow the U.S. Orbital Debris Mitigation Standard Practices, and require the heads of sponsoring departments or agencies to approve any exceptions to the Debris Mitigation Standard Practices and notify the Secretary of State. In Space Policy Directive 3 (2018), the United States recognizes, and encourages other nations to recognize, the principle that debris mitigation guidelines, standards, and policies should be revised periodically, enforced domestically, and adopted internationally to mitigate the operational effects of orbital debris. The CJCSI SROE also contain provisions that require minimizing debris as much as practicable.³⁶ In addition, within the Air Force, specific operational guidance, including AFSPCI 10-1204, *Satellite Operations* (15 May 2014), outlines the requirements and procedures for satellite end-of-life and disposal. Ultimately, international law does not prohibit the creation of debris. U.S. policies and laws, DoD, joint, and

³⁴ Space Debris Mitigation Guidelines, IADC, Revision 1, September 2007.

³⁵ *Guidelines for the Long-term Sustainability of Outer Space Activities of the Committee on the Peaceful Uses of Outer Space*, available at <https://www.unoosa.org/oosa/en/ourwork/topics/long-term-sustainability-of-outer-space-activities.html>.

³⁶ CJCSI 3121.01B, SROE Encl. E (Classified).

service regulations, rules of engagement, and law of war principles will govern how the United States conducts military operations that have the potential to create space debris.

OTHER OPERATIONAL CONSIDERATIONS

This section highlights additional issues that may arise regarding DoD space activities during times of armed conflict and other contingencies.

Shutter Control

Shutter control is a term that refers to the regulatory ability of the Secretary of Commerce to require U.S. licensed commercial imagery operators to take necessary steps to not take or not release imagery that the SecDef or Secretary of State determines would be harmful to U.S. National Security or foreign policy interests. This form of modified operations is regulated by the Land Remote Sensing Policy Act (specifically, 51 U.S.C. § 60122) and its enacting regulations (specifically, 15 C.F.R. § 960). Further, in accordance with the NSPD 27, U.S. Commercial Remote Sensing Policy (2003), the United States may restrict operations of commercial systems to limit collection and dissemination of certain data and products only to the United States or other approved recipients. To date, shutter control has never been invoked.

Selective Availability of GPS

Selective availability was an intentional degradation of public GPS signals implemented for national security reasons. By Presidential policy in 2000, the United States discontinued the use of selective availability in order to make GPS more trusted and responsive to public users worldwide. In 2007, this policy was made permanent with the decision that future GPS satellites would no longer be built with a selective availability feature.³⁷ 10 U.S.C. § 2281 and the 2004 PNT Policy set out broad policy goals for the United States concerning GPS. The PNT policy declares that the United States shall provide uninterrupted access to GPS for U.S. and allied national security systems; provide access to GPS on a continuous, worldwide basis free of direct user fees for civil, commercial, scientific uses, and homeland security purposes; improve capabilities to deny hostile use of any PNT services, without unduly disrupting civil and commercial access; and maintain the commitment to discontinue use of selective availability.³⁸

Space Situational Awareness

As noted above, SSA is doctrinal space operation. In conducting this mission, the United States has established the world's most robust and complete catalog of space objects, currently numbering approximately 20,000 objects. Pursuant to 10 U.S.C. § 2274 the DoD is authorized to provide SSA information and services to non-U.S. Government entities and is likewise authorized to obtain such information and services from these entities in accordance with authorities. The statute authorizes providing services and information to any non-U.S. Government entity, including: States; political subdivisions of States; U.S. commercial entities; the government of a foreign country; and foreign commercial entities.

³⁷ See the GPS.gov discussion of selective availability, available at <https://www.gps.gov/systems/gps/modernization/sa/>.

³⁸ See the GPS.Gov discussion of the 2004 PNT Policy, available at <https://www.gps.gov/policy/docs/2004/>.

Authorized SSA sharing may occur in two ways. A web page, www.space-track.org, makes SSA data available to the public. For more tailored SSA data, owners and operators may enter into an agreement with USSPACECOM (formerly with USSTRATCOM) in exchange for other data and services beyond what is available on the web page. The agreement, among other things, waives United States' liability for the data or service and forbids the CFE from redistributing the data without permission. Although the statute authorizes the DoD to charge for such data and services, DoD has not typically charged such fees. The United States has a significant interest in this effort because sharing SSA with those operating in space helps commercial and foreign satellite operators avoid creating new debris.

CONCLUSION

A substantial body of domestic law and policy and international law addresses civil, commercial, and military space activities. With a few significant exceptions, this body of law and policy provides the DoD wide-ranging freedom and flexibility in the conduct of space activities—from force enhancement to force application. Because Space law and operations are a relatively new and rapidly evolving area, readers are cautioned to ascertain whether a policy described above that affects a particular course of action is still in effect or whether it has been modified. The creation of the Space Force, in particular, will prompt updates to space policies and doctrine. Finally, though it is unlikely that the international space legal regime will change substantially in the near future, interpretations of how some international law principles apply in the space domain are likely to be shaped through the practice of States.

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- Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 27 January 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205 (entry into force 10 October 1967, for the United States same date) [Outer Space Treaty]
- Agreement on the Rescue of Astronauts, the Return of Astronauts, and the Return of Objects Launched into Outer Space, 22 April 1968, 19 U.S.T. 7570, T.I.A.S. No. 6599, 672 U.N.T.S. 119 (entry into force 3 December 1968, for the United States same date)
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- Constitution and Convention of the International Telecommunication Union, December 22, 1992, T. Doc 104-34 (entry into force 1 July 1994, for the United States 26 October 1997)
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- National Space Policy of the United States of America, 28 June 2010
- Manual of Regulations and Procedures for Federal Radio Frequency Management (NTIA Manual), incorporated by reference in 47 C.F.R. § 300.1
- CJCSI 3121.01B, *Standing Rules of Engagement* (13 June 2005)
- JOINT PUBLICATION 3-14, *Space Operations* (10 April 2018)
- Air Force Doctrine, Annex 3-14, *Counterspace Operations* (27 August 2018)

Chapter 6

CYBER OPERATIONS LAW

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BACKGROUND

The Advanced Research Project Agency (ARPA; now DARPA)¹ was created to design a resilient nationwide communications network. ARPANET, a prototypical communications network, went live in October 1969, sending the first communications between the University of California, Los Angeles and the Stanford Research Institute.² In a short time, the Internet was born.

The Internet was founded on the premise of reliability, not security. It is now more reliable, but still not very secure. This lack of security creates opportunities for espionage, disruption and attack. These actions can originate from anywhere, and might affect Internet infrastructure located anywhere in the world to ultimately create the effects desired in the target location.

This new domain of conflict creates opportunities for U.S. forces, but also creates vulnerabilities. This chapter discusses the basic ways U.S. forces are organized to gain advantage in cyberspace and defend our own networks against adversaries. It also addresses how the law of war principles apply to this newly emerged domain of conflict. Note that almost all cyber operations, and the core guidance governing cyber operations, are classified and cannot be discussed in this chapter.

The President's National Cyber Strategy of 2018 establishes four pillars. Pillar I, Protect the American People, the Homeland, and the American Way of Life, focuses on security federal networks, critical infrastructure, and combating cybercrime. Pillar II, Promote American Prosperity, seeks to foster the digital economy and ingenuity, and develop a superior cybersecurity workforce. Pillar III, Preserve Peace through Strength, focuses on enhancing cyber stability through State norms and deterring unacceptable behavior. Pillar IV, Advance American Influence, seeks to promote an open, interoperable, reliable and secure Internet, while building International cyber capability.³

Cyberspace is defined as: "A global domain within the information environment consisting of the interdependent network of information technology infrastructures, including the internet, telecommunications networks, computer systems, and embedded processors and controllers."⁴ The Department of Defense has divided cyberspace into three interrelated layers: the physical network layer, the logical network layer, and the cyber-persona network.⁵

¹ Defense Advanced Research Project Agency.

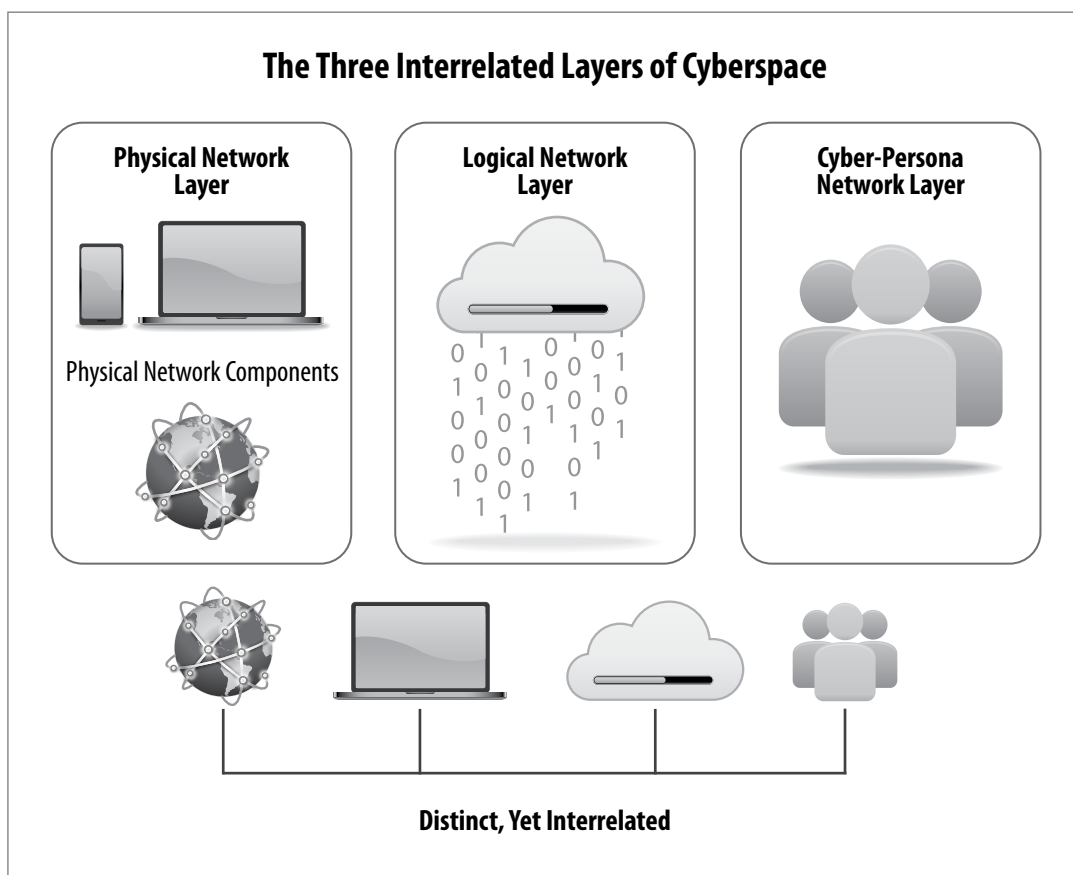
² *The Internet* (2000), available at http://www.livinginternet.com/i/ii_summary.htm (last visited 21 May 20).

³ National Cyber Strategy of the United States of America, September 2018.

⁴ JOINT PUBLICATION 3-12, *Cyberspace Operations* (8 June 2018) [hereinafter JP 3-12].

⁵ *Id.* I-4.

Figure 6.1. The Three Interrelated Layers of Cyberspace adapted from JP 3-12, Figure I-1



CYBERSPACE OPERATIONS (CO)

COs are defined as “[t]he employment of cyberspace capabilities where the primary purpose is to achieve objectives in or through cyberspace.”⁶ COs include those operations that use computers to disrupt, deny, degrade, or destroy information resident in computers and computer networks, or the computers and networks themselves.⁷ Examples of activities that qualify as cyberspace operations: reconnaissance (*e.g.*, mapping a network); seizure of supporting positions (*e.g.*, securing access to key network systems or nodes); and pre-employment of capabilities or weapons (*e.g.*, implanting cyber access tools or malicious code).⁸ The DoD categorizes CO into Offensive CO (OCO), Defensive CO (DCO) and DoD Information Networks (DoDIN) operations.⁹

⁶ JOINT PUBLICATION 3-0, *Joint Operations* (January 17, 2017), incorporating Change 1, 22 October 2018, GL-8.

⁷ DoD LAW OF WAR MANUAL (June 2015), updated December 2016), para. 16.1.2.1.

⁸ *Id.*

⁹ JP 3-12, ch. II.

Activities that would not be considered CO are those which merely use computers or cyberspace without a primary purpose of achieving objectives or effects *in or through cyberspace*.¹⁰ For example, operations that use computer networks to facilitate command and control (C2), operations that use air traffic control systems, and operations to distribute information broadly using computers would generally not be considered CO. Operations targeting an adversary's cyberspace capabilities, but that are not achieved in or through cyberspace, would also not be considered CO. For example, the bombardment of a network hub, or the jamming of wireless communications without using capabilities in or through cyberspace, would not be considered cyber operations as they were not accomplished *in or through cyberspace*, even though they may achieve military objectives *affecting cyberspace*.¹¹

CO AND THE LAW OF WAR

Experts and academics have long debated the threshold for a CO to amount to a use of force or armed attack. A common view is a CO amounts to a use of force if the actions cause injury, death, damage, or destruction. According to this view, the attacked State would then be justified in responding in self-defense. However, this is only the prevailing view, and no controlling law dictates the *jus ad bellum* calculus for cyber activities.

As a matter of policy, the United States applies the law of war to CO.¹² When no specific law of war rule applies, law of war principles provide a general guide for conduct during cyber operations in armed conflict. See Chapter Two, *Law of War* for more information on these principles. The DoD LAW OF WAR MANUAL, Chapter XVI, specifically addresses how the DoD applies the law of war to CO. Due to the variety of effects CO may produce, the DoD encounters challenging legal questions when engaging in CO.¹³ While some CO could have effects that amount to an attack, and would thus be regulated under those rules, many CO only qualify as non-forcible means and methods of warfare.¹⁴ In this way, cyber capabilities are distinct from conventional weapons and operations, and thus require special analysis under the law of war. Some experts have written specifically addressing these concerns.¹⁵

¹⁰ DoD LAW OF WAR MANUAL, para. 16.1.2.2.

¹¹ *Id.*

¹² *Id.*, para. 16.1.

¹³ *Id.*, para. 16.2.1.

¹⁴ *Id.*

¹⁵ An international group of experts produced “The Tallinn Manual.” Originally published in 2013, the Manual addressed CO during armed conflict. It did not address the vast majority of CO, which are operations below the threshold of the use of force. The group of experts then published “The Tallinn Manual 2.0” in 2017, which addresses operations below the threshold of the use of force. While the Manual’s discussion and analysis are useful, it is important to understand that the Manual is neither a product of States, nor does it capture extensive State practice. The Manual thus does not represent customary international law. Similarly, it is not an international agreement between States but merely represents the thoughts and views of various experts.

CYBER FORCES AND COMMAND AUTHORITY

U.S. Cyber Command (USCYBERCOM)

USCYBERCOM was originally established as a sub-unified command to U.S. Strategic Command (USSTRATCOM), but in May of 2018 it was elevated to a functional combatant command (CCMD). USCYBERCOM's Air Force service component is 16th Air Force (AFCYBER). 16 AF is the new Air Force unit created in 2019 by combining what was formerly 24 AF and 25 AF. As a result, the 16 AF Commander has five roles, serving as 16 AF/CC, Defense Intelligence Component Head (AF), CDR AFCYBER, Commander, Joint Force Headquarters-Cyber (JFHQ-C (AF)), and the Head, Service Cryptologic Component (SCC).

AFCYBER

AFCYBER is the service cyber component to USCYBERCOM and exercises OPCON over assigned Air Force forces. AFCYBER has the mission of executing DoDIN OPS and DCO on Air Force Information Networks (AFIN). CDR AFCYBER also exercises OPCON over cyber forces under 10 U.S.C. § 167b including service cyber protection teams (CPTs) and cyber security service providers (CSSPs). CDR AFCYBER is the COMMAFFOR for Air Force forces which have been assigned to USCYBERCOM. CDR USCYBERCOM has delegated directive authority for cyberspace operations (DACO) to CDR AFCYBER, who exercises this authority over Air Force forces operating on AFIN.

JFHQ-C (AF)

JFHQ-C (AF) is a separate component to USCYBERCOM with OPCON of assigned joint forces and has a mission to provide general support, as defined by JP 1, for OCO to EUCOM, STRATCOM, and TRANSCOM.

SCC

The SCC is the service lead for cryptologic activities and, in this role, is the Commander, Air Force SCC/Air Force Cryptologic Office (AFCO). The SCC/AFCO reports to the Director, NSA (DIRNSA)/Chief, Central Security Service (CHCSS). In this role, SCC/AFCO ensures signals intelligence (SIGINT) compliance and oversight. The SCC also is responsible for directing all AF cryptologic operations, programming, training, and policy. The SCC executes delegated SIGINT missions assigned by DIRNSA/CHCSS and also has SIGINT Operational Tasking Authority (SOTA), not including Computer Network Exploitation (CNE), over all AF-assigned organic SIGINT capabilities.

Other Services' Elements

The other services' elements to USCYBERCOM include Army Cyber Command (ARCYBER), U.S. Fleet Cyber Command (FLTCYBER), and Marine Corps Cyberspace Command (MARFORCYBER). Each service protects its own service-specific network.

DoD Cyber Operations Forces (DoD COF)

SecDef defines DoD Cyber Operations Forces (DoD COF) as “[u]nits organized, trained, and equipped to conduct...[OCO, DCO, and DoDIN] operations.”¹⁶ DoD COF are made up of five operational groups:

- **Group 1: Cyber Mission Forces (CMF).** The three elements of CMF are: (1) The Cyber Protection Force (CPF), which conducts internal protection of DoDIN or other blue cyberspace. The CPF is composed of CPTs, CSSPs, and users. (2) The Cyber National Mission Force (CNMF), designed to defeat significant cyberspace threats to the DoDIN/Nation. The CNMF comprises various numbered national mission teams, associated national support teams, and national-level CPTs for protection of non-DoDIN blue-force cyberspace terrain. (3) The Cyber Combat Mission Force (CCMF), which supports CCDRs. The CCMF comprises various numbered combat mission teams and associated combat support teams.
- **Group 2: USCYBERCOM Subordinate Command Elements.** Executes C2 of CMF and other cyberspace forces, including the CNMF-HQ, the JFHQ DoDIN, JFHQ-C, the service component command HQs, Cyberspace Operations-Integrated Planning Elements, and those service-retained forces dedicated to managing the Joint Cyber Common Access Platform. 16 AF personnel are dual-hatted to fulfill these missions and perform tasks directly through the operational chain of command to USCYBERCOM.
- **Group 3: DoD Component Network Operations Centers and CSSPs.** Units designated by the secretaries of military departments, in coordination with other DoD component heads, to conduct cyberspace operations in support of DoDIN Operations, including DCO and internal defensive measures.
- **Group 4: Special Capability Providers.** Any force purposely organized to execute OCO or DCO response actions.
- **Group 5: Specially Designated Units.** Designated by the President or SecDef as part of the DoD COF for the purpose of conducting activities in support of specific cyberspace operations.

There are also five groups specifically **EXCLUDED** from the definition of DoD COF:¹⁷

- **Group 6: DoD Business Function Elements.** Chief information officer and information technology (IT) functions.
- **Group 7: Service-retained forces.** Those service-retained forces whose primary purpose is to enable tactical C2 or weapons systems and critical infrastructure resiliency. These specifically include Air Force Mission Defense Teams (MDTs), and other services’ analogues. To reiterate, Air Force MDTs are not considered DoD COF, but are service-retained.
- **Group 8: Joint Cyber Centers.** Elements of CCMDs responsible for planning, directing, coordinating, integrating, and synchronizing CCMD cyberspace activities.
- **Group 9: Intelligence units.** Any intelligence-related units or personnel not in direct support of USCYBERCOM.
- **Group 10: CDRUSSOCOM-assigned forces.** USSOCOM forces purposely organized, trained, and equipped to conduct OCO, DCO, and DoDIN operations.

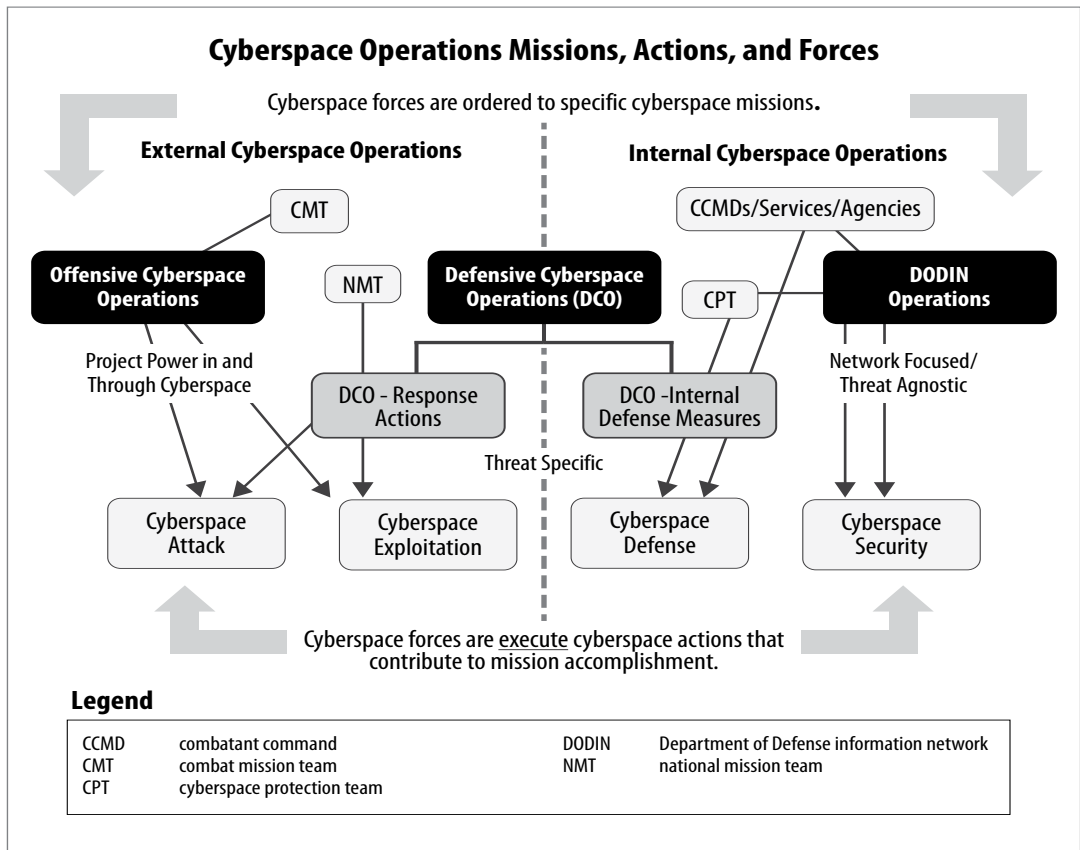
¹⁶ SecDef Memorandum, Definition of “*Department of Defense Cyberspace Operations Forces (DoD COF)*,” 12 December 2019.

¹⁷ *Id.*

OPERATIONAL AUTHORITIES

To properly determine if a unit has the authority to conduct CO, attorneys must know the respective operational authority and be adequately familiar with the cyber force structure. **If the unit is not part of the operational chain of command connected to USCYBERCOM or another CCMD, then that unit should only act within its own network, what is known as blue cyberspace**, unless otherwise specifically authorized. 10 U.S.C. § 9013 establishes the authority of the SecAF. SecAF's authority is limited to activities that organize, train, and equip (OT&E) Air Force forces. **The Air Force has no inherent authority, as a service, to conduct cyber operations.** Rather, Air Force actions are to build, maintain, and operate the Air Force network and those parts of the DoDIN assigned to it. Any unit conducting a CO outside that unit's own network must coordinate with JFHQ-DoDIN to determine its authorities.

Figure 6.2. Cyberspace Operations Missions, Actions, and Forces adapted from JP 3-12, Figure II-1.



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10 U.S.C. § 167b

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Chapter 7

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WHAT CONSTITUTES AN INTERNATIONAL AGREEMENT

Under International Law

International law makes no distinction between an “international agreement” and a “treaty.” The Vienna Convention on the Law of Treaties (VCLT) provides the following: “Treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”¹

Under Domestic Law

Under U.S. domestic law, international agreements fall into two categories: treaties and executive agreements. Both treaties and executive agreements constitute international agreements within the meaning of international law, as contemplated in U.S. domestic law.

Treaties in Domestic Law. Treaties are international agreements concluded pursuant to Article II, Section 2 of the U.S. Constitution, which provides that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.” Treaties are part of the “supreme Law of the Land” under Article VI of the Constitution. To the extent that a treaty’s provisions are self-executing, it is on an equal footing with U.S. statutes.² When there is a conflict between a U.S. statute and self-executing treaty provision, U.S. courts will apply whichever is the latest expression of the political branches.³

Executive Agreements in Domestic Law. Executive agreements are international agreements concluded by an authorized member of the executive branch of the U.S. Government (USG) based upon legal authority found in the constitutional powers of the President (*e.g.*, as “Commander in Chief of the Army and Navy of the United States” Article II, Section 2), U.S. statutes, treaties, executive orders, regulations, and other executive agreements. Their validity is recognized in 1 U.S.C. §§ 112 and 112a, wherein it is provided that the “United States Statutes at Large” and “United States Treaties and Other International Agreements” shall be legal evidence “of the...international agreements other than treaties...in all the courts of the United States, the several States and the Territories and insular possessions of the United States.”

¹ Vienna Convention on the Law of Treaties, May 23, 1969. 1155 U.N.T.S. 331 at 333 (1969). Although the United States has not ratified the VCLT, the United States considers many of its provisions to constitute customary international law on the law of treaties.

² RESTATEMENT OF THE LAW (FOURTH), THE FOREIGN RELATIONS LAW OF THE UNITED STATES (AM. LAW INST. 2018) § 309(2).

³ *Id.*

AUTHORITY FOR EXECUTIVE AGREEMENTS

Executive agreements must be supported with USG executive branch procedural authority to negotiate and conclude the international agreement, as well as substantive legal authority for the specific obligations contained in the international agreement.

Procedural Authority—Case-Zablocki Act

Department of Defense (DoD) officials' procedural authority to negotiate and conclude international agreements is governed by the Case-Zablocki Act 1972 (Case Act),⁴ Department of State (DoS) regulations, DoD Directives (DoDD) and Instructions (DoDI), and the regulations of the Joint Chiefs of Staff, the military departments, and other DoD agencies.

Under the Case Act, the Secretary of State (SecState) must transmit to the President of the Senate and the Speaker of the House the text of any international agreement (other than a treaty) to which the United States is a party (including an oral agreement, which must be reduced to writing) not later than sixty days after the agreement enters into force for the United States.⁵ Classified agreements must be sent to the Senate Foreign Relations Committee and the House Foreign Affairs Committee.⁶

The President must personally report annually to the Speaker of the House and the Chairman of the Senate Foreign Relations Committee any international agreement transmitted to Congress after expiration of this sixty-day period, describing “fully and completely” the reasons for late transmittal.⁷ Any department or agency of the USG which enters into an international agreement on behalf of the United States must transmit the text of the agreement to the DoS not later than twenty days after signature of the agreement.⁸

Consultation with the SecState is required prior to signing or otherwise concluding an international agreement on behalf of the United States.⁹ Such consultation may encompass a class of agreements rather than a particular agreement.¹⁰ The SecState determines for and within the executive branch whether an arrangement constitutes an international agreement within the meaning of the Case Act.¹¹ The President, through the SecState, promulgates such rules and regulations as may be necessary to carry out the Case Act.¹²

Procedural Authority—DoS Regulations

In implementation of its responsibilities under the Case Act, the DoS has promulgated regulations on the coordination and reporting of international agreements.¹³ The following is a synopsis of their key provisions:

⁴ 1 U.S.C. § 112b.

⁵ *Id.* § 112b(a).

⁶ *Id.*

⁷ *Id.* § 112b(b).

⁸ *Id.* § 112b(a).

⁹ *Id.* § 112b(c).

¹⁰ *Id.*

¹¹ *Id.* § 112b(e)(1).

¹² *Id.* § 112b(f).

¹³ *See* 22 C.F.R. pt. 181.

Application. The regulations apply to all USG agencies whose responsibilities include negotiating and/or concluding international agreements, but do not constitute a delegation by the SecState of authority to engage in such activities.¹⁴

Effect of Deviation or Derogation. Deviation or derogation from the regulations will not affect the legal validity under U.S. or international law of agreements concluded; will not give rise to a cause of action; and will not affect any public or private rights established by such agreements.¹⁵

Criteria for Determining What Constitutes an International Agreement. The regulations set forth criteria¹⁶ for deciding whether any undertaking, oral agreement, document, or set of documents, including an exchange of notes or of correspondence, constitutes an international agreement within the meaning of the Case Act, to wit:

1. Identity of the parties: a state, state agency, or intergovernmental organization;
2. Intention of the parties to be legally bound by their undertaking and to have such undertaking governed by international law (excluding arrangements governed solely by the law of the U.S., a state or jurisdiction thereof, or the law of a foreign State);
3. Significance of the arrangement (excluding minor or trivial undertakings);
4. Specificity, including objective criteria for determining enforceability;
5. Two or more parties (excluding unilateral commitments); and
6. Form is not normally important, but failure to use the customary form may constitute evidence for a lack of intention to be legally bound.

Agency-level agreements meeting the above criteria are included even though concluded on behalf of a particular USG agency rather than the USG.¹⁷ Implementing agreements meeting the above criteria are included unless their terms are closely anticipated and identified in the underlying agreement.¹⁸ Extensions and modifications of international agreements also constitute international agreements.¹⁹ Oral agreements meeting (1) – (5) above are included and must be reduced to writing.²⁰

Responsibility for Determinations. The Legal Adviser of the DoS, a Deputy Legal Adviser, or the Assistant Legal Adviser for Treaty Affairs determines whether any undertaking, document, or set of documents constitutes an international agreement within the meaning of the Case Act.²¹ Thus, the DoD, or other USG agency, may not use the above summarized criteria as a basis for not reporting a particular arrangement as an international agreement. As stated previously, the Case Act specifically reserves authority for making such determinations to the DoS.

¹⁴ 22 C.F.R. § 181.1(a).

¹⁵ 22 C.F.R. § 181.1(b).

¹⁶ *Id.* § 181.2(a)(1)-(5).

¹⁷ *Id.* § 181.2(b).

¹⁸ *Id.* § 181.2(c).

¹⁹ *Id.* § 181.2(d).

²⁰ *Id.* § 181.2(e).

²¹ *Id.* § 181.3(a).

Requirement of Consultation with DoS. In order to assure that all proposed international agreements are consistent with U.S. foreign policy objectives (and in view of the requirements of the Case Act), no USG agency may conclude an international agreement without prior consultation with the DoS.²² The only exception to this rule is that agencies which negotiate a large number of implementing arrangements are only required to transmit the texts of the more important arrangements to the DoS prior to entry into force.²³ While this exception does exist, it has limited applicability because only a small number of those implementing agreements constitute international agreements within the meaning of the Case Act.

DoS Authorization. In effecting consultation, the DoS gives approval for any proposed agreement negotiated pursuant to DoS authorization, and an opinion on any proposed agreement negotiated by an agency with separate authority to negotiate such agreement.²⁴ The approval or opinion is given in accordance with DoS procedures contained in Volume 11, *Foreign Affairs Manual*, Chapter 700 (Circular 175 procedure).²⁵ DoS officers are responsible for the preparation of all documents required by the Circular 175 procedure.²⁶

Process for Initiating DoS Consultation. Requests by USG agencies to the DoS for consultation on a proposed international agreement shall include a draft text or summary of the proposed agreement, a precise citation of the constitutional, statutory, or treaty authority for such agreement, and other background information requested by the DoS.²⁷ Agencies make requests for consultation before commencement of negotiations if feasible or as early as possible in the negotiating process and in no event later than 50 days prior to the anticipated date of conclusion of the agreement.²⁸ If unusual circumstances prevent meeting the 50-day requirement, the agency shall use its best efforts to transmit the required documentation “as early as possible” prior to the anticipated date of conclusion of the agreement.²⁹

Consultation on Class of Agreement. Consultation may encompass a specific class of agreements rather than a particular agreement where a series of agreements of the same general type is contemplated.³⁰ Agencies send an information copy of any particular agreement within such a class to the Legal Adviser no later than 20 days before conclusion of the agreement.

Consultation may be effected with DoS representatives to interagency committees established for the purpose of approving particular agreements.³¹ The DoS normally completes its consultation within 20 days of receipt of a request for consultation.³²

²² *Id.* § 181.4(a).

²³ *Id.* § 181.3(c).

²⁴ *Id.* § 181.4(b).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* § 181.4(d).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* § 181.4(f).

³¹ *Id.* § 181.4(g).

³² *Id.* § 181.4(c).

Any USG agency, including the DoS, that concludes an international agreement must transmit the text of the concluded agreement to the Assistant Legal Adviser for Treaty Affairs as soon as possible and in no event to arrive at that office later than 20 days after signature of the agreement.³³

Procedural Authority—DoD Regulations

DoD procedures for the negotiation and conclusion of international agreements are embodied in DoDI 5530.03, *International Agreements*, implementing Joint Chiefs of Staff (JCS) and military department regulations, and various DoD memoranda and agency regulations dealing with particular types of international agreements. The DoDI:

1. Prescribes procedures for implementation of the Case Act;
2. Assigns responsibility for maintaining complete files and central repositories for international agreements within DoD;
3. Assigns responsibility for controlling the negotiation, conclusion, and reporting of international agreements by DoD personnel;
4. Assigns authority to approve the negotiation and conclusion of international agreements and to delegate such authority;
5. Establishes procedures for obtaining approval before initiation of negotiations; and
6. Establishes procedures concerning resolution of questions of compliance by parties to international agreements.³⁴

This instruction defines international agreements in terms embodying the essential elements of the criteria used by the DoS (*i.e.*, concluded with a foreign government, including an agency, instrumentality, or political subdivision thereof, or an international organization; signed or agreed to by USG personnel; and signifying intention to be bound in international law).³⁵ The definition specifies that such agreements include oral agreements, which shall be reduced to writing, and that the term embraces agreements in whatever form, whether a memorandum of understanding, memorandum of agreement, memorandum of arrangement, exchange of notes or letters, technical arrangement, protocol, note verbale, aide memoire, agreed minute, etc.³⁶ The definition further provides that contracts under the Federal Acquisition Regulations (FAR), foreign military sales (FMS) credit agreements, FMS letters of offer and acceptance, certain standardization agreements, leases under 10 U.S.C. § 2675 and 22 U.S.C. § 2796, non-legally binding agreements solely to establish administrative procedures, and acquisitions or orders pursuant to cross-servicing agreements under 10 U.S.C. §§ 2341, *et seq.*, are not international agreements for purposes of the instruction.³⁷

Section 6 of DoDI 5530.03 assigns responsibility to the DoD General Counsel (GC) for maintaining the central repository for all international agreements concluded by DoD personnel except for intelligence agreements and documents not considered to constitute international agreements for the purposes of the instruction.³⁸ The Defense Intelligence Agency (DIA) maintains a central

³³ *Id.* § 181.5(a).

³⁴ DoDI 5530.03, *International Agreements* (4 December 2019).

³⁵ *Id.* Glossary, G.2, Definitions.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* para. 6.2.

repository of international agreements in the intelligence field that are coordinated, negotiated, or concluded on its behalf.³⁹ AF/JAO maintains the central repository for the DAF.⁴⁰

Section 7 of DoDI 5530.03 requires all DoD components to forward directly to the Assistant Legal Adviser for Treaty Affairs, DoS, and to the DoD GC the original text of an international agreement concluded by the component.⁴¹ This transmittal must be accomplished within 20 days after entry into force of the agreement, or be accompanied by a full and complete explanation for the late transmittal.⁴² A DoD component which enters into an international intelligence agreement provides a complete reproducible copy of the agreement and background statement to the Defense Intelligence Agency (DIA).⁴³ The DIA then transmits the agreement to the Assistant Legal Adviser for Treaty Affairs, DoS.⁴⁴ The directive reiterates the fundamental Case Act requirement that the DoS determine the applicability of the Case Act and whether a document constitutes an international agreement.⁴⁵ Questions regarding either are referred through and by DoD GC to the Assistant Legal Adviser for Treaty Affairs, DoS.⁴⁶

Requirements and Restrictions. The requirements for, and restriction on, negotiation and conclusion of international agreements include, but are not limited to, the following (*see* DoDI 5530.03, Section 5):

1. Approvals to negotiate or conclude: Only appropriate authorities may grant the authorization to negotiate or conclude international agreements in accordance with DoDI 5530.03, Section 3.⁴⁷
2. Compliance with relevant laws and regulations: DoD components proposing to negotiate an international agreement comply with the Case Act, DoS regulations, and DoDI 5530.03.⁴⁸
3. Receiving proposals from foreign government representatives and international organizations: DoD personnel not authorized to grant approval to negotiate international agreements promptly report the receipt of any foreign government or international organization proposal to initiate negotiations, through appropriate channels, to the DoD office with cognizance over the applicable type of international agreement. The DoD officer obtains appropriate authorization before conducting negotiations. The DoD officer may accept proposed texts from foreign government representatives but must not begin negotiations, and must inform the foreign government representative that the officer submits the proposed text for approval to negotiate before any negotiations may occur.⁴⁹

³⁹ *Id.* para. 6.3.

⁴⁰ AFI 51-403, *International Agreements* (8 February 2019), para. 1.2.9.

⁴¹ DoDI 5530.03, para. 7.2.

⁴² *Id.*

⁴³ *Id.* para. 7.3.

⁴⁴ *Id.*

⁴⁵ *Id.* paras. 7.4-7.5.

⁴⁶ *Id.* para. 7.5.

⁴⁷ *Id.* para. 5.1.a.(1).

⁴⁸ *Id.* para. 5.1.a.(2).

⁴⁹ *Id.* para. 5.1.a.(3).

4. Conducting negotiations: DoD personnel authorized to conduct international agreement negotiations are responsible for ensuring: (a) they do not communicate a proposal as a USG proposal if it deviates from an existing authorization or instruction; (b) they do not agree to a proposal that goes beyond the existing authorization without the original approval authority's clearance; (c) they communicate that any tentatively accepted proposal that is beyond the existing authorization is not final and is subject to the appropriate approval authority's final approval.⁵⁰
5. Required consultations with legal officers:
 - (a) DoD component heads authorized to negotiate and conclude international agreements regularly consult with the DoD GC or the component's SJA or GC Office, and through the Chairman of the Joint Chiefs of Staff (CJCS) Office of Legal Counsel, and the relevant office of the authorizing official, throughout the negotiation process. DoD component GCs and SJAs are encouraged to request assistance from the DoD GC.⁵¹
 - (b) No DoD component makes any unilateral commitment to any foreign government or international organization, whether in the form of a letter, memorandum, or oral statement, without obtaining the concurrence of the DoD component's SJA or GC.⁵²
 - (c) DoD GC reviews subsidiary agreements implemented under an umbrella or other master international agreement. The responsible DoD component includes in the request for DoD GC review a DoD component GC or SJA legal memorandum with a detailed review of why the proposed subsidiary agreement is within the scope of the umbrella or master agreement and why it may be concluded under the terms of such agreement.⁵³
 - (d) Unless an international agreement has been reviewed and approved in accordance with the procedures specified in DoDI 5530.03, paragraph 5.2., the appropriate authority obtains the DoD component's GC or SJA's concurrence before providing any draft of such agreement to a prospective party; before approving any negotiated text; and before concluding any international agreement.⁵⁴
6. Amendments: The same DoD official (or his or her successor) who approved the original international agreement approves the negotiation or conclusion of all amendments, whether substantive or not, unless such official has expressly delegated approval authority to another DoD official. The authorization to negotiate or conclude proposed substantive amendments is granted in accordance with DoDI 5530.03, including DoD legal authority or specific DoS authorization. Substantive amendments include those provisions that, by themselves, might form the basis of a separate agreement; that propose a new obligation not previously contemplated by the parties; or that propose a substantive revision to an existing obligation, including any provisions not authorized by DoD legal authority or specific DoS authorization.⁵⁵

⁵⁰ *Id.* para. 5.1.a.(4).

⁵¹ *Id.* para. 5.1.a.(5).

⁵² *Id.* para. 5.1.b.

⁵³ *Id.* para. 5.1.l.

⁵⁴ *Id.* para. 5.1.p.

⁵⁵ *Id.* para. 5.1.a.(6).

7. Public affairs: DoD components authorized to negotiate and conclude international agreements do not discuss the initiation, ongoing negotiations, or conclusion of international agreements with members of the news media without prior coordination with the applicable DoD component senior public affairs official.⁵⁶
8. Other approvals required: DoD personnel require approval or concurrence to negotiate and conclude international agreements in the following circumstances:
 - (a) For international agreements that have policy significance: approval of the Under Secretaries for Policy (USD(P)) or Acquisition and Sustainment (USD(A&S)), or their respective designees, as applicable (*see* paragraph 5.1.d.). When it is unclear whether an international agreement has policy significance, then the USD(P) or USD(A&S), or their respective designees, will make the determination.⁵⁷
 - (b) For international agreements relying on 10 U.S.C. § 2304(c)(4) (the international agreement exception) authority for use of other-than-competitive contracting procedures: approval of USD(A&S), or his or her designee.⁵⁸
 - (c) For international agreements involving the expenditure of DoD funds, or with funding implications: concurrence of the USD Comptroller (USD(C)), or his or her designee.⁵⁹
 - (d) For international agreements that implicate a reliance upon DoD's legal authorities to undertake military construction: concurrence of the USD(P), the USD(A&S), and the USD(C)/(CFO), or their respective designees, as applicable, and the relevant combatant command (CCMD), through the CJCS.⁶⁰
 - (e) For international agreements that involve payment to any foreign government entity for use of or access to land or facilities (except in the case of reciprocal use of test facilities): concurrence of the USD(P), USD(A&S), and USD(C)/(CFO), or their respective designees; the relevant CCMD, through the CJCS; and the DoD component office responsible for making any such payments.⁶¹
 - (f) For international agreements whose implementation requires the enactment of new legislative authority: approval of Assistant SecDef Legislative Affairs (ASD(LA)) and the DoD GC, or their respective designees.⁶²
 - (g) For international agreements involving health affairs or personnel and readiness matters: coordination with the USD for Personnel and Readiness (USD(P&R)) and the DoD GC, or their respective designees.⁶³
9. Timing and conditions on authorizations to negotiate and/or conclude international agreements: Authorizations to conclude an international agreement may be requested and granted simultaneously with the authorization to negotiate. Alternatively, the

⁵⁶ *Id.* para. 5.1.a.(7).

⁵⁷ *Id.* para. 5.1.a.(8).

⁵⁸ *Id.* para. 5.1.e.

⁵⁹ *Id.* para. 5.1.f.

⁶⁰ *Id.* para. 5.1.g.

⁶¹ *Id.* para. 5.1.h.

⁶² *Id.* para. 5.1.i.

⁶³ *Id.* para. 5.1.j.

authorization to conclude may be withheld initially and granted later. The grant of either authorization may be made subject to any conditions considered necessary or desirable by the authorizing official.⁶⁴

10. Exception for DoD personnel at U.S. diplomatic missions: The requirements of DoDI 5530.03, Section 5, do not apply to DoD personnel assigned to a U.S. diplomatic mission when the DoS grants negotiation authorization to the mission. In such situations, DoD personnel comply fully with applicable instructions, including directives of the chief of the U.S. delegation or diplomatic mission.⁶⁵
11. Use and status of English language: If an international agreement is concluded both in English and foreign language text, the agreement must either expressly provide that the English language text will be considered by the parties as the governing text in case of conflict between the different language texts or that both texts are equally authentic. In the latter event, a civilian, military, or local translator who has been designated as qualified by the DoD official authorized to negotiate and conclude the agreement or arrangement, or by an appropriate DoS official, certifies that the various texts of the agreement are in conformity with each other and have the same meaning in all substantive respects.⁶⁶
12. Document formalities: International agreements, and any of their amendments, include the dates and places of signature and the typed name and title of each signatory.⁶⁷

Procedures For Requesting Authority to Negotiate or Conclude an International Agreement (DoDI 5530.03, Section 5): The DoD component requests the authority to negotiate or conclude an international agreement in the component's area of interest from the USD(P), the USD(A&S), or the official within the DoD component to whom the requisite authority has been delegated. Section 5 procedures require:

1. A draft text or outline of the proposed international agreement, or an explanation for the unavailability of a draft;⁶⁸
2. A legal memorandum addressing, among other relevant considerations, the constitutional, statutory, or other legal authority for each proposed obligation of the United States in the agreement;⁶⁹
3. A fiscal memorandum setting forth the estimated cost of each proposed DoD obligation in the agreement, the source of funds to be obligated, or a statement that additional funds will be requested for a specified fiscal year or years;⁷⁰
4. A policy memorandum explaining in detail why the proposed international agreement is necessary or desirable, including any particular policy issues, the meaning of particular provisions, and a summary of the risks and benefits relevant to any transfer of technology or disclosure of information addressed in the agreement;⁷¹ and

⁶⁴ *Id.* para. 5.1.k.

⁶⁵ *Id.* para. 5.1.m.

⁶⁶ *Id.* para. 5.1.n.

⁶⁷ *Id.* para. 5.1.o.

⁶⁸ *Id.* para. 5.2.b.(1).

⁶⁹ *Id.* para. 5.2.b.(2) (*see* paras. 5.2.b.(2)(a)-(f) for a full list of requirements for the legal memorandum.)

⁷⁰ *Id.* para. 5.2.b.(3).

⁷¹ *Id.* para. 5.2.b.(4).

5. A delegation of disclosure authority letter (DDL) in the format described in Figure 2 to DoDI 5530.03, or other written authorization approved by the DoD component's foreign disclosure office, for international agreements that allow for the provision or generation of classified or controlled unclassified information.⁷²

Single Office of Record: DoD component heads who are delegated authority to negotiate and conclude international agreements, or the offices within the applicable DoD component that has been delegated that authority, designates a single office of record. The single office of record's responsibilities include, but are not limited to, maintaining records of requests for authorization to negotiate or conclude international agreements, recording actions taken, and compiling the negotiating history of each international agreement within its responsibility.⁷³

Delegations of Authority: DoDI 5530.03, Section 3, delegates authority to approve the negotiation and conclusion of international agreements.

Procedural Authority—AFPD 51-4 and AFI 51-403 Implementation of DoDI 5530.03

Within the categories of international agreements for which the SecAF is delegated approval authority under DoDI 5530.03, Section 3, approval authority is re-delegated to the commanders of major commands and field operating agencies, and heads of major Air Staff organizations.⁷⁴ This re-delegation applies only to agreements dealing with predominantly Air Force matters that are otherwise within the authority or responsibility of such commanders and heads.⁷⁵ Notwithstanding this delegation, the Air Force GC (SAF/GC), AF/JAO, or other elements of the Office of the SecAF and the Air Staff may require coordination or consultation on agreements or classes of agreements.

Air Force Instruction (AFI) 51-403 reiterates in its scope of authority the fundamental provision of DoDI 5530.03 that it is procedural only, and substantive legal authority for the obligations proposed to be assumed must be found in constitutional, statutory, or other legal authority applicable to the subject matter of the proposed agreement.⁷⁶ AFI 51-403, paragraph 2.5, provides that the re-delegated approval authority does **not** extend to agreements that:

1. Have policy significance;
2. Rely on the authority of 10 U.S.C. § 2304(c)(4);
3. Require new legislative authority;
4. Obtain foreign operating or military rights;
5. Involve release or likely release of classified military information;
6. Involve security assistance programs;
7. Concern intelligence and related matters;
8. Involve coproduction, licensed production, or related standardization matters;

⁷² *Id.* para. 5.2.b.(6).

⁷³ *Id.* para. 2.5.c.(1)-(4).

⁷⁴ AFPD 51-4, *Operations and International Law* (24 July 2018), para. 2.10, and AFI 51-403, para. 2.2. Both of these are under revision as at the time of publication.

⁷⁵ AFPD 51-4, para. 2.10.1, and AFI 51-403, para. 2.2.1.

⁷⁶ AFI 51-403, para. 2.

9. Involve international military or industrial security under the provisions of DoDD 5230.11 (relating to disclosure of classified information); or
10. Relate to on-base financial institutions, communications security technology, mapping, charting or geodesy, or to cooperative R&D (except health and medical matters).

Any proposed agreement falling within the foregoing exclusions or outside the categories of agreements to which re-delegated approval authority applies are forwarded to the appropriate Office of SecAF or Air Staff functional element for coordination with SAF/GC and other elements of the Office of SecAF and the Air Staff.

Substantive Legal Authority

In addition to being properly authorized under the procedural authorities discussed above, a DoD officer or employee undertaking the negotiation and conclusion of an international agreement must ascertain the substantive legal authority for each USG obligation in the agreement. This substantive legal authority is found in the constitutional, statutory, treaty, or other law applicable to the agreement's subject matter, not in the Case Act, DoS regulations, DoD regulations, or DAF implementing instructions discussed above.

U.S. Constitution. Provisions of the U.S. Constitution, standing alone, will not normally provide adequate legal authority for USG obligations undertaken in an international agreement. Due to the system of checks and balances embodied in the Constitution, the President's constitutional powers rarely may be applied in isolation of other constitutional provisions and statutes. Thus, the President's Commander-in-Chief powers must be read in conjunction with Congress' power "to make rules for the government and regulation of the land and naval forces" and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."⁷⁷ Further, the President's constitutional powers do not automatically flow to Executive Branch officers and employees, including DoD representatives negotiating and concluding international agreements, nor will they be authorized to invoke such powers (bearing in mind that the procedures for authorizing the negotiation and conclusion of international agreements confer no substantive legal authority). Accordingly, rather than relying on the Constitution itself, DoD personnel negotiating and concluding international agreements normally find the required substantive legal authority in the statutes and regulations enacted and promulgated within the framework of the Constitution.

Executive Agreements. Executive agreements often implement treaty provisions. Even if an executive agreement may be fairly characterized as being contemplated by, or in implementation of a treaty, the treaty will not usually constitute adequate substantive legal authority for every U.S. obligation in the executive agreement. The collective defense obligations of the United States under the North Atlantic Treaty, for example, do not provide DoD personnel with legal authority for executive agreement obligations requiring the expenditure of U.S. funds or the transfer of U.S. property to foreign governments. Indeed, because of the House of Representatives' constitutional role in the authorization and appropriation of funds, no treaty, standing alone, however explicit in its financial obligations, is adequate legal authority to expend U.S. funds. Thus, a U.S. security assistance obligation undertaken in defense treaties may not be fulfilled unless and until Congress authorizes and appropriates funds for that purpose. Such treaty provisions are not self-executing; that is, they do not constitute independent legal

⁷⁷ U.S. Constitution, Art. I, § 8.

authority for the execution of their terms. Most defense treaties have provisions expressly requiring implementation in accordance with “constitutional processes” or subject to U.S. laws or the authorization and appropriation of funds. Any treaty commitment subject to such conditions is, by its own terms, not self-executing. Even in the absence of such an express condition, treaty provisions are usually too general in nature to be self-executing. Therefore, notwithstanding the applicability or relevance of a treaty to a proposed executive agreement, it normally will be necessary to look to U.S. statutory law to find the full range of legal authority to support the executive agreement’s specific obligations.

Executive Orders and Regulations. Executive orders and regulations, while providing a source of legal authority for some U.S. obligations in executive agreements, depend on underlying statutory authority for obligations involving matters within Congress’ domain. For example, Article IV, Section 3 of the Constitution gives Congress the power “to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.” Therefore, statutory authority must support executive agreement obligations involving the provision of U.S. property to foreign governments or international organizations, whether permanently or on a temporary-use basis.

U.S. Statutes. The above limitations on using the Constitution, treaties, and regulations as substantive legal authority for U.S. obligations in international agreements lead to the same general conclusion: such authority must be found in U.S. statutory law. Certainly, such is the case when dealing with obligations requiring expenditure of U.S. funds or providing U.S. property or services to a foreign government or international organization. When determining the availability of legal authority, DoD personnel must keep certain basic principles in mind:

1. They must find affirmative authority for each proposed obligation; lack of a specific prohibition does not constitute authority.⁷⁸
2. They may not obligate U.S. funds unless Congress authorizes and appropriates funds for that purpose.⁷⁹ Accordingly, an international agreement that commits the USG to expenditures, either in the current fiscal year or in future years, for which funds have not yet been authorized and appropriated must be made subject to the availability of appropriated funds. USG commitments to indemnify other parties for contingent and undetermined liabilities may not be made without specific statutory authority, even if the commitment is made “subject to the availability of appropriated funds.”⁸⁰
3. They may use appropriated funds only for the purposes for which they are appropriated.⁸¹
4. Such U.S. funds as are available for foreign assistance are normally authorized and appropriated under the Foreign Assistance Act,⁸² and the Arms Export Control Act (AECA).⁸³
5. The transfer or other disposition of U.S. property requires congressional authority.⁸⁴

⁷⁸ DoDI 5530.03, para. 3.2.

⁷⁹ 31 U.S.C. § 1341.

⁸⁰ 59 Comp. Gen. 369 (1980).

⁸¹ 31 U.S.C. § 1301(a).

⁸² 22 U.S.C. §§ 2151-2152j-4.

⁸³ *Id.* §§ 2751-2799aa-2.

⁸⁴ U.S. Constitution, Art. IV, § 3.

6. Providing U.S. property and services to foreign governments and international organizations is governed by the Foreign Assistance Act (FAA), AECA, and other statutes applicable in particular circumstances, such as Acquisition and Cross-Servicing Agreements (ACSA) authority,⁸⁵ cooperative military airlift legislation,⁸⁶ and foreign excess property legislation.⁸⁷
7. DoD acquisition of equipment, supplies and services from foreign forces must be accomplished in accordance with Title 10, Chapter 137, U.S. Code, the FAR and Defense FAR, or other statutory authority applicable in the particular circumstances.⁸⁸

Statutory Authority—DoD-Negotiated and Concluded International Agreements

Bearing in mind the general principles applicable to the substantive legal authority required to support U.S. obligations in international agreements, the following statutory provisions have particular relevance to DoD international agreements. This list is by no means exhaustive.

The Arms Export Control Act (AECA). When deciding whether and under what terms and conditions DoD personnel may include USG obligations to provide property or services to a foreign government or international organization in an international agreement, they must first consider the applicability of the AECA.⁸⁹ The AECA prescribes the “normal” rule for such transfers and full cost payment in U.S. dollars, usually in advance. Unless another statutory authority is applicable under the particular circumstances, the AECA applies to any proposed transfer to a foreign government or international organization of DoD property or services (defined as defense articles and defense services in the AECA).

AECA sales, referred to as foreign military sales (FMS), are effected with Letters of Offer and Acceptance (LOA). An LOA is a sales agreement, contractual in form, and is not treated as an international agreement for Case Act and DoDI 5530.03 purposes. However, an FMS LOA often implements international agreement provisions that call for the transfer of U.S. defense articles or services.

The Foreign Assistance Act (FAA). The FAA governs the provision of economic and military assistance to eligible foreign countries and international organizations.⁹⁰

International Military Education and Training (IMET).⁹¹ The FAA authorizes the furnishing of military education and training to military and related civilian personnel of foreign countries, in the United States and abroad, through attendance at military educational and training facilities (other than U.S. service academies) or special courses of instruction at schools and institutions of learning or research, or by observation and orientation visits to military facilities and related activities.⁹² IMET includes reciprocal one-for-one professional military education (PME) exchanges each fiscal year between U.S. PME institutions and

⁸⁵ 10 U.S.C. §§ 2341-2350.

⁸⁶ *Id.* § 2350c.

⁸⁷ 40 U.S.C. § 704.

⁸⁸ *See, e.g.*, 10 U.S.C. §§ 2341-2350.

⁸⁹ 22 U.S.C. §§ 2751-2799aa-2.

⁹⁰ *Id.* §§ 2151-2152j-4.

⁹¹ *Id.* §§ 2347-2347h.

⁹² *Id.* § 2347.

comparable institutions of foreign countries and international organizations.⁹³ IMET also includes reciprocal one-for-one student exchanges each fiscal year between U.S. flight training schools and programs and comparable foreign country schools and programs.⁹⁴ DoD components execute these programs pursuant to international agreements.

The FAA authorizes transferring excess defense articles from existing DoD stocks to eligible countries and international organizations.⁹⁵ Limitations on transfers include that no funds available to the DoD for the procurement of defense equipment may be expended in connection with the transfer, the transfer must not have an adverse impact on U.S. military readiness, and the congressional committees must be notified in advance of certain proposed transfers.⁹⁶

The FAA contains several provisions authorizing the President special discretion or powers in emergencies.

1. 22 U.S.C. § 2318(a)(1) provides that, if the President determines and reports to Congress that an unforeseen emergency exists requiring immediate military assistance to a foreign country or international organization, and the emergency requirement cannot be met under the AECA or any other law, the President may direct the drawdown of defense articles from DoD stocks, DoD defense services, and military education and training of an aggregate value not to exceed \$100 million in any fiscal year.
2. 22 U.S.C. § 2318(a)(2) authorizes an additional \$200 million drawdown of defense articles, services, and training for the purposes of international narcotics control, international disaster assistance, antiterrorism assistance, nonproliferation assistance and migration and refugee assistance. 22 U.S.C. § 2348a provides additional drawdown authority of \$25 million for unforeseen emergencies in any fiscal year.
3. 22 U.S.C. § 2364(a) provides the President extraordinary authority to deal with emergencies. The President may do the following:
 - (a) Authorize the furnishing of assistance under the FAA without regard to any provisions of the FAA, AECA, any law relating to receipts and credits accruing to the United States, and any Act authorizing or appropriating funds for the FAA, in furtherance of any of the purposes of the FAA, when he determines and notifies Congress “that to do so is important to the security interests of the United States.”⁹⁷
 - (b) Make sales, extend credit, and issue guarantees under the AECA without regard to any provision of the FAA, AECA, any law relating to receipts and credits accruing to the United States, and any Act authorizing or appropriating funds for use under the AECA, in furtherance of the purposes of the AECA, when he determines and notifies Congress “that to do so is vital to the national security interests of the United States.”⁹⁸

⁹³ *Id.* § 2347c(a).

⁹⁴ *Id.* § 2347c(b).

⁹⁵ *Id.* § 2321j.

⁹⁶ *Id.*

⁹⁷ *Id.* § 2364(a)(1).

⁹⁸ *Id.* § 2364(a)(2).

Exercising 22 U.S.C. § 2364(a) authority is limited to a total in a fiscal year of \$750 million in sales and \$250 million of funds made available for use under the FAA or AECA.⁹⁹ The President is authorized to use an amount not to exceed \$50 million of foreign assistance funds “pursuant to his certification that it is inadvisable to specify the nature of the use of such funds, which certification shall be deemed to be a sufficient voucher for such amounts.”¹⁰⁰ None of these special authorities of the President have been delegated.

Acquisition and Cross-Servicing Agreements (ACSA). Authority for ACSAs provides for acquisitions and transfers of logistic support, supplies, and services.¹⁰¹ DoDD 2010.09, AFPD 25-3, and AFI 25-301 implement the ACSA authority.¹⁰²

Provision of Petroleum, Oils and Lubricants (POL), and Related Services to Foreign Military Aircraft and Vessels. Various statutes provide authority for the sale of fuel, oil, supplies, and services to foreign military aircraft transiting airbases operated by U.S. forces.¹⁰³ 10 U.S.C. § 9626 further authorizes the provision of routine airport services at no cost to the foreign country if such services are provided by Air Force personnel and equipment without direct cost to the Air Force, or where such services are provided under an agreement with the foreign country that provides for reciprocal furnishing of services at no cost. AFI 10-1801, paragraph 7.1.3., defines “routine airport services” and establishes guidelines for using this authority. These statutes constitute separate legal authority that, within the scope of their applicability (*i.e.*, support of transiting aircraft and vessels), may be used in lieu of the ACSA and AECA.

Reciprocal International Courtesies. Heads of DoD components may waive user fees when furnishing a service without charge as an appropriate courtesy to a foreign government or international organization, or comparable fees may be set on a reciprocal basis with a foreign country.¹⁰⁴

Standardization Agreements (STANAG) and NATO Cross-Servicing Agreements. In defining international agreements, DoDI 5530.03, paragraph G.2. states that certain STANAGs are not international agreements, but record the adoption of like or similar military equipment, ammunition, supplies, and stores or operational, logistic, and administrative procedures. However, a NATO standardization agreement that provides for mutual support or cross-servicing of military equipment, ammunition, supplies, and stores or for mutual rendering of defense services, including training, is considered an international agreement.

Most STANAG cross-servicing provisions are implemented by bilateral support agreements and implementing arrangements concluded under the ACSA authority, the authority to sell POL and related services, or the “reciprocal international courtesies” authority. If none of these authorities apply in a particular case, FMS may be the only alternative.

⁹⁹ *Id.* § 2364(a)(4)(A)(i)-(ii).

¹⁰⁰ *Id.* § 2364(c).

¹⁰¹ *Id.* §§ 2341-2350.

¹⁰² See Chapter 10, *Acquisition and Cross-Servicing Agreements*, for a detailed discussion on ACSAs.

¹⁰³ 49 U.S.C. § 44502(d) (this only applies where the sale of fuel is necessary because of an emergency); 10 U.S.C. §§ 2208(h), 7626, 7629, 8627, 9626 (which authorizes the SecAF to provide “routine airport services” and miscellaneous supplies to foreign military and other foreign State aircraft on a reimbursable basis), and 9629.

¹⁰⁴ 10 U.S.C. § 2350g(a)(2) and DoD 7000.14-R, *Department of Defense Financial Management Regulation* (May 2019), Vol. 11A, para. 040306.A [hereinafter FMR].

Cooperative Airlift Agreements. 10 U.S.C. § 2350c(a) authorizes the SecDef, after consultation with the SecState, to enter into cooperative military airlift agreements with allied countries for the reciprocal transportation of the personnel and cargo of the military forces of the parties on aircraft operated by or for such forces. The statute requires,

1. That such transportation be reimbursed at the same rate by both parties and in an amount not less than the rate charged to U.S. forces under 10 U.S.C. § 2208(h);
2. That accrued credits and liabilities be liquidated not less often than once every twelve months;
3. That, during peacetime, only military airlift capacity in excess of the providing party's requirements may be made available, and no airlift capacity may be created solely to accommodate requirements of the receiving party; and
4. The transportation on DoD aircraft of any defense articles purchased by a foreign country under the AECA (FMS or commercial), for the purpose of delivery of such articles, must be paid for at a rate equal to the full cost FMS rate required by 10 U.S.C. § 2761(a)(3).

The statute also authorizes the SecDef, after consultation with the SecState, to enter into nonreciprocal military airlift agreements with NATO subsidiary bodies (*e.g.*, SHAPE) for the transportation of the subsidiary body's personnel and cargo on aircraft operated by or for U.S. forces.¹⁰⁵

Multinational Trainings and Exercises. The SecDef may authorize U.S. forces to train with the military forces or other security forces of a friendly foreign country if the SecDef determines that it is in the national security interest of the United States.¹⁰⁶ A secretary of a military department or combatant commander may pay, or authorize payment for, the friendly foreign country's incremental expenses directly resulting from its participation in a training or exercise with U.S. forces.¹⁰⁷ The primary purpose of the training and exercises for which payment may be made must be to train U.S. forces.¹⁰⁸

Similarly, the Commander, Special Operations Command, and the commander of any other unified or specified CCMD, may pay, or authorize payment for, the incremental expenses incurred by a friendly developing country as the direct result of training with U.S. forces.¹⁰⁹ The primary purpose of the training for which payment may be made must be to train the CCMD's special operations forces.¹¹⁰

Communications Agreements. The SecDef, with the approval of the SecState, may enter into a bilateral arrangement with any allied country (defined as NATO countries, Australia, New Zealand, Japan, the Republic of Korea, or any country so designated for purposes of the section by the SecDef, with concurrence of the SecState), or a multilateral arrangement with allied countries, allied international organizations, or NATO, "under which, in return for being provided communications support and related supplies and services, the United States

¹⁰⁵ 10 U.S.C. § 2350c(b).

¹⁰⁶ *Id.* § 321(a).

¹⁰⁷ *Id.* § 321(b)(3)-(4).

¹⁰⁸ *Id.* § 321(c)(1).

¹⁰⁹ *Id.* § 322(a)(3).

¹¹⁰ *Id.* § 322(b).

would agree to provide...an equivalent value of communications support and related supplies and services.”¹¹¹

To accommodate the transmission of classified information between U.S. and allied forces, it is sometimes necessary to make U.S. communication security (COMSEC) equipment available to transmit and/or receive such information. In addition to the FAA and the AECA, 10 U.S.C. § 421 provides legal authority for temporary transfers of COMSEC equipment to foreign governments in appropriate circumstances.¹¹²

War Reserve Material (WRM). The FAA requires that transfers of WRM, reserved or earmarked for the use of foreign forces, to foreign countries be made only pursuant to the FAA, AECA, or subsequent corresponding legislation.¹¹³ Generally, the FAA prohibits the sale of U.S.-reserved WRM outside the DoD.¹¹⁴ However, it does not prohibit sales outside the DoD of stocks designated for replacement, substitution, or elimination, or designated for sale to provide funds to procure higher-priority stocks; nor does it prohibit transfers to NATO members.¹¹⁵ Further, the President may authorize the sale of U.S.-reserved WRM to non-NATO members where the President determines that there is an international crisis affecting the national security of the United States and the sale is in the best interests of the United States.¹¹⁶

Foreign Excess Property. The SecDef may dispose of foreign excess property by sale, exchange, lease, or transfer, for cash, credit or other property, with or without warranty.¹¹⁷ The SecDef may also authorize the abandonment, destruction, or donation of foreign excess property if it has no commercial value or if estimated costs of care and handling exceed the estimated proceeds from sale.¹¹⁸ The DoD established screening and other procedures for the disposition of foreign excess property in DoDM 4160.21, Volume 2, Enclosure 4.

Theater Security Cooperation. The SecDef may pay the travel, subsistence, and similar personnel expenses of, and special compensation for, defense personnel of friendly foreign governments and, with the concurrence of the SecState, non-defense personnel of friendly foreign governments and non-governmental personnel.¹¹⁹ The authority is limited to personnel from developing countries, except that the SecDef may authorize the payment of such expenses and special compensation for non-developing country personnel if he or she determines that such payment is necessary to respond to extraordinary circumstances and is in the national security interest of the United States.¹²⁰

¹¹¹ *Id.* § 2350f(a).

¹¹² *Id.* § 421(a) (provides that the SecDef may use funds available to DoD for intelligence and communications purposes “to pay for the expenses of arrangements with foreign countries for cryptologic support.”)

¹¹³ *Id.*, § 2321h(a).

¹¹⁴ *Id.* § 2390(a)(1).

¹¹⁵ *Id.* § 2390(c)(1)-(2).

¹¹⁶ *Id.* § 2390(b)(1)-(2).

¹¹⁷ 40 U.S.C. § 704(b)(1).

¹¹⁸ *Id.* § 704(b)(3).

¹¹⁹ 10 U.S.C. § 312(a)(1).

¹²⁰ *Id.* § 312(c)(1).

Aviation Leadership Program. The SecAF, under regulations prescribed by the SecDef, may provide undergraduate pilot training and necessary related training to personnel of the air forces of friendly, developing foreign countries.¹²¹ DoDI 2010.12 establishes policy and assigns responsibilities in implementation of the statute. AFI 16-108 provides guidance for managing and administering the program.

Inter-American Air Forces Academy (IAAFA). The SecAF may operate the IAAFA for the purposes of providing military education and training to military personnel of Central and South American countries, Caribbean countries, and other countries eligible for assistance under Chapter 5, Part II of the FAA.¹²² The fixed costs of operating and maintaining IAAFA may be paid by Air Force O&M appropriations.¹²³ All other costs are reimbursable (*e.g.*, IMET, FMS case).

International Defense Personnel Exchange Programs. The SecDef may enter into international defense personnel exchange agreements.¹²⁴ These are agreements with friendly foreign governments or international or regional security organizations for the reciprocal, or non-reciprocal, exchange of DoD service members or civilian personnel and military or civilian personnel of the defense or security ministry of the foreign government or international or regional security organization.¹²⁵ Reciprocal exchanges require each government to provide personnel with qualifications, training, and skills that are essentially equal to those of the personnel provided by the other.¹²⁶ The exchange programs generally fall into four categories: Military Personnel, Engineer and Scientist, Administrative and Professional, and Defense Intelligence Personnel. Historically, the DoD component and its foreign counterpart conclude an international agreement establishing ground rules for the exchanges, and setting forth the rights and responsibilities of exchange personnel. DoDD 5230.20 provides policies and responsibilities on assignment of foreign nationals to DoD components. AFI 16-107 implements the authorizing statute.

Cooperative Research, Development, Test, Evaluation (RDT&E), and Production Agreements. RDT&E agreements take several forms. As noted above, one such form is the engineer and scientist exchange agreement. They are more commonly found in production project or umbrella agreements, master exchange or STANAGs, and data exchange agreements. The SecDef has delegated authority to negotiate and conclude cooperative RDT&E international agreements to the Director, International Cooperation, Office of the USD(A&S).¹²⁷ In negotiating, renegotiating or implementing RDT&E international agreements, the DoD solicits the Secretary of Commerce's views with respect to the agreements' commercial implications and their potential effect on the U.S. industry's international competitive position.¹²⁸

RDT&E international agreements document the agreement between the United States and one or more foreign partners when the cooperative activity includes a commitment of

¹²¹ *Id.* § 348(a).

¹²² *Id.* § 349(a).

¹²³ *Id.* § 349(c).

¹²⁴ *Id.* § 311(a)(1).

¹²⁵ *Id.* § 311(a)(2).

¹²⁶ *Id.* § 311(c).

¹²⁷ DoDI 5530.03, para. 3.2.i.

¹²⁸ 10 U.S.C. § 2531(a)(2).

resources (*e.g.*, funds, equipment, labor, information or action).¹²⁹ U.S. legal authorities vary based on the scope of the IA and the partner(s) involved, but include 22 U.S.C. §§ 2767 and 2796d (AECA Section 65) and 10 U.S.C. §§ 2350(a), 2350(l), and 2358.¹³⁰ Development and execution of international agreements must be consistent with DoDI 5530.03, DoDI 5000.02, and the Defense Acquisition Guidebook.¹³¹

22 U.S.C. § 2767 specifically authorizes the President to enter into cooperative project agreements with NATO, NATO countries, and specific friendly foreign countries under certain circumstances.¹³² A “cooperative project” is a jointly managed arrangement described in a written agreement to further the objectives of rationalization, standardization, and interoperability of armed forces of NATO countries.¹³³ A cooperative project also includes arrangements that enhance the multinational effort of the participants to improve the conventional defense capabilities of the United States and other foreign friendly non-NATO member participants.¹³⁴ Any cooperative project provides for sharing of the costs of RDT&E or joint production of defense articles, concurrent production of jointly developed articles, a procurement by the United States of a defense article or service from NATO, its subsidiary bodies, or a friendly foreign non-NATO member country.¹³⁵

10 U.S.C. § 2350a authorizes the SecDef to enter into cooperative R&D agreements with one or more countries or organizations to conduct R&D on defense equipment and munitions.¹³⁶ The countries or organizations include NATO, a NATO organization, a NATO member nation, a major non-NATO ally, or any other friendly foreign country.¹³⁷ The statute requires that the agreements provide for the sharing of the costs of the project (including the costs of claims) between the participants on an equitable basis.¹³⁸ A foreign participant may not use any U.S. military or economic assistance, grant, loan, or other funds for its contribution.¹³⁹ Cooperative R&D programs not conducted under 22 U.S.C. § 2767 may be conducted under the “general” R&D authority of 10 U.S.C. § 2358.

Data Exchange Agreements. Agreements between the DoD, or a component, and a foreign defense ministry/department, or component, for the exchange of mutually beneficial information in a specific technical area to meet common R&D requirements. Data exchange agreements also provide for reciprocal exchanges so that, overall, the value of information received by each government from the other will be essentially equal.

The authority for data exchange agreements is found in the general R&D statute, 10 U.S.C. § 2358. Because the statute authorizes only R&D projects necessary to the DoD,¹⁴⁰ there are

¹²⁹ See *International Agreements*, OFFICE OF THE UNDER SECRETARY OF DEFENSE FOR ACQUISITION & SUSTAINMENT, <https://www.acq.osd.mil/ic/international-agreements.html> (last visited 13 May 2020.)

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² 22 U.S.C. § 2767(a) and (j)(1).

¹³³ *Id.* § 2767(b)(1).

¹³⁴ *Id.* § 2767(b)(2).

¹³⁵ *Id.* § 2767(b)(1)-(2).

¹³⁶ 10 U.S.C. § 2350a(a)(1).

¹³⁷ *Id.* § 2350a(a)(2).

¹³⁸ *Id.* § 2350a(c).

¹³⁹ *Id.* § 2350a(d)(2).

¹⁴⁰ *Id.* § 2358(a)(1).

certain limitations to keep data exchange programs within statutory authority. For example, exchanges of information are made (1) only within the scope of the specific project (*e.g.*, releases of manufacturing or production data would be outside the scope); and (2) only to the extent authorized by the participants' national laws, regulations, and policies, including national disclosure policy. Otherwise, data may be provided to a foreign government only under FMS, notwithstanding the receipt of benefits such as standardization, interoperability, closer alliances, enhanced free world security, etc.

No USG material or equipment may be provided to a foreign government solely on the basis of a data exchange agreement (*e.g.*, an AECA lease or loan or FMS LOA is required).

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- Case-Zablocki Act 1972 (1 U.S.C. §§ 112, 112a and 112b)
- 10 U.S.C. §§ 311, 312, 321, 322, 348, 349, 421, 2201-2222, 2304, 2318, 2321h, 2341-2350, 2350a, 2350c, 2350f, 2350g, 2341-2350c, 2358, 2364, 2390, 2531, 2675, 7626, 7629, 8627, 9013, 9626, 9629, 9831, and 9832
- Foreign Assistance Act, 22 U.S.C. §§ 2151 *et seq.*
- Authority to Transfer Excess Defense Articles, 22 U.S.C. § 2321j
- International Military Education and Training, 22 U.S.C. §§ 2347-47h
- Arms Export Control Act, 22 U.S.C. §§ 2751 *et seq.*
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- DoDI 5530.03, *International Agreements* (4 December 2019)

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AFI 10-1801, *Foreign Government Aircraft Landings at United States Air Force Installations* (25 September 2018)

AFI 16-107, *Military Personnel Exchange Program* (29 August 2018)

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RESTATEMENT OF THE LAW (FOURTH), THE FOREIGN RELATIONS LAW OF THE UNITED STATES (AM. LAW INST. 2018)

¹⁴¹ As of June 2020, AFPD 51-4 is under revision by AF/JAO. Please check for an updated version of these references.

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BACKGROUND

The sending of U.S. forces abroad to further national security and foreign policy objectives has profound implications under U.S. and international law and raises the basic issue of the status, rights, privileges and immunities, if any, of that force, its members, civilian component, dependents, and contractor personnel.

Since the emergence of the territorial State, States have claimed jurisdiction with respect to conduct taking place within their territory. A sovereign State “has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction.”¹ This territorial jurisdiction extends to foreigners. The soundness of this view becomes evident when one considers the consequences of a rule of law that would make foreigners immune from local law. With respect to foreign forces present within a receiving State, there are two schools of thought: territorial jurisdiction and the law of the flag. In a “territorial jurisdiction” State, the law of the receiving State is deemed to control. In a “law of the flag” State, sending State law is deemed to control.

The law of the flag provides for the immunity of a military force temporarily passing through the territory of another State in peacetime. A customary exception, somewhat misunderstood, is the immunity of a military force temporarily passing through the territory of another State in peacetime. The *Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812), case is widely cited for this proposition. The specific issue in that case involved an American civilian plaintiff’s claim to ownership of a French warship visiting a U.S. port, but in dictum, Chief Justice John Marshall addressed concerns about jurisdiction over foreign military personnel. He observed that, “the grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops, during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.” It should, however, be noted that Marshall was speaking of troops passing through foreign territory with flags flying and drums rolling, and his opinion did not exclude the possibility that a State might condition its consent to passage on submission to its jurisdiction. Although the State practice in his day was to permit the transit of such forces without condition, it should be noted that this practice was limited to the temporary presence of foreign troops in the receiving State, and not necessarily to long-term presence. Therefore, Marshall’s dictum was not an exception to the general rule but an expression of it. Consequently, the rule has since been summarized as: “Foreign military forces present in a state’s territory with the consent of that state...are subject to the law of the receiving state except as otherwise agreed between the two states.”²

After World War II, negotiation of a status of forces agreement (SOFA) became imperative because no exception to the general rule could be relied upon. Forces were to be permanently stationed overseas in significant numbers. Issues other than criminal jurisdiction had to be addressed and resolved, including access, claims, customs and taxation, and labor. In the late 1940s and early 1950s, the NATO SOFA was concluded as well as bilateral SOFAs with Japan, Korea, and the Philippines. The Department of Justice (DoJ) took the position during the 1953

¹ As noted in the U.S. Supreme Court in a *per curiam* decision in *Wilson v. Girard*, 354 U.S. 524 (1957).

² RESTATEMENT OF THE LAW (THIRD), THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987), § 461, comment f.

Senate hearings on the NATO SOFA that there existed no implied immunity from local law absent an international agreement to that effect.³

PURPOSE OF SOFAS

SOFAs are not basing or access agreements. They define the status of U.S. forces in the territory of friendly States and do not themselves authorize the presence or activities of those forces. However, although it is common to address both status and access issues in a single broad international agreement commonly referred to as a “SOFA,” it is important to carefully evaluate whether there is both a basing/access aspect to the agreement as well as a status protection aspect enabling the stationing of a force in a receiving State.

Permanently stationing U.S. forces abroad in peacetime under the general rule of international law thereby subjecting them fully to host nation jurisdiction is not acceptable for political reasons, because of the need to exercise discipline over the force, and to ensure their fair treatment. Consequently, it has been a long-standing U.S. policy to seek broad relief from host nation jurisdiction through the mechanism of a SOFA. The purpose is not to immunize the force from criminal sanctions, but to apply military discipline within a U.S. judicial system whereby similar standards are made applicable on a worldwide basis.

The purpose of a SOFA is to establish a mechanism for sharing the sovereign prerogative between the receiving and the sending States. A careful read of the NATO SOFA and similar SOFAs shows that there is a careful balance between the principles of territorial jurisdiction and the law of the flag. It is intended to strike a balance between the rights and obligations of each commensurate with the interests and needs of each. No SOFA, once concluded, will function well unless all parties understand the reason for sharing and believe their interests have been properly balanced. An ancillary purpose of a SOFA is to resolve as many issues as possible prior to the arrival of a force. It establishes a smooth working relationship, thereby reducing the need for dispute resolution.

The United States enters into SOFAs to define the rights, immunities, and responsibilities of the force, its members and dependents and civilian component, and possibly contractor personnel, focusing on two broad areas: criminal jurisdiction and civil law relief. Criminal jurisdiction establishes the basic principles for sharing or receiving authority to exercise exclusive or primary rights of jurisdiction. Civil law relief addresses, for example, exemption from income tax, duties on importation of household goods and privately owned vehicles, and work permits.

GEOGRAPHICAL APPLICATION

The NATO SOFA (and the Partnership for Peace SOFA that incorporates the NATO SOFA by reference) is the only multilateral SOFA to which the United States is a party. Because the NATO SOFA applies within the territory of all of its parties, the NATO SOFA applies in the United States and governs the activities of foreign NATO forces here in the United States. As such, it is the only reciprocal SOFA to which the United States is a party and, to give it legal effect, is a formal treaty entered into with the advice and consent of the Senate. Treaties are the supreme law of the land in the United States in accordance with Article VI, U.S. Constitution.⁴ All other SOFAs to which the United States is a party are bilateral and non-reciprocal (*i.e.*, they do not apply in the United States). For example, the bilateral and multilateral (with Germany and other sending

³ Senate Committee on Foreign Relations, *Agreement Regarding Status of Forces of Parties to the North Atlantic Treaty*, 83d Cong., 1st sess., 1953, Committee Print, 38.

⁴ U.S. Constitution Art. VI, cl. 2.

States) supplements to the NATO SOFA that were completed to address deficiencies in the NATO SOFA are non-reciprocal. They are, for the United States, executive agreements and not treaties.

Moreover, it is the position of the United States that the NATO SOFA applies to all personnel present in the receiving State, whether or not their presence is specifically and narrowly tied to a NATO mission. Not all countries recognize this principle in all cases, and Air Force legal advisors should be prepared to argue for the geographical application of the NATO SOFA. Indeed, this argument makes sense, because the NATO SOFA does not authorize the stationing of forces in *any* NATO nation. As noted previously, there must be a separate agreement authorizing such stationing of forces. Unless that separate agreement specifically disclaims the application of the NATO SOFA (an unlikely prospect), then the NATO SOFA (arguably) applies.

TYPES OF STATUS ARRANGEMENTS

In short, there are two basic types of status that the United States can seek for its military forces abroad. First is a status equivalent to that of administrative and technical (A&T) staff of an embassy under the Vienna Convention on Diplomatic Relations (commonly referred to as A&T status). Second is something less than A&T status and results in some form of shared criminal jurisdiction and some limited protection from civil liabilities. One of the many possible iterations of this second type of status is what is found in the NATO SOFA. Which arrangement is sought, A&T or something less than A&T, depends upon various factors, including the nature and system of jurisprudence in the receiving State, the duration of the military activity within the host country, the maturity of the relationship between the sending and receiving States, and the prevailing political situation in the host country. Some SOFAs are self-contained in a separate document, while others are integrated with other matters in a base rights or access agreement.

Commonly, the United States seeks status equivalent to A&T. This status is appropriate in a number of situations, such as when U.S. forces are sent abroad to participate in joint military exercises or humanitarian relief efforts lasting not more than a few days. It is also appropriate when the presence involves only a few persons on a permanent basis, such as establishing a regional Defense Contract Management Area Office or a Medical Research Unit and a SOFA does not otherwise exist. A&T status may be granted in the context of the overall agreement authorizing the activity itself. The Department of State (DoS) has approved a template text for a SOFA with A&T status, and equivalent A&T status may be obtained by a simple exchange of diplomatic notes.⁵ Work with the U.S. embassy country team in the receiving State to initiate and conclude such an exchange of notes.

The granting of equivalent A&T status means that the personnel concerned will be accorded the immunities provided for in the Vienna Convention on Diplomatic Relations to persons of comparable rank. The most important of these are full immunity from the criminal jurisdiction of the receiving State and immunity from civil jurisdiction to the extent that the act or omission giving rise to the action was done in the performance of official duty. Also granted is protection from arrest or detention, inviolability of personal residence and correspondence, and exemption from all duties and taxes.

More detailed agreements are usually reserved for circumstances in which military bases and installations are made available for use by the United States and the numbers of U.S. personnel

⁵ Known as the “Global SOFA Template.” See <https://2009-2017.state.gov/t/avc/isab/236234.htm> (last visited 18 May 20).

and dependents present in the host country require the full range of support commonly provided. It is in these circumstances when the second type of status, something less than A&T, is provided.

CONTENT OF SOFAS

Air Force legal advisors overseas should be familiar with the coverage of the SOFA. Most will cover military personnel and the civilian component, and many will also address dependents. Surprisingly, few cover contractor personnel. For example, contractor personnel are not covered by the NATO SOFA, but may be covered by a supplementary agreement or other separate bilateral agreement. Legal advisors must know whether there are any supplementary or bilateral agreements or exchanges of notes or the like, and have copies readily available to consult in the event of questions or concerns.

In circumstances where there is less than A&T status, different substantive areas may or may not be addressed. What is provided below is the content, by topic and sub-topic, of potential issues that may be addressed in a SOFA or agreements that supplement or implement SOFAs. The list is not exhaustive and is intended to give the reader a sense of the subject matter that may be addressed in a SOFA. The texts of SOFAs can be as short as a few pages, as with diplomatic notes addressed above, or, as in the case of the German Supplementary Agreement to the NATO SOFA, several hundred pages.

Definitions

1. U.S. Armed Forces
2. Members of the Force
3. Members of the Civilian Component
4. Dependents
5. Contractors
6. Contractor Employees

Respect for Law and Sovereignty

1. Duty to respect law and sovereignty. (Note that the duty to respect law and sovereignty is different from a duty of a force to comply with such laws. In the event of any questions or concerns, elevate the question in your legal chain.)
2. Duty to abstain from any inconsistent political activity.
3. Duty of the sending State to take necessary measures to that end.

Entry and Departure Procedures

1. Host nation immigration requirements vary between nations. However, it is generally accepted under most SOFAs that active duty members of the force are exempted from passport and visa requirements and need only military identification (ID) card and a collective or individual movement order.
2. Similarly, crews of visiting ships and aircraft need only their ID card and orders.
3. Members of the civilian component will normally be subject to immigration control and will require a passport and, depending on the country, applicable visas.

4. Other topics include: extent of applicability of immigration and emigration inspection, exemption from laws and regulations on the registration and control of aliens, exemption from work permit requirements if employed by the force in other than a local national position, non-acquisition of any right of permanent residence or domicile, handling request from host country for removal of an individual, and procedures to retire or separate in the host country.

Wearing of the Uniform

1. When and where permitted.
2. Application of U.S. law and service regulations.
3. When on or off a facility or installation which may be distinguished from being on or off duty.

Carrying of Arms

1. When and where permitted.
2. Members of the force may possess and carry arms while on duty if authorized to do so by their orders.
3. Other topics include sending State to give sympathetic consideration to requests by host nations. Typical host nation requests may include advance notice to host if arms taken off military facility and conditions for carrying arms in limited circumstances off military facility (such as escort of convoy). U.S. commander's force protection authority and their authority on/off installations may also be addressed.

Driving Licenses and Registration

This subject is normally worked through bilateral arrangements between the host nation and the sending State and will normally distinguish between the requirements of service vehicles versus privately owned vehicles. These SOFA arrangements will likely address: the allowance of U.S. forces-issued licenses for those operating U.S. service vehicles and privately owned vehicles; requirements for registration or licensing of U.S. vehicles; acceptance of U.S.-issued licenses to operate privately owned vehicle or for the receiving State to issue license without test or fee; local registration of privately owned vehicles, and payment of fee for cost of registration.

The Division of Criminal Jurisdiction

Refer to Chapter Nine, *Foreign Criminal Jurisdiction*.

Civil Jurisdiction

1. Immunity or limited protections for matters arising out of the performance of official duty; application of appropriate SOFA claims procedures; enforceability of judgments and actions against the U.S. Government.
2. Other topics: U.S. DoJ does not waive its defense of sovereign immunity (but may not always assert it—depends on the facts of each case).

Arrest and Service of Process

Procedures for arrest and service of process in criminal and civil matters within the military facility are normally coordinated with host nation authorities to ensure an orderly process of notification while minimizing disruption to operations.

Claims

1. Types of government-to-government claims waived and procedures for handling those claims not waived.
2. Formula for adjudication and payment of all other claims (except contractual or combat related) caused by the act or omission of U.S. personnel or by an individual for which the U.S. Force is responsible (either the United States adjudicates and pays in full or host nation adjudicates and cost shares the payment).
3. Other topics: recognition of U.S. *ex gratia* claims procedures and establishing time limits on claims submissions.

Duties, Taxes and Other Charges

1. Importation, exportation and local purchase exemption from duties and taxes for U.S. material, equipment, supplies, provisions and other property for the exclusive use by the U.S. Force (also relief for contractor acting by or on behalf of the United States).
2. Official vehicles, vessels and aircraft exempt from overflight and air navigation, landing and parking, light and harbor fees, road tolls and other similar charges (reasonable charges for services requested and received, such as for de-icing or fuel, will be paid).
3. Other topics: customs control procedures to include procedures for transfer to others, and possible contractor income tax and licensing relief.

Importation, Exportation, Use and Exemptions for Personal Property

1. Exemptions for household goods and privately owned vehicles.
2. Exemptions for reasonable quantities for personal use during assigned tour.
3. Other topics: limitation on the number of tax-free imported privately owned vehicles, procedures for transfer to others, procedures for inspection of household goods, and cooperation between the parties to prevent abuses.

Personal Tax Exemption

1. Exemption from receiving State from personal income tax on the salary and emoluments paid as members of the force of the sending State or any other tax based on legal residence or domicile.
2. Other topics: condition for loss of exemption and whether filing is required and programs to allow entitled personnel to make personal purchases free of host nation value added tax.

Provisioning of the Force and Morale, Welfare and Recreation (MWR)

1. Authorization to establish commissaries, exchanges, sales and service activities, MWR facilities, and designation of authorized users.
2. Other topics: circumstances when retirees, personnel on leave in host country, third country and local nationals may be authorized users; rules and procedures for contracting with local commercial interests and concessionaires.

Health Care

1. Basis for access to host nation health care.
2. Other topics: host nation desire to regulate U.S. medical care, and procedures for autopsies.

Postal Services

1. Authorization to establish a military post office.
2. Other topics: United States to operate under U.S. laws and regulations, customs control procedures, procedure for host to inspect (or not inspect) private mail, and any special use permitted (*e.g.*, by retirees).

Use of Transportation

1. Privately owned vehicles exempt from road tolls.
2. U.S. personnel and dependents exempt from travel tax on airline tickets and departure fees from airports.

Use of Currency and Banking Facilities

1. Authorization to contract for military banking services.
2. Relaxation of currency control restrictions and permission of military banks to convert currency of both parties and third countries for official purposes and for needs of U.S. personnel and dependents.
3. Military banks authorized to provide full-range of services.
4. Other topics: contracting process accomplished in accordance with U.S. law and regulation, circumstances permitting host country to reject a bank selected through U.S. contracting process (*e.g.*, limited to security reasons), host licensing of military bank (*pro forma*/one-time), procedures for military bank to acquire host country currency (*e.g.*, from national bank and rate of exchange).

Contractors and Contractor Employees

1. Definition of who qualifies.
2. Identify specific rights and privileges to be accorded U.S. contractor.
3. Identify any customs relief for contractor organizations.
4. Other topics: relief from work permit requirement, local national hiring obligations, dual nationality treatment, third country nationals, and waiver of visa requirement (or expedited procedures), authorization for individual logistic support for contractor employees, and status of special technical representatives working at sensitive locations (intelligence work).

Local Procurement

1. Right to accomplish in accordance with U.S. law and regulation.
2. Other topics: commitment to use local contractors to maximum extent practicable on a competitive basis.

Local Construction

1. Rules and procedures governing residual value.
2. Rules pertaining to indirect contracting through designated host nation major construction and design agents; making suitable arrangements for host nation and U.S. design and building requirements.

Utilization of Local Labor

1. Accept local labor standards.
2. Applicability of local labor laws, rules, regulations, and protections of workers (including court decisions or rulings) provided for in domestic legislation.
3. Other topics: preferential local hiring if and as permitted by U.S. law, dual nationality treatment, process for allowing strikes, dispute resolution mechanisms, and wage-setting procedures.

Dispute Resolution

Procedures for dispute resolution (via a joint commission or through diplomatic channels).

Governing Agreements

1. Preserving prior agreements not inconsistent with SOFAs.
2. Procedures for review and termination or modification of prior agreements.

Duration and Termination

1. Duration period and termination procedures (Ratified (if treaty) or accepted (if executive agreement) in accord with respective constitutional processes).
2. Date of entry into force or effect or event bringing into force or effect (exchange of instruments).
3. Other topics: authorization statement and signatures, language or languages recognized by the agreement and if provisions conflict, which language prevails if any, provision for amending or suspending (special provisions in the event of armed conflict).

COMMON PITFALLS

Deploying without Addressing the Issue of SOFA Coverage

SOFA coverage should always be raised and elevated up the chain of command for an appropriate decision. Senior DoD officials may decide to conduct an activity overseas without SOFA coverage for policy reasons. Commanders and judge advocates in the field should not be making such determinations.

Negotiating SOFAs

Negotiating SOFAs or SOFA issues is always a “policy significant matter,” which only Washington-level DoD and DoS personnel may authorize. There exists no delegation of procedural authority to the field in this regard. Consequently, all identified SOFA issues requiring negotiation must be elevated to authorities in Washington.⁶

CONCLUSION

This broad survey is not exhaustive, but is intended as a general overview and introduction to the subject of SOFAs. Many issues have only been slightly touched upon and other issues not discussed at all. Additional questions of interest might include negotiating SOFAs, treatment in U.S. law of SOFAs that are treaties and those that are executive agreements, the impact of the European Union or other similar regional authorities on SOFAs among or with their member States, and the relationship of subsequent inconsistent national legislation on SOFA obligations.

Nevertheless, it should be evident that the issues are many, the scope of SOFA coverage varies (or there may be none at all) and a full range of legal skills is required. Creativity and hard work will be necessary to resolve often difficult and complex matters. Attention to precedent and U.S. worldwide practice is essential lest what may appear at the moment to be a victory becomes a burden and loss of privileges by U.S. personnel and dependents around the world. In this age of rapid communications, it is all too easy for one State to become privy to the practice of the United States in its relations with another State. A State may utilize, to its own advantage, its knowledge of U.S. practice with other States. Communicate frequently with the international/operations legal personnel in higher headquarters to ensure that SOFA practice remains as consistent as possible both in the receiving State and for the United States as a worldwide sending State.

⁶ See AFI 51-403, *International Agreements* (8 February 2019).

A particular SOFA might not address an issue you believe so obvious that it should have been addressed. In fact, the parties may have sought to address it but agreement on language proved too difficult. Whether seeking to resolve a criminal jurisdiction, customs or tax matter, judge advocates should—keeping in mind U.S. policies such as maximizing U.S. criminal jurisdiction—strive to achieve those ends. SOFAs establish a framework in which the interests of the parties are balanced to the extent possible in a pre-determined way so as to minimize future conflicts. Although essential, SOFAs will not provide the solution to every problem that might arise. Even in those circumstances where the SOFA does not provide the solution, our effort remains consistent with established policy and worldwide practice.

Finally for an updated list of current unclassified SOFA, or to see if a SOFA exists between the United States and a specific country, go to <https://kmjas.jag.af.mil/moodle/course/view.php?id=349> (restricted access).

REFERENCES

U.S. Constitution

Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Forces, 19 June 1951, 4 U.S.T. 1792, T.I.A.S. 2846, 199 U.N.T.S. 67 (entry into force 23 August 1953, for the United States same date)

Vienna Convention on Diplomatic Relations, 18 April 1961, 22 U.S.T. 3227, T.I.A.S. 7502, 500 U.N.T.S. 95 (Entry into force 24 April 1964, for the United States 13 December 1972)

Agreement Among the States Parties to the North Atlantic Treaty Participating in the Partnership for Peace Regarding the Status of Their Forces, 19 June 1995, T.I.A.S. 12666 (entry into force 13 January 1996, for the United States same date)

Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1332, 1391, 1441, and 1602-1611

WHITEMAN DIGEST OF INTERNATIONAL LAW, Vol. 6, § 15 (1968)

RESTATEMENT OF THE LAW (THIRD), THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987)

Senate Committee on Foreign Relations, *Agreement Regarding Status of Forces of Parties to the North Atlantic Treaty*, 83d Cong., 1st sess., 1953, Committee Print

The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812)

Wilson v. Girard, 354 U.S. 524 (1957)

DoDI 5525.01, *Foreign Criminal and Civil Jurisdiction* (31 May 2019)

AFI 51-403, *International Agreements* (8 February 2019)

Chapter 9

FOREIGN CRIMINAL JURISDICTION

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BACKGROUND

Service members and non-military DoD personnel (collectively “DoD personnel”) serving in or deployed to locations outside the United States may be subject to criminal proceedings by both the host nation (HN) and the United States for criminal offenses allegedly committed in the HN. It is the policy of the DoD and the Air Force to maximize the exercise of U.S. jurisdiction over DoD personnel to the extent permissible under applicable Status of Forces Agreements (SOFA) or other forms of jurisdictional arrangements; protect, to the maximum extent possible, the rights of DoD personnel who may be subject to criminal trial by foreign courts and imprisonment in foreign prisons; and if arrested, secure, where possible, the release of DoD personnel to the custody of U.S. authorities pending completion of all foreign judicial proceedings.¹ This policy also applies to dependents of DoD personnel (command-sponsored and non-command sponsored) when those dependents are in a foreign country accompanying DoD personnel (collectively “dependents”).²

JURISDICTION

As a starting point, unless an exception has been granted or diplomatic immunity applies, the HN has jurisdiction under international law over any person, including another nation’s service members, physically within its borders based on territorial sovereignty. Simultaneously, the United States always has jurisdiction over its service members for UCMJ offenses (the UCMJ applies extraterritorially or “in all places”). Normally, only one nation will exercise criminal jurisdiction against the service member. Under international law, that nation (historically the HN) is referred to as exercising primary jurisdiction. Primary jurisdiction of the case is often governed by the terms of any applicable SOFA or comparable agreement with the particular HN. In certain peace operations, especially those run by the United Nations, a Status of Mission Agreement (SOMA) may be used instead of a SOFA. In this Chapter, SOFA will refer to both SOFAs and SOMAs. In other HNs not covered by the major SOFAs, there may be other relevant bilateral agreements or diplomatic notes. If there is no such agreement in place, DoD personnel have no more protection than tourists. The prevailing international view is that, in the absence of an agreement to the contrary, criminal jurisdiction rests exclusively with the HN. While the United States has worldwide personal jurisdiction over U.S. service members, the exercise of that jurisdiction in the HN without HN permission may be considered a breach of its territorial sovereignty.

¹ DoDI 5525.01, *Foreign Criminal and Civil Jurisdiction* (31 May 2019), para. 1.2. “Civilian component” is a term often seen in SOFAs that is used to refer to non-military DoD personnel as defined in DoDI 5525.01; however, the terms of the SOFAs should be carefully reviewed to ensure there are no distinctions in the applicable definitions.

² 32 C.F.R. 151 and DoDI 5525.01.

SOFAS

The major SOFAs (NATO, Japan, and Korea) contain similar formulas for determining which country has priority to exercise jurisdiction over DoD personnel for criminal offenses.³

Exclusive Criminal Jurisdiction. Generally, each HN has exclusive jurisdiction over acts that are crimes under the HN's laws but not under U.S. law (*e.g.*, religious crimes, political crimes, and certain negligent acts that, under U.S. law, do not rise to the level of criminal conduct or which are offenses against the security of the HN).⁴ Similarly, the United States has exclusive jurisdiction over acts that are crimes under U.S. military or other applicable law that are not violations of HN law (*e.g.*, absent without leave (AWOL), disrespect, and disobeying orders).⁵

Concurrent Criminal Jurisdiction. When the act violates the laws of both the United States and the HN, there is concurrent (shared) jurisdiction over the case. Thus, it would be necessary to determine which State will have the primary right to exercise jurisdiction. The primary right includes the right to proceed and, if exercised, will subordinate the right of the other State.⁶

Receiving State has Primary Right

Under the NATO SOFA formula, the general rule is the HN (receiving State) has the primary right to exercise jurisdiction when there is concurrent jurisdiction. There are two exceptions to this rule.

First Exception – Inter Se Cases. These are cases in which a member of the sending State force commits an offense solely against the security, personnel, or property of the sending State.⁷ This exception gives to the sending State the primary right to exercise jurisdiction and only applies where the sending State, its property or personnel, including dependents, or its interests, are the sole victims. It does not apply to offenses against a receiving State victim. As noted above, dependents may be victims but cannot be wrongdoers in inter se situations under the NATO SOFA.

³ See Chapter Eight, *Status of Forces Agreements*, for discussions on SOFAs outside of the context of FCJ. The NATO SOFA is available at <http://photos.state.gov/libraries/italy/217417/pdf/sofa-en.pdf>. The Korea SOFA is available at <https://www.usfk.mil/About/SOFA/>.

⁴ Classic examples are “insult” or “public behavior” laws.

⁵ See discussion on waivers below.

⁶ Keep in mind that the NATO SOFA addresses the “primary right” to exercise jurisdiction. It is important to distinguish this from any concept that there is both primary and secondary jurisdiction. Note that the exercise of criminal jurisdiction may include a decision by authorities not to take any action in a case. We claim that decision is an exercise of jurisdiction. The decision not to proceed with criminal action, however, should not give rise to any “secondary” jurisdiction or the right of the receiving State to take criminal action in the absence of our own. It is the U.S. position that the receiving State does not have a right to exercise jurisdiction in such cases absent a waiver by the sending State.

⁷ See NATO SOFA, Art. VII, paras. 1 and 3. This exception applies to a member of the civilian component if the member is subject to the “military law of that state” (UCMJ). See footnote 11 below for additional discussion. Per DoDI 5525.01, para. 1.2, “It is DoD policy to apply, when practicable, procedures similar to those called for in the U.S. Senate Resolution of Ratification, with reservations, to the North Atlantic Treaty Organization Status of Forces Agreement, in all areas outside the United States where DoD personnel are present in connection with official duties, even in those areas where the North Atlantic Treaty Organization Status of Forces Agreement is not applicable.”

Second Exception – Official Duty Cases. The sending State has the primary right to exercise jurisdiction over offenses arising out of an act or omission done in the performance of official duty.⁸ This derives from the principle that official activities of the sovereign must not be subject to determination or judgment by another sovereign. The sovereign on whose behalf the duty was performed should be the sole arbiter of alleged offenses committed by those acting in an official capacity. The United States vigorously defends the concept of official duty and asserts the primary right to exercise jurisdiction in these cases. Moreover, the practice under the NATO SOFA model is that the sending State alone decides whether an act arose out of official duty. This decision is communicated to the receiving State through various protocols agreed upon between the U.S. Government and the HN. Official duty declaration may be accomplished through a bilateral agreement or by an embassy diplomatic note. Normally, receiving States accept such declarations with little argument. The official duty exception applies only to official actions of DoD personnel (jurisdiction over civilians is discussed below). It does not apply to dependents because they do not act in an official capacity. Consistent with U.S. policy to maximize jurisdiction, official duty declarations must be issued in all appropriate circumstances.

Waivers of Jurisdiction

With concurrent jurisdiction, when the HN has the primary right to try a case, the United States will normally request a waiver of jurisdiction from the HN, consistent with U.S. policy to maximize jurisdiction. The procedures for and the likely success of a request for waiver vary depending on the HN and, frequently, the seriousness of the offense (the more serious the offense, the less likely the waiver will be granted). On occasion, standing waivers for certain categories of offenses have been negotiated with receiving States. Conversely, some States judiciously guard their jurisdiction and grant few waiver requests.⁹

⁸ *Id.*

⁹ As procedures for requesting waivers vary depending on the receiving State, one must refer to geographic Combatant Commander (GCC) and designated commanding officer (DCO) guidance and policy for the specific procedures in place for the receiving State in question. Waiver of jurisdiction in official duty cases is not prohibited but is uncommon, and if encountered the authority to grant such a waiver is based on the applicable agreement with the HN. See *Wilson v. Girard*, 354 U.S. 524 (1957).

Jurisdiction over Non-Military DoD personnel and Dependent Family Members Accompanying the Force

Non-military DoD Personnel (rarely contractors) and dependent family members¹⁰ accompanying U.S. forces abroad are normally considered subject to the terms of the applicable SOFA.¹¹ The HN will have primary jurisdiction based on its territorial sovereignty. However, consistent with U.S. policy, the United States should seek to maximize jurisdiction over non-military DoD personnel and dependents accompanying DoD personnel.¹²

In the past, if the HN ceded primary jurisdiction over to the United States, or otherwise chose not to exercise jurisdiction, the options of the commander were limited to administrative procedures (e.g., Family Member Misconduct Boards, early return of dependents and employment disciplinary procedures, if appropriate). To remedy this problem, Congress passed the Military Extraterritorial Jurisdiction Act (MEJA) of 2000.¹³ MEJA extends U.S. jurisdiction to cover offenses committed by non-military DoD Personnel and dependent family members outside the United States if the criminal act is punishable by at least one year in confinement. MEJA can also extend jurisdiction over military personnel and contractors' employees who are not normally residents in the HN. This act allows the Department of Justice (DoJ), not the Air Force or DoD, to prosecute the offending civilian in U.S. federal court. Congress also amended Article 2a(10), UCMJ, to provide jurisdiction over civilians serving with or accompanying U.S. armed forces in the field during either declared war or a contingency operation.¹⁴ Questions concerning cases involving MEJA or application of extended Article 2a(10) jurisdiction should be referred to the Military Justice Directorate of the Air Force Legal Operations Agency (AFLOA/JAJM).

¹⁰ For the definition of “dependent,” refer to applicable service personnel regulations.

¹¹ Jurisdiction over U.S. civilians and dependents abroad presents unique challenges. SOFA language appears narrowly drawn and may only authorize sending State jurisdiction when the accused is a person “subject to the military law of the sending state.” This phrase is used in the NATO SOFA, at Art. VII, para. 1(a). At the time the NATO SOFA entered into force, U.S. military law applied to civilian employees and dependents accompanying the force. However, in 1957, the U.S. Supreme Court held that civilians could not be tried by court-martial in time of peace. *Reid v. Covert*, 354 U.S. 1 (1957). Thus, the SOFA language “subject to the military law of the sending state” could serve to thwart U.S. efforts to obtain jurisdiction, and it does. It can successfully be argued, however, that “military law” includes not only the UCMJ, but also all U.S. federal law that a force takes with it when it goes abroad. Further, Art. VII, para. 1a gives the military authorities of the sending State the right to exercise all criminal and “disciplinary” jurisdiction conferred on them by the law of the sending State. U.S. civilian employees and dependents may well be subject to the command’s disciplinary authority that, in appropriate cases, would satisfy the interests of justice.

¹² DoDI 5525.01, para. 4.3.a.

¹³ Military Extraterritorial Jurisdiction Act of 2000 (MEJA), 18 U.S.C. §§ 3261, *et seq.*; DoDI 5525.11, *Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members* (3 March 2005).

¹⁴ Art. 2a(10), UCMJ.

RECEIVING STATE EXERCISE OF JURISDICTION – PROCEDURAL PROTECTIONS

Despite best efforts, there are occasions when the receiving State will not yield the primary right to exercise jurisdiction or when the receiving State has exclusive jurisdiction and insists on prosecuting DoD personnel and/or their dependents. When this happens, procedures are in place to protect, to the maximum extent possible, the rights of those persons, and if arrested, to secure, where possible, the release of those persons to the custody of U.S. authorities pending completion of all foreign judicial proceedings.¹⁵ The geographic Combatant Commander (GCC) appoints a designated commanding officer (DCO) for each country in their areas of responsibility who is responsible for implementation of these procedural protections.¹⁶

Legal Counsel and Expenses

DoD personnel or dependents facing foreign criminal charges may request the Air Force employ legal counsel and pay counsel fees,¹⁷ court costs, bail,¹⁸ and other expenses incident to the representation.¹⁹ They may also request a Military Legal Advisor (MLA) (appointed by the SJA) to advise the member on U.S. related matters arising out of the criminal charges.²⁰ The MLA is not the accused's defense lawyer in the foreign court and MLAs may not appear on their client's behalf before any foreign tribunal. Rather, the MLA's chief functions are to assist the accused's foreign lawyer, to advise the accused of rights under the applicable status arrangement and other international agreements, and to advise the accused regarding any ancillary action the Air Force may be taking as a result of the foreign criminal action. The MLA has an attorney-client relationship with the accused. Additionally, DoD personnel and dependents who are victims of

¹⁵ DoDI 5525.01, paras. 1.2.b. and c. *See also* 32 C.F.R. 151.

¹⁶ DoDI 5525.01, para. 2.2. GCCs are also responsible for preparing country law studies as described in DoDI 5525.01, Section 4. Sections 3 and 4 establish the procedures discussed throughout this section.

¹⁷ 10 U.S.C. § 1037. The secretaries of the military departments are responsible for providing attorney's fees pursuant to DoDI 5525.01, para. 2.1 and 32 C.F.R. 151.6(c). *See also* DoDI 5525.01, para. 4.5 and 4.6. Currently, AFJI 51-706, *Status of Forces Policies, Procedures, and Information*, para. 2-9 states these expenses and fees are paid from appropriated funds of the service to which the accused belongs. For the Air Force, funds are chargeable to the base for operation and maintenance purposes (O&M) or research and development (R&D), as applicable, in accordance with AFJI 51-706, para. 2-9(a). To initiate payment, the accused must apply through the local commander to the general court-martial convening authority (GCMCA) per AFJI 51-706, para. 2-3(a). *Note—AFJI 51-706 is currently under revision.

¹⁸ Commanders are also required to consult with their SJA prior to authorizing bail pursuant to AFI 51-402, *International Law* (6 August 2018), para. 3.1. In turn, "Installation SJAs will coordinate with general court martial convening authority SJAs any requests to post bail bonds using U.S. funds. General court martial convening authority SJAs shall obtain the approval or disapproval of the general court martial convening authority, or designee, of any requests to post bail bonds using U.S. funds." AFI 51-402, paras. 2.2.4.1 and 2.

¹⁹ If victims of crimes must appear before a foreign judicial tribunal or administrative agency, attorney fees and other expenses may be authorized pursuant to 10 U.S.C. § 1037 as discussed in DoDI 5525.01, para. 4.5.a.(6), b.(2), and 4.6. *See also* AFI 51-402, para. 2.3.5.

²⁰ AFI 51-402, para. 2.2.6.

a crime being adjudicated by the HN criminal justice system may request payment of counsel fees for representation in the case and other related expenses in accordance with applicable laws.²¹

Trial Observers

DoD personnel and dependents will have a trial observer, usually a designated judge advocate, appointed by the U.S. Chief of Mission, to monitor HN criminal proceedings and report whether the trial complied with the applicable SOFA and was fair.²² The DCO submits a list of qualified persons to serve as U.S. trial observers at trials before courts of each country to the U.S. Chief of Mission (CMO) who appoints the observers. Trial observers must be lawyers (may be waived in cases of minor offenses) and should be from the same military service as the accused, whenever possible.²³ “Trial observers must attend and prepare formal reports in all cases of trials of DoD personnel (and their dependents) by foreign courts or tribunals, except for minor offenses.”²⁴ The trial observer report must contain a summary of the trial proceedings and should enable the DCO to determine whether the trial complied with the applicable SOFA (or other forms of jurisdictional arrangements) and that the accused received a fair trial.²⁵

Confinement in Foreign Penal Institutions

Some FCJ cases are serious enough to merit pretrial confinement of the accused pending either a custody hearing or the trial itself. In such cases, it is U.S. policy to seek to maintain custody or to secure the release of DoD personnel and dependents from foreign confinement pending completion of all foreign judicial proceedings, including appeals.²⁶ If the United States is granted custody, the United States retains an independent decision-making authority as to whether confinement of the accused for whom it has accepted custody is appropriate.²⁷ However, the

²¹ “In cases of exceptional interest” the military department or the Department of Homeland Security may approve counsel fees and related expenses pursuant to 10 U.S.C. § 1037 as stated in DoDI 5525.01, para. 2.1 and 32 C.F.R. 151.6(c). This has been interpreted by the Air Force to include fees and related expenses when U.S. service members, non-military DoD personnel, or dependents are victims of crimes committed in the HN.

²² Trial observers may be provided for DoD contractors in accordance with the applicable GCC and DCO policies and procedures (in conjunction with the applicable SOFA). While DoDI 5525.01 does not expressly direct providing trial observers for DoD contractors, it also does not prohibit providing them at the direction of the GCC or DCO.

²³ DoDI 5525.01, para. 4.4.a.

²⁴ DoDI 5525.01, para. 4.4.b and d. Trial observer reports are to be forwarded immediately upon completion of each hearing at the trial court level and for hearings on appeal. They are sent to the DCO, who in turn is required to forward them to the GCC, the U.S. COM, and the GC and TJAG of the accused’s military department.

²⁵ DoDI 5525.01, paras. 4.7.c and e.

²⁶ DoDI 5525.01, para. 4.7.a.

²⁷ *See* R.C.M. 304 and 305.

commanders generally have an obligation to place U.S. service members on “international hold” pending resolution of criminal cases within the HN.²⁸

If the DoD personnel and dependents remain in the custody of foreign authorities, the DoD seeks to ensure they are treated fairly at all times. The DoD further seeks to assure that when confined (pretrial, during trial, and post-trial) in foreign penal institutions, these personnel are treated appropriately and are entitled to all the rights, privileges, and protections of personnel confined in U.S. military facilities.²⁹ DCOs are responsible for the aforementioned assurances as well as ensuring that confined service members are visited at least every 30 days.³⁰ The DCO will report to the DoD General Counsel (GC), the applicable GCC, and the GC and Judge Advocate General of the respective military department if the treatment or condition of the confinement facility is deficient or if permission to visit is arbitrarily denied.³¹

²⁸ International hold is the way commanders try to prevent the departure of a military member, civilian employee, or dependent facing foreign criminal charges prior to final disposition of those charges by the host country. The commander orders the military member not to depart the country and ensures that the military member, civilian employee, or dependent is not provided U.S. funded transportation out of the country. See AFI 51-402 and AFJI 51-706 (currently under revision). The United States is also obligated under the NATO SOFA and most other status arrangements to surrender U.S. personnel to receiving states in which they face criminal charges. This obligation has been challenged by U.S. military members who, having departed the receiving State, did not want to return to face those foreign charges. In every case, federal courts have held that the U.S. armed forces could return their members for this purpose. A common prerequisite, however, is the existence of a status of forces obligation to do so and the proper assignment of jurisdiction to the receiving State. Extradition process is not relevant when SOFA obligations exist. However, absent such obligations, extradition may become material.

When enlisted personnel are pending foreign criminal charges, it is important to check the date the member's enlistment will expire. Airmen who are not in foreign confinement while awaiting disposition of foreign criminal charges may be retained beyond their expiration of term of service (ETS) only with their consent. AFI 36-3208, para. 2.7. If an Airman voluntarily extends his or her enlistment, the Air Force may continue custody while charges are pending. If the Airman does not wish to extend enlistment, then the host country must be advised that the United States will lose control of the member and the host country must be given an opportunity to take the Airman into its custody. All enlisted Airmen must be given an opportunity to consult with the MLA /area defense counsel before making this decision. Once convicted and confined in a foreign prison, consent is no longer required to extend enlistments, and the time period is tolled.

Per DoDI 5525.01, para. 4.9, the military service will not administratively discharge a service member while confined in a foreign prison unless the military department secretary grants an exception.

²⁹ DoDI 5525.01, para. 4.7.a. If the confined persons are non-military DoD personnel or dependents of DoD personnel, the DCO also works with the U.S. Chief of Mission (COM) and the SDO/DATT to ensure rights, privileges, and protections and to report any deficiencies. If the non-military DoD personnel or dependents of DoD personnel are not U.S. nationals, the DCO will work with the appropriate COM to make appropriate diplomatic contacts. 32 C.F.R. 151.5(c)(2).

³⁰ DoDI 5525.01, para. 4.7.b through 4.7.f. Refer to AFJI 51-706 and applicable GCC and DCO guidance for additional requirements regarding the assurances and visitation afforded to prisoners.

³¹ DoDI 5525.01, para. 3.4.

Prisoner Transfer

The United States is a party to a number of bilateral and multilateral international agreements allowing prisoners who are nationals of signatory nations to transfer to prisons within their own country. These agreements apply to U.S. forces and dependents serving sentences in foreign prisons who want to transfer to a U.S. prison.³² To qualify for a transfer, usually there must be at least six months remaining to be served on the sentence and all appeals must be exhausted. MLAs or judge advocates visiting prisoners are generally responsible for informing their clients of this program. The transfer process begins with a request by a prisoner in a foreign prison to be moved to a U.S. prison. This application is then investigated by the DoJ in a hearing within the receiving State.³³ The prisoner is entitled to counsel, who may be a military judge advocate if requested and available. The presiding official will generally be a U.S. magistrate. The purpose of the hearing is to verify the prisoner's informed consent to be transferred. Once verified, it is irrevocable.

JURISDICTION OF SERVICE COURTS OF FRIENDLY FOREIGN FORCES IN THE UNITED STATES

Because there are foreign forces temporarily stationed in the United States, judge advocates may need to advise commanders on FCJ issues from a receiving State's perspective. Absent an international agreement to the contrary, foreign forces in the United States are subject to U.S. criminal jurisdiction. If the foreign force is from a State party to the NATO SOFA, or has otherwise been designated as a friendly foreign State pursuant to 22 U.S.C. § 706, it is authorized, under appropriate circumstances, to exercise criminal jurisdiction over its members in the United States and to hold a service court in the United States. If the foreign force is from a State that has not been so designated, it must obtain U.S. presidential designation pursuant to 22 U.S.C. § 706, before it can convene a service court over its members in the United States.³⁴ Upon proper authorization, commanders will assist with apprehension, confinement (pre- and post-trial), and the trial.³⁵

³² 10 U.S.C. § 955, Prisoners Transferred to or from Foreign Countries.

³³ 18 U.S.C. § 4108(a), Verification of Consent of Offender to Transfer to the United States.

³⁴ A Presidential Proclamation, 3681, has been issued in the case of Australian forces in the United States.

³⁵ AFI 51-402, part 2.

REFERENCES

- U.S. Senate Resolution of Ratification, With Reservations, to the North Atlantic Treaty Organization Status of Forces Agreement, as agreed to by the Senate on July 15, 1953
- 1946 Convention on Privileges and Immunities of the United Nations, adopted 13 February 1946, 1 U.N.T.S. 16, 21 U.S.T. 1418, T.I.A.S. 6900, (entry into force 17 September 1946, for the United States 29 April 1970)
- Vienna Convention on Diplomatic Relations, 18 April 1961, 22 U.S.T. 3227, T.I.A.S. 7502, 500 U.N.T.S. 95 (entry into force 24 April 1964, for United States 13 December 1972)
- United Nations Convention on Safety of United Nations and Associated Personnel, opened for signature 9 December 1994, 34 I.L.M. 482 (entry into force 15 January 1999, transmitted by U.S. President to the Senate, December 2000)
- 10 U.S.C. § 802 (a)(10), Persons Subject to This Chapter (Uniform Code of Military Justice)
- 10 U.S.C. § 805, Territorial Applicability of Chapter
- 10 U.S.C. § 955, Prisoners Transferred to or from Foreign Countries
- 10 U.S.C. § 1037, Counsel Before Foreign Judicial Tribunals and Administrative Agencies; Court Costs and Bail
- Military Extraterritorial Jurisdiction Act of 2000 (MEJA), 18 U.S.C. §§ 3261, *et seq.*
- Uniform Code of Military Justice, 10 U.S.C. Chapter 47
- 18 U.S.C. § 4108, Verification of Consent of Offender to Transfer to the United States
- 22 U.S.C. § 701-706. Service Courts of Friendly Foreign Forces
- 32 C.F.R. Part 151, Foreign Criminal and Civil Jurisdiction (2019)
- Presidential Proclamation (*re* Australia), No. 3681, 10 October 1965
- Reid v. Covert, 354 U.S. 1 (1957)
- Wilson v. Girard, 354 U.S. 524 (1957)
- DoDI 5525.01, *Foreign Criminal and Civil Jurisdiction* (31 May 2019)
- DoDI 5525.11, *Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members* (3 March 2005)
- AFI 36-3208, *Administrative Separation of Airmen* (9 July 2004), incorporating through Change 7, 2 July 2013
- AFI 51-402, *International Law* (6 August 2018)
- AFJI 51-706, *Status of Forces Policies, Procedures, and Information* (the tri-service regulation formerly numbered, AR 27-50, SECNAVINST 5820.4G, AFR 110-12) (15 December 1989), certified current 8 January 2016 (Note: at the time of printing, this AFJI is current, however, it is intended to be updated in the near future based on the new DoDI 5525.01)

Chapter 10

ACQUISITION AND CROSS-SERVICING AGREEMENTS

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BACKGROUND

Acquisition and Cross-Servicing Agreements (ACSAs) are bilateral, international agreements to acquire and transfer logistics support, supplies, and services (LSSS) between the U.S. military and allied or friendly foreign forces and international organizations. The ACSA authority is found in 10 U.S.C. §§ 2341-2350, and implemented by DoDD 2010.09, CJCSI 2120.01D, AFPD 25-3, AFI 25-301, and DoD 7000.14-R, *DoD Financial Management Regulation (FMR)*, Volume 11A, Chapters 1 and 8. This chapter provides an overview of ACSA requirements and is not a substitute for a detailed reading of the applicable statutory authority and regulations.

ACSAs “are used primarily during combined exercises, training, deployments, or unforeseen circumstances or exigencies, including wartime, contingency operations, humanitarian or foreign disaster relief, and peace operations conducted under Chapter VI or VII of the United Nations (UN) Charter, in which there is a need to acquire and/or transfer LSSS.”¹ ACSAs are not the primary means for obtaining LSSS and do not replace national responsibilities for planning and acquiring logistics requirements.² The intent is to provide commanders with a flexible tool to obtain, or provide, LSSS when mission needs prevent self-support.³ The ACSA is just one among other statutory authorities that allow U.S. forces to provide support to foreign forces. The determination of which statutory authority is most appropriate is scenario dependent.⁴

TYPES OF ACSAS

Title 10 of the U.S.C. provides two ACSA legal authorities: an acquisition-only authority and a cross-servicing authority, which includes an acquisition and a transfer authority.

The acquisition-only authority (10 U.S.C. § 2341) provides authority to acquire logistic support, supplies, and services for elements of the armed forces deployed outside the United States from the governments of NATO members, NATO and its subsidiary bodies, the UN, any regional international organization, and any other countries which meet one or more of the following criteria:

1. Has a defense alliance with the United States;
2. Permits the stationing of members of U.S. armed forces in such country or the homeporting of U.S. naval vessels in such country;
3. Has agreed to pre-position U.S. materiel in such country; or
4. Serves as the host country to military exercises, which include elements of U.S. armed forces, or permits other military operations by U.S. armed forces in such country.

The authority stemming from this section is not reciprocal and does not require an approved cross-servicing agreement in place. Many Federal Acquisition Regulations (FAR) clauses that would otherwise be required for commercial contracts are waived pursuant to 10 U.S.C. § 2343, such as the requirement for obtaining full and open competition, the prohibition

¹ AFI 25-301, *Acquisition and Cross-Servicing Agreements* (3 June 2016), para. 1.1.

² *Id.*

³ *Id.* para. 1.1.2.

⁴ *Id.* para. 1.1.3.

against using cost-plus-percentage-of-cost type contracts, and the requirement for a warranty stating no commission or fee was paid to obtain the contract.

The cross-servicing authority (10 U.S.C. § 2342) authorizes the DoD, upon consultation with the SecState, to enter into reciprocal agreements for the provision of LSSS with the governments of NATO members; NATO and its subsidiary bodies; the UN; any regional international organization; and the governments of non-NATO members designated by the SecDef as a government with which the SecDef may enter agreements under 10 U.S.C. § 2342(a), subject to the limitations set forth in 10 U.S.C. § 2342(b). The Director for Logistics, the Joint Staff (J-4), maintains a current listing of these agreements and eligible countries and international organizations.

LIMITATION ON USE OF ACSAS

Prohibited logistics support, supplies, and services

Transactions under an ACSA authority are limited to LSSS. 10 U.S.C. § 2350(1) defines LSSS as, “food, billeting, transportation (including airlift), petroleum, oils, lubricants, clothing, communications services, medical services, ammunition, base operations support (and construction incident to base operations support), storage services, use of facilities, training services, spare parts and components, repair and maintenance services, calibration services, and port services.” The term LSSS includes temporary use of general purpose vehicles and other non-lethal items of military equipment which are not designated as significant military equipment on the United States Munitions List promulgated pursuant to section 38(a)(1) of the Arms Export Control Act.”

The DoD may not use ACSA authorities to acquire or transfer weapons systems; the initial quantities of replacement and spare parts for major end items of equipment covered by tables of organization and equipment, tables of allowances and distribution, or equivalent documents; and major end items of equipment.⁵ DoD policy more specifically outlines prohibitions on acquiring or transferring under ACSA authority guided missiles; naval mines and torpedoes; nuclear ammunition and included items such as warheads, warhead sections, projectiles, demolition munitions, and training ammunition; guidance kits for bombs or other ammunition; and chemical ammunition (other than riot control agents).

As an exception to the prohibitions regarding weapons systems and major end items of equipment, Congress provided a temporary authority to loan such equipment for personnel protection or to aid in the personnel survivability of military forces participating in the following: (1) a coalition operation with the United States as part of a contingency operation; (2) a coalition operation with the United States as part of a peacekeeping operation under the UN or another international agreement; or (3) training of such forces in connection with the deployment of such forces to be deployed to an operation described in (1) or (2). Use of this authority requires that U.S. forces in the coalition operation have no unfilled requirements for such equipment, and the concurrence of the SecState. The military forces of the nation receiving the loan may use the equipment no longer than the duration of the country’s participation in the coalition operation. The authority expires on 31 December 2024.⁶

⁵ DoDD 2010.09, *Acquisition and Cross-Servicing Agreements* (28 April 2003), incorporating Change 2, 31 August 2018, para. 4.5.1.

⁶ Pub. L. 113-291, § 1207, 19 December 2014; Pub. L. 115-91, § 1051(t)(4), 12 December 2017; and Pub. L. 116-92, § 1202, 20 December 2019.

Goods or services reasonably available from U.S. commercial sources

The DoD cannot use the ACSA authority to procure goods or services “reasonably available” from U.S. commercial sources.⁷ Consistent with this statutory limitation, DoD components may use the ACSA authorities to facilitate routine mutual logistics support during training, exercises, and military operations, or to permit better use of host-nation resources for recurring logistics support requirements of deployed U.S. armed forces during operations.⁸ Such determination shall be made in consultation with contracting authorities.⁹

ACSA PROCESS

Air Force organizations follow the process set out in AFI 25-301. Joint Staff, combatant commands (CCMD), and Defense agencies reporting through the Chairman of the Joint Chiefs of Staff follow the procedures set out in CJCSI 2120.01D.

Where an ACSA exists, in general terms, the ACSA process is:

1. Air Force (or combined/joint) unit identifies a need to acquire military logistics support in the location of its deployed/forward operation.
2. An ACSA may be used to fill any shortfalls in support, supplies and services that cannot readily be met from U.S. sources. If a delay would negatively impact the mission, then the U.S. source is not readily available.
3. The appropriate authority discusses and negotiates requirements with host nation military representatives to determine availability of support.
4. Air Force (or combined/joint) unit itemizes support items/categories in the ACSA order and signs formal request; host nation military reviews the support and provides signature accepting the order.
5. A signed ACSA order represents a binding commitment upon both parties' military forces to provide and reimburse for LSSS.

Methods of Payment for ACSAs

Under 10 U.S.C. § 2344(a), the United States may acquire or transfer LSSS by payment in cash, by replacement-in-kind, or equal value exchange. The United States must liquidate credits and liabilities accrued under the ACSA not less than once every 12 months by direct payment to the entity providing the LSSS.¹⁰

⁷ 10 U.S.C. § 2342(c).

⁸ DoDD 2010.09, para. 4.4.

⁹ CJCSI 2120.01D, *Acquisition and Cross-Servicing Agreements* (21 May 2015), Encl. A, para. 5.c.

¹⁰ 10 U.S.C. § 2345(a).

Payment-In-Kind (PIK)

PIK requires that the receiving defense department reimburse the providing defense department the full value of the LSSS by electronic funds transfer (EFT), cash, or check.¹¹ For example, if the DoD provides \$10,000 worth of rations to a foreign defense department, it reimburses the DoD with \$10,000 by EFT, cash, or check. The U.S. Treasury generally requires bills for incurred costs be rendered on a 30-day cycle. Such bills shall be paid within 30 days from the date of the bill, although by agreement the time for payment may be extended to 90 days.¹²

Replacement-In-Kind (RIK)

RIK allows the receiving party under the ACSA to reconcile its obligation by replacing the LSSS it receives with LSSS of an identical or substantially identical nature.¹³ As an example, a country may provide rations to the United States during a training exercise with the proviso that the United States will provide the same amount of rations during a future exercise. The replacement must occur within one year of the initial provision of the LSSS.¹⁴

Equal Value Exchange (EVE)

EVE enables the receiving party under the ACSA to reconcile its obligation by exchanging LSSS considered by both parties to be of an equal value to those received. As an example, a country may provide \$10,000 worth of rations to the United States during a training exercise in exchange for the United States providing \$10,000 worth of ammunition. The exchange must occur within one year of the initial provision of the LSSS.¹⁵

Note that while acquisition-only authority is non-reciprocal, this does not prevent the United States from using any of the three ACSA payment methods to repay the foreign entity.

The DoD may use either reciprocal or non-reciprocal pricing methods for pricing reimbursable transactions.¹⁶ The method used depends on whether there is mutual agreement on reciprocal pricing.¹⁷ FMR, Volume 11A, Chapter Eight, paragraph 0806, provides guidance on pricing ACSA transactions. The term “transfer” under the ACSA authority includes “leasing, loaning, or otherwise temporarily providing” LSSS.¹⁸ Guidance on pricing such support or services is in FMR Volume 11A, Chapter 1, paragraph 010203.I.

Limits on the total amount of liabilities the United States may accrue under ACSAs with countries per fiscal year, except during a period of active hostilities, are set out in 10 U.S.C. § 2347. The combatant commanders and their service component or sub-unified commands may coordinate in advance the level and type of LSSS to be acquired or transferred to a given country or eligible international organization.¹⁹

¹¹ AFI 25-301, para. 1.4.1.

¹² DoD 7000.14-R, *DoD Financial Management Regulation (FMR)*, Volume 11A, ch. 8, para. 080202.A.

¹³ DoDD 2010.09, Encl. 2, para. E2.1.14.

¹⁴ FMR, Volume 11A, para. 080202.B

¹⁵ *Id.*

¹⁶ 10 U.S.C. § 2344(b).

¹⁷ *Id.*

¹⁸ 10 U.S.C. § 2350(4).

¹⁹ CJCSI 2120.01D, Encl. A, para. 5.g.

CONSTRUCTION

There is no explicit monetary limitation on how much construction incident to base operation support (BOS) can be provided by a foreign country to U.S. forces pursuant to an ACSA transaction. However, CJCSI 2120.01D (Appendix A to Enclosure A) provides examples and guidance on what is permissible LSSS. “Under Base Operation Support,” the instruction limits construction activity under an ACSA to “minor construction (construction under Title 10, U.S.C., §§ 2804, 2805, and 2803).” Those sections provide for:

1. 10 U.S.C. § 2804 Contingency Construction
2. 10 U.S.C. § 2805 Unspecified Minor Construction
3. 10 U.S.C. § 2803 Emergency Construction

JUDGE ADVOCATE RESPONSIBILITIES

The MAJCOM/SJA and/or the Air Force component SJA of the applicable CCMD equivalent address the legal concerns in all proposed ACSAs. The MAJCOM/SJA forwards any unresolved ACSA legal issues to either the CCMD legal office or SAF/GCI for resolution, with copy to AF/JAO.²⁰ Before advising on ACSAs, be aware that there are a variety of statutory authorities and limitations for transferring defense articles and defense services to foreign governments and international organizations that may apply. Be sure to consult with the servicing MAJCOM or CCMD legal and/or logistics (A4/J4) office as appropriate.²¹

REFERENCES

National Defense Authorization Act (NDAA) 2015, Pub. L. 113-291, § 1207, 19 December 2014; NDAA 2018, Pub. L. 115-91, § 1051(t)(4), 12 December 2017; and NDAA 2020, Pub. L. 116-92, § 1202, 20 December 2019

10 U.S.C. §§ 2341-2350

CJCSI 2120.01D, *Acquisition and Cross-Servicing Agreements* (21 May 2015)

DoD 7000.14-R, *DoD Financial Management Regulation (FMR)*, Volume 11A, Chapters 1 (July 2020) and 8 (July 2010)

DoDD 2010.09, *Acquisition and Cross-Servicing Agreements* (28 April 2003), incorporating Change 2, 31 August 2018

AFI 25-301, *Acquisition and Cross-Servicing Agreements* (3 June 2016)

AFPD 25-3, *Acquisition and Cross-Servicing Agreements* (18 February 2020)

Joint Staff (J4) ACSA website [https://intellipedia.intelink.gov/wiki/Acquisition_and_Cross-Servicing_Agreements_\(ACSA\)](https://intellipedia.intelink.gov/wiki/Acquisition_and_Cross-Servicing_Agreements_(ACSA))

²⁰ AFI 25-301, para. 3.6.

²¹ See *Id.* para. 1.1.1.2. for a listing of potential corresponding MAJCOMs/C-MAJCOMs/CCMDs.

Chapter 11

INTERNATIONAL ORGANIZATIONS

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BACKGROUND

An international organization is an organization created by a formal agreement (*e.g.*, a treaty) between two or more governments on a global, regional, or functional basis to protect and promote national interests shared by member states.¹ Examples include the International Committee of the Red Cross (ICRC), the United Nations (UN) and its agencies, and the North Atlantic Treaty Organization (NATO).

There are two basic kinds of international organizations: governmental (sometimes referred to as intergovernmental) and nongovernmental (frequently referred to as NGOs). Governmental international organizations are generally created by States through an international agreement which serves as the organization's charter. These organizations have membership of two or more States and operate under public international law. Nongovernmental organizations, on the other hand, are generally private, self-governing, not-for-profit organizations dedicated to causes such as alleviating human suffering, promoting education and economic development, and encouraging the establishment of democratic institutions, among other things.² Nongovernmental organizations operate under private international law.

Technical Organizations. Some international organizations have particular technical specializations. Technical governmental international organizations include the International Civil Aviation Organization (ICAO), International Sea Bed Authority, and World Trade Organization (WTO).³ Technical NGOs include, for example, the International Center for Settlement of Disputes (ICSID) and the American Arbitral Association.

Because of the ever-expanding nontraditional missions performed by the DoD and coalition forces, it is likely that in operational contexts, Air Force legal personnel will either deal directly with representatives of various international organizations, or advise personnel who have dealings with them. A wide variety of international organizations, both governmental and NGO, could be involved in any given mission, such as the UN (UN peacekeeping forces, UN relief agencies, or the UN High Commissioner for Refugees (UNHCR)), NATO, International Committee of the Red Cross (ICRC), Human Rights Watch, Organization for Security and Cooperation in Europe (OSCE), and the European Union (EU). This Chapter provides a brief overview of the legal nature of international organizations, legal considerations that may arise, and a general introduction to the more prevalent international organizations that may be encountered in the course of international contingency operations.

¹ JOINT PUBLICATION 3-08, *Interorganizational Cooperation*, 56 (October 12, 2016) [hereinafter JP 3-08]. For the purposes of determining the privileges and immunities of international organizations, 22 U.S.C. § 288 defines “international organization” to mean “a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation....”

² JP 3-08, II-18.

³ Certain of these organizations are effectively subordinate to larger organizations. For example, ICAO is a UN specialized agency, although it was independently established under the Chicago Convention (1944). See Chapter Four, *Air Law*.

LEGAL NATURE OF GOVERNMENTAL INTERNATIONAL ORGANIZATIONS

Legal Personality. A governmental international organization acquires its rights to, for example, sue or be sued, own property, and enter into contracts, from States. These rights are sourced from either the foundational charter or international agreement, or through a subsequent grant of power by member States. For example, in the *Reparations Case*, the International Court of Justice (ICJ), the judicial arm of the UN, rendered an advisory opinion as to whether the UN possessed legal personality allowing it to recover for the death of its envoy to Palestine, Count Bernadotte, in 1948.⁴ The ICJ concluded the UN had legal personality. However, this principle of legal personality does not amount to a recognition of sovereignty, and governmental international organizations are not equal to States. Their authority is limited by what States have granted them.

Privileges and Immunities. The privileges and immunities which a governmental international organization (including its officials and administrative staff) might enjoy are likewise governed by grant through international agreement by States. For example, the UN Charter and the Convention on the Privileges and Immunities of the United Nations extend privileges and immunities to UN officials.⁵ Privileges and immunities of international organizations are also reflected in U.S. domestic law.⁶ Privileges and immunities granted to officers of an international organization differ in two important respects from privileges and immunities enjoyed by State officials under the Vienna Convention on Diplomatic Relations. First, privileges and immunities of, for example, UN officials are universal; that is, they can provide immunity even from one's own national government.⁷ Second, international organizations, unlike States, lack reciprocity as an enforcement mechanism and must instead rely on their member States for enforcement of these privileges and immunities or addressing violations by another State.⁸

LEGAL ISSUES GENERALLY

The conduct of military operations requires, in many cases, interaction with agencies and organizations outside of the armed forces or, at the very least, an awareness of their role and how it shapes the operational environment.

Governmental International Organizations. Critical to the legality of some, although not all, international military operations is a UN mandate. Acting through the Security Council, the UN can vest in member States the authority to preserve international peace and security, which may include the right to use force.⁹ In these circumstances, Air Force legal personnel

⁴ *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 ICJ Rep. 174 (April 11).

⁵ Charter of the United Nations with the Statute of the International Court of Justice annexed thereto, Arts. 104 and 105 (1945) [hereinafter UN Charter].

⁶ 22 U.S.C. § 288a (1945).

⁷ Convention on the Privileges and Immunities of the United Nations Art. IV, February 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 15.

⁸ The UN is a unique example of a governmental international organization, and is the only organization that could credibly make a claim to constitute a personified community and demand performance of obligations by both members *and* non-members.

⁹ See further below for a discussion on the UN Security Council, and Chapter One, *International Use of Force by the United States Air Force* generally.

will need to be aware of the terms of any given UN mandate in order to appreciate the lawful basis on which force (or any other potentially coercive measure) can (or cannot) be employed. In some cases, the scope of authority for any given member State may be limited by the terms of the mandate, and this will, in turn, inform a commander's constraints and restraints.¹⁰

In certain operations, the interests and objectives of the United States will largely align with those of an international organization, such as NATO, in which case the United States will generally coordinate and cooperate with the international organization and its member States at the strategic, operational and tactical levels. The goal of Air Force legal personnel in these situations will generally be to ensure that their U.S. or multinational commanders meet their objectives without sacrificing U.S. interests or legal positions. Where legal divergences arise, constructive solutions can and ought to be identified.

Nongovernmental International Organizations. In situations typically involving NGOs, a commander will need to be cognizant of the circumstances in which an organization chooses to operate in the operational environment. For example, a NGO may insist—whether as a function of its mandate or for humanitarian reasons—upon access to certain areas within the operational environment. For example, it is well-established that the ICRC has a mandate to offer humanitarian protection and assistance to victims of armed conflict and prisoners of war.¹¹ While this mandate does not operate to create an exception to the principle of State sovereignty,¹² a State should not withhold consent to humanitarian activities arbitrarily.¹³

Nevertheless, there may be situations where command, in facilitating access to a humanitarian organization, may need to attach conditions to a grant of consent. Legitimate reasons may include security requirements or to ensure that non-State actors cannot attempt to use humanitarian organizations as cover for participation in hostilities.¹⁴

There may also be situations where an international organization chooses not to coordinate or cooperate with the United States, or it may prefer to do so on its own terms. This situation may typically arise when a NGO pursues its own objectives in a neutral and impartial manner. In many cases, this is a factor for military planning and is reflective of the increasing prevalence of international organizations in the operational environment.¹⁵

¹⁰ For example, UN Security Council Resolution 1973, authorizing intervention in Libya, expressly established the terms of a No Fly Zone. S.C. Res. 1973 paras. 6-12 (March 17, 2011), [https://undocs.org/S/RES/1973\(2011\)](https://undocs.org/S/RES/1973(2011)) (last visited 14 October 2020).

¹¹ As an example, GC III art. 125 provides that "...the representatives of religious organizations, relief societies, or any other organization assisting prisoners of war, shall receive [from the detaining power]... all necessary facilities for visiting the prisoners.... The special position of the International Committee of the Red Cross in this field shall be recognized and respected at all times."

¹² International organizations cannot operate within a State's territory, or in the area of that State's military operations, without that State's consent. DOD LAW OF WAR MANUAL (June 2015), updated December 2016, § 4.26.2.

¹³ *Id.*

¹⁴ *Id.* § 4.26.2.1.

¹⁵ The strike which resulted in the destruction of a Médecins Sans Frontières hospital in Kunduz, Afghanistan, on 3 October 2015, while not the direct result of a lack of coordination between the NGO and the United States, does underscore the complexities which attend the modern operational environment and the presence of international organizations. For a general summary of the report into the incident, refer to the CENTCOM FOIA Library: https://www6.centcom.mil/foia_rr/FOIA_RR.asp?Path=/5%20USC%2052%28a%29%282%29%28D%29Records&Folder=1.%20Airstrike%20on%20the%20MSF%20Trauma%20Center%20in%20Kunduz%20Afghanistan%20-%203%20Oct%202015 (last visited 15 April 2020).

Finally, there may be circumstances in which the very involvement of an international organization causes a State (or a non-State actor) to disengage from intervention in an international crisis. Other international organizations might be at risk of being philosophically “captured” or influenced by a group of States and used for narrow national policy interests rather than those of the broader international community. In any case, involvement of international organizations makes the operational environment more complex and challenging.

Noting that any given legal issue will ultimately depend on the type of international organization concerned, the remainder of this Chapter provides an introduction to the following key international organizations: the UN; NATO; Organization of American States (OAS); OSCE; Council of Europe (COE) and European Court of Human Rights (ECHR); EU; Association of South East Asian Nations (ASEAN); the Australian, New Zealand, and U.S. Council created under the tripartite ANZUS Treaty; and the ICRC.

THE UNITED NATIONS (UN)

The UN was established on 24 October 1945 by 51 countries committed to preserving peace through international cooperation and collective security. Today, nearly every nation in the world belongs to the UN.¹⁶

When States become Members of the UN, they accept the obligations of the UN Charter, an international treaty that sets out basic principles of international relations. According to the UN Charter the UN has four purposes: to maintain international peace and security; to develop friendly relations among States; to cooperate in solving international problems and in promoting respect for human rights; and to be a center for harmonizing the actions of States.¹⁷

Main Organs of the UN

The UN has six main organs. Five of them—the UN General Assembly, the UN Security Council, the UN Economic and Social Council, the UN Trusteeship Council and the UN Secretariat—are based at UN Headquarters in New York. The sixth, the International Court of Justice, is located at The Hague, The Netherlands. Several of these organs are considered below.

The UN General Assembly. All UN Member States are represented in the UN General Assembly—a kind of parliament of nations which meets to consider the world’s most pressing problems.¹⁸ Each member State has one vote.¹⁹ Decisions on “important matters,” such as international peace and security, admitting new members, the UN budget, and the budget for peacekeeping, are decided by two-thirds majority.²⁰ Simple majority decides other matters.²¹ In recent years, a special effort has been made to reach decisions through consensus, rather than by taking a formal vote. The UN General Assembly cannot force action by any State,²² but its recommendations are indicative of world opinion and, arguably, represent the moral authority of the community of States.

¹⁶ At the time of this publication, 193 States are members of the UN.

¹⁷ UN Charter Art. 1.

¹⁸ *Id.* Art. 9(1).

¹⁹ *Id.* Art. 18(1).

²⁰ *Id.* Art. 18(2).

²¹ *Id.* Art. 18(3).

²² UN Charter Arts. 10, 14.

The UN Security Council. The UN Charter gives the UN Security Council primary responsibility for maintaining international peace and security.²³ The UN Security Council may convene at any time whenever peace is threatened. Under the UN Charter, all member States are obligated to carry out the UN Security Council's decisions.²⁴ There are 15 UN Security Council members. Five of these (China, France, the Russian Federation, the United Kingdom and the United States) are permanent members (sometimes referred to as the P5).²⁵ The other ten are elected by the UN General Assembly for two-year terms.²⁶ Decisions of the UN Security Council require nine affirmative votes.²⁷ Except for votes on procedural questions, a decision cannot be taken if there is a "no" vote, or veto, by a permanent member.²⁸ When the UN Security Council considers a threat to international peace and security, it first explores ways to settle the dispute peacefully. Under Chapter VI of the UN Charter, the UN Security Council may recommend principles for a settlement or undertake mediation.²⁹ In the event of armed conflict, the UN Security Council may try to secure a cease-fire.³⁰ It may authorize a peacekeeping mission to help the parties maintain a truce and to keep opposing forces apart.³¹ Where a situation is particularly grave, the UN Security Council can also take measures to enforce its decisions under Chapter VII of the UN Charter. For example, it can impose economic sanctions or order an arms embargo.³² Finally, the UN Security Council may authorize member states to use "all necessary means," including military action, to see that its decisions are carried out.³³ Such missions are referred to as "peace enforcement operations."³⁴ UN Security Council resolutions are binding on all UN members under articles 25 and 103 of the UN Charter.

²³ *Id.* Art. 24.

²⁴ *Id.* Art. 25.

²⁵ *Id.* Art. 23.

²⁶ *Id.* Art. 23(1).

²⁷ *Id.* Art. 27.

²⁸ *Id.*

²⁹ *Id.* Arts. 33 and 37.

³⁰ *See, e.g.*, S.C. Res. 338 (October 22, 1973), <https://peacemaker.un.org/middleeast-resolution338> (last visited 14 October 2020) (calling upon parties to the conflict in the Middle East to cease fire).

³¹ *See, e.g.*, S.C. Res. 1769 (July 31, 2007), [https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1769\(2007\)](https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1769(2007)) (last visited 14 October 2020) (establishing the UN and African Union Mission in Darfur (UNAMID)).

³² UN Charter Art. 41.

³³ For example, S.C. Res. 1925 (May 28, 2010), [https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1925\(2010\)](https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1925(2010)) (last visited 14 October 2020), established the UN Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO). The Security Council emphasized the need to protect civilians pursuant to that mission, and authorized MONUSCO to "use all necessary means, within the limits of its capacity and in the areas where its units are deployed, to carry out its protection mandate...."

³⁴ In 2011, the UN Security Council, acting under Chapter VII, authorized intervention in Libya under S.C. Res. 1973, *supra* note 10. The United States participated in a coalition military operation enforcing Resolution 1973, under the name Operation ODYSSEY DAWN. U.S. DEP'T OF DEF., 'OPERATION ODYSSEY DAWN' (March 19, 2011), https://archive.defense.gov/home/features/2011/0311_libya2/ (last visited 14 October 2020).

The International Court of Justice. The ICJ, also known as the World Court, is the main judicial organ of the UN.³⁵ It consists of 15 judges elected by the UN General Assembly and the UN Security Council.³⁶ The jurisdiction of the Court is established by the UN Charter in combination with the Annexed Statute of the International Court of Justice, and extends to all cases which States refer to it, as well as all matters provided for in the UN Charter and any other international agreement.³⁷ Participation by States in a proceeding is voluntary, but if a State agrees to participate, it is obligated to comply with the Court's decision.³⁸ The Court also provides advisory opinions to the UN General Assembly, the UN Security Council, and the specialized agencies of the United Nations upon request.³⁹ The United States, after being sued by Nicaragua in 1984,⁴⁰ no longer recognizes the compulsory jurisdiction of the ICJ over disputes involving the United States.⁴¹

The UN Secretariat. The UN Secretariat carries out the substantive and administrative work of the UN as directed by the UN General Assembly, the UN Security Council, and the other organs. At its head is the UN Secretary-General, who provides overall administrative guidance.⁴²

UN Role in Disarmament

Halting the spread of arms and reducing and eventually eliminating all weapons of mass destruction are major goals of the UN Office for Disarmament Affairs (UNODA).⁴³ The UN supports multilateral negotiations in international forums such as the Conference on Disarmament.⁴⁴ These negotiations have produced such agreements as the Nuclear Non-Proliferation Treaty (1968), the Comprehensive Nuclear-Test-Ban Treaty (1996), and the treaties establishing nuclear-free zones.⁴⁵ Other treaties prohibit the development, production and stockpiling of chemical weapons (1993) and bacteriological weapons (1972), ban nuclear weapons from the seabed and ocean floor (1971) as well as outer space (1967). The Vienna-based International Atomic Energy Agency (IAEA),

³⁵ UN Charter Art. 92.

³⁶ Statute of the International Court of Justice, Arts. 3-4.

³⁷ *Id.* Art. 36(1).

³⁸ *Id.* Art. 36(2) provides that States party to the Statute “may” recognize the Court’s jurisdiction over a range of issues. Art. 36(5) affirms that any such recognition amounts to acceptance of “the compulsory jurisdiction” of the Court.

³⁹ UN Charter, Art. 96. Perhaps the most significant advisory opinion rendered by the International Court of Justice [hereinafter ICJ] concerned a question on the legality of nuclear weapons: *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ Rep. 226.

⁴⁰ See generally ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, <https://www.icj-cij.org/en/case/70> (last visited May 28, 2020) (providing an overview of the case and links to all proceedings therein).

⁴¹ By letter dated 7 October 1985, then-Secretary of State George Shultz notified the UN Secretary General that the United States was terminating the declaration it made on 26 August 1946 accepting the optional compulsory jurisdiction of the International Court of Justice. George P. Shultz, *United States: Department of State Letter and Statement Concerning Termination of Acceptance of ICJ Compulsory Jurisdiction*, October 7, 1985, 24 I.L.M. 6, 1742-45, https://www.jstor.org/stable/20692919?seq=1#metadata_info_tab_contents (last visited 14 October 2020).

⁴² UN Charter, Chapter XV.

⁴³ UNODA, *About Us*, <https://www.un.org/disarmament/about> (last visited May 28, 2020).

⁴⁴ See UN Office at Geneva, *Conference on Disarmament* (January 20, 2020), <https://www.unog.ch/cd> (last visited 14 October 2020).

⁴⁵ See, e.g., *Treaty on a Nuclear-Weapon Free Zone in Central Asia, Kaz.-Kyrg.-Taj.-Turkm.-Uzb.*, September 8, 2006, 2970 U.N.T.S. No. 51633.

through a system of safeguards agreements, also ensures that nuclear materials and equipment intended for peaceful uses are not diverted to military purposes.⁴⁶

UN Role in Providing Accountability for Violations of Human Rights and Law of War

The UN's inherent interest in addressing serious violations of international law has manifested in the creation of both *ad hoc* criminal tribunals, such as the International Criminal Tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR), and also a permanent court, the International Criminal Court (ICC), which provides a comprehensive means for punishing perpetrators of genocide, other crimes against humanity, war crimes, and aggression.⁴⁷ These tribunals are discussed further in Chapter 3, *War Crimes and Enforcement of the Law of War*.

UN Role in Providing Humanitarian Assistance

As an extension of the UN Charter's mandate to "save succeeding generations from the scourge of war," the UN has established various organizations and programs to mitigate suffering caused by humanitarian crises. The UN Emergency Relief Coordinator is responsible for overseeing emergencies requiring UN humanitarian assistance,⁴⁸ and chairs the Inter-Agency Standing Committee (IASC), the UN's longest-standing and highest-level humanitarian coordination forum.⁴⁹ IASC members include the UN Children's Fund (UNICEF), the UN Development Program (UNDP), the World Food Program (WFP), and the UN Human Rights Council. Other UN agencies are also represented, and standing invitations exist for major non-governmental and intergovernmental humanitarian organizations, such as the ICRC.⁵⁰ Disaster prevention and preparedness are also considered UN humanitarian action. When disasters occur, UNDP coordinates relief work at the local level. UNDP also helps ensure that emergency relief contributes to recovery and longer-term development. In countries undergoing extended emergencies or recovering from conflict, humanitarian assistance is increasingly seen as part of an overall peace-building effort along with developmental, political, and financial assistance.

⁴⁶ Statute of the International Atomic Energy Agency Art. 3, October 23, 1956, 8 U.S.T. 1093, 276 U.N.T.S. 3.

⁴⁷ Rome Statute of the International Criminal Court Art. 5, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

⁴⁸ See UN Office for the Coordination of Humanitarian Affairs, *OCHA Leadership*, <https://www.unocha.org/about-ocha/ocha-leadership> (last visited May 29, 2020).

⁴⁹ The IASC was established by UN General Assembly Resolution 46/182 in 1991. *Id.*

⁵⁰ *Id.*

NORTH ATLANTIC TREATY ORGANIZATION (NATO)

The North Atlantic Treaty, signed in Washington on 4 April 1949, created an alliance of ten European and two North American independent States committed to each other's mutual defense.⁵¹ Membership has subsequently expanded and there are presently 30 NATO members.⁵² As a "regional arrangement" contemplated under Chapter VIII of the UN Charter, the NATO Treaty does not create any new substantive rights for States to use force.⁵³ However, as a mutual defense pact, the Treaty does incorporate the right of all States to commit to collective self-defense, pursuant to Article 51 of the UN Charter and international customary law.⁵⁴

NATO military operations are, by their very nature, multinational. Multinational operations give rise to specific legal considerations.⁵⁵ Of particular interest to judge advocates are topics such as logistical support among NATO members, NATO financing for construction projects, NATO basing and headquarters agreements, the interface between NATO and other organizations (such as the European Union), the manner in which NATO decisions are made, NATO standardization agreements (STANAGs), NATO's relationship to Partnership for Peace (PfP) countries, NATO exercises, NATO rules of engagement (ROE),⁵⁶ and NATO command relationships.

OTHER GOVERNMENTAL INTERNATIONAL ORGANIZATIONS

Other governmental international organizations that may affect military operations include:

Organization of American States (OAS). The OAS, while not a military alliance, is a political forum for multinational dialogue and action.⁵⁷

Organization for Security and Cooperation in Europe (OSCE). The OSCE is a regional security organization whose participating States are from Europe, Central Asia, and North America. The OSCE addresses a wide range of security-related issues including arms control, preventive diplomacy, confidence-building and security-building measures, human rights, election monitoring, and economic and environmental security.⁵⁸

⁵¹ North Atlantic Treaty, April 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 [hereinafter NATO Treaty].

⁵² NATO, *What Is NATO?*, <https://www.nato.int/nato-welcome/index.html> (last visited May 29, 2020).

⁵³ Refer to Chapter One, *International Use of Force by the United States Air Force*.

⁵⁴ NATO Treaty Art. 5 provides that an armed attack on one or more members of NATO will be deemed an attack against them all. NATO invoked Art. 5 subsequent to the terrorist attacks at the World Trade Center in New York and the Pentagon in Washington, D.C. NATO is but one example of a regional defense arrangement; another one is the African Union.

⁵⁵ Refer to Chapter 19, *Multinational Air Operations*.

⁵⁶ Refer to Chapter 15, *Rules of Engagement*.

⁵⁷ OAS, *Who We Are*, http://www.oas.org/en/about/who_we_are.asp (last visited May 29, 2020).

⁵⁸ OSCE, *Who We Are*, <https://www.osce.org/who-we-are> (last visited May 29, 2020). The Treaty on Conventional Armed Forces in Europe (1990)—in which NATO and then-Soviet forces agreed to reduce the footprint of conventional forces in Europe—is one of several international initiatives that the OSCE oversees.

Council of Europe (COE) and the European Court of Human Rights (ECHR). The COE is focused on the protection of human rights, promotion of awareness of European cultural identity and diversity, judicial cooperation, and finding solutions to problems facing European society.⁵⁹ Ratification of the European Convention on Human Rights is a prerequisite for joining the COE.⁶⁰ The ECHR is the judicial body established to ensure the observance of the European Convention on Human Rights by member States.⁶¹

European Union (EU). The EU is an economic and political union between 27 States,⁶² established with the goal of promoting peace, well-being, freedom, security and justice, among other things, without internal borders.⁶³ To give effect to these goals, the European Parliament is charged with the responsibility of passing EU laws. These laws have the potential to affect U.S. military operations within Europe, to include impacts on U.S. Status of Forces Agreement (SOFA) rights. NATO allies, many of whom are EU members, are required to implement mandatory EU laws and directives into their domestic laws. In other cases, EU laws have a direct effect on member States without any domestic action on their part. EU law is not always consistent with NATO SOFA rights, and the resulting conflict of laws can create interesting and complex international law questions. EU laws have impacted operations in the areas of training, labor law, data protection, logistical support, taxation, and food importation.⁶⁴

Association of Southeast Asian Nations (ASEAN). ASEAN was founded in 1967 for the purpose of cooperation in securing the region's peace, stability, and development.⁶⁵ With the establishment of the ASEAN Regional Forum (ARF), ASEAN created a major consultation process and confidence-building mechanism for peace and stability in the Asia-Pacific Region. Besides the ten ASEAN countries, ARF membership includes ten dialogue partners (Australia, Canada, China, the EU, India, Japan, the Republic of Korea, New Zealand, the Russian Federation, and the United States).

⁵⁹ Council of Europe Portal, *The Council of Europe in Brief*, <https://www.coe.int/en/web/about-us/values> (last visited May 29, 2020).

⁶⁰ Council of Europe Portal, *The European Convention on Human Rights*, <https://www.coe.int/en/web/human-rights-convention> (last visited May 29, 2020).

⁶¹ European Convention for the Protection of Human Rights and Fundamental Freedoms Art. 19, November 4, 1950, E.T.S. 5 (as amended through Protocol 14bis, May 27, 2009, C.E.T.S. 204). See Chapter 12, *Human Rights Law*, and Chapter 19, *Multinational Air Operations*.

⁶² As of 31 January 2020, the United Kingdom (UK) ceased to be a member of the EU.

⁶³ European Union, *The EU in Brief*, https://europa.eu/european-union/about-eu/eu-in-brief_en (last visited 29 May 2020).

⁶⁴ For example, EU regulations on the importation of food can affect arrangements whereby the United States directly imports food into its European installations.

⁶⁵ ASEAN, *About ASEAN*, <https://asean.org/asean/about-asean/> (last visited May 29, 2020).

The Australia, New Zealand, and U.S. (ANZUS) Council. Australia, New Zealand and the United States signed the tripartite ANZUS Treaty in 1951, in the midst of the Korean War and escalating threats in the Pacific region.⁶⁶ The ANZUS Treaty is yet another example of a regional security arrangement,⁶⁷ although the international organization that was founded under the treaty is not as large as other organizations created under similar mandates, such as NATO. In particular, the “Council,” founded under Article VII of the treaty, consists of the foreign ministers (equivalent to the U.S. Secretary of State) or their deputies, who generally meet annually.⁶⁸ Following the attacks of 11 September 2001, Australia invoked the ANZUS Treaty for the first time.⁶⁹

INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC)

Established in 1863, the ICRC is an impartial, neutral, and independent NGO whose purpose is exclusively humanitarian: to protect the lives and dignity of victims of war and internal violence and to provide them with assistance.⁷⁰ The ICRC is a unique NGO in that States have invested it with a special responsibility for the 1949 Geneva Conventions and its Additional Protocols. The ICRC directs and coordinates international relief activities in situations of conflict. It also endeavors to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles. The ICRC, however, should not be confused with national Red Cross societies, such as the American Red Cross, which are typically quasi-governmental organizations. The requirement to be impartial fundamentally distinguishes the ICRC from national societies, which naturally have an allegiance to the State party where they have been established.⁷¹ Together, however, the ICRC and the league of national Red Cross societies comprise the Red Cross movement.

The ICRC and its functions are mandated by universally applicable international humanitarian law. In international armed conflicts, ICRC activities are derived from the four 1949 Geneva Conventions and Additional Protocol I, which collectively recognize its right to conduct certain activities such as bringing relief to wounded, sick, or shipwrecked military personnel; visiting prisoners of war, taking action on behalf of the civilian population, and ensuring that protected

⁶⁶ Security Treaty between Australia, New Zealand and the United States of America, September 1, 1951, 3 U.S.T. 420, 131 U.N.T.S. 83 (entered into force April 29, 1952) [hereinafter ANZUS Treaty].

⁶⁷ ANZUS Treaty Art. IV provides: “Each Party recognizes that an armed attack in the Pacific Area on any of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes. Any such armed attack and all measures taken as a result thereof shall be immediately reported to the Security Council of the United Nations. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.”

⁶⁸ Gary Brown & Laura Rayner, *Upside, Downside: ANZUS: After Fifty Years* (August 28, 2001), https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/cib0102/02CIB03. Note that the commitments between New Zealand and the U.S. under the treaty have been effectively suspended since the 1980s, when New Zealand refused to permit U.S. nuclear-powered warships into its ports. U.S. Dep’t of State, Office of the Historian, *The Australia, New Zealand and United States Security Treaty (ANZUS Treaty), 1951*, <https://history.state.gov/milestones/1945-1952/anzus> (last visited May 29, 2020). However, this has not prevented New Zealand’s active participation in military affairs of both Australia and the United States. For example, New Zealand remains an active member of the “Five Eyes” intelligence community.

⁶⁹ Austl. Joint Standing Comm. on Foreign Affairs, Defence & Trade, *Australia’s Defence Relations with the United States*, ch. 2, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Completed_Inquiries/jfad/usrelations/chapter2 (last visited May 29, 2020).

⁷⁰ ICRC, *History of the ICRC* (October 29, 2016), <https://www.icrc.org/en/document/history-icrc>.

⁷¹ DoD LAW OF WAR MANUAL § 4.26.1.

persons are treated according to law. In non-international armed conflicts, the ICRC bases its activities on Common Article 3 to the Geneva Conventions and Additional Protocol II. These provisions recognize its right to offer its services to parties to the conflict, undertake relief operations, and visit persons detained in connection with the armed conflict. As noted further above, these activities are technically subject to consent of the responsible State party.⁷²

CONCLUSION

Unity of effort through unified action is a key principle underpinning the DoD's approach to operations. This principle is not limited to operations in the joint, combined and integrated environments. Indeed, the principle also contemplates the need to coordinate and, where possible, cooperate with the full spectrum of international organizations in order to achieve common objectives.⁷³

The Air Force legal advisor can assist significantly with the achievement of these objectives. Through knowledge of the legal nature of any given international organization, its agenda or mandate, and how its presence in the operational environment can impact upon the Air Force or DoD mission, Air Force legal personnel will be able to maximize their support to command, and advance U.S. interests consistently with strategic objectives.

⁷² See also Chapter Two, *Law of War*.

⁷³ JP 3-08, ix.

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Chapter 12

HUMAN RIGHTS LAW

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BACKGROUND

Human rights law refers to a broad category of law that focuses on the basic rights and freedoms to which all human beings are entitled. In contrast with most international law, human rights law protects persons as individuals rather than as subjects of sovereign States.

When conducting operations, the key human rights law questions for judge advocates are:

1. Does human rights law apply to this operation?
2. If so, which human rights laws apply?
3. What are the Air Force's obligations to prevent or punish human rights violations during operations?
4. If we are working in a coalition or with a host nation, are there additional human rights law issues which may affect Air Force operations?

APPLICATION OF HUMAN RIGHTS LAW TO OPERATIONS

The United States considers human rights law and the law of war to be separate systems of protection. Human rights law regulates the relationship between a State and individuals under the State's jurisdiction in ordinary life.¹ In contrast, the law of war is "chiefly concerned with the conditions particular to armed conflict and the relationship between a State and nationals of the enemy State."² The law of war includes very restrictive triggering mechanisms, which limit its application to specific circumstances.³ As such during a time of armed conflict where human rights law appears to conflict with the law of war, the law of war is the *lex specialis* (i.e., the controlling body of law and will override the general law).⁴

However, the life and dignity of human beings remain protected despite the application of the law of war in lieu of human rights law. Common Article 3 to the Geneva Conventions sets out minimum standards for humane treatment that apply in all armed conflicts, including prohibitions on cruel treatment, torture, and humiliating and degrading treatment. In addition, certain categories of persons are entitled to higher standards of treatment (see Chapter Two, *Law of War*). The Air Force applies these standards during all armed conflicts, however such conflicts are characterized, and acts consistently with the law of war's fundamental principles and rule in all other military operations.⁵

¹ Damira Kamchibekova, *State Responsibility for Extraterritorial Human Rights Violations*, 13 Buff. HUM RTS. L. REV. 87, 104 (2007); Gamal Abouali, *Natural Resources under Occupation: The Status of Palestinian Water under International Law*, 10 PACE INT'L L. REV. 411, 498 (1998); Daniel Aguirre, *Corporate Social Responsibility and Human Rights Law in Africa*, 5 AFR. HUM. RTS. L. J. 239, 248 (2005).

² DoD LAW OF WAR MANUAL (June 2015), updated Dec 2016, Office of General Counsel, para. 1.6.3.

³ See e.g. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Art. 2. See also, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996, ICJ Rep. 226, para.25 (July 8).

⁴ DoD LAW OF WAR MANUAL, para. 1.6.3.1. Some scholars and states do not share the United States' view and consider the application of human rights law and LOAC as overlapping. Their view is that human rights law creates rights and duties beyond national borders between states and alien individuals during periods of armed conflict as well as peace. Further, some States in Asia and the Islamic world question the universality of human rights as a neo-colonialist attitude of northern states. See Darren J. O'byrne, HUMAN RIGHTS: AN INTRODUCTION 52-55 (2003) (discussing Marxist, Confucian, and Islamic attitudes toward concepts of universal human rights).

⁵ DoDD 2311.01, *DoD Law of War Program* (2 July 2020) and CJCSI 5810.01D, *Implementation of the DoD Law of War Program* (30 April 2010).

CONTENT OF HUMAN RIGHTS LAW

On operations in which the law of war does not apply as a matter of law, human rights law applies.⁶ Human rights law is found in customary international law (CIL) and in treaty law.⁷ The source of the law directly affects the scope of its application.

For example, if a specific human right falls within the category of CIL, it is a fundamental human right. It is binding on U.S. forces at all times, including when overseas. This is because CIL is considered part of U.S. law,⁸ and customary human rights law operates to regulate the way State actors (in this case the United States) treat all persons.⁹

In contrast, human rights law established by treaty generally only binds the state in relation to persons under its jurisdiction.¹⁰ Therefore, human rights obligations from treaty law usually only apply within U.S. territory.

Customary Law Obligations

There is no definitive “source list” of those human rights considered by the United States to be CIL. The best source is the RESTATEMENT OF THE LAW (THIRD), THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987).¹¹ According to the Restatement, the United States accepts the position that certain fundamental human rights fall within the category of CIL, and a State violates international law when, as a matter of policy, it practices, encourages, or condones any of the following:

1. Genocide,
2. Slavery or slave trade,
3. Murder or causing the disappearance of individuals,
4. Torture or other cruel, inhuman, or degrading treatment or punishment,
5. Prolonged arbitrary detention,
6. Systematic racial discrimination, or
7. A consistent pattern of gross violations of internationally recognized human rights.¹²

⁶ Note that where the law of war is applied on an operation as a matter of policy rather than law (IAW DoDD 2311.01 and CJCSI 5810.01D), human rights law would still apply.

⁷ RESTATEMENT OF THE LAW (THIRD), THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987), § 701 [hereinafter RESTATEMENT].

⁸ *Paquete Habana*, 175 U.S. 677 (1900), and *Banco Nacional De Cuba v. Sabbatino*, 376 U.S. 398 (1964); see also RESTATEMENT, note 7, § 111.

⁹ RESTATEMENT note 7, § 701.

¹⁰ International Covenant for Civil and Political Rights, Art. 2 (1966); Convention against Torture and Other Cruel, Inhuman, and Degrading Treatment, Art. 4 (1984); Convention on the Elimination of All Forms of Racial Discrimination, Art. 3 (1965).

¹¹ RESTATEMENT, *supra* note 7, § 702.

¹² *Id.*

Treaty Law Obligations

The original focus of human rights law was to protect individuals from the harmful acts of their own government.¹³ Consequently, U.S. human rights treaties apply to persons living in the territory of the United States and not more broadly to any person with whom agents of the U.S. government deal in the international community.¹⁴ This is referred to as “non-extraterritoriality.”¹⁵ This is a critical difference from the CIL human rights obligations discussed above.

Further, within U.S. territory, while treaties are part of the “supreme Law of the Land,”¹⁶ some treaties entered into by the United States are not enforceable in U.S. courts unless there is subsequent legislation or an executive order to execute the obligations created by the treaty. The U.S. position is that “the intention of the United States determines whether an agreement is to be self-executing in the United States or should await implementation by legislation or appropriate executive or administrative action.”¹⁷ Where there is implementing legislation, it is the legislation or executive order, and not the treaty provision, which is given effect by U.S. courts; this legislation or executive order, therefore, defines the scope of U.S. obligations under our law.¹⁸

Where a treaty has no implementing legislation and is not explicitly self-executing, the obligation of the United States is less clear, and advice on specific issues should be sought from higher command.

The major human rights treaties for the United States are:

1. *International Covenant on Civil and Political Rights* (ICCPR) (1966). The United States ratified the ICCPR in 1992 but it is not a party to the two optional Protocols. The United States, upon ratification, noted explicitly that Articles 1-27 are not self-executing. There is no specific implementing legislation.

¹³ RESTATEMENT, note 7 and accompanying text.

¹⁴ While the actual language used in the scope provisions of such treaties usually makes such treaties applicable to “all individuals subject to [a state’s] jurisdiction” the United States interprets such scope provisions as referring to the United States and its territories and possessions and not any area under the functional control of U.S. armed forces. See RESTATEMENT, *supra* note 7, § 322(2) and Reporters’ Note 3; see also CLAIBORNE PELL REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. Exec. Rep. No. 102-23 (Cost Estimate) (1992) (This Congressional Budget Office Report indicated that the Covenant was designed to guarantee rights and protections to people living within the territory of the nations that ratified it).

¹⁵ S. Theodore Meron, *Extraterritoriality of Human Rights Treaties*, 89 AM. J. INT’L L. 78, 78-82 (1995).

¹⁶ U.S. Constitution, Art. VI. According to the RESTATEMENT, “international agreements of the United States are law of the United States and supreme over the law of the several States.” RESTATEMENT, *supra* note 7, § 111.

¹⁷ See RESTATEMENT, *supra* note 7, § 111, comment h. Also see *Sei Fujii v. California*, 38 Cal.2d 718, 242 P.2d 617 (1952). The court stated, “[t]he provisions in the [C]harter pledging cooperation in promoting observance of fundamental freedoms lack the mandatory quality and definiteness which would indicate an intent to create justiciable rights in private person immediately upon ratification.” 242 P.2d at 621-22.

¹⁸ For example, the U.S. Supreme Court considered that the determination of refugee status for individuals fleeing Haiti was dictated not pursuant to the Refugee Protocol standing alone but by the implementing legislation for that treaty—the Refugee Act. *United States v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993).

2. *Convention on the Prevention and Punishment of the Crime of Genocide* (1948). This treaty was ratified by the United States in 1986, and is implemented by The Genocide Convention Implementation Act of 1987.¹⁹
3. *Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment* (1984). This treaty was ratified by the United States in 1994, and is implemented by The Torture Victim Protection Act of 1991.²⁰
4. *Convention on the Elimination of All Forms of Racial Discrimination* (1965). The United States ratified this treaty in 1994. There is no statute that implements this treaty, but U.S. obligations are implemented through the U.S. Constitution and other laws.²¹

Enforcement

The Alien Tort Statute provides jurisdiction for U.S. district courts to hear “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”²² In *Filartiga v. Peña-Irala*,²³ the Second Circuit recognized a right to be free from torture actionable under the statute.²⁴ The court’s analysis included a detailed exploration of CIL and the level of proof required to establish an actionable provision of CIL. However, in 2004, the United States Supreme Court addressed the Alien Tort Statute in *Sosa v. Alvarez-Machain*.²⁵ Refining and tightening the standard for establishing torts “in violation of the law of nations,” the Court characterized the statute essentially as a jurisdictional statute.²⁶ The Court declined to go as far as categorically requiring separate legislation to establish causes of action under the statute; however, the Court set a very high burden of proof to establish actionable causes.

AIR FORCE OBLIGATIONS TO PREVENT OR PUNISH HUMAN RIGHTS VIOLATIONS DURING OPERATIONS

The scope of U.S. obligations to actively protect fundamental human rights rests with the President and the SecDef, and will be reflected in the rules of engagement (ROE). Whether this authorization or obligation is granted depends on a variety of factors, including the nature of the operation, the expected likelihood of serious violations, and the existence of viable host nation law enforcement authority. However, it is a common provision of ROE for peace operations that U.S. forces may prevent, by force if necessary, violations of fundamental human rights. Generally, ROE authorize U.S. forces to prevent crimes that constitute grave breaches of Common Article 3 of the Geneva Conventions.

¹⁹ Genocide Convention Implementation Act of 1987, 18 U.S.C. §§ 1091-93 (2006).

²⁰ Torture Victim Protection Act of 1991, Pub. L. 102-256, 106 Stat. 73 (1992), reprinted in 28 U.S.C. § 1350 (2006).

²¹ See Periodic Report of the United States of America to the U. N. Committee on the Elimination of Racial Discrimination Concerning the International Convention on the Elimination of all forms of Racial Discrimination, April 2007 and June 2013, available at https://2009-2017.state.gov/j/drl/rls/cerd_report/210605.htm (last visited 19 May 2020).

²² 28 U.S.C. § 1350.

²³ 630 F.2d 876 (2d Cir. 1980).

²⁴ *Id.*

²⁵ 542 U.S. 692 (2004).

²⁶ *Id.*

Potential responses to observed violations of fundamental human rights include reporting through command channels, informing DoS personnel in the relevant State, increased training of host nation forces in how to respond to violations, documenting incidents and notifying host nation authorities, and finally, intervening to prevent the violation. The greater the dependability and reliability of the host nation law enforcement authorities; the less likely it is U.S. forces will have to intervene. However, when preparing to conduct an operation, judge advocates should recognize the need to seek guidance, in the form of the mission statement or ROE, on how U.S. forces should react to such situations.

CONSIDERATIONS WHEN WORKING IN A COALITION

In allied or coalition operations, judge advocates must note that partner nations may have differing perspectives on the applicability of human rights principles, especially during time of armed conflict. For example, many European States will have obligations arising from the European Convention of Human Rights, which are different from those obligations imposed on the United States.²⁷ Accordingly, judge advocates will need to liaise with partner nation legal personnel and seek guidance where appropriate.

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- Universal Declaration of Human Rights, G.A. Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948)
- Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Article 2, 12 August 1949, 6 U.S.T. 3516
- International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 U.N.T.S. 195, 5 I.L.M. 352 (1966)
- United Nations Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948, 78 U.N.T.S. 277-323 (1951), 45 A.J.I.L Supplement 7-13 (1951) (entry into force 12 January 1951, for United States 25 November 1988)
- International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 85, 21 October 1994
- Executive Order 13107, *Implementation of Human Rights Treaties*, 63 Fed. Reg. 68,991, 15 December 1998
- CJCSI 5810.01D, *Implementation of the DoD Law of War Program* (30 April 2010)
- DoDD 2311.01, *DoD Law of War Program* (2 July 2020)
- RESTATEMENT OF THE LAW (THIRD), THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987)

²⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR).

Chapter 13

COMMAND AND CONTROL (C2): AUTHORITY AND RELATIONSHIPS

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BACKGROUND

Inherent to command is the authority that a military commander lawfully exercises over subordinates, including authority to assign missions and accountability for their successful completion.¹ Commanders, among other responsibilities, are called to provide clear intent and timely communication of specific tasks, transfer forces and other capabilities necessary to accomplish assigned tasks, ensure discipline, and delegate authorities appropriately to ensure mission effectiveness.² Command and Control (C2) enhances the commander's ability to make sound and timely decisions and successfully execute them.³ To best accomplish the mission across the command spectrum, unity of command ensures that "all forces operate under a single commander with requisite authority to direct all forces employed in pursuit of a common purpose." This concept is strengthened by the C2 tenets of, among others, establishing clearly defined authorities, roles, and relationships; communication; timely decision making; and mutual trust;⁴ all of which seek to ensure seamless execution of mission requirements. Command authority, however, is never absolute. Limits are appropriately placed on command, and command relationships, through various authorities, directives, and law.⁵ The purpose of this Chapter is to aid in understanding the nature, limitations, relationships, and processes inherent in executing proper command authorities.

CONCEPT OF COMMAND

Command exists to provide authority, accountability, and responsibility over persons and missions.⁶ Command devolves upon an individual, not a staff, and is exercised by virtue of the office and the special assignment of officers holding military grades who are eligible by law to command. A commander exercises control through subordinate commanders. Staff, including vice and deputy commanders, have no command authority. Rather, they assist the commander by planning, investigating, and providing recommendations regarding the execution of command responsibilities. Though some command duties may be delegated, the responsibilities of command may never be delegated.

COMMAND ELIGIBILITY

A military commander must be "a commissioned officer who, by virtue of grade and assignment, exercises primary command authority over an [Air Force] unit (and some non-units, by exception) as authorized by AFI 38-101, paragraph 2.1 and 2.2."⁷ There are three fundamental requirements for an officer to command an Air Force unit. The officer must be: (1) assigned or attached to the unit, (2) present for duty, and (3) otherwise eligible and authorized to command.⁸ Command authority will generally flow to the senior Air Force officer, in both grade and rank, who is

¹ JOINT PUBLICATION 1, *Doctrine for the Armed Forces of the United States*, V-1 (25 March 2013), incorporating Change 1, 12 July 2017 [hereinafter JP 1].

² See *Id.* xx-xxi.

³ *Id.* xxiii.

⁴ *Id.*

⁵ *Id.* V-1.

⁶ See AFI 51-509, *Appointment to and Assumption of Command* (14 January 2019), para. 3.1.

⁷ AFI 51-509, para. 3.2.

⁸ *Id.* para. 3.4.

otherwise eligible to command the unit. An individual may, however, be appointed to command other officers of the same grade but higher rank.⁹

There are various special rules and limitations of command, which are fully detailed in AFI 51-509, *Appointment to and Assumption of Command*. For example, a retired officer cannot command unless recalled to active duty.¹⁰ An individual may not be given the title or position of “acting commander,” as the term is not authorized.¹¹ Officers assigned to HQ USAF cannot assume command of personnel, unless directed to do so by a superior competent authority.¹² By law, chaplains cannot exercise command but may give lawful orders and exercise functions of operational supervision, control, and direction.¹³ By policy, Judge Advocates may only exercise command if expressly authorized by The Judge Advocate General, or as the senior ranking member among a group of prisoners of war, or under emergency field conditions.¹⁴ By law, only officers designated as a medical, dental, veterinary, medical service, or biomedical sciences officer, or as a nurse, may command organizations and installations whose primary mission involves health care or the health profession.¹⁵ Additionally, flying organizations may only be commanded by Line of the Air Force officers with current aeronautical ratings.¹⁶

While civilians may lead a unit, hold supervisory positions, and provide supervision to military and civilian personnel, they cannot assume military command or exercise command over military members.¹⁷ Civilians designated to lead a unit are referred to as directors. As leaders of military organizations, civilian directors perform all functions normally performed by a unit commander except as restricted by law (*e.g.*, the Uniform Code of Military Justice) or controlling superior authority (*e.g.*, DoD issuance).¹⁸ Units led by directors will not have commanders, and members of the unit or subordinate units may not assume command of the unit. Because members of the unit may not assume command, individuals should be designated in advance to perform the duties of civilian leaders in the event such persons become unable to perform their duties.¹⁹

⁹ See *Id.* para. 3.4.5.

¹⁰ See *Id.* para. 3.4.7.1.

¹¹ See *Id.* para. 11.5.

¹² See *Id.* para. 3.4.7.5.

¹³ See *Id.* para. 3.4.7.7.

¹⁴ See *Id.* para. 3.4.7.8.

¹⁵ 10 U.S.C. § 9067; see also AFI 51-509, para. 3.4.7.9.

¹⁶ See AFI 51-509, para. 10.1.

¹⁷ See *Id.* para. 3.6; see also AFI 38-101, *Manpower and Organization* (29 August 2019).

¹⁸ See AFI 51-509, para. A2.2; see also AFI 38-101, para. 25.1.2.1.2.

¹⁹ See generally *Id.*

COMMAND SUCCESSION

An officer succeeds to command in one of two ways: by appointment or by assuming command.²⁰ Command succession is generally announced by publishing orders. Air Force Form 35, Request and Authorization for Assumption of/Appointment to Command, may be used to publish command orders for commanders of Air Force organizations.

Appointment to command is an order from a higher authority directing an eligible officer to take command of an organization. To be appointed to command, an officer must be of equal or senior grade to every other officer who is eligible to command in that organization. Seniority by date of rank is not necessary.²¹ Appointment to command is the preferred command succession option.

Assumption of command is the unilateral act of taking command by the senior officer in an organization who is present for duty and eligible to command.²² The senior officer may not assume command if an eligible officer of equal grade is already in command by virtue of an appointment. Additionally, unlike appointment to command, an officer may not assume command of a unit if an eligible officer of equal grade and higher rank is assigned to the unit.²³

COMMAND ORGANIZATION (A.K.A. THE CHAIN OF COMMAND)

The basis of command authority is derived from Article II, section 2, of the U.S. Constitution, which provides original command authority to the President as Commander-in-Chief. The President and SecDef exercise authority, direction, and control of the Armed Forces through two distinct chains of command: (1) a combatant chain of command, flowing from SecDef to the combatant commander (CCDR), and (2) an administrative chain of command flowing from SecDef to the service secretary.²⁴ Both branches are separate and distinct from each other.²⁵

COMBATANT CHAIN OF COMMAND

Combatant commanders (CCDRs) exercise combatant command authority (COCOM) over assigned forces and are directly responsible to the President and SecDef for the performance of assigned missions and the preparedness of their commands.²⁶ The primary duties of the CCDR are: (1) to produce plans for the employment of the armed forces to execute national defense strategies and respond to significant military contingencies; (2) to take actions, as necessary, to deter conflict; and (3) to command U.S. armed forces as directed by the SecDef and approved by the President.²⁷ Unless otherwise directed by the President or SecDef, CCDRs possess the authority, direction, and control to discharge numerous functions over commands and assigned forces, to include the following: give authoritative direction to subordinate commands and forces for missions, including all aspects of military operations, joint training, and logistics; prescribe

²⁰ AFI 51-509, para. 6.

²¹ *Id.* para. 6.1.

²² *Id.* para. 6.2.

²³ *Id.* para. 6.2.5.2.

²⁴ See Air Force Doctrine, Annex 3-30, *Command and Control* (7 January 2020), 6.

²⁵ See JP 1, II-9; see also JP 1, Figure II-3.

²⁶ *Id.*; see also 10 U.S.C. § 164(b).

²⁷ 10 U.S.C. § 164(b)(3).

the chain of command to commands and assigned forces; organize commands and forces within that command necessary to implement assigned missions; employ forces within that command; assign command functions to subordinate commanders; coordinate and approve those aspects of administration and support (including control of resources and equipment, internal organization, and training) and discipline necessary to carry out assigned missions; select subordinate commanders and command staff; suspend subordinates; and convene courts-martial.²⁸

SecDef may assign the Chairman of the Joint Chiefs of Staff (CJCS) the responsibility to oversee activities of the combatant commands (CCMDs). This assignment, however, does not confer any command authority on the CJCS and does not alter the responsibilities of the CCDRs.²⁹ Subject to the authority, direction, and control of SecDef, the CJCS serves as spokesperson for CCDRs, especially on the operational requirements of their commands.³⁰

Unified Command Structure

The President, through SecDef and with the advice and assistance of the CJCS, establishes unified and specified CCMDs and prescribes the force structure of those commands.³¹ Under the direction of the SecDef, service secretaries are directed to assign specified forces under their jurisdiction, except as otherwise identified, to unified and specified CCMDs or to the U.S. element of North American Aerospace Defense Command (NORAD) to perform missions assigned to those commands.³² The unified command structure is flexible and changes as required to accommodate evolving national security needs. The Unified Command Plan establishes the various CCMDs, identifies geographic areas of responsibility, assigns primary tasks, defines the authority of the commanders, establishes command relationships, and gives guidance on the exercise of COCOM.

ADMINISTRATIVE COMMAND CHAIN

The service (and administrative) chain of command is separate and distinct from the combatant chain and runs from the President, to the SecDef, to the service secretaries, and to the commanders of subordinate military forces. Forces not assigned to a CCMD or NORAD remain assigned to their respective service and carry out the responsibilities of the service secretary.³³ Subject to the authority, direction, and control of SecDef, and subject to the authorities of the CCDRs, the service secretary remains responsible for the administration and support of forces assigned to the CCMD.³⁴ The authority for the SecAF to organize service forces and appoint commanders is found at 10 U.S.C. § 9013 and 10 U.S.C. § 9074.

Service secretaries are responsible for the administration and support of service forces. They fulfill their responsibilities by exercising administrative control (discussed below) through the commanders of the service component commands, assigned to CCMDs, and through the service chiefs (as determined by the secretaries) for forces not assigned to the CCMDs. The responsibilities and authority exercised by service secretaries are subject by law to the authority provided to the CCDRs in their exercise of COCOM. Each of the service secretaries, coordinating as appropriate

²⁸ 10 U.S.C. § 164(c)(1).

²⁹ *See* 10 U.S.C. § 163(b)(1).

³⁰ *See* 10 U.S.C. § 163(b)(2).

³¹ *See* 10 U.S.C. § 161(a).

³² *See* 10 U.S.C. § 162(a)(1).

³³ *See* 10 U.S.C. § 162(a)(2).

³⁴ *See* 10 U.S.C. § 165(b).

with the other service secretaries and with CCDRs, has the responsibility for organizing, training, equipping, and providing forces to fulfill specific roles and for administering and supporting these forces.

Subject to the authority, direction, and control of the SecDef, SecAF has the authority to organize the Air Force and Space Force forces to carry out “the functions of the Department of the Air Force so as to fulfill the current and future operational requirements of the unified and specified CCMDs.”³⁵ Regardless of how an Air Force or Space Force organization is assigned or attached to a CCMD or joint force, the organization normally retains its commander and its structure as established by the Air Force or Space Force. The Air Force or Space Force commander has administrative control from the Air Force or Space Force, and specified elements of operational command authority are delegated by the joint force chain of command. The details of these command authorities will be discussed at length below.

COMMAND RELATIONSHIPS (COMREL)

Command relationships are defined as “the interrelated responsibilities between commanders, as well as the operational authority exercised by commanders in the chain of command; defined further as combatant command (command authority), operational control, tactical control, or support.”³⁶ COMREL should be clearly defined to avoid confusion and ensure seamless mission execution. Accomplishing a clear definition requires a firm understanding of command authorities and how they work together.³⁷

COMMAND AUTHORITIES

Command authorities generally fall into two categories: operational and other. Operational—or “warfighting”—authorities are specifically exercised by CCDRs. These authorities include operational control, tactical control, and support.³⁸ Other command authorities include administrative control, coordinating authority, and Direct Liaison Authorized (DIRLAUTH).³⁹ Understanding these authorities is key to comprehending command relationships.

³⁵ 10 U.S.C. § 9013(c)(4).

³⁶ JP 1, GL-6.

³⁷ Annex 3-30, 4.

³⁸ *See* JP 1, xxi.

³⁹ *See Id.* xxii.

OPERATIONAL AUTHORITIES

Combatant Command Authority (COCOM)

As previously mentioned, COCOM is a CCDR's authority over assigned forces in accordance with 10 U.S.C. § 164 or as directed by the President in the Unified Command Plan. COCOM gives full authority for CCDRs to perform those functions involving organizing and employing commands and forces, assigning tasks, designating objectives, and giving authoritative direction over all aspects of military operations, joint training, and logistics necessary to accomplish assigned combatant missions.⁴⁰ COCOM cannot be delegated or transferred and enables CCDRs to do all things necessary to carry out directed missions and operations.

Operational Control (OPCON)

OPCON is the CCMD authority involving organizing and employing commands and forces, assigning tasks, designating objectives, and giving authoritative direction over all aspects of military operations necessary to accomplish the mission.⁴¹ OPCON is inherent in COCOM and derives from the CCDR. OPCON may be delegated or transferred within a CCMD by the CCDR, or between CCMDs only by order of the President or SecDef.⁴² OPCON may be exercised by commanders at any echelon at or below the level of CCMD.⁴³

Tactical Control (TACON)

Inherent in OPCON, TACON is command authority over assigned or attached forces or commands, or military capability or forces made available for tasking, that is limited to the detailed direction and control of movements and maneuvers within the operational area necessary to accomplish assigned missions or tasks.⁴⁴ TACON is a lesser authority than OPCON and may be delegated to and exercised by commanders at any level at or below CCMD. The President or SecDef must authorize the transfer of TACON between CCMDs.⁴⁵ TACON does not provide organizational authority or directive authority for administrative and logistics support.

Support Authority

Support is a command authority established by a common superior commander between subordinate CCDRs when one organization should aid, protect, complement, or sustain another force.⁴⁶ Support authority is exercised by commanders at any level at or below the CCMD level.⁴⁷ The support command relationship is designed to be a somewhat vague, but flexible, concept and is broken into the following four categories: general, mutual, direct, and close.⁴⁸ SecDef establishes

⁴⁰ JP 1, xxi.

⁴¹ *Id.*

⁴² *Id.* xiv.

⁴³ *Id.* xxi.

⁴⁴ *Id.*

⁴⁵ *Id.* xiv.

⁴⁶ *Id.* xxi.

⁴⁷ *Id.*

⁴⁸ *Id.* (See JP 1, Figure V-2 for a complete description of all four categories.)

support relationships between the CCDRs, which ensures the supporting CCDR provides the necessary support.⁴⁹

OTHER AUTHORITIES

Administrative Control (ADCON)

ADCON pertains to the direction or exercise of authority over subordinate or other organizations with respect to administration and support, including organization of service forces, control of resources and equipment, personnel management, logistics, individual and unit training, readiness, mobilization, demobilization, discipline, and other matters not included in the operational missions of the subordinate or other organizations.⁵⁰ Often referred to as organize, train and equip (OT&E) authority, ADCON is generally regarded as a service-specific responsibility and is synonymous with administration and support responsibilities identified in Title 10, U.S.C. Service secretaries exercise ADCON over service forces through their respective service chiefs and commanders. Unlike OPCON, which remains a CCMD authority, ADCON may be delegated to and exercised by commanders of service forces assigned to a CCDR at any echelon at or below the level of service component command and is subject to the command authority of CCDRs.⁵¹ Service commanders exercising ADCON may not usurp the authorities assigned by a CCDR having COCOM over commanders of assigned service forces.⁵²

Coordinating Authority

Coordinating authority is the authority delegated to a commander or individual to coordinate specific functions and activities involving forces of two or more military departments, two or more joint force components, or two or more forces of the same service.⁵³ It is a consultation relationship between commanders rather than a directive authority through which command may be exercised. Coordinating authority may be granted and modified through a memorandum of agreement to provide unity of command and unity of effort for operations involving reserve component (RC) and active component (AC) forces engaged in interagency activities. Commanders or individuals may exercise coordinating authority at any echelon at or below the level of CCMD.⁵⁴

Direct Liaison Authorized (DIRLAUTH)

DIRLAUTH is the authority granted by a commander (at any level) to a subordinate to directly consult or coordinate an action with a command or agency within or outside of the granting command.⁵⁵ This authority is more closely associated with planning than direct operations and centers on the need to inform the commander granting such authority. DIRLAUTH is a coordination relationship, not an authority through which command may be exercised.⁵⁶

⁴⁹ *Id.* xxii.

⁵⁰ *Id.* V-12.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* V-12–V-13.

⁵⁶ *Id.* V-13.

ASSIGNMENT AND TRANSFER OF FORCES

The Goldwater-Nichols Act requires that forces under the jurisdiction of the service secretaries be assigned to CCMDs or NORAD, or designated as service retained, as specified by SecDef in the Global Force Management Implementation Guidance (GFMIG).⁵⁷ Forces within a CCMD's geographic area of responsibility normally fall under the command of the CDR, except as otherwise directed by SecDef.⁵⁸ Assigned or attached forces to a CCMD, or service retained forces, cannot be transferred from that command unless directed by SecDef.⁵⁹ When forces are transferred between commands, command relationships do not automatically transfer with those forces. The command relationship the gaining commander will exercise—and a losing commander will relinquish—must be specified.⁶⁰

When transfer of forces to a joint force will be permanent or for an unknown, but lengthy, period of time, forces should be reassigned. CDRs will exercise COCOM, and subordinate Joint Force Commanders (JFCs), which normally exist through the service component commander, will exercise OPCON over reassigned forces. For temporary transfers, forces will be attached to the gaining command, and the JFCs will exercise OPCON.⁶¹

Commanders of forces are responsible to their respective service chiefs for the administration, training, and readiness of their unit(s). Commanders of forces assigned to the CCMD are under the authority, direction, and control of (and are responsible to) their CDR to carry out assigned operational missions, joint training and exercises, and logistics.⁶²

JOINT COMMAND CONCEPTS

Joint forces are established at three levels: unified CCMDs, subordinate unified commands, and joint task forces (JTFs).⁶³ All joint forces include service component commands, which consist of the service component commander and all those service forces, such as individuals, units, detachments, organizations, and installations under that command (including the support forces that have been assigned to a CCMD and further assigned to a subordinate unified command or JTF).⁶⁴

Joint Force Commander (JFC)

A joint force commander is a CDR, subunified commander, or joint task force commander authorized to exercise COCOM or OPCON over a joint force.⁶⁵ JFCs traditionally delegate OPCON of assigned and attached Air Force forces to the Commander, Air Force Forces (COMAFFOR) or the Joint Force Air Component Commander (JFACC).

⁵⁷ See 10 U.S.C. § 162; *see also* JP 1, V-11.

⁵⁸ The operational command relationships between Air Force organizations and commanders and the combatant commands are set forth in Section II of the GFMIG; *see also* Unified Command Plan.

⁵⁹ *Id.*

⁶⁰ JP 1, V-11.

⁶¹ *See* JP 1, Figure V-3.

⁶² *See generally* JP 1; *see also* Annex 3-30.

⁶³ *See* JP 1, IV-1.

⁶⁴ *Id.* GL-11.

⁶⁵ *Id.* GL-9.

Joint Force Air Component Commander (JFACC)

The JFACC derives authority from the JFC, who possesses authority to exercise OPCON, assign missions, direct coordination among subordinate commanders, and redirect and organize forces. The JFC normally designates the JFACC, whose responsibilities are assigned by the JFC and include, but are not limited to, planning, coordination, allocation, and tasking, based upon the JFC's priorities. The JFACC will recommend to the JFC a plan for air sorties, apportioned to missions and geographic areas, after coordinating with service component commanders and other assigned or supported commanders. The JFACC is normally the component commander with the preponderance of air assets and the capability to plan, task, and control joint air operations.⁶⁶

The JFACC is not the same as the Air Force service component commander (COMAFFOR), although the same officer may wear both hats. The JFC exercises C2 through the JFACC for service tactical and operational assets, which generally allows assets to function as designed. The intent is to satisfy the needs of the JFC and maintain the tactical/operational integrity of the particular service organizations. The Joint Air Operations Center (JAOC) legal advisor supports the JFACC role.⁶⁷

A JFACC exercises TACON authority when it produces Air Tasking Orders (ATO) that task other component's air assets to conduct joint missions. For example, in most situations involving a Marine Air-Ground Task Force (MAGTF), the MAGTF commander retains OPCON of organic Marine air assets during sustained air-ground operations. During joint operations, MAGTF air assets will normally support the MAGTF mission. The MAGTF commander, however, will make sorties available to the JFC for a JFACC tasking, air defense, long range interdiction, and long range reconnaissance. Sorties in excess of the MAGTF direct support requirement will be allocated to the JFC for JFACC tasking for support of other joint force components or the joint force as a whole. Even so, the CDR or JFC, while exercising OPCON, still possesses the authority to assign missions and redirect sorties for higher priority missions.⁶⁸

The JFACC and COMAFFOR Relationship

As previously mentioned, the same commander frequently wears both JFACC and COMAFFOR hats. The COMAFFOR is directly responsible for overseeing administration and support of Air Force forces. The COMAFFOR exercises ADCON, including logistics and administrative support, over all assigned forces as well as specified ADCON over attached forces with some exceptions.⁶⁹ The JFACC's responsibilities include planning, coordination, allocation of forces, tasking of forces, and recommending air sorties to the JFC.⁷⁰ Given that the roles for each position are different, a commander operating as both JFACC and COMAFFOR must remain aware of "which hat" in which he or she is functioning for any given decision.

⁶⁶ See generally Annex 3-30, 7-8.

⁶⁷ *Id.* xii.

⁶⁸ See generally JOINT PUBLICATION 3-30, *Joint Air Operations* (25 July 2019) [hereinafter JP 3-30].

⁶⁹ See Annex 3-30, 10-11.

⁷⁰ See JP 3-30, x-xi.

TYPES OF FORCES

Assigned Forces

All service forces, except those specified in 10 U.S.C. § 162, are assigned to CCMDs as specified in the GFMIG. The CCDR exercises COCOM over assigned forces and normally exercises OPCON of forces attached by SecDef.⁷¹ Commanders of subordinate commands, including JTFs, are given OPCON of assigned forces and OPCON or TACON of attached forces, as authorized by the superior commander.⁷² The JFACC normally exercises OPCON over service forces and TACON over other forces made available to the functional component for tasking.⁷³ The COMAFFOR exercises complete ADCON over assigned forces and specified ADCON over attached forces, although the scope of ADCON may vary.⁷⁴

Attached Forces

As previously mentioned, forces are normally attached, rather than assigned, when their transfer will be temporary.⁷⁵ Within CCMDs, establishing authorities for subordinate unified commands or JTFs may direct the assignment or attachment of forces to those subordinate commands as appropriate. The COMAFFOR normally exercises ADCON over attached forces.⁷⁶

Supporting Forces

Supporting forces conduct operations in support of a CCMD but are bedded down in another CCMD's area of responsibility (or CONUS). While the CCMD charged with the operational mission has OPCON of the supporting forces, ADCON usually remains with the beddown/CONUS commander.

Reachback Forces

Reachback is a form of combat support that provides products, services, applications, forces, or materiel/equipment from organizations that are not forward deployed.⁷⁷ Forces are not physically located in-theater, and direction is most often provided through TACON or support relationships. While such support is commonly associated with distributed or split operations, unlike such operations, reachback forces are not involved in the operational planning or decision-making process.⁷⁸

Transient Forces

Forces transiting a particular geographic area of responsibility do not fall under the chain of command of that particular CCMD solely by their movement within the area of responsibility. They are, however, generally subject to the ADCON authority of the COMAFFOR for local force protection and administrative reporting requirements.⁷⁹

⁷¹ See JP 1, V-11.

⁷² *Id.* V-6.

⁷³ See generally Air Force Doctrine Volume 3, *Command* (22 November 2016).

⁷⁴ *Id.*

⁷⁵ See JP 1, Figure V-3.

⁷⁶ See generally Annex 3-30, 9-10.

⁷⁷ See Annex 3-30, 18.

⁷⁸ *Id.* 19.

⁷⁹ *Id.* 16.

10 U.S.C. § 601 POSITIONS

Special rules exist for positions designated under 10 U.S.C. § 601 for the grade of lieutenant general or general. Individuals appointed to positions designated by the President as positions of importance and responsibility, in accordance with 10 U.S.C. § 601, become eligible to assume the grade of O-9 or O-10 by virtue of their appointment to, and service in, that position.⁸⁰ Upon Senate confirmation, that officer will be appointed to the command position and appointed to the higher grade.⁸¹ Command appointments for major command or HQ USAF direct reporting units will be made by SecAF, the Chief of Staff of the Air Force (CSAF), or the Vice Chief of Staff. Numbered Air Force and Center commanders in the O-9 or O-10 grades are appointed by a superior competent authority. These officers retain their grade so long as they serve in their appointed positions.⁸²

For the Air Force, succession to the position of CSAF is set out in 10 U.S.C. § 9034. The Vice Chief of Staff shall perform the duties of the CSAF if the CSAF is absent, disabled, or the position is vacant. If the Vice Chief of Staff's position is vacant, or he or she is absent or disabled, unless the President directs otherwise, the most senior Air Staff officer who is not absent or disabled and who is not restricted in performance of duty shall perform the duties of Chief of Staff until a successor is appointed or the absence or the disability ceases, whichever is first.⁸³

⁸⁰ *Id.* para. 8.1.1.

⁸¹ *Id.*

⁸² *See Id.* para. 8.1.2.

⁸³ 10 U.S.C. § 9034(d)(2).

REFERENCES

U.S. Constitution, Article II, § 2

10 U.S.C. §§ 161-165

10 U.S.C. § 601

10 U.S.C. § 9013

10 U.S.C. § 9034

10 U.S.C. § 9067

10 U.S.C. § 9074

JOINT PUBLICATION 1, *Doctrine for the Armed Forces of the United States* (25 March 2013),
incorporating Change 1, 12 July 2017

JOINT PUBLICATION 3-30, *Joint Air Operations* (25 July 2019)

Air Force Doctrine, Volume 3, *Command*, (22 November 2016)

Air Force Doctrine, Annex 3-30, *Command and Control* (7 January 2020)

AFI 38-101, *Manpower and Organization* (29 August 2019)

AFI 51-509, *Appointment to and Assumption of Command* (14 January 2019)

Chapter 14

INTELLIGENCE ACTIVITIES

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INTRODUCTION

“Intelligence” is commonly categorized as either *foreign* intelligence or *counterintelligence*.¹ *Foreign intelligence* (FI) is defined as “information relating to the capabilities, intentions, or activities of foreign governments.”² *Counterintelligence* (CI) is defined as “information gathered and activities conducted to identify, deceive, exploit, disrupt, or protect against espionage, other intelligence activities, sabotage, or assassinations conducted for or on behalf of foreign [entities]...or international terrorist organizations...”³ Note that intelligence is not only “the product resulting from the collection, processing, integration, evaluation, analysis, and interpretation of available information concerning foreign nations,” but also “[t]he activities that result in the product,” and “the organizations engaged in such activities.”⁴ Past abuses by the U.S. Government using intelligence capabilities to monitor U.S. persons⁵ and the lack of judicial oversight for most of the system have resulted in a rigorous oversight regime commonly referred to as intelligence oversight. When lawyers refer to “intelligence law,” they are generally referring to this intelligence oversight regime. This Chapter describes intelligence oversight laws, policies, and practices; it is only designed as an introduction to the topic and close reading of the rules and definitions, plus consultation with experienced counsel, is vital to properly serving your client.

THE INTELLIGENCE COMMUNITY

Intelligence activities are carried out by the “intelligence community” (IC) which consists of 17 organizations:⁶

- **Two independent agencies:** The Office of the Director of National Intelligence (ODNI)⁷ and the Central Intelligence Agency (CIA);
- **Eight DoD elements:** The Defense Intelligence Agency (DIA), the National Security Agency (NSA), the National Geospatial Intelligence Agency (NGA), the National Reconnaissance Office (NRO), and **intelligence elements of the four** DoD services: the Army, Navy, Marine Corps, Coast Guard and Air Force.
- **Seven elements of other departments and agencies:** The Department of Energy’s Office of Intelligence and Counter-Intelligence; the Department of Homeland Security’s

¹ Executive Order 12333, § 3.5(f), Definitions, “Intelligence.”

² *Id.* § 3.5(e)

³ *Id.* § 3.5(a). Note that for the Air Force, the *only* entity authorized to conduct CI is the Air Force Office of Special Investigations (AFOSI). All legal advice regarding CI matters comes only from AFOSI/JA or the Office of the Air Force General Counsel, Deputy General Counsel for Intelligence, International and Military Affairs (SAF/GCI).

⁴ JOINT PUBLICATION 1; *DoD Dictionary of Military and Associated Terms*, as of January 2020.

⁵ See, e.g., Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities. United States Senate, 94th Congress, 2nd sess., April 29, 1976. [AKA “Church Committee Report”].

⁶ <https://www.dni.gov/index.php/what-we-do/members-of-the-ic>; The Intelligence Community, <https://www.intelligence.gov/>; see also Executive Order 12333, § 3.5(h).

⁷ The Director of National Intelligence (DNI) serves as the head of the U.S. Intelligence Community, overseeing and directing the implementation of the National Intelligence Program (NIP). The DNI also acts as the principal advisor to the president, the National Security Council, and the Homeland Security Council for intelligence matters related to national security. The president appoints the DNI with the advice and consent of the Senate.

Office of Intelligence and Analysis and U.S. Coast Guard Intelligence; the Department of Justice's Federal Bureau of Investigation and the Drug Enforcement Agency's Office of National Security Intelligence; the Department of State's Bureau of Intelligence and Research; and the Department of the Treasury's Office of Intelligence and Analysis.

There are six basic intelligence sources, or collection disciplines:⁸

1. **SIGINT**: Signals intelligence is derived from signal intercepts comprising all communications intelligence (COMINT), electronic intelligence (ELINT) and foreign instrumentation signals intelligence (FISINT). The NSA is responsible for collecting, processing, and reporting SIGINT.⁹
2. **IMINT**: Imagery Intelligence includes representations of objects reproduced electronically or by optical means. NGA is the manager for all imagery intelligence activities.
3. **MASINT**: Measurement and Signature Intelligence is technically derived intelligence data other than imagery and SIGINT. DIA manages all MASINT matters.
4. **HUMINT**: Human intelligence is derived from human sources.
5. **OSINT**: Open-Source Intelligence is publicly available information appearing in print or electronic form including radio, television, newspapers, journals, and the Internet.
6. **GEOINT**: Geospatial Intelligence is the analysis and visual representation of security related activities on the earth. It is produced through an integration of imagery, imagery intelligence, and geospatial information.

ODNI lays out seven mission objectives of the IC which transcend individual threats, topics, or geographic regions.¹⁰ The missions differ from foundational military intelligence, which is intelligence on foreign military capabilities. As such, foundational mission objectives collectively represent the broadest and most fundamental of the IC's intelligence missions.

1. **Strategic Intelligence** – addresses issues of enduring national security interest.
2. **Anticipatory Intelligence** – addresses new and emerging trends, changing conditions, and underappreciated developments.
3. **Current Operations Intelligence** – supports planned and ongoing operations.

The next four mission objectives address specific, topical missions of the IC.

4. **Cyber Threat Intelligence** – addresses State and non-State actors engaged in malicious cyber activities.
5. **Counterterrorism** – addresses State and non-State actors engaged in terrorism and related activities.
6. **Counterproliferation** – addresses State and non-State actors engaged in the proliferation of weapons of mass destruction and their means of delivery.
7. **Counterintelligence and Security** – addresses threats from foreign intelligence entities and insiders.

⁸ <https://www.dni.gov/index.php/what-we-do/what-is-intelligence> (last visited 21 May 20).

⁹ Special note re SIGINT: Under Executive Order 12333, § 1.7(c)(2), NSA is the only entity that conducts SIGINT. 16 AF has been appointed to support NSA as the Service Cryptologic Component.

¹⁰ National Intelligence Strategy of 2019.

INTELLIGENCE OVERSIGHT

DoD Manual (DoDM) 5240.01, *Procedures Governing the Conduct of DoD Intelligence Activities*, provides the primary source of guidance to DoD for intelligence oversight. It is meant to “enable DoD to conduct authorized intelligence activities in a manner that protects the constitutional and legal rights and the privacy and civil liberties of U.S. persons.”¹¹ The general policy states that DoD components “[a]re authorized to collect, retain, and disseminate information concerning U.S. persons,” (USP) but “[m]ay not investigate [USP] or collect or maintain information about them solely for the purpose of monitoring activities protected by the First Amendment or the lawful exercise of other rights secured by the Constitution or laws of the United States.”¹² Section 3 of DoDM 5240.01 lays out the procedures DoD follows to implement this guidance. Note that these procedures govern not only activities of Defense Intelligence Components (DIC), but also the conduct of *non*-intelligence components or elements when conducting intelligence activities under DoD authorities.¹³ Consequently, even if an Air Force unit does not belong to the DIC, these procedures apply whenever that unit conducts any type of authorized intelligence activity.

Procedures 2 through 4 describe how DoD may collect, retain, and disseminate U.S. person information (USPI). USPI is defined as “Information that is reasonably likely to identify one or more specific U.S. persons.”¹⁴ The term “U.S. person” includes U.S. citizens, but is broader. It also includes known permanent resident aliens, unincorporated associations substantially composed of U.S. citizens or permanent resident aliens, and corporations incorporated in the U.S. and not directed and controlled by a foreign government. A person or organization in the United States is presumed to be a USP, unless specific information to the contrary is obtained. Conversely, a person or organization outside the United States, or whose location is not known to be in the United States, is presumed to be a non-U.S. person, unless specific information to the contrary is obtained.¹⁵

¹¹ DoDM 5240.01, *Procedures Governing the Conduct of DoD Intelligence Activities* (8 August 2016).

¹² *Id.* 1.2b(1)&(3).

¹³ *Id.* 3.1a(1).

¹⁴ *Id.* glossary entry for “USPI.” The full definition includes information on how to determine that likelihood, who can do so, and some exceptions.

¹⁵ *Id.* glossary entry for “U.S. person.”

COLLECTION

Collection of information occurs “when it is received by a [DIC] whether or not it is retained by the Component for intelligence or other purposes.” It does *not* include information: passing through a computer system; on the Internet or a forum outside the component and simply viewed or accessed (not copied or saved); disseminated by another component or element of the IC; or maintained on behalf of another USG agency for non-intelligence purposes.¹⁶

Procedure 2 of DoDM 5240.01 breaks collection of USPI into two major categories: intentional collection, and incidental collection. For USPI *incidentally* collected during an authorized intelligence activity, it does not have to fall into any particular category, as long as the retention and dissemination procedures (3 and 4) are followed.¹⁷ However, a DIC may *intentionally* collect USPI only if it is believed to be necessary for an authorized intelligence mission, and if it falls into one of the following categories:¹⁸

- (1) Publicly available¹⁹
- (2) Consent
- (3) Foreign Intelligence
- (4) Counterintelligence
- (5) Threats to safety
- (6) Protection of intelligence sources, methods, and activities
- (7) Current, former, or potential sources
- (8) Persons in contact with sources or potential sources
- (9) Personnel security
- (10) Physical security
- (11) Communications security (COMSEC) investigation
- (12) Overhead and airborne reconnaissance
- (13) Administrative purposes

The collection will use the least intrusive collection techniques feasible within the United States or directed against a USP abroad, and collect no more information than is reasonably necessary.²⁰ In addition, there are limits on collection of FI in the United States.²¹

¹⁶ *Id.* glossary entry for “collection.”

¹⁷ *Id.* 3.2d.

¹⁸ *Id.* 3.2c.

¹⁹ IAW DoDD 3115.18, *DoD Access to and Use of Publicly Available Information (PAI)* (11 June 2019), 1.2b(1)&(2), PAI collected by the Air Force will comply with DoDM 5240.01 (for intelligence components), or DoDD 5200.27, *Acquisition of Information Concerning Persons and Organizations not Affiliated with the Department of Defense*, (for non-intelligence components)(5 April 2019).

²⁰ DoDM 5240.01, 3.2f(3)&(4).

²¹ *Id.* 3.2(g).

RETENTION

Retention of USPI generally falls into three timeframes: permanent, five years for evaluation, and 25 years for evaluation. Retention for evaluation is used to determine if the USPI can be permanently retained or must be deleted. Paragraph 3.3 of DoDM 5240.01 can generally be explained as follows:

USPI may be permanently retained if necessary for performance of an authorized intelligence function and the USPI was lawfully collected by the component or lawfully disseminated to the component.

Table 14.1. Retention Periods for Intelligence Collected on U.S. Persons

Description	Retention for Evaluation
<i>Intentionally</i> collected USPI	5 years
<i>Incidentally</i> collected USPI where the intentional target was reasonably believed to be <i>inside</i> the United States	5 years
<i>Incidentally</i> collected USPI where the intentional target was reasonably believed to be <i>outside</i> the United States	25 years
Voluntarily provided USPI	5 years
Voluntarily provided info on non-USP, but <i>may</i> contain USPI	25 years
Special circumstances collection IAW Procedure 2.e	5 years

For some special circumstances collection, retention can be extended no more than five years beyond the above timeframes. While USPI is being retained, DICs must limit access, audit access, establish documented procedures, and annually train employees who access or use USPI regarding civil liberties and privacy protections.²² Special note: Any retention of USPI from SIGINT is subject to classified procedures, in a classified annex to DoDM 5240.01.²³

²² *Id.* 3.3f.

²³ *Id.* 3.3i.

DISSEMINATION

USPI may only be disseminated by DIC employees who have received training specific to dissemination, and the information falls into one of the following categories:²⁴

Table 14.2. Dissemination of U.S.-Person Intelligence

Category	Qualification
Any person or entity	Information is publically available or USP consented
Other IC Elements	Sent to another element of the IC to determine whether information is relevant to its responsibilities
Other DoD Elements	Sent to another DoD element (or contractor) reasonably believed to have a need to perform its mission
Other Federal Government entity	Sent to another federal government entity reasonably believed to have a need to perform its mission
State/Local/Tribal/Territorial Government	Sent to state/local/tribal/territorial government reasonably believed to have a need to perform its mission
Foreign Government or International Organization	Reasonably believed to have a need to perform its mission and the head of the DIC (or delegee) has determined that disclosure is consistent with foreign disclosure policy, international agreements, and a harms analysis
Assistance to the Component	Not part of the government but necessary for the limited purpose of assisting the component to carry out its mission (includes further restrictions)
Protective Purposes	Not part of the government but necessary to protect the safety/security of persons/property, or protect against or prevent a crime or threat to national security (component conducts risk assessment)
Required Dissemination	Statute/treaty/EO/National Security Council guidance/court order/etc., requires dissemination

²⁴ *Id.* 3.4c.

Any dissemination not conforming to Procedure 3 must be approved by the head of the DIC with advice of their respective legal office, after consultation with DoD General Counsel (GC) and the National Security Division of the Department of Justice, and relevant DIC privacy and civil liberties officials.²⁵

Procedures 5 through 13 govern the use of certain collection techniques to obtain information for foreign intelligence and CI purposes.²⁶

- **Procedure 5:** Electronic Surveillance (SIGINT units, only)
- **Procedure 6:** Concealed Monitoring (Air Force Office of Special Investigations (AFOSI) only)
- **Procedure 7:** Physical Searches (AFOSI only)
- **Procedure 8:** Searches of Mail and the Use of Mail Covers (AFOSI only)
- **Procedure 9:** Physical Surveillance (AFOSI only)
- **Procedure 10:** Undisclosed Participation in Organizations
- **Procedure 11:** Contracting for Goods and Services
- **Procedure 12:** Provision of Assistance to Law Enforcement
- **Procedure 13:** Experimentation on Human Subjects for Intelligence Purposes²⁷

LAW ENFORCEMENT ASSISTANCE

Procedure 12 establishes that the DIC are authorized to cooperate with law enforcement authorities for the purpose of: (1) investigating or preventing clandestine intelligence activities by foreign powers, international narcotics activities, or international terrorist activities, (2) protecting DoD employees, information, property, and facilities, and (3) preventing, detecting, or investigating other violations of law.²⁸ The type of assistance provided includes:

- Incidentally acquired information reasonably believed to indicate a violation of Federal law
- Incidentally acquired information reasonably believed to indicate a violation of state, local, or foreign law
- Specialized equipment and facilities may be provided to Federal law enforcement authorities, and, when lives are endangered, to state and local law enforcement authorities, with high-level approval
- Personnel who are employees of DoD intelligence components may be assigned to assist Federal law enforcement authorities, and, when lives are endangered, state and local law enforcement authorities, with high-level approval

²⁵ *Id.* 3.4i.

²⁶ *Id.* 3.5 – 3.10. Procedures 11-13 are not included in DoDM 5240.01, but rather, in DoD 5240.1-R, below.

²⁷ DoD 5240.1-R, *Activities of DoD Intelligence Components that Affect United States Persons* (December 1982), incorporating Change 2, effective 26 April 2017.

²⁸ *Id.* C12.2.1.

- Assistance may be rendered to law enforcement agencies and security services of foreign governments or international organizations in accordance with established policy and applicable Status of Forces Agreements, with limitations on actions against U.S. persons²⁹

DOMESTIC IMAGERY

Domestic imagery is defined as “[a] likeness or presentation of any natural or manmade feature or related object or activity and the positional data acquired at the same time...collected in the area that includes [U.S. territory].”³⁰ Imagery does *not* include ground based or handheld images taken by or on behalf of Air Force intelligence organizations.³¹ When an Air Force organization requests domestic imagery to support CI or FI missions, their servicing legal office will conduct a legal review and complete a proper use memorandum (PUM), if necessary.³² Air Force personnel who use unmanned aircraft systems (UAS) during missions to collect, retain and disseminate data or imagery are required to follow DoDM 5240.01.³³ UAS flights conducting intelligence or intelligence-related activities require a PUM and follow procedures in Air Force Manual 11-502, *Small Unmanned Aircraft Systems*, 29 July 2019.³⁴ Organizations that operate sensors which collect domestic imagery must have an approved MAJCOM PUM before collection.³⁵ Domestic small UAS (SUAS) flights *not* conducting intelligence or intelligence-related activities do not require PUMs.³⁶

REPORTING QUESTIONABLE ACTIVITIES

In 2003, DARPA’s “Total Information Awareness” program sought to collect vast amounts of information without regard to USP status. The name was changed to the “Terrorist Information Awareness,” and testimony was provided to Congress that the program would include privacy protection and oversight. Although SecDef chartered a study on it, Congress ultimately defunded the program.³⁷ Many other intelligence activities have been called into question, and there is policy in place with which lawyers should be familiar to properly advise when questionable activities surface.

DoDD 5148.13, *Intelligence Oversight*, establishes policies and procedures regarding questionable intelligence activities (QIAs) and significant or highly sensitive matters (S/HSMs).³⁸ A QIA is defined as any intelligence activity “when there is reason to believe such activity may be unlawful or contrary to” required guidance.³⁹ An S/HSM is an activity, whether or not a QIA, “or serious criminal activity by intelligence personnel, which could impugn the reputation or integrity of the Intelligence Community....” Such matters might involve actual or potential congressional

²⁹ *Id.* C12.2.2.

³⁰ AFI 14-404, *Intelligence Oversight* (3 September 2019), glossary entry for “domestic imagery.”

³¹ *Id.* glossary entry for “imagery.”

³² *Id.* 4.3.

³³ *Id.* 4.3.1.

³⁴ *Id.*

³⁵ *Id.* 4.3.3.

³⁶ AFMAN 11-502, *Small Unmanned Aircraft Systems* (29 July 2019), A8.3.1.2.3 (29 July 2019).

³⁷ Funding for TIA All But Dead, *Wired Magazine*, Ryan Singel, 14 July 2003, <https://www.wired.com/2003/07/funding-for-tia-all-but-dead/> (last visited 21 May 20).

³⁸ DoDD 5148.13, *Intelligence Oversight* (26 April 2017).

³⁹ *Id.* G.2.

inquiries/investigations, adverse media coverage, impact on foreign relations/foreign partners, or systemic compromise/loss/unauthorized disclosure or protected information.⁴⁰

DoD personnel must identify any QIA or S/HSM to their chain of command/supervision immediately.⁴¹ Commanders will ensure an investigation determines the facts using procedures for commander-directed investigation IAW AFI 90-301, *Inspector General Complaints Resolution*.⁴² All QIAs and S/HSMs will then be reviewed by legal counsel. If the legal counsel considers that the activity may constitute a crime or indicate that a person may be acting on behalf of a foreign intelligence entity, the counsel must report the activity to AFOSI or other military department counterintelligence organization.⁴³ The DoD Senior Intelligence Oversight Official (SIOO) and DoD GC will review the results of all QIA and S/HSM investigations. The DoD SIOO may also initiate an independent investigation.⁴⁴

The SIOO has full access to all DoD intelligence activities, and communicates directly with SecDef as well as the President's Intelligence Oversight Board (IOB) and DNI.⁴⁵ Additionally, the SIOO serves as the lead DoD official for all matters dealing with the President's Intelligence Advisory Board (PIAB)⁴⁶ and DoD reporting to the IOB.⁴⁷

GOVERNANCE

At the unit level, intelligence oversight is a commander's program. Commanders are responsible for providing training tailored to the unit's mission, creating procedures, investigating incidents, appointing a monitor of appropriate grade, ensuring against reprisal, and inspecting the program. Judge advocates assist commanders in that mission. At MAJCOM and HAF levels, directors of intelligence oversee the program, appoint program managers, and ensure contract processes address intelligence oversight, as needed.

CONCLUSION

Familiarity with policy and guidance, including the resources identified below, will greatly assist legal advisors in navigating their way through intelligence oversight issues. The laws, policies, and practices require a close reading to properly serve clients. It is recommended that legal advisors consult with counsel experienced in intelligence oversight matters.

⁴⁰ *Id.*

⁴¹ *Id.* 4.1a.

⁴² AFI 14-404, *Intelligence Oversight*, para. 3.1 (3 September 2019).

⁴³ DoDD 5148.13, 4.2b.

⁴⁴ *Id.* 4.2d.

⁴⁵ *Id.* 3a.

⁴⁶ Executive Order 13462, *President's Intelligence Advisory Board and Intelligence Oversight Board*.

⁴⁷ DoDD 5148.13, 2.1g.

REFERENCES

- Executive Order 12333, *United States Intelligence Activities*
- Executive Order 13462, *President's Intelligence Advisory Board and Intelligence Oversight Board*
- DoD 5240.1-R, *Activities of DoD Intelligence Components that Affect United States Persons* (December 1982), incorporating Change 2, effective 26 April 2017
- DoDD 3115.18, *DoD Access to and Use of Publically Available Information (PAI)* (11 June 2019)
- DoDD 5148.13, *Intelligence Oversight* (26 April 2017)
- DoDM 5240.01, *Procedures Governing the Conduct of DoD Intelligence Activities* (8 August 2016)
- AFI 14-404, *Intelligence Oversight* (3 September 2019)
- AFMAN 11-502, *Small Unmanned Aircraft Systems* (29 July 2019)
- National Intelligence Strategy, 2019

Chapter 15

RULES OF ENGAGEMENT

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BACKGROUND

U.S. military doctrine defines Rules of Engagement (ROE) as “directives issued by competent military authority that delineate the circumstances and limitations under which U.S. forces will initiate and/or continue combat engagement with other forces encountered.”¹ Basically, this means that ROE regulate when, where, how, and against whom military forces may use force to accomplish a mission or to defend themselves and others.

NATO ROE present a similar, more detailed definition:

Rules of Engagement are directives to military forces (including individuals) that define the circumstances, degree, and manner in which force, or actions which might be construed as provocative, may, or may not, be applied. ROE are not used to assign tasks or give tactical instructions.²

PURPOSES OF ROE

ROE serve important *political / diplomatic, military, and legal* purposes for both national political leaders and military commanders. Each State issues ROE to its military personnel based upon an interpretation of its obligations under domestic and international law, national policy interests, and military goals and capabilities.

Political / Diplomatic Purposes

Joint Publication (JP) 3-33 states “ROE and Rules for the Use of Force (RUF) are a reflection of the [U.S. Government and Partner Nations’] diplomatic and political will.”³

ROE ensure that national policy objectives are reflected in the action of commanders in the field, particularly under circumstances in which communication with higher authority is difficult or impossible. ROE provide guidance on the use of force from the President and the SecDef to military units. ROE may restrict certain targets or use of particular weapons to further national political and diplomatic interests, so as not to needlessly antagonize the enemy, diminish public opinion, or destroy infrastructure that would make post-conflict reconstruction more difficult. Political considerations, such as international diplomatic relations and public opinion, factor into U.S. national strategy and policy.⁴ Within multinational military coalitions, each State’s forces must operate within their own domestic political and legal landscape, as well as the State’s interpretation of its international legal commitments. Compounding this complexity are relationships with host nations where operations are conducted or supported. These international issues combine to help shape U.S. military strategy and policy and, in turn, U.S. ROE.

¹ DoD LAW OF WAR MANUAL (June 2015), updated December 2016, para. 1.6.5. *See also* JOINT PUBLICATION 3-84, *Legal Support* (2 August 2016) [hereinafter JP 3-84].

² NATO, MC 362-1, *Rules of Engagement*.

³ JOINT PUBLICATION 3-33, *Joint Task Force Headquarters* (31 January 2018), IV-9, para. (2)(b) [hereinafter JP 3-33].

⁴ *See, e.g.*, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 33-42 (December 2017) (discussing the importance of diplomacy and championing American values to our national security).

Military Purposes

In addition to addressing political imperatives, ROE assist commanders to accomplish assigned missions. JP 3-33 states, “[p]roperly developed ROE and [rules for the use of force in domestic situations, or RUF] clarify the inherent right and obligation of unit self-defense. ROE may regulate a commander’s capability to influence a military action by granting or withholding the authority to use particular weapons systems or tactics, and may also reemphasize the scope of the mission.”⁵

ROE also act as a control mechanism for the transition from peacetime to combat operations or in ambiguous mission environments. ROE provide parameters within which the commander must operate in order to achieve the mission. They provide a ceiling on operations to ensure undesired responses or escalations are not triggered by friendly forces and ensure that all subordinate forces stay within the scope of the mission.

Legal Purposes

“ROE and RUF are established after consideration of international and domestic law and existing multilateral and bilateral agreements and arrangements.”⁶ Because ROE are largely self-imposed rules, they are the primary means by which a State can ensure its forces scrupulously comply with the law of war. ROE can never be more permissive than what the law allows and the absence of ROE does not excuse a law of war violation. ROE can impose restrictions greater than those imposed by the law of war, to reflect the mission mandate. ROE can also change throughout an operation, to reflect the political will at the time.

Commanders routinely issue ROE to reinforce law of war principles, such as prohibitions on the destruction of religious or cultural property, or minimization of injury to civilians and damage to civilian property. Such ROE provide guidance to assist commanders in preventing law of war violations.

SOURCES OF ROE

Standing ROE

Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3121.01B, *Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. forces* (SROE/SRUF), is standalone guidance for worldwide U.S. military operations. Within U.S. territory (including territorial seas) the SROE apply to air and maritime homeland defense missions. Outside of U.S. territory, the SROE apply to all military operations and contingencies. Unless otherwise approved by the President or Secretary of Defense (SecDef), all ROE promulgated by U.S. forces must comply with the SROE/SRUF. Detailed discussion of this document is provided in a separate section, below.

NATO Rules of Engagement (MC 362, Enclosure 1)

MC 362, Enclosure 1 is the basic ROE document for all forces participating in “NATO/NATO-led military operations.”

⁵ JP 3-33, IV-9, para. (2)(a).

⁶ *Id.* para. (2)(c).

Theater/Mission-Specific ROE

ROE may be issued for a geographic region or specifically tailored to a particular mission. Mission-specific ROE are almost always included as an annex to the mission's operational plan (OPLAN) or operational order (OPORD). Commanders can use supplemental measures to tailor OPLANs and OPORDs for specific theaters or missions. Supplemental measures allow commanders to adapt ROE for mission accomplishment during DoD operations. There are two types of supplemental measures: (1) specific actions that require SecDef approval, and (2) measures that allow commanders to place limits on the force.⁷

Other Documents that May Affect the Use of Force

In addition to the ROE, JAGs must be aware of other documents that may reissue, complement and/or amplify the ROE.⁸ JAGs should also review all guidance applying to a given operation for provisions directly or indirectly affecting the use of force, while using the term carefully in their interaction with others.

Special Instructions (SPINS). SPINS are periodically issued by the Joint Force or Combined Force Air Component Commander (JFACC or CFACC) via the Joint or Combined Air Operations Center (JAOC or CAOC) and usually have several sections that concern the use of force.

Airspace Control Order (ACO). An ACO is produced and periodically reissued by the Airspace Management team of the JAOC, may contain ROE-like provisions, such as restrictions on when aircrew may turn their MASTER ARM switches on or where they may jettison fuel tanks and ordnance.

Air Tasking Order (ATO). An ATO, produced by the Combat Plans Division of the JAOC, may contain late-breaking, airframe-specific, or individual target-specific ROE restrictions, normally referenced on the cover page or ATO banner. These ROE restrictions might contemplate new intelligence or emergent surface-to-air threats.

SOURCE DOCUMENTS FOR THE DEVELOPMENT OF ROE

The following documents may be used as sources for the development of mission-specific ROE.⁹

United Nations (UN) Documents

1. UN Security Council resolutions
2. UN Secretary-General's mission-specific terms of reference
3. UN Force Commander's regulations
4. Status of mission agreement (SOMA)/UN Model SOMA
5. UN Guidelines for the development of Rules of Engagement (ROE) for United Nations Peacekeeping Operations, 1 U.N. Doc. MD/FGS/0220.001, May 2002

⁷ CJCSI 3121.01B, *Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. forces* (June 13, 2005), paras. 6.b.(2)(a)1-2 [hereinafter SROE].

⁸ JOINT PUBLICATION 3-30, *Joint Air Operations* (25 July 2019), I-4 [hereinafter JP 3-30].

⁹ SROE, Encl. J, para. 2.b.(1).

NATO documents

1. North Atlantic Council (NAC) resolutions
2. NATO Military Committee planning elements or guidance

Other Sources

1. Status of forces agreements (SOFAs), infrastructure or facilities agreements, mutual defense cooperation agreements (MDCAs) (*e.g.*, restrictions on numbers and types of flights)
2. Host nation domestic law and treaty obligations (*e.g.*, Ottawa Convention)
3. U.S. domestic law or treaty obligations

THE U.S. STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE

The SROE/SRUF is the key document for the application of U.S. military force. Since 2005, the SRUF have been combined with the SROE into a single instruction as a means to centralize the fundamental rules applicable to the use of force by U.S. military personnel worldwide.

SROE/SRUF Structure

The current SROE/SRUF basic instruction (pages 1-4) and some of its enclosures are unclassified and contain basic ROE (Enclosure A) and RUF (Enclosure L) principles. The text of Enclosures A and L include no classified material, thereby allowing broad dissemination to U.S. forces and sharing with allies and coalition partners. Enclosures A and L are supplemented by a number of classified appendices and other enclosures addressing specific mission areas.

GENERAL PRINCIPLES CONTAINED IN THE SROE

Applicability

The SROE apply during

all military operations and contingencies and routine Military Department functions occurring outside U.S. territory (which includes the 50 states, the Commonwealths of Puerto Rico and Northern Marianas, U.S. possessions, protectorates and territories) and U.S. territorial seas. SROE also apply to air and maritime homeland defense missions conducted within U.S. territory or territorial seas unless otherwise directed by SecDef.¹⁰

The SRUF apply to

DoD civil support (*e.g.* military assistance to civil authorities) and routine Military Department Functions including antiterrorism force protection duties) occurring within U.S. territory or U.S. territorial seas. SRUF also apply to land homeland defense missions occurring within U.S. territory and to DoD forces, civilians, and contractors performing law enforcement and security duties at all DoD installations (and off installations while conducting official DoD security functions), within or outside U.S. territory, unless otherwise directed by SecDef.¹¹

¹⁰ *Id.* para. 3.a.

¹¹ *Id.* para. 3.b.

Responsibilities

The SecDef approves SROE, as with any ROE for U.S. forces,¹² and authorizes supplemental measures for major operations and certain mission types.¹³ The Chairman of the Joint Chiefs of Staff (CJCS) promulgates SROE and SRUF, the Joint Staff, Operations Division (J-3), is responsible for maintenance of the SROE and SRUF.¹⁴ Combatant commanders (CCDRs) can issue theater-specific and operation-specific ROE (with SecDef approval, as required), authorize some specific supplemental measures, and ensure SROE implementation by subordinate echelons. Commanders at every echelon must ensure that any mission ROE they issue comply with the SROE/SRUF.

Interpretation

SROE are designed to be permissive in nature. Therefore, unless a specific weapon or tactic requires SecDef or CCDR approval or unless a specific weapon or tactic is restricted by an approved supplemental measure, commanders may use any lawful weapon or tactic available for mission accomplishment.¹⁵ Unlike SROE, specific weapons and tactics not approved within SRUF require SecDef approval.¹⁶

Multinational Operations

When U.S. forces are under the operational or tactical control of a multinational force, U.S. forces operate under the multinational force's ROE for mission accomplishment, if ordered to do so by SecDef. U.S. forces always operate under self-defense ROE as set forth in the SROE, unless otherwise ordered by SecDef. When operating with a multinational force but under U.S. operational control (OPCON) or tactical control (TACON), U.S. forces should attempt to create common ROE with other national forces. If not possible, U.S. forces will inform the multinational forces that U.S. forces will operate under the SROE.¹⁷ Only the President or SecDef can authorize U.S. forces to engage in collective self-defense of multinational or coalition forces, civilians, or property.¹⁸

Self-Defense

The concept of self-defense is fundamental in the SROE and the rules do not limit a commander's inherent authority and obligation to use all necessary means available and to take all appropriate actions in self-defense of the commander's unit and other U.S. forces in the vicinity.¹⁹

Inherent Right and Obligation of Self-Defense

Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Military members may act in individual self-defense unless otherwise directed by a unit commander. To balance this command-driven

¹² *Id.* para. 6.

¹³ *Id.* para. 6.b(2)(a).

¹⁴ *Id.* para. 6.

¹⁵ *Id.* para. 6.b.(3).

¹⁶ *Id.* para. 6.c.(3).

¹⁷ *Id.* Encl. A, paras. 1.f.(1)-(2).

¹⁸ *Id.* Encl. A, para. 3.c.

¹⁹ *Id.* Encl. A, paras. A and L-3.

approach to self-defense with the safety and security of individual troops, the commander's right and obligation of unit self-defense under the SROE/SRUF includes not circumscribing individual self-defense recklessly or without following the SROE/SRUF.²⁰

National Self-Defense

The SROE define national self-defense as defense of the United States, U.S. forces, and in certain circumstances U.S. persons and their property, and/or U.S. commercial assets from a hostile act or demonstrated hostile intent.²¹

Collective Self-Defense

If authorized by the President or SecDef, U.S. forces may use force to protect designated non-U.S. persons or property from hostile acts or demonstrated hostile intent.²²

Elements of Self-Defense

Use of force in self-defense must be *necessary* and *proportionate*.

Necessity: Necessity exists when a hostile act is committed or when a force demonstrates hostile intent against U.S. forces or other designated persons or property.²³

Proportionality: The use of force in self-defense should be sufficient to respond decisively to hostile acts or demonstrations of hostile intent. Such use of force may exceed the means and intensity of the hostile act or hostile intent, but the nature, duration, and scope of force used should not exceed what is required. Proportionality in self-defense should not be confused with proportionality as a principle of the law of war, which requires you to minimize collateral damage during offensive operations.²⁴

Common Terms used in ROE

Hostile Act: An attack or other use of force against the United States, U.S. forces or other designated persons or property. It also includes force used directly to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital U.S. government (USG) property.²⁵

Hostile Intent: The threat of imminent use of force against the United States, U.S. forces or other designated persons or property. It also includes the threat of force to preclude or impede the mission and/or duties of U.S. forces including the recovery of U.S. personnel or vital USG property.²⁶

²⁰ *Id.* Encl. A, para. 3.a.

²¹ *Id.* Encl. A, para. 3.b.

²² *Id.* Encl. A, para. 3.c.

²³ *Id.* Encl. A, para. 4.a.(2).

²⁴ *Id.* Encl. A, para. 4.a.(3).

²⁵ *Id.* Encl. A, para. 3.e.

²⁶ *Id.* Encl. A, para. 3.f.

Pursuit: Self-defense includes the authority to pursue and engage forces that have committed a hostile act or demonstrated hostile intent, if those forces continue to commit hostile acts or demonstrate hostile intent.²⁷

Imminent Use of Force: The determination of whether the use of force against U.S. forces is imminent will be based on an assessment of all facts and circumstances known to U.S. forces at the time and may be made at any level. Imminent does not necessarily mean immediate or instantaneous.²⁸

Declared Hostile Force: Any entity that has been declared hostile by appropriate U.S. authority, such as an enemy country's military forces or members of a terrorist organization. Policy and procedure regarding the authority to declare forces hostile are found within Appendix A to Enclosure A, CJCSI 3121.01B.²⁹

MULTINATIONAL CONSIDERATIONS

Not all States use ROE in the same manner as the United States, and some States do not operate under standing ROE at all. U.S. commanders and JAs involved in developing or executing ROE for coalition operations must account for these differences in all operational planning and training to ensure a common understanding of the rules affecting the use of force of each participating nation or organization. For further information see Chapter 19, *Multinational Air Operations*.

FUNCTIONAL ENCLOSURES

In addition to the unclassified and classified sections of the SROE that provide general guidance on self-defense and applicability, the SROE also contain functional enclosures, as listed below.

Supplemental Measures (Enclosure I)

In addition to the basic and functional SROE, commanders may obtain additional authority or restraints for specific missions. To standardize requests for supplemental ROE, the SROE contains a large number of pre-numbered and pre-formatted supplemental measures that are most likely to be requested by commanders. Supplemental ROE are designed to limit or grant authority for mission accomplishment purposes—like the rest of the SROE, they are not intended to limit a commander's inherent right and obligation to engage in self-defense. Close examination of Enclosure I is warranted to determine whether Supplemental Measures are permitted to limit the availability of a particular means or method of unit self-defense. Finally, Supplemental Measures enable subordinate commanders to request additional measures or clarification.

²⁷ *Id.* Encl. A, para. 4.b.

²⁸ *Id.* Encl. A, para. 3.g.

²⁹ *Id.* Encl. A, para. 3.a.

The ROE Process (Enclosure J)

Enclosure J discusses the ROE process, including incorporating ROE development and dissemination into the operational planning process, as well as drafting and cataloguing requests for implementing supplemental ROE. The Staff Judge Advocate (SJA) plays a significant role, along with operations (J-3) and planning (J-5) personnel, in developing and integrating ROE into operational planning.³⁰

ROE References (Enclosure K)

This section includes a collection of CJCSIs, Joint Publications, and DoD publications relevant to the ROE.

SRUF and the RUF Process (and Enclosures)

The SRUF are defined in general in Enclosure L, with further details pertaining to maritime, land, and counterdrug operations set forth in Enclosures M-O, respectively. Enclosure Q lists RUF references.

FUNDAMENTALS OF ROE PLANNING IN AIR OPERATIONS

Effective ROE is critical to mission accomplishment and can only be achieved through constant drafting, redrafting, coordination, and planning.

ROE Planning Cell

Commanders should use a ROE planning cell to assist in developing ROE. J-3 is responsible for the ROE planning cell and, assisted by the SJA, develops supplemental ROE. ROE are developed as an integral facet of crisis action and deliberate planning and are a product of the Operations Planning Group (OPG), Joint Planning Group (JPG), or equivalent staff mechanism. An ROE planning cell can be established at any echelon to refine ROE derived from the OPG or JPG planning and to produce the most effective ROE requests and/or authorizations possible.³¹

ROE Development

The ROE development and execution process requires constant review and revision. ROE must directly support the commander's operational concept and be an integral part of all planning from national policy, to the CCDR's theater OPLAN, and down to individual mission planning.³²

³⁰ *Id.* Encl. J, para. 2.a.(4).

³¹ *Id.* Encl. J, paras. 3a.–c.

³² *Id.* Encl. J, para. 2.a.

ROE CONTROL AND DISSEMINATION

ROE Control

Each level of command that issues ROE must have a comprehensive system of ROE quality control. Commanders and their staff must continuously analyze ROE and recommend supplemental measures when required to meet changing operational parameters. Methods must be in place to ensure that only the most current ROE serial is in use throughout the operation. To facilitate this, staff should catalog all supplemental ROE requests and answers, track ROE dissemination messages, and monitor ROE training programs.³³

ROE Dissemination

The SROE contain advice on how to distribute ROE to subordinates and integrate the standing rules into everyday operations. Each echelon of command has an obligation to disseminate baseline ROE, ROE changes, and other guidance to subordinate units, supporting units from other commands and components, and to coalition partners as appropriate. Mission specific ROE will be promulgated by the JFC or geographic CCDR. Within the air component, the JFACC will promulgate SPINS which usually reprint relevant parts of the ROE and provide further clarification and amplification. On behalf of the JFACC, the JAOC periodically will “push” ROE changes to subordinate units via message traffic and emails, while also allowing subordinate units to “pull” the guidance from the JAOC web site.

³³ *Id.* Encl. J, para. 2.b.(10).

REFERENCES

DoD LAW OF WAR MANUAL (June 2015), updated December 2016

CJCSI 3121.01B, *Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. forces* (13 June 2005) (portions classified)

JOINT PUBLICATION 3-30, *Joint Air Operations* (25 July 2019)

JOINT PUBLICATION 3-33, *Joint Task Force Headquarters* (31 January 2018)

JOINT PUBLICATION 3-84, *Legal Support* (2 August 2016)

MC 362/1, *NATO Rules of Engagement* (2003) (NATO RESTRICTED)

Chapter 16

TARGETING

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BACKGROUND

Targeting is the process of selecting and prioritizing targets, then matching an appropriate response to them, taking account of command objectives, rules of engagement (ROE), operational requirements and capabilities.¹ A target is an entity or object considered for possible engagement or other actions.²

There are two categories of targeting: *deliberate* and *dynamic*. Time is the differentiating factor between the two categories of targeting. Deliberate targeting normally involves additional time to more fully develop a factual understanding of a target and craft a plan to engage it as deemed appropriate. Deliberate targeting supports the joint force's future plans effort, normally 24 to 72 hours in the future. Typically, the emphasis of the future plans effort is on planning the next phase of operations (sequels to the current operation). Deliberate targeting includes targets planned for attack by on-call resources.³ Dynamic targeting includes targets that are either identified or developed too late or not selected in time to be included in the air tasking order (ATO) or other plan, but when detected or located, meet criteria specific to achieving the commander's objectives if engaged. Normally, dynamic targets are processed and engaged within the current ATO, generally within 24 hours. When deliberate target plans change and planned targets must be adjusted, dynamic targeting can also manage those changes.⁴

Two subsets of targets that require special consideration are *sensitive* and *time-sensitive*. Sensitive targets are targets where the commander has estimated the physical and collateral effects on civilian and/or noncombatant persons, property, and environments occurring incidental to military operations, exceed established national-level notification thresholds.⁵ Sensitive targets are not always associated with collateral damage. They may also include those targets that exceed national-level rules of engagement thresholds, or where the combatant commander (CCDR) determines the effects from striking the target may have adverse political ramifications. The other target category requiring special consideration, time-sensitive targets, are joint force commander validated targets or sets of targets requiring immediate response because they are highly lucrative, fleeting targets of opportunity or they pose (or will soon pose) a danger to friendly forces. These targets present one of the biggest targeting challenges.⁶

Targeting occurs at every level of conflict, from strategic to tactical, and it is not solely the domain of airpower, but integrates the full spectrum of joint military capabilities to achieve the commander's objectives. Further, the targeting process is flexible enough to provide solutions in situations ranging from limited-scope, quick-reaction tactical operations to broad multiple-theater campaigns. In the Air Force, the focus is to assist the commander most effectively and legally employ air, space, and information resources to achieve joint force and national objectives.

¹ JOINT PUBLICATION 3-0, *Joint Operations* (17 January 2017), incorporating Change 1, 22 October 2018 [hereinafter JP 3-0].

² AF Annex 3-60, *Targeting* (15 March 2019), 4.

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 4-5. See also Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3122.06, *Sensitive Target Approval and Review (STAR) Process* (classified publication), for more information on sensitive targets.

⁶ AF Annex 3-60, *Targeting* (15 March 2019), at 5. See also JOINT PUBLICATION 3-60, *Joint Targeting* (28 September 2018) [hereinafter JP 3-60].

TARGETING AND LEGAL CONSIDERATIONS

The law of war and other legal and policy considerations, such as ROE, directly affect all phases of targeting and ultimately targeting decisions. Those involved in targeting should have a thorough understanding of these legal considerations and be able to apply them during the targeting process. The five fundamental law of war principles, military necessity, distinction, proportionality, humanity, and honor apply to targeting. Chapter Two, *Law of War*, discusses these principles, and the law of war generally.

Military Objectives

The term military objective refers to objects and persons which may lawfully be made the object of attack.⁷ Although enemy combatants may be made the object of attack, some sources do not classify persons as military objectives.⁸ As far as objects are concerned, military objectives include, “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, under the circumstances ruling at that time, offers a definite military advantage.”⁹

“Nature” refers to the type of object and may be understood to refer to objects that are *per se* military objectives. For example, military equipment and facilities, by their nature, make an effective contribution to military action. On the other hand, “nature” can also be understood to refer to objects that may be used for military purposes.¹⁰

The location of an object may provide an effective contribution to military action. For example, during military operations in urban areas, a house or other structure that would ordinarily be a civilian object may be located such that it provides cover to enemy forces or would provide a vantage point from which attacks could be launched or directed. The word “location” also helps clarify that an area of land can be militarily important and therefore a military objective.¹¹

“Use” refers to the object’s present function. For example, using an otherwise civilian building to billet combatant forces makes the building a military objective. Similarly, using equipment and facilities for military purposes, such as using them as a command and control center or a communications station, would result in such objects providing an effective contribution to the enemy’s military action.¹²

“Purpose” means the intended or possible use in the future. For example, runways at a civilian airport could qualify as military objectives because they may be subject to immediate military use in the event that runways at military air bases have been rendered unserviceable or inoperable. Similarly, the possibility that bridges or tunnels would be used to assist in the adversary’s military operations in the future could result in such objects providing an effective contribution to the enemy’s military action, even though they are not being used at that moment for such purposes.¹³

⁷ DoD LAW OF WAR MANUAL (June 2015), updated December 2016, para. 5.6.1, 209.

⁸ *Id.* para. 5.6.1.1.

⁹ CCW Amended Mines Protocol, Art. 2(6).

¹⁰ DoD LAW OF WAR MANUAL, para. 5.6.6.1, 213.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

The object must “make or be intended to make an effective contribution to military action;” however, this contribution need not be “direct” or “proximate.” There does not have to be a geographical connection between effective contribution and military advantage. For example, an object might make an effective, but remote, contribution to the enemy’s military action and nonetheless meet this aspect of the definition. Similarly, an object might be geographically distant from most of the fighting and nonetheless satisfy this element.¹⁴

Military action has a broad meaning and is understood to mean the general prosecution of the war. It is not necessary that the object provide immediate tactical or operational gains or that the object make an effective contribution to a specific military operation. Rather, the object’s effective contribution to the war-fighting or war-sustaining capability of an opposing force is sufficient. Although terms such as “war-fighting,” “war-supporting,” and “war-sustaining” are not explicitly reflected in the treaty definitions of military objective, the United States has interpreted the military objective definition to include these concepts.¹⁵

The phrase, “in the circumstances ruling at the time,” is essential. If, for example, enemy military forces have taken up position in a building that otherwise would be regarded as a civilian object, such as a school, retail store, or museum, the building has become a military objective. The circumstances ruling at the time, that is, the military use of the building, permits its attack, if attacking the building would offer a definite military advantage. If enemy military forces abandon the building, however, the change of circumstances may preclude its treatment as a military objective.¹⁶ Nonetheless, the purpose (*i.e.*, future use) of the object can be considered in whether an object provides an effective contribution to the adversary’s military action. In addition, the definite military advantage offered by the attack need not be immediate, but may be assessed in the full context of the war strategy.¹⁷

“Definite” means a concrete and perceptible military advantage, rather than one that is merely hypothetical or speculative. A military commander may regard this requirement as met in seeking to seize or destroy objects with a common purpose to deny their use to the threat. An example is the attack of all bridges on lines of communication (LOC) the enemy is using, or may use, as alternate LOC, to reinforce or resupply his or her forces.¹⁸

Restrictions and Special Protections

Civilians and Civilian Objects. Normally, civilians and civilian objects may not be intentionally targeted. However, circumstances may permit exceptions where civilians directly participate in hostilities or the object serves both a military and civilian purpose.

Direct Participation in Hostilities. The law of war protection offered civilians carries a strict obligation on their part not to take direct part in hostilities. Civilians engaging in combat or otherwise taking a direct part in combat operations, singularly or as a group, lose their protection against direct attack.¹⁹ Descriptions for “direct participation in hostilities” are largely derived from treaty provisions, including Additional Protocol I to the Geneva Conventions, Article 51(3). Although the U.S. view is that Article 51(3) does not reflect customary

¹⁴ *Id.* 213-214.

¹⁵ *Id.* 214.

¹⁶ JP 3-60, Appendix A, para. 4.b.(7), A-4.

¹⁷ DoD LAW OF WAR MANUAL, para. 5.6.7.2, 215.

¹⁸ JP 3-60, Appendix A, para. 4.b.(8), A-4.

¹⁹ JP 3-60, Appendix A, para. 4.a.(1), A-2.

international law, it supports the customary principle on which it is based. The DoD LAW OF WAR MANUAL contains a more detailed discussion on the U.S. view.²⁰

Dual-Use Objects. U.S. policy refers to facilities or objects that serve both a military and civilian purpose or function as a “dual-use entity.”²¹ From a legal perspective, such objects are either military objectives or not.²² When targeting a military objective that retains a civilian purpose or function, operators should apply the principle of proportionality, weighing the harm to the civilian population and civilian objects.²³ For example, a power grid that supports an enemy airbase and also a civilian city is likely a dual-use object. While it may meet the military objective test, operators should examine whether targeting the power grid will cause excessive damage to civilians and civilian objects in relation to the concrete and direct military advantage from a strike. Typically, dual-use targets require a higher level of approval authority because of higher risk for collateral damage.²⁴

Economic Objects. Historically, economic objects have been factories, workshops, and plants that make an effective contribution to an adversary’s military capability. A modern example includes members of the Taliban utilizing the heroin trade or the Islamic State utilizing captured crude oil to generate millions of dollars in revenue to fund their insurgency, including the purchase of weapons and supplies. For example, the Taliban commonly operates its drug labs where there are large stockpiles of drugs and employs local villagers and farmers. The applicable ROE may require a higher approval level for economic targets because of the higher risk for collateral damage.²⁵

Lines of Communication (LOC). Although civilian in nature, military necessity may justify targeting transportation (roadways, bridges, etc.) and communication (TV, radio) systems. Like dual-use and economic objects, LOC targets may require a higher approval level due to the higher risk for collateral damage.²⁶

Dangerous Forces. The United States does not recognize a general proscription against attacking facilities, works, or installations containing dangerous forces, such as dams, dikes, or nuclear power plants.²⁷ However, Additional Protocol I to the Geneva Conventions limits attacks on such targets, “even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.”²⁸ The U.S. view is that Article 56 does not reflect customary international law, insofar that it deviates from the regular application of distinction and proportionality.²⁹ Any decision by U.S. authorities to attack targets of this nature should be scrutinized to ensure compliance with the law of war, especially the principle of proportionality.

²⁰ DoD LAW OF WAR MANUAL, para. 5.8.1.2, 227.

²¹ CJCSI 3160.01C, *No-Strike and Collateral Damage Estimation Methodology* (9 April 2018), Encl. B, para. 4, B-4.

²² *Id.* See also DoD LAW OF WAR MANUAL, para. 5.6.1.2., 209.

²³ DoD LAW OF WAR MANUAL, para. 5.6.1.2., 209.

²⁴ AF Annex 3-60, at 93.

²⁵ *Id.*

²⁶ *Id.*

²⁷ DoD LAW OF WAR MANUAL, para. 5.13, 270.

²⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, (Protocol I), Art. 56, June 8, 1977.

²⁹ DoD LAW OF WAR MANUAL, para. 5.13.1, 271.

Protection of Wounded and Sick Personnel, Medical Units, Hospitals, and Medical Transport.

Under the Geneva Conventions, medical personnel, facilities and equipment are not to be attacked.³⁰ To make them apparent, they should be marked by a distinctive medical emblem such as a red cross, red crescent, red crystal, or red lion and sun.³¹ Combatant commanders typically place known medical facilities and structures in a no-strike list database. Parties to a conflict may not use medical facilities to shield military objectives from attack, and doing so does not prevent an attack on the military objective.³² For instance, placing a surface-to-air missile (SAM) system next to a hospital does not prevent an attack on the SAM system. The CCDR, or theater specific ROE, may provide targeting guidance concerning military objectives placed next to protected objects.³³ Persons incapacitated by wounds or sickness and wholly disabled from fighting, are “out of the fight” and are considered *hors de combat while incapacitated*.³⁴ On the other hand, combatants that suffer from wounds and sickness, but nonetheless continue to fight, do not receive protection.³⁵

Protection of Religious, Cultural, and Charitable Buildings and Monuments. As long as buildings and monuments devoted to religion, art, science, charitable purposes, or historical sites are not used for military purposes, they may not be targets. Governments and combatants have a duty to identify such places with distinctive and visible signs. When these buildings are used for military purposes, they may lose their protected status and may qualify as military objectives. Lawful military objectives located near protected buildings are not immune from attack, but the principle of proportionality must be carefully applied. The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) established a royal blue and white shield as the distinctive emblem for protected cultural property in war.³⁶

Human Shields. If civilians are used as human shields to protect military targets from attack, provided they are not taking a direct part in hostilities, they must be considered as civilians in determining whether a planned attack would be excessive.³⁷ Enemy use of voluntary human shields may be considered as a factor in assessing the legality of an attack.³⁸ The party that employs human shields in an attempt to shield military objectives from attack assumes responsibility for their injury, although the attacker may share this responsibility if it fails to take feasible precautions (to reduce the risk of harm to human shields).³⁹

³⁰ Geneva Conventions I and II of 12 August 1949, Arts. 19 and 23.

³¹ DoD LAW OF WAR MANUAL, para. 7.15.1, 493.

³² *Id.* para. 5.16, 282.

³³ AF Annex 3-60, at 93-94.

³⁴ DoD LAW OF WAR MANUAL, para. 5.9.4, 239.

³⁵ *Id.*

³⁶ JP 3-60, Appendix A, para. 7.d.(1), A-7.

³⁷ JP 3-60, Appendix A, para. 4.a.(1), A-2.

³⁸ DoD LAW OF WAR MANUAL, para. 5.16.4, 285.

³⁹ *Id.* See also prepared comments by DoD General Counsel, Jennifer O’Conner, “Applying the Law of Targeting to the Modern Battlefield,” in speech delivered at New York University School of Law, New York on 28 November 2016, available at: <https://www.justsecurity.org/34977/applying-law-targeting-modern-battlefield%E2%80%8E-full-speech-dod-general-counsel-jennifer-oconnor/> (last visited 14 October 2020).

Feasible Precautions

When planning and conducting military operations, parties to a conflict must take feasible precautions to reduce the risk of harm to civilians and civilian objects.⁴⁰ The standard for what precautions must be taken is one of due regard or diligence, not an absolute requirement to do everything possible.⁴¹ Combatants must avoid excessive incidental civilian casualties and damage to civilian property. The extent of danger to the civilian population varies with the type of military target attacked, terrain, weapons used, weather, and civilian proximity. Feasible precautions are those that are practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations.⁴²

Minimizing Civilian Casualties. Unless otherwise prohibited by ROE, attacks against military targets are permissible even if they might cause incidental injury or damage to civilians or civilian objects if the incidental injury or damage is proportional, not excessive in relation to the concrete and direct benefit of striking the target. In spite of precautions, such incidental casualties may be inevitable during armed conflict. Required precautionary measures are reinforced by traditional tenets of military doctrine, such as surprise, economy of force, and concentration of effort. Warnings must be given before commencing a bombardment where civilians are present, when circumstances permit. Where surprise is necessary for an attack no warning is required.⁴³

Cancellation or Suspension of Attacks. If target intelligence, or faulty intelligence, makes it apparent that a target is no longer a lawful military objective, the attack must be cancelled or suspended before it is started or completed.⁴⁴

Rules of Engagement (ROE)

The ROE are directives issued by a competent military authority that delineate the circumstances and limitations under which U.S. forces will initiate and/or continue combat engagement with other forces encountered. ROE are the means by which the President, SecDef, and operational commanders regulate the use of armed force in the context of applicable political and military policy and domestic and international law. ROE provide a framework that encompasses national policy goals, operational mission requirements, and the rule of law. All targeting decisions must be made in light of the applicable ROE. For further information on ROE, see Chapter 15, *Rules of Engagement*.

Other ROE-Like Guidance

Target Lists. The no-strike list (NSL), restricted target list (RTL), and joint target list (JTL) are compiled and maintained by the combatant command or, in coalition operations, by senior coalition leadership elements. A NSL will include those facilities and structures protected under the law of war (churches, hospitals, etc.) and/or otherwise prohibited from being engaged by the ROE. The RTL contains facilities and structures that require the designated authority's approval before striking. They are on the RTL because there is some function or valid military reason for not engaging the object. Targets on the JTL have been validated as

⁴⁰ DoD LAW OF WAR MANUAL, para. 5.2.3, 190.

⁴¹ DoD LAW OF WAR MANUAL, para. 5.2.3.2, 192.

⁴² *Id.*

⁴³ JP 3-60, Appendix A, para. 6.b.(2)(b), A-5.

⁴⁴ JP 3-60, Appendix A, para. 6.b.(3), A-5.

valid targets, but may also contain restrictions. Restrictions may be on specific desired points of impact (DPIs) within a target or on the size or type of munitions that may be utilized. For example, if a target is near a sensitive site, such as a school, the DPIs closest to the school may be restricted entirely or restricted to only certain types of weapons.⁴⁵

Special Instructions (SPINS). SPINS are periodically issued by the Joint/Combined Force Air Component Commander (J/CFACC) through the Air Operations Center (AOC). SPINS are the J/CFACC's implementation and supplementation of ROE to the Air and Space domains. Most SPINS have a subsection specifically titled "ROE" that may contain Fragmentary Orders (FRAGOs) that memorialize ROE changes until a new version or regular changes to the operational order (OPORD) can be published. This section will also contain any amplification the J/CFACC deems necessary for complex ROE provisions.

Fragmentary Orders (FRAGO). FRAGO is an abbreviated form of an OPORD usually issued on a day-to-day basis that eliminates the need for restating information contained in a basic OPORD. FRAGOS can include changes or modifications to an OPORD or execute a branch or sequel to the OPORD. Restrictions from the CDR impacting targeting may also be published in FRAGOs.

Coalition Concerns. Coalition forces have their own set of ROE that likely differs from U.S. ROE. U.S. forces operating from coalition bases (e.g., Diego Garcia) may be subject to coalition force ROE. Close planning coordination and understanding of limitations with coalition partners during targeting will facilitate deconfliction, minimize misunderstandings and prevent conflict amongst coalition partners. Refer to Chapter 19, *Multinational Air Operations*.

REFERENCES

- CJCSI 3121.01B, *Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. forces* (13 June 2005), directive current as of 18 June 2008 (portions classified)
- CJCSI 3160.01C, *No-Strike and Collateral Damage Estimation Methodology* (9 April 2018)
- JOINT PUBLICATION 1; *DoD Dictionary of Military and Associated Terms*, as of January 2020
- JOINT PUBLICATION 3-0, *Joint Operations* (17 January 2017), incorporating Change 1, 22 October 2018
- JOINT PUBLICATION 3-09, *Joint Fire Support* (10 April 2019)
- JOINT PUBLICATION 3-30, *Joint Air Operations* (25 July 2019)
- JOINT PUBLICATION 3-60, *Joint Targeting* (28 September 2018)
- AF Annex 3-60, *Targeting* (15 March 2019)
- AF Annex 3-84, *Legal Support* (24 January 2020)
- AFI 13-1AOC-V3, *Operational Procedures - Air Operations Center* (2 November 2011), incorporating Change 1, 18 May 2012

⁴⁵ AF Annex 3-60, at 97.

Chapter 17

JOINT PLANNING

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BACKGROUND

The highly complex nature and pace of joint military operations requires each service to use the same planning system for interoperability and compatibility. The Joint Planning Process (JPP)¹ is the deliberate process of determining how (the ways) to use military capabilities (the means) in time and space to achieve objectives (the ends) while considering the associated risks. In JP 5-0, *Joint Planning*, planning begins with specified national strategic objectives and military end states to provide a unifying purpose around which actions and resources are focused. Joint planning is an adaptive, collaborative process that can be iterative to provide actionable direction to commanders and their staffs across multiple echelons of command.² This Chapter will provide the basic concepts of the joint planning process.

OVERVIEW OF JOINT PLANNING

The JPP provides a proven process to organize the work of the commander, staff, subordinate commanders, and other partners, to develop plans that will appropriately address a problem and provide and develop a basic structure for campaigns and operations. The Joint Planning Process (JPP) is a set of logical steps to frame a problem; examine a mission; develop, analyze and compare alternative courses of action (COAs); select the best COA; and produce a plan or order. Operational design is the construction of the framework of a campaign, operation plan, or order.³ The JPP and operational design facilitate interaction between and among the commander, staff, and subordinate and supporting headquarters throughout planning. The JPP helps commanders and their staffs organize their planning activities, share a common understanding of the mission and commander's intent, and develop effective plans and orders.⁴

The JPP is a seven step process: planning initiation, mission analysis, COA development, COA analysis and war gaming, COA comparison, COA approval, and plan or order development. Some JPP steps or tasks may be performed concurrently, truncated, or modified as necessary depending on the situation, subject, or time constraints of the planning effort. In a crisis, the JPP steps can be conducted simultaneously and mission analysis continues until the operation is complete, while other steps are repeated as necessary to integrate new requirements (missions).⁵

Operational design and the JPP are complementary tools of the overall planning process. Operational design provides an iterative process that allows for the commander's vision and mastery of operational art to help planners answer ends–ways–means–risk questions and appropriately structure campaigns and operations in a dynamic operation environment (OE). The commander, supported by the staff, gains an understanding of the OE, defines the problem, and develops an operational approach for the campaign or operation through the application of operational design during the initiation step of the JPP. As the JPP is applied, commanders may receive updated guidance, learn more about the OE and the problem, and refine their operational approach. Commanders provide their updated approach to the staff to guide detailed planning.⁶

¹ Formerly referred to as Joint Operation Planning Process-Air (JOPPA).

² JOINT PUBLICATION 5-0, *Joint Planning* (16 June 2017), I-1 .

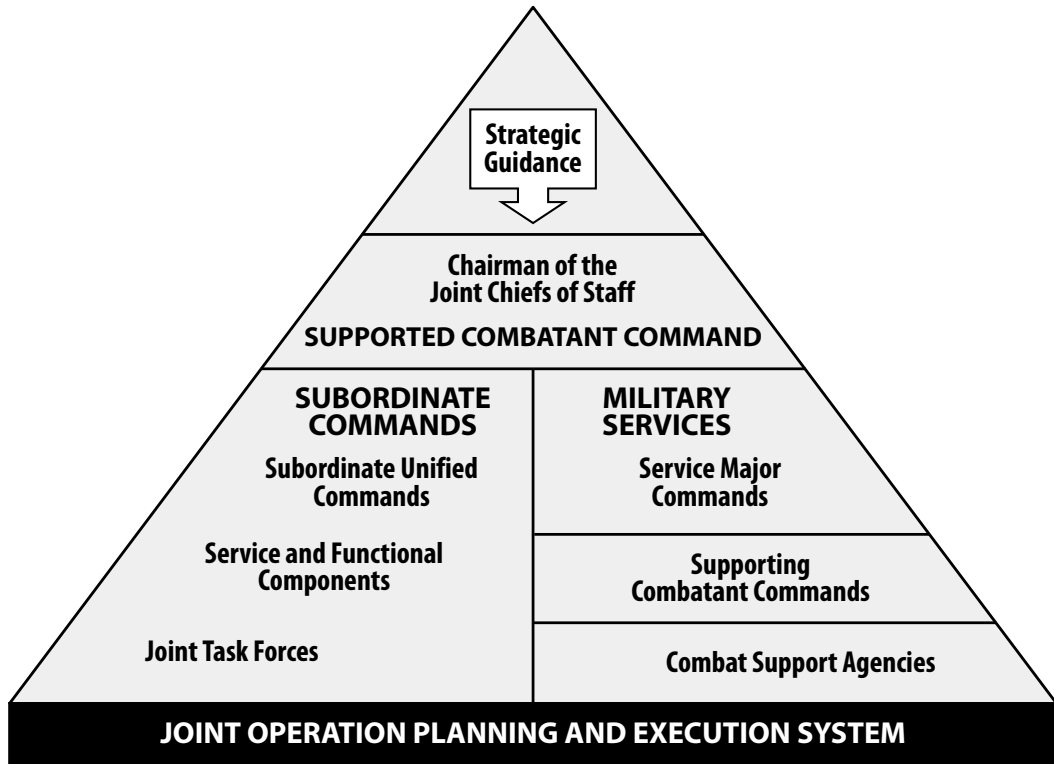
³ *Id.* GL-12.

⁴ *Id.*

⁵ *Id.* V-2.

⁶ *Id.*

Figure 17.1. The Joint Planning and Execution Community



Joint Planning and Execution Community

The headquarters, commands, and agencies involved in joint planning or committed to conduct military operations are collectively termed the Joint Planning and Execution Community (JPEC). The JPEC consists of the CJCS and other members of the JCS, the Joint Staff, the services and their major commands, the combatant commands (CCMDs) and their subordinate commands, and the combat support agencies. In the planning process, the President and SecDef issue policy, strategic guidance, and direction. The supported command, normally the CCMD and its subordinates, is primarily responsible for developing a plan and execution.⁷ The JPEC conducts joint planning to understand the strategic and OE and determines the best method for employing the DoD's existing capabilities to achieve national objectives. Joint planning identifies military options the President can integrate with other instruments of national power (diplomatic, economic, informational) to achieve those national objectives. In the process, joint planning identifies likely benefits, costs, and risks associated with proposed military options.⁸

⁷ CJCSI 3141.01F, *Management and Review of Campaign and Contingency Plans* (31 January 2019), A-2.

⁸ *Id.*

THE PLANNING PROCESS

The joint planning process is applied during peacetime to develop joint Operation Plans (OPLANs), CONPLANs (with and without Time-Phased Force and Deployment Data (TPFDD)), or supporting plans to support the national military strategy. The seven JPP steps, and the judge advocate's JPP role⁹, are explained below.

Planning Initiation

Joint planning starts when an appropriate authority recognizes potential for a military capability to be employed in support of the national strategy or in response to a threat or crisis. Presidential

Directives, NSS, Unified Command Plan (UCP), Guidance for Employment of the Force (GEF), Joint Strategic Campaign Plan (JSCP), and related strategic guidance documents (*e.g.*, strategic guidance statements (SGSs)) serve as the primary guidance to begin planning. CCDRs, subordinate commanders, and supporting commanders also initiate planning on their own authority when they identify a planning requirement not directed by higher authority.¹⁰

Mission Analysis

The joint force's mission is the task or set of tasks, together with the purpose, that clearly indicates the action to be taken and the reason for doing so.¹¹ Mission analysis requires the development of an understanding of the problem being addressed and the potential capabilities and resources available to address the task and those in opposition. Mission analysis is critical because it provides direction that drives the rest of the planning process and enables the commander and staff to effectively focus on the problem. The primary products of mission analysis are staff estimates, the mission statement, a refined operational approach, the commander's intent statement, updated planning guidance, and initial commander's critical information requirements (CCIRs).¹² Rules of engagement should be initially developed during the mission analysis phase to identify authorities and capabilities that commanders require to achieve the tasks assigned.¹³

After conducting a mission analysis, the staff will create a mission statement that describes the organization's essential tasks and purpose. It is the "who, what, when, where, and why." The how will be the rest of the plan. Other items that will come out of the mission analysis phase are the commander's intent that clearly and concisely identifies the operation's purpose and end state, CCIRs that identify critical information that could affect the decision making process, and planning guidance that will help subordinate commands prepare their estimates of feasibility and support.

A judge advocate from the CCMD and/or component command staff should be a primary member of the core planning cell as soon as planning begins. The judge advocate's primary responsibility is to identify legal considerations (authorities, restraints, and constraints) and highlight them to the commander and other planners to shape the initial planning guidance. Failure to identify legal considerations early in the planning process may waste precious time as the staff develops COAs that may not be legally feasible.¹⁴

⁹ See CJCSI 5810.01D, *Implementation of the DoD Law of War Program* (30 April 2010), 2-3.

¹⁰ JP 5-0, V-4.

¹¹ *Id.* V-4.

¹² *Id.* V-5.

¹³ See generally JP 5-0, V-10.

¹⁴ JOINT PUBLICATION 3-84, *Legal Support* (2 August 2016), II-7 .

COA Development

The mission analysis products drive the COAs, which are potential methods and solutions to accomplish the mission. Because the operational approach contains the JFC's broad approach to solve the problem at hand, each COA will expand this concept with the additional details that describe **who** will take the action, **what type** of military action will occur, **when** the action will begin, **where** the action will occur, **why** the action is required (purpose), and **how** the action will occur (method of employment of forces).¹⁵

As COAs are developed, the judge advocate must thoroughly understand the specifics of each iteration, consider the second and third order effects, and provide a risk assessment of each COA. If a COA is legally objectionable, the joint force SJA should seek clarification or amendment of the COA, or recommend that the JFC request appropriate authorizations, exceptions, or waivers.¹⁶

COA Analysis and Wargaming

COA analysis identifies advantages and disadvantages of each proposed COA. Wargaming provides a means to analyze potential COAs, improve understanding of operational environments, and obtain new information. Wargaming visualizes the flow of operation from start to finish, looking at the joint force's and adversary's strengths and weaknesses, and other aspects of operational environments such as weather, topography, and international considerations.¹⁷ During COA analysis, the judge advocate identifies and recommends legal authorities or requirements necessary to achieve objectives at each phase of the operation.¹⁸

COA Comparison

COA comparison is a subjective process in which each COA is compared independently of each other and compared and evaluated against a set of pre-established criteria. The goal is to identify the strengths and weaknesses of each COA so the COA with the highest probability of success can be selected and further developed. COA comparison facilitates the commander's decision-making process by balancing the ends, means, ways, and risk of each COA.¹⁹ The judge advocate develops criteria to evaluate and compare the legal issues associated with each COA.²⁰

COA Approval

The staff will brief the commander on the COA comparison, analysis, and war-gaming results. This briefing usually takes the form of the commander's estimate and may include the current status of the joint force, and assumptions used in the COA development.²¹ During the brief, the judge advocate is prepared to identify legal considerations that have significant impact on any aspect of the selected COA and provides an assessment of the legal support requirements.²²

¹⁵ JP 5-0, V-20.

¹⁶ JP 3-84, II-8, II-9.

¹⁷ JP 5-0, V-31.

¹⁸ JP 3-84, II-9.

¹⁹ JP 5-0, V-42.

²⁰ JP 3-84, II-11.

²¹ JP 5-0, V-45.

²² JP 3-84, II-11.

Plan/Order Development

An approved Concept of Operations (CONOP) is expanded into a complete OPLAN during the plan development phase. Plan development is accomplished by a designated commander, normally with the assistance of supporting and subordinate commanders. Forces and resources required to execute the CONOP are progressively identified, sequenced, and coupled with transportation capabilities to produce an executable OPLAN.

The command's judge advocate prepares the OPLAN's legal considerations paragraph and legal appendix to the personnel annex. A judge advocate also assists with other sections and appendices with significant legal components.²³

Preparation of the Legal Considerations Paragraph

The paragraph should contain a summary of the international legal basis, domestic legal basis, and any legal considerations that may affect implementation of the plan or order.²⁴

Preparation of the Legal Appendix

The legal appendix reflects the legal considerations developed during the planning process and outlines the plan for legal support. It is used to describe those considerations in detail; cite applicable references, including inter-service, host nation, and reciprocal support agreements; define key terms; establish coordinating and other administrative instructions; and state policies and procedures for all matters within the judge advocate's area of concern. In addition, or unique concerns for the plan or that joint operations area (JOA).²⁵

TYPES OF JOINT PLANS AND ORDERS

A variety of plans and orders result from the planning cycle. Practitioners should know the type of plan or order that the staff is expected to complete, as each plan or order may have different legal considerations involved. Below is a list of the most common plans and orders.²⁶

Concept Plan (CONPLAN) Without a TPFDD. A CONPLAN normally does not include the level of detail that will go into an OPLAN. A CONPLAN contains the basic plan, the commander's CONOPS, and those annexes and appendices either required by the JCS or the CCDR.

Concept Plan (CONPLAN) With a TPFDD. This plan contains more detailed planning for the phased deployment of forces.

OPLAN. This is the complete and detailed operational plan that will describe a CONOP and include all required annexes and appendices. It identifies the forces, resources, and assets required to execute the plan and will include a movement schedule for forces, resources, and assets into the theater.

²³ JP 3-84, II-13.

²⁴ *Id.* II-14.

²⁵ *Id.*

²⁶ AFI 10-401, *Air Force Operations Planning and Execution* (7 December 2006), incorporating through Change 4, 13 March 2012, 48.

Supporting Plan. Supporting CCDRs, subordinate JFCs, component commanders, and combat support agencies prepare supporting plans as tasked by the supported commanders in support of their plans. Supporting plans are prepared in OPLAN format and are developed responsively in collaboration with the supported commander's planners. Supporting commanders or agencies may, in turn, assign their subordinates the task of preparing additional supporting plans.

Operation Order (OPORD). An OPORD is a directive issued by a commander to subordinate commanders for the purpose of effecting the coordinated execution of an operation. OPORDs are prepared under joint procedures in prescribed formats.

Fragmentary Order (FRAGO). A FRAGO is an abbreviated form of an OPORD (verbal, written, or digital), which eliminates the need for restating information contained in a basic OPORD. It is usually issued as needed or on a day-to-day basis.

Warning Order (WARNORD). A WARNORD is a planning directive that initiates the development and evaluation of military COAs by a supported commander and requests that the supported commander submit a commander's estimate.

Planning Order (PLANORD). A PLANORD is a planning directive that provides essential planning guidance and directs the initiation of plan development before the directing authority approves a military COA.

Alert Order (ALERTORD). An ALERTORD is a planning directive that provides essential planning guidance and directs the initiation of plan development after the directing authority approves a military COA. An ALERTORD does not authorize execution of the approved COA.

Execute Order (EXORD). An EXORD is a directive to implement an approved military COA. Only the President and the SecDef have the authority to approve and direct the initiation of military operations. The CJCS, by the authority of and at the direction of the President or SecDef, may issue an EXORD to initiate military operations. Supported and supporting commanders and subordinate JFCs use an EXORD to implement the approved CONOPS.

Prepare to Deploy Order (PTDO) and Deployment Order (DEPORD). The CJCS, by the authority of and at the direction of the President or SecDef, issues a PTDO or DEPORD to move forces. A PTDO proposes the day on which a deployment operation begins (C-day) and the specific hour on C-day when deployment is to commence (L-hour).

CONDUCTING A LEGAL REVIEW OF AN OPORD OR OPLAN

Once the OPORD or OPLAN is drafted, the command's judge advocate and higher authorities will need to conduct a legal review of the entire document to ensure its consistency with U.S. domestic law and international law, especially the law of war. When reviewing the plan, judge advocates commonly address the following areas:

1. Authorities
2. Command and control
3. Rules of Engagement
4. Targeting, collateral damage, civilian casualties
5. Displaced civilians
6. Interaction with nongovernmental organizations or private voluntary organizations
7. Sites, monuments, or buildings of cultural or religious significance

8. Non-lethal or less-than-lethal technology
9. Nuclear, biological, and chemical weapons
10. Enemy prisoners of war (EPW) and detainees
11. Captured weapons, war trophies, documents, equipment
12. Host Nation support
13. Proper fiscal sources for military action
14. Acquisitions during combat or military operations

CONCLUSION

At all appropriate levels of command and during all stages of operational planning and execution of joint and combined operations, judge advocates provide the commander, staff, and appropriate planning boards, centers, and cells with advice and recommendations regarding legal issues that impact all aspects of the operation. Judge advocates must not only consider the law of war principles of military necessity, humanity, distinction, proportionality, and honor, but must also consider, among other disciplines, international law, fiscal law, and government contract law during planning.²⁷ Doing so ensures that legal issues are addressed early before they might derail the planning process. Early involvement also allows the judge advocate to become integrated with the planning staff.

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²⁷ *Id.* II-6.

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BACKGROUND

During joint operations, the joint force commander (JFC)¹ has three organizational options for command and control (C2) of joint air operations: (1) designate a joint force air component commander (JFACC), (2) designate a service component commander, *e.g.*, commander, Air Force forces (COMAFFOR), or (3) retain C2 within the JFC. The most common option is the appointment of a JFACC for the coordination of joint air operations.² The JFC designates a JFACC based on missions, the concept of operations (CONOPS), available forces, duration and nature of the desired joint air operations, and the degree of control of joint air operations required. The JFC will normally assign JFACC responsibilities to the component commander having the preponderance of air assets and the ability to effectively plan, task, and control joint air operations, and for these reasons, the Air Force is often selected as the JFACC due to its C2 capabilities provided through the Air and Space Operations Center (AOC).³

Joint air operations are usually conducted using centralized control and decentralized execution to achieve effective control and foster initiative, responsiveness, and flexibility.⁴ The AOC is the aerospace operations planning and execution focal point for the JFC and is the location where centralized planning, direction, control, and coordination of aerospace operations occur.⁵ Personnel in the AOC are responsible for planning, executing, and assessing aerospace operations, as well as, directing changes when situations dictate. Judge advocates within the AOC provide expertise on domestic, foreign, and international law that directly affect aerospace operations.

This Chapter discusses the functions of an AOC, provides an introduction to the Air Tasking Cycle, and furnishes an overview of a typical AOC organization, including duties of the teams within the AOC.

PRIMARY AOC FUNCTIONS

The JFACC's responsibilities are assigned by the JFC. These may include planning, coordinating, and monitoring joint air operations, in addition to the allocation and tasking of air component forces based on the JFC's CONOPS and air apportionment decisions. Specific JFACC responsibilities include:⁶

1. Developing a joint air operations plan (JAOP) in coordination with other services and functional components.
2. Recommending air apportionment priorities to the JFC.
3. Allocating and tasking joint air capabilities and forces made available based on the JFC air apportionment decisions.

¹ Referred to as Combined Forces Commander (CFC) when commanding forces from multiple nations. Additionally, the "J" will be replaced with a "C" indicating combined nature of operations for subordinate commands as well.

² JOINT PUBLICATION 3-30, *Joint Air Operations* (25 July 2019), I-2 [hereinafter JP 3-30].

³ *Id.* I-2.

⁴ *Id.* I-3.

⁵ In combined operations (*i.e.*, operations with coalition partners) the air component's AOC is referred to as a Combined Air and Space Operations Center (CAOC) and the JFACC is designated as the CFACC (combined force air component commander).

⁶ JP 3-30, II-2 to II-3.

4. Providing guidance in the air operations directive.
5. Providing oversight and guidance during the execution of joint air operations.
6. Assessing the results of joint air operations.
7. Performing the duties of the airspace control authority (ACA), if designated.
8. Performing the duties of the area air defense commander (AADDC), if designated.
9. Performing the duties of the space coordinating authority, if designated.
10. Performing the duties of the personnel recovery coordinator, as required.
11. Performing the duties of the collection management authority (CMA), if designated.⁷
12. Performing the duties of the jamming control authority (JCA), if designated.⁸
13. Establishing and deploying a Joint Air Component Coordination Element (JACCE) to land, maritime, and special operations component commanders' headquarters, as necessary.⁹
14. Additionally, JFACCs perform tasks within various mission areas to include, but not limited to:¹⁰
 - (a) Defensive counterair (DCA) and offensive counterair (OCA).
 - (b) Close air support (CAS).
 - (c) Airborne intelligence, surveillance, and reconnaissance, (ISR) and incident awareness and assessment.
 - (d) Air mobility operations.
 - (e) Strategic attack.
 - (f) Air interdiction.

AOC ORGANIZATION

The AOC acts as both an Air Force unit, as well as, a weapons system that can be employed by the COMAFFOR to exercise command and control of Air Force forces, or form the core of a joint (or combined) AOC (JAOC or CAOC) and be employed by the JFACC to exercise control of joint (or combined) forces.¹¹ The AOC commander is responsible for the day-to-day readiness of the AOC, as well as, conducting daily joint air, space, and cyberspace operations based on JFC and JFACC guidance, in coordination with the Director of Mobility Forces (DIRMOBFOR), the Director of Space Forces (DIRSPACEFOR), and the Director of Cyber Forces (DIRCYBERFOR).¹² While doctrine provides a basic structure for AOC organization, the AOC commander may organize or tailor the AOC for various theater-specific missions to achieve air and space operations objectives.

⁷ AFI 13-1AOC-V3, *Operational Procedures-Air Operations Center (AOC)* (2 November 2011), incorporating Change 1, 18 May 2012, para. 1.3.3.

⁸ *Id.* para. 1.3.5.

⁹ *Id.* para. 1.3.7.

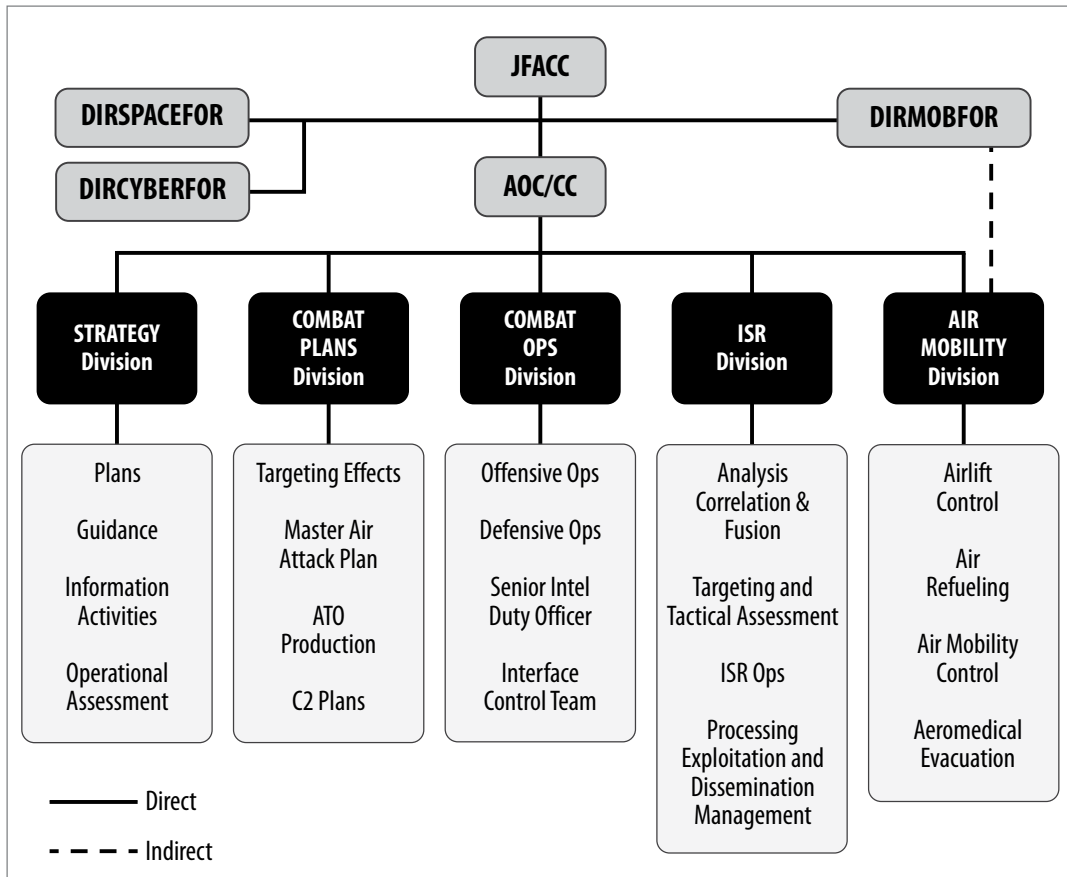
¹⁰ JP 3-30, II-3.

¹¹ *Id.* para. 1.1.

¹² *Id.* para. 2.3.1.

The AOC commander provides guidance and oversight for monitoring, evaluating, and adjusting execution of the air tasking order (ATO) to meet changing theater situations and to achieve desired effects in support of the JFACC air battle plan (ABP) and JFC's intent and desired effects.

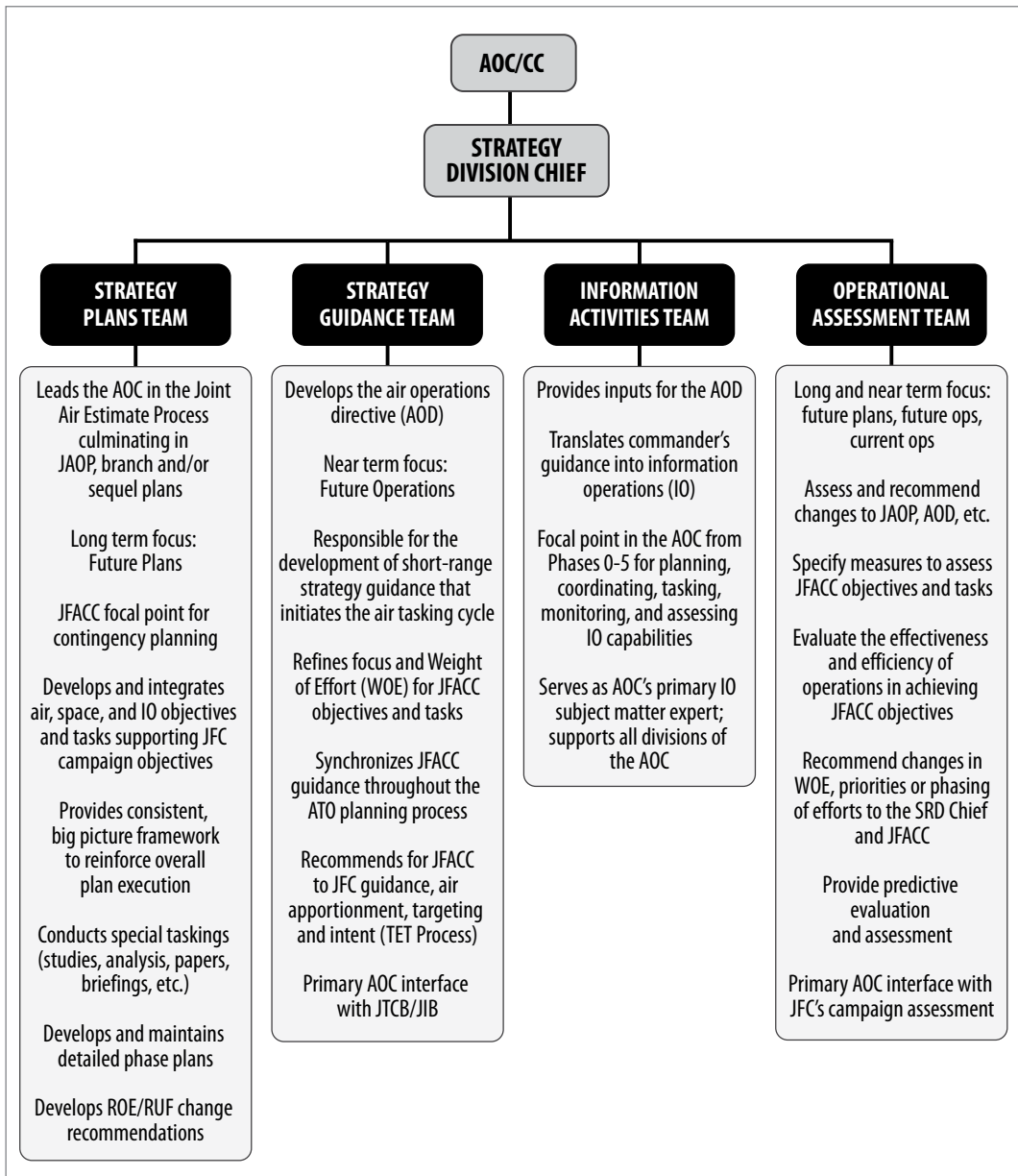
Figure 18.1. Organizational Chart, Notional Air Operations Center Joint Force Air Component Commander



Generally, the AOC integrates equipment and personnel from a component staff. The manning of the AOC is based on a core concept with personnel (normally assigned to a NAF) selected for their air, space, cyberspace, and information operations expertise, as well as, knowledge of C2 concepts and procedures. Personnel are also chosen from functional specialties such as communications, intelligence, and battle management. Additional personnel, from all services and coalition partners, who are knowledgeable in current capabilities and tactics of each aircraft, ISR platforms, space resources, cyber resources and weapons systems utilized, augment as applicable. Augmentees should not be confused with representatives of other component commanders, typically referred to as liaisons. Though liaisons are an integral part of the AOC, they do not work for the JFACC.

The AOC is structured to operate as a fully integrated facility and staffed to fulfill all JFACC responsibilities. JFACC organizations may differ based on the specific area of responsibility (AOR) or joint operations area (JOA) requirements and types of operations. Typically, the AOC organization includes an AOC commander, five divisions (Strategy, Combat Plans, Combat Operations, ISR, and Air Mobility), and multiple support and specialty teams.

Figure 18.2. Organizational Chart, Notional Air Operations Center Strategy Division Chief



The Strategy Division (SRD) focuses on near (current)- and long (future)-term planning of aerospace operations to achieve theater objectives by developing, refining, disseminating, and assessing the progress of the JFACC's aerospace strategy and JAOP. Additionally, the SRD conducts near-term planning for space operations, cyberspace operations, and information activities in

¹³ See generally, AFI 13-1AOC-V3, ch. 3.

coordination with joint air operations. The JFACC is normally assigned responsibility for joint aerospace operations planning and develops a JAOP for employing that portion of the air effort made available to him or her to accomplish the objectives assigned by the JFC. The SRD is divided into four core teams: Strategy Plans, Strategy Guidance, Information Activities, and Operational Assessment.¹⁴

Strategy Plans Team

The Strategy Plans Team (SPT) is responsible for the development and maintenance of operational-level, long-range, joint air strategy and associated branch and sequel plans that support the JFC and JFACC objectives. The SPT is responsible for developing the JFACC Estimate, proposed aerospace strategy, and the JAOP.¹⁵

Strategy Guidance Team

The Strategy Guidance Team (SGT) operates within the current phase of the campaign (current plans) and is responsible for the AOC's transition from operational-level to tactical-level planning, which culminates in the detailing of daily JFACC guidance in the form of an air operations directive (AOD). The SGT provides short-range guidance from 72 to 48 hours before execution. The AOD supplements the JAOP and provides more precise guidance to support the planning, executing, and assessing of the ATO.¹⁶

Information Activities Team

The Information Activities Team is charged with providing inputs for the air operations directive (AOD), translating the commander's guidance into information operations (IO) related tasks, and developing long- and near-term operational-level plans to accomplish those tasks. The team integrates a variety of information-related capabilities (IRCs) in its plans, including public affairs (PA), operations security (OPSEC), electronic warfare operations (EW), cyber, and military information support operations (MISO) to influence, disrupt, corrupt, or usurp the decision making of adversaries and potential adversaries while protecting our own. By effectively integrating these IRCs into planning from the very beginning, IO provides commanders the ability to control the narrative to support kinetic activities.¹⁷

Operational Assessment Team

The Operational Assessment Team (OAT) evaluates the products of the other teams to assess the progress and execution of air, space, and cyberspace operations strategy. The team assesses the progress of each phase toward accomplishment of the JFACC's objectives and tasks. Operational assessment addresses the overall effectiveness and efficiency of the desired aerospace objectives including battle damage assessment (BDA), munitions effectiveness, re-strike options, and mission.¹⁸ Specific tasks and responsibilities for the four teams comprising the SRD can be found above in figure 18.2.

¹⁴ *Id.* para. 3.1; and JP 3-30, E-1 (Appendix E).

¹⁵ AFI 13-1AOC-V3, para. 3.5.2.3.

¹⁶ *Id.* para. 3.5.3.3.

¹⁷ *Id.* para. 8.7.

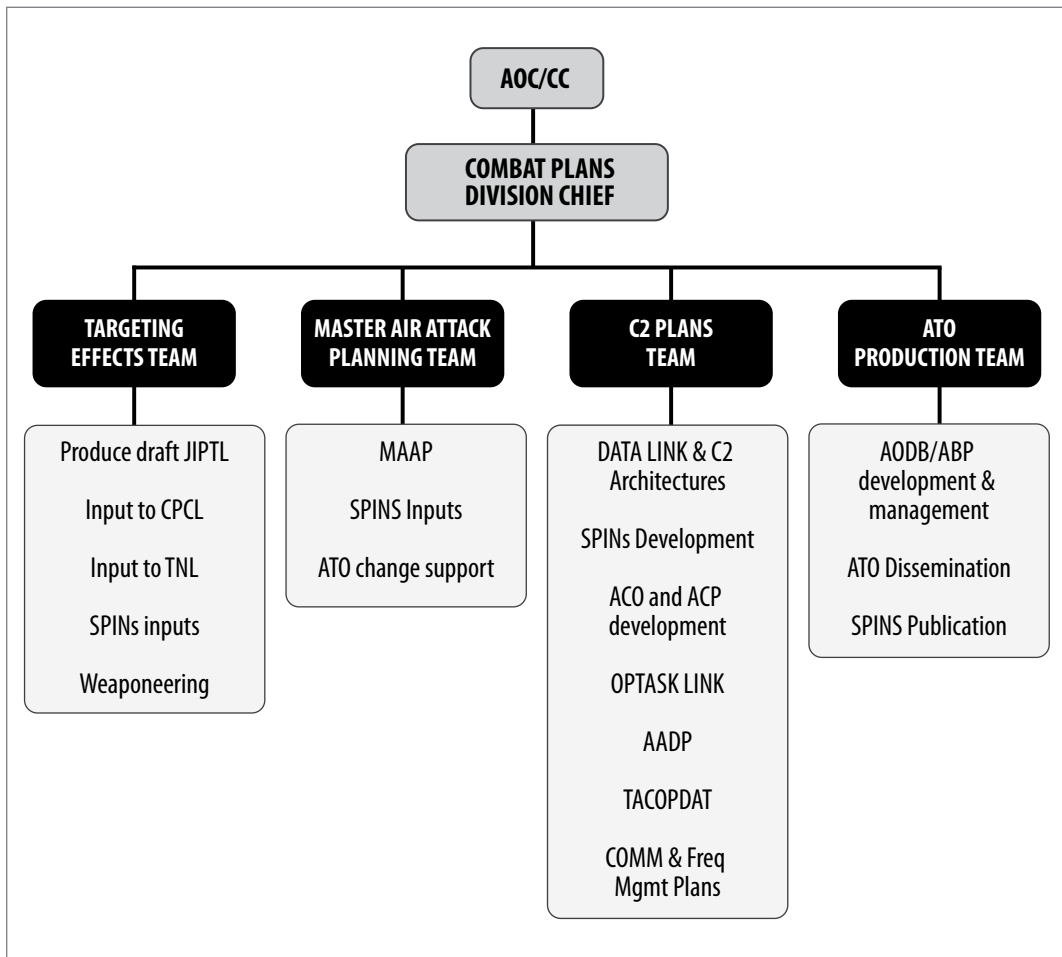
¹⁸ *Id.* para. 3.5.4.

Judge Advocates (JAGs)

Judge advocates provide advice concerning compliance with the law of war at all appropriate levels of command and during all states of operational planning and execution of joint and combined operations. As such, JAGs attached or embedded within the SRD are involved in the planning process from the very beginning, focusing on the “big picture,” *i.e.*, evaluating target sets or systems vice individual targets. Additionally, in several AOCs, rules of engagement (ROE) development will reside within the SRD. Although operators are responsible for developing ROE, JAGs are heavily involved, especially when the JFACC desires changes to existing ROE. Strategy Division JAGs will likely serve as the legal representatives to the Information Operations (IO) and Special Technical Operations (STO) cells.¹⁹

Combat Plans Division²⁰

Figure 18.3. Organizational Chart, Notional Air Operations Center Combat Plans Division Chief



¹⁹ *Id.* para. 8.8.2.

²⁰ See generally, AFI 13-1AOC-V3, ch. 4.

The Combat Plans Division (CPD) is responsible to the AOC commander for near-term planning (within 48 hours of ATO execution), and the allocation and tasking of air, space, and cyberspace operations forces in accordance with JFC and JFACC guidance. The CPD is divided into four core teams: Targeting Effects, Master Air Attack Plan, C2 Plans, and ATO/airspace control order (ACO) Production.²¹

Targeting Effects Team

The Targeting Effects Team (TET) incorporates all joint force prioritized target selections for a given ATO period into a joint integrated prioritized target list (JIPTL) to achieve desired kinetic and non-kinetic effects reflected in AOD guidance and are linked back to a JFC campaign objective.²²

Master Air Attack Plan Team

The Master Air Attack Plan Team (MAAP) develops the daily MAAP and transforms it into an electronic format for conversion into the ATO. The MAAP is the JFACC's time-phased air, space, cyberspace, and scheme of maneuver for a given ATO period and it synthesizes JFACC guidance, desired effects, friendly and enemy capabilities, supported components' schemes of maneuver, and available resources.²³

C2 Plans Team

The C2 Plans Team is composed of airspace management, air defense, C2 architecture, C2 communications planning, air support, and special instructions (SPINS) cells. The functions of these cells are directly related to the JFACC's roles as the ACA and AADC. C2 planners take JFC/JFACC guidance and all available information in existing operation orders (OPORDs) and operation plans (OPLANs) and capabilities (includes but is not limited to, satellite support capabilities, space support and theater C2 assets from the JFACC, service coalition, partner nation and other government agency partners), and design the JFACC's theater C2 structure.²⁴

ATO Production Team

The ATO Production Team constructs, publishes, and disseminates the daily ATO and applicable SPINS to appropriate JTF forces that task JFACC allocated air, space, and cyberspace operations capabilities and assets in accordance with the MAAP. The ATO Production Team is staffed by operational experts representing every aircraft or system that may be tasked or employed by the JFACC.²⁵

Judge Advocates

JAGs assigned to the CPD ensure a thorough legal analysis is conducted for selected targets, weaponeering, and assignment of forces. They work with the Intelligence, Surveillance, and Reconnaissance Division (ISR/D) targets analysts, TET chief, and MAAP chief in reviewing the choice of tactics for sensitive targets. This requires JAGs to participate in the development of the

²¹ *Id.* para. 4.5.1 and JOINT PUBLICATION 3-10, E-1 (Appendix E).

²² *Id.*, para. 4.5.2.3.

²³ *Id.* para. 4.5.3.3.

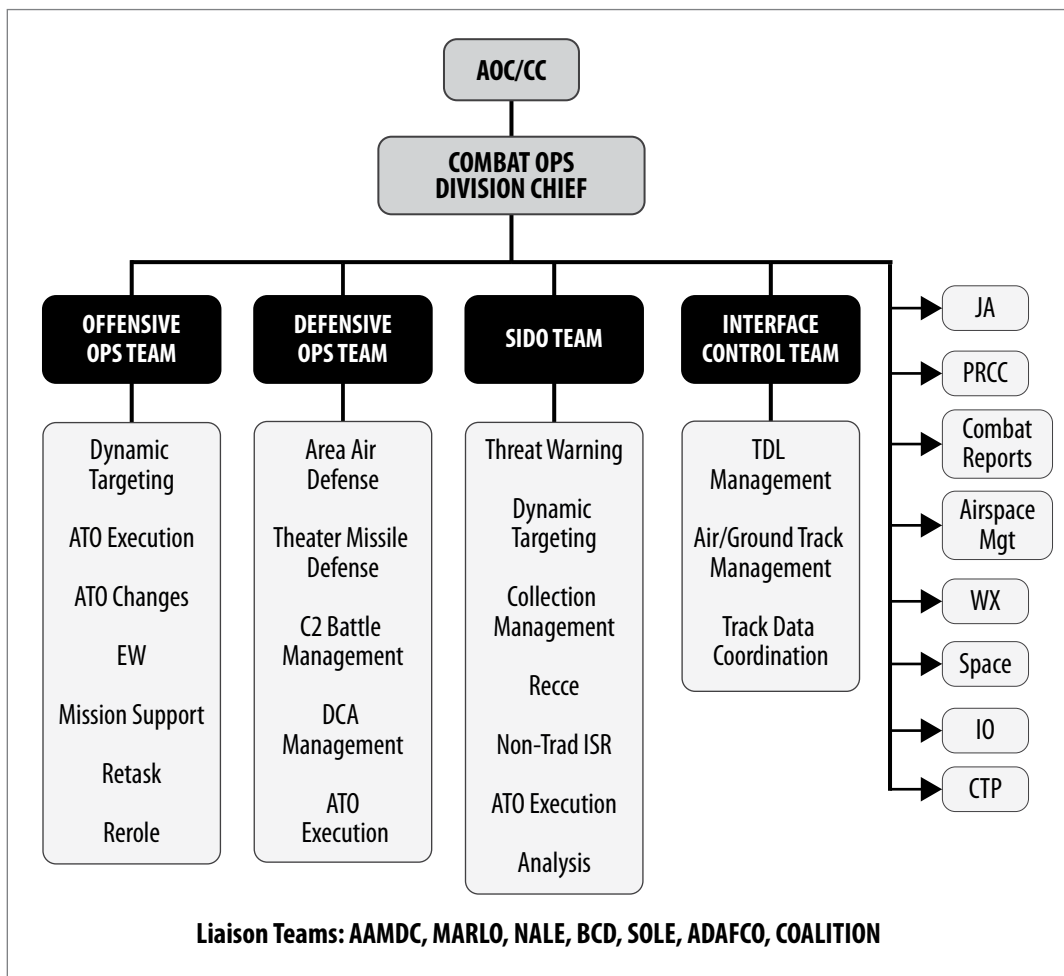
²⁴ *Id.* paras. 4.5.4 and 4.5.4.3.2.

²⁵ *Id.* para. 4.5.5.3.

JIPTL and MAAP throughout the ATO cycle. JAGs assigned to the CPD may also work with the C2 plans chief to develop the ROE and rules for the use of force (RUF) chapter for the JFACC SPINS. JAGs assigned to the CPD may also provide support to the STO team, as needed, during planning.²⁶

Combat Operations Division²⁷

Figure 18.4. Organizational Chart, Notional Air Operations Center Combat Plans Division Chief



The Combat Operations Division (COD) is charged with effective execution of the current ATO and ACO. The COD accomplishes this through constant monitoring of the operational environment and leveraging subordinate C2 Theater Air Control System (TACS) capabilities within the Theater Air Ground System (TAGS) elements, and other assigned or attached assets. In general,

²⁶ *Id.* para. 8.8.3.

²⁷ *See generally*, AFI 13-1AOC-V3, ch. 5.

the COD responds to battlefield dynamics by command and control of air and missile defense operations, IO, and by modifying the published ATO and ACO to facilitate changes in mission requirements.²⁸

Depending on the situation, the COD is composed of offensive and defensive operations (to include missile defense) teams, the senior intelligence duty officer (SIDO) team (providing ISR operations execution support), interface control team, and numerous specialty teams such as legal, airspace management, weather (WX), personnel recovery coordination cell (PRCC), and various experts from other weapons systems. The COD is also supported by various liaison teams as needed. Examples of these teams are the battlefield coordination detachment (BCD), Army Air and Missile Defense Command (AAMDC), naval and amphibious liaison element (NALE), special operations liaison element (SOLE), Marine liaison officer (MARLO), coalition liaison teams, and other governmental agency liaisons.²⁹

Judge Advocate

Judge advocates advising the COD provide legal counsel on all matters within the purview of that division, including ensuring law of war and ROE/RUF compliance for dynamic targeting, close air support, and Combat Search and Rescue (CSAR) actions. JAGs also interpret SPINS, ROE/RUF, and address other emergent legal issues that arise during the execution of the current ATO.³⁰

Intelligence, Surveillance, and Reconnaissance Division (ISR)³¹

The ISRD provides the JFACC, AOC, and subordinate units with predictive and actionable intelligence, ISR operations, and targeting in a manner that drives the air tasking cycle. A common threat and targeting picture is critical to planning and executing theater-wide air, space, and cyberspace to accomplish JFACC objectives. The ISRD provides the means by which the effects of these operations are measured. ISRD personnel direct the AOC's distributed and reach-back ISR processes in order to conduct ISR strategy, intelligence preparation of the operational environment (IPOE), ISR operations, target development, and assessment, which provides the context for understanding the adversary's intentions and supports the achievement of predictive battlespace awareness (PBA).³²

The ISRD is composed of four core teams: Analysis, Correlation, and Fusion (ACF) Team; Targets/Tactical Assessment (TGT/TA) Team; ISR Operations (ISR Ops) Team; and the Processing, Exploitation and Dissemination (PED) Team.³³

²⁸ *Id.* para. 5.1.

²⁹ *Id.*

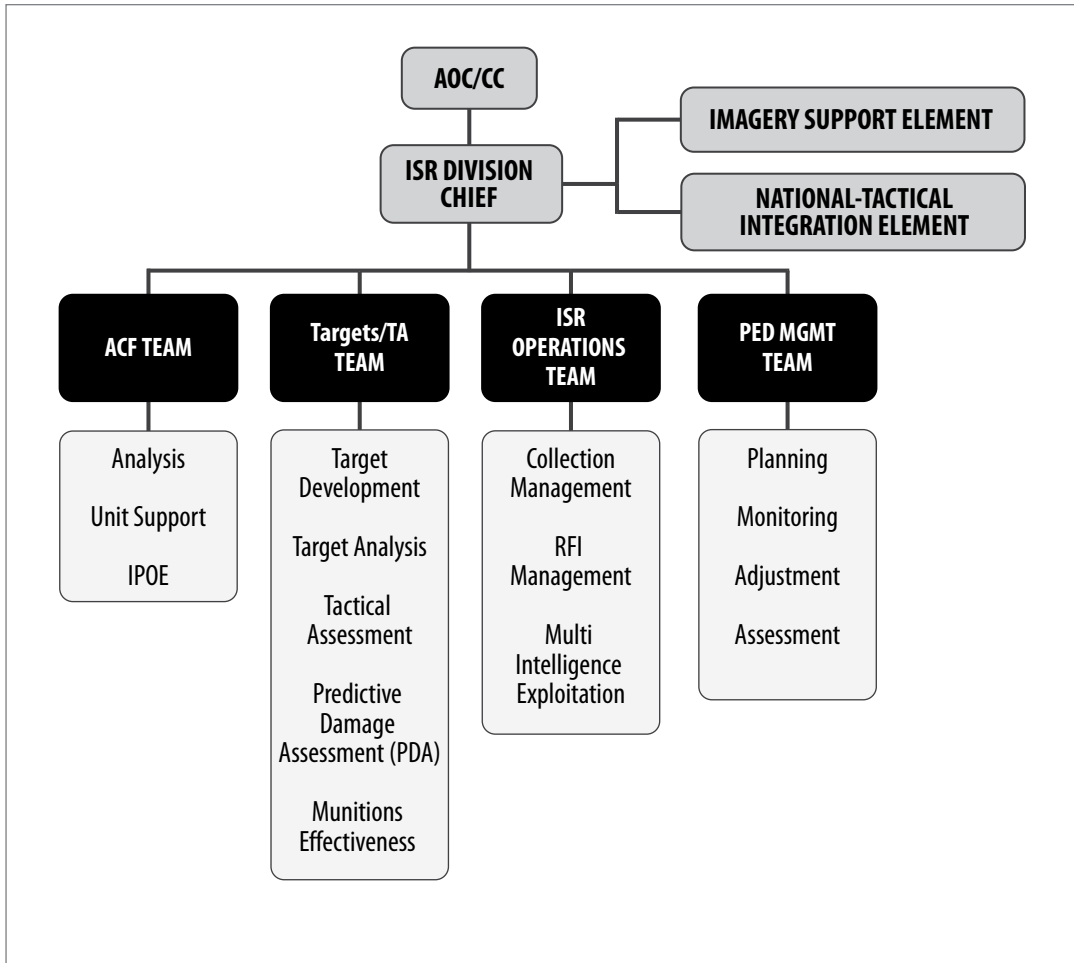
³⁰ *Id.* para. 8.8.4.

³¹ *See generally*, AFI 13-1AOC-V3, ch. 6.

³² *Id.* para. 6.1.

³³ *Id.* para. 6.4.1.

Figure 18.5. Organizational Chart, Notional Air Operations Center Intelligence Surveillance and Reconnaissance Chief



ACF Team

The ACF Team is comprised of an analytical cell and a unit support cell. The analytical cell may organize into any combination of the following elements: integrated air defense system; political-military, economic, and command, control, communications; ground; naval; special operations forces; theater ballistic missile; and weapons of mass effect. The analysis cell is responsible for conducting dynamic IPOE that provides the context for understanding the adversary's capabilities, options, and intentions, and supports the achievement of PBA.³⁴

³⁴ *Id.* para. 6.4.4.

Targets/TA Team

The Targets/TA Team includes the target development cell (TDC) and the tactical assessment cell (TAC). The TDC performs target development and target systems analysis to determine which critical and vulnerable nodes could or should be attacked or affected to achieve objectives. The TAC provides target status updates and recommendations on re-attack to the TDC.³⁵

ISR Operations Team

The ISR Operations Team develops ISR strategy and plans and executes those plans to satisfy theater intelligence requirements. The ISRD chief normally delegates to this team responsibility for synchronizing air component ISR operations with joint or coalition forces. The ISR operations team is comprised of the collection operations management cell, the collection requirements management cell, and the request for information (RFI) management cell.³⁶

PED Management Team

The PED Management Team is the ISRD focal point for implementing, coordinating, maintaining, and assessing PED support from units or agencies external to the AOC. The PED management team also assesses the effectiveness of the PED effort. The PED management team coordinates with joint, coalition, component, and national agency intelligence producers in order to facilitate the PED program. Depending on the particular requirements of the AOR/JOA and the mission, the ISRD Chief may choose to locate PED management functions within the ISR operations team.³⁷

Judge Advocate

JAGs advising the ISRD provide legal counsel on all matters within the purview of that division, including the legality of collecting, storing, and disseminating information; the currency of information about a target and its location with respect to non-military structures and personnel; the weaponizing or weapon system being used; the likelihood of disproportionate collateral damage; and ROE limitations and restrictions.³⁸

³⁵ *Id.* para. 6.4.5.2.

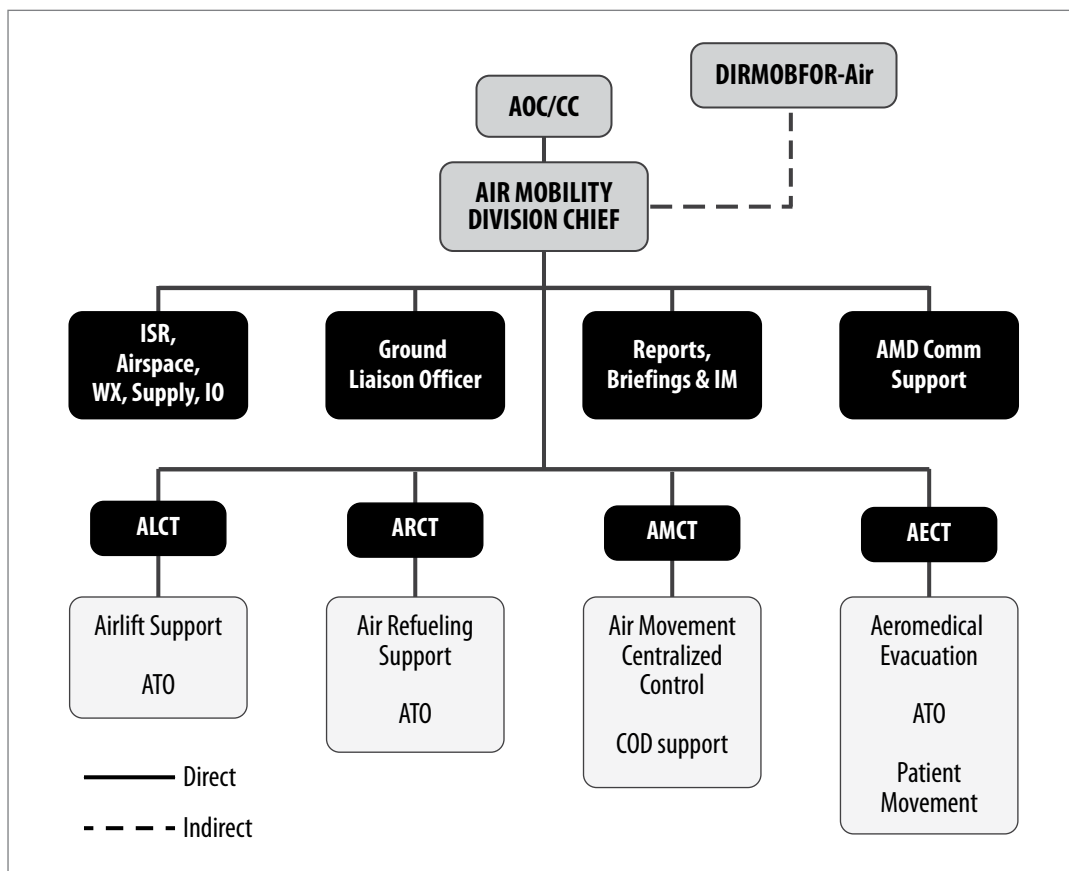
³⁶ *Id.* para. 6.4.6.

³⁷ *Id.* para. 6.4.7.

³⁸ *Id.* para. h 8.8.5.

Air Mobility Division (AMD)³⁹

Figure 18.6. Organizational Chart, Notional Air Operations Center Air Mobility Division Chief



In coordination with the Director of Mobility Forces (DIRMObFOR), the AMD plans, coordinates, tasks, and executes the theater air mobility mission. The DIRMObFOR is responsible for integrating the total air mobility effort for the JFACC and provides support and guidance to the AMD to execute the air mobility mission. The DIRMObFOR is the JFACC's designated coordinating authority for air mobility with all commands and agencies, both internal and external to the joint force. The DIRMObFOR-Air provides direction to the AMD on all air mobility matters.⁴⁰

The AMD chief ensures the division works as an effective part of the AOC in the air, space, and cyberspace operations planning and execution processes. The AMD is comprised of four core teams: Aeromedical Evacuation Control Team (AECT), Airlift Control Team (ALCT), Air Refueling Control Team (ARCT), and Air Mobility Control Team (AMCT).⁴¹

³⁹ See generally, AFI 13-1AOC-V3, ch. 7.

⁴⁰ *Id.* para. 7.1.

⁴¹ *Id.* para. 7.5.

Aeromedical Evacuation Control Team

The Aeromedical Evacuation Control Team (AECT) is responsible for operational planning, scheduling and executing intra-theater Aeromedical Evacuation (AE) missions. The AECT advises the AMD chief and DIRMOBFOR-Air on AE issues. It provides command and control of all theater assigned or attached AE units and operations within the specified AOR/JOA and assists with inter-theater AE operations arriving, departing or transiting the AOR/JOA.⁴²

Airlift Control Team

The Airlift Control Team (ALCT) is the source of intra-theater airlift expertise within the AMD. The ALCT brings intra-theater airlift functional expertise from the theater organizations to plan, coordinate, manage, and execute intra-theater airlift operations in the AOR/JOA for the JFACC.⁴³

Aerial Refueling Control Team

The Aerial Refueling Control Team (ARCT) coordinates aerial refueling planning, tasking, and scheduling to support combat air operations or to support a strategic air bridge within the AOR/JOA.⁴⁴

Air Mobility Control Team

The Air Mobility Control Team (AMCT) is the centralized source of Air Mobility Command, Control, and Communication (C3) during mission execution. The DIRMOBFOR uses the AMCT to direct air mobility forces in concert with other aerospace forces. The AMCT de-conflicts all air mobility operations into, out of, and within the area of operations. The AMCT maintains execution process and communications connectivity for tasking, coordinating, and flight following with the AOC Combat Operations Division, subordinate air mobility units, and mission forces.⁴⁵

Judge Advocate

In coordination with the COMAFFOR/JA and JFACC/JA staff, JAGs advising the AMD provide legal counsel on all matters within the purview of that division including international agreements affecting landing rights, overflight, sovereignty, taxes, customs, aircraft accidents, and civil reserve air fleet (CRAF).⁴⁶

⁴² *Id.* para. 7.5.4.

⁴³ *Id.* para. 7.5.1.

⁴⁴ *Id.* para. 7.5.2.

⁴⁵ *Id.* para. 7.5.3.

⁴⁶ *Id.* para. 8.8.6.

Specialty and Support Functions⁴⁷

Specialty teams provide an AOC with diverse capabilities to help orchestrate theater aerospace power. These capabilities are interwoven into the aerospace assessment, planning, and execution process. Specialty functions include component liaisons, ISR, air defense, space, information operations, weather, and legal.

Support teams provide direct support to the AOC and to operational echelons above and below the AOC. They perform their tasks allowing the core and specialty teams to focus on the aerospace assessment, planning, and execution process. Examples of support teams are intelligence unit support, systems administration, information management, and communications.

CONCLUSION

Successful joint aerospace power employment requires unity of effort, centralized planning, and decentralized execution. The Joint Air Operations Center is the aerospace operations planning and execution focal point for aerospace power. AOC personnel, including legal advisors, are responsible for planning, executing, and assessing aerospace operations and directing changes as the situation dictates. Within the AOC, the judge advocate is an essential advisor on the myriad of legal issues associated with aerospace operations.

⁴⁷ See generally, AFI 13-1AOC-V3, ch. 8.

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BACKGROUND

Multinational operations are those operations conducted by forces of two or more States, usually within the structure of a coalition or alliance.¹ While the United States retains the capability to act alone, the 2018 National Defense Strategy Summary states:

Mutually beneficial alliances and partnerships are crucial to our strategy, providing a durable, asymmetric strategic advantage that no competitor or rival can match.... Our allies and partners provide complementary capabilities and forces along with unique perspectives, regional relationships, and information that improve our understanding of the environment and expand our options.²

A key role of judge advocates serving on multinational operations is to advise U.S. commanders or multinational force (MNF) commanders to whom they are assigned, with a view to identifying workable solutions between coalition forces.³ Maintaining and promoting interoperability, while ensuring unity of effort, is crucial for mission success.

COMMAND AND CONTROL OF MULTINATIONAL OPERATIONS

Coalition States participating in MNF operations will not, in ordinary circumstances, relinquish national command of their forces.⁴ A coalition force will have at least two distinct chains of command: national and multinational. As Commander-in-Chief, the President always retains national command authority over U.S. forces.⁵

Command authority for a MNF (MNFC) operation is negotiated between coalition States and can vary from State to State. The command authority vested in a MNFC by participating nations can include operational control (OPCON), tactical control (TACON), designated support relationships, and coordinating authority.⁶

LEGAL SUPPORT OF PARTNER AIR FORCES

Attorney Role and Position

The role and position of legal staff within a MNF may differ from that found in U.S. forces. U.S. judge advocates may find that their nearest counterpart in a coalition air force is at a different level in the command structure. Some coalition States with whom the United States routinely operates (*e.g.*, Australia, Canada, and the United Kingdom) maintain legal departments providing

¹ The term “alliance” is used in this context to describe a group of nations working together for a shared military goal under a formalized structure such as the North Atlantic Treaty Organization. “Coalition” on the other hand denotes a less rigid structure, again consisting of a group of nations cooperating closely in a mission, but in a less permanent manner.

² 2018 National Defense Strategy Summary, 8.

³ For convenience, the terms “coalition States,” “coalition forces,” and “multinational force” will be used in this Chapter to describe any State contributing force or nation to a MNF operation, regardless of whether there is a formal coalition in place or not.

⁴ JOINT PUBLICATION 1, *Doctrine for the Armed Forces of the United States* (25 March 2013), incorporating Change 1, 12 July 2017, II-24 [hereinafter JP 1].

⁵ *Id.*

⁶ *Id.*

national legal representation at MNF headquarters and operations centers. MNF counterparts may be of different military ranks, be civilian legal advisors, or even be non-lawyers with subject matter expertise in the laws of war. It is likely that core tasks performed by U.S. military legal staff (*e.g.*, contract law and fiscal law) will not be handled by the legal staff of a coalition force.

Paralegals

Foreign military forces generally deploy few, if any, military paralegals. Work routinely accomplished by U.S. military paralegals may be completed by coalition military lawyers themselves, by non-paralegals, or not at all.

LAW OF WAR

General

The law of war obligations and policies of coalition States have a bearing on the missions they may execute, the weapons they can employ, and the support they can provide to the MNF. While the law of war is largely based upon customary international law and widely ratified treaties, and thus is applicable to a majority of States, many obligations are created by treaties which may not have been ratified by all MNF participants. In addition, States party to treaties may have submitted reservations or declarations of understanding that affect their interpretation of treaty obligations.⁷ Finally, States may have different interpretations of both treaty and customary international law obligations, and may choose to apply differing standards as a matter of policy.⁸ The following is a non-exhaustive list of law of war treaties which may be relevant in MNF operations.

Additional Protocol I to the Geneva Conventions (AP I)

The United States has signed, but not ratified, AP I, a key law of war treaty that is legally binding for many other States (including the UK and Australia). While certain articles within AP I reflect customary international law and therefore do not create any significant practical barriers in a MNF environment,⁹ there are provisions in relation to which the United States takes issue, as the following examples demonstrate:

Article 1, Paragraph 4. The United States objects to the application of the law of war to wars of “self-determination” on the basis that this Article inappropriately imports moral qualities into the determination of what constitutes an international armed conflict.¹⁰ As a result, parties to AP I consider a wider range of persons to be entitled to combatant status, and associated belligerent privileges.¹¹

Article 44 – Combatants and Prisoners of War. The United States objects to portions of Article 44, which lowers standards for combatants to distinguish themselves from the civilian

⁷ For example, Australia has lodged five declarations of understanding in relation to AP I.

⁸ For example, a State may choose to apply the comprehensive legal standards ordinarily applicable to an international armed conflict to a particular non-international conflict.

⁹ See DoD LAW OF WAR MANUAL (June 2015), updated December 2016, para. 19.20.1, for a more detailed discussion on the United States’ approach to AP I.

¹⁰ See President Reagan, Message to the Senate Transmitting a Protocol to the 1949 Geneva Conventions, 29 January 1987, available at https://ogc.osd.mil/LoW/treaty/message_from_potus_transmitting_ap_i_relaying_decision_not_to_ratify_ap_i.pdf. See page IV in particular for the objection relating to Art. 1, para. 4.

¹¹ See DoD LAW OF WAR MANUAL, para. 4.6.1.2.

population below what is required by Article 4, Paragraph 2, of Geneva Convention III.¹² Consequently, parties to AP I may consider certain groups who qualify as members of the armed forces under Article 43 to be combatants regardless of whether or not they wear a fixed distinctive sign recognizable at a distance.¹³ MNF legal officers should advise on their States' interpretation on which armed groups involved in an international armed conflict are regarded as combatants. The rules of engagement (ROE) or a national targeting directive may contain this information. This interpretation may affect targeting decisions, and whether persons captured can be handed over to the United States.

Article 55 – Protection of the Natural Environment.¹⁴ It is possible that an attack, which the United States would consider lawful, would be unlawful for parties to AP I due to the expectation of "...widespread, long-term and severe environmental damage."¹⁵ However, such an attack, if conducted by the United States, may nevertheless be prohibited if it generated excessive collateral damage or otherwise violated U.S. policy.

Article 56 – Protection of Works and Installations Containing Dangerous Forces. This Article prohibits targeting dams, dykes, and nuclear power plants if there is a high potential for release of dangerous forces or severe loss of the civilian population. The United States and other coalition States would likely prohibit targeting these installations, if striking such targets generated excessive collateral damage or otherwise violated their national policies. Targets of this nature often appear on a joint task force or combatant command no-strike or restricted target list.

Additional Protocol II to the Geneva Conventions (AP II)

The United States is not a party to AP II whereas many coalition States are. While non-international armed conflict generally requires that all parties comply with the obligations mandated by the common Article 3 of the Geneva Conventions at minimum,¹⁶ parties to AP II may have additional obligations.¹⁷ For example, a State party must ensure that conditions of detention comply with the minimum standards set out in AP II's Article 5, and the prosecution of any criminal offense related to the conflict is carried out by an independent and impartial court in accordance with the Article 6 standards. Further, parties to AP II will have differing obligations regarding protection of objects containing dangerous forces, cultural objects and places of worship.¹⁸

¹² Geneva Convention III (GC III), Art. 4, para. 2, requires members of organized resistance movements to, *inter alia*, have a fixed distinctive sign recognizable at a distance before being entitled to status as a prisoner of war. Art. 44 reduces this requirement to carrying arms openly during each military engagement and when engaged in a military deployment preceding an attack.

¹³ See AP I, Art. 44(3) in particular.

¹⁴ Note similarly Art. 35(3), prohibiting the employment of methods or means of warfare which may be expected to cause "widespread, long-term **and** severe damage to the natural environment."

¹⁵ Note the use of the conjunctive "and" in this provision. To be strictly prohibited by the convention, the anticipated environmental damage must be widespread, long-term, and severe. Anticipated environmental damage falling short of this standard would nonetheless be considered in the collateral damage assessment.

¹⁶ Common Article 3 concerns "Conflicts not of an international character."

¹⁷ Note that AP II only applies where there is an armed conflict in the territory of a State party between the State armed forces and one or more organized armed groups "which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." (AP II, Art. 1.)

¹⁸ See Arts. 15 and 16, respectively.

Detainees

Coalition States will generally have differing legal obligations and interpretations of the law of war regarding the way detainees are classified, how they may be treated while in custody and how to deal with criminal offenses allegedly committed by them.¹⁹ For example, parties to AP I might be obliged to ensure that their legal obligations (whether under Third Geneva Convention or another source of law) continue to be met if a detainee is transferred, even temporarily, to the custody of another State.²⁰

Detainee issues should be considered by MNF judge advocates and legal staff at the earliest opportunity, preferably before the commencement of hostilities. It is important to determine which legal regime (AP I or II if any) applies and to whom the coalition States will accord combatant (or other) status. If there are differing national policies on the status and treatment of detainees, then mutually agreed procedures should be established in relation to their custody, transfer, transportation, supervision and trial.²¹

Regardless of the category or status of a detainee, U.S. forces are required to properly control, maintain, protect, and account for all detainees in accordance with applicable U.S. domestic law, international law, and policy.²²

Legal Status of Persons Generally

In addition to the different ways States party to AP I may define combatants, coalition States may apply different terms or standards with respect to identifying and categorizing other classes of person under the law of war, such as unprivileged belligerents.²³ Additionally, parties to AP I may apply different interpretations of the rule in Article 51(3) of AP I, which provides that civilians lose protections afforded by AP I for such time as they take a direct part in hostilities.²⁴ Accordingly, judge advocates should seek advice on the national interpretation of this term from relevant coalition forces.

¹⁹ Different States might use different terms to describe “detainees.” For example, the United States may refer to someone as an “unprivileged belligerent,” whereas a coalition State might refer to the same person as a “civilian detainee.” Refer to applicable detention policies.

²⁰ See, for example, AP I, Art. 45, regarding the protection of persons who have participated in hostilities.

²¹ During Operation IRAQI FREEDOM a trilateral arrangement between the United States, United Kingdom, and Australia established procedures for the transfer of “Prisoners of War, civilian internees, and civilian detainees.” 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 was in the custody of the accepting power; sole responsibility of the detaining power for classification of potential PWs; primary jurisdiction of the detaining power over pre-capture offenses, but with favorable consideration to a request by the accepting power to waive jurisdiction; and costs met by the detaining power.

²² DoDD 2310.01E, *DoD Detainee Program* (19 August 2014).

²³ See, for example, the “Explanatory Memorandum” to the Australian Parliament’s *Criminal Code Amendment (War Crimes) Bill 2016*: “Members of organised armed groups are recognized as a category distinct from civilians under international humanitarian law.”

²⁴ The United States supports the customary principle upon which Art. 51(3) is based, but does not necessarily accept the rule as it is expressed in that article: see DoD LAW OF WAR MANUAL, para. 5.8.1.2.

WEAPONS

Additional Protocol I

States party to AP I are generally subject to a more stringent prohibitions and standards with respect to the employment of weapons. In particular, AP I Article 35 prohibits parties from employing weapons which are of a nature to cause superfluous injury or unnecessary suffering, or are intended, or may be expected, to cause widespread, long-term, and severe damage to the natural environment. While the prohibitions against superfluous injury or unnecessary suffering are legal obligations to which the United States is already bound,²⁵ there is no analogous prohibition binding the United States in relation to the environment.²⁶ States party to AP I are obliged to consider these issues when conducting weapon reviews under Article 36. The United States, for its part, conducts weapon reviews as a matter of long-standing practice.²⁷

Conventional Weapons Treaty 1980, Protocol III (Incendiary Weapons)

The U.S. ratification of the protocol contains a reservation to Article 2, reserving:

...the right to use incendiary weapons against military objectives located in concentrations of civilians where it is judged that such use would cause fewer casualties and/or less collateral damage than alternative weapons, but in so doing will take all feasible precautions with a view to limiting the incendiary effects to the military objective and to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.

The United States utilizes relatively few incendiary weapons compared to standard high explosive weapons. Due to the political ramifications of the use of incendiary weapons, U.S. commanders and MNF authorities will likely consult with their senior national leadership before operations commence if the use of incendiary weapons is planned and where MNF participation or support is required.

White Phosphorous

White phosphorous (WP) is a highly reactive substance that produces white smoke and significant heat. WP may be employed for different purposes, but it is particularly useful for marking locations and masking forces. Given the definition of “incendiary weapon,”²⁸ the United States considers WP to be excluded from it.²⁹ If WP is used within a combined area of operations, then some coalition forces may raise objections to the use, transportation, or storage of WP, even if used for target marking. U.S. commanders and MNF authorities will consult with their senior national leadership before operations commence if MNF participation or support is required.

²⁵ See, for example, 1899 Hague II Regulations, Art. 23(e), and 1907 Hague IV Regulations, Art. 23(e).

²⁶ See the discussion further above concerning AP I, Art. 55.

²⁷ See DoDD 5000.01, *The Defense Acquisition System* (12 May 2003), and the discussion in DoD LAW OF WAR MANUAL, para. 6.2.

²⁸ The *Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons* (1980 Protocol III) defines “incendiary weapon” at Article 1(1) as “any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or a combination thereof, produced by a chemical reaction of a substance delivered on the target.” The following are specifically excluded from the definition: “Munitions which may have incidental incendiary effects, such as illuminants, tracers, smoke or signaling systems.” *Id.* Art. 1(1)(b)(i).

²⁹ DoD LAW OF WAR MANUAL, para. 6.14.1.3.

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines 1997 (Ottawa Convention)

For parties, the possession or use of anti-personnel landmines (APL) as well as assistance, encouragement, or inducement to any other person to possess or use these mines is prohibited. Some weapons presently in the U.S. inventory that will lead to interoperability conflicts include the Artillery Delivered Anti-Personnel Mine (ADAM) and its M731 and M692 projectiles, the BLU-92/B anti-personnel mine sub-munitions of the CBU 78/B and CBU-89/B Gator Mine systems, the M74 APL, the M86 Pursuit Deterrent Munition, the Volcano Multiple Delivery Mine System, and the M18A1 Claymore when used in trip-wire mode. When the United States plans to employ APL, the limitations placed on coalition States by virtue of the Ottawa Convention must be considered. Parties to the Ottawa Convention may be prohibited from refueling vehicles transporting APL. In addition, if joint terminal attack controllers (JTACs) are members of the armed force of a coalition State which has ratified the Ottawa Convention, that JTAC may not provide targeting information to aid the delivery of APL. Planners serving party States in MNF headquarters may not be able to support staff processes where use of APL is planned. If the use of APL is required or must be included in planning efforts, the operation may need to be entirely planned and executed by U.S. components of the MNF.³⁰

Chemical Weapons Convention 1993

Some nations bound by the Chemical Weapons Convention have differing national interpretations of the convention's obligations, particularly with respect to the use of riot control agents (RCA). While the United States does not consider RCA to be a chemical weapon,³¹ it is possible certain coalition States would take a different view. U.S. commanders and MNF authorities will receive guidance from their senior national leadership before operations commence if use of RCA is planned.

Convention on Cluster Munitions 2008 (Oslo Convention)

Parties to the Oslo Convention remain able to engage in military cooperation and operations with non-State parties (such as the United States).³² However, under the Oslo Convention, the parties are not authorized to use, transfer or stockpile cluster munitions, or to expressly request the use of cluster munitions in cases where the choice of munitions used is within their exclusive control.³³ U.S. commanders and MNF authorities will consult their senior national leadership before operations commence if the use of cluster munitions is planned, to determine whether any national restrictions or prohibitions will apply.

³⁰ Following the rescission of Presidential Policy Directive 37, the DoD released a revised landmine policy. This policy confirms that, in its use of landmines, the DoD will adhere to international law (including the Amended Mines Protocol of the Convention on Conventional Weapons), and the law of war generally. The policy prohibits "persistent" landmines, and confirms that there are no geographical limitations on employing non-persistent landmines, among other things. SecDef Memorandum, *DoD Policy on Landmines* (January 31, 2020), <https://media.defense.gov/2020/Jan/31/2002242359/-1/-1/1/DOD-POLICY-ON-LANDMINES.PDF>.

³¹ See DoD LAW OF WAR MANUAL, para. 6.16.1.

³² Oslo Convention, Art. 21(3).

³³ *Id.* Art. 21(4).

OTHER INTERNATIONAL LAW AFFECTING MILITARY OPERATIONS

European Convention of Human Rights 1950 (ECHR)

Many European nations are parties to the ECHR. The extent of the ECHR's applicability and its impact on MNF may affect operations. For example, a European State may be obliged to treat a detainee consistently with not only the law of war, but also the ECHR.³⁴ Such an obligation may affect that State's capacity to transfer the detainee to non-party States, such as the United States.

International Covenant on Civil and Political Rights (ICCPR)

The United States interprets its obligations under the ICCPR to apply only within U.S. territory.³⁵ Certain coalition States may take a similar position.³⁶ However, the UN Human Rights Committee has consistently held that the ICCPR has extraterritorial application, clearly demonstrating its understanding that a State's jurisdiction extends beyond its territorial boundaries where it exercises "power or effective control" over a person.³⁷ It is possible that some coalition States may determine that the ICCPR should be applied within an area of operations to locations where the relevant State has "effective control." For many European States, the ICCPR rights are subsumed by similar ECHR rights, which are enforceable through a private right of action.³⁸

Law of the Sea

A significant majority of States has ratified the United Nations Convention on the Law of the Sea 1982 (UNCLOS). The United States has not ratified UNCLOS, but considers the navigation and overflight provisions to be generally reflective of customary international law.³⁹

Law of the Air

Virtually all States, including the United States, have ratified the Convention on International Civil Aviation 1944 (Chicago Convention). Despite the fact that the Chicago Convention applies only to civil aircraft,⁴⁰ the definition of airspace reflects customary international law regarding the

³⁴ In *Al-Skeini and Others v. The United Kingdom*, ECtHR, 55721/07 it was held that the UK "exercised authority and control" over a portion of Iraq such that a jurisdictional link to the ECHR was established. The Tribunal found the UK breached Art. 2 of the ECHR (Right to Life) in relation to the individuals under its power; refer to Chapter 12, *Human Rights Law*.

³⁵ See DoD LAW OF WAR MANUAL, para. 1.6.3.2.

³⁶ In the case of Australia, see, for example, the "Explanatory Memorandum" to the Australian Parliament's *Criminal Code Amendment (War Crimes) Bill 2016*, under "Human rights implications": "It is only in exceptional circumstances that Australia will owe human rights obligations beyond its territory. Under international law, a high standard of control would need to be met and substantiated in order to engage any international human rights obligations for Australia extraterritorially."

³⁷ See para. 10 of General Comment No. 31 to the ICCPR: "...a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."

³⁸ See, for example, *Abd Ali Hameed Al-Waheed v Ministry of Defence* [2017] UKSC 2.

³⁹ See NWP 1-14M, *The Commander's Handbook on the Law of Naval Operations* (August 2017), para. 1.2.

⁴⁰ Art. 3(a): "This Convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft."

lateral extent of airspace and is thus relevant to multinational air operations. The United States has not set any firm position on the specific altitude that marks the vertical limit of airspace.⁴¹

Policy Issues Specific to Air Operations

While the United States and other States may concur on the law, as to territorial boundaries, policy considerations and ROE may place restrictions on how closely aircraft approach national territorial boundaries and features, or other vessels (including maritime vessels and aircraft). Such restrictions may create additional buffer zones adjacent to territorial boundaries and features which aircraft may not enter except in prescribed circumstances (such as an emergency). The purpose of such buffer zones may be to reduce tension with a neutral or third party State or to mitigate any potential navigational error. States within a combined area of operations may follow differing policies about approach distances to territorial boundaries and features because of interstate relationship issues. Even if the ROE authorize specific geographic approach limits, local unit commanders may impose more restrictive limits based on their own risk management strategy. It is important for both legal advisers and operators to confer with respect to any such policy limitations as they can limit the kinds of missions that may be performed by coalition forces.

INTERNATIONAL CRIMINAL COURT

Rome Statute of the International Criminal Court 1998 (Rome Statute)

Parties to the Rome Statute are subject to the jurisdiction of the International Criminal Court (ICC). Members of the armed forces of a State, who are accused of war crimes, would normally be tried under the appropriate provisions of their own service's disciplinary code or domestic criminal law. The ICC will only exercise jurisdiction where States having jurisdiction themselves are unwilling or unable genuinely to exercise that jurisdiction.⁴² It is thus complementary to State jurisdiction and does not have primacy.⁴³ The United States is not a party to the Rome Statute but many of its allies and coalition partner States are. Further, there are jurisdictional implications which may affect non-party States, such as the United States, as outlined further below.

General

The Rome Statute defines the various war crimes within its jurisdiction, including offenses committed in international and non-international armed conflict, and also provides the ICC with jurisdiction over the crimes of genocide, aggression and other crimes against humanity.⁴⁴ In addition to individual responsibility, a commander or a person acting with similar authority will be criminally responsible for crimes committed by forces under their command and control, or

⁴¹ See generally Chapter Four, *Air Law*. See also Chapter Five, *Space Law*.

⁴² See, for example, Art. 17(1)(a): "Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution."

⁴³ In contrast, this was not the case with the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

⁴⁴ See Rome Statute, Arts. 5, 6, 7, 8 and 8 *bis*.

effective authority and control, as a result of a failure to exercise control properly in the circumstances specified under the Statute.⁴⁵

Jurisdiction

For the purposes of participating in MNF operations, it is important to remain cognizant of the ways in which the ICC may seek to assert jurisdiction over any given alleged war crime. The ICC may assert jurisdiction on the basis that:

- The accused member is a national of a party to the Rome Statute,⁴⁶ or
- The U.N. Security Council refers an allegation to the ICC,⁴⁷ or
- The alleged offense occurred within the territory of a State party (to include an aircraft registered in that State).⁴⁸

Given these bases, it is conceivable that the ICC, in certain cases, might attempt to assert jurisdiction over a member of the U.S. armed forces. The United States, however, has a longstanding and continuing objection to any assertion of jurisdiction in the absence of consent or a U.N. Security Council referral.⁴⁹

In terms of a MNF operation with coalition States who are party to the Rome Statute, it is clear that a party could be held liable for offenses committed by the forces of a coalition State, if the criteria for command or individual responsibility are satisfied. This potential liability exists notwithstanding that the State of the force committing the offense is not a party to the Rome Statute or does not regard the incident as an offense.

Under Article 89 of the Rome Statute, parties may be required, upon ICC request, to arrest and surrender to the ICC an individual within their territory. It is unclear whether this obligation extends to territory under a State's effective control, such as a military base of the party in a combined area of operations in a different State.

⁴⁵ *Id.* Art. 28: "In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
 - (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
 - (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."

⁴⁶ *Id.* Art. 12(2)(b).

⁴⁷ *Id.* Art. 13(b).

⁴⁸ *Id.* Art. 12(2)(a).

⁴⁹ See DoD LAW OF WAR MANUAL, para. 18.20.3.1.

Article 98(2) of the Rome Statute provides:

The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

The United States has entered into over 100 bilateral agreements wherein signatories agree not to surrender U.S. nationals to the ICC. However, there are no Article 98 agreements with a number of regular coalition States, including the United Kingdom, Canada, and Australia, each of whom is a party to the Rome Statute.

APPLICATION OF LAW TO OPERATIONS

Rules of Engagement

Some States do not operate under ROE or they do not apply them in the same manner as the United States. For those States that apply them, the ROE for a particular operation are usually generated through coordination between the strategic and operational levels of authority. For some States, seeking an amendment to their ROE can be a cumbersome process, requiring approval at various levels of their national chain of command. This increases the importance of early ROE consultation among multinational legal and command staff. Some interoperability problems can be solved through interpretation of the extant ROE. Rather than seeking a change, the military commander may request higher headquarters confirmation that the ROE's interpretation is consistent with the planned method of operations.

Release of U.S. ROE

The release of classified information, including ROE, to foreign governments must comply with the procedures in DoDD 5230.11.⁵⁰ Thus, judge advocates and operational staff should employ processes necessary for the release of ROE at the earliest opportunity. In circumstances where access to U.S. ROE is not granted, there may be other solutions. For example, in operation ENDURING FREEDOM, the United States worked alongside Afghan forces trained by U.S. Special Forces. However, U.S. forces did not have permission to share U.S. ROE with Afghan forces. The solution was for U.S. forces to assist Afghan forces in creating Afghan ROE sufficiently similar to U.S. ROE to allow participation in and coordination of operations.

Multinational ROE

Multinational operations rarely operate exclusively under multinational ROE. Normally, the multinational ROE sets a baseline for participating nations, with national ROE imposing additional restrictions or caveats. Multinational ROE will apply to U.S. forces for mission accomplishment only if authorized by the SecDef. Apparent inconsistencies between U.S. ROE and multinational ROE should be submitted through the U.S. chain of command for resolution. In all cases, U.S. commanders retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent.⁵¹ When operating under a multinational ROE, coalition

⁵⁰ DoDD 5230.11, *Disclosure of Classified Military Information to Foreign Governments and International Organizations* (16 June 1992).

⁵¹ See generally Chapter 15, *Rules of Engagement*.

States may interpret the ROE differently. It is imperative that judge advocates always clarify the practical application of the ROE with coalition partners.

Common Issues

Common ROE issues may include:

1. Hostile Act/Hostile Intent. These terms, which are commonly used in national and multinational ROE, are defined differently by many States.
2. Use of force for mission accomplishment. It should not be assumed that force can be used to ensure mission accomplishment. For most States, specific authorization is required for the use of force beyond self-defense.
3. Self-Defense. For some States, the use of lethal force in self-defense is limited to the defense of life. Necessary and proportional, but less than lethal force may be used to protect property from loss or destruction. State practice in the use of force to protect property may affect the kinds of roles to which security forces should be assigned. However, ROE that do not authorize the use of lethal force to protect property do not always cause meaningful interoperability problems. Armed attack upon property frequently involves a concomitant threat to life, authorizing the use of proportional force, up to and including lethal force, in self-defense.

Below is a list of questions judge advocates should seek to answer when analyzing the ROE requirements of a MNF.

Table 19.1. ROE Harmonization Checklist

1. Are there generic ROE provisions and definitions to which all multinational force States have agreed?
2. Does each State have a common or clear understanding of the terms used in the ROE?
3. What is the impact of the proposed ROE on the effectiveness and interoperability of each participating State?
4. How does each State disseminate ROE to its units and troops?
5. Have the ROE been distributed to the troops and training conducted prior to deployment?
6. What are the key differences in ROE across the multinational force?
7. Are there national points of contention concerning ROE that the commander must resolve or at least be wary of?
8. Are there ROE on the use of indirect fire agreed upon by all multinational force States?
9. Is there a dichotomy between multinational ROE on the use of indirect fire and national force protection?
10. Has the use of certain systems or equipment—such as defoliants, riot control agents, landmines—been evaluated for its impact in relation to the ROE?

Targeting

Target Approval in a Combined Area of Operations. Each MNF contingent is likely to have different targeting rules as a result of differences in law and/or policy. Commonly, States will differ in the national assessments of particular targets. One method of characterizing these differences is by source: intelligence, law, or policy.

1. Intelligence. Each coalition State may apply its 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. Intelligence differences can be reduced through information sharing—such as the Five Eye network—but is otherwise subject to classification limitations.
2. Law. Differences may occur due to differing treaty obligations, or due to different interpretations of treaty obligations. For example, parties to AP I may disagree on whether a given object constitutes a “military objective.”⁵²
3. Policy. Some targets may not be politically acceptable to some coalition States, despite their permissibility under international law. These may either be prohibited outright or require national government approval before engagement.

The impact of these differences can be minimized through coordination. Judge advocates involved in targeting must learn the impermissible and problematic target types for each coalition State and how these differences may affect each mission. An impermissible target will influence not only a State’s ability to deliver a weapon onto that target, but may also affect the level of permissible support provided to U.S. engagement of the target. If the target is impermissible, then that State may also be prohibited from refueling strike aircraft, providing airborne early warning and control, or participating in the planning for the mission.

Where U.S. forces rely on support from a State contingent, it is imperative that solutions are developed early, to preclude mission interference. These may include exclusion from missions involving certain target types, establishing alternative target approval chains to avoid placing staff officers where they would have to step aside and be replaced temporarily during an operation, or simply briefing plans staff in advance of any potential difficulties or sensitivities. For aerial targeting, attendance of MNF personnel, including legal representatives, at the guidance apportionment and targeting stage can minimize coordination difficulties. During this stage, strategic aims are broken down into particular targets and MNF personnel can indicate which targets cause national level concerns. Concern by MNF personnel over a particular target is a good indicator of international sensitivity and may provide valuable cues for either neutralizing the target in a different way or attacking a different target set to achieve the same result.

Exchange and Loan Personnel

MNF personnel embedded with U.S. forces usually are required to apply international law as it applies to, and is interpreted by, their nation. Generally, prior to deployment, MNF personnel will be briefed through their own national chain of command on the different legal obligations that apply to them.

⁵² While the United States is not party to AP I, it is a party to the 1980 Protocol II to the CCW Convention, which defines “military objective” in practically identical terms to the AP I definition. Despite the common definition, interpretational differences will most frequently arise when considering the meaning of “effective contribution to military action.”

POLICING WITHIN THE MULTINATIONAL FORCE

Background

U.S. personnel tasked with policing duties on a MNF base may encounter situations where offenses are committed by personnel from the forces of a coalition State. The legal authority of military police to respond to these situations differs with the circumstances.

General Rule

The powers of military police fundamentally derive from the domestic law of the sending State. Outside that State's territory, its forces are generally entitled to exercise legal authority derived from their own national law solely over their own forces. Thus, as a general rule, in a third-party State the military police of each element in a MNF do not have the authority to apprehend or arrest members of other forces. This general rule may be altered by international instrument, bilateral or multilateral agreement, or through cross-vesting of police powers under legislation.⁵³

Application of Local Law

In relation to military members of another coalition State, police personnel may exercise any authority granted by local law. For example, if local law allows the use of reasonable force to prevent crime, then this may allow the use of force, including restricting freedom of movement, to prevent a crime. Local law could also be used as the basis to exercise legal authority over members of all component forces, provided component forces are subject to local law. However, the military police would have no greater powers than a citizen of the local State and would not have specific local police powers.

International Instruments

Power to enforce criminal laws within a third-party State against MNF members could be obtained through a UN Security Council Resolution. A resolution that authorizes the use of all necessary measures to restore peace and security may include the authority to arrest persons, including MNF members, committing offenses against the laws that applied within a third-party State.

Agreements

The national command chains of each branch of a MNF could reach an agreement on joint policing issues, enforceable within each multinational element by national military orders. It would be lawful for each force to issue orders to cooperate with directions given by military police from other contingents in relation to issues like traffic direction and public order.

Power to Detain Temporarily

Given the general lack of legal authority to arrest or to investigate offenses committed by personnel from a MNF contingent, the best approach is for the authorities of that State to deal with the offender. This may require military police from one State to temporarily hold an individual from another State who was committing or about to commit an offense, while waiting for personnel

⁵³ In an example of cross-vesting police powers, Australian and New Zealand military forces, when invited to the Solomon Islands on a multinational peacekeeping mission, were authorized by the host nation legislature to "exercise any powers that may be exercised by police officers appointed under the Police Act."—See *Facilitation of International Assistance Act 2003* (Solomon Islands), § 7(1).

from the relevant coalition force to arrive and take control of the matter. The power to temporarily detain may result from an international agreement as discussed above. It is less certain whether domestic law or international agreements allow State police members the power to temporarily detain a MNF member. Police should seek the voluntary cooperation of the MNF member before taking any action to exert control over the member's freedom of movement.

Power of Apprehension under the U.S. Rules for Court-Martial (R.C.M.)

On U.S. territory, military police and security forces have the same powers of apprehension over foreign military personnel as they do over U.S. civilians, subject to any specific SOFA provision to the contrary. Outside of U.S. territory, including on U.S. bases outside U.S. territory, the authority under the R.C.M. to apprehend is limited to apprehending persons subject to the Code.⁵⁴ Thus, under the R.C.M. there is no power to apprehend foreign personnel not affiliated with U.S. forces outside U.S. territory.

⁵⁴ Rules for Courts Martial 2019, rule 302.

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Chapter 20

AIR FORCE SPECIAL OPERATIONS

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BACKGROUND

Special operations require unique modes of employment, tactics, techniques, procedures (TTPs), and equipment. They are often conducted in hostile, denied, or politically and/or diplomatically sensitive environments, and are characterized by one or more of the following: time-sensitivity, clandestine or covert nature, low visibility, work with or through indigenous forces, greater requirements for regional orientation and cultural expertise, and a higher degree of risk.¹

Special operations provide discrete, precise, and scalable options that can be synchronized with activities of other interagency partners to achieve U.S. Government (USG) objectives.² These operations are designed in a culturally attuned manner to create both immediate and enduring effects to help deter or prevent conflict or prevail in war.³ They assess and shape foreign political and military environments. Although special operations can be conducted independently, most are coordinated with conventional forces (CF), interagency partners, and multinational partners, and may include work with indigenous, insurgent, or irregular forces and indigenous populations.⁴

Special Operations Forces (SOF) undergo a rigorous selection process and generally tend to be more experienced personnel, many of whom maintain competency in more than one military specialty. Selected SOF personnel develop and maintain regional, cultural, and linguistic specialties. Extensive foreign language and cross-cultural training are routine parts of their development. Some SOF personnel require highly technical and advanced training for anticipated missions.⁵

Special operations conducted by small SOF units, with unique capabilities and self-sufficiency (for short periods of time) provide the USG with a wide array of military options. These options may generate less liability or risk of escalation than are normally associated with employment of larger and more visible CF.⁶ Special operations are built on individuals and small units who apply special skills with highly developed traits such as adaptability, improvisation, and innovation. Special operations normally require precise tactical-level planning, detailed intelligence, and knowledge of the cultures and languages of the operational areas.⁷ Critical to the evaluation and planning for future special operations is the review, and potential employment of, joint lessons learned and best practices from previous operations. Collection of joint lessons learned in accordance with the Chairman of the Joint Chiefs of Staff guidance promotes the availability of such information for SOF consideration and decision making.⁸

Special operations are inherently joint because of the integration and interdependency that is established among Air Force, Army, Navy and Marine special operations forces. SOF conduct joint and combined training both within the SOF community, with CF, and with interagency and multinational partners. When employed, SOF deploys with its own Command and Control (C2) structure intact, which facilitates integration into the joint force, retains SOF cohesion,

¹ JOINT PUBLICATION 3-05, *Special Operations* (16 July 2014), ix [hereinafter JP 3-05]. See also Air Force Doctrine, Annex 3-05, *Special Operations*, 6 (1 February 2020).

² JP 3-05, ix.

³ *Id.* I-1.

⁴ *Id.* I-1.

⁵ *Id.* I-5.

⁶ *Id.* I-2.

⁷ *Id.* I-2.

⁸ *Id.*

and provides a supported Joint Forces Command (JFC) with the control mechanism to address specific special operations concerns and coordinates its activities with other components and supporting commands.⁹

While special operations can be conducted unilaterally in support of specific theater or national objectives, the majority are planned and conducted in support of theater campaigns world-wide. Special operations typically complement conventional operations.¹⁰ SOF add unique capabilities to achieve sometimes otherwise unattainable objectives. Integration enables the JFC to maximize CF and SOF core competencies. SOF special skills and low-visibility capabilities also provide an adaptable and scalable military response in situations or crises requiring tailored, precise, and focused use of force.¹¹

AIR FORCE SPECIAL OPERATIONS COMMAND CORE MISSIONS

As an Air Force major command (MAJCOM) and the Air Force component of U.S. Special Operations Command (USSOCOM), Air Force Special Operations Command (AFSOC) is responsible for providing specially tailored aviation-related capabilities to conduct or support special operations core activities and other SecDef-directed taskings. AFSOC refers to these capabilities as core missions. AFSOC core missions include:

1. **Agile Combat Support (ACS).** Enables all AFSOC core missions and capabilities across the range of military operations. Protects, fields, prepares, deploys, maintains, sustains, and reconstitutes Air Force special operations personnel, weapons systems, infrastructure, and information in support of special operations core activities.
2. **Aviation Foreign Internal Defense (AvFID).** AFSOC combat aviation advisors (CAA) assess, train, advise, and assist/accompany partnered forces aviation assets in airpower employment, sustainment, and integration. CAA conduct special operations activities by, with, and through foreign aviation forces. CAA mission priorities are focused on mobility, intelligence, surveillance and reconnaissance (ISR), and precision strike missions, with associated surface integration tasks that enable the air-to-ground integration of partnered forces.
3. **C2.** C2 is the exercise of the commander's authority and direction over assigned and attached forces. Operational C2 elements consist of personnel and equipment with specialized capability to plan, direct, coordinate, and control forces to conduct joint and combined special operations.
4. **Information Operations (IO).** IO is the integrated employment, during military operations, of information-related capabilities in concert with other lines of operation to influence, disrupt, corrupt, or usurp the decision-making of adversaries and potential adversaries while protecting our own forces by producing effects in and through the information environment. The resulting information superiority allows friendly forces the ability to collect, control, exploit, and defend information without effective opposition.

⁹ *Id.* I-5.

¹⁰ *Id.* I-2.

¹¹ *Id.* I-6.

5. **Intelligence, Surveillance, and Reconnaissance (ISR).** ISR synchronizes and integrates sensors, collection assets, and processing, exploitation and dissemination in direct support of current and future SOF operations. It consists of manned and remotely piloted aircraft and distributed common ground systems that deliver actionable intelligence to supported special operations forces. ISR produces detailed, specialized products tailored to mission, customer, and pace of operation that gives SOF a decisive advantage against adversaries.
6. **Precision Strike.** Precision strike provides the JFC and the SOF operator with specialized capabilities to find, fix, track, target, engage, and assess (F2T2EA) targets. F2T2EA can use a single weapon system or a combination of systems to complete the kill chain. Precision strike missions include close air support, air interdiction, and armed reconnaissance. Attributes associated with precision strike include persistence, robust communications, high situational awareness, precise target identification, lethality, and survivability, as required.
7. **Specialized Air Mobility.** Specialized air mobility missions include both specialized mobility and refueling. Specialized mobility is the rapid global infiltration, exfiltration, and resupply of personnel, equipment, and material using specialized systems and tactics. Specialized refueling is the rapid, global refueling of both airborne and overland platforms using specialized systems and tactics, thereby increasing mission flexibility and aircraft range. This is done via in-flight refueling either as a tanker or receiver and can additionally be conducted on the ground through a forward arming and refueling point. These missions may be clandestine, covert, low visibility, or overt and through hostile, denied, or politically sensitive airspace using manned or unmanned platforms with a single aircraft or part of a larger force package. Specialized air mobility aircraft operate across the range of military operations in all environmental regions (*e.g.*, arctic, desert, littoral, mountainous, sea, tropical, etc.), day and night, and during adverse weather conditions to include transient exposure to chemical, biological, radiological, and nuclear effects. Specialized air mobility platforms also have capability to conduct limited military information support operations (MISO) via leaflet drops of printed material. Although modern means of communications will most likely be used in MISO, leaflet drops can and will remain an effective MISO medium when the area of interest does not possess modern means of communications, is outside a high threat area, or is affected by natural disasters.
8. **Special Tactics.** A special tactics team (STT) is a ground force that conducts special operations core activities with expertise in airpower application. A STT conducts special operations at the tactical and operational level to solve threat-centric problems and concurrently applies specialized airpower capabilities. Special tactics capabilities consist of air traffic control; assault zone assessment, establishment and control; terminal attack control; fire support; operational preparation of the environment; special reconnaissance; command and control; full spectrum personnel and equipment recovery; humanitarian relief; battlefield trauma care; and battlefield surgery. The special tactics squadron is the basic unit of action and task organized with subordinate mission-oriented STTs. The special operations surgical team provides a forward resuscitation and surgical capability. Agile special tactics forces enable projection and integration of SOF power across domains, geographic boundaries, and operational environments. Through an integrated warfighting approach, special tactics is uniquely capable of delivering airpower against hard problem sets that are otherwise not within operational reach of the joint force.¹²

¹² Air Force Doctrine, Annex 3-05, 16-18.

COMMAND STRUCTURE AND ORGANIZATION OF SPECIAL OPERATIONS FORCES

United States Special Operations Command (USSOCOM). USSOCOM is a unified combatant command (CCMD). It is unique among the CCMDs in that it performs service-like functions and has military department-like responsibilities and authorities. USSOCOM is responsible for organizing, training and equipping all of the services' SOF active and reserve components. SOF are trained to operate on their own under mission command, using modified/special equipment and irregular TTPs; and they train to accomplish their special operations core activities to achieve strategic and operational objectives. SOF core and augmenting forces are designated by SecDef or the Joint Chiefs of Staff Joint Strategic Capabilities Plan.¹³

Theater Special Operations Commands (TSOCs). A TSOC is a subordinate unified command of USSOCOM. TSOCs perform broad, continuous missions uniquely suited to SOF capabilities. SecDef has assigned operational control (OPCON) of the TSOCs and attached SOF tactical units to their respective geographic combatant commander (GCC) via the Global Force Management Implementation Guidance. A GCC normally exercises OPCON of attached SOF through the commander, theater special operations command (CDRTSOC).¹⁴ TSOCs attached to their respective GCCs, are:

1. Special Operations Command, Europe
2. Special Operations Command, Africa
3. Special Operations Command, Central
4. Special Operations Command, Korea;
5. Special Operations Command, Pacific
6. Special Operations Command, South
7. Special Operations Command, North

Other Joint Special Operations C2 Organizations within GCCs. There are several options for C2 of SOF subordinate to the TSOC: the joint force special operations component command (JFSOCC), joint special operations task force (JSOTF), and the joint special operations air component. Multiple GCC operational requirements and missions may be served most efficiently by multiple SOF organizations. The GCC must establish appropriate command relationships between the SOF commanders (*i.e.*, CDRTSOC, CDRJFSOCC, and CDRJSOTF), and any designated commanders, JTF (CJTfFs), and the theater service and functional component commanders. SOF commanders and CJTFs must establish command relationships among their service and functional components.¹⁵

A JFC has the authority to organize assigned or attached forces with specification of OPCON to best accomplish the assigned mission based on the commander's intent, the concept of operations, and consideration of service organizations.¹⁶ A JSOTF is organized in a manner similar to a conventional JTF and is normally established by a JFC to plan and conduct special

¹³ JP 3-05, I-3.

¹⁴ *Id.* I-3.

¹⁵ *Id.* III-7.

¹⁶ JOINT PUBLICATION 1, *Doctrine for the Armed Forces of the United States* (25 March 2013), incorporating Change 1, 12 July 2017, IV-2.

operations. The JSOTF is a JTF composed of SOF from more than one service and may have CF assigned or attached to support the conduct of specific missions. A JSOTF may be established subordinate to another JTF, a GCC, or sub-unified command (*e.g.*, TSOC). For example, a GCC may designate a JTF to prosecute operations in a specific operational area and attach SOF (established as a JSOTF) to that JTF to plan and execute special operations. Likewise, a CDRTSOC may establish a JSOTF to focus on a specific mission or region within the GCC's AOR.¹⁷

Joint Special Operations Command (JSOC). JSOC is a sub-unified command of USSOCOM. JSOC is charged to study special operations requirements and techniques, ensure interoperability and equipment standardization, plan and conduct special operations exercises and training, and develop joint special operations tactics. JSOC has assigned and attached subordinate units and may deploy to support the GCC's training, exercises, activities, and operations.¹⁸

Nationally-Directed Missions. The President and SecDef use designated SOF to conduct activities and operations across the world. Specific nationally-directed special mission units are comprised of SOF and CF, as required by specific mission requirements.¹⁹

AFSOC. AFSOC organizes, trains, equips, and provides trained Air Force SOF (AFSOF). AFSOC delivers specialized airpower using unique fixed-wing and tilt-rotor aircraft; STTs (including combat controllers, pararescue, special operations weather teams, select tactical air-control party units and augmented with special operations surgical and evacuation teams); CAAs who assess, train, advise, and assist partner nation air forces; and specialized ISR personnel and capabilities that generate near-real-time, all-source intelligence products. AFSOC consists of the Headquarters Air Force Special Operations Command Operations Center, the 1st, 24th, 27th, 137th (Air National Guard), 193rd (Air National Guard), 352nd, and 492nd, and 919th (Air Force Reserve) Special Operations Wings, and the 353rd Special Operations Group.²⁰

U.S. Army Special Operations Command (USASOC). USASOC is the designated Army component command of USSOCOM and provides manned, trained, and equipped Army SOF. USASOC consists of a variety of Army organizations, including the U.S. Army John F. Kennedy Special Warfare Center and School; 1st Special Forces Command which includes the 8th Psychological Operations Group (Airborne), 95th Civil Affairs Brigade (Airborne), 528th Sustainment Brigade (Airborne), and Special Forces Groups; 75th Ranger Regiment; and U.S. Army Special Operations Aviation Command, which includes the 160th Special Operations Aviation Regiment (Airborne).²¹

¹⁷ JP 3-05, A-1.

¹⁸ *Id.* I-4.

¹⁹ *Id.* I-5.

²⁰ *Id.* I-4. See also AFSOC Heritage Pamphlet (updated July 2019) and USSOCOM 2020 Fact Book (2020), 27, <https://www.socom.mil/latest-factbook>

²¹ *Id.* I-3 – I-4 and U.S. Army Special Operations Command Website, <https://www.soc.mil/> (last visited 28 May 2020).

Naval Special Warfare Command (NAVSPECWARCOM). NAVSPECWARCOM is the designated Navy component command of USSOCOM and provides manned, trained, equipped Sea, Air and Land (SEAL) forces. Navy SOF consists of eight SEAL teams; one SEAL delivery vehicle team; three special boat teams; and supporting commands. Supporting forces also include ISR, cultural engagement; logistics support; and tactical mobility. Mobility forces include combatant craft, combat submersibles (small submarine-launched underwater craft), and tactical ground mobility vehicles. These forces combine into direct-action oriented, maritime-focused, scaled and tailored force packages that integrate intelligence gathering and analysis, a versatile portfolio of insertion and extraction techniques, logistic support, flexible C2 options, and a high density of specialized capabilities. NAVSPECWARCOM teams and supporting commands are organized into six naval special warfare groups; the Naval Special Warfare Center (training); and Naval Special Warfare Development Group (tactical development and evaluation).²²

U.S. Marine Corps Forces, Special Operations Command (MARSOC). MARSOC is the designated Marine Corps component of USSOCOM and trains, equips, and provides Marine Corps SOF (MARSOF). MARSOC provides MARSOF that operate independently or as part of larger units. Marine special operations battalions can be task-organized to conduct specific special operations missions in support of USSOCOM or a supported GCC. MARSOC consists of the Marine Special Operations Regiment, 1st, 2nd, and 3rd (Marine special operations battalions), Marine Special Operations Support Group, and the Marine Special Operations School.²³

LEGAL SUPPORT TO SPECIAL OPERATIONS

Each SOF commander has a servicing staff judge advocate (SJA) to advise on legal issues during all stages of the planning and execution of special operations missions.²⁴ SOF operations can implicate U.S., international, and possibly host nation, laws and regulations. It is imperative that SOF commanders ensure their forces operate in accordance with the law of war and the established ROE.²⁵

The employment of Air Force and joint SOF may incorporate significant legal considerations beyond those of CF, including law of war, use of force, fiscal law, environmental law, international agreements, and other legal considerations including U.S. and/or host nation domestic laws and policies. The key to avoiding legal obstacles to mission accomplishment is early identification and resolution of potential legal issues before they become “show stoppers.” Active involvement by SOF-knowledgeable judge advocates, providing legal advice to commanders, planners, and operators, should be encouraged from the earliest stages of planning throughout mission execution. Commanders should ensure that qualified legal support is integrated into mission planning, ROE development and publication, aircrew and operator training, and actual mission execution.²⁶

²² *Id.* I-4.

²³ *Id.*

²⁴ *Id.* IV-11.

²⁵ *Id.*

²⁶ Air Force Doctrine, Annex 3-05, 35.

When assigned to or supporting a special operations JTF, judge advocates provide legal counsel and advice on a wide range of operational issues, encompassing the breadth of military legal practice, and are integral members of a command's staff.²⁷ Judge advocates/legal advisors:

1. Provide pre-deployment and post-deployment legal assistance, as necessary.
2. Interpret, advise-upon, or brief the content of any applicable status-of-forces agreements, and other relevant international agreements.
3. Interpret ROE and assist J3 in training personnel.
4. Assist J3 in development of supplemental ROE, as necessary.
5. Support appropriate law of war training for all personnel.
6. Provide advice during target selection development, including the review of no-strike and restricted target lists.
7. Ensure that proper command relationships are identified.
8. Ensure proper processing of all general orders, including orders establishing provisional rear detachments with Uniform Code of Military Justice (UCMJ) jurisdiction as appropriate.
9. Review and provide advice on plans and procedures.
10. Review and provide advice on procedures for handling detainees, refugees, and displaced persons.
11. Provide advice on procedures for addressing asylum and temporary refuge.
12. Provide commanders advice on maintaining good order and discipline, including prosecutions under the UCMJ, nonjudicial punishment, and other adverse administrative actions.
13. Claims.
 - (a) Prepare for potential claims events.
 - (b) Identify and investigate potentially compensable events.
 - (c) Coordinate with the proper claims adjudication authority to resolve claims.
14. Advise staff on contract law issues, including fiscal law, military construction, and humanitarian assistance (Denton shipments, Title 10 U.S.C. § 402, "Transportation of humanitarian relief supplies to foreign countries").
15. Advise staff on host nation labor law.
16. Advise staff on environmental law, including hazardous waste disposal.
17. Brief all personnel on appropriate ethical standards.
18. Provide legal advice to other staff agencies, as appropriate.

²⁷ See generally JOINT PUBLICATION 3-84, *Legal Support* (2 August 2016).

19. Identify the presence, expertise, and responsibilities of NGOs to the commander as they pertain to the legal issues. Advise on what obligations the commander has to assist or cooperate with requests from NGOs. The SJA should work closely with other staff elements, primarily the J2 and J9, in developing this advice. Commanders may also consider forming an interagency coordination group.²⁸
20. Report questionable activity to the general counsel and inspector general of the DoD intelligence component concerned.
21. Determine what other U.S. legal services in the area are available.
22. Learn the procedures and formats for reporting to the CDRJSOTF all alleged serious crimes and incidents of national or international interest involving JSOTF personnel (*e.g.*, a serious vehicle mishap).
23. Identify service component legal advisors supporting CDRJSOTF.²⁹

²⁸ See generally JOINT PUBLICATION 3-08, *Interorganizational Cooperation* (12 October 2016), validated 18 October 2017.

²⁹ JP 3-05, B-44 – B-46.

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- 10 U.S.C. § 321, Training with Friendly Foreign Countries: Payment of Training and Exercise Expenses
- 10 U.S.C. § 322, Special Operations Forces: Training with Friendly Foreign Forces
- 10 U.S.C. § 401, Humanitarian and Civic Assistance Provided in Conjunction with Military Operations
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- 22 U.S.C. §§ 2751, *et seq.*, Arms Export Control Act
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Chapter 21

NONCOMBATANT EVACUATION OPERATIONS

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INTRODUCTION

Noncombatant evacuation operations (NEOs) are conducted to assist the Department of State (DoS) evacuate U.S. citizens, DoS and other United States Government (USG) civilian personnel, and designated host nation and third country nationals from areas of danger overseas to safe havens or to the United States. NEOs generally occur in the event of imminent or actual hostilities or civil disturbances overseas, but may also be directed in anticipation of any natural or manmade disasters. NEOs usually occur with little advance warning and pose challenging legal concerns related to individual status. Decisions regarding status often affect a number of legal rights and may cause considerable scrutiny if applicable statutes and regulation are not applied correctly.

The DoS directs NEOs and the DoD provides support, to include airlift and security. One of the primary foundations to the governance of NEOs is a memorandum of agreement between the DoS and DoD (the MOA).¹

A NEO is defined as:

An operation whereby noncombatant evacuees are evacuated from a threatened area abroad, which includes areas facing actual or potential danger from natural or man-made disaster, civil unrest, imminent or actual terrorist activities, hostilities, and similar circumstances, that is carried out with the assistance of the Department of Defense.²

In accordance with DoDD 3025.14, *Evacuation of U.S. Citizens and Designated Aliens from Threatened Areas Abroad*, DoD will support the Secretary of State's (SecState's) overall formal responsibility to U.S. citizens and nationals, including: (1) Protecting them, and possibly evacuating them to relatively safe areas; (2) Reducing their risk of death or seizure as hostages; and (3) Reducing their number to a minimum in combat areas so that the combat effectiveness of U.S. and allied forces is not impaired.³ NEOs may restrict the use of force to that necessary to complete the mission, defend evacuees, and provide for self-defense of military personnel.⁴

MOA BETWEEN DOD AND DOS

While DoS retains ultimate responsibility for NEOs under Executive Order 12656, the MOA provides further details on respective roles and responsibilities.⁵ The MOA details that, “[o]nce the decision has been made to use military personnel and equipment to assist in the implementation of emergency evacuation plans, the military commander is solely responsible for conducting the operations. However, except to the extent that delays in communication would make it impossible to do so, the military commander shall conduct those operations in coordination with and under policies established by the Principal U.S. Diplomatic or Consular Representative.” Under

¹ Memorandum of Agreement between the Departments of State and Defense on the Protection and Evacuation of U.S. Citizens and Nationals and Designated Other Persons from Threatened Areas Overseas (14 July 1998).

² JOINT PUBLICATION 3-68, *Noncombatant Evacuation Operations* (18 November 2015), validated 14 November 2017 [hereinafter JP 3-68], GL-6.

³ DoDD 3025.14, *Evacuation of U.S. Citizens and Designated Aliens from Threatened Areas Abroad* (26 February 2013), incorporating Change 1, 30 November 2017, 1.

⁴ JP 3-68, A-1.

⁵ Executive Order 12656, *Assignment of Emergency Preparedness Responsibilities*, 53 Fed. Reg. 47491, 3 C.F.R. 585, §§ 502 and 1301 (18 November 1988), as amended by Executive Orders 13074 (9 February 1998); 13228 (8 October 2001); 13286 (28 February 2003); and 13603 (16 March 2012).

the MOA, the DoS is responsible for “evacuation related costs” and the DoD is responsible for “protection related costs.”⁶

USG FRAMEWORK

A NEO begins when a U.S. ambassador requests and obtains approval of the Under Secretary of State for Management authorizing the departure of designated personnel. The table below explains the command and control elements to accomplish this.⁷

Table 21.1. Organization of Command and Control for Noncombatant Evacuation Operations

Organization	Action
Chief of Mission	Principal DoS officer. Serves as the lead official responsible for the evacuation of all U.S. noncombatants within the host nation, to include DoD dependents.
Washington Liaison Group (WLG)	Chaired by a DoS representative, this group of DoS and DoD personnel fulfill responsibilities for national coordination for protection and evacuation of U.S. citizens abroad. WLG monitors Regional Liaison Group (RLG) activities, as specified below.
Regional Liaison Groups (RLGs)	<p>Co-located with combatant commands (CCMDs), a DoS representative chairs this group, which includes appropriate CCMD staff and other departments and agencies as appropriate. The chairperson of each RLG receives instructions from the SecState, and the military members receive their instructions from the SecDef through the relevant CCMD. The RLG performs the following functions:</p> <ul style="list-style-type: none"> • Provides support to officials at diplomatic and consular posts and military commands within the relevant region by serving as a liaison between the WLG, military commands, and diplomatic posts • Assists diplomatic posts and appropriate military commands in planning for evacuation and/or in-place protection of U.S. citizens and nationals, and other designated persons in an emergency • Reviews emergency action plans created by the diplomatic posts and forwards them to the DoS for approval and distribution

⁶ MOA on Protection and Evacuation.

⁷ *Id.*

ROLE OF THE COMBATANT COMMANDERS

Combatant commanders (CCDRs) prepare and maintain plans for assisting the DoS in the protection and evacuation of U.S. noncombatants abroad. When a NEO is ordered by the DoS, the CCDR will assign the NEO mission to either a service component or establish a joint task force, commanded by a joint force commander (JFC). The JFC or service component commander is responsible for all phases of the operation, to include the intermediate staging base and temporary safe haven. The CCDR is also responsible for examining all DoS emergency action plans for countries and consular districts in their area of responsibility (AOR) and for areas in which they might participate in NEOs.

LEGAL ISSUES

Operational Environment Considerations. NEOs fall into three categories based on host nation intent and the circumstances:⁸

1. ***Permissive Environment*** – Host country military and law enforcement have control as well as the intent and capability to assist operations a unit intends to conduct.
2. ***Uncertain Environment*** – Host government forces do not have total effective control in the AOR.
3. ***Hostile Environment*** – Evacuation may be under conditions ranging from civil disorder, to terrorist action, to full-scale combat. The JFC may elect to deploy a sizable security element with the evacuation force.⁹

SOVEREIGNTY

Territorial sovereignty may become an issue when U.S. forces are ingressing and egressing out to safe havens. A safe haven is a stopover point where evacuees are initially taken once removed from danger before being taken to their ultimate destination.¹⁰ NEO planners need to know the boundaries of territorial seas and national airspace of the countries in their AOR. Absent the consent of the host government, U.S. forces should respect the territorial boundaries in the ingress and egress routes.

⁸ JP 3-68, IV-14.

⁹ *Id.* IV-15.

¹⁰ *Id.* VII-1.

LAW OF WAR

Appendix B of JP 3-68 expounds on the “legal considerations” of NEOs.¹¹ The JFC or service component and subordinate commanders must ensure that participating personnel abide by all applicable law and policy, to include the law of war and other relevant international law, the Uniform Code of Military Justice, and the operation’s Rules of Engagement (ROE)/ Rules for the Use of Force (RUF).¹² Legal advisors should consult and comply with JP3-68, Appendix B.

Specific Standing ROE and RUF guidance for NEOs is found in Enclosure G of the CJCSI 3121.01B. When drafting ROE, the CCDR will generally coordinate with the U.S. Marine Corps security guards (who are assigned to the DoS), other embassy security, and host nation security. Depending upon the nature of the anticipated threat, the ROE may need to be supplemented with additional authorities. If warranted, the force commander may seek approval from the appropriate higher authority for authorization to employ measures such as firing warning shots at demonstrators or employing similar measures proportional to the threat encountered. The possible use of riot control agents (RCAs) will undoubtedly be addressed early on in the planning process. Legal advisors should consult and comply with Appendix A of JP 3-68, which directly addresses ROE and RCAs.¹³

ASYLUM AND TEMPORARY REFUGE

JTF or service component commanders may not grant political asylum to any foreign national. They may grant temporary refuge under emergency conditions when there is imminent danger to the safety, health, or life of any person. Commanders must understand that if temporary refuge is granted, the approval of a secretary of a military department is necessary to release the individual. All requests for asylum should be referred to the embassy or senior DoS representative.¹⁴ Additionally, AFI 51-402, *International Law*, details Air Force policy and practice for handling requests for asylum.¹⁵

NEOs provide challenging legal opportunities for judge advocates to work with DoS and other U.S. interagency officials to support American citizens overseas with response to natural disasters or civil unrest in a host nation.

¹¹ *Id.* B-1.

¹² *Id.*

¹³ *Id.* A-2.

¹⁴ *Id.* B-2.

¹⁵ AFI 51-402, *International Law* (6 August 2018), Part 4 .

REFERENCES

Executive Order 12656, *Assignment of Emergency Preparedness Responsibilities*, 53 Fed. Reg. 47491, 3 C.F.R. 585, §§ 502 and 1301 (18 November 1988)

Memorandum of Agreement between the Departments of State and Defense on the Protection and Evacuation of U.S. Citizens and Nationals and Designated Other Persons from Threatened Areas Overseas (14 July 1998)

CJCSI 3121.01B, *Standing Rules of Engagement/Standing Rules for the Use of Force (SROE/SRUF) for U.S. forces*, (13 June 2005) (Classified)

JOINT PUBLICATION 3-68, *Noncombatant Evacuation Operations* (18 November 2015), validated 14 November 2017

DoDD 3025.14, *Evacuation of U.S. Citizens and Designated Aliens from Threatened Areas Abroad* (26 February 2013), incorporating Change 1, 30 November 2017

AFI 51-402, *International Law* (6 August 2018)

Chapter 22

RULE OF LAW OPERATIONS

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INTRODUCTION

In recent times, many JAG Corps personnel have deployed to what are called “Rule of Law” deployments. Rule of law deployments typically involve joint and interagency personnel, and may present unique environments in which to operate. They frequently have unspecified missions, not necessarily involving the kind of day-to-day details typical of military missions. Often these types of deployments have required deployed personnel to assume roles with a great deal of innovation, creativity and energy. Finally, these deployments have generally involved significant interaction with host nation personnel. Not only can rule of law deployments be personally and professionally rewarding, the strategic implications of establishing the rule of law are immeasurable. The purpose of this chapter is to provide a basic orientation to rule of law deployments and provide valuable references for use on these deployments.

WHAT IS RULE OF LAW?

Rule of law operations fall within the broader construct of stability operations. It is DoD policy to plan and conduct stabilization in support of mission partners across the range of military operations in order to counter subversion; prevent and mitigate conflict; and consolidate military gains to achieve strategic objectives, to the extent authorized by law.¹ DoD recognizes that stabilization is an inherently political endeavor that requires aligning U.S. Government (USG) efforts to create conditions in which locally legitimate authorities and systems can peaceably manage conflict and prevent violence.² DoD is a support element in this endeavor, providing requisite security and reinforcing civilian efforts. The Department of State (DoS) is the overall lead federal agency for stabilization efforts, and the U.S. Agency for International Development (USAID) is the lead implementing agency for non-security U.S. stabilization assistance.³

According to Joint Publication (JP) 3-07, *Stability*, military contributions to stabilization consist of those various missions conducted outside the United States in coordination with other instruments of national power to maintain or reestablish a safe and secure environment, provide essential governmental services, emergency infrastructure reconstruction, and humanitarian relief.⁴ Commanders might employ stability capabilities as part of the theater campaign plan.⁵ Stability actions are conducted in each joint phase and should not be confused with joint phase IV (Stabilize).⁶

Rule of law operations are one component of a comprehensive stabilization process that may be included in a theater campaign plan. As described in JP 3-07,

The rule of law function refers to programs conducted to ensure all individuals and institutions, public and private, and the state itself are held accountable to the law, which is supreme. The rule of law in a country is characterized by just legal frameworks, public order, accountability to the law, access to justice, and a culture of lawfulness. Rule of law requires laws that are publicly promulgated, equally enforced, and independently adjudicated, and that are consistent with international human rights principles. It also

¹ DoDD 3000.05, *Stabilization* (13 December 2018), § 1.3(a).

² *Id.* § 1.2(a).

³ *Id.* § 1.2(b).

⁴ JOINT PUBLICATION 3-07, *Stability* (3 August 2016), I-1 [hereinafter JP 3-07].

⁵ *Id.*

⁶ *Id.*

requires measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in applying the law, separation of powers, participation in decision making, and legal certainty.”⁷

According to Army Field Manual (FM) 3-07, *Stability*, “The rule of law means that all persons, institutions, and entities, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, independently adjudicated, and consistent with international human principles.”⁸

Generally, the rule of law helps to ensure the following conditions:

- The State monopolizes the use of force and coercion in the resolution of disputes
- Individuals are secure in their persons and property
- The State is bound by law and does not act arbitrarily
- The law can be readily determined and is stable enough to allow individuals to plan their affairs
- Individuals have meaningful access to an effective and impartial justice and dispute resolution system
- Individuals have the ability to enforce contracts through an impartial, transparent judicial process
- The State protects basic human rights and fundamental freedoms
- Individuals understand and respect judicial institutions and develop a belief in their equity and fairness that guides the conduct of their daily lives
- Individuals are treated equally under the law regardless of membership in any social class or category⁹

RULE OF LAW OPERATIONAL PROFILES

As noted in Army Doctrine Publication (ADP) 3-07, *Stability*, establishing effective rule of law typically requires a review of the host nation legal framework and general justice reform programs. Importantly, all efforts to establish and support the rule of law should account for the customs, culture, and ethnicity of the local populace.¹⁰ Military forces may be tasked to establish an interim rule of law based upon international legal principles if the host nation has no existing framework of laws.¹¹ Planning, preparing, and executing the transfer of responsibility from military to host-nation control for rule of law is critical for public confidence but also often proves to be the most complex aspect of stability operations. Failure to ensure continuity of the rule of law through such a transition threatens the security of the local populace, the legitimacy of the host-nation, and achievement of the desired end state.¹²

⁷ *Id.* III-44.

⁸ FM 3-07, *Stability* (2 June 2014), §§ 3-101.

⁹ JP 3-07, III-45.

¹⁰ ADP 3-07, *Stability* (31 July 2019), §§ 1-50.

¹¹ *Id.* §§ 1-51.

¹² *Id.* §§ 1-52.

The rule of law also plays a key role in counterinsurgency operations, as recognized in counterinsurgency doctrine. Rule of law is a goal and end state of counterinsurgency operations, sought by host nation authorities, international and intergovernmental organizations, and USG agencies such as the DoS, sometimes with U.S. military support.¹³ According to counterinsurgency doctrine, key aspects of the rule of law include: a government that derives its power from the governed and competently manages, coordinates, and sustains collective security, as well as political, social, and economic development; sustainable security institutions; and fundamental human rights.¹⁴ In counterinsurgency environments where justice mechanisms are in need of rebuilding, interim justice mechanisms may become necessary. This interim justice development should be mutually reinforcing with institutional capacity building; rule of law development is more rapid “when building the capacity of police, prosecutors, judiciary, civil dispute resolution, and corrections occurs simultaneously rather than sequentially.”¹⁵

Transitional justice mechanisms may consist of truth commissions, trials, amnesties, purges from office, and reparations as the means to addressing past violations of human rights and humanitarian law. These can be effective in building the rule of law and reducing support for an insurgency.¹⁶

Whether in support of stability operations or counterinsurgency operations, categories of rule of law activities could include:

- The criminal justice system
- Law enforcement
- Judicial systems and processes
- Corrections
- The civil judicial system
- Anticorruption
- Elections
- Detention
- Transitional military authority and military governance
- Transitional justice
- Coordination with host nation leaders, police forces, legal personnel, ministry of defense and security force legal personnel¹⁷

ROLE OF LEGAL PERSONNEL

JAGs and paralegals are well suited to play a key role in support of these rule of law activities. In addition to the references cited throughout this Chapter, a useful reference for JAGs and paralegals is the *Rule of Law Handbook: A Practitioner’s Guide for Judge Advocates*, published by the U.S. Army Center for Law and Military Operations (CLAMO) at the Army Judge Advocate General’s

¹³ FM 3-24, *Insurgencies and Countering Insurgencies* (13 May 2014), §§ 13-61.

¹⁴ *Id.*

¹⁵ *Id.* §§ 13-65.

¹⁶ *Id.* §§ 13-66.

¹⁷ FM 3-07, §§ 3-106.

Legal Center and School (TJAGLCS).¹⁸ The Rule of Law Handbook advises that JAGs should anticipate requirements and prepare accordingly, as “potential requirements will depend upon the phase of the intervention and the status of the host nation.”¹⁹ Flexible templates and plans are essential, as are good handover procedures from predecessors in deployment.²⁰

It is imperative that a JAG or paralegal embarking on a rule of law deployment understand the key players involved. In fact, the JAG or paralegal’s first question when approaching a rule of law deployment should be: who else is involved in accomplishing this mission at the deployed location? Rule of law missions are truly joint, interagency, and multi-national endeavors.

With regard to the DoD’s efforts, rule of law deployments typically support joint organizations. Most Airmen on these missions deploy to organizations led by ground components (U.S. Army and Marine Corps). Stated in operational terms, the lead component will typically exercise tactical control.

The JAG Corps of all services are not the only military personnel involved in the rule of law mission. Military police and security forces members frequently play leading roles in rule of law missions. Examples of such roles include working detainee operations (*e.g.*, working in a theater internment facility or similar confinement facility), arresting and transporting detainees, and coordinating with police stations at both a local and regional level. More specialized military criminal investigators may also work within the DoD rule of law mission. This includes the Air Force Office of Special Investigations, Naval Criminal Investigative Service, and Army Criminal Investigation Command. These more experienced federal agents investigate crimes, train host nation investigators, and perform a liaison service with host nation law enforcement. JAGs will find experienced investigators indispensable in accomplishing their own mission. Finally, military civil affairs units, which play a critical role in rule of law deployments, are typically staffed by a variety of different career fields and services.

As noted above, rule of law missions almost always involve interagency personnel, with the military acting in a support role. This means that many other departments and agencies outside DoD are involved in accomplishing the rule of law mission. These other actors include persons from the DoS, the Department of Justice, the Department of Commerce, USAID, and other federal agencies. Notably, each of these departments and agencies has smaller units within them that address discrete areas of the rule of law mission. Also, while some of these departments and agencies operate in isolation, a JAG or paralegal may deploy to a location or a unit that has all of these agencies plus others present and working together in the same effort. For example, a JAG may be assigned to a provincial reconstruction team which includes a host of interagency partners working to set government structures back into place. In addition, task forces dealing with detained persons, major crimes, and similar law and order missions will also include actors from these and other departments and agencies.

Rule of law deployments are not only characterized as joint and interagency ventures; they are also multi-national in nature. Attorneys, law enforcement specialists, and diplomats from States worldwide frequently make huge contributions to rule of law missions with which the United States is involved. For example, when the Law and Order Task Force existed at Multi-National Force – Iraq from 2007 to 2009, it consisted not only of joint and interagency partners from

¹⁸ *Rule of Law Handbook: A Practitioner’s Guide for Judge Advocates*, Judge Advocate General’s Legal Center and School, U.S. Army Center for Law and Military Operations (2015).

¹⁹ *Id.* 13.

²⁰ *Id.*

within the U.S. bureaucracy, but also British and Australian law enforcement personnel and Australian lawyers.

In addition to this wide array of personnel, effective rule of law deployments must include host nation personnel. Including local officials is essential to the ultimate goal of rule of law missions—to turn everything over to the host nation. Thus, at its best, every rule of law mission will, to one degree or another, train, equip, and enable the host nation to take over the mission.

Successful rule of law missions require immersion in the host nation's culture, and every effort to understand the host nation and its legal systems—laws, procedures, and the actors involved.

With this in mind, it is important to build relationships with host nation personnel. A JAG should take opportunities to ask questions about local legal systems, background, culture, and views. A great deal of mission accomplishment may be achieved through interaction with host nation personnel. Interpreters may be a valuable source of understanding and may often teach deployed personnel about the host nation's culture.

Finally, rule of law deployment operations are often vague, with limited guidance. JAGs and paralegals need to temper their own expectations for success. Effecting change (*i.e.*, bringing about the desired end state known as rule of law) is an extremely slow and often painstaking process. Progress may be difficult to discern.

CONCLUSION

JAGs and paralegals have an important role to play in global efforts to support the rule of law because of their unique understanding of the rule of law and its strategic context in stability and counterinsurgency operations. Success in the rule of law environment requires understanding the various players, what they bring to the effort, and, most importantly, how they make their various contributions.

REFERENCES

JOINT PUBLICATION 3-07, *Stability* (3 August 2016)

JOINT PUBLICATION 3-84, *Legal Support to Military Operations* (2 August 2016)

DoDD 3000.05, *Stabilization* (13 December 2018)

DoDI 3000.05, *Stability Operations* (16 September 2009)

United States Joint Forces Command, *Handbook for Military Support to Rule of Law and Security Sector Reform* (19 February 2016)

ADP 3-07, *Stability* (31 July 2019)

FM 3-07, *Stability* (2 June 2014)

FM 3-24, *Insurgencies and Countering Insurgencies* (13 May 2014)

Rule of Law Handbook: *A Practitioner's Guide for Judge Advocates*, Judge Advocate General's Legal Center and School, U.S. Army Center for Law and Military Operations (2015)

Chapter 23

CIVILIAN PERSONNEL SUPPORTING MILITARY OPERATIONS

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BACKGROUND

Civilians, both DoD civilian employees and DoD contractor personnel, have historically played important roles in the conduct of military operations. This Chapter provides guidance on the issues which relate to the employment and presence of civilians in an operational environment.

SUGGESTIONS FOR ANALYZING CIVILIAN ISSUES

At the outset, legal personnel should determine the status of relevant civilian personnel under U.S. law, the law of the host nation, and international law. Correctly determining the status of civilian personnel is critical because different rules may apply depending on the person's status (*e.g.*, U.S. citizen, host nation citizen, third country national (TCN), DoD civilian, or contractor).

Legal personnel should obtain a copy of any applicable international agreement (IA) between the host nation and the United States. The IA may be a Status of Forces Agreement (SOFA), a Defense Cooperation Agreement, an Exchange of Notes (EN), or some similar arrangement. The IA will likely spell out the rights and responsibilities of the civilians with respect to host nation laws and jurisdiction. The following resources may help determine if the United States has an IA with a particular country:

- The Department of State (DoS) website¹
- The FLITE Knowledge Management (KM) website²
- The Center for Law and Military Operations (CLAMO) website³

Additionally, legal personnel should review applicable combatant command (CCMD) directives, guidance, and policies concerning civilian personnel. These documents should provide direction regarding many of the issues that may arise during deployment—*e.g.*, arming civilians, clothing, providing medical support to civilians, and other topics. Consult appropriate Air Force component command subject matter experts for Air Force and CCMD-specific guidance.

The references below are intended to facilitate more in-depth research for issues involving civilians who are deployed with the force. This Chapter is broken down into three sections:

1. Disciplinary issues involving civilians, including DoD civilian employees and DoD contractor personnel;
2. DoD defense contractors; and
3. DoD civilian employees.

¹ *Treaties in Force*, U.S. DEP'T OF STATE, OFFICE OF TREATY AFFAIRS, <https://www.state.gov/treaties-in-force> (last visited 9 June 2020).

² *International Negotiations and Agreements*, FLITE KM, <https://kmjas.jag.af.mil/moodle/course/view.php?id=349> (last visited 9 June 2020; restricted access).

³ U.S. DEP'T OF ARMY, CENTER FOR LAW AND MILITARY OPERATIONS (CLAMO), *Welcome to the Center for Law and Military Operations (CLAMO)*, <https://www.jagcnet.army.mil/CLAMO> (last visited 9 June 2020) (restricted links from this website also include country studies, which are a quick way to learn about a country to which personnel are deploying).

DISCIPLINARY ISSUES INVOLVING CIVILIANS, INCLUDING DOD CIVILIAN EMPLOYEES AND DOD CONTRACTOR PERSONNEL

Recognizing the new reality of civilians deploying in great numbers, Congress amended the Uniform Code of Military Justice (UCMJ) to extend UCMJ jurisdiction over persons serving with or accompanying the U.S. armed forces in the field in times of “declared war or a contingency operation.”⁴

Background

The 2007 John Warner National Defense Authorization Act (NDAA) amended UCMJ Article 2(a)(10) to extend UCMJ jurisdiction over persons serving with or accompanying an armed force in the field during declared war or contingency operations. On 10 March 2008, the SecDef issued guidance on the implementation of this expanded UCMJ jurisdiction.⁵ The SecDef Memorandum includes three Attachments. Attachment 1 summarizes the commander’s and military law enforcement’s authority when a crime is committed within the commander’s geographic area of responsibility outside the United States. Attachment 2 sets forth the SecDef’s determination regarding application of the UCMJ to “all disciplinary actions under this UCMJ amendment.” Attachment 3 describes the chain of notification procedures for exercising the UCMJ jurisdiction.

SecDef re-emphasized the commander’s authority and responsibility to “respond to an incident, restore safety and order, investigate, apprehend suspected offenders, and otherwise address the immediate needs” of a given situation, including situations where the alleged offender’s identity or affiliation is undetermined. SecDef then noted that the “unique nature” of expanded UCMJ jurisdiction over civilians serving with or accompanying the armed forces “requires sound management over when, where, and by whom such jurisdiction is exercised,” and set forth the process for exercising UCMJ authority over DoD contractor personnel and DoD civilian employees.

Who Can Exercise UCMJ Authority?

According to Attachment 2 to the SecDef Memorandum, only the SecDef may exercise UCMJ authority over persons subject to Article 2(a)(10) of the UCMJ with respect to:

1. Offenses committed within the United States (the states, the District of Columbia, and the commonwealths, territories and possessions of the United States);
2. Persons who were not at all times, during the alleged misconduct, located outside the United States; and
3. Persons who are located within the United States when court-martial charges are preferred or Article 15s are offered.

Subject to the SecDef’s authority as noted above, geographic combatant commanders (GCCs) may withhold UCMJ authority within the CCMC.

⁴ 10 U.S.C § 802(a)(10) (2016).

⁵ SecDef Memorandum, *UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations* (10 March 2008), incorporating Change 1, 23 September 2010.

General Court-Martial Convening Authority (GCMCA) commanders assigned or attached to a geographic CCMD for situations must provide written notification to the CCMD before exercising UCMJ authority.

All other commanders must meet notification requirements and forward all available information through command channels to the first GCMCA in the chain of command for consideration and disposition under Rules for Courts-Martial 407.

What UCMJ Authority Can be Exercised?

Authority was granted to exercise court-martial convening authority over DoD contractor personnel and DoD civilian employees.

Authority was also granted to impose nonjudicial punishment over DoD contractor personnel and DoD civilian employees.

NOTE: However, UCMJ authority does not confer the authority for day-to-day supervision and control over DoD contractor personnel; authority over DoD contractor personnel is governed by the controlling contract.

Procedures

Combatant commanders (CCDRs) must notify the Department of Justice (DoJ), through the DoD, in accordance with Attachment 3 to the SecDef Memorandum and DoDI 5525.11 in order that the DoJ may determine whether U.S. federal criminal jurisdiction under the Military Extraterritorial Jurisdiction Act (MEJA) or other federal law applies and will be pursued.

NOTE: Commanders and military criminal investigators at all levels may conduct law enforcement and criminal investigations. Likewise, military criminal investigations may continue as necessary in coordination with DoJ, unless DoJ informs DoD that it will assume sole responsibility for the investigation.

The DoJ must decide whether or not to exercise jurisdiction within 14 days of formal notification; however, an extension can be requested by the Deputy Attorney General.

1. If the DoJ elects to exercise jurisdiction under MEJA, the DoD's authority is terminated/withheld until the prosecution is either terminated or completed.
2. If the DoJ declines jurisdiction under MEJA, the DoD may proceed with UCMJ action.

Military Extraterritorial Jurisdiction Act of 2000 (MEJA)

- Military Extraterritorial Jurisdiction Act of 2000 (MEJA), *as amended by* § 1088 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (18 U.S.C. §§ 3261-3267)

Prior to MEJA, the military had been prohibited since the 1950s from prosecuting by courts-martial civilians accompanying the armed forces overseas in peacetime who committed criminal offenses. Many federal criminal statutes lack extraterritorial application, including those penalizing rape, robbery, burglary, and child sexual abuse. In addition, many foreign States decline to prosecute crimes committed within their nation, particularly those involving U.S. property or another U.S. person as a victim. Furthermore, military members who committed crimes while overseas, but

whose crimes were not discovered or fully investigated prior to their discharge from the armed forces, are no longer subject to court-martial jurisdiction. The result was jurisdictional gaps in which crimes went unpunished.

MEJA closed the jurisdictional gaps by extending federal criminal jurisdiction to certain civilians overseas and former military members.⁶

Covered Conduct and Persons. MEJA covers conduct committed outside the United States, which would be a crime under U.S. law if committed within U.S. special maritime and territorial jurisdiction, punishable by imprisonment for more than one year.⁷

Covered persons include:⁸

1. Members of the armed forces who, by federal indictment or information, are charged with committing an offense with one or more defendants, at least one of whom is not subject to the UCMJ;
2. Members of a reserve component who commit an offense when they are not on active duty or inactive duty for training;
3. Former members of the armed forces who were subject to the UCMJ at the time the alleged offense was committed, but are no longer subject to the UCMJ;
4. Civilians employed by the armed forces outside the United States, who are not a national of or resident in the host nation, who commit an offense while outside the United States in connection with such employment. Such civilian employees include:
 - (a) Persons employed by DoD, including nonappropriated funds instrumentalities (NAFI);
 - (b) Persons employed as a DoD contractor, including subcontractors at any tier;
 - (c) Employees of a DoD contractor, including subcontractors at any tier; and
 - (d) Civilian employees, contractors (including subcontractors at any tier), and civilian employees of a contractor (including subcontractors at any tier) of any other federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the DoD overseas.
5. Dependents of anyone covered above if the dependent resides with the person, allegedly committed the offense while outside the United States, and is not a national of or ordinarily resident in the host nation. Command sponsorship is not required for the MEJA to apply.

The MEJA does not apply to persons whose presence outside the United States at the time the offense is committed is solely that of a tourist, student, or other person not accompanying the armed forces.

⁶ DoDI 5525.11, *Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members* (3 March 2005), para. 2.5.

⁷ 18 U.S.C. § 3261(a) (2000).

⁸ *Id.*

Foreign Criminal Jurisdiction. If a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting the person, the United States will not prosecute the person for the same offense, absent approval by the Attorney General or Deputy Attorney General.⁹

TCNs who might meet the requirements above for MEJA jurisdiction may have a nexus to the United States that is so tenuous that it places into question whether the Act should be applied. The DoS should be notified of any potential investigation or arrest of a TCN.

DoDI 5525.11 contains detailed guidance regarding the procedures required for MEJA use, including investigation, arrest, detention, representation, initial proceedings, and removal of persons to the United States or other States. Further, much authority is delegated to CCDRs, so local policies must be researched and followed.

DEFENSE CONTRACTOR PERSONNEL

Significance

As noted above, contractors are an integral part of U.S. military operations. Nevertheless, U.S. international obligations are clear: contractor personnel accompanying Air Force forces are not combatants and must not be allowed to act as combatants, or directly participate in hostilities, during Air Force operations.

Judge advocates should be sensitive to the often-complicated issues that arise from the increased use of contractor support in deployed locations. Although contractor personnel are subject to the UCMJ, the day-to-day control and supervision of contractor personnel is governed by the terms of the contract and the contracting officer is responsible for the oversight of contract performance. DoDI 3020.41, *Operational Contract Support (OCS)*, provides a comprehensive overview of DoD policy, guidance, and procedures concerning contractor personnel authorized to accompany U.S. forces.¹⁰

Key Terms and Definitions

Contingency Operation. A contingency operation is a military operation that is either designated by the SecDef as a contingency operation or becomes a contingency operation as a matter of law.¹¹

Contractors Authorized to Accompany the Force (CAAF). Contingency contractor employees and all tiers of subcontractor employees who are specifically authorized through their contract to accompany the force in applicable contingency operations outside the United States and are afforded such status through the issuance of a letter of authorization (LOA).¹²

Contractors Not Authorized to Accompany the Force (non-CAAF). Includes local-national (LN) and some non-LN employees working on a DoD contract in the operational area who are not afforded CAAF status IAW the nature of the contract. Non-CAAF include DoD prime contractor and associated subcontractor employees whose area of performance is not in the

⁹ See generally Chapter Nine, *Foreign Criminal Jurisdiction*.

¹⁰ DoDI 3020.41, *Operational Contract Support* (20 December 2011), incorporating Change 2, 31 August 2018).

¹¹ JOINT PUBLICATION 1; *DoD Dictionary of Military and Associated Terms*, as of January 2020.

¹² JOINT PUBLICATION 4-10, *Operational Contract Support* (4 March 2019).

direct vicinity of U.S. forces. Non-CAAF are usually non-mission-essential personnel (*e.g.*, day laborers, delivery personnel, and cleaning service personnel) who neither reside with U.S. forces nor receive authorized government support (AGS) such as billeting and subsistence. During international armed conflict, non-CAAF contractor employees are not entitled to protection under the Geneva Convention Relative to the Treatment of Prisoners of War (GC III) but may still be afforded protected status under the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV). The applicability of any existing SOFA between the United States and the host nation to non-CAAF will be determined by the terms of that SOFA.¹³

Contract Types. In a deployed environment, contracts can be grouped into three categories. Knowing the type of contract in which a particular employee performs services is important because each type of contract may trigger different sets of rules. The contract category may also determine where the contracting officer is located.

1. **Systems Support Contracts.** A prearranged contract awarded by a service acquisition program management office that provides technical support, maintenance and, in some cases, repair parts for selected military weapon and support systems. They are put in place to provide support to newly fielded weapons systems, including aircraft, land combat vehicles, and automated command and control systems.¹⁴
2. **External Support Contracts.** Contract awarded by contracting organizations whose contracting authority does not derive directly from the theater support contracting head(s) of contracting activity or from systems support contracting authorities. Examples include the Army Logistics Civil Augmentation Program and Air Force Contract Augmentation Program and construction contracts awarded by the U.S. Army Corps of Engineers.¹⁵
3. **Theater Support Contracts.** A type of contingency contract that is awarded by contracting officers in the operational area serving under the direct contracting authority of the service component, special operations force command, or designated joint head of contracting activity for the designated contingency operation.¹⁶ These are also referred to as contingency contracts.

Mission Essential CAAF. In some cases, the CCDR or subordinate commanders may designate mission-essential host nation or LN contractor employees (*e.g.*, interpreters), who reside with and receive AGS such as billeting and access to dining facilities, as CAAF. CAAF status only applies to selected contractor personnel in foreign operations and is not applicable in operations within the United States. During international armed conflicts, CAAF are protected as prisoners of war IAW GC III. In situations where U.S. forces are present within a host nation at its request, the terms of any SOFA will have to be reviewed to determine their applicability to CAAF. CAAF status also makes the contractor subject to the provisions of the UCMJ.¹⁷

¹³ *Id.* at I-10-11.

¹⁴ *Id.* at I-9.

¹⁵ *Id.* at I-9-10.

¹⁶ *Id.* at I-9.

¹⁷ *Id.* at I-10.

Pre-Deployment Issues

Because of the nature of the employer-independent contractor relationship, the Air Force is not obligated to provide any services or support to contractor personnel unless specifically stated in the terms of the governing contract.

Medical & Dental Care. Contractors are responsible for providing medically and psychologically fit contractor personnel to perform contracted duties.¹⁸ They may also be tested for HIV before deployment if required by the contract or by local requirements.¹⁹ In addition, contractors may have Panorex (an x-ray that displays upper and lower jaws and teeth in the same film) or DNA samples taken for identification purposes.²⁰ Emergency care by Air Force medical personnel for serious injuries is appropriate, as it would be for any person.

Legal Assistance. Contractor personnel are not entitled to military legal assistance either in-theater or at the deployment center.²¹ Contractor personnel generally will not be eligible to receive legal assistance unless they are eligible to receive it under another status (*i.e.*, as a reservist, military retiree, or military family member). If a contractor employee is accompanying the Air Force outside of the United States, he or she may receive certain legal assistance when the DoD or the Air Force is obligated by the terms of the contract to provide such assistance as part of logistical support. The specific terms of the contract should be reviewed to verify this obligation.

Identification Cards. Contracts should require eligible CAAF to be issued an identification card with the Geneva Conventions Accompanying the Force designation in accordance with DoDI 1000.01, *Identification (ID) Cards Required by the Geneva Conventions*. The contractor employee must carry the identification card at all times while in the theater of operations.

Logistical Support. Contractors are generally responsible for providing their own logistical support. However, in austere, uncertain, and/or hostile environments, the DoD may provide logistical support to ensure continuation of essential contractor services. CAAF may receive government-furnished support commensurate with the operational situation in accordance with the terms and conditions of their contract.²² Both DFARS 225.7402-3 (Government Support) and DoDI 3020.41 require the contracting officer to verify the logistical and operational support that will be available for deployed contractor personnel at the deployed location.

Contractor Personnel Issues at Deployed Locations

Control of civilian contractor personnel is tied to the terms and conditions of the contract; therefore, key performance requirements should be reflected in detail in the contract. Contractor personnel shall adhere to all guidance and obey all instructions and general orders issued by the CCMD including those relating to force protection, security, health, safety, or relations and interaction with local nationals.²³

¹⁸ DoDI 3020.41, *supra* note 10, at 19.

¹⁹ *Id.* at 30.

²⁰ *Id.* at 31.

²¹ *Id.* at 20.

²² *Id.* at 2.

²³ Defense Federal Acquisition Regulation Supplement (DFARS) § 252.225-7040(d).

The contracting officer or the contracting officer's representative is the designated liaison for implementing contractor performance requirements. However, contractor personnel are not under the direct supervision of the contracting officer or the contracting officer's representatives.

The DFARS authorize the contracting officer to direct a contractor to remove and replace, at the contractor's expense, any contractor personnel "who jeopardize or interfere with mission accomplishment or who fail to comply with or violate applicable requirements of this contract. Such action may be taken at the U.S. government's (USG) discretion without prejudice to its rights under any other provision of this contract, including the Termination for Default clause."²⁴

Status of Contractor Personnel

During contingencies that do not constitute international armed conflicts, the status of contractor personnel accompanying the armed forces is determined entirely by host nation law or applicable international agreement. During contingencies that rise to the level of international armed conflicts, contractor personnel have the status of persons "accompanying the armed forces" without being members of the force, under GC III. They are, legally, civilians but would be entitled to prisoner of war (POW) status if captured by an adversary. Contractors accompanying the force may, as a practical matter, be subject to hostile action because of the support they provide in close physical proximity to combat forces. Commanders should ensure contractor personnel are not used in any manner that would jeopardize their status under international law, such as directly participating in hostilities.

Support to Contractors at Deployed Locations

The terms of a particular contract will determine the level of support the Air Force must provide. Contractor personnel should maintain LOAs or Invitational Travel Orders (ITOs), which detail the support that must be provided under the contract to the contractor employees. Some of the more common support issues are:

Medical Support and Evacuation

DoDI 3020.41, Enclosure 2, para. 4(i) contains a comprehensive review of the issue.²⁵

1. *Routine/Primary Care*. Deployed contractor personnel generally do not receive routine medical and dental care at military medical treatment facilities (MTFs) unless this support is specifically included in the contract with the USG. In the absence of such agreements, contractors should make provisions for their employees' medical and dental care.
2. *Resuscitative Care*. All contractor personnel engaged in the theater of operations are authorized resuscitative care, stabilization, and hospitalization at level III MTFs, and assistance with patient movement in emergencies where loss of life, limb, or eyesight could occur. Hospitalization will be limited to stabilization and short-term medical treatment with an emphasis on return to duty or placement in the patient movement system.
3. *Medical Evacuation*. In cases where contractor personnel accompanying the force are evacuated for medical reasons to a MTF, normal reimbursement policies will apply for services rendered by the facility. Should such personnel require medical evacuation to CONUS, the sending MTF shall assist the personnel in making arrangements for transfer to a civilian facility of their choice. When U.S. forces provide emergency medical care

²⁴ *Id.* § 252.225-7040(h)(1).

²⁵ *See also* DFARS § 252.225-7040(c)(2).

to TCN and host nation personnel hired under theater, systems, or external support contracts, these patients will be evacuated/transported via national means (when possible) to their medical systems.

4. **Reimbursement.** When the USG provides medical treatment or transportation of contractor personnel, the contractor shall ensure that the USG is reimbursed for any costs associated with such treatment or transportation.

Organizational Clothing & Equipment and Individual Protective Equipment

1. Items of personal clothing and personal care, to include both casual attire and work clothing required by the particular assignment, are the responsibilities of the individual contractor personnel or the contractor. Generally, commanders should not issue military garments to contractor personnel.
2. DoDI 3020.41 provides that the USG may issue items such as chemical protective equipment when the contract requires the USG to issue such items, and as determined by the component commander. The wearing of such equipment by contractor personnel is voluntary, unless required in the contractual agreement. Commanders should ensure that contractor personnel are trained in the use of any issued personal protective gear.²⁶ Should commanders issue any type of standard uniform item to contractor personnel, care must be taken to ensure that the contractor personnel are distinguishable from military personnel through the use of distinctively colored patches, armbands, or headgear.

Force Protection and Weapons Issuance²⁷

The CCMD may include contractor personnel within its force protection responsibilities if it is in the interests of the USG to provide security (*e.g.*, because the contractor cannot obtain effective security services; such services are unavailable at a reasonable cost; or threat conditions necessitate security through military means). The contracting officer shall include in the contract the level of protection to be provided to contractor personnel accompanying the force. In appropriate cases, the CCCR may provide security through military means, commensurate with the level of security provided to DoD civilians. Specific security measures should be tied to the mission and situation dependent, as determined by the CCCR.

Under limited circumstances, contractor personnel authorized to accompany the force may be armed for individual self-defense using the following procedures:

The CCMD or designee may authorize arming contractor personnel for individual self-defense when the situation warrants and when such action is permitted under applicable U.S., host nation, and international law, relevant SOFAs or international agreements, or other arrangements with local host nation authorities. In such cases, the contractor will validate to the contracting officer, or designee, that weapons familiarization, qualification, and briefings regarding the rules for the use of force have been provided to contingency contractor personnel in accordance with CCCR policies.²⁸

²⁶ *Id.* § 252.225-7040 (h)(3).

²⁷ DoDI 3020.41 *supra* note 10, at Encl. 2, para. 3(k).

²⁸ DoDI 3020.41, *supra* note 10, at 23.

Acceptance of weapons by contractor personnel can only be on a voluntary basis and only if permitted by the defense contractor and the contract. Contractors who accept weapons should be advised that they may be subject to prosecution by the host nation or to civil suits if they use the weapon. Contractor personnel who are otherwise prohibited from possessing or using firearms (*i.e.*, pursuant to the Lautenberg Amendment (18 U.S.C. § 922(g)(9))), will not be issued firearms.

All applications for arming contractor personnel authorized to accompany the force shall be reviewed on a case-by-case basis by the appropriate staff judge advocate to the CCDR to ensure there is a legal basis for approval.

Vehicle and Equipment Operation

Deployed contractor personnel may be required or asked under the contract to operate U.S. military, government-owned, or government-leased equipment or vehicles. Contractor personnel may also be required to obtain local licenses and permits for the host nation to which they are being deployed (*e.g.*, an Omani driver's license). While operating a military-owned or leased vehicle, a contractor employee is subject to the local laws and regulations of the country, area, city, and/or camp in which he or she is deployed. Traffic accidents or violations usually will be handled in accordance with the local laws, the applicable IA, and/or theater guidance. If contractor personnel do not enjoy special status under the IA, they may be subject to host nation criminal and/or civil liabilities. Therefore, the individual or the contractor may be held liable by the host nation for damages resulting from negligent or unsafe operation of USG military vehicles and equipment.²⁹

Inherently Governmental Functions

Functions and duties that are inherently governmental are barred from private sector performance.³⁰ The contracting officer is statutorily required to make certain determinations before entering into a contract for the performance of each function closely associated with inherently governmental functions. Program managers shall coordinate with the DoD component manpower authority before contracting for operational support services, to ensure contracts are not awarded for tasks and duties that are designated as inherently governmental, or that should not ordinarily be performed by contractors in areas of operations. The DoD components shall determine workforce mix in accordance with DoDD 1100.4, *Guidance for Manpower Management*. DoDI 3020.41 states that the ranking military commander may, in emergency situations (*e.g.*, enemy or terrorist actions or natural disaster), “urgently recommend” contractors authorized to accompany the force to remove themselves from harm's way or take self-protective measures.

²⁹ DFARS 252.225-7040(k).

³⁰ DoDI 3020.41, *supra* note 10, at 11; Office of Management and Budget Circular A-76, *Performance of Commercial Activities* (4 August 1983), revised 1999; 10 U.S.C. § 2383 (2007).

FEDERAL CIVILIAN EMPLOYEES

Significance

DoD civilian employees are an integral part of the DoD mission. DoD policy is to rely on a mix of capable military members and DoD civilians to meet DoD global national security missions.³¹

Key Terms

DoD Civilian Employee. An individual meeting the definition of “employee” under 5 U.S.C. § 2105 as well as employees of DoD NAFIs paid for from non-appropriated funds. This includes DoD civilian employees filling full-time, part-time, intermittent, or on-call positions. The term excludes dual status National Guard and reserve technicians, and contractor employees.³²

Emergency Essential. A position-based designation to support the success of combat operations or the availability of combat-essential systems in accordance with 10 U.S.C. § 1580.

Non-Combat Essential. A position-based designation to support expeditionary requirements in other than combat or combat support situations.

Capability-Based Volunteer. An employee who may be asked to volunteer for deployment.

Pre-Deployment Issues

Medical Screening/Processing. Force health protection pre- and post-health assessments shall be conducted for DoD civilian employees in accordance with DoDI 6490.03, *Deployment Health*. DoD civilian employees who become ill, contract diseases, or who are injured or wounded while deployed in support of U.S. military forces engaged in contingency operations are eligible for medical evacuation and health care treatment and services in MTFs at no cost to the civilian employee and at the same level and scope provided to military personnel until the civilian employee’s return from deployment. The same system used to track active duty patients through the military health system shall be used to track DoD civilian employees injured in theater while deployed. Civilians will not be charged personal leave while undergoing therapy or rehabilitation due to a combat, combat support, duty related or non-duty related injury incurred during deployment after they return from deployment.³³

Credentials. DoD civilians who deploy are to be provided with a valid official passport, Common Access Card, Geneva Conventions identification card, and required security clearances, when appropriate.³⁴

Weapons Certification and Training. The CCMD or the CCMD’s designee may issue small arms to DoD civilian employees for their personal self-defense. Before issuing any weapon, the individual is required to comply with military regulations regarding training in the proper use and safe handling of firearms. Acceptance of a firearm is strictly voluntary and may not be made a condition of employment under Air Force policy. Civilians accepting firearms must qualify with the firearm being issued. Because of these stringent authorization

³¹ USecDef Directive-Type Memorandum (DTM)-17-004, *DoD Expeditionary Workforce* (25 January 2017), 2.

³² *Id.* 17.

³³ *Id.* 14.

³⁴ *Id.* 6.

and training requirements, the Air Force component commander must decide early in the operation whether civilians should be armed. In addition, the Air Force must ensure that the DoD civilian employees are not barred from possession of firearms under the Lautenberg Amendment.

Clothing and Equipment Issue

Organizational Clothing. As a general rule, civilian personnel should not wear military uniform items. However, conditions in the field may require that civilian personnel be issued specific items of military clothing or equipment for personal safety or health. Care should be taken to ensure that civilians issued military items can still be distinguished at a reasonable distance from military members wearing similar items of clothing or equipment. If required, DoD civilian employees will be provided personal protective gear (*e.g.*, helmets and body armor). This equipment will be issued only as necessary to perform assigned duties during hostilities, conditions of war, or other crisis situations. Again, efforts should be undertaken to ensure that civilians are distinguishable from military personnel wearing similar items. Maintenance and accountability of the equipment is the responsibility of the employee to whom the items were issued. Items of personal clothing and personal care are also the responsibility of the individual.

Legal Assistance

DoD civilian employees deploying to or in a theater of operations are eligible for assistance to prepare and execute wills and any necessary powers of attorney in accordance with DoDI 1400.32, *DoD Civilian Work Force Contingency and Emergency Planning Guidelines and Procedures*. Additionally, outside the United States and its territories, DoD civilian employees and their dependents residing with them are also entitled to legal assistance.³⁵

DoD Civilian Employee Issues at Deployed Locations

Day-to-Day Supervision and Control. During a crisis situation or deployment, civilian employees are under the direct supervision and control of the on-site supervisory chain. Therefore, the on-site supervisory chain will perform the normal supervisory functions regarding detailed employees; for example, those functions related to task assignments and instructions, input to permanent supervisor for annual performance evaluations, and initiating and effecting recognition and disciplinary actions.

Compliance with Local Law. The United States will usually have an international agreement or other similar arrangement with the host nation that defines certain rights and responsibilities of U.S. forces, to include accompanying civilians.

Status of DoD Civilian Employees. Under GC III, DoD civilian employees who accompany the force, without actually being members thereof, are entitled to POW status if captured. These protections are accorded to civilians accompanying the force if they have received authorization from the force which they accompany and have been provided with the Geneva Conventions Card.

³⁵ AFI 51-304, *Legal Assistance, Notary, Preventive Law, and Tax Programs* (22 August 2018), para. 2.3.7.

Hours of Work/Tour of Duty. Tour of duty and hours of work are synonymous terms meaning the hours of a day (a daily tour) and the days of an administrative workweek (a weekly tour of duty) that constitute an employee's regularly scheduled administrative work week. The administrative work week constitutes the regularly scheduled hours for which a deployed employee must receive basic and premium pay. The authority for establishing and changing the tours of duty for civilian employees is delegated to the in-theater commander or representative. The duration of the duty is dependent upon the particular operation and will also be established by the in-theater commander.

On-Call Employees. During crisis situations, the nature of the work may make it necessary to have employees on call because of emergencies or administrative requirements that might occur outside the established work hours. On-site commanders may designate employees to be available for such a call during off-duty times. Designation of employees for this purpose will follow these guidelines: there should be a definite possibility that the services of the designated employee might be required; on-call duties required of the employees will be brought to the attention of all employees concerned; if more than one employee could be used for on-call service, the designation should be made on a rotating basis; on-call duty should not unduly restrict movement. The designation of employees to be on-call or in an alert posture will not, in itself, serve as a basis for additional compensation (*e.g.*, overtime or compensatory time). If an employee is called in, the employee must be compensated for a minimum of two hours.

Federal Employees' Group Life Insurance (FEGLI). DoD civilian employees are eligible for coverage under the FEGLI program. Death benefits (under basic and all forms of optional coverage) are payable regardless of cause of death.

Retirement Benefits. Survivors of civilians who die while in a deployment status may be entitled to survivor benefits. Benefits payable depend on the retirement system, the amount of creditable service, and the survivor's relationship to the employee.

Mortuary Affairs. Civilian employees killed in the line of duty are entitled to many of the same benefits as military casualties. Mortuary benefits for eligible employees include: search, recovery, and identification of remains; next of kin notifications; disposition of remains; removal and preparation of remains; casket; clothing; cremation (if requested); and transportation of remains to permanent duty station or other designated location.³⁶

³⁶ AFI 34-501, *Mortuary Affairs Program* (16 April 2019), para. 4.5.

REFERENCES

- Hague Convention No. IV, Respecting the Laws and Customs of War on Land and Annex Thereto, October 18, 1907, 36 Stat. 2227.2, 2 A.J.I.L. (1908) Supplement 90-117 (entered into force 26 January 1910, for the United States 27 November 1909)
- Geneva Convention Relative to Treatment of Prisoners of War, adopted 12 August 1949, 6 U.S.T. 3316, 75 U.N.T.S. (1950) 135-285 (entered into force 21 October 1950, for the United States 2 February 1956)
- Geneva Convention Relative to the Protection of Civilians in Time of War, adopted 12 August 1949, 6 U.S.T. 3516, 75 U.N.T.S. (1950) 287-417 1949 (entered into force 21 October 1950, for the United States 2 February 1956)
- Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. §§ 3261, *et seq.*
- Defense Federal Acquisition Regulation Supplement (DFARS), 48 C.F.R. ch 2, subpart 252.225-7040 (Contractor Personnel Authorized to Accompany Armed Forces Deployed Outside the United States) (*see* <https://www.acquisition.gov/content/regulations>)
- Office of Management and Budget Circular A-76, *Performance of Commercial Activities* (4 August 1983), revised 1999
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Chapter 24

OPERATIONS IN THE INFORMATION ENVIRONMENT

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INTRODUCTION

The information environment (IE) is the aggregate of individuals, organizations, and systems which collect, process, disseminate, or act upon information.¹ What has historically been referred to as “Information Operations” (IO) is evolving into the Information joint function, conducting “Operations in the Information Environment” (OIE). Part of this evolution includes a change in terminology. Joint doctrine currently provides the following terms and definitions:²

Information Environment (IE). The IE is comprised of and aggregates numerous social, cultural, cognitive, technical, and physical attributes that act upon and impact knowledge, understanding, beliefs, world views, and, ultimately, actions of an individual, group, system, community, or organization. The IE also includes technical systems and their use of data. The IE directly affects and transcends all operational environments.³

Information Joint Function. This function encompasses the management and application of information and its deliberate integration with other joint functions to influence relevant-actor perceptions, behavior, action or inaction, and human and automated decision making. It helps commanders and staffs understand and leverage the pervasive nature of information, its military uses, and its application during all military operations. Furthermore, the function provides joint force commanders (JFCs) the ability to integrate the generation and preservation of friendly information while leveraging the inherent informational aspects of all military activities to achieve the commander’s objectives and attain the end state.⁴

Informational Power. The ability to leverage information to shape the perceptions, attitudes, and other elements that drive desired behaviors and the course of events.⁵

Information Operations (IO). Historically, the staff function which synchronized information-related capabilities (IRCs) for the commander. This synchronization has been superseded by the Information joint function and IO is a legacy term. Services may retain the use of IO as a staff function for the commander in service-specific operations. In practice, IO is still in use as a term in Air Force and joint environments, and will likely take time to transition to the Information joint function.

The IE consists of three interrelated dimensions which continuously interact with individuals, organizations, and systems. These dimensions are the physical, informational, and cognitive.⁶ The physical dimension is composed of command and control (C2) systems, key decision-makers, and supporting infrastructure that enable individuals and organizations to create effects. It is the dimension where physical platforms and the communications networks that connect them reside.⁷ The informational dimension encompasses where and how information is collected, processed,

¹ DoDD 3600.01, *Information Operations* (2 May 2013), incorporating Change 1, 4 May 2017, Part II, Definitions.

² Note that these terms are subject to change, as the underlying concepts and doctrine develops.

³ VCJCS, *Joint Concept for Operating in the Information Environment (JCOIE)* (25 July 2018), 42.

⁴ JOINT PUBLICATION 1, *Doctrine for the Armed Forces of the United States* (25 March 2013), incorporating Change 1, 12 July 2017, I-19.

⁵ *JCOIE* (25 July 2018), 42.

⁶ JOINT PUBLICATION 3-13, *Information Operations* (27 November 2012), incorporating Change 1, 20 November 2014, I-1 [hereinafter JP 3-13].

⁷ *Id.* at I-2.

stored, disseminated, and protected. It is the dimension where the C2 of military forces is exercised and where the commander's intent is conveyed. Actions in this dimension affect the content and flow of information.⁸ The cognitive dimension encompasses the minds of those who transmit, receive, and respond to or act on information. It refers to individuals' or groups' information processing, perception, judgment, and decision-making.⁹

The central idea for the Joint Concept for OIE is for the Joint Force to build information into operational art to design operations that deliberately leverage the inherent informational aspects of military activities.¹⁰ To integrate physical and informational power, the joint force must:

1. Understand information, the informational aspects of military activities, and informational power;
2. Institutionalize the integration of physical and informational power; and
3. Operationalize the integration of physical and informational power.¹¹

IRCs are the tools, techniques, or activities that affect any of the three dimensions of the IE. They affect the ability of the target audience to collect, process, or disseminate information before and after decisions are made.¹² This chapter discusses various IRCs and how they contribute to military operations when combined with traditional military techniques and technologies.

INFORMATION-RELATED CAPABILITIES

IO is not about ownership of individual capabilities but rather the use of those capabilities as force multipliers to create a desired effect. There are many military capabilities that contribute to IO and should be taken into consideration.¹³

Strategic Communication (SC)

The SC process consists of the United States Government (USG) efforts to create, strengthen, or preserve conditions favorable for the advancement of national interests, policies, and objectives by understanding and engaging key audiences through the use of coordinated programs, plans, themes, messages, and products synchronized with the actions of all instruments of national power.¹⁴ SC is a whole-of-government approach, driven by interagency processes and integration that are focused upon effectively communicating national strategy.¹⁵

Joint Interagency Coordination Group (JIACG)

Many national-level objectives require the combined and coordinated use of the diplomatic, informational, military, and economic instruments of national power.¹⁶ Due to their forward presence, the combatant commands (CCMDs) are well situated to coordinate activities with elements

⁸ *Id.* at I-3.

⁹ *Id.*

¹⁰ *JCOIE* (25 July 2018), viii.

¹¹ *Id.* at viii-ix.

¹² JP 3-13, x.

¹³ *Id.* at II-5.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at II-7.

of the USG, regional organizations, foreign forces, and host nations. In order to accomplish this function, the geographic combatant commands (GCCs) have established JIACGs as part of their normal staff structures. The JIACG is well suited to help the CCMD's IO cell with interagency coordination. Although OIE is not the primary function of the JIACG, the group's linkage to the IO cell and the rest of the interagency is an important enabler for synchronization of guidance and IO.¹⁷

Public Affairs (PA)

PA comprises public information, command information, and public engagement activities directed toward both the internal and external publics with interest in the DoD. External publics include allies, neutrals, adversaries, and potential adversaries. When addressing external publics, opportunities for overlap exist between PA and IO.¹⁸ PA must provide timely, truthful, and accurate information (and must have the knowledge, skills, resources, and authority to do so).¹⁹ Common legal issues associated with PA include de-conflicting with operations security (OPSEC), which restricts disclosure, and military deception (MILDEC), which aims at deceiving the adversary. Operational guidance for PA is generally found in Annex F of an OPLAN.

Civil-Military Operations (CMO)

CMO activities establish, maintain, influence, or exploit relations between military forces, governmental and nongovernmental civilian organizations and authorities, and the civilian populace in a friendly, neutral, or hostile operational area in order to achieve USG objectives.²⁰ These activities may occur prior to, during, or subsequent to other military operations. In CMO, personnel perform functions normally provided by the local, regional, or national government, placing them into direct contact with civilian populations. This level of interaction results in CMO having a significant effect on the perceptions of the local populace. Because this populace may include potential adversaries, their perceptions are of great interest to the IO community.²¹ Common legal issues are similar to SC. Operational guidance for CMO is generally found in Annex G to the OPLAN.

Cyberspace Operations (CO)

See Chapter Six, *Cyberspace Law*, and JP 3-12, *Cyberspace Operations*.

Information Assurance (IA)

IA is necessary to gain and maintain information superiority. The JFC relies on IA to protect infrastructure to ensure its availability, to position information for influence, and for delivery of information to the adversary.²² Furthermore, IA and CO are interrelated and rely on each other to support IO.²³

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ JOINT PUBLICATION 3-61, *Public Affairs* (17 November 2015), incorporating Change 1, 19 August 2016, I-4.

²⁰ JP 3-13, II-7.

²¹ *Id.*

²² *Id.* at I-9.

²³ *Id.*

Space Operations

Space capabilities are a significant force multiplier when integrated with joint operations.²⁴ Space operations support IO through the space force enhancement functions of intelligence, surveillance, and reconnaissance; missile warning; environmental monitoring; satellite communications; and space-based positioning, navigation, and timing. The IO cell is a key place for coordinating and de-conflicting the space force enhancement functions with other IRCs.²⁵

Military Information Support Operations (MISO)

MISO are planned operations to convey selected information and indicators to foreign audiences to influence their emotions, motives, objective reasoning, and ultimately the behavior of foreign governments, organizations, groups, and individuals.²⁶ MISO focuses on the cognitive dimension of the information environment where its target audience includes not just potential and actual adversaries, but also friendly and neutral populations.²⁷ MISO are applicable to a wide range of military operations such as stability operations, security cooperation, maritime interdiction, noncombatant evacuation, foreign humanitarian operations, counterdrug, force protection, and counter-trafficking.²⁸ Given the wide range of activities in which MISO are employed, the military information support representative within the IO cell should consistently interact with the PA, CMO, JIACG, and IO planners.²⁹

Intelligence

Intelligence is an integrated process, fusing collection, analysis, and dissemination to provide products that will expose a target audience's potential capabilities or vulnerabilities.³⁰ Intelligence is a vital military capability that supports IO.³¹ The utilization of information operations intelligence integration (IOII) greatly facilitates understanding the interrelationship between the physical, informational, and cognitive dimensions of the IE.³² By providing population-centric, socio-cultural intelligence and physical network lay-downs, including the information transmitted via those networks, intelligence can greatly assist IRC planners and IO integrators in determining the proper effect to elicit the specific response desired.³³

Military Deception (MILDEC)

MILDEC is defined as “[a]ctions executed to deliberately mislead adversary military, paramilitary, or violent extremist organization decision-makers, thereby causing the adversary to take specific actions (or inactions) that will contribute to the accomplishment of the friendly mission.”³⁴ MILDEC can mask, protect, reinforce, exaggerate, minimize, distort, or otherwise misrepresent

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at II-9 – II-10.

²⁷ *Id.* at II-10.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

U.S. technical and operational capabilities, intentions, operations, and associated activities.³⁵ When properly integrated with OPSEC, other IRCs, and the visible activities of the joint force and its components, MILDEC can be a decisive tool in altering how the adversary views, analyzes, decides, and acts in response to friendly military operations.³⁶ The functions of MILDEC include:

1. Causing ambiguity, confusion, or misunderstanding in adversary perceptions of friendly critical information and indicators such as unit identities, locations, movements, dispositions, weaknesses, capabilities, strengths, supply status, and intentions;
2. Causing the adversary to misallocate personnel, fiscal, and material resources in ways that are advantageous to the friendly force;
3. Causing the adversary to reveal strengths, dispositions, and intentions;
4. Conditioning the adversary to particular patterns of friendly behavior to induce adversary perceptions that can be exploited by the joint force; and
5. Causing the adversary to waste combat power and resources with inappropriate or delayed actions.³⁷

There are four different deception techniques:

1. Feints. A feint is an offensive action involving contact with the adversary conducted for the purpose of deceiving the adversary as to the location and/or time of the actual main offensive action;
2. Demonstrations. A demonstration is a show of force where a decision is not sought and no contact with the adversary is intended. A demonstration's intent is to cause the adversary to select a COA favorable to friendly goals;
3. Ruses. A ruse is designed to deceive the adversary to obtain an advantage. It is characterized by deliberately exposing false or confusing information for collection and interpretation by the adversary; and
4. Displays. Displays are the simulation, disguising, and/or portrayal of friendly objects, units, or capabilities in the projection of the MILDEC story. Such capabilities may not exist, but are made to appear so (simulations) (*e.g.*, show of force).³⁸

Common legal issues with MILDEC include compliance with treaties and customary norms, in particular the laws and norms concerning ruses, perfidy, and protection of civilians and civilian objects.³⁹ Additionally, MILDEC activities, including planning efforts, are prohibited from explicitly or implicitly targeting, misleading, or attempting to influence the U.S. Congress, the U.S. public, or the U.S. news media.⁴⁰

Operational guidance for MILDEC is generally found in Appendix 3 to Annex C of an OPOD or OPLAN.

³⁵ JOINT PUBLICATION 3-13.4, *Military Deception* (14 February 2017), I-2.

³⁶ *Id.* at I-1.

³⁷ *Id.* at I-1 – I-2.

³⁸ *Id.* at I-9.

³⁹ *Id.* at II-10.

⁴⁰ *Id.* at II-9.

Operations Security (OPSEC)

If critical information and indicators are disclosed, adversaries or potential adversaries could identify and exploit friendly vulnerabilities, leading to increased risk to mission failure or the loss of life.⁴¹ The desired effect of OPSEC is to influence the adversary's behavior and actions by reducing the adversary's ability to collect and exploit critical information and indicators about friendly activities.⁴² The OPSEC process is a systematic method used to identify, control, and protect critical information to:

1. Identify actions that may be observed by adversary intelligence systems;
2. Determine what specific indications could be collected, analyzed, and interpreted to derive critical information in time to be useful to adversaries;
3. Select countermeasures that eliminate or reduce vulnerability or indicators to observation and exploitation; and
4. Preserve a commander's decision cycle and allow options for military actions.⁴³

Cyberspace Defense Analysis weapon system units conduct Electronic Systems Security Assessments (ESSAs) on Air Force owned, operated, and/or leased communication systems to support OPSEC protection measures.⁴⁴ ESSA assists commanders in evaluating their organization's OPSEC posture by identifying the amount and type of information available to adversary collection entities. Commanders may request ESSAs from the 68th Network Warfare Squadron.⁴⁵ ESSA monitoring can be tasked and focused on specific information pertaining to Air Force core functions, weapon systems, operations, and activities. Awareness of active electronic monitoring of government telecommunication systems is an essential element of deterrence of such disclosures. The monitoring of Air Force communication systems can only be conducted by authorized personnel.⁴⁶ The Air Force currently monitors three major mediums:⁴⁷

1. Telephone. The monitoring and assessment of Air Force unclassified voice networks,⁴⁸
2. Email communications. The monitoring and assessment of unclassified Air Force email traffic on the Air Force Information Network,⁴⁹ and
3. Radio Frequency Communications. The monitoring and assessment of Air Force communications within radio frequency bands (e.g., mobile phones, land mobile radios, wireless local area networks).⁵⁰

Common legal issues with OPSEC include de-conflicting OPSEC measures with the disclosures of PA, and other IRCs. Operational guidance for OPSEC is generally found in Appendix 3 to Annex C of an OPORD or OPLAN.

⁴¹ AFI 10-701, *Operations Security* (24 July 2019), para. 1.2.

⁴² *Id.*

⁴³ JOINT PUBLICATION 3-13.3, *Operations Security* (6 January 2016), I-2 – I-3.

⁴⁴ AFI 10-701, para. 5.3.3.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* para. 5.3.3.1.

⁴⁸ *Id.* para. 5.3.3.1.1.

⁴⁹ *Id.* para. 5.3.3.1.2.

⁵⁰ *Id.* para. 5.3.3.1.3.

Joint Electromagnetic Spectrum Operations (JEMSO)

All information-related mission areas increasingly depend on the electromagnetic spectrum (EMS). JEMSO, consisting of electronic warfare (EW) and joint EMS management operations, enable EMS-dependent systems to function in their intended operational environment.⁵¹ JEMSO supports IO by enabling successful mission area operations.⁵²

The term EW refers to military action involving the use of EM energy and directed energy (DE) to control the EMS or to attack the enemy.⁵³ EW consists of three divisions: electronic attack (EA), electronic protection (EP), and electronic warfare support (ES).⁵⁴ DE is an umbrella term covering technologies that produce concentrated EM energy or atomic or subatomic particles.⁵⁵ DE capabilities complement and optimize the use of EW because DE is an enabler for all mission areas.⁵⁶ For more guidance on JEMSO, consult JP 6-01.⁵⁷

Key Leader Engagements (KLEs)

KLEs are planned engagements between U.S. military leaders and the leaders of foreign audiences that have defined objectives, including changing policy or supporting mission objectives.⁵⁸ These engagements can be used to shape and influence foreign leaders at the strategic, operational, and tactical levels (*e.g.*, to solidify trust and confidence in U.S. forces); they may also be directed toward specific groups such as religious leaders, academic leaders, and tribal leaders.⁵⁹ KLEs may be applicable to a wide range of operations such as stability operations, counterinsurgency operations, noncombatant evacuation operations, security cooperation activities, and humanitarian operations.⁶⁰ When fully integrated with other IRCs into operations, KLEs can effectively shape and influence the leaders of foreign audiences.⁶¹

IO INTEGRATION

IO Cell

The IO cell integrates and synchronizes the above IRCs, to achieve national or CCDR-level objectives.⁶² Normally, the chief of the CCMD's IO staff will serve as the IO cell chief.⁶³ The IO cell comprises representatives from a wide variety of organizations to coordinate and integrate additional activities in support of a JFC.⁶⁴ The specific makeup of an IO cell depends on the

⁵¹ JP 3-13, II-12.

⁵² *Id.*

⁵³ JOINT PUBLICATION 3-13.1, *Electronic Warfare* (8 February 2012), I-4.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ JOINT PUBLICATION 6-01, *Joint Electromagnetic Spectrum Operations* (20 March 2012).

⁵⁸ JP 3-13, II-13.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

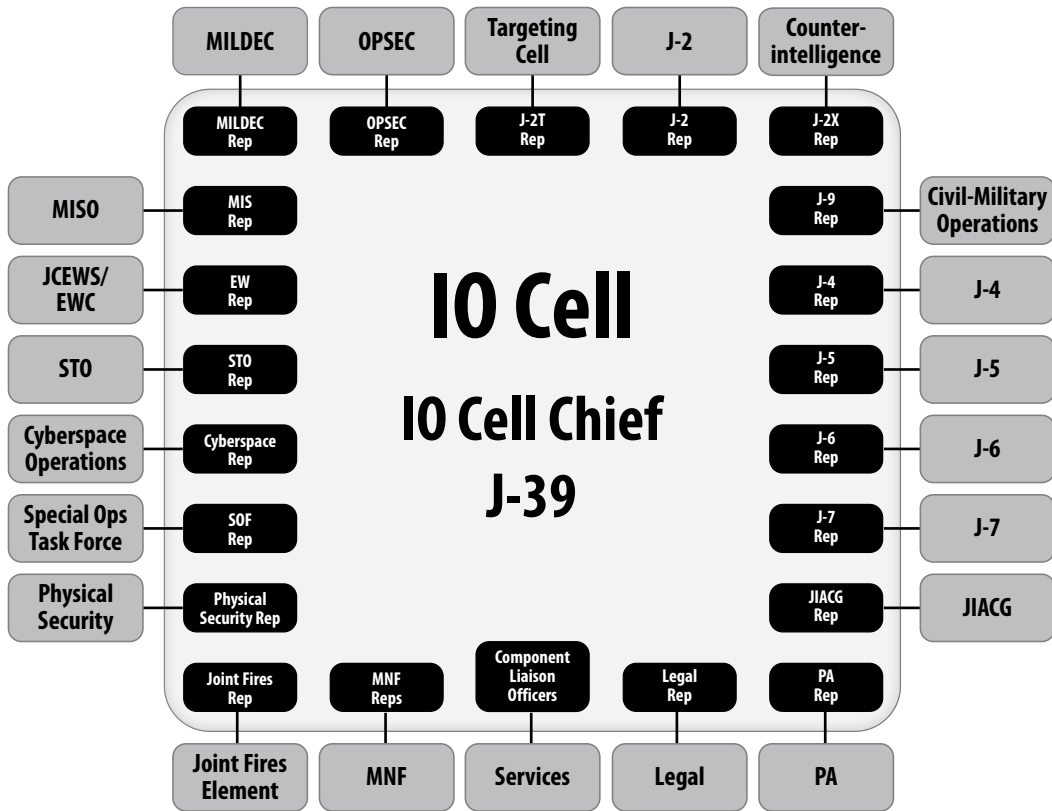
⁶² *Id.* at II-4.

⁶³ *Id.*

⁶⁴ *Id.*

situation.⁶⁵ It may include representatives from organizations outside the DoD, even allied or multinational partners.⁶⁶

Figure 24.1. Notional Information Operations Cell⁶⁷



Legend

EW	electronic warfare	JCEWS	joint force commander's electronic warfare staff
EWC	electronic warfare cell	JIACG	joint interagency coordination group
IO	information operations	MILDEC	military deception
J-2	intelligence directorate of a joint staff	MIS	military information support
J-2T	deputy directorate for targeting	MISO	military information support operations
J-2X	joint force counterintelligence and human intelligence staff element	MNF	multinational force
J-39	information operations staff	Ops	operations
J-4	logistics directorate of a joint staff	OPSEC	operations security
J-5	plans directorate of a joint staff	PA	public affairs
J-6	communications system directorate of a joint staff	Rep	representative
J-7	force development directorate of a joint staff	SOF	special operations forces
J-9	civil-military operations directorate of a joint staff	STO	special technical operations

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at II-6.

CONCLUSION

The myriad IRCs detailed above provide a commander with multiple options to use the OIE to create effects providing advantages for accomplishing the mission. For some of the IRCs, such as PA, SC, CMO, and KLEs, the information should be truthful, as their specific objectives need to maintain trust with the intended audience. Others, such as MILDEC and OPSEC, do not require that information be truthful as their objectives include deceiving the adversary. The Information Joint Function (IO cell) can tailor multiple ICRs for action by the commander to meet the specific needs of the mission. As the OEI and its policy evolves, legal advisors in this space should pay special attention to doctrinal developments and publication updates to the references below.

REFERENCES

- JOINT PUBLICATION 1, *Doctrine for the Armed Forces of the United States* (25 March 2013), incorporating Change 1, 12 July 2017
- JOINT PUBLICATION 3-12, *Cyberspace Operations* (8 June 2018)
- JOINT PUBLICATION 3-13, *Information Operations* (27 November 2012), incorporating Change 1, 20 November 2014
- JOINT PUBLICATION 3-13.1, *Electronic Warfare* (8 February 2012)
- JOINT PUBLICATION 3-13.3, *Operations Security* (6 January 2016)
- JOINT PUBLICATION 3-13.4, *Military Deception* (14 February 2017)
- JOINT PUBLICATION 3-61, *Public Affairs* (17 November 2015), incorporating Change 1, 19 August 2016
- JOINT PUBLICATION 6-01, *Joint Electromagnetic Spectrum Operations* (20 March 2012)
- VCJCS, *Joint Concept for Operating in the Information Environment (JCOIE)* (25 July 2018)
- DoDD 3600.01, *Information Operations* (2 May 2013), incorporating Change 1, 4 May 2017
- AFI 10-701, *Operations Security* (24 July 2019)

Chapter 25

DOMESTIC OPERATIONS AND SUPPORT TO CIVIL AUTHORITIES

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BACKGROUND

Domestic military operations are generally divided into two distinct missions, “homeland defense” and “defense support of civil authorities” (DSCA). This chapter will analyze the legal authorities governing both missions, focusing specifically on the latter.

The contrast between “homeland defense” and “DSCA” is useful and sufficient in most cases. The DoD has two priority missions:

Homeland Defense. The homeland defense mission “is the protection of U.S. sovereignty, territory, domestic population, and critical infrastructure against external threats and aggression or other threats, as directed by the President of the United States.”¹ For example, a U.S. fighter patrol designed to deter and defeat an external attack constitutes a homeland defense mission.

DSCA. The DSCA mission is to provide support in response to requests for assistance from civil authorities for domestic emergencies, law enforcement support, and other domestic activities, or from qualifying entities for special events.² For example, active duty support to the Federal Emergency Management Agency (FEMA) in response to a hurricane falls within the DSCA mission.

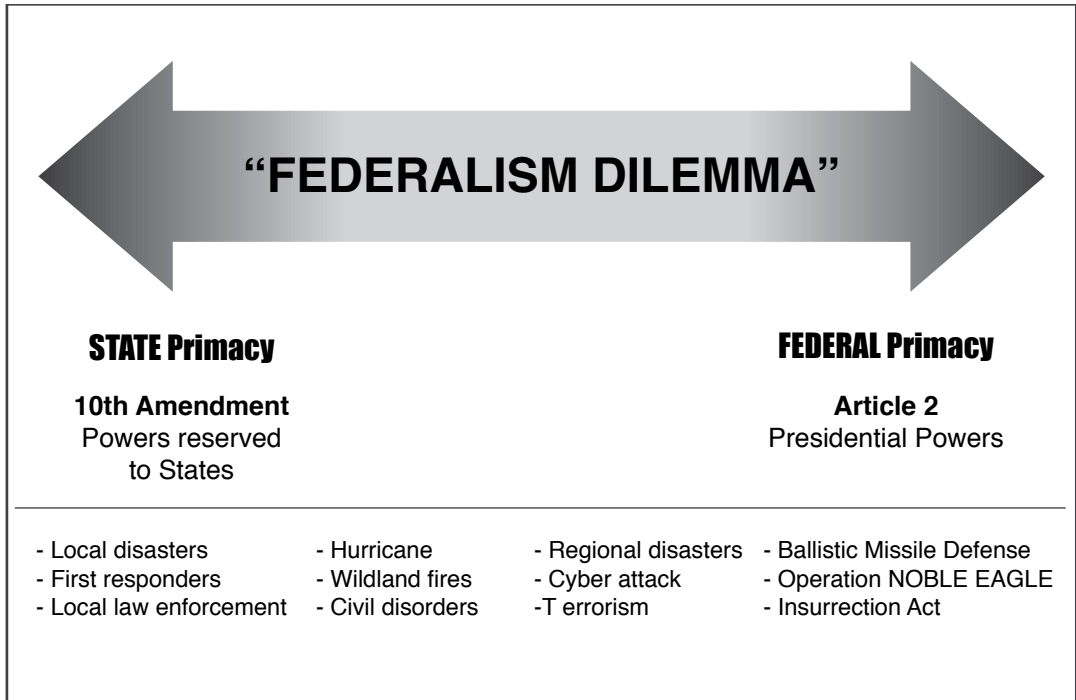
This contrast however, may not always prove so neat in practice, especially in the event of large scale or geographically distributed terrorist attacks crossing state lines. State governments are primarily responsible for responding to natural or man-made disasters under their Tenth Amendment “police powers.”³ The constitutional balance in a post-attack scenario slides towards the President’s Article II authorities (*see* Figure 25.1). Active duty forces may operate for a time in a legal gray area until the President through the SecDef provides definitive legal and policy guidance. The challenge confronting JAGs and commanders in these scenarios (*e.g.* when exercising “immediate response” authority) will be to plan and execute operations in a manner consistent with our constitutional structure, and statutory and regulatory authorities.

¹ JOINT PUBLICATION 3-27, *Homeland Defense* (10 April 2018), vii [hereinafter JP 3-27].

² DoDD 3025.18, *Defense Support of Civil Authorities (DSCA)* (29 December 2010), incorporating Change 2, 19 March 2018.

³ State police power comes from the Tenth Amendment to the U.S. Constitution, which gives states the rights and powers “not delegated to the U.S.” States are thus granted the power to establish and enforce laws protecting the welfare, safety, and health of the public.

Figure 25.1. Division of Federal and State Responsibilities Under Federalism



ESTABLISHMENT OF U.S. NORTHERN COMMAND

The need for a more organized and unified approach to domestic military operations was recognized immediately following the attacks of 11 September 2001. The President directed the establishment of U.S. Northern Command (USNORTHCOM) on 1 October 2002, which reached full operational capability on 11 September 2003. USNORTHCOM was created to provide command and control of DoD homeland defense efforts and to coordinate DSCA. According to its mission statement, USNORTHCOM “Defends Our Homeland—Deters, detects, and defeats threats to the United States, conducts security cooperation activities with allies and partners, and supports civil authorities.”⁴ USNORTHCOM is collocated with the North American Aerospace Defense Command (NORAD) at Peterson Air Force Base in Colorado Springs, CO.

HOMELAND DEFENSE

Homeland defense is the protection of U.S. sovereignty, territory, domestic population, and critical infrastructure against external threats and aggression or other threats, as directed by the President. The DoD is responsible for homeland defense.⁵

⁴ USNORTHCOM Mission statement, available at www.northcom.mil/About-USNORTHCOM/ (last visited 18 May 20).

⁵ JP 3-27, I-3.

Under Article II of the U.S. Constitution, the President is primarily responsible for homeland defense. Testifying before Congress in 2002, then-SecDef Donald Rumsfeld described the homeland defense mission in the following terms: “There are three circumstances under which the Department of Defense would be involved in activity within the United States. First, under extraordinary circumstances that require the Department to execute its traditional military mission. In these circumstances, DoD would take the lead. Also included in the category of extraordinary circumstances are cases in which the President, exercising constitutional authority as Commander in Chief and Chief Executive authorizes military action. This inherent constitutional authority may be used only in cases such as terrorist attack where normal measures are insufficient to carry out federal functions. Second, in emergency circumstances of a catastrophic nature, Third, missions or assignments that are limited in scope, where other agencies have the lead from the outset.”⁶

One of the clearest and most notable manifestations of the President’s authority for homeland defense can be found in the establishment and day-to-day operations of NORAD. NORAD Command is a bi-national (United States and Canadian) command established in 1958 by executive-level agreement (the “NORAD Agreement”).⁷ Its missions have traditionally consisted of “aerospace warning” and “aerospace control” for North America. In 2006, the NORAD Agreement was amended to include a third mission—“maritime warning.” The missions of NORAD can be summarized as follows:

1. Aerospace Warning: processing, assessing, and disseminating intelligence and information related to man-made objects in the aerospace domain and the detection, validation, and warning of attack against North America, whether by aircraft, missiles, or space vehicles.⁸
2. Aerospace Control: providing surveillance and exercising operational control of the airspace of the United States and Canada.⁹
3. Maritime Warning: processing, assessing, and disseminating intelligence and information related to the respective maritime areas and internal waterways of, and the maritime approaches to, the United States and Canada, and warning of maritime threats to, or attacks against North America.¹⁰

Historically, NORAD’s mission focused on countering air and missile threats posed by nation-states (primarily the former Soviet Union). The attacks of 11 September 2001, however, demonstrated the grave threat of an air attack posed by non-State terrorist actors. To counter this so-called asymmetric aviation threat, NORAD’s mission now includes a system of layered defenses. For example, Operation Noble Eagle (ONE) commenced on 14 September 2001 and enables NORAD to work closely with United States and Canadian interagency partners to deter, detect, and defeat terrorist air attacks.¹¹

⁶ SecDef Donald Rumsfeld, *Homeland Security and the Role of the Department of Defense, Congressional Testimony before the United States Senate*, Committee of Appropriations, 7 May 2002., S. Hrg. 107-502, p. 257.

⁷ Agreement Between the Government of Canada and the Government of the United States of America Concerning the Organization and Operation of the North American Air Defence Command (NORAD), 12 May 1958.

⁸ Agreement between the Government of Canada and the Government of the United States of America on the North American Aerospace Defense Command, 28 April 2006, Art. I, § 2.a.

⁹ *Id.* § 2.b.

¹⁰ *Id.* § 2.c.

¹¹ See www.norad.mil/Newsroom/Article/578175/the-years-of-noble-eagle/ (last visited 18 May 20).

The successful execution of ONE requires an innovative total force effort. Air National Guard (ANG) members on federal active duty (*i.e.*, Title 10 status) provide significant support. ANG support has been accomplished through the use of so-called “hip-pocket orders.”¹² The designated authority cannot, however, order an ANG member to active duty unless both the member and the member’s governor agree. Over the past several years, the Commander of the U.S. Continental NORAD Region (CONR) /AFNORTH Commander¹³ has entered into numerous agreements¹⁴ with state governors to enable the CONR/AFNORTH Commander to quickly and efficiently (oftentimes at a moment’s notice) obtain command and control of ANG members to perform NORAD missions.¹⁵

DEFENSE SUPPORT TO CIVIL AUTHORITIES (DSCA)

Overview

DSCA is support provided by federal military forces, DoD civilians, DoD contract personnel, and DoD component assets, in response to a request for assistance from civil authorities for domestic emergencies, cyberspace incident response, law enforcement support, and other domestic activities, or from qualifying entities for special events. DoD assets include National Guard (NG) forces when SecDef, in coordination with the governors of the affected states, elects and requests to use and fund those forces in Title 32 status. DSCA includes support to prepare, prevent, protect, respond, and recover from domestic incidents. DSCA is provided in response to requests from civil authorities¹⁶ and upon approval from appropriate authorities. DSCA is conducted only in the U.S. homeland.¹⁷

Generally, DoD’s authority to conduct DSCA derives from the President’s Article II authorities and various statutory grants and limitations.

Civil Authorities. These authorities are defined as “Those elected and appointed officers and employees who constitute the government of the United States, the governments of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, insular areas, and political subdivisions thereof.”¹⁸

There are many historical examples of DSCA. For example, active duty military forces provided civil support during the Chicago Fire of 1871, the Johnstown Flood of 1889, the Galveston Hurricane of 1900, the San Francisco Fire of 1906, Hurricane Katrina in 2005, Hurricanes Gustav and Ike in 2008, and initial Department of Health and Human Services Coronavirus Disease 2019 (COVID-19) response in 2020.

¹² 10 U.S.C. § 12301(d) empowers an authority designated by the Secretary of a military department to order ANG members to federal active duty status.

¹³ Through a series of delegations, the dual-hatted CONR and the First Air Force (AFNORTH) Commander is a SAF-designee.

¹⁴ Through the authority under 10 U.S.C. § 12301(d).

¹⁵ See Domestic Operational Law Handbook for Judge Advocates, 2018, 75, for further discussion on “hip pocket activation.”

¹⁶ DoDD 3025.18, para. 4.c, states “it is DoD Policy that...DSCA is initiated by a request for DoD assistance from civil authorities or qualifying entities or is authorized by the President or Secretary of Defense.”

¹⁷ JOINT PUBLICATION 3-28, *Defense Support of Civil Authorities* (29 October 2018), x [hereinafter JP 3-28].

¹⁸ *Id.* Part II, Terms and Definitions.

When analyzing specific authorities governing DSCA, commanders and JAGs must begin with certain fundamental constitutional and statutory principles:

1. The response to natural or man-made disasters begins locally—states, territories and tribal governments maintain primary responsibility for the public health and welfare of the people in their jurisdictions.¹⁹
2. National Guard units, under the command and control of state governors acting through The Adjutants General (TAGs), are the primary military responders in domestic operations and emergencies. The involvement of active duty DoD forces in any domestic affair is the exception to the general rule.
3. Under the Stafford Act,²⁰ federal assistance is generally premised upon a request from the state governor, except in those cases where the U.S. government (USG) exercises exclusive authority over the area affected. DoD active duty forces will usually be in support of the designated primary federal agency, which is supporting the state.
4. DoD support to civil authorities is tightly controlled by statute and regulation.

DoDD 3025.18, *Defense Support of Civil Authorities (DSCA)*, incorporates these principles and provides a framework for analyzing DSCA requests.²¹ DoD DSCA approval authorities (typically, USNORTHCOM or SecDef through the Chairman of the Joint Chiefs of Staff (CJCS)) must analyze requests in accordance with the criteria below. In some support situations (*e.g.*, Immediate Response Authority), installation commanders and JAGs will need to apply these criteria in responding to a request for support before being able to vet it through the appropriate DSCA approval authority:²²

1. Legality – compliance with the law.
2. Lethality – potential use of lethal force by or against DoD forces.
3. Risk – safety of DoD forces.
4. Cost – who pays and how it effects the DoD budget.
5. Appropriateness – whether it is in the interest of DoD to provide the requested support.
6. Readiness – impact on DoD’s ability to perform its other primary missions.

The next two sections analyze specific authorities governing DSCA during *domestic emergencies* (natural or man-made disasters) and *support to law enforcement*.

Domestic Emergencies—Natural or Man-Made Disasters

As noted above, state governments maintain primary authority under the Tenth Amendment of the U.S. Constitution to respond to natural or man-made disasters in territory under their jurisdiction. The Stafford Act constitutes the primary legal authority for federal emergency and disaster relief to the states. This section will consider the powers under the Stafford Act and other authorities that can be utilized during domestic emergencies.

¹⁹ Tenth Amendment to the U.S. Constitution.

²⁰ The Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121, *et seq.*, as amended by the Post-Katrina Emergency Management Reform Act of 2006, Pub. L. 109-295 (2007) and the Sandy Recovery Improvement Act of 2013, Pub. L. 113-2 (2013) (hereinafter The Stafford Act).

²¹ *See also*, AFI 10-801, *Defense Support of Civil Authorities* (29 January 2020).

²² DoDD 3025.18, para. 4.e.

Stafford Act

The intent of Congress in passing the Stafford Act was to provide for an “orderly and continuing means of assistance by the Federal Government to state and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from...disasters.”²³ In general, Stafford Act assistance “is rendered upon request (request for delegation) from a Governor of an affected state, provided certain conditions are met, primarily that the Governor certifies that the disaster is of such magnitude that an effective response is beyond the capabilities of the state to manage the consequences of the event without federal assistance.”²⁴ Recent examples of DoD support to FEMA through USNORTHCOM under the Stafford Act include responses to flooding in the Midwest (2008) and North Dakota (2009), Hurricane Matthew (2016), Hurricanes Harvey, Irma, and Maria (2017), Hurricane Michael (2018), Hurricane Dorian (2019), and the COVID-19 Pandemic (2020).

The USG can respond to a disaster or emergency in four ways under the Stafford Act:

1. ***Presidential Declaration of a “Major Disaster.”*** Upon receipt of a request from an affected state governor, the President may declare a “major disaster.”²⁵ A presidential declaration may direct any federal agency, with or without reimbursement, to utilize its authorities and the resources granted to it under federal law in support of state and local assistance response or recovery efforts. These efforts may include precautionary evacuations, providing essential assistance to save lives, preventing human suffering, mitigating severe damage, coordinating all disaster relief assistance, and providing temporary communications services, food, relocation assistance, and legal assistance.²⁶ A “major disaster” includes natural and man-made disasters.²⁷
2. ***Presidential Declaration of an “Emergency.”*** Upon request from an affected state governor, the President may declare an “emergency.”²⁸ The authorities granted to the President following an “emergency” declaration are similar to those granted following a “major disaster” declaration. However, emergency assistance is limited in time and scope and the total assistance may not exceed \$5 million for a single emergency, unless the President determines there is a continuing and immediate risk to lives, property, public health, or safety, and necessary assistance will not otherwise be provided on a timely basis.²⁹ An “emergency” includes natural and man-made disasters.³⁰
3. ***Presidential Approval of “Emergency Work.”*** Upon request from an affected state governor, the President may direct DoD to provide “emergency work” essential for the preservation of life and property for a maximum of ten days before the declaration of either an “emergency” or a “major disaster.”³¹

²³ 42 U.S.C. § 5121(b).

²⁴ See 42 U.S.C. § 5170.

²⁵ *Id.*

²⁶ *Id.* § 5170a-c.

²⁷ *Id.* § 5122.

²⁸ *Id.* § 5191(a).

²⁹ *Id.* § 5193.

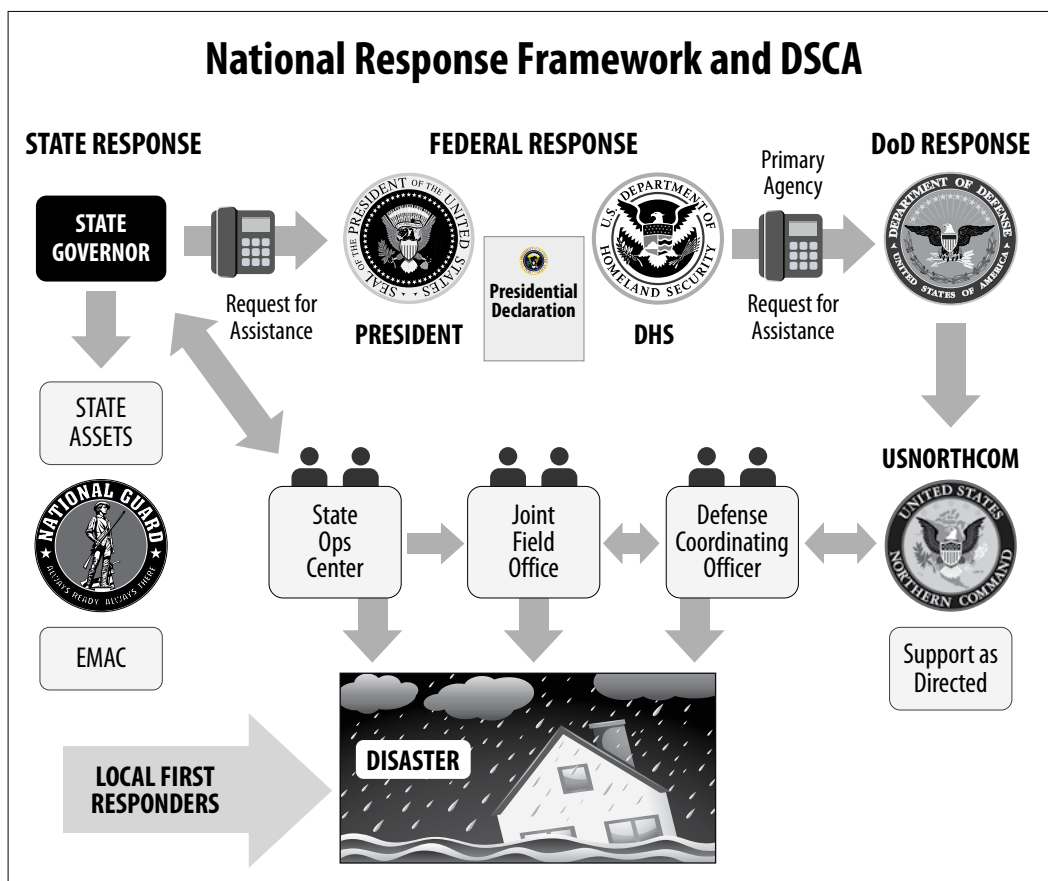
³⁰ *Id.* § 5122.

³¹ *Id.* § 5170b(c).

4. **Certain Emergencies Involving Federal Primary Responsibility.** The President may direct federal disaster relief without the request of an affected governor in circumstances where the President determines that the United States “exercises exclusive or preeminent responsibility and authority” with respect to the emergency.³² The President exercised this authority in the wake of the bombing of a federal building in Oklahoma City in 1995.

Once a presidential declaration is made under one of the four mechanisms of the Stafford Act, the federal response is initiated through the appointment of a primary federal agency, typically the Department of Homeland Security (DHS), and more specifically, FEMA. As detailed in Figure 2 below, the primary federal agency will provide support to the state(s), with DoD assistance as required. DoD support to the primary federal agency under the Stafford Act will be provided through USNORTHCOM in accordance with the latest SecDef approved CJCS DSCA Execute Order (DSCA EXORD).

Figure 25.2. Overview of DoD’s Support Role under the Stafford Act Through the National Response Framework (CONUS)



³² *Id.* § 5191(b).

Finally, the Stafford Act contains specific guidance providing for immunity from liability for certain actions taken by federal agencies or employees of the USG. The USG shall not be liable for any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the USG in carrying out the provisions of this chapter.³³

The Economy Act³⁴

Separate to the authorities under the Stafford Act, the Economy Act authorizes the DoD to provide direct support to other federal agencies. It does not, however, authorize direct support to state or local entities. The Economy Act authorizes support in both non-emergency and emergency situations. Reimbursement of direct costs is required. However, The Secretary of Defense retains authority to waive reimbursement for DoD support.³⁵ The Secretary of Defense usually memorializes reimbursement activities in the form of a DoD publication or a memorandum (*e.g.* SecDef Memorandum, Reimbursable Activities in Support of Other Entities, 19 June 2020).

Immediate Response Authority

In most emergencies and disasters, DoD support will be provided under Stafford and Economy Act authorities. This is especially true after a presidential declaration of a “major disaster” or “emergency” has occurred. However, even under optimal conditions, it can take a day or two for requests for assistance from the primary federal agency (typically FEMA) to be validated and approved, turned into a mission assignment, and sourced to USNORTHCOM or U.S. Indo-Pacific Command (USINDOPACOM). Under certain circumstances, this delay may be circumvented through the utilization of the immediate response authority (IRA) authorization.

Federal military commanders, heads of DoD Components, and responsible DoD civilian officials have IRA.³⁶ “In response to a request for assistance from a civil authority, under imminently serious conditions and if time does not permit approval from higher authority, DoD officials may provide an immediate response by temporarily employing the resources under their control, subject to any supplemental direction provided by higher headquarters, to save lives, prevent human suffering, or mitigate great property damage within the United States. Immediate response authority does not permit actions that would subject civilians to the use of military power that is regulatory, prescriptive, proscriptive, or compulsory.”³⁷ When IRA is utilized, it is critical for commanders to work closely with their staff judge advocates, given the limits of the authority.

IRA is derived from the President’s power as Chief Executive and Commander in Chief. DoDD 3025.18 outlines the policy on exercising immediate response authority. IRA should only be exercised in response to a request from civil authorities while civil authorities are committing or have committed their resources and still need assistance. If time does not permit a written request,

³³ *Id.* § 5148.

³⁴ 31 U.S.C. § 1535.

³⁵ See DoDI 3025.21, *Defense Support of Civilian Law Enforcement Agencies* (27 February 2013), incorporating Change 1, 8 February 2019, Encl. 8; DoD 7000.14- R, *Department of Defense Financial Management Regulation* Volume 11A, ch. 19, 1906A.

³⁶ DoDD 3025.18, para. 4.i.

³⁷ *Id.*

DoD members inform civil authorities that an oral request for assistance must be followed by a written request that includes an offer to reimburse the DoD at the earliest available opportunity.³⁸

The DoD official directing a response under IRA shall immediately notify the National Joint Operations and Intelligence Center (NJOIC).³⁹ The NJOIC will inform appropriate DoD Components, including the geographic combatant command. An immediate response shall end when the necessity giving rise to the response is no longer present. The approving authority should review the necessity for continuing the IRA response no later than 72 hours after the request for assistance was received.⁴⁰ Support should be provided on a cost-reimbursable basis, where appropriate.⁴¹

For small unmanned aircraft systems (UAS), O-6 level installation commanders are delegated UAS utilization for IRA within airspace delegated by the Federal Aviation Administration (FAA) for DoD use as long as the UAS utilized are restricted to UAS Groups 1, 2, and 3, as categorized by JP 3-30, *Joint Air Operations*, 25 July 2019.⁴² The IRA missions must be executed in accordance with DoDD 3025.18.⁴³ The SecDef policy memorandum, *Guidance for the Domestic Use of Unmanned Aircraft Systems in U.S. National Airspace*,⁴⁴ delegates authority to approve the domestic employment of small UAS to the Secretaries of the Military Departments; authorizes geographic combatant commanders to approve the domestic use of small UAS in support of force protection and DSCA incident awareness and assessment; and authorizes state governors to approve state NG use of small UAS for domestic operations in support of state and local civil authorities for search and rescue and incident awareness and assessment.⁴⁵ All domestic use of DoD UAS will be conducted in accordance with FAA policies, regulations and memoranda of agreement concerning UAS operations in U.S. national airspace, unless otherwise permitted by law or agreement.⁴⁶ DoD and NG intelligence oversight policy must be followed if the UAS is conducting an intelligence or intelligence-related activity.⁴⁷

³⁸ *Id.* para. 4.b. See SecDef Memorandum, *Reimbursable Activities in Support of Other Entities*, 19 June 2020 for potential further restrictions on providing support to non-federal entities under IRA. This is a developing area of law and policy, and while it is not anticipated that the memorandum will change the ability of the DoD to provide assistance under IRA, it is recommended that JAGs seek headquarters guidance on reimbursement issues.

³⁹ *Id.* para. 4.i.

⁴⁰ *Id.*

⁴¹ *Id.* para. 4.i.

⁴² AFI 10-801, para. 3.2.4.7. See also, AFMAN 11-502, *Small Unmanned Aircraft Systems* (29 July 2019).

⁴³ *Id.* para. 3.2.4.7.2.

⁴⁴ SecDef Policy Memorandum, *Guidance for the Domestic Use of Unmanned Aircraft Systems in U.S. National Airspace*, 18 August 2018. This policy memorandum rescinded Policy Memorandum 15-002, *Guidance for the Domestic Use of Unmanned Aircraft Systems*, 17 February 2015.

⁴⁵ *Id.*

⁴⁶ *Id.* Encl. 1.

⁴⁷ See *Id.* for further specific requirements for DoD UASs that are Intelligence Component capabilities or assets; see also DoDM 5240.01, *Procedures Governing the Conduct of DoD Intelligence Activities* (8 August 2016) and DoD 5240.1-R, *Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons* (December 1982), incorporating Change 2, 26 April 2017.

IRA does not constitute an exception to the Posse Comitatus Act (PCA),⁴⁸ discussed below. IRA “does not permit actions that would subject civilians to the use of military power that is regulatory, prescriptive, proscriptive, or compulsory.”⁴⁹ This means, commanders exercising IRA may not authorize military forces to engage in law enforcement activities or provide direct support to civilian law enforcement agencies in a manner inconsistent with the PCA.

Emergency Authority

DoDD 3025.18 regulates federal military commanders’ emergency authority. Emergency authority exists “in extraordinary emergency circumstances where prior authorization by the President is impossible and duly constituted local authorities are unable to control the situation, to engage temporarily in activities that are necessary to quell large-scale, unexpected civil disturbances because: (1) [s]uch activities are necessary to prevent significant loss of life or wanton destruction of property and are necessary to restore governmental function and public order; or, (2) [w]hen duly constituted Federal, State, or local authorities are unable or decline to provide adequate protection for Federal property or Federal governmental functions.”⁵⁰

Emergency authority should not be confused with IRA. Federal forces acting under IRA are still bound by the PCA and may not participate directly in law enforcement; whereas emergency authority is an exception to the PCA.⁵¹

Mutual Aid Agreements

Mutual aid agreements are distinct from IRA or emergency authority. Installation commanders are authorized to enter into these agreements to provide assistance to the civilian community—specifically, in the areas of mutual fire-fighting support and emergency services. Installation commanders may develop, document, and maintain mutual aid agreements.⁵² These agreements generally provide for the provision of emergency services under the direct control of the installation to the local community, and vice versa. These agreements are generally reciprocal in nature and reimbursement is not mandatory. Within their proper scope, mutual aid agreements do not require approval from the Joint Director of Military Support or the SecDef. Mutual aid agreements must meet local, state, federal, and status of forces agreement requirements.⁵³

⁴⁸ 18 U.S.C. § 1385.

⁴⁹ DoDD 3025.18, para. 4.i.

⁵⁰ *Id.* para. 4.k(2). See also AFI 10-801, para. 1.5.1.

⁵¹ JP 3-28, II-6.

⁵² AFI 10-801, para. 2.13.8.

⁵³ AFI 10-2501, *Emergency Management Program* (10 March 2020); AFI 32-2001, *Fire and Emergency Services Program* (28 September 2018).

Support to Law Enforcement

The Posse Comitatus Act of 1878

The PCA prohibits the direct, active participation of military forces in executing civilian laws. The PCA was enacted in response to the perceived misuse of federal Army forces in the South during Reconstruction after the Civil War. The law has come to symbolize the separation of military involvement in civilian law enforcement. However, it is perhaps the most misunderstood statute in the field of DSCA as military participation with civilian law enforcement authorities is permissible under PCA exceptions.

The PCA is a criminal statute and provides that “whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.”⁵⁴

The PCA applies to active duty Army and Air Force personnel, Army and Air Reservists in active duty status, and NG and ANG in Title 10 status. The PCA also applies to the U.S. Marine Corps and U.S. Navy by policy as directed by Congress.⁵⁵ The statute does not apply to Army and Air National Guard forces in State Active Duty (SAD) or Title 32 status.⁵⁶

Exceptions

Exceptions to the PCA (*i.e.*, statutory provisions for authorized support to law enforcement) generally fall into three broad categories: (1) use of information; (2) use of DoD personnel; and (3) use of military equipment and facilities.

Use of Information. SecDef may provide information collected during the course of military operations to federal, state, and local law enforcement agencies if the information is relevant to a violation of federal or state law.⁵⁷ DoD policy allows transfer “information acquired in the normal course of DoD operations that may be relevant to a violation of any federal or state laws.”⁵⁸ Furthermore, “the needs of civilian law enforcement officials shall, to the maximum extent practicable, be considered when scheduling routine training missions.”⁵⁹ While information sharing consistent with the guidance above is authorized and encouraged, there are PCA limitations to this type of support. In particular, the planning or creation of missions or training for the *primary purpose* of aiding civilian law enforcement officials is prohibited.⁶⁰

⁵⁴ 18 U.S.C. § 1385.

⁵⁵ DoDI 3025.21, Encl. 3, para. 3.

⁵⁶ *Id.* para. 2.

⁵⁷ 10 U.S.C. § 271.

⁵⁸ DoDI 3025.21, Encl. 3, § 1.g.(1).

⁵⁹ *Id.* Encl. 7, § 1.e.

⁶⁰ *Id.*

Use of DoD Personnel.⁶¹ The federal courts have established three tests to determine whether the use of military personnel violates the PCA;⁶² if any one of these three tests is met, the assistance may be considered a violation of the PCA.⁶³

1. Whether the actions of the military personnel are “active” or “passive.” Only the direct participation of military personnel to enforce the laws (*i.e.*, search, seizure, arrests) is a violation of the PCA.⁶⁴
2. Whether use of military personnel pervades the activities of civilian law enforcement personnel.⁶⁵
3. Whether the military personnel subjected citizens to the exercise of military power that was “regulatory, proscriptive, or compulsory in nature.”⁶⁶

Active duty personnel are prohibited from providing the following “direct assistance” to civilian law enforcement:

1. Interdiction of a vessel, aircraft, or other similar activity.
2. A search or seizure.
3. An arrest, apprehension, stop and frisk, or engaging in interviews, interrogations, canvassing, or questioning of potential witnesses or suspects, or similar activity.
4. Using force or physical violence, brandishing a weapon, discharging or using a weapon, or threatening to discharge or use a weapon except in self-defense, in defense of other DoD persons in the vicinity, or in defense of non-DoD persons, including civilian law enforcement personnel in the vicinity, when directly related to an assigned activity or mission.
5. Evidence collection, security functions, crowd and traffic control, and operating, manning, or staffing checkpoints.
6. Surveillance or pursuit of individuals, vehicles, items, transactions, or physical locations, or acting as undercover agents, informants, investigators, or interrogators.
7. Forensic investigations or other testing of evidence obtained from a suspect for use in a civilian law enforcement investigation in the United States unless there is a DoD nexus (*e.g.*, the victim is a member of the Military Services or the crime occurred on an installation under exclusive DoD jurisdiction) or the responsible civilian law enforcement official requesting such testing declares in writing that the evidence to be examined was obtained by consent.⁶⁷

⁶¹ The use of DoD personnel in support of civilian law enforcement personnel is governed by 10 U.S.C. §§ 271-284, federal case law, and DoDI 3025.21, Encl. 3.

⁶² *United States v. Yunis*, 924 F.2d 1086, 1093 (D.C. Cir. 1991); *United States v. Yunis*, 681 F. Supp. 891, 892 (D.D.C. 1988) (setting out three tests); *United States v. McArthur*, 419 F. Supp. 186, 194 (D.N.D. 1976).

⁶³ See Domestic Operational Law Handbook for Judge Advocates (2018), pg 87-88.

⁶⁴ *United States v. Rasheed*, 802 F. Supp. 312, 324-25, (D. Hawai’i. 1992).

⁶⁵ See *United States v. Kahn*, 35 F.3d 426, 431-432 (9th Cir. 1994).

⁶⁶ DoDD 3025.18, *supra* note 43, para. 4.

⁶⁷ DoDI 3025.21, Encl. 3, para. 1.c.(1)(g).

The PCA and authorities cited above allow the following categories of direct assistance:⁶⁸

1. Investigations and other actions related to the enforcement of the Uniform Code of Military Justice.
2. Investigations and other actions that are likely to result in administrative proceedings by the DoD, regardless of whether there is a related civil or criminal proceeding.
3. Investigations and other actions related to the commander's inherent authority to maintain law and order on a military installation or facility.
4. Protection of classified military information or equipment.
5. Protection of DoD personnel, DoD equipment, and official guests of the DoD.
6. Audits and investigations conducted by, under the direction of, or at the request of, the DoD Inspector General, subject to applicable limitations on direct participation in law enforcement activities.
7. Actions taken pursuant to DoD responsibilities under 10 U.S.C. §§ 240a-240f, relating to the use of the military forces with respect to insurgency or domestic violence or conspiracy that hinders the execution of state or federal law in specified circumstances.⁶⁹

In addition to the above, several federal statutes provide express statutory authority to active duty forces to assist officials in executing the laws, subject to applicable limitations. The laws that permit direct military participation in civilian law enforcement include, but are not limited to, the following:

1. Assistance in the case of crimes involving nuclear materials.⁷⁰
2. Protection of the President, Vice President, and other designated dignitaries.⁷¹
3. Execution of quarantine and certain health laws.⁷²
4. Support of territorial governors if a civil disorder occurs.⁷³
5. Actions in support of certain customs laws.⁷⁴

⁶⁸ For a complete list, see DoDI 3025.21, Encl. 3, para. 1.b.

⁶⁹ Actions under this authority are governed by DoDD 3025.18.

⁷⁰ 18 U.S.C. § 831.

⁷¹ *Id.* § 1751 and the Presidential Protection Assistance Act of 1976.

⁷² 42 U.S.C. § 97.

⁷³ 48 U.S.C. §§ 1422 and 1591.

⁷⁴ 50 U.S.C. § 220.

Use of Military Equipment and Facilities. The SecDef can make available equipment (including associated supplies and spare parts), base facilities, and research facilities to any federal, state, or local civilian law enforcement official for law enforcement purposes, so long as otherwise consistent with applicable law.⁷⁵ DoD policy is that any support provided should be consistent with national security and military preparedness and meet the criteria of legality, lethality, risk, cost, appropriateness, and readiness.⁷⁶ Generally, reimbursement is required when equipment or services are provided to agencies outside the DoD.⁷⁷

⁷⁵ 10 U.S.C. § 272. *See also* AFI 10-801, para. 3.2.6.

⁷⁶ DoDI 3025.21, Encl. 8.

⁷⁷ AFI 10-801, para. 3.5.

REFERENCES

- Agreement Between the Government of Canada and the Government of the United States of America Concerning the Organization and Operation of the North American Air Defence Command (NORAD), 12 May 1958
- Agreement Between the Government of Canada and the Government of the United States of America on the North American Aerospace Defense Command, 28 April 2006
- Posse Comitatus Act – 18 U.S.C. § 1385
- Stafford Act – 42 U.S.C. §§ 5121, *et seq.*
- Economy Act – 31 U.S.C. §§ 1535, *et seq.*
- Homeland Security Act of 2002, Pub. L. 107-296
- Presidential Protection Assistance Act, Pub. L. 94-524, H.R. 1244, 94th Cong. (1976)
- JOINT PUBLICATION 3-27, *Homeland Defense* (10 April 2018)
- JOINT PUBLICATION 3-28, *Defense Support of Civil Authorities* (29 October 2018)
- JOINT PUBLICATION 3-30, *Joint Air Operations* (25 July 2019)
- DoD 5240.1-R, *Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons* (December 1982), incorporating Change 2, 26 April 2017
- DoD Strategy for Homeland Defense and Defense Support of Civil Authorities (February 2013)
- DoDD 3025.18, *Defense Support of Civil Authorities (DSCA)* (29 December 2010), incorporating Change 2, 19 March 2018
- DoDI 3025.21, *Defense Support of Civilian Law Enforcement Agencies* (27 February 2013), incorporating Change 1, 8 February 2019
- DoDM 5240.01, *Procedures Governing the Conduct of DoD Intelligence Activities* (8 August 2016)
- USNORTHCOM, CONPLAN 3502-09 (www.northcom.mil/About-USNORTHCOM)
- AFI 10-801, *Defense Support of Civil Authorities* (29 January 2020)
- AFI 10-2501, *Emergency Management Program* (10 March 2020)
- AFI 32-2001, *Fire and Emergency Services Program* (28 September 2018)
- AFMAN 11-502, *Small Unmanned Aircraft Systems* (29 July 2019)
- Domestic Operational Law Handbook for Judge Advocates (2018)
- North American Aerospace Defense (NORAD) Command, available at www.norad.mil

Chapter 26

AEROSPACE AND GROUND ACCIDENT INVESTIGATIONS

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BACKGROUND

The day-to-day activities conducted by Air Force personnel inevitably involve mishaps. Although great strides have been made over the past decades to minimize accidents in the Department of the Air Force (DAF), the DAF suffers personnel and property losses to mishaps in training and operations every year. Judge advocates and paralegals should become familiar with the statutory guidance and regulatory procedures for conducting aerospace (aircraft, missile, unmanned aerial systems and space) and ground mishap investigations. Additionally, they should be aware of the requirements to keep the public informed through the release of the reports produced as a result of those investigations.

DoD Instruction (DoDI) 6055.07, *Mishap Notification, Investigation, Reporting, and Record Keeping*, provides overall guidance for investigating mishaps within the DoD. Air Force Instruction (AFI) 91-204, *Safety Investigations and Reports*, implements DoD guidance for conducting safety investigations, and AFI 51-307, *Aerospace and Ground Accident Investigations*, implements DoD guidance for conducting accident investigations.

Safety and accident investigations of mishaps are separate and independent investigations. However, at the conclusion of the safety investigation, certain factual information and documents are transferred to the accident investigation. Both investigations issue a final report describing the facts, circumstances, and causes of the accident. However, certain portions of the safety report are privileged, and therefore protected from public release. Conversely, the accident report is fully releasable to the public and is provided to personnel seriously injured or the next of kin (NoK) of personnel killed in the mishap.

While this chapter focuses on DAF investigations of aerospace and ground accidents, DoDI 6055.07, *Mishap Notification, Investigation, Reporting, and Record Keeping*, Enclosures 3 and 4, outlines applicable regulations and procedures for other types of mishap investigations. Those investigations include friendly fire mishaps; mishaps involving both DoD and civil aircraft; multiple DoD component mishaps; contractor mishaps involving DoD personnel or property; and mishaps involving foreign nations and DoD personnel or property.

TYPES OF BOARDS AND PURPOSE

Interim Safety Board (ISB). The purpose of an interim safety board is to gather and preserve evidence at the mishap site immediately following the mishap, make an initial determination of the mishap classification, conduct initial interviews of transient and key witnesses, and photograph the mishap site, wreckage, and human remains, if any, before they are disturbed.¹ The ISB obtains fluid samples from the aircraft; recovers the flight data recorder, cockpit voice recorder, and other air traffic control and radar tapes onboard the aircraft; accomplishes toxicological testing of the mishap flight crew; and prepares for the arrival of the safety investigation board (SIB).² Additionally, the ISB gathers evidence relating to the mishap flight, such as pilot records, aircraft maintenance records, weather briefings, records of the mishap flight recorded at the applicable air operations center, if any, etc.³

Safety Investigation Board (SIB). The sole purpose of a SIB is to determine the cause of a mishap in order to take preventive actions to preclude its reoccurrence.⁴ SIB reports are used exclusively for mishap prevention; they may not be publicly released nor used for punitive, disciplinary, or adverse administrative actions, or to determine financial liability, adjudicate claims, or support civil litigation, even when favorable to the government.⁵ In many cases, the SIB may offer confidentiality to witnesses in order to encourage full and candid cooperation, and testimony provided under a promise of confidentiality is privileged.⁶ Privileged testimony is not provided to the AIB; however, the SIB does provide the AIB names and contact information of every person interviewed.⁷

Accident Investigation Board (AIB)/Ground Accident Investigation Board (GAIB). An AIB or GAIB conducts a legal investigation to inquire into the facts surrounding the accident, to provide a publicly-releasable report, including a statement of opinion as to the cause of the accident (however, a statement of opinion is only included in a GAIB if specifically authorized), and to gather and preserve evidence for use in claims, litigation, disciplinary and administrative proceedings, and for other purposes.⁸ Unlike an ISB or SIB, normally an AIB or GAIB is only conducted for on-duty class A accidents.⁹

¹ AFI 91-204, *Safety Investigations and Hazard Reporting* (27 April 2018), para. 2.8 and ch. 6.

² *Id.* ch. 6.

³ *Id.*

⁴ *Id.* para. 6.1.

⁵ *Id.* para. 4.8.

⁶ *Id.* para. 4.5.

⁷ *Id.* para. 6.15.1.

⁸ AFI 51-307, *Aerospace and Ground Accident Investigations* (18 March 2019), para. 1.2.1.

⁹ *Id.* para. 1.16.1.1.

MISHAP CLASSIFICATIONS¹⁰

Class A Mishap

All DoD mishaps involving a fatality, permanent total disability, destruction of a DoD aircraft (excluding unmanned aircraft system Groups 1, 2, or 3), or total cost of damages to government and other property of \$2.5 million or more.

Class B Mishap

All DoD mishaps involving a permanent partial disability, inpatient hospitalization of three or more personnel (not including observation or diagnostic care), or total mishap costs of \$600,000 or more, but less than \$2.5 million.

Class C Mishap

All DoD mishaps involving a nonfatal injury or illness resulting in one or more lost workdays beyond the day it occurred, or total mishap costs of \$60,000 or more, but less than \$600,000.

Class D Mishap

All DoD mishaps involving a recordable injury or illness not otherwise classified as Class A, B, or C or total mishap costs of \$25,000 or more, but less than \$60,000.

INVESTIGATION REQUIREMENTS

Safety Investigations

A safety investigation is conducted for Class A-D mishaps.¹¹ Safety investigations are not conducted for combat losses if the aircraft was lost or damaged due to direct enemy action.¹² For example, an undamaged aircraft that is subsequently destroyed in a bad landing upon return from a combat mission would not be classified as a combat loss; therefore, a safety investigation would need to be conducted. In addition, DoDI 6055.07 and AFI 91-204, paragraph 5.11.1 require a SIB be convened following a friendly fire incident.

¹⁰ See DoDI 6055.07, *Mishap Notification, Investigation, Reporting, and Record Keeping* (6 June 2011), incorporating Change 1, 31 August 2018 (Glossary, as modified by the Assistant SecDef for Readiness, Memorandum, *Revision to Accident Severity Classification Cost Thresholds and Recording of Injury and Fatality Costs*, 15 October 2019).

¹¹ AFI 91-204, AFGM 2019-01, Attachment 1, Table 1.1.

¹² DoDI 6055.07, Encl. 8, Table 8, Exemption 2; AFI 91-204, para. 1.4.2.

Accident Investigations

AIBs or GAIBs are required for: Class A accidents¹³ (however, if the damage is solely to federal government property, the investigation may be waived);¹⁴ accidents where high public interest, media, or Congressional interest is probable; and, accidents in which litigation is anticipated.¹⁵ In accidents where DoDI 6055.07 requires a legal investigation, but AFI 51-307 does not specifically require an AIB/GAIB, an AIB/GAIB is discretionary. A major command (MAJCOM) commander has the discretion to conduct an AIB/GAIB for all other classes of mishaps.¹⁶ AIBs/GAIBs are not conducted for combat losses.¹⁷

BOARD CONVENING AUTHORITY

Interim Safety Board

The commander of the Regular Air Force installation nearest a mishap will generally convene the interim safety board.¹⁸

Safety Investigations

The MAJCOM commander of the organization that owns/leases the asset or the injured personnel is the convening authority unless the Air Force Chief of Safety (AF/SE) or another MAJCOM commander (with the concurrence of the owning organization and AF/SE) assumes investigative responsibility.¹⁹ The owning unit is the unit which has permanent possession and mishap-reporting accountability for the assets and personnel involved in the mishap. If two or more MAJCOMs have assets involved in the mishap, the command that initiated or sustained the highest level of loss in the mishap will normally convene the safety investigation.²⁰ For Air Force Reserve Command (AFRC) or Air National Guard (ANG) mishaps, the gaining MAJCOM traditionally convenes a Class A safety investigation. The SIB convening authority for all on-duty Class A mishaps is the MAJCOM commander (this duty cannot be delegated).²¹ All other mishaps can be delegated to commanders at lower levels of command; that authority is not delegable to a vice or deputy commander.²²

Accident Investigations

The AIB or GAIB convening authority for all on-duty Class A mishaps is the MAJCOM commander unless delegated to the deputy commander.²³ Where applicable, the MAJCOM commander who convened or would have convened the preceding safety investigation under AFI

¹³ AFI 51-307, para. 1.16.1.1.

¹⁴ *Id.* para. 1.16.2.3; note that, in the case of aerospace assets, the asset must not have been destroyed.

¹⁵ *Id.* paras. 1.16.3.-1.16.5.

¹⁶ *Id.* para. 1.17.

¹⁷ *Id.* para. 1.19.1.

¹⁸ AFI 91-204, para. 2.7.

¹⁹ *Id.* para. 5.2.

²⁰ *Id.* para. 5.3.

²¹ *Id.* para. 5.2.1.

²² *Id.* para. 5.2.2.

²³ AFI 51-307, paras. 2.1.1. and 2.1.1.1.

91-204 convenes the accident investigation.²⁴ For investigations involving AFRC assets, the AFRC commander can convene the accident investigation. For ANG mishaps, the commander of the gaining MAJCOM convenes the accident investigation.²⁵

BOARD COMPOSITION AND QUALIFICATIONS

Interim Safety Board

The composition of the ISB generally mirrors the composition of the SIB. ISB members should not be from the mishap unit, and they cannot have had any involvement in the mishap. The board president must have completed the Air Force Safety Center (AFSEC) Board President's Course and the investigating officer must have completed one of the AFSEC investigation courses.²⁶

Safety Investigation Boards

The convening authority appoints individuals to SIBs based on the event type, the class of mishap, and the complexity of the investigation.²⁷ For example, a mishap involving a destroyed aircraft requires a board president, an investigating officer, an AFSEC representative, a pilot member, a maintenance member, a flight surgeon, and a recorder; additional members may be added at the discretion of the convening authority or upon request from the board president.²⁸ A Class A ground mishap investigation requires a board president, an investigating officer, a recorder, and appropriate functional experts based on the nature of the mishap.²⁹ A Class A weapons mishap requires a board president, an investigating officer, a weapons operations officer, a maintenance member, a recorder, and others as appropriate.³⁰ At the other end of the spectrum, an engine-confined mishap of any class only requires a single investigating officer.³¹ Additional members could be anyone who the convening authority believes could assist; a comprehensive list is impossible, but could include human factors experts, maintenance, fire, weather, contracting, civil engineering, etc. Technical advisors, such as those from Air Force laboratories or an aircraft manufacturer, are not SIB members, and may also be assigned as necessary. Each type of mishap is investigated according to discipline-specific AFMANs (*e.g.*, 91-221 for weapons, 91-223 for aviation, 91-224 for ground/industrial). Those AFMANs also prescribe specific grade and training requirements for each board member. Class A SIB presidents must be a colonel (or GS-15 for weapons or ground mishaps) or higher (general officer or general officer-select for a fatal aviation mishap), and must be a graduate of the AFSEC Board President's Course.³² The investigating officer must be a graduate of one of the appropriate AFSEC mishap investigation courses (Aviation Mishap

²⁴ *Id.*

²⁵ *Id.* para. 2.2.1.

²⁶ See AFMANs 91-221, *Weapons Safety Investigations and Reports* (26 March 2020), 91-223, *Aviation Safety Investigations and Reports* (14 September 2018), and 91-224, *Ground Safety Investigations and Reports* (26 March 2019) for course requirements.

²⁷ AFI 91-204, para. 6.3.

²⁸ AFMAN 91-223, Table 5.1.

²⁹ AFMAN 91-224, Table 4.1.

³⁰ AFMAN 91-221, Table 3.1.

³¹ See AFMANs 91-221, 91-223, and 91-224.

³² See AFMANs 91-221, 91-223, and 91-224 for board requirements.

Investigation Course or Mishap Investigations Non-Aviation). Every SIB also requires a recorder. The AFMANs identify other board members.³³

Accident Investigation Boards (AIBs/GAIBs)

AIBs/GAIBs for Class A mishaps generally reflect the same composition and qualifications of the preceding SIB, with some exceptions: there is no AFSEC representative or investigating officer appointed to the AIB/GAIB; instead, a legal advisor is appointed to the board. The legal advisor will be a graduate of the AIB Legal Advisor Course or the Accident Investigation Course.³⁴ Other technical advisors are assigned as necessary.³⁵ The board president must be a graduate of the AFSEC Board President's Course. For manned aircraft accidents, AIB presidents must be rated officers (pilots, navigators, or air battle managers) and have experience with the same or similar mishap airframe.³⁶ For ground accidents, board presidents must have expertise or experience with the mishap asset, medical issue, or other relevant circumstances surrounding the mishap.³⁷ For non-fatality aviation mishaps, the AIB president is traditionally a rated O-6 or O-5. General officers or general officer selects serve as AIB/GAIB presidents for fatality mishap investigations.³⁸ Pursuant to 10 U.S.C. § 2255(a) and (b), the majority of AIB/GAIB members must come from outside the mishap squadron; otherwise the SecAF must approve the waiver and report the matter to Congress. Air Force policy, however, states a majority of the AIB/GAIB members should come from outside the mishap wing.³⁹ AIB/GAIB members must not have access to privileged safety information from the preceding SIB, nor may any AIB/GAIB member be currently performing full-time safety duties.⁴⁰

TIME STANDARDS FOR INVESTIGATION

The SIB is expected to complete its investigation within 30 days of the mishap.⁴¹ The AIB/GAIB is expected to complete its investigation within 30 days following receipt of non-privileged evidence from the SIB.⁴² Extensions can be granted to each board for good cause, with the approval of the convening authority, or for the AIB, the MAJCOM staff judge advocate (SJA) if delegated for AIB/GAIBs.⁴³

³³ *Id.*

³⁴ AFI 51-307, para. 3.3.

³⁵ *Id.* para. 3.5.1.

³⁶ *Id.* para. 3.2.3.1.

³⁷ *Id.*

³⁸ *Id.* para. 3.2.2.

³⁹ *Id.* para. 3.1.1.

⁴⁰ *Id.* paras. 3.1.4 and 3.1.5.

⁴¹ AFI 91-204, para. 6.4.

⁴² AFI 51-307, paras. 1.20.3 and 1.20.3.1.

⁴³ *Id.* para. 1.20.3.2.

HOST INSTALLATION SUPPORT

The commander of the host installation (the Air Force installation nearest to the mishap site) or designee will provide in-house administrative and logistical support to both the SIB and AIB/GAIB.⁴⁴ This will generally include work areas and office work space; computers with internet access; use of computers, printers, color copy machines, and fax machines; office supplies; paper supplies and computer CDs or DVDs; telephone service; use of government owned or leased vehicles; use of audio-visual equipment and services; and transcription equipment.⁴⁵ Court reporters from JA offices should not be used to support SIBs, but may be a good source for AIB support. The same court reporter or recorder should not assist both the SIB and the AIB/GAIB.⁴⁶ When civilian services are required, commanders at the installation supporting the SIB will assign finance and contracting officers with authority and funds to pay for all support requirements.⁴⁷ The host installation, with the approval of and in concert with the SIB president, will also remove the wreckage from the mishap site and store the wreckage in a secure location on the installation.⁴⁸ The host installation SJA will also assist the boards to arrange appearance at witness interviews by civilian employees and foreign nationals employed on the base.⁴⁹

FUNDING OF INVESTIGATION BOARDS

Temporary Duty (TDY) Travel

The convening authority shall fund temporary duty (TDY) travel costs for all board members, functional area experts, and witnesses, including personnel from other MAJCOMs.⁵⁰ For joint service boards, each military service funds its own personnel.⁵¹ See AFMAN 65-605, Volume I, *Budget Guidance and Technical Procedures*, Chapters 7 and 10.

Other Costs

The convening authority funds additional SIB and AIB/GAIB expenses to include: leasing vehicles or special equipment, leasing communications, other contractual services, and the costs associated with the removal and storage of wreckage.⁵²

Clean up and Restoration Costs

Generally, the convening authority is responsible for all costs associated with the crash site clean-up and environmental restoration.⁵³

⁴⁴ *Id.* para. 2.6.5.

⁴⁵ *Id.*

⁴⁶ *Id.* para. 2.6.3.1.

⁴⁷ AFI 91-204, para. 6.2.

⁴⁸ AFI 51-307, para. 8.4.2.

⁴⁹ *Id.* paras. 4.2.3 and 5.7.3.1.

⁵⁰ *Id.* para. 2.6.1.

⁵¹ AFI 91-204, para. 6.2.2.

⁵² AFI 51-307, para. 2.6.2.; AFI 91-204, para. 6.2.4.

⁵³ AFI 51-307, para. 2.6.4.

CONDUCTING THE INVESTIGATION

General Guidelines

The SIB takes precedence over the AIB/GAIB.⁵⁴ Although the AIB/GAIB will generally be appointed concurrently or within a few days after convening the SIB, the AIB/GAIB cannot begin its investigation until the SIB has released the wreckage, witnesses, and documents relating to the accident.⁵⁵ Great care must be taken to prevent the AIB/GAIB from inadvertently receiving privileged safety information from the SIB. Any contact between the two boards should be limited to only administrative or logistical matters such as coordination on the status of the ongoing SIB investigation, the timing of the release of witnesses, and the hand-off of non-privileged documents of the SIB report to the AIB/GAIB.⁵⁶

Interim Safety Board

The ISB concludes its activities upon arrival of the SIB and the transfer of information and documents to the SIB investigators.

Safety Investigation

The safety investigation process can be subjectively divided into three phases.

1. Phase I (Days 1-10) is concentrated on gathering all the evidence to determine what happened.
2. Phase II (Days 11-20) is concentrated on analyzing all the evidence to determine why it happened.
3. Phase III (Days 21-30) is concentrated on writing the SIB report, preparing the briefing to the convening authority, and drafting the final message report.

The activities within each phase are not necessarily separate and distinct from the other phases but are routinely commingled with activities in the other phases.

Following inspection of the wreckage, various key components are routinely shipped to Air Force depots, laboratories, and contractor facilities for tear-down analyses. Maintenance, flight, and training records are reviewed for any discrepancies. The flight data recorder, cockpit voice recorder, head-up display (HUD) tapes, radar, and air traffic control tapes are reviewed and transcribed. Witnesses are interviewed, flight simulations are conducted, and animations are created, as appropriate. Fuel and oil analyses are conducted and medical, toxicological, and autopsy reports are reviewed. After these documents have been reviewed, a detailed analysis is conducted by the SIB to determine why the mishap occurred and to develop findings, causes, and recommendations.

At the conclusion of the SIB, all the non-privileged documents, reports, photographs, witness interview transcripts, and witness lists are turned over to the AIB for its use, regardless of whether the SIB included it in its report.⁵⁷ Requests for early release of documents are rarely approved.

⁵⁴ *Id.* para. 1.20.1.

⁵⁵ *Id.* para. 1.20.3.1.

⁵⁶ *Id.* para. 4.2.4.

⁵⁷ AFI 91-204, para. 6.15.

Privileged safety information and documents are not released to the AIB or to any party outside of DoD safety channels.⁵⁸

Accident Investigation

Although the AIB/GAIB is convened at about the same time as the SIB, the AIB/GAIB investigation normally does not commence until it receives a hand-off from the SIB consisting of the SIB, non-privileged information, evidence, documents, and the witness list. Prior to the hand-off, the AIB/GAIB conducts its internal organization and arranges for logistical and administrative support. In the case of a fatality, at the direction of the convening authority, the AIB/GAIB president and legal advisor must travel to the mishap site within 72 hours of the arrival of the SIB team, to contact the family assistance representative and meet NoK and/or seriously injured personnel, address media concerns, and view the mishap site.⁵⁹ Following the hand-off, the AIB/GAIB begins a four week schedule, similar to the three phase SIB process, consisting of review and analysis of the non-privileged evidence received from the SIB, and other documents, ordering additional testing and analysis of component parts, conducting separate interviews of witnesses, and drafting the AIB/GAIB report, with a statement of opinion, (for a GAIB, if authorized), on the cause of the mishap. The AIB/GAIB report is not routinely briefed to the convening authority.

WITNESS INTERVIEWS AND CONTRACTOR INPUTS

Rules Governing Categories of Witnesses

Military and DoD civilian employees can be compelled to appear before the SIB and AIB/GAIB for interviews. Witnesses can also be ordered to bring documents to the interview. If a DoD civilian employee is covered by a local bargaining unit, a union representative may have the right to be present during both the SIB (non-privileged only) and AIB/GAIB interviews.⁶⁰ Ultimately, the investigation should comply with the bargaining agreement. Foreign national employees may also have specific rights to representation during both the SIB and AIB/GAIB interviews. Contractor witnesses may also have certain rights under their labor management agreement during both non-privileged SIB interviews and AIB/GAIB interviews. Private civilian witnesses cannot be compelled to testify.

Safety Investigations

Interviews conducted by the SIB are not under oath.⁶¹ In Class A aerospace accidents, the SIB president may extend a promise of confidentiality to any witness in order to obtain timely and candid information from the witness.⁶² A promise of confidentiality can be extended to any witness to include contractor witnesses, if necessary, in order to obtain required information or documents.⁶³ All witness interviews conducted by a safety investigator under a promise of confidentiality are privileged and are protected from release to the public.⁶⁴ Privileged witness

⁵⁸ *Id.* para. 4.4.

⁵⁹ AFI 51-307, para. 4.2.2.

⁶⁰ *Id.* para. 5.7.3.2.4.

⁶¹ AFI 91-204, para. 6.6.1.4.

⁶² *Id.* para. 4.5.3.

⁶³ *Id.* para. 4.5.4.

⁶⁴ *Id.* Attachment 1, Terms, Privileged Safety Information.

interviews may not be used in any type of civil, criminal, or other adverse administrative proceedings against the individual.⁶⁵

Accident Investigations

The AIB/GAIB must conduct all interviews under oath and may not give promises of confidentiality to any witness.⁶⁶ Because SIB witness interviews conducted under a promise of confidentiality are privileged, the AIB/GAIB must re-interview these witnesses if it needs their testimony. Even if a SIB witness provided information without receiving a promise of confidentiality, the AIB/GAIB should have that witness adopt under oath the testimony provided the SIB.⁶⁷ During the interview, witnesses can provide the same information to the AIB/GAIB as they did to the SIB. However, the AIB/GAIB cannot request, nor can the witness disclose, what questions were asked, and what responses were given, during the confidential SIB interview if a promise of confidentiality was offered.⁶⁸ Care must be taken before the interview to explain these requirements to the witness. Whenever a witness is or becomes a suspect, he or she must also be advised of his or her rights under Article 31, Uniform Code of Military Justice, or the 5th Amendment of the U.S. Constitution, as appropriate.⁶⁹

COCKPIT VOICE RECORDING (CVR)

Cockpit voice recordings are factual and are reviewed by both the SIB and AIB/GAIB.⁷⁰ If the tapes are transcribed by the SIB, they are provided to the AIB/GAIB. Both the tapes and the transcripts are turned over to the AIB/GAIB and the transcripts are included in the AIB report.⁷¹ The tapes themselves shall not be released to the public unless required to be released under DoDM 5400.07,⁷² and in accordance with third party privacy concerns.⁷³ Following completion of the SIB and AIB/GAIB, original CVR tapes are sent to the convening authority's SJA for storage with the additional evidentiary materials.⁷⁴

MILITARY SAFETY PRIVILEGE

Under the legal concept of the military safety privilege, certain SIB investigations are authorized to grant promises of confidentiality to witnesses and contractors to encourage frank, open, and timely communications to the SIB. The promise is two-fold: the statement or information given to a safety investigator will not be released outside of DoD safety channels, and the statements or information cannot be used against the witness in any type of adverse administrative, civil or criminal proceeding.⁷⁵ In addition, the internal deliberations of the SIB members and advisors,

⁶⁵ *Id.* para. 4.4.2.

⁶⁶ AFI 51-307, paras. 5.3.3 and 5.4.

⁶⁷ *Id.* para. 5.3.5.3.

⁶⁸ *Id.* para. 5.1.5.3.

⁶⁹ *Id.* paras. 5.7.2.1 and 5.7.3.2.3.

⁷⁰ *Id.* para. 4.3.2.1.

⁷¹ *Id.*

⁷² See DoDM 5400.07, *DoD Freedom of Information Act (FOIA) Program* (25 January 2017).

⁷³ AFI 51-307, para. 4.3.2.1.3.

⁷⁴ *Id.* para. 4.3.2.1.2.

⁷⁵ AFI 91-204, para. 4.3.

and their analyses, conclusions, and recommendations also fall under the military safety privilege and cannot be released to the public nor can they be used for any purpose except DoD mishap prevention, even when it would be favorable to the government.⁷⁶ No privileged safety material is provided to the AIB/GAIB.⁷⁷ The federal courts have strongly supported protection of the military safety privilege from disclosure in either civil discovery or under the Freedom of Information Act (FOIA).⁷⁸

There are some limited exceptions to the non-release of privileged safety information. If a witness who has been promised confidentiality intentionally misleads the SIB, his or her confidential testimony is no longer confidential and privileged.⁷⁹ Confidential testimony may be released under a protective order to comply with a valid court order on behalf of a defendant in a criminal action, based upon either the Jencks Act or *Brady v. Maryland*, 373 U.S. 83 (1963). Any release of privileged safety material, however, must first be authorized by the SecDef, following consultations with the DoD General Counsel and all three service secretaries.⁸⁰

DRAFTING THE REPORT

Safety Investigation Board Report

SIB reports are comprised of two types of materials. Non-privileged, factual information and documents include flight records, maintenance records, training records, technical and engineering evaluations, weight and balance clearance forms, air traffic control transcripts, CVR transcripts, statements of damage, diagrams, and photographs.⁸¹ Privileged safety information includes a narrative description of the mishap sequence; investigation and analysis; findings, causes, and recommendations; confidential witness statements; confidential technical analyses; and the SIB proceedings.⁸² In addition to the SIB report, a privileged final message is drafted containing a privileged analysis of the accident and the findings, causes, and recommendations of the SIB.⁸³ Class C and below mishaps are generally reported by message only but contain both privileged and non-privileged information.⁸⁴

Accident/Ground Accident Investigation Board Report

The non-privileged portions of the SIB report are incorporated into tabs A-S of the AIB/GAIB report.⁸⁵ The remaining tabs may include sworn witness statements, weather observations, additional flight and maintenance records, statements of injury or death, additional photographs and diagrams, and extracts of applicable directives and regulations. A one-page executive summary is prepared which summarizes the facts and the AIB president's opinion (or GAIB president's

⁷⁶ *Id.*

⁷⁷ *Id.* para. 4.8.3.4.

⁷⁸ *Machin v. Zuckert*, 316 F.2d 336 (D.C. Cir., 1963), cert. denied, 375 U.S. 896 (1963); *United States v. Weber Aircraft Corporation*, 465 U.S. 792 (1984).

⁷⁹ AFI 91-204, para. 4.5.1.

⁸⁰ DoDI 6055.07, Encl. 5, para. 10.

⁸¹ AFI 91-204, para. 7.4.1 and Table 7.2.

⁸² *Id.*

⁸³ *Id.* para. 7.2.2.3.

⁸⁴ *Id.* para. 7.4.

⁸⁵ AFI 51-307, para. 7.10.1.

opinion, if authorized) as to the cause and/or substantially contributing factors.⁸⁶ This is followed by a summary of facts, which is a narrative description of the entire sequence of events from the start of the mission to final impact.⁸⁷ This is followed by a statement of opinion of the AIB president (or GAIB president's opinion, if authorized) setting forth his or her full opinion on the cause of the mishap and/or substantially contributing factors.⁸⁸

DETERMINATION OF CAUSAL FINDINGS AND RECOMMENDATIONS

Safety Investigation Findings

The SIB findings represent the SIB's conclusions of the major events in the mishap sequence following its analysis of the facts of the accident. The findings are based on the weight of the evidence, coupled with the professional knowledge and good judgment of the SIB members.⁸⁹ Not all findings are causal. Causal findings are those findings that singularly or in combination with other causes resulted in the damage or injury.⁹⁰ There are no legal or statutory criteria for determining causal findings; however, the SIB must use the reasonable person concept when determining a cause. Recommendations to prevent recurrence of a similar accident are also contained within the SIB report.⁹¹

Accident Investigation Findings

A statement of opinion presents the AIB president's (or GAIB president's, if authorized) personal opinion regarding the cause or causes of the accident and/or any factors that substantially contributed to the mishap.⁹² The cause of the accident must be based upon the preponderance of the credible evidence, or in other words, must be supported by the greater weight of credible evidence.⁹³ If a cause cannot be determined then the AIB/GAIB president must state those factors which substantially contributed to the accident.⁹⁴ The AIB/GAIB president may also state substantially contributing factors in addition to a cause or causes of the mishap; substantially contributing factors must also be supported by a preponderance of the evidence.⁹⁵ No recommendations are provided in the AIB report.⁹⁶

⁸⁶ *Id.* para. 7.5.

⁸⁷ *Id.* para. 7.7.

⁸⁸ *Id.* paras. 7.8 and 11.3.

⁸⁹ AFI 91-204, para. 6.10.

⁹⁰ *Id.* para. 6.9.

⁹¹ *Id.* para. 6.12

⁹² AFI 51-307, para. 7.8.2.

⁹³ *Id.* para. 7.8.3.

⁹⁴ *Id.* para. 7.8.5.1.

⁹⁵ *Id.* paras. 7.8.5.1 and 7.8.5.3.

⁹⁶ *Id.* para. 7.3.5.

PROCESSING AND APPROVAL OF REPORT

Safety Investigation Board Report

Once the SIB report is complete, it is personally briefed to the convening authority, usually the MAJCOM commander.⁹⁷ Although intermediate command reviews or briefings on the results of the SIB are prohibited, the convening authority may permit the numbered air force (NAF) commander (or, in the case of an ANG mishap, the state Adjutant General or respective ANG commander) experiencing the mishap to receive an information-only briefing prior to the convening authority's briefing.⁹⁸ The NAF commander may invite his or her vice commander, chief of safety and the mishap wing commander to attend the NAF briefing, but no one else.⁹⁹ Following the briefing to the MAJCOM commander, the convening authority will accept the report as written or direct the SIB to further investigate.¹⁰⁰ This is followed by the issuance of a SIB final message to safety offices at all appropriate levels of command worldwide requesting comments on the report within 45 days.¹⁰¹ The AFSEC evaluates all comments or endorsements and then prepares a Memorandum of Final Evaluation (MOFE) for the Chief of Safety.¹⁰² Once the Chief of Safety issues the MOFE, it becomes the final official Air Force position on the findings, causes, and recommendations.¹⁰³ All recommendations validated by the Chief of Safety become directed actions that are assigned to the appropriate action agencies for implementation.¹⁰⁴

Accident/Ground Accident Investigation Board Report

Once the AIB/GAIB report is completed, it is forwarded to the convening authority's SJA who will send it to the convening authority's staff for formal review and comment. All substantive comments will then be transmitted to the AIB/GAIB president for consideration. The AIB/GAIB president can elect to continue the investigation, modify the report, or make no changes. Following this decision, the AIB/GAIB president will send the final report to the convening authority's SJA who in turn will conduct a final legal review to ensure that the report meets all statutory and regulatory requirements and make a recommendation to the convening authority to approve the report as written or return the report to the AIB/GAIB for further action.¹⁰⁵ The AIB/GAIB report is not personally briefed to the convening authority, unless specifically requested. If a formal briefing is requested, an informational briefing may first be given to the NAF commander, who may forward any written comments to the convening authority. The convening authority's approval of the AIB/GAIB report does not constitute his or her agreement or disagreement with the statement of opinion of the AIB/GAIB president.¹⁰⁶ Following approval, the report can be released to the NoK families, Congress, the media, and the public, as appropriate.

⁹⁷ AFI 91-204, para. 8.4.1.

⁹⁸ *Id.* para. 8.4.7.2

⁹⁹ *Id.* para. 8.4.7.2.

¹⁰⁰ *Id.* para. 8.5.

¹⁰¹ *Id.* para. 9.2.2.

¹⁰² *Id.*

¹⁰³ *Id.* para. 9.2.7.

¹⁰⁴ *Id.* para. 9.3.

¹⁰⁵ AFI 51-307, paras. 9.1.2.2.5 and 9.3.

¹⁰⁶ *Id.* para. 9.3.

RELEASABILITY OF REPORT

Safety Investigation Board Report

The SIB report cannot be released outside of DoD safety channels. If, however, a FOIA request is made for the SIB report, only releasable non-privileged portions can be released, subject to applicable FOIA exemptions.¹⁰⁷

Accident/Ground Accident Investigation Board Report

The AIB/GAIB report is fully releasable to the public.¹⁰⁸

EARLY RELEASE OF INFORMATION

Routine Releases

10 U.S.C. § 2254(b)(2) prohibits any release of mishap investigation information by or through officials with responsibility for, or who are conducting, the safety investigation. Upon request, and prior to the completion of the AIB/GAIB, the convening authority may disclose unclassified tapes, scientific reports and other factual information regarding the accident as long as the release will not undermine the ongoing safety or legal investigations, or compromise national security.¹⁰⁹ Release of non-investigatory information (*e.g.*, search and rescue, recovery of remains, salvage operations) can be made by the appropriate command or public affairs office (PA) at any time.¹¹⁰

Releases in High Interest Mishaps

In high interest mishaps (those involving death; serious personal injury; significant civilian property damage; or high public, media, or congressional interest), any release of investigation information on the accident (other than the initial PA release) must first be coordinated through the convening authority's PA and SJA; approved by the convening authority; and reviewed by TJAG, CSAF, and SecAF.¹¹¹ If the mishap involves a fatality or seriously injured personnel, the NoK and/or injured parties are notified after the aforementioned offices review the information, but prior to any other public release of the information.¹¹²

DISTRIBUTION OF AIB/GAIB REPORT

NoK Briefings

In all cases involving fatalities and serious personal injuries, after the convening authority approves the report and it is reviewed by the CSAF and the SecAF, the NoK or injured parties will receive a copy of the approved AIB/GAIB report and a personal briefing by the AIB/GAIB president

¹⁰⁷ AFI 91-204, para. 4.8.4.

¹⁰⁸ AFI 51-307, para. 7.3.

¹⁰⁹ 10 U.S.C. § 2254(b)(1).

¹¹⁰ AFI 51-307, para. 6.2.1.

¹¹¹ *Id.* para. 6.3.2.3.

¹¹² *Id.* para. 6.3.2.4.

on the results of the investigation.¹¹³ In the case of multiple deaths or injured parties, additional briefing officers may be appointed to carry out this function.¹¹⁴ These briefings will take place before further public release of the report.

Public Release

Following the NoK or injured parties briefings, or, if there are no deaths or serious personal injuries involved in the mishap, the AIB/GAIB report will be released to the public after approval by the convening authority. Prior to the public release, a copy of the executive summary, summary of facts and statement of opinion will be provided to appropriate Air Force offices, to include the mishap wing commander and intermediate commanders, for internal review.¹¹⁵

POST INVESTIGATION MATTERS

Report and Evidence Disposition

The convening authority's SJA stores the AIB/GAIB report with original signatures for a period ending three years from the date of the mishap, unless JAO mandates otherwise due to ongoing claims and/or litigation, and will then retire it to the appropriate Federal Records Center/National Archives and Records Administration office.¹¹⁶ The report is destroyed 25 years from the date of the mishap, unless it is deemed historically significant.¹¹⁷ The SJA stores all non-privileged ancillary evidence gathered during both the SIB and AIB/GAIB, including the CVR and other voice communication tapes, until specifically released from legal hold.¹¹⁸ Once released from legal hold, all ancillary evidence is returned to the source agency or disposed of in accordance with applicable regulations.¹¹⁹

Wreckage Disposition

Wreckage from Class A mishaps investigated by an AIB/GAIB must continue to be stored by the host installation, or as instructed by the convening authority's SJA, until it is released from legal hold by the appropriate release authority in accordance with AFI 51-307.¹²⁰ For all other mishap classes, the convening authority's SJA may release the wreckage, evidence, and other materials, once the AIB/GAIB report (if applicable) has been approved, if after consulting with the appropriate release authority no claims or litigation are likely or reasonably anticipated.¹²¹ A release from legal hold must also be obtained prior to repair of an aircraft involved in a Class A mishap investigated by an AIB.¹²² AFI 51-307 discusses the procedures for release of wreckage.

¹¹³ *Id.* para. 9.7.1.

¹¹⁴ *Id.* para. 9.7.4.1.

¹¹⁵ *Id.* paras. 9.6.1.3 and 9.6.2.3.

¹¹⁶ *Id.* para. 8.3.1.

¹¹⁷ *Id.*

¹¹⁸ *Id.* para. 8.3.2.

¹¹⁹ *Id.* para. 8.3.6.

¹²⁰ *Id.* para. 8.4.1.1.

¹²¹ *Id.*

¹²² *Id.* para. 8.6.

REFERENCES

- U.S. Constitution, Amendment V
- Uniform Code of Military Justice, 10 U.S.C. Chapter 47
- Jencks Act, 18 U.S.C. § 3500
- 10 U.S.C. § 2254, Treatment of Reports of Aircraft Accident Investigations (17 October 1998)
- 10 U.S.C. § 2255, Aircraft Accident Investigation Boards: Composition Requirements (23 September 1996)
- Brady v. Maryland, 373 U.S. 83 (1963)
- Machin v. Zuckert, 316 F.2d 336 (D.C. Cir., 1963), cert. denied, 375 U.S. 896 (1963)
- United States v. Weber Aircraft Corporation, 465 U.S. 792 (1984)
- DoDI 6055.07, *Mishap Notification, Investigation, Reporting, and Record Keeping* (6 June 2011), incorporating Change 1, 31 August 2018
- DoDM 5400.07, *DoD Freedom of Information Act (FOIA) Program* (25 January 2017)
- Assistant SecDef for Readiness Memorandum, *Revision to Accident Severity Classification Cost Thresholds and Recording of Injury and Fatality Costs* (15 October 2019)
- Joint Service Memorandum of Understanding for Investigations (10 April 2006)
- AFI 51-307, *Aerospace and Ground Accident Investigations* (18 March 2019)
- AFI 91-204, *Safety Investigations and Hazard Reporting* (27 April 2018)
- AFMAN 65-605, Volume 1, *Budget Guidance and Technical Procedures*, AFGM2019-01 (26 November 2019)
- AFMAN 91-221, *Weapons Safety Investigations and Reports* (26 March 2020)
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Chapter 27

AIR FORCE LEGAL READINESS

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BACKGROUND

The Air Force JAG Corps' mission is to "provide the Air Force, commanders, and Airmen with professional, full-spectrum legal support, at the speed of relevance, for mission success in joint and coalition operations." A core element of the JAG Corps' mission is ensuring the operational readiness of Air Force personnel and the legal capabilities available to support military operations. This is achieved, in part, by achieving the legal readiness of all Airmen.

To recognize the services expected of judge advocates, one must understand the term "legal readiness." Legal readiness is the degree to which Air Force members are prepared and ready to deploy in both *personal* and *professional* capacities.

Personal. On a personal level, legal readiness involves awareness of and sensitivity for the personal legal issues that may arise during pre-deployment preparation or a deployment, along with the remedies available to mitigate any adverse effects. Examples include challenges with real property leases, family law obligations, estate planning, and unique protections from impacts to civilian employment for reserve members.

Mission. On an operational level, legal readiness involves the ability of individuals and their organizations to deal with the military-legal aspects of the operational environment. Examples include the ability to identify and effectively apply domestic and international law, including applicable treaties and international conventions, the law of war and other operational laws and policies, and status of forces agreements (including foreign criminal jurisdiction) to facilitate mission accomplishment.

LEGAL READINESS PROGRAM AND RESPONSIBILITIES

In order to ensure legal readiness of a supported population, the servicing SJA should develop and implement a legal readiness program that tailors available legal services to satisfy the requirements of the supported population.¹ Additionally, each legal office must have a readiness manager who works with unit deployment managers (UDM) and installation deployment officers when developing the readiness program.² UDMs are the primary liaison to the unit training manager, squadron leadership, and wing training functions for deployment-related issues.

Legal Readiness Clients

All active duty service members, as well as reserve and guard members, are potential legal readiness clients. Legal offices are responsible for offering Airmen legal assistance and mandatory pre-deployment briefings.

The readiness manager will ensure that the installation's deployment checklist includes a legal readiness briefing as a mandatory requirement prior to deployment. SJAs should take a proactive approach to preventive law briefings, providing an opportunity for the deploying members to request legal assistance for estate planning, pending real estate or commercial situations, and any of the other myriad legal issues that arise before, during and after a deployment.

¹ AFI 51-101, *The Air Force Judge Advocate General's Corps (AFJAGC) Operations, Accessions, and Professional Development* (29 November 2018), para. 1.2.12.6.

² AFI 10-403, *Deployment Planning and Execution* (17 April 2020), para. 1.15.2.3

The Personnel Deployment Function (PDF)

The readiness manager should designate legal representatives to serve as members of the personnel deployment function (PDF, a.k.a., the mobility line). The PDF is established by the installation deployment officer to provide support to individuals selected to deploy during contingency, wartime, exercise and emergency operations.

Pre-Mobility Line. Judge advocates must have the appropriate training and equipment necessary to support the deployment process, whether as part of the PDF or in supporting personnel who report to the installation legal office for services. Each legal representative assigned to support the PDF must be familiar with the overall purpose of the PDF and ensure the legal station is stocked with the necessary supplies and reference materials. The PDF legal station should be equipped with blank power of attorney forms, blank will forms (if permitted by state law), a notary log, notary seal or stamp, a computer (with appropriate estate planning capabilities) and printer or local area network connection, and access to a private area should the need arise for confidential attorney-client consultations. Judge advocates should learn as much information about the deployed location as possible to identify what legal services may be present and must be prepared to assist deploying members or advise commanders on the following legal issues:

1. Jury duty;³
2. Conscientious objectors;⁴
3. Refusal of medical requirements (e.g., Anthrax, DNA samples);
4. Civil court actions (e.g., continuances for divorce, adoption, civil suits);
5. Criminal actions (e.g., continuances for traffic offenses);
6. Quality force management actions (e.g., control roster, unfavorable information files, nonjudicial punishment);
7. Authority to negotiate international agreements;⁵
8. Contracting authority (e.g., who can obligate the U.S.);
9. Deployed military justice (e.g., General Order Number 1, *Joint Justice*); and
10. Claims issues (e.g., what is the limit of “reasonable” personal property at a deployed location?)

Manning the Mobility Line. The PDF legal representative may be a judge advocate or a paralegal with a judge advocate on call. Judge advocates must recognize that the mobility processing line may not be the best environment for making informed, appropriate choices concerning wills, guardians, and other personal matters. Accordingly, judge advocates should serve their clients prior to, or after, manning the PDF if possible. The provision of legal services at the mobility processing area should be reserved for emergencies.

³ See AFI 51-301, *Civil Litigation* (2 October 2018).

⁴ See AFI 36-3204, *Procedures for Applying as a Conscientious Objector* (6 April 2017).

⁵ For example, who can bind the United States? See Chapter Seven, *International Agreements*.

PERSONAL READINESS

As part of the Legal Readiness Program, legal offices should be aggressive in sponsoring preventive law programs to educate Airmen and their families on the legal issues they may face during a deployment. The program should highlight the potential pitfalls and direct Airmen to appropriate courses of action to protect themselves from such concerns. Potential topics to be covered can include, but should not be limited to:

1. Eligibility for legal assistance services;
2. Procedures, times, contact information and the scope of legal assistance;
3. Servicemembers' Group Life Insurance (SGLI) designation;
4. Family care plans;
5. Wills;
6. Powers of attorney;
7. Claims information concerning the loss, damage, destruction, or theft of personal property while deployed;
8. Servicemember Civil Relief Act (SCRA—particularly for deploying reservists);
9. Uniformed Service Employment and Reemployment Rights Act (USERRA—particularly for deploying reservists); and
10. Consumer law issues.

MISSION READINESS

The mission readiness aspect to a Legal Readiness Program requires judge advocates be able to advise deploying Airmen and commanders on the military-legal environment wherever they are going. This should include unique or distinctive laws (both domestic and international) applicable in the deployed area, as well as any combatant command (CCMD) policies, or other guidance that restricts or permits activities.

Specifically, judge advocate personnel should be prepared to provide briefings on:

1. The law of war;
2. Rules of engagement (ROE);
3. Rules for the use of force (RUF);
4. Applicable status of forces agreements (SOFA);
5. Area or country law studies if any are available from the CCMD;
6. Command and control relationships; and
7. Other matters relevant to the deployment location.

Be mindful that some of this information is likely to be classified (*e.g.*, theater-specific ROE, some SOFAs), requiring special handling and storage. A judge advocate must be cognizant of individual training requirements that fall under the mission readiness prong of legal readiness. Most notably is the requirement for recurring law of war training and the reporting requirements under AFI 51-401, *The Law of War*, but other requirements may exist depending on the location where the member is deploying.

CONCLUSION

The concept of “full-spectrum legal support” recognizes that supporting the legal needs of Airmen in a wide variety of circumstances is essential to achieving the overall Air Force mission. The provision of advice and support in the areas discussed in this Chapter, particularly those concerning personal readiness, can significantly alleviate the concerns which might otherwise affect an individual while deployed away from home for an extended period. To that extent, the Air Force Legal Readiness Program is an essential aspect of Air Force operations.

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DoD LAW OF WAR MANUAL (June 2015), updated December 2016

DoDD 2311.01, *DoD Law of War Program* (2 July 2020)

AFI 10-403, *Deployment Planning and Execution* (17 April 2020)

AFI 36-3204, *Procedures for Applying as a Conscientious Objector* (6 April 2017)

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AFI 51-301, *Civil Litigation* (2 October 2018)

AFI 51-401, *The Law of War* (3 August 2018)

Chapter 28

DEPLOYED FISCAL LAW AND CONTINGENCY CONTRACTING

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BACKGROUND

Few legal issues directly impact the war-fighting mission more than contract and fiscal law. Airmen require proper training, equipment, living and work facilities, meals, and transportation to and from an area of operations. Contract and fiscal law plays a substantial role in regulating how the Air Force acquires all of these items or services to accomplish the mission, and ultimately whether an operation is a success or failure.

Contract and fiscal law is not limited to simply training and equipping U.S. forces. In executing the mission, commanders need to build facilities, purchase supplies, and pay for services. Furthermore, coalition partners frequently request supplies or services from U.S. forces in a contingency environment, and U.S. commanders are often obliging of these requests. Commanders may, however, possess limited knowledge in dealing with the applicable rules and regulations. As a consequence, they may focus on results rather than the details, such as which “pot of money” is used. Additionally, at many deployed locations, Airmen and NCOs serve as warranted contracting officers with little or no fiscal experience, and only a cursory knowledge as to how contracts are funded.

A critical role of the judge advocate is to navigate the complex contract and fiscal law regulatory framework in the operational environment. Judge advocates need to be able to identify the appropriate source of funds and acquisition vehicle so that they may, in turn, advise commanders on the appropriate mechanisms to achieve the mission. Accordingly, judge advocates must possess a basic knowledge of contract and fiscal law, and be prepared to explain key concepts to clients.

If the opportunity exists before a deployment, judge advocates should involve themselves in operational planning and determine the kinds of activities expected to be conducted. If the unit is sending an advance team or survey team, the judge advocate should seek to join it. Alternatively, the judge advocate should ensure sure that the team is briefed on permissible support purchases under the law. Judge advocates should also acquaint themselves with the contingency contracting officer (CCO), the financial management (FM) officer, civil engineer personnel, and requirement owners during a deployment, as these offices will interact with the judge advocate repeatedly. Judge advocates should maintain good records that will demonstrate to reviewing authorities or auditors why, and on what legal authority, the relevant action was based. On many occasions, the best documentation is a legal review. The manner in which the military spends funds appropriated by Congress is always at issue. The fundamental duty of a judge advocate is to ensure that the expenditure of funds is justifiable, properly documented, and can withstand scrutiny from Congressional or other inquiries.

This Chapter only scratches the surface of fiscal and contract issues. Unfortunately for judge advocates, fiscal law authorities sometimes contain ambiguous language, which can lead to differing interpretations. A judge advocate must be able to research and, in many circumstances, seek advice from supervisory or higher headquarters judge advocates to determine the proper solution.

Much of fiscal law as described in this Chapter only applies to “appropriated funds.” Congress provides the DoD with appropriated funds through an appropriation act. An appropriation is a statutory authorization “to incur obligations and make payments out of the Treasury for specified purposes.”¹ Nonappropriated funds (NAF) are funds lawfully acquired by other means. Examples of NAF funds include money-generating entities such as the bowling alley or other morale, welfare, and recreational activities.

¹ See U.S. Gov’t Accountability Office, GAO-05-734SP, A Glossary of Terms Used in the Federal Budget Process, (2005), 13.

FISCAL LAW

Constitutional Fiscal Law Controls

The foundation of fiscal law is based in the U.S. Constitution, Article I, section 9, clause 7: “No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law...” Explicitly, the Constitution requires positive authorization from Congress before expenditures can be made from the Treasury. The basic fiscal law rule, as stated by the Supreme Court, 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.”² This rule can be misunderstood by commanders, who may believe “if it’s not specifically prohibited, you can do it.” Judge advocates will need to help commanders and clients understand that, when it comes to fiscal law, it is **prohibited unless allowed**.

Congressional Fiscal Law Controls

Congress maintains a measure of control over how the executive branch spends the money it is allocated each fiscal year. Hence, in addition to the Constitutional mandate in *MacCollom*, the expenditure of appropriate funds is also controlled by statute. Spending appropriated funds for other than their intended purpose is a violation of law, commonly called an Anti-Deficiency Act violation. The “Big Three” fiscal law limitations Congress places on the DoD regarding the obligation and expenditure of appropriated funds are referred to as the “purpose, time, and amount” rules (PTA). In general, funds may only be used for the right purpose (P), at the right time (T), and may not exceed the amounts currently available (A).

Purpose

“Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.”³ In appropriation acts, Congress provides funds in separate provisions for different purposes to each of the military departments. Each of these different provisions can be referred to as “pots” of money. Some of these pots of money are very specific regarding the manner in which Congress directs the money to be spent. Instructions on how to spend these pots are either placed directly into the Appropriation Act or in additional legislation. The typical categories of money that may be at issue during a contingency deployment include:

1. Operations and maintenance (O&M);
2. Construction; and
3. Other procurement.

Operations and Maintenance (O&M)

The “Operations and Maintenance” pot is the best example of an appropriation with broad statutory language. The typical language appropriating O&M for DoD components include “[f]or expenses, not otherwise provided for, necessary for the operation and maintenance of the Air Force...” O&M is the primary source of funds used during military operations. The purpose of O&M funds is to pay for day-to-day expenses that are “necessary and incident” to military operations. Hence, the appropriation provides for great flexibility in accomplishing the objectives of the DoD and its components.

² *United States v. MacCollom*, 426 U.S. 317 (1976).

³ 31 U.S.C. § 1301(a).

Because of the broad language in legislation for appropriated funds, the General Accounting Office (GAO) has provided helpful guidance for judge advocates in determining whether a proposed expense is being used for the right purpose. The GAO has developed a three-pronged test, commonly referred to as the “necessary expense” doctrine.⁴

1. The expenditure must not be otherwise provided for; *i.e.*, it must not fall within the scope of some other appropriation;
2. The expenditure must not be prohibited by law; and
3. The expenditure must be “reasonably related” to the purpose of the appropriation.

Construction

Military construction funding presents many issues for the deployed judge advocate, primarily because construction projects use different sources of funding, depending on the scope of the project. The paragraphs below will explain the funding thresholds and some common issues that arise in an operational environment.

Specified military construction. The SecDef and the secretaries of the military departments may carry out military construction projects that are specifically authorized by law from the military construction pot of money (MILCON).⁵ Specified military construction funds are specifically authorized by Congress in the annual Military Construction Authorization Act or the National Defense Authorization Act (NDAA). The conference report accompanying the Military Construction Authorization Act provides line-item authorizations by project.

Dealing with specified military construction funds usually presents few issues for deployed judge advocates because these projects are planned years in advance. Either the construction project is specifically authorized by Congress or it is not. If a project is not specifically authorized, judge advocates and commanders may look to unspecified minor military construction, or other authority, as an alternative.

Unspecified Minor Military Construction (UMMC). Unlike specified military construction funds, UMMC funds do not specifically tell commanders what individual construction projects can be funded. The benefit of UMMC is that commanders can fund construction projects without receiving specific approval from Congress, or undergoing the burdensome pre-planned budgeting process. UMMC funds allow commanders to approve military construction projects quickly, for unexpected and minor projects needed for mission accomplishment.

Generally, all projects exceeding \$6 million must use specified MILCON appropriated by Congress for the projects. For projects between \$2 million and \$6 million, commanders may use UMMC. For projects less than \$2 million, commanders may use O&M funds. UMMC projects, including those funded with O&M, costing more than \$750,000 may not be carried out unless approved in advance by the secretary concerned. If the project costs more than \$2 million, the secretary concerned is required to notify the appropriate Congressional committees. The project may only start after 14 days have passed since the notification.⁶

⁴ U.S. Gov’t Accountability Office, 63 Comp. Gen. 422, 427-428 (1984).

⁵ 10 U.S.C. § 2802.

⁶ 10 U.S.C. § 2805.

Using Unspecified Military Construction (MILCON) Funds, 10 U.S.C. § 2805(a). Each service has an annual MILCON “pot” to use for UMMC projects. Congress appropriates “Unspecified Minor Construction” along with specified construction funds as part of the lump-sum military construction appropriation for each individual service. Of the lump-sum military construction appropriation, the conference report accompanying the Military Construction Appropriations Act identifies the amount available for unspecified minor construction.

Using Operations & Maintenance (O&M) funds, 10 U.S.C. § 2805(c). As discussed above, the “necessary expense” doctrine follows statutory law that expressly prohibits using funds in one pot that “fall within the scope of some other appropriation.” A clear example of this prohibition is the use of O&M for construction. However, Congress has expressly provided for an exception to this rule. 10 U.S.C. § 2805(c) allows the use of O&M for minor construction projects that do not exceed \$2 million per project.

Project Splitting or “Incrementation”—A Judge Advocate’s Nemesis. The most significant and common issue related to using O&M funds for a military construction project is “project splitting.” A project splitting analysis can be complex and confusing. To begin the analysis, judge advocates should first understand basic concepts and definitions used in analyzing construction funding. Each *individual military construction project* must remain below the statutory threshold of \$2 million if using O&M funds. For judge advocates providing legal advice, two questions need to be answered. First, what are considered “construction” costs that must be aggregated against the statutory threshold? Second, what is the *scope* of each individual military construction project?

The term “military construction,” as used in 10 U.S.C. § 2801(a), includes any “construction, development, conversion, or extension of any kind carried out with respect to a military installation, whether to satisfy temporary or permanent requirements, or any acquisition of land or construction of a defense access road.” Military installation “means a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of the Secretary of a military department or the Secretary of Defense.”⁷ AFI 32-1020, *Planning and Programming Built Infrastructure Projects* provides examples of work classification.⁸ Paragraph A4.3 provides detailed guidance on what should be classified as military construction. After determining that certain work is construction, the *scope* of the construction project must be determined.

Maintenance (recurrent work to prevent deterioration) and repair (restoration for use for a designated functional purpose or conversion of a real property facility to a new functional purpose without increasing its external dimensions)⁹ are not considered construction. Any work that can be lawfully categorized as maintenance or repair need not be aggregated in determining whether a certain project is below the statutory threshold. It is always appropriate to use O&M funds for maintenance and repair expenses. Additionally, those costs may be “apportioned” from any related military construction costs. For current Air Force guidance, *see* 10 U.S.C. § 2811 and AFI 32-1020, Chapter 3. AFI 32-1020, Attachment 4, provides detailed, non-exhaustive lists of what should be classified as maintenance and repair.

⁷ 10 U.S.C. § 2801(c)(4).

⁸ AFI 32-1020, *Planning and Programming Built Infrastructure Projects* (18 December 2019), Attachment 4.

⁹ *See* 10 U.S.C. § 2811(e).

A military construction “project” is defined by 10 U.S.C. § 2801(b). The term includes “all military construction work...necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility...” Under 10 U.S.C. § 2801(c)(1) “facility” is defined as “a building, structure, or other improvement to real property.”¹⁰

As stated above, project splitting or “incrementation” is strictly prohibited. Construction projects cannot be split into increments in order to circumvent the statutory threshold of \$2 million, approval authorities, reporting requirements, or programming policy.¹¹ In determining whether two projects are being improperly “split,” judge advocates should undergo a two-step analysis to determine whether all of the proposed work is needed in order to have a “complete and usable facility” or a “complete and usable improvement to an existing facility.”

Step One: Is the construction work “interdependent” with regard to function?

For this analysis, it is essential that the facility requirement be fully defined. Is one construction project “interdependent” on the other to make one “complete and usable facility?” A simple example is a building and its parking lot. Planners shouldn’t consider these as two separate projects for funding purposes. The building requires the parking lot in order to be “complete and usable.”

The analysis can become more complex. If a maintenance building is being constructed, should a garage or vehicle maintenance bays being built adjacent be included as the same “military construction project?” If so, the maintenance building, garage, and bays should all be aggregated for the purposes of determining the total construction costs. However, it could be argued that the maintenance building, garage, and bays are each “complete and usable.”

Step Two: Are the construction projects “interdependent” with regard to overall government requirements?

The analysis for this step can be much more complex and confusing. The GAO has provided opinions related to this aspect of project splitting. According to the GAO, the project splitting analysis does not end once an agency determines two projects are not “interdependent” with regard to function, or, in other words, complete and usable as stand-alone facilities.

In a 1991 opinion, GAO responded to a Congressional request to investigate whether the purchase of 12 trailers by the Air Force, through two separate contracts, was project splitting.¹² In that case, the GAO articulated that the key factor in project splitting cases is a determination of whether a single building, structure, or other improvement could not “satisfy the need that justified carrying out the construction project.” As a consequence, a determination of whether facilities are “interdependent” with regard to function is only the first step in determining the scope of a single military construction project.

The overall government requirement in *Donley* was 12 trailers. The Air Force purchased the 12 trailers via two separate contracts. The total cost of the two contracts, in aggregate, was more than the statutory threshold at the time. Separately, the costs were below the threshold. In evaluating the acquisition, the GAO found that the seven trailers purchased in the first contract were “interdependent” with the five trailers in the second contract. The key question asked by

¹⁰ See also DoD Financial Management Regulation (FMR), DoD Reg. 7000.14-R, Volume 3, ch. 17, para. 170107 *Scope of a Military Construction Project*.

¹¹ AFI 32-1020, para. 2.4.6.

¹² U.S. Gov’t Accountability Office, *The Hon. Michael B. Donley*, B-234326, 1991 U.S. Comp. Gen. LEXIS 1564 (24 December 1991).

the GAO was: what were the *agency requirements at the time of acquisition* that “justified carrying out the construction project?” This is the second question that must be examined in defining a “complete and usable” facility.

The GAO articulated this second step, acknowledging that each individual trailer was “complete and usable” under step one of the project splitting analysis. Rather than merely looking at whether each individual trailer was complete and usable, the GAO examined the purpose for which all of the trailers were purchased. In this case, the Air Force’s ultimate requirement was for 12 trailers to house 48 personnel. That requirement was part of the GAO’s determination of the scope of the “facility” in this case. In reporting to Congress that the Air Force improperly split this military construction project into two contracts, the GAO reasoned that “[t]o view each trailer as a ‘complete and usable facility’ in this case ignores the Air Force’s need for which the contracts were awarded.”

The GAO reached similar conclusions in decisions involving the U.S. Army. In another opinion,¹³ the GAO reviewed the Army’s construction of an airfield in Honduras. Focusing on the ultimate requirement “that justified carrying out the construction project,” the GAO did not evaluate each building the Army constructed in determining a “complete and usable facility.” In evaluating the requirement as a whole, the GAO observed that “the Army’s construction of separate facilities such as a runway, control tower, and hangar constituted a single project to produce a complete and usable new airfield.” The GAO concluded that, while individual buildings may be complete and usable, determination of a complete and usable *facility* within the meaning of 10 U.S.C. § 2801(b) has a much broader analysis. This analysis includes the intent of the agency in building the structure, to include the ultimate requirement the construction was meant to fulfill.¹⁴ Thus, when multiple interrelated buildings, structures, or other improvements are being constructed to meet a need for a single “complete and usable” facility, they typically will constitute one construction project.

Military construction funds are used to create enduring improvements and structures to be used during future operations (*e.g.*, assault landing strips, roads, hangars, and barracks). Only “funded” costs must be considered in determining whether a project meets a funding threshold. Funded costs include expenses such as materials, supplies, services, installed equipment, transportation, travel and per diem costs for troop labor, equipment use costs, and site preparation. Unfunded costs are separately accounted for and do not count toward funding thresholds; they include military personnel pay and allowances, equipment depreciation, and some planning and design costs.¹⁵

Alternative Military Construction Funding Sources. In addition to the two primary construction authorities (specified and unspecified MILCON), there are other important authorities to be aware of in advising on construction projects in the operational environment.

Emergency Construction, 10 U.S.C. § 2803. The secretaries of the military departments may use unobligated MILCON to fund a project not otherwise authorized, if it is vital to the national security or to the protection of health, safety, or the environment, and is so urgent that it

¹³ U.S. Gov’t Accountability Office, *The Hon. Bill Alexander*, B-213137, 63 Comp. Gen. 422 (June 22, 1984).

¹⁴ See also U.S. Gov’t Accountability Office, B-159451 (September 3, 1969) determining that the construction and renovation of a number of separate facilities at the Grand Hotel in Nha Trang, Vietnam, constituted a single project to produce a complete and usable Field Force I headquarters.

¹⁵ See AFI 32-1020, para. 2.10 and DoDI 7000.14-R, vol. 3, ch. 17, §§ 170401 and 170501.

cannot wait until the next MILCON authorization act. This requires notice to Congress and a five-day waiting period applies.¹⁶

Contingency Construction, 10 U.S.C. § 2804. The SecDef may authorize MILCON if waiting for the next MILCON authorization act would be “inconsistent with national security or national interest.” The expenditure must be “within the amount appropriated for such purpose.” The expenditure must be reported to Congress and there is a seven-day waiting period.¹⁷ This funding authority is normally used on extraordinary projects that develop unexpectedly. However, it may not be used for projects denied authorization in previous Military Construction Appropriations Acts.¹⁸

Construction Authority in the Event of a Declaration of War or National Emergency, 10 U.S.C. § 2808. Upon a “declaration of war” or Presidential declaration of national emergency, the SecDef may authorize the expenditure of MILCON “necessary to support” the armed forces. This permits the use of unobligated MILCON, including family housing funds. This also requires a report to Congress, but there is no waiting period.¹⁹

Emergency and Extraordinary Expenses, 10 U.S.C. § 127. Although this is not a “construction” statute, its language suggests that it may be available for emergency or contingency construction. It provides resources to the SecDef and secretaries of the military departments for unanticipated emergencies or extraordinary expenses, including unanticipated, short-notice construction. If the costs exceed \$500,000, the secretary concerned must notify Congress.²⁰

“OTHER PROCUREMENT” FUNDS

Major “end items” or investment purchases must be purchased with “procurement funds.” These are durable items expected to last, or hold value, beyond the fiscal year of purchase. The opposite of investment items are expenses. “Expenses” must be funded using O&M.

Expense/Investment Threshold

“Expenses” are costs of resources consumed in operating and maintaining the DoD. Expenses can be thought of as consumables. These are often recurring expenses related to the day-to-day operation of military facilities. The Financial Management Regulations (FMR) provide the following examples:

1. Labor of civilian, military, or contractor personnel;
2. Rental charges for equipment and facilities;
3. Food, clothing, and fuel;

¹⁶ AFI 32-1020, paras. 1.3.1.2.3, 5.2.1.1; *see also* DoD Reg. 7000.14-R, vol. 3, chs. 7 and 17.

¹⁷ AFI 32-1020, paras. 1.3.1.2.4, 5.2.1.2; DoDD 4270.5, *Military Construction* (12 February 2005), incorporating Change 1, 31 August 2018; DoD Reg. 7000.14-R, vol. 3, chs. 7 and 17.

¹⁸ Legislative History. H.R. Rep. No. 97-612 (1982).

¹⁹ 10 U.S.C. § 2808; DoDD 4270.5; AFI 32-1020, para. 1.3.1.2.5.

²⁰ The DoD utilized this authority in the immediate aftermath of the accident at Cavalese, Italy, in which a U.S. Marine aircraft collided with overhead cables, causing the deaths of a number of people within a cable car. The authority was utilized to pay some of the expenses of the next-of-kin. *See* Reisman, W. Michael, and Robert D. Sloan, “The Incident at Cavalese and Strategic Compensation.” *The American Journal of International Law*, 94, No. 3, 2000, 505-15.

4. Supplies and materials designated for supply management of the Defense Working Capital Funds; and
5. Maintenance, repair, overhaul, rework of equipment.²¹

Conversely, “investments” are “costs to acquire capital assets such as real property and equipment,”²² or assets which will benefit both current and future periods and generally have a long life span. Investments are normally financed with procurement appropriations. The FMR definition of an investment item is expansive.²³

However, there is a major exception permitting certain purchases of investments with O&M funds. In each year’s Defense Appropriation Act, Congress traditionally permits the DoD to utilize its O&M appropriations to purchase investment items with a cost less than \$250,000. In section 9010 of the Consolidated and Further Continuing Appropriations Act, 2013, Congress permitted the SecDef to increase that unit cost threshold to \$500,000, provided the “action is necessary to meet the operational requirements of a Commander of a Combatant Command engaged in contingency operations overseas.” By Memorandum dated 21 September 2010, the Deputy SecDef provided the increased unit cost threshold to the Commander, United States Central Command (USCENTCOM), for Operations IRAQI FREEDOM (OIF) and ENDURING FREEDOM (OEF). The appropriations language has been repeated in subsequent appropriations, most recently in the Consolidated Appropriations Act, 2020, in section 9010. Likewise, the Deputy SecDef has repeatedly authorized the increase for USCENTCOM. The authorization is accomplished each year and is typically tied to the fiscal year.

Contingency Funding (OCO funds)

Congress appropriates funds for the DoD specifically for the purpose of prosecuting designated ongoing contingency operations. After 2001, these appropriations were commonly called “Global War on Terror” funds, but starting with Fiscal Year 2010, Congress has termed them Overseas Contingency Operations (OCO) funds. These OCO funds are typically misunderstood by most military commanders, contracting officers, and judge advocates. It is important to understand that “OCO” is not a separate pot of money, but rather a special *type* of funding requested by DoD and provided by Congress for overseas contingency operations.

An important distinction must be made between ordinary, day-to-day funds received in normal appropriations (baseline) and OCO funds. OCO funds are to be used for “incremental expenses” according to the GAO. Congress defined the difference between baseline and incremental expenses associated with ongoing contingency operations in the Omnibus and Reconciliation Act of 1990 (Omnibus Act), 101 P.L. 508, 13101. In that law, Congress defined an incremental expense as “costs associated with the increase in operations in the Middle East and do not include costs that would be experienced by the Department of Defense as part of its normal operations absent Operation Desert Shield.” Congress articulated a “but for” test in determining what an incremental expense is. Therefore, the question becomes: Is the expense directly attributable to ongoing contingency operations? If so, the cost is an incremental expense, appropriate for OCO funds.

²¹ DoD Reg. 7000.14-R, vol. 2A, ch. 1, para. 010201.D.1.

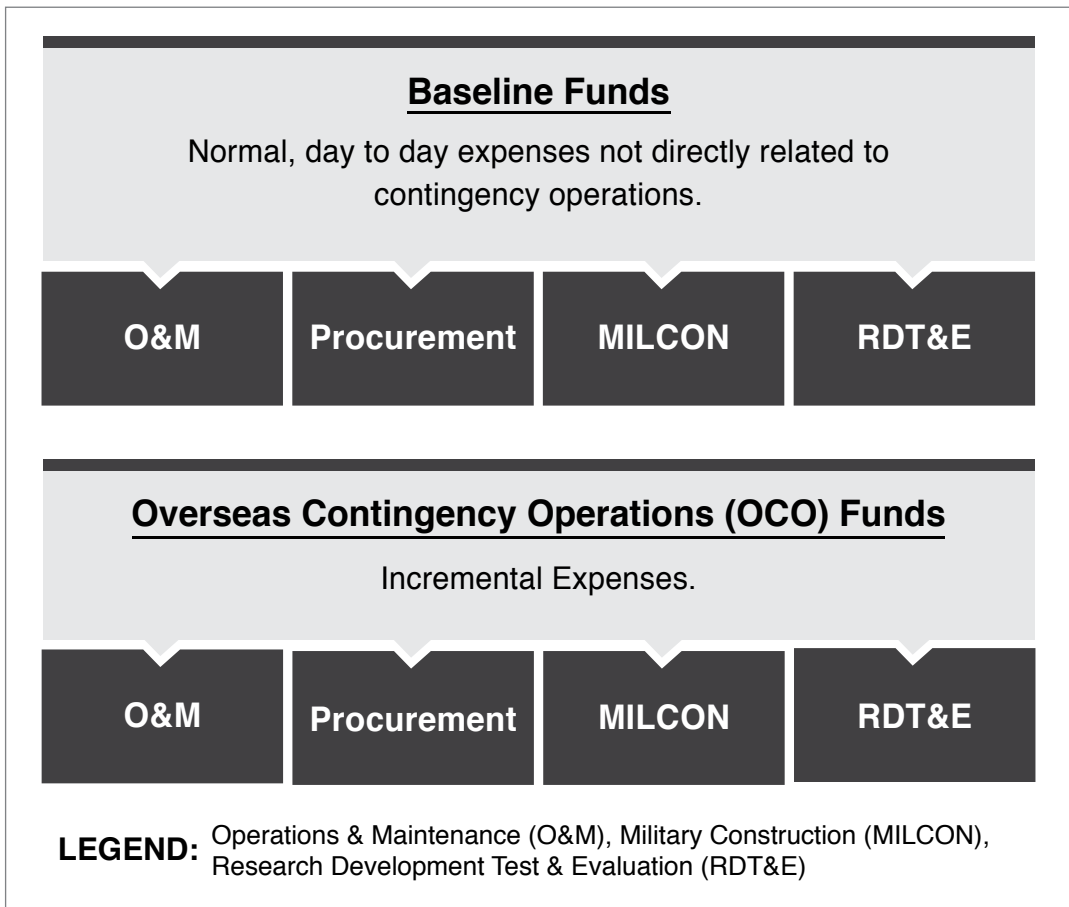
²² *Id.* para. 010201.D.2.

²³ *See Id.* paras. 010201.D.2(a)-(f) and D.3(a)-(k).

The DoD FMR and GAO opinions mirror this distinction by Congress. DoD FMR 7000.14-R, volume 12, chapter 23, provides guidance on the use of contingency funds for incremental expenses. Paragraph 230107 explains that “the funding derived from a contingency transfer account is available only for those *incremental* costs incurred in direct support of a contingency operation” (emphasis added). Like the Omnibus Act, the FMR identifies “baseline” funds as day-to-day expenses which are not directly related to the incremental cost of the contingency.²⁴

Thus, there are two different “types” of pots of money. Installation O&M funds (the “pot”) can be either OCO or “baseline,” depending on how they were appropriated. For example, the Air Force Expeditionary Center at Fort Dix may have a requirement to build an addition to its schoolhouse in order to accommodate more students. Assume there are more students because of a greater number of deployments to support contingency operations. The installation can use OCO O&M (if the construction is under \$2 million) because the expense would be an “incremental” cost directly attributable to ongoing contingency operations. In addition to O&M, there is also OCO appropriations for every pot normally provided by Congress (*i.e.*, OCO military personnel, OCO construction).

Figure 28.1. Separation of Baseline and Overseas Contingency Operations Funds



²⁴ See also *Id.* at V 12, ch. 23, para. 2309.

Time

There are two rules governing time. The first is the “period of availability” rule: “An appropriation is available for obligation for a definite period of time. It must be obligated during this period of availability, or the authority to obligate expires.”²⁵ Different types of funds have different periods of availability. O&M funds are one-year funds, MILCON funds are five-year funds, and procurement funds are three-year funds (the fiscal year (FY) runs from 1 October to 30 September). The vast majority of expenses are paid for with current year funds, and after their period of availability has passed, current year funds become expired funds. Expired funds remain available to adjust old obligations, but they cannot be used to fund new obligations.²⁶ After five years from the end of the period when a fund was considered current it becomes a closed fund. Closed funds cannot be used for any purpose.

The second rule is the “bona fide needs” (BFN) rule: “[A]n appropriation...is available only for payment of expenses properly incurred during the period of availability.”²⁷ Generally, supplies are the BFN of the FY in which they are used. Severable services (those that can be divided into discrete periods) are the BFN of the FY in which they are performed; non-severable services or construction are the BFN of the FY in which work begins.

There are important exceptions to the BFN rule.²⁸ Supplies ordered during one FY may be funded with current funds, even if they will not be delivered until the next year, due to normal lead time needed for producing and/or delivering the supply. Purchasing items for which there is no present need, simply because funds are available (typically at FY end), is strictly prohibited; however, authorized stock levels may always be maintained regardless of when supplies will actually be used. 10 U.S.C. § 2410a authorizes contracts for severable services (for example custodial services, routine maintenance, and lawn care) and leases to use current year funds for a period of performance up to 12 months, even if the period of performance will cross into the next fiscal year. Non-severable services or construction contracts awarded near the end of the FY may be funded with current FY funds, even though work may continue into, or may not even begin, until the next FY.

Amount

Finally, the last aspect of the PTA analysis is “amount.” This rule requires that there be an available appropriation to support every obligation and expenditure.²⁹ The Anti-Deficiency Act (ADA) generally prohibits obligation or expenditure of appropriated funds in advance of, or in excess of, an appropriation. Criminal sanctions for violations are possible. An important exception is the Feed and Forage Act, which allows the DoD to contract for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies for the current FY without an appropriation.³⁰ Judge advocates should always check with the FM officer (comptroller) to determine if sufficient amounts of the “right” funds are available.

²⁵ 31 U.S.C. § 1552.

²⁶ *Id.* § 1553(a).

²⁷ *Id.* § 1502(a).

²⁸ *See generally*, DFAS-IN 37-1, para. 9-5c.

²⁹ 31 U.S.C. §§ 1341-42, 1511-19, the Anti-Deficiency Act (ADA).

³⁰ 41 U.S.C. § 6301.

FISCAL LAW ISSUES IN MILITARY OPERATIONS

Other than military construction issues, there are two areas in which most fiscal law problems arise during overseas operations: (1) training and equipping of foreign forces; and (2) humanitarian assistance (HA). The Comptroller General provided a good analysis regarding DoD funding the training and equipping of foreign forces and HA in the opinion, *The Honorable Bill Alexander*, B-213137, January 30, 1986 (unpublished). The opinion dealt with training exercises, but remains viable and valuable precedent for resolving these common issues.

Training, Contact Programs, and Conferences with Foreign Forces

As previously stated, a basic tenet of fiscal law is that a “general” appropriation cannot fund a purpose for which Congress has made a specific appropriation. While, conceptually, assistance to foreign forces may at times seem “necessary and incident” to Air Force operations, the Comptroller General has determined that this is not a proper purpose of O&M funds. Generally, the duty to train and provide assistance to foreign countries rests with the Department of State (DoS) under Title 22 of the U.S. Code. Funds for foreign assistance activities are specifically provided by Congress in annual appropriations acts to the DoS. This foreign assistance authority consists of funds for health, education, and development programs under the Foreign Assistance Act.

Thus, the provision of assistance to foreign countries is “provided for” by a more specific appropriation to the DoS. Therefore, using O&M for this purpose fails the first prong of the “necessary expense” test. The GAO reinforced this in *The Honorable Bill Alexander*: “it is our opinion that DoD’s operation and maintenance funds may not be used to finance such activities in light of the availability of other appropriations specifically provided therefore.” There are, however, two exceptions.

One exception is for minor amounts of “interoperability, safety, and familiarization training,” so long as the training does not rise to the “level of formal training comparable to that normally provided by security assistance.” Whether training of foreign forces is “incidental” to the operation is not the key; what is key is whether or not it is “training;” O&M funds may be used only for “minor amounts of interoperability and safety instruction.”³¹ The primary training benefit must be for U.S. forces.

The second exception is for joint combined exchange training (JCETs) conducted by special operations forces (SOF) (including civil affairs and psychological operations forces) training with “friendly foreign forces.” This is authorized because it is part of the SOF mission to train foreign forces. So, again, the primary benefit must be for the U.S. forces.³² The SecDef must annually report to Congress all SOF training, including its relationship to other overseas training programs. No additional O&M funds are authorized/appropriated. The statute (sometimes referred to as the “SOF Exception”) authorizes the United States Special Operations Command (USSOCOM) commander, or the commander of any other unified or specified command, to pay or authorize payment for certain expenses. These include the expenses of training U.S. SOF personnel during combined exercises, the expenses of deploying the U.S. SOF for the training, and associated “incremental expenses” (“reasonable and proper costs of rations, fuel, training ammunition, transportation, and other goods and services consumed by each country, except that

³¹ 63 Comp. Gen. 422 at 441 (1984).

³² 10 U.S.C. § 322.

the term does not include pay, allowances, and other normal costs of such country's personnel,") of a "friendly developing country."³³

Additional Training, Conferences, and Combined Exercises Statutes

Theater Security Cooperation, 10 U.S.C § 312. This authority permits the SecDef to pay personnel expenses, such as travel, subsistence, similar personnel expenses, and special compensation for defense personnel of friendly foreign governments and, with the concurrence of the Secretary of State (SecState), for other personnel of friendly foreign governments and non-governmental personnel. The SecDef may also pay medical expenses and provide administrative services and support for liaison officers. This authority is specifically applicable to conferences, seminars, and similar meetings. No individual can receive more than \$150,000 worth in one fiscal year under this authority.

Training with Friendly Foreign Countries, 10 U.S.C. § 321. This authority permits the armed forces under the jurisdiction of the SecDef to train with the military forces or security forces of a friendly foreign country so long as the SecDef determines that it is in the national security interest of the United States to do so AND the primary purpose of the training for which payment may be made shall be to train U.S. forces.

Expanded IMET (International Military Education and Training) Program, 22 U.S.C. § 2347. The purpose of the Expanded IMET is to promote responsible defense resource management, the principle of civilian control over the military, or military justice systems which protect human rights.

Demilitarization of the Independent States of the Former Soviet Union, 22 U.S.C. § 5901. It is in the U.S. national security interest to facilitate the destruction of, and prevent the proliferation of, nuclear, chemical, biological, and other weapons of mass destruction; and to support the demilitarization of the independent States; and to expand military-to-military contacts (Nunn-Lugar Program).

Combatant Commander Initiative Funds (CCIF), 10 U.S.C. § 166a. The Chairman of the Joint Chiefs of Staff controls these funds. They are allocated to the combatant commands to supplement other appropriations. The total amount for FY 20 was only \$6.9 million, so its use is limited. The highest priority is given to activities that enhance war fighting capability, readiness, sustainability, and reduce the threat to, or otherwise increase, U.S. national security. The authorized uses are:

1. Force training;
2. Contingencies;
3. Selected operations;
4. Command and control;
5. Joint exercises (including activities of participating foreign countries);
6. Humanitarian and civic assistance, to include urgent and unanticipated humanitarian relief and reconstruction assistance;
7. Military education and training to military and related civilian personnel of foreign countries (including transportation, translation, and administrative expenses);

³³ *Id.* § 322(d)(2).

8. Personnel expenses of defense personnel for bilateral or regional cooperation programs;
9. Force protection; and
10. Joint warfighting capabilities.

SUPPORTING AND EQUIPPING FOREIGN MILITARY FORCES

In addition to providing training, the general prohibition on providing assistance to foreign countries applies to supporting and equipping them as well. There is a critical distinction between providing supplies and services to a foreign country (Security Assistance pursuant to Title 22 U.S.C.) and providing supplies and services to U.S. forces that may have an incidental benefit to a foreign country. This concept is critical because, for the most part, the Security Assistance program governs the transfer of any items or services to another country that will primarily benefit that country. If, however, the United States is the primary beneficiary and the foreign country receives only minor and incidental benefits, the United States may be able to construct or provide the items or services, subject to the limitations set out below.

U.S. forces are typically deployed in austere areas and in countries which do not have the same military capacity as the United States. Generally, U.S. forces are very well equipped compared to some coalition and host-nation forces. As a consequence, foreign militaries often request equipment or support services. These requests range from providing food to sophisticated air navigation equipment. Although the role of the DoD has changed significantly over the past decade, the general rule remains: logistical support and equipping foreign military forces falls with the authority of the DoS. This general rule applies to all transactions in which the services or equipment are provided to a foreign country (either sold or given for free). There must be positive (explicit) authority that authorizes the DoD to give, or sell, supplies or services to another nation. Thus, the starting point for any analysis is that support for, or equipment of, a foreign force is prohibited unless there is positive statutory authority authorizing a certain transaction. Positive authority traditionally can be found via a statute, but is occasionally derived from international agreements such as an acquisition and cross-servicing agreement (ACSA).

Acquisition and Cross-Servicing Agreements (ACSAs)³⁴

One exception to the general rule stated above are ACSAs. These agreements provide great flexibility for the United States to provide, or to receive, logistics support, supplies, and services (LSSS) to or from coalition or other forces. An ACSA is an international agreement between the United States and a foreign country. The agreement allows the United States to provide certain logistical support in exchange for cash, an even value exchange, or replacement in kind. An ACSA is not an authority that allows the United States to provide supplies or services for free. “ACSA orders” are placed by the receiving country when needed, using the over-arching ACSA as authority.

The ACSA legislation permits the SecDef to enter into ACSA with NATO, NATO subsidiary bodies, the UN, regional international organizations of which the United States is a member, and other eligible countries for: “logistic support, supplies, and services for elements of the armed forces deployed outside the United States.”³⁵ The SecDef can also enter into ACSAs with governments of

³⁴ See 10 U.S.C. §§ 2341-2350; CJSCI 2120.01D, *Acquisition and Cross-Servicing Agreements* (21 May 2015); and DoDD 2010.9, *Acquisition and Cross-Servicing Agreements* (28 April 2003). See also Chapter Seven, *International Agreements*, and Chapter 10, *Acquisition and Cross-Servicing Agreements*.

³⁵ 10 U.S.C. § 2341.

non-NATO countries for armed force elements deployed (or to be deployed) outside the United States, if the government meets any of four conditions:

1. It has a defense alliance with the United States;
2. It permits the stationing of members of the U.S. armed forces or the home porting of U.S. naval vessels in such country;
3. It has agreed to preposition U.S. materiel in such country; or
4. It serves as the host country to military exercises, which include elements of the armed forces or permits other military operations by the armed forces in such country.³⁶

The statutes also contain dollar limitations on amounts that may be obligated or accrued by the United States “except during a period of active hostilities involving the armed forces.”³⁷ However, when the armed forces are involved in a contingency operation or in a non-combat operation (including an operation in support of the provision of humanitarian or foreign disaster assistance or in support of peacekeeping operations under either Chapter VI or VII of the UN Charter), most of these dollar limitations are waived for the purpose and duration of that operation. The SecDef must submit an annual report (before 15 January) of all non-NATO ACSAs.³⁸

In addition to international agreements, Congress authorizes DoD to train and equip foreign militaries through legislation. Many of these legislative authorities for OEF are contained in annual Authorization or Appropriation Acts.

Support for the Conduct of Operations, 10 U.S.C. § 331

This statute authorizes, among other things, the SecDef, with SecState concurrence, to provide LSSS to allied forces participating in combined operations with U.S. forces or participating in a military or stability operation that benefits the national security interests of the United States. This authority also allows for the procurement of equipment to lend it to the military forces of a friendly foreign country. This authority is subject to the Arms Export and Control Act and the definition of LSSS under the ACSA statute.³⁹ There is a cap on LSSS depending on who the recipient is and what is being provided. An annual report to Congress is required.

Coalition Support Funds

Section 1217 of the FY 2020 NDAA authorized the SecDef to reimburse any “key cooperating nation” other than Pakistan for logistical and military support provided by that nation to, or in connection with, U.S. military operations in Afghanistan, Iraq, or Syria. These payments are made to cooperating nations in amounts as determined by the SecDef with concurrence of the SecState and in consultation with the Director of the Office of Management and Budget. Reimbursing coalition partners helps to ensure their contributions yield the maximum benefit to the overall operations of U.S. military forces fighting terrorism worldwide. Reimbursing coalition contributions is critical to enabling forces from these countries to remain in theater and provide direct support to U.S. military operations. The FY 20 Consolidated Appropriations Act authorized the expenditure of up to \$225 million of Defense-wide O&M for this fund, available

³⁶ *Id.*

³⁷ *Id.* § 2347.

³⁸ *Id.* § 2342(h).

³⁹ *Id.* § 2350.

until expended. The SecDef must notify Congress 15 days before making a reimbursement and must submit quarterly reports to Congress.

Afghanistan Security Forces Fund

The FY 20 Consolidated Appropriations Act authorized the SecDef to continue to provide certain support to the Afghanistan security forces. The Commander, Combined Security Transition Command-Afghanistan (CSTC-A) controls and administers this fund in Afghanistan. The Afghanistan Security Forces Fund will remain available until September 30, 2021.

Authority to Build Capacity, 10 U.S.C. § 333

This section provides DoD with the authority to provide training and equipment to the national security forces of one or more foreign countries for the purpose of “building the capacity” of those foreign military forces. This authority is designed to build a country’s capacity to, among other things, conduct counterterrorism operations, counter-illicit drug trafficking operations, or build the capacity of a country’s maritime forces to combat terrorism. It authorizes the following activities: provision and sustainment of defense articles, training, defense services, supplies, and small-scale construction. This authority does not provide for additional funds, but allows DoD to use its O&M pot to train and equip foreign militaries.

Presidential Drawdowns of Defense Articles, Defense Services, and Military Education and Training, 22 U.S.C. § 2318

If the President determines that an unforeseen emergency requires immediate military assistance to a foreign country or international organization and the emergency cannot be addressed under the Arms Export Control Act or any other law, the President may direct the drawdown of those items from current DoD stocks (this is not a supplementation of an appropriation with additional funds from Congress, but a redirection of already appropriated funds or purchased items to another authorized purpose). Use of this authority requires a Presidential determination and prior Congressional notification. The aggregate value may not exceed \$100 million in any year.

The President has non-emergency drawdown authority under this section. If the President determines it is in the national interest of the United States to drawdown articles and services from the inventory and resources of any agency of the U.S. government (USG) and military education and training from the Department of Defense, the President may direct the drawdown for international narcotics control, international disaster assistance, antiterrorism assistance, nonproliferation assistance, migration and refugee assistance, or Southeast Asian and missing-in-action efforts. The aggregate value may not exceed \$200 million in any year and, of that amount, not more than \$75 million may be provided from the DoD.

Excess Defense Articles, 22 U.S.C. § 2321(j)

The President may transfer excess defense articles to a foreign nation under certain circumstances as long as doing so does not have an adverse impact on military readiness, national technology, and the industrial base. Priority should be given to NATO countries and non-NATO allies on the southern and southeastern flank of NATO. If the articles are significant military equipment (defined in 22 U.S.C. § 2794 (9)) or valued at more than \$7 million, the transfer cannot occur until 30 days after Congressional notification. The aggregate value may not exceed \$500 million in any fiscal year.

Peacekeeping Operations (PKO), 22 U.S.C. § 2348

This authority allows the President to furnish assistance to friendly countries and international organizations for peace keeping operations (PKO) and other programs carried out in furtherance of the national security interests of the United States. This authority is distinct from the United Nations Participation Act (UNPA) as the intended activities to benefit from these funds are not UN-mandated and are not funded by UN assessments (some PKOs are, of course, authorized by UN mandate); although, it does not preclude reimbursing the DoD for expenses incurred pursuant to section 7 of the UNPA. Examples include:

1. African Crisis Response Force Initiative (ACRF);
2. Multinational Force and Observers (MFO) (22 U.S.C. §§ 3422, *et seq.*), an independent, international body supervising Egyptian and Israeli forces in the Sinai;
3. Organization for Security and Cooperation in Europe (OSCE) for Bosnia and Croatia, and for Kosovo; and
4. Maintaining a multinational force in Haiti.

HUMANITARIAN ASSISTANCE

Immediate Foreign Disaster Relief

DoDD 5100.46, *Foreign Disaster Relief*,⁴⁰ outlines various responsibilities of DoD components in undertaking foreign disaster relief operations in response to a DoS request. The purpose of the relief is for prompt aid which can be used to alleviate the suffering of foreign disaster victims because of a foreign disaster. The directive outlines the procedural steps that need to be taken in order to provide the relief. However, paragraph 4.f. provides that the directive does not prevent “a military commander with assigned forces at or near the immediate scene of a foreign disaster from taking prompt action to save human lives,” (which is commonly referred to as “immediate response authority”).

Overseas Humanitarian, Disaster, and Civic Assistance (OHDACA)

Performing humanitarian assistance (HA) activities is not the traditional job of the DoD. Traditionally, HA is considered security assistance within the realm of the DoS. However, recognizing that the need exists, in 1986 Congress enacted the DoD’s first statutory authority for HA in 10 U.S.C. § 401. Since that time, Congress has added a series of interrelated statutes, now known collectively as “Overseas Humanitarian, Disaster, and Civic Assistance” (OHDACA). Those statutes include 10 U.S.C. §§ 402, 404, 407, 2557, and 2561.

The DoD conducts humanitarian assistance missions under the OHDACA program for the statutory purposes of training military personnel, serving the political interests of the host nation and the United States, and providing humanitarian relief to foreign civilians.

⁴⁰ DoDD 5100.46, *Foreign Disaster Relief (FDR)* (6 July 2012), incorporating Change 1, 28 July 2017.

Transportation of Humanitarian Relief Supplies to Foreign Countries, 10 U.S.C. § 402

The SecDef may transport to any country, without charge, supplies from a non-governmental organization (NGO) which are intended for HA on a space available basis, provided that:

1. The transportation of such supplies is consistent with the foreign policy of the United States;
2. The supplies to be transported are suitable for humanitarian purposes and are in usable condition;
3. There is a legitimate humanitarian need for such supplies by the people or entity for whom they are intended;
4. The supplies will in fact be used for humanitarian purposes; and
5. Adequate arrangements have been made for the distribution or use of such supplies in the destination country.

The organization requesting the transportation is responsible for ensuring the supplies are suitable for transport. Supplies transported under this section may be distributed by an agency of the USG, foreign government, an international organization, or a private nonprofit relief organization. Supplies transported under this section may not be distributed, directly or indirectly, to any individual, group, or organization engaged in a military or paramilitary activity.

Foreign Disaster Assistance, 10 U.S.C. § 404

The President may direct the SecDef to provide disaster assistance outside the United States to respond to manmade or natural disasters when necessary to prevent loss of lives or serious harm to the environment. Executive Order 12966, 60 Fed. Reg. 36949, delegates this authority to the SecDef. EO 12966 states that the SecDef shall provide disaster assistance only:

1. At the direction of the President;
2. With the concurrence of SecState; or
3. In emergency situations in order to save human lives, where there is insufficient time to seek the prior initial concurrence of SecState, in which case the SecDef shall advise, and seek the concurrence of, SecState as soon as practicable thereafter.

Humanitarian Demining Assistance, 10 U.S.C. § 407

This statute authorizes U.S. armed forces to assist countries in relieving the suffering caused by uncleared landmines and other explosive remnants of war (ERW). U.S. forces can provide training in the procedures of landmine clearance, mine risk education, victims' assistance, and the development of necessary leadership and organization skills to conduct a program. However, no member of the U.S. armed forces, while providing assistance for detection and clearing of landmines, shall engage in the physical detection, lifting, or destruction of landmines or other ERW (unless the member does so for the concurrent purpose of supporting a U.S. military operation) or provide such assistance as part of a military operation that does not involve the U.S. armed forces.

Excess Nonlethal Supplies: Availability for Homeless Veteran Initiatives and Humanitarian Relief, 10 U.S.C. § 2557

The SecDef may make available for humanitarian relief purposes any nonlethal excess supplies of the DoD. Excess supplies made available for humanitarian relief purposes under this section shall be transferred to the Secretary of Homeland Security to support domestic emergency assistance activities and transferred to the SecState for humanitarian relief purposes. The SecDef may assist in the distribution of the supplies at the request of the Secretary of Homeland Security, but the SecState will be responsible for the distribution of supplies the DoS receives. The term “nonlethal excess supplies” means property, other than real property, of the DoD that is excess property that is not a weapon, ammunition, or other equipment or material that is designed to inflict serious bodily harm or death.

Humanitarian Assistance, 10 U.S.C. § 2561

Funds authorized to be appropriated to the DoD for a FY and for HA shall be used for the purpose of providing transportation of humanitarian relief and for other humanitarian purposes worldwide. The SecDef may use the authority to transport supplies intended for use in responding to, or mitigating the effects of, an event or condition, such as an oil spill, which threatens serious harm to the environment, but only if other sources to provide such transportation are not readily available. This authority applies worldwide. There is no requirement that the activity promotes operational readiness of U.S. forces.

Humanitarian and Civil Assistance (HCA), 10 U.S.C. § 401

The secretary of a military department may carry out humanitarian and civic assistance (HCA) activities in conjunction with authorized military operations of the armed forces in a country if the secretary concerned determines that the activities will promote the security interests of both the United States and the country in which the activities are to be carried out. The secretary concerned must also determine that the activity promotes the specific operational readiness skills of the members of the armed forces who participate in the activities. There are two types of HCA activities.

Pre-planned HCA. HCA provided in conjunction with military operations. Under 10 U.S.C. § 401 the secretary of a military department is authorized to carry out HCA activities *in conjunction with authorized military operations* of the armed forces in a country if the secretary concerned determines that the activities will promote: (1) the security interests of both the United States and the country in which the activities are to be carried out; and (2) the specific operational readiness skills of the members of the armed forces who participate in the activities. Provided that:

1. HCA activities carried out under this section shall complement, and may not duplicate, any other form of social or economic assistance which may be provided to the country concerned by any other department or agency of the United States.
2. Such activities shall serve the basic economic and social needs of the people of the country concerned.
3. HCA may not be provided under this section (directly or indirectly) to any individual, group, or organization engaged in military or paramilitary activity.
4. Expenses incurred as a direct result of providing HCA under this section to a foreign country shall be paid for out of funds specifically appropriated for such purpose, except that funds appropriated to the DoD for O&M may be obligated for HCA under this section only for incidental costs of carrying out such assistance.

An “HCA activity” is defined by 10 U.S.C. § 401 and DoDI 2205.02 as:

1. Medical, surgical, dental, and veterinary care provided in rural or underserved areas of a country, including education, training, and technical assistance related to the care provided;
2. Construction of rudimentary surface transportation systems;
3. Well-drilling and construction of basic sanitation facilities; and
4. Rudimentary construction and repair of public facilities.

COMMANDER’S EMERGENCY RESPONSE PROGRAM (CERP)

The Commander’s Emergency Response Program (CERP) was originally funded with seized Iraqi assets. The Coalitional Provisional Authority (CPA) accounted for the seized Iraqi funds, administered and distributed the funds to U.S. Commanders in Iraq for “reconstruction assistance” to the Iraqi people. Congress authorized \$200 million from Defense-wide O&M for CERP for FY13.⁴¹ In FY20, Congress appropriated \$5 million for CERP.⁴²

The CERP is designed to enable local U.S. military commanders in Afghanistan to respond to urgent, small-scale, humanitarian relief and reconstruction requirements within their areas of responsibility and provides an immediate and direct benefit to the people of Afghanistan. In this context, “urgent” is defined as any chronic or acute inadequacy of an essential good or service that, in the judgment of a local U.S. military commander, calls for immediate action. “Immediate benefit” means that at the time a project is commenced, the planned completion date for the project is within one year, recognizing that, in the course of executing the project, unforeseen circumstances may cause the completion date to be extended beyond one year. “Direct benefit” means that the people of Afghanistan are the proximate beneficiaries of a completed project, not the Government of the Islamic Republic of Afghanistan, tribal leaders, or other third parties. In addition, the CERP is intended to be used for small-scale projects that, optimally, can be sustained by the local population or government, or other non-DoD funding sources. Small-scale would generally be considered less than \$500,000 per project. No project may exceed \$2 million.⁴³

The CERP may be used to assist the Afghan people in the following representative areas:

1. Water and sanitation;
2. Food production and distribution;
3. Agriculture;
4. Electricity;
5. Healthcare;
6. Education;
7. Telecommunications;
8. Transportation;

⁴¹ Sections 1221, 2013 NDAA.

⁴² Sections 9005, 2020 Consolidated Appropriations Act.

⁴³ See DoD Reg. 7000.14-R, vol. 12, ch. 27, para. 270104 (December 2019).

9. Civic cleanup activities;
10. Civic support vehicles;
11. Repair of civic facilities;
12. Battle damage repair;
13. Condolence payments;
14. Other urgent humanitarian or reconstruction projects; and
15. Temporary contract guards for critical infrastructure (this authority is limited by the DoD FMR).

DEPLOYMENT CONTRACTING AND ACQUISITION

Having discussed the law applicable to the obligation of funds during an overseas deployment, this chapter now examines how the U.S. armed forces obtain various services, supplies, facilities, and equipment. In recent years, the way in which the DoD (and in particular the Air Force) contracts for supplies and services has been under the Congressional spotlight. Over the past few years, several military and civilian contracting officers have been accused of personally benefitting from awarding contracts to particular contractors. Some have taken bribes and some inappropriately obtained post-government employment. Regardless, contracting personnel must benefit from good counsel, especially in a deployed environment.

On a positive note, contracting procedures in deployed areas differ little from the procedures in the United States. However, the challenges for a judge advocate include the pace of the workload, the experience (or inexperience) of the contracting officers and other mission partners, and the demand to “speed up” the process or cut corners because of the ongoing operation.

Contracting can be an effective force multiplier of combat service support for deployed forces. Contingency contracting requires an understanding of the legal aspects, funding issues, duties, and responsibilities of procurement personnel, their relationship with support staff, and requirements in deployment preparation. The ability to work with people who have vastly different cultures, backgrounds, perspectives, and, most importantly, business practices is another aspect of contingency contracting that will have considerable impact upon the successful support of a joint operation.⁴⁴

Contract Authority

Only authorized personnel may enter into contracts on behalf of the United States. Contract authority flows from the SecAF to heads of contracting activities and to contracting officers (COs). Commanders of Air Force major commands are heads of contracting activities. In Joint Chiefs of Staff-declared contingencies, the commander of the Air Force unified component command in the area of responsibility (AOR) is a head of contracting activities. COs are appointed via a certificate of appointment (also known as a warrant). The warrant specifies any limits on the CO’s authority. When COs deploy, they take their warrants (and their contract authority) with them, even though they are under functional control of the wing commander or some other deployed commander. Contingency Contracting Officers (CCOs) must be warranted COs, specially trained and certified as CCOs, and should be active duty military members.

⁴⁴ JOINT PUBLICATION 4-10, *Operational Contract Support* (4 March 2019).

Exhausting Other Means

Before a CCO may purchase supplies and/or services, he or she must ensure that requesting officials have tasked the established logistics supply pipeline and that the supply pipeline cannot provide the required supplies or services in a timely fashion. If the required supply and/or service is not available, then the CCO must exhaust the following means.

Inter-Service Support Agreements. A sister service may be able to provide the logistic and/or administrative support.

Other Required Government Sources. Parts 8 of the Federal Acquisition Regulation (FAR) and Defense FAR Supplement (DFARS) require that sources for supplies and services throughout the USG and the DoD be utilized. For example, The Economy Act, 31 U.S.C. § 1535, allows executive agencies to transfer funds to other executive agencies, and to obtain goods and services provided from existing stocks or by contracts. Also, on a deployment the Air Force could have construction performed by the Army Corps of Engineers. Procedural requirements are established in FAR Subpart 17.5 and DFARS Subpart 217.5.

Host Nation Support. A host nation will often agree to the supply of items for an operation. Support items under these agreements may include billeting, food, water, fuel, transportation, and utilities.

Contingency (Coalition) Partners. Allied forces/contingency partners may have agreed to provide supplies or services pursuant to an implementing arrangement to an ACSA. A memorandum of understanding or protocol to the implementing arrangement may have been executed for the contingency.

LOGCAP/AFCAP Contract. The LOGCAP is the (U.S. Army) Logistics Civil Augmentation Program and AFCAP is the Air Force Civil Augmentation Program. The LOGCAP/AFCAP contract provides for a civilian contractor to provide logistics support to a deployed force anywhere in the world. The LOGCAP has been used in areas as diverse as Iraq, Afghanistan, Somalia, Haiti, Rwanda, and the Balkans. Both programs may only be used to provide services, not construction. On 7 March 2006, the Office of the General Counsel, DoD, issued a memorandum on *LOGCAP Funding Limitations*, which opined that placing a task order under a LOGCAP contract to construct a facility would be an improper use of the contract because the work to be done would not be a service, but rather construction.

TYPES OF CONTRACTS

Once other means of acquiring the supplies and/or services have been exhausted, the CCO now can consider local purchasing. The first step is to decide what type of contract to utilize. Below are the various types:

Firm Fixed Price

This is the primary type of contract used during a contingency operation. Since the price is firm and fixed, the contractor has the risk of contract completion, but also has an incentive to perform efficiently and economically.⁴⁵

⁴⁵ FAR, 16.202.

Requirements

This type provides for purchasing all requirements or services from one contractor so that maximum and minimum order amounts are established in the contract. The contractor is not obligated to fill orders beyond the established maximum.⁴⁶

Indefinite Quantity

This contract provides for an indefinite quantity (within stated limits) of specific services or supplies to be furnished within a fixed period; deliveries are scheduled by placing orders with the contractor. This type of contract is used when the agency cannot determine, above a stated minimum, the precise quantities of services or supplies that it will need; however, the agency must not commit itself for more than a minimum quantity. The agency may place several indefinite quantity contracts with several contractors in order to maintain sufficient sources if one or more contractors are unable to deliver.⁴⁷

Time and Materials

This type of contract acquires services or supplies on the basis of direct labor hours at specified fixed hourly rates (including wages, overhead, profit, and material at cost, which may include material handling costs). This form of contract may be the only effective mechanism when large amounts of repair, maintenance, or overhaul work have to be performed in emergency situations; however, it can be used only when it is not possible, at the time of placing the contract, to estimate accurately the extent or duration of the work, or anticipate costs with any reasonable degree of confidence.⁴⁸

COMPETITION REQUIREMENTS

With the best type of contract identified, the CCO can choose a supplier. The fundamental rule of law for government contracting is full and open competition that affords all responsible sources an opportunity to compete. This is embodied in the Competition in Contracting Act (CICA), 10 U.S.C. § 2304. While there is no automatic exception for contracting operations during deployments, CICA does not apply to simplified acquisitions.⁴⁹ However, the CCO is still required to take certain steps to ensure that the government's interests are protected, consistent with the circumstances.

Generally, open competition results in a long lead time in order to procure needed items or services. There is a 45-day minimum procurement administrative lead time (PALT) for solicitations to be issued and contracts to be awarded. Notices of proposed acquisitions have to be published for 15 days and offerors must have a minimum of 30 days to submit bids or proposals. There is no automatic deployment contracting exception to the 45-day PALT. Additional time will be needed to define requirements, prepare solicitation documents, evaluate offers, award the contract, and allow for delivery of services or performance of services.

⁴⁶ *Id.* at 16.503.

⁴⁷ *Id.* at 16.504.

⁴⁸ *Id.* at 16.601.

⁴⁹ *See* FAR 6.001(a) (discussed below).

There are seven statutory exceptions to the full and open competition rule. The following five are applicable to an overseas deployment:

1. Only one or few responsible sources, and no other supplies or services will satisfy agency requirements. For example, only the host nation has compatible parts for a system.⁵⁰
2. Unusual and compelling urgency such that the agency would be seriously injured unless the agency can limit the number of sources from which it solicits offers. The CCO may limit the number of sources to those who are able to meet the requirements in the limited time available, and the agency may dispense with the publication periods (the 45-day PALT) if the government would be seriously injured by the delay.⁵¹
3. International agreements may sometimes preclude open and fair competition (*e.g.*, an agreement may limit sources of supplies and services to those found in the host nation).⁵²
4. National security.⁵³
5. Public interest, but this can only be invoked by the head of the agency.⁵⁴

Each exception action requires a justification and approval (J&A) document.⁵⁵ For the international agreement exception, the Air Force requires an international agreement competitive restrictions (IACR) document.⁵⁶ The approval levels for these exceptions (except public interest) are delegated as follows:

1. Under \$700,000: the chief of the contracting office. This authority is delegable to the CO or CCO.
2. \$700,000 to \$13.5 million: the procuring activity competition advocate.
3. For a proposed contract over \$13.5 million but not exceeding \$93 million, by the head of the procuring activity, or a designee who —
 - (a) If a member of the armed forces, is a general or flag officer; or
 - (b) If a civilian, is serving in a position in grade above GS-15 under the General Schedule (or in a comparable or higher position under another schedule).
4. For a proposed contract over \$93 million, by the senior procurement executive of the agency designated pursuant to the Office of Federal Procurement Policy Act (41 U.S.C. § 1702) in accordance with agency procedures.

Judge advocates often assist contracting officers with drafting J&As. Many of the issues associated with J&As are non-legal. One of a judge advocate's biggest contributions to the J&A is ensuring that the justification for a sole source is adequately detailed. If a J&A needs to be entirely rewritten, the judge advocate should let the CO know, and suggest ways to fix it. Support of this nature will make for a better product in the future, and in most cases COs appreciate the mentorship.

⁵⁰ 10 U.S.C. § 2304(c)(1); 41 U.S.C. § 3304(a)(1); FAR 6.302-1.

⁵¹ 10 U.S.C. § 2304(c)(2); 41 U.S.C. § 3304(a)(2); FAR 6.302-2.

⁵² 10 U.S.C. § 2304(c)(4); 41 U.S.C. § 3304(a)(4); FAR 6.302-4.

⁵³ 10 U.S.C. § 2304(c)(6); 41 U.S.C. § 3304(a)(6); FAR 6.302-6.

⁵⁴ 10 U.S.C. § 2304(c)(7); 41 U.S.C. § 3304(a)(7); FAR 6.302-7.

⁵⁵ FAR 6.303 and 6.304.

⁵⁶ Air Force FAR Supplement (AFFARS) 5306.302-4.

METHODS OF ACQUISITION

There are a number of methods of acquisition. Only those appropriate for, or common to, deployments will be discussed.

Sealed Bidding

This type of contracting is rarely, if ever, used. Contract award under sealed bidding is based only upon price and price-related factors, and the contract is awarded to the lowest responsive, responsible bidder. This method **requires** the use of sealed bids if four conditions in the CICA are present:

1. Time permits for the solicitation, submission, and evaluation of sealed bids;
2. The award will be made on the basis of price and other price related factors;
3. It is not necessary to conduct discussions with the responding offerors about their bids; and
4. There is a reasonable expectation of receiving more than one sealed bid.⁵⁷

Negotiations

On deployments, because sealed bidding is rarely appropriate, CCOs may negotiate with offerors (a process sometimes called competitive proposal procedures).⁵⁸ Negotiations allow the agency to use a “best value” basis for awarding a contract and pay more in order to obtain a better service or product. The contract is awarded based upon stated evaluation criteria (one of which must be cost) and is awarded to the responsible offeror whose proposal offers either the lowest cost, technically acceptable solution to the agency’s requirements (LPTA), or the offeror whose proposal represents the best value.⁵⁹

Offers are solicited by either a request for proposals (RFP) or a request for quotations (RFQ). Although negotiated contracting permits greater discretion in the selection of a source, substantial time may be required to obtain and evaluate all information relevant to the criteria which apply to negotiations. This method is commonly used during deployments for amounts above those applicable to the “simplified acquisition procedures” (SAP) described in the next paragraph.

Simplified Acquisition Procedures (SAP)

SAP are used almost exclusively to obtain nonpersonal services, supplies, or construction which are not estimated to exceed \$250,000, except for the acquisition of supplies or services which, as determined by the head of the agency, are to be used to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack (41 U.S.C. § 428a). The term means:

1. \$750,000 for any contract to be awarded and performed, or purchase to be made, inside the United States; and
2. \$1.5 million for any contract to be awarded and performed, or purchase to be made, outside the United States.

⁵⁷ 10 U.S.C. § 2304(a)(2)(A); FAR 6.401(a); FAR Part 14.

⁵⁸ 10 U.S.C. § 2304(a)(2)(B).

⁵⁹ FAR Part 15.

The SAP threshold is further raised to \$7 million (within the United States) and \$13 million (outside the United States in support of contingency operations) under the commercial item test program,⁶⁰ if the acquisition is for a “commercial item” as defined by FAR 2-101.

A major advantage of SAP is that the CCO may use the simplified acquisition method that is the most suitable, efficient, and economical.⁶¹ Simplified acquisitions do not require full and open competition. Simplified acquisitions include: purchase orders, international merchant purchase authorization cards (IMPAC) (explained below), blanket purchase agreements, and imprest funds.

Purchase Orders⁶²

CCOs may use the standard form 44 to purchase aviation fuel and oil, or for any purchase in support of the contingency up to the simplified acquisition threshold.⁶³ The standard form 1449, Solicitation/Contract/Order for Commercial Items may also be used. The DD Form 1155, *Order for Supplies or Services* is multipurpose and can be used to place orders against blanket purchase agreements (BPAs).

Government Wide Commercial Purchase Card⁶⁴

Government credit card/micropurchase program. Because this method is often not feasible in developing countries or in circumstances where a country’s basic services are no longer functioning, use should be limited to CCO. The Government-wide commercial purchase card may be used to (1) make micro-purchases; (2) place a task or delivery order (if authorized in the basic contract, basic ordering agreement, or blanket purchase agreement); or (3) make payments when the contractor agrees to accept payment by the card.⁶⁵ “Micro-purchase threshold” means \$10,000, except in the following circumstances:

1. For acquisitions of construction subject to the Davis-Bacon Act the threshold is \$2,000;
2. For acquisitions of services subject to the Service Contract Act the threshold is \$2,500; and
3. For acquisitions of supplies or services that are to be used to support a contingency operation or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack, as described in FAR 13.201(g)(1) the threshold is:
 - (a) \$20,000 in the case of any contract to be awarded and performed, or purchase to be made, inside the United States; and
 - (b) \$30,000 in the case of any contract to be awarded and performed, or purchase to be made, outside the United States.

⁶⁰ FAR 13.5.

⁶¹ FAR 13.003(h).

⁶² Standard Form 44, FAR 13.302; DFARS Subpart 213.5; AFFARS Subpart 5313.302.

⁶³ DFARS 213.505-3.

⁶⁴ FAR 13.301.

⁶⁵ FAR 13.301(c).

Blanket Purchase Agreements (BPAs)⁶⁶

A BPA is not a contract but rather akin to setting up a “charge account” with a provider of services or supplies. BPAs are commonly used to procure billeting, meal services, and other supplies and services of a recurring, yet indeterminate, nature.

Imprest Funds⁶⁷

An imprest fund is a petty cash fund for small transactions. Commanders may use imprest funds on a very limited basis, and must comply with DoD 7000.14-R, *DoD Financial Management Regulation, Volume 5, Disbursing Policy and Procedures* and The Treasury Financial Manual, Volume I, Part 4, Chapter 3000.⁶⁸

As indicated above, SAP have relaxed competition requirements. For acquisitions of micro-purchases, award may be made without soliciting competitive quotations if the contracting officer or individual appointed in accordance with FAR 1.603-3(b) considers the price to be reasonable. To the extent practicable, micro-purchases must be distributed equitably among qualified sources.⁶⁹ From over the micro-purchase maximum to the applicable SAP ceiling, the CCO shall solicit quotes to the maximum extent practical.⁷⁰ Solicitation of at least three sources is normally appropriate, including at least two sources not included in the previous solicitation where possible.⁷¹ The nature of the requirement, urgency, dollar-value, and past experience will be relevant to the determination as to how many sources to solicit in each case. Solicitation of only one source is permitted if the CCO determines that only one source is “reasonably available” under the existing circumstances.⁷² Incumbent contractors cannot be excluded without good reason.⁷³ Publication of notices soliciting the contract may be waived if the contracting officer determines that an exception under 5.202 applies.⁷⁴

Most purchases the CCO will make at an operational site should be simplified acquisitions. However, many CCOs may be reluctant because they are unfamiliar with the SAP. It is common for deployed CCOs to undergo the rigorous administrative burden of an invitation for bids or requests for proposals simply because they do not know SAP is available. Part of the reason for this may be that SAP thresholds increase greatly in a deployed environment overseas (up to \$13 million for commercial items) versus the standard threshold in the United States of \$250,000.

⁶⁶ FAR 13.303; AFFARS Subpart 5313.303.

⁶⁷ FAR 13.305; DFARS Subpart 213.305; AFFARS Subpart 5313.305; DoDR 7000.14-R, vol. 5, paras. 020901 to 020902.

⁶⁸ DFAR 213.305-3(d)(i)(A) and (B).

⁶⁹ FAR 13.203.

⁷⁰ FAR 13.104 and 106-1.

⁷¹ FAR 13.104(b).

⁷² FAR 13.106-1(b).

⁷³ *J. Sledge Janitorial Service*, B-241843, Feb 27, 1991, 91-1 CPD, para. 225.

⁷⁴ FAR 5.202(12) and (13).

RATIFICATION OF UNAUTHORIZED COMMITMENTS MADE BY UNAUTHORIZED PERSONS

During a deployment, especially if regular procedures have not been established, commanders and other individuals may commit to certain obligations because they feel that they have the authority to do so. Also, personnel may retain leased equipment or vehicles beyond the terms of the contract, effectively exercising options for continued performance. Regardless of the fact that they have no authority, the United States may be legally obligated to comply with the terms of the contract, or exercise an option in relation to which there has been a commitment. This requires an official with authority to ratify the unauthorized commitment.

The CCOs have authority to ratify unauthorized commitments if seven conditions exist.⁷⁵ Generally, in order for an official to ratify an unauthorized commitment, the CCO must determine the following:

1. Supplies or services have been provided to and accepted by the USG, or the USG has otherwise obtained or will obtain a benefit resulting from performance of the unauthorized commitment;
2. The ratifying official has the authority to enter into a contractual commitment;
3. The resulting contract would otherwise have been proper if made by an appropriate CO;
4. The CO reviewing the unauthorized commitment determines the price to be fair and reasonable;
5. The CO recommends payment and legal counsel concurs in the recommendation, unless agency procedures expressly do not require such concurrence;
6. Funds are available and were available at the time the unauthorized commitment was made; and
7. The ratification is in accordance with any other limitations prescribed under agency procedures.

Generally, the head of contracting activities will have certain ratification authority delegated to him or her.⁷⁶ Approval authority for ratifications:

1. The senior CO acts on all actions equal to or greater than \$30,000.
2. The chief of the contracting office acts on all actions less than \$30,000.

LAST RESORT METHOD OF ACQUISITION

If all else fails, the law of war permits the taking of supplies (and sometimes services) under certain circumstances.⁷⁷ However, these provisions are outside proper logistics and acquisitions procedures and extreme care should be taken before seizing any property under the law of war.

⁷⁵ FAR 1.602-3; AFFARS 5301.602-3.

⁷⁶ AFFARS 5301.602-3.

⁷⁷ Hague Convention Annex Reg., Arts. 23, 42, 53; Geneva Convention Relative to the Treatment of Prisoners of War, Art. 49; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Art. 51.

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- 10 U.S.C. § 166a Combatant commands: funding through the Chairman of Joint Chiefs of Staff
- 10 U.S.C. § 312 Payment of personnel expenses necessary for theater security cooperation
- 10 U.S.C. § 321 Training with friendly foreign countries: payment of training and exercise expenses
- 10 U.S.C. § 322 Special operations forces: training with friendly foreign forces
- 10 U.S.C. § 331 Friendly foreign countries: authority to provide support for conduct of operations
- 10 U.S.C. § 333 Foreign security forces: authority to build capacity
- 10 U.S.C. § 401 Humanitarian and civic assistance provided in conjunction with military operations
- 10 U.S.C. § 402 Transportation of humanitarian relief supplies to foreign countries
- 10 U.S.C. § 404 Foreign disaster assistance
- 10 U.S.C. § 407 Humanitarian demining assistance and stockpiled conventional munitions assistance: authority; limitations
- 10 U.S.C. § 2304 Contracts: competition requirements
- 10 U.S.C. § 2305 Contracts; planning, solicitation, evaluation, and award procedures
- 10 U.S.C. §§ 2341-2350 Authority to acquire logistic support, supplies, and services for elements of the armed forces deployed outside the United States
- 10 U.S.C. § 2410a Contracts for periods crossing fiscal years: severable service contracts; leases of real or personal property
- 10 U.S.C. § 2557 Excess nonlethal supplies: availability for humanitarian relief, domestic emergency assistance, and homeless veterans assistance
- 10 U.S.C. § 2561 Humanitarian assistance
- 10 U.S.C. § 2801 Military construction; definitions
- 10 U.S.C. § 2802 Military construction projects
- 10 U.S.C. § 2803 Emergency construction
- 10 U.S.C. § 2804 Contingency construction
- 10 U.S.C. § 2805 Unspecified minor construction
- 10 U.S.C. § 2808 Construction authority in the event of a declaration of war or national emergency
- 10 U.S.C. § 2811 Repair of facilities
- 10 U.S.C. § 2854 Restoration or replacement of damaged or destroyed facilities
- 22 U.S.C. § 1928 North Atlantic Treaty Organization
- 22 U.S.C. § 2318 Special authority (drawdown authority)

22 U.S.C. § 2321j Authority to transfer excess defense articles

22 U.S.C. § 2347 General authority; International Military Education and Training

22 U.S.C. § 2348 General authorization; Peacekeeping Operations

22 U.S.C. § 2761 Sales from stocks (Foreign Military Sales Program)

22 U.S.C. § 2763 Credit sales (Foreign Military Financing Program)

22 U.S.C. § 5901 Demilitarization of independent states of former Soviet Union

31 U.S.C. § 1301 Purpose Statute

31 U.S.C. § 1341 Limitations on expending and obligating amounts

31 U.S.C. § 1342 Limitation on voluntary services

31 U.S.C. § 1502 Balances available

31 U.S.C. §§ 1511-1519 Obligations and expenditures

31 U.S.C. § 1552 Procedure for appropriation accounts available for definite periods

31 U.S.C. § 1553 Availability of appropriation accounts to pay obligations

41 U.S.C. § 3304 Use of noncompetitive procedures

41 U.S.C. § 6301 Authorization requirement

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Chapter 29

SALE, TRANSFER, AND DISPOSAL OF DEFENSE ARTICLES AND DEFENSE SERVICES

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BACKGROUND

Chapter 28, *Deployed Fiscal Law and Contingency Contracting*, addressed multiple areas in which the United States transfers defense articles (*i.e.*, personal property) and services to foreign governments or individuals. This Chapter fills in gaps necessarily left open in that Chapter and provides further detail in several areas it discussed.¹

When evaluating a commander's proposal to transfer articles or services to another entity, military legal advisors must tread cautiously. Legal reviews in most areas of law proceed on the presumption that if there is no statutory or regulatory impediment to a course of action, that course is legal. When the issue is the transfer of goods or services, this presumption is reversed.

The Constitution contains two clauses that, together, provide the starting point for analysis in this area. Article I, section 9, clause 7 states that, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law...." The Supreme Court has interpreted this to mean that "[T]he expenditure of public funds is proper only when authorized by Congress" and that "[it is not the case] that public funds may be expended unless prohibited by Congress."² Coupled with Article IV, section 3, clause 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the...Property belonging to the United States..."), this means a judge advocate must identify affirmative federal law specifically authorizing any proposed transfer before recommending the commander release the articles or perform the services in question.

The remainder of this Chapter discusses the two primary pieces of legislation that authorize transfer under the rubric of security assistance, as well as the system the DoD has established for military activities to transfer excess property to non-DoD entities in compliance with controlling statutory authority.

SECURITY ASSISTANCE

Security assistance, a subset of security cooperation, is a group of programs authorized under Title 22 authorities by which the United States provides defense articles, military education and training, and other defense-related services by grant, loan, credit, cash sales, or lease, in furtherance of national policies and objectives. All security assistance programs are subject to the continuous supervision and general direction of the Secretary of State (SecState) to best serve U.S. foreign policy interests, but are variously administered by the DoD or Department of State (DoS).³ Security assistance programs support U.S. national security and foreign policy objectives by increasing the ability of friends and allies to deter and defend against possible aggression, promote the sharing of common defense burdens, and help foster regional stability. Security assistance authorizations and appropriations are provided primarily under three public laws: the Arms Export Control Act (AECA) (22 U.S.C. §§ 2751, *et seq.*); the Foreign Assistance Act (FAA) (22 U.S.C. §§ 2151, *et seq.*); and annual appropriations acts for Foreign Operations, Export Financing and Related Programs. Title 22 of the U.S.C., "Foreign Relations and Intercourse," which contains both the AECA and the FAA, is primarily applicable to the DoS. Statutes specifically applicable to the DoD are found in Title 10, "Armed Forces."

¹ This chapter does not cover the transfer of defense articles or services under acquisition and cross-servicing agreements; see Chapter 10, *Acquisition and Cross-Servicing Agreements*.

² *United States v. MacCollom*, 426 U.S. 317, 321 (1976).

³ See Defense Security Cooperation (DSCA) Manual 5105.38-M, *Security Assistance Management Manual* (2012), § C1.1., as amended.

The SecState is responsible for continuous supervision and general direction of the security assistance program. The SecDef establishes military requirements and implements programs to transfer defense articles and services to eligible foreign countries and international organizations. Within the DoD, the principal planning agencies for security assistance are the Defense Security Cooperation Agency (DSCA), the combatant commands (CCMDs), the Joint Staff, the security cooperation organizations, and the military departments' international lawyers and organizations. This information is critical for the deployed judge advocate, because it is very unlikely that a judge advocate in the field will ever be the only attorney advising on a security assistance issue. Rather, by the time a deployed judge advocate becomes involved with security assistance, he/she will have a wealth of experience and issue-specific knowledge to draw from as he/she gives counsel, usually in the final stages of the process of transferring the items or services.

The Arms Export Control Act (AECA)

The AECA authorizes the sale of defense services and the sale and lease of defense articles to eligible foreign governments and international organizations. The cornerstone of the AECA is the requirement for full cost payment in U.S. dollars contained in sections 21 and 22 of the Act.⁴ This authority for U.S. Government (USG) sale of defense articles and services is referred to as Foreign Military Sales (FMS). It is the principal means by which the United States provides security assistance to eligible foreign governments and international organizations. Unless another statutory authority is applicable under the particular circumstances (*see, e.g.*, the Foreign Assistance Act discussion below), the AECA applies to any proposed transfer to a foreign government or international organization of defense articles or services, requiring the foreign recipient to pay the United States for what it receives.

A letter of offer and acceptance (LOA) is the document by which the USG offers to sell articles or services to a foreign government or international organization pursuant to the AECA. The standard terms and conditions of the LOA describe, among other things, the financial terms and conditions of the sale, the assumption of risk, warranties, and how FMS items may be used.

AECA efforts will generally take place at service or CCMD headquarters, with DoS coordination. The deployed judge advocate will rarely be involved in the process beyond coordinating the execution of a well-defined plan.

The Foreign Assistance Act (FAA)

The FAA authorizes the United States to furnish assistance to foreign countries and international organizations, often at no cost to the recipient. Part I of the FAA addresses international development efforts overseen by the DoS, Part II includes military assistance and DoD administered programs, and Part III contains general provisions for Parts I and II.⁵

The international military education and training (IMET) program and expanded IMET (e-IMET) are authorized under FAA sections 2347 – 2347h. Section 2321j of the FAA authorizes the transfer of excess defense articles in furtherance of Congress's overall security assistance program as expressed in the annual congressional presentation documents for military assistance. Similarly, section 2318 authorizes the President to “draw down” DoD and other government agencies' stocks, articles, services, and training in specified amounts during certain emergencies.

⁴ 22 U.S.C. §§ 2761 and 2762.

⁵ *Id.* §§ 2151-2296f, 2301-2349bb, 2351-2428b.

TRANSFER OF EXCESS PROPERTY

In addition to the FAA provision for transferring excess defense articles to foreign governments, Title 40 of the U.S.C. provides authority for transferring excess (demilitarized) property outside of the context of security assistance.

Units deployed outside the continental United States (OCONUS), and sometimes units participating in CONUS operations (*e.g.*, disaster relief efforts), will often be faced with questions as to whether and how to transfer materiel deemed excess to the unit's requirements. The DoD has established systems to ensure that property deemed excess by one unit can be reutilized by other DoD units or activities; failing this, U.S. policy is that the property will be used by other federal, state, or local governments.

CONUS Transfers

Within CONUS, the General Services Administration (GSA) is primarily responsible for overseeing the reutilization, transfer, and donation of excess federal property. The DoD works with GSA through the Defense Logistics Agency's (DLA's) Defense Reutilization and Marketing Service (DRMS) to effect these transactions. DRMS oversees local Defense Reutilization Management Offices (DRMOs) that make the process relatively simple and efficient for DoD units or activities.

The Stafford Act and other statutes authorize the use of DoD contracts, as well as the donation and sale of excess DoD property within CONUS, to non-DoD federal agencies, as well as to state and local governments.

DoDM 4160.21, Volume 3, *Defense Materiel Disposition Manual*,⁶ particularly Enclosures 3 and 5, outlines the process of CONUS transfer of excess property. An additional resource for the operational judge advocate is the DLA Office of General Counsel.

OCONUS Transfers

Frequently, a unit deployed OCONUS will find itself in a situation where retaining or transporting personal property is cumbersome, unduly expensive, time-consuming, or even detrimental to the unit's mission. This can happen when a unit moves forward from one deployed location to another or when the unit redeploy to its home station.

DoDM 4160.21, Volume 2, covers the disposition of OCONUS excess property, generally referred to as "foreign excess personal property" (FEPP). In order for the foreign policy of the United States to be effectively served in foreign countries, foreign excess disposal programs shall be developed and conducted with the coordination and approval of the U.S. diplomatic mission in the country concerned. Accordingly, DoD components or their representatives shall maintain close liaison and cooperate with the U.S. diplomatic representatives and consular offices in the country concerned in order to receive necessary approvals, recommendations, and suggestions from the local U.S. DoS representatives. The Air Force judge advocate, however, will still interface primarily with DRMS through the local overseas DRMO for all FEPP dispositions. The DRMS, in turn, coordinates efforts with the appropriate CCMD or service headquarters and the DoS.

The SecDef, under 40 U.S.C. § 704, may authorize the abandonment, destruction, or donation of FEPP if the property has no commercial value or if estimated costs of care and handling exceed the estimated proceeds from sale. DoDM 4160.21, Volume 2, sets forth a formula for economic analysis

⁶ DoDM 4160.21-V3, *Defense Materiel Disposition* (October 22, 2015), incorporating Change 3, September 30, 2019.

which, when certain conditions are satisfied, permits the in-place abandonment or destruction of certain types of FEPP. Essentially, the formula evaluates whether there is a positive net sale value for any item (accounting for transportation and other logistics costs associated with the sale), and whether that net sale value exceeds the anticipated cost of abandonment or destruction.

There is a possibility a unit deployed OCONUS will also have to deal with turning over Foreign Excess Real Property (FERP). The statutory authorities for FERP are the same as those for FEPP: 40 U.S.C. § 704.⁷ The authority for a FERP transaction has been delegated to the Under Secretary of Defense for Acquisition, Technology, and Logistics.⁸ Initially, it will be important to determine which service has authority over the real property in question as that service's regulations will dictate the FERP process. For the Air Force, AFI 32-9004 provides relevant guidance.

As with property disposition under the auspices of security assistance, the unit-level judge advocate will seldom, if ever, work alone in facilitating the disposition of excess property. Instead, the judge advocate's role will be coordinating with the appropriate headquarters element and DLA (DRMS) representatives to ensure compliance with the significant amount of statutory, regulatory, and situation-unique policy guidance that controls the disposition of excess property.

⁷ 40 U.S.C. § 102(9) defines property as “any interest in property except—

- (A)
 - (i) the public domain;
 - (ii) land reserved or dedicated for national forest or national park purposes;
 - (iii) minerals in land or portions of land withdrawn or reserved from the public domain which the Secretary of the Interior determines are suitable for disposition under the public land mining and mineral leasing laws; and
 - (iv) land withdrawn or reserved from the public domain except land or portions of land so withdrawn or reserved which the Secretary, with the concurrence of the Administrator, determines are not suitable for return to the public domain for disposition under the general public land laws because the lands are substantially changed in character by improvements or otherwise;
- (B) naval vessels that are battleships, cruisers, aircraft carriers, destroyers, or submarines; and
- (C) records of the Government.

⁸ Foreign excess real property (FERP), most commonly encountered during base closures, disposal is authorized by DoDD 4165.06, *Real Property*, (October 31, 2004), incorporating Change 1, August 31, 2018, para. 5.1.3.3.

REFERENCES

- U.S. Constitution, Article I, § 9, Cl. 7; also Article IV, § 3, Cl. 2
- Arms Export Control Act, 22 U.S.C. §§ 2751, *et seq.*
- Foreign Assistance Act, 22 U.S.C. §§ 2151, *et seq.*
- Federal Property & Administrative Services Act, 40 U.S.C. §§ 521, *et seq.*
- 40 U.S.C. § 704, Other Methods of Disposal (21 August 2002)
- The Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121, *et seq.*
- DoD 7000.14-R, *Department of Defense Financial Management Regulation (Volume 15, Security Cooperation Policy)* (September 2019)
- DoDM 4160.21, *Defense Materiel Disposition*, Volumes 1-4 (22 October 2015), incorporating Change 3, 30 September 2019
- Defense Security Cooperation (DSCA) Manual 5105.38-M, *Security Assistance Management Manual* (2012), Section C1.1., as amended. E-SAMM available at: <https://www.samm.dscamil>
- AFI 32-9004, *Disposal of Real Property* (24 September 2018)
- AFMAN 16-101, *Security Cooperation (SC) and Security Assistance (SA) Management* (2 August 2018)

Chapter 30

ENVIRONMENTAL REQUIREMENTS FOR DEPLOYED OPERATIONS OVERSEAS

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BACKGROUND

This Chapter discusses the requirements that apply for deployed operations at overseas locations to conserve and protect human health and the environment, remediate environmental contamination, and consider environmental impacts in decision making.¹ It is intended to help deployed JAGs know where to look for answers and guidance when addressing water quality, waste disposal, spill response, and the other environmental issues that may arise at a deployed operations installation (e.g., base, camp, station, or site). This Chapter focuses on U.S. forces' environmental obligations associated with military operations other than combat from an expeditionary or deployed operations installation. This Chapter does not address environmental issues associated with the use of force during an armed conflict. Routine conventional military operations involving the employment of air, ground, and naval forces may cause damage to the environment, but are not activities prohibited by the law of war.

Addressing environmental law issues during an operational deployment in a foreign country (*i.e.*, “overseas”) is fundamentally different than practicing environmental law in the United States or at an enduring or established overseas installation (*i.e.*, an installation which was in use prior to the contingency operation and will likely continue to be used after the contingency operation). In the United States, environmental activities are governed by an extensive framework of federal, state, and local laws and regulations. At enduring overseas installations, international agreements and DoD policies, including directives and instructions, establish the majority of environmental requirements. In contrast, there are very few laws, policies, and other governing documents that specify environmental requirements for deployed operations in a foreign country. The challenge for deployed judge advocates is to identify the applicable legal requirements for the operation in which they are involved, so that they may properly support commanders while being good stewards of the natural environment around them.

SOURCES OF REQUIREMENTS

There are numerous sources of environmental requirements during deployed operations in foreign countries. However, the primary source of requirements is the environmental annex to the relevant operation order (OPORD), operation plan (OPLAN), or similar operation directive. The governing environmental annex should summarize and reference all applicable environmental requirements concerning the operation. As a result, a judge advocate should carefully review the environmental annex to the appropriate OPORD, OPLAN, or similar operation directive and any environmental policy or guidance issued through the operational chain-of-command (e.g., combatant command (CCMD)) before attempting to independently identify any relevant international agreements or DoD policy.

¹ For purposes of this chapter, “deployed operations” are contingency operations and other military actions or activities pursuant to operation orders, operation plans, or similar operation directives. In addition, “overseas locations” are geographic areas outside the jurisdiction of the United States and U.S. territories, and associated navigable waters, contiguous zones, and ocean waters of which the natural resources are under the exclusive management authority of the United States. “United States” is formally defined in DoDI 4715.05, *Environmental Compliance at Installations Outside the United States* (1 November 2013), incorporating Change 2, 31 August 2018. “Contingency operation” is defined in footnote 2.

U.S. Law, Treaties, and International Agreements

The majority of U.S. environmental laws and implementing regulations applicable to DoD activities and installations within the United States or U.S. territories (*e.g.*, Guam, Puerto Rico) are not applicable to DoD operations in foreign countries. The same is true for DoD activities at enduring installations (*e.g.*, Kadena AB in Japan and Ramstein AB in Germany) and in the case of DoD activities at temporary installations during contingency operations.² As a general rule, a federal law does not apply to DoD activities in foreign countries unless the statute contains language that clearly expresses Congressional intent that the law apply worldwide.³ Because most federal statutes do not contain clear expressions of Congressional intent for the legislation to apply extraterritorially (in areas outside the legal jurisdiction of the United States and U.S. territories), few U.S. environmental laws apply to installations and deployed operations in overseas areas.⁴

Treaties and other international agreements to which the United States is a party can apply to or impact DoD activities outside the United States and U.S. territories. The London Dumping Convention, for example, regulates disposal at sea of wastes from ships, aircraft, and platforms or other man-made structures.⁵ Because the United States signed and ratified this treaty, it has

² Per the JOINT PUBLICATION 1; *DoD Dictionary of Military and Associated Terms*, as of January 2020 [hereinafter JP 1], a “contingency” is “[a] situation requiring military operations in response to natural disasters, terrorists, subversives, or as otherwise directed by appropriate authority to protect [U.S.] interests;” a “contingency operation” is “[a] military operation that is either designated by the Secretary of Defense as a contingency operation or becomes a contingency operation as a matter of law (Title 10, United States Code, § 101[a][13]).” Under 10 U.S.C. § 101(a)(13), “contingency operation... is designated by the Secretary of Defense as an operation in which members of the Armed Forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing force;” or... is created by definition of law. Under Title 10, U.S.C. § 101(a)(13)(B), a contingency operation exists if a military operation results in (1) the call-up to (or retention on) active duty of members of the uniformed Services under certain enumerated statutes; or (2) the call-up to (or retention on) active duty of members of the uniformed Services under other (non-enumerated) statutes during war or national emergency declared by the President or Congress.

³ See Richard A. Phelps, *Environmental Law for Overseas Installations*, 40 A.F. L. REV. 49, 50-52 (1996). The National Historic Preservation Act, 16 U.S.C. §§ 470-470x-6 (2010), is an example of a federal law that applies extraterritorially. It contains provisions that mandate federal undertakings outside the United States to avoid or mitigate adverse effects on properties included on either the World Heritage List or a foreign nation’s equivalent of the National Registry of Historic Places (*i.e.*, list of properties that are historically or culturally significant). 16 U.S.C. § 470a-2 (2010).

⁴ In 2008, the DoD Deputy General Counsel for Environment and Installations addressed the extraterritorial application of several domestic environmental laws. Memorandum from Roy G. Wuchitech, Deputy General Counsel, Environment and Installations, Department of Defense, to the General Counsels, U.S. Navy, U.S. Army, and U.S. Air Force, *Extraterritorial Applicability of the National Environmental Policy Act*, 42 U.S.C. §§ 4321 *et seq.*, *Endangered Species Act*, 16 U.S.C. §§ 1531 *et seq.*, and *Marine Mammal Protection Act (MMPA)*, 16 U.S.C. §§ 1631 *et seq.* (21 May 2008) (available at <https://afsa.jag.af.mil/AF/ENVLAW/overseas/jmn%20extraterr%20opinion.pdf> (last visited on 11 June 20; restricted access)). The Deputy General Counsel determined: (1) the National Environmental Policy Act and the consultation provisions of the Endangered Species Act apply only within the United States and U.S. territorial waters; (2) the Marine Mammal Protection Act applies within U.S. territorial waters, the U.S. exclusive economic zone, and international waters; and (3) the takings provisions of the Endangered Species Act apply within the United States, U.S. territorial waters, and international waters, but do not apply to foreign exclusive economic zones, foreign territorial waters, or foreign territory.

⁵ Convention on the Prevention of Marine Pollution by Dumping of Waste and Other Matter, 29 December 1972, 26 U.S.T. 2403 [hereinafter London Dumping Convention]. The United States signed this convention on 29 December 1972 and ratified it on 29 April 1974. See <http://www.imo.org/OurWork/Environment/SpecialProgrammesAndInitiatives/Pages/London-Convention-and-Protocol.aspx> (last visited 11 June 20), for more information about the London Dumping Convention.

the force of law and directly affects U.S. forces' actions during contingency operations. A basing agreement, as another example, might subject U.S. forces to specific environmental stewardship requirements while conducting operations in a foreign country.

Even if the United States is not a party to the treaty or other international agreement, U.S. forces' activities can be affected if the United States has signed the treaty or international agreement but not ratified it.⁶ While a non-party is not bound by a treaty's specific provisions and obligations, a signatory to a treaty is required to act, in good faith and has a duty "not to defeat the object and purpose" of the treaty.⁷

The activities of U.S. forces may also be affected by the treaty obligations of another nation. For instance, the United States is not a member of the Basel Convention on the Control and Transboundary Movement of Hazardous Wastes and Their Disposal.⁸ While the United States is not a Basel member and accordingly the U.S. forces are not legally bound to follow the provisions of the Convention, U.S. forces operating in countries which have acceded to the Basel Convention have to contend with Basel Convention prescriptions if they try to transport and dispose of the waste outside the country where the waste is generated. U.S. forces also have to contend with Basel Convention requirements if they try to transport wastes through Basel Convention countries.

Executive Orders and DoD Policy

Executive Orders (EOs) are tools the President uses to manage agencies and organizations within the executive branch of the U.S. Government, of which a few directly address or influence environmental requirements for overseas installations. For instance, EO 12088, *Federal Compliance with Pollution Control Standards*, requires federal executive branch agencies to ensure their facilities in foreign countries operate in compliance with "the environmental pollution control standards of general applicability in the host country or jurisdiction."⁹ EO 12114, *Environmental Effects Abroad of Major Federal Actions*, directs executive branch agencies to implement environmental impact analysis requirements when making decisions about major federal actions that will significantly affect the environment of a foreign country or the global commons (*i.e.*, geographic areas outside the jurisdiction of any nation).¹⁰ EO 11850, *Renunciation of Certain Uses in War of Chemical Herbicides and Riot Control Agents*, applies to overseas contingency operations.¹¹ EO

⁶ For a list of treaties in force as of 1 January 2019, see the U.S. Department of State website at <http://www.state.gov/s/l/treaty/tif/index.htm> (last visited 11 June 20).

⁷ See Vienna Convention on the Law of Treaties, Article 18, 23 May 1969, 1155 U.N.T.S. 331, available at http://www.oas.org/dil/Vienna_Convention_on_the_Law_of_Treaties.pdf (last visited 11 June 20).

⁸ Basel Convention on the Control and Transboundary Movement of Hazardous Wastes and Their Disposal, 22 March 1989 [hereinafter Basel Convention], available at <http://www.basel.int/Portals/4/Basel%20Convention/docs/text/BaselConventionText-e.pdf> (last visited 11 June 20). The United States signed the convention on 22 Mar 1990, but has not ratified the treaty. The treaty regulates the transport and disposal of hazardous waste outside the country where the waste is generated.

⁹ Executive Order 12088, *Federal Compliance with Pollution Control Standards*, § 1-801, 43 Fed. Reg. 47707 (October 13, 1978).

¹⁰ Executive Order 12114, *Environmental Effects Abroad of Major Federal Actions*, 44 Fed. Reg. 1957 (January 4, 1979).

¹¹ Executive Order 11850, *Renunciation of Certain Uses in War of Chemical Herbicides and Riot Control Agents*, 40 Fed. Reg. 16187 (April 8, 1975).

11850 prohibits U.S. forces from using any riot control agents and chemical herbicides in war as a method of warfare without prior Presidential approval.¹²

Several DoD Directives, Instructions, and Regulations specify environmental requirements for overseas installations. However, most of the DoD environmental policies for overseas installations do not apply to temporary locations and deployed operations. For example, DoDI 4715.05, *Environmental Compliance at Installations Outside the United States*, specifies environmental compliance requirements for DoD installations located overseas, but does not apply to operational and training deployments away from enduring installations.¹³ In addition, DoDI 4715.08, *Remediation of Environmental Contamination Outside the United States*, identifies remediation requirements for environmental contamination caused by DoD activities in overseas areas, but does not govern actions to remedy environmental contamination that are covered by an environmental annex to an operation order or similar operational directive.¹⁴ Executive Order 12114, *Environmental Effects Abroad of Major Federal Actions*, as implemented in 32 C.F.R. Part 187, *Environmental Effects Abroad of Major Department of Defense Actions*, requires consideration of effects to the environment of areas outside the United States and U.S. territories prior to taking certain major federal actions, but definitions and exemptions make the DoDD inapplicable to actions taken in the course of an armed conflict.¹⁵ Finally, DoDI 4165.69, *Realignment of DoD Sites Overseas*, prescribes procedures for return (or partial return) of overseas sites operated or maintained by U.S. forces to host nation control but does not apply to return of temporary sites in areas with no long-term U.S. presence that are acquired or controlled during contingency operations.¹⁶

Joint Publication 4-04, *Contingency Basing*, contains comprehensive contingency basing life cycle guidance. JP 4-04, directs the specific environmental, health and safety considerations which must be assessed during the planning phase of establishing a new contingency location. Most operations will require contract support which typically includes provisions incorporating DoD environmental management requirements.¹⁷ The DoD issuances governing environmental management at contingency locations include: DoDD 3000.10, *Contingency Basing Outside the United States* and DoDI 4715.22, *Environmental Management Policy for Contingency Locations*. Contingency basing must be scalable and interoperable in the joint community, driving joint rather than service specific guidance regarding environmental management.¹⁸ Contingency location environmental standards must include compliance standards and best management practices. The management practices must include methods employed to avoid or mitigate adverse effects to recognized cultural, historic, and natural resources to the maximum extent practicable. The

¹² *Id.* § 1. This prohibition is implemented in part through CJCSI 3110.07C, *Guidance Concerning Chemical, Biological, Radiological, and Nuclear Defense and Employment of Riot Control Agents and Herbicides* (U) (22 November 2006), which is a classified publication that provides detailed guidance on approval authorities and procedures to request the use of herbicides.

¹³ See DoDI 4715.05.

¹⁴ See DoDI 4715.08, *Remediation of Environmental Contamination Outside the United States* (1 November 2013), incorporating Change 2, 31 August 2018.

¹⁵ See 44 Fed. Reg. 21786 (14 April 1978), redesignated and amended at 56 Fed. Reg. 64481 (10 December 1991).

¹⁶ See DoDI 4165.69, *Realignment of DoD Sites Overseas*, para. 2.3 (6 April 2005), incorporating Change 1, 31 August 2018.

¹⁷ See JOINT PUBLICATION 4-04, *Contingency Basing* (4 January 2019), V-9-V-10, VI-5.

¹⁸ See DoDD 3000.10, *Contingency Basing Outside the United States* (10 January 2013), incorporating Change 2, 31 August 2018, para. 10(a).

practices are measured against mission requirements. In recognition of the dynamic nature of a contingency location, DoDI 4715.22 requires the standards be revised at least every five years.¹⁹

DoDI 4715.19, *Use of Open-Air Burn Pits in Contingency Operations*, is a DoD instruction that specifically (and exclusively) applies to contingency operations. DoDI 4715.19 generally prohibits the use of open-air burn pits except as a short-term solution where no other alternative is feasible. Key features of the DoDI include prohibiting use of open-air burn pits except in accordance with a pre-approved solid waste management plan, limiting what wastes can be disposed through open burning, and requiring combatant commanders to decide when no alternative disposal method to open burning is feasible.²⁰

Command Directives and Service Policy

CCMD and subordinate operational command policy and guidance may address environmental matters for overseas deployed operations. For example, U.S. Central Command (USCENTCOM) Regulation 200-2, *CENTCOM Contingency Environmental Guidance*, provides environmental guidance and best management practices for U.S. installations operated by USCENTCOM personnel engaged in contingency operations within USCENTCOM's geographic area of responsibility (AOR).²¹ In addition, U.S. Army Europe Pamphlet 200-2 (AE Pam 200-2), *Contingency Operations Environmental Guide*, explains policy and responsibilities for managing environmental issues by U.S. forces conducting contingency operations in a U.S. Army Europe area of responsibility.²²

Service instructions, regulations, guidance, and other publications may supplement DoD and CCMD policies or fill voids where there are no DoD or policies. For example, AFH 10-222, Vol 4, *Environmental Considerations for Overseas Contingency Operations*, provides guidance on environmental considerations for Air Force civil engineering personnel deployed in support of contingency operations in foreign countries.²³

At a joint deployed operations location, one of the participating services should be designated as having responsibility for the base operations support – integrator (BOS-I). In the absence of an applicable CCMD regulation, the governing service regulation for the service with BOS-I responsibility should govern. As a result, in a joint deployed operations setting, an Air Force judge advocate may need to refer to another service's regulation for governing guidance. Army Techniques Publication 3-34.5/Marine Corps Reference Publication 4-11B (ATP 3-34.5/MCRP 4-11B), *Environmental Considerations*, is an Army-Marine Corps publication that defines and provides guidance on integrating environmental considerations into the conduct of operations.²⁴

¹⁹ See DoDI 4715.22, *Environmental Management Policy for Contingency Locations* (18 February 2016), incorporating Change 2, 31 August 2018, para. 3.1.

²⁰ DoDI 4715.19, *Use of Open-Air Burn Pits in Contingency Operations* (13 November 2018).

²¹ CCR 200-2, *CENTCOM Contingency Environmental Guidance* (August 2009).

²² AE Pam 200-2, *Contingency Operations Environmental Guide* (24 June 2005).

²³ AFH 10-222, Vol. 4, *Environmental Considerations for Overseas Contingency Operations* (1 September 2012).

²⁴ ATP 3-34.5/MCRP 4-11B, *Environmental Considerations* (August 2015).

“*You Spill, You Dig!*” and “*You Spill, You Dig II*” are Army environmental guides for use during deployment operations.²⁵

Environmental Annex to OPLAN or OPORD

The OPORD, OPLAN, or other operation directive under which military action is taken during a deployed operation will have numerous annexes and appendices that specify requirements and provide guidance on specific aspects of the operation. One of those annexes or appendices will address environmental considerations.²⁶ The environmental annex or appendix will identify roles and responsibilities regarding topics including air emissions, waste water discharges, drinking water quality, solid and hazardous waste management, toxic substances, protection of natural resources, protection of historic and cultural sites, spill response, environmental impact analysis process, and remediation of environmental contamination. The requirements and guidance contained in the environmental annex or appendix should seek to protect force health, limit adverse public health impacts, and minimize risk to the environment without impacting readiness and mission accomplishment.²⁷ In fact, joint doctrine states that even though military operations do not generally focus on environmental compliance and protection, joint force commanders are “responsible to protect the environment in which U.S. forces operate to the greatest extent possible consistent with operational requirements.”²⁸

PRACTICE TIPS

The primary source of environmental requirements for deployed operations conducted in foreign areas is the environmental annex to the relevant OPORD, OPLAN, or similar operation directive. However, unless the environmental annex was recently drafted or updated, it might not reflect consideration of all applicable requirement sources. Consequently, when addressing environmental issues, the deployed judge advocate should look to the environmental annex for help, but then check for international agreements, DoD directives or instructions, and command policy relevant on the issue and not addressed in the annex. A legal office in the deployed operational chain-of-command

²⁵ U.S. Army Corps of Engineers, Europe District and U.S. Army, Europe, “*You Spill, You Dig!*”—*An Environmental Handbook for Deployment*, July 1998 (available at [https://aflsa.jag.af.mil/AF/ENVLAW/deployed/You%20Spill,%20You%20Dig%20\(Jul98\).pdf](https://aflsa.jag.af.mil/AF/ENVLAW/deployed/You%20Spill,%20You%20Dig%20(Jul98).pdf) (last visited 11 June 20; restricted access); U.S. Army Corps of Engineers, Europe District and U.S. Army Installation Management Agency, Europe Region, “*You Spill, You Dig II*”—*An Environmental Handbook for Sustained Deployment Operations*, 2005 (available at https://aflsa.jag.af.mil/AF/ENVLAW/deployed/You_Spill_You_Dig_II.pdf (last visited 11 June 20; restricted access)).

²⁶ The annex might be a standalone document, often labeled Annex L, *Environmental Considerations*, or it might be an appendix to an engineering annex. Compare USCENTCOM OPLAN (U), Annex L, *Environmental Considerations* (18 September 2002), with ATP 3-34.5/MCRP 4-11B, App. D, *Environmental Appendix to Engineering Annex for Army Operation Plans and Operation Orders*. Typically, an environmental annex is created by the command that owns the parent plan using a standard template, such as the standard Joint Operational Planning and Execution System (JOPES) template for OPLANs and OPORDs. See JOINT PUBLICATION 5-0, *Joint Planning* (16 June 2017), A.4.b and Glossary (“Adaptive Planning and Execution System” and “Joint Operation Planning and Execution System”).

²⁷ See JOINT PUBLICATION 3-34, *Joint Engineer Operations* (6 January 2016), appendix C (“Environmental Considerations”), para. 3.b; AFH 10-222, 1 September 2012, vol. 4, para. 1.3.

²⁸ See JOINT PUBLICATION 3-0, *Joint Operations* (17 January 2017), incorporating Change 1, 22 October 2018, ch. III (“Joint Functions”), para. 8.e.4 [hereinafter JP 3-0].

can assist with the international agreement check,²⁹ and an environmental engineering element in the operational chain can assist with the DoD and command policy checks. The International Law Branch of the Environmental Law Field Support Center (ELFSC) can also be helpful when working deployed operations environmental issues. Subject matter experts at the Air Force Civil Engineer Center (AFCEC) can provide technical support. A few specific topics are addressed below.

Disposal of Hazardous Waste

Disposal of hazardous waste can be challenging at deployed operations locations. If in-country disposal is not a viable option, the Basel Convention might complicate trying to move the waste out-of-country for disposal in another country.³⁰ Defense Logistics Agency Disposition Services (DLA Disposition Services) will be instrumental in resolving any Basel Convention issues. DLA Disposition Services has sites worldwide, even in contingency operation areas, so installation waste managers should work with their servicing DLA Disposition Services site to arrange out-of-country disposal of hazardous waste. To locate a DLA Disposition Services site, go to <https://www.dla.mil/DispositionServices/Contact/FindLocation/>.

Environmental Baseline Surveys (EBS)

U.S. forces should document existing environmental conditions at the start of an operation. During Operation JOINT ENDEAVOR, efforts by unit commanders in taking photographs and otherwise documenting the condition of the land under their control greatly facilitated processing a myriad of claims and helped protect U.S. interests.³¹ See United States Air Forces in Europe Instruction 32-7068, *Environmental Baseline Surveys for Deployed Operations*, Attch. 4, *Facility Assessment Checklist*, for a useful checklist for service members conducting an environmental baseline survey (EBS).³² For installations located in USCENTCOM's geographic AOR, USCENTCOM Regulation 200-1, *Protection and Enhancement of Environmental Assets*, and USCENTCOM Regulation 200-2, *CENTCOM Contingency Environmental Guidance*, require the completion of EBS and provide templates to use when preparing surveys.³³

Environmental Stewardship

As expected during an operation, the main focus is mission accomplishment. However, accomplishing the mission and protecting the environment are not mutually exclusive, and environmental stewardship may enhance mission goals. By explaining how environmental considerations further mission objectives, judge advocates and paralegals can contribute to mission success. When evaluating environmental issues, commanders should consider the effect their actions have on:

²⁹ HQ USAF/JAO is the Air Force repository for all international agreements between the Air Force and a foreign government. DoD Office of the General Counsel is the DoD repository for all international agreements between any DoD component and a foreign government.

³⁰ The Basel Convention prohibits the shipment of hazardous waste from a member nation to a non-member nation unless a special agreement has been negotiated. See Basel Convention, *supra* note 8, at Art. 11.

³¹ Richard M. Whitaker, *Environmental Aspects of Overseas Operations: An Update*, 1997-July Army Law 17, 25 (July 1997).

³² USAFEI 32-7068, *Environmental Baseline Surveys for Deployed Operations* (16 March 2004).

³³ See CCR 200-1, *Protection and Enhancement of Environmental Assets* (1 December 2011), para. 4-1.b and appendix C; CCR 200-2, *CENTCOM Contingency Environmental Guidance* (August 2009), para. 3-2.d and appendix D. USCENTCOM's EBS format is such that junior personnel can perform the survey with limited training.

1. **Health of military members, both long-term and short-term.** It should be no surprise that poor environmental practices can directly affect the health of military members and their ability to perform duties;
2. **Community or diplomatic relations.** Increasingly, mission success depends on the support of the local populace and the host nation. A robust environmental program can foster these relationships in a positive way;
3. **Impeding current and future operations.** Commanders should evaluate whether their environmental conduct may discourage other nations from supporting the United States in future contingencies or other deployed operations;
4. **Generating domestic and international criticism.** Poor environmental practices may undermine support for DoD or its operations; and
5. **Financial Cost.** Poor environmental practices may result in the United States paying for cleanups to protect service members, paying to satisfy claims under the Foreign Claims Act, or paying to fulfill obligations with the host nation.

Host Nation Laws and Regulations

Host nation environmental laws, regulations, and ordinances do not apply to the activities of U.S. forces unless the provisions of a Status of Forces Agreement (SOFA), basing agreement, or other international agreement makes them applicable. Deployed judge advocates should consult a legal office in their operational chain-of-command for assistance in determining to what extent (if any) international agreements require U.S. forces to comply with host nation environmental requirements.

Overseas Environmental Baseline Guidance Document (OEBGD)

The OEBGD is a set of objective standards and management practices designed to protect human health and the environment. It reflects generally accepted environmental protection standards that apply to DoD activities in the United States and incorporates requirements of federal law which apply overseas.³⁴ The OEBGD criteria and procedure, as a whole, provide a minimum standard applicable to overseas DoD installations for protecting human health and the environment. These standards apply to overseas installations in countries where the DoD designated authority (*i.e.*, the Theater Environmental Coordinator Lead Environmental Component) has not established country-specific compliance requirements.³⁵

The OEBGD and country-specific requirements developed using the OEBGD do not apply to off-installation operational and training deployments.³⁶ However, if the environmental annex to the relevant OPLAN or OPORD is deficient or missing and there is no other applicable source of requirements (*e.g.*, CCMD regulation), deployed personnel may use the OEBGD as a guide when developing environmental compliance (but not remediation or planning) requirements for their installation or command.

³⁴ See DoDI 4715.05, *supra* note 13, Encl. 3.

³⁵ *Id.*

³⁶ *Id.* para. 2(a)(2).

The OEBGD is a DoD Publication, formally published as DoD 4715.05-G, *Overseas Environmental Baseline Guidance Document*.³⁷

Use of Herbicides

The United States has renounced “first use of herbicides in war except, under regulations applicable to their domestic use, for control of vegetation within U.S. bases and installations or around immediate defensive perimeters.”³⁸

Petroleum Spills

Petroleum spills account for the great majority of environmental issues at deployed operation locations. Therefore, deployed personnel should be ready to provide advice on spill response and reporting. If the guidance in the environmental annex to the OPOD or OPLAN is limited or unworkable in a particular situation, the installation should seek guidance through the operational chain-of-command. *You Spill, You Dig II*, is an Army handbook that provides helpful information about spill plans and response during sustained deployed operations.³⁹

CONCLUSION

Although environmental considerations are not usually the primary concern of commanders during deployed operations overseas, environmental matters are important because how we address environmental issues including air emissions, drinking water and waste water, solid and hazardous waste, cultural and natural resources, and hazardous materials will directly and significantly impact human health and safety. Commanders cannot accomplish their missions if their assigned forces or equipment cannot function due to illness, injury, damage, or deterioration, let alone opposition by host nation authorities which might occur if U.S. forces fail to take reasonable measures to preserve and protect the health, safety, and environment of local nationals. Consequently, environmental considerations matter during deployed operations and deployed judge advocates should be prepared to advise commanders on the importance of protecting the natural environment in which U.S. forces operate to the greatest extent possible, consistent with operational requirements. Deployed judge advocates should familiarize themselves with the sources of environmental requirements at deployed operations locations so that they can help their deployed commanders properly address environmental issues which arise.

³⁷ DoD 4715.05-G, *Overseas Environmental Baseline Guidance Document* (1 May 2007), incorporating Change 1, 31 August 2018.

³⁸ Executive Order 11,850, 40 Fed. Reg. 16187 (8 April 1975); CJCSI 3110.07D, *Guidance Concerning Employment of Riot Control Agents and Herbicides (U)* (31 January 2011), is a classified publication that provides detailed guidance on approval authorities and procedures to request the use of herbicides.

³⁹ See “*You Spill, You Dig II*”, *supra* note 25.

REFERENCES

- Convention on the Prevention of Marine Pollution by Dumping of Waste and Other Matter, 29 December 1972, 26 U.S.T. 2403; T.I.A.S. 8165; 1046 U.N.T.S. 120 (entry into force 30 August 1975)
- Basel Convention on the Control and Transboundary Movement of Hazardous Wastes and Their Disposal, 22 March 1989 (the United States signed the convention on 22 March 1990, but has not ratified it)
- Executive Order 11850, *Renunciation of Certain Uses in War of Chemical Herbicides and Riot Control Agents*, 40 Fed. Reg. 16187 (8 April 1975)
- Executive Order 12088, *Federal Compliance with Pollution Control Standards*, § 1-801, 43 Fed. Reg. 47707 (13 October 1978)
- Executive Order 12114, *Environmental Effects Abroad of Major Federal Actions*, 44 Fed. Reg. 1957 (4 January 1979)
- 32 C.F.R. Part 187, Environmental Effects Abroad of Major Department of Defense Actions CJCSI 3110.07C, *Guidance Concerning Chemical, Biological, Radiological, and Nuclear Defense and Employment of Riot Control Agents and Herbicides (U)* (22 November 2006)
- JOINT PUBLICATION 1; *DoD Dictionary of Military and Associated Terms*, as of January 2020
- JOINT PUBLICATION 3-34, *Joint Engineer Operations* (6 January 2016)
- JOINT PUBLICATION 4-04, *Contingency Basing* (4 January 2019)
- JOINT PUBLICATION 5-0, *Joint Planning* (16 June 2017)
- DoD 4715.05-G, *Overseas Environmental Baseline Guidance Document* (1 May 2007), incorporating Change 1, 31 August 2018
- DoDD 3000.10, *Contingency Basing Outside the United States* (10 January 2013), incorporating Change 2, 31 August 2018
- DoDI 4715.05, *Environmental Compliance at Installations Outside the United States* (1 November 2013), incorporating Change 2, 31 August 2018
- DoDI 4715.08, *Remediation of Environmental Contamination Outside the United States* (1 November 2013), incorporating Change 2, 31 August 2018
- DoDI 4715.19, *Use of Open-Air Burn Pits in Contingency Operations* (13 November 2018)
- DoDI 4715.22, *Environmental Management Policy for Contingency Locations* (18 February 2016), incorporating Change 2, 31 August 2018
- CCR 200-1, *Protection and Enhancement of Environmental Assets* (1 December 2011)
- CCR 200-2, *CENTCOM Contingency Environmental Guidance* (August 2009)
- USCENTCOM OPLAN (U), Annex L, Environmental Considerations (18 September 2002)
- USAFEI 32-7068, *Environmental Baseline Surveys for Deployed Operations*, Attachment 4, *Facility Assessment Checklist* (16 March 2004)

- AFH 10-222, Vol 4, *Environmental Considerations for Overseas Contingency Operations* (1 September 2012)
- AE Pam 200-2, *Contingency Operations Environmental Guide* (24 June 2005)
- ATP 3-34.5/MCRP 4-11B, *Environmental Considerations* (August 2015)
- USACE, Europe District and USA, Europe, “*You Spill, You Dig!*” – *An Environmental Handbook for Deployment* (July 1998)
- USACE, Europe District and USAIMA, Europe Region, “*You Spill, You Dig II*” – *An Environmental Handbook for Sustained Deployment Operations* (2005)
- DoD Deputy General Counsel for Environment and Installations Memorandum, *Extraterritorial Applicability of the National Environmental Policy Act*, 42 U.S.C. §§ 4321 *et seq.*, *Endangered Species Act*, 16 U.S.C. §§ 1531 *et seq.*, and *Marine Mammal Protection Act (MMPA)*, 16 U.S.C. §§ 1631 *et seq.* (21 May 2008)
- Richard A. Phelps, *Environmental Law for Overseas Installations*, 40 A.F. L. REV. 49, 50-52 (1996)

Chapter 31

FOREIGN, INTERNATIONAL, AND PERSONNEL CLAIMS

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INTRODUCTION

When U.S. forces are stationed in or deployed to a foreign country, the possibility exists that those forces will damage property or cause personal injury to local nationals or others. Claimants can include local nationals, local businesses, host nation government entities (local and national), foreign allied military forces and their troops, and even U.S. personnel. Judge advocates in these environments must understand the claims regime as well as their personal responsibilities.

SINGLE SERVICE CLAIMS RESPONSIBILITY (SSCR)

As a general rule, commands are responsible for settling tort claims arising from their own activities and, in practice under this rule, claims are normally settled by the service branch responsible for generating them. However, a broad exception to this rule and practice is single service claims responsibility (SSCR). Under DoDI 5515.08, General Counsel for the Department of Defense (DoD GC) has assigned certain countries to the Army, Navy, and Air Force and designated each military department exclusively responsible for those claims referenced by the instruction arising within their assigned countries.¹

Although commanders of geographic combatant commands (through the Chairman of the Joint Chiefs of Staff) may assign “interim responsibility” for adjudicating claims in countries where such assignments have not been made, they must immediately seek confirmation and approval of such assignments from DoD GC.² Admiralty claims are not covered by SSCR assignments unless such claims fall under a specific agreement (*e.g.*, admiralty claims with personal injury under the North Atlantic Treaty Organization Status of Forces Agreement (NATO SOFA)). If another service has SSCR for a particular claim, the Air Force has no authority to settle or pay the claim. However, without regard to SSCR, the Navy may pay a claim in an Army or Air Force-assigned country when the claim is generated by Naval forces afloat, occurs outside the scope of duty in a foreign port, and is payable for less than \$2,500.³

SOLATIUM (PLURAL, SOLATIA)

A solatium payment is a nominal payment made immediately to a victim or victim’s family to express sympathy—*when the local custom for solatium exists*. A solatium payment is not compensation (it is not deducted from the award of any payable claim) and is not paid with appropriated claims funds. These nominal amounts are typically paid from operations and maintenance funds and are generally governed by military regulation in the few countries where customarily paid.⁴

Any solatium payment under consideration in a country lacking a history of such payment requires close scrutiny, as the risks of being misunderstood, inviting victim or national backlash, and/or increasing long-term claim costs to the United States are notable where no bona fide custom exists. While proper inquiry into a custom may prove difficult in a combat environment and might be understandable if prematurely paid based on preliminary information, a custom in peacetime should not be recognized until established by proper inquiry as clear and indisputable. Concern should also be shown for the payment amount provided. Payments need to reflect

¹ DoDI 5515.08, *Assignment of Claims Responsibility* (30 August 2016).

² *Id.* § 2.4.

³ *Id.* § 2.3.

⁴ See 32 C.F.R. § 536.145; see also Chapter 28, *Deployed Fiscal Law and Contingency Contracting*.

economic conditions prevailing in the particular country, and to be “token” or “nominal” under the circumstances, payment should consist of a relatively small percentage of per capita income.

If a custom exists, it should be either expressed in law or well-understood within the society. If the latter applies, the custom should be capable of articulation by more than a small circle of academically-minded legal professionals. If the custom is not actually codified in law, does the law reference any benefits or consequences for acting, or failing to act, in a manner reflective of the custom? Do entities such as public and private transportation services in that country, within a few hours or days of having caused an accident, routinely make *non-compensatory sympathy* payments to victims, and if so, in what form and amounts? Are such payments presented in a special manner or recorded in some way?

CLAIMS ARISING FROM COMBAT

Claims arising from combat activities, whether causing intentional damage or collateral damage, are not payable. Keep in mind that combat activities may include peacekeeping. However, claims may be paid when there is an accident or malfunction incident to the operation of an aircraft (including its airborne ordnance) indirectly related to combat and occurring while preparing for, going to, or returning from a combat mission. Although claims arising in combat zones are often barred by the combat exclusion, the mere fact that a claim arises in a combat area does not necessarily mean it arises from combat. During Operation DESERT STORM, the Air Force paid claims arising from traffic accidents in rear areas in Saudi Arabia, and in response to conflict in Iraq and Afghanistan, the Army has investigated claims on a case-by-case basis to determine their relation to combat.

CLAIMS ARISING IN FOREIGN COUNTRIES

Both the International Agreement Claims Act (IACA) and Foreign Claims Act (FCA) have been enacted by Congress to compensate meritorious tort claims caused by DoD personnel outside the United States. The Acts are mutually exclusive, so only one will apply, but not both.

International Agreement Claims Act⁵

The IACA takes precedence over the FCA when it applies. The IACA is an implementing Act that allows for payment of claims arising under certain international agreements. For a claim to be payable under the IACA: (1) the United States must be a party to the international agreement; (2) the claim must have arisen out of an act or omission of U.S. military or civilian personnel acting in the performance of official duty (or out of an act or omission for which the U.S. armed forces are legally responsible under host nation law); and (3) the claim must be subject to pro rata cost-sharing under the agreement.

If the IACA applies, the host nation will adjudicate the tort claim, usually with investigative support from the command having responsibility for the claim on behalf of the United States, and the host nation will then seek reimbursement from the United States if the claim results in a payment to the claimant.

Article VIII, paragraph 5(e)(i) of the NATO SOFA provides an example of what is meant by cost-sharing: “Where one sending State alone is responsible [for the claim], the amount awarded or adjudged shall be distributed in the proportion of 25[%] chargeable to the receiving State and

⁵ 10 U.S.C. § 2734a.

75[%] chargeable to the sending State.” Thus, under this Article, if a U.S. service member sent to the United Kingdom (UK) causes personal injury and/or property damage in the UK, and the UK Ministry of Defense settles the tort claim for 100 British Pounds (£), the UK would pay the full £100 to the injured party, but then be reimbursed £75 by the United States. In this way, both nations share in the cost of the claim.

For the IACA to apply, the international agreement must clearly express the cost-sharing arrangement governing the claim. Depending upon the nation with which the agreement was negotiated and the number of governments responsible for the damages caused, cost-sharing percentages vary.

If a receiving State pays a tort claim under a cost-sharing agreement and submits a bill to the U.S. military office responsible for paying the bill, the bill should be carefully examined. Although objections to the bills tend to be infrequent, objection is appropriate if the claim was not cognizable under the agreement (for example, the claim was waived under the terms of the agreement). Objection is also appropriate if the receiving State applied more burdensome tort standards to U.S. forces than it applies to its own forces under the same or similar tort circumstances.

Foreign Claims Act⁶

The FCA is an *ex gratia* payment statute that provides potential relief in tort cases arising outside the United States where the IACA is inapplicable. According to the statute, the purpose of the FCA is “to promote and maintain friendly relations through the prompt settlement of meritorious claims” based on “such regulations as the Secretary may prescribe.” 32 C.F.R. Part 842 and AFI 51-306⁷ govern adjudication of all FCA claims for which the Air Force is responsible.

The following circumstances broadly capture when the FCA will apply:

1. No international agreement exists between the United States and receiving State governing claims;
2. An international agreement exists between the United States and receiving State, but it is either silent on the matter of claims, or it references claims without articulating a cost-sharing arrangement;
3. An international agreement exists between the United States and receiving State that contains a cost-sharing arrangement, but the claimant is not a proper third party under the agreement or the claim arose from an act or omission *outside* the performance of official duty, which includes both lawful actions wholly unrelated to duty as well as criminal acts.

As indicated above, there will be times when a FCA claim will arise under a (non-cost-sharing) agreement containing some claim provisions. In such cases, the FCA claim must still be adjudicated consistent with the agreement. If a claim is payable under the FCA but has been waived by international agreement, the United States has no fiscal obligation, and the Foreign Claims Commission (FCC) has no fiscal authority to settle and pay the claim. Under the FCA, settlement authority for all claims under Air Force responsibility resides exclusively in the FCC. Service personnel from one service branch may serve as FCC for another service branch only with the concurrence of the headquarters-level chiefs of the two affected claims services.

⁶ *Id.* § 2734.

⁷ AFI 51-306, *Administrative Claims for and Against the Air Force* (14 January 2019), incorporating Change 1, 16 October 2019.

Foreign Claims Act claims are generally filed in writing, but may be filed orally if, in fact, oral filing is the established local custom. If a FCA claim is filed orally, it must be immediately reduced to writing by judge advocate personnel accepting the claim.

The FCA is available solely to foreign inhabitants. Foreign inhabitants include persons or commercial entities whose usual place of abode or business is in a foreign country (*any* foreign country, not necessarily the country where the claim arose), foreign governments, and their political subdivisions. If the claimant is not a foreign inhabitant but a U.S. inhabitant with an actual or constructive place of abode in the United States (*e.g.*, U.S. Government employees and dependents thereof, U.S. tourists), “in-scope” claims can be settled under the Military Claims Act (MCA). The FCA, like the MCA, also allows settlement authorities to pay for damages caused by the noncombat activities of the U.S. armed forces.

Claims under the FCA are adjudicated under the law, standards, and customs in effect in the country where the incident occurred. However, in contrast to IACA claims where host nation law is normally applicable in every detail, Air Force regulatory provisions control if there is a conflict between them and host nation law on a FCA claim. Regardless of host nation law, for example, FCA claims remain subject to U.S. causation analysis and not subject to joint and several liability.

The Air Force requires that all FCA claims be adjudicated, and all meritorious FCA claims be paid, using foreign currency. In the absence of special circumstances, claims are paid in the currency of the country where the incident arose.

Although the pool of potential FCA claimants is immense, numerous grounds for non-payment are also provided in 32 C.F.R. Part 842, Subpart E. Some of the most common in deployments include:

1. The claim has been waived by international agreement.
2. The claim arose from a contractual transaction or is based on the negligence of an independent contractor.
3. The claim is for rent, damage, or other payments involving the regular acquisition, possession, or disposition of real property by or for the United States.
4. The claim is from foreign military personnel seeking damages for personal injury incurred incident to service or pursuant to combined military operations.

While clearly valuable as an overview, the information in this chapter is no substitute to a full review of 32 C.F.R. Part 842 and AFI 51-306, especially in relation to improper claimants and payment exceptions.

FCA analysis should address:

1. What happened factually?
2. Is payment contrary to the FCA statute or an applicable international agreement?
3. Is payment disallowed by Air Force regulatory provisions implementing the FCA?
4. What does local law say about redressing the matter and how is local law actually applied? How, in particular, is local law applied to members of the host nation’s armed forces (or police forces)?

The FCA has a two-year statute of limitations and prohibits subrogation payments. If the claimant received insurance proceeds as a result of property damage or personal injuries suffered, those proceeds are not deducted from the claimant’s recovery unless the insurance was purchased by the United States or a U.S. employee. A verdict in a foreign court against a U.S. military member

or civilian employee is also not binding upon the FCC as to the value of a claim, though it is a factor to carefully consider.

Finally, a claimant has no statutory right to appeal a FCA denial, and no requirement exists for a FCC to reconsider a FCA denial. A claimant may request reconsideration, however, and a FCC should reconsider a denial if the claimant presents new and material evidence or if there was an obvious error in the original decision.

PERSONNEL CLAIMS

The Military Personnel and Civilian Employees Claims Act,⁸ or the Personnel Claims Act (PCA), authorizes payment for claims for loss, damage, or destruction of personal property owned by military personnel and civilian employees of the DoD. The PCA applies worldwide, and with respect to deployed personnel, covers only those personal property losses that are incident to service and which involve property that is considered reasonable or useful under the circumstances of the deployment.

Payable Claims

Common PCA claims that may arise during a deployment situation include (these are not necessarily payable) loss, damage, or destruction of:

Personal equipment and clothing during transportation to the deployed location.

5. Personal property from assigned quarters or duty locations arising from theft, vandalism, or other unusual occurrences (such as severe weather).
6. Personal property as a result of an emergency evacuation.
7. Personal property due to terrorism directed against the United States.
8. Clothing and articles worn while performing non-routine duties.
9. Equipment and other articles purchased and provided by the Government. Loss not payable, but may be reportable via a Report of Survey (ROS) with the Airman's home station ROS manager.
10. Personally procured property or supplies the claimant wants to use vice equipment purchased/issued by the Government.
11. Personal equipment or supplies not authorized by the deployed commander.

Limitations on Payment

AFI 51-306, Chapter 4, and Air Force Claims Service Center (AFCSC) Operating Instruction 51-502, Chapter 2, set out the limitations on payment. No claim may be approved under the PCA if the claimant's negligence caused or contributed to the loss, damage, or destruction of the personal property. This limitation also applies if the loss, damage, or destruction was caused by the negligent or wrongful act of the claimant's agent. Claims for loss, damage, or destruction of personal property must be made within two years of the incident. The two-year limitation period may be extended if the claimant shows good cause for delaying filing the claim and if the two-year period began either within two years before the United States enters a war or armed conflict or during a war or an armed conflict involving the United States. Any extension of the two-year

⁸ 31 U.S.C. §§ 3701 and 3721.

period expires two years after the end of the United States' participation in the armed conflict, the end of any period of captivity, or the date the good cause for delaying filing the claim ceased to exist, whichever is earliest. From a practical standpoint, the time that a member's good cause for extending the limitation period would usually end when he or she ceases participation in the war or armed conflict.

Payment is also limited to property that is deemed reasonable and useful to the member's duties under the circumstances. For example, property held illegally (such as war trophies) or in violation of a directive or lawful general order (such as alcohol or sexually explicit materials within certain regions) is not payable. Large amounts of precious metals, jewelry, and other expensive materials purchased at the deployed location for the member's personal use or as gifts also may not be payable. Settlement authorities consider all the surrounding circumstances in determining whether possession of the items in question was reasonable.

Claims for loss, damage, or destruction of clothing and uniform items which result from the military member's routinely assigned duties are not payable. For example, a civil engineering squadron member's claim for clothing damaged while performing routinely assigned construction is not payable. However, an administrative specialist claim's for uniform damage while filling sandbags in an emergency situation may be payable. Before adjudicating uniform claims, consult AFI 23-101, *Air Force Materiel Management*, to determine if payment is appropriate under this provision.⁹ If a uniform claim is not payable under the PCA, units should also consider whether the circumstances warrant a supplemental uniform allowance.¹⁰

Settlement Authority

Claims under PCA are filed with and adjudicated by the AFCSC. They can be filed on-line at <https://claims.jag.af.mil>. Claimants or legal offices can call Monday-Friday, 0730-1630, to DSN 312-986-8044 or toll-free 1-877-754-1212 with questions. The PCA claims of other military service personnel (*i.e.*, Army, Navy, Marine Corps, and Coast Guard) should be sent to that member's military service. Deployed judge advocates and paralegals should refer sister service claimants to their service's claims division. The AFCSC's website has centralized points of contact for all the services.

PRACTICAL MATTERS

Generally, gaining commands for a deployment will give their judge advocate personnel some direction concerning claims. Consequently, processing claims may be different for each deployment. For example, gaining commands must advise on how to keep track of claims filed and paid (hand-log or AFCIMS) and provide a fund-cite for payment vouchers to any FCC appointed under its authority.

Obviously, some foreign claimants will not speak English, and many will not know of the claims system. While one cannot solicit claims, one can explain the filing process and even go to the extent of letting local inhabitants know exercises are to be conducted in their area. In cases where claimants do not speak English, host country law enforcement or perhaps even the U.S. embassy may provide an interpreter, if the command has not already provided one. In some countries, it may be more efficient to respond to the scene with cash and settle claims immediately, though one will need to investigate local custom and finance office capabilities first.

⁹ AFI 23-101, *Air Force Materiel Management* (12 December 2016), Guidance Memorandum 9 September 2019.

¹⁰ See AFI 36-3012, *Military Entitlements* (23 August 2019).

For claims arising from the performance of official duty under a cost-sharing international agreement (*e.g.*, SOFA), receiving State claims authorities, not U.S. military claims authorities, must settle the claim. It is a host nation prerogative. If the claim is filed with U.S. forces, it must be forwarded to the appropriate receiving State claims authorities. If an incident occurs some distance away from the deployed location, someone will have to judge how much information is needed to determine if the claim is payable, and if so, how one will get the money or a check to the claimant. If the claim clearly arises from combat, there is also no need to subject oneself to danger to investigate.

Advance Payments

Advance payments are a helpful means of reducing tensions arising from legitimate claims when available and justifiable. Indeed, it is especially unfortunate whenever pressure from interagency sources arises to recognize an inadequately established or non-existent solatia custom when the option to make an advance payment remains readily available.

Advance payments are available under the MCA and FCA (not the Federal Tort Claims Act (FTCA) or IACA) if the claimant requests it, the claimant appears to have a valid claim that will exceed the amount of the advance payment, and circumstances demonstrate an immediate need for food, shelter, medical or burial expenses, or other necessities.¹¹ With a commercial enterprise, the need may be to prevent severe financial loss or potential bankruptcy. If the need is probable, and tensions are rising due to a claimant's ignorance of this option, it may be appropriate to invite a claimant to demonstrate genuine immediate needs for consideration by the FCC. However, to accept advance payment, a claimant must sign a written agreement in which he or she promises to refund the advance payment if no tort claim is filed or the advance payment exceeds the final approved claim payout. On the next page is a basic template for an Advance Payment Agreement.

¹¹ See also Advance Payments Act, 10 U.S.C. § 2736.

ADVANCE PAYMENT AGREEMENT

I, _____ (name), of _____

(address), agree to accept the sum of \$ _____ (amount in foreign currency if paying under the FCA) as an advance payment under the provisions of Title 10 U.S.C., Section 2736, in partial settlement of, and to alleviate hardships for death, personal injury or property damage incurred as a result of an incident on _____ (date), arising out of _____

(description of incident that led to the claim).

I understand that this payment is made in advance of an administrative settlement of a claim under the provisions of the [*Military Claims Act, Title 10, United States Code, Section 2733*] [*Foreign Claims Act, Title 10, United States Code, Section 2734*] [*National Guard Claims Act, Title 32, United States Code, Section 715*]. I intend to file a claim with the U.S. Air Force for the above damages or injuries as soon as I know the extent and amount. The amount of this advance payment will be deducted from the award in final settlement of my claim.

If the final award is less than the advance payment received, I agree to refund to the U.S. Air Force the portion of the advance payment in excess of the final award. If no award is made or no claim is filed within the statutory period, I agree to refund the entire advance payment.

I understand this advance payment is not an admission by the United States of liability for the above incident.

CLAIMANT:

_____ (signature) _____ (date)

_____ (printed name)

_____ (address)

WITNESS:

_____ (signature) _____ (date)

_____ (printed name)

_____ (address)

REFERENCES

- Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Forces, 19 June 1951, 4 U.S.T. 1792, T.I.A.S. 2846, 199 U.N.T.S. 67 (entered into force 23 August 1953, for the United States same date)
- Agreement Among the States Parties to the North Atlantic Treaty Participating in the Partnership for Peace Regarding the Status of Their Forces, 19 June 1995, T.I.A.S. 12666 (entered into force 13 January 1996, for the United States same date)
- Military Claims Act, 10 U.S.C. § 2733
- Foreign Claims Act, 10 U.S.C. § 2734
- International Agreement Claims Act, 10 U.S.C. § 2734a
- Advance Payments Act, 10 U.S.C. § 2736
- Use of Government Property Claims Act, 10 U.S.C. § 2737
- Military Personnel and Civilian Employees' Claims Act, 31 U.S.C. § 3721
- 32 C.F.R. § 536.145, Solatia Payment
- Title 32, Code of Federal Regulations (32 C.F.R.) Part 842, Administrative Claims
- DoDI 5515.08, *Assignment of Claims Responsibility* (30 August 2016)
- AFI 23-101, *Air Force Materiel Management* (12 December 2016), Guidance Memorandum 9 September 2019
- AFI 36-3012, *Military Entitlements* (23 August 2019)
- AFI 51-306, *Administrative Claims For and Against the Air Force* (14 January 2019), incorporating Change 1, 16 October 2019
- AFCSC OI 51-502, *Personnel and Carrier Recovery Claims* (2 November 2019)

Chapter 32

ASYLUM AND TEMPORARY REFUGE

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BACKGROUND

Air Force Judge Advocate General's Corps personnel may be presented with a request for, or information pertaining to, asylum and temporary refuge. These requests require rapid initial action and may be politically sensitive; therefore, it is essential that Air Force judge advocates and paralegals understand the rules and procedures involved in handling these requests and the context in which they arise. This chapter provides a short summary of the applicable international and U.S. immigration law before addressing DoD regulations on asylum and temporary refuge.

APPLICABLE INTERNATIONAL LAW

Refugees

The United Nations (UN) is concerned with the plight of refugees fleeing from oppression. The right to seek asylum was included among the enumerated rights of the Universal Declaration of Human Rights approved by the UN General Assembly in 1948.¹ However, the declaration did not obligate States to grant asylum. Under generally accepted principles of international law, each sovereign State has the exclusive control of its borders and the right to decide who will be admitted within them.

The UN Convention Relating to the Status of Refugees of 1951, while recognizing that granting asylum may place a heavy burden on States, sought to provide refugees with fundamental rights and freedoms.² The UN Protocol Relating to the Status of Refugees of 1967 modified the definition of refugee contained in the 1951 Convention by removing an arbitrary cut-off date for eligibility to be considered a refugee.³ It otherwise incorporated by reference the entire text of the 1951 Convention. The United States did not join the 1951 Convention, but became a party to its terms when it joined the 1967 Protocol.

Refugee Defined

Under both the 1951 Convention and the 1967 Protocol, a “refugee” is defined as any person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his formal habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁴

Prohibition of Expulsion or Return (“Refoulement”)

The 1951 Convention sets forth the principle of non-refoulement. It prohibits signatories from returning refugees to a country where their lives or freedoms will be threatened due to their race, religion, nationality, membership in a particular social group, or possession of a certain political

¹ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810 at 71 (1948).

² Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150 (entry into force 22 April 1954; the United States is not a party). Available at <https://www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html> (last visited 12 June 20).

³ United Nations Protocol Relating to the Status of Refugees, 31 January 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entry into force 4 October 1967; for the United States 1 November 1968).

⁴ 1951 Convention, Art. 1; 1967 Protocol, Art. 1, para. 2.

opinion. This benefit may not be claimed by refugees who are either regarded as a danger to the security of the country they are in or who have been convicted of a particularly serious crime and therefore pose a danger to the community.⁵

U.S. IMMIGRATION LAW

Background

By constitutional mandate, the U.S. Congress regulates the nation's immigration policy.⁶ Congress fulfills this obligation through the Immigration and Nationality Act (INA).⁷ Day-to-day administration of immigration, including processing applications for refugee status and asylum, is primarily the responsibility of the U.S. Citizenship and Immigration Services (USCIS) under the Department of Homeland Security (DHS).⁸ The Department of Justice (DoJ) plays a significant role in adjudicating immigration matters through the Executive Office for Immigration Review and the Board of Immigration Appeals.⁹ The Department of State, through its Bureau of Consular Affairs, plays a significant role overseas, including conducting initial screening of aliens wishing to enter the United States and through the consideration of visa applications.

Refugees and Asylum

Prior to the Refugee Act of 1980, the United States had no firm definition of refugee in its domestic law. The Refugee Act of 1980 amended the INA by establishing a comprehensive refugee policy and including a definition of refugee consistent with the 1951 Convention and the 1967 Protocol.¹⁰ In order to meet the Act's definition of refugee, the following elements must be met:

1. The noncitizen must be outside any country of such person's nationality or last habitual residence;
2. The noncitizen must have been persecuted or have a fear of persecution;
3. The fear must be well-founded;
4. The fear of persecution must be based on race, religion, nationality, membership in a particular social group, or political opinion; and
5. Due to this persecution or well-founded fear of persecution, the individual must be unwilling to return to his/her country of nationality or last habitual residence.

Refugees may be permitted to enter the United States, or, if already present, to remain in the United States, through a variety of methods. Refugees abroad can apply for admission to the United States

⁵ 1951 Convention, Art. 33.

⁶ U.S. Constitution, Art. I, § 8, clause 4.

⁷ Immigration and Nationality Act, 8 U.S.C. §§ 1101, *et seq.*

⁸ The Homeland Security Act of 2002 transferred what was then known as the Immigration and Naturalization Service from the Department of Justice to the DHS, and the service was renamed the USCIS. *See* Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 (2002). The U.S. Immigration and Customs Enforcement and the Customs and Border Protection (CBP) were also established as separate components under the DHS.

⁹ *See* 8 U.S.C. § 1103; Ruth E. Wasem, U.S. IMMIGRATION POLICY ON ASYLUM SEEKERS 13 (Cong. Research Serv. Rep. No. R13262125, 2007); Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, IMMIGRATION LAW AND PROCEDURE § 1.02[2] (2009).

¹⁰ Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (1980), 8 U.S.C. § 1101(a)(42).

against categories and quotas fixed by the President after consultation with Congress. Refugees at the border or within the United States can request refugee status, designated as “asylum.” Noncitizens at the border or within the United States who do not qualify for asylum may nonetheless seek restriction on removal to a country where they could face persecution. Unlike asylees or individuals admitted under quota, restriction on removal is a temporary status that does not come with the option of applying for permanent residency. If the likelihood of persecution ends, the restriction on removal can be lifted.

Asylum at Overseas Embassies

The United States generally does not grant asylum at its embassies or other diplomatic premises within the territorial jurisdiction of a foreign state. There are two primary reasons for this practice. First, a U.S. embassy in foreign state territory is not U.S. territory, nor is it within the territorial jurisdiction of the United States. Second, the granting of asylum is not recognized as a diplomatic function under customary international law or the UN Vienna Convention on Diplomatic Relations.¹¹ To use our embassies as havens for asylum of host country nationals might invite charges that the United States is violating Article 41 of the Vienna Convention, which prohibits diplomatic personnel from interfering in the internal affairs of the host country and from using embassy premises in any way incompatible with the functions of the mission as set out in the Convention. U.S. embassies are authorized to grant temporary refuge for humanitarian reasons in extreme or exceptional circumstances when the life or safety of a person is put in immediate danger, such as pursuit by a mob. Any decision to grant temporary refuge must be made by the senior U.S. official present.

DEPARTMENT OF DEFENSE PRACTICE

Background

The DoD defines and employs the two terms “asylum” and “temporary refuge.”¹² The two terms are defined as follows:

Asylum. Protection granted by the U.S. Government within the United States to a foreign national who, due to persecution or a well-founded fear of persecution on account of his or her race, religion, nationality, membership in a particular social group, or political opinion, is unable or unwilling to avail himself or herself of the protection of his or her country of nationality (or, if stateless, of last habitual residence).

Temporary Refuge. Protection afforded for humanitarian reasons to a foreign national in a DoD shore installation, facility, or military vessel within the territorial jurisdiction of a foreign nation or in international waters, under conditions of urgency in order to secure the life or safety of that person against imminent danger, such as pursuit by a mob.

¹¹ See Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

¹² DoDI 2000.11, *Procedures for Handling Requests for Asylum and Temporary Refuge* (13 May 2010), incorporating Change 1, 23 May 2017, paras. 3.a. and 3.b.

Asylum Requests

In the Territory of the United States. If the foreign national requesting asylum is physically present in the United States, which includes the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands, the application for asylum will be adjudicated by the USCIS, DHS, or if the applicant is in removal proceedings, by an Immigration Judge of the Executive Office for Immigration Review, DoJ.¹³ U.S. commanders may not grant asylum. When the senior commander of an Air Force element receives a request for asylum from a foreign national in U.S. territory, the commander must: (1) notify the servicing Air Force Office of Special Investigations (AFOSI); (2) notify the nearest USCIS office;¹⁴ (3) report the request (see “reporting” below) and (4) protect the foreign national, pending transfer to the USCIS.¹⁵ Applicants for asylum or temporary refuge will be surrendered to foreign jurisdiction only at the direction of the secretary of the military department or the director of the defense agency concerned or higher authority.

In all other areas (including territorial seas and international waters). It is the general policy of the United States not to grant asylum at its units or installations within the territorial jurisdiction of a foreign country or in international waters. Although asylum can, by definition, only be sought and granted within U.S. territory under DoD policy, foreign nationals may request asylum or otherwise seek protection in other areas, including territorial seas and international waters. Foreign nationals, including third country nationals, should be referred, as applicable, to the local representative of the UN High Commissioner for Refugees or, if outside the individual’s country of nationality or if the individual fears harm from host country officials, to the appropriate officials in the host country, foreign territory, or foreign possession, if any, for assistance in being recognized as a refugee or submitting a request for asylum under that country’s domestic law.¹⁶ If it is clear from the facts and circumstances that the requestor is in fact seeking temporary refuge but has improperly used the word “asylum,” the request should be treated as a request for temporary refuge and the requestor so informed.¹⁷

Commander’s Authority to Grant Temporary Refuge

The senior DoD official present may grant a request for temporary refuge if the foreign national appears to need protection from imminent danger to life or safety.¹⁸ When deciding which measures may be taken to provide temporary refuge, the safety of U.S. personnel and security of the unit must be taken into consideration.¹⁹ Temporary refuge is not intended to protect persons fleeing pursuit from duly constituted law enforcement authorities of a foreign country.²⁰

¹³ *Id.* para. 4.a.

¹⁴ See <http://www.uscis.gov/portal/site/uscis> (last visited 12 June 20).

¹⁵ AFI 51-402, *International Law* (6 August 2018), para. 16.1.

¹⁶ DoDI 2000.11, para. 4.b.2.a.

¹⁷ *Id.* para. 4.b.2.d.

¹⁸ AFI 51-402, para. 16.

¹⁹ *Id.* para. 17.2; see also DoDI 2000.11, para. 4.b.2.b. If an Air Force member or employee serving under the chief of a diplomatic mission receives a request for political asylum or temporary refuge, that person must handle the request according to instructions issued by that mission.

²⁰ AFI 51-402, para. 17.1.

The senior commander of an Air Force element receiving a request for temporary refuge must take steps similar to those with respect to a request for asylum: (1) notify the servicing AFOSI; (2) if outside of U.S. territory, notify the local U.S. embassy or consular office; (3) report the incident (see “reporting” below); and (4) protect the foreign national.²¹ Once granted, temporary refuge may only be terminated when directed by SecAF, or higher authority, in coordination with relevant U.S. entities. The person whose temporary refuge has been terminated will only be released to the protection of the authorities designated in the message authorizing release.²² These are politically sensitive cases, and prompt, close coordination with the U.S. embassy and relevant combatant command is generally appropriate and expected.

Reporting

Any request for asylum or temporary refuge received by Air Force personnel must be transmitted by an operational report to the Air Force Service Watch Cell (AFSWC). The AFSWC will make further notifications as required by AFI 51-402.

Protection

The civilian law enforcement or security agency having exclusive or concurrent jurisdiction has primary responsibility for providing protection to persons requesting asylum. In unusual circumstances where it is necessary to protect persons on a temporary basis pending involvement of the USCIS, Air Force commanders will take interim measures to ensure the safety of the person against attempts at forcible repatriation.²³

Release of Information

All requests for information concerning requests for asylum or temporary refuge received by Air Force personnel should be referred through command channels. Do not release information concerning requests for asylum or temporary refuge, or even that a request has been made, to the public or media without prior approval of the Assistant SecDef for Public Affairs.²⁴ Inquiries from foreign authorities should be addressed by the senior Air Force official present with a response that the case has been referred to higher authorities.²⁵

²¹ *Id.* para. 16.1.

²² DoDI 2000.11, para. 4.b.1.c.

²³ *Id.* para. 19.

²⁴ *Id.* para. 16.3.

²⁵ *Id.* para. 20.

REFERENCES

U.S. Constitution Article I, § 8, cl. 4

Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150 (entry into force 22 April 1954; the United States is not a party)

Vienna Convention on Diplomatic Relations, 18 April 1961, 22 U.S.T. 3227, T.I.A.S. 7502, 500 U.N.T.S. 95 (entry into force 24 April 1964; for the United States 13 December 1972)

United Nations Protocol Relating to the Status of Refugees, 31 January 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (entry into force 4 October 1967; for the United States 1 November 1968)

Immigration and Nationality Act, 8 U.S.C. §§ 1101, *et seq.*

Mitigation and Refugee Assistance Act of 1962, 22 U.S.C. § 2601

Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (1980)

DoDI 2000.11, *Procedures for Handling Requests for Asylum and Temporary Refuge* (13 May 2010)

AFI 51-402, *International Law* (6 August 2018)

AFMAN 10-206, *Operational Reporting (OPREP)* (18 June 2018)

Army Regulation 550-1, *Processing Requests for Political Asylum and Temporary Refuge* (21 June 2004)

Secretary of the Navy Inst. 5710.22C, *Asylum and Temporary Refuge* (1 May 2019)

Chapter 33

REPORTS

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BACKGROUND

When conducting operations during peacetime or armed conflict, overseas or within U.S. territory, operations and international law impose certain reporting obligations on DoD personnel. The following periodic and episodic reports are examples of some of these reporting requirements:

Report of actual or suspected violations of the law of war;

1. Report relating to the exercise of criminal jurisdiction by foreign tribunals over U.S. personnel, including annual reports, individual case reports, monthly visitation reports, confinement reports, serious or unusual incident reports, trial observer reports, and trial observer reports on appeal;
2. Report of conclusion of international agreement;
3. Report of questionable intelligence activities;
4. Report of receipt of a request from a foreign national for asylum or temporary refuge;
5. Report by training assistance team members of human rights violations; and
6. Report or summary of significant foreign tax relief program activities.

Legal staffs at all levels must be familiar with the above-mentioned reports, which are discussed in further detail below.¹

Description of Reports

REPORT OF ACTUAL OR SUSPECTED VIOLATIONS OF THE LAW OF WAR

This report is required following a law of war reportable incident, which is defined as “an incident that a unit commander or other responsible official determines, based on credible information, potentially involves: a war crime; other violations of the law of war; or conduct during military operations that would be a war crime if the military operations occurred in the context of an armed conflict. The unit commander or responsible official need not determine that a potential violation occurred, only that credible information merits further review of the incident.”²

All military and U.S. civilian employees, contractor personnel, and subcontractors assigned to or accompanying a DoD component shall report reportable incidents through command channels. Such reports may also be made through other channels, such as the military police, a judge advocate, or an inspector general. Reports made to officials other than those specified shall, nonetheless, be accepted and immediately forwarded through the recipient’s chain of command.³

The commander of any unit that obtains information regarding a reportable incident shall make an initial report through the applicable operational command and military department; these

¹ For additional information, see the following chapters within this manual: Chapter Three, *War Crimes and Enforcement of the Law of War* (Report 1); Chapter Eight, *Status of Forces Agreements* (Reports 2-7); Chapter Seven, *International Agreements* (Report 3); Chapter 14, *Intelligence Activities* (Report 4); Chapter 32, *Asylum and Temporary Refuge* (Report 5); and Chapter 12, *Human Rights Law* (Report 6).

² DoDD 2311.01, *DoD Law of War Program* (2 July 2020), para. G.2.

³ *Id.* para. 6.3.

reporting requirements run concurrently. The initial report shall be made through the most expeditious means available.⁴

Once received, the combatant commander shall report, by the most expeditious means available, all reportable incidents to the Chairman of the Joint Chiefs of Staff, the SecDef, and the Secretary of the Army, who is the DoD Executive Agent for reportable incidents.⁵ Further reporting may be required if the incident falls or is suspected to fall within the definition of “friendly fire.”⁶

Law of war reporting requirements and procedures are commonly restated in combatant command (CCMD) directives and subordinate command regulations. Note that these reporting requirements are the role and responsibility of all DoD personnel.⁷

Reports Relating to the Exercise of Criminal Jurisdiction by Foreign Tribunals over U.S. Personnel

To the greatest extent possible, the Department of the Air Force (DAF) seeks to protect the rights of U.S. personnel who are subject to criminal trial by foreign courts and/or imprisonment in foreign prisons. Commanders of members facing foreign criminal jurisdiction should coordinate with their local legal office to provide up-to-date case information to be submitted in the AF/JAO-managed foreign criminal jurisdiction database.⁸

Individual Case Report—Exercise of Criminal Jurisdiction by Foreign Tribunals over U.S. Personnel

When a foreign government exercises criminal jurisdiction over U.S. military personnel, civilian employees, or dependents, an initial written report must be sent to TJAG of the service concerned. This report is not required for minor offenses, and existing reporting procedures may be used for such a report. Initial reports will be followed by timely supplemental reports of additional information. Information submitted via a Serious or Unusual Incident Report (see below) need not be reported under this provision.⁹

Report of Visit to U.S. Personnel in Foreign Penal Institutions (“Monthly Visitation Report”)

Service members confined in foreign penal institutions must be visited at a minimum every 30 days. During these visits, the member’s conditions of confinement and other matters relating to their health and welfare must be observed and recorded on a DD Form 1602, *Report of Visit – U.S. Personnel in Foreign Penal Institution*. The report should be sent to the designated commanding officer (DCO) no later than 10 workdays following the visit and all reports indicating adverse confinement conditions are forwarded to TJAG of the service concerned.¹⁰

⁴ *Id.* paras. 6.4 and 6.5.2.

⁵ *Id.* para. 6.6.

⁶ DoDI 6055.07, *Mishap Notification, Investigation, Reporting, and Record Keeping* (6 June 2011), incorporating Change 1, 31 August 2018, Encl. 3.

⁷ AFI 51-401, *The Law of War* (3 August 2018), para. 4.1.1.

⁸ AFI 51-402, *International Law* (6 August 2018), para. 7.3.3.

⁹ DoDI 5525.01, *Foreign Criminal Jurisdiction* (31 May 2019), paras. 4.2 and 4.3; and AR 27-50, para. 4-9.

¹⁰ DoDI 5525.01, para. 4.7(b) and AFJI 51-706/AR 27-50, *Status of Forces Policies, Procedures, and Information* (15 December 1989), certified current 8 January 2016, paras. 4-3.d and 4-7.

Serious or Unusual Incident Report

Serious or unusual incidents must be reported to TJAG of the service concerned as soon as practicable. Serious or unusual incidents include cases in which one or more of the following conditions exist: (1) a person subject to AR 27-50 is placed in pretrial confinement by foreign authorities, or is actually or allegedly mistreated by foreign authorities; (2) the incident is reasonably likely to result in publicity adverse to the United States; (3) Congressional or other domestic or foreign public interest is likely to arise; (4) a jurisdictional question has arisen; (5) the death of a foreign national is involved; or (6) capital punishment may be imposed. Initial reports must be followed by timely and complete supplemental reports.¹¹ Note: these reports are not the Special Interest Reports (SIRs) reported to JAJ through AMJAMS.

Trial Observer Report and Trial Observer Report on Appeal

Trial observers must attend and prepare formal reports for all trials of U.S. personnel conducted by foreign courts or tribunals, except trials for minor offenses. Incidents that result in serious personal injury or that would normally result in sentences of confinement, suspended or not suspended, are not considered minor offenses. When trial observers are precluded from attending a trial, they must obtain necessary information to file their report from interviews with defense counsel, interpreters, and other available sources.¹²

Observer reports must contain a factual description or summary of the trial proceedings. Unless directed by the DCO, trial observers are not required to attend all preliminary proceedings. Upon completion of the lower court proceedings, the report must be immediately forwarded to the DCO and should not be delayed because of the possibility of a new trial, rehearing, or appeal. In addition, copies of the report must be sent to the geographic combatant commander (GCC), if any, and to the chief of the diplomatic mission.¹³

If the DCO believes procedural safeguards were denied or the accused did not otherwise receive a fair trial, they will submit a recommendation as to appropriate action to rectify the trial deficiencies to the SecDef (via the GCC concerned), the Chairman of the Joint Chiefs of Staff, and the secretary of the service concerned or the Secretary of Homeland Security.¹⁴

Report of Receipt of a Request from a Foreign National for Asylum or Temporary Refuge

This report is required upon the receipt of a request or an indication that a request for asylum is imminent. The senior commander of the Air Force or Space Force element receiving a request shall: (1) notify the servicing Air Force Office of Special Investigations, (2) notify the nearest office of the U.S. Citizenship and Immigration Services in the case of asylum requests within U.S. territory, (3) notify his or her command post/center to transmit an operational report to the Air Force Service Watch Cell in accordance with AFMAN 10-206, *Operational Reporting*, (4) if outside U.S. territory, notify the local U.S. embassy or consular office, and (5) protect the foreign national.¹⁵

¹¹ AR 27-50, para. 4-8.

¹² DoDI 5525.01, para. 4.4 and AR 27-50, para. 1-8.c.

¹³ DoDI 5525.01, paras. 4.4(b)(1) and (4).

¹⁴ *Id.* para. 4.4(e)(2).

¹⁵ AFI 51-402, para. 16.1.

Report by Security Cooperation Education and Training Team Members of Human Rights Violations

This report is required when a Security Cooperation Education and Training team member encounters misconduct committed by foreign country personnel. Prohibited acts include:

1. Violence to life and person—in particular, murder, mutilation, cruel treatment, and torture.
2. Taking of hostages.
3. Outrages upon personal dignity—in particular, humiliating and degrading treatment.
4. Passing of sentences and carrying out of executions without previous judgment by a regularly constituted court, affording all the judicial guarantees that are recognized as indispensable.¹⁶
5. If a team member encounters such acts, they are required to disengage from the activity, leave the area if possible, and report the incidents immediately to proper in-country U.S. authorities. The country team will identify proper U.S. authorities during the team's initial briefing and team members will not discuss such matters with non-U.S. Government authorities such as journalists or civilian contractors.¹⁷

Report of Conclusion of International Agreement

This report is required when an international agreement has been concluded. Each organizational element of the DAF which concludes an international agreement must send the original or certified copies (or both) of the international agreement, in time to arrive at the Office of the Assistant Legal Adviser for Treaty Affairs, Department of State, not later than 20 calendar days after signature of the agreement.¹⁸ For international intelligence agreements, submit the report in time to arrive at the Defense Intelligence Agency or National Security Agency, as appropriate, not later than 15 calendar days after signature of the agreements.¹⁹

Copies of the agreements are to be sent to the following locations:²⁰

1. Department of State (DOS) (The original and one certified copy, or two certified copies)
2. DoD General Counsel (GC). (Two certified copies)
3. Office of the General Counsel, Secretary of the Air Force (SAF/GCI). (One certified copy)
4. Operations and International Law Division, Office of The Judge Advocate General (AF/JAO). (One certified copy)
5. Any other offices required by relevant command directives or deemed appropriate by the component Air Force or Space Force commands or their designee.

¹⁶ AFI 16-105/AR 12-15, *Joint Security Cooperation and Training* (3 January 2011), para. 4-3(b)(1).

¹⁷ *Id.* para. 4-3 (b)(3).

¹⁸ 22 C.F.R. 181.5, *Twenty-Day Rule for Concluded Agreements*.

¹⁹ DoDI 5530.03, *International Agreements* (4 December 2019), para. 7.3; and AFI 51-403, *International Agreements* (8 February 2019), para. 8.

²⁰ AFI 51-403, para. A3.1.

Report of Questionable Intelligence Activities

This report is required upon the occurrence of a questionable intelligence activity (QIA).²¹ A QIA is “[a]ny intelligence or intelligence-related activity when there is reason to believe such activity may be unlawful or contrary to an [executive order], Presidential directive, Intelligence Community Directive, or applicable DoD policy governing that activity.”²²

DAF personnel must immediately report QIAs to their chain of command, if practical. If immediate reporting to one’s command is impractical, reports may be made to any DAF legal counsel or inspector general (IG), DoD GC; DoD Senior Intelligence Oversight Official, Joint Staff IG or intelligence oversight officer, Chairman of the Joint Chiefs of Staff legal counsel, DoD IG, or the Intelligence Community IG.²³ This report must be made regardless of whether a criminal or other investigation has been initiated.

Commanders shall investigate reports of QIAs within their unit IAW guidance and procedures for commander-directed investigations.²⁴ Updates in investigations must be submitted quarterly through command channels to AF/A2/6.²⁵

²¹ DoDD 5148.13, *Intelligence Oversight* (26 April 2017), para. 4.1.

²² *Id.* para. G.2.

²³ AFI 14-404, *Intelligence Oversight* (3 September 2019), para. 2.11.2.

²⁴ *Id.* para. 3.1. AFI 90-301, *Inspector General Complaints Resolution* (28 December 2018), provides additional guidance on how to conduct a commander-directed investigation.

²⁵ *Id.* para. 3.2.

REFERENCES

- Executive Order 12333, *U.S. Intelligence Activities*, 46 Fed. Reg. 59941, as amended by Executive Order 13284 (23 January 2003), Executive Order 13355 (27 August 2004), and Executive Order 13470 (30 July 2008)
- DoD 5240.1-R, *Procedures Governing the Activities of DoD Intelligence Components that Affect United States Persons* (11 December 1982), incorporating Change 2, 26 April 2017
- DoDD 2311.01, *DoD Law of War Program* (2 July 2020)
- DoDI 5525.01, *Foreign Criminal and Civil Jurisdiction* (31 May 2019)
- DoDI 5530.03, *International Agreements* (4 December 2019)
- DoDI 6055.07, *Mishap Notification, Investigation, Reporting, and Record Keeping* (6 June 2011), incorporating Change 1, 31 August 2018)
- DoDM 5240.01, *Procedures Governing the Conduct of DoD Intelligence Activities* (8 August 2016)
- AFI 14-404, *Intelligence Oversight* (3 September 2019)
- AFI 16-105/AR 12-15 *Joint Security Cooperation Education and Training* (3 January 2011)
- AFI 51-401, *The Law of War* (3 August 2018)
- AFI 51-402, *International Law* (6 August 2018)
- AFI 51-403, *International Agreements* (8 February 2019)
- AFJI 51-706/AR 27-50, *Status of Forces Policies, Procedures, and Information* (15 December 1989), certified current 8 January 2016

Chapter 34

AIR RESERVE COMPONENT ISSUES DEPARTMENT OF STATE – DEPARTMENT OF DEFENSE INTERFACE OVERSEAS

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BACKGROUND

The principal roles of the Department of State (DoS), in its relationship with the Department of Defense (DoD), are to facilitate defense activities overseas, and to ensure that those activities support U.S. foreign policy. In recognition of the impact that DoD activities have on U.S. foreign affairs, DoS has assigned a single bureau, the Bureau of Political-Military Affairs (PM), to be its primary interface with the DoD. As the lead foreign affairs agency, DoS is the lead coordinating agency for the development and implementation of U.S. foreign policy; management of the foreign affairs budget and other foreign affairs resources; leading and coordinating U.S. representation abroad, and conveying U.S. foreign policy to foreign governments and international organizations through U.S. embassies and consulates.¹

DoD personnel routinely coordinate with DoS entities, including U.S. embassies abroad. Judge advocates, paralegals and legal staff should be familiar with DoS functions and organization structure, as well as how DoS interacts with DoD, non-governmental organizations (NGOs), international organizations, and regional organizations. In an operational context, this knowledge can be critical to mission accomplishment. Interaction usually takes place within the U.S. Government (USG) through what is generally called the “interagency process.” Judge advocates will encounter many U.S. agencies working together to achieve USG objectives, relying on each other’s skills, resources, and authorities to accomplish agency and collective missions.

U.S. EMBASSIES

To comprehend the USG interagency structure overseas, it is helpful to start with the U.S. embassy. The embassy serves as a diplomatic headquarters in the host nation’s capital. The ambassador, appointed by the President,² is usually the Chief of the Mission (COM) and leads the diplomatic mission of the embassy. The COM to a foreign country has full responsibility for the direction, coordination, and supervision of all USG executive branch employees in that country.³ There are three groups specifically excepted from COM authority by legislation or presidential directive: (1) Personnel serving under the command of a Geographic Combatant Commander (GCC), (2) Executive branch employees on official detail to an international organization, and (3) Voice of America correspondents (but not other employees of the U.S. Agency for Global Media on official assignment).⁴ The COM shall keep fully and currently informed with respect to all activities and operations of the USG within that country, and shall ensure that all USG executive branch employees in that country under his/her authority comply fully with all applicable directives of the COM.⁵ The embassy advocates U.S. policy interests, reports to Washington, and protects the welfare of U.S. citizens. Branches known as consulates may be located somewhere outside the country capital with more limited responsibilities than embassies.⁶ Embassy premises are inviolable

¹ JOINT PUBLICATION 3-08, *Interorganizational Cooperation* (12 October 2016), Annex M to Appendix A, Department of State [hereinafter JP 3-08].

² 22 U.S.C. § 3942.

³ 22 U.S.C. § 3927. *See also* JP 3-08, IV-2, § 1.

⁴ 2 FAH-2 H-112.1 Chief of Mission Authority.

⁵ 22 U.S.C. § 3927.

⁶ JP 3-08, IV-2, § 1.

under international law.⁷ Most embassy officials and staff will have varying degrees of immunity from the host country's criminal, civil, and administrative jurisdiction.⁸

Embassy Officials and Areas of Interaction

Embassy officials and other DoS personnel play a central role in most international agreement negotiations and disputes involving significant military issues. Personnel of importance to the mission are the ambassador, the political-military counselor, public affairs counselor, regional security officer (RSO), the refugee coordinator, and various local national employees who are experts in their fields. Consular officers play a central role during noncombatant evacuation operations (NEOs), disaster relief, foreign criminal jurisdiction (FCJ) cases of unusual importance,⁹ and a host of matters related to passports, visas, and immigration. Embassy officials and employees of non-DoD agencies can be of great assistance, depending upon the issue. Judge advocates should know the functions of these positions and get to know the people in those positions as soon as practicable. An orientation visit to the U.S. embassy can be very beneficial throughout a judge advocate's deployment or forward-basing assignment.

A sense of united purpose will not always be self-evident. Judge advocates should expect different means and methods for achieving broader, more politically-oriented objectives and be aware that many embassy staffers have law degrees and legal backgrounds, but most are not working in attorney positions.

Typical issues which may require interaction and coordination with the embassy include overflight rights, landing fees, sovereign aspects of aircraft, country clearances, interfacing with host nation officials on customs and immigration issues affecting operations, carrying weapons, importing ammunition, and interpreting aspects of the United States and host nation agreements, host country rules, and host nation law. Judge advocates may engage embassy personnel on FCJ issues; claims, provisioning; licensing; postal services; Morale, Welfare, and Recreation activities; and in many similar base support type issues.

Ambassador

The ambassador is the President's personal representative, managing all embassy operations and coordinating the activities of in-country USG agencies and therefore as noted earlier, the ambassador is normally the COM.¹⁰ The relationship between the combatant commander (CCDR) and the ambassador eludes precise definition and will vary based on host country and regional circumstances. The ambassador should not make recommendations concerning, and has no role in, the military justice decisions affecting military personnel. However, DoD components are required to keep the COM fully and currently informed with respect to all activities and operations of the USG in that country.¹¹ Disciplinary matters for DAF personnel assigned to the ambassador, such as in the defense attaché office, are normally handled by the member's Air Force element commander, or a similar centralized DAF organization formally delegated the authority and tasked with administering such matters. One such organization is the Air Force District of Washington. The ambassador integrates the programs and resources of all USG agencies, and will interact regularly

⁷ Vienna Convention on Diplomatic Relations, 1961, Art. 22.

⁸ See Chapter Eight, *Status of Forces Agreements* (SOFAs) and, in particular, discussion on administrative and technical (A&T) status under the Vienna Convention on Diplomatic Relations.

⁹ See Chapter Nine, *Foreign Criminal Jurisdiction*.

¹⁰ JP 3-08, IV-I, § 1.a.(1).

¹¹ 22 U.S.C. § 3927(b).

with senior DoS policymakers in Washington, D.C. Additionally, the ambassador functions at both the operational and tactical levels where recommendations and considerations for crisis action planning are provided directly to the CCDR or the commander of a joint task force.¹²

Deputy Chief of Mission

The role of Deputy Chief of Mission (DCM), the mission's second in charge, is critical to the diplomatic and operational structure of any embassy. The DCM is usually responsible for the day-to-day activities of the embassy.¹³ When the ambassador is traveling outside of the country or there is no ambassador appointed, the DCM takes over and he or she, when acting in this role, is known as the *chargé d'affaires* (the *chargé*).¹⁴ The *chargé* may also be appointed as the 'head of mission' in cases when only tenuous diplomatic relations exist between the sending and receiving States.

Political Counselor (or Political-Military Counselor)

Among other responsibilities, the head of the Political Section (sometimes known as the POL-MIL officer) is tasked with evaluating and reporting host country political and military developments. This official is familiar with the U.S. military and can be the most effective conduit to the ambassador.

The POL-MIL counselor should not be confused with a political advisor (POLAD). A POLAD is a senior DoS officer detailed as a personal advisor to U.S. military commanders to provide policy support regarding the diplomatic and political aspects of the commanders' military responsibilities.¹⁵

Defense Attaché Office (DAO)

The senior defense official/defense attaché (SDO/DATT) is the principal DoD official in U.S. embassies, who serves as the diplomatically-accredited DATT and chief of the security cooperation organization (SCO) (if an SCO is present).¹⁶ The SDO/DATT is the COM's principal advisor on defense issues and the senior diplomatically accredited DoD military officer assigned to a U.S. diplomatic mission. All DoD elements under COM authority are under the coordinating authority of the SDO/DATT, except for the Marine security guard detachment and naval support units.¹⁷ The SDO/DATT is funded and rated by the Defense Intelligence Agency, but keeps the CCDR informed of their activities. The SDO/DATTs are valuable liaisons to their host nation counterparts. They serve the ambassador and coordinate with, and represent, their respective military departments on service matters.¹⁸

¹² JP 3-08, IV-I, § 1.a.(1).

¹³ *Id.* IV-2, § 1.a.(2).

¹⁴ *Id.*

¹⁵ *Id.* IV-5.

¹⁶ DoDD 5205.75, *DoD Operations at U.S. Embassies* (4 December 2013), § 1.b.

¹⁷ *Id.* § 3.c.

¹⁸ JP 3-08, IV-4.

Security Cooperation Organization (SCO)

The President is authorized to assign U.S. military personnel overseas to manage security assistance (SA) programs administered by the DoD.¹⁹ The generic term SCO encompasses all DoD elements located in a foreign country to carry out security cooperation (SC) and SA management functions.²⁰ The SCO manages DoD SC programs under the guidance of the CCDR.²¹

The SCO is separate from the DAO and performs an entirely different function. The SCO falls under the direction and supervision of the COM and therefore the SCO chief's ability to form positive professional relationships with the COM and other members of the embassy country team is critical to DoD success in synchronizing priorities and efforts with other agencies.²² The SCO also falls under the command and supervision of the CCDR in matters that are not functions or responsibilities of the COM. The SDO/DATT ensures compatibility of DoD and DoS policies, and promotes complementary use of resources.²³

The operational relationships between the CCDR and SCO will depend upon the scope of DoD and CCDR military-to-military activities with the SCO's host country. In 1997, the Secretaries of State and Defense co-signed a Memorandum of Understanding (MOU) governing security responsibility for DoD elements and personnel in foreign areas and not under the command of a GCC.²⁴ The DoS/DoD MOU is used worldwide, through individual country memoranda of agreement (MOAs) between the COM and the relevant GCC. Each country's MOA assigns operational control of overseas security functions for all DoD elements/personnel in country and not under the command of a GCC to either the COM or the GCC, thereby eliminating "gray areas" that have led to confusion over security responsibility for some DoD elements or personnel.²⁵

The SCO plays key roles in support of DoD and CCDR activities conducted in and with their host country. SA and SC includes a range of activities from managing foreign military sales and international military training programs to evaluation and planning of the host government's military capabilities and requirements, among others.²⁶

¹⁹ Section 515(a) of the Foreign Assistance Act (FAA) of 1961, as amended.

²⁰ These are functions under the FAA and the Arms Export Control Act (AECA) of 1976, as amended.

²¹ Defense Security Cooperation Agency (DSCA), *Security Assistance Management Manual*, C2.1.1.1.

²² *Id.* C2.1.2.1.

²³ *Id.* C2.1.2.2.

²⁴ Available at https://fam.state.gov/FAM/02FAM/02FAM0110.html#X111_3_I (last visited 15 May 2020).

²⁵ See 2 FAH-2, H-116.4 *COM Security Responsibility and the DoD*. See also FAM Exhibit 111.3 (I). Note—any MOA will be pursuant to the Memorandum of Understanding (MOU) between the DoS and the DoD on Security of DoD Elements and Personnel in Foreign Areas of December 16, 1997.

²⁶ JOINT PUBLICATION 3-20, *Security Cooperation* (23 May 2017), II-18.

Other Officers

Consul General. The consul general heads the consular section of the embassy or consulate delivering a variety of public services related to travel documents, such as visas and passports. This section supports U.S. citizens visiting or living in the host country through emergency assistance, hospital and jail visits, information on the local medical and legal system, and assistance on certain federal programs, among other activities. The consular officer is a key official in NEOs.²⁷

Public Affairs Officer (PAO). The PAO is similar to a military PAO in many respects, and is very helpful with interaction with media. The embassy PAO helps achieve U.S. foreign policy objectives through information and cultural programs. He or she works actively with the host nation media, providing information on U.S. policy and actions, and reporting to the U.S. host nation viewpoints and commentary. The PAOs are especially useful during humanitarian assistance operations and NEOs. During these events, it is vital that the embassy and the military speak with one voice.

Regional Security Officer (RSO). The RSO supervises the Marine security guard detachment and the contract guards. The RSO is also a liaison with local police and an expert on local force protection issues—and therefore is a valuable point of contact. The RSO enforces the security standards (set by a central Overseas Security Policy Board) for everyone under COM authority.

Refugee Coordinator. If stationed at the embassy, this official will be especially helpful in dealing with NGOs and private voluntary organizations (PVOs) that may be involved in the crisis at hand. This person monitors the activities of various refugee agencies, such as the United Nations High Commission on Refugees and the International Committee of the Red Cross.²⁸

Legal Attaché (LEGAT). A LEGAT is a Federal Bureau of Investigations (FBI) agent posted to a U.S. embassy or consulate abroad. Each office is established through mutual agreement with the host country. They have no law enforcement function in the country where assigned but provide a conduit into the FBI, other federal law enforcement agencies, Interpol, foreign police and security officers in Washington, and national and international law enforcement associations.²⁹

Country Team

The country team, headed by the COM, is the senior in-country interagency coordinating body, and the principal means by which a diplomatic mission comes together as a cooperative, coordinated, and well-informed staff. Its composition is a function of many factors and is established at the discretion of the COM, but membership usually includes the ambassador, who serves as its head, the DCM, the chiefs of the political and economic sections, and the senior member of each USG department or agency in country. In almost all bilateral missions, the SDO/DATT is the principal DoD official and representative on the country team.³⁰

The country team analyzes situations and formulates plans and strategies for executing U.S. foreign policy in country. It also coordinates policy recommendations to feed back to Washington D.C. It provides the foundation for rapid interagency consultation, coordination, and action

²⁷ See separate Chapter 21, *Noncombatant Evacuation Operations*.

²⁸ See also Chapters 11, *International Organizations*, and 32, *Asylum and Temporary Refuge*.

²⁹ For further information on legal attaché offices see <https://www.fbi.gov/contact-us/legal-attache-offices> (last visited 5 May 20).

³⁰ JP 3-08, IV-4.

on recommendations from the field and effective execution of U.S. missions, programs, and policies.³¹ The relationship with military chains of command may be ad hoc. Unity of effort will be paramount. The country team concept encourages agencies to coordinate their plans and operations and keep one another and the COM informed of their activities.

United States Agency for International Development (USAID)

The majority of U.S. foreign economic and humanitarian assistance is managed by USAID. USAID is an independent USG agency that receives overall foreign policy guidance from the Secretary of State. USAID promotes U.S. national security and foreign policy goals by promoting peace and stability.³² USAID achieves this by fostering economic growth, protecting human health, providing emergency humanitarian assistance, and enhancing democracy in developing countries. The USAID staff may be especially helpful in post-conflict situations where part of the mission is to restore law and order. For example, USAID may provide funds for the retraining of judges, prosecutors, and other judicial personnel, renovating courts, and funding police training. The USAID Administrator is usually designated as the USG humanitarian assistance coordinator for emergency response. The Administrator is the most important person to deal with in attempting to fully coordinate a civil-military operations center (CMOC), discussed below. International organizations and NGOs appreciate the importance, especially economically, of the USAID Administrator.³³

AIR OPERATIONS³⁴

Aircraft and Aircrew Clearances

Foreign clearance of USG international air operations is obtained through U.S. officials. Aircrew performing only aircrew duties do not require personnel clearance (special area, theater, or country).³⁵ Overflight issues should be settled with the host nation, preferably, by an international agreement or an exchange of diplomatic notes;³⁶ however, aircrew performing additional official duties in a capacity other than as members of an aircrew must secure clearance in accordance with the appropriate country section of the DoD Foreign Clearance Guide.³⁷ The provisions of the DoD Foreign Clearance Guide apply to DoD personnel who are U.S. citizens.³⁸ In instances where U.S. military activities propose to use third nation personnel as crewmembers for missions where blanket clearances exist or no clearance is required, the military activity must first obtain approval of the U.S. embassy in the country concerned (see paragraphs dealing with personnel clearances below for clearances of non-aircrew; see also discussion below under Personnel Clearances).³⁹

³¹ *Id.*

³² See <https://www.usaid.gov/who-we-are/mission-vision-values> for further information on USAID's mission, vision and values (last visited 5 May 20).

³³ See also Chapter 28, *Deployed Fiscal Law and Contingency Contracting*.

³⁴ See also Chapter Four, *Air Law* for further details and references.

³⁵ DoD *Foreign Clearance Guide*, DL1.3: an aircraft diplomatic clearance will include clearance for aircrew in such circumstances; available at <https://www.fcg.pentagon.mil/> (last visited 15 May 20).

³⁶ *Id.* C2.1.2; See also Chapter Four, *Air Law*.

³⁷ DoD *Foreign Clearance Guide*, C2.3.1.2.

³⁸ *Id.* C2.1.3.6.

³⁹ *Id.*

Department of Defense Contract Aircraft

The normal practice of the USG is not to designate DoD contract aircraft as State aircraft.⁴⁰ In certain circumstances, however, the DoS political-military advisor may declare DoD contract aircraft as a State aircraft. If the aircraft is engaged in a humanitarian or other mission using civilian aircraft solely dedicated for use by or on behalf of the USG and there is a compelling reason, DoS might be prepared to declare it a State aircraft. Judge advocates should remember, however, that although DoS may be prepared to so designate aircraft, the receiving State may be unwilling to allow entry into its airspace with that condition.

OTHER LEGAL ISSUES

One of the key roles of the DoS is to facilitate defense activities overseas. The DoS will approach foreign governments through high-level visits, diplomatic representations by U.S. missions overseas, or contact with foreign government representatives in the United States to negotiate agreements or obtain authorization for defense activities in the foreign country.⁴¹

Bureau of the Political Military Affairs (PM)

The PM is the DoS principal link to the DoD. The PM provides policy direction in the areas of international security, SA, military operations, defense strategy and plans, and defense trade.⁴² The Office of Security Negotiations and Agreements leads the USG's negotiation of status of forces agreements (SOFA), defense cooperation agreements, cost-sharing special measures agreements, facilities access agreements, transit and overflight arrangements, and State flight agreements.⁴³ Some of the issues these agreements will cover are discussed below.

Personnel Clearances

The DoD Foreign Clearance Guide answers most questions pertaining to clearances for DoD personnel and non-DoD personnel traveling under DoD sponsorship. Generally, standard requirements do not apply to travel by personnel in unified or overseas service commands to units of those commands, intra-theater troop movements, personnel deploying to support formally approved exercises, personnel on leave and aircrew who perform aircrew duties exclusively (see paragraph dealing with aircrew clearances above). Exceptions may apply to general officers and Senior Executive Service (SES) employees.⁴⁴

There are three categories of travel clearance to be aware of (1) special area, (2) theater and (3) country.⁴⁵ Ensuring the traveler has the appropriate travel clearance is the responsibility of the traveler, his or her unit, and the clearance granting authority. All official travelers must obtain one or more of these clearances. The DoD policy is that the number of visits and visitors to overseas areas shall be minimal, and be made only when their purpose cannot be satisfied by other means.⁴⁶ Visits shall be arranged with a minimum requirement on equipment, facilities, time, services of

⁴⁰ *Id.* C2.1.8.2. See also Chapter Four, *Air Law*.

⁴¹ JP 3-08, Annex M to Appendix A.

⁴² *Id.* II-20.

⁴³ See <https://www.state.gov/bureau-of-political-military-affairs-office-of-security-negotiations-and-agreements-pm-sna/> (last visited 15 May 20).

⁴⁴ DoD *Foreign Clearance Guide*, C3.3.5.6.

⁴⁵ *Id.* C3.1.5.3.

⁴⁶ *Id.* C3.1.1.

installations, and personnel being visited. When practicable, trips to the same general area and in the same general period should be consolidated.⁴⁷

Special Areas. The DoS and the Office of the Under Secretary of Defense for Policy designate certain countries as “Special Areas.” Requests for special area clearance (or notification) should be submitted when necessary, concurrently with country and theater clearance.⁴⁸

Country Clearance. This is clearance required from the U.S. embassy through the SDO/DATT’s office, the SCO, and the military advisory and assistance group, among others, as appropriate.⁴⁹

Theater Clearance. This type of clearance is required for visits to overseas military activities on matters pertaining to the mission of the CCDR. Clearance is granted by the CCDR or may be delegated to the component commands, subordinate commands, special agencies, or units to be visited.⁵⁰ Clearances may be required or assumed. Special rules may apply and are listed on the individual country pages in the DoD Foreign Clearance Guide. The DoD Foreign Clearance Guide also contains medical requirements and special service requirements such as those that may pertain to contact with foreign representatives, force protection, etc.

DEALING WITH FOREIGN OFFICIALS

U.S. military personnel are often required to coordinate with host nation officials in order to accomplish their military missions. This can involve local national officials on relatively minor matters, or it may require interface with national level, host nation officials. National level meetings are normally conducted by the U.S. embassy. However, even seemingly minor interactions with local officials may establish problematic precedents. Ensure compliance with U.S. policies and agreements for the country involved. It is always a good idea to establish a liaison officer at the embassy in each country that an operation may affect. By way of illustration, the arrangements adopted in a number of countries are detailed below:

Australia. In Australia, official government-to-government contact is handled through the U.S. embassy in Canberra. When it is necessary to engage with Australian officials, contact should be made with the DAO or the Office of the SJA for the 337th Air Support Flight (337 ASUF/JA). The SDO/DATT is the senior U.S. military officer in Australia and the office represents USINDOPACOM in relations with the government of Australia. The 337 ASUF/JA is the office responsible for administering and supervising the application of the SOFA between the United States and Australia for all the services.

Japan. In Japan, the Commander of the Fifth Air Force is dual-hatted as Commander, U.S. forces Japan (COMUSFJ). As COMUSFJ, this position is the principal point of contact between the Government of Japan and U.S. forces in Japan, as well as the principal U.S. military contact with the U.S. embassy and other USG agencies in Japan. Weekly meetings of the Joint Committee are the principal forum for the conduct of routine business.

South Korea. In South Korea, the Commander, U.S. forces Korea (USFK) conducts all relations above the installation level with the Government of Korea. Monthly meetings of the U.S.-ROK Joint Committee are the forum in which most routine business is conducted.

⁴⁷ *Id.*

⁴⁸ *Id.* DL1.41.2.

⁴⁹ *Id.* DL1.41.1.

⁵⁰ *Id.* DL1.41.3.

Germany. In Germany, official interface with the German (Federal) Government is mainly governed by the Federal Republic of Germany Supplementary Agreement to the NATO SOFA. As a rule, official contact is made through the U.S. embassy at Berlin. Various sending States' working groups have been established to deal with particular issues, *e.g.*, accommodations, environment, construction, indirect contracting, labor, hazardous cargo, customs, technical expert issues, and others.

Spain. In Spain, all official interface with the Spanish Ministry of Defense (MOD) or Spanish military officials above base level is conducted through the U.S.-Spain Permanent Committee in Madrid.

Greece. In Greece, all official interface with the Greek Ministries of Foreign Affairs and Defense above base level is conducted through the U.S.-Greek Joint Commission in Athens.

Italy. In Italy, official government-to-government contact is handled via the U.S. embassy in Rome. Commanders and judge advocates should contact, as appropriate, the SDO and the U.S. Sending State Office for Italy (USSSO). The USSSO works for and reports to European Command (EUCOM-ECJ4) and oversees all matters related to permanent or contingency basing of U.S. forces in Italy. The latter is a multiservice legal office working under the technical supervision of EUCOM JA (ECJA) and is the office responsible for administering and supervising the application of the NATO SOFA and other international agreements in Italy.

Netherlands. In the Netherlands, contact with the Dutch government is generally directly with the authorities. On occasion, the matter is raised with the Dutch MOD, especially if the issue involves the payment of fees and the U.S. force is seeking the Dutch government to bear the cost.

Norway. In Norway, there are no formal Norwegian rules governing interface between U.S. and Norwegian government officials. When it is necessary to engage Norwegian officials on any substantive matter of importance, questions or concerns are addressed directly to the Norwegian MOD via their legal counsel.

Turkey. In Turkey, the Defense and Economic Cooperation Agreement, (DECA) governs official interface between the U.S. forces and the Turkish General Staff (TGS). The chief, SDO Turkey is the single point of contact with the Turkish General Staff regarding all U.S. military organizations and activities in Turkey.⁵¹ Information required to be provided to the TGS will be provided through the SDO. Of course, at the installation level, the U.S. commander is expected to have close ties with his or her Turkish counterpart, and they are frequently able to solve a myriad of issues at their level. However, all communication above that level is conducted by the SDO.

UK. In the UK, interface with the UK MOD is through the Assistant Chief of the Air Staff (ACAS) for air-related matters and a U.S. Air Force representative is part of the ACAS staff for this purpose. Military issues involving other UK departments (*e.g.*, Customs & Excise, Ministry of Agriculture Fisheries and Food) will frequently be directly raised with those departments, in coordination with MOD.

⁵¹ Art. III to Annex Five to Supplementary Agreement Three of the DECA.

NON-GOVERNMENTAL ORGANIZATIONS AND PRIVATE VOLUNTEER ORGANIZATIONS

During complex humanitarian emergencies, both United Nations (UN) and non-UN international organizations, public and private, have typically been working in the affected area for months or even years. They may be an invaluable source of information, but these organizations have different mandates and often act independently of one another.

Once in the field, a judge advocate may find an organization called the humanitarian operations center (HOC). The HOC is primarily an international and interagency policy coordinating body that seeks to achieve unity of effort among all participants in a large humanitarian operation.⁵² Another organization is the civil-military operations center (CMOC), which is established by the commander for the joint task force.⁵³ The way a commander makes use of a CMOC depends on the situation. Commanders have used CMOCs to reach out to receiving State nationals as well as to NGOs and PVOs. The CMOC can serve as a forum for airing problems as well as a vehicle for shaping expectations regarding what forces in the field realistically can and cannot do. A judge advocate may be called upon to act as a liaison with a HOC or CMOC and to deal with UN agencies, international police task force headquarters, and local judicial authorities. A judge advocate may also be asked to draft important agreements with the understanding that such agreements may be negotiated or concluded only with proper authority.

⁵² JP 3-08, IV-26.

⁵³ *Id.*

REFERENCES

- Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Forces, 19 June 1951, 4 U.S.T. 1792, T.I.A.S. 2846, 199 U.N.T.S. 67 (entry into force 23 August 1953, for the United States same date)
- Vienna Convention on Diplomatic Relations, open for signature 18 April 1961, 23 U.S.T. 3227, T.I.A.S. 7502, 500 U.N.T.S. 95 (entry into force 24 April 1964 for the United States 13 December 1972)
- Vienna Convention on Consular Relations, adopted 24 April 1963, 21 U.S.T. 77; T.I.A.S. 6820; 596 U.N.T.S. 487 (entry into force 19 March 1967, for the United States 24 December 1969)
- Defense and Economic Cooperation Agreement with Turkey, 1980
- Agreement Among the States Parties to the North Atlantic Treaty and the other States Participating in the Partnership for Peace regarding the Status of their Forces, open for signature 19 June 1995
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- 2 FAH-2 H-110 – Chief of Mission Authority, Security Responsibility and Overseas Staffing
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Chapter 35

AIR RESERVE COMPONENT ISSUES

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BACKGROUND

The Air Reserve Component (ARC) is an integral part of the Air Force's Total Force and is comprised of the Air Force (AF) Reserve and the Air National Guard (ANG).¹ The ARC's mission is to "provide trained units and qualified persons available for active duty in the armed forces, in time of war or national emergency, and at such other times as the national security may require, to fill the needs of the armed forces whenever more units and persons are needed than are in the regular components."² The AF Reserve is an exclusively federal organization intended to provide a reserve for active duty (AD) and includes all AF Reserves who are not ANG members.³ The ANG, on the other hand, traces its roots to the colonial militia,⁴ existing prior to the adoption of the U.S. Constitution, and provides a dual federal and state mission.⁵ The ANG's federal mission is to "maintain well-trained, well-equipped units available for prompt mobilization during war and provide assistance during national emergencies."⁶ When not mobilized or under federal control, the ANG provides support to various missions protecting life and property, and preserving peace, order, and public safety through various operations within the state/territory.⁷ In light of the exponential rise in Total Force operations since September 11, 2001, judge advocates must understand the structure of the ARC and some of the unique legal issues which may arise with ARC forces.

STRUCTURE OF THE ARC

Whether AF Reserve or ANG, all reservists are placed into one of three primary categories: the Ready Reserve, the Standby Reserve, or the Retired Reserve.⁸ The following provides a brief description of each.

The Ready Reserve

The Ready Reserve is the "primary manpower pool" for reservists called to AD.⁹ Within the Air Force, the Ready Reserve is generally divided into two subcategories: the Selected Reserve (SELRES) and the Individual Ready Reserve (IRR).¹⁰

¹ See 10 U.S.C. § 10101.

² *Id.* § 10102.

³ *Id.* § 10110.

⁴ See generally, *A Legacy of Valor, A History of Honor*, Air National Guard (available at <https://www.goang.com/discover-ang/history.html>).

⁵ Lawrence Kapp and Barbara S. Torreon, *Reserve Component Personnel Issues: Questions and Answers*, Congressional Research Service Report for Congress (15 June 2020), 1.

⁶ See www.ang.af.mil/About-Us/ (last visited 15 June 20).

⁷ *Id.*

⁸ See 10 U.S.C. § 10141.

⁹ Kapp and Torreon, *Reserve Component Personnel Issues*, 1. Per 10 U.S.C. § 10142, the authorized strength of the Ready Reserve is 2,900,000.

¹⁰ *Id.* at 2 (While there is also an Inactive National Guard within the Ready Reserve, currently only Army National Guard has personnel in this subcategory).

Selected Reserve (SELRES)

The SELRES consists of units and individuals in the Ready Reserve designated “as so essential to initial wartime missions that they have priority over all other Reserves.”¹¹ Persons within the SELRES include Category A (Unit Reservists or Traditional Reservists (TR)) and Category B (Individual Mobilization Augmentees (IMA)). Category A reservists belong to organized reserve units and generally (but not always) train and mobilize as a unit. Category B (IMA) reservists train with regular AF units. Their role is to individually augment or backfill AD forces during war or national emergency.

Individual Ready Reserve (IRR)

The IRR is a manpower pool consisting of individuals who have some training, have previously served in the active component or SELRES, and have some period of their military service obligation remaining.¹²

The Standby Reserve

The Standby Reserve generally consists of individuals who have a temporary disability or hardship, or are serving in key defense-related positions in their civilian capacity.¹³ These individuals are placed on either the “active” or “inactive” status lists.¹⁴ While members are in inactive status, they are ineligible for pay and promotion, and do not receive credit for years of service attributable to retirement and benefits.¹⁵

The Retired Reserve

The Retired Reserve consists of members currently receiving retired benefits as a result of their AD or reserve service and members who qualify for reserve retirement but have not reached their qualifying pay age.¹⁶ These individuals are subject to involuntary activation in limited circumstances.¹⁷

THE ANG

As an Air Force Reserve Component, the ANG is a full partner in the defense of the United States and worldwide projection of U.S. military strength. The ANG is comprised of the state/territorial militias operating as federally recognized units in every state, the District of Columbia, and the territories of Guam, Puerto Rico, and the Virgin Islands.¹⁸ The ANG fulfills two general functions: operations at the state level and operations at the federal level. While operational at the state/territory level, ANG members generally serve in either State Active Duty (SAD) or Title 32 (T32) status. While in either status, command and control (C2) remains with the governor of the state/territory. SAD status is entirely state-funded and there are no federal benefits or protections

¹¹ DoDI 1215.06, *Uniform Reserve, Training and Retirement Categories for the Reserve Component* (11 March 2014), incorporating Change 1, 19 May 2015), 23.

¹² *Id.* at 26.

¹³ *Id.* at 28.

¹⁴ *Id.*

¹⁵ *Id.* at 29.

¹⁶ *Id.*

¹⁷ *Id.* at 30.

¹⁸ Air National Guard Readiness Center (April 19, 2013), available at www.ang.af.mil/Portals/77/documents/AFD-130506-013.pdf (last visited 16 June 20).

available, to include credit toward federal retirement points. Unlike SAD, T32 missions receive federal funding despite remaining under state control. There are several authorities which allow ANG personnel to perform certain operations in T32 status.¹⁹

ANG members mobilized for federal operations are placed in Title 10 (T10) status.²⁰ Because deployments support federal missions, all deployed members of the ANG are in T10 status. While on T10 orders (*i.e.*, federal status), ANG members receive federal benefits and are assigned to the AD Air Force. Once ANG members, organizations, and units are relieved from T10, they return to being solely in ANG status.

FULL TIME SUPPORT (FTS) PERSONNEL

While the ARC is generally comprised of “traditional” (*i.e.*, part-time) personnel, some individuals may fill full-time support positions. It is important to remember that FTS personnel are intended to specifically support and enhance the Reserve Component (RC) by conducting various activities surrounding recruitment, training, deployability, administrative support, and facility maintenance.²¹ There are four general types of FTS personnel: Active Guard & Reserve (AGR), Air Reserve Technician (ART), Active Component, and Civilian. The latter two categories are easily understood. Active Component (AC) members provide “AC experience, advice, doctrinal expertise, and coordination to RC units.”²² Civilians are federal civil service employees hired to provide standard support services to RC units. While these two categories are fairly standard, the remaining two require further explanation.²³

Active Guard and Reserve Personnel (AGRs)

AGRs are reservists placed on AD orders for the primary purpose of “organizing, administering, recruiting, instructing, or training the reserve components.”²⁴ AGRs exist in both the AF Reserve (10 U.S.C. § 12310) and ANG (32 U.S.C. § 328). In either component, AGRs are capable of performing additional duties so long as “those duties [do] not interfere with the performance of the member’s primary Active Guard and Reserve duties.”²⁵ JA applies the “51% rule” to determine whether an AGR’s additional duties “interfere” with an AGR’s primary duties.²⁶ That is, additional duties that make up 49% or less of a member’s overall duties will generally be considered as not interfering with the member’s primary duties.²⁷

¹⁹ For example, 32 U.S.C. § 112 allows NG members to perform counter-drug operations in T32 status. Likewise, 32 U.S.C. § 904 authorizes NG personnel to perform Homeland Defense duties.

²⁰ See 10 U.S.C. § 10103.

²¹ See DoDI 1205.18, *Full-Time Support (FTS) to the Reserve Components*, 6 (5 June 2020).

²² *Id.*

²³ At the field level, understanding these positions is important based on the FTS duty limitations imposed by law and the funding sources for FTS positions. Given that FTS positions are funded by the RC, duties supporting the Regular Air Force that exceed the limitations imposed by Congress risk violations of the Purpose Statute (10 U.S.C. § 1301) and/or the Anti-Deficiency Act (10 U.S.C. § 1341).

²⁴ 10 U.S.C. § 12310; see also 32 U.S.C. § 328. Also known as “OARIT.”

²⁵ *Id.* Note, however, that 32 U.S.C. § 328 restricts additional duties allowed for AGRs within the ANG (per 32 U.S.C. § 328) significantly more than AGRs within the Air Force Reserve (10 U.S.C. § 12310).

²⁶ See *Permissible Duties for Air Force Reserve Personnel Serving as Active Guard and Reserve under 10 U.S.C. § 12310*, OpJAGAF 2018/4 (11 May 2018), available at https://kmjas.jag.af.mil/moodle/pluginfile.php/6058/mod_folder/content/0/OpJAGAF_2018-Permissible_Duties_for_Reserve_Personnel_Serving_as_AGRs.pdf?forcedownload=1 (restricted access).

²⁷ *Id.*

Air Reserve Technicians (ARTs)

Known as “dual-status technicians,” ARTs are federal civilian employees simultaneously serving as military reservists. These members are required to attend drill weekends and fulfill annual training requirements, often in the same units in which they serve as civilian employees. Though they wear military uniforms and otherwise appear to be military personnel, ARTs remain federal civilian employees when not fulfilling drill or annual training requirements. Similar to AGRs, ARTs are assigned specifically for the purpose of “organizing, administering, instructing, or training of the Selected Reserve or in the maintenance and repair of supplies or equipment issued to the Selected Reserve or the armed forces.”²⁸ Also like AGRs, ARTs are generally allowed to support additional duties on a “non-interference” basis, with the same general standard applicable to both FTS categories. Because AGRs and ARTs have the primary duty of supporting the RC, personnel generally should not deploy in this status.

MOBILIZATION AND ACTIVATION OF ARC MEMBERS

Members of the ARC are brought onto AD by various methods depending on the number of people needed, the length of the tour, whether entry onto AD is voluntary or involuntary, and the nature of the operation to be supported (*e.g.*, declared war, national emergency, operational augmentation, etc.).

Full Mobilization – 10 U.S.C. § 12301(a)

During time of war or national emergency declared by Congress, or when otherwise authorized by law, any unit, and any member not assigned to a unit organized to serve as a unit, may be involuntarily ordered to AD for the duration of the war and for six months thereafter.²⁹ No limit exists for the number of members that can be activated.³⁰ Members on an inactive status list or in retired status cannot be activated unless the SecAF, with SecDef approval, determines that there are otherwise not enough qualified Reserves in active status to support the requirement.³¹

Partial Mobilization – 10 U.S.C. § 12302

During a time of national emergency declared by the President, or when otherwise authorized by law, any unit, and any member not assigned to a unit organized to serve as a unit, may be involuntarily ordered to AD for up to 24 consecutive months. The number of members activated at any one time is limited to not more than one million.

Presidential Reserve Call-Up (PRC) – 10 U.S.C. § 12304

The President may augment the AD force for (1) any named operational mission; or (2) to provide assistance in responding to an emergency involving the use or threatened use of a weapon of mass destruction, or a terrorist attack or threatened terrorist attack in the United States that results, or could result, in significant loss of life or property.³² When augmenting the AD force, any unit, any member not assigned to a unit organized to serve as a unit, and certain members of the IRR

²⁸ 10 U.S.C. § 10216; *see also* 32 U.S.C. § 709.

²⁹ 10 U.S.C. § 12301(a).

³⁰ *Id.*

³¹ *Id.*

³² 10 U.S.C. § 12304.

may be involuntarily ordered to AD for up to 365 consecutive days.³³ The number of members activated at one time under this provision is limited to 200,000, of whom not more than 30,000 may be members of the IRR.³⁴

Major Disaster or Emergency Response – 10 U.S.C. § 12304a

Upon the request of a governor for federal assistance in responding to a major disaster or emergency, the SecDef may involuntarily order any unit, and any member not assigned to a unit organized to serve as a unit, to AD for a continuous period not to exceed 120 days.³⁵ This provision also states whenever any unit or member of the RC is ordered to AD under this section, the service of all units or members so ordered to AD may be terminated by order of the SecDef or law.

Preplanned Mission Support – 10 U.S.C. § 12304b

When the secretary of a military department determines that it is necessary to augment AD forces for a preplanned mission in support of a combatant command (CCMD), the secretary may involuntarily order any unit of the Selected Reserve to AD for not more than 365 consecutive days.³⁶ The secretary's authorization is limited, however, as he/she can only order units to AD if: (1) the manpower and associated costs have been specifically included in the DoD budget for the FY involved; and (2) the budget information describes the mission and the anticipated length of the mobilization.³⁷ The number of members activated at one time under this authority is limited to 60,000.³⁸

Voluntary Activation – 10 U.S.C. § 12301(d)

Any ARC member may be ordered to AD, or retained on AD, with his or her consent (and, for ANG members, with the consent of the governor or other appropriate authority of the state concerned).³⁹ Members ordered to AD under this section are subject to end strength accountability if they have spent more than 1095 of the previous 1460 days on AD.⁴⁰ In the absence of Presidential or Congressional action ordering reservists to AD involuntarily, the overwhelming majority of AD service performed by reservists is voluntary. Once placed on such orders, a reservist remains on AD (largely indistinguishable from a Regular Air Force (RegAF) member) until his/her orders expire, unless released earlier.⁴¹

Dual-Status Commanders (DSC) – 32 U.S.C. §§ 315, 325

Though commanders generally serve in either a federal or state status, the law authorizes “dual-status commanders” to serve in limited circumstances. A DSC is a commissioned officer of the Air Force or ANG authorized by the SecDef, with the consent of the applicable governor, to exercise

³³ *Id.*

³⁴ *Id.*

³⁵ 10 U.S.C. § 12304a.

³⁶ 10 U.S.C. § 12304b.

³⁷ *Id.*

³⁸ *Id.*

³⁹ 10 U.S.C. § 12301(d).

⁴⁰ *See* 10 U.S.C. § 115(b)(2)(B).

⁴¹ A member is released if the orders terminate or the reservist is otherwise released by proper authority.

command and receive separate orders from both the federal and state chains of command.⁴² This concept is not intended as a permanent position and is routinely utilized for multi-state disasters or national events.⁴³

STOP-LOSS DURING ACTIVATION OF ARCS

Whenever reservists are serving on AD under the authority of 10 U.S.C. §§ 12301, 12302, or 12304, the President may suspend laws relating to promotion, retirement, or separation of any member of the armed forces determined to be essential to the national security of the United States.⁴⁴ This “stop-loss” authority will terminate when the reservist is released from AD or when the President determines that the circumstances for ordering reservists to AD no longer exist, whichever is earlier.⁴⁵

OPERATIONAL CONTROL (OPCON) AND ADMINISTRATIVE CONTROL (ADCON) OF ACTIVATED OR MOBILIZED ARCS

Combatant commanders (CCDRs) exercise combatant command (COCOM) authority over their assigned and attached forces.⁴⁶ Such authorities are generally described as Operational Control (OPCON) and Tactical Control (TACON).⁴⁷ Forces are assigned to CCMDs in the classified Global Force Management Implementation Guidance (GFMIG) “Forces For” tables, which are updated annually. Forces are attached as directed by SecDef or his authorized delegate.⁴⁸ The CCDR will normally delegate OPCON of all assigned and attached Air Force forces to the Commander of Air Force Forces (COMAFFOR).⁴⁹

The level of ADCON follows service chains of command.⁵⁰ For deploying reserve forces, the ARC structure will normally retain full ADCON, and the COMAFFOR (or other commander) will usually exercise specified elements of ADCON that are provided in appropriate orders.⁵¹ All T10 status ANG personnel are assigned to the 201st Mission Support Squadron (201 MSS), a subordinate unit of the ANGRG, for ADCON. Due to overlapping areas of ADCON among commanders, it is important that written orders clearly delineate the commander’s ADCON authority and responsibility.⁵²

OPCON is the command authority that may be exercised by commanders at any echelon at or below the level of CCMD.⁵³ OPCON is “the authority to perform those functions of command

⁴² See JOINT PUBLICATION 3-28, *Defense Support of Civil Authorities* (29 October 2018), Appendix D, 1.

⁴³ See *Dual Status Commander*, National Guard Website (December 2017), available at www.nationalguard.mil.

⁴⁴ 10 U.S.C. § 12305.

⁴⁵ *Id.*

⁴⁶ See 10 U.S.C. § 164.

⁴⁷ See generally JOINT PUBLICATION 1, *Doctrine for the Armed Forces of the United States* (25 March 2013), incorporating Change 1 on 12 July 2017 [hereinafter JP 1].

⁴⁸ *Id.*

⁴⁹ See Air Force Doctrine Annex 3-30, *Command and Control* (7 January 2020), 6.

⁵⁰ See generally JP 1.

⁵¹ See Annex 3-30, 37.

⁵² *Id.* 11.

⁵³ See generally JP 1.

over subordinate forces involving organizing and employing commands and forces, assigning tasks, designating objectives, and giving authoritative direction necessary to accomplish the mission.”⁵⁴ OPCON is inherent in COCOM (command authority) and may be delegated within the command. It includes authoritative direction over all aspects of military operations and joint training necessary to accomplish missions assigned to the command. OPCON flows from the National Command Authorities through the CCDRs to subordinate warfighting organizations, such as joint task forces or functional component commanders.⁵⁵ OPCON generally provides authority to organize commands and forces, and to employ those forces as the commander considers necessary to accomplish assigned missions; it does not provide authoritative direction for logistics or ADCON matters.

ADCON is the authority exercised over subordinate organizations regarding administration and support, which generally includes the organization of forces, personnel management, control of resources and logistics, training, readiness, mobilization, and discipline.⁵⁶ ADCON is a service responsibility that flows from the National Command Authorities to the SecAF, through the Chief of Staff of the Air Force, to Major Commands (MAJCOMs) and Numbered Air Forces, to a unit.⁵⁷ Within a CCMD, the COMAFFOR is given complete ADCON of all assigned Air Force component forces and specified ADCON of all attached Air Force component forces.⁵⁸ For those attached forces, complete ADCON generally remains with the commander to whom they are assigned.

When ANG members enter T10 status, they are relieved of duty with their state ANG units for the purpose of performing duty at the federal level.⁵⁹ The member (or their unit if it is a unit activation/mobilization) is assigned directly to the ANG Readiness Center (ANGRC) or to a subordinate ANGR unit created for the purpose of deploying forces in support of an active component mission. As noted above, all T10 ANG personnel are assigned to the 201 MSS for certain elements of ADCON.⁶⁰ The ANGR Commander makes forces available to a CCMD by attaching them to the gaining organization within the area of responsibility (AOR). Similarly, the Commander of the Air Force Reserve Command (AFRC/CC) retains ADCON over all AFRC members activated for use in contingencies or other Air Force operations (except for those units and members brought on AD through full mobilization).⁶¹

The COMAFFOR is the principal Air Force commander supporting an operational mission.⁶² The Joint Forces Air Component Commander (JFACC) is a joint component-level operational commander.⁶³ To support the operational mission, the JFACC uses assigned forces to form the Air Component of the joint command. The JFACC will have one or more service components’

⁵⁴ See JP 1, V-6.

⁵⁵ See generally JP 1; see also Air Force Doctrine Volume III, *Command* (22 November 2016), ch. 3.

⁵⁶ *Id.*

⁵⁷ See Annex 3-30, 12.

⁵⁸ See JP 1, V-12.

⁵⁹ 32 U.S.C. § 325(a). This status is also referred to as the Air National Guard of the United States. See 10 U.S.C. § 10111; see also DoDD 1200.17, *Managing the Reserve Components as an Operational Force*, (29 October, 2008).

⁶⁰ Air National Guard Readiness Center (19 April 2013), available at www.ang.af.mil/Portals/77/documents/AFD-130506-013.pdf (last visited 16 June 2020).

⁶¹ See Annex 3-30, 37.

⁶² See generally Annex 3-30.

⁶³ *Id.*

forces assigned to his or her command. Usually, the predominant amount of these forces will be from the Air Force. The COMAFFOR exercises ADCON over assigned forces and specified ADCON over attached forces and RC forces.⁶⁴ For ARC forces, the ANGRC and AFRC retain all other ADCON responsibilities, such as RC activation, inactivation, partial mobilization, and length of tour.⁶⁵

Deployed ARC members are subject to two different chains of command with different commanders: (1) the commander of the unit to which they are assigned (ADCON), and (2) the commander of the unit to which they are attached while activated or mobilized (specified ADCON).⁶⁶ Disciplinary authority is shared concurrently between the commander of an ARC member's unit of assignment (complete ADCON) and the commander of the member's unit of attachment (specified ADCON). Coordination is therefore required between the two commanders concerning which commander will take disciplinary action.⁶⁷

COMMAND OF "REGULAR" AD UNITS AND MEMBERS BY ARC PERSONNEL

ARC officers generally cannot command RegAF units.⁶⁸ There are two exceptions to this rule. First, ARC officers may command RegAF units when they are on extended AD (EAD) for 90 days or more.⁶⁹ This eligibility to command begins on the first day of the AD period.⁷⁰ If the tour of an ARC commander originally brought onto AD for more than 90 days was later shortened to less than 90 days, all command actions taken since the first day of command are unaffected by the change in the length of the individual tour.⁷¹

Second, the COMAFFOR may authorize ARC officers not on EAD to command RegAF units operating under the COMAFFOR's authority.⁷² This delegation of authority is to no lower than the commander of an AEW for forces operating under the AEW.⁷³ If an ARC officer is appointed to command a RegAF unit, the ARC commander has disciplinary authority, under specified ADCON, over the RegAF and all other members attached to their unit as part of their command authority.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ The same individual may command both units, resulting in overlapping ADCON authorities. For example, during Operation ALLIED FORCE, ANGRC created Detachment 15 (Det 15). Elements of three ANG A-10 units were assigned to Det 15. The G-Series order attached Det 15 to the 52nd Expeditionary Operations Group (52 EOG), an operational unit established under the 52nd Fighter Wing (52 FW) at Spangdahlem Air Base, Germany. The ANGRC detachment commander was appointed commander of both Det 15 and 52 EOG. The result was that the single commander had ADCON in his role as ANGRC Det 15 commander and specified ADCON as 52 EOG/CC.

⁶⁷ *See, e.g.*, AFI 51-202, *Nonjudicial Punishment* (6 March 2019), para. 1.2.1.2 (noting the need for coordination with reservist's parent organization prior to initiating NJP action against member assigned or attached to a command.)

⁶⁸ *See* AFI 51-509, *Appointment and Assumption of Command* (14 January 2019), para. 9.1.3.4.

⁶⁹ *Id.* para. 9.2.1.

⁷⁰ *Id.*

⁷¹ *See* AFI 51-509, para. 9.2.2.

⁷² *Id.* para. 9.2.3.

⁷³ *Id.*

INTERNATIONAL AGREEMENTS BY ARCS

The ANG, in their state militia capacity (T32), and the National Guard Bureau (the liaison organization for the Department of the Army and Department of the Air Force) have no authority to negotiate and conclude international agreements. When the ANG deploys overseas, it is in T10 status under the ANGRC. The ANGRC is a field operating agency (FOA) of the Air Force, and AFRC is a MAJCOM. MAJCOMs and FOAs are delegated limited authority to negotiate and conclude international agreements, pursuant to relevant DoD and Air Force Instructions.⁷⁴ However, it should be stressed that, notwithstanding a delegation of authority, any organization, unit, or agency of the Air Force seeking to exercise such authority should coordinate all actions with interested parties. Therefore, the AFRC and ANGRC should exercise this authority only in coordination with the Air Force theater commander (*i.e.*, USAFE, PACAF, or AFSOUTH) as well as the Operations and International Law Directorate (AF/JAO).

MILITARY JUSTICE MATTERS INVOLVING ARC MEMBERS

Jurisdiction

Members of the Air Force Reserve are subject to disciplinary action under the Uniform Code of Military Justice (UCMJ) when serving on AD and inactive duty for training. Members of the ANG are subject to the UCMJ when serving in T10 AD status.⁷⁵ This jurisdiction begins at 0001 on the “reporting date” of the orders placing the member of the Reserve or ANG on AD. These orders are self-executing, and duty hours and travel times are irrelevant.⁷⁶ For Air Force Reservists serving on inactive duty for training, this jurisdiction begins and ends with each duty period, which is four hours in length.⁷⁷

Retaining/Recalling ARC Members on AD for Disciplinary Reasons

If a member of the Reserve or ANG in T10 status commits an offense under the UCMJ while on AD, he or she can be involuntarily retained on AD pending trial by special or general court-martial.⁷⁸ If a member of the Reserve or ANG in T10 status is no longer on AF when a UCMJ offense is discovered, they can be involuntarily recalled to AD unless the member’s military status has been completely terminated (*e.g.*, discharge).⁷⁹ ARC members may also be recalled for nonjudicial punishment; however, doing so for ANG members requires consultation with the Adjutant General of the state for which the member serves in T32 status.⁸⁰ AFI 51-201, *Administration of Military Justice*, provides the list of individuals who would normally recall an ARC member.⁸¹

⁷⁴ AFI 51-403, *International Agreements* (8 February 2019), para. 2.2. For example, agreements about operational command of joint forces require approval from the Chairman of the Joint Chief of Staff.

⁷⁵ AFI 51-201, *Administration of Military Justice* (8 April 2020), para. 4.14.

⁷⁶ But *see*, *United States v. Phillips*, 58 M.J. 217 (2003) (the Court of Appeals for the Armed Forces found UCMJ jurisdiction over an Air Force reservist for criminal acts committed on the travel day prior to the commencement of her AD orders); *see also* AFI 51-201, para. 4.14.

⁷⁷ *See generally* AFMAN 36-2136, Reserve Personnel Participation (6 September 2019).

⁷⁸ AFI 51-201, para. 4.14.2. For Air National Guard members, the supporting legal office should contact the Air National Guard Readiness Center legal office (NGB/JA) to discuss the timing of exercising jurisdiction and options for maintaining jurisdiction.

⁷⁹ *See generally* AFI 51-201, paras. 4.14 and 4.15.

⁸⁰ *Id.* para. 4.14.9.

⁸¹ *See* AFI 51-201, paras. 4.14.3 and 4.14.4.

Limitations on Punishment for Recalled ARC Members

An ARC member recalled to AD for court-martial may not be sentenced to confinement or be required to serve a punishment consisting of any restriction on liberty during the recall period of duty without authorization from the SecAF.⁸² Unless SecAF's approval is obtained, punishment of restriction to specified limits may be imposed only during normal periods of inactive duty training or AD.⁸³ When discipline results from a Summary Court-Martial, all punishment remaining unserved at the end of a period of the member's T10 AD, or the end of any normal period of inactive duty training, may be carried over to the subsequent periods of inactive duty training or T10 AD.⁸⁴

LINE OF DUTY (MISCONDUCT) DETERMINATIONS FOR ARC MEMBERS

Because most ARC members only serve on AD for limited periods, it is important to be aware of the need for Line of Duty (LOD) determinations involving ARC members. LOD determinations play a key role in establishing an ARC member's eligibility for military medical and dental care, and possible incapacitation pay and allowances.⁸⁵ ARC members are not entitled to pay and allowances, medical benefits, or incapacitation pay if it is determined that an injury, illness, or disease is the result of the member's gross negligence or misconduct.⁸⁶ Even if an LOD determination is to be conducted by an ARC member's parent unit, it is important that the unit to which the ARC member was attached at the time of the incident coordinate with the parent unit to ensure that the parent unit receives complete information for the LOD determination.

LOD determinations are needed for ARC members who die, or incur or aggravate an injury, illness, or disease while performing AD, AD for training, inactive duty for training, or travel to or from the place of duty.⁸⁷ A LOD determination is necessary any time a member of the ARC has a disease or injury which requires medical treatment, regardless of the ability to perform military duties.⁸⁸ In addition, an LOD should be performed if it is likely that the ARC member will apply for incapacitation pay.

The medical officer or facility may make an administrative determination to document an ARC member's medical condition considered to be existing prior to service (EPTS) and not considered service aggravated or a minor in-line-of-duty condition if there is no likelihood of permanent disability, hospitalization, continuing medical treatment, or a request for incapacitation pay. The military medical officer makes an administrative determination by finding the member's condition to be in the LOD and notes this in the member's medical record. If an administrative determination is made, no further action is required.⁸⁹ Refer to AFI 36-2910, paragraph 2.3.2.1, for all cases where an informal LOD, via AF Form 348, is appropriate rather than an administrative LOD.

⁸² AFI 51-201, para. 4.14.5.

⁸³ *Id.*

⁸⁴ AFI 51-201, para. 4.14.8.

⁸⁵ See generally AFI 36-2910, *Line of Duty (Misconduct) Determination* (8 October 2015), para. 1.3.

⁸⁶ See generally 10 U.S.C. § 1074a (c), 10 U.S.C. § 1207, and 37 U.S.C. § 204(i)(3).

⁸⁷ See AFI 36-2910, para. 1.6.

⁸⁸ *Id.* para. 1.6.8.

⁸⁹ *Id.* para. 2.3.1.3.

The ARC member's immediate commander may issue an interim LOD determination to establish initial care and treatment pending the final LOD determination.⁹⁰ An interim LOD determination should not be made if there is clear and convincing evidence that misconduct was the proximate cause of the illness, injury, or disease.⁹¹

A formal LOD is required to support a determination of "Not in Line of Duty."⁹² The immediate commander may also recommend a formal determination when the member's illness, injury, disease, or death apparently occurred (1) under strange or doubtful circumstances, or (2) under circumstances the commander believes should be fully investigated.⁹³

EMPLOYMENT AND REEMPLOYMENT RIGHTS OF ARC MEMBERS

Members of the ARC are provided certain rights and protections regarding their civilian employers under the Uniformed Services Employment and Reemployment Rights Act (USERRA).⁹⁴ While the majority of legal issues related to USERRA involve reemployment rights, it is possible that USERRA-related issues will arise on deployment.⁹⁵ USERRA is a very powerful legal tool to protect the jobs and employment benefits of reservists who perform military duty, offering Department of Labor, Merit Systems Protection Board, or state and federal court enforcement.⁹⁶ The following is a brief guide to USERRA-related issues that may arise.

Reemployment Rights

Members of the ARC who are absent from their civilian jobs due to military service are generally entitled to reemployment, provided the cumulative length of the absence and all previous absences from that employer by reason of military service do not exceed five years.⁹⁷ It is also necessary that the employer has been given advance notice of the absence by the employee or by an appropriate officer of the ARC.⁹⁸ However, no advance notice is required if military necessity prevents giving notice or providing notice is otherwise impossible or unreasonable.⁹⁹

Time Limits on Reporting Back to Work – 38 U.S.C. § 4312(e)

Generally, to be eligible for reemployment rights under USERRA, a member of the ARC must apply for reemployment within the following time periods after being released from military service:

- Service of 1 to 30 days: No later than the beginning of the next regularly scheduled workday, or as soon as possible if earlier notice is unreasonable or impossible through no fault of the person;

⁹⁰ *Id.* para. 2.3.3.1.

⁹¹ *Id.* para. 2.3.3.2.

⁹² *Id.* para. 2.3.4.1.

⁹³ *Id.*

⁹⁴ *See generally* 38 U.S.C. §§ 4301-4335.

⁹⁵ For example, a member may learn that he or she has been terminated by his or her civilian employer while deployed on active duty.

⁹⁶ More information regarding USERRA can be found at www.esgr.mil.

⁹⁷ *See* 38 U.S.C. § 4312 (a)(2).

⁹⁸ *Id.* § 4312 (a)(1).

⁹⁹ *See Id.* § 4312(b).

- Service of 31 to 180 days: No later than 14 days from redeployment, or as soon as possible if earlier notice is unreasonable or impossible through no fault of the person; and
- Service of 180 or more days: No later than 90 days from redeployment.

The deadlines are extended for persons hospitalized or convalescing because of a disability incurred or aggravated during the period of military service.¹⁰⁰

Protection from Discharge – 38 U.S.C. § 4316(c)

Upon reemployment with their employers, ARC members are protected from discharge without cause for one year after the date of reemployment if the person's period of military service was for more than six months (181 days or more), or for 180 days after the date of reemployment if the person's period of service was between 31 and 180 days. Persons serving for 30 or fewer days are not protected from discharge without cause, however, they are protected from discrimination because of military service or obligation.¹⁰¹

Protection from Discrimination and Reprisals

An employer may not deny reemployment, retention in employment, promotion, or any benefit of employment due to membership (or application for membership) in the ARC.¹⁰² Additionally, an employer may not discriminate against, or take any adverse employment action against, an employee who has taken action, participated in process, or exercised a right related to USERRA.¹⁰³

Retention of Benefits

While serving in the armed forces, a member of the ARC is entitled to retain certain benefits from civilian employers. For example, USERRA allows for continuation of a reservist's employment health plan when the member is absent from work due to military service.¹⁰⁴ If a person's health plan coverage would terminate because of an absence due to military service, the person may elect to continue the health plan coverage for up to 24 months after the absence begins, or for the period of service (plus the time allowed to apply for reemployment), whichever is shorter.¹⁰⁵ The person cannot be required to pay more than 102 percent of the full premium for the coverage. If military service is for 30 or fewer days, the person cannot be required to pay more than the normal employee share of any premium.¹⁰⁶

Loss of USERRA Benefits

Members of the ARC lose this entitlement to the benefits of USERRA if their military service terminates due to: (1) separation with a dishonorable or bad conduct discharge; (2) separation and discharge under other than honorable conditions; (3) dismissal of a commissioned officer in certain situations involving court-martial or by order of the President in time of war; or (4) being

¹⁰⁰ See *Id.* § 4312(e)(2)(a).

¹⁰¹ See 38 U.S.C. § 4316(c); see also 38 U.S.C. § 4311.

¹⁰² See 38 U.S.C. § 4311(a).

¹⁰³ See 38 U.S.C. § 4311(b).

¹⁰⁴ See 38 U.S.C. § 4317(a)(1).

¹⁰⁵ *Id.*

¹⁰⁶ See 38 U.S.C. § 4317(a)(2).

dropped from the rolls due to being absent without authority for more than three months or due to being imprisoned by court-martial or civilian court.¹⁰⁷

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- Uniform Code of Military Justice, 10 U.S.C. Chapter 47
- 10 U.S.C. §§ 10101, 10102, 10110, 10113, and 10141
- 10 U.S.C. §§ 115, 164, 10174, 12301, 12302, 12304, and 12305
- 10 U.S.C. §§ 10216, 12301, and 12310
- 10 U.S.C. §§ 10152, 10153, and 10154
- 10 U.S.C. §§ 1074a and 1207
- 32 U.S.C. §§ 315 and 325
- 32 U.S.C. §§ 328 and 709
- 37 U.S.C. § 204
- 38 U.S.C. §§ 4301-4335
- JOINT PUBLICATION 1, *DoD Dictionary of Military and Associated Terms*, as of January 2020
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¹⁰⁷ See 38 U.S.C. § 4304.

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Chapter 36

EXERCISES, WARGAMES, AND LESSONS LEARNED

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BACKGROUND

Air Force mission success depends on readiness to perform assigned tasks satisfying combatant commander (CCDR) requirements. The Department of the Air Force is required under Title 10 of the U.S. Code to “organize, train, and equip” (OT&E) forces for joint operations. Readiness is ensured by training, exercising, inspecting, and evaluating Mission Essential Task Lists (METLs).¹ Exercises, wargames, and a collection of lessons-learned all serve a function in ensuring readiness.² In this light, JAG Corps personnel perform an important role, not only as legal advisors in the planning and support of such activities, but also as active participants in the exercises and wargames themselves. The purpose of this chapter is to provide an orientation on exercises and wargames, and lessons learned from the perspective of JAG Corps personnel as potential subject matter planners and participants.

EXERCISE GUIDANCE

To the extent these activities are Air Force specific, the requirements for exercises and wargames are laid out in Air Force policy directives and instructions, primarily under the “Operations” series (*i.e.*, AFPD/AFI 10XXX). It is important to check for major command (MAJCOM) or local supplements. For joint exercises, wargames and lessons-learned, the guidance is found primarily in Chairman, Joint Chiefs of Staff Instructions (CJCSIs). An excellent, comprehensive resource for this information is the Joint Electronic Library, which can be accessed at <https://www.jcs.mil/Doctrine>.

Participants³

Sponsoring Commander. The Chairman of the Joint Chiefs of Staff (CJCS), the Chief of Staff of the Air Force, the geographic or functional CCDR, the MAJCOM commander, or any commander at any echelon who requests the exercise. This is the commander and staff who initially set the basic exercise objectives and chooses the primary training audience.

Training Audience or “Blue Forces.” The people you want to train and exercise. Make sure that JA is explicitly included in the training audience.

Control Group or “White Cell.” The people who run the scenario and play the roles of all people outside the training audience (*e.g.*, DoD, IntraAgency, CCDR, allies). They are charged with keeping the exercise on track and ensuring the training objectives are met. Good legal exercise play will require one or more JA representatives to serve on the White Cell.

Opposition Forces (OPFOR) or “Red Team.” The part of the control group dedicated exclusively to playing the enemy. Often they are separate from the White Cell and are not privy to information on the scenario and inputs. The White Cell judge advocate may want to provide some “legal ammunition” to the Red Team to elicit a response from the training audience.

Evaluators. Although most exercises are “no fault,” some may include evaluations of all or part of the training audience. JA evaluators are often exercise participants.

¹ CJCSM 3500.03E, *Joint Training Manual for the Armed Forces of the United States* (20 April 2015), A-2.

² See generally *Id.* See also CJCSI 3500.01J, *Joint Training Policy for the Armed Forces of the United States* (13 January 2020), D-11.

³ See *Id.* at G-C-A-6.

EXERCISE PLANNING CYCLE

A well-executed exercise is both realistic and seamless. The amount of manpower, time, and resources required to execute an effective exercise is substantial.

As a general rule, if meaningful training for JAG Corps personnel is desired, substantial planning must occur. Because JA activities cut across all other functions, it is impossible to achieve effective JA exercise training without detailed coordination and advance planning.

Depending on its size and sophistication, the planning joint event life cycle (JELC) for a typical exercise involves several events:

1. Concept Development Conference. This first event generally develops detailed exercise requirements and objectives from the often vague guidance provided by the sponsoring commander.⁴ This is also when the scenario begins to be developed along with wargame simulations. A judge advocate or paralegal should be involved at this initial conference to “lay down a marker” for JA participation.
2. Initial Planning Conference. This is where most of the major decisions on objectives, players, scenario, and controllers are made.⁵ It is essential that JA attend and participate in this conference if meaningful JA exercise play is desired.
3. Master Scenario Event List (MSEL, pronounced “measle”) Conference. The MSEL Conference is where the real nitty-gritty detail of an exercise is accomplished. This is when a minute-by-minute script of scenario development and control group inputs is assembled.⁶ It is critical that either a judge advocate or paralegal attend this meeting or send detailed legal MSEL inputs. The MSEL Conference is the linchpin for ensuring meaningful functional specialty involvement in the exercise. Judge advocate and paralegal participation and inputs should be accurately identified throughout the various MSEL events to ensure JA participation, where appropriate, and identify the expectations of JA personnel by other exercise participants during a given event.
4. Crisis Action Planning (CAP) Conference. The CAP Conference is an opportunity for the Blue Forces to conduct planning in response to the exercise/wargame scenario normally provided to them via a Planning Order (PLANORD) from their higher headquarters.⁷ Planners formulate and implement an effective response within the timeframe permitted, normally utilizing the joint planning process outlined by JP 5-0, *Joint Planning*.⁸ Crisis action planners base their plan on the facts and circumstances presented to them by the White Cell. Blue Forces identify authorities, information, and resources available to them and then submit requests for information (RFIs), requests for forces (RFF), and seek clarification or delegation of authorities (*i.e.*, Rules of Engagement (ROE)). Where appropriate, the White Cell will answer Blue Force requests appropriately and as realistically as possible within the context of the scenario in the formulation of a proposed plan of action. The plan formulated during the CAP Conference may be amended by the sponsoring commander or White Cell following the CAP Conference to ensure it meets the exercise requirements and objectives which will be exercised during

⁴ *Id.* at E-4; figure 47.

⁵ *Id.*

⁶ *Id.*

⁷ *See Id.* at H-C-A-1.

⁸ *See* JOINT PUBLICATION 5-0, *Joint Planning* (16 June 2017).

execution. It is critical that separate JA personnel participate as a part of the Blue Force and White Cell during the CAP Conference to ensure proper legal considerations are integrated into the Blue Force plan. White Cell JA participation by an experienced judge advocate enables realistic responses to requests (RFI, RFF, ROE, etc.) implicating legal considerations at execution.

5. Final Planning Conference. This is the conference at which all the loose ends are tied up and all last minute details are worked-out for the exercise.⁹ Although some late-breaking significant changes can be made at this conference, it is usually not the most important pre-exercise event.

EXERCISE FUNDAMENTALS

The variety in size, duration, subject-matter, and training audience of military exercises is almost infinite—exercises include local squadron mobility or wing command post exercises; through to large-scale joint and combined exercises such as AUSTERE CHALLENGE and BRIGHT STAR, or flying exercises such as RED FLAG.

Joint Doctrinal Tenets

Under DoD doctrine, the six basic tenets of effective joint training—including exercises—are:

1. Rely on joint doctrine. Stick to the basic rules so all participants play from the same music. This tenet also applies to Air Force-only exercises. Joint doctrine establishes standard procedures and uniform operational methods based on a common terminology. This baseline assists commanders in developing standards for joint training, exercises, and operations.¹⁰
2. Commanders and directors are the primary trainers. Commanders, or a civilian director, are responsible for the readiness of their assigned forces. No one knows the needs of a unit better than its leader. They are responsible for preparing their command to accomplish assigned missions.¹¹
3. Focus on assigned missions. Prepare efficiently by consciously focusing training for the real-world assigned tasks. Time, manpower, and resources are in short-supply, so they must be employed wisely.¹²
4. Train the way you intend to fight. Exercise participants should practice what they need to know and do under combat conditions. Train based upon relevant conditions, utilizing realistic standards.¹³
5. Centralize planning, decentralize execution. Senior commanders should determine centrally what objectives to train to, and then permit subordinate commanders develop training appropriate to their units' needs. Decisions are made where and when neces-

⁹ CJCSM 3500.03E, *Joint Training Manual for the Armed Forces of the United States* (20 April 2015), E-3; figure 47.

¹⁰ See CJCSI 3500.01J, *Joint Training Policy and Guidance for the Armed Forces of the United States* (13 January 2020), C-1.

¹¹ See *Id.* at C-1 – C-2.

¹² See *Id.* at C-2.

¹³ See *Id.*

sary by subordinates, consistent with available resources and the senior commander's intentions, priorities, and mission objectives.¹⁴

6. Link training to Readiness Assessment. The purpose of training is to improve capability and readiness to perform operational missions. Commanders and their staffs will use training assessment data to support their readiness assessment for the DoD Readiness Reporting System (DRRS) program. Once training assessments are approved in the Joint Training Information Management System (JTIMS), the assessments are then provided to DRRS and made available to support overall readiness assessment.¹⁵

Air Force Exercise Planning Guidelines

The basic Air Force instruction on exercise planning, AFI 10-204, *Air Force Service Exercise Program and Support to Joint and National Exercise Program*, provides general guidelines for planning and execution of exercises for Air Force units at all echelons. Air Force guidelines include:

1. Utilization of the Joint Planning Process (JPP). To aid in initial requirements assessment, reference and use the JPP found in JP 5-0, *Joint Planning*. JPP reflects current doctrine for conducting joint, interagency, and multinational planning activities across the range of military operations. It provides commanders with processes that allow for flexibility and the ability to plan and develop plans for an uncertain and challenging environment.¹⁶ JPP should be utilized by the White Cell in planning exercises and by the Blue Force in their response to the training scenario.
2. "No-fault" conditions. In most circumstances, exercises should be "no-fault," meaning no ranking or grading of units. Exercise participants should have the "freedom to fail" within the bounds of safe operations and the need to meet exercise objectives.¹⁷ This minimizes the "gaming" effect which attends Operational Readiness Inspections (ORIs) and other evaluations and allows the commander to identify and correct readiness deficiencies.
3. Train the way we fight. Use real-world conditions as much as possible, minimize artificialities, and do not wish-away operational constraints such as force security and logistics support. Exercise actual command relationships as much as possible. Exercises should provide opportunities to assess real-world capabilities consistent with safety, security, and the exercise objectives.¹⁸
4. Synchronize with other exercises. To the greatest extent possible, take advantage of the synergy which exists when exercises require similar skill sets and have common venues, scenarios, and objectives by seeking to coordinate or "piggyback" with MAJCOM, Numbered Air Force (NAF), or other unit exercises. This maximizes training opportunities, adds realism and more productively utilizes finite manpower and resources.¹⁹

¹⁴ See *Id.*

¹⁵ See *Id.* at C-2 – C-3.

¹⁶ AFI 10-204, *Air Force Service Exercise Program and Support to Joint and National Exercise Program* (12 April 2019), para. 3.2.

¹⁷ *Id.* para. 3.2.3.

¹⁸ *Id.* para. 4.1.1.

¹⁹ *Id.* para. 4.1.3.

Wing Level Exercise Training

The vast majority of exercise training occurs at the wing level. Every Air Force wing has a wing exercise plan and an office responsible for administering a wing exercise program (typically XP). Major attack responses, environmental emergencies, aircraft crashes, natural disaster responses, flying operations, hostage or terrorist events require meaningful JA involvement. Naturally, exercises involving such activity provide valuable opportunities for training. These local exercises represent a low-threat environment where inexperienced judge advocates and paralegals can be allowed to shine or fail without fear. These local exercises also provide a chance for JA staff to practice procedures and work with deployment equipment before deploying. Having a judge advocate actively involved with the base exercise planning team will allow maximum quality training opportunities for the JA staff.

Combined/Multinational Exercises

Numerous legal issues arise in combined and multinational exercises, such as fiscal law restrictions on security assistance. These are an important consideration in exercise planning, but are dealt with in other chapters.

Exercising with forces from other nations is very rewarding but at the same time can be very challenging. Exercises with near-peer military forces within long-standing alliances—NATO is the most obvious example—will of course be much easier to plan and execute than exercises with less capable forces from nations with whom the United States does not have a standing defense relationship. There are some fundamental considerations that can reduce problems and increase multinational cohesion during the exercise:

1. Optimize contribution. Seek to optimize the contributions of foreign forces within the political or military constraints placed on their participation. If foreign personnel do not feel they have been adequately utilized or challenged, they will not value exercise training and will probably not return in the future. Exercising with foreign legal personnel is a unique opportunity to explore comparative law issues and differing interpretations of international law.
2. Match exercise taskings with capabilities. Over-tasking or under-tasking foreign exercise participants will be, at best, a waste of their time and, at worst, an insult. It may take significant effort and flexibility to find roles and missions for less well-trained or capable forces, but it will be worth it in the end.
3. Use of Training Assistance Resources. Use existing military training assistance resources to improve the exercise participation and contribution of foreign forces. The Office of Defense Cooperation (ODC) or Defense Attachés Office in U.S. embassies are an invaluable resource for information on foreign force capabilities and honest assessments of what can be expected from the participants during multinational exercises.
4. Establish a common frame of reference with participating foreign personnel. Take the time to establish common understanding of the basics of your objectives and tasks. Developing a common dictionary and acronym list may help avoid confusion.
5. Address classification issues. Classification is a major obstacle to effective interaction at exercises. Keep information at the lowest level of classification possible (ideally unclassified), research in advance what documents or publications are classified, and work to avoid making foreign counterparts feel excluded.

AIR FORCE LEGAL SUPPORT FOR EXERCISES

Exercise Requirements

The amount of legal support required for an exercise is proportional to the size, duration, location, and scope of the exercise. Large-scale exercises that are designed to test the feasibility of an existing deliberate plan may require legal capabilities to deploy to a Forward Operating Location (FOL). Even if the exercise does not task personnel to deploy to a FOL, legal activities within the exercise should be viewed as opportunities to test the readiness of the legal staff and their equipment to support their assigned mission.

The legal support requirements for an exercise are determined during the exercise planning cycle. All legal support requirements (personnel and equipment) are best satisfied if objectively determined early in the exercise planning cycle. As the exercise planning progresses, it is very difficult, though not impossible, to add additional legal support requirements. If there is to be an exercise of legal capabilities, a legal representative will most likely need to be on the White Cell as well. However, large-scale exercises, especially CJCS-funded exercises, involve a significant amount of planning and coordination across many agencies, and JA will have a function in the planning phase if nothing else.

If the exercise is designed to test the feasibility or concept of operations for a deliberate plan, the supported Air Component should review the deliberate plan's Time Phased Force Deployment Data (TPFDD), if applicable, to determine what legal capabilities have been previously designated to support the plan. Every effort should be made to task legal activities that have an actual deployment tasking for the specified location or similar location within the area of responsibility (AOR). The "train as you would fight" view is personified through objective sourcing of exercise requirements.

One of the principles of effective exercise planning is employing deliberate plan taskings as they would be executed and sourcing the legal activities that actually reside in a deliberate plan's TPFDD. In the past, personnel were "chosen" using various methods and were tasked to fill exercise requirements. Filling requirements using volunteers does little to test the feasibility of a plan or the readiness of a legal activity to support its deployment requirements. Restricting exercise sourcing to legal activities with specific deliberate plan taskings permits the functional area manager to test a legal activity's ability to support a deployment tasking vis-à-vis an individual's ability to deploy.

When the legal support requirements have been determined and validated by the Air Component, the requirements are forwarded through planning channels to the MAJCOM functional area manager for sourcing. The exercise taskings are then sent to each host wing and the tasked legal activity is notified of the requirement. Any exercise, especially those conducted at short tour areas and FOLs without a major Air Force presence during peacetime, provide an invaluable opportunity to view the capabilities of the location and verify the accuracy of the base support plan. JA personnel are strongly encouraged to conduct a site survey of each FOL in conjunction with exercise deployments to validate the requirements and capabilities of the location and to develop a plan for the most effective use of the location's resources.

LESSONS LEARNED

Post Exercise Assessment

Military exercises are designed to enhance the readiness of all participating forces through a structured evaluation of new or existing tactics, techniques, capabilities, and procedures.²⁰ Significant investments in fiscal, manpower, and equipment resources are needed to properly evaluate the force. Assessment is a critical part of the exercise process and enables participants to evaluate and assess exercise actions, propose changes, and share this information with other stakeholders.²¹

Lessons learned during military operations, planning, and exercises will be lost if they are not recorded, analyzed, maintained in a usable database, and reviewed by future planners and operators. During exercises and operations, identifying lessons learned and completing an after action report (AAR) are key.²² DoD agencies must ensure the results of major exercises are documented, consolidated, and available for future review, through a formal After-Action Reporting System (AARS). An AARS is a mechanism used by many DoD agencies to memorialize the results, both positive and negative, of each major exercise. The same system can also be used for real world operations.

Joint Lessons Learned Information System (JLLIS)

The JLLIS is the AARS program of record for the DoD Joint Lessons Learned Program and the most appropriate way for capturing, communicating and disseminating lessons learned to improve the development/readiness of the joint force.²³ The validated information enables actionable Doctrine, Organization, Training, Materiel, Leadership and Education, Personnel, and Facilities (DOTMLPF) and Policy changes to improve joint and combined capabilities.²⁴ JLLIS is also the Air Force system of record for the management of all Air Force observations, lessons learned, and AARs.²⁵ JLLIS is found on the classified NIPRNET at <https://www.jllis.mil> (restricted access) and on the unclassified SIPRNET at <http://www.jllis.smil.mil> (restricted access).

Air Force Lessons Learned

The LeMay Center Directorate of Air Force Lessons Learned is responsible for Air Force JLLIS master sites through coordination with Joint Staff/J7.²⁶ The primary method for submitting observations and AARs is via JLLIS.²⁷ Organizations or individuals should use JLLIS whenever possible to submit individual lessons or AARs to their appropriate lessons learned office (normally the A9L for that MAJCOM or NAF), or directly to The LeMay Center where appropriate.²⁸ The intent is for inputs to be validated at the appropriate level of the submitting organization's chain

²⁰ See AFI 10-1302, *Air Force Lessons Learned Program* (30 July 2019), para. 1.2 and para. 3.6.

²¹ AFI 10-204, para. 3.5.

²² *Id.*

²³ See CJCSI 3150.25G, *Joint Lessons Learned Program* (31 January 2018), A-3.

²⁴ See CJCSI 3500.01J, *Joint Training Policy and Guidance for the Armed Forces of the United States* (13 January 2020), B-9 – B-10.

²⁵ AFI 10-204, para. 3.5.5.

²⁶ AFI 10-1302, para. 8.3.1. See also AFI 10-204, para. 3.5.5.

²⁷ AFI 10-204, para. 3.5.5. See also CJCSI 3150.25G, *Joint Lessons Learned Program* (31 Jan. 2018), A-3.

²⁸ AFI 10-1302, para. 2.3.2.

of command—the lessons learned process is not intended to be used to bypass the chain of command when submitting lessons.²⁹ An AAR summary template is available on the JLLIS website.³⁰

After Action Reporting (AAR) Procedures. All Airmen are encouraged to create an account on the JLLIS; this account will allow them to enter observations and potential lessons-learned into this system.³¹ Reference AFI 10-1302, *Air Force Lessons Learned Program*, for posting and forwarding AARs. Procedures outlined consolidate and summarize observations and lessons identified. Submit observations and AARs utilizing JLLIS no later than 30 days after an event.³²

Air Force Judge Advocate General Corps (AFJAGC) After Action Reporting System

All AFJAGC members are required to submit AFJAGC specific AARs to AF/JAO within 30 days after returning from all deployments, including major exercise participation.³³ AFJAGC deployment and major exercise AARs should be submitted electronically through FLITE at <https://aflsa.jag.af.mil/apps/aar> (restricted access). AARs are available for review by everyone in AFJAGC with the goal that this information will better prepare future deployers and provide insight to the challenging issues worked in the deployed environment. The AAR program requires SJAs to personally review reports before an AAR is published to the website.³⁴ AARs are consolidated and allow HQ AF/JAO to draw legal lessons learned that provide information for senior AFJAGC members and future AFJAGC operations personnel. Additional information regarding the AFJAGC AAR site is available at <https://aflsa.jag.af.mil/apps/aar/aarhelp.pdf> (restricted access), to include step-by-step instructions for using the program and pulling the various available reports.

²⁹ *See Id.* para. 1.5.9.

³⁰ Following links have restricted access: <https://www.jllis.mil> (NIPRNET) and <http://www.jllis.smil.mil> (SIPRNET).

³¹ AFI 10-1302, para. 2.3.1.

³² *Id.* para. 2.2.2.3.

³³ AFI 51-101, *The Air Force Judge Advocate General's Corps (AFJAGC) Operations, Accessions, and Professional Development* (29 November 2018), para. 11.8.

³⁴ *After Action Reporting System User Guide*, Headquarters, United States Air Force Judge Advocate Generals Corps, Air Force Operations and International Law Directorate, <https://aflsa.jag.af.mil/apps/aar/aarhelp.pdf> (22 July 2019), para. 1.3 (restricted access).

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- AFI 51-101, *The Air Force Judge Advocate General's Corps (AFJAGC) Operations, Accessions, and Professional Development* (29 November 2018)
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Chapter 37

OPERATIONAL EMPLOYMENT OF JAG CORPS PERSONNEL

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BACKGROUND

The U.S. military has been globally employed since World War II. U.S. forces are either permanently stationed or deployed in support of the objectives outlined in the National Security Strategy, National Defense Strategy, and National Military Strategy.¹ These forces act jointly, combining air, land, sea, space, and cyber power to defend the United States and protect its interests abroad in concert with other U.S. government agencies as well as partner nations. The Air Force is an integral part of the joint force, and traditionally its Airmen provided the majority of U.S. air, space, and cyber capabilities and, with the advent of the Space Force, the Air Force continues to take the lead in air and cyber capabilities while supporting space capabilities.² They deploy worldwide to provide these core capabilities and many others to ensure mission accomplishment.

The fundamental role of the JAG is to provide frank and independent counsel to commanders. Several statutes protect this independence by giving The Judge Advocate Generals (TJAGs) statutory assignment authority over JAGs, as well as the ability to direct their activities.³ A wartime setting presents many moral, ethical, and legal issues, and sound, independent counsel is critical to effective mission accomplishment. The lack of independent counsel can have dire consequences, both politically and operationally.

Air Force JAGs and paralegals deploy in support of the joint force like most other Airmen, and their skills are in high demand by joint force commanders. Multiple organizations are involved in getting those with the right skills into the critical deployed billets they occupy, enabling Air Force JAG Corps members to provide commanders with timely advice.

GLOBAL FORCE MANAGEMENT

Under the Goldwater-Nichols Act, the secretaries of the military departments assign specified forces under their jurisdiction to unified and specified combatant commands (CCMDs) or to the U.S. element of the North American Aerospace Defense (NORAD) Command to perform missions assigned to those commands.⁴ An Air Force force not assigned to a CCMD or to the U.S. element of the NORAD Command remains assigned to the Air Force for carrying out the responsibilities of SecAF.⁵ Only the President or SecDef can order forces from one CCMD to deploy to support another CCMD whose organic forces are insufficient to conduct contingency operations within the given area of responsibility (AOR).⁶ The deployment process is known as Global Force Management (GFM).⁷ The basic concept of GFM allows the SecDef to strategically manage the employment of the force among CCDRs.⁸ GFM aligns force assignment, allocation,

¹ JOINT PUBLICATION 3-35, *Deployment and Redeployment Operations* (10 January 2018) [hereinafter JP 3-35].

² Air Force Doctrine, *Volume 1 Basic Doctrine* (27 February 2015).

³ 10 U.S.C. § 806; 10 U.S.C. § 9037.

⁴ 10 U.S.C. § 162.

⁵ *Id.*

⁶ *Id.*

⁷ JP 3-35, ch. I.

⁸ *Id.*

and apportionment methodologies in support of the National Defense Strategy, joint force availability requirements, and joint force assessments.⁹

In accordance with the GFM process and statute, the secretaries of the military departments assign forces to CCDRs as directed by SecDef to perform missions assigned to those commands.¹⁰ The assignment of forces is implemented via the assignment tables in the Global Force Management Implementation Guidance (GFMIG) in even years and Forces For Unified Commands Memorandum (“Forces For”) in odd years.¹¹ It is the responsibility of each military department secretary to identify units to satisfy SecDef’s direction in the assignment tables.¹² The forces identified then become “assigned” to that CCMD. SecDef also has the authority to allocate forces between CCDRs.¹³ The allocation process is the temporary shifting of forces among CCDRs to meet force requirements in support of current operations and campaign plans.¹⁴ The allocation of forces is published in the Global Force Management Allocation Plan (GFMAP) and its associated annexes.¹⁵ The Chairman of the Joint Chiefs of Staff apportions forces quarterly to provide an estimate of the military departments’ capacity to generate capabilities which can reasonably be expected to be made available along general timelines.¹⁶

The Joint Staff publishes the GFMIG and Forces For assignment tables, which document the SecDef’s direction to the services for the assignment of forces.¹⁷ The Joint Staff, in coordination with the services, orchestrates the force flow of deploying and redeploying forces.¹⁸ CCDRs are responsible for determining and validating the requirements necessary to support the missions for which they are responsible.¹⁹

The Air Force presents Air Expeditionary Task Forces to the Joint Force Commander, which are task-organized at the time of execution, able to respond to emerging crises, and ready to sustain rotational requirements while retaining a surge capability.²⁰ The Air Force also:

1. Develops recommended global-sourcing solutions for conventional forces, independent of force assignment in accordance with the GFMIG;
2. Aligns force-assignment, allocation, and apportionment methodologies in support of strategic guidance documents, joint force availability requirements, and joint force assessments; and
3. Tasks individuals throughout the Air Force to source SecDef-directed taskings in another CCMD, as codified in Chairman of the Joint Chiefs of Staff Manual 3130.06B.²¹

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ AFI 10-403, *Deployment Planning and Execution* (17 April 2020), para. 1.4.1.

¹⁸ *Id.* para. 1.4.3.

¹⁹ JOINT PUBLICATION 1-0, *Joint Personnel Support* (31 May 2016).

²⁰ AFPD 10-4, *Operations Planning: Air Expeditionary Force and Global Force Management* (4 April 2019), para. 2.3.

²¹ *Id.* paras. 2.4 – 2.6.

Under this construct, every Airman is assigned to a deployment vulnerability period, colloquially known as a “bucket,” which is based on their Air Force Specialty Code (AFSC) or career field.²² Some career fields typically deploy as part of their home-station unit as part of a “standard force solution.” Members of the JAG Corps deploy as individual augmentees to the Joint Force, and as part of a Demand Force Team.²³ The Deliberate and Crisis Action Planning and Execution Segments (DCAPES) is the Air Force’s primary operation planning and execution automated data processing system and is used to manage Time-Phased Force and Deployment Data (TPFDDs) in support of deployment and distribution operations.²⁴ The various deployment solutions are described below.

The Air Force Personnel Center (AFPC) assigns most Air Force deployments, with the exception of JAG Corps members. Due to TJAG’s statutory assignment authority over JAGs, as well as a Headquarters Air Force Program Action Directive extending that authority to paralegals for deployment purposes, JAG Corps deployment assignments are made by TJAG’s staff, specifically the Professional Development Directorate (JAX).²⁵ JAX selects JAG Corps personnel to fill deployed billets based on their experience, skill, and knowledge of specialized areas of law to ensure CCDRs receive the legal capabilities they need to accomplish their missions. Subordinate JA Functional Area Managers (FAM) represent TJAG and AF/JAX at their respective commands and execute TJAG and AF/JAX direction.²⁶

EMPLOYMENT OF JAGC PERSONNEL

While some judge advocates and paralegals deploy as part of a standard force solution, the overwhelming majority deploy as individual augmentees (IAs) or as part of a joint expeditionary tasking solution.

Individual Augmentees (IAs)

As the name implies, IAs augment an existing headquarters staff when needed. Headquarters staffs are established on a joint manning document (JMD), and commanders request IAs to fill either existing JMD positions or new positions when they are raised within the JMD. Joint Staff J-1 (Manpower and Personnel Directorate) validates CCMD JMD joint IA requirements against criteria prescribed in the GFMIG, and forwards the validated requirements to Joint Staff J-3 (Operations Directorate) for sourcing solution development.²⁷

FUNCTIONAL AREA MANAGERS

The Air Force uses FAMs for each career field at the Air Staff, Major Command (MAJCOM)/Direct Reporting Unit (DRU)/Field Operating Agency (FOA), and the CCMD component staff levels to facilitate Unit Type Code (UTC) requirements determinations during TPFDD management

²² AFI 10-401, *Air Force Operations Planning and Execution* (7 December 2006), incorporating Change 4, 13 March 2012.

²³ AFI 51-101, *The Air Force Judge Advocate General’s Corps (AFJAGC) Operations, Accessions, and Professional Development* (29 November 2018), para. 11.2.

²⁴ JP 3-35, para. 6.d.

²⁵ 10 U.S.C. § 806; AFI 51-101, para. 11.3.

²⁶ AFI 51-101, para. 11.3.

²⁷ JP 3-35, para. 3.h.(2).

and development.²⁸ In accordance with AFI 10-401, each functional area (*e.g.*, JA) designates FAMs to support operational planning and execution.²⁹ FAMs are the principal advisors to their respective commanders/functional directors on the management and oversight of all personnel and equipment within a specific functional area.³⁰ All FAMs are concerned with the same broad planning areas; however, the specific activities accomplished at each level are considerably different. Responsibilities include:³¹

1. Developing and reviewing policy;
2. Developing, managing, and maintaining UTCs described below;
3. Developing criteria for and monitoring readiness reporting; and
4. Force posturing, analysis, and execution activities which are crucial to the management and execution of Air Force readiness programs.

Headquarters Air Force (HAF) FAM

The HAF FAMs represent the highest level of functional management responsibility. These individuals are responsible for all wartime planning policies and procedures that affect the entire functional area.³² They oversee all aspects of the planning process and must fully understand the responsibilities of both the supported and supporting command functional planners.³³

TJAG has designated AF/JAX as the HAF FAM for the JA functional area.³⁴ In accordance with TJAG's statutory assignment authority, AF/JAX serves as the principal advisor to AF/JA on the configuration, operational readiness, and employment of Air Force legal support capabilities.³⁵ AF/JAX is responsible for: reviewing and validating requests for forces and operational capability packages requiring legal support; recommending individual sourcing solutions for judge advocate and paralegal deployments for TJAG's approval; and serving as AF/JA's coordinating authority for operational legal support matters, including policy, plans, force availability, and readiness matters.³⁶ In addition, AF/JAX oversees JAG Corps associated UTCs and manages related issues; acts as central coordinator of force management activities; and monitors JAG Corps shortfalls, deficiencies, and sourcing reclaims, and ensures MAJCOM FAMs take actions to minimize adverse mission impact.³⁷

MAJCOM/FOA/DRU FAMs

Supporting MAJCOM/FOA/DRU and Air Reserve Component (ARC) FAMs play a vital role in the planning and execution process. They are responsible for tracking the availability of forces and equipment; providing UTC availability to MAJCOM war planners and AFPC functional schedulers; tracking readiness status and training levels; and coordinating with other

²⁸ AFI 10-401.

²⁹ *Id.*

³⁰ *Id.* para. 12.2.

³¹ *Id.* para. 12.3.

³² *Id.* para. 12.4.1.

³³ *Id.*

³⁴ AFI 51-101, para. 1.2.5.4.

³⁵ *Id.* para. 1.2.5.4.1.

³⁶ *Id.* paras. 1.2.5.4.1.1 – 1.2.5.4.1.3.

³⁷ *Id.* paras. 1.2.5.4.2 – 1.2.5.4.4.

FAMs on all wartime and exercise matters affecting their functional area.³⁸ As mentioned above, AF/JAX exclusively performs this role for the JAG Corps. AF/JAX coordinates extensively with MAJCOM/FOA/DRU FAMs to select the individuals who are available and can best fulfill the tasked requirements.

Component Headquarters FAMs

Supported component headquarters FAMs (*e.g.*, AFCENT, AFSOUTH) are an integral part of the contingency and crisis action planning process.³⁹ They are responsible for advising commanders on implementing Air Force policy to meet CCDR requirements and maintaining contact with FAMs at all levels to maintain continuity (*e.g.*, AF/JAX for JAG Corps personnel.)⁴⁰

Unit Level

The Installation Deployment Officer (IDO) and Unit Deployment Managers (UDMs), while technically not considered FAMs, are responsible for the day-to-day management of unit functions.⁴¹ The IDO is usually a logistics readiness officer or logistics management specialist and manages all aspects of deployment operations on behalf of the installation commander.⁴² Each unit has a UDM, who acts on behalf of the unit commander, assigned to prepare their members for deployment. This typically includes ensuring the personnel subject to deploy have an Air Expeditionary Force Indicator, and receive all mandatory training, equipment, and clearances needed for the deployment.⁴³

DEPLOYED JAGC PERSONNEL FUNCTIONS

JAG Corps personnel provide vital services in the deployed environment, similar to those they provide at home-station bases. They also perform tasks while deployed, particularly serving in a joint or coalition environment, which may be uncommon for home-station JAGs.

JAG Corps personnel advise Air Expeditionary Wing commanders on the full spectrum of legal issues they face—military justice, contract and fiscal law, ethics, claims, administrative law, and legal assistance—and also provide defense services to Airmen accused of Uniform Code of Military Justice violations. Commanders maintain good order and discipline through, among other things, holding courts-martial in-theater, which are presided-over by military judges. JAG Corps personnel also serve on the staff of Air Force forces, working on theater-wide issues such as international agreements, basing and overflight rights, and command policy. Judge advocates ensure compliance with the law of war and rules of engagement by assisting in target selection and weapons employment in air operations centers.

In addition to Air Force-centric roles, JAG Corps personnel serve on joint staffs with coalition partners and with host nation armed forces providing a variety of services in support of national objectives. JAG Corps personnel are often heavily-involved in nation-building (*e.g.*, through detention operations and development of host nation legal, judicial, and governmental institutions and capacity), and provision of basic services to local populations by ensuring proper contracting

³⁸ AFI 10-401, para. 12.4.2.

³⁹ *Id.* para. 12.4.3.

⁴⁰ *Id.*

⁴¹ *Id.* para. 12.4.4.

⁴² AFI 10-403, paras. 1.28.1 – 1.28.2.

⁴³ *Id.* para. 1.29.

and fiscal practices are followed. JAG Corps personnel are integrated with sister services and frequently travel outside of installations on patrol with ground forces. Other non-traditional roles include special operations support, civil support, and humanitarian assistance.

As referenced above, the Air Force deploys UTCs, which are generic capabilities that are uniform across the department. Some UTCs include multiple personnel and equipment, but UTCs applicable to the JAG Corps only include one person—either a judge advocate or a paralegal. The JAG Corps mainly uses two UTCs due to the inherent flexibility and adaptability of our personnel. The UTCs JAG Corps personnel fill are:

XFFJJ – Combat Support JAG (1 pax)

XFFJJ is the primary UTC providing judge advocate legal services capability that enables TJAG to fulfill his specific responsibilities listed in Air Force War and Mobilization Plan-1, Annexes P and R.⁴⁴ The combat support judge advocate assists and advises the Commander, Air Force Forces (COMAFFOR) in carrying out obligations and responsibilities under international and domestic law and policy.⁴⁵ UTC XFFJJ is used for Regular Air Force, Air National Guard, and Air Force Reserve JAG personnel to support any force module, to augment existing legal support forces, or to independently support operations.⁴⁶

XFFJP – Combat Support Paralegal (1 pax)

XFFJP is the primary UTC providing paralegal services capability that enables TJAG to fulfill his specific responsibilities listed in Air Force War and Mobilization Plan-1, Annexes P and R.⁴⁷ Combat Support Paralegals assist judge advocates and the COMAFFOR in carrying out their obligations and responsibilities under international and domestic law and policy.⁴⁸ The combat support paralegal UTC is used for Regular Air Force, Air National Guard and Air Force Reserve paralegal personnel to support any force module, to augment existing legal support forces, or to independently support operations.⁴⁹

THE FUTURE OF JAG CORPS DEPLOYMENTS

All JAG Corps personnel are subject to deployment, and positions are “postured” against a particular UTC.⁵⁰ Members are selected to deploy primarily as a function of their capacity to meet the requirements for the deployed position and other considerations, such as the relative personnel strength of the offices which can provide the requirement needed, and the recency of any previous deployment for the member under consideration.⁵¹ The deployment of civilians follows the guidance in DoD Civilian Expeditionary Workforce directives and instructions, as well as applicable Air Force instructions.⁵²

⁴⁴ AFI 51-101, para. 11.4.3.1.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* para. 11.4.3.2.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* para. 11.5.

⁵¹ *Id.* para. 11.6.1.

⁵² *Id.* para. 11.6.2.

The U.S. military will continue to deploy as a joint force and work with coalition and host nation partners in furtherance of United States' objectives abroad. Persistent legal support will be required for all contingency operations, and JAG Corps members will be needed to advise Air Force and joint commanders on the issues mentioned above, as well as in emerging and developing areas such as space and cyber operations. Deployed positions will become increasingly specialized and will require advanced education, training, and security clearances. The core skills which JAG Corps personnel possess—analytical thought, quality writing and speaking, negotiation, and advocacy—will remain in high demand and will be an integral part of future operations.

REFERENCES

- 10 U.S.C. § 162, Combatant commands: assigned forces; chain of command
- 10 U.S.C. § 806, Article 6. Judge advocates and legal officers
- 10 U.S.C. § 9037, Judge Advocate General, Deputy Judge Advocate General: appointment; duties
- White House Memorandum, *Unified Command Plan*, (U/FOUO)
- CJCSI 1301.01F, *Joint Individual Augmentation Procedures* (17 November 2014)
- CJCSM 3122.05, *Operating Procedures for Joint Operation Planning and Execution System (JOPES)-Information Systems (IS) Governance* (15 December 2011)
- JOINT PUBLICATION 1, *Doctrine for the Armed Forces of the United States* (25 March 2013), incorporating Change 1, 12 July 2017
- JOINT PUBLICATION 1-0, *Joint Personnel Support* (31 May 2016)
- JOINT PUBLICATION 1-04, *Legal Support to Military Operations* (2 August 2016)
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- JOINT PUBLICATION 3-35, *Deployment and Redeployment Operations* (10 January 2018)
- JOINT PUBLICATION 5-0, *Joint Planning* (16 June 2017)
- Air Force Doctrine, Volume 1, *Basic Doctrine* (27 February 2015)
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- Air Force Doctrine, Annex 4-0, *Combat Support* (5 January 2020)
- AFI 10-244, *Reporting Status of Air and Space Expeditionary Forces* (15 June 2012)
- AFI 10-401, *Air Force Operations Planning and Execution* (7 December 2006), incorporating Change 4, 13 March 2012
- AFI 10-403, *Deployment Planning and Execution* (17 April 2020)
- AFI 10-404, *Base Support and Expeditionary (BAS&E) Site Planning* (24 July 2019)
- AFI 51-101, *The Air Force Judge Advocate General's Corps (AFJAGC) Operations, Accessions, and Professional Development* (29 November 2018)
- AFPD 10-4, *Operations Planning: Air Expeditionary Force and Global Force Management* (4 April 2019)

Chapter 38

CODE OF CONDUCT

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BACKGROUND

The Code of Conduct serves as a moral and ethical guide for combat, captivity, and isolation across a range of military operations.¹ Air Force personnel deploying in support of contingency operations must comprehend the Code of Conduct. Commanders must ensure their personnel are prepared to respond to an isolating event, as an isolated person, as a member of a unit with a member that becomes isolated, or as part of those responsible organizations charged with personnel recovery coordination or operations.²

The Code of Conduct was created in 1955 by The Secretary of Defense Advisory Committee on Prisoners of War following a comprehensive study on the problems related to the Korean War POW experience.³ This Committee's report and recommendations were based, in part, on the U.S. military's experience in the Korean War. On 27 July 1953, North and South Korea signed the Armistice effectively ending the Korean War. As the United States began repatriating thousands of POWs, many of them revealed chilling accounts of starvation, beatings, killings, and months of Communist indoctrination.⁴ One in twenty-three POWs were suspected of committing serious misconduct while in captivity.⁵ After examining the experience of these POWs, the Committee made numerous recommendations, concluding that, "Americans require a unified and purposeful standard of conduct for our prisoners of war."⁶ In its report, the Committee stated that its recommendations, which included the Code of Conduct, were based on "principles and foundations which have made America free and strong and on the qualities which we associate with men of integrity and character."⁷

On 17 August 1955, President Dwight D. Eisenhower promulgated the Code of Conduct.⁸

LEGAL STANDING OF THE CODE OF CONDUCT

The Code of Conduct is a moral code designed to provide U.S. military personnel with a standard of conduct in any confrontation with a foe of our nation, regardless of the nature of the conflict or the duties of the service member. It serves, in part, to implement the provisions of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War. It was intended to gain punitive support from provisions of the Uniform Code of Military Justice that relate to conduct before capture or as a prisoner of war. However, the Code of Conduct is, and always has been, intended to be a moral rather than a punitive guide. A service member may be subject to prosecution for a violation of the Code of Conduct only if his or her misconduct also constitutes a violation of the Uniform Code of Military Justice or other federal law.

¹ Executive Order 10631, *Code of Conduct for Members of the Armed Forces of the United States* (17 August 1955), as amended; see also DoDI 1322.31, *Common Military Training* (20 February 2020), G.2.

² AFPD 10-30, *Personnel Recovery* (28 August 2018), para. 1.

³ The Report of the Secretary of Defense's Advisory Committee on Prisoners of War, *POW The Fight Continues After The Battle* (August 1955), v-vii.

⁴ *Id.* 8-12.

⁵ *Id.* vi.

⁶ *Id.* vii.

⁷ *Id.* v.

⁸ Executive Order 10631.

CODE OF CONDUCT PRINCIPLES

The Code of Conduct consists of six articles. The articles address situations and decision areas that, to some degree, all personnel may encounter. They include information that is useful to U.S. POWs in their efforts to survive and return home with honor. They also help POWs resist a captor's efforts to exploit them. Medical personnel and chaplains are obligated to abide by certain provisions of the Code of Conduct, while retaining a special status under the Geneva Conventions. The Code of Conduct is in Appendix A of this chapter.

MEDICAL PERSONNEL AND CHAPLAINS

Medical personnel who are exclusively engaged in the medical services of their armed forces and chaplains who fall into the power of the enemy are considered “retained personnel” under the Geneva Conventions and are not POWs.⁹ This status authorizes them to perform their professional duties (preferably for POWs of their own country), but it does not relieve them from their responsibility to adhere to the provisions of the Code of Conduct. In order to take advantage of the “retained personnel” status, medical personnel and chaplains should assert their right to this status.¹⁰ All medical personnel and chaplains are accountable for their actions while in enemy hands. Medical personnel may not assume command over non-medical personnel and chaplains may not assume command over any military personnel. Medical personnel and chaplains are authorized to communicate with their captors in connection with their professional responsibilities.¹¹

CAPTIVITY AND HOSTILE DETENTION DURING MILITARY OPERATIONS OTHER THAN WAR

Members of the U.S. military and those accompanying the forces, because of their deployments throughout the world and their participation in military activities other than war, may be detained by unfriendly governments or kidnapped by terrorist groups. U.S. personnel must be aware that the basic protections available to POWs under the Geneva Conventions may not be adhered to during operations other than war. Thus, personnel detained may be subject to the domestic criminal laws of the detaining nation. These personnel should use the Code of Conduct as a moral guide to assist them uphold the ideals of DoD policy and survive their ordeal with honor.

⁹ DoD LAW OF WAR MANUAL (June 2015), updated December 2016, 132.

¹⁰ *Id.*

¹¹ *Id.* 133.

CODE OF CONDUCT TRAINING

DoD Instruction O-3002.05 provides guidance for conducting Code of Conduct training.¹² Code of Conduct is the foundation underpinning the warfighter's personnel recovery (PR)/Survival, Evasion, Resistance, and Escape (SERE) preparation and training. Air Force SERE programs prepare AF personnel for isolation across the range of military operations.¹³ All Air Force personnel receive Level-A Code of Conduct training,¹⁴ and personnel whose missions require it receive more in depth training based on combatant commander, Headquarters Air Force, or MAJCOM guidance.¹⁵ Levels of SERE Training include:¹⁶

- Level-A: The minimum level of understanding for all members of the armed forces attained by all personnel during entry-level training.
- Level-B: The minimum level of understanding needed by personnel who have a moderate risk of isolation during peacetime or combat.
- Level-C: The minimum level of understanding needed by personnel who have a high risk of isolation or are vulnerable to greater-than-average exploitation by a captor during peacetime or combat. Level-C includes senior Air Force officials assigned to or visiting high threat areas.

This training is very important to ensure all Air Force members understand their responsibilities under the Code of Conduct as well as their rights and obligations under the Geneva Conventions.

¹² Website at <http://www.dtic.mil/whs/directives> (restricted access).

¹³ AFI 16-1301, *Survival, Evasion, Resistance, and Escape (SERE) Program* (3 August 2017), para. 1.2.2.2.1.

¹⁴ *Id.* para. 2.2.6. Level-A Code of Conduct training is a one-time training event for all Air Force personnel and is available through computer based training (SERE 100.2) on the Air Force's Advanced Distributed Learning Service (ADLS).

¹⁵ *Id.* paras. 2.1.6. and 2.2.2.2.

¹⁶ *Id.* 54.

REFERENCES

- Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, of 12 August 1949, 6 U.S.T. 3114, 75 U.N.T.S. (1950) 31-83 (entry into force 21 October 1950, for the United States 2 February 1956)
- Geneva Convention for the Amelioration of the Conditions of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, adopted 12 August 1949, 6 U.S.T. 3217, 75 U.N.T.S. (1950) 85-133 (entry into force 21 October 1950, for the United States 2 February 1956)
- Geneva Convention Relative to Treatment of Prisoners of War of 12 August 1949, 6 U.S.T. 3316, 75 U.N.T.S. (1950) 135-285 (entry into force 21 October 1950, for the United States 2 February 1956)
- Executive Order 10631, as amended, *Code of Conduct for Members of the Armed Forces of the United States* (17 August 1955), as amended
- Executive Order 12017, *Amending the Code of Conduct for Members of the Armed Forces of the United States* (3 November 1977)
- Executive Order 12633, *Amending the Code of Conduct for Members of the Armed Forces of the U.S.* (28 March 1988)
- CJCS Guide 5260, *A Self-Help Guide to Antiterrorism* (10 June 2013)
- DoD LAW OF WAR MANUAL (June 2015), updated December 2016
- DoDD 3002.01, *Personnel Recovery in the Department of Defense* (16 April 2009), incorporating Change 2, 24 May 2017
- DoDD 5110.10, *Defense Prisoner of War/Missing In Action Accounting Agency (DPAA)* (13 January 2017)
- DoDI 3002.03, *DoD Personnel Recovery – Reintegration of Recovered Personnel* (15 July 2013), incorporating Change 1, 26 April 2016
- DoDI O-3002.05, *Personnel Recovery (PR) Education and Training* (12 April 2016)
- AFI 16-1301, *Survival, Evasion, Resistance, and Escape (SERE) Program* (3 August 2017)
- AFPD 10-30, *Personnel Recovery* (28 August 2018)
- AFPD 16-13, *Survival, Evasion, Resistance, and Escape (SERE)* (1 March 2000), certified current 2 June 2010

APPENDIX A – ARTICLES OF THE CODE OF CONDUCT

Article I

I AM AN AMERICAN, FIGHTING IN THE FORCES WHICH GUARD MY COUNTRY AND OUR WAY OF LIFE. I AM PREPARED TO GIVE MY LIFE IN THEIR DEFENSE.

Article II

I WILL NEVER SURRENDER OF MY OWN FREE WILL. IF IN COMMAND, I WILL NEVER SURRENDER THE MEMBERS OF MY COMMAND WHILE THEY STILL HAVE THE MEANS TO RESIST.

Article III

IF I AM CAPTURED, I WILL CONTINUE TO RESIST BY ALL MEANS AVAILABLE. I WILL MAKE EVERY EFFORT TO ESCAPE AND AID OTHERS TO ESCAPE. I WILL ACCEPT NEITHER PAROLE NOR SPECIAL FAVORS FROM THE ENEMY.

Article IV

IF I BECOME A PRISONER OF WAR, I WILL KEEP FAITH WITH MY FELLOW PRISONERS. I WILL GIVE NO INFORMATION OR TAKE PART IN ANY ACTION WHICH MIGHT BE HARMFUL TO MY COMRADES. IF I AM SENIOR, I WILL TAKE COMMAND. IF NOT, I WILL OBEY THE LAWFUL ORDERS OF THOSE APPOINTED OVER ME AND WILL BACK THEM UP IN EVERY WAY.

Article V

WHEN QUESTIONED, SHOULD I BECOME A PRISONER OF WAR, I AM REQUIRED TO GIVE NAME, RANK, SERVICE NUMBER, AND DATE OF BIRTH. I WILL EVADE ANSWERING FURTHER QUESTIONS TO THE UTMOST OF MY ABILITY. I WILL MAKE NO ORAL OR WRITTEN STATEMENTS DISLOYAL TO MY COUNTRY AND ITS ALLIES OR HARMFUL TO THEIR CAUSE.

Article VI

I WILL NEVER FORGET THAT I AM AN AMERICAN, FIGHTING FOR FREEDOM, RESPONSIBLE FOR MY ACTIONS, AND DEDICATED TO THE PRINCIPLES WHICH MADE MY COUNTRY FREE. I WILL TRUST IN MY GOD AND IN THE UNITED STATES OF AMERICA.

Chapter 39

SMALL UNMANNED AIRCRAFT SYSTEMS

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INTRODUCTION

Unmanned aircraft systems (UAS) are categorized as follows:¹

Table 39.1. Unmanned Aircraft Systems (UAS) Categories

UA Category	Maximum Gross Takeoff Weight (lbs)	Normal Operating Altitude (feet)	Speed (KIAS)
Group 1	0-20	< 1200 AGL	100
Group 2	21-55	< 3500 AGL	< 250
Group 3	< 1320	< 18000 MSL	< 250
Group 4	> 1320		Any Airspeed
Group 5	> 1320	> 18000 MSL	Any Airspeed
Legend: AGL – above ground level; MSL – mean sea level; KIAS – knots indicated airspeed			

Small UAS (SUAS) include UAS from Groups 1-3 in the above table. Air Force operations involving SUAS are divided into two categories: counter-SUAS (C-SUAS) and blue SUAS. C-SUAS operations concern force protection (FP), integrated air base defense, and air defense against adversarial uses of SUAS to DoD facilities or assets. Blue SUAS operations concern Air Force or contractor owned and operated SUAS operations. Blue SUAS missions conducted as training on C-SUAS solutions are referred to as “red air” SUAS operations.²

COUNTER-SUAS

When countering SUAS threats, commanders should apply the Standing Rules of Engagement (SROE) and Standing Rules for the Use of Force (SRUF), as appropriate.³

When taking action against SUAS, various federal criminal provisions are implicated. The Aircraft Sabotage Act prohibits destruction of civil aircraft,⁴ while the Wiretap Act prohibits acquisition of content of communications without a warrant (*i.e.*, video feed or possibly the control commands themselves).⁵ The Pen Register and Trap and Trace Statutes regulate the collection of routing, addressing, signaling and other non-content information for wire and electronic communications (*i.e.*, the signal/routing commands or identifying information specific to the SUAS ID/ownership).⁶ The Computer Fraud and Abuse Act prohibits illegal access to protected computers, as well as damage or use of those computers.⁷ The Foreign Intelligence Surveillance Act (FISA) prohibits

¹ DoDD 3800.03E, *DoD Executive Agent for C-SUAS for Unmanned Aircraft Groups 1, 2, and 3* (21 February 2020), 18.

² AF/JAO SUAS Primer (February 2019), 1.

³ Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3121.01B, *Standing Rules of Engagement (SROE)/Standing Rules for the Use of Force (SRUF) for U.S. forces* (13 June 2005) [classified SECRET]; see also CJCS Notice (CJCSN) 3124, *Interim Guidance for Countering Unmanned Aircraft* (8 February 2017) [classified].

⁴ 18 U.S.C. § 32.

⁵ 18 U.S.C. §§ 2510-2522.

⁶ 18 U.S.C. §§ 3121-3127.

⁷ 18 U.S.C. § 1030.

certain activities done for foreign intelligence purposes unless authorized by statute,⁸ and the Signal Interference Statutes establish that certain signal interference is illegal except as lawfully authorized.⁹ Additionally, there are various Anti-Jamming Statutes which also apply.¹⁰

Moreover, the Fourth Amendment to the U.S. Constitution arguably applies to the intercept (or “search”) of communications content via SUAS signaling information.¹¹

In order to exempt DoD from liability under the aforementioned criminal statutes, and to authorize DoD to take actions against SUAS threats, Congress passed 10 U.S.C. § 130i, which authorizes the DoD to take the following actions to protect “covered” facilities or assets:

- Detect, ID, monitor, and track SUAS;
- Warn SUAS operators;
- Disrupt SUAS control;
- Seize or exercise control over SUAS;
- Seize or confiscate SUAS; or
- Use reasonable force to disable, damage, or destroy SUAS.

A “covered facility or asset” is defined as a DoD entity:

- Identified by SecDef;
- Located in the United States or U.S. territories; and
- Engaged in operations directly related to the following missions:
 - (i.) nuclear deterrence, including with respect to nuclear command and control, integrated, tactical warning and attack assessment, and continuity of government;
 - (ii.) missile defense;
 - (iii.) national security space;
 - (iv.) assistance in protecting the President or the Vice President (or other officer immediately next in order of succession to the office of the President);
 - (v.) air defense of the United States, including air sovereignty, ground-based air defense, and the National Capital Region integrated air defense system;
 - (vi.) combat support agencies;
 - (vii.) special operations activities;
 - (viii.) production, storage, transportation, or decommissioning of high-yield explosive munitions, by the DoD; or
 - (ix.) a Major Range and Test Facility Base.¹²

⁸ 18 U.S.C. §§ 1801, 1827.

⁹ 18 U.S.C. §§ 1362 and 1367.

¹⁰ 47 U.S.C. §§ 333, 501 and 502.

¹¹ See the SUAS Primer for further information.

¹² Note that covered missions (iv) through (ix) are statutorily scheduled to sunset on 31 December 2023.

As of 2020, 92% of Department of the Air Force installations within the United States and its territories are considered “covered” under 10 U.S.C. § 130i. Commanders, therefore, have the legal authority not only to act in self-defense IAW with the SROE and SRUF, but may also take actions authorized by 10 U.S.C 130i. Specifically, after determining that a SUAS is a threat, commanders may use “technical means,” (*i.e.*, electromagnetic spectrum capabilities) without incurring criminal liability under the above-referenced federal criminal provisions. Note that while commanders at non-covered installations or overseas installations may not use 10 U.S.C. § 130i statutory authority to engage SUAS, authority to act in self-defense IAW CJCSI 2131.01B and CJSCI 3124 applies.

RULES OF ENGAGEMENT

In many cases, authority for taking action using C-SUAS is provided in Deputy SecDef Policy Memorandum (PM) 16-003,¹³ and Deputy SecDef Policy Memorandum 17-00X.¹⁴ PM 17-00X applies to covered facilities/assets and contains criteria for determining whether an adversarial SUAS is a threat. Until SecDef issues SROE to address C-SUAS, these policy memoranda govern the authorized response to threatening SUAS. Absent mission-specific ROE/RUF for C-SUAS operations, these criteria should be used to determine when a commander can engage an adversarial SUAS over or near a covered facility or asset.

C-SUAS CAPABILITIES

Delivering capabilities to installation commanders is a top Air Force priority. The Air Force programmatic solution is led by Air Force Materiel Command (AFMC) and the Air Force Lifecycle Management Center. The Air Force is fielding and installing a variety of C-SUAS capabilities at installations in accordance with a prioritized list. Installations are permitted to purchase C-SUAS capabilities on their own provided they meet various requirements. Commanders must coordinate with AFMC if they intend to pursue a C-SUAS solution. DoDD 3800.03E, *DoD Executive Agent for C-SUAS for Unmanned Aircraft Groups 1, 2, and 3*, provides the latest guidance regarding policy, responsibilities, and governance of DoD-wide efforts. Currently, the Secretary of the Army is assigned as Executive Agent.

All C-SUAS capabilities are evaluated under the law of war and reviewed as weapon systems under AFI 51-401, *The Law of War*.¹⁵ AF/JAO has reviewed multiple C-SUAS systems as program offices seek approval to move forward in developing their respective weapon systems. All Air Force C-SUAS capabilities are intended to fit into the “Medusa” system-of-systems architecture.

¹³ In August 2016, Deputy SecDef issued *Interim Guidance for Countering Unmanned Aircraft* (classified). This document, along with the subsequent CJCS Notice 3124, modifying CJCSI 3121.01B, *SROE/SRUF*, serve as “amplifying guidance” to DoD personnel on the application of SRUF and the exercise of the inherent right and obligation of self-defense against a threat posed by a SUAS for all DoD assets and installations, to include those not covered. Policy Memorandum 16-003 is classified and is available on AF/JAO’s SIPR SharePoint site.

¹⁴ In July 2017, Deputy SecDef issued *Supplemental Guidance for Countering Unmanned Aircraft* (classified). It includes approved actions that have been coordinated with the Federal Aviation Administration. It is only applicable to DoD assets and installations considered covered under 10 U.S.C. § 130i, Attachment 1, and serves as additional guidance to PM 16-003, which remains in effect for both covered and non-covered assets and installations. Policy Memorandum 17-00X is classified and is available on AF/JAO’s SIPR SharePoint site.

¹⁵ AFI 51-401, *The Law of War* (3 August 2018).

Following is a list of core unclassified C-SUAS capabilities currently being fielded by the Air Force. This list is limited; contact AF/JAO for a full list including classified systems.

Table 39.2. Selected Air Force Counter-Small Unmanned Aircraft Systems Capabilities

CAPABILITY	DESCRIPTION
Skynet	Shotgun round with a net.
Crew Duke	Spectrum capability which interrupts radio waves and disrupts connection between controller and vehicle.
MADS-K	Four to five backpacks which contain various jammers and electro-optical / infrared (EO/IR) sensors.
Drone Buster, version III	Spectrum capability which interrupts radio waves and disrupts connection between controller and vehicle.
NINJA	Spectrum capability which interrupts radio waves and disrupts connection between controller and vehicle.

BLUE SUAS

Blue SUAS refers to Air Force or DoD / Air Force contractor owned and operated SUAS. To employ effective C-SUAS threat mitigation systems, commanders and security forces personnel regularly conduct training exercises deploying red teams of DoD SUAS operators flying red air missions.

Air Force Special Operations Command is the lead command for blue SUAS, and coordinates all unit purchases. The 2020 National Defense Authorization Act (NDAA) prohibits “agency operation or procurement” of SUAS manufactured in a covered foreign country or SUAS which use various parts from those countries.¹⁶ C-SUAS testing and training is exempt from this restriction. Consult the latest DoD guidance and your local legal office to understand how this legislative development will be implemented by the Air Force.

AFMAN 11-502, *Small Unmanned Aircraft Systems*, functions as the Air Force-specific guidance for SUAS.¹⁷ Figure A8.2, Enclosure 2, details DoD domestic use of SUAS in a matrix. The following table reproduces several sections from that matrix. Note that the table in AFMAN 11-502 is far more detailed and discusses many more potential SUAS operations.¹⁸

¹⁶ NDAA FY 2020, § 848.

¹⁷ AFMAN 11-502, *Small Unmanned Aircraft Systems* (29 July 2019).

¹⁸ *Id.* Figure A8.2, 59.

Table 39.3. Domestic Small Unmanned Aircraft Systems Operations Approval Authorities

Domestic SUAS Operations	Approval Authority	Delegation
Counter Intelligence (CI) or Foreign Intelligence (FI) related activities	As determined by the head of the DoD Intelligence Component concerned	No
Defense Support to Civil Authorities (DSCA), General, and support to Law Enforcement Agencies (LEAs)	SecDef	No
DSCA Search and Rescue (SAR)	Geographic Combatant Commander	No
Training Exercises, and repositioning within airspace delegated for DoD use	Installation Commander	Yes; to unit commander as determined by the installation commander
Force Protection (FP)	Installation Commander	No
Public Affairs support	Installation Commander	Yes; to unit commander as determined by the installation commander

INTELLIGENCE OVERSIGHT

Intelligence oversight (IO) rules apply to counterintelligence, foreign intelligence, and intelligence-related activities. Collection and analysis of U.S. imagery using intelligence component capabilities (ICC) requires a Proper Use Memorandum (PUM). IO rules and procedures do not apply to routine non-ICC activities such as force protection, law enforcement, or criminal investigations activities, but these rules could apply depending on several factors (The 6 Ps Test).¹⁹ When IO rules do not apply, and a PUM is not required, a legal review of the concept of employment (CONEMP) should be completed. For bases within USSTRATCOM's or USINDOPACOM's AOR, a legal review of the CONEMP will provide sufficient opportunity to identify and review any domestic imagery concerns. Note that, for the purposes of force protection, USSTRATCOM consults with the appropriate geographic combatant command.²⁰ In most cases, this will be USNORTHCOM.

CONCLUSION

Air Force and DoD efforts with SUAS are still developing and frequently change with each NDAA. A legal advisor in this field should ensure they read the most recent version of JAO's SUAS Primer and contact AF/JAO with any questions.

¹⁹ The 6 Ps Test: If any of the people, pipes, process, platforms, purpose, or procurement are ICC related, IO rules apply. For example, if the sensor is procured with intelligence-related funding, but the platform and personnel are non-ICC related, a PUM is required.

²⁰ SecDef Memorandum, *Guidance for the Domestic Use of Unmanned Aircraft Systems in U.S. National Airspace* (18 August 2018), Encl. 2.

REFERENCES

- National Defense Authorization Act for Fiscal Year 2020, § 848
10 U.S.C. § 130i
- The Aircraft Sabotage Act, 18 U.S.C. § 32
- The Wiretap Act, 18 U.S.C. §§ 2510-2522
- The Pen Register and Trap and Trace Statute, 18 U.S.C. §§ 3121-3127
- The Computer Fraud and Abuse Act, 18 U.S.C. § 1030
- The Foreign Intelligence Surveillance Act, 18 U.S.C. §§ 1801, 1827
- Anti-Jamming Statutes, 47 U.S.C. §§ 333, 501 & 502
- DoDD 3800.03E, *DoD Executive Agent for C-SUAS for Unmanned Aircraft Groups 1, 2, and 3*
(21 February 2020)
- SecDef Memorandum, *Guidance for the Domestic Use of Unmanned Aircraft Systems in U.S. National Airspace* (18 August 2018)
- Deputy SecDef Policy Memorandum 16-003 (August 2016) (classified)
- Deputy SecDef Policy Memorandum 17-00X (July 2017) (classified)
- AFI 51-401, *The Law of War* (3 August 2018)
- AFMAN 11-502, *Small Unmanned Aircraft Systems* (29 July 2019)
- AF/JAO SUAS Primer (February 2019)

Chapter 40

NUCLEAR OPERATIONS

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EDITORIAL NOTE: The information in this chapter is general in nature and provided by way of introduction to the topic. Should JAG Corps personnel have any questions on specific aspects of Nuclear Operations, please speak to your chain of command or AF/JAO.

BACKGROUND

Nuclear deterrence serves as the bedrock of U.S. national security and defense.¹ For more than 70 years, U.S. nuclear forces have been the foundation of the U.S. strategy to preserve peace and stability by deterring aggression against the United States, our allies, and our partners.² Although the highest nuclear policy and strategy priority is to deter nuclear attack of any scale, U.S. nuclear forces also are essential to prevent nuclear attack, non-nuclear strategic attacks, and large-scale conventional aggression, while also providing assurance to more than 30 allies and partners.³ Should deterrence fail, the United States would only consider the employment of nuclear weapons in extreme circumstances to defend the vital interests of the United States, its allies, and partners. In such circumstances, longstanding U.S. nuclear policy provides that the United States would strive to end any conflict with the objective of limiting damage to the lowest level possible.⁴

Judge advocates should be aware of, and be prepared to discuss, the basic legal framework and U.S. policy with respect to nuclear weapons; specifically, nuclear command and control (NC2), legal issues regarding the possession, use, and threat to use nuclear weapons, international treaties and agreements, nuclear security, and incident response considerations.

LEGALITY OF NUCLEAR WEAPONS

The basic legal position with respect to the possession, use and threat to use nuclear weapons, is as follows:

1. There is no blanket prohibition in treaty or customary international law on the threat or use of nuclear weapons. On the contrary, State practice, including numerous agreements regulating the possession or use of nuclear weapons, demonstrate that their threat or use is not generally unlawful.⁵

¹ Office of the Deputy Assistant SecDef for Nuclear Matters, *Nuclear Matters Handbook*, 2020, 1.

² President of the United States, *National Security Strategy*, December 2017, 30.

³ *Id.* 30. See also, Office of the Secretary of Defense, *Nuclear Posture Review*, February 2018, V (NPR).

⁴ *Id.* VIII.

⁵ See Antarctic Treaty, 1 December 1959, 12 U.S.T. 794., T.I.A.S. 4780, the United States entry into force 1961; Outer Space Treaty, 27 January 1967, 18 U.S.T. 2410, T.I.A.S. 6347, the United States entry into force 10 October 1967; *Written Statement of the Government of the United States of America*, 21 June 20, 1995, ICJ, Request by the United Nations General Assembly for an Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (noting that “there is no general prohibition in conventional or customary international law on the use of nuclear weapons,”) *per* DoD LAW OF WAR MANUAL (June 2015), updated December 2016), para. 6.18; *Written Statement of the Government of the United States of America*, 28-29, June 20, 1995, ICJ, Request by the United Nations General Assembly for an Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (“Evidence of a customary norm requires indication of ‘extensive and virtually uniform’ State practice, including States whose interests are ‘specially affected’... With respect to the use of nuclear weapons, customary law could not be created over the objection of the nuclear-weapon States, which are the States whose interests are most specially affected.”) *per* DoD LAW OF WAR MANUAL, para. 1.8.2.3.

2. The law of war governs the use of nuclear weapons, just as it governs conventional weapons. Legal advisors and operational planners must carefully analyze the employment of nuclear weapons in the context of their intended use, just as they would with any other weapon.⁶

LAW OF WAR PRINCIPLES⁷

Unnecessary Suffering

Nuclear weapons do not violate the principle of unnecessary suffering when the weapons are employed based on military necessity and do not inflict needless suffering, injury or destruction.⁸ The unnecessary suffering prohibition was intended to preclude weapons designed to increase the injury or suffering of the persons attacked beyond what is necessary to accomplish the military objective (*e.g.*, poison, chemical weapons, biological weapons, munitions containing fragments not detectable by x-ray, and blinding laser weapons). This principle does not limit the bringing of overwhelming firepower to subdue or destroy an opposing military force.

Distinction

Nuclear weapons are not inherently indiscriminate. Whether the user can exert proper control over a weapon's destructive characteristics determines if any given weapon, conventional or nuclear, is indiscriminate; not the total number of civilian casualties caused by its use. The principle of proportionality, and not distinction, addresses that concern. Because modern delivery systems allow the targeting of specific military objectives by nuclear weapons, the use of nuclear weapons is discriminate.

Proportionality

Proportionality weighs the justification of force against the expected harm to determine if the latter is disproportionate to the former.⁹ Whether employing nuclear weapons is proportionate depends on the circumstances, including the nature of the enemy threat, the importance of destroying the objective, the character, size and likely effects of the device, and the magnitude of the risk to civilians. Similar to the employment of conventional weapons, this analysis must be conducted on a case-by-case basis. Ultimately, attacks using nuclear weapons must not be conducted when the expected incidental harm to civilians is excessive compared to the military advantage expected to be gained.¹⁰ However, the law of war acknowledges that incidental damage to the civilian population and civilian objects, while unfortunate and tragic, is inevitable.¹¹ While

⁶ NPR, 23. *Written Statement of the Government of the United States of America*, 21 June 20, 1995, 21 (“The United States has long taken the position that various principles of the international of armed conflict would apply to the use of nuclear weapons as well as to other means and methods of warfare.”) *per* DoD LAW OF WAR MANUAL, para. 6.18. SecDef, *Report on Nuclear Employment Strategy of the United States Specified in Section 491 of 10 U.S.C.*, June 2013, 4-5 (“The new guidance makes clear that all plans must also be consistent with fundamental principles of the [law of war]. Accordingly, plans will, for example, apply the principles of distinction and proportionality and seek to minimize collateral damage to civilian populations and civilian objects.”) *per* DoD LAW OF WAR MANUAL, para. 6.18.

⁷ See Chapter Two, *Law of War*.

⁸ DoD LAW OF WAR MANUAL, para. 2.3.

⁹ *Id.* para. 2.4.

¹⁰ *Id.* para. 6.18.

¹¹ *Id.*

many situations are unlikely to warrant the use of nuclear weapons, it does not follow that there is a blanket prohibition on their use. The United States does not regard nuclear weapons to be inherently disproportionate.¹²

THREAT OF USE OF FORCE

Article 51 of the United Nations Charter recognizes a State's inherent right to individual or collective self-defense.¹³ States which maintain nuclear weapons for possible use in self-defense, and for deterring aggression and hostile use of nuclear or other weapons of mass destruction (WMD), do not violate international law. Many States rely on the nuclear capabilities of nuclear-weapon States and have entered into mutual defense arrangements, such as NATO, consistent with the collective self-defense principle recognized in Article 51 of the UN Charter.

Advisory Opinion of the International Court of Justice (ICJ)¹⁴

In 1996, the ICJ issued an advisory opinion on the legality of the threat or use of nuclear weapons. The opinion of the court was advisory only, not binding, and not entirely consistent with the United States view of the current state of international law. Nevertheless, legal professionals should be aware of the six findings by the fourteen member court (the number of votes for each finding are also listed).

1. "There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons." (Unanimous).
2. "There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such." (By 11 votes to 3).
3. "A threat or use of force by means of nuclear weapons that is contrary to article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of article 51 [self-defense], is unlawful." (Unanimous).
4. "A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons." (Unanimous).
5. "It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law. However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake." (By 7 votes to 7).

¹² DoD LAW OF WAR MANUAL, para. 6.7.4. See, *Written Statement of the Government of the United States of America*, 23.

¹³ Charter of the United Nations (1945), 10-11. See Chapter One, *International Use of Force by the United States Air Force*.

¹⁴ Advisory Opinion on the Legality of the Threat or Use of Force of Nuclear Weapons, International Court of Justice, 8 July 1996.

6. “There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.” (Unanimous).

U.S. Declaratory Policy

Concurrent with the role of nuclear weapons to maintain deterrence, the United States has long-held arms control, non-proliferation, and nuclear security objectives. This includes a strong U.S. commitment to the goals of the Treaty on the Non-proliferation of Nuclear Weapons (NPT), a cornerstone of the nuclear non-proliferation regime. In furtherance of the NPT but separate from the actual treaty itself, the United States has provided a negative security assurance to non-nuclear State parties to the NPT through a U.S. declaratory policy regarding the potential employment of nuclear weapons. The negative security assurance is stated in the second paragraph of the current declaratory policy:

The United States would only consider the employment of nuclear weapons in extreme circumstances to defend the vital interests of the United States, its allies, and partners. Extreme circumstances could include significant non-nuclear strategic attacks. Significant non-nuclear strategic attacks include, but are not limited to, attacks on the United States, allied, or partner civilian population or infrastructure, and attacks on United States or allied nuclear forces, their command and control, or warning and attack assessment capabilities.

The United States will not use or threaten to use nuclear weapons against non-nuclear weapons States that are party to the NPT and in compliance with their nuclear non-proliferation obligations.

Given the potential of significant non-nuclear strategic attacks, the United States reserves the right to make any adjustment in the assurance that may be warranted by the evolution and proliferation of non-nuclear strategic attack technologies and U.S. capabilities to counter that threat.¹⁵

As the policy itself makes clear, the assurance is not legally binding. In addition to the NPT, the United States has certain obligations pursuant to nuclear-weapon free zones that are discussed below.

ENVIRONMENTAL EFFECTS

The use of nuclear weapons may have adverse effects on the environment; however, existing international agreements do not address nuclear weapons’ impact on the environment. Additional Protocol I to the Geneva Conventions (AP I) prohibits the use of methods or means of warfare intended, or expected, to cause “widespread, long-term and severe damage” to the natural environment.¹⁶ There is no consensus that this prohibition would apply to nuclear weapons. The United States is not a party to AP I and does not consider this provision to be reflective of customary international law; nor is AP I applicable to nuclear weapons.¹⁷

¹⁵ NPR, 21.

¹⁶ Arts. 35 and 55.

¹⁷ DoD LAW OF WAR MANUAL, para. 6.18.3. (“Parties to AP I have understood AP I provisions not to regulate or prohibit the use of nuclear weapons.”); the United Kingdom and France, both parties to AP I and nuclear-weapon States, lodged a reservation upon ratification of AP I confirming their understanding that the rules contained in AP I are only applicable to conventional weapons.

The Environmental Modification Convention (ENMOD) does not apply to nuclear weapons. ENMOD generally prohibits States from engaging in military or other hostile use of environmental modification techniques having “widespread, long-lasting or severe effects as the means of destruction, damage, or injury.”¹⁸ The ENMOD reflects the general international consensus that the environment itself should not be used as an instrument of war, but it does not prohibit damage to the environment resulting from armed conflict. While the use of a nuclear weapon may have considerable effects on the environment, its purpose is not the deliberate manipulation of the environment. Any effect on the environment is simply a byproduct of its use.¹⁹

In addition to environmental provisions related to the law of war, it is important to note the position regarding the more general international environmental law. No international environmental instrument expressly applies during armed conflict. Furthermore, no such instrument expressly prohibits or regulates the use of nuclear weapons. As a result, there is no customary international law prohibition on the use of nuclear weapons on account of their environmental effects.

NUCLEAR COMMAND AND CONTROL

Planning for the potential employment of U.S. nuclear forces proceeds through a deliberate and methodical process consistent with that used for the planning of conventional forces. U.S. Strategic Command (USSTRATCOM) and the geographic combatant commands nominate, vet, and select targets. Once selected, a physical vulnerability assessment evaluates a target’s susceptibility to the effects of a nuclear weapon. The next step involves a weaponeering analysis and the identification of weapon aim points. Finally, force planning brings together target development and weaponeering analysis with available forces. The USSTRATCOM judge advocate’s office participates in this process and ensures proposed plans are consistent with the law of war. The Commander, USSTRATCOM has combatant command (COCOM) authority over the intercontinental ballistic missile (ICBM) and specified bomber forces.

One significant difference between nuclear and conventional weapons is the level of authority required for employment. While the SecDef, the Chairman of the Joint Chiefs of Staff (CJCS), and the combatant commanders (CCDRs) may advise the President, the President retains sole authority for the execution and termination of nuclear options.²⁰ The Nuclear Command and Control System (NCCS) plays a critical role in enabling this decision-making conference and, if determined, receiving Presidential orders to execute or terminate a nuclear strike.²¹

NC2 is the exercise of authority and direction by the President, as Commander in Chief, through established national command authority lines, over nuclear weapons, nuclear weapons systems, and nuclear weapon operations of military forces. Nuclear command, control, and communications (NC3) is the means through which the President executes this authority.²² NC3 provides an integrated system comprised of facilities, equipment, communications, procedures, and personnel. NC3 is essential to the proper execution of the National Military Command System (NMCS), which includes continuous, survivable, and secure NC2.

¹⁸ Convention on the Prohibition of Military or Any other Hostile Use of Environmental Modification Techniques, 18 May 1977 (The United States signed on 15 May 1977 and ratified on 17 January 1980), Art. 1.

¹⁹ DoD LAW OF WAR MANUAL, para. 6.10.3.

²⁰ AFI 13-520, *Nuclear, Space, Missile, Command and Control* (22 August 2018), 1.3.

²¹ *Id.*

²² *Id.*

Facilities which comprise the NC3 include the National Military Command Center (NMCC), the Global Operations Center (GOC), the E-4B National Airborne Operations Center (NAOC), and the E-6B Take Charge and Move Out (TACAMO)/Airborne Command Post. The primary facility is the NMCC, which is located within the Pentagon. The NMCC provides daily support to the President, the SecDef, and the CJCS, allowing for the monitoring of nuclear forces and ongoing conventional military operations. The GOC is located with USSTRATCOM at Offutt Air Force Base, Nebraska. The GOC enables the Commander of USSTRATCOM to conduct command and control while also enabling the day-to-day management of forces and the monitoring of world events. In the event fixed command centers are unavailable, both the E-4B NAOC and the E-6B TACAMO/Airborne Command Post provide a survivable alternative.

Air Force Global Strike Command (AFGSC) is the air component MAJCOM of USSTRATCOM. In this role, AFGSC provides combat-ready forces for deterrence and global strike operations on behalf of the President and CCDRs. To fulfill this responsibility, the AFGSC Commander is dual-hatted as both the Commander, Air Forces Strategic-Air (COMAFSTRAT-Air) and the Joint Force Air Component Commander (JFACC). The Joint Global Strike Operations Center (J-GSOC) serves as the primary command and control center for all operations within AFGSC. The J-GSOC supports COMAFSTRAT-Air/JFACC with operational and tactical-level planning and day-to-day employment of assigned and attached forces for USSTRATCOM global strike operations, to include bomber and ICBM forces.

NUCLEAR TREATIES AND AGREEMENTS²³

There are numerous treaties and agreements which focus on arms control and nonproliferation efforts of nuclear weapons, including the deployment, testing, and proliferation of nuclear weapons. Listed below are significant nuclear-related treaties and agreements which may need to be considered during nuclear weapons-related operations. Several of these agreements are either no longer legally binding or never entered into force, but they still provide important historical or situational awareness. Any agreement between the United States and the former Soviet Union is still applicable to the Russian Federation unless otherwise identified, as Russia acceded to the Soviet Union's treaty obligations following the breakup of the Soviet Union.

Limited Test Ban Treaty or LTBT

Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water (Limited Test Ban Treaty or LTBT).

- Opened for signature: 1963
- Entry into force: 1963

The LTBT prohibits all nuclear weapons tests and all nuclear explosions in the atmosphere, in outer space or anywhere underwater, including on the high seas. It does not prohibit underground testing, but it does prohibit test explosions that would result in the spread of radioactive debris outside the testing nation's national boundaries.²⁴ The LTBT does not restrict use of nuclear weapons in time of war.

²³ See, *Nuclear Matters Handbook*, ch. 12.

²⁴ *Nuclear Matters Handbook*, 200.

Nuclear Nonproliferation Treaty or NPT

Treaty on the Nonproliferation of Nuclear Weapons (Nuclear Nonproliferation Treaty or NPT).

- Opened for signature: 1968
- Entry into force: 1970
- Extended indefinitely: 1995

The NPT prohibits the nuclear weapons states (NWS) from transferring nuclear weapons or nuclear weapons technology to non-nuclear weapons states (NNWS).²⁵ NWS as defined in the treaty includes only the United States, Russia, United Kingdom, France, and China. It does not include other countries which have since acquired nuclear weapons, such as India and Pakistan. The U.S. negative security assurances to encourage non-nuclear States to become parties to the NPT and related safeguard and nonproliferation agreements are discussed above.

Anti-Ballistic Missile Treaty (ABM)

Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems (Anti-Ballistic Missile Treaty or ABM Treaty).

- Signed: 1972
- Entry into force: 1972
- United States withdrawal: 2002

Strategic Arms Limitation Talks (SALT I)

Interim Agreement Between the United States of America and the Union of Soviet Socialist Republics on Certain Measures with Respect to the Limitation of Strategic Offensive Arms (Strategic Arms Limitation Talks or SALT I).

- Signed: 1972
- Entry into force: 1972

Threshold Test Ban Treaty (TTBT)

Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Underground Nuclear Weapon Tests (Threshold Test Ban Treaty or TTBT).

- Signed: 1974
- Entry into force: 1990

²⁵ U.S. responsibilities under arrangements with NATO that would involve the transfer of control over U.S. nuclear weapons in a war situation are consistent with U.S. obligations under the NPT. The NPT only prohibits the transfer of nuclear weapons or control over them, not the transfer of delivery vehicles or systems, nor does it prohibit consultations and planning on nuclear defense so long as no transfer of nuclear weapons or control over them results. The deployment of U.S. nuclear weapons to allied territory does not involve the transfer or control over U.S. nuclear weapons, “unless and until a decision were made to go to war, at which time the treaty would no longer be controlling.” Testimony of Dean Rusk, U.S. Secretary of State on 10 July 1968 in Executive Report 91-1, 91st Congress, 1st Session (6 March 1969) at 3-4.

Peaceful Nuclear Explosions Treaty (PNET)

Treaty Between the United States of America and the Union of Soviet Socialist Republics on Underground Nuclear Explosions for Peaceful Purposes (Peaceful Nuclear Explosions Treaty or PNET).

- Signed: 1976
- Entry into force: 1990

Strategic Arms Limitation Treaty (SALT II)

Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Strategic Offensive Arms (Strategic Arms Limitation Treaty or SALT II).

- Signed: 1979
- SALT II never entered into force, although both sides complied with its provisions until 1986

Intermediate-Range Nuclear Forces Treaty (INF)

Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of their Intermediate-Range and Shorter-Range Missiles (Intermediate-Range Nuclear Forces Treaty or INF Treaty).

- Signed: 1987
- Entry into force: 1988
- United States withdrawal: 2019

The INF Treaty provided for the elimination of intermediate-range nuclear missiles, those with a range of 500-5500 kilometers. This agreement was the first to eliminate an entire class of nuclear missiles. The United States officially withdrew from the INF Treaty on 2 August 2019.²⁶

Strategic Arms Reduction Talks (START)

Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Reduction and Limitation of Strategic Offensive Arms (Strategic Arms Reduction Talks (START) Treaty).

- Signed: 1991
- Entry into force: 1994
- Expired 2010

Presidential Nuclear Initiatives

- Announced 1991

The United States eliminated its ground-launched theater nuclear weapons and the President withdrew all tactical nuclear weapons from U.S. surface ships and attack submarines, as well as those associated with U.S. land-based naval aircraft.

²⁶ *Nuclear Matters Handbook*, 204.

START II

Treaty Between the United States of America and the Russian Federation on Further Reduction and Limitation of Strategic Offensive Arms (START II).

- Signed: 1993
- START II never entered into force

Comprehensive Nuclear Test-Ban Treaty (CTBT)

- Opened for signature: 1996
- CTBT has not entered into force

The CTBT has not yet entered into force. It would prohibit parties to the treaty from carrying out any nuclear test explosions. It would also prohibit parties from detonating any nuclear explosion at any place under their control and to refrain from encouraging or participating in the carrying out of any nuclear explosion.

Strategic Offensive Reductions Treaty (SORT, or Moscow Treaty)

Treaty Between the United States of America and the Russian Federation on Strategic Offensive Reductions (Strategic Offensive Reductions Treaty, SORT, or Moscow Treaty).

- Signed: 2002
- Entry into force: 2003
- Euperseded by New START Treaty

New START Treaty

Treaty Between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms (New START Treaty).

- Signed: 2010
- Entry into force: 2011

Under the New START Treaty, the United States and Russia agreed to reduce the number of strategic nuclear missile launchers. Rather than set specific limits on each type of launcher (ICBM, submarine-launched ballistic missiles (SLBM), or heavy bomber equipped for nuclear armaments), each party has flexibility to determine the structure of its strategic forces so long as the overall forces comply with the aggregate limits set by the Treaty. The aggregate limits set by the Treaty are:

- 1,550 deployed warheads. Warheads on deployed ICBMs and deployed SLBMs count toward this limit and each deployed heavy bomber equipped for nuclear armaments counts as one warhead toward this limit;
- A combined limit of 800 deployed and non-deployed ICBM launchers, SLBM launchers, and heavy bombers equipped for nuclear armaments; and
- A separate limit of 700 deployed ICBMs, deployed SLBMs, and deployed heavy bombers equipped for nuclear armaments.

The Treaty **will expire 5 February 2021**, but can be extended by the parties for an additional five years.

Treaty on the Prohibition of Nuclear Weapons (TPNW)

- Opened for signature: 2017
- TPNW has not yet entered into force

The TPNW seeks to prohibit the use of nuclear weapons. Parties to the treaty agree not to use, threaten to use, develop, produce, manufacture, acquire, possess, stockpile, transfer, station, or install nuclear weapons or other nuclear explosive devices or assist with any of these prohibited activities. The existence of this agreement further illustrates the legality of nuclear weapons. If customary international law prohibited the use or threat to use nuclear weapons, then there would be no need for the TPNW. The TPNW opened for signature on 20 September 2017. It has not yet entered into force. As of January 2020, the TPNW had 81 signatory states, 35 of which had ratified the Treaty. No nuclear weapon State has signed it, including the United States.

Nuclear Weapon-Free Zones

Nuclear Weapon-Free Zones prohibit the stationing, testing, use, and development of nuclear weapons inside a geographical region.²⁷ There are five existing Nuclear Weapon-Free Zones established by treaty: Latin America (Treaty of Tlatelolco), the South Pacific (Treaty of Rarotonga), Southeast Asia (Bangkok Treaty), Africa (Pelindaba Treaty), and Central Asia (CANWFZ Treaty).²⁸ Planners should be aware of these zones and understand their impact on operations.

The United States has ratified Additional Protocols I and II to the Treaty for the Prohibition for Nuclear Weapons in Latin America and the Caribbean (Treaty of Tlatelolco),²⁹ subject to stated understandings and declarations. As a result, the United States is precluded from stationing nuclear weapons within the zone of application of the Treaty and from using (or threatening to use) nuclear weapons against a Treaty party.³⁰ The effect of the United States understandings and declarations is that:

1. The United States retains the right to transport or transit nuclear weapons through or over U.S. territories, U.S. national waters, and international waters located within the zone of application of the treaty.
2. Treaty parties can permit the same transportation or transit through or over their territories (including their national waters).
3. The United States would not be bound by the prohibition against the use or threat to use nuclear weapons against a treaty party if that treaty party is assisted in an armed attack by a nuclear weapon State.

U.S. territories within the Treaty zone include Puerto Rico, U.S. Virgin Islands, Guantanamo Bay Base, Navassa Island, Seranilla Bank and Bajo Neevo (Petrel Island).

²⁷ *Nuclear Matters Handbook*, 194-195.

²⁸ *Id.* 198.

²⁹ Additional Protocol I to the Treaty of February 17, 1967, for the Prohibition of Nuclear Weapons in Latin America, 33 U.S.T. 1792; T.I.A.S. 10147, entered into force for the United States November 23, 1982; Additional Protocol II to the Treaty of February 17, 1967, for the Prohibition of Nuclear Weapons in Latin America, 22 U.S.T. 754; T.I.A.S. 7137, entered into force for the United States May 12, 1971.

³⁰ *Id.* 195-196.

The United States is also a signatory to Protocols I and II to the African-Nuclear-Weapons-Free Zone Treaty;³¹ Protocols 1, 2, and 3 to the South Pacific Nuclear Free Zone Treaty;³² and the Protocol to the Treaty on a Nuclear-Weapon-Free Zone in Central Asia.³³ Although not a party to the protocols, as a signatory to them, the United States is obligated under international law to refrain, in good faith, from acts which would defeat the object and purpose of the treaty.³⁴ Like the Protocols to the Treaty of Tlatelolco, these protocols include provisions whereby the parties to them (nuclear weapons States) undertake not to use or threaten to use any nuclear explosive device against treaty parties or in the geographically defined areas of the zones. Although the United States has not yet ratified these protocols, the Obama Administration's Letters of Submission to the Senate included recommendations for declarations and understandings similar to those for the Treaty of Tlatelolco, including a statement in the United States instrument of ratification that the United States will not use or threaten to use nuclear weapons against any party to the Treaty which is a non-nuclear weapons State party to the NPT and in compliance with its nuclear non-proliferation obligations.³⁵

Other treaties also deal with the denuclearization of certain areas. These treaties include:

- *Antarctic Treaty*. Opened for signature: 1959; entry into force: 1961.
- *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (Outer Space Treaty)*. Opened for signature: 1967; entry into force: 1967.
- *Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof (Seabed Treaty)*. Opened for signature: 1971; entry into force: 1972.
- *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (Moon Agreement)*. Opened for signature: 1979; entry into force: 1984.

Outer Space Treaty

The Outer Space Treaty prohibits the placement of nuclear weapons or other WMD in orbit, on celestial bodies to include the Moon, or in outer space. It does not prohibit the launching of ballistic missiles armed with nuclear warheads that only temporarily transit through space. The United States has signed and ratified the Outer Space Treaty. The United States has also signed and ratified the Seabed Treaty. This Treaty prohibits the placement of WMD on the ocean floor at any point outside the 12 nautical mile territorial seas of a nation. Similar to the Outer Space Treaty, the Seabed Treaty only applies to the placement of nuclear weapons. It does not prohibit the use of nuclear devices not affixed to the seabed or ocean floor such as nuclear depth charges and nuclear torpedoes.

³¹ Senate, *Message From The President Of The United States Transmitting Protocols I And II To The African Nuclear-Weapon-Free Zone Treaty, Signed On Behalf Of The United States At Cairo, Egypt, On April 11, 1996, Including A Third Protocol Related To The Treaty*, 112th Cong., 1st sess., 2011 (Treaty Doc. 112-3).

³² Senate, *Message From The President Of The United States Transmitting Protocols 1, 2, And 3 To The South Pacific Nuclear Free Zone Treaty, Signed On Behalf Of The United States At Suva On March 25, 1996*, 112th Cong., 1st sess., 2011.

³³ Senate, *Message From The President Of The United States Transmitting The Protocol To The Treaty On A Nuclear-Weapon-Free Zone In Central Asia, Signed At New York On May 6, 2014 (The "Protocol")*, 114th Cong., 1st sess., 2015.

³⁴ See, Vienna Convention on the Law of Treaties (1969), Arts. 10 and 18.

³⁵ Treaty Doc. 112-3, 9.

In addition to these agreements, individual countries have also enacted legislation that limit nuclear operations. For example, Mongolia has declared itself nuclear weapon-free. The UN recognized this status in its General Assembly Resolution 55/33S.³⁶ And in 1987, New Zealand enacted the Nuclear Free Zone, Disarmament, and Arms Control Act. This Act bans both nuclear-armed and nuclear-powered ships from entering New Zealand waters. Judge advocates should be aware of these and other host nation sensitivities related to nuclear operations when advising planners.

NUCLEAR OPERATIONS

Nuclear operations occur daily. Nuclear and Missile Operations Officers stand watch every day in underground alert facilities deployed across more than 33,600 square-miles of central Montana, western North Dakota, eastern Wyoming, western Nebraska and northern Colorado. Nuclear Weapons specialists inspect, store and repair weapons and associated equipment. Other Airmen provide care, feeding, and force protection. The massive nature of this effort requires the regular use of nuclear convoys, escorted by armed helicopters, to transport sensitive nuclear-related equipment across miles of public highway. This strategic deterrent mission happens 24 hours a day, seven days a week, 365 days a year. As a result, the majority of issues regarding nuclear operations will actually arise outside the scope of armed conflict. While many of the issues a judge advocate might encounter will generally overlap with other domestic operations, there are some unique considerations which apply to nuclear operations.

Force Protection

Given the significant national security implications of nuclear operations, additional considerations are applicable in the defense of nuclear assets and operations. Ordinarily the use of deadly force by DoD personnel is “justified only under conditions of necessity and may be used only when lesser means cannot be reasonably employed or have failed and the risk of death or serious bodily harm to innocent persons is not increased by its use.”³⁷ Department of Defense Directive (DoDD) 5210.56, however, provides two exceptions relevant to nuclear operations. DoD personnel may use deadly force when it appears reasonably necessary to prevent the actual theft of or sabotage to assets vital to national security or inherently dangerous property.³⁸ Assets vital to national security are President-designated non-DoD and/or DoD property, the actual theft or sabotage of which the President determines would seriously jeopardize the fulfillment of a national defense mission and would create an imminent threat of death or serious bodily harm.³⁹ Examples of assets vital to national security would include nuclear weapons, nuclear command and control facilities, special nuclear materials, and designated restricted areas containing strategic operational assets, sensitive codes, or special access programs. Inherently dangerous property is property that, if in the hands of an unauthorized individual, would create an imminent threat of death or serious bodily harm.⁴⁰ Special nuclear materials qualify as inherently dangerous property. These rules apply only to the use of force for peacetime security operations, and are codified in CJCSI 3121.01B, Enclosure L (Standing Rules for the Use of Force for U.S. Forces) and N (Land Contingency and Security-Related Operations Within U.S. Territory), and AFI 31-117, *Arming and Use of Force by*

³⁶ 20 November 2000.

³⁷ DoDD 5120.56, *Arming and the Use of Forces*, 18 November 2018, 1-26; 17.

³⁸ *Id.*

³⁹ *Id.* 22.

⁴⁰ *Id.* 23.

Air Force Personnel. DoD military personnel engaged in military operations should comply with their applicable rules of engagement (ROE), and not DoDD 5210.56.

Incident Response

DoD and the Department of Energy are the only federal agencies which can have custody of U.S. nuclear weapons.⁴¹ DoD is the coordinating agency for incidents occurring on all DoD-owned or operated facilities, and for incidents involving a nuclear weapon, special nuclear material, or nuclear components under DoD custody. The agency with custody of a U.S. nuclear weapon involved in an incident (including a recapture/recovery incident) retains custody throughout the response even if the agency does not always maintain control through the entire incident. It is DoD policy to consider all U.S. nuclear weapon incidents to be the result of hostile acts until proven otherwise.⁴²

In the event of a nuclear incident involving the DoD, the closest, capable DoD installation will deploy an initial response force (IRF). A legal representative should be included in the IRF. The IRF commander will assume U.S. military command of the incident site, provide security forces, and set up a National Defense Area (NDA) if warranted. The purpose of the IRF is to provide initial safety, security, and initial render-safe actions. For all incidents, the IRF commander will coordinate with the civilian incident commander consistent with the National Response Framework for domestic incidents, and with host nation civilian authorities for incidents outside the United States. The IRF commander will retain control of U.S. forces at the scene until relieved by the response task force (RTF) commander. Upon arrival of the RTF, the IRF will become part of the RTF.

An RTF is a DoD response force led by a general/flag officer, and is appropriately staffed, trained, and equipped to coordinate all actions necessary to respond to a nuclear weapon incident, whether on or off DoD installations. The specific purpose of the RTF is to direct DoD consequence management activities at a U.S. nuclear weapon incident site. Geographic CCDRs assume OPCON of RTFs at an appropriate time in the response as directed by the SecDef.

⁴¹ DoDI 3150.10, *DoD Response to U.S. Nuclear Weapons Incidents* (2 July 2010), 1-17; 2.

⁴² *Id.* 1.

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