

LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOLUME II

FULL SPECTRUM OPERATIONS (2 MAY 2003 – 30 JUNE 2004)

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LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOLUME II

FULL SPECTRUM OPERATIONS (2 MAY 2003 – 30 JUNE 2004)

In the name of God, the Merciful, the Compassionate

Preamble

We the people of Afghanistan:

- 1. With firm faith in God almighty and relying on His lawful mercy, and Believing in the Sacred relation of Islam,*
- 2. Realizing the injustice and shortcoming of the past, and the numerous troubles imposed on our country,*
- 3. While acknowledging the sacrifices and the historic struggles, rightful Jihad and just resistance of all people of Afghanistan, and respecting the high position of the martyrs for the freedom of Afghanistan,*
- 4. Understanding the fact that Afghanistan is a single and united country and belongs to all ethnicities residing in this country,*
- 5. Observing the United Nations Charter and respecting the Universal Declaration of Human Rights,*
- 6. For consolidating national unity, safeguarding independence, national sovereignty, and territorial integrity of the country,*
- 7. For establishing a government based on people's will and democracy,*
- 8. For creation of a civil society free of oppression, atrocity, discrimination, and violence and based on the rule of law, social justice, protection of human rights, and dignity, ensuring the fundamental rights and freedoms of the people,*
- 9. For strengthening of political, social, economic, and defensive institutions of the country,*
- 10. For ensuring a prosperous life, and sound environment for all those residing in this land,*
- 11. And finally for regaining Afghanistan's deserving place in the international community,*

Have adopted this constitution in compliance with historical, cultural, and social requirements of the era, through our elected representatives in the

*Loya jirga dated 14 Jaddi 1382 in the city of Kabul.*¹

--2004 Afghan Constitution

We, the coalition, [continue] to do all we can to improve the lives of all Iraqi citizens. . . . The coalition came here to liberate all Iraqis from Saddam Hussein, his regime, and the clear danger which they posed to us all. . . . Many of you are now free from the first time. Free to speak openly, free to live without fear of torture or repression, free to practice your own religion as you choose, free to leave and enter your country as your wish. . . . We came here to give you those freedoms, and to protect them as we help you build your democratic future for your country. Our task is to ensure that fragile, and hard-won freedoms that you are now starting to enjoy are not removed by elements of the old regime who continue to attack you, to attack us, and to attack the services vital to you . . .

*In recent days, my colleagues and I have been working with many Iraqis from all over the country to quicken the march towards political responsibility for Iraqis. All of Iraq's main cities, and dozens of other towns, now have administrative councils. Within two weeks, the new Iraqi Governing Council will be established. And shortly thereafter, we will launch the process to write a new Iraqi Constitution. This will be your new constitution: written by Iraqis, debated by Iraqis and approved by Iraqis. It will not be written by Americans or British or anyone else. Once a new constitution has been approved, Iraq's new Government will be chosen by Iraq's first democratic, free and fair elections. At that point, the coalition's job will be done.*²

– Ambassador L. Paul Bremer,
Administrator, Coalition Provisional Authority

I. Introduction

The terrorist attacks of 11 September 2001 and the resulting “Global War on Terrorism,” or GWOT, continued to shape U.S. foreign and domestic policy after President George Bush declared an end to major combat operations in Iraq and Afghanistan on 1 May 2003. Although major combat operations had ended, the U.S. and its Coalition Forces continued to conduct offensive operations in both Afghanistan and Iraq, using military force to root out terrorists and insurgents. At the same time,

¹ Unofficial translation of the 2004 Afghan Constitution, *found at* www.hazara.net/jirga/afghanconstitution-final.pdf (last visited 30 May 2005).

² Press Release Number 0010, Coalition Provisional Authority, subject: Text of Ambassador Paul Bremer's Message to the Iraqi People (3 Jul. 2003) (on file with CLAMO).

Coalition Forces conducted stability and support operations, bringing needed reconstruction and reform to government services and humanitarian assistance to private citizens. The focus of this Publication is on the legal issues in the full spectrum of these military operations—from providing legal advice on Rules of Engagement (ROE) for conducting offensive operations to the fiscal law issues involved in providing humanitarian assistance.

Specifically, the focus of Volume II is on the lessons learned by military legal personnel involved in Operations ENDURING FREEDOM (OEF) (primarily Afghanistan) and IRAQI FREEDOM (OIF) (Iraq) after President George Bush declared an end to major combat operations in Afghanistan and Iraq on 1 May 2003 until 30 June 2004, two days after the transfer of sovereignty to an Iraqi Interim Government. Volume I of this Publication outlined the many challenges that judge advocates (JAs) and enlisted paralegals faced in applying law to missions that oftentimes presented unique admixtures of war and law enforcement—as the GWOT’s seemingly incongruous grouping of the terms “war” and “terrorism” suggests—that did not always fit neatly into established legal paradigms.

If possible, legal teams grappled with even more complex international law issues during the period covered by Volume II. In particular in Iraq, legal teams struggled to apply the international laws of belligerent occupation for the first time since the end of World War II. International law issues concerning judicial reconstruction and reform, detention operations, proper interrogation techniques, and civilians on the battlefield were significant legal issues confronted by legal teams in both countries. Additionally, JAs continued to be out in front of the complex ROE issues presented to a Coalition Force who oftentimes could not positively identify their enemy, using real-world vignettes and tactics, techniques, and procedures to provide continual ROE instruction to service members. At the same time, legal teams continued to provide legal advice on complex contract and fiscal law issues, and to assist with myriad administrative law issues, including hundreds of administrative investigations. The legal teams’ claims mission also took on new importance, as compensating local citizens for injury, death, or property damage or loss became an important part of the command’s information operations campaign.

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

Legal teams have imparted these lessons in a variety of ways. Unit legal offices as well as individual JAs and paralegals have provided excellent written after action

reports. CLAMO has traveled to units and conducted multi-day review conferences. The Center also has conducted videotaped interviews with legal personnel passing through TJAGLCS for further training, and has gathered information from numerous informal telephonic and in-person interviews and e-mail exchanges with personnel involved in OEF and OIF. Moreover, CLAMO has a vast collection of primary documents from the Operations, ranging from legal annexes to information papers to ROE serials. Many of these documents appear as Appendices to this Publication. Finally, for this Publication, CLAMO has added an entire chapter on lessons learned and observations from JAs assigned to Civil Affairs units. In many cases, these JAs worked side-by-side with legal teams assigned to conventional units. Oftentimes, they were at the forefront of Coalition judicial reconstruction and reform efforts in concert with other legal teams. Thus, as the conventional JA mission has evolved to include governance issues, including judicial reconstruction and reform, lessons learned from these Civil Affairs JAs have taken on added significance for all legal teams.

The Publication, however, does not represent the views of every single JA and paralegal who served in OEF and OIF. The number of units, levels of command, and legal personnel involved made such an undertaking simply too difficult. Nonetheless, the source material for this Publication represents a rich assortment of primary references. It must be emphasized, however, that this Publication is a lessons learned compilation, not an historical recitation of JA and paralegal participation in OEF and OIF, and therefore does not specifically cite all of the material supplied by the JAs and paralegals who contributed to this project.

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

Draft versions of these lessons were staffed back through the military legal community prior to publication. The comments of all who provided feedback undoubtedly made this a better product, one that CLAMO hopes will assist future legal personnel before they deploy in support of future operations. It is for these legal personnel—the Army and Marine Corps JAs and paralegals supporting commanders and troops on the ground—that this Publication is written.

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

II. Continuing Military Operations and Reconstruction

A. REVIEW.

As discussed in Volume I of this Publication, during the period 11 September 2001 to 1 May 2003, the United States engaged in major combat operations in two different theatres—Afghanistan (Operation EDURING FREEDOM (OEF)) and Iraq (Operation IRAQI FREEDOM (OIF)).³ After the 11 September 2001 attacks on the United States, U.S. and Coalition Forces, using primarily air power and Special Forces combined with indigenous Afghani Northern Alliance forces, drove the Taliban regime and its al Qaeda terrorist supporters from power in Afghanistan. A new internationally supported Afghan government—the Afghan Interim Authority (AIA)—was formed in December 2001 and began the process, with significant U.S., Coalition and other help, of rebuilding Afghanistan. As of 1 May 2003, U.S. and Coalition Forces, together with the United Nations (U.N.)-created International Security Assistance Force, remained in Afghanistan at the request of the Afghani government to effect the rebuilding process and eliminate the remaining Taliban and al Qaeda forces.

In Iraq, after continued refusal by the Saddam Hussein regime to comply with U.N. Security Council (UNSC) Resolutions regarding inspection and destruction of weapons of mass destruction, the United States and a “coalition of the willing” initiated a conventional combined arms campaign against Iraq. After three weeks of heavy combat, Baghdad fell and the Saddam Hussein regime was toppled. As of 1 May 2003, the United States and its Coalition allies were struggling to begin the reconstruction of Iraq amid sporadic violence conducted by remnants of the regime, foreign fighters, and other resistance forces. Authority for governing Iraq pending reconstitution of the Iraqi government was soon placed in the hands of the Coalition Provisional Authority (CPA), headed by U.S. Ambassador L. Paul Bremer III.

B. AFGHANISTAN (OEF).

1. *Military Operations.*

a. Coalition Forces.

³ See CENTER FOR LAW AND MILITARY OPERATIONS, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, VOLUME I: MAJOR COMBAT OPERATIONS (11 September 2001 – 1 May 2003), ch. II (1 Aug. 2004) [hereinafter Volume I, Afghanistan and Iraq Legal Lessons Learned].

During 2003-04, the U.S. Army continued to rotate brigade-size units through Afghanistan on a six-month basis. In August 2003, the 1st Brigade (Warrior Brigade) from the 10th Mountain Division (OEF-A 4) replaced elements of the 82nd Airborne Division (OEF-A 3).⁴ In February 2004, a brigade of the 25th Infantry Division rotated to Afghanistan (OEF-A 5). In late 2003, the Marine Corps deployed the 2nd Battalion of the 8th Marine Division to Afghanistan.⁵ In April 2004, more than 2,200 Marines of the 22nd Marine Expeditionary Unit (Special Operations Capable) (MEU (SOC)) began operations in the country.⁶ In April 2004 when the 10th Mountain Division headquarters was replaced by the headquarters of the 25th Infantry Division, Combined Joint Task Force (CJTF) 180 became CJTF-76.⁷ The CJTF-76 became the operational headquarters in Afghanistan, subordinate to Combined Forces Command-Afghanistan, the strategic headquarters for the country.⁸

Beginning in August 2003 Afghan militia forces and Coalition Forces participated in Operation MOUNTAIN VIPER, which resulted in killing nearly 100 enemy fighters and forcing anti-coalition forces to withdraw from many of their positions in the mountains north of Deh Chopan in the Zabul province in Afghanistan.⁹ Operation MOUNTAIN VIPER participants included special operations forces, close air support, and the 1st Brigade of the 10th Mountain Division. Following on Operation MOUNTAIN VIPER, from January to March 2004 Coalition Forces conducted Operation MOUNTAIN BLIZZARD. The operation included nearly 2,000 patrols and over 140 raids and cordon-and-search operations. These resulted in killing dozens of enemy fighters and seizing multiple thousands of rockets, mines, mortar rounds, RPGs, and small arms ammunition.¹⁰

b. The International Security Assistance Force.

The International Security Assistance Force (ISAF), a multilateral military force, was established by the United Nations to assist in creating a secure environment in

⁴ Operation Enduring Freedom - Afghanistan [OEF-A 5] U.S. Forces Order of Battle, 15 January 2005, at http://www.globalsecurity.org/military/ops/oef_orbat.htm. See also Division Soldiers Help Kill Enemy Fighters in Operation Mountain Viper, at http://www.drum.army.mil/sites/news/blizzard/blizzard_archives/hnews.asp?id=1&issuedate=9-11-2003 [hereinafter Operation Mountain Viper].

⁵ Blizzard Ends, Storm Begins, at http://www.military.com/NewsContent/0,13319,usmc2_031604.00.html (last visited 3 June 2005).

⁶ 22 MEU (SOC) Arrives in Afghanistan, at <http://www.usmc.mil/marinelink/mcn2000.nsf/main5/237A35E145B63BBB85256E7700> (last visited 20 Dec. 2004).

⁷ <http://www.globalsecurity.org/military/agency/dod/jtf-180.htm> (last visited 14 Mar. 2005).

⁸ Coalition Forces in Afghanistan as of Oct. 4, 2004, at <http://www.defenselink.mil/home/features/1082004d.html> (last visited 14 Mar. 2005).

⁹ Adapted from Operation Mountain Viper, *supra* note 2.

¹⁰ Operation Mountain Blizzard, at http://www.globalsecurity.org/military/ops/oef-mountain_blizzard.htm (last visited 20 Dec. 2004).

Afghanistan's capital, Kabul.¹¹ The period May 2003 to June 2004 saw a change in its command, as well as increases in its mandate, activities, and composition. On 11 August 2003, the conduct of the ISAF mission became the responsibility of the North American Treaty Organization (NATO), the first time NATO had conducted an operation outside of Europe.¹² Originally limited to providing security in Kabul, the ISAF's mandate was broadened two months later on 13 October 2003 by UNSC Resolution 1510 to include the rest of Afghanistan and additional tasks. Specifically, the resolution authorized:

expansion of the mandate of the [ISAF] to allow it . . . to support the Afghan Transitional Authority and its successors in the maintenance of security in the areas of Afghanistan outside of Kabul and its environs, so that the Afghan Authorities as well as the personnel of the [U.N.] and other international civilian personnel engaged, in particular, in reconstruction and humanitarian efforts, can operate in a secure environment, and to provide security assistance for the performance of other tasks in support of the Bonn Agreement.¹³

As a result, in addition to continuing its patrols of police districts in Kabul with Kabul City Police, the ISAF began:

- Civil Military Cooperation (CIMIC) projects elsewhere in Afghanistan through the use of Provincial Reconstruction Teams (PRTs);
- Supported the convening of the council drafting Afghanistan's new constitution;
- Assisted in operating Kabul Afghan International Airport;
- Helped individual countries in training and developing the new Afghan National Army;
- Supported the Afghan Ministry of Defense in the redeployment and cantonment of heavy weapons; and
- Supported the U.N. Disarmament, Demobilization and Reintegration process for disarming and demobilizing former combatants.¹⁴

¹¹ See S.C. Res. 1386, U.N. SCOR, 56th Sess., 4443rd mtg., U.N. Doc. S.RES/1386 (2001). See also discussion of the ISAF in Volume I, Afghanistan and Iraq Legal Lessons Learned, *supra* note 1, para. II.C.2.c.

¹² International Security Assistance Force – ISAF, *at* <http://www.afnorth.nato.int/ISAF/Backgrounders/BackWhatIsISAF.htm> (last updated 17 Nov. 2004) [hereinafter ISAF Backgrounder]. The ISAF had previously been led by the United Kingdom (Dec. 01 – June 02), Turkey (June 02 – Feb. 03) and Germany (Feb. 03 – Aug. 03).

¹³ S.C. Res. 1510, U.N. SCOR, 58th Sess., 4840th mtg., U.N. Doc. S.RES/1510 (2003).

¹⁴ NATO in Afghanistan Factsheet, *at* <http://www.nato.int/issues/afghanistan/040628-factsheet.htm> (last updated 2 Sep. 2004) [hereinafter NATO Factsheet].

These missions were overseen by ISAF Headquarters, which provided operation-level direction and planning to the Kabul Multinational Brigade. The first PRT to become part of the ISAF chain of command was the military element of the German-led PRT in Kunduz.¹⁵

2. Afghan Government.

In late 2003, the interim Transitional Islamic State of Afghanistan (TISA) government convened a Constitutional Grand Council (Loya Jirga) to develop a new constitution for Afghanistan, which was subsequently signed on 16 January 2004. The constitution provided for a strong executive branch and basic protections for human rights.¹⁶ The adoption of the constitution set the stage for the next phase of rebuilding the Afghan government—election of a President and a Parliament.¹⁷ One of the first priorities of the TISA government was to demobilize and disarm the various Afghan militias and to create a multi-ethnic Afghan National Army (ANA) and Afghan National Police (ANP) force. On 9 February 2003, the 6th ANA Battalion finished its basic training.¹⁸ By late Spring 2004, with the graduation of the 20th ANA Battalion, the United States, together with the United Kingdom and France, had helped train and equip over 10,000 soldiers. In addition, the United States and Germany had trained 18,000 police officers during the same period. The United States, the U.N. and Japan also assisted the TISA government in demobilizing over 8,000 militia members.¹⁹

3. Reconstruction.

The reconstruction of Afghanistan slowly continued during 2003-04. As of late Spring 2004, the United States had repaired 7,000 km of rural roads and was reconstructing and paving an additional 1,000 km of provincial roads. Power was restored to Kandahar and large parts of southern Afghanistan through the U.S.-sponsored repair of the Kajaki Dam turbines. During this time, the U.S. Agency for International Development (USAID) built or renovated 205 schools, trained 4,400 teachers and provided over 25 million textbooks, as well as constructed 140 medical clinics.²⁰

¹⁵ *Id.* As of 15 June 2004, the ISAF numbered 6,500 troops from 37 countries, including nine NATO partner countries and two other non-NATO allies. The principal contributors were Germany (1,909), Canada (1,576), Italy (491), Norway (342) and the United Kingdom (315). The United States' contribution was 67 troops.

¹⁶ Central Intelligence Agency, World Factbook – Afghanistan, at <http://www.cia.gov/cia/publications/factbook/geos/af.html> (last updated 30 Nov. 2004).

¹⁷ The head of the TISA government, Hamid Karzai, was announced as the official winner of the Presidential election on 3 November 2004 with over 55 percent of the vote (elections were held on 9 October 2004). *Id.* See also U.S. Dep't of State, Bureau of South Asia Affairs, Background Note: Afghanistan, at <http://www.state.gov/r/pa/ei/bgn/5380.htm> (last updated Dec. 2004).

¹⁸ White House Office of Global Communication, Fact Sheet: Rebuilding Afghanistan (27 Feb. 2003), at <http://www.state.gov/p/sa/rls/fs/18148.htm>.

¹⁹ U.S. Dep't of State, Bureau of South Asia Affairs, Fact Sheet: New Initiatives for a Peaceful, Prosperous and Democratic Afghanistan (15 Jun. 2004), at <http://www.state.gov/p/sa/rls/fs/33575.htm>.

²⁰ *Id.*

C. IRAQ (OIF).

1. Overview.

On 1 May 2003, President George W. Bush declared an end to major combat operations in Iraq, saying that the battle to topple Saddam Hussein's government was "one victory in a war on terror that began on September 11, 2001, and still goes on."²¹ Brigadier General Daniel Hahn, the chief of staff for the Army's V Corps, accurately predicted on 2 May 2003, "It will look at times like we are still at war."²²

The occupation of Iraq, stretching from the end of major combat operations through the turnover of sovereignty to the interim Iraqi government on 28 June 2004, was marked by instability, insurgency, and lack of security. Coalition Forces operated in a difficult environment that alternated between war and peace, at times battling insurgents while simultaneously assisting the reconstruction. On average, about 135,000 U.S. troops were in Iraq during the occupation, along with about 25,000 Coalition troops. The numbers of new Iraqi government forces grew steadily throughout the occupation, reaching more than 200,000 by the turnover of sovereignty on 28 June 2004. The insurgency consisted of a broad array of forces that opposed the new order: hard-core members of Saddam Hussein's old regime, criminal bands, Iraqi and transnational terrorists, foreign agents, and Iraqi religious factions.

2. Military Operations.

a. Military Command and Authority for Operations.

Initial command of U.S. and Coalition Forces during 2003-04 was the responsibility of Coalition Joint Task Force 7 (CJTF-7), initially commanded by LTG William S. Wallace, the commanding general of V Corps, who was replaced by LTG Ricardo Sanchez in July 2003. CJTF-7 had operational control over all forces within Iraq, including the multinational forces from Great Britain, Poland, Australia, and other countries. General Sanchez reported directly to the U.S. Central Command (USCENTCOM) combatant commander, General John Abizaid.²³

²¹ David Sanger, *Bush Declares 'One Victory in a War on Terror'*, NY TIMES, May 2, 2003, at A1.

²² Michael Gordon, *Between War and Peace*, NY TIMES, May 2, 2003, at A1.

²³ Coalition Joint Task Force 7, at <http://www.globalsecurity.org/military/agency/dod/cjtf-7.htm> (last visited 18 Jan. 2005). The 49 countries publicly committed to the Coalition as of 4 February 2004 were Afghanistan, Albania, Angola, Australia, Azerbaijan, Bulgaria, Colombia, Costa Rica, Czech Republic, Denmark, Dominican Republic, El Salvador, Eritrea, Estonia, Ethiopia, Georgia, Honduras, Hungary, Iceland, Italy, Japan, Kuwait, Latvia, Lithuania, Macedonia, Marshall Islands, Micronesia, Mongolia, Netherlands, Nicaragua, Palau, Panama, Philippines, Poland, Portugal, Romania, Rwanda, Singapore, Slovakia, Solomon Islands, South Korea, Spain, Tonga, Turkey, Uganda, Ukraine, United Kingdom, United States, and Uzbekistan. <http://www.whitehouse.gov/infocus/iraq/news/20030327-10.html>.

On 16 October 2003, the U.N. Security Council unanimously passed Resolution 1511 authorizing an American-led multinational force in Iraq.²⁴ The resolution gave the U.S.-created Coalition Provisional Authority (CPA) an international mandate to maintain troops to “contribute to the maintenance of stability and security in Iraq” while a constitution was drafted and ratified and a new government elected and established. Resolution 1511 also “[U]rge[d] Member States to contribute assistance . . . including military forces” and set 15 December 2003 as the deadline for the establishment of a timeline for creating a democratic government.²⁵

On 15 May 2004, CJTF-7 was disbanded and its mission was given to the Multinational Forces-Iraq (MNF-I), commanded by General George M. Casey, Jr. Subordinate to MNF-I, was the Multinational Corps-Iraq (MNC-I), the majority of which was comprised of the Army’s III Corps headquarters, and the Multinational Security Transition Command (MNSTC-I). The MNC-I’s responsibilities included the tactical fight to suppress the insurgency. MNC-I’s commander was LTG Thomas F. Metz, also commander of III Corps.²⁶ Led by LTG David H. Petraeus, MNSTC-I was charged with preparing Iraqi forces to take responsibility for security from Coalition Forces. Specifically, MNSTC-I’s mission was to:

Organize, train, equip, and mentor Iraqi Security Forces, in order to support Iraq’s ultimate goal of a unified, stable and democratic Iraq, which provides a representative government for the Iraqi people; is underpinned by new and protected freedoms for all Iraqis and a growing market economy; and is able to defend itself and not pose a threat to the region.²⁷

b. Continuing Combat Operations.

In the weeks following the fall of Baghdad, small-scale sporadic attacks on Coalition Forces continued.²⁸ These attacks began to escalate during the summer and

²⁴ See S.C. Res. 1511, U.N. SCOR, 58th Sess., 4844th mtg., U.N. Doc. S.RES/1511 (2003).

²⁵ *Id.* See also Felicity Barringer, *Unanimous Vote by U.N.’s Council Adopts Iraq Plan*, NY TIMES, October 17, 2003, at A1.

²⁶ <http://www.mnf-iraq.com/oif2/senior-leadership/mnci-senior-leaders.htm> (last visited 14 Mar. 2005).

²⁷ MSNTC-I Information, at <http://www.mnstci.iraq.centcom.mil/mission.htm> (last visited 14 Mar. 2005).

²⁸ The most common forms of attacks were through the use of roadside improvised explosive devices (IEDs). Many IEDs were constructed out of unexploded ordinance or out of antipersonnel and antitank mines. Some of the IEDs were configured to detonate remotely using readily available low-technology devices, such as garage door openers, toy car remotes, two-way radios, cellular telephones, and pagers. Many IEDs were placed in median strips along Iraq’s improved highways or under girders. MRE boxes, soda cans, manholes, tunnels burrowed under roads, cement-encased bomb projectiles, and even dead animal carcasses were used by the insurgents to conceal IEDs. Some of the attacks included direct fire on survivors and rescuers immediately following the detonation of the device. Improvised Explosive Devices – Iraq, at <http://www.globalsecurity.org/military/intro/ied-iraq.htm> (last visited 18 Jan. 2005). Another technique involved vehicle borne IED (VBIED) attacks in Iraq. Either a single vehicle was used, or, in other instances, a lead vehicle was used as a decoy or barrier buster. After this vehicle was stopped or neutralized and the Coalition forces moved to inspect or detain, the main VBIED crashed into the crowd

fall of 2003. Operation DESERT SCORPION was begun on 15 June 2003 to attempt to identify and defeat selected Ba'ath party loyalists, terrorist organizations, and criminal elements while simultaneously delivering humanitarian aid. In the central region near Tikrit and Kirkuk, Coalition Forces conducted 36 raids and detained 215 individuals. In Baghdad, Coalition Forces conducted 11 raids and detained 156 individuals. As of 29 July 2003, 13 raids had resulted in the capture of 38 detainees, including nine captured by the 1st Armored Division in the course of seven raids the unit conducted in Baghdad, and the seizure of \$8 million dollars.²⁹ Operation SODA MOUNTAIN was the second major operation conducted by Coalition Forces after the end of the major combat phase in Iraq. During 12-17 July 2003, 141 raids were conducted, resulting in the capture of 611 individuals, including 62 former regime leaders. Thousands of mortar rounds, rocket-propelled grenades, and various other weapons were also seized.³⁰ On 22 July 2003, the Coalition Forces killed Saddam Hussein's two sons, Uday and Qusay, after U.S. forces surrounded their house and engaged them in a ferocious shootout.³¹

Increasing violence during the fall of 2003 resulted in Operation IRON HAMMER. The objective of this operation was to prevent the staging of weapons by insurgents, target enemy operating areas, and destroy enemy forces before they could attack. This was also a joint operation between the Army, Air Force, and Iraqi Civil Defense Corps. On 12 November 2003, the 1st Armored Division's 3rd Brigade began its assault on the city of Baghdad targeting Saddam loyalists and other insurgents. The days leading up to Operation IRON HAMMER had seen an increased wave of violence against Coalition Forces. Major attacks on Coalition Forces included firing on U.S. supply convoys in Samarra, an attack on an Iraqi police station, and a roadside bomb explosion that targeted a British civilian convoy. However, the most devastating attack was the assassination of Hmud Kadhim, the Education Ministry's director general in the Diwaniyah province in the southern town of Diwaniyah. The overwhelming force used in Operation IRON HAMMER resulted in the destruction of many buildings in Baghdad and was a departure from previous, more limited, search and seizure operations. Advanced munitions such as 2,000-pound satellite-guided bombs were dropped on suspected improvised explosive device making camps and 1,000-pound bombs were dropped on terrorist targets in Kirkuk. Coordinated U.S. strikes including an AC-130 gunship crew supporting Army Soldiers who leveled a warehouse that had been used by insurgents. Other

and detonated, increasing the casualty ratio. Vehicle Born IEDs (VBIEDs), at <http://www.globalsecurity.org/military/intro/ied-vehicle.htm> (last visited 18 Jan. 2005).

²⁹ Operation Dessert Scorpion, at http://www.globalsecurity.org/military/ops/desert_scorpion.htm (last visited 18 Jan. 2005).

³⁰ Operation Soda Mountain, at <http://www.globalsecurity.org/military/ops/soda-mountain.htm> (last visited 18 Jan. 2005).

³¹ The Special Operations Forces involved were members of Task Force 20, an elite unit charged with hunting down top targets. The deaths eliminated the two most wanted members of the former Iraqi government after Saddam Hussein himself. Neil MacFarquhar, *Hussein's 2 Sons Dead in Shootout*, U.S. Says, NY TIMES, July 23, 2003, at A1.

targets in Tikrit, Baqouba, and Fallujah were also taken out by heavy artillery, battle tanks, attack helicopters, F-16 fighters, and AC-130 gunships.³²

Former regime head Saddam Hussein was finally arrested without a fight on 13 December 2003 by American Soldiers who found him crouching in an eight-foot hole at an isolated farm near Tikrit.³³ While the arrest elated most Iraqis, it did not quell the insurgency as had been hoped. Two days later, two powerful car bombs exploded at police stations in Baghdad, killing at least six Iraqi officers and wounding more than twenty other people.³⁴ During the spring of 2004, the insurgency began to increase again. By early April 2004, Coalition Forces were trying to put down a rebellion on two fronts: by Sunni loyalists of Saddam Hussein in the "Sunni Triangle" (Baghdad, Falluja-Ramadi, and Tikrit) and by militant Shiites in Baghdad and the south.³⁵

On 1 April, 2004 a mob in Fallujah attacked four American civilians working for an American private paramilitary organization, burned them inside their vehicle, dismembered them, and dragged them through the streets in a manner reminiscent of a similar incident in Mogadishu, Somalia in 1993. In response, U.S. Marines of the I Marine Expeditionary Force and Coalition Forces began Operation VIGILANT RESOLVE on 4-5 April 2004. The Marines were supported by AC-130 gunships at night, and F-15 fighters and AH-1 Cobra attack helicopters in the day. The insurgents fought from hard points and rigged houses, and then melted away to fight again. Of the city's population of 300,000, it appeared that during April 2004 the insurgency involved around 20,000.³⁶

In addition, trouble with militant Shiites began on 29 March 2004 after American troops imposed a sixty-day shut down of *al-Hawsa*, an Iraqi Shia newspaper, charging it with inciting violence. The paper was run by the young fiercely anti-American firebrand Shia cleric Muqtada al-Sadr. On 2-3 April, Sadr called upon his 10,000 man militia to move into open rebellion. More than fifty were killed, as well as eight Americans, in clashes throughout the country. Bomb blasts in the south on 21 April killed scores as it became clear that the new Iraqi police forces were being infiltrated by insurgents. On 17 May, Iraqi Governing Council President Ezzedine Salim was among those killed in a suicide car bombing in Baghdad. On 19 May, U.S. forces along the border between Iraq and Syria trying to stop the infiltration of foreigners bent on joining Iraqi insurgents fired upon what locals described as a wedding party, killing approximately forty. Then, on 20 May, U.S.

³² Operation Iron Hammer, at <http://www.globalsecurity.org/military/ops/oif-iron-hammer.htm> (last visited 18 Jan. 2005).

³³ Susan Sachs, *Hussein Caught in Makeshift Hide-Out; Bush Says 'Dark Era' for Iraqis Is Over*, NY TIMES, December 15, 2003, at A1.

³⁴ Ian Fisher, *Attacks Go On; Car Bomb Kills 6 Iraqi Officers*, NY TIMES, December 16, 2003, at A1.

³⁵ Coalition Provisional Authority Rule of Iraq 2002-2003, at http://www.nmhschool.org/tthornton/mehistorydatabase/united_states_in_iraq.htm (last visited 18 Jan. 2005) [hereinafter CPA Rule].

³⁶ Operation Vigilant Resolve, at <http://www.globalsecurity.org/military/ops/oif-vigilant-resolve.htm> (last visited 18 Jan. 2005).

forces raided the home and offices of Ahmad Chalabi, a member of the Iraqi Governing Council, head of the Iraqi National Congress in the years leading up to the war, and, up to that point, regarded as a key U.S. ally.³⁷

In response to the uprising and growing strength of Muqtada al-Sadr, the 1st Armored Division launched Operation IRON SABER. The operation focused heavily in the area south of Baghdad, in particular the cities of Najaf, Diwaniyah, Al Kut and Karbala where the Mahdi army was the strongest and resulted in a great deal of urban combat. The Mahdi army eventually became entrenched in Najaf where they occupied the holy shrine of Imam Ali. On 23 May, American and Iraqi forces raided a mosque in the holy Shiite city of Kufa where insurgents were storing weapons. Thirty-two militia men loyal to Moqtada al-Sadr were killed. By June, Muqtada al-Sadr had surrendered and called upon his forces to peacefully disband and leave the city. However, al-Sadr was not taken into custody by Coalition Forces. The 1st Armored Division estimated it had killed approximately 7,000 anti-Coalition fighters.³⁸

Throughout the occupation, it became clear that anti-coalition fighters, whatever their origin and inspiration, had adopted a coherent strategy not only to kill members of Coalition Forces when possible, but also to spread fear by destroying public offices and utilities. The strategy by anti-Coalition Forces was to depict the United States as being unable to guarantee public order, as well as to frighten away relief organizations rebuilding Iraq.³⁹

3. *Governing Iraq.*

a. Authority.

The fall of the Saddam Hussein regime and the lack of an easily identifiable and legitimate replacement Iraqi government resulted in the United States and Coalition Forces having to govern Iraq until a replacement Iraqi government could be instituted. This situation raised the issue of whether the international law of occupation should apply, as found in the 1907 Hague Convention IV⁴⁰ and the 1949 Geneva Convention IV.⁴¹ Article 42 of the 1907 Hague Convention IV states that “[t]erritory is considered occupied when it is actually placed under the authority of the hostile army.” The United States and the United Kingdom, the two principal members of the Coalition Forces,

³⁷ CPA Rule, *supra* note 33.

³⁸ Operation Iron Sabre, at <http://www.globalsecurity.org/military/ops/oif-iron-saber.htm> (last visited 18 Jan. 2005).

³⁹ Thom Shanker, *Chaos as a Strategy Against the U.S.*, NY TIMES, August 20, 2003, at A1.

⁴⁰ Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulation Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 [hereinafter 1907 Hague IV Convention], *reprinted in*, Int’l & Operational Law Dep’t, The Judge Advocate General’s Legal Center and School, Law of War Documentary Supplement, 148 (2005) .

⁴¹ Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 [hereinafter GC IV], *reprinted in*, Int’l & Operational Law Dep’t, The Judge Advocate General’s Legal Center and School, Law of War Documentary Supplement, 236 (2005) .

indirectly acknowledged the application of these conventions to their activities in Iraq in communications with and votes in the U.N. Security Council. In a joint letter of 8 May 2003 to the President of the U.N. Security Council, the United States and the United Kingdom stated:

The States participating in the Coalition will strictly abide by their obligations under international law, including those relating to the essential humanitarian needs of the people of Iraq In order to meet these objectives and obligations in the post-conflict period in Iraq, the United States, the United Kingdom and Coalition partners, acting under existing command and control arrangements through the Commander of Coalition Forces, have created the Coalition Provisional Authority, which includes the Office of Reconstruction and Humanitarian Assistance, to exercise powers of government temporarily, and, as necessary, especially to provide security, to allow the delivery of humanitarian aid, and to eliminate weapons of mass destruction⁴²

Subsequently, both countries, as permanent members of the U.N. Security Council, voted on 22 May 2003 for U.N. Security Council Resolution 1483.⁴³ This Resolution “recogniz[ed] the specific authorities, responsibilities, and obligations under applicable international law of [the United States and the United Kingdom] as occupying powers under unified command . . . ” and called upon “all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907.”⁴⁴

The 1907 Hague IV Convention contains a mixture of authorities (with limitations), responsibilities, and prohibitions of an occupying power. Under this Convention, an occupying power is permitted to, *inter alia*, collect taxes for the administration of the occupied territory,⁴⁵ requisition in kind and service contributions for the needs of the army of occupation,⁴⁶ and take possession of the property of the occupied State and seize all means of transmitting news, persons or things and munitions.⁴⁷ Responsibilities include taking all measures in its power to restore and ensure public order and safety,⁴⁸ respecting, unless absolutely prevented, the laws in force in the occupied country,⁴⁹ respecting family rights, lives, private property and religious practices,⁵⁰ and treating municipal property and cultural institutions, even if State-owned,

⁴² Letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council, S/2003/538.

⁴³ S.C. Res. 1483, U.N. SCOR, 58th Sess., 4761st mtg., U.N. Doc. S.RES/1483 (2003) [hereinafter S.C. Res. 1483].

⁴⁴ *Id.*

⁴⁵ 1907 Hague IV Convention, *supra* note 38, arts. 48, 49.

⁴⁶ *Id.* art. 52.

⁴⁷ *Id.* art. 53.

⁴⁸ *Id.* art. 43.

⁴⁹ *Id.*

⁵⁰ *Id.* art. 46.

as private property.⁵¹ An occupying power is specifically prohibited from pillaging⁵² and from forcing the inhabitants to furnish information about the country's army⁵³ or swear allegiance to the occupying power.⁵⁴

The 1949 Geneva Convention (IV) regulations for occupying powers, contained in Section III of the Convention, expand upon and add to the provisions of the 1907 Hague Convention. Of special significance to OIF were the provisions on guaranteed rights, the applicable internal law and limits on its modification, and the treatment of protected persons. Reflecting the negative experiences with “puppet” governments set up by the Nazis in occupied Norway and France during World War II, Article 47 of the Convention declares that protected persons⁵⁵ in the occupied territory cannot be deprived of their rights under the Convention by any changes in the government of the occupied territory or by agreements between that government and the Occupying Power.⁵⁶ The domestic law applicable in Iraq was addressed by Article 64, which provides:

[T]he penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws. The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.⁵⁷

Article 65 goes on to require that any new laws be published and notice given to the inhabitants in their own language prior to coming into force and that such laws may not be retroactive.⁵⁸ Under Section III of Part III of the Convention, no forcible transfers

⁵¹ *Id.* art. 56.

⁵² *Id.* art. 47.

⁵³ *Id.* art. 44.

⁵⁴ *Id.* art. 45.

⁵⁵ Protected persons are defined as “civilian nationals within the national territory of each of the parties to the conflict.” GC IV, *supra* note 39, art. 4.

⁵⁶ *Id.* art. 47.

⁵⁷ *Id.* art. 64.

⁵⁸ *Id.* art. 65. CPA Order Number 7 revived the 3rd edition of the 1969 Iraqi Penal Code with Amendments, except for parts of Part II and for capital punishment, which was suspended. CPA Memorandum Number 3 revived the 1971 Criminal Procedure rules with numerous suspensions and the addition of a rights warning. MAJ Sean Watts, The Law of Occupation, Power Point Presentation to the 43rd Operational Law Course (10 Mar. 2005) [hereinafter Watts Presentation] (on file in CLAMO).

or deportations of protected persons are allowed⁵⁹ and the Occupying power is required, *inter alia*, to: Ensure education and care of children; Ensure hygiene and public health; Protect and respect property; and Permit relief consignments.⁶⁰ Protected persons are allowed to be interned if they meet the qualifications of Articles 41, 42, 43, 68 or 78 of the Convention. Section IV of Part III of the Convention contains the regulations for the treatment of such persons, e.g., the location of the internment, food and clothing, hygiene and medical attention, and religious, physical and intellectual activities.

b. Coalition Provisional Authority.

As discussed in Volume I of this Publication, in May 2003 the United States and its Coalition partners established the Coalition Provisional Authority to administer Iraq until a government was reconstituted.⁶¹ U.N. Security Council Resolution 1483 specifically acknowledged the CPA as the civil authority in Iraq.⁶² The Resolution granted an extraordinary amount of power to the U.S. and Coalition Forces with regard to Iraq's political and economic affairs, including granting them complete control over Iraq's oil revenues.⁶³ This authority, according to the resolution, would last until the installation of a representative, internationally-recognized government. The CPA head was responsible for overseeing and coordinating all executive, legislative, and judicial functions necessary for temporary governance of Iraq. These functions included humanitarian relief, reconstruction, and assistance in forming an Iraqi interim authority. The immediate goal of the CPA was to provide basic humanitarian aid and services such as water, electricity, and sanitation.

Over the course of the fourteen months of its existence, the CPA focused on helping Iraqis build four foundational pillars for their sovereignty: Security, Governance, Essential Services, and Economy. In the security area, the CPA assisted the Iraqi government in constructing the means to assume responsibility for external and internal security, including its own defense and police forces, and in establishing relationships with regional states and with the international community. The CPA also assisted Iraq to clearly define within a legal framework, the roles and accountabilities of organizations providing security. In the governance area, the CPA worked with Iraqis to ensure the early restoration of full sovereignty to the Iraqi people. The 13 July 2003 establishment of a Governing Council and the 1 June 2004 establishment of the Interim Iraqi Government were major steps toward that goal. With regard to essential services, the CPA helped the Iraqi government to reconstitute Iraq's infrastructure, maintain a high level of oil production, ensure food security, improve water and sanitation infrastructure,

⁵⁹ *Id.* GC IV, *supra* note 39, art. 49.

⁶⁰ Watts Presentation, *supra* note 56. GC IV, *supra* note 39, arts. 50-62.

⁶¹ Volume I, Afghanistan and Iraq Legal Lessons Learned, *supra* note 1, para. 2.D.2.d

⁶² S.C. Res. 1483, *supra* note 41.

⁶³ *Id.* Proceeds from the sale of petroleum were deposited into the Development Fund for Iraq, whose goal was to support the economic, humanitarian, and administrative needs of Iraqis. CPA had complete discretion over how these funds were spent in accordance with those goals. The Fund was audited by representatives of the International Advisory and Monitoring Board, whose members included U.N., International Monetary Fund, World Bank, and Arab Fund for Social and Economic Development representatives.

improve health care quality and access, rehabilitate key infrastructures such as transportation and communications, improve education, and improve housing-quality and access. Finally, the CPA helped the Iraqi government to build a market-based economy by:

- Modernizing the Central Bank, strengthening the commercial banking sector and re-establishing the Stock Exchange and securities market;
- Developing transparent budgeting and accounting arrangements, and a framework for sound public sector finances and resource allocation;
- Laying the foundation for an open economy by drafting company, labor and intellectual property laws and streamlining existing commercial codes and regulations; and
- Promoting private business through building up the domestic banking sector and credit arrangements.⁶⁴

Article 6(3) of the 1949 Geneva Convention IV addresses the issue of when an occupation ends. That Article provides that the application of the Convention, except for selected articles, ceases one year after the “general close of military operations.”⁶⁵ This rule was modified by the 1977 Protocol I to the Geneva Conventions, to which the United States is not a Party but which the United States recognizes, with certain exceptions, as generally reflecting customary international law. Article 3 of that Protocol provides that the application ceases when the occupation terminates.⁶⁶ In any case, on 8 June 2004, the U.N. Security Council, acting under Chapter VII of the U.N. Charter, recognized in UNSC Resolution 1546 that “by 30 June 2004, the occupation will end and the Coalition Provisional Authority will cease to exist, and that Iraq will reassert its full sovereignty.”⁶⁷ Due to security concerns, the United States and Coalition partners dissolved the Coalition Provisional Authority early and returned authority for governing Iraq to the Interim Iraqi Government on 28 June 2004.

c. Interim Iraqi Government.

On 13 July 2003, a twenty-five member Iraqi Governing Council (GC), the first postwar Iraqi interim government, was formed. The members were chosen by the Coalition, and its priorities were to achieve stability and security, revive the economy,

⁶⁴ Coalition Provisional Authority, at http://en.wikipedia.org/wiki/Coalition_Provisional_Authority (last visited 18 Jan. 2005).

⁶⁵ GC IV, *supra* note 39, art. 6(3). On 1 May 2003, President Bush declared that major combat operations had ceased in Iraq. See *supra* note 19.

⁶⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, art. 3, *reprinted in*, Int’l & Operational Law Dep’t, The Judge Advocate General’s Legal Center and School, Law of War Documentary Supplement, 349 (2004).

⁶⁷ S.C. Res. 1546, U.N. SCOR, 59th Sess., 4987th mtg., U.N. Doc. S.RES/1546 (2004) [hereinafter S.C. Res. 1546].

and deliver public services.⁶⁸ The new body shared responsibility for running the country under UNSC Resolution 1483, which continued to grant the CPA ultimate authority until a sovereign government could be elected and a new constitution ratified.⁶⁹ Under Saddam Hussein's rule, the minority Sunni population had dominated the national political scene. The Governing Council, on the other hand, was broadly representative of Iraq's population and included women and representatives of various religious and ethnic groups. On 1 September 2003, a twenty-five member GC cabinet, composed of Iraqis who had been appointed by the GC, assumed the responsibility for the day-to-day operation of the government using the previous organization of the Iraqi government, except for ministries of defense, information and religious affairs.⁷⁰ The chairman of the Governing Council, which rotated on a monthly basis, acted during this time as prime minister.⁷¹

On 15 November 2003, a landmark agreement was reached to restore full Iraqi sovereignty by 30 June 2004, to create a permanent constitution, and to hold free, national elections.⁷² U.N. Security Council Resolution 1511⁷³ called for this schedule to be put in place. The agreement called for an interim constitution or Transitional Administrative Law (TAL).⁷⁴ The TAL, which was signed on 8 March 2004, defined the structures of a transitional government and the procedures for electing delegates to a constitutional convention. The TAL guaranteed freedom of speech, the press, and religion (but still respected the Islamic identity of the majority of Iraqis).⁷⁵ On 28 June 2004, two days ahead of schedule, the Iraqi Interim Government assumed all governmental authority from the CPA, and the TAL became the supreme law of Iraq.⁷⁶

4. United Nations Operations and other UNSC Resolutions.

Shortly after the end of major combat operations, the United Nations Security Council passed Resolution 1483, which, *inter alia*, called for the Secretary General to

⁶⁸ Iraqi Governing Council, at <http://www.globalsecurity.org/military/world/iraq/igc.htm> (last visited 18 Jan. 2005) [hereinafter IGC].

⁶⁹ Patrick E. Tyler, *Iraqis Set To Form An Interim Council With Wide Power*, NY Times, July 11, 2003, at A1.

⁷⁰ Transitional Administration, at http://www.globalsecurity.org/military/ops/iraqi_transition.htm (last visited 21 Mar. 2005).

⁷¹ Iraqi Cabinet, at <http://www.globalsecurity.org/military/world/iraq/cabinet-intro.htm> (last visited 18 Jan. 2005).

⁷² The Coalition Provisional Authority – Governance, at <http://www.iraqcoalition.org/government.html> (last visited 18 Jan. 2005).

⁷³ S.C. Sec. Res. 1511, *supra* note 22.

⁷⁴ IGC, *supra* note 66.

⁷⁵ The November 15 Agreement – Timeline to a Sovereign, Democratic and Secure Iraq, at <http://www.iraqcoalition.org/government/AgreementNov15.pdf> (last visited 18 Jan. 2005).

⁷⁶ The handover of sovereignty was completed two days early in an effort to thwart any potential insurgent attacks related to the transfer of power. Christine Hauser, *Handover Completed Early to Thwart Attacks, Officials Say*, NY TIMES, June 28, 2004. National elections for the Transitional National Assembly, which will draft a permanent constitution, allowing national elections of a permanent Iraqi government were at the end of January 2005. The agreement called for the constitution to be ratified by October 2005, and for elections for the final government to be held by December 2005. <http://www.iraqcoalition.org/government/press-packet.pdf>.

appoint a Special Representative for Iraq to assist in reconstruction efforts and in establishing an Iraqi interim government.⁷⁷ The United Nations gave further support to the rebuilding effort in UNSC Resolution 1500,⁷⁸ which formally established an Assistance Mission in Iraq. On 19 August 2003, five days after the passage of that resolution, a suicide bomber blew up a cement mixer full of explosives in the U.N. compound in Baghdad, killing, among others, Sergio Vieira de Mello, the secretary general's special representative in Iraq.⁷⁹ The attack, coupled with another outside the headquarters on 22 September 2003, prompted U.N. Secretary-General Kofi Annan to pull out all but a skeletal foreign staff from Iraq and re-evaluate foreign missions of the United Nations. It wasn't until January 2004 that U.N. experts were sent back to Iraq to assist with the limited mission of determining when elections were feasible.⁸⁰ The experts agreed with the United States that direct elections in Iraq were not feasible before the planned turnover of sovereignty.⁸¹

The final Security Council Resolution passed with regard to the occupation of Iraq was Resolution 1546,⁸² authorized on 8 June 2004. This resolution endorsed the formation of the fully sovereign interim Iraqi government and, more importantly, it empowered an American-led multinational force to "take all necessary measures to contribute to the maintenance of security and stability in Iraq" in "security partnership" with the government. The presence of the multinational force was to be at the request and consent of the Iraqi government, which could order the force's withdrawal. There was to be "full partnership" and "close coordination and consultation" between Iraqi commanders and the multinational command on all security matters.⁸³ The resolution also gave control of Iraq's petroleum revenues to the interim government. While the resolution put an international stamp of approval on the American-led military force, it did not lead to other nations contributing needed troops to the security effort.⁸⁴ NATO, however, did agree to assist the fledgling Iraqi state by pledging to "encourage nations to contribute to the training of the Iraqi armed forces."⁸⁵

⁷⁷ S.C. Res. 1483, *supra* note 4.

⁷⁸ S.C. Res. 1500, U.N. SCOR, 58th Sess., 4808th mtg., U.N. Doc. S.RES/1500 (2003).

⁷⁹ Dexter Filkins and Richard A. Oppel Jr., *Huge Suicide Blast Demolishes U.N. Headquarters In Baghdad; Top Aid Officials Among 17 Dead*, NY TIMES, August 20, 2003, at A1.

⁸⁰ Warren Hoge, *Annan Signals He'll Agree To Send U.N. Experts to Iraq*, NY TIMES, January 20, 2004, at A1.

⁸¹ Steven R. Weisman and Warren Hoge, *U.S. Expected to Ask United Nations to Keep Trying for an Agreement*, NY TIMES, February 21, 2004, at A6.

⁸² S.C. Res. 1546, *supra* note 65.

⁸³ *Id.*

⁸⁴ Warren Hoge, *Security Council Backs Resolution on Iraq Turnover*, NY TIMES, June 9, 2004, at A1. The resolution, American officials hoped, would help persuade nations not to pull out their troops following the turnover of sovereignty. Some nations that had strongly opposed military intervention in Iraq suggested, though, that they would be willing to contribute troops to a separate military force of about 4,000 to protect U.N. personnel in Iraq. The resolution called for the establishment of that distinct force.

⁸⁵ Eric Schmitt and Susan Sachs, *NATO Agrees to Help Train Iraqi Forces*, NY TIMES, June 29, 2004, at A12.

III. Lessons Learned

A. INTERNATIONAL LAW

*The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.*⁸⁶

Similar to combat operations, international law considerations continued to permeate operations in Iraq and Afghanistan once Coalition Forces transitioned to full spectrum operations.⁸⁷ In both theaters, legal teams led the way in reconstruction and reform efforts, ensuring international law requirements were met when necessary. Judicial reconstruction and reform, in particular, were implemented through the hard work and dedication of judge advocates (JAs), legal administrators, and paralegals. Legal teams served as the backbone for many other governmental initiatives and reforms as well—from advising local councils to training security forces to mediating property disputes. In addition, legal teams were deeply involved in all aspects of detention operations, acting as advisors to the military police and intelligence personnel. Moreover, legal teams were often called upon to provide advice on a wide array of additional complicated international law issues, such as the status of contractors on the battlefield and whether contractors could (and should) carry weapons. The many complex international law issues that legal teams tackled during full spectrum operations in both Iraq and Afghanistan will serve as a cornerstone for future legal doctrine and training.

1. Judicial Reconstruction and Reform.

People have the impression that [Iraq] is a lawless society, therefore they have no qualified legal system or qualified lawyers. This is a mistake. [Iraq] has been a country of law throughout history but this law was subverted by Saddam Hussein.

--Moniem Al-Khatib⁸⁸

Upon entering Baghdad, the Coalition found a non-functioning Ministry of Justice (MOJ) and a justice infrastructure that was almost totally destroyed.⁸⁹ The MOJ was in a state of almost

⁸⁶ Annex to Hague Convention No. IV Regulations Respecting the Laws and Customs of War on Land, art. 43 (1907) [hereinafter Hague Regulations].

⁸⁷ Full spectrum operations include offensive, defensive and stability and support operations. See U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS, para. 1-48 (14 Jun. 2001).

⁸⁸ Judy Aita, *Iraqi Jurists Plan for Return to Rule of Law*, United States Embassy, Tokyo, Japan, at <http://japan.usembassy.gov/e/p/tp-20030521b2.html> (last visited 14 Jan. 2005). Moniem Al-Khatib is a member of the Iraqi Jurists' Association, an independent organization of about 80 lawyers and judges living outside of Iraq. The group worked with the U.S. Department of State on the Iraqi transitional justice system.

⁸⁹ See Information Memorandum, Mr. Clint Williamson, Senior Advisor, Ministry of Justice, to Ambassador L. Paul Bremer, Administrator, Coalition Provisional Authority, subject: End of Mission Report, at 1 (20 Jun. 2003) [hereinafter Williamson Report] (on file with CLAMO).

total devastation; most of the ministry buildings had been looted and, therefore, were non-functional. In addition, of the eighteen courthouses in Baghdad, twelve were gutted. Approximately seventy-five percent of the remaining estimated 110 courthouses in Iraq were destroyed.⁹⁰ Further, damage was not limited to the physical facilities. During April and early May 2003, the vast majority of court records and official documents were either destroyed or stolen.⁹¹

Recognizing that the security situation had degraded to an unacceptable level, one of the Coalition's campaign lines was to reestablish security. Among the first radio broadcasts by the Coalition to the Iraqi people, given by the Staff Judge Advocate (SJA), V Corps, on 23 April 2003, was an order for all police, judges, and court personnel to return to work and safeguard facilities and records.⁹² The legal teams throughout Iraq became integral to the reconstruction and reform effort and, in fact, led many of these missions. As the SJA for V Corps observed: "[a] functioning and transparent court system is one of the three legs of the domestic security stool, along with prisons and police. Judge advocates were integrally involved in all three areas, from forming and heading organized crime prosecution task forces . . . to forming and chairing the Detention Working Group, which included prisons"⁹³

a. One Agency Must Be Responsible For Managing a Comprehensive, Coordinated, and Fully Integrated Judicial Plan.

The Coalition found that the Iraqis had a workable judicial system that had existed before Saddam Hussein's regime, but had been corrupted by him. During the Hussein regime, a parallel court system operated to which Saddam would direct the cases of interest to the regime. Consequently, the regular courts under the MOJ did not contain a large number of high-level Ba'athists.⁹⁴ Even so, corruption appeared in the court system and bribery was common. Moreover, although there was a hesitation to describe the Coalition Forces as "occupiers," it was

⁹⁰ *Id.*

⁹¹ In many instances, this appears to have been the result of intentional acts, rather than random vandalism. *Id.* at 2. One JA observed:

Prior to the arrival of Coalition forces, Court infrastructure was dealt a heavy blow. Most court houses in the country were looted by criminals, and some, in particular in the Baghdad area were completely destroyed. Nearly all of this damage is attributable to the wide spread looting that took place as the Ba'ath Party collapsed. The destruction not only included the court houses, but court records as well.

Memorandum, Commander Greg Bolanger, Judge Advocate General's Corps, U.S. Navy, subject: Iraq Legal Issues: Perspectives from the Field, at 3 (undated) [hereinafter Bolanger Memo] (on file with CLAMO). There were, however, courthouses in which court employees had removed criminal records and property records prior to hostilities to protect them, such as the courthouse in An Nasariyah. *See* Legal Assessment of Southern Iraq, 358th Civil Affairs Brigade, Lieutenant Colonel Craig Trebilcock, at 10 (Spt. 2003) [hereinafter Southern Iraq Legal Assessment] (on file with CLAMO).

⁹² E-mail, Colonel Marc L. Warren, former Staff Judge Advocate, V Corps, to Lieutenant Colonel Pamela M. Stahl, Director, Center for Law and Military Operations, subject: Judicial Reconstruction (28 Jan. 2005) [hereinafter Warren E-mail] (on file with CLAMO).

⁹³ *Id.*

⁹⁴ Williamson Report, *supra* note 4, at 2. Within the entire ministry, only 35 of approximately 12,000 employees were found to be in the top four levels of the Ba'ath Party. *Id.*

clear that under occupation law “tribunals of the occupied territory shall continue to function in respect of all offences covered by [the penal laws of the occupied territory],” except laws that were repealed or suspended by the occupying power because they constitute a threat to security or an obstacle to the application of the Geneva Convention.⁹⁵

Given the above, the Coalition Force’s rule of law mission and the message to the Iraqi people was to get the judicial system back up and running, facilitating reform where necessary and when possible.⁹⁶ Unfortunately, the Office of Reconstruction and Humanitarian Assistance (ORHA) did not have a plan in place to conduct comprehensive judicial reconstruction and reform. Therefore, in many cases, Coalition Forces were left to develop a judicial reconstruction and reform plan without detailed guidance.⁹⁷

1. Senior Task Force Judge Advocates Must Directly Liaison with the Country’s Senior Judicial Leadership in the Absence of a Coordinated Interagency Effort.

From the beginning of full spectrum operations “[judicial reconstruction] efforts were plagued with communication, bureaucratic and administrative problems that made it impossible for the central coalition authorities and the commanders in the field to adequately communicate with each other.”⁹⁸ At the end of April 2003, for example, communications between MOJ offices, courthouses, and prosecutors’ offices were non-existent. Moreover, ORHA had little capability to communicate by telephone within Baghdad or to other parts of the country. This hindered their ability to gather accurate information about the courts and to issue instructions to MOJ personnel.⁹⁹

In late May, the Department of Justice’s (DOJ) Overseas Prosecutorial Development and Training Office (OPDAT) sent four teams to Iraq to assess the post-war judicial system in Iraq.¹⁰⁰ The teams consisted of Assistant U.S. Attorneys, state and federal judges, and several academic lawyers. Judge advocates from the major subordinate commands participated in the assessments, and the military provided all the logistical and force protection support.¹⁰¹ The

⁹⁵ Geneva Convention, Relative to the Protection of Civilian Persons in Time of War, art. 64, August 12, 1949, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287 [hereinafter GC IV].

⁹⁶ Lieutenant Colonel Jeffery R. Nance, Interagency Legal Lessons Learned in Iraq Seminar in Charlottesville, Va. (8-9 Nov. 2004) [hereinafter Nance Presentation, Interagency Iraq Seminar] (power point presentation on file with CLAMO).

⁹⁷ This issue was noted by every legal team serving in Iraq during this period of operations. For example the OSJA, 3d Infantry Division noted the issue of “[n]o civilian authority in place prepared to serve as civilian administrator of Iraq and no Phase IV plan.” After Action Review, Office of the Staff Judge Advocate, 3d Infantry Division, at 289 (undated) [hereinafter 3ID AAR] (on file with CLAMO). As the legal team at 1AD observed: “[i]f an operation goes poorly, critics *will* look to the planners. Without a comprehensive plan, CPA agencies established their own priorities, worked at cross-purposes, and committed themselves to a reactive posture.” After Action Review Conference, Office of the Staff Judge Advocate, 1st Armored Division, with the Center for Law and Military Operations, in Wiesbaden, Germany, Governate Support Team power point presentation (13-14 Dec. 2004) [hereinafter 1AD AAR] (on file with CLAMO).

⁹⁸ See Report of the Iraq Judicial Assessment Team, Overseas Prosecutorial Development and Training Office, U.S. Department of Justice, at 6 (Jun. 2003) [hereinafter OPDAT Report] (on file with CLAMO).

⁹⁹ Williamson Report, *supra* note 4, at 2.

¹⁰⁰ OPDAT Report, *supra* note 13, at 3.

¹⁰¹ Judicial Report, Mr. Bruce Pagel, Department Of Justice (Jan. 2005) [hereinafter Pagel Report] (on file with CLAMO). The logistical support was coordinated by Lieutenant Colonel Kirk Warner, judge advocate, 12th Legal

teams only stayed in theater for about two weeks, thus much of their observations came from discussions with JAs who had already conducted assessments.¹⁰² Noting the coordination and communications problems between the central Coalition authorities and the military commanders in the field, OPDAT recommended that lawyers be placed in each of the four geographical areas to coordinate with the local military units and facilitate communications with the central justice ministry. They also recommended a uniform process for the removal of corrupt judicial officials and a process for vetting prospective judges and prosecutors.¹⁰³ The plan did not, however, address the need to establish an effective working relationship with the military, particularly Combined Joint Task Force Seven (CJTF-7).¹⁰⁴

In addition, DOJ was slow to send their attorneys to regions outside of Baghdad. The increasing violence, along with confusion over logistics, support, and mission, caused an extended delay before DOJ was finally able to support regions outside the capital.¹⁰⁵ Further, DOJ did not provide logistical support to its employees in Iraq, such as hardened vehicles and personal security details, making their personnel wholly dependent upon the military for all force protection, mobility, and life support requirements.

This situation resulted in a lack of central guidance throughout the period covered by this Publication once DOJ attorneys did make it outside of Baghdad. For example, the DOJ attorney working in the 1st Infantry Division area of operation commented that his inability to obtain information on plans and policy intentions at the MOJ/Council of Judges-level adversely affected his ability to advise commanders and make decisions.¹⁰⁶ Therefore, in the absence of a responsive interagency effort, senior JA and other U.S. Government attorneys found that they had to coordinate directly with the senior judicial leadership. Then, they had to ensure that the local judicial personnel were briefed on policy decisions.¹⁰⁷ Unfortunately, this was not easy in the outlying areas in the absence of a Baghdad-located liaison or point of contact.

2. Be Prepared to Advise Commanders on Judicial Reconstruction and Reform in the Absence of Detailed Guidance From Higher.

Support Organization. See The 12th LSO Team in Support of Operation Iraqi Freedom (7 February to 12 October 2003), at 9 (undated) [hereinafter 12th LSO AAR] (on file with CLAMO).

¹⁰² E-mail, Lieutenant Colonel Jeffery R. Nance, formerly assigned to the Office of the Staff Judge Advocate, V Corps, to Lieutenant Colonel Pamela M. Stahl, Director, the Center for Law and Military Operations, at 1 (1 Feb. 2005) [hereinafter Nance E-mail] (on file with CLAMO).

¹⁰³ OPDAT Report, *supra* note 13, at 7.

¹⁰⁴ Pagel Report, *supra* note 16, at 1.

¹⁰⁵ *Id.* DOJ was not provided separate funding in support of OIF, but was dependent on the Department of State for funding and program approval, which caused unnecessary delays while personnel in Washington D.C. from both agencies tried to resolve money and missions. *Id.*

¹⁰⁶ For example, there were many instances where judges either did not know what the Council of Judges was planning, or needed approval before moving forward with their judicial initiatives. The idea was to de-conflict local projects with national level planning and avoid potential redundancy and delay. Nonetheless, DOJ personnel did not play this liaison role. *Id.* at 2.

¹⁰⁷ The legal team at 1AD recommended that OSJAs must stay linked with their Iraqi counterparts in order to facilitate the flow of information and ensure that the Iraqi judicial personnel are apprised of policy decisions. 1AD AAR, *supra* note 12 (Governate Support Team power point presentation).

Legal teams and civil affairs (CA) units first on the scene undertook efforts to determine the state of the Iraqi legal system and to restart and reform the system. Judge advocates found that setting the conditions for a fully functioning, orderly and impartial legal system, capable of enforcing the rule of law, must be one of the commander's key tasks.¹⁰⁸ In mid-May, the Senior Advisor to the MOJ issued instructions through the central ministry for courthouses that were undamaged or had suffered light damage, to re-open. The instruction was repeated on 31 May 2003.¹⁰⁹ While this instruction had some impact in Baghdad, on 20 June 2003, the Senior Advisor wrote:

. . . [T]he reality in the rest of the country is that most court re-openings should be attributed to local military commanders who have acted independently to get courts in their AOR's [areas of responsibility] up and running. Without dependable communications to or from ORHA or the MOJ, commanders have acted in isolation to re-open courts. In many instances, they have removed judges and/or prosecutors and have appointed others in their place. While these measures have facilitated court openings and a re-initiation of justice functions, the approach followed by different commanders has varied widely. We are in the process of finalizing a nationwide guidance directive which should be issued next week. It should help to establish a consistent approach throughout Iraq, and ensure that where mistakes have been made they are corrected before personnel or policies become too entrenched.¹¹⁰

The lack of central guidance led to commanders instituting their own policies on a wide variety of judicial reforms. For example, disagreement among Coalition partners resulted in a failure of the Coalition authorities to timely promulgate a statement concerning the applicable law until 9 June 2003, two months after the fall of Baghdad. Therefore, the military commanders, aided by their JAs, were required to decide on their own what law to apply.¹¹¹ In addition, in the absence of Coalition Provisional Authority (CPA) guidance, JAs also advised

¹⁰⁸ OPDAT Report, *supra* note 13, at 10.

¹⁰⁹ Mr. Clint Williamson, Senior Advisor, Ministry of Justice, wrote:

In my capacity as Senior Adviser to the Ministry of Justice and acting pursuant to the powers vested in me by the Coalition Provisional Authority, I hereby reiterate and request that, if they have not done so already, all Ministry of Justice employees should return to their workplaces and resume performance of their duties to the fullest extent possible. This instruction applies to all judges, prosecutors, court investigators, and other employees, subject however to decisions of local military commanders and/or Coalition Provisional Authority officials that circumstances warrant the provisional exclusion of any specific individual whose presence would disrupt the functioning of the local court system. I also hereby reiterate and request that, if they have not done so already, all Ministry of Justice employees shall work expeditiously to organize and perform repair, clean-up, and restoration of their respective courthouses and other Ministry buildings wherever necessary.

Memorandum, Mr. Clint Williamson, Senior Advisor, Ministry of Justice, Office of the Coalition Provisional Authority (31 May 2003) (on file with CLAMO).

¹¹⁰ Williamson Report, *supra* note 4, at 6.

¹¹¹ Southern Iraq Judicial Assessment, *supra* note 6, at 7; *see also* Coalition Provisional Authority, Order Number 7, Penal Code (9 Jun. 2003) [hereinafter CPA Order No. 7] (on file with CLAMO).

their commanders on the process of vetting judges to re-establish the court systems as soon as possible (this process is discussed at length, below).

By late June 2003, the Coalition MOJ issued national policy guidance regarding matters within the purview of the MOJ. The policy acknowledged that “[d]ue to difficulties with communication and coordination, consistency has heretofore been impossible to achieve; due to different circumstances, it has not necessarily been appropriate.”¹¹² Nevertheless, the policy stated that as communications and infrastructure improved and Iraq progressed back to civilian rule, a uniform nationwide approach to justice was desirable.¹¹³ The policy authorized local CPA and military officials to make decisions or take actions that they deemed necessary and proper to implement the national MOJ policy, subject to review by the MOJ’s Senior Advisor.¹¹⁴ For example, the policy allowed local commanders to direct court personnel to return to work and replace those who refused to return.¹¹⁵

The CPA MOJ continued to be severely understaffed and relied heavily on military personnel to accomplish its mission.¹¹⁶ Much of the daily interaction between the Coalition and local judicial authorities was accomplished by JAs as directed by their division commanders. In many areas, the division commanders set the policy and allocated resources with the advice of their supporting legal teams. In Baghdad, for instance, the V Corps OSJA was the primary provider of manpower for the judicial reconstruction efforts.¹¹⁷ This situation lasted throughout the period of this Publication. When the 1st Cavalry Division deployed to Iraq in March of 2004, for example, the OSJA continued to maintain a strong connectivity with the local Iraqi Judiciary in Baghdad. The legal team found that the judiciary was greatly affected by the CPA’s continued vetting of judicial personnel to remove those connected with the former regime. As the legal team discovered, this process created some animosity and friction with the judiciary, the Iraqi Bar Association, and others. In this environment, it was particularly important that the

¹¹² Memorandum, Judge Donald F. Campbell, Senior Advisor, Ministry of Justice, Coalition Provisional Authority, subject: Ministry of Justice National Policy Guidance, at 1 (26 Jun. 2005) [hereinafter National Policy Guidance] (on file with CLAMO). Judge Campbell succeeded Mr. Clint Williamson as the Senior Advisor to the Ministry of Justice on 21 Jun. 2003

¹¹³ *Id.*

¹¹⁴ *Id.* at 2.

¹¹⁵ *Id.* at 4.

¹¹⁶ Judicial Reconstruction Assistance Team and the Iraqi Ministry of Justice, Major Juan A. Pyfrom and Captain Travis W. Hall, Office of the Staff Judge Advocate, V Corps, at 2 (undated) [hereinafter JRAT and the MOJ Report] (on file with CLAMO). In addition to the MOJ being understaffed, there was a high turnover of civilian staff members in the Prisons Department. By mid-July the MOJ was on its second Senior Advisor and the Prison’s staff was down to a bookkeeper from Great Britain. *Id.*

¹¹⁷ *Id.* at 4. As explained by the OSJA, V Corps, JRAT:

The CPA manning structure envisioned civilian experts from Coalition governmental agencies man the CPA ministries and provide the kind of expertise that was not organic to military operation structure. In reality, for most of the summer and fall of 2003, Coalition military found itself performing missions that were gross departures from their METL [Mission Essential Task List] which provided for a very steep learning curve.

Id.

OSJA take the time to begin cultivating relationships with key judicial personnel in their area of operation.¹¹⁸

Thus, it remained essential that Coalition Forces continue their active support of the courts. By spring of 2004, however, the Coalition MOJ was sufficiently robust to play a greater role. A goal of all should be to improve coordination and better define respective roles and responsibilities between levels of command and civilian authorities. Moreover, OSJAs and others performing rule of law missions must work to include the state authorities in their activities with an eye towards handing the mission to the state as soon as possible.¹¹⁹

3. As Part of the Legal Preparation of the Battlefield, Judge Advocates Must Develop their Own Plans for Judicial Reconstruction.

Given the above, legal teams cannot assume that there will be a comprehensive, coordinated, interagency plan for judicial reconstruction in future operations. Therefore, as part of the LPB (Legal Preparation of the Battlefield) analysis, legal teams must develop their own plans for judicial reconstruction. They must actively engage with their commanders and their planning staffs to ensure that the rule of law mission receives attention in the planning process, and that adequate resources of personnel, equipment, and supplies are allocated to carrying out the rule of law mission.¹²⁰ During an exercise leading up to the commencement of OIF, for example, the V Corps legal team conducted mission planning on judicial reconstruction, to include a course of action using traditional occupation law as an interim measure to try cases while concurrently rebuilding the local courts. This plan was not executed, as they were directed not to implement military government or civil administration-like structures.¹²¹ Nevertheless, this course of action should be considered in future operations.

In sum, the first, and arguably most important, lesson learned in the area of judicial reconstruction and reform is that Coalition Forces must have a comprehensive, coordinated, and fully integrated justice plan prior to the beginning of hostilities. Since the beginning of OIF, the Department of State has established the Office of Reconstruction and Stabilization. The Rule of Law subgroup of this office has begun meeting to ensure that in future full spectrum operations there is a coordinated effort in judicial reconstruction between U.S. Government agencies that may have a part to play in judicial reconstruction.¹²²

¹¹⁸ After Action Report, Office of the Staff Judge Advocate, 1st Cavalry Division, at 29 (Feb. 2005) [hereinafter ICAV AAR] (on file with CLAMO).

¹¹⁹ See Lieutenant Colonel Bruce Pagel, former DoJ rule of law liaison to 1ID, comments on draft volume II, at 7 [hereinafter Pagel Comments] (on file with CLAMO).

¹²⁰ Memorandum, Colonel David Gordon, former Staff Judge Advocate, CJCMOTF and OMC-A, OEF, subject: Rule of Law Operations in Afghanistan 2002-2003: Lessons Observed (27 Apr. 2005) (on file with CLAMO).

¹²¹ Warren E-mail, *supra* note 7.

¹²² For additional information about the Office of Reconstruction and Stabilization, see www.crs.state.gov. See also E-mail, Colonel Michael W. Meier, Office of the Legal Advisor, Chairman, Joint Chiefs of Staff, to Lieutenant Colonel Pamela M. Stahl, Director, CLAMO, subject: Volume II, OEF/OIF Lessons Learned Handbook (3 May 2005) [hereinafter Meier E-Mail] (on file with CLAMO).

The Judge Advocate General's Corps' lesson learned from their experience in Iraq is that in the absence of a comprehensive plan, commanders will rely heavily on their legal teams to advise them on all rule of law and policy issues. Moreover, even if a comprehensive plan is in place prior to the beginning of hostilities, in a non-permissive, unsecured environment, legal teams may be the only personnel in theater capable of conducting a large-scale rule of law mission. Thus, as in OIF, JAs, legal administrators, and enlisted paralegals must be prepared to step into the breach, not only to provide guidance on a wide-variety of judicial issues, but to implement much of the reconstruction and reform efforts themselves.

b. Legal Teams Must Deploy with Translations of Local Laws and an Understanding of the Judicial System to Immediately begin Rule of Law Missions.

With much of the Iraqi police and judicial system not functioning, JAs and other planners quickly found that they needed to have an understanding of the Iraqi judicial system and an accurate translation of the Iraqi laws to plan for and initiate judicial reconstruction and reform.¹²³ The very first regulation promulgated by the CPA on 16 May 2003 established the authority of the CPA to exercise the powers of government. The regulation further provided that the laws in force in Iraq as of 16 April 2003 would continue to apply (unless suspended or replaced by the CPA or superseded by legislation issued by democratic institutions of Iraq) as long as the laws did not prevent the CPA from exercising its rights and fulfilling its obligations, or conflict with CPA Regulations or Orders.¹²⁴ Of course, Coalition Forces acting pursuant to this regulation needed to know what law was actually in effect as of 16 April 2003, and they needed an accurate translation of this law to facilitate judicial reconstruction and reform. The V Corps legal team recognized the need for a translation of the Iraqi Codes prior to deployment. Fortunately, one of their JAs was an Arabic linguist, and he had begun translating a portion of the 1969 Iraqi Criminal Code and 1972 Criminal Procedure rules as early as October 2002.¹²⁵ There were other laws and administrative codes and rules, however, that Iraqi courts continued to use that were not available in an English translation. For example, the "Revolutionary Command Counsel Orders," were not available in English but were widely believed by Iraqis to still be in effect.¹²⁶ The MOJ at CPA eventually employed twenty translators, most of whom were attorneys, to assist in determining applicable law.¹²⁷

Having an accurate translation of the Iraqi law, however, was only a part of the resources necessary to begin judicial reconstruction and oversight. Coalition Forces also had to understand the Iraqi court system, which was based on the French Civil Law system, although Shar'ia

¹²³ After Action Review Conference, 12th Legal Support Organization, U.S. Army Reserve, and the Center for Law and Military Operations, at Charlottesville, Va. (12-13 Feb. 2004) [hereinafter 12th LSO AAR Conference] (noting that commanders wanted to know the existing Iraqi weapons laws in order to determine whether they were adequate and enforceable) (videotapes and notes on file with CLAMO).

¹²⁴ See Coalition Provisional Authority, Regulation Number 1, sec. 2 (16 May 2003) (on file with CLAMO).

¹²⁵ Paper, Lieutenant Colonel Jeffery R. Nance, subject: Iraq: Creating and Expanding Judicial Institutions (Jan. 2005) [hereinafter Nance Paper] (on file with CLAMO).

¹²⁶ Pagel Comments, *supra* note 34, at 9.

¹²⁷ Major Juan A. Pyfrom, Transcript of After Action Review Conference, Office of the Staff Judge Advocate, V Corps, and the Center for Law and Military Operations, Heidelberg, Germany, at 6 (17-19 May 2004) [hereinafter Pyfrom Transcript] (on file with CLAMO).

concepts had been woven into the code over time.¹²⁸ Under Saddam Hussein's rule, the Iraqi judicial system had been marginalized. The regime had created a variety of special security courts that heard cases of state security.¹²⁹ The CPA abolished these courts by Order dated 23 May 2003.¹³⁰ In addition, the Saddam regime encouraged the use of tribal courts to garner support for the regime from tribal leaders, diverting even more cases from the judicial system to these tribal courts.¹³¹ Understanding tribal courts and tribal law, along with being aware of tribal influences on ordinary courts is also critical, and can be prepared for in advance.¹³²

Legal teams found that the unfamiliarity of most JAs with the Civil Law legal system created another challenge to judicial reconstruction. It led to confusion about rule of law issues, such as what constituted due process,¹³³ and as to what, in fact, required reform as opposed to what was simply, while unfamiliar to common law trained Western lawyers, still fair and effective practice.¹³⁴ Therefore, legal teams must study the laws and judicial system prior to deployment to assess rule of law issues and implement changes when necessary.

c. Be Prepared to Modify Existing Law and Implement Other Reforms to Establish the Rule of Law.

Armed with an understanding of the country's legal system, an occupying power must decide early whether any of the country's laws should be amended or rescinded to institute basic human rights and the rule of law. To assess the legal system in Iraq, the DOJ's OPDAT Judicial Assessment Team interviewed judges, public prosecutors, and lawyers at the Baghdad and surrounding provincial courts. The team noted five reoccurring criticisms of the current system: (1) the use of torture to obtain confessions; (2) the inability to provide appointed counsel to indigents at the investigative stage of even the most serious cases; (3) the ineffectiveness of the

¹²⁸ See, e.g., 12th LSO AAR, *supra* note 16, at 8. For a summary of the Iraqi Judicial System and laws, see OPDAT Assessment, *supra* note 13, at 11-27

[T]here is a court or judicial investigator that lives, works at the police station. His job, if the police arrest somebody, is to take their initial statements and then present that to the investigation judge. The investigation judge serves kind of a dual function, partly, as the Chief Investigator because he directs the police investigators, the court investigator, and all of the investigative effort that goes into developing that case to be presented for trial is the sole province of that investigative judge. So, as the cases come in, the court investigator that works at the precinct would have done the initial write up on the case. . . . The court . . . brings that person to the investigation court where the court queries any witnesses. The judicial investigator develops the case further and makes a determination based upon the evidence that's presented to him there, and the evidence that's a part of the file that he's presented with, whether or not this person can, under Iraqi law, be released on bond or released for lack of evidence, or bound over for trial. That is the determination that's made at that initial appearance before the judge.

Pyfrom Transcript, *supra* note 42, at 7.

¹²⁹ OPDAT Report, *supra* note 13, at 5.

¹³⁰ Coalition Provisional Authority, Order Number 2, ann. A (23 May 2003) (disestablishing, among other organizations, the Revolutionary, Special, and National Security Courts) (on file with CLAMO).

¹³¹ OPDAT Report, *supra* note 13, at 6.

¹³² Pagel Comments, *supra* note 34, at 9.

¹³³ Judicial Assessment in Operation Iraqi Freedom II, Office of the Staff Judge Advocate, 1st Infantry Division, at 11 (Jan. 2005) [hereinafter IID Judicial Assessment] (on file with CLAMO).

¹³⁴ Pagel Comments, *supra* note 34, at 10.

public prosecutor's office; (4) the limitations on the ability of defense counsel to effectively represent their clients; and (5) the low burden of proof required to refer a case from the investigation court to the misdemeanor or felony courts for trial.¹³⁵

Shortly after the OPDAT Judicial Assessment Team completed its report, the CPA issued Order Number Seven, dated 9 June 2003, informing the Iraqi citizens that the third edition of the 1969 Iraqi Penal Code applied in Iraq, except for certain sections, which were suspended.¹³⁶ The Order suspended capital punishment, prohibited torture and cruel, degrading or inhuman treatment or punishment, and prohibited the prosecution of individuals for aiding, assisting, associating with, or working for the Coalition or CPA.¹³⁷

On 18 June 2003, the CPA also issued a Memorandum providing that the Iraqi Criminal Procedure Code of 1972, as modified by the Memorandum, applied in Iraq.¹³⁸ The Memorandum implemented certain fundamental rights. First, defendants held on suspicion of committing a felony were given the right to appointed counsel beginning with the first appearance before a magistrate, rather than at trial only. Moreover, confessions extracted by torture were made inadmissible under any circumstances.¹³⁹ Finally, defendants were given the right to remain silent.¹⁴⁰

Because these were fundamental changes to the rights of a defendant that were unfamiliar to Iraqi court personnel, JAs involved in the judicial system reported that some judges tended to ignore these CPA Orders. Nevertheless, if a person was brought to the court by the police or the Coalition Forces, the judges would try to have a defense attorney available. If no defense counsel was available, however, some judges proceeded without one.¹⁴¹ Similarly, the right to remain silent did not exist under Iraqi Law. Therefore, JAs noticed that when Coalition Forces or Iraqi police began reading an accused his rights, if the accused had actually committed the crime and the police were asking about it, Iraqis would generally admit to the crime.¹⁴² Nevertheless, in areas where the judicial system had a functioning bar, JAs found that these reforms had great impact. The Office of the Staff Judge Advocate (OSJA) at the 101st Airborne

¹³⁵ OPDAT Report, *supra* note 13, para. IV.

¹³⁶ CPA Order No. 7, *supra* note 26.

¹³⁷ *Id.* sec. 3. The CPA again modified the Iraqi Penal Code and Criminal Proceedings Law in September 2003 with regard to sentences for kidnapping, rape, indecent assault, damage to public utilities or oil infrastructure, and theft offenses involving means of transportation, and with regard to bail arrangements. Coalition Provisional Authority, Order Number 31, Modifications of Penal Code and Criminal Proceedings Law (10 Sept. 2003).

¹³⁸ Coalition Provisional Authority, Memorandum Number 3, Criminal Procedures (18 Jun. 2003) (on file with CLAMO) [hereinafter CPA Memo No. 3]. This memorandum was revised shortly before the transfer of authority to reflect return of Iraqi sovereignty. Coalition Provisional Authority, Memorandum Number 3 (Revised), Criminal Procedures (27 Jun. 2004) (on file with CLAMO).

¹³⁹ Under existing Iraq procedures, such confessions were admissible if corroborated by other evidence, even if that other evidence was obtained through torture. OPDAT Report, *supra* note 13, para. 6.

¹⁴⁰ The CPA Memorandum also required the Coalition Forces to afford criminal detainees: (1) immediate notice of the right to remain silent and to consult an attorney upon arrival in a detention center; (2) the right to consult with an attorney after 72 hours have elapsed since arrival in felony cases only (persons held for offenses not rising to the level of a felony enjoyed no right to counsel); (3) a prompt written explanation of the charges; (4) appearance before a judicial officer "as rapidly as possible" and no later than 90 days after detention; and (5) access to the ICRC, unless contrary to imperative military necessity. CPA Memo No. 3, *supra* note 53.

¹⁴¹ Pyfrom Transcript, *supra* note 42, at 14.

¹⁴² *Id.* at 16.

Division (Air Assault), for example, was able to conduct classes with defense attorneys, prosecutors, and the police, so that they could understand and begin implementing these concepts. Moreover, JAs generally found these reforms, in particular the right to remain silent and the right to an attorney, were positive because the Iraqi's could see that they were being provided with due process and that the system was more fair.¹⁴³

By the time the 1st Infantry Division entered Iraq in the spring of 2004, they found that the judges knew of the CPA laws and that defense counsel were being appointed by the courts to represent indigent defendants. They also found that most judges understood the defendant's right to remain silent and that they were enforcing it against the Iraqi police who coerced confessions from defendants.¹⁴⁴

Thus, judicial teams learned that modifications to existing law to ensure fundamental fairness and protect the rights of the accused must be instituted as soon as possible. Moreover, such reforms must be understood by those involved in the judicial system, including the judges, prosecutors, defense counsel, and police.

1. Understand the Process for How a Law Becomes Enforceable.

To institute legal reform, legal teams must understand the country's rules and procedures on how laws become effective and enforceable. Moreover, international law provides that penal laws enacted by an Occupying Power cannot be enforced until they have been "published and brought to the knowledge of the inhabitants in their own language."¹⁴⁵ The Official Gazette of Iraq had been the official publication for Iraqi laws since the 1920s. New laws or amendments to existing laws had to be published in the Gazette in order for them to become effective. Publication of the Gazette had been halted during the war, but the CPA resumed publication on 17 June 2003. The first publication contained the CPA Orders that had been issued up until that date. All CPA Regulations, Orders, Memoranda, and Public Notices were subsequently published in the Gazette and became enforceable on the date of publication.¹⁴⁶

The SJA for the 352d Civil Affairs Command was responsible for publishing the Gazette, coordinating with the CPA Office of General Counsel to obtain official versions of the CPA documents. The SJA devised a distribution plan so that copies reached courthouses and law schools free of charge. The plan was to publish the Gazette every three to four months using an Iraqi editorial staff with a view towards handing it over to them as quickly as possible.¹⁴⁷

¹⁴³ After Action Review Conference, Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), and the Center for Law and Military Operations (21 Oct. 2004) [hereinafter 101st ABN DIV AAR Conference] (on file with CLAMO).

¹⁴⁴ IID Judicial Assessment, *supra* note 48, at 7. They did note, however, that several judges were displeased with the right to remain silent as they thought that Iraqis always told the truth if they were "roughed up" a bit. After further discussion and explanation, the judges generally agreed that the new laws prevented this sort of behavior from the police. *Id.*

¹⁴⁵ GC IV, *supra* note 10, art. 65.

¹⁴⁶ National Policy Guidance, *supra* note 27, at 6; *see also* Alwaqai Aliraqiya (Official Gazette of Iraq), No: 3977, Vol. 44 (17 Jun. 2003) (on file with CLAMO).

¹⁴⁷ Civil Affairs Judge Advocate Conference, Columbia, S.C., at 12-13 (6-7 Jan. 2005) (briefing by Lieutenant Colonel Margaret Bond, Staff Judge Advocate, 352d Civil Affairs Command) [hereinafter CA JA Conference] (notes on file with CLAMO).

Unless the CPA directives were published in the Official Gazette, it was difficult, if not impossible, to get judges to recognize and enforce them.¹⁴⁸ Consequently, JAs learned that in planning for judicial reform, it is imperative that they discover the means by which laws become effective and attempt to comply with these rules if possible.

2. Consider Other Measures to Affect Judicial Reform.

The CPA also set about making a number of other legal reforms. A Judicial Review Committee was formed to review each of approximately 850 judges and prosecutors with significant Ba'ath Party links, looking for complicity in crimes of the former regime and corruption.¹⁴⁹ The CPA also re-established the Council of Judges, which, prior to the Hussein regime, had administered the judicial and prosecutorial systems. The Council of Judges was charged with investigating allegations of misconduct and incompetence, and nominating capable persons to fill judicial and prosecutor vacancies.¹⁵⁰ The CPA also established a Central Criminal Court of Iraq (CCCI) with jurisdiction over crimes against the Coalition and select crimes that threatened the stability of the government.¹⁵¹ The CCCI is addressed in paragraph 1.j., below.

d. Provide a Process to Vet and Seat Judges as Soon as Possible.

On 16 April 2003, the Coalition announced that it was disestablishing the Ba'ath Party of Iraq. The CPA Order implementing this declaration, however, was not promulgated for another month.¹⁵² In the interim, commanders found that they could not wait for a centralized decision. Faced with prisons and jails overcrowded with looters and criminals released by Saddam immediately before the war, and confronted by the expectations of the liberated Iraqis that the remnants of the Ba'ath regime be removed from power, military governors had to assume responsibility for vetting judges so that the courts could begin working again.¹⁵³ Consequently,

¹⁴⁸ See, e.g., 1AD AAR, *supra* note 12 (Governate Support Team power point presentation).

¹⁴⁹ Coalition Provision Authority, Order Number 15, Establishment of The Judicial Review Committee (23 Jun. 2003). The Judicial Review Committee was abolished upon transfer of governing authority to the Iraqi Interim Government on 28 June 2004. See Coalition Provisional Authority, Order Number 100, Transition of Laws, Regulations, Orders, and Directives issued by the Coalition Provisional Authority, sec. 3.6 (28 Jun. 2004) [hereinafter CPA Order No. 100] (on file with CLAMO)

¹⁵⁰ Coalition Provisional Authority, Order Number 35, Re-establishment of the Council of Judges (13 Sep. 2003) (on file with CLAMO); see also Coalition Provisional Authority, Memorandum Number 12, Administration of Independent Judiciary (8 May 2004) (on file with CLAMO) (further implementing the Council of Judges). Pursuant to The Administrative Law for Iraq, the Higher Juridical Council assumed the role of the Council of Judges as of 30 June 2004. CPA Order No. 100, *supra* note 64, sec. 3.13.

¹⁵¹ See Coalition Provisional Authority, Order Number 13, The Central Criminal Court of Iraq (18 Jun. 2003) (on file with CLAMO).

¹⁵² Coalition Provision Authority, Order Number 1, De-Ba'athification of Iraqi Society, sec. 1 (16 May 2003) (on file with CLAMO). See also Coalition Provision Authority, Memorandum Number 7, Delegation of Authority Under De-Ba'athification Order No. 1 (16 May 2003) (on file with CLAMO) (delegating authority to the Governing Council to carry out the De-Ba'athification of Iraqi society consistent with CPA Order No. 1).

¹⁵³ See, e.g., 1st Marine Expeditionary Force Weekly Report input by Paralegal Specialist Rachel Roe (17 Jul. 2003) (on file with CLAMO) (indicating the ongoing vetting of judges by the military governor of Najaf, due to the absence of any activity in restoring the provincial court system by CPA.).

commanders, aided by JAs and Civil Affairs Governance Support Teams (GSTs),¹⁵⁴ had to decide their own policies on what level of officials and judges should be dismissed because of membership in the Ba'ath Party.¹⁵⁵

This situation led to disparate policies as legal teams and CA officers did their best to restart the courts. In the 4th Infantry Division area of operations, for example, the JAs found themselves vetting judges—looking through court records and personnel files, interviewing the judiciary and collecting biographies, and reviewing judges' cases for dissimilar treatment to determine whether judges were biased.¹⁵⁶ In the First Marine Expeditionary Force (I MEF), the U.S. Marine Corps JA for the governance commander in Karbala interviewed twenty-one judges to determine whether they should continue their judicial work.¹⁵⁷ In other provinces, the legal unions chose the judges and in still others, the local mayor and community leaders were involved in selecting the judges.¹⁵⁸ In An Najaf, the Marine JA held an election in which judges and members of the bar could remove judges with a vote of "no confidence."¹⁵⁹

¹⁵⁴ For a general discussion of Civil Affairs missions and governance support teams, see JOINT CHIEFS OF STAFF, JOINT PUB. 3-57.1, JOINT DOCTRINE FOR CIVIL AFFAIRS (14 Apr. 2003); U.S. DEP'T OF ARMY, FIELD MANUAL 3-05.401, CIVIL AFFAIRS TACTICS, TECHNIQUES, AND PROCEDURES (28 Sept. 2003); *see also* paragraph I, *infra*, describing CA JA missions.

¹⁵⁵ The OPDAT team also found the following.

Of equal significance was the initial lack of guidance to the justice ministry and the commanders in the field concerning the policy and procedures for removing Ba'ath Party members from their posts. Ba'ath party membership consisted of various levels that in some measure reflected whether the member joined the party simply to be employed, or because the member was committed to Ba'athist ideology. The initial confusion over the level of member that should be removed resulted in commanders in the field being required to make decisions without the necessary guidance. These decisions by the commanders varied throughout the country with the consequence that there has been no uniform approach to the process of removing judges. This issue [was] resolved with the order on de-Ba'athification that specifies the levels of membership that should be subject to removal and the procedures for removal.

OPDAT Report, *supra* note 13, at 6.

¹⁵⁶ After Action Review Conference, Office of the Staff Judge Advocate, 4th Infantry Division, and the Center for Law and Military Operations, Fort Hood, Tx., at 2 (8 Sept. 2004) [hereinafter 4ID AAR] (on file with CLAMO).

¹⁵⁷ Southern Iraq Judicial Assessment, *supra* note 6, at 4.

¹⁵⁸ *Id.* at 15.

¹⁵⁹ The JA decided that any judge who received a vote of no confidence from 25 percent of the judges or 75 percent of the lawyers would be removed from office. The vote resulted in twelve judges removed from the court. *Id.* at 8. Without centralized guidance, each Marine battalion commander employed a different procedure to determine if the judges would remain in their positions. However, the common tools employed to screen judges included:

- (1) To poll the local provincial legal union (bar association) for their collective opinion of the judges in regard to Ba'athist sympathies and reputation for corruption;
- (2) To poll the opinions of the local tribal sheikhs and municipal officials;
- (3) To question each judge individually as to his prior links to the Ba'ath regime, as well as those of other local judges; and
- (4) To discuss with local business persons the reputations of the various judges.

Id.

Judge advocates learned that there were essentially two types of judges in the provincial courts. First were those of local origin who had family and tribal ties within the province in which they sat as judges. Saddam had chosen these judges for their local ties, in addition to their legal acumen. Each judge attended a three year program in the Iraqi Judicial Institute in Baghdad prior to assuming his or her position on the bench. The second type of judge had high level political ties within the Ba'ath party. The job of this second group of judges, in addition to their day-to-day legal duties, was to keep watch over the first group of judges and to report any politically questionable activity to Baghdad.¹⁶⁰

Although implemented on an *ad hoc* basis, without a well established set of procedures, the provincial legal selection and vetting committees performed very well, permitting the local provincial governors to reestablish the rule of law under a quasi-democratic system that gave local Iraqi community leaders input into the selection of their judicial leaders for the first time. This process permitted courts in some portions of Iraq to return to a functioning state as early as June 2003.¹⁶¹

Finally, on 17 June 2003, the CPA issued a national policy establishing a Judicial Review Committee (JRC) to vet and remove judges, as necessary.¹⁶² This Order effectively eliminated a commander's authority to remove or replace judges. Dismissals and appointments of court personnel that had occurred prior to the CPA Order were considered provisional until ratified by the JRC.¹⁶³ According to the Order, judges who were in the top four tiers of the Ba'ath Party were to be removed, but it often took months to determine who those persons were, as many records had been destroyed.¹⁶⁴ With one exception in Wassit province, for example, every judge interviewed in the seven provinces under I MEF control denied ever having been a Ba'ath Party member.¹⁶⁵ This denial was made despite the fact that it was common knowledge within the MOJ that one was not appointed as a judge without Ba'ath Party membership.¹⁶⁶

This repeated vetting by the CPA, while well-intentioned, proved a source of confusion and anxiety among many local judges as to why they had to be reviewed again, when a

¹⁶⁰ Interview with Judge Haithem Jassim Mohound, Al Kut, Iraq (8 Jun. 2003) (notes of file with CLAMO). During the vetting process of the Iraqi judges it gradually became easier to identify the politically oriented judges, as they tended to bear two distinctive attributes. First, they were not required to attend the Judicial Institute for three years, but were provided an accelerated program that lasted only 3-4 months in many instances. Second, they were given judgeships in provinces far from their familial and tribal roots. This second indicator was not a 100% indicator of high level Ba'ath membership, but it was a red flag warranting further investigation. Saddam valued having persons on the bench with no local loyalties or conflicts which might cause them to hesitate to provide information regarding perceived disloyal conduct. *Id.*

¹⁶¹ See, e.g., Legal Assessment of Southern Iraq, *supra* note 6.

¹⁶² Coalition Provisional Authority, Order Number 7, Establishment of the Judicial Review Committee (23 Jun. 2003) (on file with CLAMO).

¹⁶³ National Policy Guidance, *supra* note 27, at 4.

¹⁶⁴ See, e.g., Interview, Major Sean Dunn, Judge Advocate, U.S. Marine Corps, in Al Kut, Iraq (Jul. 2003) [hereinafter Maj. Dunn Interview].

¹⁶⁵ Interview with Lieutenant Colonel Michael O'Hare, Staff Judge Advocate, 358th Civil Affairs Brigade, Camp Babylon, Iraq (9 Aug. 2003).

¹⁶⁶ Interview with Mr. Michael Dittoe, Department of Justice attorney assigned to the CPA Ministry of Justice, in Baghdad, Iraq (14 Jul. 2003).

commander had approved them already. This process had the potential to undercut the authority of the Coalition by having a different Coalition authority repeat the same review process.¹⁶⁷

Consequently, legal teams learned that a coordinated, comprehensive plan for vetting judges must be a first priority in judicial reconstruction and reform missions. Judges must be selected and returned to the bench to lead the way in reconstituting the judicial system.

e. Be Prepared to Provide Assessments and Assist in Reconstruction of Courthouses in Coordination with Civil Affairs Teams.

As explained at the beginning of this section, a majority of the Iraqi courthouses had been looted and damaged. In the south, for instance, the I MEF found that none of the courts in any of the seven provinces in its area were operational. Accordingly, opening the courts and encouraging judges to return to work was a high priority of the military commanders appointed to administer each province.¹⁶⁸ In the absence of guidance from higher headquarters or ORHA and, later, the CPA, commanders, JAs, and CA Governance Support Teams took a number of different approaches in reconstituting the judicial system.¹⁶⁹

In April 2003, the SJA, V Corps, formed the Judicial Reconstruction Assistance Team (JRAT) to begin assessing the structural condition of each courthouse in the Baghdad area of operation. The JRAT mission was to provide technical and practical assistance to reconstruct and reform criminal justice and penal systems throughout the country.¹⁷⁰ The JRAT was directed to make recommendations for repairs or, if the courthouse was severely damaged, find an alternate location.¹⁷¹ Over the next four weeks, JRAT members traveled to each courthouse in the Baghdad area and met with the judges and other court personnel. Judge advocates then wrote numerous fragmentary orders directing units to secure courthouses and public facilities, including the national property records repository in downtown Baghdad.¹⁷² They also prepared a final report with specific recommendations as to a course of action, which was forwarded to the MOJ and CPA to support funding requests.¹⁷³

¹⁶⁷ See, e.g., Maj. Dunn Interview, *supra* note 79 (“[o]ur judges got the first sense that there were rifts in the Coalition that they could exploit for their advantage when CPA began repeating the vetting process. After that they began to resist direction from JAs in the field, often indicating they wanted direction from Baghdad.”).

¹⁶⁸ Southern Iraq Legal Assessment, *supra* note 6, at 4.

¹⁶⁹ See, e.g., Nance Paper, *supra* note 40, at 2 (stating that the OSJA, V Corps decided to begin judicial reconstruction in the absence of any detailed direction from higher headquarters about what the Phase IV mission would be).

¹⁷⁰ Nance Presentation, Interagency Iraq Seminar, *supra* note 11. Initial members of the JRAT included JAs and paralegals from the OSJA, V Corps, augmented by lawyers and paralegals from the OSJA, 3d Infantry Division. Nance Paper, *supra* note 40, at 1.

¹⁷¹ 12th LSO AAR, *supra* note 16, at 10. Lieutenant Colonel Jeffery Nance, V Corps, was initially in charge of the JRAT. Major Craig Jacobsen, a 12th LSO JA assigned to V Corps, then took over the mission in mid-June 2003, followed by Major Juan Pyfrom, JA, V Corps, LTC Bruce Pagel, and Lt. Col Robert Coachar, USAF.

¹⁷² Warren E-mail, *supra* note 7.

¹⁷³ Mr. Clint Williams and Judge Donald Campbell, Senior Advisors to the MOJ at CPA joined the JRAT on several missions, particularly in the earlier stage of the operation. Their participation facilitated the reconstruction efforts, as they saw first-hand the need for funding and other support. See Nance E-mail, *supra* note 17, at 1.

Similarly, the legal team from the 101st Airborne Division (Air Assault) formed the Northern Iraq Office of Judicial Operations (NIOJO). Members of NIOJO traveled throughout their area of operation, overseeing inspections and assessments of courthouses, and helping draft detailed schematic building plans and bills of quantities to facilitate reconstruction.¹⁷⁴

The OSJA, 4th Infantry Division devised a three phase operation to get the courts in their sector up and running. The BCT JA shared primary responsibility for the process with the OSJA's Chief of Justice. The first phase of the operation began with the assessment of the facilities, pending cases, and personnel. Three person JA teams traveled to each courthouse in their assigned province with a specially selected and educated interpreter.¹⁷⁵ While at each courthouse, the team met with the judges and court personnel, conducted a detailed assessment of necessary facilities repairs, and reviewed each felony criminal file that was available to ensure sufficient evidence existed to go forward with the charges. The SJA also traveled to each provincial capital and met with the assigned judges to discuss their concerns and the process.¹⁷⁶ At the conclusion of phase one, the BCT commanders forwarded the court assessments to the Division with a request for funding and a recommendation to open select courthouses.¹⁷⁷ The OSJA tracked every individual courthouse in its area of operations and the Commanding General made individual decisions on the opening of each court based on a recommendation of the BCT commander and the SJA.¹⁷⁸ During the second phase, the BCT JAs focused on ensuring the projects to repair and upgrade courthouses and other issues stayed on track. Because the CPA MOJ assumed responsibility for the judiciary during phase two, phase three (turning over the judiciary from 4th Infantry Division to the Iraqis) never came about.¹⁷⁹

The 82d Airborne Division had a somewhat different experience in that their area of operations, the Anbar Province, which included Fallujah, was one of the most unsecured areas of Iraq. Moreover, the Anbar Judiciary was perhaps in the worst condition of any Province in the country.¹⁸⁰ There were ten courthouses in their area, but they were only able to travel to one in al Ramadi, which was a felony court. The OSJA did not have sufficient JAs to conduct judicial reconstruction and oversight, but tried to use the JAs assigned to the CA battalion in their area as much as possible for this mission. The JA would visit al Ramadi once a week to coordinate with

¹⁷⁴ Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault) Operation Iraqi Freedom (OIF) After Action Review (AAR), at 66 (24 Sept. 2004) [hereinafter 101st ABN DIV AAR] (on file with CLAMO).

¹⁷⁵ E-mail from Lieutenant Colonel Flora Darpino, former Staff Judge Advocate, 4th Infantry Division, to Lieutenant Colonel Pamela Stahl, Director, Center for Law and Military Operations, at 1 (15 Apr. 2005) [hereinafter Darpino E-mail] (on file with CLAMO). The team consisted of the BCT JA, the Chief of Justice, and a third JA from 4th ID. The third JA for the 1BCT was an officer assigned to the 64th Corps Support Group who spoke Arabic; the 2BCT's third JA was a TDS officer attached to the Division; and the 173d's third JA was the operational law attorney for the Division headquarters. The CA teams did not participate in the assessment of the judiciary. *Id.* See also, 4th ID AAR, *supra* note 71, at 1-2

¹⁷⁶ Darpino E-mail, *supra* note 90, at 1.

¹⁷⁷ All the initial requests included opening of the felony court at the provincial capital. The Commanding General, if satisfied with the state of the courthouses and judiciary, ordered the opening of individual courthouses on a case-by-case basis. Each provincial courthouse was opened after the initial assessments. *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Memorandum, Major Craig E. Bennett, International Law Officer, 304th Civil Affairs Brigade, 82nd Airborne Division (DMAIN), for Lieutenant Colonel JP Kisiecki, Judge Advocate, 1st Marine Division, United States Marine Corps, subject: Status of Anbar Province Judiciary, para. 1 (Feb. 2004) [hereinafter Bennett Memorandum] (on file with CLAMO).

the judges and try to facilitate the operation of the courthouse.¹⁸¹ The CA JA spent much of January 2004 conducting engineering assessments of each of the ten courthouses to begin the reconstruction effort.¹⁸²

The OSJA for 1st Infantry Division and their attached DOJ attorney found during their assessments that there were certain things that every court needed, to include: improved communications; vehicles; office automation; and courthouse and judicial security improvements.¹⁸³ They noted that it was important to evaluate security at the courthouses, both physical security of the building (standoff from street, barriers, guards) and personal security for the judges (weapons, weapons cards, authorized personal security details).¹⁸⁴ They also found that they needed to identify measures of effectiveness to assess the progress of the judicial reconstruction effort. Their measures fell into four broad categories—security, rule of law, infrastructure, and “crimes against Coalition capable courts.”¹⁸⁵

Although many JAs, legal administrators, and enlisted paralegals were assigned to judicial assessment and reconstruction missions, it was sometimes difficult for these legal teams to visit every courthouse, especially within the first month or two of their deployments. Therefore, some legal teams obtained the assistance of their S-5s and CA personnel, whenever possible, to assist in this effort.¹⁸⁶ Moreover, SJAs should not forget their Reserve Component (RC) counterparts. Legal teams found that many RC attorneys brought civilian legal and

¹⁸¹ After Action Review Conference, Office of the Staff Judge Advocate, 82d Airborne Division, and the Center for Law and Military Operations, at 5 (22 Jun. 2004) [hereinafter 82d ABN DIV AAR] (on file with CLAMO).

The operational environment in Ramadi proper borders on non-permissive for civil affairs operators. Some argue it is not permissive – full stop. The GST would travel to the CMOC at city hall in 5 to 7 vehicle convoys with more firepower than a rifle platoon. Despite my better judgment I would be dropped off at the courthouse on a regular basis with one NCO to watch my back. On occasion there was a 1BCT HUMV (sic) in the parking lot with a .50 cal while the 1BCT JAG collected property damage claims, but more often than not we were alone. I would not recommend repeating this. There is absolutely no force protection in place at the courthouse and zero reliable communications. If we ever came under attack we were on our own. Due to limited vehicle availability the only way I could conduct business was to take this risk.

Bennett Memorandum, *supra* note 95, para. 14.

Id. para. 14.

¹⁸² *Id.* para. 4.

¹⁸³ Pagel Report, *supra* note 16, at 5.

¹⁸⁴ IID Judicial Assessment, *supra* note 48, at 6.

¹⁸⁵ Pagel Report, *supra* note 16, at 5. The CA JA assisting working in the 82 ABN DIV area also recommended that the courthouses be constructed with all of the security measures that are found in U.S. Federal Courthouses, to wit:

Blast walls/barriers distancing vehicles from the courthouse, armed guards with established SOPs for building security, high quality handheld or walkthrough metal detectors at single entry and exit point, disciplined pat-downs of all entrants (metal detectors don't sense plastic explosives in suicide bombers vests), secure holding cells for prisoners being brought to the courthouse, 24 hours guard presence to deter bombs being planted inside or outside the court building after hours
....

Bennett Memorandum, *supra* note 95, para. 10.f.

¹⁸⁶ IID Judicial Assessment, *supra* note 48, at 12.

governmental skills to the fight that their active duty counterparts did not possess. The JAs from the 256th Brigade Combat Team, Army National Guard, attached to the 1st Cavalry Division, found it helpful to assign one of their own to the Division GST because the GST benefited from the National Guard JAs experience and the brigade as a whole was able to take the lead in many GST projects on behalf of Task Force Baghdad.¹⁸⁷

A lesson learned is that during the Legal Preparation of the Battlefield planning, there must be a more comprehensive allocation of responsibility for court assessment and reconstruction between line units and their JAs on the one hand and CA units and their JAs on the other.¹⁸⁸ Without a comprehensive, integrated plan, there is a possibility of conflict and redundancy, where both legal teams are conducting assessments of the same courthouses and coordinating the same reconstruction projects. This is also true as between the military, other governmental agencies, and non-governmental agencies.

1. Be Prepared to Handle Many Contract and Fiscal Law Issues During the Judicial Reconstruction Process.

During the reconstruction process, many legal teams found that they needed a method to obtain money for rebuilding facilities. They knew U.S. forces had the money and that they had authority to spend it, but no one seemed to know how to get the money. As the first JRAT team chief stated: “[t]he concept of legal authority or correct fund site is one thing; having the actual cash is another.”¹⁸⁹ This inability to obtain cash had a negative impact on the Iraqi people. They needed U.S. assistance, the legal teams told them that they would help them, and then it took weeks to get small amounts of money or building materials to repair their courthouses.¹⁹⁰ While waiting for funds, the JRAT personnel, for instance, secured \$10,000 in Commanders Discretionary Funds toward the restoration of four pre-selected courthouses. A JA was designated as the responsible officer for collecting these funds from V Corps non-divisional units.¹⁹¹ As the restoration of the courthouses began, JRAT personnel conducted periodic inspections to assess the program and maintain contact with the judges and court personnel.¹⁹²

Even during the second rotation of units into Iraq in the early spring of 2004, the fiscal and contract law issues had not been resolved. For example, the DOJ attorney with the 1st Infantry Division noted that the process of identifying funding sources was in some ways the most difficult and “certainly the most frustrating.”¹⁹³ They found that access to the Iraqi relief and reconstruction fund (IRRF)¹⁹⁴ and project coordination office (PCO) (also known as the

¹⁸⁷ ICAV AAR, *supra* note 33, at 64.

¹⁸⁸ See Warren E-mail, *supra* note 7.

¹⁸⁹ Nance Paper, *supra* note 40, at 8.

¹⁹⁰ *Id.*

¹⁹¹ See E-mail from Captain Ryan Dowdy, OSJA, V Corps, to Lieutenant Colonel Kirk Warner, 12th LSO, subject: OIF Lessons Learned II (9 May 2005).

¹⁹² 12th LSO AAR, *supra* note 16, at 10.

¹⁹³ Pagel Report, *supra* note 16, at 7.

¹⁹⁴ The IRRF was appropriated funds designated to carry out the purposes of the Foreign Assistance Act. The funds were administered by the Department of State, primarily through USAID and the CPA (and later the PCO). See Information Paper, Office of the Staff Judge Advocate, Combined Joint Task Force-Seven, subject: Sources of FY04 Funding for Projects Benefiting the Civilian Population of Iraq, para. 2.e(1) (4 Feb. 2004) (on file with CLAMO).

project management office) was difficult and was an obstacle to efficiently moving forward with reconstruction efforts. They also found that numerous Coalition-led renovation and construction projects were beset with theft and poor workmanship. Arranging for courthouse specific statement of work and design specifications acceptable to the PCO was difficult and caused delay. The legal teams found that enlisting the assistance of the CA officers, the engineers, and the contracting office helped in this regard.¹⁹⁵

Therefore, legal teams must understand the mechanism for accessing funding prior to deployment, if possible. Moreover, JAs must be schooled in contract law issues, such as reviewing statements of work, to carry out the judicial reconstruction mission. Finally, JAs must be prepared to educate their resource managers and finance officers on the process.¹⁹⁶

2. Proficient Translators are key to Court Assessments.

Legal teams conducting judicial assessments quickly found that they needed proficient translators to assist them in this mission. Ideally, the translator should be a trusted local attorney. This person must be able to provide continuity, technical expertise, and consistent translation to this highly technical area.¹⁹⁷ Of course, one of the difficulties in finding an adequate translator was that, like everyone working for the Coalition Forces, these translators were targets of the insurgents.¹⁹⁸ Many legal teams did not have their own translators, but had to rely on unit translators. Legal teams advised that it is important to identify the translator that will be working with the assessment team early on and provide them with a questionnaire so that they can read it over and ask any questions prior to the assessment visits.¹⁹⁹

3. Legal Teams Must be Schooled in Soldier Skills to Conduct Judicial Assessments.

To carry out the judicial assessment mission, legal personnel had to have a high-level of basic Soldier skills. Many legal teams noted that the most challenging aspect of evaluating the judicial system was security.²⁰⁰ The paralegals and JAs on the JRAT teams, for instance, were

¹⁹⁵ Some of the funding sources were for projects that required very little oversight. Other projects required more direct day-to-day involvement. Moreover, identifying and contracting a reliable contractor was complicated. Pagel Report, *supra* note 16, at 7.

¹⁹⁶ As Lieutenant Colonel Jeffery R. Nance, Chief of the JRAT during the early part of the operation noted:

I think that adding to the problem was that even when we understood the fiscal law and applicable process involved in getting the particular funds we were trying to get, the finance people rarely really understood. We often had to explain to them, if we could. And even then, they did not want to take our word for it. They wanted to go higher to get clarification.

Nance E-mail, *supra* note 17, at 1; also see Bennett Memorandum, *supra* note 95, at para. 4. (discussing the fact that the JA CA operating in the 82d area of operations had to assist in conducting engineering assessments of each of the ten courthouses in the Anbar Province to create a scope of work for contractors to submit bids against for the rehabilitation of existing courthouses and the construction of new courthouses that were beyond repair).

¹⁹⁷ See, e.g., Pagel Report, *supra* note 16, at 4.

¹⁹⁸ IID Judicial Assessment, *supra* note 48, at 2.

¹⁹⁹ *Id.* at 5.

²⁰⁰ See, e.g., *id.* at 10 (noting that the lack of security prevented them from doing more frequent courthouse visits).

out on the streets every day. As a senior paralegal noncommissioned officer for V Corps commented: “[w]hat I least expected was having to clear buildings with attorneys and paralegals. Having never done that before, thank god that nothing happened to any of us on any of those missions, but it could have.”²⁰¹ Many unit travel policies required convoys of at least three vehicles and a crew served weapon. These safety requirements made travel very difficult and the ability to get to the courthouses and police stations was limited without some organic capabilities.²⁰²

Because of the security situation, legal teams routinely recommended that Soldier skills, such as reacting to an ambush, clearing buildings, and personnel searches must be trained prior to deployment, even if it appears completely improbable that legal personnel will be in situations where such skills are required.²⁰³ Although many legal teams traveled with other service members and sometimes security detachments, they must know basic Soldier skills to function in an unsecured environment and to “pull their own weight” when participating in a convoy.

Therefore, to begin the process of judicial reconstruction, legal teams must understand that resources are key to their success. They must have a plan for transportation and security to travel to the sites to make an assessment of the courthouses. Moreover, legal teams must understand how to access funding to rebuild the physical facilities and have a system to oversee and monitor the reconstruction effort.²⁰⁴

f. Plan for Restarting the Judicial Process With a View Towards Returning the Criminal Justice System to Full Control of the Local Populace as soon as Practicable.

*Operational law offices need to prepare for the new, part civil affairs, part JA role of judicial operations. Commanders at all levels benefited from an effective and functioning court system Not only did the efforts “win the hearts and minds” with the populous, but they also helped foster an environment where the tenets of freedom and justice could develop and improve.*²⁰⁵

Once JAs and others completed their initial assessments of the courthouses and police stations, they turned to the very difficult process of rebuilding the entire legal system. Through their experiences, legal teams overcame many challenges and learned many lessons. They learned that legal teams must be flexible; initial assumptions, such as that all Iraqi judges were

²⁰¹ Sergeant First Class Luis Millan, Round Table Discussion, Transcript of After Action Review Conference, Office of the Staff Judge Advocate, V Corps, and the Center for Law and Military Operations, Heidelberg, Germany, at 1-2 (17-19 May 2004) [hereinafter Round Table Discussion] (on file with CLAMO) (SFC Millan also stated that when the JRAT first started doing convoys around Baghdad, they had support from 3d Infantry Division Soldiers. These Soldiers gave the JRAT briefs on how to react to an ambush); see also Captain Lisa Gumbs, *id.* at 4 (“[judge advocates] need to know basic soldiering skills; how to call in a MEDEVAC; how to react to an ambush in a convoy. All of those things you’re not generally taught because we’re usually with the JAG office, but in this environment we were going out as the JRAT Team. I was going out in convoys to different locations.”).

²⁰² IID Judicial Assessment, *supra* note 48, at 1.

²⁰³ CPT Travis W. Hall, Round Table Discussion, V Corps, *supra* note 116, at 5; see also Nance Paper, *supra* note 40, at 8-9 (providing that all personnel could use more training in basic weapons use and safety and providing convoy and building security and that the M-16/M-9 were not sufficient for their JRAT mission).

²⁰⁴ Nance Presentation, Interagency Iraqi Seminar, *supra* note 11.

²⁰⁵ 101st ABN DIV AAR, *supra* note 89, at 70.

ideologically tied to the Ba'ath Party, may be wrong and have to be changed.²⁰⁶ They also discovered that obtaining money was not simply a matter of finding the nearest finance office and getting the cash. Legal teams need to think through this process and have the personnel contacts in place to access funds.²⁰⁷ They also learned that a unit should have an established working group consisting of representatives from the Provost Marshal, SJA, G-5, and G-2, among others, to effectively plan and carry out judicial reconstruction.²⁰⁸

Additionally, legal teams learned that judicial reconstruction is a lengthy process. At the time of the transfer of sovereignty to the Iraqi Interim Government on 28 June 2004, CPA Memorandum Number Three was amended to recognize the continuing involvement of the Multinational Force (MNF) in providing critical support to the administration of justice and the need to transition from this support.²⁰⁹ The Memorandum asserted the right of the MNF to apprehend persons suspected of having committed criminal acts, but who were not considered security internees, and required that these individuals be turned over to Iraqi authorities as soon as practicable.²¹⁰ It also recognized the ongoing process of security internee management under the Fourth Geneva Convention applied to the MNF as a matter of policy and set forth the MNF security internee process.²¹¹

1. Be Prepared to Rebuild the Judicial System from the Ground Up.

Upon assessing the state of the facilities in Baghdad and discovering that most had been burned or looted, the Senior Advisor to the MOJ directed that the V Corps' JRAT set a goal to hold the first criminal court session in Baghdad by 8 May 2003.²¹² In planning for this mission, the V Corps OSJA quickly recognized that the only real *legal* issue was their authority to begin rebuilding the judicial system, in the first place.

We looked first to our higher headquarters for authority, guidance, a plan; but those things were only supplied in the broadest terms. There was no detailed plan for Phase IV operations (post-major combat) when coalition forces took Baghdad Furthermore, OHRA/CPA had no more than a broad plan at this early stage. Thus, we were left to either sit and wait for someone to tell us what to do or to act within the broad guidance we had been given, with grounding in international law. It was no real challenge to determine this matter. We knew we had to do something. We knew our window of opportunity was closing. We also knew that we had a responsibility under the Geneva and Hague Conventions to do certain things to ensure public order and safety for the Iraqi people We knew that whatever Phase IV plan was eventually issued, it would have to be based on this law. Therefore, our decision to act with international law as our base line plan was no real decision at all – it was the only logical, legal and responsible

²⁰⁶ Nance Paper, *supra* note 40, at 7.

²⁰⁷ *Id.*

²⁰⁸ Pagel Report, *supra* note 16, at 9.

²⁰⁹ CPA Memo No. 3, *supra* note 53, sec. 1.

²¹⁰ *Id.* sec. 5.

²¹¹ *Id.* sec. 6.

²¹² Nance Paper, *supra* note 40, at 3 (providing that the Senior Advisor, Ministry of Justice, directed them to hold the first session on 8 May 2003).

thing to do. After this, the only initial issues we faced were practical ones. These we overcame with pluck, dogged determination and the knowledge and resourcefulness of COL [Marc] Warren [Staff Judge Advocate, V Corps].²¹³

Because of the state of most courthouses in Baghdad, the JRAT chose one courthouse in the east and one in the west of Baghdad to begin hearing cases. Critical to this first step were the judges and court police investigators.²¹⁴ Although most of the judges and prosecutors were Ba'athists, this fact, alone, did not mean that they were corrupt, as they had to be members of that party to hold their jobs. Because the de-Ba'athification process had not yet started, the JRAT conducted some vetting of judges and court personnel with the assistance of a translator.²¹⁵ Although the judges were reluctant to hear cases in other than their own courthouses, the JRAT stood firm, directing them to appear at the appropriate courthouse on 8 May.²¹⁶

Another critical and difficult step in planning for the court session was managing the "administration" side of the judicial system. A successful justice system requires not only lawyers and judges, but secure facilities, reliable docketing, and case-tracking system, communications, and transportation support for detainees.²¹⁷ Transporting to court Iraqi detainees accused of Iraqi-on-Iraqi crimes who were in Coalition custody proved particularly difficult. In the Baghdad area, those detained for Iraqi-on-Iraqi crimes were evacuated to two detention facilities located in the Rusafa District of Baghdad.²¹⁸ During the first months of the occupation, all police functions were being carried out by Coalition Forces. Upon arrest, the detaining service member filled out a CPA Apprehension Form.²¹⁹ These forms had to be translated from English into Arabic so that the JRAT members could present them to the court.²²⁰ To get the suspects to the court sessions, the JRAT drafted a fragmentary order instructing the military police to transport the detainees to court and provide perimeter security for each courthouse. The JRAT also obtained two buses to be used by the military police to transport the Iraqi prisoners, and to transport uniforms and weapons for the Iraqi Court Police.²²¹ Despite

²¹³ *Id.* at 7.

²¹⁴ The JRAT decided to hold the initial sessions of the Iraqi criminal system called the investigative hearing. During this hearing, the police present a case file to the investigative judge, who reviews the file and asked questions, even of the suspect. This judge decides whether to assign the case to a court investigator to further develop it for possible trial. *Id.* at 3.

²¹⁵ The de-Ba'athification process did not begin until May 2003. The JRAT asked questions of court personnel and had their translator ask questions. *Id.* at 4.

²¹⁶ *Id.* at 3.

²¹⁷ IAD AAR, *supra* note 32 (Governate Support Team power point presentation).

²¹⁸ JRAT and the MOJ Report, *supra* note 31, at 1. Major Juan A. Pyfrom, OSJA, V Corps, explained that most of the persons detained for Iraqi-on-Iraqi crimes were from the Baghdad area. Pyfrom Transcript, *supra* note 42, at 2.

²¹⁹ See Appendix A-1 for a copy of the CPA Apprehension Form.

²²⁰ Pyfrom Transcript, *supra* note 42, at 6.

²²¹ Initially, there was a lot of frustration among the military police who were responsible for transporting detainees to court. The Iraqis had a different sense of the importance of time; therefore, often judges would not come to work until the afternoon, which meant that of the 10-15 detainees transported to court, only one to two would be processed. This resulted in the same individuals being shuttled back and forth to the courthouse several times before being seen by a judge. E-mail, Captain Brent E. Fitch, former V Corps JA, to Lieutenant Colonel Pamela M. Stahl, Director, Center for Law and Military Operations (26 Jan. 2005) (on file with CLAMO).

these almost insurmountable difficulties, through hard work the JRAT held the first investigatory sessions for fifteen suspects on 8 May 2003, as directed.²²²

To manage the flow of detainees to the courthouses, the JRAT worked out a system whereby each week the military magistrate at the detention facilities forwarded 120 criminal files to the JRAT which were then translated from English to Arabic. The JRAT then created a weekly docket for each court. The docket was forwarded to the Noncommissioned Officer in Charge (NCOIC) at each jail, who would use it to bring fifteen detainees to each court, four days a week.²²³ The JRAT also hired two Iraqi lawyers to act as “court liaisons” who assisted in managing the court docket and recording the dispositions of each case. On 24 June 2003, the Bayaa and Adamyia Criminal Courts began hearing criminal cases on a consistent bases.²²⁴

During this period, the JRAT continued to maintain situational awareness of the judicial system by talking to court personnel. Members of the JRAT learned that many were concerned about courthouse security. Therefore, the JRAT instituted an identification system using badges, which allowed them to take pictures and obtain information on everyone who was going into the courthouse.²²⁵

By the summer of 2003, the JRAT mission had evolved from assessing and managing the judicial system to implementing the transition of the Iraqi judicial system back to the Iraqis. This was accomplished through empowering the Baghdad courts and Iraqi police to assume control of the criminal justice system.²²⁶ This transition had to be done as soon as possible, because it quickly became apparent to members of the JRAT that the system they had constructed would collapse unless there was a way to increase the throughput of individuals into the system. To address this issue, JRAT began a process of incremental expansion. The first step in the process required greater participation by the Iraqi police and the Baghdad courts. The plan was to use the newly trained Baghdad police to arrest, detain, and transport to the court all persons suspected of Iraqi-on-Iraqi crime.²²⁷ This meant that they had to get the Iraqi Chief of Police for the city of Baghdad, the Minister of the Interior, and the senior judges at the same table to discuss the criminal justice system issues. In August 2003, the JRAT managed to

²²² Nance Paper, *supra* note 40, at 5.

²²³ According to JRAT personnel:

When JRAT sent the weekly dockets to the battalions responsible for running the local detention facilities, often less than fifty percent of the detainees scheduled for court would be brought to the appropriate court. Upon further investigation, we determined that detainees often would be at a location other than [sic] which was indicated on the detainee database or the detainee would have been transported to a different facility after the detainee list was published or after the unit received [the] docket. In other instances, the detainee would have been located at the correct facility, but the unit responsible for transporting could not find the detainee on its prisoner list.

JRAT and MOJ Report, *supra* note 31, at 6.

²²⁴ 12th LSO AAR, *supra* note 16, at 10-11.

²²⁵ Nance Presentation, Interagency Iraq Seminar, *supra* note 11.

²²⁶ JRAT and MOJ Paper, *supra* note 31, at 3. Members of the JRAT drafted a fragmentary order, briefed the SJA, presented the plan to a military police forum in early August 2003, then briefed the CJTF-7 Commander. The Commander was primarily concerned with how to maintain visibility of those Iraqis who were arrested by the Coalition and turned over to Iraqi police and courts for prosecution.

²²⁷ *Id.*

coordinate such a meeting.²²⁸ At the meeting, everyone agreed that the Iraqi police needed to re-engage; that the court investigators would be allowed back into the main police precincts and that the chiefs at the individual precincts would facilitate that process; and that investigations would be initiated at the precincts again.²²⁹

By October 2003, the police had begun to send people to all of the local courts in Baghdad. Also in October, the JRAT had its first successful trial; an Iraqi was convicted of murder and sentenced to life in prison.²³⁰ By mid-November, all felony and misdemeanor courts in Baghdad were open and working, court investigators were back in the police stations, and the Iraqi police were transporting detainees to and from the court. Nevertheless, the Iraqi Police were still experiencing problems picking up prisoners from Coalition detention facilities to transport them to the courthouse.²³¹ The system worked immeasurably better when Iraqi prisoners were held in Iraqi jails, not Coalition detention facilities, for alleged Iraqi-on-Iraqi crimes.

As the through-put on the front end of the process improved throughout the fall of 2003, the JRAT discovered that the investigation courts were opening cases but failing to complete investigations and refer cases to trial. The JRAT reasoned that much of the inefficiency was due to poor investigations and unavailable witnesses. Fear also played a part. In early November, two judges nominated for appointment to the Iraqi Supreme Court were murdered and the courthouse at Al Rusafa was targeted by an improvised explosive device.²³² Thus, the JRAT then turned their attention to providing personal security details to the court judges. A JA worked full time with the MOJ to recruit, hire, train, arm, and put into place security details for the Iraqi judges.²³³

Although almost an impossible task, by October 2003, the entire system was running and courts throughout Baghdad were open. As the initial JRAT team chief stated: “[c]ertainly we made mistakes along the way. But, they were mistakes in the right direction—towards the rule of law in Iraq.”²³⁴ When the 1st Cavalry Division OSJA assumed the judicial reconstruction mission in Baghdad from the legal team at V Corps in the spring of 2004, they continued to closely monitor and assist the local court personnel.²³⁵

2. Manage Judicial Reforms to Ensure Integrity of the Process.

²²⁸ Pyfrom Transcript, *supra* note 42, at 7.

²²⁹ *Id.*

²³⁰ *Id.* at 17.

²³¹ When the Iraqi Police arrived at Abu Graib to pickup prisoners and transport them to the courthouse, for example, the military police would routinely send the officer to CPA to get written verification from someone at MOJ. JRAT and MOJ Report, *supra* note 31, at 9.

²³² *Id.*, at 8 (also noting that U.S. military police were twice targeted while transporting detainees to court); see also Bennett Memorandum, *supra* note 95, para. 8 (discussing the judges’ fear of retaliation in Anbar Province – in the previous six months two judges had been murdered in Karbala and Mosul after rendering lengthy prison sentences to defendants).

²³³ See Interview with Lieutenant Colonel Sharon E. Riley, Staff Judge Advocate, 1st Armored Division, in Charlottesville, Va. (5 Oct. 2004) (notes on file with CLAMO).

²³⁴ Nance Paper, *supra* note 40, at 6.

²³⁵ See 1CAV AAR, *supra* note 33, at 29-42.

Unlike the experiences of V Corps in Baghdad and the 82d Airborne Division in and around Fallujah, where the security situation impeded judicial reconstruction and reform efforts, the 101st Airborne Division (Air Assault) experienced relative calm throughout the summer and early fall of 2003. Thus, judicial reconstruction and reform in northern Iraq proceeded at a much faster rate. The OSJA, 101st Airborne Division (Air Assault) created the Northern Iraq Office of Judicial Operations (NIOJO) in June 2003 to help rebuild the legal system in northern Iraq, particularly in Mosul and Nineveh Province. The office worked closely with local officials, U.S. military police, the CPA and others to ensure that the legal system operated properly and that any changes to the law were fully implemented.

The NIOJO began with a staff of one officer-in-charge and one NCOIC. It was initially established to assist the 431st CA Battalion with their mission, as well as to tackle some of the issues regarding operations of the courts. The development of judicial operations, however, required extensive JA participation, as the judicial reform effort was far too expansive for a single CA battalion judicial section composed of one JA and one paralegal.²³⁶ As NIOJO assumed its expanded mission, it grew to nine persons, including one Iraqi attorney and two interpreters.²³⁷ The primary tasks of NIOJO was to rebuild, equip, and modernize over twenty courthouses; develop and implement plans and programs to restructure and reorganize all juvenile, criminal, and civil courts and courts of appeal; mentor judges, prosecutors, attorneys, and legal professionals; and develop and implement “organizations, programs and training initiatives designed to transform the judicial system from a corrupt, broken and dysfunctional model into a world class judiciary that is ethical, efficient, fair, and on the cutting edge of justice.”²³⁸

The NIOJO soon discovered that the only effective way to ensure that the courts functioned properly was to maintain a near-constant presence in the courthouses. Thus, personnel regularly visited the courthouses and embedded themselves in the courts’ operations and management. In addition, to facilitate the through-put of Iraqis into the court system, the NIOJO, in coordination with the military police and engineers, established a Central Booking Facility and Investigative Arraignment Court (CBF/IAC). All new arrests were first brought to this court to be booked, processed, and arraigned.²³⁹ The legal team continued to have problems, however, as police and judges persisted in bringing suspects to local prisons and choosing not to enforce the use of the facility from the bench.²⁴⁰ Nevertheless, by the time the 101st Airborne Division (Air Assault) redeployed in the spring of 2004, most courts in their area of operation were up and running, trying about three hundred criminal and civil cases each week.²⁴¹

Once the court systems were operating, NIOJO was able to focus on improving other legal institutions. They developed a bar association for both men and women attorneys and began to refurbish and re-equip courts to better than pre-war standards. NIOJO spearheaded the construction of computer laboratories, classrooms, and courthouses. They also developed

²³⁶ 101st ABN DIV AAR, *supra* note 89, at 70.

²³⁷ Various other local professionals worked part-time with NIOJO, usually as independent contractors, as engineers, architects, computer technicians, and instructors. *Id.*

²³⁸ *Id.* at 63.

²³⁹ *Id.* at 67-68.

²⁴⁰ *Id.* at 68.

²⁴¹ 101st ABN DIV AAR Conference, *supra* note 58.

substantive legal programs to help better educate Iraqi legal professionals, such as the Court Appointed Attorney Program (CAAP) ethics and rights training, and computer automation training.²⁴²

NIOJO also helped to develop and implement a proprietary computer docketing system that allowed users to index cases and search for and retrieve files. It also assumed oversight of the funds that were allocated to the Nineveh court system by the Iraqi Ministry of Finance. These funds were provided by the Coalition and the NIOJO found that the local judges and court administrators were not prepared, and did not have the systems in place, to maintain accountability for spending these funds.²⁴³

In addition, the NIOJO developed and implemented plans to refurbish the dormant Iraqi Juvenile Justice system. They researched Iraqi law on the issue and began to build the foundation for juvenile rehabilitation and education programs. The NOIJO also assisted in hiring a contractor to refurbish the juvenile courthouse. This work continued through February 2004, when the Division began redeploying. A lesson learned from their experience with the juvenile justice system was not to get too caught up in the weeds of these initiatives. It proved better to get a program up and running, then tweak the operation later.²⁴⁴

The many programs instituted by the OSJA, 101st Airborne Division (Air Assault), were carried out by a very large legal team, augmented by U.S. Army Reserve JAs and paralegals, which climbed to fifty-five attorneys at the height of their deployment.²⁴⁵ Because of the breadth and depth of these programs, and the number of attorneys and paralegals it took to run them, the legal team recognized that they had to plan for handing these programs off to Iraqi control as soon as possible. Once the 101st Airborne legal team re-deployed and was replaced by a much smaller legal team from Task Force Olympia, the new legal team could not supervise several of these initiatives.²⁴⁶ Therefore, it was imperative to identify and secure long-term funding in advance of initiating any judicial reform projects to keep these programs viable once the unit redeployed. In addition, indigenous leadership had to be found to oversee the operation.²⁴⁷ For example, three local attorneys were hired to oversee the court appointed attorney program.²⁴⁸ Thus, legal teams learned that judicial reform must include programs to ensure oversight of the system by the local population.

3. Continue to Monitor and Assess the Status of Each Court Once They Begin Operations, Using Local Attorneys to Assist.

Legal teams continued to play a key role in reestablishing the rule of law in their area of operations throughout the period of this Publication.²⁴⁹ Follow-on legal teams found it critical

²⁴² 101st ABN DIV AAR, *supra* note 89, at 64.

²⁴³ *Id.* at 66.

²⁴⁴ *Id.* at 69.

²⁴⁵ 101st ABN DIV AAR Conference, *supra* note 62.

²⁴⁶ Interview with Lieutenant Colonel William R. Kern, former Command Judge Advocate, Task Force Olympia, in Fort Lee, Va., at 4 (24 Aug. 2004) [hereinafter Kern Interview] (on file with CLAMO).

²⁴⁷ 101st Airborne AAR, *supra* note 89, at 67.

²⁴⁸ Unfortunately, one of these attorneys was assassinated for his participation in the program. *Id.* at 67.

²⁴⁹ See, e.g., Newsletter, Office of the Staff Judge Advocate, 1st Cavalry Division, Vol. 1, No. 7, at 3 (3 May 2004).

that the status of each court be tracked and the judicial assessment kept up-to-date. Similar to assessing and monitoring the physical reconstruction, they found that without continued monitoring, the initial assessment was soon outdated. By monitoring each courthouse, commanders and their supporting JAs were able to remain informed as to whether the courthouses in their sectors were capable of fairly and efficiently processing cases. Whether the courts are respected within the community and properly resourced is an important strategic consideration and must be well understood to allow commanders to affirmatively and optimally use the Iraqi courts in their counter-insurgency and stability and support operations.²⁵⁰ Monitoring also provided continuing updates as to the security status of each courthouse and helped commanders stay current on the likely and evolving threats in their sector, such as what, if any external factors—insurgents, tribal leaders, political parties—are influencing the courts.

Legal teams found that they must be prepared to continually travel to courts and other locations to meet with judicial personnel. Moreover, they discovered that these meetings generally lasted much longer than anticipated. After beginning the judicial reconstruction and reform mission, JAs and others learned that judges and leaders of the legal community placed great weight on the willingness of visitors to spend time talking about a variety of subjects. Therefore, legal teams must know the local culture and protocol regarding such meetings so as not to offend local leaders.²⁵¹ Legal teams also found that these visits often allowed the team to maintain a situational understanding of the mood of the local population. They discovered that the judges, in particular, were an excellent source of information regarding the nature of the “threat” on the streets and local crime trends.²⁵²

When the OSJA for 1st Infantry Division entered theater in early 2004, they looked to a variety of sources in conducting their initial court assessments, to include assessments by their predecessor units, and evaluations of civil-military teams and sector commanders. Then, the brigade operational law teams planned visits to each courthouse: inspecting the courthouses, interviewing available judges, and interviewing senior police leaders and local lawyers.²⁵³ In addition, they found that the security situation was such that even after their initial assessments, later operations or insurgent activity caused further damage to courthouses and equipment.²⁵⁴ For example, despite the renovation of the Samarra courthouse at the end of major hostilities, it was again badly damaged during subsequent operations.²⁵⁵ To continue the monitoring process, the 1st Infantry Division legal team developed a checklist of questions for the chief judge and

²⁵⁰ Memorandum, Lieutenant Colonel Bruce Pagel, former court liaison officer working for the Department of Justice in the 1st Infantry Division area of operation, to Lieutenant Colonel Pamela Stahl, subject: Comments – Afghanistan/Iraq Lessons Learned, at 1 (May 2005) [hereinafter Pagel Memorandum] (“They Iraqi courts – no less than the Iraqi police, prisons or Iraqi Army – have to be made full and capable partners in the counter-insurgency battle and empowered to deal with insurgents and terrorists if there is to be a rule of law based solution to the insurgency.”) (on file with CLAMO).

²⁵¹ One legal team observed that judges and other leaders of the local community often wanted to bring in others to introduce to the legal personnel. They also wanted to have tea and sweets and discuss a variety of topics not germane to the visit. It was important the legal teams planned sufficient time for these meetings in order not to offend their host. ICAV AAR, *supra* note 33, at 37.

²⁵² *Id.*

²⁵³ Pagel Report, *supra* note 16, at 3.

²⁵⁴ IID Judicial Assessment, *supra* note 48, at 1.

²⁵⁵ *Id.* at 4.

other courthouse personnel.²⁵⁶ A copy of the checklist is at Appendix A-2. Legal teams recommended that these checklists include a requirement to conduct a concise and updated threat assessment.²⁵⁷

Similarly, the 1st Cavalry Division OSJA made judicial assessment of the court system in Baghdad one of their first missions when they arrived in March 2004. The first phase of their judicial reconstruction operation, dubbed Operation HUMMURABI, involved the assessment of the administrative capabilities of the courts and was conducted by the brigade JAs. The 1st Cavalry Division legal team found it was critical that this effort be undertaken immediately after arrival in theater.²⁵⁸ In addition, as more personnel arrived in Iraq with an interest in various rule of law projects, to include U.S., Coalition, and other governmental and non-governmental organizations, the legal team at 1st Cavalry Division immediately sought to identify these organizations to coordinate projects and avoid duplication of efforts.²⁵⁹

Moreover, regular monitoring ensured that new laws and procedures were being used and that they were working. By way of example, judges who were fired from their positions during initial vetting by military governors on occasion simply refused to leave the courthouse.²⁶⁰ Other judges would turn a blind eye as the terminated judge simply relocated their office to a less trafficked corner of the courthouse and continue occupying office space for their personal purposes until escorted from the building by Coalition judge advocates.²⁶¹

In addition, JAs and CA teams had to monitor the courts to ensure that new rights of the accused implemented by the CPA were being recognized by the judiciary. These concepts, such as the right to remain silent and the right to an attorney, were completely foreign to Iraqi judges and required the attentive presence of JAs to train the judges to implement these laws. One JA assigned to a CA unit related that the first time an accused tried to plead guilty to an investigating magistrate, the judge rejected the plea and told him to return to his cell until he could locate a lawyer pursuant to the new law. The accused indicated that he did not want a lawyer and that he was guilty and wanted to be sentenced. The judge refused to accept the plea and admonished the accused that he would be in even more trouble if he refused to get a lawyer because the Coalition required every accused to have a lawyer whether he wanted one or not. At this point, the intervention of the JA was necessary to explain that the intent of the law was to protect the accused, and should not be used against him.²⁶²

Legal teams also hired local liaison lawyers to monitor the state of civil and criminal justice in the local courts and to coordinate justice modernization, information technology, court

²⁵⁶ Pagel Report, *supra* note 16, at 8.

²⁵⁷ *Id.* at 10.

²⁵⁸ 1CAV AAR, *supra* note 33, at 30.

²⁵⁹ *Id.* at 31. After the transfer of sovereignty to the Iraqis, the 1st Cavalry Division legal team continued to maintain strong and regular connectivity with various U.S. agencies involved in justice, rule of law, and human rights training. *Id.* at 33.

²⁶⁰ Dunn Interview, *supra* note 79.

²⁶¹ See, e.g., *id.* ([i]f I wasn't at the court every day or at least every other day, any progress we had made would evaporate. People I had replaced would sneak back in, the judges would sit around and not hear cases, supplies we had obtained for the court would disappear, as someone sold them for personal profit.”).

²⁶² Dunn Interview, *supra* note 79.

administration, and human rights training projects. Judge advocates found that they were more successful using local attorneys if the attorneys spoke English, as time and effort was wasted when they were not able to clearly articulate what they wanted done in a manner understood by local judicial personnel.²⁶³ In Baghdad, once the courts were up and running, however, this practice was discouraged, as the court personnel believed they did not need to be monitored by the Coalition.

4. Ensure a System to Track Detainees Who Have Been Turned Over to the Local Courts.

A major part of the process for the legal teams was reviewing the detainee files and determining which ones they could reasonably expect, even with further investigation, that a court could actually bring a case successfully to prosecution. Many of the files did not have sufficient information and the magistrate would recommend they be released. For the first several weeks of the occupation, a JA was assigned the sole duties of reviewing the files of detainees accused of committing serious crimes to determine whether sufficient evidence existed to continue their detention.²⁶⁴ There were, of course, Iraqis detained for committing minor crimes, but these individuals' files were reviewed by the magistrate, and battalion commanders at the detention facilities had the authority to release these individuals. If the commanders did not release these detainees, they were referred to the investigative court as well.²⁶⁵

As the occupation continued, legal teams had to improve the means by which detainees were transferred from U.S. to Iraqi custody for purposes of prosecution. The system involved procedures for transferring evidence to the Iraqi courts and making witnesses available, and a system for tracking the detainees who were turned over to the Iraqi authorities. An effective tracking system could help commanders understand how and why detainees were suddenly released and back in their area of operation. Moreover, tracking the disposition of these individual's cases was a measure of effectiveness for both the Iraqi police and Iraqi courts.²⁶⁶

5. Plan for a System for Paying Court Personnel.

A significant part of the judicial reconstruction efforts involved paying the Iraqi MOJ employees. This mission was routinely planned and executed by legal teams. The V Corps JRAT experience is illustrative of this mission. For them, it involved the efforts of dozens of Soldiers and twenty-seven vehicles in seven different convoys to transport security, money, and pay agents to six different locations in Baghdad simultaneously. Legal teams had to plan and coordinate routes, as well as security at the distribution locations. The JRAT was also careful to have an Iraqi paymaster with them, so that the Iraqis could see that they were being paid by other

²⁶³ ICAV AAR, *supra* note 33, at 39. Local English speaking attorneys used by the legal team at the 1st Cavalry Division formed their own non-governmental organization (NGO), and the Division legal team encouraged the brigade JAs to use these attorneys. *Id.*

²⁶⁴ Pyfrom Transcript, *supra* note 42, at 4. If the detainee was accused of an Iraqi-on-Iraqi crime and there was insufficient evidence in the file to investigate further, the detainee was recommended for release.

²⁶⁵ *Id.*, at 5.

²⁶⁶ Pagel Report, *supra* note 16, at 13.

Iraqis, and not U.S. Soldiers.²⁶⁷ Thus, legal teams again found that they had to be prepared to plan all aspects of the mission and have the Soldier skills necessary to carry them out in an unsecured operational environment.

In addition, legal teams advised that JAs conducting judicial reconstruction and reform develop a roster of all judicial employees. In the 82d Airborne Division area of operations, the CA JA conducting judicial reconstruction and reform completed an employee roster for each of the ten courthouses with each employee's name, national identification number, and pay grade to facilitate managing office personnel, including salaries.²⁶⁸ Once the courts were up and running, legal teams also should review employee salaries. For example, the DOJ attorney with 1st Infantry Division commented that judicial salaries remained far below pre-occupation standards, where judges were provided houses and cars, and needed to be reviewed.²⁶⁹

In sum, JAs generally found that a court liaison officer had to be appointed from the OSJA at each major subordinate command (MSC) to manage and coordinate Coalition operations. For example, if Coalition Forces unilaterally released detainees from Iraqi jails, or Iraqi Judges detained Coalition allies or issued other court orders interfering with Coalition operations, an MSC level senior JA is best equipped to mediate any actual or potential conflict. This liaison officer also must coordinate and attempt to avoid redundancy in court support projects initiated by NGOs, CA units, and others.²⁷⁰

g. Be Prepared to Provide Instruction to Judges, Lawyers, and Police Officers on Judicial Reform Efforts.

Many legal teams sponsored training programs for attorneys on basic due process and criminal suspect rights. When attempting to provide training on rule of law issues, JAs found that they needed to consider that the Iraqis were already trained judges and lawyers. As JAs from the 1st Armored Division observed:

In our interactions with the Iraqis, we tended to *tell* them how we would improve their country. For example, we often presumed that Iraqi judges and lawyers need and want our technical expertise in trying cases, and we told them that we would teach them how to do their jobs. Instead, we should *ask* them how we can help.

²⁶⁷ Nance Paper, *supra* note 40, at 5. During the pay missions, the JRAT came under fire while delivering money in Baghdad. *Id.*

²⁶⁸ Bennett Memorandum, *supra* note 95, para. 9.d.

²⁶⁹ Pagel Report, *supra* note 16, at 11.

²⁷⁰ Pagel Memorandum, *supra* note 165, at 1. LTC Pagel also recommended that:

Each MSC, along with the higher HQ, formally and unambiguously task a senior JA with the court support mission as his or her primary and exclusive responsibility. This is full time work and cannot be performed to standard without a dedicated and concentrated effort. This position should be made part of JA doctrine and manning considerations, and the nature of this mission should be made known to commanders, also on a doctrinal basis, so Commanders can integrate this resource into both tactical and strategic planning and operations.

Id.

We may be surprised to learn that their assessment is significantly different from ours.²⁷¹

Legal teams also found that they had to be sensitive to various groups as they conducted training. For example, personnel from the 1st Cavalry Division OSJA found that Iraqi judges did not like to be involved in training programs where lawyers were also present, as they received more training than lawyers and did not want to be put in a position where their knowledge was questioned in front of the lawyers.²⁷² They also learned that many Iraqi judicial personnel were suspicious of training efforts, seeing them as an attempt to train “western” or “American” values. Legal teams recommended that to avoid this perception, JAs should look for international covenants on human rights that the country, or other Islamic countries, have signed. The International Covenant on Civil and Political Rights, for instance, had been signed by Iraq in March 1975. Legal teams were able to provide training on this covenant not as an American legal norm, but as an international covenant that had already been part of Iraqi law for almost thirty years.²⁷³

The V Corps legal team conducted a training program that refocused judges on their own criminal procedure code and explained the interim process that required integration of the Coalition-run detention facilities and the local court operations.²⁷⁴ In addition, the legal team facilitated a training program for Iraqi judges in the United Kingdom. The program was initially established to train judges from the former Soviet republics to reform their legal systems with a view towards protection of human and civil rights and establishing the rule of law as a primary pillar of the judiciary.²⁷⁵ Additionally, when the 1st Cavalry Division arrived in the spring of 2004, the legal team also sought opportunities to train outside of Iraq. The leader of the judicial team, for example, coordinated a training mission to Cairo, Egypt for nineteen Iraqi attorneys. The conference addressed human rights and women’s rights and was sponsored by the Afro-Asian Lawyers Federation of Human Rights.²⁷⁶

The 101st Airborne Division’s training program included a formal graduation ceremony where the Commanding General spoke, creating good will with the local attorneys.²⁷⁷ The legal team at 101st Airborne Division also helped establish a computer lab at the Mosul main courthouse and coordinated hiring instructors from the local workforce.²⁷⁸ The program held two training classes per day, training over one hundred and thirty students each week.²⁷⁹ The

²⁷¹ 1AD AAR, *supra* note 12 (Governate Support Team power point presentation).

²⁷² 1CAV AAR, *supra* note 33, at 35. The 1st Cavalry Division’s Governance Support Team Justice recommended that the International Covenant on Civil and Political Rights is an excellent model for training human rights concepts, especially in Arabic countries because a translation into Arabic is readily available on the United National webpage. Judge advocates must be familiar with the two Optional Protocols as well, and determine whether the country in question has adopted them. *Id.*

²⁷³ *See id.*

²⁷⁴ E-mail from Major Juan A. Pyfrom, Office of the Staff Judge Advocate, V Corps, to Lieutenant Colonel Pamela M. Stahl, Director, Center for Law and Military Operations (21 Jan. 2005) [hereinafter Pyfrom E-mail] (on file with CLAMO).

²⁷⁵ *Id.*

²⁷⁶ 1CAV AAR, *supra* note 33, at 40.

²⁷⁷ 101st ABN DIV AAR Conference, *supra* note 58.

²⁷⁸ 101st ABN DIV AAR, *supra* note 89, at 65.

²⁷⁹ *Id.*

NOIJO further established a court appointed attorney program (CAAP) to provide a pool of trained and qualified defense attorneys. They held CAAP classes once a week, training them on judicial reforms instituted by the CPA, which culminated in a final examination. Over one hundred and fifty attorneys were certified to provide CAAP services to the public through this program.²⁸⁰

Similarly, legal teams throughout Iraq trained court personnel. Shortly after they entered Iraq in the spring of 2004, the 1st Cavalry Division OSJA, for example, began conducting seminars offering guidance on the rights of citizens and how local attorneys can best protect and defend those rights.²⁸¹ The OSJA also approached the Iraqi Bar Association about training defense counsel on the changes to the Iraqi Criminal Procedure Code pursuant to CPA Memorandum Number Three using the Commander's Emergency Response Program funds. Although the classes were initially taught by U.S. personnel, over time Iraqi attorneys began to take on an increasing role in the training.²⁸²

One court liaison officer cautioned that through his experience working with judicial personnel in Iraq the substantive and procedural training was best provided by lawyers from a civil code tradition, as opposed to our common law practice. He noted that the civil code lawyers were better equipped to help the Iraqis catch-up with the rest of the civil code world, something that they were determined to do as quickly as possible. The Iraqis did, however, benefit greatly from legal team training on computer and administrative skills, investigative techniques and strategies, Geneva Convention, including occupation law, use of force, and the claims process, and human rights law.²⁸³

In addition, the legal teams' judicial oversight and reconstruction mission included assisting in the training of the Iraqi police force in the new criminal laws, searches, and criminal procedures.²⁸⁴ Legal teams helped develop and implement training programs to teach police officers a code of ethics and instruct them on the rights of the accused.²⁸⁵ Another technique was to include Iraqi investigative judges in the training plans.

The training programs served to build strong relationships with the judiciary and others. These relationships often afforded legal teams the opportunity to learn the nature of grievances against the Coalition from those who represented individual clients. In many instances, legal teams were able to explain certain policies, thus avoiding misunderstandings that could lead to resentment against the Coalition among the local population. For example, the 1st Cavalry Division legal team discovered through their work with the local Iraqi Bar Association that many were confused by what they perceived as inconsistent dispositions of claims under the Foreign Claims Act. The legal team found that the local attorneys and others were unaware of the

²⁸⁰ *Id.* at 67.

²⁸¹ *See, e.g.*, Newsletter, Office of the Staff Judge Advocate, 1st Cavalry Division, No. 9, Vol. 1, 1 & 4 (24 May 2004).

²⁸² 1CAV AAR, *supra* note 33, at 34.

²⁸³ Pagel Memo, *supra* note 165, at 2.

²⁸⁴ Memorandum, Office of the Staff Judge Advocate, 82d Airborne Division, subject: Operation Iraqi Freedom and Enduring Freedom Recent Legal Developments, 82d Airborne Division, at 5 (26 Jan. 2004).

²⁸⁵ 101st ABN DIV AAR, *supra* note 89, at 68.

distinction between combat and non-combat losses. Consequently, they were able to address these issues during meetings with local attorneys.²⁸⁶

h. Establish a Mechanism for Investigating Charges of Corruption and Impropriety Against Local Officials.

By the end of May 2003, the Coalition began receiving complaints and accusations from local citizens against Iraqi officials, religious leaders, and laypersons on a wide variety of criminal activity ranging from embezzlement to extortion to genocide. Some were credible, but many were not. In the absence of a functioning Iraqi court system the Coalition was the only authority in the country to sort out these accusations. The Coalition, however, did not have the necessary personnel to actively pursue every serious accusation from thirty-five years of pent-up frustration within the Iraqi populace. Yet, the Coalition could not appear unconcerned or disengaged from the prior crimes inflicted under the Hussein regime.

The most realistic solution was to have the Iraqis help themselves, rather than having the Coalition become the judge of all previous transgressions. In several provinces, grievance committees were established to accept complaints for further investigation. The CA GSTs and OSJAs were often a recipient of such complaints. When issues arose concerning the misuse of power by local Iraqi officials the existence of an independent investigating body gave the Coalition credibility. These bodies were often *ad hoc* creations of the GSTs and OSJAs, staffed by locally selected Iraqi officials operating under the authority of the military commander. They had the power to receive complaints and recommend action, but could take no corrective action of their own without Coalition approval.²⁸⁷

Going perhaps one step further, the OSJA, 101st Airborne Division (Air Assault) established the Anti-Corruption Commission (ACC). The mission of the ACC was to alleviate the rampant corruption problems in the public sector of Nineveh Province. Planning for the ACC began in August 2003 and it was officially created by joint proclamation of the 101st Airborne Division (Air Assault) Commander and the Governor of Nineveh Province on 21 December 2003. The ACC grew out of a recognition that the Iraqi citizen needed a mechanism to report corruption without fear of reprisal. The ACC had the authority to arrest, issue subpoenas, and perform searches. Personnel were trained in witness interrogations, evidence gathering, current Iraqi laws on corruption, and automation. A hotline was established to allow the public a secure, anonymous way of reporting incidents of corruption to the ACC.²⁸⁸ Members of the legal team involved with the ACC found that such organizations need proper safeguards, such as independent funding and a direct subordination to the mayor, not the MOJ or MOI.

In particular, during the first weeks of the occupation, these committees freed Coalition resources from a parade of local issues, provided the Iraqis a forum for expressing their complaints, and gave the local provinces a semblance of control over their own local affairs that

²⁸⁶ ICAV AAR, *supra* note 33, at 34.

²⁸⁷ Legal Assessment of Southern Iraq, *supra* note 6.

²⁸⁸ Fact Sheet, NIOJO, Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), subject: Anti-Corruption Commission (20 Dec. 2003) (on file with CLAMO).

had been absent under the Ba'athist Regime. Accordingly, quick action in establishing organizations for handling local concerns helped to keep such issues from escalating into something more serious.

i. Be Prepared to Provide Advice on the Prosecution of Unlawful Combatants.

As the insurgency increased throughout the summer of 2003, it became necessary to consider alternatives for the prosecution of persons who continued to fight against Coalition Forces. These individuals became known as “unlawful combatants.” In a U.S. Army information paper issued by the Office of The Judge Advocate General, an unlawful combatant was defined for these purposes as “a person who does not meet the requisite international legal standards required to directly take part in international armed conflict, but who nevertheless directly participates in hostilities against OF [occupation forces].”²⁸⁹ Examples of these individuals included:

- Former members of the Iraqi military who continue to engage in hostile acts whether in uniform or not;
- Members of the Fedayeen Saddam (irregulars) who continue to engage in hostile acts [this group has never acquired lawful combatant status because the group collectively and its individual members do/did not comply with the strict conditions specified in Article 4A(2) of the Third Geneva Convention: 1) they must belong to an organized group under responsible command; 2) they must have a fixed, distinctive sign; 3) they must carry their arms openly; and 4) they must conduct their operations in accordance with the laws and customs of war;
- Foreign citizens who, for whatever reason, commit hostile acts against OF [occupation forces]. [NOTE: Although the law does sanction a *levee en masse* (the single, limited exception to the proscription against civilians participating in hostilities), whereby civilians may spontaneously take up arms in order to resist an invading force, the legal basis no longer exists in Iraq because the Iraqi regime and its military have been defeated and the occupation process has begun].²⁹⁰

First, under the law of occupation the CPA had to allow Iraqi domestic courts to continue to function as the lawful judicial system whenever feasible. If not feasible, however, the occupying power could establish tribunals to enforce the law of the occupied territory under Article 64 of the Geneva Convention for Civilians.²⁹¹ Several alternatives using military courts of the occupying power to try these unlawful combatants were considered, to include: (1) courts-martial; (2) provost courts or Article 18 military tribunals; and (3) military commissions.

²⁸⁹ Information Paper, Office of the Judge Advocate General of the Army, subject: Crimes Committed Against Iraqi Occupation Forces: Prosecution Alternatives, at 1 (Aug. 2003) [hereinafter OTJAG Information Paper] (on file with CLAMO).

²⁹⁰ *Id.* at 1-2.

²⁹¹ This article allows the Occupying Power to create its own occupation courts if and when the local courts fail to operate. GC IV, *supra* note 10, art. 64.

The only apparent drawback to the courts-martial was the appeals process. Under occupation law there is no absolute right of appeal; however, the rules for courts-martial include a specific appeals process.²⁹² Additionally, provost courts under customary international law, or Article 18 Military Tribunals under the Uniform Code of Military Justice could be used. These options would permit the military tribunal to try offenses punishable by the law of war and to adjudge any punishment permitted by the law of war.²⁹³ There is no practical guidance in international law on how to implement a provost court, however, and the United States has no statutory authority to establish such courts.²⁹⁴ Finally, if the Coalition opted for military commissions, the President most likely would have to establish them, similar to the military commission associated with the prosecution of the detainees at Guantanamo Bay pursuant to the Global War on Terrorism.²⁹⁵

Given the above, it appeared that the two most viable options were to prosecute under the Uniform Code of Military Justice or allow the unlawful combatants held by Coalition Forces to be tried in Iraqi courts.²⁹⁶ Ultimately, it was decided that these unlawful combatants should be prosecuted by the Iraqis in the Central Criminal Court of Iraq.

j. Consider Establishing a Separate Court to Adjudicate Both Felonies Intended to Destabilize the Government and Crimes Against Coalition Forces.

The Central Criminal Court of Iraq (CCCI) was established by CPA Order Number Thirteen on 18 June 2003 to adjudicate felonies that could have national ramifications, such as crimes of inter-ethnic or religious violence and mass crimes, crimes with security implications, such as crimes committed in retaliation for cooperation with Coalition authorities, and other serious crimes that may undermine public confidence in overall safety.²⁹⁷ The Iraqis were notified of the CCCI by Public Notice from the CPA Administrator.²⁹⁸ The court was given

²⁹² OTJAG Information Paper, *supra* note 204, at 2. The Geneva Convention provides that “the convicted persons shall have the right of appeal provided for by the laws applied by the court. When no appeal is provided for, the convicted individual may petition the “competent authority of the Occupying Power” for relief.” GC IV, *supra* note 10, art. 73.

²⁹³ OTJAG Information Paper, *supra* note 204, at 2.

²⁹⁴ The information paper stated that because of the lack of established guidance, the use of provost courts could be criticized as “victor’s justice.” *Id.* at 3.

²⁹⁵ *Id.*

²⁹⁶ *Id.* In the Information Paper, OTJAG did note that the occupying power has a duty to ensure the “effective administration of justice” under Article 64, GC. At the time the Information Paper was drafted (August 2003) it was not clear that the Iraqi tribunals were prepared to effectively administer justice. Moreover, OTJAG noted that prosecuting these individuals in U.S. District Court under Title 18 of the U.S. Code was not a practical solution because Article 49 of GC prohibits deportation of protected persons from an occupied territory. Moreover, the 1936 Iraq-U.S. extradition treaty, which may still be in effect, prohibits extradition of Iraqi nationals to the United States for offenses committed inside Iraq. *Id.* at 4.

²⁹⁷ National Policy Guidance, *supra* note 27, at 8.

²⁹⁸ See Public Notice, Office of the Administrator of the Coalition Provisional Authority, Baghdad, Iraq, Public Notice Regarding the Creation of a Central Criminal Court of Iraq and Adjustments to the Criminal Procedure Code (18 Jun. 2003). The Public Notice read, in part:

The CPA has taken steps to meet the urgent security needs of the People of Iraq and Coalition Forces by creating a Central Criminal Court of Iraq. This court will apply and operate under Iraqi law, as amended to ensure fundamental fairness and due process for accused persons and will be

jurisdiction over specific, named crimes committed in Iraq since 19 March 2003.²⁹⁹ The CPA modified the list shortly before the transfer of authority to include, among others, terrorism; organized crime; governmental corruption; acts intended to destabilize democratic institutions or processes; violence based on race, nationality, ethnicity or religion; and instances in which a criminal defendant may not be able to obtain a fair trial in a local court.³⁰⁰ In addition, in October 2004, the Secretary of Defense decided that attacks against Coalition Forces would be referred to the CCCI for trial.³⁰¹

The CPA Administrator had broad authority over the CCCI. The Administrator appointed judges to the CCCI, with the recommendations from the Judicial Review Committee, for a period of one year.³⁰² The Administrator also appointed three prosecutors to present witnesses, examine or cross-examine witnesses, and introduce evidence.³⁰³ Additionally, the Administrator, with the advice of the CPA General Counsel, decided what matters to submit to the CCCI for prosecution.³⁰⁴ As the transfer of authority approached, Order Thirteen was amended to give the Court the authority to refer cases to the CCCI on its own.³⁰⁵ The CPA Order, however, also sought to limit the authority of the CCCI over Coalition Forces. The CCCI could not compel the production of Coalition documentary or other material or the attendance of Coalition personnel.³⁰⁶ Moreover, any CPA or Coalition Forces personnel had the right to appear before the CCCI as *amicus curiae* to adduce or provide evidence and, when doing so, had the same functions as a Prosecutor.³⁰⁷

modeled on the current Iraqi court system. The Central Criminal Court will consist of an Investigative Court, a Trial Court and an Appeal Court, with the right of further appeal to the Iraqi Court of Cassation. The judges and prosecutors will be locally selected Iraqis.

The Court will deal with serious offenses that most directly threaten the security and civil order in Iraq. This interim measure will address the immediate need for a reliable and fair system of justice. The CPA will continue to assist in restoring the capability of the Iraqi court system, as it recovers from years of Iraqi Ba'ath Party abuse and perversion.

Id.

²⁹⁹ Coalition Provisional Authority, Order Number 13, The Central Criminal Court of Iraq, sec. 5 (18 Jun. 2003) [hereinafter CPA Order No. 13 (Jun. 2003)] (on file with CLAMO). The Order delineated several crimes that could be referred to the CCCI. *Id.* sec. 21.

³⁰⁰ Coalition Provisional Authority, Order Number 13 (Revised) (Amended), The Central Criminal Court of Iraq, sec. 18 (22 Apr. 2004) [hereinafter CPA Order No. 13 (Apr. 2004)] (on file with CLAMO).

³⁰¹ Major Carlos O. Santiago, Transcript of After Action Review Conference, Office of the Staff Judge Advocate, V Corps, and the Center for Law and Military Operations, Heidelberg, Germany, at 6 (17-19 May 2004) [hereinafter Santiago Transcript] (on file with CLAMO).

³⁰² CPA Order No. 13 (Jun. 2003), *supra* note 214, sec. 6. This authority was later rescinded and replaced with a procedure to appointed judges pursuant to the Law of Administration for the State of Iraq for the Transition Period, art. 46(A) (8 Mar. 2004) (on file with CLAMO). CPA Order No. 100, *supra* note 64, sec. 3(4).

³⁰³ CPA Order No. 13 (Jun. 2003), *supra* note 214, sec. 15.

³⁰⁴ *Id.* sec. 21. The Senior Advisor to the MOJ could request that cases be referred to the CCCI. The Senior Advisor could file such requests on his own initiative, or at the request of accused persons under Iraqi law, any Iraqi court, the Commander of Coalition Forces, or the Senior Advisor of the Ministry of Interior. *Id.* sec. 21(2).

³⁰⁵ CPA Order No. 13 (Apr. 2004), *supra* note 215, sec. 19.

³⁰⁶ CPA Order No. 13 (Jun. 2003), *supra* note 214, sec. 18(3).

³⁰⁷ *Id.* sec. 19.

From the outset, legal teams, already spread thin by numerous missions, formed the backbone of the CCCI. Judge advocates formed the Special Prosecutions Task Force, which developed the entire legal and practical construct by which unlawful combatants were tried before the CCCI.³⁰⁸ Initially, the CJTF-7 SJA (V Corps) appointed JAs as special prosecutors in each Division to create a network of prosecutors to prepare cases for trial. These prosecutors worked with the local Criminal Investigation Command (CID) and their respective brigade combat teams to properly gather and preserve evidence for trial. Once completed, the cases were forwarded to a JA at CJTF-7 who was designated the Chief Special Prosecutor who then prepared the cases for referral to the CCCI.³⁰⁹

Consequently, these cases required careful management and coordination with numerous legal teams to ensure they were ready for referral to the CCCI.³¹⁰ Because of the number of cases and the different legal teams working to perfect them, the CJTF-7 SJA designated the CJTF-7 Chief Prosecutor as the single point of entry into the court system for the CCCI. The Chief Prosecutor would then decide the order in which the cases would be referred to the court.³¹¹ Because of the importance placed on these cases at the highest level within the U.S. Administration, the CJTF-7 SJA and Chief Prosecutor also worked long hours answering questions from higher headquarters regarding the CCCI.³¹²

One interesting mission of the Special Prosecutions Task Force JAs was boarding the Navstar I GP 3 Oil Tanker in the waters off the Port of Umm Qasr, Iraq to investigate oil smuggling operations.³¹³ The boarding party included an Australian legal advisor, an U.S. Army JA, and a U.S. Marine Corps JA.³¹⁴ These JAs coordinated with the local Iraqi police to secure the crew and evidence and spent fifteen hours onboard the oil tanker interviewing the crew and preparing sworn statements. Their work uncovered a major oil smuggling ring, which led to the successful prosecution of the Ukrainian Captain and First Mate.³¹⁵

³⁰⁸ Warren E-mail, *supra* note 7.

³⁰⁹ After Action Review, Captain Carlos O. Santiago, Special Prosecutor for Crimes Against Coalition Forces, Office of the Staff Judge Advocate, V Corps, para. 3 (undated) [hereinafter Santiago AAR] (on file with CLAMO). The CJTF-7 Special Prosecutor reviewed the daily situation reports and if an incident occurred that might fall within the purview of the CCCI, the prosecutor would contact the special prosecutor in the area where the incident took place to gather additional information. *Id.* at 25.

³¹⁰ Memorandum, Lieutenant Colonel Sharon E. Riley, Staff Judge Advocate, 1st Armored Division, to the Center for Law and Military Operations, subject: Operations Iraqi Freedom and Enduring Freedom Recent Legal Developments, at 4 (28 Jan. 2004) [hereinafter 1AD Recent Legal Developments] (noting also that witness contact and evidence preservation had to be coordinated so that the case could be brought before an investigative Panel after being referred to trial by the CPA Authority).

³¹¹ Santiago Transcript, *supra* note 216, at 4-5.

³¹² *Id.* at 7 (“[a] lot of times we got questions like, ‘what do you need? Why aren’t cases moving faster? We have 10,000 people in detention. How many of those cases are going to the CCCI?’ . . . [s]o on a regular basis I was getting e-mails from the Joint Chiefs’ legal office or the DOD General Counsel’s Office or DA General Counsel’s Office, OTJAG, and a number of places.”).

³¹³ 12th LSO AAR, *supra* note 16, at 16.

³¹⁴ All assigned to CJTF-7, OSJA. E-mail from Lieutenant Colonel Kirk Warner, JA, 12th Legal Support Organization, to Lieutenant Colonel Pamela Stahl, Director, Center for Law and Military Operation, subject: OIF Lessons Learned (II) (15 Apr. 2005).

³¹⁵ *Id.*

Work by the Special Prosecutions Task Force legal team and other JAs resulted in numerous prosecutions of insurgents. The first case to be heard by this court was in August 2003 involving the transportation of a cache of weapons in a Red Crescent ambulance. The case was originally charged under laws prohibiting the possession of weapons, rather than as a war crime for misuse of the red crescent emblem.³¹⁶ Another noteworthy conviction was that of an insurgent charged with murdering a U.S. Soldier in an ambush.³¹⁷

Eventually, a Legal Liaison Office at Abu Ghraib was established to manage the prosecution of individuals before the CCCI. The office was staffed with JAs and enlisted paralegals who interfaced with the Coalition's major subordinate commands (MSCs) and the CCCI. The Legal Liaison Office was eventually staffed with a team of six full-time JAs, three translators, and several paralegals. This team reviewed criminal reports to determine whether sufficient evidence existed to refer the cases of individuals detained by Coalition Forces to the CCCI for prosecution.³¹⁸ Then, they constructed the cases and handled the investigative hearings before the Iraqi investigative judges. Many of these cases involved individuals found with weapons caches. In cases where the office decided that it was possible to gather additional evidence for prosecution, the case was referred back to the MSCs for additional investigation.³¹⁹ Some cases required further investigation for various reasons, such as where the evidence contained no photographs of the weapons, a witness was not named, or it was not clear whether the Iraqi witness was willing to testify at the CCCI.³²⁰

In addition, in March 2004 a Joint Services Legal Enforcement Team (JSLET), consisting of JAs and paralegals, was dispatched to the MSCs to gather evidence for prosecution before the CCCI. The JSLETs were to be the "eyes and ears" of the CCCI throughout Iraq.³²¹ Task Force Olympia had the first JSLET in its area of operations. The Task Force Olympia Command JA observed that the JSLET found it very difficult to gather sufficient evidence in many cases. Nevertheless, many JSLETs were successful in obtaining evidence to assist in the prosecutions.³²²

³¹⁶ See Bolanger Memo, *supra* note 6, at 4. The case was forwarded to the court as a weapons possession case, but the CPA Order on weapons possession placed a cap on the maximum punishment at a year. See CPA Order No. 3, *supra* note 53. The case was sent back to the CCCI in November charging the individuals with theft, as the RPGs were taken from an Iraqi government depot. The defense in this case was that they had stolen the RPGs to sell them so they could give monies to the poor. Each of the three defendants received six years confinement. Santiago Transcript, *supra* note 216, at 15.

³¹⁷ Warren E-mail, *supra* note 7.

³¹⁸ Meier E-mail, *supra* note 37.

³¹⁹ As of 1 Oct. 2004, 1,723 cases had been reviewed by the Legal Liaison Office. Of those cases, 401 had been sent for prosecution, 1,155 were deemed "no prosecute" and sent to the Combined Review and Release Board, and 167 cases required additional investigation. See CCCI Legal Liaison Office, Power Point Presentation (on file with CLAMO).

³²⁰ *Id.*

³²¹ Office of the Staff Judge Advocate, First Infantry Division, Transfer of Sovereignty Issues, at 10 (Jul. 2004) [hereinafter IID Transfer of Sovereignty Issues]. Each team was comprised of service members from all branches of the military. The teams were typically made up of a JA team leader, paralegals, and special investigators. *Id.*

³²² *Id.* at 11.

By the fall of 2004, the Legal Liaison Office reported an approximately seventy-five percent successful prosecution rate at the CCCI.³²³ It had reviewed almost 2,000 cases and referred hundreds for prosecution. The success of this difficult mission was due almost entirely to the legal teams supporting the CCCI. Nevertheless, it was a constant struggle to identify cases and support investigations as units transitioned from combat operations to management of a crime scene.³²⁴ The issue of evidence collection is further discussed in paragraph 2.e.

k. Implement a Process for Prosecution of War Crimes and Crimes Against Humanity Which Includes Representatives of the Occupied Territory.

Initially, ORHA established an Office of Transitional Justice (OJT) which attempted to coordinate exploitation of mass graves and become the evidentiary receptacle for crimes against humanity. Judge advocates worked closely with the OJT in coordinating the mass grave evidentiary collection effort.³²⁵ In December 2003, the CPA Administrator, by CPA Order, delegated to the Iraqi Governing Council the authority to establish an Iraqi Special Tribunal (IST) to try Iraqi nationals and residents of Iraq accused of genocide, crimes against humanity, war crimes or violations of certain Iraqi laws, by promulgating a statute.³²⁶ The CPA Administrator delegated his administrative authority to the Governing Council because he believed that the tribunal for Iraqis should be designed by Iraqis.³²⁷ The statute was promulgated and became effective on 10 December 2003.³²⁸

No cases were brought before the Iraqi Special Tribunal during the time period covered by this Publication. Nevertheless, legal teams provided training to the Iraqi judges who were selected to sit on the IST. Judge advocates discovered that they had to conduct extensive study of the underlying domestic law and procedures to identify and train differences between international law, the domestic law that the judges were more familiar with, and war crimes statutes such as the IST statute.³²⁹ Legal teams also found that the best way to train the Law of Armed Conflict was scenario-based training using fictional countries.³³⁰ Another resource used to training the IST was the Defense Institute of International Legal Studies (DIILS). The JAs assigned to DIILS trained Iraqi judges and lawyers for two weeks on basic international law

³²³ *Id.*

³²⁴ Pagel Comments, *supra* note 34, at 39.

³²⁵ 12th LSO AAR, *supra* note 16, at 7. LTC Kirk Warner, Judge Advocate, 12th LSO, became the custodian for several months of over 560 teeth extracted from over 300 skulls for DNA preservation from one mass grave near Al Hillah.

³²⁶ Coalition Provision Authority, Order Number 48, Delegation of Authority Regarding an Iraqi Special Tribunal (9 Dec. 2003) (on file with CLAMO).

³²⁷ Coalition Office of Strategic Communications, Talking Points on Iraq Special Tribunal (9 Dec. 2003) (on file with CLAMO).

³²⁸ The Statute of the Iraqi Special Tribunal (10 Dec. 2003) (on file with CLAMO). Initially, the U.S. Government appropriated \$75 million to fund investigations into crimes of the former regime, and this effort was tied directly into the IST. See Coalition Office of Strategic Communications, Questions and Answers on Iraqi Special Tribunal (9 Dec. 2003) (on file with CLAMO).

³²⁹ ICAV AAR, *supra* note 33, at 36 (“[i]n Iraq, for example, there were significant differences between the international defense of ‘duress’ and the domestic defense of ‘duress.’ Similarly, there are slightly different notions of command responsibility crimes in Iraq than has evolved in international criminal practice.”).

³³⁰ This prevented the training from becoming mere rehearsals for the real trials and reverting to discussions about the cases under investigation. *Id.*

related to crimes against humanity, war crimes, and genocide. They also worked with the Regime Crimes Liaison Office to develop a training session for the investigators appointed to the IST, to be conducted in England. In cooperation with the British Foreign Office, DIILS planned to again address basic international law on crimes against humanity, war crimes, and genocide.³³¹

1. Understand the Weapons Control Laws and Make Necessary Changes.

Another early CPA order addressed weapons control. Once major combat operations wound down, Coalition Forces were confronted with a multitude of Iraqi's who carried weapons. The Iraqi's advised that weapons were part of their culture. Some Iraqi citizens and Coalition Forces civilian personnel and contractors desired to carry weapons for their personal protection. Still others wished to use them offensively against Coalition Forces. To maintain security and protect Coalition Forces, it was necessary to institute a weapons control policy. The Iraqis already had a weapons control law, the Iraqi Weapons Code of 1992, which made the Ministry of Interior the official responsible for issuing weapons licenses. The CPA, however, decided to issue its own weapons control policy. The original CPA weapons control Order, dated 23 May 2003,³³² generally provided that no person could possess a small arms weapon in a public place.³³³ It did, however, allow Coalition Forces and Iraqi police, security, and military forces in uniform under the supervision of the Coalition Forces to possess "heavy weapons," to the extent necessary to perform their duties.³³⁴ It also allowed Coalition Forces, Iraqi police, and military forces on duty, in uniform and under the supervision of Coalition Forces, and groups assisting Coalition Forces who remain under their supervision, to carry small arms openly in public places.³³⁵

To address the desire of the Iraqi citizen to possess a weapon for self-defense, the Order also allowed a small arms weapon to be possessed in a person's home or place of business, but prohibited them from being possessed in a school, hospital or holy site except by individuals authorized by Coalition Forces.³³⁶ An individual could also apply for a temporary weapons authorization card to carry a weapon.³³⁷ The Order, however, was silent on the procedures for applying for an authorization card.

In August 2003, the CPA issued a Memorandum authorizing foreign liaison missions, the United Nations, and the United Nations Specialized and Related Agencies to execute contracts

³³¹ Information Paper, DIILS in Afghanistan and Iraq: Rebuilding Under the Rule of Law, at 1 (Jan. 2005) [hereinafter DIILS Information Paper] (on file with CLAMO).

³³² Coalition Provisional Authority, Order Number 3, Weapons Control (23 May 2003) [hereinafter CPA Order No. 3] (on file with CLAMO).

³³³ *Id.* sec. 3(1). "Small arms" included rifles that fire up to 7.62 MM ammunition, shotguns, and pistols. *Id.* sec. 1(2). The Order also prohibited all weapons or arms markets and the firing of weapons within city limits, except in self-defense or for purposes of official duties. It also prohibited anyone under the age of eighteen to possess, carry, conceal, trade, sell, barter, give, or exchange weapons, and generally prohibited the carrying of a concealed weapon, except by Coalition Forces and authorized police and security forces. *Id.* sec. 4.

³³⁴ *Id.* sec. 2. "Heavy weapons" were defined as weapons firing ammunition larger than 7.62 MM, machine guns or crew-served weapons, anti-tank weapons (such as rocket propelled grenades), anti-aircraft weapons, indirect fire weapons, armored vehicles or self-propelled weapons, high explosives and explosive devices. *Id.* sec. 1(1).

³³⁵ *Id.* sec. 3(2).

³³⁶ *Id.* sec. 3(3).

³³⁷ *Id.* sec. 5.

for security services. The Memorandum permitted these security services personnel to carry small arms and defensive weapons, as long as they provided the locations of their facilities with armed personnel to the CPA.³³⁸ As the transfer of sovereignty neared, the CPA issued additional regulations regarding these private security companies (PSC), requiring them to be registered through the Ministry of Trade and obtain an Operating License through the PSC Registration and Vetting Office of the Ministry of Interior (MOI). If an Operating License was granted, the MOI was also to issue a Weapons Card to those PSC employees who were to be armed as part of their duties.³³⁹

As the insurgency grew throughout the fall of 2003, Coalition Forces civilian employees and contractors also wanted to carry firearms in self defense. However, U.S. Central Command (USCENTCOM) General Order Number 1A (USCENTCOM GO-1A) prohibited the possession of privately owned weapons or ammunition by Coalition Forces and contractors.³⁴⁰ Yet some Coalition Forces contracts included language permitting contractor employees to possess weapons for their personal protection with the authorization of the theater commander. Many contracts, however, did not address the issue. Therefore, the policy became that the Commander, USCENTCOM could authorize Coalition Forces to issue government-owned weapons and ammunition to contractor employees for their personal protection.³⁴¹

Further, Coalition Forces could enter into contracts to provide services that necessitated the possession and use of weapons, such as security guard service contracts. First, the CPA Administrator could authorize possession of weapons by Coalition Forces contractors when their possession and use was for official purposes consistent with the contract. Additionally, the Commander, USCENTCOM could authorize Coalition Forces to issue government-owned

³³⁸ Coalition Provisional Authority, Memorandum Number 5, Implementation of Weapons Control Order No. 3 (23 May 2003), secs. 2 & 4 (22 Aug. 2003) (on file with CLAMO).

³³⁹ Coalition Provisional Authority, Memorandum Number 17, Registration Requirements for Private Security Companies, secs. 1 & 6 (26 Jun. 2004). The Memorandum also regulated the use of weapons by PSC as follows:

- a) PSC shall notify the MOI of details and serial numbers of all weapons in its possession.
- b) PSC will notify the MOI of any changes in the PSC's weapons inventory within one (1) month of such changes.
- c) PSC shall store all weapons and ammunition in a secure armory or other secure facility.
- d) PSC shall ensure that only employees carrying Weapons Cards may carry weapons and only when such employees are on official duty. PSC shall also ensure that its employees return all PSC weapons to the armory or other secure facility, as the case may be, when no longer on duty. This provision does not restrict the right of PSC employees to carry weapons while not on duty under the provisions of other Iraqi laws.
- e) PSC may only own and its employees may only use categories of weapons allowed by CPA Order . . . [and] other applicable Iraqi law.
- f) Under no circumstances may privately owned weapons be used for PSC duties.

Id. sec. 4(4)

³⁴⁰ Commander, U.S. Central Command, Gen. Order No. 1A (29 Dec. 2000) [hereinafter USCENTCOM GO-1A] (on file with CLAMO). See CENTER FOR LAW AND MILITARY OPERATIONS, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, VOLUME I: MAJOR COMBAT OPERATIONS, app. G-1 (11 September 2001 – 1 May 2003) (1 Aug. 2004) [hereinafter Volume I, Afghanistan and Iraq Legal Lessons Learned] (providing a copy of USCENTCOM GO-1A).

³⁴¹ See Information Paper, Combined Joint Task Force-7, subject: Possession of Weapons by Coalition Forces Contractors, para. 4.b. (11 Nov. 2003) [hereinafter Weapons Possession Information Paper] (on file with CLAMO).

weapons and ammunition to contractors and their employees to use in the performance of duties under the contract.³⁴² Consistent with the authority of the CPA and USCENCOM, the CPA weapons control Order was amended in December 2003 to allow the possession of firearms and military weapons by those authorized to carry weapons in the course of their duties by CPA or the Coalition Forces Commander.³⁴³ Later, the Order was amended to allow individuals to possess firearms for personal use *only* if they obtained authorization from the MOI. In addition, the amendment allowed private security firms to be licensed by the MOI to possess and use firearms and military weapons in the course of their duties, including in public places.³⁴⁴ Even with an authorization, however, they could not carry concealed weapons.³⁴⁵

Although the MOI had the authority to issue weapons permits under both the 1992 Iraqi Weapons Code and CPA Order, they had no established procedure in place to carry out this authority. Therefore, the only licensing authority continued to be the CPA and Coalition Forces Commander.³⁴⁶ In practice, the Divisions printed the weapons permit cards for individuals authorized to carry weapons in accordance with established guidance. In First Infantry Division, for example, the maneuver brigades and chief of staff authorized the issuance of weapons permits. The Division ultimately purchased fifteen laminating machines for distribution to Iraqi officials so that they could begin processing requests for weapons permits.³⁴⁷

Upon the transfer of sovereignty on 28 June 2004, CPA Order Number 100 rescinded the CPA and Coalition Forces Commander authority to authorize groups and individuals to carry weapons.³⁴⁸ Therefore, the MOI became the only licensing authority under the 1992 Iraqi Weapons Code. Unfortunately, the MOI was still not prepared to implement a nation-wide weapons licensing procedure. Therefore, local Iraqi governments and Coalition Forces continued to issue temporary weapons cards.³⁴⁹

³⁴² *Id.* para. 4.c. Contractors had to be trained in the use of the weapons and use them only in self-defense or under the terms of the contracts, or in defense of persons or property in compliance with CPA Orders, Memoranda, and Iraqi law. *Id.*

³⁴³ Coalition Provisional Authority, Order Number 3 (Revised) (Amended), Weapons Control, sec. 3(1) (31 Dec. 2003) [hereinafter Revised CPA Order No. 3] (on file with CLAMO). The Order defined “firearms” to include automatic (7.62mm (.308 caliber and under)) and non-automatic rifles, shotguns, and pistols for personal use, and associated ammunition, but not to include weapons rendered permanently inoperable, replicas, antiques or ceremonial weapons. *Id.* Sec. 1(3). The Order defined “military weapons” as any weapon system, ammunition or explosives or explosive devices of any type designed for use by any military forces but not including “firearms.” Military weapons also included “special category weapons,” defined as any explosives, improvised explosives or incendiary devices, grenade, rockets, shells or mines and any means of discharging such items, crew-served weapons of any kind, and Man Portable Air Defense Systems of any kind. *Id.* sec. 1(6) & (9).

³⁴⁴ *Id.* sec. 3(2) (private security firms could not possess and use special category weapons, however).

³⁴⁵ *Id.* sec. 4(3). The Iraqi security forces, private security companies, security officers from diplomatic missions, and any other group or individual authorized by the MOI could carry concealed weapons, however. CPA Order No. 100, *supra* note 64, sec. 3.3(4).

³⁴⁶ See, e.g., Position Paper, Headquarters, Multi-National Corps – Iraq, Office of the Staff Judge Advocate, Status of CPA/Coalition Weapons Cards in Sovereign Iraq (9 Jul. 2004) (on file with CLAMO).

³⁴⁷ See E-mail, Lieutenant Colonel Michael O. Lacy, Deputy Staff Judge Advocate, 1ID, to Lieutenant Colonel Pamela M. Stahl, Director, the Center for Law and Military Operations (14 Jan. 2005) (on file with CLAMO); see also ICAV AAR, *supra* note 33, at 69 (noting that after the transfer of sovereignty the BCTs continued to issue weapons cards in narrow circumstances where the mission dictated a need under the authority of UN Security Council Resolution 1546 “all necessary measures” language).

³⁴⁸ CPA Order No. 100, *supra* note 64, sec.3.6(g).

³⁴⁹ Weapons Possession Information Paper, *supra* note 256, para. 4.b.

2. Detention Operations.

*Respect for others, humane treatment of all persons, and adherence to the law of war and rules of engagement is a matter of discipline and values. It is what separates us from our enemies. I expect all leaders to reinforce this message This awful episode at Abu Ghraib must not allow us to get distracted The honor and value systems of our armed forces are solid and the bedrock of what makes us the best in the world America's armed forces will never compromise their honor. In Iraq the coalition military, including our 130,000 Americans, remains focused, and I guarantee you, they will not fail.*³⁵⁰

*The war against terrorism ushers in a new paradigm Our nation recognizes that this new paradigm—ushered in not by us, but by terrorists—requires new thinking in the Law of War, but thinking that should nevertheless be consistent with the principles of Geneva.*³⁵¹

As stated in Volume I of this Publication, detainee operations occupied JAs in OEF and OIF perhaps more than any other issue of International and Operational Law. Volume I provides a brief overview of pertinent legal authorities and implementing U.S. regulations regarding detainee operations, with the exception of legal opinions and policy memoranda not available during the period of that Publication.³⁵² Generally, those references will not be repeated here. Rather, this Volume covers legal and other lessons learned in the area of detention operations during the period of time covered by this Publication.

a. Be Prepared to Advise Commanders on the Status of Detainees.

*JAs must be the conscience of the command regarding detainees.*³⁵³

In both Afghanistan and Iraq, legal teams were an integral part of detention operations, advising commanders, military police (MPs), and military intelligence (MI) members on the status and treatment of detainees. In both operations, there was initial confusion over the status of individuals captured by Coalition Forces. Judge advocates quickly found that status determinations were extremely important to making successive decisions with respect to treatment and interrogation of detainees.³⁵⁴ As a predicate to determining the status of captured

³⁵⁰ Lieutenant General Ricardo Sanchez, Commander, CJTF7, at the hearing of the Senate Armed Services Committee regarding allegations of mistreatment of Iraqi prisoners (19 May 2004) [hereinafter LTG Sanchez Testimony].

³⁵¹ Memorandum, President George Bush, for the Vice President, the Secretary of State, the Secretary of Defense, the Attorney General, Chief of Staff to the President, Director of Central Intelligence, Assistant to the President for National Security Affairs, and Chairman of the Joint Chiefs of Staff, subject: Humane Treatment of al Qaeda and Taliban Detainees (7 Feb. 2002) [hereinafter 2002 Presidential Memorandum] (on file with CLAMO).

³⁵² See Volume I, Afghanistan and Iraq Legal Lessons Learned, *supra* note 255, para. III.A.5. and A.6.

³⁵³ Lieutenant Colonel Thomas Ayres, SJA, 82d ABN DIV. 82d ABN DIV AAR, *supra* note 96.

³⁵⁴ See, e.g., Mr. David E. Graham, The Treatment and Interrogation of Prisoners of War and Security Detainees: Current Issues, Miller Center of Public Affairs Forum (3 Sept. 2004) [hereinafter Graham Forum] (transcript on file with CLAMO).

individuals, JAs must first have access to and understand the U.S. Government's position on the legal basis for the military operation.

1. The United States Government's Position on Whether the Geneva Conventions Apply to a Conflict with a Particular Enemy is Crucial to Advising Commanders on the Status of Detainees.

The status of Taliban and al Qaeda detainees in Afghanistan was discussed in Volume I of this Publication.³⁵⁵ After publication, however, several Administration documents were made public that were not generally available to legal teams on the ground in Afghanistan at the time that these documents were issued. These documents reflect the decision-making process and should be reviewed in this Publication. Essentially, the U.S. Government's position was that members of the Taliban and al Qaeda were not entitled to prisoner of war (POW) status or other protections of the Geneva Conventions.³⁵⁶

On 18 January 2002, the White House Counsel advised President Bush that the Department of Justice (DoJ) had issued a legal opinion concluding that the Third Geneva Convention did not apply to the conflict with al Qaeda. The opinion also stated that there were reasonable grounds for the President to conclude that the Third Geneva Convention also did not apply to the conflict with the Taliban.³⁵⁷ The DoJ legal opinion, labeled "draft," and issued to the DoD General Counsel, concluded that international treaties "did not protect members of the al Qaeda organization, which as a non-State actor cannot be a party to the international agreements governing war."³⁵⁸ Additionally, the opinion concluded that these treaties also did not apply to the Taliban militia because Afghanistan was a failed state, and as such could not be considered a party of the Geneva Conventions.³⁵⁹ The legal opinion further noted that the Taliban and al Qaeda could be found to be so intertwined "that the Taliban cannot be regarded as an independent actor, and therefore cannot stand on a higher footing under the Geneva Conventions than al Qaeda."³⁶⁰ In addition, the legal opinion stated that "[e]ven if Afghanistan under the Taliban were not deemed to have been a failed State, the President could still regard the Geneva Conventions as temporarily suspended during the current military action."³⁶¹

³⁵⁵ See Volume I, Afghanistan and Iraq Lessons Learned, *supra* note 255, para. III.A.5.a.

³⁵⁶ Geneva Convention, Relative to the Treatment of Prisoners of War, art. 4., Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. 3364, 75 U.N.T.T. 135 [hereinafter GC III].

³⁵⁷ See Memorandum, U.S. White House Counsel Alberto R. Gonzales, for The President, subject: Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (25 Jan. 2002) [hereinafter Gonzales Memorandum] (on file with CLAMO); see also Memorandum, Deputy Assistant Attorney General Mr. John Yoo and Special Counsel Robert J. Delahunty, Office of the Legal Counsel, Office of the Assistant Attorney General, U.S. Department of Justice, for William J. Haynes II, General Counsel, Department of Defense, re: Application of Treaties and Law to al Qaeda and Taliban Detainees (9 Jan. 2002) (draft) [hereinafter Yoo Memorandum] (on file with CLAMO).

³⁵⁸ *Id.*, at 1.

³⁵⁹ *Id.* The legal opinion reasoned that "Afghanistan was a 'failed State' whose territory had been largely overrun and held by violence by a militia or faction rather than by a government. Accordingly, Afghanistan was without the attributes of statehood necessary to continue as a party to the Geneva Conventions . . ." Therefore, the Taliban were not protected by GC III and could not attain POW status. *Id.* at 14.

³⁶⁰ *Id.* at 22.

³⁶¹ *Id.* at 28. The legal opinion provides that:

On 19 January 2002, the Secretary of Defense issued a memorandum to the Chairman, Joint Chiefs of Staff providing that the United States “has determined that al Qaida and Taliban individuals under the control of the Department of Defense are not entitled to prisoner of war status for the purposes of the Geneva Conventions of 1949.”³⁶² The memorandum also provided that “[t]he Combatant Commanders shall, in detaining al Qaida and Taliban individuals under the control of the Department of Defense, treat them humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Geneva Conventions of 1949.”³⁶³

On 22 January 2002, a final legal opinion was issued by the Office of Legal Counsel, Office of the Assistant Attorney General, DoJ for the White House Counsel and the DoD General Counsel. The final legal opinion was similar to the earlier draft opinion. The opinion concluded that “al Qaeda detainees cannot claim the protections of Geneva III because the treaty does not apply to them.”³⁶⁴ Moreover, the conflict with al Qaeda “is not properly included in non-international forms of armed conflict to which some provisions of the Geneva Conventions might apply.”³⁶⁵ Thus, Common Article Three of the Geneva Conventions did not apply to al Qaeda because it only “covers ‘armed conflict not of an international character’ – a war that does not involve cross-border attacks – that occurs within the territory of one of the High Contracting parties.”³⁶⁶

The opinion also stated that the President could decide that the Geneva Conventions did not protect the Taliban militia as well.³⁶⁷ Again, this was based on an analysis that Afghanistan was a failed state such that the President, under his constitutional authority, could “suspend the performance of our Geneva III obligation towards it.”³⁶⁸ Moreover, although having no bearing on domestic constitutional issues, the opinion found that, in certain circumstances, countries

As a constitutional matter, the President has the power to consider performance of some or all of the obligations of the United States under the Conventions suspended. Such a decision could be based on the finding that Afghanistan lacked the capacity to fulfill its treaty obligations or (if supported by the facts) on the finding that Afghanistan was in material breach of its obligations.

Id.

³⁶² Memorandum, Secretary of Defense, for Chairman of the Joint Chiefs of Staff, subject: Status of Taliban and Al Qaida (19 Jan. 2002) [hereinafter Rumsfeld Memorandum] (on file with CLAMO).

³⁶³ *Id.*

³⁶⁴ Memorandum, Office of Legal Counsel, Office of the Assistant Attorney General, U.S. Department of Justice, for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (22 Jan. 2002) [hereinafter 2002 DOJ Opinion] (on file with CLAMO). This conclusion was first based on their opinion that “Geneva III did not apply to a non-State actor such as the al Qaeda terrorist organization.” *Id.* at 1-2. Moreover, “al Qaeda members fail to satisfy the eligibility requirements for treatment as POWs under Geneva Convention III.” *Id.* at 9. The opinion also provided that even if article 4 of CG III applies, captured members of al Qaeda still would not be POWs because they are not an “armed force,” volunteer force, or militia of a state party as defined in article 4(A)(1) and they are not a volunteer force, militia, or organized resistance force under article 4(A)(2). *Id.* at 10.

³⁶⁵ *Id.* at 1-2.

³⁶⁶ *Id.* at 6. Thus, “Common article 3’s text provides substantial reason to think that it refers specifically to condition of civil war, or a large-scale armed conflict between a State and an armed movement within its own territory.” *Id.*

³⁶⁷ *Id.* at 1.

³⁶⁸ *Id.* at 15.

have the authority to suspend the Geneva Conventions consistent with international law.³⁶⁹ Finally, the opinion noted that the President could still decide to follow the Third Geneva Convention as a matter of policy.³⁷⁰

Additionally, the DoJ legal opinion addressed the issue of detention conditions under the Third Geneva Convention. The opinion found that even if the Taliban were legally entitled to POW status, the United States could deviate from the POW requirement of the Third Geneva Convention without violating the treaty's obligations under the doctrine of legal excuse.³⁷¹ More specifically, deviations would not amount to a treaty violation if they would be justified by the need for force protection.³⁷² Further, even if the President did not suspend U.S. obligations under the Third Geneva Convention, the DoJ opinion found that "it is possible that Taliban detainees still might not receive the legal status of POWs" because they did not fall within one of the categories in Article 4 of that Convention entitling them to POW status.³⁷³ Under Article 4.A(1), members of the armed forces, and militias and volunteer corps forming part of such armed forces, of a Party to the conflict are entitled to POW status.³⁷⁴ Moreover, members of other militias and volunteer corps are entitled to POW status under Article 4.A(2) of the Convention if they: (a) are commanded by a person responsible for his subordinates; (b) have a fixed distinctive sign recognizable at a distance; (c) carry arms openly; and (d) conduct their operations in accordance with the laws and customs of war.³⁷⁵ The opinion declined to answer whether the Taliban fell outside these dictates, as they did "not have the facts available to advise [DoD] or the White House whether the President would have the grounds to apply the law to the facts [and find that the Taliban forces do not fall within the legal definition of POW as defined in Article 4]."³⁷⁶

Shortly thereafter, on 26 January 2002, the Secretary of State forwarded a memorandum to the White House Counsel commenting on a draft decision memorandum for the President on the applicability of the Geneva Conventions to the conflict in Afghanistan that was based on the DoJ legal opinion. The Secretary of State's memorandum noted that the President had two choices: (1) determine that the Third Geneva Convention does not apply; or (2) determine that the Third Geneva Convention does apply but that members of al Qaeda as a group and the Taliban (either individually or as a group) are not entitled to POW status under the Convention.³⁷⁷ The memorandum provided that the first option would allow maximum flexibility, but noted several issues. First, "[i]t will reverse over a century of U.S. policy and practice in supporting the Geneva conventions and undermine the protections of the law of war

³⁶⁹ *Id.* at 23 (noting that "[u]nder customary international law, the general rule is that breach of a multilateral treaty by a State party justifies the suspension of the treaty with regard to the State.").

³⁷⁰ *Id.* at 26 (noting that if the United States applied the Convention as a matter of policy this "would allow the United States to deviate from certain provisions it did not believe were appropriate to the current conflict.").

³⁷¹ *Id.* at 28.

³⁷² *Id.* (arguing the U.S.'s national right to self-defense).

³⁷³ *Id.* at 30; *see also* GC III art. 4(A).

³⁷⁴ GC III, *supra* note 270, art. 4.A(1).

³⁷⁵ *Id.* art. 4.A(2).

³⁷⁶ 2002 DOJ Memorandum, *supra* note 279, at 31.

³⁷⁷ Memorandum, Secretary of State, to Counsel to the President and Assistant to the President for National Security Affairs, subject: Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan, 1 (26 Jan. 2002) (on file with CLAMO).

for our troops, both in this specific conflict and in general.”³⁷⁸ Moreover, it would provoke “negative international reaction, with immediate adverse consequences for our conduct of foreign policy.”³⁷⁹ Further, it would “undermine public support among critical allies,” and “Europeans and others” would “likely have legal problems with extradition or other forms of cooperation in law enforcement, including bringing terrorists to justice.”³⁸⁰ The memorandum also noted that deciding that the Geneva Convention did not apply would make the United States “more vulnerable to domestic and international legal challenge and deprive the US of important legal options” such as:

- It undermines the President’s Military Order by removing an important legal basis for trying the detainees before Military Commissions.
- We will be challenged in international fora (UN Commission on Human Rights; World Court; etc.).
- The Geneva Conventions are a more flexible and suitable legal framework than other laws that would arguably apply (customary international human rights, human rights conventions). The GPW permits long-term detention without criminal charges. Even after the President determines hostilities have ended, detention continues if criminal investigations or proceedings are in process. The GPW also provides clear authority for transfer of detainees to third countries.
- Determining GPW does not apply deprives us of a winning argument to oppose habeas corpus actions in U.S. courts.³⁸¹

The memorandum also found several pros and cons to the second option, that is, that the Geneva Convention applied to the conflict. First, such a finding provided a “more defensible legal framework” and “preserves our flexibility under both domestic and international law.”³⁸² Further, it provided “the strongest legal foundation for what we actually intend to do” and “presents a positive international posture, preserves U.S. credibility and moral authority by taking the high ground, and puts us in a better position to demand and receive international support.”³⁸³ It also “maintains POW status for U.S. forces, reinforces the importance of the Geneva conventions, and generally supports the U.S. objective of ensuring its forces are accorded protection under the Convention.”³⁸⁴ The only problem was that a case-by-case review of the Taliban detainees might be required, which may find that some of them are entitled to POW status, although this would not “affect their treatment as a practical matter.”³⁸⁵

³⁷⁸ *Id.* at 2.

³⁷⁹ *Id.*

³⁸⁰ *Id.* The memorandum noted that it could also provoke some foreign prosecutors to investigate and prosecute U.S. officials and troops. *Id.* at 2.

³⁸¹ *Id.* at 2-3.

³⁸² *Id.* 3

³⁸³ *Id.*

³⁸⁴ *Id.* at 3-4. The memorandum also noted that this alternative reduced the incentive for international criminal investigations against U.S. officials and troops. *Id.*

³⁸⁵ *Id.* at 4

Upon review of the Secretary of State's memorandum, the White House Counsel forwarded a memorandum to the President outlining "the ramifications of your decision [that the Third Geneva Convention did not apply to either al Qaeda or the Taliban] and the Secretary [of State's] request for reconsideration,"³⁸⁶ and finding "the arguments for reconsideration and reversal [to be] unpersuasive."³⁸⁷

On 7 February 2002, the President issued an Order accepting the legal conclusion of the DoJ that none of the provisions of the Geneva Conventions applied to al Qaeda "in Afghanistan or elsewhere throughout the world because among other reasons, al Qaeda is not a High Contracting Party to Geneva."³⁸⁸ Moreover, the President accepted the legal conclusion that he had "the authority under the Constitution to suspend Geneva as between the United States and Afghanistan," but declined to exercise that authority at that time.³⁸⁹ The President determined that "the provisions of Geneva will apply to our present conflict with the Taliban" but reserved the right to exercise authority to suspend the Geneva Conventions in this or future conflicts.³⁹⁰ Additionally, the President accepted the legal conclusion that Common Article Three of the Geneva Conventions did not apply to either al Qaeda or Taliban detainees, as the relevant conflicts were international and Common Article Three only applies to "armed conflict not of an

³⁸⁶ Gonzales Memorandum, *supra* note 272, at 1.

³⁸⁷ *Id.* at 3. According to the memorandum:

- The argument that the U.S. has never determined that the GPW did not apply is incorrect. In at least one case (Panama in 1989) the U.S. determined that the GPW did not apply even though it determined for policy reasons to adhere to the convention. . . .
- In response to the argument that we should decide to apply GPW to the Taliban in order to encourage other countries to treat captured U.S. military personnel in accordance with the GPW, it should be noted that your policy of providing humane treatment to enemy detainees gives us the credibility to insist on like treatment for our soldiers. Moreover, even if GPW is not applicable we can still bring war crimes charges against anyone who mistreats U.S. personnel. Finally, I note that our adversaries in several recent conflicts have not been deterred by GPW in their mistreatment of captured U.S. personnel, and terrorists will not follow the GPW rules in any event.
- The statement that other nations would criticize the U.S. because we have determined that GPW does not apply is undoubtedly true. It is even possible that some nations would point to that determination as a basis for failing to cooperate with us on specific matters in the war against terrorism. On the other hand, some international and domestic criticism is already likely to flow from your previous decision not to treat the detainees as POWs. And we can facilitate cooperation with other nations by reassuring them that we fully support GPW where it is applicable and by acknowledging that in this conflict the U.S. continues to respect other recognized standards.
- In the treatment of detainees, the U.S. will continue to be constrained by (i) its commitment to treat the detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of GPW, (ii) its applicable treaty obligations, (iii) minimum standards of treatment universally recognized by the nations of the worlds, and (iv) applicable military regulations regarding the treatment of detainees.
- Similarly, the argument based on military culture fails to recognize that our military remain bound to apply the principles of the GPW because that is what you have directed them to do.

Id. at 3-4.

³⁸⁸ 2002 Presidential Memorandum, *supra* note 266, at 1.

³⁸⁹ *Id.* at 1-2.

³⁹⁰ *Id.* at 2.

international character.”³⁹¹ Finally, the President found that the Taliban detainees were “unlawful combatants” not entitled to POW status and, similarly, al Qaeda detainees did not qualify as POWs.³⁹²

Nevertheless, the President stated that detainees must be treated humanely, including those who were not legally entitled to such treatment, that is, al Qaeda and Taliban forces. According to the Presidential Order “[a]s a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.”³⁹³ A White House Press Release issued the same day explained that “[e]ven though the detainees are not entitled to POW privileges, they will be provided many privileges as a matter of policy.”³⁹⁴ This comports with current DoD policy that the United States “will apply law of war principles during all operations that are categorized as Military Operations Other than War.”³⁹⁵

Shortly before the end of the period covered by this Publication, on 28 June 2004, the Supreme Court decided the case of *Rasul v. Bush*.³⁹⁶ That case involved two Australians and twelve Kuwaitis captured abroad during hostilities in Afghanistan and held in military custody at Guantanamo Bay, Cuba. Petitioners filed suits under Federal law challenging the legality of their detention, alleging that they had never been combatants against the United States or

³⁹¹ *Id.*

³⁹² *Id.*

³⁹³ *Id.*

³⁹⁴ See Fact Sheet, the White House, Status of Detainees at Guantanamo at 1, 7 Feb. 2002, at <http://www.whitehouse.gov/news/releases/2002/02/print/20020207-13.html> [hereinafter White House Fact Sheet] These privileges included:

- Three meals a day that meet Muslim dietary laws
- Water
- Medical care
- Clothing and shoes
- Shelter
- Showers
- Soap and toilet articles
- Foam sleeping pads and blankets
- Towels and washcloths
- The opportunity to worship
- correspondence materials, and the means to send mail
- the ability to receive packages of food and clothing, subject to security screening

The detainees at Guantanamo Bay specifically did not receive some of the privileges afforded to POWs, including:

- access to a canteen to purchase food, soap, and tobacco
- a monthly advance of pay
- the ability to have and consult personal financial accounts
- the ability to receive scientific equipment, musical instruments, or sports outfits

Id.

³⁹⁵ CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 5810.01B, IMPLEMENTATION OF THE LAW OF WAR PROGRAM (25 Mar. 2002); see also U.S. DEP’T OF DEFENSE, DIR. 5100-77, DoD LAW OF WAR PROGRAM (9 Dec. 1998).

³⁹⁶ 542 U.S. 1 (2004).

engaged in terrorist acts, and that they had never been charged with wrongdoing, permitted to consult counsel, or provided access to courts or other tribunals. Initially, the District Court construed the suits as *habeas* petitions and dismissed them for lack of jurisdiction and the Court of Appeals affirmed. The U.S. Supreme Court disagreed, however, finding that the U.S. courts had jurisdiction to consider challenges to the legality of detaining foreign nationals captured abroad in connection with hostilities and held at Guantanamo Bay and remanding for the District Court to consider in the first instance the merits of petitioners' claims.³⁹⁷ On 7 July 2004, the Deputy Secretary of Defense issued an order establishing combatant status review tribunals and on 29 July 2004, the Secretary of the Navy issued procedures implementing the review tribunals.³⁹⁸ The Order provided that all detainees were to be notified of the opportunity to contest designation as an enemy combatant, to consult with and be assisted by a personal representative, and to seek a writ of *habeas corpus* in the courts of the United States.³⁹⁹ The order defined "enemy combatant" as:

an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.⁴⁰⁰

Additionally, in 2004 Congress amended the definition of the "United States" for purposes of the federal crime of torture to mean the several States of the United States, the district of Columbia, and the commonwealths, territories, and possessions of the United States.⁴⁰¹

Thus, by early 2002, the U.S. Government made clear its position that none of the individuals detained in Afghanistan were entitled to POW status and, thus, the protections of the Geneva Conventions regarding POWs as a matter of law. The U.S. Government's policy, however, was to treat all detained members of these organizations humanely and consistent with the Geneva Conventions to the extent appropriate and consistent with military necessity.

2. Be Prepared to Make Status Recommendations on Individuals Detained By Coalition Forces during an Occupation.

When they entered Iraq in March 2003, it was clear that the United States and its Coalition partners were engaged in an international armed conflict against Iraq.⁴⁰² Nevertheless, once major combat operations were completed, the United States Government declared U.S and

³⁹⁷ *Id.* The court noted that "by the express terms of its agreements with Cuba, the United States exercises complete jurisdiction and control over the Guantanamo Base, and may continue to do so permanently if it chooses." *Id.* at 3.

³⁹⁸ Memorandum, The Secretary of the Navy, subject: Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba (29 Jul. 2004).

³⁹⁹ Memorandum, Deputy Secretary of Defense, for Secretary of the Navy, subject: Order Establish Combatant Status Review Tribunals, para. b (7 Jul. 2004).

⁴⁰⁰ *Id.* para. a.

⁴⁰¹ National Defense Authorization Act for FY 2005, § 1089, Pub. L. 108-375 (28 Oct. 2004).

⁴⁰² Common Article Two of the Geneva Conventions provides: "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." GC III, *supra* note 270, art. 2.

Coalition Forces “liberating forces,” rather than occupying forces.⁴⁰³ The reluctance of the Coalition to acknowledge that their forces occupied Iraq such that the Fourth Geneva Convention applied to operations led to confusion over the legal status of detainees and the standards applicable to them.⁴⁰⁴

The Coalition Forces detained thousands of individuals during operations in Iraq, a vast majority of who were captured in civilian clothing. Some were caught in suspicious circumstances, some in sweeps, and some for security or intelligence reasons.⁴⁰⁵ As of January 2004, for example, the Coalition had detained more than 9,000 individuals. Of these, only 107 were EPWs. There were over 2,500 civilians detained solely due to suspected criminal activity and an additional approximately 7,000 interned because they were a security threat to Coalition Forces.⁴⁰⁶ The complex issues under international law that JAs faced in making status determinations in this environment was perhaps best summed up by a U.S. Marine Corps judge advocate.

Detainee handling proved to be one of the greatest challenges for the Division Part of the problem stemmed from a lack of standardized plan and approach for identifying the reasons for detaining Iraqi personnel, the establishment and maintenance of detention facilities, and the transfer and disposition of detainees. . . . As an occupying force, the coalition also had the responsibility to provide law enforcement support in those areas where the local Iraqi officials were unable or unwilling to process criminal cases. The limited battalion detention facilities quickly filled to capacity, as commanders struggled to categorize detainees and move them in and out of the facilities. Eventually the Division G-3, in conjunction with the SJA and attached Military Police cadre, developed a rudimentary detainee handling procedure Despite these efforts, MEF and CJTF-7 were slow to provide guidance and locations to hold the growing numbers of detainees, while in many provinces the local Iraqi jails were too run-down or overcrowded to hold the number of purely criminal offenses. This problem area was compounded by the lack of functioning Iraqi court systems, with the end

⁴⁰³ See, e.g., 3ID AAR, *supra* note 12, at 289.

As a matter of law, the United States is an occupying power in Iraq, even if we characterize ourselves as liberators. Under International Law, occupation is a de facto status that occurs when an invading army takes effective control of a portion of another country. If necessary to maintain this public affairs position, [the United States] should have stated that while we were “liberators,” we intended to comply with International Law requirements regarding occupation Because of the refusal to acknowledge occupier status, commanders did not initially take measures available to occupying powers, such as imposing curfews, directing civilians to return to work, and controlling the local government and populace.

Id.

⁴⁰⁴ GC IV, *supra* note 10. Common Article Two of the Geneva Conventions also provides: “[t]he Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.” *Id.* art. 2.

⁴⁰⁵ See OIF After Action Report – Detainee Outline: Articles 5 (GPW) and 78 (GC), Major Alvin P. Wadsworth, Jr., Judge Advocate, 12th Legal Support Organization (undated) [hereinafter OIF Detainee Outline] (on file with CLAMO).

⁴⁰⁶ See. Santiago Transcript, *supra* note 216, at 5.

result a growing jail population and no “release valve” in terms of trial and disposition of offenses. Even once CJTF-7 developed a plan for categorizing the different types of detainees . . . the staffing and operation of the Army-run facilities, and the paperwork and documentation required to place an individual in the system, remained constantly evolving. . . Finally, a shortage of qualified interrogators and interpreters, the location of Army detention facilities, and the disjointed detainee tracking system made it extremely difficult for our units to track a detainee once placed in the system, or conduct follow-up interrogations based on new evidence.⁴⁰⁷

It is not the intention or charter of this Publication to review and critique overall detention operations in Iraq, as that has been the subject of several investigations by DoD that have sought to provide findings and recommendations on the numerous issues dealing with overcrowding in detention facilities, lack of accountability of detainees, logistical support, and detainee abuse.⁴⁰⁸ Nevertheless, it is vital for legal teams in future operations to understand the issues confronted by JAs as they struggled to devise and implement a process to determine the status under international law of those captured by Coalition Forces in Iraq and fashion a system for lawfully transferring custody, to include release, and/or disposing of allegations against individual detainees. Their experiences and lessons learned will certainly inform those legal teams conducting such operations in the future.

i. In the Absence of Specific Doctrinal Guidance, Be Prepared to Implement a Process for Determining the Status of Detainees that Comports with the United States’ International Legal Obligations.

According to Article 5 of the Third Geneva Convention, “[s]hould any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy [are POWs under Article 4, CG III], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”⁴⁰⁹ The language, on its face, requires a “belligerent act” as a prerequisite to an Article 5 tribunal. Because most individuals captured by Coalition Forces in Iraq were in civilian clothing and because most arrived at the detention facility with little documentation regarding their capture, many times JAs found it was impossible to discern their appropriate status or even whether they

⁴⁰⁷ Memorandum, Staff Judge Advocate, to Assistant Chief of Staff, G-3, subject: Phase IVB After Action Review (undated) [hereinafter IMEF Phase IVB AAR] (on file with CLAMO).

⁴⁰⁸ Legal teams involved in detainee operations routinely commented that the lack of a comprehensive country-wide database of detainees severely hindered detainee operations. By memorandum, dated 31 July 2003, the Director, Civil Affairs Policy, requested that the CPA Administer approve a preliminary detainee tracking system, and funding therefore, to enable the Coalition to provide relatives with vital information regarding the status of detainees. The memorandum noted that “tracking the hundreds of criminal detainees that come into temporary detention facilities across Iraq every day is a difficult task.” The director noted that as of the date of the memorandum, a list of persons detained in the Baghdad area was provided daily to the International Committee of the Red Cross (ICRC) and to Civil-Military Operations and Humanitarian Assistance Centers and that the CPA was working on consolidating similar lists from temporary detention facilities countrywide to provide to the local and central ICRC offices. Memorandum, Judge Donald F. Campbell, Director, Civil Affairs Policy, for The Administrator, CPA, subject: Detainee Tracking System (31 Jul. 2003).

⁴⁰⁹ GC III, *supra* note 271, art. 5.

had committed a belligerent act, such that an Article 5 Tribunal was required.⁴¹⁰ Therefore, in the early period of the operation, JAs decided that if status was in doubt and there was doubt as to whether a belligerent act had been committed, they would conduct a screening interview or a more formal hearing to comply with Article 5 of the Third Geneva Convention.⁴¹¹

Initially, the Iraqi Internment Facility (IF) was established at Camp Bucca in Umm Qasr, which was under the control of British Forces. The British officers, organized by their legal advisors, used a screening process to determine whether a person was entitled to POW status under Article 4 of the Third Geneva Convention. When the 800th Military Police Brigade took over the IF, JAs from the Combined Forces Land Component Command (CFLCC) were dispatched in April 2003 to assist the unit in the task of status determinations. These JAs first worked with the British legal advisors, conducting screenings with them. The screening panels generally had two or three officers, one paralegal, and an interpreter. The British also used enlisted behavioral specialists who watched the individual being screened to provide advice on their veracity. After several weeks, the U.S. JAs and MPs established screening panels separate from their British counterparts. In May 2003, a senior paralegal noncommissioned officer moved to Umm Qasr as the legal NCOIC for detainee processing. She developed and maintained a comprehensive database for tracking and processing detainees. She also supervised six Soldiers in detainee screening operations and tribunals, as well as supervised and transcribed over 150 Article 5 screening interviews and hearings.⁴¹²

As JA personnel assets increased, they conducted as many as ten screening tables concurrently, subject to the availability of interpreters. Each screening took about thirty minutes to one hour to complete, depending on the line of questioning. Judge advocates constituted the bulk of the screeners by about a ratio of five to one. Each screening panel could feasibly conduct ten to twenty-five screenings a day, for a total of 100 or more screenings per day. At one point, CFLCC directed that more formal Article 5 tribunals were to commence. Because of the more detailed procedures for these tribunals required by Army Regulation 190-8,⁴¹³ including the requirement for a written summary of the facts and evidence, the Tribunals took a great deal longer to conduct and the JAs found that they could only process about one-tenth of the number of detainees in a given day.⁴¹⁴

The JAs conducting hearings at Camp Bucca quickly discovered that rarely did the IF have any captured property, capture cards, or intelligence information on the detainees. This required JAs to devise baseline questioning procedures in an attempt to gain information on which to base a determination as to their status. At the conclusion of the screening interview, the

⁴¹⁰ OIF Detainee Outline, *supra* note 320, at para. 1.a.

⁴¹¹ *Id.* Article 5 of GC III only requires a status determination “by a competent tribunal.” It does not set forth procedures for such a tribunal. As implemented by Army doctrine, the Article 5 Tribunal must be convened by a general court-martial convening authority and composed of three commissioned officers. Among other requirements, a written record must be made of the proceedings. U.S. DEP’T OF ARMY, REG. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES, AND OTHER DETAINEES, para. 1-6 (1 Oct. 1997) [hereinafter AR 190-8]; *see also* U.S. CENTRAL COMMAND, REG. 27-13, CAPTURED PERSONS, DETERMINATION OF ELIGIBILITY FOR ENEMY PRISONER OF WAR STATUS (7 Feb. 1995) [hereinafter USCENTCOM Reg. 27-13].

⁴¹² 12th LSO AAR, *supra* note 16, at 4.

⁴¹³ AR 190-8, *supra* note 326, para. 1-6.

⁴¹⁴ OIF Detainee Outline, *supra* note 320, at 2.(a); AR 190-8, *supra* note 326, para. 1-6.

panel would make a status determination and, if they determined that the person was a civilian, as opposed to an EPW, they would make a decision whether to release the individual. To decide whether to release the detainee, the panel had to consider issues regarding security, intelligence, and criminal offenses.⁴¹⁵ Through questioning, for instance, the JAs found that the Saddam Fedayeen, though militia-like in its purpose, frequently committed civil crimes, crimes against humanity and violated acceptable laws of war by forcing civilians to engage in hostile acts and killing those who refused, thus placing them outside the parameters of a POW, as defined in Article 4, Third Geneva Convention.

Because there were no doctrinal procedures for status determinations beyond the Article 5 Tribunal process outlined in Army Regulation 190-8,⁴¹⁶ the V Corps JAs assigned to CJTF-7 drafted a comprehensive Standard Operating Procedure (SOP) for reviewing and approving each detainee's status based on the Third and Fourth Geneva Conventions. First, the SOP provided that units could only detain civilians if: (1) probable cause existed that they had committed a crime; or (2) there was a reasonable basis to believe the individual posed a serious threat to Coalition Forces, other protected persons, key facilities, mission-essential property, or the Coalition's progress.⁴¹⁷ The JAs also devised a Coalition Provisional Authority Apprehension Form that the capturing unit was required to complete to provide the reviewing JAs information to make an informed decision as to the individual's status. A copy of this apprehension form is at Appendix A-1.

CJTF-7 issued guidance to subordinate commands on detainee operations through fragmentary orders (FRAGOs). At the major subordinate commands, units had their own holding areas and their own procedures for detention operations. The 4th Infantry Division, for instance, captured large numbers of detainees. The chief of staff decided whether to release a detainee based on the recommendations of the SJA, provost marshal (PMO), G-2, and G-3. If not released, the detainee was sent to the Corps detention facility.⁴¹⁸ At the 1st Armored Division, each brigade was required to stand up their own detainee holding area and maintain it to Division standards.⁴¹⁹ The detention review board at the 101st Airborne Division (Air Assault) was comprised of the G-2, PMO, and SJA and reviewed each detainee's case before voting to recommend release or retention.⁴²⁰

The CJTF-7 OSJA SOP provided categories of detainees: EPWs, Security Internees, including criminal Security Internees, and Criminal Detainees.⁴²¹ A Security Internee was defined "as any individual who possesses information deemed mission-essential to Coalition Forces and is detained for imperative reasons of security to Coalition Forces."⁴²² These security detainees could be detained for up to fourteen days in the Division holding areas for

⁴¹⁵ OIF Detainee Outline, *supra* note 320, at 2.(a).

⁴¹⁶ AR 190-8, *supra* note 326, para. 1-6.

⁴¹⁷ Standard Operating Procedures for Joint Detention Operations in Support of Operation Iraqi Freedom, CJTF-7, para. 7 (31 Jan. 2004) [hereinafter CJTF-7 Detention SOP] (on file with CLAMO).

⁴¹⁸ 4ID AAR, *supra* note 71, at 4.

⁴¹⁹ 1AD Recent Developments, *supra* note 225, para. 2.a.

⁴²⁰ Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), Operation Iraq Freedom Recent Legal Developments, para. 2.b. (27 Jan. 2004).

⁴²¹ CJTF-7 Detention SOP, *supra* note 332, para. 3.

⁴²² *Id.* para. 3.b.

interrogation or questioning before being transported to the Corp holding area in Baghdad.⁴²³ A criminal security internee was a subcategory of security internee and was defined as “any individual who poses a serious threat to Coalition Forces, other protected persons, key facilities, mission-essential property, or the Coalition’s progress and is detained for imperative reasons of security to Coalition Forces.”⁴²⁴ The authority to detain these individuals is found in Article 5, Fourth Geneva Convention, which provides:

Where in occupied territory an individual protected person⁴²⁵ is detained . . . as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so required, be regarded as having forfeited rights of communication under the present convention.⁴²⁶

Finally, a criminal detainee was “any individual who commits a criminal act against the citizenry of Iraq.”⁴²⁷ According to the Hague Convention, an occupying power “shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”⁴²⁸ Therefore, Coalition Forces had an obligation under international law to ensure public safety, including protecting the citizens from criminal activity and ensuring that the judicial system dealt with accused criminals. These categories of detainees were also explained in Coalition Provisional Authority, Memorandum Number Three, implemented in mid-June of 2003.⁴²⁹ The Memorandum set forth standards to apply to Criminal Detainees and Security Internees.⁴³⁰

⁴²³ *Id.*

⁴²⁴ *Id.* para., 3.c.

⁴²⁵ A protected person is defined as follows.

[T]hose who, at a given moment and in any manner whatsoever, find themselves in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

GC IV, *supra* note 10, art. 4.

⁴²⁶ *Id.* art. 5.

⁴²⁷ CJTF-7 Detention SOP, *supra* note 332, para. 3.d.

⁴²⁸ Hague Regulations, *supra* note 1, art. 43.

⁴²⁹ Coalition Provisional Authority, Memorandum No. 3, subject: Criminal Procedures (18 Jun. 2003) (on file with CLAMO).

⁴³⁰ These standards included:

- (a) Upon the initial induction into a Coalition force detention center a criminal detainee shall be appraised of his rights to remain silent and to consult an attorney.
- (b) A criminal detainee suspected of a felony offence may consult an attorney 72 hours after induction into a Coalition Force detention centre.
- (d) A criminal detainee shall be promptly informed, in writing, in a language which they understand, of the particulars of the charges preferred against them.

Within seventy-two hours of their arrival, the Detention Review Authority (DRA)—a JA, acting as a magistrate—reviewed the case files and separated them into security internees or criminal detainees. A decision to classify a detainee as a security internee could only be made upon a finding that there was a “reasonable basis” to support the classification.⁴³¹ If the detainee was classified as a security internee, the JA would also recommend them for internment or refer the case to an Article 78 Panel. Major criminals were referred to the Iraqi Criminal Court or the Criminal Release Board.⁴³² The DRA determined a release date for all Minor Criminals.⁴³³ If a

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- (d) A criminal detainee shall be brought before a judicial officer as rapidly as possible and in no instance later than 90 days from the date of induction into a Coalition Force detention centre.
 - (e) Access to detainees shall be granted to official delegates of the International Committee of the Red Cross (ICRC). Access will only be denied delegate for reasons of imperative military necessity as an exception and temporary measure. ICRC delegates shall be permitted to inspect health, sanitation and living conditions and to interview all detainees in private. They shall also be permitted to record information regarding a detainee and to pass messages to and from the family of a detainee subject to reasonable censorship by the facility authorities.

Id. Section 6.

The standards for processing security internees, consistent with the Fourth Geneva Convention, included:

- (a) In accordance with Article 78 of the Fourth Geneva Convention, Coalition forces shall, with the least possible delay, afford persons held as security internees the right of appeal against the decision to intern them.
- (b) The decision to intern a person shall be reviewed not later than six months from the date of induction into an internment facility by a competent body established for the purpose of Coalition Forces.
- (c) The operation, condition and standards of any internment facility established by Coalition Forces shall be in accordance with Section IV of the Fourth Geneva Convention.
- (d) Access to internees shall be granted to official delegates of the ICRC. Access will only be denied delegates for reasons of imperative military necessity as an exceptional and temporary measure. ICRC delegates shall be permitted to inspect health, sanitation and living conditions and to interview all internees in private. They shall also be permitted to record information regarding an internee and to pass messages to and from the family of an internee subject to reasonable censorship by the facility authorities.
- (e) If a person is subsequently determined to be a criminal detainee following tribunal proceedings concerning his or her status, or following the commission of a crime while in internment, the period that person has spent in internment will not count with respect to the period set out in Section 6(1)(d) herein.
- (f) Where any security internee held by Coalition Forces is subsequently transferred to an Iraqi Court, a failure to comply with these procedures shall not constitute grounds for any legal remedy, but may be considered in mitigation of sentence.

Id. Section 7.

⁴³¹ CJTF-7 Detention SOP, *supra* note 332, para. 5.r.

⁴³² “Serious crimes” were defined as any crime punishable by more than five years confinement under the Iraqi Criminal Code of 1969. That included: murder, rape, armed robbery, kidnapping, abduction, state infrastructure sabotage, car-jacking, assault causing bodily harm, arson, destruction of property valued at equal to or greater than \$500, or inchoate offenses associated with the above. *Id.*

⁴³³ For example, the DRA would release minor criminals within 24 hours for violation of curfews and traffic violations; for discharging a weapon in city limits or being drunk and disorderly, the DRA would release the individual after ten days. *See* Internment Boards, Operation Iraq Freedom, Power Point Presentation (undated) (on file with CLAMO).

detainee's status as an EPW was in doubt, the detainee would be referred to an Article V Tribunal to determine whether he qualified for EPW status or for security internee status.⁴³⁴

For security internees, the next step under the SOP was to notify the individual of their status in writing and provide them an opportunity to appeal their status and their internment. These rights were given under Article 78, Fourth Geneva Convention.⁴³⁵ It should be noted that there is a question regarding whether those who were detained under Article 5 of the Fourth Geneva Convention for "suspicion of activity hostile to the security of the Occupying power" are entitled to the appeal rights granted under Article 78, Fourth Geneva Convention. The latter article provides appellate rights if the Occupying Power considers necessary, for imperative reasons of security, to take safety measures concerning protected persons, by subjecting them to assigned residence or to internment. Nevertheless, the CJTF-7 procedure gave all security internees appellate rights. The English version of the Notification of Rights is at Appendix A-3.

Representatives from the Criminal Investigations Division (CID), MI, MP and JA communities sat on the Appellate Review Panel to hear the security internees' appeals and recommend either internment until the six-month review or the Article 78 Review and Appeal Board hear the case.⁴³⁶ The Article 78 Review and Appeal Board reviewed the cases of all Security Internees recommended for release, either by the initial Appellate Review Panel or the Six-Month Review Panel. The CJTF-7 C-2 sat as the President of the board and members of the board included the MP brigade commander and the CJTF-7 SJA or their delegees. The officer in charge of the SJA Joint Detention Operations section acted as the recorder for the board.⁴³⁷ The initial processes for Security Internees and Criminal Detainees are graphically depicted at Appendices A-4 and A-5.

The Main Detention Facility was located at Camp Cropper, Baghdad International Airport from June to September 2003. Camp Cropper was the central booking facility during this time. In late September, Camp Cropper was closed and the detention facility at Abu Ghraib became the central booking facility for Iraq. Moreover, in September, Camp Bucca was told not to accept additional detainees. CJTF-7 (V Corps) had four of their JAs, with two paralegals assisting, conducting all detention review boards throughout the summer and fall of 2003. In all,

⁴³⁴ CJTF-7 Detention SOP, *supra* note 332, para. 5.

⁴³⁵ Article 78 provides:

If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.

Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concern. The Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodic review, if possible every six months, by a competent body set up by the said Power.

GC IV, *supra* note 10, art. 27.

⁴³⁶ CJTF-7 Detention SOP, *supra* note 332, para. 5.h.

⁴³⁷ *Id.* para. 5.k.

over 10,000 detainees would be processed by Coalition Forces. One JA reported that when he arrived at Abu Ghraib in August of 2003 there were over 3,000 detainees awaiting a detention review board, with five hundred additional detainees being captured each week. These JAs and paralegals worked around the clock attempting to hasten the review process.⁴³⁸ Initially, the MI wanted all detainees held until they had a chance to speak with them, regardless of the evidence. Judge advocates estimated that of the 500 new detainees coming in each week easily one-half of them were criminals, without any intelligence value. Therefore, the JAs and MI personnel devised a plan whereby an MI Soldier would be at the intake area and identify detainees who may be of intelligence value. The JAs would then screen these individuals first so that MI personnel could interrogate them. This greatly speeded up the process.⁴³⁹

As the procedures matured and the Iraqi judicial system began taking criminal cases, the criminal detainees held by Coalition Forces were processed by the Ministry of Justice at CPA, rather than by the JA detention procedures. Moreover, the legal teams devised a Guarantor Program, which allowed certain detainees to be released. Under the program, the detainee could sign a Conditional Release Agreement disavowing and renouncing violence and agreeing to certain other conditions. A guarantor would also have to sign the agreement, giving their personal assurances that the detainee would comply with the conditions of his release. The guarantor also agreed to report any violations of the agreement and, if the guarantor did not report the violations, he was subject to detention as a threat to the stability and security of Iraq as well. A copy of a Conditional Release Agreement is at Appendix A-6.

As the time for transfer of sovereignty to the Interim Iraqi Government neared, United Nations Security Council Resolution 1546 provided that the “multinational force shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution”⁴⁴⁰ Secretary of State Colin Powell’s attached letter provided that the activities of the multinational forces necessary to maintain security included “internment where this is necessary for imperative reasons of security.”⁴⁴¹ Based on this authority, Coalition Provisional Authority, Memorandum Number Three, was revised to update procedures for processing criminal detainees and security internees.⁴⁴²

⁴³⁸ Interview with Captain Michael Scionti, Judge Advocate, CJTF-7 (18 May 2004).

⁴³⁹ *Id.*

⁴⁴⁰ S.C. Res. 1546, U.N. SCOR, 59th Sess., 4987th mtg., U.N. Doc. S.RES/1546 (2004).

⁴⁴¹ *Id.* attached letter from U.S. Secretary of State (5 Jun. 2004).

⁴⁴² Coalition Provisional Authority, Memorandum Number 3 (Revised), subject: Criminal Procedures (27 Jun. 2004). According to the Memorandum, the multinational forces (MNF) had the right to apprehend persons suspected of committing criminal acts, but were not considered security internees. These individuals had to be handed over to the Iraqi authorities as soon as reasonably practicable. The MNF could retain criminal detainees in their facilities at the request of appropriate Iraqi authorities based on security or capacity considerations. If the MNF held the criminal detainee, the following procedures were to apply.

- (a) Upon the initial induction into the detention centre a criminal detainee shall be apprised of his rights to remain silent and to consult an attorney by the authority serving an arrest warrant.
- (b) A criminal detainee suspected of a felony offence may consult an attorney 72 hours after induction into the detention centre.

Detainee operations SOPs continued to evolve throughout the period of this Publication. A lesson learned by JAs deploying into theater was that legal teams should take the initiative before deploying to urge their units to review and staff their detention facilities' SOPs. Additionally, detention operations SOPs helped units understand the standard for detention facilities which can later be used for reference as JAs and others inspect detention facilities.⁴⁴³ The 1st Cavalry Division found their SOP had to evolve as their situation on the ground changed. They entered theater in early 2004 with a forty page SOP on detention operations. By the time they redeployed one year later, they were on their tenth update to the SOP and it had grown to 120 pages in length.⁴⁴⁴

Further, as new Divisions entered theater, they generally coordinated with the outgoing unit to obtain a copy of their SOP. The 1st Infantry Division, for example, used the SOP developed by 4th Infantry Division. Because no one on the staff had originally drafted the SOP, they found that generally no one on the staff took ownership of the SOP to update it with changes in CJTF-7's detention policy or even their own division-level FRAGOs. As a result, the OSJA realized their facility was using an SOP that was incomplete and often ignored. Therefore, the legal teams recommended that staff sections review the outgoing unit's SOP prior to deployment and that staff sections submit input to ensure an SOP everyone understands. Early publication will allow interrogators and guard force personnel to train using the same SOP they

(c) A criminal detainee shall be promptly informed, in writing, in a language which they understand, of the particulars of the charges preferred against them by the authority serving an arrest warrant.

(d) A criminal detainee shall be brought before a judicial officer as rapidly as possible and in no instance later than 90 days from the date of induction into the detention centre.

(e) Access to detainees shall be granted to the Iraqi Prisons and Detainee Ombudsman (hereinafter "the Ombudsman"). Access will only be denied the Ombudsman for reasons of imperative military necessity as an exceptional and temporary measure. The Ombudsman shall be permitted to inspect health, sanitation and living conditions and to interview all detainees in private and to record information regarding a detainee.

(f) Access to detainees shall be granted to official delegates of the International Committee of the Red Cross (ICRC). Access will only be denied the delegates for reasons of imperative military necessity as an exceptional and temporary measure. The ICRC delegates shall be permitted to inspect health, sanitation and living conditions and to interview all detainees in private. They shall also be permitted to record information regarding a detainee and may pass messages to and from the family of a detainee subject to reasonable censorship by the facility.

Id. Section 5. If held by MNF for imperative reasons of security for more than 72 hours, the detainee was entitled to a review of the decision to intern him. A further review had to be conducted on a regular basis and in no case later than six months from induction in to the internment facility. The Memorandum also stated that "[t]he operation, condition and standards of any internment facility established by the MNF shall be in accordance with Section IV of the Fourth Geneva Convention." *Id.* Section 6(4). Moreover, those security internees placed in internment after 30 June 2004 must be either released or transferred to the Iraqi criminal jurisdiction no later than 18 months from the date of induction. If the MNF decided for imperative reasons of security to intern someone for longer than 18 months, the Joint Detention Committee had to approve the continued internment. The Ombudsman and ICRC had the same rights and privileges as with Criminal detainees.

⁴⁴³ Some facility managers mandated that every member of the facility read and sign the SOP as well as regularly updated changes to the SOP. This is helpful to preempt facility personnel claims that they were not aware of proper procedures within the facility.

⁴⁴⁴ ICAV AAR, *supra* note 33, at 19.

will employ in theater.⁴⁴⁵ Moreover, a division-wide SOP must discuss detention operations below the division level while ensuring that subordinate units will be able to meet the standard with the resources allocated to them.⁴⁴⁶

Legal teams often gathered guidance from various sources in an effort to create an all-encompassing guide for their subordinate units.⁴⁴⁷ Several units developed SOPs that incorporated specific control mechanisms, such as requiring a certain number of personnel to be present during interrogations, having all service members sign a document outlining acceptable behavior, and moving leaders to task independent officers to monitor all detainee operations with the ability to observe anything anytime in their facility. Judge advocates must ensure that any guidance issued to units is compliant with all higher guidance and be proactive in ensuring units are receiving and implementing the guidance.

ii. Be Prepared to Conduct Formal Article 5 Tribunals on High Value Detainees.

In the June – August 2003 time period, the SJA, CJTF-7 (V Corps) recognized the need to conduct status determinations for High Value Detainees (HVDs). These detainees were not under the control of the 800th MP Brigade, but were held at a special confinement facility (SCF) under the control of CJTF-7. There were no specific procedures, however, for conducting classified status determinations.⁴⁴⁸ Therefore, JAs developed procedures for conducting Article 5 Tribunals for HVDs based on their understanding of the security and intelligence issues involved and their lessons learned from conducting screenings at the IF at Camp Bucca, Iraq in April and May of 2003.⁴⁴⁹

First, the JAs developed a new procedure to conduct HVD screenings without personal contact. They reviewed available intelligence files and created a screening form to record relevant status information about each detainee. The JA screening the file would then make a recommendation on status to the SJA, CJTF-7 who then approved or disapproved the recommendation.⁴⁵⁰

If the JA could not determine status based on the information available, an Article 5 Tribunal would be scheduled. The Convening Authority was the Commander, CJTF-7. A copy

⁴⁴⁵ Office of the Staff Judge Advocate, 1st Infantry Division, First Quarter After Action Report, at 6 (May 2004) [hereinafter I1D 1st Quarter AAR] (on file with CLAMO).

⁴⁴⁶ Brigades and battalions have separate collection points where detainees are held prior to movement to the division collection point.

⁴⁴⁷ After Action Review Conference, Office of the Staff Judge Advocate, 10th Mountain Division, and the Center for Law and Military Operations, at Fort Drum, NY., Power Point Presentation (17 Jun. 2004) [hereinafter 10th MNT DIV AAR] (power point presentation on file with CLAMO). Identifying and synthesizing applicable guidance and procedures for detainee operations was a challenge. To capture the role of the detainee operations JA, the JA published an SOP. The SOP was an evolving document and was not completed until shortly before the rotation between 10th Mountain Division and the 25th Infantry Division. One repeated recommendation of units both in Iraq and Afghanistan was to dedicate one JA with responsibility and oversight over detention operations over the unit's entire area of operations. This JA can ensure adherence to standards across theater and as well as have the time to consolidate and improve SOPs.

⁴⁴⁸ See AR 190-8, *supra* note 326; USCENCOM Reg 27-13, *supra* note 326.

⁴⁴⁹ OIF Detainee Outline, *supra* note 320, para. 2(a)(3).

⁴⁵⁰ *Id.*

of an Article 5 Tribunal Convening Order is at Appendix A-7. The JAs also drafted a written notification, informing the HVD of the tribunal and of their rights. In addition, they drafted a script that allowed for tighter security procedures and protected classified information.⁴⁵¹ During the tribunal, the JAs examined the captured property, and the background and overview intelligence, including the HVDs role within the Iraqi Government and society.

At the conclusion of the tribunal, the JA notified the MPs controlling the SCF of the status of the HVD so that he could be segregated by status. The paralegal also prepared a typed, summarized record of the tribunal proceedings, which was submitted to the SJA, CJTF-7 for approval or disapproval of the recommendation.⁴⁵² Written notice (in English and Arabic) of the tribunal decision was also provided the HVD and, for those classified as a security detainee, the notice included an explanation of their rights under Article 78, Fourth Geneva Convention. Finally, the JAs created procedures for Article 78 reviews and appeals for the HVDs.⁴⁵³

Through conducting these status determinations, JAs learned that some Ba'ath Party members may be considered members of the Iraqi militia, entitling them to POW status under the Third Geneva Convention, Article 4. Ba'ath Party membership sometimes carried with it an obligation to engage in civil defense of their "assigned" territories. It was only after conducting in-person screenings that the JAs recognized that many in the Ba'ath Party hierarchy could be considered members of a militia, given the right circumstances.⁴⁵⁴

Through this process, JAs learned that it is very important to preserve the integrity of the legal process in which they are involved. Judge advocates must understand the roles of those involved in the process, including military intelligence, military police, other government agencies, Coalition Forces, and the host nation. Not everyone is after the same information at the same time when they interview or interrogate detainees. Additionally, JAs must conduct themselves with the proper bearing, professionalism, and civility regardless of who they are communicating with—a detainee, tribunal, board, court, or in preparation thereof. For example, JAs should ensure that a detainee does not confuse the legal process with interrogation. To maintain a credible process, JAs must ensure that the regulatory procedures, including those allowing for due process, are adhered to in all proceedings.⁴⁵⁵

b. Ensure that Detention Facilities Comply with the International Law Requirements for the Proper Accountability, Notice, and Access Requirements Related to Detained Civilians.

The Geneva Conventions imposed certain legal obligations to account for, provide third party notice of, and allow third party access to civilians detained by U.S. Forces during OIF. Judge advocates must understand these obligations to properly advise commanders on detainee operations. If a civilian detained by U.S. Forces qualifies as a "protected person" under the

⁴⁵¹ For example, the JAs reviewed classified information outside the presence of the HVDs and did not allow the HVDs to see the classified information when they were present for the formal portion of the tribunal. *Id.*

⁴⁵² *Id.*

⁴⁵³ *Id.*

⁴⁵⁴ *Id.* para. 2.b.

⁴⁵⁵ See, e.g., E-mail from Major Alvin P. Wadsworth, Jr., Judge Advocate, 12th Legal Support Organization, to Lieutenant Colonel Pamela M. Stahl, Director, Center for Law and Military Operations, subject: Volume II, OEF/OIF Lessons Learned Handbook (19 Apr. 2005).

Fourth Geneva Convention,⁴⁵⁶ then Article 136 of that Convention imposes upon the United States an accountability and reporting obligation that is similar to that for POWs. Article 136 provides:

Upon the outbreak of a conflict and in all cases of occupation, each of the Parties to the conflict shall establish an official Information Bureau responsible for receiving and transmitting information in respect of the protected persons who are in its power. Each of the Parties to the conflict shall, within the shortest possible period, give its Bureau information of any measure taken by it concerning any protected persons who are kept in custody for more than two weeks, who are subjected to assigned residence or who are interned. It shall, furthermore, require its various departments concerned with such matters to provide the aforesaid Bureau promptly with information concerning all changes pertaining to these protected persons, as, for example, transfers, releases, repatriations, escapes, admittances to hospitals, births and deaths.⁴⁵⁷

In addition, the Fourth Geneva Convention imposes upon the United States an obligation to allow the International Committee of the Red Cross (ICRC) access to detained protected persons identical to that for EPWs.⁴⁵⁸ The only limitation on this obligation is the express authority of the United States to prohibit such visits for reasons of “imperative military necessity.”⁴⁵⁹ The official commentary to the Fourth Geneva Convention reflects that the ICRC proposed this exception to balance the unlimited right of access with the realities of military operations. The commentary also makes clear that defining what constitutes “imperative military necessity” is left to the discretion of the detaining power, based on the facts and reasonable inferences available to the deciding official. As with all other provisions of the law, however, there is an expectation that this decision is made in good faith, and reliance on this exception will not be abused. Therefore, JAs should advise commanders against speculative or unfounded justifications for prohibiting access.⁴⁶⁰

Moreover, in particular after the detainee abuse cases from Abu Ghraib became public, the media was very interested in visiting detention facilities and photographing detainees. Judge advocates had to provide advice and assistance to commanders in answering these media requests for access to detention facilities. As stated, most of the detainees were not EPWs. In fact, by September 2004, EPWs numbered only about twenty. The rules prohibiting exposure for public curiosity are nevertheless similar for EPWs and security internees. Prisoners of war “must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.”⁴⁶¹ Protected persons under the Fourth Geneva Convention “shall be protected

⁴⁵⁶ See fn 340, *supra* (defining a “protected person”).

⁴⁵⁷ GC IV, *supra* note 10, art. 136.

⁴⁵⁸ *Id.* art. 143.

⁴⁵⁹ *Id.*

⁴⁶⁰ See Information Paper, International Law Department, Office of The Judge Advocate General, U.S. Army, subject: Accountability, Notice, and Access Requirements Related to Detained Civilians (15 Sept. 2004) (on file with CLAMO).

⁴⁶¹ GC III, *supra* note 270, art. 13.

especially against all acts of violence or threats thereof and against insults and public curiosity.”⁴⁶² Moreover, during operations in both Iraq and Afghanistan, the public affairs guidance prohibited photographs or other visual media showing an EPW or detainee’s recognizable face, nametag, or other identifying feature or item.⁴⁶³

Given the above, the JAs in Iraq determined that visits of detention facilities where security internees are put on display for non-governmental actors would be an impermissible breach of Coalition Forces’ obligations to protect security internees from public curiosity. Likewise, photography under the same circumstances is prohibited. Nevertheless, visits of detention facilities to view the facilities and receive briefings would be permissible—even if security detainees were visible at a distance. Any photographs of detainees, even if taken in such a way as to ensure that the person was unrecognizable, had to be approved by the senior MP in the IF commander’s chain of command.⁴⁶⁴ The OSJA, CJTF-7 concluded, however, that the “conduct of war may require limited publicity to achieve legitimate purposes of security or control, such as public education of the capture of a head of state.”⁴⁶⁵ This analysis allowed the limited publicity of Saddam Hussein’s capture, which was proffered by the Secretary of Defense for security purposes, that is, “to prove to insurgents that they no longer fought for a leader on the battlefield.”⁴⁶⁶

c. Ensure Service Members are Trained on the Proper Treatment of Detainees.

*We cannot be sure how much the number and severity of abuses would have been curtailed had there been early and consistent guidance from higher levels. Nonetheless, such guidance was needed and likely would have a limiting effect.*⁴⁶⁷

In Iraq, the first allegations of improper treatment of detainees by MP detention facility guards occurred in May of 2003. An investigation was initiated on the night of 12 May 2003 after Soldiers from another unit reported observing what they believed to be inappropriate treatment of Iraqi detainees by MPs at Camp Bucca, Iraq. Court-martial charges were preferred against four Soldiers as a result of this investigation.⁴⁶⁸ The most well-known cases occurred in November 2003 at the Abu Ghraib detention facility, where several MP guards were accused of abusing prisoners. Pictures of the alleged abuse were made public in March 2004, leading to several investigations and Congressional hearings.

⁴⁶² GC IV, *supra* note 10, art. 27.

⁴⁶³ Message, 101900Z Feb 03, SECDEF, subject: Public Affairs Guidance (PAG) on Embedding Media During Possible Future Operations/Deployments in the U.S. Central Command (CENTCOM) Area of Responsibility (AOR) (on file with CLAMO).

⁴⁶⁴ See Information Paper, Office of the Staff Judge Advocate, MNF-I, subject: Photography of Prisoners, para. 3 (26 Sept. 2004) (on file with CLAMO).

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.*

⁴⁶⁷ Final Report of the Independent Panel to Review DoD Detention Operations, at 15 (Aug. 2004) [hereinafter The Schlesinger Report] (on file with CLAMO).

⁴⁶⁸ The allegations included charges of dereliction of duty, assault, and maltreatment. One of the Soldiers was charged with obstruction of justice, and three of the Soldiers were charged with making a false official statement. Memorandum, CJTF-7, subject: Response to Possible Questions From Media (undated) (on file with CLAMO).

1. Understand the Legal Requirements on the Proper Treatment of Detainees.

As discussed herein, the treatment of individuals detained in Afghanistan was dictated through policy and Federal law prohibiting torture. In Iraq, however, the Coalition Forces were an Occupying Power under the Fourth Geneva Convention and, therefore, were required to comply with the various provisions in that Convention on treatment of detainees as a matter of international law. Clearly, the baseline standard of treatment for all detainees under the Geneva Conventions is that they be treated “humanely.” Common Article Three of the Geneva Conventions provides:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited . . .

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular, humiliating and degrading treatment;

(d) the passing of sentences and carrying out of execution without previous judgment . . .⁴⁶⁹

In addition, those detained under suspicion of activity hostile to the security of the Occupying Power, i.e., “security internees” must be “treated with humanity.”⁴⁷⁰ Moreover, the Fourth Geneva Convention provides specific treatment requirements for those detained for allegedly committing criminal offenses. According to Article 76, Fourth Geneva Convention, protected persons accused of offenses must be detained in the occupied country and shall, if possible, be separated from other detainees. Moreover, they must be given food and hygiene sufficient to keep them in good health; receive required medical attention; receive required spiritual assistance; women must be separated from men and under the direct supervision of women; given proper regard to the special treatment of minors; have the right to be visited by the

⁴⁶⁹ GC IV, *supra* note 10, art. 3.

⁴⁷⁰ *Id.* art. 5.

ICRC; and given the right to receive one relief parcel per month.⁴⁷¹ Finally, those detained for imperative reasons of security, for safety reasons are entitled to a broad range of privileges similar to those provided EPWs.⁴⁷² Many detainees were both criminals and held for “imperative reasons of security,” however, so it was difficult to decide what standard applied.

In many cases in both Afghanistan and Iraq, because of the unavailability of MPs, other Soldiers were used to run the Holding Areas and guard the detainees. The legal teams recommended that JAs must assist the command in these cases by ensuring proper training of the guard force on treatment of detainees.⁴⁷³ Further, JAs often had their commanders sign policy memoranda regarding the treatment of detainees. For example, the SJA at 4th Infantry Division drafted a policy for the Commander providing, among other things, that detainees were to be treated humanely.⁴⁷⁴ In March 2004, the CJTF-7 Commander signed Policy Memorandum Number 18, reemphasizing the responsibility of Coalition Forces to treat all persons with dignity and respect and reiterating the obligation of Coalition Forces to comply with the law of war. The Memorandum specifically stated that “[i]n all circumstances, treat those who are not taking an active part in hostilities, including prisoners and detainees, humanely.”⁴⁷⁵

During the period covered by this Publication, commanders were sometimes confused about what was required to be provided to detainees and at what point they were required to provide it.⁴⁷⁶ Part of the problem may have stemmed from the lack of a standardized plan to identify the reasons for detaining certain personnel and the subsequent struggle for commanders with limited capacity and resources to move the detainees in and out of their facilities based on their status. For example, there was uncertainty regarding mail privileges, visitors, payment of wages, labor, tobacco and other issues.⁴⁷⁷ Though numerous FRAGOs and policy letters were issued to elaborate on detainee status and treatment, commands sometimes found the guidance either too vague to effect local SOPs or too difficult to implement given the resources available to capturing units at the lowest levels of command. While it may be difficult to do with absolute certainty, it is essential to publish guidance that clearly discusses what detainees are entitled to at each level. Understanding the proper treatment is very important to commanders because they genuinely desire to accomplish all that is required of them under the Geneva Conventions.⁴⁷⁸

Commanders and service members continuously asked for clarification of left and right limits that subordinate level legal teams could not answer with complete certainty in the face of changing or incomplete guidance.⁴⁷⁹ International law was helpful as a framework for the

⁴⁷¹ *Id.* art. 76.

⁴⁷² *Id.* Section IV.

⁴⁷³ See, e.g., 10th MNT DIV AAR, *supra* note 362; 1AD Recent Developments, *supra* note 225, para. 2.a; 4ID AAR, *supra* note 71, at 3.

⁴⁷⁴ 4ID AAR, *supra* note 71, at 3.

⁴⁷⁵ Memorandum, Commander, CJTF-7, for All Coalition Forces Personnel, subject: Proper Conduct During Combat Operations, para. 4 (4 Mar. 2004) (on file with CLAMO).

⁴⁷⁶ 1ID 1st Quarter AAR, *supra* note 360.

⁴⁷⁷ IMEF Phase IVB AAR, *supra* note 322.

⁴⁷⁸ 1ID 1st Quarter AAR, *supra* note 360.

⁴⁷⁹ Army Regulation 15-6 Investigation of the Abu Ghraib Detention Facility and the 205th Military Intelligence Brigade, at 7 (2004) [hereinafter *The Fay Report*] (“Theater Interrogation and Counter Resistance Policies (ICRP) were found to be poorly defined and changed several times. As a result, interrogation activities sometimes crossed into abusive activity.”).

treatment of detainees, but after official hostilities ended, Army doctrine ceased to guide actual practice as some doctrine proved unworkable on a non-linear battlefield.⁴⁸⁰

Given the above, JAs were asked to provide legal opinions on the requirements under international law regarding rights and privileges of detainees. For example, the OSJA at CJTF-7 provided advice on the scope of medical care required for security internees. In providing advice on the standard of medical care, JAs looked to the Third and Fourth Geneva Conventions for guidance. The OSJA provided that monthly medical inspections of internees should be conducted to supervise their general state of health and that medical treatment should include provision of any apparatus, such as dentures or eyeglasses, for the maintenance of good health. They also found that the detention facility at Abu Ghraib should maintain an adequate medical facility.⁴⁸¹

In addition to providing advice on the treatment of detainees, legal teams advised commanders on issues regarding detainee abuse. Once detainee abuse was identified the unit had to submit a serious incident report (SIR) with photographs through the chain of command to the division. The OSJA, 1st Cavalry Division appointed a JA as a point of contact for all allegations of detainee abuse. They found it very helpful to have one point of contact within the OSJA to provide advice on detainee abuse allegations. They recommended that this JA be on the Operations serious incident report (SIR) e-mail distribution list and ensure that the JA is familiar with the CID points of contact for investigating such allegations. They also recommended that the JA ensure that pictures of the detainee be included with the Standard Form 600, Chronological Record of Medical Care.⁴⁸²

It should be noted that after the end of the time period covered by this Publication, Congress provided additional guidance on detainee treatment in the National Defense Authorization Act for Fiscal Year 2005. Section 1091 provided that the sense of Congress was that “the Constitution, laws, and treaties of the United States and the applicable guidance and regulations of the United States Government prohibit the torture or cruel, inhumane, or degrading treatment of foreign prisoners held in custody by the United States,” and that no detainee shall be subject to that treatment.⁴⁸³ Moreover, the section provided that it was U.S. policy to ensure that no detainee in its custody is subjected to the treatment described, to promptly investigate and prosecute instances of abuse, to ensure that U.S. personnel understand

⁴⁸⁰ ICAV AAR, *supra* note 33.

⁴⁸¹ See Information Paper, Office of the Staff Judge Advocate, CJTF-7, subject: Scope of Medical Care Required for Security Detainees (2 May 2004) (on file with CLAMO).

The security detainees held at Abu Ghraib prison are not covered under Geneva Convention Relative to the Treatment of Prisoners of War, (GPW). However, the guidance offered by the GPW is a source for the establishment of similar standards for medical treatment of the security detainees. The Geneva Convention Relative to the Protection of Civilian Persons in Time of War August 12, 1949, (GC IV), specifically Article 91 and Article 92, offer similar guidance to be considered when determining similar standards of medical treatment of security detainees.

Id. para. 4.A.

⁴⁸² ICAV AAR, *supra* note 33, at 22.

⁴⁸³ National Defense Authorization Act for FY 2005, § 1091, Pub. L. 108-375 (28 Oct. 2004).

the applicable standards, and to accord detainees whose status is in doubt the protection for POWs.⁴⁸⁴

2. Judge Advocates Should Assist in Predeployment Training on Detention Operations.

At the time of this Publication, measures had been implemented to further include detention operations training as part of Army training,⁴⁸⁵ and through the efforts of the JA and MP Observer Controllers (O/Cs), the detention process is taught to all units rotating through the Combat Training Centers (CTCs).⁴⁸⁶ The Operations Orders (OPORDs) at all CTCs contain

⁴⁸⁴ *Id.*

⁴⁸⁵ See The Fay Report, *supra* note 394, at 115 (recommending that TRADOC initiate an effort to develop a cross-branch training program in detainee and interrogation operations training; that FORSCOM should reinstitute combined MP/MI unit training; and that the Department of Defense should improve training provided to all personnel in Geneva Conventions, detainee operations, and the responsibilities of reporting detainee abuse).

⁴⁸⁶ All Army CTCs now train units for the challenges associated with detainee detention, detainee handling, and the associated paperwork requirements. The CTCs include the Battle Command Training Program (BCTP), the Joint Readiness Training Center (JRTC), the National Training Center (NTC), and the Combat Maneuver Training Center (CMTc). When NTC began conducting Mission Readiness Exercises (MRXs) in the summer of 2003, JA O/Cs took the initiative to gather information on current detainee operations, through CLAMO and personal contact with JAs in Iraq, and to incorporate this information into NTC rotations. They also incorporated the latest unclassified portions of the CJTF-7 and, more recently, MNF-I FRAGOs on detainee operations, into their training. The Commander of the Operations Group (COG) emphasizes detainee operations and the importance of ROE, detainee handling procedures, and detainee processing. The COG directs the BCT commanders to conduct ROE and detainee handling training during RSOI. During RSOI Theater Update Briefs to the BCT staff, the JA O/C briefs the unit as the HICON SJA, emphasizing detainee-handling procedures. Similar to JRTC, NTC requires that the unit complete the proper apprehension forms and collect evidence. When detentions occur, O/Cs cover the process from start to finish, and if treatment issues arise, they are dealt with in the AAR. NTC also has an ICRC role player inspect the Holding Facility. The inspection is a field grade officer event, usually at the BSA. During a rotation, the JA O/Cs coach brigade JAs on drafting detainee operations SOPs and advise these JAs to combine detainee operation training with their ROE/LOW briefings during RSOI.

In the past year, CMTc has substantially increased its emphasis on detention operations. Significantly, the JA O/C works with the MI and MP O/Cs to devise training scenarios that emphasize interoperability between the brigade JAs, MPs, MI personnel, and S3 on all detainee issues. CMTc has also recently built a detention facility. During the most recent KFOR rotation, beginning the end of July 2004, for example, the JA O/C ensured Soldiers operating the detention understood and could apply the RUF- and that all Soldiers were well-versed in the LOW with regard to detention operations. The JA O/C also ensured that the brigade JA was involved in the detention process, through reviewing criteria regarding the detention of specific individuals and receiving back briefs from the MP platoon leader in charge of the Detention Facility. The JA O/C further coached the brigade JA to conduct periodic checks on the facility to ensure that it would pass inspection by the ICRC and to ensure that the detainees were being treated humanely and in accordance with the LOAC. For these rotations, the EXSOP was supplemented - to include, among other tasks, detention facility operations, which included a section on handling detainees.

In the past year, JAs assigned to BCTP have begun to inject detention issues into Staff Exercises and work with staffs to ensure that all key players are involved in developing and implementing a plan for detention operations. As legal O/Ts, the JA's focus on ensuring that the right players are involved and energized about detention operations and ensure that plans and orders are fully staffed. BCTP JAs receive the latest information on detention operations from CLAMO, JAs in theater, and through their own recons. In addition, although the JAs at BCTP were not required to provide LOW training in the past, this has changed. For example, during the MRX for KFOR 6A, beginning in late July, 2004, a JA O/T was specifically tasked by GEN(Ret.) Crouch, the BCTP senior mentor for KFOR, to provide LOW training to the unit's entire leadership chain, from SGT and above. The JA gave

appendices that outline detainee procedures and the proper handling of detainees.⁴⁸⁷ All CTCs advise units that they should train detention operations and the proper handling of detainees during unit training programs and JAs are encouraged to proactively engage commands to ensure that this training is being conducted and that the units have all necessary legal assets that might maximize the effectiveness of such training.⁴⁸⁸

Additionally, CTCs have built mock detention facilities to ensure that units are sufficiently trained on the entire process, from initial point of capture to release.⁴⁸⁹ Brigade and battalion commanders, key staff leaders, and service members operating detention facilities receive briefings on detainee treatment under the law or war from operational law O/Cs. The MP O/Cs also brief proper restraint procedures within a detention camp, including a detailed explanation of how to apply hand/leg restraints. Moreover, JAs brief detention operations in Iraq and include information on detainee classifications as well as the proper handling of detainees.⁴⁹⁰ The JA O/Cs are also involved in writing vignettes that require the brigade to deal with escapees, riots, and other menacing conduct designed to support unit home station training. In addition, all CTCs focus on training units on proper evidence collection and handling procedures, accountability of personal property, completing coalition forces detention forms, and completing capture tags and sworn statements regarding each detainee.⁴⁹¹

The JA O/Cs coach the brigade JAs to track every detainee and to become actively involved in the process by regularly visiting the detention facility and resolving issues that may arise. A JA visitation or collocation at detention facilities has proven to be critical to ensure that facilities are meeting their obligations under international law. During JA After Action Reviews (AARs), the O/Cs highlight any potential law of war violations. Any command and control issues related to the operation of the detention facility, the tracking of detainees, or the detention of prisoners, are addressed during the overall brigade AAR. During the rotation, the brigade

a 1 1/2 hour LOW presentation during the junior and senior leader teach periods. This training emphasized humane treatment of detainees and Geneva Conventions III and IV. Every leader in KFOR 6A received this training. The JA also conducted a classified Use of Non-Lethal Means class to the unit's senior leadership.

Because BCTP does not train to the Soldier level, they do not specifically train detainee handling. In the past year, however, OPLAW O/Ts injected detention issues and worked with training unit staffs to ensure all key players are involved in developing and implementing a plan for detention operations. The O/Ts focus on getting the right players involved and energized about the issue and ensuring plans and orders regarding detention are fully staffed. BCTP JAs receive the latest information on detention operations from JAs in theater and through their own recons.

See Information Paper, Detention Operations Legal Training, Center for Law and Military Operations (Mar. 2004) [hereinafter Detention Operations Legal Training] (on file with CLAMO).

⁴⁸⁷ *The CTCs' Exercise Standard Operating Procedures (EXSOPs), however, do not allow the units to physically touch detainees, except during searches. If they do so, they are guilty of an EXSOP violation. Therefore, detentions are accomplished via the EXSOPs when a Soldier produces flex cuffs, gives them to an O/C, and says "O/C, I am detaining this person."* Id.

⁴⁸⁸ Id.

⁴⁸⁹ Id.

⁴⁹⁰ Id.

⁴⁹¹ Id.

holding facility is inspected, either by the ICRC role player, the “Division PMO,” or the “Division SJA.”⁴⁹²

Despite these efforts to familiarize units with detention operations in the predeployment phase, units continued to report that they deployed not realizing that their role in detention operations would be so great. This is true for the JA as well.⁴⁹³ As was noted in Volume I of this Publication, all units—not just military police—require training on detention from the point of capture onward.⁴⁹⁴ To this end, JAs should integrate detention operations training in their standard Law of War/Rules of Engagement training that they conduct as part of traditional predeployment training. The traditional briefings that discuss the status of EPWs generally are no longer sufficient for units deploying in support of the current Global War on Terror. Service members should instead be well trained on the proper treatment of all detainees, the proper collection and transfer of evidence, the duty to report abuse, and the relationship between their detention facilities and other DoD personnel (e.g. Special Operations Forces) and non-DoD civilians (e.g. Central Intelligence Agency personnel) who seek access to detainees under the control of U.S. forces.

d. Ensure that Command Representatives, including Judge Advocates, Visit and Inspect Detention Facilities.

Legal teams routinely commented that the commander must have a procedure for conducting detention facility inspections. Legal teams discovered that it was critical for JAs to physically inspect detention facilities for compliance with international law and command policies.⁴⁹⁵ As the OSJA at 1st Infantry Division found: “[t]here is no substitute for unannounced face to face discussion with detainees about the quality of their treatment and any possible abuse they have suffered.”⁴⁹⁶

In one area, where the 82d Airborne Division controlled two Brigade Combat Teams (BCTs) in addition to its own organic brigade, a division level inspection revealed the lack of uniformity between the two BCTs’ management of detainee facilities: one facility manager was able to recite legal portions of Division detention FRAGOs verbatim and show how they were implemented while another BCT’s facility manager admitted that he had never read any Division guidance on detention operations. The latter facility commander therefore had a difficult time explaining how his facility was complying with legal obligations. Both of these units had Brigade level JAs collocated with them on the same Forward Operating Base (FOB), but one JA was actively visiting the facility and interacting with its staff.⁴⁹⁷ Such a discrepancy may never have been discovered without on-site Division JA inspections.

⁴⁹² *Id.*

⁴⁹³ ICAV AAR, *supra* note 33 (“Prior to the actual deployment, no preparation for the conduct of DO was incorporated into the training and deployment preparation. This became a significant responsibility of the SJA section with one attorney dedicated full time to detention operations.”).

⁴⁹⁴ See Volume I, Afghanistan and Iraq Legal Lessons Learned at 41-58.

⁴⁹⁵ See 82d ABN DIV AAR, *supra* note 96 (“JAs must be integrated into detention operations. The MPs ran the physical facilities; the JAs did everything else.”).

⁴⁹⁶ *Id.* para. 6.

⁴⁹⁷ *Id.*

Other legal teams similarly discovered that in participating in the inspections of various facilities, they were able to identify any lack of uniformity that existed in subordinate unit holding areas and detention facilities and offer commanders great insight into systematic improvements that might be made. The 1st Cavalry Division OSJA cooperated with the Division Inspector General (IG) in ensuring compliance within facilities.⁴⁹⁸ Once the 1st Cavalry Division IG inspections noted deficiencies in the under-resourced Brigade Internment Facilities (BIFs), forcing corrections to be made, the BCT JA was the person who exercised oversight on the unit's compliance with the reporting requirements to division on a wide array of areas such as whether the evidence was sufficient to continue detention.⁴⁹⁹ In other Divisions, the OSJAs often had brigade paralegal NCOs informally visit the brigade holding facilities, as well.⁵⁰⁰

In addition to inspection of detention facilities by command representatives, some units found it beneficial to allow other local nationals to tour the facilities. The 101st Airborne Division (Air Assault), for example, allowed city council members and other government officials to tour their detention facilities when security would permit. They found that this procedure fostered a good relationship with the local community.⁵⁰¹

Legal teams can assist commanders by emphasizing how best to ensure consistent compliance through what the teams learn through inspections. For instance, 1st Cavalry Division noted that though there was sufficient oversight at all BIFs to prevent critical errors, those BIFs with dedicated staffs consistently performed better during the IG inspections than BIFs with staffs interchanged with the rest of the BCT. The difference between a BIF with a permanent guard force and staff versus a constantly changing guard force and staff was evident in the details such as documentation, cleanliness, and evidentiary processing.⁵⁰² Such information can prove invaluable to commanders who want to comply with all available detention operations guidance and want to ensure that violations are punished.

Additionally, the Department of the Army Inspector General's (DAIG's) inspection revealed that poor control mechanisms to inspect facility personnel decreased the likelihood that abuse would be discovered by the command.⁵⁰³ The report stated that in cases where the command took no corrective action because the chain of command was not aware of any incidents in the facility, the lack of corrective action resulted in a continuation of the offenses or a progression from talking about abuse to actually committing abuse.⁵⁰⁴ As another investigation concluded, "Well disciplined units that have active, involved leaders both at the NCO and officer levels are less likely to commit abuse or other such infractions. If such instances do occur, they are seldom repeated because those leaders act aggressively to deal with violators and reemphasize the standards."⁵⁰⁵ It is unrealistic to think that through inspections JAs could catch

⁴⁹⁸ 1CAV AAR, *supra* note 33.

⁴⁹⁹ *Id.*

⁵⁰⁰ *See, e.g.,* 4ID AAR, *supra* note 71, at 3.

⁵⁰¹ 101st ABN DIV AAR, *supra* note 89, at 69.

⁵⁰² 1 CAV DIV AAR, *supra* note 33.

⁵⁰³ Detainee Operations Inspection, The Department of the Army Inspector General, 21 (21 Jul. 2004) [hereinafter DAIG Report] (on file with CLAMO).

⁵⁰⁴ *Id.*

⁵⁰⁵ The Fay Report, *supra* note 394, at 44.

all behavior that may evolve into abuse, but it is more likely than if the JA did not inspect the facilities.

One method of inspection that would likely catch such behavior is an inspection that actually solicits the opinions of detainees themselves. First Infantry Division initiated this practice with great results. First Infantry Division OSJA noted that generally, inspections by senior officers escorted through the facilities by MPs had limited utility in ensuring compliance with the Law of War and theater-level guidance.⁵⁰⁶ They recommended that those conducting the inspection talk to individual detainees selected at random from the prison population about their treatment. At the 1st Infantry Division, the JA and IG conducted the investigations. Generally, the inspection team coordinated with the PMO to gain access to the facility with an interpreter and had a list of questions prepared to ask a specified number of randomly selected detainees.⁵⁰⁷ In the course of these interviews, many detainees made false allegations of abuse, but the JA would also ask for witnesses and other details which could effectively confirm or deny the detainees' allegations.⁵⁰⁸ A copy of the 1st Infantry Division Detention Inspection Checklist is at Appendix A-8. A CJTF-7 Inspection Checklist is at Appendix A-9.

Such visits can also greatly assist detention facilities with upcoming visits from the ICRC. The visits help detention facility staffs understand what the legal standard is for a detention facility and the importance of vigilant compliance. Some detention facility staffs may not understand the international legal basis that the ICRC enjoys or be able to explain under what conditions the ICRC might be denied access to certain, previously identified detainees. The JAs presence at the facility can often serve to instruct staff members on important ICRC issues and ensure smooth compliance with ICRC visits.

When units operate in very remote areas of a country temporarily detaining and holding individuals, such as was often the case in Afghanistan, the guards for these detainees should receive the same level of training as service members in long-term holding facilities.⁵⁰⁹ More often than not, guards of detainees at remote FOBs were not MPs and may never have received a briefing on detention operations. The JAs should work to visit the remote sites and ensure that soldiers guarding the prisoners are aware of the unit's detention SOP and the law applicable to treatment.

e. Legal Teams Must Consider and Plan for the Relationship Between Detainee Property, the Claims Process, and Prosecutorial Evidence.

Unit handling of detainee property was problematic at best for just about the whole deployment in my opinion. Early in the deployment, units would confiscate cash, weapons and vehicles of detainees and normally consolidate these at Battalion or Brigade level. Handling of this property was not uniform, but was normally handled under the Commander's Emergency Response Program (CERP) and was turned over for the benefit of the Iraqi people or local

⁵⁰⁶ See 1ID 1st Quarter AAR, *supra* note 360.

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.*

⁵⁰⁹ 10th MTN DIV AAR, *supra* note 362.

Iraqi government. The problem of course, was that detainees who were found free from suspicion or without sufficient evidence of wrongdoing were normally released at the Division or higher level. Some of these same former detainees then sought the return of their property or filed a claim for their loss. Our series of directives through Trial Counsel and eventually through Division level orders tried to remedy the situation by enforcing better record keeping and consolidation of cash, weapons and especially vehicles. The hope was that in the instance a detainee was released, the unit could restore equivalent vehicles, cash, and weapons based upon records when presented with the claim. The record-keeping process we instituted did not always completely solve the problem as units in some cases for instance would detain a person at a Traffic Control Point (TCP) and then leave the car where it stood, where it would surely disappear through theft. Additionally, it was my impression that sometimes, when detainees were released by higher level authorities, lower commands were again in some cases very hesitant to return weapons, vehicles and guns to individuals they still firmly believed would use these as tools against the coalition. [It is] hard to second-guess the lower commands in these instances because they generally had better facts and would have to live, or rather cope with the consequences. Ultimately, we processed some claims that were based upon confiscation of property when persons were detained and subsequently released, but the number of cases was a small percentage of the total claims load. We paid these claims in at least a couple instances with Foreign Claims Commission (FCC) funds when we could show that the unit was negligent in the handling of the property per published Division orders, and at other times considered the payment of claims under CERP when the claimant was truly sympathetic, unquestionably pro-coalition, and payment would tend to alleviate perceived injustices.⁵¹⁰

Judge advocates making status determinations must have sufficient evidence upon which to make a reasoned and supportable classification decision. Legal teams learned that collection of property, capture cards, and intelligence information was vital to making status determinations. Yet this information frequently did not follow the detainee to the detention facility. This loss of information and detainee property affected assessments of credibility, diminished the JAs' ability to determine status, and sometimes led to resentment against the Coalition Forces. For instance, civilian internees that were captured in security sweeps or at checkpoints would often have personal property such as wallets, money, pictures, and even vehicles taken for examination. Oftentimes this property was not properly tagged and was therefore lost or impossible to identify as belonging to a particular detainee. Upon their release, the detainees many times were upset that their property was not returned and filed claims for their lost property.⁵¹¹

The key to obtaining sufficient information to make a determination of status was the ability of the capturing service members to provide adequate information on the apprehension form. One JA noted that the lack of good information regarding the circumstances of capture

⁵¹⁰ E-mail, Lieutenant Colonel Thomas Ayres, former Staff Judge Advocate, 82d Airborne Division, to Captain Patricia Froehlich, Center for Law and Military Operations (on file with CLAMO).

⁵¹¹ OIF Detainee Outline, *supra* note 320, para. 2.b(4).

resulted in the release of numerous detainees who simply returned to the area that they were captured in and re-engaged in their previous activities. This led to units complaining about the detention facilities releasing individual who were bad actors.⁵¹² Units must understand that that their role in the process is vital; if they do not provide sufficient evidence to detain, the individual will be released. As the JA observed, it was not sufficient for the unit to note simply “looting” or “carjacking” on the capture tag. To detain and prosecute these individuals, the capturing unit had to provide witness statements, physical evidence, and so on.⁵¹³ Moreover, the SJA, 1st Armored Division noted that the key to evidence collection was for the brigade operational law team to be intimately involved in the process to ensure evidence is promptly collected and carefully handled. All pieces of evidence must be tagged and remain together with the detainee and made available for Iraqi investigative judges.⁵¹⁴

The 82d Airborne Division JAs also discovered early on that Soldiers must be trained on detention operations and capture procedures, including chain of custody issues. Moreover, Soldiers must know what to do with physical evidence, in particular vehicles, because detainees are going to want their property returned to them. When property was not returned, these detainees many times filed claims with the claims office for their lost or damaged personal property.⁵¹⁵ During the second rotation of Divisions to Iraq in the spring of 2004, legal teams continued to note this problem. The legal team at 1st Infantry Division recommended that JAs “must be able to articulate [the evidentiary standard for holding detainees] to commanders so that commanders know what evidence is required for detention and prosecution. . . . Commanders do not understand why so many detainees are being released and request clear guidance to ensure their units are not detaining people only to have them released at division.”⁵¹⁶

Many legal teams reported that capturing units did not adequately complete the mandated apprehension forms. These forms were the CPA’s version of the traditional capture card. A copy of this form is at Appendix A-1. By way of FRAGO, capturing units were ordered to ensure that each detainee was accompanied by one CPA apprehension form and two sworn statements detailing the reasons for detaining the individual and the circumstances of the individual’s capture.⁵¹⁷ Each unit noted that especially upon arrival into the Iraqi theater of operations, capturing units were not always providing sufficient information on these documents to be able to justify continued detention of the individual. This was often because many detainees were captured in one operation and Soldiers might have to spend a significant amount of time in very early mornings at battalion and brigade holding facilities, in the immediate aftermath of the adrenaline of a combat mission, explaining the reasons for detaining the individuals.

If units were experiencing difficulty in drafting the sworn statements for individuals, they were even less able to document each item of detainee personal property confiscated. In the

⁵¹² OIF Lessons Learned, Captain Brian Banks, JA, 18th Military Police Brigade, para. 2c (1 Dec. 2003) (on file with CLAMO).

⁵¹³ *Id.*

⁵¹⁴ 1AD Recent Legal Developments, *supra* note 225, para. 2.a.

⁵¹⁵ 82d ABN AAR, *supra* note 96, para. 9.

⁵¹⁶ 11D 1st Quarter AAR, *supra* note 360, para. 7-8.

⁵¹⁷ The 82d ABN DIV and 1AD ordered that no facility was permitted to accept detainees from any capturing force without the proper documentation. Facilities would turn detainees away if not accompanied by these forms.

chaos of the raid or cordon, which items belonged to which detainee were difficult to document. For example, despite the fact that it was legal for Iraqi citizens to keep a weapon in their home for self-defense and there was no threshold limit of illegally large sums of money, service members continued to confiscate these items as evidence of illegal activity. In many cases, such items were not attributable to one detainee in particular by any documentation.

The most accurate tracking of detainee property was occurring during the inprocessing of detainees at the initial collection points. What items the detainee possessed on his person were documented and safeguarded, but later upon release, detainees would file claims for the property taken from their homes. These claims were a mixed bag of clearly false claims and apparently credible claims, but the units' inability to keep accurate records of detainee property made it very difficult for Claims JAs to make a decision as to under which category the claimed property fell. Further, the ever present risk of paying claims funds to a bona fide insurgent was clearly higher if the claimant had been at one time apprehended.

In addition to impacting the JA's ability to make status determinations, the failure to adhere to an SOP for storing and disposing of confiscated property could lead to the inability to prosecute ostensibly dangerous detainees. It is for this reason that the CTCs are now training on evidence collection procedures.⁵¹⁸ During full spectrum operations, JAs knew that one vital task of Iraqi courts was to prosecute detained personnel for their crimes. Making use of Iraqi courts part of the counter-insurgency strategy was both critical and necessary. Transitioning custody and responsibility for prosecution to the Iraqi government for Coalition-apprehended detainees was a critical element of the Coalition's counter-insurgency strategy. Developing a comprehensive, user friendly, process for identifying, collecting, controlling and then transferring evidence (and the accused) to an Iraqi court, however, remained a challenge.⁵¹⁹

Asking line units to take on the role of crime scene managers during and after combat operations, while necessary, significantly expanded their mission and required additional detained training, as well as committed small-unit leadership. Moreover, making Coalition Forces available in ordinary Iraqi courts on a regular basis caused force protection issues, the potential exposure of Coalition tactics, techniques, and procedures and classified information, and other issues that must be carefully thought through.⁵²⁰ In light of operational demands facing units every day, it was a challenge for JAs to convey the importance of preserving detainee property as evidence for future criminal hearings requiring certain evidentiary burdens of proof. The JAs continued to stress to units that while forces often detained personnel for valid reasons, they were later released for lack of evidence linking the detained personnel to the crime.

As was mentioned in the case of detention facility SOPs, JAs can avoid these issues by helping to establishing evidence collection SOPs in the absence of guidance from higher headquarters, or supplement the guidance from higher. The 82d Airborne Division OSJA drafted a FRAGO which mandated that all physical evidence be tagged and transferred with the detainee

⁵¹⁸ See Major Toby Harryman, Senior Observer/Controller, National Training Center, Fort Irwin, CA, Notes on Evidence Collection (undated) (on file with CLAMO).

⁵¹⁹ Pagel Memorandum, *supra* note 165, at 2.

⁵²⁰ *Id.*

to the detention facility using a bilingual evidence/property custody document (DA Form 4137). A copy of this bilingual DA 4137 is at Appendix A-10.

For evidentiary purposes, the FRAGO stated that any item that was too large to move, such as an inoperable vehicle, or any evidence that could not be moved, should be photographed with the photograph fixed to a completed evidence/property custody document. In essence, the property had to follow its original owner from facility to facility by way of the bilingual DA Form 4137. This was true even where a unit was relinquishing property to another coalition unit or Iraqi security force unit. The releasing unit was to record that action on the bilingual DA Form 4137, giving a copy to the gaining unit and keeping a copy for unit records. The order specified that in the case of a monies seizure, the proper amount of money—not just a description stating “money”—would be specifically entered on the form as soon as practicable and that in cases of a detainee’s automobile seizure, all contents of the vehicle would be recorded thoroughly on the DA Form 4137. What was most useful about the bilingual DA 4137, was that the order directed that the known detainee owner of the property should review the bilingual property document (DA Form 4137) himself and approve it. With the help of a translator, units gave one copy of the DA Form 4137 to the person from whom the property was seized and kept another as a detainee property tracking document.

The detainee’s bilingual DA Form 4137 was given to all detainees upon their release. Units would document any property released or retained, the date of the release, and the reason for retaining property. The detainee was to sign and acknowledge this transaction on the DA Form 4137, a copy of which served as the detainee’s receipt. This system was similar to standard prison operating procedures and was an attempt by JAs to help preserve detainee property.

Additionally, units were given a specific time limit by which they must forward an inventory of all property they wished to retain for mission purposes to the SJA to determine if there was an outstanding claim against the property and for legal review.⁵²¹ The inventory was to detail if the detained property was known to be the property of a specific detainee, whether the detainee was still in confinement, and whether the property was evidence against a particular detainee. This was to preempt claims by family members for detainee property that the units were erroneously using for their own purposes and to return the items to their rightful owners. See Appendix A-11 for the National Training Center evidence collection SOP.

Therefore, a lesson learned is that service members must be trained to properly account for property. The property will aid in identification and status determinations, and should be available for return once the individual is released. It is vital that JAs take the initiative to ensure that units are safeguarding the property of detainees and complying with the law. Establishing guidelines for units can also serve as a method to investigate the claims of detainees and their families. It is not only legally required to respect the property of detainees, the commander who owns the battle space is ultimately best served if the property of the local populace is respected and documented.

⁵²¹ Units were also reminded of the rules regarding looting and what items constituted legal war trophies as well as the ramifications of violating these rules under the Uniform Code of Military Justice.

f. Be Prepared to Advise Military Intelligence Personnel on the Legal Issues Regarding Interrogations.

*Torture is abhorrent both to American law and values and to international norms. This universal repudiation of torture is reflected in our criminal law . . . international agreements, exemplified by the United Nations Convention Against Torture (the “CAT”); customary international law; centuries of Anglo-American law; and the longstanding policy of the United States, repeatedly and recently reaffirmed by the President.*⁵²²

In August of 2002, the Office of Legal Counsel for the DoJ issued a legal opinion on the standards of conduct for interrogation under U.S. Federal Law, which became known as the “torture memo.”⁵²³ The legal opinion dealt with the standards of conduct under the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, implemented by Sections 2340-2340A of title 18, U.S. Code,⁵²⁴ in the context of interrogations outside the United States. The legal opinion concluded:

Section 2340A [of title 18 U.S. Code] proscribes acts inflicting, and that are specifically intended to inflict, severe pain or suffering, whether mental or physical. Those acts must be of an extreme nature to rise to the level of torture within the meaning of Section 2340A and the Convention. We further conclude that certain acts may be cruel, inhuman, or degrading, but still not produce pain and suffering of the requisite intensity to fall within Section 2340A’s proscription against torture.⁵²⁵

⁵²² Memorandum, Office of Legal Counsel, Office of the Assistant Attorney General, U.S. Department of Justice, for James B. Comey, Deputy Attorney General, 1 (30 Dec. 2004) [hereinafter 2004 DoJ Interrogation Memorandum] (on file with CLAMO).

⁵²³ Memorandum, Office of Legal Counsel, Office of the Assistant Attorney General, U.S. Department of Justice, for Alberto R. Gonzales, Counsel to the President, re: Standards of Conduct for Interrogation under 18 U.S. C. 2340-2340A (1 Aug. 2002) [hereinafter DoJ Interrogation Memorandum] (on file with CLAMO).

⁵²⁴ Section 2340A provides in full:

(a) Offense. – Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

(b) Jurisdiction. – There is jurisdiction over the activity prohibited in subsection (a) if –
 (1) the alleged offender is a national of the United States; or
 (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.

(c) Conspiracy. – A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed by the offense, the commission of which was the object of the conspiracy.

18 U.S.C. § 2340A (2000).

Perhaps most controversial, the opinion found that “in the circumstances of the current war against al Qaeda and its allies, prosecutions under Section 2340A may be barred because enforcement of the statute would represent an unconstitutional

Section 2340 provided in full:

As used in this chapter—

(1) “torture” means an act committed by a person acting under color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful actions) upon another person within his custody or physical control;

(2) “severe mental pain or suffering” means the prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another person will imminently be subject to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality; and

(3) “United States” means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.

18 U.S.C. § 2340 (as amended by Pub. L. No. 108-375, 118 Stat. 1811 (2004)).

⁵²⁵ *Id.* at 1. The legal opinion found that:

for acts to constitute torture as defined in Section 2340, it must inflict pain that is difficult to endure. Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture under Section 2340, it must result in significant psychological harm of significant duration, e.g., lasting for months or even years. We conduct that the mental harm also must result from one of the predicate acts listed in the statute, namely: threats of imminent death; threats of infliction of the kind of pain that would amount to physical torture; infliction of such physical pain as a means of psychological torture; use of drugs or other procedures designed to deeply disrupt the senses, or fundamentally alter an individual’s personality; or threatening to do any of these things to a third party.

Id. The legal opinion also found that the Torture Convention’s text “prohibits only the most extreme acts by reserving criminal penalties solely for torture and declining to require such penalties for ‘cruel, inhuman, or degrading treatment or punishment.’ This confirms our view that the criminal statute penalizes only the most egregious conduct.” *Id.* at 1-2. Further, the opinion analyzed court cases construing the Torture Victims Protection Act, 28 U.S.C. § 1350 (2000). It concluded from the cases “that courts are likely to take a totality-of-the circumstances approach and will look at an entire course of conduct, to determine whether certain acts violate Section 2340A.” They also noted that “these cases demonstrate that most often torture involves cruel and extreme physical pain.” *Id.* at 2. The opinion also examined international court decisions regarding use of sensory deprivation techniques and concluded that “[t]hese cases make clear that while many of these techniques may amount to cruel, inhumane or degrading treatment, they do not produce pain or suffering of the necessary intensity to meet the definition of torture. From these decisions we conclude that there is a wide range of such techniques that will not rise to the level of torture.” *Id.*

infringement of the President's authority to conduct war."⁵²⁶ Questions were raised by DoJ and others about the appropriateness and relevance of this latter discussion. Questions were also raised about aspects of the statutory analysis, particularly the statement that "severe" pain under the statute was limited to pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."⁵²⁷

Almost two years after the opinion was issued, in June 2004, the Deputy Attorney General announced that the 2002 DoJ opinion was withdrawn and directed that the Office of Legal Counsel, DoJ, prepare a new memorandum. This memorandum was issued in December of 2004. The opinion provided that the discussion concerning the President's Commander-in-Chief power and a discussion of possible defenses to liability under title 18 U.S. Code was unnecessary and eliminated the discussion from the new legal opinion, stating that "[c]onsideration of the bounds of any such authority would be inconsistent with the President's unequivocal directive that United States personnel not engage in torture."⁵²⁸ The opinion also disagreed with the previous DOJ opinion that limited "severe" pain under that statute to "excruciating and agonizing pain" or to pain "equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily functions, or even death."⁵²⁹ Rather, they concluded that "under some circumstances 'physical suffering' may be of sufficient intensity and duration to meet the statutory definition of torture even if it does not involve 'severe physical pain.'"⁵³⁰ To constitute "torture," the opinion concluded, "severe physical suffering" would have to be a condition of some extended duration or persistence as well as intensity.⁵³¹

1. Judge Advocates Assigned to Strategic Detention/Interrogation Facilities Must Have Specialized Knowledge in Domestic and International Law Impacting on Interrogations.

On 11 January 2002, the first detainees arrived at Joint Task Force-Guantanamo in Guantanamo Bay, Cuba. The Army doctrine on interrogations, found in Field Manual 34-52 (FM 34-52), guided the interrogation of those detainees from January to December 2002.⁵³² As explained by a DoD Press Release, the doctrine sets forth basic principles for interrogations for the U.S. military in a "conventional military conflict."⁵³³ During the summer and fall of 2002, however, the press release noted that the United States was in a high-threat environment, and intelligence continued to indicate that al Qaeda was planning attacks against the United States.

⁵²⁶ *Id.*

⁵²⁷ 2004 DOJ Interrogation Memorandum, *supra* note 437, at 2.

⁵²⁸ *Id.* at 2.

⁵²⁹ *Id.*

⁵³⁰ *Id.* at 12.

⁵³¹ *Id.*

⁵³² See News Release, United States Department of Defense, Office of the Assistant Secretary of Defense (Public Affairs) (22 Jun. 2004) at <http://www.defense.link.mil/releases/2004/nr20040622-0930.html> (last visited 24 Mar. 2005); see also U.S. Dep't of Army, Field Manual 34-52, Intelligence Interrogations (28 Sept. 1992) [hereinafter FM 34-52].

⁵³³ *Id.*

Among those detained at Guantanamo were individuals with close ties to al Qaeda leadership and planners, who were assessed to possess significant information of al Qaeda plans. These detainees were also demonstrating training in resistance methods to interrogation approaches set forth in doctrine.⁵³⁴

On 11 October 2002, the Intelligence Officer for JTF-170 at Guantanamo Bay requested approval of various counter-resistance strategies because the “current guidelines for interrogation procedures at GTMO limit the ability of interrogators to counter advanced resistance.”⁵³⁵ Therefore, the officer sought approval from the Commander, JTF-170 of an interrogation plan that included some techniques not found in FM 34-52.⁵³⁶ A legal review of the proposed

⁵³⁴ *Id.* See also Memorandum, Director of Intelligence, JTF-170, for Commander, Joint Task Force 170, subject: Request for Approval of Counter-Resistance Strategies (11 Oct. 2002) [hereinafter J2 Memorandum], *available at* <http://www.defenselink.mil/news/jun2004/d20040622doc3.pdf>.

⁵³⁵ *Id.* para. 1.

⁵³⁶ The techniques recommended included the following:

a. Category I techniques. During the initial category of interrogation the detainee should be provided a chair and the environment should be generally comfortable. The format of the interrogation is the direct approach. The use of rewards like cookies or cigarettes may be helpful. If the detainee is determined by the interrogator to be uncooperative, the interrogator may use the following techniques.

- (1) Yelling at the detainee (not directly in his ear or to the level that it would cause physical pain or hearing problems)
- (2) Techniques of deception.
 - (a) Multiple interrogator techniques
 - (b) Interrogator identity. The interviewer may identify himself as a citizen of a foreign nation or as an Interrogator from a country with a reputation for harsh treatment of detainees.

b. Category II techniques. With the permission of the JIG [Joint Interrogation Group], Interrogation Section, the interrogator may use the following techniques.

- (1) The use of stress positions (like standing), for a maximum of four hours.
- (2) The use of falsified documents or reports.
- (3) Use of the isolation facility for up to 30 days. Request must be made to [sic] through the OID, Interrogation Section, to the Director, Joint Interrogation Group (JIG). Extensions beyond the initial 30 days must be approved by the Commanding General. For selected detainees, the OIC, Interrogation Section, will approve all contacts with the detainee, to include medical visits of a non-emergent nature.
- (4) Interrogating the detainee in an environment other than the standard interrogation booth.
- (5) Deprivation of light and auditory stimuli.
- (6) The detainee may also have a hood placed over his head during transportation and questioning. The hood should not restrict breathing in any way and the detainee should be under direct observation when hooded.
- (7) The use of 20-hour interrogations.
- (8) Removal of all comfort items (including religious items).
- (9) Switching the detainee from hot rations to MRES.
- (10) Removal of clothing
- (11) Forced grooming (shaving of facial hair, etc.)
- (12) Using detainees individual phobias (such as fear of dogs) to induce stress.

techniques by the SJA, JTF-170, concluded that the proposed counter-resistance techniques were lawful “because they do not violate the Eight Amendment to the United States Constitution⁵³⁷ or the Federal torture statute⁵³⁸ . . . [also] [a]n international law analysis is not required for the current proposal because the Geneva Conventions do not apply to these detainees since they are not EPWs.”⁵³⁹ Therefore, the legal opinion noted that the detainees held at Guantanamo Bay were not protected by the Geneva Conventions, and that because the Army doctrine on interrogations, as found in Army Field Manual 34-52, is “constrained by, and conform to the GC and applicable international law, [the doctrine is] therefore not binding.”

The Commander, JTF-170 forwarded a request to the Commander, U.S. Southern Command (USSOUTHCOM) to approve the techniques.⁵⁴⁰ The Commander, USSOUTHCOM forwarded the memorandum to the Chairman, Joint Chiefs of Staff. In his memorandum, the USSOUTHCOM Commander explained that “some detainees have tenaciously resisted our current interrogation methods” and that the chain of command had been working to try to identify counter-resistant techniques that they could lawfully employ.⁵⁴¹ He also provided that he believed the first two categories of techniques were lawful and humane, but that he was “uncertain whether all the techniques in the third category are legal under US law, given the judicial interpretation of the US torture statute.”⁵⁴² On 27 November 2002, the Secretary of

c. Category III techniques. Techniques in this category may be used only by submitting a request through the Director, JIG, for approval by the Commanding General with appropriate legal review and information to Commander, USSOUTHCOM. These techniques are required for a very small percentage of the most uncooperative detainees (less than 3%). The following techniques and other aversive techniques, such as those used in U.S. military interrogations resistance training or by other U.S. government agencies, may be utilized in a carefully coordinated manner to help interrogate exceptionally resistant detainees. Any or [sic] these techniques that require more than light grabbing, poking, or pushing, will be administered only by individuals specifically trained in their safe application.

- (1) The use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family.
- (2) Exposure to cold weather or water (with appropriate medical monitoring).
- (3) Use of wet towel and dripping water to induce the misperception of suffocation
- (4) Use of mild, non-injurious physical contact such as grabbing, poking the chest with the finger and light pushing.

Id. para. 2.c.

⁵³⁷ The Eight Amendment prohibits cruel and unusual punishment. The legal opinion also noted that although U.S. personnel are bound by the Constitution, the detainees confined at Guantanamo Bay have no jurisdictional standing to allege a violation of the Eight Amendment in U.S. Federal Court. *Id.* fn 1.

⁵³⁸ 18 U.S.C. § 2340. The torture statute is the United States’ codification of the signed and ratified provisions of the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment.

⁵³⁹ Memorandum, Staff Judge Advocate, JTF-170, to Commander, JTF-170, Legal Review of Aggressive Interrogation Techniques (11 Oct. 2002), *available at* <http://www.defenselink.mil/news/Jun2004/d20040622doc3.pdf>.

⁵⁴⁰ Memorandum, Commander, JTF-170, to Commander, USSOUTHCOM, subject: Counter-Resistance Strategies (11 Oct. 2002), *available at* <http://www.defenselink.mil/news/Jun2004/d20040622doc3.pdf>.

⁵⁴¹ Memorandum, Commander, USSOUTHCOM, for Chairman of the Joint Chiefs of Staff, subject: Counter-Resistance Techniques (25 Oct. 2002), *available at* <http://www.defenselink.mil/news/Jun2004/d20040622doc4.pdf>. The Commanding General noted that he was “particularly troubled by the use of implied or expressed threats of death of the detainee or his family.” *Id.*

⁵⁴² *Id.* para. 1.

Defense found that as a matter of policy, the Commander, USSOUTHCOM was authorized to employ only Categories I and II and the fourth technique listed in Category III, that is, “[u]se of mild, non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing.”⁵⁴³

By memorandum, dated 15 January 2003, the Secretary of Defense rescinded his 27 November 2002 authorization and directed that if the Commander, USSOUTHCOM, determined that a Category II or III technique was warranted, the request must be forwarded to the Secretary for approval.⁵⁴⁴ The Secretary of Defense also reiterated that in all interrogations, “you should continue the humane treatment of detainees, regardless of the type of interrogation technique employed.”⁵⁴⁵ That same day, the Secretary of Defense directed the DoD General Counsel to establish a working group to assess the legal, policy, and operational issues relating to the interrogation of detainees held by the U.S. military in the war on terrorism.⁵⁴⁶

The working group was convened by the General Counsel of the Air Force, and comprised of representatives from the General Counsels and Judge Advocates General of the Air Force, Army, Navy, and Marines, and others. Among other conclusions, the working group found that the general use of exceptional techniques (those having substantially great risk than those currently, routinely used by the U.S. military interrogators) even though lawful, may create uncertainty among interrogators regarding the appropriate limits of interrogation and should be employed with careful procedures and only when fully justified. Moreover, the working group concluded that the use of these techniques should be limited.⁵⁴⁷ The working group then recommended that twenty-six specific techniques be approved for use with unlawful combatants outside the United States, subject to the limitations described in the report.⁵⁴⁸ The working

⁵⁴³ Memorandum, General Counsel of the Department of Defense, for Secretary of Defense, subject: Counter-Resistance Techniques (27 Nov. 2002), *available at* <http://www.defenselink.mil/news/Jun2004/d20040622doc5.pdf>.

⁵⁴⁴ Memorandum, Secretary of Defense, to Commander, USSOUTHCOM, subject: Counter-Resistance Techniques (15 Jan. 2003), *available at* <http://www.defenselink.mil/news/Jun2004/d20040622doc7.pdf>.

⁵⁴⁵ *Id.*

⁵⁴⁶ Memorandum, Secretary of Defense, to the General Counsel of the Department of Defense, subject: Detainee Interrogations (15 Jan. 2003), *available at* <http://www.defenselink.mil/news/Jun2004/d20040622doc6.pdf>. The Secretary of Defense directed the working group to address and make recommendations on the legal considerations raised by interrogation of detainees held by U.S. Armed Forces and policy considerations with respect to the choice of interrogation techniques, to include:

- contribution to intelligence collection
- effect on treatment of captured US military personnel
- effect on detainee prosecutions
- historical role of US armed forces in conducting interrogations

The Secretary also directed that the group make recommendations for employment of particular interrogation techniques by DoD interrogators.

⁵⁴⁷ Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations, 69 (4 Apr. 2003). The working group recommended limiting exception interrogation techniques to specified strategic interrogation facilities; when a good basis exists to believe that detainees possess critical intelligence; when the detainee is medically and operationally evaluated as suitable; when interrogators are specifically trained; a specific interrogation plan; when there is appropriate supervision; and, after obtaining appropriate specified senior approval level for use with any specific detainees. *Id.*

⁵⁴⁸ *Id.* at 70. These techniques included: (1) Direct; (2) Incentive/Removal of Incentive; (3) Emotional Love; (4) Emotional Hate; (5) Fear Up Harsh; (6) Fear Up Mild; (7) Reduced Fear; (8) Pride and Ego Up; (9) Pride and Ego

group also recommended that nine other techniques be approved for use with unlawful combatants outside the United States subject to the general limitations as well as the specific limitations regarding “exceptional” techniques.⁵⁴⁹ In addition, the working group recommended that commanders and supervisors, *as well as their legal advisers*, involved with decisions related to employing exception techniques receive specialized training on the legal and policy consideration relevant to interrogations that make use of such techniques.⁵⁵⁰

On 16 April 2003, the Secretary of Defense approved the use of twenty-four specified counter-resistance techniques.⁵⁵¹ The memorandum also established certain safeguards for employing these techniques, to include limiting their use to a strategic interrogation facility; when there is a good basis to believe the detainee possesses critical intelligence; when the detainee is medically and operationally evaluated as suitable; when interrogators are specifically trained and specific interrogation plans have been developed; when there is appropriate supervision; and when there is specified senior approval for use with any specific detainee, after considering the safeguards and receiving *legal advice*.⁵⁵² Moreover, if the following techniques are to be used, the Secretary of Defense must be notified in advance: incentive/removal of incentive; pride and ego down; mutt and jeff; and isolation. The memorandum also emphasized that all U.S. Armed Forces must continue to treat detainees humanely and, “to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Geneva Conventions.”⁵⁵³

2. All Operational Law Judge Advocates Must Be Prepared to Advise Commanders and Military Intelligence Personnel on the Legal Issues Surrounding Interrogations.

As discussed at the beginning of this section on Detainee Operations, JAs must understand the U.S. Government’s position on the international legal basis for the military operations to make status determinations. These determinations regarding status are extremely important to making succeeding decisions with respect to the interrogation techniques that may be applied to detainees.⁵⁵⁴ As noted, the official U.S. Government position was that those detained in Afghanistan and moved to Guantanamo Bay were not protected by the Geneva Conventions. Nevertheless, interrogators were constrained by the Convention Against Torture

Down; (10) Futility; (11) We know all; (12) Establish Your Identity; (13) Repetition Approach; (14) File and Dossier; (15) Mutt and Jeff; (16) Rapid Fire; (17) Silence (18) Change of Scenery Up; (19) Change of Scenery Down; (20) Hooding; (21) Mild Physical Contact; (22) Dietary Manipulation; (23) Environmental Manipulation; (24) Sleep Adjustment; (25) False Flag; (26) Threat of Transfer. *Id.*, attached chart at 9-10.

⁵⁴⁹ *Id.* These techniques included: (27) Isolation; (28) Use of Prolonged Interrogations; (29) Forced Grooming; (30) Prolonged Standing; (31) Sleep Deprivation; (32) Physical Training; (33) Face slap/Stomach slap; (34) Removal of Clothing; (35) Increasing Anxiety by Use of Aversions. *Id.* attached chart at 11.

⁵⁵⁰ *Id.* at 70 (emphasis added).

⁵⁵¹ Memorandum, Secretary of Defense, for Commander USSOUTHCOM, subject: Counter-Resistance Techniques in the War on Terrorism, 1 (16 Apr. 2003). These techniques were the same as the first twenty-six addressed in the working group (*see* fn 463, *supra*), except that hooding, mild physical contact, and threat of transfer were not approved and isolation was added. *Id.* at 3.

⁵⁵² *Id.* at 5.

⁵⁵³ *Id.* at 1.

⁵⁵⁴ *See* Graham Forum, *supra* note 269.

and Other Cruel, Inhumane and Degrading Treatment or Punishment, as implemented by Sections 2340-2340A of title 18, U.S. Code.

One of the “systemic problems” identified in the investigation of incidents at Abu Ghraib was inadequate interrogation doctrine and the lack of a clear interrogation policy for the Iraq Campaign.⁵⁵⁵ By October 2003, interrogation policy in Iraq had been issued three times in less than thirty days, confusing what techniques could be employed and at what level non-doctrinal approaches had to be approved.⁵⁵⁶ The CJTF-7 guidance was also released and re-released reiterating and/or incorporating previous guidance, which at least one investigation found further confused units as to whether new guidance had been issued or not.⁵⁵⁷

In Afghanistan and Iraq, JAs providing legal advice regarding interrogation operations had to be thoroughly familiar with the latest interrogation policies for *that theater* and understand the interrogation process to clearly articulate the standard of treatment during an interrogation. In addition, JAs had to understand the difference between treatment that is prohibited by law, such as physical abuse of the detainee, and that prohibited by policy, such as an interrogation policy that prohibits denying a detainee extra rations. Clearly, treatment prohibited by law can never be sanctioned during an interrogation, but a command can request a policy change to allow treatment prohibited by policy.

In addition, operational law JAs must understand the differences between interrogation, which should only be performed by a trained interrogator, and tactical questioning, which can be conducted by non-interrogators looking for information of immediate value. Tactical questioning can be conducted by a service member at the point of capture, for instance, to provide the unit with a method of gathering current battlefield information important to that small unit. This questioning, however, could set the stage for further interrogation and exploitation. Therefore, JAs must ensure that specific guidance is provided on tactical questioning. In both OIF and OEF, only the direct approach could be used in tactical questioning.⁵⁵⁸

Much has been written about the changing policies and whether they led to confusion among interrogators over authorized interrogation techniques. The lessons for JAs, however, is that they must keep abreast of the latest policy decisions regarding interrogations in *their* theater

⁵⁵⁵ The Fay Report, *supra* note 394, at 8.

⁵⁵⁶ *Id.*

⁵⁵⁷ The Schlesinger Report, *supra* note 382, at 9.

⁵⁵⁸ U.S. DEP'T OF ARMY, SPECIAL TEXT 2-91.6, SMALL UNIT SUPPORT TO INTELLIGENCE (Mar. 2004).

Direct Approach. The basic method and usually first-used approach. This is standard questioning of name, rank, unit affiliation, unit mission, etc. Past operations have shown this method to be 90-95% effective. The shock and awe of capture alone puts detainees in a state of mind where they are willing to divulge anything. However, recent anecdotal evidence suggests that detainees in current operations are more savvy as to US interrogation methods and have even been trained on interrogation resistance techniques, similar to our SERE training, and that the direct approach is less and less effective.

Id.

of operation and be prepared to advise commanders and interrogators on interrogation techniques authorized by law and policy.

g. Have a Plan for Release or Retention of Detainees to Other Government Agencies and Special Operations Forces.

*The lack of OGA adherence to the practices and procedures established for accounting for detainees eroded the necessity in the minds of Soldiers and civilians for them to follow Army rules.*⁵⁵⁹

The term “Other Government Agencies” (OGA) most commonly refers to the Central Intelligence Agency (CIA)⁵⁶⁰ and the term “Special Operations Forces” (SOF) can refer to any number and combination of the Military Services’ Special Forces personnel. Sometimes, conventional forces involved in detention operations were not necessarily aware of the OGA/SOF presence in their immediate area of operations. Some units discovered only after some time that a SOF detention facility existed outside their front gate when, for example, allegations of abuse arose. Moreover, the CIA conducted unilateral and joint interrogation operations at facilities such as Abu Ghraib. The DAIG’s inspection of over sixteen detention facilities in Iraq and Afghanistan found that “in a few cases, the perception, accurate or not, that OGAs conducted interrogations using harsher methods than allowed by Army regulation, led to a belief that higher levels of command condoned such methods.”⁵⁶¹ Legal teams must be trained to be sensitive to other military and OGAs in their AO conducting detainee operations and interrogations, as the commander responsible for that piece of ground may have to answer for any abuse arising out of those facilities.

In addition, one finding of the administrative investigation of the Abu Ghraib facility was that the CIA’s detention and interrogation practices contributed to a loss of accountability and abuse at Abu Ghraib. The findings go on to point out that: (1) no memorandum of understanding existed on the subject of interrogation operations theater wide between CJTF-7 and the CIA; (2) that CIA officers convinced military leaders that they should be permitted to operate outside the established local rules and procedures, and (3) that the CIA practice of placing its detainees unaccounted for in Abu Ghraib impacted Abu Ghraib detention operations at large, because facility personnel were uncertain how to classify or report certain detainees.⁵⁶² The report states that “the treatment and interrogation of OGA detainees occurred under different practices and procedures which were absent any DoD visibility, control, or oversight” and that this caused “confusion over the proper treatment of detainees and created a perception that OGA techniques

⁵⁵⁹ The Fay Report, *supra* note 394, at 44-45.

⁵⁶⁰ *Id.* at 9.

⁵⁶¹ DAIG Report, *supra* note 418, at 22.

⁵⁶² The Fay Report, *supra* note 394, at 54. In some cases, Abu Ghraib personnel were unable to respond to requests for information about OGA detainees from higher headquarters. This was especially troubling in one instance, where the CIA had placed three detainees in Abu Ghraib under false names. Repeat inquiries on these special detainees came from the highest levels of US Administration with a negative response until the identities of the detainees were revealed through conversation.

and practices were suitable and authorized for DoD operations.”⁵⁶³ The investigation recommended that the DoD enforce adherence by OGA with established DoD practices and procedures while conducting interrogation operations within DoD facilities.⁵⁶⁴

Units found it vital to specifically track detainees released to other agencies. After interviewing detention facility personnel who stated that some OGA/SOF personnel refused to sign out specific detainees using their names and agencies, the 82d Airborne Division implemented detailed policy via FRAGO regarding the release of detainees to OGA/SOF which included ensuring a senior facility NCO be accountable for the detainee and that a medic inspect and photograph the detainee before and after the release. Similarly, after initially allowing others access to their detainees, 1st Infantry Division began to tell these interrogators that they could not take 1st Infantry Division detainees without approval from the MNC-I commander. In these cases, the release was documented. Legal teams should anticipate this issue and ensure that the detention SOPs in all of the facilities under their control include a section on transfer of detainees to OGA/ SOF.

h. Understand the Relationship of Contract Interrogators With Military Personnel.

As in the case of OGA and SOF, the commander who owns the battle space where abuse occurs may have to answer for any of those abuses. The local population generally does not distinguish between U.S. military forces and the contractors that the U.S. Government employs. To that end, it is in the DoD’s best interests to maintain close control and understand the legal relationship between U.S. contract interrogators and U.S. forces. For a discussion of the Military Extraterritorial Jurisdiction Act and its applicability to these contractors, see paragraph G.2.c. of this Publication. This section addresses the issues specific to contract interrogators and how legal teams can best assist their command in supervising contract interrogator personnel.

During most of the period covered by this Volume, training was not provided for units at any level on the employment of contract interrogators in military detention operations.⁵⁶⁵ Units will inevitably look to JAs, then, to assist them in understanding the management, control, and discipline of contract interrogation personnel. In one of the investigations of Abu Ghraib, Army interrogation personnel commented that they never received any guidance on how the contract personnel were to be used and that they were not aware that they could reject unsatisfactory contract personnel. “It would appear,” the report goes on to say, “that no effort to familiarize the ultimate user of the contracted services of the contract’s terms and procedures was ever made.”⁵⁶⁶ For instance, several junior facility personnel at Abu Ghraib reported that contractor personnel were supervising military personnel or vice versa.⁵⁶⁷

⁵⁶³ *Id.* at 118-19. At the time of this publication, DoD is drafting a new interrogation manual which may address the relationship between service members and people working for government agencies such as the CIA.

⁵⁶⁴ *Id.* at 119.

⁵⁶⁵ The Fay Report, *supra* note 394, at 19.

⁵⁶⁶ *Id.* at 50.

⁵⁶⁷ *Id.*

Additionally, results of one investigation estimate that thirty-five percent of contract interrogators lacked military training as interrogators.⁵⁶⁸ Therefore, JAs should ascertain to what degree Army interrogators are trained on the Law of War.⁵⁶⁹ The terms of the contract governing requisite contract interrogator qualifications in at least one instance required that the contractor employee needed to have met the requirements of having experience as one of two military interrogator Military Occupational Specialties (MOSs) or equivalent.⁵⁷⁰ An investigation determined that no portion of this contract monitored the contractor's decision making process with regard to what could be considered "equivalent" to military training.⁵⁷¹

Given the above, JAs should consider how many contract interrogators are working within the facilities in their jurisdiction. Ideally this could occur in the predeployment phase so that JAs could undertake to learn the terms of the contract and brief detention facility leaders on the roles of contracted interrogators in military detention facilities and settle questions of how to manage and work alongside contracted interrogators. These briefings could include a discussion of the Military Extraterritorial Jurisdiction Act. After arrival into theater and perhaps as part of the final staffing of the detention facility SOP, JAs may choose to brief contractors on the Law of War, how it applies to them, as well as what the ramifications of abuse may be and the duty to report abuse. Units may elect to include in their SOP a document to be signed by the contractors stating they have received the briefing and this document might be incorporated into the facility SOP.

3. Understand the Issues Surrounding the Status of Contractors on the Battlefield.

In Afghanistan and Iraq, JAs grappled with difficult legal issues regarding the status of contractors on the battlefield.⁵⁷² With the decrease in military personnel, ever more complex technologies, and logistical outsourcing, the U.S. military has increasingly relied upon civilian contractors to support and sustain the force. Therefore, as the need for additional civilian personnel to sustain troop deployments grew, more contractors flooded the Iraqi theater, and to a lesser extent, the Afghan theater.⁵⁷³ Because of the security situation in both countries, many of

⁵⁶⁸ *Id.*

⁵⁶⁹ Army interrogator candidates at the interrogator course at Fort Huachuca, AZ receive 16.5 weeks of instruction which include blocks of instruction on AR 27-10, The Law of Land Warfare. The student's understanding of the Geneva Conventions and the Law of Land Warfare is continually evaluated as a critical component so that if at any time in the exercise, the student violates the Geneva Conventions, they will fail the exercise. Students may be given the opportunity to recycle to another class, but egregious violations can result in a dismissal from the course. Army regulations also require that interrogators undergo refresher training on the Geneva Conventions annually. *Id.*

⁵⁷⁰ *Id.* at 51.

⁵⁷¹ *Id.*

⁵⁷² Contrast the issue of the status of contractors on the battlefield under international law as civilians who are not combatants to the status of contractors in regard to whether they are subject to the jurisdiction of the local criminal and civil courts. In Iraq, during the occupation civilians accompanying the force, including U.S. Government contractors, were not subject to local law or the jurisdiction of local courts. See Office of the Administrator of the CPA, Baghdad, Iraq, Public Notice, Regarding the Status of Coalition Foreign Liaison and Contractor Personnel (26 Jun. 2003) (providing that "[w]ith regard to criminal, civil, administrative or other legal process, [the CPA, Coalition Forces, and the military and civilian personnel accompanying them] will remain subject to the exclusive jurisdiction of the State contributing them to the Coalition.") (on file with CLAMO).

⁵⁷³ The use of contractors by the U.S. armed forces has grown dramatically. In Bosnia, the U.S. military employed approximately 6,000 contractors; in Iraq the number grew to upwards of 20,000. See Arming Civilians Briefing,

the Department of Defense (DoD) contractor employees wanted to carry firearms for their personal protection. Moreover, some contractors were willing to take on almost any mission, if the price was right. Commanders and contracting officers were not necessarily sensitive to the international law issues surrounding hiring a contractor to perform certain missions during military operations. Therefore, JAs had to be alert to contractor status issues and advise commanders and contracting officers of the limits on the missions that a contractor could perform for the U.S. military.

a. Judge Advocates Must Understand the International Laws that Impact the Status of Contractors on the Battlefield.

[Those entitled to prisoner of war status include] persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card

-- Geneva Convention III, Art. 4.A(4)⁵⁷⁴

According to the Geneva Conventions, contractors are “persons who accompany the armed forces,” but are not members of that force. Consequently, they are not “combatants” under the generally accepted view that combatants include individuals who meet the criteria for prisoner of war (POW) status enumerated in Articles 4.A(1) and (2) of the Third Geneva Convention (GC III). Thus, members of the armed forces, and militias and volunteer corps forming part of such armed forces, of a Party to the conflict are combatants under Article 4.A(1) of the Convention.⁵⁷⁵ Moreover, members of other militias and volunteer corps are combatants under Article 4.A(2) of the convention if they: (a) are commanded by a person responsible for his subordinates; (b) have a fixed distinctive sign recognizable at a distance; (c) carry arms openly; and (d) conduct their operations in accordance with the laws and customs of war.⁵⁷⁶ So long as these individuals follow the law of armed conflict, they enjoy the combatant’s immunity and cannot be prosecuted for their actions. Contractors accompanying the force, on the other hand, are not considered combatants under either Article 4.A(1) or (2), above.

As civilians accompanying the armed forces in the field, in accordance with Article 4.A(4) and (5) of the Third Geneva Convention, contractors are, however, entitled to POW status if captured. Contractors in an active theater of operations during armed conflict are at risk of incidental injury as a result of enemy operations. Moreover, a contractor may be subject to intentional attack for such time as he or she takes a direct part in hostilities. A contractor who takes a direct part in hostilities (a phrase as yet undefined, and often situational) remains entitled

International Law Division, Office of The Judge Advocate General, U.S. Army (Jun. 2004) (briefing slides on file with CLAMO).

⁵⁷⁴ GC III, *supra* note 271, art. 4.A(4).

⁵⁷⁵ *Id.* art. 4.A(1).

⁵⁷⁶ *Id.* art. 4.A(2).

to POW status, however, but may be subject to prosecution if his or her actions include acts of perfidy.⁵⁷⁷

Joint doctrine recognizes that U.S. and foreign contractors accompanying the armed forces are not combatants.⁵⁷⁸ To distinguish contractors from members of the armed forces, joint doctrine provides that contractors generally should not wear U.S. military uniforms or clothing, although they may be required to wear battle dress uniforms when camouflage integrity or other military necessity dictates. In situations where commanders authorize contractors to wear battle dress uniforms, the contractor must wear a symbol that establishes their contractor status.⁵⁷⁹ This requirement serves to distinguish them from actual members of the U.S. armed forces, that is, from combatants, so as not to jeopardize their status as civilians authorized to accompany the force in the field under international law.⁵⁸⁰

b. Legal Teams must be Prepared to Advise Commanders on Civilian Contractor Requests to Carry Weapons for Personal Protection.

During OIF, U.S. contractor personnel were killed, injured, or taken hostage by Iraqi insurgents. Contractors in Afghanistan were also at risk. Therefore, many wanted to carry personal firearms for their own protection. In fact, some Coalition Forces contractor employees were accustomed to receiving permission from the host nation in which they had worked previously to possess a privately-owned weapon.⁵⁸¹ The USCENTCOM GO-1A, however, prohibited the “[p]urchase, possession, use or sale of privately owned firearms, ammunition, explosives, or the introduction of these items into the USCENTCOM AOR [area of responsibility].”⁵⁸² In addition, although some U.S. contracts included language permitting contractor employees to possess weapons for their personal protection with the authorization of the theater commander, many contracts did not address the issue.

Legal opinions were consistent that merely carrying a weapon for self defense does not abrogate a contract employee’s status as a person accompanying the force, nor does it make them a combatant not within the protections of the Third Geneva Convention regarding status as a POW. For instance, the OSJA, CJTF-7, found that contractors who are issued weapons to

⁵⁷⁷ See GC III, *supra* note 271, art. 85 (defining acts of perfidy). See also, E-mail from Mr. Hays Parks, Office of the General Counsel, Department of Defense, to Colonel Michael W. Meier, Office of the Legal Advisor, Chairman, Joint Chiefs of Staff, subject: Contractors (4 May 2004) (on file with CLAMO); Memorandum, International Law Division, Office of The Judge Advocate General, U.S. Army, for Lieutenant Colonel Lind, subject: Coalition Provisional Authority (CPA) Program Management Office (PMO) Statement of Work (SOW) Reconstruction Security Support Services, para. 3 (15 Mar. 2004) [hereinafter OTJAG Memorandum] (“when contractors take up arms and engage in combat activities going well beyond the use of small arms for individual self defense, they are acting as soldiers without having the legal status or protections of soldiers.”) (on file with CLAMO).

⁵⁷⁸ Joint doctrine provides that “US and foreign contractors accompanying the armed forces (other than some local hire personnel providing housekeeping services, who are noncombatants) are considered civilians accompanying the force and are neither combatants or noncombatants.” CHAIRMAN, JOINT CHIEFS OF STAFF, PUB. 4-0, DOCTRINE FOR LOGISTIC SUPPORT OF JOINT OPERATIONS, app. V., para. 12.a (6 Apr. 2000) [hereinafter JOINT PUB. 4-0].

⁵⁷⁹ *Id.*, at app. V, para. 12.b.

⁵⁸⁰ See U.S. DEP’T OF ARMY, FIELD MANUAL 3-100.21, CONTRACTORS ON THE BATTLEFIELD, Chap 6 (3 Jan. 2003) [hereinafter FM 3-100.21].

⁵⁸¹ See Weapons Possession Information Paper, *supra* note 256, para. 4.a.

⁵⁸² USCENTCOM GO-1A, *supra* note 255, para. 2.a.

protect their person and property, “run little risk of being classified as combatants or mercenaries under international law” because they are “only ensuring their own protection, not taking an ‘active part in the hostilities.’”⁵⁸³

Joint policy recognizes the international law issues involved in arming contract personnel. It provided that as a general rule, contractor personnel accompanying the U.S. forces should not be armed. “Regardless of prior military experience or reserve status, contract personnel are not military personnel.”⁵⁸⁴ Moreover, as the Joint policy states “[i]ssuing weapons to contractor personnel deployed in an uncertain or hostile environment can cloud their status, leaving them open to being targeted as a combatant.”⁵⁸⁵

Joint policy does, however, provide that contractors may be issued weapons for their personal protection if consistent with host nation law and not precluded by the law of armed conflict. In these limited cases, the geographic commander must authorize carrying weapons and the contractor must comply with military regulations regarding firearms training and safe handling. Underlying any authorization to carry firearms, of course, is that it must be consistent with the terms of their contract.⁵⁸⁶ The Army policy explains this concept further:

[U]nder certain conditions . . . [contractors] may be allowed to arm for self-defense purposes. Once the combatant commander has approved their issue and use, the contractor’s company policy must permit its employees to use weapons, and the employee must agree to carry a weapon. When all of these

⁵⁸³ Information Paper, Office of the Staff Judge Advocate, Combined Joint Task Force 7, subject: Legal Bases for Maximizing Logistics Support in an Operational Environment Using Contracted Security, para. 2 (3 Feb. 2004) [hereinafter CJTF-7 Information Paper] (on file with CLAMO). The Information Paper also looked at the definition of mercenary found in the 1977 Protocol 1 Additional to the Geneva Conventions, article 47, which defines “mercenaries” as a person who

- (a) is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) does, in fact, take a direct part in the hostilities;
- (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promise or paid to combatants of similar ranks and functions in the armed forces of that Party;
- (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- (e) is not a member of the armed forces of a Party to the conflict; and
- (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

The 1977 Protocols Additional to the Geneva Conventions, art. 47(a), December 12, 1977, 16 I.L.M. 1391.

⁵⁸⁴ JOINT PUB. 4-0, *supra* note 493, app. V., para. 13b; *see also* FM 3-100.21, *supra* note 495, chap. 6 (“[t]he general policy of the Army is that contractor employees will not be armed.”).

⁵⁸⁵ JOINT PUB. 4-0, *supra* note 493, app. V., para. 13b.

⁵⁸⁶ *Id.*

conditions have been met, contractor employees may only be issued military-specification sidearms, loaded with military-specification ammunition. Additionally, contractor employees must be specifically trained and familiarized with the weapon and trained in the use of deadly force in order to protect themselves. Contractor employees will not possess privately owned weapons. When determining to issue weapons to a contractor the combatant commander must consider the impact this may have on their status as civilians authorized to accompany the force.⁵⁸⁷

Given the above, the policy during the period of OIF and OEF covered by this Publication was that the Commander, USCENTCOM could authorize Coalition Forces to issue government-owned weapons and ammunition to contractor employees for their personal protection.⁵⁸⁸ Appendix A-12 contains the USCENTCOM procedures to request approval for DoD contractors to carry weapons.

In addition, in March 2004, DoD proposed a rule to include a new contract clause when contractor employees accompany the forces on contingency, humanitarian, peacekeeping or combat operations. The proposed clause requires contractors to acknowledge the inherent danger in the operations, clarifies that contractor employees are required to comply with all host nation, U.S., and international laws, and states that contractor personnel cannot wear military uniforms or carry weapons unless specifically authorized.⁵⁸⁹

The lessons learned regarding authorizing DoD contract employees to carry firearms for their personal protection are many. First, such a decision must be made by the combatant commander, or his delegee, on a case-by-case basis. According to Joint policy, which is based on international law, force protection should be the responsibility of the armed forces. If a decision is made to allow contractor employees to carry weapons for their personal protection, the legal advisor must review the contract to ensure it is allowed and must consider many questions. For example, if the contractor is requesting that all of his employees be armed for their personal protection, will a military weapon be issued to each and every employee? If not, upon what basis will a determination be made to selectively arm particular personnel? What limitation will be placed on the personnel to be issued weapons—U.S. citizens, third country nationals, local nationals? Who is accountable for each weapon issued? Who will exercise command and control? Questions regarding training, including training on the use of the weapon and use of force rules must be answered. Issues regarding improper use of force by a contractor with a U.S. government issued weapon must also be considered. What happens if a contractor uses his or her weapon not in self-defense, but in an offensive manner? Will the military be subject to a claim of wrongful death because it armed the contractor?

⁵⁸⁷ FM 3-100.21, *supra* note 495, chap. 6.

⁵⁸⁸ See Weapons Possession Information Paper, *supra* note 256, at 4.b.; Memorandum, Headquarters, Combined/Joint Task Force (CJTF)-76, for all Combined/Joint Task Force-76 Personnel, subject: CJTF 76 Policy Memorandum SJA-2, Civilian Employees Carrying Weapons (15 May 2004) (on file with CLAMO).

⁵⁸⁹ Defense Federal Acquisition Regulation Supplement, Contractors Accompanying a Force Deployed, 69 Fed. Reg. 13,500 (proposed Mar. 23, 2004) (to be codified at 48 C.F.R. pts. 207, 212, and 252).

These are just some of the issues inherent in advising commanders on whether to recommend to the combatant commander that contractor employees be provided with weapons for their personal security.

c. Be Alert to Contracted Security Issues.

*A recurring (and troubling for commanders and staff) issue we have worked is the effort by units to hire private security firms to provide force protection for our forces and installations. Such a COA [course of action], clearly, is fraught with problems and understanding the issue associated with arming contractors and the extent of their ability to use firearms is critical.*⁵⁹⁰

Legal teams not only grappled with DoD contractors wanting to carry weapons in self-defense, but they also dealt with the issue of contracting for security services. Joint doctrine recognizes the international legal issues involved, providing that contractor employees “cannot lawfully perform military functions and should not be working in scenarios that involve military combat operations where they might be conceived as combatants.”⁵⁹¹

Initially, similar to the analysis for issuing weapons to protect their person and property, the opinion at OSJA, CJTF-7 was that contractors may also be issued weapons to protect non-military personnel and property.⁵⁹² Again, this is because they are not taking an “active part in the hostilities.” Hiring contractors to protect military personnel and property is another matter, however. According to Army doctrine, contracted support service personnel may be used to perform only selected combat support and combat service support activities. “They may not be used in or undertake any role that could jeopardize their status as civilians accompanying the force.”⁵⁹³

For example, contractor employees driving convoys of supplies destined for coalition military use are in danger of injury or death collateral to the targeting of the supplies that they carry, which are proper military targets. Nevertheless, these contractors do not lose their status as “persons accompanying the force” by carrying supplies that are lawful targets. Allowing contractors to provide security for these military supply convoys is different. The opinion of the OSJA, CJTF-7 was that this is an inherently military function, i.e., force protection, such that contract employees performing this mission would be taking an active part in hostilities. Also by way of example, the International Law Division, Office of The Judge Advocate General objected to a statement of work that called for “close personal protection, movement/escort security, anti-terrorism support” and “a Counter Assault security capability to direct action against any armed or dangerous assault against PMO [provost marshal officer] personnel under protective control.”⁵⁹⁴ Essentially, the opinion reasoned, “when contractors take up arms and engage in combat

⁵⁹⁰ Thoughts on Contracting, Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), para. 2 (8 Jan. 2004) (on file with CLAMO).

⁵⁹¹ JOINT PUB. 4-0, *supra* note 493, Chap. V, para. 2.

⁵⁹² CJTF-7 Information Paper, *supra* note 498, para. 2.

⁵⁹³ U.S. DEP’T OF ARMY, REG. 715-9, CONTRACTORS ACCOMPANYING THE FORCE, para. 3-3(d) (29 Oct. 1999).

⁵⁹⁴ OTJAG Memorandum, *supra* note 492, para. 2.

activities going well beyond the use of small arms for individual self defense, they are acting as soldiers without having the legal status or protections of soldiers.”⁵⁹⁵

Given the above, USCENTCOM policy was that they would not allow requests for contracted security “where the intent is to guard U.S. or Coalition MSRs (main supply routes), military personnel, military facilities, or military property, including property destined for military use.”⁵⁹⁶ Nevertheless, some contracted security was authorized, such as where contractors performed security missions for nonmilitary personnel or property, including humanitarian missions; internal security provided to guard detainees at detention facilities and prisons; and internal security contracted at bases where the purpose of the security is not to fight an exterior opposing force, but to guard internal facilities.⁵⁹⁷ In Iraq, the CPA issued a Memorandum requiring all private security companies to be registered, regulated, and vetted.⁵⁹⁸ This Memorandum also provided rules for the use of force by contracted security forces in Iraq and a code of conduct.⁵⁹⁹

⁵⁹⁵ *Id.* para. 3.

⁵⁹⁶ Information Paper, Multi-National Corps – Iraq, subject: Procedures to Obtain CENTCOM Authority to Arm Government Contractor Employees, para. 1 (29 Jul. 2004) [hereinafter MNC-I Information Paper] (on file with CLAMO).

⁵⁹⁷ CJTF-7 Information paper, *supra* note 498, at 3. Note, also, the ancillary issue pointed out in the information paper that hiring contractors to provide security in an operational environment may be an illegal “personal services contract.” The USCENTCOM Commander, however, possessed the authority to approve such contracts under 10 U.S.C. § 129b(d) if the Secretary of Defense determines they are necessary and appropriate to support the activities of the DoD outside the U.S. *Id.*

⁵⁹⁸ Coalition Provisional Authority, Memorandum Number 17, Registration Requirements for Private Security Companies (PSC) (26 Jun. 2004).

⁵⁹⁹ The use of force rules for contractors read as follows.

NOTHING IN THESE RULES LIMITS YOUR INHERENT RIGHT TO TAKE ACTION NECESSARY TO DEFEND YOURSELF.

1. **CONTRACTED SECURITY FORCES:** Cooperate with Coalition, Multi-national and Iraqi Security Forces and comply with theater force protection policies. Do not avoid or run Coalition, Multi-national or Iraqi Security Force checkpoints. If authorized to carry weapons, do not aim them at Coalition, Multi-national or Iraqi Security Forces.

2. **USE OF DEADLY FORCE:** Deadly force is that force which one reasonably believes will cause death or serious bodily harm. You may use NECESSARY FORCE, up to and including deadly force, against persons in the following circumstances:

- a. In self-defense.
- b. In defense of persons as specified in your contract.
- c. To prevent life threatening offenses against civilians.

3. **GRADUATED FORCE:** You should use graduated force where possible. The following are some techniques you can use if their use will not unnecessarily endanger you or others.

- a. SHOUT: verbal warnings to HALT.
- b. SHOVE: physically restrain, block access, or detain.
- c. SHOW: your weapon and demonstrate intent to use it.
- d. SHOOT: to remove the threat only where necessary.

4. **IF YOU MUST FIRE YOUR WEAPON:**

Legal teams learned that they must be an integral part of the Logistics Preparation of the Battlefield, not only to spot contract and fiscal law issues, but to ensure proposed contractor support complies with the law of armed conflict. Judge advocates must ensure that contractor security is addressed, as well as the types of missions that they will perform. Moreover, when reviewing contracts, JAs must be alert to statements of work that call for contractors to perform missions that are inherently military, as they do not have the legal status and protections of a Soldier under international law.

4. Be Prepared to Assist in Numerous Governance Missions During Full Spectrum Operations.

In addition to their judicial reconstruction and reform mission, commanders often directed their legal teams to perform many other governance missions. As part of those missions, legal teams ordinarily participated in city and provincial council meetings. Commanders generally wanted their JAs present to answer the many legal issues that arose during the course of these meetings. Claims issues, for example, were typically the source of many inquiries and complaints, as were issues dealing with border security and property disputes.⁶⁰⁰ The Command JA at Task Force Olympia, for example, attended all provincial council meetings with his commander, and he often coordinated with the local Iraqi council attorney to schedule meetings between Iraqis to settle disputes.⁶⁰¹ Likewise, the legal team at

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- (1) Fire only aimed shots.
 - (2) Fire with due regard for the safety of innocent bystanders.
 - (3) Immediately report incident and request assistance.

5. CIVILIANS: Treat Civilians with Dignity and Respect.

- a. Make every effort to avoid civilian casualties.
- b. You may stop, detain, search, or disarm civilian persons if required for your safety or if specified in your contract.
- c. Civilians will be treated humanely.
- d. Detained civilians will be turned over to the Iraqi Police or Coalition or Multi-national Forces as soon as possible.

6. WEAPONS POSSESSION AND USE: Possession and use of weapons must be authorized by the Ministry of Interior and must be specified in your contract.

- a. You must carry proof of weapons authorization.
- b. You will maintain a current weapons training card.
- c. You may not join Coalition or Multi-national Forces in combat operations except in self-defense or in defense of persons as specified in your contracts.
- d. You must follow Coalition or Multi-national Force weapons condition rules for loading and clearing.

Id. Annex A.

⁶⁰⁰ See, e.g., Kern Interview, *supra* note 161; Troops to Tasks, Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), 1 (undated) [hereinafter 101st Airborne Troops to Tasks] (on file with CLAMO).

⁶⁰¹ For example, the CJA related that an Iraqi Kurd was arrested in an Arab area for a weapons violation and he came to the CJA to complain that he was treated more harshly than an Arab would have been treated. The CJA

1st Armored Division attended many District and Neighborhood Advisory Council meetings to help answer questions and resolve complaints.⁶⁰²

Judge advocates were also involved in a number of governmental operations and reform initiatives. They were at the forefront of assisting their commanders in drafting numerous governmental proclamations and orders addressing myriad governance issues—from garbage collection, to traffic laws, to eviction notices.⁶⁰³ A copy of the 101st Airborne Division’s Joint Order Prohibiting the Illegal Disposal of Refuse and Garbage is at Appendix A-13. They also assisted and advised Coalition/Iraqi working groups and councils on the selection of local officials.⁶⁰⁴ Two JAs from the 1st Armored Division, for example, served on the Governate Support Team that acted as a liaison between the Division and the CPA and Iraqi government agencies.⁶⁰⁵

Moreover, in northern Iraq the legal team at 101st Airborne Division (Air Assault) led the way in implementing economic reforms in their area. They helped negotiate a multi-billion dollar contract to provide electrical power to northern Iraq. This required the JAs to be proficient in the international electricity and oil product industries to educate the command on terms and concepts, and draft and negotiate contracts. In the end, these JAs helped strike a deal with a Turkish corporation for sufficient electricity to provide a reliable source of constant power to Mosul, something that had not been available for more than a decade.⁶⁰⁶ These JAs also helped negotiate a deal with Syria to bring electrical power into Iraq in exchange for crude oil.⁶⁰⁷ They further tackled a difficult issue surrounding the unfreezing of assets of an Iraqi Cement Company that had been frozen by Syria and Jordan. To prevent collapse, the company needed access to their accounts in those countries to pay open contracts.⁶⁰⁸

When helping to negotiate contracts during contingency operations, JAs must be familiar with the DoD and their Service policies on negotiating international agreements to ensure that they follow policy, if required. An “international agreement” is generally “[a]ny agreement concluded with one or more foreign governments (including their agencies, instrumentalities, or

spoke with the Chief Judge and requested the sentences of all individuals convicted in the court of the same violation. After he discovered that the sentence was within acceptable levels, he was able to resolve the complaint. Kern Interview, *supra* note 161.

⁶⁰² 1AD Recent Legal Developments, *supra* note 225, para. 9.

⁶⁰³ See, e.g., 101st Airborne Troops to Tasks, *supra* note 515, at 2 (relating that the OSJA, 101st Airborne Division “drafted hundreds of governmental proclamations and orders established by the 101st CG and the local province governor for all manner of purposes – they give instant relief and provide immediate direction to solve serious problems or address less serious concerns.”) Everything from garbage collection to weapons control was addressed in these joint orders. Information for OIF II AO North JAs, Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), 5 (undated) [hereinafter Information for OIF II AO North JAs] (on file with CLAMO).

⁶⁰⁴ As early as April 2003, for example, the OSJA, 101st Airborne Division (Air Assault) worked with other personnel within the Division to host a Mosul Metropolitan Area Interim Government Working Group to devise a process for selecting the greater Mosul metropolitan area interim government. See Mosul Metropolitan Area Interim Gov’t Working Group Proposed Agenda for April 29, 2003 and Proposed Process for Selecting Greater Mosul Metropolitan Area Interim Government (undated) (on file with CLAMO).

⁶⁰⁵ 1AD AAR, *supra* note 12 (Governate Support Team power point presentation).

⁶⁰⁶ 101st Airborne AAR, *supra* note 89, at 4.

⁶⁰⁷ *Id.*

⁶⁰⁸ See Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), Northern Cement Company Contracts, power point presentation (undated) (on file with CLAMO).

political subdivisions) or with an international organization” that is signed or agreed to by DoD personnel, signifies the intent of the parties to be bound in international law, and is “denominated” as an international agreement or other similar instrument.⁶⁰⁹ Only certain individuals have authority to negotiate and conclude “international agreements.”⁶¹⁰

The Small Business Loan Commission (SBLC) was another innovation of the OSJA, 101st Airborne Division (Air Assault). The commission, which was intended to create jobs and stimulate the economy, was created by a joint order drafted by the legal team and signed by the Commanding General and the Governor of Ninevah Province. In this instance, the legal administrator for the 101st Airborne Division OSJA worked with the Iraqi chairman and other commission members to implement the program, which used CERP funds to provide loans.⁶¹¹

The 101st Airborne Division (Air Assault) legal team also led privatization efforts within their area of operations. This included identifying and determining the potential uses of public property, then obtaining authorization from the local ministry for its development. The legal team worked closely with local Iraqis in these efforts because only the Iraqis could lease, rent, sell or otherwise obligate public property. A Provincial Investment Committee was formed of local Iraqis who managed the privatization of public property in coordination with the Coalition. Pursuant to the privatization efforts, JAs, in coordination with the local Iraqi committee, drafted requests for proposals, took bids, evaluated them in reference to the bid criteria, selected the winner, negotiated and prepared investment contracts and supervised the construction and renovation, among other duties.⁶¹²

The legal personnel working on privatization initiatives learned that it was very important to have a local investment committee to help with these projects because they knew the area and could more easily identify properties for investment. If an investment committee does not exist, they advised that the legal team should seek out professionals and government leaders in the community that can help set up such a committee.⁶¹³ They also found that obtaining the correct deeds early in the process saved many hours of work. Therefore, the legal teams need to locate the property registration office and visit the office with a translator to get to know the personnel who work there and understand how their property registration process works.⁶¹⁴

Legal teams also handled many border issues, serving as key arbitrators on international commerce issues between Iraq and Turkey to increase the flow of trucks carrying critical fuel products in and out of Iraq. They also drafted and coordinated a plan to deal with the thousands of religious pilgrims that entered Iraq from Iran and Syria each year.⁶¹⁵

⁶⁰⁹ U.S. DEP'T OF DEFENSE, DIR. 5530.3, INTERNATIONAL AGREEMENTS, E2.1.1. (11 Jun. 1987) [hereinafter DoDD 5530.3]; *see also* CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 2300.01B, INTERNATIONAL AGREEMENTS (1 Nov. 2003); U.S. DEP'T OF ARMY, REG. 550-51, INTERNATIONAL AGREEMENTS (15 Apr. 1998).

⁶¹⁰ *See, generally*, DoDD 5530.3, *supra* note 524.

⁶¹¹ The legal administrator, CW2 Craig Sumner, assisting in granting loans for a maximum of five years, at a maximum rate of five percent interest, and a maximum amount of \$5,000.00. Information for OIF II North JAs, *supra* note 518, at 5.

⁶¹² *Id.*

⁶¹³ 101st ABN DIV AAR, *supra* note 89, at 71.

⁶¹⁴ *Id.* at 72.

⁶¹⁵ Information for OIF II North JAs, *supra* note 518, at 5.

The above represents just a few of the many governance issues that legal teams tackled during their deployments. The lesson learned for legal teams in future operations is that they must be prepared to expand their duties to meet mission requirements. Governance missions such as overseeing economic reform and privatization efforts fall within the roles and missions of the JAs, ably supported by their legal administrators and paralegals.

5. To Assist Commanders in Maintaining Security and Carrying Out International Law Obligations, Legal Teams Must Lead Efforts to Resolve Numerous Property Issues.

From the time Coalition Forces entered Afghanistan and Iraq, legal teams advised commanders on their international law obligations regarding enemy public and private property. Destruction and seizure of an enemy's property during combat operations are discussed in Volume 1 of this Publication.⁶¹⁶ In Iraq, once Coalition Forces toppled the regime of Saddam Hussein, JAs were required to advise commanders on numerous issues regarding their authority and responsibility to administer and use Iraqi public property. This included the authority to evict personnel from public lands and the process by which these evictions would be implemented. In addition, with the potential for additional violence over land ownership, JAs also proactively devised and implemented interim solutions to property disputes as thousands of Iraq's displaced Kurds and other minorities moved to regain their homes and farmlands taken by the former regime.

a. Understand International Law with Regard to Administration and Use of Public Property.

*The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.*⁶¹⁷

At the end of major hostilities in Iraq, the Coalition occupied many public buildings and required additional space for personnel assigned to the CPA. Initially, in late May 2003, the CPA Administrator issued an order finding that Iraqi Ba'ath Party assets and property were State assets and, therefore, subject to seizure by the CPA on behalf and for the benefit of the Iraqi people.⁶¹⁸ The Order directed all persons in possession of property and assets to inform local

⁶¹⁶ See Volume I, Afghanistan and Iraq Legal Lessons Learned, *supra* note 255, para. III.G.1.

⁶¹⁷ Hague Regulations, *supra* note 1, art. 55. Generally, in civil law, "usufruct" means:

the right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility, and advantage which it may produce, provided it be without altering the substance of the thing.

BLACK'S LAW DICTIONARY (7th ed. 1999). Hence, a "usufructuary" is someone "who has the usufruct or right of enjoying anything in which he has no property." *Id.*

⁶¹⁸ Coalition Provisional Authority, Order Number 4, Management of Property and Assets of the Iraqi Baath Party (25 May 2003) (on file with CLAMO).

Coalition authorities and immediately turn them over.⁶¹⁹ The Order also provided that any expenditure or use of the seized property and assets by the CPA were to be “recorded and open to audit by outside auditors.”⁶²⁰

Shortly thereafter, in early June 2003, the CPA issued Order Number Nine on the management and use of Iraqi public property.⁶²¹ The Order applied to the occupancy, use, management, and assignment of property being used by the CPA, Coalition Forces, Iraqi Ministries and property temporarily made available to private individuals or organizations. The Order also provided a process by which the CPA Facilities Manager issued a Letter of Authority (LOA) to the Coalition and Iraqi Ministries and a license to private individuals or organizations that identified the occupants and the terms, conditions, and duration of the use.⁶²² As implemented, each request for a permit to occupy real property was submitted through the Contingency Real Estate Support Team (CREST),⁶²³ CJTF-7 to the CPA Facilities Management Office. In addition, requests to occupy private property for over thirty days had to be forwarded to the CREST team, which then negotiated and executed a lease with the private party.⁶²⁴

As part of the administration of public buildings, the CPA also issued an order evicting persons who were illegally occupying public buildings.⁶²⁵ The Order clearly provided that the CPA exercised control over all public property and all property formerly owned by the Ba’ath Party in Iraq. Any individual or groups determined to be illegally occupying public property were to be evicted.⁶²⁶ Legal teams assisted commanders in implementing these eviction notices. For example, the 101st Airborne Division (Air Assault) wanted to use approximately forty-six homes bordering an Iraqi airfield. They discovered, through speaking with the Airfield Manager, that these homes were formerly owned and used by the Iraqi Military to support the airfield. Therefore, under international law⁶²⁷ and CPA Orders,⁶²⁸ the OSJA determined that the Division

⁶¹⁹ *Id.* sec. 3(3). The Order also provided for a “Confiscation Appeal Tribunal” to determine disputes arising in relation to seizure actions. *Id.* sec. 4.

⁶²⁰ *Id.* sec. 3(5).

⁶²¹ Coalition Provisional Authority, Order Number 9, Management and Use of Iraqi Public Property (8 Jun. 2003) [hereinafter CPA Order No. 9] (on file with CLAMO).

⁶²² *Id.* sec. 3.

⁶²³ A Contingency Real Estate Support Team (CREST) is a team from the Army Corps of Engineers trained to negotiate leases, as well as handle any claims resulting from the lease, for a command on a reimbursable basis. *See* 10 U.S.C. § 2675 (providing that the Secretary of a military department may acquire by lease in foreign countries structure and real property needed for a military purposes other than family housing); 10 U.S.C. § 2673 (providing that the maintenance or construction appropriations may be used for the acquisition of land or interests in land under 10 U.S.C. § 2675); U.S. DEP’T OF ARMY, REG. 405-10, ACQUISITION OF REAL PROPERTY AND INTERESTS THEREIN (14 May 1970).

⁶²⁴ *See* Information Paper, Office of the Staff Judge Advocate, Combined Joint Task Force 7, subject: Real Property Guidance for Commanders in Iraq (28 Mar. 2004) (on file with CLAMO). Use of private property for less than 30 days did not require a lease. *Id.* para. 8.a.

⁶²⁵ Coalition Provisional Authority, Order Number 6, Eviction of Persons Illegally Occupying Public Buildings (8 Jun. 2003) [hereinafter CPA Order No. 6] (on file with CLAMO).

⁶²⁶ *Id.* sec. 1. Those evicted had a right to appeal their eviction by submitting to the CPA Administrator or his designee written evidence showing a valid right of occupancy. *Id.* sec. 3.

⁶²⁷ The OSJA, 101st Airborne Division (Air Assault) legal opinion cited as authority under international law the following language in U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para 401 (Jul. 1956, C1 15 Jul. 1976): “real property of a State, which is of direct military use, such as forts . . . barracks . . . airfields . . . and other military facilities, remains in the hands of the occupant until close of the war.” Memorandum, Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), for Record, subject:

could legally evict the occupants and occupy the homes. An English version of the Notice of Eviction developed by the legal team and served on these individuals is at Appendix A-14. Some of the occupants, however, produced documents that indicated they had leased the home from the Iraqi Military. Therefore, the 101st Airborne Division (Air Assault) OSJA developed a commission, consisting of a JA representing the Division, a representative of the city mayor, and a community representative, to decide whether to evict these individuals.⁶²⁹

The 4th Infantry Division OSJA also grappled with this issue. The Kirkuk Team Government Committee, headed by a JA, met with city representatives to develop courses of action to begin charging rent to the occupants of Government owned housing and evict those who refused to sign a lease agreement or who were not entitled to remain in the Government housing.⁶³⁰

As the transfer of sovereignty neared, JAs became concerned about the status of property occupied by the Coalition. In April of 2004, the SJA, CJTF-7 forwarded a memorandum to the General Counsel, CPA, recommending that a bi-lateral agreement with the Interim Iraqi ministers be pursued that would independently maintain the efficacy of the CPA Orders regarding use of real property.⁶³¹ In addition, the SJA recommended that the U.S. Army Corps of Engineers, Real Estate Office be the proper repository for the LOAs.⁶³² Although a separate agreement was not negotiated, on 27 June 2004, pursuant to United Nations Security Council Resolution 1546, the CPA revised Order Number Nine to provide that all LOAs in force on 30 June 2004 would continue in force until a decision on use or occupancy of the property was made by the Iraqi Government.⁶³³

b. Legal Teams must Assist in Developing Plans to Resolve Property Disputes.

The current US policy defers resolution of land disputes resulting from the “Arabization” policies of the former regime until a formal legal process can be established. . . . In order to reduce the potential for violence and to preserve the legal right of parties, the policy . . . direct[s] Coalition commanders to prevent

Rational and Method to Evict Iraqi Civilians Squatting in DREAR Airfield Housing, para. 2.a. (20 Jan. 2004) (on file with CLAMO).

⁶²⁸ CPA Order No. 6, *supra* note 540; CPA Order No. 9, *supra* note 536.

⁶²⁹ Memorandum, OSJA, 101st Airborne Division (Air Assault), for Record, subject: Results of Commission to Evict Iraqi Civilians Squatting in DREAR Airfield Housing, para. 2 (27 Jan. 2004) (on file with CLAMO).

⁶³⁰ Major Laura K. Klein, Judge Advocate, assigned as an Advanced Operational Law Studies Program Fellow with the Center for Law and Military Operation and deployed to Iraq with the 173rd Airborne Brigade, Situation Report, Team Government Kirkuk, at 1 (11 Nov. 2003) [hereinafter Team Government Kirkuk SITREP (11 Nov. 2003)] (on file with CLAMO).

⁶³¹ See Memorandum, Colonel Marc L. Warren, SJA, CJTF-7, to General Counsel, CPA, subject: Comments Regarding Green Zone Property Issues Paper, para. 1 (9 Apr. 2004) (on file with CLAMO).

⁶³² *Id.* para. 2.

⁶³³ Coalition Provisional Authority, Order Number 9, Management and Use of Iraqi Public Property (27 Jun. 2004) (Revised) (on file with CLAMO). The Iraqi Government included the Iraqi Interim Government, the Iraqi Transitional Government, or the Iraqi government elected under a permanent constitution. The determination to continue the management and use of Iraqi public property after the transfer of sovereignty on 28 June 2004 was based in part on United Nations Security Council Resolution 1546, sec. 10, which gave the multinational force the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq, including the Iraqi request for continued presence of the multinational force. See Section II, *supra*, discussing UNSCR 1546.

*former occupants from using “self help” to remove current occupants from disputed property.*⁶³⁴

With civil courts not functioning, real estate documents looted, and thousands of Iraqis⁶³⁵ on the move intent on taking back the lands that the former regime had taken from them during the previous thirty years, legal teams and others worked to find a solution to this internally displaced persons (IDPs) problem before it became a major security issue. In May 2003, shortly after the end of major combat operations in Iraq, the 101st Airborne Division (Air Assault) and the 4th Infantry Division found themselves controlling areas with thousands of IDPs looking to reclaim their land. Legal teams in those Divisions immediately began assisting their commanders in formulating a plan to resolve property disputes.⁶³⁶ In May and June of 2003, the units attempted to implement a “stay put” policy, trying to convince IDPs to stay in place until a system could be devised and instituted for resolving property disputes. Judge advocates worked with their information operations cells to disseminate this message through newspapers, televisions, city council meetings, and other fora.⁶³⁷

Much of the problem lay in the former regimes “Arabization” policy, whereby Arabs were coerced or induced to resettle onto Kurdish lands in northern Iraq. The Coalition recognized that there was a tremendous potential for violence over land ownership as Kurds returned to reclaim their former lands from Arabs.⁶³⁸ The property in dispute was generally either homes that Kurds had originally owned and occupied or farmland. Arabs were farming Kurdish lands under a contract entered into with the Government, which had confiscated the lands from Kurds about thirty years before the Coalition entered Iraq.⁶³⁹ The problem was especially acute in and around the city of Kirkuk, where the 173rd Airborne Brigade, attached to the 4th Infantry Division, was located.⁶⁴⁰ Initially, on 15 May 2003, interested parties signed the

⁶³⁴ General Framework for Coalition Buy-Out of “Arabized” Property and Payment of Relocation Costs, Office of the Staff Judge Advocate, 101st Airborne Division (Draft), at 1 (27 May 2003) [hereinafter Coalition Buy-Out of Arabized Property] (on file with CLAMO).

⁶³⁵ These Iraqis included Kurds, Turkomens, and Assyrians.

⁶³⁶ 101st ABN DIV AAR, *supra* note 89, at 79.

⁶³⁷ See E-mail, Captain Heath Wells, 353d Civil Affairs Command, to the Office of the Staff Judge Advocate, Division Main, 4th Infantry Division, subject: Property Issues/Building Villages (21 Jun. 2003) [hereinafter Wells E-mail] (on file with CLAMO).

⁶³⁸ 101st ABN DIV AAR, *supra* note 89, at 79.

⁶³⁹ See Major Laura Klein, Judge Advocate, assigned as an Advanced Operational Law Studies Program Fellow with the Center for Law and Military Operation and deployed to Iraq with the 173rd Airborne Brigade, Situation Report, Team Government Kirkuk (9 Dec. 2003) [hereinafter Team Government Kirkuk SITREP (9 Dec. 2003)] (on file with CLAMO).

⁶⁴⁰ According to Captain Heath Wells, JA, 353d Civil Affairs Command:

The situation in many places, especially the city of Kirkuk is still very unstable and unsuitable for families. There is no temporary housing available, health and sanitation facilities are not available, and employment opportunities are very limited. In some places, unexploded ordnance is still present. Schools do not yet have the capacity to accommodate many additional children. Many of the villages have no infrastructure such as water and power to support normal life, and many homes have been destroyed and need to be rebuilt.

Wells E-mail, *supra* note 552. A final tally for the 188 IDP sites assessed in the fall of 2003 showed a total population of over 34,000 around the area of Kirkuk; the survey also located 152 new IDP sites. See Team Government Kirkuk SITREP (11 Nov. 2003), *supra* note 545, at 1.

“Joint Arab – Kurd Harvest Agreement” in Kirkuk. The parties agreed that all harvested crops were to be apportioned forty-five percent each to Arabs and Kurds, with the remaining ten percent to go as costs for machinists and harvesting. Judge advocates then drew up agreements to be signed by the farmer harvesting the land and those who had claims to the land to ensure the proceeds from the harvest were split in accordance with the agreement. These agreements, however, did not always work. In the city of Daquq, for example, the original owners and the contract farmers could not reach agreement on the use of the land, so the Daquq Resettlement Committee froze all lands under contract to Arabs.⁶⁴¹ A copy of the agreement is at Appendix A-15.

Recognizing the potential for violence if land ownership was not resolved, the OSJAs of both the 4th Infantry Division and 101st Airborne Division (Air Assault) set about developing proposed policies to settle disputes in the absence of CPA direction. The OSJA, 4th Infantry Division, drafted a property dispute settlement proposal and presented it to the Division Commander in early June 2003.⁶⁴² They proposed a process whereby the claimant would file with a Property Claims Commission (PCC), which had the authority to convene a hearing, request additional documents if necessary, and determine ownership of the property and any compensation due the displaced party.⁶⁴³ A copy of the proposed Disputed Property Claims Form is at Appendix A-16.

In addition to a property settlement authority, the 101st Airborne Division OSJA proposed an immediate buy-out plan for those Arabs who wanted to move to a location of their choosing. They reasoned that the program would significantly reduce the number of disputes that needed to be resolved through a formal dispute resolution process that was contemplated by the Coalition and Iraqi national authorities.⁶⁴⁴

At the end of June 2003, the CPA issued Regulation Number Four, establishing an Iraqi Property Reconciliation Facility (IPRF).⁶⁴⁵ The Regulation provided that the CPA Administrator was to establish an IPRF to collect real property claims and resolve those claims through a voluntary dispute resolution process.⁶⁴⁶ Although the Regulation provided for an IPRF central office in Baghdad and several regional offices throughout Iraq, it contained no implementing instruction.

In an attempt to resolve property issues, in September 2003, several SJAs met with the CPA Office of General Counsel in Baghdad to develop a property dispute resolution process

⁶⁴¹ See Team Government Kirkuk SITREP (9 Dec. 2003), *supra* note 554, at 2.

⁶⁴² See E-mail, Lieutenant Colonel Flora D. Darpino, Staff Judge Advocate, 4th Infantry Division, to Captain Brian Hughes, Judge Advocate, 173d Airborne Brigade, subject: Property Dispute Settlement – OSJA (2 Jun. 2003).

⁶⁴³ Strategic Plan for Property Dispute Settlement, Office of the Staff Judge Advocate, 4th Infantry Division, (Jun. 2003) (on file with CLAMO).

⁶⁴⁴ Coalition Buy-Out of Arabized Property, *supra* note 549, at 1 (providing that “[t]he contemplated formal process being developed . . . will . . . provide either compensation to relocate or in-kind housing . . . the cost of such an approach, added to the costs of a formal dispute resolution mechanism, will make the formal process much more expensive (and slower) than the immediate buy-out program.”).

⁶⁴⁵ Coalition Provisional Authority, Regulation Number 4, Establishment of the Iraqi Property Reconciliation Facility (25 Jun. 2003) (on file with CLAMO).

⁶⁴⁶ *Id.* sec.1(1).

acceptable to all parties. The CPA, however, decided to allow the Iraqi Governing Council (IGC) to resolve the issue. The CPA reasoned that the IGC had to be empowered to resolve internal Iraqi disputes, such as property disputes, in order for them to be seen by the Iraqi people as a legitimate, functioning governmental body. Unfortunately, the IGC and CPA did not finalize a property dispute mechanism until January 2004.⁶⁴⁷

In the interim, legal teams worked throughout the fall of 2003 to prevent property disputes from igniting violence until the IGC/CPA completed a plan to render final decisions in property disputes. In Kirkuk, for example, a JA with the 173rd Airborne Brigade was designated the leader of the Team Government organization. This organization worked with the Kirkuk City Council to develop and implement an interim solution to real property disputes and provide care for IDPs.⁶⁴⁸ As part of the Team Government, the Resettlement Team helped negotiate interim agreements between claimants in real property disputes to “bridge the gap” until the IGC could implement a process to resolve property disputes.⁶⁴⁹ The capture of Saddam Hussein in December 2003 only exacerbated the problem, as even more IDPs began returning to areas such as Kirkuk now that their fear of the former regime and its potential return was gone.⁶⁵⁰

Finally, on 14 January 2004, the CPA issued Regulation Number Eight, delegating to the IGC the authority to establish the Iraq Property Claims Commission (IPCC) pending the establishment of a means of conclusively resolving related claims by a future Iraqi government, and rescinding CPA Regulation Number Four which established the IPRF.⁶⁵¹ Appended to the CPA Regulation was a proposed statute containing procedures for voluntary reconciliation. The statute proposed to establish Regional Commissions to receive and adjudicate claims. Moreover, the proposed procedure provided that inhabitants of residential property in areas that were subject to ethnic cleansing could be resettled, receive compensation from the state, receive new land near their residence, and receive costs of moving to such area.⁶⁵² The Regulation was not published with a set of complementing instruction; instead, the statute merely indicated that matters such as funding and how to execute the Commission were to be resolved and published in future documents.⁶⁵³

Nevertheless, based on the CPA Order, OSJAs began assisting Iraqis in implementing the Property Dispute Resolution program. The Task Force Olympia OSJA, who had recently assumed the mission from the 101st Airborne Division (Air Assault), worked with the CPA attorney in their area, establishing an office staffed by five Iraqi attorneys, who required training,

⁶⁴⁷ 101st Airborne AAR, *supra* note 89, at 79.

⁶⁴⁸ See Major Laura Klein, Judge Advocate, assigned as an Advanced Operational Law Studies Program Fellow with the Center for Law and Military Operation and deployed to Iraq with the 173rd Airborne Brigade, Situation Report, Team Government Kirkuk, at 1 (28 Oct. 2003) (on file with CLAMO).

⁶⁴⁹ *Id.*

⁶⁵⁰ Major Laura Klein, Judge Advocate, assigned as an Advanced Operational Law Studies Program Fellow with the Center for Law and Military Operation and deployed to Iraq with the 173rd Airborne Brigade, Situation Report, Team Government Kirkuk, at 1 (30 Dec. 2003) (on file with CLAMO).

⁶⁵¹ Coalition Provisional Authority, Regulation Number 8, Delegation of Authority Regarding An Iraq Property Claims Commission, sec. 1 (14 Jan. 2004).

⁶⁵² *Id.* App. art. 10.

⁶⁵³ See Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), Operation Iraqi Freedom, Recent Legal Developments, at 7 (27 Jan. 2004) (on file with CLAMO).

logistical support and supervision.⁶⁵⁴ The next step was to have an Iraqi commission adjudicate the claims. During the period of this Publication, however, this body was not hired. Thus, expectations were raised, claims were filed, and nothing happened.⁶⁵⁵ This caused much consternation among the Iraqi claimants, the JAs, and others who were trying their best to mediate property disputes to prevent further violence. Ultimately, shortly before the transfer of sovereignty to the Iraqi people, the CPA issued Regulation Number Twelve on 23 June 2004 amending the Iraq Property Claims Commission statute and promulgating instructions for the operation of the claims commission.⁶⁵⁶

The overarching lesson learned in this area is that as an occupying power under international law, the Coalition had the authority and the responsibility to implement procedures to resolve land issues. Judge advocate must be proactive in advising commanders on their responsibility under international law and lead the way in implementing workable solutions. Property issues must be addressed and solutions implemented as soon as practicable because disputes over land ownership is a security issue that left unresolved could lead to additional animosity and violence among ethnic and religious groups and also Coalition Forces. The authority of the Coalition as an occupying force, however, has to be weighed against the end state of a legitimate, functioning Government capable of resolving civil law matters, such as land ownership. Therefore, the Coalition must empower the State government and its judiciary to resolve such issues as land ownership as soon as practicable in order to achieve this objective.

6. Be Prepared to Provide Advice on Military Justice Reform and Training.

In Afghanistan and Iraq, legal personnel were at the forefront in drafting and implementing a disciplinary system for indigenous security forces. The mission in both countries was similar, in that both disciplinary systems had been corrupted by the previous regimes and did not comply with basic tenets of humanitarian law. Therefore, JAs used their legal expertise to review the current disciplinary systems, identify needed reforms, and draft the necessary changes to the systems to implement those reforms.

In addition, legal teams in both countries often teamed with other U.S. and Coalition personnel, including military police, to provide training to indigenous security forces. In Afghanistan, the Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, otherwise known as the “Bonn Agreement,” made the United States responsible for assisting the Afghan Government in creating and training an Afghan National Army (ANA).⁶⁵⁷ To accomplish this mission, the Department of Defense created the Office of Military Cooperation – Afghanistan (OMC-A), which included an OSJA.⁶⁵⁸ The SJA, OMC-A worked on the ANA Design Team, helping

⁶⁵⁴ See After Action Review, Office of the Staff Judge Advocate, Task Force Olympia, at 3 (undated) (on file with CLAMO).

⁶⁵⁵ See, e.g., Kern Interview, *supra* note 161.

⁶⁵⁶ Coalition Provisional Authority, Regulation Number 12, Iraq Property Claims Commission (23 Jun. 2004).

⁶⁵⁷ *Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions*, S.C. Res. 1383, U.N.S.C., 4434th mtg., U.N. Doc. S/2001/1154 (2001) [hereinafter *Bonn Agreement*].

⁶⁵⁸ See Major Russell L. Miller, *Legal Support for the Afghan National Army*, THE ARMY LAWYER 33 (Dec. 2003) [hereinafter *Legal Support for the Afghan National Army*] (describing the OSJA, OMC-A training mission).

develop the initial structure and training for the ANA.⁶⁵⁹ Additionally, in Iraq, legal teams located throughout the country often provided training on numerous issues—including law of armed conflict, use of force rules, and ethics—to the new Iraqi security forces.

a. Anticipate Taking the Lead in Military Justice Reform.

The JAs assigned to OMC-A worked with Afghanistan officials on military justice reform. Similar to civil judicial reform, the initial step for these JAs was to thoroughly understand the current system. Unfortunately, the Taliban had destroyed much of the writings containing Afghan laws, including the military justice code.⁶⁶⁰ Consequently, the JAs had to find another method to understand existing military law. They began meeting with the Chief Judge for the Afghan Ministry of Interior, representatives from the Ministry of Defense, and others to gather information on the existing law and to discuss reforms that comport with international humanitarian law. Based on these meetings, they discovered that the existing source of military law was the Law of Military Crimes, adopted in August 1986 during the Soviet occupation. Not surprisingly, the punitive articles were not consistent with international human rights standards. Moreover, they found that military courts had jurisdiction over civilians who committed crimes against a member of the armed forces and that the military courts did not have their own rules of evidence or criminal procedures. These meetings led the Ministry of Interior to produce a draft statute on the organization and authority of Afghan military courts.⁶⁶¹ The OSJA then drafted, edited, internally reviewed, and translated into a single publication the Afghan military justice code.⁶⁶² The OMC-A OSJA goal was to bring Afghan military justice into compliance with international standards and promote discipline, fairness, and efficiency in the military.⁶⁶³

As part of a larger project of OMC-A to reform and develop the ministry and general staff to be modern, efficient, and effective, the JAs at OMC-A also provided advice and guidance on the Ministry of Defense Legal Department structure, including the structure of the ANA Office of the Judge Advocate General.⁶⁶⁴ The SJA, OMC-A mentored both the General Counsel and the Judge Advocate General. The two individuals were neither lawyers or legally trained. Therefore, the OSJA, OMC-A assisted them in locating and hiring competent Afghan military lawyers for their staffs.⁶⁶⁵

⁶⁵⁹ After Action Report, Civil Affairs Judge Advocate, Rule of Law Activities in Afghanistan (12 Nov. 2002 – 12 Nov. 2003), Colonel Richard Gordon, former SJA, OMC-A, 1 (27 Apr. 2005) [hereinafter Gordon AAR], (on file with CLAMO).

⁶⁶⁰ *Id.* at 35.

⁶⁶¹ See Military Justice Reform, Office of the Staff Judge Advocate, Office of Military Cooperation – Afghanistan, power point presentation (undated) (outlining the existing military courts, jurisdiction, criminal code, sources of law, etc.) (on file with CLAMO).

⁶⁶² Legal Support for the Afghan National Army, *supra* note 573, at 36.

⁶⁶³ See Gordon AAR, *supra* note 574, at 6.

⁶⁶⁴ See, e.g., *id.* at 6; Memorandum, Major Russell L. Miller, Office of the Staff Judge Advocate, Office of Military Cooperation – Afghanistan, to Lieutenant Colonel Platte Moring, Office of the Staff Judge Advocate, Office of Military Cooperation – Afghanistan (22 Sept. 2003) (advising that the ANA Office of the Judge Advocate General should include someone responsible for: (1) military legal training; (2) oversight of the defense bar; (3) JA doctrine development; (4) reviewing weapons for legality under the LOW) (on file with CLAMO).

⁶⁶⁵ Gordon AAR, *supra* note 574, at 6.

In addition, the JAs assigned to the Defense Institute of International Legal Studies (DIILS) worked through OMC-A to help organize and implement Rule of Law reform in the ANA and Afghan Ministry of Defense. The program focused on institutionalizing the concepts of civilian control of the military, and the importance of maintaining separate, but effective, military and civilian court jurisdiction. A core group of fifty to sixty military and civilian leaders attended the initial three DIILS seminars. The first, Criminal Jurisdiction and Procedure, brought international instructors from Malaysia and the Czech Republic to discuss the challenges of transitioning from a Soviet-style regime, and establishing a secular legal regime in an Islamic society. Subsequent seminars addressed Ethics in Government and Government Contracting, and Basics of Criminal Law and Investigations. Further, DIILS JAs planned to conduct courses to train and certify ANA legal officers, who will then perform paralegal roles akin to legal journeymen in the U.S. Navy.⁶⁶⁶

Similarly, legal teams in Iraq worked to implement a disciplinary process for Iraqi Security Forces. Shortly after Coalition Forces entered Baghdad, all Iraqi military organizations were dissolved.⁶⁶⁷ The dissolution Order provided that the CPA intended to create a New Iraqi Corps as the “first step in forming a national self-defense capability for a free Iraq.”⁶⁶⁸ The New Iraqi Army was created by CPA Order, dated 7 August 2003.⁶⁶⁹ In September 2003, the CPA also established an Iraqi Civil Defense Corps (ICDC) to act as a security and emergency service agency⁶⁷⁰ and a Facilities Protection Corps to provide security for ministry and governorate offices, infrastructure, and fixed sites under the control of governmental ministries and governorate administrations.⁶⁷¹ In addition, the CPA established a separate Department of Border Enforcement to monitor and control the movement of persons and goods, to, from, and across the borders of Iraq.⁶⁷² Further, in March 2004, the CPA established a Ministry of Defence (MoD), consisting of the Iraqi Armed Forces (formerly called the “New Iraqi Army”), and

⁶⁶⁶ DIILS Information Paper, *supra* note 246, at 1. As of January 2005, DIILS was organizing, training in 9 core legal competencies identified by OMC-A, which mirror the divisions of the Ministry of Defense legal department. They planned to teach short seminars, with follow-on working groups to help each division develop a mission statement and basic operational guidelines in the area of military justice; fiscal law; environmental law; acquisition law; intelligence compliance; operational law; personnel law; standards of conduct; and legal assistance. *Id.*

⁶⁶⁷ See Coalition Provisional Authority, Order Number 2, Dissolution of Entities (23 May 2003) (dissolving the Army, Air Force, Navy, the Air Defense Force, and other regular military services; the Republican Guard; the Special Republican Guard; the Directorate of Military Intelligence; the Al Quds Force; and the Emergency Forces) (on file with CLAMO).

⁶⁶⁸ *Id.* sec. 5.

⁶⁶⁹ Coalition Provision Authority, Order Number 22, Creation of the New Iraqi Army (7 Aug. 2003) (on file with CLAMO).

⁶⁷⁰ Coalition Provisional Authority, Order Number 28, Establishment of the Iraqi Civil Defense Corps (3 Sept. 2003) (on file with CLAMO). The Iraqi Civil Defense Corps (ICDC) was designed to complement operations conducted by the military forces to counter organized groups and individuals employing violence against the Iraqi people and their national infrastructure. It was separate from the Iraqi Police and Military and acted as a constabulary force to patrol areas and conduct various operations to search for and seize illegal weapons and other contraband. *Id.* sec. 1. This Order was later amended to provide that the ICDC was a component of the Iraqi Armed Forces. See Coalition Provisional Authority, Order Number 73, Transfer of the Iraqi Civil Defense Corps to the Ministry of Defense (22 Apr. 2004) [hereinafter CPA Order No. 73] (on file with CLAMO).

⁶⁷¹ Coalition Provisional Authority, Order Number 27, Establishment of the Facilities Protection Service (4 Sept. 2003) (on file with CLAMO).

⁶⁷² Coalition Provisional Authority, Order Number 26, Creation of the Department of Border Enforcement (24 Aug. 2003) (on file with CLAMO).

members of the Facilities Protection Services employed by the MoD for the defense of its installations.⁶⁷³ In April 2004, the CPA transferred the ICDC to the MoD.⁶⁷⁴

The CPA also issued an Order in August 2003 that provided for a code of military discipline for the Iraqi Army.⁶⁷⁵ The code set forth numerous military offenses and their elements,⁶⁷⁶ made civilian criminal offenses military offenses, and made law of war violations military offenses.⁶⁷⁷ The code also gave certain military officers jurisdiction over military offenses⁶⁷⁸ and gave military judges and military courts jurisdiction over all military offenses that were also civilian criminal offenses and law of war violations. These military judges were selected from sitting civilian judges by the Senior Advisor, Ministry of Justice, in coordination

⁶⁷³ Coalition Provisional Authority, Order Number 67, Ministry of Defence (21 Mar. 2004).

⁶⁷⁴ CPA Order No. 73, *supra* note 585, sec. 1.

⁶⁷⁵ Coalition Provision Authority, Order Number 23, Creation of a Code of Military Discipline for the New Iraqi Army (7 Aug. 2003) [hereinafter CPA Order No. 23] (on file with CLAMO). The New Iraqi Army included all components of the national armed forces of Iraq, including the ground forces recruited, trained, and organized as the first step in the process of creating a military defense force of the new Iraq. *Id.* sec. 1.

⁶⁷⁶ These offenses included:

- (a) mistreatment of Members of the New Iraqi Army of inferior rank;
- (b) causing or engaging in a disturbance or behaving in a disorderly manner;
- (c) behaving in an insubordinate manner;
- (d) striking a Member of the New Iraqi Army or a member of another armed force of superior rank or civilian instructor placed in authority over the accused;
- (e) while on sentry duty either
 - (i) engaging in misconduct, or
 - (ii) failing to do the Member's duty;
- (f) disobeying a lawful order;
- (g) drunkenness if, owing to the influence of alcohol or any drug, whether alone or in combination with any other circumstances, the Member is:
 - (i) unfit to be entrusted with his duty,
 - (ii) unfit to be entrusted with any duty which the Member was reasonably aware that he could be called upon to perform,
 - (iii) behaving in a disorderly manner, or;
 - (iv) behaving in any manner likely to bring discredit on the New Iraqi Army;
- (h) absence without leave;
- (i) avoiding the performance of a duty or negligently performing a duty;
- (j) making a false statement concerning any official matter relating to the New Iraqi Army;
- (k) fighting with another Member of the New Iraqi Army;
- (l) willfully or by neglect damaging or causing damage to or the loss of any property of the New Iraqi Army;
- (m) conduct to the prejudice of good order or military discipline;
- (n) behaving in a manner likely to bring discredit on the New Iraqi Army.

Id. sec. 3(1)

⁶⁷⁷ *Id.* sec. 3(3) and (4).

⁶⁷⁸ Junior disciplinary officers—officers not below the rank of captain appointed in writing by an officer in command of a brigade—had authority over members of the New Iraqi Army below the rank of lieutenant. Senior disciplinary officers had authority over those in the rank of lieutenant and above, so long as the senior disciplinary officer was at least one rank above the accused. They also had jurisdiction over all appeals of decisions of junior disciplinary officers. *Id.* sec. 4.

with the Interim Minister of Justice.⁶⁷⁹ Moreover, the appellate court with jurisdiction to hear appeals from the trial court acted on appeals from military courts as well.⁶⁸⁰

The CPA Order also provided due process for those suspected of criminal offenses. If arrested, a service member had the right to be informed of the reasons therefore within twenty-four hours. Also within twenty-four hours, a Disciplinary Officer had to consider the circumstances for the arrest and determine whether continued confinement was warranted.⁶⁸¹ A Disciplinary Officer could also investigate all allegations of criminal misconduct and decide whether to charge the individual with an offense.⁶⁸² Moreover, the Disciplinary Officer could refer pure military offenses to a disciplinary hearing, similar to the Uniform Code of Military Justice, Article 15 proceedings.⁶⁸³

Legal teams often advised Coalition commanders and other officers on the Iraqi military disciplinary system. In particular, Coalition officers assigned duties to coach and mentor Iraqi commanders had to be briefed on the disciplinary system so that they could advise their Iraqi counterparts on the proper disciplinary measures to take within their command. For instance, in mid-April 2004, there were mass defections from the ICDC during military operations in Falujah and Najaf. Judge advocates found themselves advising commanders and others on the disciplinary measures that could be taken against these personnel.

Therefore, legal teams advised that JAs must become intimately familiar with the penal code and disciplinary system of the indigenous military forces to properly advise both Coalition commanders and indigenous force trainers.⁶⁸⁴ Moreover, JAs from DIILS were involved in training senior members of the Iraqi Ministry of Defense. They held a training conference in Washington, DC on human rights, the rule of law, and the law of armed conflict. Future training sessions were also planned.⁶⁸⁵

Judge advocates also drafted disciplinary guides for the Iraqi Security Forces. First Infantry Division OSJA, for example, drafted a commanders' guide for the ICDC (renamed the Iraqi National Guard (ING)) based on the CPA Order that created the disciplinary system.⁶⁸⁶ They borrowed heavily from the U.S. Army's regulation on military justice⁶⁸⁷ and Article 15 of the UCMJ for the basic procedural rules for nonjudicial punishment. Once completed, the guide was translated into Arabic and disseminated to the ING commanders.⁶⁸⁸

b. Be Prepared to Assist in Training Indigenous Security Forces.

⁶⁷⁹ *Id.* sec. 5.

⁶⁸⁰ *Id.* sec. 6.

⁶⁸¹ *Id.* sec. 7.

⁶⁸² *Id.* secs. 9 and 10.

⁶⁸³ *Id.* sec. 10. *See also* Uniform Code of Military Justice, article 15 (10 U.S.C. § 815).

⁶⁸⁴ After Action Report (Mar/Apr/May), Office of the Staff Judge Advocate, 1st Infantry Division, 4 (Jun. 2004).

⁶⁸⁵ DIILS Information Paper, *supra* note 246, at 2.

⁶⁸⁶ CPA Order No. 23, *supra* note 590.

⁶⁸⁷ U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE (6 Sept. 2002).

⁶⁸⁸ IID Transfer of Sovereignty Issues, *supra* note 236, at 9.

Part of the mission of the OSJA, OMC-A in Afghanistan was to implement and oversee the Law of War (LOW) training program for the ANA. While Afghanistan was an original signatory to the 1949 Geneva Conventions, there was little or no knowledge of the Conventions or the law of war in general. In fact, the first military lawyers that the SJA, OMC-A met with had never heard of the Conventions.⁶⁸⁹

The law of war program was developed by the JAs at OMC-A, and initially implemented at the Kabul Military Training Compound (KMTC), where the U.S. Army conducted basic training for the ANA.⁶⁹⁰ The OSJA first drafted a comprehensive LOW training manual.⁶⁹¹ As described in the manual:

[T]his manual divides Law of War training materials into three tiers. The first substantive section is designed to educate and prepare ANA military lawyers to advise ANA commanders in their basic international responsibilities while conducting military operations. The second substantive section is designed as a Commander's guide to the Law of War, to which ANA Commanders can look to for basic Law of War reference. The third section is designed to provide basic Law of War rules for the ANA soldier. . . . The manual is designed such that ANA soldiers at all levels can extract the parts applicable to their position and implement them accordingly.⁶⁹²

Appendix A-17 contains a Program of Instruction for Basic Soldier Training and Appendix A-18 contains a Program of Instruction for Noncommissioned Officer Training. The OSJA further coordinated with the ICRC to procure several hundred copies of a cargo pocket-sized Geneva Convention summary, translated into Dari, for use during their LOW training.⁶⁹³ The OSJA LOW trainers also recognized that the training program had to continue at the unit level after the initial basic training phase. Therefore, they met with the ANA Central Corps Commander to recommend that LOW principals be incorporated into their situational training exercises.⁶⁹⁴

Likewise, the legal teams in Iraq provided training to Iraqi Security Forces. The Brigade Operational Law Teams with the 82d Airborne Division, for example, trained over 600 ICDC members on the use of force, human rights, and the law of armed conflict. In addition, JAs and paralegals taught Army values and professional Soldiering.⁶⁹⁵ Legal teams at the 1st Armored Division also created training packages for the use of force rules used by the ICDC. They created vignettes applying the use of force rules to the ICDC mission, and printed pocket cards for use during the training.⁶⁹⁶ In addition, the 101st Airborne Division (Air Assault) OSJA developed and implemented a training program to teach police officers a code of ethics and

⁶⁸⁹ Gordon AAR, *supra* note 574, at 6.

⁶⁹⁰ *Legal Support for the Afghan National Army*, *supra* note 573, at 33.

⁶⁹¹ See LAW OF WAR TRAINING PROGRAM FOR THE AFGHAN NATIONAL ARMY, CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL (23 Oct. 2003) (on file with CLAMO).

⁶⁹² *Id.* at 2.

⁶⁹³ *Legal Support for the Afghan National Army*, *supra* note 573, at 34.

⁶⁹⁴ *Id.*

⁶⁹⁵ 82d ABN DIV AAR, *supra* note 96, at 6.

⁶⁹⁶ 1AD AAR, *supra* note 12 (Operational Law power point presentation).

instruct them on the rights of the accused. The new program was integrated into the police academy training.⁶⁹⁷ A copy of the Iraqi Security Forces Rules for the Use of Force is at Appendix A-19.

When training indigenous security forces, legal teams advised that the translator is key to this mission and that the teaching examples must be screened to reflect customs and religious matters. Moreover, many JAs and paralegals had to be prepared to discuss other issues, such as survivor benefits, ICDC misconduct, and claims when providing training.⁶⁹⁸

7. Judge Advocates Must Provide Advice to Commanders and Public Affairs Officers on Public Statements and Requests for Information Regarding Various Incidents.

Legal teams were often called upon to provide advice and assistance to commanders and public affairs officers (PAOs). Many times, JAs drafted speeches for their commanders to broadcast over television or radio that addressed various issues of concern to the local population. Some JAs even found themselves broadcasting their own television shows to provide information to the local populace on various legally-related issues.⁶⁹⁹

Many JAs also provided advice on the international law implications of certain Coalition actions to respond to media inquiries and local concerns.⁷⁰⁰ The legal team at 1st Armored Division, for instance, found that the Iraqi district or neighborhood councils frequently requested information on Coalition incidents with the local population.⁷⁰¹ Because of the number of issues, SJAs often found that they had to assign a particular JA to advise the PAO. With very high media interest in Coalition activities, the PAOs were regularly asked about sensitive operations, or were questioned on issues that required an analysis of the law.

At CJTF-7, the SJA assigned a JA to advise the Deputy C-3, Operations, in his role as CJTF-7 spokesperson, as well as the PAO and his staff. The JA reviewed all public affairs guidance and drafted weekly press briefings which outlined the major issues that were the subject of media inquiries. These issues often included the rule of law, rules of engagement, detention operations, interrogation rules, investigations, and military justice.⁷⁰² Judge advocates also assisted in drafting responses to questions and press releases on many aspects of Coalition operation.⁷⁰³

For example, JAs were involved in providing legal advice on whether, under international law, the bodies of Saddam Hussein's sons, Uday and Qusay, could be photographed and whether those photographs could be shown to the Iraqi citizenry. First, they noted that Article 17 of the

⁶⁹⁷ 101st ABN DIV AAR, *supra* note 89, at 73-74.

⁶⁹⁸ 1AD AAR, *supra* note 12, Operational Law power point presentation.

⁶⁹⁹ Colonel Richard Whittaker, Staff Judge Advocate, 101st Airborne Division (Air Assault), for example, broadcast a television show on various issues to the local citizens of Mosul.

⁷⁰⁰ Legal teams also provided advice on other issues involving the media, which are addressed in Volume I of this Publication. Volume I, Afghanistan and Iraq Legal Lessons Learned, *supra* note 255, para. III.D.2.

⁷⁰¹ 1AD Recent Legal Developments, *supra* note 225, para. 9.

⁷⁰² Memorandum, Captain Jennifer C. Santiago, JA, Office of the Staff Judge Advocate, CJTF-7, for SJA, subject: After Action Review, at 1 (26 Mar. 2004) [hereinafter J. Santiago Memorandum] (on file with CLAMO).

⁷⁰³ *Id.*

Geneva Convention on the Wounded and Sick required the Coalition to examine the bodies of the deceased to confirm death and establish identity.⁷⁰⁴ Therefore, JAs reasoned that so long as the dead were not photographed in a disrespectful manner and the photographs were not used in a manner exhibiting disrespect for the dead, the display of such photographs was not prohibited by international law. Moreover, the Coalition had a duty to restore and ensure public order and safety under the Hague Regulations.⁷⁰⁵ Consequently, the Coalition used photographs of the two to achieve the purpose of identification of the deceased to the Iraqi citizenry, who had expressed concerns in obtaining confirmation that the two were, in fact, dead and would never be in a position to commit atrocities on their own people or threaten their neighbors again.⁷⁰⁶

Judge advocates also learned that the primary point of contact for PAO issues must be familiar with the media organizations in theater. Moreover, JAs should review various reports from international organizations and non-governmental organizations, both positive and negative, to provide them with a good understanding of media interest. Additionally, once highly-publicized reports are issued, JAs must be prepared to analyze the report and draft responses for the commander.⁷⁰⁷ This was often the case in the areas of international law, such as detention operations and interrogation of detainees.

8. Be Prepared to Advise on Numerous Other International Law Issues, such as Repatriation of Local Citizens from Previous Conflicts and U.S. Citizens Discovered in Hostile Areas.

As the discussion in this section reflects, legal teams were involved in all aspects of operations in Afghanistan and Iraq. In particular in the area of international law, they dealt with many issues either of first impression or that had not been explored in many years.

One JA, for example, was appointed the action officer to effect the return of Iraqi POWs from Iran. The JA discovered that there were, in fact, fifty-nine mid-grade to senior Iraqi officers held as POWs by Iran from the first Iran-Iraq War in the early 1980s. After twenty-two years of captivity in Iran, they were to be repatriated to Iraq. The JA worked closely with the ICRC, supervising and coordinating support for the return movement and repatriation of these POWs arriving at the Baghdad International Airport. He also prepared the official memorandum accepting return of these POWs on behalf of the Coalition Provisional Authority.⁷⁰⁸

Judge advocates also learned that there should be a plan in place for handling U.S. citizens discovered in a foreign, hostile country who are not members of the force. The case of Nicholas Berg is representative of this issue. Mr. Berg was discovered by the command at Task Force Olympia to be in a local Iraqi jail in their area of operations. Although once freed he was

⁷⁰⁴ Geneva Convention, for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Art. 17, August 12, 1949, 6 U.S.T. 3217, T.I.A.S. 3362, 75 U.N.T.S. 31.

⁷⁰⁵ See Hague Regulations, *supra* note 1, art. 43.

⁷⁰⁶ See CJTF-7 Talking Point on Release of Photos of Uday and Qusay Hussein (undated) (on file with CLAMO). While there is a general U.S. military practice of not permitting close-up photography of deceased enemy soldiers out of respect, this practice was balanced against the unique security situation in Iraq, and the very significant value to the citizenry of Iraq of seeing photographs to confirm the deaths. *Id.*

⁷⁰⁷ *Id.* at 3.

⁷⁰⁸ See 12th LSO AAR, *supra* note 16, at 7-8 (describing the work of Lieutenant Colonel Kirk Warner, JA, 12th LSO).

offered free and safe passage out of the country, he refused. Unfortunately, a short time later Mr. Berg was captured by terrorists in Iraq and beheaded. Because of this incident, the command JA at Task Force Olympia recommended that commanders, with the advice of their JAs, must decide what the military can and should do in situations where U.S. citizens refuse the assistance of U.S. forces in hostile areas.⁷⁰⁹

⁷⁰⁹ Kern Interview, *supra* note 161, at 4.

B. RULES OF ENGAGEMENT

. . . [A]n unfortunate use of the term “rules of engagement.” What it should have said is⁷¹⁰

1. Judge Advocates Must Be Precise in Using Doctrinal Terms.

Judge Advocates (JAs) continued to play a critical role in Rules of Engagement (ROE) dissemination, training, and interpretation during the period of full spectrum operations in Operation ENDURING FREEDOM (OEF) and Operation IRAQI FREEDOM (OIF). Similar to ROE in major combat operations, much of the OEF and OIF ROE remained classified during the period covered by this Publication. Nevertheless, many of the lessons learned by legal teams providing advice to commanders and their staff on ROE and targeting can be adequately discussed in an unclassified publication.

a. Understand the Difference Between Rules of Engagement and Self-Defense.

Department of Defense (DoD) doctrine defines “rules of engagement” as:

Directives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered. Also called ROE.⁷¹¹

“Self-defense” is defined by DoD doctrine as follows:

A commander has the authority and obligation to use all necessary means available and to take all appropriate action to defend that commander's unit and other US forces in the vicinity⁷¹² from a hostile act or hostile intent. Force used should not exceed that which is necessary to decisively counter the hostile act or intent and ensure the continued safety of US forces or other persons and property they are ordered to protect. US forces may employ such force in self-defense only so long as the hostile force continues to present an imminent threat.⁷¹³

⁷¹⁰ This quote is taken from a senior Army judge advocate's 19 May 2004 testimony at a United States Senate hearing on potential detainee abuse in Iraq. The words quoted were in response to Senator Clinton's request to, “...return for a moment to ... interrogation rules of engagement.”

⁷¹¹ See JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DO D DICTIONARY OF MILITARY AND ASSOCIATED TERMS (12 Apr. 2001) (as amended through 30 Nov. 2004), at <http://www.dtic.mil/doctrine/jel/doddict/data/d/index.html> [hereinafter JOINT PUB. 1-02].

⁷¹² See also CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3121.01A, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES, encl. A, para. 2 (15 Jan. 2000) [hereinafter SROE].

⁷¹³ JOINT PUB. 1-02, *supra* note 2.

In both Iraq and Afghanistan, misuse of the term rules of engagement (ROE), led to significant confusion and frustration for operators and judge advocates (JAs) alike. Perhaps the most common example of the confusion created by imprecise use of ROE is illustrated when training units or briefing staff members on ROE. Invariably, the initial focus is the Secretary of Defense/President of the United States (SECDEF/POTUS) approved supplemental measures published by the Chairman of the Joint Chiefs of Staff (CJCS) and promulgated by the responsible combatant commander. Hypothetical scenarios are often posed with the ultimate question of whether a service member may fire at someone or something. Often in these scenarios, the solution is not found in the applicable supplemental ROE, but rather in the U.S. self-defense policy and procedures which are based on the principles of necessity—identifying either a hostile act or demonstration of hostile intent—and proportionality.⁷¹⁴ It is imperative to ensure commanders, as well as the service members who execute the commander's plans, understand what ROE are as well as what they are not, and further that supplemental ROE measures apply only to the use of force for mission accomplishment and do not affect or limit the application of force in self-defense.⁷¹⁵

Another example of problems arising as a result of failure to understand the distinction between mission accomplishment ROE and self-defense became apparent in both OEF and OIF when considerable time and effort was spent attempting to create training packages aimed at developing a specific level of identification⁷¹⁶ before either returning fire or taking other actions in response to a hostile act or demonstration of hostile intent. This training should have emphasized the law of war concepts of necessity and proportionality, which apply to self-defense situations, rather than on developing a level of identification required under the ROE for offensive operations that does not apply to self-defense situations.⁷¹⁷ What many training packages failed to recognize, or appreciate, is that supplemental ROE measures do not apply to, or limit, the obligation to take all appropriate actions in self-defense.⁷¹⁸ The mixing of mission accomplishment supplemental ROE concepts and self-defense concepts may prove dangerous for two critical reasons: (1) it unnecessarily complicates self-defense and creates the potential for hesitation; and (2) it creates uncertainty and confusion at the tactical level which can foster an attitude of acting independently whenever rules seem to stand in the way of mission accomplishment.

b. Remember That the Combatant Commander Must Approve All Modifications and Amplifications to the Rules of Engagement.

Why can't I find all the ROE in one place?

⁷¹⁴ *Id.* App. A, para. 5.

⁷¹⁵ SROE, *supra* note 3, para. 6.b.

⁷¹⁶ For OEF, see CJCS Message (S) 212315Z NOV 01, para. 3.H. [hereinafter OEF CJCS Message]. For OIF, see USCENCOM Message (S/REL AUS/GBR/USA) 121917Z MAR 03, para. 3.J [hereinafter OIF USCENCOM Message].

⁷¹⁷ SROE, *supra* note 3, para. 2.a. and 6.b.

⁷¹⁸ *Id.*

Another frequently reported problem created by using the term ROE in an imprecise manner is that operators and JAs reported frustration over having to search through voluminous material to find all of the “applicable ROE.” Certainly, if one applies a broad definition of ROE, which far exceeds that contemplated by the doctrinal definition of ROE, to include special instructions, fire control measures, tactics, techniques and procedures, and so on, then there literally is no end to the perpetual hunt for ROE. Often the problem that will follow close behind is that either a senior member of the operations staff or the commander will issue an edict to the “judge” to “put all the ROE on one 3 x 5 card or one slide and post it in the operations center.”

If the term “ROE” is used with precision the task of finding all of the applicable ROE is not as difficult as it may seem. It is not so simple, however, that it can all be put on one 3 x 5 card or one slide. To find all the applicable ROE according to doctrine for either OEF or OIF, JAs must look for all 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.⁷¹⁹

Breaking the process down, JAs must first determine who is a competent military authority to issue such directives. Supplemental ROE measures approved by either POTUS or SecDef or both are distributed to the responsible combatant commander by the Chairman of the Joint Chiefs of Staff. The responsible combatant commander will in turn distribute these supplemental measures to subordinate commanders.⁷²⁰

The Commander, U.S. Central Command (CDR, USCENTCOM) is the responsible combatant commander for both OEF and OIF. The first place JAs should look to find ROE applicable to operations conducted in the USCENTCOM AOR is in the USCENTCOM theater specific ROE as cited to in enclosure K to the Chairman’s instruction on the standing ROE.⁷²¹ The next place to find applicable ROE is the ROE authorization message for either OEF or OIF.⁷²² In the case of OEF, CDR USCENTCOM received ROE authorization serial two from the Chairman, Joint Chiefs of Staff (CJCS) via message.⁷²³ This message was promulgated to subordinate commanders via voice message and was never re-promulgated via record message traffic. The CJCS OIF ROE authorization message was re-promulgated by CDR, USCENTCOM by message.⁷²⁴ Both the CJCS message for OEF and the CDR, USCENTCOM message for OIF require subordinate commanders to submit any additional ROE/amplified ROE guidance to CDR, USCENTCOM for review and approval prior to dissemination.⁷²⁵

⁷¹⁹ JP 1-02, *supra* note 2.

⁷²⁰ SROE, *supra* note 3, App. A, para. 6.

⁷²¹ USCENTCOM theater specific ROE is contained in USCINCENT Message (S) 081600Z NOV 95, available at http://recluse.centcom.smil.mil/crisis/catdesks/jag/roe_info.

⁷²² As this publication only covers OEF and OIF, these are the only two operations cited. There are messages relevant to other areas of operations that are not cited herein.

⁷²³ OEF CJCS Message, *supra* note 7.

⁷²⁴ OIF USCENTCOM Message, *supra* note 7.

⁷²⁵ The OEF CJCS message provides as follows:

Given that all modifications and amplifications to authorized ROE must be submitted to CDR, USCENTCOM for review and approval, JAs need look no further than USCENTCOM to find all authorized ROE for either OEF or OIF. The USCENTCOM judge advocate directorate (CCJA) posted all applicable ROE for OEF and OIF on their SIPRNET webpage at http://recluse.centcom.smil.mil/crisis/catdesks/jag/roe_info. This page contains applicable ROE in the ROE authorization messages, the authorized ROE modification messages,⁷²⁶ and EXORDS that contain ROE for specific missions that don't necessarily apply to all OEF or OIF operations.⁷²⁷ There are also fragmentary orders (FRAGOs) posted on this page that provide ROE amplification guidance and direction. In some rare circumstances there are other memoranda or documents that provide amplification to applicable ROE.⁷²⁸

9. (U) ALL COMMANDERS WILL BE INSTRUCTED TO ENSURE THEIR PERSONNEL ARE FAMILAR WITH THE LAW OF ARMED CONFLICT AND WITH THESE ROE. IF OPERATIONALLY REQUIRED, SUBORDINATE COMMANDERS WILL PROMULGATE ADDITIONAL ROE/AMPLIFIED ROE GUIDANCE APPLICABLE TO UNITS UNDER THEIR COMMAND AND WILL SUBMIT THEM TO USCINCCENT FOR REVIEW/APPROVAL VIA GUIDANCE CONTAINED IN REF E (CJCSI 3121.01A). COMMANDERS WILL BE INSTRUCTED TO ENSURE THAT MODIFIED OR SUPPLEMENTAL ROE:

A. (U) REMAIN COMPATIBLE WITH THE INTENT OF THESE ROE.

B. (U) RESULT IN MORE DEFINATIVE GUIDANCE TO SUBORDINATE COMMANDERS.

C. (U) DO NOT IMPAIR THE COMMANDER'S INHERENT RIGHT OF SELF-DEFENSE.

OEF CJCS Message, *supra* note 7, para. 9.

The OIF USCENTCOM Message provides as follows:

8. (U) IF OPERATIONALLY REQUIRED, SUBORDINATE COMMANDERS WILL PROMULGATE ADDITIONAL ROE AND/OR AMPLIFIED ROE GUIDANCE APPLICABLE TO FORCES UNDER THEIR COMMAND AND SUBMIT THEM TO CDR USCENTCOM FOR REVIEW AND/OR APPROVAL VIA GUIDANCE CONTAINED IN REF B (CJCSI 3121.01A). COMMANDERS WILL ENSURE THAT MODIFIED OR SUPPLEMENTAL ROE:

8.A. (U) REMAIN COMPATIBLE WITH THE INTENT OF THESE ROE.

8.B. (U) RESULT IN MORE DEFINATIVE GUIDANCE TO SUBORDINATE COMMANDERS.

8.C. (U) DO NOT IMPAIR THE COMMANDER'S INHERENT RIGHT OF SELF-DEFENSE.

OIF USCENTCOM Message, *supra* note ___, para. 8.

⁷²⁶ The ROE modification messages are neither numerous or complex. In nearly every case the modification messages are only a few substantive sentences of straight forward text that is not difficult to understand.

⁷²⁷ There are some EXORDS that contain ROE not posted on the CCJA SIPR webpage due to classification. Some of these EXORDS may be transmitted via JWICS after the recipient is read into the applicable program.

⁷²⁸ Memoranda and/or any other documents not transmitted via record message traffic, whether that be SIPR, JWICS or GIANT message traffic, are to be avoided whenever possible. There were specific instances in OIF where amplification provided in a memorandum not transmitted via message traffic or posted on any webpage was known by the land component command but not the air component command and resulted in confusion. Both sides in the controversy elevated the matter to the combatant command level where the officers on duty also were unaware of the memorandum in question until early the next morning when one of the authors of the memorandum returned to duty and recalled something about it and was eventually able to retrieve a copy. The point being, in that particular instance an opportunity to strike a

With all this said, JAs must remember that they are not relieved from maintaining situational awareness with respect to current special instructions (SPINs), FRAGOs, policy memoranda, and information and position papers which also may effect operations. This task, however, should not prove to be overly burdensome because the operational law attorney already should be working with the operations section in developing these products or at a minimum reviewing these products and providing a legal review of them prior to their publication and dissemination.

As stated above, however, ROE and ROE amplification are not so simple that they can all be put on a small card or on one slide. No matter how much an operations chief or commander may lobby for “boiling down” or “consolidating” the ROE to a one page document, JAs must be able to articulate why it is dangerous to change the ROE format without obtaining an authorized modification of published amplification guidance message. The easiest way to illustrate the potential dangers of changing the format the authorized ROE are promulgated under is by pointing to instances where components have failed to support each other in the manner each component expected due to different understandings of how the ROE applies.

Even more problematic than attempting to “consolidate” the ROE is the publishing of supplemental ROE that has not been reviewed and approved by the combatant commander. After action reports indicate that subordinate units published their own supplemental ROE. Again this leads to situations where components will not be operating with the same understanding of what support can be expected from each other and friction will follow when targets are not serviced or responses to requests for fire support are delayed or denied.⁷²⁹

c. Judge Advocates Should Not Be Confused By No-Strike Targets.

The DoD dictionary defines “no-strike list” as follows:

A list of geographic areas, complexes, or installations not planned for capture or destruction. Attacking these may violate the law of armed conflict or interfere with friendly relations with indigenous personnel or governments. Also called NSL. See also law of armed conflict.⁷³⁰

target was lost that night because there was some very relevant amplification guidance that was published in a memorandum that was only known to a very limited number of people who were not on duty at the time.

⁷²⁹ One of the most common examples of how this leads to conflicts between components is in the area of cross border operations. When a subordinate land component command publishes its own supplemental measures that aren’t reviewed and approved by USCENTCOM and distributed to all other components, especially the air component command, it is very likely that there will be friction when the land component commander calls for a target to be serviced across a border.

⁷³⁰ JP 1-02, *supra* note 2. See also JOINT CHIEFS OF STAFF, JOINT PUB. 3-60, JOINT DOCTRINE FOR TARGETING (17 Jan. 2002).

Legal teams must remember that the no-strike list is maintained by the Defense Intelligence Agency (DIA). Targets are vetted by the national intelligence community prior to being placed on the no-strike list. Unit intelligence officers and analysts do not put targets on the no-strike list. Normally targets make their way onto the no-strike list by their status as a protected place, for example a hospital or place of worship. However, very similar to the discussion above concerning the importance of distinguishing between use of force in self-defense and use of force offensively for mission accomplishment, it is important to distinguish between targeting something on the no-strike list for attack and returning fire or calling for fire in self-defense on a no-strike list target.

No discussion of OEF and OIF ROE would be complete without reviewing a few examples of scenarios in which service members took fire from a mosque.⁷³¹ Military commanders have the inherent right and obligation to “use all necessary means available and to take all appropriate actions to defend that commander’s unit and other US forces in the vicinity.”⁷³² The take away from all of the discussion papers and FRAGOs written on the subject is that if a mosque is being used for a military purpose rather than a religious or cultural purpose, it loses its protected status and therefore may become a legitimate military objective when adequate military intelligence indicates it is being used for military purposes.

2. Non-Joint Doctrinal Terminology is Problematic in Joint Operations.

a. Understand What Troops in Contact Means.

Just as it is imperative to be precise in the use of doctrinal terms, it is also imperative to use non-doctrinal terms with caution. A prime example from targeting in OIF is the controversy which surrounded use of the non-doctrinal⁷³³ term *troops in contact*.⁷³⁴ The term *contact* is defined in Army Field Manual 101-5-1 as follows:

1. In air intercept, a term meaning, “Unit has an unevaluated target.” 2. In health services, an unevaluated individual who is known to have been sufficiently near an infected individual to have been exposed to the transfer of infectious material. (Army) - 1. Friendly, when two or more friendly forces make visual, physical, or communications interaction. 2. Enemy, when a friendly force engages an enemy force physically in hand-

⁷³¹ See Memorandum, CJTF-7, for CJTF-7 Commanders Subj: Military Operations in Buildings Dedicated to Religious Use (5 Jul. 2003) [on file with CLAMO].

⁷³² SROE, *supra* note 3, at App. A, para. 5.a.

⁷³³ Although the term *troops in contact* does appear in joint publications such as JOINT CHIEFS OF STAFF, JOINT PUB. 3-09, DOCTRINE FOR JOINT FIRE SUPPORT (12 May 1998) and JOINT CHIEFS OF STAFF, JOINT PUB. 3-09.3, JOINT TACTICS, TECHNIQUES, AND PROCEDURES, Chap. 5, para. 2(g) (8) (3 Sept. 2003) it is not defined in the DoD Dictionary, *supra* note 2; and is not explained in the Joint Doctrine Encyclopedia, available at http://www.dtic.mil/doctrine/joint_doctrine_encyclopedia.htm (16 Jul. 1997).

⁷³⁴ The significance of adopting a very broad interpretation of the term “troops in contact” becomes apparent upon reading the U.S. Central Command, Collateral Damage Estimation Policy and Methodology, para. 3.B. (8 Mar. 2003) (S/REL/AUS/CAN/GBR/USA) and the USCENTCOM FWD Message 121917Z MAR 03, ROE Serial One ISO Military Operations Against Iraq, para. 3.C. (OPLAN 1003V) [hereinafter OIF ROE Serial One].

*to-hand fighting or at the maximum range of weapons and visual or electronic devices. (See also close operations.).*⁷³⁵

The term *contact* Because this is a definition found in an Army field manual/Marine Corps reference publication, it is not accepted Joint doctrine. The term *troops in contact* has neither joint nor service definition. Despite this, some commanders advocated a broad reading of the term, arguing that given the definition of contact, the situation of troops in contact existed if friendly forces were within weapons range of enemy forces. USCENTCOM held that this reading was flawed in a number of ways not the least of which it failed to follow the plain reading under the field manual which requires a physical engagement of the enemy and failed to follow the intent of the USCENTCOM OIF collateral damage estimation methodology.⁷³⁶

b. Understand Point of Origin Targets.

As the insurgency in Iraq grew and U.S. Forces continued to be attacked in a “shoot and scoot” fashion, components began to see a need to deny the enemy the ability to launch attacks from registered positions. As a result, the term “point of origin targets” gained in popularity and usage. The term, however, was not always used to describe contemporaneous counter-fires return fire. The term was more often used to describe strikes on cold, unoccupied grid coordinates. This seemed to raise questions about how these potential *targets* were legitimate military objectives that could be targeted for kinetic destruction.⁷³⁷ Different theories were advanced in efforts to justify striking unoccupied positions from which U.S. Forces had previously been engaged by enemy mortar fire, but which at the requested time on target, had been unoccupied for several days.⁷³⁸ The air component command began to raise concerns over the military necessity of kinetically striking these *targets*, which often times were nothing more than dirt. Aside from being seen as a questionable use of high demand / low density (HD/LD) assets, concerns were raised that such strikes could be seen as a means to terrorize the civilian population and/or apply pressure on the civilian population to take action against insurgent forces to deny them access to their property for purposes of launching attacks against coalition forces.⁷³⁹ Other concerns raised included whether or not these strike

⁷³⁵ U.S. DEP'T OF ARMY, FIELD MANUAL 100-1-5, U.S. MARINE CORPS REFERENCE PUB. 5-2A, OPERATIONAL TERMS AND GRAPHICS, at 1-37 (30 Sept. 1997).

⁷³⁶ See MNF-I Fragmentary Order 599 (MNF-I Targeting Guidance), 071515Z JAN 05 [hereinafter MNF-I FRAGO 599] (providing a current interpretation of the term troops in contact).

⁷³⁷ For a definition of military objective, see, e.g., DEPT OF NAVY, ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 1-14M (NWP 1-14/MCWP 5-2.1/COMDTPUB P5800.1), para. 8.1.1. (1999)[hereinafter NWP 1-14] (defining military objectives for attack to be combatants and those objects which, by their nature, location, purpose, or use, effectively contribute to the enemy's war-fighting or war-sustaining capability and whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack. Military advantage may involve a variety of considerations, including the security of the attacking force).

⁷³⁸ See OIF ROE Serial One, *supra* note 7, para. 3.B. - 3.D. (setting forth categories of authorized target sets).

⁷³⁹ See The 1977 Protocols Additional to the Geneva Conventions, December 12, 1977, 16 I.L.M. 1391, arts. 57(1) and 57(4) (this treaty is not ratified by the United States).

were a deliberate destruction of the environment,⁷⁴⁰ as well as whether the strikes would produce excessive collateral damage in relation to the concrete and direct military advantage expected to be gained from such strikes.⁷⁴¹

Eventually the issue was raised to the USCENTCOM level for resolution.⁷⁴² A memorandum from the USCENTCOM Director of Operations to the CJTF-7 Director of operations was signed which placed restrictions and limitations on the use of point of origin air strikes.⁷⁴³

c. Judge Advocates Must Train Service Members on the Concept of Hostile Force.

“We have eyes on the *bad guys*! We have confirmation through multiple sources that there are *bad guys* on the objective.” Reports like these are all too common where there is a lack of specificity or precision in the identification of the object or objects of attack. It is not enough to simply state that people who appear suspicious are gathered in a questionable area, and therefore these people must be enemy forces.

While no one ever wants to slow the progress of a mission that will result in the killing or capture of hostile forces or identified terrorists, JAs do need to be the voice of reason, maintaining a degree of integrity in the process of vetting and identifying legitimate military targets to a much greater degree of fidelity than just the infamous *suspicious people in a questionable location*. In the words of a senior officer pressing his intelligence officers for more information after being presented with courses of action involving dropping ordnance on *bad guys*, “I mean we are talking about killing people here guys!”

d. Understand the Black List, Grey List, and White List Mean Definitionally.

⁷⁴⁰ For a discussion of environmental considerations in targeting, see NWP 1-14, *supra* note 28, para. 8.1.3., U.N. Doc. A/49/323 (1994), and San Remo Manual on International Law Applicable to Armed Conflict at Sea, para. 44, *available at* <http://www.icrc.org/IHL.nsf/52d68d14de6160e0c12563da005fdb1b/7694fe2016f347e1c125641f002d49ce?OpenDocument> (last visited April, 25, 2005). These sources provide that while collateral damage to the environment is not *per se* prohibited, damage or destruction of the natural environment not justified by military necessity and carried out wantonly is prohibited. One specific example of a point of origin strike was ordnance dropped on a grid coordinate identified to have been the point of origin of insurgent mortar fire two days prior to the U.S. strike. The point of origin was a section of cultivated farmland.

⁷⁴¹ See also NWP 1-14, *supra* note 28, Chap. 8 (further discussing what constitutes a lawful military target); San Remo Manual, *supra* note 31, para. 46 (requiring “feasible,” vice all “reasonable” precautions be taken to ensure only military objectives are targeted so civilians and civilian objects are spared as much as possible from the ravages of war).

⁷⁴² This is the situation footnote 19 where there was further ROE amplification provided in a memorandum from the USCENTCOM Director of Operations for the CJTF-7 Director of Operations. While the details of the memorandum are classified it is instructive to note even though taking innovative and creative approaches to problem solving is a good thing, inventing non-doctrinal terms may create confusion because it is unrealistic to expect all components to immediately accept non-doctrinal terms.

⁷⁴³ This memorandum is available on the CCJA SIPR web page under ROE references, as cited in para. 1.b., *supra*.

Judge advocates must understand that black lists are not kill lists. Many units produced their own black list, but JAs must understand that individuals placed on black lists must be evaluated like any other potential targets and meet the criteria for a valid military target before being engaged.

All too often, planning efforts will focus on *black list individual x*. Initially, it might seem acceptable to plan missions against *individuals* on a *black list* but care must be taken, however, to query the source of the black list. The *black list* most often referred to in OIF was the DIA list of the top fifty-five individuals in Iraq. However, the DIA black list had 230 names on it⁷⁴⁴ and certainly was not intended to be considered a list of individuals to be killed on sight. Among the DIA black list, grey list, white list, and unlisted individuals, there were some 2,500 names in the Iraq database that were individuals of interest. When other intelligence organizations and activities' lists were considered, it is easy to see that prior to launching a major planning effort against an *individual*, it is vital to identify why the individual is or is not a person authorized to be targeted for a kill or capture mission.

3. Judge Advocates Need to be Wary of Doctrinal Terms Used in NON-Doctrinal Ways.

a. Understand When it is Appropriate to Use Warning Shots.

What do you mean you're requesting bombs on deck as a warning shot?

During full spectrum operations in Iraq there was a novel interpretation of the term "warning shot." The DoD Dictionary defines warning shots as:

The firing of shots or delivery of ordnance by personnel or weapons systems in the vicinity of a person, vessel, or aircraft as a signal to immediately cease activity. Warning shots are one measure to convince a potentially hostile force to withdraw or cease its threatening actions.⁷⁴⁵

Leaving aside the academic discussions of whether or not the OIF ROE provided for non-maritime warning shots, and whether or not there is ever a circumstance that justifies firing rounds not intended to either destroy or kill, the issue of whether fixed wing air delivered ordnance might properly be considered a warning shot presented itself in Iraq. Another issue is whether such ordnance delivery requested through the normal air tasking order (ATO) cycle as opposed to requested as on-call close air support could appropriately be considered a warning shot.

Initially, it may seem odd to contemplate use of non-maritime warning shots in anything but the traditional crowd control or check point scenario. However, the doctrinal definition cited above did bring some skeptics around to consider the

⁷⁴⁴ The DIA black, grey and white lists may be found at http://caws-s.dia.smil.mil/pdb/lead_top.cfm?trigraph=irq.

⁷⁴⁵ JOINT PUB., *supra* note2.

possibility. Critics of this type of novel interpretation of the term “warning shot” held that live ordnance may never be dropped on anything but: (1) a valid military target; or (2) an approved training range. Critics also opined that requesting live ordnance drops through the normal ATO cycle indicated that there was no *immediate* necessity to signal a potentially hostile force to withdraw or cease its threatening activity. The critics went on to say that dropping bombs under those circumstances was tantamount to deliberately terrorizing the civilian population. Ultimately, the practice of dropping bombs as warning shots was discontinued.

b. Understand the Definition of Time Sensitive Targets.

In both Afghanistan and Iraq there were many reports of confusion over exactly what constituted a time sensitive target (TST). The reason why this is significant is that under both OEF and OIF ROE, true TSTs could trigger certain supplemental ROE provisions designed to expedite the servicing of TSTs.⁷⁴⁶ The DoD dictionary defines TSTs as: Those targets requiring immediate response because they pose (or will soon pose) a clear and present danger to friendly forces or are highly lucrative, fleeting targets of opportunity.⁷⁴⁷ The Joint Doctrine Encyclopedia defines TSTs with the following:

Time-sensitivity can play an important part in categorizing a target and determining its appropriateness as a special operations target. Time-sensitivity can be viewed from either a targeting or mission planning perspective or a combination of both, as in the case of personnel recovery missions. A target is time-sensitive when it requires an immediate response because it poses (or will soon pose) a danger to friendly forces or is highly lucrative, fleeting target of opportunity. Time-sensitive targets are usually mobile, such as a mobile intercontinental ballistic missile, or they may lose their value quickly, such as a bridge being used for an enemy advance or withdrawal.⁷⁴⁸

During major combat operations, the TST process seemed to work well. However, as time went on and the number of pure doctrinal TSTs dwindled and the number of insurgent targets increased there was a tendency to stray from the doctrinal definition and the doctrinal TST process in order to prosecute the new emerging target sets as TSTs and take advantage of the benefits of working a target as a TST. The further from doctrine commanders and staff strayed, the more confusion and friction entered into the TST process.

While confusion and friction in the TST process was peaking, there was a turn-over of significant leadership billets within CENTCOM. This transition period provided an opportunity to brief the new staff members. In this process, questions were posed as

⁷⁴⁶ See OEF CJCS Message, *supra* note 7, para. 3.C.(1) (outlining OEF TST ROE); OIF USCENTCOM Message, *supra* note 7, 3.C. (describing OIF TST ROE). See also MNF-I FRAGO 599, *supra* note 2.

⁷⁴⁷ JOINT PUB. 1-02, *supra* note 2.

⁷⁴⁸ *Id.*

to how targets were classified or not classified as TSTs. A response provided was that *the ROE says all TSTs must be of a specific type or category*. This proved to be inaccurate from a doctrinal perspective but accurate from a policy perspective possessed internally within the command. Upon recognition that this was driven by the internal command policy and not doctrinal constraints, the target set could appropriately be readjusted to better accord with the doctrinal definition of TSTs.⁷⁴⁹

c. Understand Who is a Terrorist.

The DoD dictionary defines terrorist as “[a]n individual who uses violence, terror, and intimidation to achieve a result.”⁷⁵⁰

There are several lists of terrorists in the public domain—there are State Department terrorist lists and human rights group terrorist lists, for example. For the JA providing counsel in either OEF or OIF, however, the only listing of terrorists that had significance for ROE purposes is found in the promulgated ROE messages from either the Joint Staff or USCENTCOM.

When using the term *terrorist* in the context of either OEF or OIF ROE, the term had more specific meaning and greater significance than the simple joint doctrinal definition provided in the DoD dictionary.⁷⁵¹ A valid learning point for JAs is to be vigilant for loose or sloppy use of the term “terrorists” in the context of identification of legitimate military targets. Again, it is not uncommon to hear briefers citing that positive identification of *bag guys* has been established. Since no doctrinal definition of *bad guys* exists, it is critically important to know who the *bad guys* are and why they meet the criteria to be a valid military target.

4. With Rules of Engagement Issues, Use the Technical Chain of Command to the Maximum Extent Possible.

a. Notify Higher Headquarters Judge Advocates Before Forwarding Requests for Supplemental Measures.

Judge, what do you know about this ROE request?

All understand that ROE are a product of the operations section and that JAs play a supporting role in the ROE process. Given this, however, it remains critical for JAs involved in the ROE process to use their technical chain to the maximum extent possible. The worst example of not utilizing the technical chain occurs when, for example, a request for additional supplemental ROE measures makes its way up the chain of

⁷⁴⁹ See JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-05.2, JOINT TACTICS, TECHNIQUES, AND PROCEDURES FOR SPECIAL OPERATIONS TARGETING AND MISSION PLANNING (21 May 2003) and U.S. DEP’T OF ARMY, FIELD MANUAL 3-60.1/MCRP 3-16D/NTTP 3-60.1/AFTTP(I) 3-2.3, MULTISERVICE TACTICS, TECHNIQUES AND PROCEDURES FOR TIME SENSITIVE TARGETS PUBLICATION (20 Apr. 2004).

⁷⁵⁰ JOINT PUB. 1-02, *supra* note 2.

⁷⁵¹ See OEF CJCS Message, *supra* note 7, para. 3.C.; OIF USCENTCOM Message, *supra* note 7, at paras. 3.B.(4), 3.C.(3), 3.D., 3.F.(1) and 4.I.

command and the first time higher headquarters JA see or hear of the request is through record message traffic. This lack of communication through the technical chain of command makes it very difficult for the higher headquarters JAs to support the request to their operations division. Two likely results in this situation are a delay as critical justification is sought and provided or a denial of the request for new ROE.

Using the technical chain of command may also save time in other ways. For example, if a unit coordinates a request for supplemental ROE measures up the technical chain of command, the higher headquarters may be able to facilitate communication between the respective operations divisions to arrive at the common understanding that: (1) the supplemental measures being discussed are not necessary since authority already exists in the current measures; or (2) requesting the particular supplemental measures is premature prior to submission of a concept of operations and request for an execute order.

b. Consider the Unit Mission Prior to Requesting Additional Supplemental Rules of Engagement Measures.

Judge, we need new ROE.

One of the most common ROE traps JAs fall into is to spin into a flurry of activity to request additional supplemental ROE measures in support of the commander's intent to do x , when x is beyond the scope of the commander's assigned mission(s) and no authority to do x exists in the current EXORD. In this situation, requesting additional supplemental ROE measures is not the answer. The problem often is that while the tactical level commander may indeed want to do x , without being assigned a mission or given an EXORD to do x , the commander has no authority to do x , regardless of any ROE provisions. The answer, and the best way to support the commander's desire to accomplish x , is to help draft a CONOPS and a request for an EXORD to do x . Within the draft EXORD, it is prudent to include justification for additional supplemental ROE measures needed to accomplish the mission. This is a perfect opportunity to get informal input from the technical chain of command to hasten the formal approval of the CONOP and transmission of an actual EXORD.

It is critical to note the JA needs to have a good working relationship with the operations directorate and know exactly how, when, and to what extent, preliminary planning efforts may be shared through technical chains of command. Sending something through technical channels without the appropriate level of visibility within the operations directorate is a mistake to be wary of making.

Also, when the operations officer says, "Judge, we need new ROE," JAs must ensure the supported personnel realize the limits of their commander's authority to provide amplified ROE guidance or to promulgate additional ROE without first obtaining review and approval from USCENTCOM.⁷⁵² Some after action reports reviewed cite a lesson learned is to serialize the additional supplemental ROE measures published.

⁷⁵² See *supra* note 16 (outlining specific OEF and OIF guidance).

While it may be appropriate to serialize all promulgations of supplemental ROE measures, JAs must remember that the only level of command authorized to promulgate ROE is the combatant command. Subordinate units are not authorized to publish additional supplemental measures or to provide amplification on ROE guidance without the review and approval from USCENTCOM.⁷⁵³ To avoid situations where supported and supporting components disagree about the nature and extent of support, *e.g.* fire support, to operations is authorized under the ROE, it is critical to submit all such ROE amplifications or additions to USCENTCOM for that command's review and approval as well as promulgation to all components. When a component receives amplified ROE guidance and/or additional ROE measures from the combatant commander there are invariably fewer questions, about whether or not the requested support is authorized under the ROE.

c. Use Real-World Incidents When Drafting ROE Training Scenarios.

The technical chain of command can be particularly useful when preparing ROE training packages or plans. As with all other amplified ROE guidance provided, the products must be reviewed and approved by USCENTCOM prior to dissemination.⁷⁵⁴ During the process of preparing the products for transmission through the chain of command for this review and approval, undoubtedly somewhere along the technical chain of command someone will be able to provide copies of products produced in the past that can serve as a good baseline to modify and adjust based on the current situation.

One common ROE training technique cited in almost every after action report reviewed is some version of training using scenarios derived from the daily significant acts (SIGACTS) reports. It has been proven time and again to be very useful to use unclassified descriptions of actual events to stimulate thought and provoke discussion on how to learn from the experience of others and to attempt to improve tactics, techniques, and procedures wherever there is room for improvement.

A significant learning point associated with this method of training, however, is to avoid the temptation to mix and match self-defense and mission accomplishment ROE concepts. Almost invariably the scenarios derived from the SIGACTS reports are self-defense scenarios where the ultimate question of responding with deadly force is raised. As mentioned in subparagraph 1.a. above, these are self-defense scenarios and are not limited or shaped by *any* supplemental ROE measures, to include any such measures aimed at obtaining any particular level of identification prior to employing force. It is very important to keep use of force in self-defense training scenarios separate and distinct from use of force for mission accomplishment ROE training scenarios.

⁷⁵³ http://recluse.centcom.smil.mil/crisis/catdesks/jag/roe_info.

⁷⁵⁴ See *supra* note 16.

5. *Be Prepared to Advise on Cross Border Operations and Effects.*⁷⁵⁵

Discussion of specific rules, permissions, and limitations under either OEF or OIF ROE is beyond the scope of an unclassified forum. It is helpful, however, to mention some of the issues to consider in the area of cross border operations or effects, without referring to the language of existing ROE documents.

a. Advise Commanders on Non-kinetic Effects that Cross International Borders.

The majority of non-kinetic cross border effects are either strategic communications (STRATCOM) effects or information operations (IO) effects. When evaluating STRATCOM/IO plans, JAs must first identify the target audience and the desired effect. Often times in both Afghanistan and Iraq, great desire existed to spread STRATCOM/IO messages across the borders of neighboring countries, like Pakistan and Iran.⁷⁵⁶ When the IO plan has a target audience that may be across an international border it is critical to examine the method of dissemination of that message—is it a leaflet drop, a radio broadcast, television broadcast, internet messages,⁷⁵⁷ hand bills being carried across a border, or some other creative means of disseminating the message? In all such cases JAs must be prepared to give accurate advice on permissions and limitations under not only the ROE but international law as well. .

One of the simplest methods of solving such border problems is to have permission from the nation whose border is being affected and/or crossed. Because this is the easiest way, however, it follows that it is not the typical case. When the inevitable planning effort proposes effects across an international border, even if the JA does not have the specific ROE citation or the latest FRAGO or guidance message, one of the most important contributions the JA can make to the planning effort is to remind those involved of the level of authorization required to approve execution of a plan involving cross border effects. It is not uncommon for those involved in planning efforts to fail to fully appreciate the significance of intentionally producing effects across international borders.

⁷⁵⁵ The baseline ROE for cross border operations or effects for OEF missions is found at CJCS OEF Message, *supra* note 7, para. 3.E. (S). For OIF missions the starting point is OIF USCENTCOM Message, *supra* note 7, para. 3.F. (S REL AUS, GBR, USA). There are also subsequent guidance documents relevant to operations that have cross border implications that are critical to read and understand thoroughly before advising on cross border operations.

⁷⁵⁶ Although Horn of Africa (HOA) operations are not specifically addressed in this publication it is worth noting here that in the area of IO that HOA experiences show that U.S. Ambassadors to host nations are critical to gaining permission from host nations for dissemination of either IO products or broadcasts.

⁷⁵⁷ Judge advocates also need to be very conscious of international borders when reviewing electronic warfare plans and computer network operations. *See also* the International Telecommunication Convention, Nairobi, 6 Nov. 1982, 32 U.S.T. 3821; T.I.A.S. 9920 (entered into force for the United States 10 January 1986)(for implications of intentionally broadcasting into sovereign nations without their permission and the effect of a state of international armed conflict). *See also* the United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF.62/122), 21 I.L.M. 1261 (entered into force on Nov. 16, 1994)(for implications of broadcasting from the high seas into a sovereign nation without that nation's consent).

Other areas where non-kinetic effects may have a propensity to carry over or cross international borders are in the areas of electronic warfare (EW) and computer network operations (CNO). Judge advocates need to be aware that specific ROE authorizations are required for EW and CNO.⁷⁵⁸ The most common form of EW is jamming of either communications or radar signals. These effects seem harmless enough to operators and planners who may not realize or appreciate that these acts are normally considered hostile acts which can justify a necessary and proportional response up to and including deadly force. Accordingly, JAs should review EW plans and ensure adequate authority exists to execute as planned or, if needed, help draft the required message traffic requesting EW authorities.

Similarly, computer network operations have great potential to cross international borders. Before proceeding with CNO, the JA must work closely with the special technical operations (STO) representatives. The STO representatives should have legal points of contact for the judge advocate. Prior to execution, every STO operation goes through a review and approval process which includes a legal review. In cases where a STO is executed by an operational level command without a JA, or a JA read into the program, the legal review will be preformed at the next level in the chain of command with a JA read into STO programs. A good learning point for JAs is to be aggressive in insisting upon being read into all programs in which the unit is participating. A JA cannot provide adequate advice or counsel on programs and operations the JA does not know about. Ignorance is no excuse. Get read in.

b. Advise Commanders on Kinetic Effects Across International Borders.

Kinetic effects across international borders seem to get the attention of planners a little more quickly than non-kinetic effects, but there are still those who do not understand the issues involved. While there certainly may be authorities that exist which allow kinetic effects across international borders, this is an area where the JA must be confident he or she has the most current guidance from the combatant command and below. The JA must make sure they are synchronized with the operations section with respect to cross border operations. If a discrepancy exists, resolve it quickly. Judge advocates should not accept answers that involve ROE classified above their “need to know.” If such a thing exists, JAs must be read in to evaluate the message content to be positioned to provide accurate advice on cross border operations.

c. Advise Commanders on Pursuit Across International Borders.⁷⁵⁹

The specific permissions, restrictions, and guidance pertaining to pursuit across international borders are generally classified. However, the guidance and documentation for both OEF and OIF are not hard to find on the secure internet protocol routing network (SIPRNET or SIPR), and advice in these areas is advice JAs must be able to provide

⁷⁵⁸ See SROE, *supra* note 3.

⁷⁵⁹ See USCENTCOM theater specific ROE message for guidance relevant to personnel recovery operations in the USCENTCOM AOR.

without hesitation or reservation. Little imagination is required to be able to predict the amount of attention cross-border kinetic effects are likely to draw whether or not executed properly and within the bounds of authorities in existence at the time of execution. Whether the JA believes cross border kinetic effects are a likely scenario at their level of operation, they need to know where to find the current authorities and keep abreast of any changes or requests for changes in this area.

6. *Understand the Uses of Riot Control Agents.*

Judge advocates must be familiar with Executive Order (EO) 11850 and the accompanying documents that provide the principle foundation for DoD use of RCAs and in particular the perpetual question of permissions or restrictions concerning the use of pepper spray and CS (teargas) rounds. For the specific language of the OEF and OIF ROE refer to the base documents.⁷⁶⁰

A learning point concerning RCAs is that an extraordinary amount of time and planning effort goes into arguing over use of RCAs even though they are seldom, if ever, actually used. Further, there are very few situations that present themselves where use of RCAs, consistent with EO 11850, would help units successfully execute a mission. There is, however, never a shortage of proposed uses of RCAs which are clearly inconsistent with EO 11850. Arguing over these proposals often bogs down planning for missions, which but for the arguments over RCAs, would most likely be approved relatively quickly. The bottom line is that before wrangling over RCA use jeopardizes a planning effort entirely, the JA should critically examine the utility of including a controversial RCA request.

If there are legitimate instances which can be cited where the use of RCAs would substantially facilitate mission accomplishment consistent with EO 11850, however, these instances need to be organized and consolidated in support of such an additional supplemental ROE request.

⁷⁶⁰ See OEF CJCS Message, *supra* note 7; OIF USCENTCOM Message, *supra* note 7. If the JA's command has operational control of any special forces, he or she must ensure they also look at those force's EXORD for any potential further authorities or restrictions concerning RCAs.

C. COALITION ISSUES

Lieutenant Colonel Richard Batty MBE⁷⁶¹

On 8 June 2004, UN Security Council Resolution (UNSCR) 1546 was passed, endorsing the formation of the Interim Iraqi Government. On 28 June 2004, the Coalition Provisional Authority ended the country's occupation and transferred authority to the Iraqi Interim Government, thereby ending the second chapter of Operation IRAQI FREEDOM (OIF). UNSCR 1546 extended the mandate of the Coalition's military force in Iraq under the title of Multi-National Force-Iraq (MNF-I) and its subordinate command, Multinational Corps Iraq (MNC – I). During the time of this Publication, the coalition comprised some 25 countries with forces deployed to Iraq.

The British House of Commons Defence Committee's sixth report of the 2004 -05 session acknowledges that the transition from war-fighting to peace enforcement proved to be one of the major challenges:

It is difficult to avoid concluding that the Coalition, including British Forces, were insufficiently prepared for the challenges represented by the insurgency....We are concerned that there is some evidence that the extensive planning, which we all knew took place in both the U.S. and the UK, did not fully respect the extent of that range.⁷⁶²

That being the case, it would seem impossible for all the coalition legal advisors to have prepared fully for the challenges they might face as "operations since May 2003 saw the coalition confronted by a range of post-conflict challenges many of which it seemed not to have foreseen."⁷⁶³ The amount of training, both military and legal, was also deemed by some coalition members to be insufficient.⁷⁶⁴

It is important for members of the coalition to address and learn from the identified legal issues. The British Prime Minister's Strategy Unit published a Report stating, "[f]or the foreseeable future, United Kingdom foreign policy is likely to underpin its conflict prevention activities with the regeneration or sustainment of fragile states."⁷⁶⁵

⁷⁶¹ BA. (Hons), British Army. Adjutant Generals Corps (Army Legal Services) (AGC-ALS). Currently Director Coalition Legal Operations, Center for Law and Military Operations, The Judge Advocate General's Legal Center and School.

⁷⁶² See HOUSE OF COMMONS, SIXTH REPORT FROM THE DEFENCE COMMITTEE, IRAQ: AN INITIAL ASSESSMENT OF POST CONFLICT OPERATIONS, H.C. 65-I, 2004-05 SESS. (2005)[hereinafter House of Commons Sixth Report].

⁷⁶³ *Id.*

⁷⁶⁴ Report submitted by Captain Ardan Flowaij, Legal Advisor, Netherlands Battlegroup (NLBG), Camp Smitty, Iraq to CLAMO (Feb., 2005)(on file with CLAMO)(stating that further pre-deployment training in the NLBG was required in communications and combat drills as well as specific legal problems in the NLBG AOR. As this training did not occur in the Netherlands, it had to occur while deployed which was not the optimal solution).

⁷⁶⁵ PRIME MINISTER'S STRATEGY UNIT, CABINET OFFICE, INVESTING IN PREVENTION, AN INTERNATIONAL STRATEGY TO MANAGE RISKS OF INSTABILITY AND IMPROVE CRISIS RESPONSE (2005)(U.K.). See also,

Clearly, the U.K. understands that this concept will be a key feature in each country's foreign policy in the foreseeable future.⁷⁶⁶ The goal of the U.S. for future of operations appears to be much the same, "to make stabilization and reconstruction missions one of [its] core competencies."⁷⁶⁷ Accordingly, lessons learned in the area of coalition operations in conflict prevention is clearly an area that shall continue to be studied.

1. Previous, Continuous, and Regular Interaction during the Mission Assists and Improves the Likelihood of Mission Success and Understanding between Coalition Partners and the Host Nation.

Post May 2003, both Operation ENDURING FREEDOM (OEF) and OIF continued to be multinational operations and coalition actions, consisting of multiple willing states led by the U.S. In both OEF and OIF, many coalition personnel worked with each other for the first time but, apparently, without specific coalition legal pre-deployment training for these particular operations or significant multi-national legal exercises.⁷⁶⁸ The post-conflict situation facing the coalition did not match the pre-conflict expectations; therefore, many of the differences among the coalition have only become clear with the benefit of hindsight. However, other interoperability issues could have been addressed prospectively. Since the U.S. was by far the biggest contributor of forces to the Coalition,⁷⁶⁹ coalition lawyers would have benefited from working with U.S. forces before ground combat began. In the alternative, coalition forces could have better understood the differences in opinion, approaches and practices more easily had they attended a relevant course at the U.S. Army's Judge Advocate General's Legal Center and School in Charlottesville, Virginia. In the absence of previous operational coalition experience, it would have been quite useful to have training or guidance on coalition operations,⁷⁷⁰ for example, on the issues that a UK coalition officer could address, i.e. what was U.S. national and what was coalition work.⁷⁷¹

U.K. JOINT WARFARE PUBLICATION 3-50 (2d Ed.), THE MILITARY CONTRIBUTION TO PEACE OPERATIONS at 1-1. (2003) (hereinafter JWP 3-50)

⁷⁶⁶ See JWP 3-50, *supra* note 5.

⁷⁶⁷ See DEFENSE SCIENCE BOARD, OFFICE OF THE UNDER SECRETARY OF DEFENSE FOR ACQUISITION, TECHNOLOGY, AND LOGISTICS (Dec., 2004) at 14.

⁷⁶⁸ See E-mail from Lieutenant Colonel Graham Coombes, Office of the General Counsel, Coalition Provisional Authority to CLAMO (18 Apr. 2005) [hereinafter Coombes E-mail] (on file with CLAMO), (noting the absence of this type of training but stating that coalition legal officers seemed to find real value in any multi-national experience they have had in their earlier careers).

⁷⁶⁹ In February, 2005, the U.S. had some 150,000 service personnel out of a total of around 175,000. See House of Commons 6th Report *supra* note 2 at 248. As of 18 February 2005 in addition to the U.S. and UK, the contributions were Italy (3116), Netherlands (1368), Denmark (485), Lithuania (131), Czech Republic (102), Romania (747), Japan (536), Bulgaria (495), Mongolia (130), Poland (2,500), Slovakia (105), Ukraine (1589), Albania (74), Kazakhstan (29), Macedonia (34), Azerbaijan (154), Estonia (47), Latvia (117), El Salvador (380), South Korea (3,700), Australia (282), Armenia (46), Norway (9). *Id.*

⁷⁷⁰ E-mail from Lieutenant Colonel Whitwham, Chief Military Operations Law, Office of the Staff Judge Advocate, Multi-National Coalition Iraq to CLAMO (2 Jun. 2005)(on file with CLAMO)[hereinafter Whitwham E-mail]

⁷⁷¹ *Id.* At times Lt Col Whitwham felt as if he was doing a U.S. officer's job in a U.S. HQ rather than a coalition officer's job in a coalition HQ. He was often asked questions on U.S. national policy, regulations, or U.S. investigations – areas not properly in his area of expertise. *Id.*

a. All Coalition Legal Advisors Need to be Aware of Other Nation's Interpretations of International Law, the Different Methodologies Used by Coalition Members to Interpret International Law, and the Different Law and Policy Applied as a Result of these Methodologies.

Interpreting international law is not an exact science and members of the coalition used fundamentally different approaches in interpreting international law. Judge advocates tend to use their own U.S. regulations (which should comply with international law) to reach a legal conclusion. British legal officers tend to look at the source of the law itself. Coalition officers will not, and cannot, be expected to be familiar with the U.S. Army Regulations and Field Manuals. However, because U.S. policy and interpretations are incorporated in the U.S. Army regulations, coalition officers may wish to separate U.S. domestic policy from strict international law.

These different approaches did not necessarily lead to problems between coalition members,⁷⁷² but at times there appears to have been a disconnection between the view of one coalition partner and another.⁷⁷³ Fundamental cultural, legal or political differences in the interpretation of international law existed, for example, as to the role of the CPA.⁷⁷⁴ Further, the language coalition partners used in documents could vary enormously and lead to challenges.⁷⁷⁵ Given the above, effort should be undertaken by all coalition members to address these challenges during routine interoperability training and exercises so as to mitigate these challenges while conducting contingency operations.

b. Coalition Legal Advisors Must be Aware of the Domestic Law, Politics, Civilian and Military Culture, and History of Coalition Members and the Host Nation.

In addition to understanding one's own domestic law, policy, and interpretation of international law, coalition partners must also understand the host nation's laws, policies, and interpretation of international law--admittedly, it can often be difficult for coalition

⁷⁷² See Coombes E-mail, *supra* note 8 (noting that the U.S. and UK forces had different geographical AOR which allowed them to follow their own legal and policy considerations, and avoid any blatant conflict of views to surface and damage the coalition).

⁷⁷³ See, e.g., *id.* (noting that the U.S. and the UK could have substantively disconnected views on the law of detention. Lt Col Coombes noted that some coalition members believed that U.S. lawyers would effectively structure their legal opinions to conform to U.S. Government policy. According to Lt Col Coombes, it is possible that U.S. lawyers regarded the policy as the correct legal position and, therefore, substantiated their legal opinion with international law when possible. Regardless of the impetus, the U.S. policy would be put into effect in any event.)

⁷⁷⁴ *But cf., id.* (stating that often the Australian and British views were very similar and that these two countries generally found it very easy to work together. Both countries were of the opinion that international law permitted the CPA to make the minimum changes to the Iraqi law necessary for the occupation, and that it was not the role of the CPA to overhaul the Iraqi system with a U.S. model as a template--i.e. with detailed regulations on the banking system and intellectual property. Although the British and Australians did not share the U.S. view on the role of the CPA, both countries reviewed U.S. proposals and made constructive comments on any proposals).

⁷⁷⁵ See, e.g., *id.* (referring to the interplay between the British Military and the UK Foreign and Commonwealth office (FCO), and the U.S. military and U.S. civilians. Lt Col Coombes notices that each had a very different style of drafting documents dealing with draft UN resolutions in the run up to the handover of power from the CPA to the Iraqis).

partners to accurately assess the host nation's laws.⁷⁷⁶ Furthermore, it is also necessary for coalition partners to be aware of coalition partners' legal systems and fundamental laws that may impact operations. British and Australian legal officers have the benefit of similar procedures and approaches to legal issues. One way to fill this apparent gap in understanding is to provide lawyers in the coalition with advanced training on the similarities and differences in approaches and practices, thereby identifying and addressing potential frictions early.

Both U.S. and other coalition officers need a basic awareness of each others' history, constitution, force levels and structure,⁷⁷⁷ as well as cultural differences, and all need to anticipate how these factors will impact decisions, interpretations and conduct.⁷⁷⁸ It may not be necessary for members of the coalition to have detailed knowledge of other coalition partners' applicable domestic law and policy, but a limited comprehension can aid understanding of any delays in implementing requested actions. One method for providing coalition members with context for their coalition partners' laws and policy might be through additional training for coalition legal officers in pre-deployment training. The British and Australian exchange officers at CLAMO may be able to assist the U.S. with this effort. In addition, U.S. legal exchange officers based at the OP law Branch in Warminster UK and Sydney Australia could assist UK Army Legal Services (ALS) Officers and Australian Army Legal Corps (AALC) Officers prior to deployment

For U.S. personnel, proclamations by the President and the Secretary of Defence effectively constitute orders, in stark contrast to decisions by the UK Ministers which do not carry the same weight. The U.S. President is Commander in Chief of U.S. forces and has significant authority in dealing with U.S. international affairs. Therefore, his decisions on policy carry great weight for U.S. officers. In the UK, however, the Queen is the titular head of the armed forces, and the Prime Minister and government have the de facto authority.

Similarly, a more developed understanding of the different cultural backgrounds coalition members bring to such operations is crucial. A telling example is realized in

⁷⁷⁶ See E-mail from Professor Charles H B Garraway, Stockton Professor of International Law, U.S. Naval War College, to Lt Col Batty, Director Coalition Legal Operations, Center for Law and Military Operations, The Judge Advocate General's Legal Center and School (7 Mar. 2005) (on file with CLAMO) (recognizing that effective transitional justice requires one to access local legislation, local expertise, and involve local Iraqis from the start. Professor Garraway acknowledges that it is difficult to obtain translations of relevant Iraqi legislation, e.g. the Criminal Procedure Code, and there were some translation problems with the documents that were collected).

⁷⁷⁷ See, e.g., E-mail from Major John Bridley to CLAMO (11 Mar. 2005) (on file with CLAMO) (recognizing that, perhaps understandably, U.S. judge advocates would not realize that the Australian politicians had considerable ability to reach their deployed personnel because the force levels were so small).

⁷⁷⁸ See, e.g., Major Nick Simpson, Legal Advisor HQ 1 Mechanized Brigade, After Action Report. (3 Nov. 2004) [hereinafter Simpson AAR](on file with CLAMO)(noting that HQ 1 Mechanized Brigade introduced the provisions of the Regulation of Investigatory Powers Act 2000 (RIPA), which provides the rules for the interception of logs, phone calls and e-mails of suspected criminals by the security and intelligence services. These provisions only directly impacted the British, but required some training on the appropriate procedures, extra staff work, and co-ordination).

comparing the U.S. concept of the duty day not ending until all missions are complete with those of other nations. Such cultural differences must be identified and understood to make coalition operations more effective.⁷⁷⁹

Another important example of the need to understand aspects of coalition partners' laws is the applicability of the European Convention of Human Rights (ECHR) to those coalition partners bound by it.⁷⁸⁰ Other coalition partners may not have faced the same dilemma, but British forces were required to gather evidence when a fatal shooting occurred to be prepared to defend the British Government in the event litigation was initiated against it in civil courts. Without some form of investigation and evidence collection, it is very difficult to refute potential claims, and it remained uncertain as to the precise legal environment governing operations in the post conflict operation.⁷⁸¹ There was also the fact that while persons detained by British forces would be transferred to the Iraqi authorities at the earliest opportunity rather than held in internment, good quality tangible evidence of criminal activity obtained during detention operations was necessary for a successful prosecution.⁷⁸² All coalition forces seemed to need training on basic evidence gathering techniques and evidence preservation in order to preserve prosecution options later. This lesson also extended to any coalition partner having a role in an operation where individuals might be released to Iraqi authorities for prosecution.

2. Cooperation and Uniformity of Approach and Practice Concerning the Use of Property and Facilities is Beneficial to all Coalition Members.

Still another lesson learned is that of the necessary to maintain a repository of relevant archives and a documentary trail of the use and responsibilities of areas and facilities, because coalition members may change or move between facilities.⁷⁸³ Judge advocates serve their clients well when they anticipate these challenges and are prepared for them when they arise.

⁷⁷⁹ See, e.g., Coombes E-mail, *supra* note 8 (noting that many U.S. officer colleagues of Lt Col Coombes at the CPA worked close to 18-hour days with almost a missionary zeal, a practice which Lt Col Coombes did not adopt. The U.S. culture appeared to be, if the boss was in the office so were all of his staff. In Lt Col Coombes' opinion, this practice could be counter productive because some staff were simply too tired to be effective and fresh).

⁷⁸⁰ See *Al-Skeini and Others v. Secretary of State* [2005] H.R.L.R. 3 (Q.B. 2004) (holding that the UK was obliged to comply with the ECHR and the Human Rights Act because the legislation applied to UK military bases as territory under the control of the UK).

⁷⁸¹ See Simpson AAR, *supra* note 18.

⁷⁸² *Id.*

⁷⁸³ See Captain Chris Hamers, Royal Netherlands Army, After Action Report (15 Mar. 2005) [hereinafter Hamers AAR] (on file with CLAMO) (noting that there was a lot of discussion in Afghanistan when the handover of the ISAF was drawing closer. Various leases had been granted by the Afghan Transitional Authority (ATA) but the terms of these leases was not always clear with regard to reviews of the terms at a given time and when there was a change of an incumbent nation or unit and important paperwork was missing. The issues also affected camp development and expansion and led to unnecessary difficulties with 'entrepreneurial officials'. Issues also existed between coalition members as to ownership and control of buildings and the costs of improving them. A troop contributing nation may wish to sell a building to a new troop contributing nation when their forces leave or relocate. A six month cycle of purchase, improvement and sale could have been avoided if NATO had purchased all troop contributing nations 'owned' buildings within COMISAF's control).

3. *Coalition Communications and Coalition Cohesion Must Be a Priority.*

Full access to the SIPR net and JAGC net would improve efficiency and compatibility of coalition legal partners.

Legal officers' time and that of the other office staff was wasted by non U.S. judge advocates having to ask questions and be briefed on the current situation, or other matters, upon which everyone else in the office had been informed via the SIPR net. This could lead to coalition legal officers feeling "blind" and disadvantaged without SIPR access, or at the very least being poorly informed as they would be just about the only person that did not see things flash across their computer screen. If a coalition legal officer was in a position of responsibility and including responsibility for other coalition lawyers this, through no fault of his own, could affect his credibility when compared to his U.S. counterpart and this may reflect in the perception of others and affect the officer's ability to contribute fully and be an effective manager.⁷⁸⁴

It would appear that the CPA multinational lawyers who had access to an internal e-mail system did not have quite the same communication problems. However, there were other problems and access to the SIPR net was difficult as their never appeared to be an intent that this communication system would be used by coalition officers.⁷⁸⁵

A lesson to learn for both the U.S. and the British was that even in June 2004 there was not particularly good communication from the office of the SJA at Multi-national Corps Iraq to the UK and MND SE.⁷⁸⁶ This issue simply made it more difficult for Army Legal Services officers to obtain a UK or other coalition members' view point, or for the coalition members to consult with each other. Furthermore, it inhibited the potentially beneficial contribution of views other than those held by U.S. forces. It was, accordingly, important for ALS officers to remain aware of the British view/perspective

⁷⁸⁴ See Whitwham E-mail, *supra* note 10, (noting that the Divisions were primarily using SIPR. Lt Col Coombes stated that many units did not have CENTRIX on their desk so it was hardly used, but this is the system that embedded coalition officers had access to. CENTRIX could be used to contact fellow staff in the same HQ, as they knew this is what coalition used, but others outside the HQ did not know this, so often there would not be a reply to a question that had posed using this means).

⁷⁸⁵ See Coombes E-mail, *supra* note 8, (noting that it was his job to act as the liaison between the U.S. Military/Civilian lawyers at the CPA and the British Government. Lt Col Coombes stated that it was difficult to have contact with the UK Permanent Joint Headquarters (PJHQ) let alone his UK counter part in Camp Victory and therefore at times efforts to get a consistent UK position put to the UK were hindered. The SIPR issue was resolved, despite some nagging problems with a terminal for coalition officers).

⁷⁸⁶ See *id.* This did improve with time. The situation may have occurred partially as a result of it being a U.S. dominated HQ and therefore it was designed and primarily set up for U.S. business.

on any particular matter and not “go native,” thereby defeating the purpose of having a British officer doing the job.⁷⁸⁷

With poor communications and their small numbers, coalition officers did not always feel like part of a multi-national team.⁷⁸⁸ Other coalition officers noted the same sentiment.⁷⁸⁹ It is unlikely that U.S. personnel had a similar experience. In fact, the domination of U.S. forces and the focus on U.S. standard operating procedures would have been an advantage to U.S. personnel. Such an environment can lead to potentially negative effects on coalition cohesion and work to undermine the chain of command. An example of this might be where orders were issued theatre-wide but only seem to apply to U.S. forces and not their coalition allies as well.

To create and preserve a feeling of a fully functioning coalition in a U.S. Corps Headquarters, it would be helpful to identify a dividing line between the major force/resources providers’ national policy and procedures and coalition matters.⁷⁹⁰ That this point arose is, perhaps understandable, given the fact of the scale and synergy of U.S. Forces. However, given the disproportionate number of U.S. personnel in the coalition, care must be taken by such personnel to not think in a national mindset rather than in that of a coalition mindset. Guidance from the leadership of the coalition might have helped address this matter.⁷⁹¹ This challenge was exacerbated by the fact that there were both an Australian and British National Support element (UKNSE), but not a separate U.S. HQ.

4. All Coalition Partners Must Understand and Accept That Some Coalition Partners May Have Different Political and Legal Interpretations and Limitations Placed on Their Forces.

a. Internees and Detainees.

⁷⁸⁷ See Whitwham E-mail, *supra* note 10. As a result of his location, it was straight forward for Lt Col Whitwham to keep in regular contact with the British Deputy Commanding General at MNC I, but this may not always be the case.

⁷⁸⁸ See Coombes E-mail, *supra* note 8. It was clear that at the very top there were fundamental differences of approach. Mr Bremer was the top U.S. civilian official and received his orders from Washington. Mr Greenstock, from the UK, could give a British view and hoped to have some influence but he did not make the decisions. This fact was understandable as the U.S. was providing the vast majority of the money and resources and was taking the vast majority of the casualties but it did not make for the feeling of there being a team. Things were simply done by the U.S. in a U.S. manner and as they wished. A symbol of this was at the end of the CPA the building became the U.S. Embassy.

⁷⁸⁹ See Whitwham AAR, *supra* note 10, (stating that “The HQ at all times felt like a U.S. Headquarters with a little of a coalition feel”).

⁷⁹⁰ See *id.* (noting that there appeared to be a lack of understanding or consideration of the coalition and it was not in reality a coalition HQ, not the least because operational planning was done on a U.S. basis i.e. FRAGOS were issued in U.S. terms, referring to U.S. regulations and distributed to all units).

⁷⁹¹ The root of the problem so far as the OSJA Multinational Corps Iraq was that everyone was doing both U.S. and coalition business. For some issues the distinction was obvious, such as discipline. For others it was not so clear. It would have been useful to have had guidance on what was clearly coalition business vice U.S. business. See Whitwham E-mail *supra* note 10.

Coalition arrangements and handling techniques for detainees must be discussed, understood, and refined. Differences in terminology and practice existed between members of the coalition which could lead to complications and misunderstandings.⁷⁹² In the post-occupation period in Iraq, aside from the U.S. and UK, most of the coalition were not permitted to get involved in detention operations. The U.S. did not have the same restrictions as the UK--i.e. detention was not permissible for intelligence exploitation alone. The U.S. used the word "detainee" to describe both detainees and security internees. During occupation, the UK classified detained persons as either detainees or security internees. Detainees were individuals suspected of committing criminal offences. Security internees were individuals who were suspected of being a threat to public safety.⁷⁹³ Despite pre-dating the Iraqi Interim Government, UNSC 1546, dated 8 June 2004, provided the legal authority for UK personnel to apprehend, detain and intern persons for the maintenance of security and stability in Iraq in the Post-occupation period. However, the grounds for determining whether an individual would be detained for suspected criminal activity in the post-occupation period was based on whether there was a reasonable suspicion that the individual had committed a criminal offence.⁷⁹⁴ Individuals had to either be handed over to the Iraqi criminal justice system/Iraqi Police Service (IPS) or released.⁷⁹⁵

The policy across the coalition regarding capturing detainees varied greatly, depending on national caveats. United States forces would detain individuals whereas the UK forces would detain individuals only if really necessary and then they would try to transfer hand them to the Iraqi Police service (IPS). The Italian approach mirrored that of the British while the Dutch did stopped detaining people after the Iraqi Interim Government surprisingly reintroduced the death penalty.

U.S. judge advocates need to possess, a basic grasp of the European Convention on Human Rights (ECHR) and the European Court of Human Rights and their potential impacts on coalition partners.⁷⁹⁶ While certain political and legal differences of opinion and approaches did not affect the U.S., the existence of the European Convention and

⁷⁹² See Interview of Captain Mynors, ALS Officer at HQ, NDS SE with Lt Col Richard Batty, Director, Coalition Operations, Center for Law and Military Operations (14 March 2005) (on file at CLAMO).

⁷⁹³ *Id.*

⁷⁹⁴ *Id.*

⁷⁹⁵ See Whitwham E-mail, *supra* note 10 (noting that during the period of his deployment many U.S. practices had changed. Prison facilities had improved and there had been more appeals and reviews resulting in many releases. The U.S. numbers of detainees had dropped from about 7,000 to 5,000 by the end of his tour. UK detainees had dropped from about 100 to 27. He stated that he had arrived in Iraq a few weeks after the Abu Ghraib publicity. He did not have any internee or detainee issues of any significance. The matter became a force issue (Multi National Force Iraq) rather than a Multi National Corps matter i.e. a strategic rather than a tactical issue if persons were being held for longer periods).

⁷⁹⁶ See Hamers AAR, *supra* note 23 (stating that writing a detention policy for Afghanistan led to differences of opinion between U.S. and European legal advisors. Captain Hamers further stated that if European law and jurisprudence was more widely featured in Operational law handbooks, a considerable amount of time and misunderstanding would be saved as well as the delays in getting ISAF detention policy on such key issues as transferring detainees to local authorities, the role of the LEGAD and POLAD before, during and after the detention, cooperation with the ICRC, the standards of detention facilities operations and the duration of detention).

Court impacted the other members of the coalition. British Army Legal Services lawyers were quite aware of the possibility of a court ruling extending the applicability of the European Convention on Human Rights to territory in Iraq under British control and undertook substantial efforts to comply with the requirements of the convention as a result. By the end of the tour, the High court judgment in the case of *Al Skeini* and others confirmed that ECHR applied to Iraqi territory under the control of the UK. These decisions affected a number of areas, including investigations.

b. Rules of Engagement/Use of Force.

The legal framework for the use of force may differ substantially between coalition partners with fundamental consequences. These differences must be studied and understood by coalition partners to insure clarity of purpose and mission while planning joint operations. Great effort must be made to stay current on the nuanced positions of different coalition members as these positions evolve as operations unfold. As a result, coalition legal advisors must be aware of the current legal and policy positions of their respective governments and other coalition partners. Coalition legal advisors should also endeavour to inform fellow coalition legal advisors of changes in their respective legal and policy positions, and the potential impact that such changes may have on operations. They must further bring such changes to the attention of operational planners. Coalition collaboration in drafting ROE must also be embraced.⁷⁹⁷ In Afghanistan, such collaboration appeared to occur between members of the coalition, but work needed to be done to keep the “national caveats matrix” up to date and useful to the chain of command and the operators.⁷⁹⁸

With the end of major combat operations in Iraq, the legal framework for the use of force by UK forces changed to the application of UK law vice that of the law of armed conflict. The British Government viewed the situation as one of law enforcement and, the relevant UK use of force authorization became that of self defence. This position contrasted with the U.S. position that a state of international armed conflict continued to exist in Iraq.

⁷⁹⁷ See, Folwaj Report, *supra* note 4 (noting the NL forces used the ROE of MND (SE) which was prepared by UK forces without consultation from other members of the forces that made up MND (SE). Captain Folwaj further states that each country did then make their own caveats to the ROE for political reasons or because of their own domestic legislation).

⁷⁹⁸ See Hamers, *supra* note 23 (noting that there was discussion on ROE and the issue of extended self defence, between the U.S., UK, CA and NL legal advisors. There were differences of opinion as to whether an Apache flying on a QRF mission was operating under the principle of extended self defence or under the ROE and this was relevant when the weapons release authority was being considered. Further to make the national caveat matrix more workable the lesson identified and put into practice was to divide the ROE matrix into ‘use of force caveats’ and ‘employment caveats’. Consultation and communication between coalition members on ROE was used to ensure similar conduct by coalition members and proved useful for some new NATO members, for example – Estonia, Lithuania, Latvia and Bulgaria, all of whom did not issue ‘Soldiers cards’ to their troops. To facilitate this a standard ‘Soldiers card’ was introduced and briefed at newcomers briefings and to national contingent commanders and senior national representatives and was made part of the commanders OPLAN. Captain Hamers further stated that the importance of a weapons release authority matrix became evident when NL Apache came into the Afghan theatre as there were the two missions running side by side).

The U.S. view on the existence of an international armed conflict granted the U.S. a greater to respond to spikes in violence that occurred in May, August and September, 2004. It also appeared, however, that the British ROE were also regarded as sufficiently robust and comprehensive to complete required missions. However, this required a robust interpretation of the ROE by UK troops in contact.⁷⁹⁹ As an example, a number of “clearance” operations to re-establish freedom of movement were conducted in Al Amarah and Basrah and these operations did not constitute offensive operations. However, plans were created to assault and clear Mahdi Militia strongholds and had these plans been executed, it is likely that the British would have required Ministerial authorization for war fighting ROE.⁸⁰⁰

In the lead up to the transfer of authority (TOA) to the Iraqi Interim Government on 28 June 2004, HQ I Mechanized Brigade in Basra had a significant increase in their legal work load as they prepared, trained, and introduced new MND (SE) policy and procedures on stop, search, detention and internment. I Mech Bde anticipated the creation of a fundamentally different legal regime from that in existence during the time of this Publication.⁸⁰¹ A policy for recording and investigating shooting incidents had to be prepared and reviewed in light of the volatile operational tempo prevailing in theatre. An existing shooting investigation policy proved to be practically incapable of being supported given the prolonged, high intensity engagements experienced in May, August and September 2004. While the purpose of the policy was proper— to record events in anticipation of future litigation at the European Court of Human Rights – adherence to the policy was difficult at best.⁸⁰²

The UK shooting and investigation policy serves to highlight a fundamental difference in the legal environment in which the UK and U.S. forces operated, and how these divergent understandings can have a significant impact on one member of the coalition and not the others. During the period of international armed conflict, it was clear that British soldiers enjoyed combatant immunity when killing enemy combatants. The legal position with respect to the use of force changed significantly in May 2003 to one of a self-defence environment. This constrained operational environment became difficult and divisive. Though it was transitioned to at a time when it was anticipated that the operational environment was becoming more benign, this was far from the reality of operations on the ground. While the aim was to work to comply UK actions with potential application of the ECHR, this aim proved unrealistic at best given that the operational environment was filled with high intensity contacts. Some saw this approach to the use of force as a “Home Counties standards in an operational theatre.” There was also principled concerns that the criminal investigation of soldiers who made decisions on the use of lethal force on a daily basis would negatively affect operational effectiveness and morale.

⁷⁹⁹ See, Simpson, *supra* note 18.

⁸⁰⁰ See *id.*

⁸⁰¹ See *id.*

⁸⁰² See, e.g. *McCann v UK*, 13 Eur. H. R. Rep. 597 (1995).

This concern became a reality in February, 2005 when a hearing took place in the Central Criminal Court, Royal Courts of Justice in London.⁸⁰³ Trooper Kevin Williams of the 1st Battalion of the Kings Regiment was facing a charge of murder for actions resulting in the death of an Iraqi that Trooper Williams and others were trying to subdue.⁸⁰⁴ On the night of 2 August 2003, Trooper Williams had been on patrol when he and others of his unit came across some Iraqis moving ammunition.⁸⁰⁵ Some Iraqis were detained but one escaped only to be caught a short while later.⁸⁰⁶ A struggle ensued and Williams shot the Iraqi in the back of the head causing his death.⁸⁰⁷ Williams claimed that he acted in self-defence as he believed the Iraqi was trying to get hold of a pistol to kill or seriously injure Williams or one of his fellow soldiers.⁸⁰⁸ The case received huge publicity and demonstrated a widely held concern in the UK and its military about such prosecutions.⁸⁰⁹ Trooper Williams faced charges in the civilian criminal courts after the Army Prosecution Authority referred the case to the Attorney General when Williams' commanding officer refused to charge him.⁸¹⁰ The Judge noted that "there are many people who genuinely believe that the prosecution of Trooper Williams is a betrayal of British soldiers who risk their lives for their country and who are expected to make difficult decisions in split seconds".⁸¹¹

Differences in ROE also impact the ability of personnel embedded with another coalition partner to function effectively and make joint operations far more complex. With U.S. and British soldiers working alongside each other, there were some tensions, difficulties, and a lack of understanding of the differences in their respective ROE as well as the reason for those differences within the coalition in relation to the level of force that could be used to defend property.⁸¹² Towards the end of 2004, the UK position changed due to the belief that the situation on the ground had altered and deteriorated to a state of non-international armed conflict across Iraq between various insurgent groups and the Iraqi Interim Government. Such differences of opinion will have a major impact on the permissible actions of a nation's forces. Such distinctions do little to enhance coalition coherence and understanding unless military lawyers are aware of the different coalition partners' legal positions, either major or subtle, are cognizant of any different approaches to a situation, and are capable of explaining those positions and approaches to both soldiers and commanders.

The change in the position for British Forces meant that UK Forces might have occasion to use force in accordance with the Law of Armed Conflict, as opposed to defensive/law enforcement measures, and brought UK Forces closer to the U.S. legal

⁸⁰³ See Crown Prosecution Service Press Release *R. v. Kevin Williams* (7 Apr. 2005), available at http://www.cps.gov.uk/news/pressreleases/120_05.html (last visited 30Aug. 2005).

⁸⁰⁴ *Id.*

⁸⁰⁵ *Id.*

⁸⁰⁶ *Id.*

⁸⁰⁷ *Id.*

⁸⁰⁸ *Id.*

⁸⁰⁹ *Id.*

⁸¹⁰ *Id.*

⁸¹¹ *Id.*

⁸¹² See Coombes E-mail, *supra* note 8.

footing. The revision of the legal framework altered the position of UK forces, allowing a more robust position by permitting offensive attacks against designated hostile elements, i.e. those insurgent groups assessed to be engaged in armed conflict with the Iraqi Interim Government, and those operating under the command or in conjunction with the hostile elements. It was clear that the UK Attorney General would take an interest in any offensive operations and that the more robust stance was only to be adopted where the defensive/law enforcement measures were insufficient.

5. Coalition Partners must Liase with each other to Reduce the Impact of Differing Standards of Behaviour.

During the post conflict period of both OEF and OIF, some coalition elements continued to be based with U.S. forces. The differing rules and standards of conduct remained in place so that coalition partners were responsible for the discipline of their own forces.⁸¹³ Such differences between coalition partners and their civilians and contractors can lead to tensions. However, coalitions members can avoid such tensions if they understood the different positions of other coalition members, and treat them with discretion and mutual respect.⁸¹⁴

Similarly, coalition members must be cognizant of different national policies on war trophies. A coalition war trophy policy never existed and there was some support for attempting to reach such a policy, or at least some consistent approach.⁸¹⁵ The different policies among coalition partners led to a feeling of “haves” and “have-nots.”

Finally, investigations into misconduct by personnel continues to require careful consideration in multi-national operations. The issue of who has the authority to investigate and take administrative and disciplinary action must be clear to all involved in the chain of command.⁸¹⁶

6. Conclusion.

Many of the coalition legal issues from Afghanistan and Iraq carried over from the war-fighting phase to post conflict operations. However, unanticipated issues and

⁸¹³ See CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, U.S. ARMY, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, VOLUME I: MAJOR COMBAT OPERATIONS (11 September 2001 – 1 May 2003) at 129 (1 Aug. 2003) [hereinafter Volume I, Afghanistan and Iraq, Legal Lessons Learned].

⁸¹⁴ See Lt Col Coombes AAR, *supra* note 8.

⁸¹⁵ See Squadron Leader Renee Jensen, Royal Australian Air Force, After Action Report (27 Jan. 2005) [hereinafter Jensen AAR] (on file with CLAMO) (stating that she was in total support of such a uniform coalition approach. SQNLDR Jensen stated that Australia started to allow war trophies albeit with limitations but that individuals found ways around the rules which led to a complete ban which proved unpopular).

⁸¹⁶ See Hamers AAR, *supra* note 23 (stating that this issue was raised after allegations of misconduct by ISAF HQ personnel. There was a “requirement to remind some that the HQ command is authorised to initiate a fact finding mission but this must be done in close cooperation and coordination with the national contingent commander or senior national representative of the accused to recognise national legal issues since the authority to conduct disciplinary or administrative action lies with the national contingent.”).

substantial challenges arose as well. Coalition members continued to have different legal, political, and policy obligations, as well as different interpretations of shared obligations between coalition members. The successful management of coalition legal issues and policy constraints was often achieved by early and continuous liaison in order to better understand the stance of a coalition partner.

Recording the legal experiences of deployed legal officers and collating legal lessons learned in a format that can be used in future training is essential to preserve the experiences of serving legal officers, but it is not necessarily easy for all coalition partners. The U.S. Army has incredible judge advocates resources when compared to other coalition partners. The U.S. Army's Judge Advocate General's Corps has a well-established system for collecting and using legal lessons learned that can then be maintained in the public domain and used for training. Other coalition partners do not have the extent of resources to devote to collating post operational tour reports, and even when these exist, security classifications can often prevent disclosure of identified legal issues. Legal lessons learned, or a record of operational legal issues encountered, would normally appear as a chapter in a HQ post tour report, the whole of which would likely have a security classification. Added to the issue of security classification is the reluctance of a number of coalition partners to provide comments that are published in the public domain and could be seen as critical of other coalition partners. The development of working relationships between coalition legal advisors to understand and learn about potentially different approaches and legal views is an important aspect of successfully working together as an integrated coalition. The U.S., UK, and Australian legal exchange programs should be strengthened even more as it is a primary means of fostering the type of interoperability training that was at times quite a challenge in OEF and OIF during the period of this Publication. A better understanding of the significant legal issues encountered during this time frame must be incorporated into all coalition legal officers' training if they are to succeed in future coalition operations.

D. CIVIL LAW

*Civil law is the body of law containing the statutes, regulations, and judicial decisions that govern the rights and duties of military organizations and installations with regard to civil authorities. The practice of civil law includes contract law, fiscal law, environmental law, as well as many other specialized areas of law.*⁸¹⁷

Deployed judge advocates (JAs) routinely confront challenging civil law issues in the deployed environment. Contract and fiscal law remained among the most time-consuming, resource demanding areas of practice for deployed JAs. One Staff Judge Advocate (SJA) observed that fully forty percent of their legal work was related to contract and fiscal law.⁸¹⁸ JAs provided legal advice and solutions over a tremendous variety of subjects ranging from helping units occupying forward operating bases (FOBs) describe their contracting requirements, to advising contracting officers on the best contract vehicle to fill these requirement, to advising commanders and medical personnel on the responsibilities and limits of caring for contractor employees, to developing a plan to close FOBs and turn property over to Iraqi forces.

Many of the JAs asked to solve these difficult issues deployed with little experience in the area of civil law. Their ability to successfully confront challenging and unfamiliar contract and fiscal law actions is a testament to these JAs' flexibility and focus on mission accomplishment.

1. Build Contract and Fiscal Law Skills Among Judge Advocates.

Judge advocates continued to express concern regarding their comfort level in advising commanders on contract and fiscal law matters. Senior JAs noted their desire to have more contract and fiscal law familiarity among their attorneys.⁸¹⁹ Staff judge advocates noted that junior JAs often have little or no exposure to contract and fiscal law issues in the garrison environment. A partial explanation of this shortcoming is found in the responsibilities of deployable JAs in garrison. Some Offices of the Staff Judge Advocate (OSJAs) do not generally review contract actions while in garrison,⁸²⁰ and many others use civilian attorneys in the contract law function. At least one JA felt his initial lack of experience with contract actions

⁸¹⁷ U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS para. 3-6 (1 Mar. 2000) [hereinafter FM 27-100].

⁸¹⁸ Colonel Richard M. Whitaker, Notes from After Action Review Conference, Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), and the Center for Law and Military Operations, Fort Campbell, Ky. (20-21 Oct. 2004) [hereinafter Whitaker Notes] (on file with CLAMO).

⁸¹⁹ *Id.*; E-mail from Colonel Kathryn P. Sommerkamp, to Lieutenant Colonel Pamela M. Stahl, subject: Interagency Symposium, (17 Nov. 2004) [hereinafter Sommerkamp E-mail] (on file with CLAMO); Lieutenant Colonel Thomas E. Ayres, Notes from After Action Review Conference, Office of the Staff Judge Advocate, 82d Airborne Division and Center for Law and Military Operations, Fort Bragg, N.C., (17-19 June 2004) [hereinafter Ayres Notes] (on file with CLAMO).

⁸²⁰ On Fort Bragg, contracts are generally reviewed by DoD civilian attorney at the OSJA, XVIII Airborne Corps, including contracts directly supporting the 82d Airborne Division. Ayres Notes, *supra* note 3.

made his job more difficult.⁸²¹ A shortage of contract and fiscal law experience made reviewing these actions more difficult—or at a minimum, more time consuming. Attorneys had to grapple with unfamiliar concepts and procedures before providing sound legal advice on specific issues. Unfamiliarity with this area of law is doubtless a greater burden in a deployed environment where access to research materials is likely to be limited. As one JA reported, “fully forty percent of the long term substantive issues I touched at DREAR had some fiscal or contracting aspect involved.”⁸²² Unfamiliarity with contracts and fiscal law has the potential to greatly affect legal operations. Several suggestions based on lessons learned are offered to improve proficiency in contract and fiscal law. Prior to Deployment:

- Identify an attorney to be the office contract and fiscal law ‘expert’ to train and assist other JAs;⁸²³
- Get administrative law attorneys ‘school trained’ by The Judge Advocate General’s Legal Center and School (TJAGLCS);⁸²⁴
- Have all administrative law attorneys practice some contract law as a matter of course in garrison;⁸²⁵
- Have operational law attorneys practice contract law as a matter of course in garrison;⁸²⁶ and
- Stop civilianizing contract law positions.⁸²⁷

2. Acquire Access to Contract Documents.

An issue running throughout legal lessons of contract formation and administration is that of acquiring access to the contract documents themselves. Judge advocates repeatedly mentioned the difficulty in acquiring copies of the contracts they were asked to review.⁸²⁸

Judge advocates found it particularly difficult to locate contracts involving inter-agency transfers or the federal supply schedules, as the base contract would often be formed and

⁸²¹ One JA explained his discomfort early in his deployment articulating legal objections to fiscal and contracting issues such as split purchases that became much easier as he gained experience with these issues. There was significant debate whether the purchase was split to circumvent the simplified acquisition threshold. Captain Michael A. Banks, Notes from After Action Review Conference, Office of the Staff Judge Advocate, V Corps, and the Center for Law and Military Operations, Heidelberg, Germany, (17-19 May 2004) [hereinafter Banks Notes] (on file with CLAMO).

⁸²² Lieutenant Colonel Paul S. Wilson, DSJA, 101st Airborne Division (Air Assault), Thoughts on Contracting (6 Jan. 2004) (Microsoft Word document contained in E-mail from Lieutenant Colonel Richard M. Whitaker, Staff Judge Advocate, 101st Airborne Division (Air Assault), to Lieutenant Colonel Pamela M. Stahl, Director, Center for Law and Military Operations (8 Jan. 2004)) (on file with CLAMO).

⁸²³ Colonel Richard O. Hatch, Legal Support in Operation Iraqi Freedom: an SJA’s Perspective, (undated) (Power Point presentation on file with CLAMO).

⁸²⁴ Ayres Notes, *supra* note 3.

⁸²⁵ Sommerkamp E-mail, *supra* note 3.

⁸²⁶ *Id.*

⁸²⁷ *Id.*

⁸²⁸ See, e.g., Major Francis (Abe) Dymond, Notes from Interagency Symposium, Charlottesville, VA, (8-9 Nov. 2004) [hereinafter Dymond Notes] (on file with CLAMO); Major David T. Crawford, Notes from After Action Review Conference, Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), and the Center for Law and Military Operations, Fort Campbell, Ky. (20-21 Oct. 2004) [hereinafter Crawford Notes] (on file with CLAMO).

managed somewhere in the United States.⁸²⁹ One JA noted he would have been unable to locate a portable housing contract but for his experience working at the Office of the Judge Advocate General (OTJAG) Contract Appeals Division, where he worked with that particular contract.⁸³⁰ Ultimately the actual contract was located and administered at Scott Air Force Base, Illinois.⁸³¹ Not surprisingly, the difficulty did not end once the contract was located, as the file size of a digital copy made transfer of the information to the deployed theater difficult.⁸³²

Another factor adding to the difficulty in locating and acquiring actual contracts was the diversity of contracting agencies. A JA for Combined Joint Task Force Seven (CJTF-7) noted that during his deployment he provided advice related to contracts created not only by his own command, but by U.S. Army Europe, Army Material Command, the Defense Intelligence Agency, Central Intelligence Agency, the Coalition Provisional Authority, the Departments of State, Justice, and Interior, U.S. Agency for International Development (USAID), and others.⁸³³ The lessons learned here are to anticipate that contract documents will often be unavailable, and to identify points of contact to assist in locating contracts early in the process.

3. Prepare to Influence Contract Statements of Work.

The Statement of Work (SOW) is “[t]he portion of a contract that describes the actual work to be done by the contractor by means of (1) specification/s or other minimum requirements, (2) quantities, (3) performance dates, (4) time and place of performance of services, and (5) service requirements.”⁸³⁴ The SOW is an essential element of government contract formation, as it serves as the baseline against which progress, and subsequent contract changes are measured during contract performance.⁸³⁵ Consequently, effective legal input in drafting the SOW pays dividends over the entire life of the contract.

Deployed JAs working with government contracts noted a recurring problem with contracts formed with inadequate SOWs. The SOW is found in Part I. C. of standard government contracts⁸³⁶ and sets forth a description of the work/tasks/products/ deliverables to be completed under the contract. The contractor relies on the accuracy of the SOW when determining his price, and submitting his offer to complete the work.⁸³⁷ In the deployed environment, contracts sometimes were hastily put together by individuals with limited training and/or expertise in either government contracting or the particular supply or service contracted for. In one case, the SOW for a multi-million dollar reconstruction contract was less than one-

⁸²⁹ *Id.* This did not seem to be the case for contracts actually created by the command where the attorney worked, but with contracts initially created by other commands or agencies.

⁸³⁰ Crawford Notes, *supra* note 12.

⁸³¹ *Id.*

⁸³² *Id.*

⁸³³ Dymond Notes, *supra* note 12.

⁸³⁴ RALPH C. JASH, JR. & STEVEN L. SCHOONER & KAREN R. O'BRIEN, THE GOVERNMENT CONTRACTS REFERENCE BOOK: A COMPREHENSIVE GUIDE TO THE LANGUAGE OF PROCUREMENT (2d ed. 1998) [hereinafter A COMPREHENSIVE GUIDE TO THE LANGUAGE OF PROCUREMENT].

⁸³⁵ *Id.*

⁸³⁶ U.S. General Services Administration, SF Form 33, Solicitation Offer and Award (Sept. 1997).

⁸³⁷ See generally Ch. 13, Contract Changes, CONTRACT LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, CONTRACT LAW DESKBOOK, (Fall 2004)[hereinafter Contract Law Deskbook].

half page long.⁸³⁸ Though such brief descriptions of the work to be performed are not prohibited, they invite controversy in contract administration as they fail to express clear standards of contract performance.

Reviewing JAs faced a difficult challenge when a deficient SOW was identified in contract solicitation.⁸³⁹ Reviewing attorneys realized that returning all deficient requirements documents for clarification of the SOWs, (or re-writing SOWs themselves) would slow the contracting process, probably be perceived as obstructionist, and delay filling the commander's requirements. This problem is simply defined as one of selecting between expediency and quality.⁸⁴⁰ Attorneys addressed these shortcomings by using their judgment to weigh the desirability of complete technical compliance with the need for contracts to fill commander's requirements rapidly. Where the attorneys determined a SOW contained only minor deficiencies or posed a relatively low risk of trouble in contract administration, the attorneys would make minor corrections, but the SOW was not returned for additional clarification.⁸⁴¹

4. Prepare to Address Issues of Contract Scope.

Another problem specifically identified by JAs working in the contracting field was that of scoping. The term "contract scope" encompasses "all work that was fairly and reasonably within the contemplation of the parties at the time the contract was made."⁸⁴² Government procurement regulations permit contracting officers to make unilateral changes to existing contracts, so long as those changes fall within the original scope of the contract.⁸⁴³ This provision has obvious utility in a deployed environment where evolving missions and conditions are likely to impact on contract requirements and performance. Determining whether a change to a contract, or a task order placed against an existing contract was within the scope of the original contract posed a daunting task for reviewing JAs.⁸⁴⁴

Scoping determinations were particularly difficult for contracts involving inter-agency transfers, or the federal supply schedules as base contract, and thus, the SOW necessary to make an informed scoping determination would normally be formed and managed somewhere in the United States. This is another manifestation of the previously mentioned problem of accessing actual contract documents.

The scoping problem was further complicated by the general scarcity of contract oversight in the deployed environment. Contract attorneys noted that a single contracting

⁸³⁸ Dymond Notes, *supra* note 12.

⁸³⁹ A solicitation is defined as: A document, sent to prospective contractors by a Government agency, requesting the submission of offers or of information. This generic term includes invitations for bids (IFBs) requests for proposals (RFPs) and requests for quotations (RFQs). *See* A COMPREHENSIVE GUIDE TO THE LANGUAGE OF PROCUREMENT, *supra* note 18.

⁸⁴⁰ Dymond Notes *supra* note 12.

⁸⁴¹ *Id.*

⁸⁴² A COMPREHENSIVE GUIDE TO THE LANGUAGE OF PROCUREMENT, *supra* note 18.

⁸⁴³ GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 43.201 (July 2004) [hereinafter FAR].

⁸⁴⁴ A scoping determination has serious implications for contract performance. Changes within the scope of the original contract may be ordered by the contracting officer by exercising the changes clause in the original contract. Changes that fall outside the scope of the contract are considered "cardinal changes" and require formation of a new contract, often causing significant delay. *See* Contract Law Deskbook, *supra* note 21, at Ch. 13.

officer's representative (COR),⁸⁴⁵ as an additional duty, might be expected to oversee a contract being executed in locations all across Iraq and report back to a contracting officer in the United States.⁸⁴⁶ As this situation made it difficult to obtain either timely or accurate information from the COR, contracting officers and reviewing attorneys had little information to work with when making scoping determinations.⁸⁴⁷

As long as the military relies on contractors to meet deployed logistics requirements, advising contracting officers and their customers in scoping determinations will remain a frequent and challenging task for JAs. Judge advocates can reduce the difficulty of this task by taking steps to anticipate requests for this advice. Helpful steps include communicating with contracting and ordering officers to identify and acquire copies of contracts receiving repeated orders, and establishing contact with CORs either directly or through other legal personnel.

5. Execute Requirements Contracts with Caution.

Judge advocates reviewing contract actions must anticipate problems that might result from executing requirements contracts,⁸⁴⁸ and advise contracting officers and commanders on these potential problems. Permitted by the Federal Acquisition Regulation (FAR), requirements contracts generally provide for the contractor to fulfill all the government contracting activity's actual requirements for the designated supply or service throughout the term of the contract.⁸⁴⁹ The selection of this contract type during contingency operations "may be more difficult because customer needs may easily be overstated or understated."⁸⁵⁰ Once a requirements contract is executed, the contract is breached if the government purchases supplies or services within the scope of the requirements contract from another source.⁸⁵¹

An example provided by JAs of the 101st Airborne Division (Air Assault), (101st Airborne) highlights lessons learned regarding requirements contracts.⁸⁵² After the conclusion

⁸⁴⁵ The COR is an employee of a contracting activity designated by a contracting officer to perform certain contract administration activities. A COR is an authorized representative of a contracting officer within the scope of his or her authority, but is rarely given the authority to enter into contractual agreements or modifications. A COMPREHENSIVE GUIDE TO THE LANGUAGE OF PROCUREMENT, *supra* note 18.

⁸⁴⁶ Dymond Notes, *supra*, note 12.

⁸⁴⁷ *Id.*

⁸⁴⁸ Requirements contracts provide for filling all actual purchase requirements of designated Government activities for specific supplies or services during a specified contract period, with deliveries to be scheduled as orders are placed. The contractor is legally bound to such a contract because the Government's promise to buy its requirements constitutes consideration. A requirements contract may be used when the Government anticipates recurring requirements but cannot predetermine the precise quantities of supplies or services that designated Government activities will need. A COMPREHENSIVE GUIDE TO THE LANGUAGE OF PROCUREMENT, *supra* note 18.

⁸⁴⁹ *Cf.* JOHN CIBINIC JR. & RALPH C. JASH, JR. FORMATION OF GOVERNMENT CONTRACTS (3d ed. 1998) (noting that requirements-type contracts have been used to purchase all supplies and services in excess of those that can be provided by a Government activity or to purchase a stated percentage of the activity's requirements).

⁸⁵⁰ Army Federal Acquisition Regulation Manual No. 2, Contingency Contracting, para 8-4 (c).

⁸⁵¹ Datalect Computer Servs. Inc. v. United States, 56 Fed. Cl. 178 (2003), *see also*, Contract Law Deskbook, *supra* note 21 at Chapter 3. III. D.

⁸⁵² This example was provided to the author by Major David T. Crawford, and Captain Savas T. Kyriakidis, Notes from After Action Review Conference, Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), and the Center for Law and Military Operations, Fort Campbell, Ky. (17-19 May 2004) [hereinafter 101st ABN DIV Administrative Law Notes].

of major combat operations, the 101st Airborne conducted Stability and Support Operations in the Mosul area of Iraq. Part of these operations included an attempt to restore some civil aviation to the Mosul airport.⁸⁵³ As part of this effort the division contracted with a global express air delivery service to fly the division's mail and other express deliveries into Mosul.⁸⁵⁴ This operation proved to be successful, and provided a benefit to the local economy as well as helping to meet the division's logistical needs.⁸⁵⁵ This initial success spurred an attempt to contract with other air delivery services to further expand civil aviation operations. The expansion was hindered by the type of contract initially used to procure air delivery services. This was a requirements contract, and the contractor correctly complained that the division would violate the contract terms by contracting with other providers for the same services.⁸⁵⁶ The contractor made an additional complaint that reinforces contract formation lessons discussed earlier. As the SOW was worded broadly—presumably to maximize flexibility by permitting the command to use this express air delivery service for a wide variety of requirements—the contractor argued it should be the exclusive non-military means of air delivery.⁸⁵⁷ Careful analysis of whether a requirements type contract best suits the mission might avoid such difficulties in the future.

6. Know the Acquisition Review Board Process.

Deployed JAs working with contract and fiscal law issues reported the necessity of understanding the Acquisition Review Board (ARB), Corps Acquisition Review Board (CARB), or Joint Acquisition Review Board (JARB⁸⁵⁸) process.⁸⁵⁹ A JARB in one form or another will be part of any joint command's logistics operation as joint commanders are obliged "to activate an acquisition review board to integrate the acquisition flow with the overall theater logistics operation."⁸⁶⁰ Understanding the purpose and process of the JARB gives JAs who advise the JARB itself, or units submitting requirements to the JARB, the opportunity to improve legal services by identifying acquisition problems early enough to avoid frustrating delays.

⁸⁵³ *Id.*

⁸⁵⁴ The contractor provided express delivery of a wide range of requirements from repair parts for military vehicles to Christmas trees. *Id.*

⁸⁵⁵ *Id.*

⁸⁵⁶ *Id.*

⁸⁵⁷ The issue of how broadly the contract's SOW should be interpreted never rose to the level of a formal dispute. *Id.*

⁸⁵⁸ Several different names have described acquisition review boards used in OIF. For clarity, this chapter will use the acronym JARB throughout. "When we first came to theater, we had a forum called the CARB (Corps Acquisition Review Board). In an attempt to separate operational requirements from base ops/support requirements, they created the BCARB (Base Corps Acquisition Review Board). When CJTF-7 was dissolved, and we went to MNC-I / MNF-I as a Joint Command, the whole process was recombined into the JARB (Joint Acquisition Review Board)." E-mail from Mr. Roy Holly, Multinational Corps Iraq Science and Technology Advisor, to Major Steve Cullen, Advanced Operational Law Studies Fellow, Center for Law and Military Operations, subject: JARB for Dummies (18 Jan. 2004).

⁸⁵⁹ Lieutenant Colonel Dale N. Johnson, Notes from After Action Review Conference, Office of the Staff Judge Advocate, 1st Armored Division, and the Center for Law and Military Operations, Wiesbaden, Germany (13-14 Dec. 2004) [hereinafter Johnson Notes] (on file with CLAMO); 10th Mountain Division (Light) Office of the Staff Judge Advocate, After Action Report: CJTF 180 OEF IV (Power Point presentation on file with CLAMO).

⁸⁶⁰ *Army Federal Acquisition Supplement Regulation 2 (Contingency Contracting)*, para 2-1 (a)(6), (Oct. 2001) at <http://wwwlafsc.army.mil/gc/files/AFARS.doc> (last visited 4 Jan. 2004).

The JARB assists the commander in making funding decisions.⁸⁶¹ The JARB does not determine or approve requirements. It reviews proposed expenditures to “ensure they meet bona-fide needs of the command and reflect the best value to the United States to accomplish the mission and achieve required standards.”⁸⁶² Subordinate commanders determine their requirements, and submit requests for recommendation. The JARB exists to assist the commander in allocating limited financial resources where they best meet mission requirements. The JARB itself is comprised of voting members and advisors as determined by the commander.⁸⁶³ A JA serves as a non-voting advisor to the JARB, and reviews all packets submitted to the JARB for legal sufficiency prior to presentation.⁸⁶⁴ The JARB’s final product (sometimes called validation) is a recommendation to the commander on whether a reviewed requirement should be funded.

Not every logistics requirement must be submitted to the JARB for consideration. A consistent policy for forces in OIF required requirements costing more than \$200,000 to be submitted to the command’s JARB for review and recommendation to the commander.⁸⁶⁵ The JARB process also assisted the commander in ensuring that certain purchases met security and interoperability standards. To meet this goal, the JARB reviewed certain categories of requirements regardless of cost. Judge advocates found that they must stay current with these special categories, to ensure requirements were prepared for and routed through the JARB when necessary.

- requests for non-tactical vehicles (including busses and all-terrain vehicles);
- requests for tactical communications equipment or encryption devices;
- requests for automation equipment (computers, servers etc.);
- requests for cell phone or satellite internet service;
- requests for re-locatable buildings;
- requests for base support services or improvements;
- requests for replacements or augmentation to authorized MTOE equipment.⁸⁶⁶

Judge advocates advising units sending requirements to the JARB assisted the staff by reviewing requirements documents for completeness and anticipating questions that were asked by the JARB.⁸⁶⁷ Judge advocates found that they needed to review all the documents prepared

⁸⁶¹ See MULTI-NATIONAL CORPS IRAQ C4, JARB FOR DUMMIES: THE UNOFFICIAL GUIDELINE AND HELPFUL HINTS MANUAL, prepared by R.J. Holley (9 Aug. 2004) [hereinafter JARB for Dummies] (on file with CLAMO)

⁸⁶² Headquarters, CJTF-7, Annex A to Chapter 8, to CJTF-7 Standing Operating Procedures (CJTF-7 Acquisition Review Board (CARB)), (131530DNOV03), para 1, [hereinafter CARB SOP] (on file with CLAMO).

⁸⁶³ See *id.*, para. 8 (naming voting members as representatives of the C1, C3, C4, C6, C7, and C8; and the Staff Judge Advocate, Contracting Officer and other subject matter experts as required as non voting advisors). See also JARB for Dummies, *supra* note 45, Ch. 2 (naming each staff section C1 through C9 as voting members, and advisors as members with expertise in contracting and other legal fields).

⁸⁶⁴ CARB SOP, *supra* note 46, para. 12.

⁸⁶⁵ See, e.g., CARB SOP *supra* note 46; Headquarters, MNF-I, FRAGO 328 (MNF-I FY-05 Budget Execution Policy and Fiscal Guidance) (061500COCT04) (directing that all expenditures over \$200K must be approved by the CARB/JARB) (on file with CLAMO).

⁸⁶⁶ JARB for Dummies, *supra* note 45, ANNEX A.

⁸⁶⁷ See CARB SOP, *supra* note 46, para. 9 (listing the following as questions that should be asked by board members during the ARB:

- What is the funding source for the requirement?

for submission to the JARB, and if possible, should consult the attorney advising the JARB to help avoid legal deficiencies.⁸⁶⁸ Checklists were available to assist attorneys reviewing JARB requests for completeness.⁸⁶⁹ A copy of this checklist is at Appendix D-1.

The JARB required the following documents:

- Justification memorandum: This memorandum stated the requirement, to include the purpose, background information, scope of work, total cost, and impact if the requirement is not approved. Common errors cited include failing to include the entire project in the requirement, and failing to obtain the correct signature.⁸⁷⁰
- Funding documentation: Requirements submitted to the JARB were required to include properly completed and appropriate funding documents. These were either a Purchase Request and Commitment⁸⁷¹ for local purchases and new contracts, or a Military Interdepartmental Purchase Request⁸⁷² generally used when placing an order against an existing contract.
- Statement of Work: A complete statement of work (SOW) was needed to fully describe what was required and the performance standards to be enforced during the contract.⁸⁷³
- Independent Government Cost Estimate. The Independent Government Cost Estimate (IGCE) is the Government's estimate of the resources and projected cost of the resources a contractor will incur in the performance of a contract. These costs include direct costs; such as labor, supplies, equipment, or transportation and indirect costs; such as labor overhead, material overhead, as well as general and administrative (G&A) expenses, profit or fee.⁸⁷⁴ Reviewing JAs found that they had to ensure that the IGCE is actually

-
- Can someone else provide the service or product?
 - How have you gotten along without it for so long?
 - Why is this a valid requirement?
 - Is there any similar excess property available?
 - Why is the requested quantity needed, and why can't you get by with fewer?
 - Why won't a cheaper version meet the need?
 - Do you realize th[at] when you leave here the property will not go with you, and that it stays in the area of operations?
 - What is the impact to mission success/completion if this requirement is not validated/met?
 - Does this requirement conflict with other priorities, missions, policies, units?

⁸⁶⁸ An excellent source for general information on contracting procedures is the CUSTOMER HANDBOOK prepared by the 3rd Army Principal Assistant Responsible for Contracting (PARC), *available at* <http://irq01ws/sections/C8/contracting/default/htm> (1 Jan. 2003).

⁸⁶⁹ JARB for Dummies, *supra* note 45, Ch. 3.

⁸⁷⁰ *Id.*

⁸⁷¹ U.S. Dep't of Army, DA Form 3953, Purchase Request and Commitment (Mar. 1991).

⁸⁷² U.S. Dep't of Defense, DD Form 448, Military Interdepartmental Purchase Request (June 1972).

⁸⁷³ CARB / BCARB Checklist, *supra* note 53.

⁸⁷⁴ Army Contracting Agency, *Independent Government Cost Estimate*, at [http://www.carson.army.mil/doc/Independent%20Government%20Cost%20Estimate%20\(IGCE\).htm](http://www.carson.army.mil/doc/Independent%20Government%20Cost%20Estimate%20(IGCE).htm) (last visited Jan. 14, 2005).

the government's independent estimate, rather than a cost estimate solicited from a potential contractor, a cited failure of some projects submitted to the JARB.⁸⁷⁵

7. Avoid, and Prepare to Address, Unauthorized Commitments.

Unauthorized commitments were a legal problem mentioned by a number of JAs regarding civil law activities after major combat operations.⁸⁷⁶ An unauthorized commitment is defined as an agreement that is nonbinding solely because the government representative who made it lacked the authority to enter into that agreement.⁸⁷⁷ Only the heads of agencies,⁸⁷⁸ the heads of contracting activities,⁸⁷⁹ and certified contracting officers⁸⁸⁰ have authority to commit the expenditure of government funds. Contracting officers may further delegate the authority to make micro-purchases⁸⁸¹ in writing to selected individuals, called ordering or purchasing officers.

When unauthorized commitments occurred it was unlikely they were caused by individuals with ill intent, but by people with the "intention to do great things in the short time allotted."⁸⁸² In an example of such an unauthorized commitment provided by Task Force Olympia, a young Army specialist (E-4), with no purchasing authority bought a motor pool for \$50,000. The environment in post-major conflict operations is rife with the temptation and opportunity for individuals to engage in unauthorized commitments. At least three factors contributed to this condition: 1) commanders and their action officers were challenged by an almost innumerable combination of mission-related and force sustainment requirements; 2) by definition, the U.S. government acquisition process was foreign to local businesses that could supply goods and services in Iraq; and 3) military purchases in Iraq provided a direct benefit to the Iraqi population in terms of economic stimulus, and fostered good will between the military and the local population.⁸⁸³ In this context, it is easy to understand the occurrence of unauthorized commitments, and to predict that many will be explained as an expeditious means to mission accomplishment. Ultimately, unauthorized commitments often become a hindrance to mission accomplishment⁸⁸⁴ because of the significant administrative burden necessary to ratify⁸⁸⁵

⁸⁷⁵ JARB for Dummies, *supra* note 45, Ch. 3.5.

⁸⁷⁶ See, e.g., 101st ABN DIV Administrative Law Notes, *supra* note 36; Sommerkamp E-mail, *supra* note 3.

⁸⁷⁷ FAR, *supra* note 27, Pt. 1.602-3.

⁸⁷⁸ FAR, *supra* note 27, pt. 1.601 (a)

⁸⁷⁹ FAR, *supra* note 27, pt. 2.101

⁸⁸⁰ See FAR, *supra* note 27, pt. 1.602-1(a) (stating that contracting officers are appointed in writing on an SF 1402, Certificate of Appointment (also known as a warrant), and have actual authority to commit the expenditure of government funds to the extent of their appointment).

⁸⁸¹ See FAR, *supra* note 27, pt. 13.201(g) (defining the spending authority for simplified acquisitions as acquisitions of supplies and services to facilitate the defense against terrorism by or for the DoD the aggregate amount of which does not exceed \$15,000, except that in the case of construction the limit is \$2,000).

⁸⁸² Coalition Provisional Authority Baghdad, Memorandum, subject: Unauthorized Commitments (14 Apr. 2004) (on file with CLAMO) [hereinafter Unauthorized Commitment Memorandum].

⁸⁸³ Lieutenant Colonel Paul S. Wilson, Notes from After Action Review Conference, Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), and the Center for Law and Military Operations, Fort Campbell, Ky. (20-21 Oct. 2004) [hereinafter LTC Wilson Notes] (on file with CLAMO).

⁸⁸⁴ Unauthorized Commitments Memorandum, *supra* note 66.

⁸⁸⁵ Ratification is the act of approving an unauthorized commitment, by an official who has the authority to do so, for the purpose of paying for supplies or services provided to the government as a result of an unauthorized commitment. FAR, *supra* note 61, pt. 1.602-3. Normally, the HCA is the ratification authority for unauthorized

them.⁸⁸⁶ Commanders and other individuals in positions at risk of engaging in unauthorized commitments would benefit from pre-deployment training on the authority to commit government resources, and both the likely and potential⁸⁸⁷ ramifications of unauthorized commitments.⁸⁸⁸

8. *Learn the Commander's Emergency Response Program.*⁸⁸⁹

*Money is the most powerful ammunition we have.*⁸⁹⁰

Possibly the most significant development for legal personnel during full spectrum operations in Iraq, and later Afghanistan, was the creation and administration of the Commander's Emergency Response Program (CERP). The genesis of CERP was the collection of seized Iraqi cash into an Office of Reconstruction and Humanitarian Assistance (ORHA)-managed account known as the Commander's Discretionary Fund (CDF). As the military's

commitments, but may delegate this authority to the PARC for amounts of \$100,000 or less, and to the chiefs of contracting offices for amounts of \$10,000 or less, U.S. Dep't of Army, Federal Acquisition Reg. Supp. pt. 1.602 (b)(3) (July 2004) [hereinafter AFARS].

⁸⁸⁶ FAR, *supra* note 61, pt. 1.602-3(a). To ratify an unauthorized commitment, the ratification authority must find in writing that:

- 1) The government has received and accepted supplies or services, or the government has obtained or will obtain a benefit from the contractor's performance of an unauthorized commitment.
- 2) At the time the unauthorized commitment occurred, the ratifying official could have entered into, or could have granted authority to another to enter into, a contractual commitment which the official still has authority to exercise.
- 3) The resulting contract otherwise would have been proper if made by an appropriate contracting officer.
- 4) The price is fair and reasonable.
- 5) The contracting officer recommends payment and legal counsel concurs, unless agency procedures expressly do not require such concurrence.
- 6) Funds are available and were available when the unauthorized commitment occurred.
- 7) Ratification is within limitations prescribed by the agency.

Id.

⁸⁸⁷ See Unauthorized Commitments Memorandum, *supra* note 66. The memo stated the following.

Administrative discipline for civilians can include reduction in grade, suspension from duty without pay, or removal from office. Military personnel may be subject to appropriate administrative discipline or may be subject to action under the Uniform Code of Military Justice which may include punishment under Article 15 or trial by court-martial. Government Contractors may be held liable for their employee's misconduct. Contractor employees may also be held personally liable.

Id.

⁸⁸⁸ Sommerkamp E-mail, *supra* note 3.

⁸⁸⁹ For a thorough exploration of the genesis and potential future of the CERP, upon which this section heavily relies, See Lieutenant Colonel Mark Martins, *No Small Change of Soldiering: The Commander's Emergency Response Program (CERP) in Iraq and Afghanistan*, ARMY LAW. at 1, 4 n.24 (Feb. 2004) [hereinafter *No Small Change of Soldiering*].

⁸⁹⁰ Ariana Eunjung Cha, *Military Uses Hussein Hoard for Swift Aid*, WASH POST, Oct. 30 2003, at A01, [hereinafter *Military Uses Hussein Hoard for Swift Aid*] (quoting Major General David H. Petraeus, then commander of the Army's 101st Airborne Division (Air Assault)).

normal financial controls, intended to protect the expenditure of Congressional appropriations, were inapplicable to seized Iraqi funds, a special procedure was established to administer these funds.⁸⁹¹ Taking over for the ORHA, the Coalition Provisional Authority (CPA) renamed the CDF the CERP.⁸⁹² The CERP was partly shaped by, and intended to capitalize on, the success of humanitarian and reconstruction efforts in the Mosul area carried out by the 101st Airborne Division.⁸⁹³

The CJTF-7 put the seized Iraqi assets, and the CDF (now generally referred to as the CERP) into action by issuing implementing guidance in a fragmentary order (FRAGO).⁸⁹⁴ Numerous additional FRAGOs implemented changes and expansions to the program in its first few months of existence.⁸⁹⁵ These FRAGOs gave commanders the authority to use the seized Iraqi funds to conduct reconstruction assistance in their areas of operation. The CERP defined reconstruction broadly as “the building, repair, reconstitution, and reestablishment of the social and material infrastructure of Iraq.”⁸⁹⁶ The FRAGOs permitted purchasing goods and services to support a non all-inclusive list of projects to address the humanitarian needs of the Iraqi people, including:

- water and sanitation infrastructure;
- food production and distribution;
- healthcare;
- education;
- telecommunications;
- transportation;
- rule of law;
- effective governance;
- irrigation;
- purchase or repair of civic support vehicles;
- repairs to civic or cultural facilities; and

⁸⁹¹ Memorandum, The President to the Secretary of Defense, subject: Certain State-or Regime-Owned Property in Iraq (30 Apr. 2003).

⁸⁹² Headquarters, Combined Joint Task Force 7, FRAGO 89 (Commander’s Emergency Response Program (CERP) Formerly the Brigade Commander’s Discretionary Fund) to CJTF-7 OPOD 03-036 (192346JUN03) [hereinafter FRAGO 89] (on file with CLAMO).

⁸⁹³ Whitaker Notes, *supra* note 2.

⁸⁹⁴ Headquarters, U.S. Army V Corps, FRAGO 104M to OPOD Final Victory (establishing a “Brigade Commander’s Discretionary Recovery Program to Directly Benefit the Iraqi People”) (070220LMAY03) [hereinafter FRAGO 104M] (on file with CLAMO).

⁸⁹⁵ See Headquarters, U.S. Army V Corps, FRAGO 132M (Change 1 to FRAGO 104M – BDE CDR’s Discretionary Funds) to OPOD Final Victory (establishing a “Brigade Commander’s Discretionary Recovery Program to Directly Benefit the Iraqi People”) (082130LMAY03) [hereinafter FRAGO 132M]; Headquarters, U.S. Army V Corps, FRAGO 458M (Change 2 to FRAGO 104M – BDE CDR’s Discretionary Funds) to OPOD Final Victory (establishing a “Brigade Commander’s Discretionary Recovery Program to Directly Benefit the Iraqi People”) (051030MJUN03) [hereinafter FRAGO 458M]; FRAGO 89, *supra* note 69; Headquarters, Combined Joint Task Force 7, FRAGO 250 (Amendment to CERP) to CJTF-7 OPOD 03-036 (011947JUL03) [hereinafter FRAGO 250]; Headquarters, Combined Joint Task Force 7, FRAGO 438 (Expansion of the Commander’s Emergency Response Program (CERP) to Non-U.S. Coalition Forces) to CJTF-7 OPOD 03-036 (171949DJUL03) [hereinafter FRAGO 438] (on file with CLAMO).

⁸⁹⁶ FRAGO 89, *supra* note 76, para 3.B.

- payments to day laborers to perform civic cleaning.⁸⁹⁷

Certain categories of projects were specifically prohibited by the CERP FRAGO, these included:

- direct or indirect support to CJTF-7 forces, to include coalition forces;
- entertainment of the local Iraqi population;
- any type of weapons buy-back program or rewards program;
- the removal of unexploded ordnance;
- duplication of services available through local municipal governments;
- support to individuals or private businesses; and
- paying salaries or pensions to the civil work force.⁸⁹⁸

Judge advocates helped commanders put CERP funds to use, and Iraqi people to work on an extremely broad range of projects throughout Iraq. To the maximum extent possible, work on CERP projects was performed by Iraqi companies and individuals.⁸⁹⁹ CERP projects included rudimentary efforts to clean up after the conclusion of major combat.

Thousands of able-bodied Iraqis were paid a daily wage to clean streets, alleys, buildings and public spaces of debris and garbage, far exceeding the scope of cleanup the Army alone could accomplish and leveraging with self-interested Iraqi hands the efforts of American sergeants and privates operating military equipment.⁹⁰⁰

Commanders' use of the CERP and the immediate benefits this program provided to the Iraqi people gained national media attention.⁹⁰¹ The CERP was extraordinarily popular with commanders, and was expanded by the CPA to include non-U.S. Coalition Forces. Commanders approved literally thousands of CERP-funded projects in the first few months of the program's existence, spending tens of millions of seized dollars in the process.⁹⁰² To help maintain the CERP's success Congress appropriated \$180 million to fund CERP projects as part of an Emergency Supplemental Appropriations Act on 30 September 2003.⁹⁰³

The funds appropriated for the CERP infused new cash into the program, and the appropriations language contained several provisions significant to JAs.⁹⁰⁴ The appropriated

⁸⁹⁷ *Id.*

⁸⁹⁸ *Id.* para 3.D.

⁸⁹⁹ FRAGO 438, *supra* note 79, para. 3.B.6.

⁹⁰⁰ *No Small Change for Soldiering*, *supra* note 73, at 8

⁹⁰¹ *Military Uses Hussein Hoard for Swift Aid*, *supra* note 74, at A01.

⁹⁰² *No Small Change for Soldiering*, *supra* note 73, at 8.

⁹⁰³ Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004 Pub. L. No. 108-106, §1110, 117 Stat. 1209, 1215 [hereinafter Emergency Supplemental Appropriation].

⁹⁰⁴ The complete language of the CERP appropriation stated:

During the current fiscal year, from funds made available in this Act to the Department of Defense for operation and maintenance, not to exceed \$180,000,000 may be used notwithstanding any other provision of law, to fund the Commander's Emergency Response Program, established by the Administrator of the Coalition Provisional Authority for the purpose of enabling military

CERP dollars permitted commanders to continue implementing projects quickly, without the administrative strictures normally associated with acquisitions⁹⁰⁵ by stating that the appropriated CERP funds could be used “notwithstanding any other provision of law.”⁹⁰⁶ The appropriation language did, however, limit the use of these somewhat, by specifying the purpose of “urgent humanitarian relief and reconstruction requirements.”⁹⁰⁷ Recognizing the CERP’s success in Iraq as a valuable tool of commanders towards mission accomplishment, Congress in the emergency appropriation, authorized creation of a CERP to benefit the people of Afghanistan.⁹⁰⁸

Although new guidance for administering the CERP with appropriated funds (CERP-APF) was issued,⁹⁰⁹ practical changes to administration of the program were minimal, and remained largely transparent to units in the field.⁹¹⁰ The new guidance emphasized that as CERP-APF was funded with U.S. government funds, it was now liable to greater financial scrutiny and fiscal controls. Expenditures of CERP-APF must be necessary or incidental for the proper execution of the appropriation,⁹¹¹ and failure to remain within this requirement could violate U.S. fiscal law, and be enforced accordingly.⁹¹²

An example helps to demonstrate how JAs applied the CERP-APF guidance: Operating in the Al Anbar Province of Iraq, the 82d Airborne Division identified the need for a trucking company both to bring reconstruction supplies into the community, and to provide some of the division’s own logistics requirements. Several benefits would be derived from a functioning Al Anbar trucking company. The division could contract locally for hauling capacity, relieving some of the burden from the division’s own limited capacity, the company itself would provide jobs to Iraqi citizens, and interaction between the division and local business people would likely benefit the often mentioned “hearts and minds” element of the OIF mission.⁹¹³ A privately-owned trucking company operated in the area before the war, but its equipment was badly

commanders in Iraq to respond to urgent humanitarian relief and reconstruction requirements within their areas of responsibility by carrying out programs that will immediately assist the Iraqi people, and to establish and fund a similar program to assist the people of Afghanistan: Provided, that the Secretary of Defense shall provide quarterly reports, beginning on January 15, 2004 to the congressional defense committees regarding the source of funds and the allocation and use of the funds made available pursuant to the authority in this section.

Id.

⁹⁰⁵ See, e.g., FAR, *supra* note 27; AFARS, *supra* note 69.

⁹⁰⁶ Emergency Supplemental Appropriation, *supra* note 87.

⁹⁰⁷ *Id.*

⁹⁰⁸ *Id.*; see also, Message, 092041ZDEC03, Headquarters U.S. Central Command to Commander, ARCENT and CJTF-180, subject: Combined Forces Command Fragmentary Order 07-231 Commanders Emergency Response Program (CERP) – Appropriated Funds (CERP-APF) (on file with CLAMO).

⁹⁰⁹ Message, 092024ZDEC03, Headquarters U.S. Central Command to Commander, CJTF-7, subject: Combined Forces Command Fragmentary Order 07-231 Commanders Emergency Response Program (CERP) – Appropriated Funds (CERP-APF); CJTF-7 FRAGO 107 to OPORD 03-036; CJTF-7A, Information Paper, Subject: Sources of FY04 Funding for Projects Benefiting the Civilian Population of Iraq (5 Feb. 2004) (on file with CLAMO).

⁹¹⁰ Captain Timothy P. Hayes, Notes from After Action Review Conference, Office of the Staff Judge Advocate, 1st Armored Division, and the Center for Law and Military Operations, Wiesbaden, Germany, (13-14 Dec. 2004) [hereinafter Hayes Notes] (on file with CLAMO).

⁹¹¹ See *The Honorable Bill Alexander*, House of Representatives, 63 COMP. GEN. 422 (1984).

⁹¹² Hayes Notes, *supra* note 94.

⁹¹³ Ayres Notes, *supra* note 3.

damaged, and no longer functioned. The command believed providing start-up funds to the trucking company was an ideal candidate for the CERP because of the obvious humanitarian benefit. The OSJA identified a potential violation of CERP guidance prohibiting use of CERP funds for the direct benefit of individuals or private businesses.⁹¹⁴ As the benefits of obtaining the services of a local trucking company were undeniable, the OSJA struggled with a means of funding the start-up costs. Ultimately, the OSJA determined that O&M funds could indirectly provide the Al Anbar trucking company's start-up costs. As no other trucking company was readily available, the division could contract with the company for some of the division's logistics needs. The trucking company would use some of those funds for start-up costs, and once the company was up and running, it could use additional hauling capacity for the relief and reconstruction effort.⁹¹⁵

The CERP continued to evolve in Iraq after the transfer of sovereignty. New FRAGOs tailored the program as operational needs evolved. For the period covered by this chapter, JAs' experience with the CERP is accurately summarized by reflecting that although "CERP spending may be criticized for lack of documentation and. . . procedures,"⁹¹⁶ [t]he CERP is a "powerful tool that contributed greatly to the 'occupation' mission and had a strong positive impact on winning hearts and minds."⁹¹⁷

9. Prepare for Issues Regarding Support to Contractors on the Battlefield.⁹¹⁸

The Department of Defense uses contractors to provide U.S. forces that are deployed overseas with a wide variety of services because of force limitations and a lack of needed skills. These services are acquired through normal contracting procedures as well as through the Logistics Civil Augmentation Program (LOGCAP).⁹¹⁹ The types of services contractors provide to deployed forces include communication services, interpreters, base operations services, weapons systems maintenance, gate and perimeter security, intelligence analysis, and oversight of other contractors.⁹²⁰

The presence of many contractors in Iraq raised numerous issues addressed by deployed JAs. Legal issues concerning civilians accompanying the force, both DoD civilian employees and contractors, have been identified repeatedly in after action reports from various military

⁹¹⁴ FRAGO 89, *supra* note 76.

⁹¹⁵ Ayres Notes, *supra* note 3.

⁹¹⁶ Sommerkamp E-mail, *supra* note 3.

⁹¹⁷ *Id.*

⁹¹⁸ An excellent resource of information regarding these contractors is the Army Contractors Accompanying the Force (CAF) (AKA Contractors on the Battlefield) Guidebook, (Sept. 2003), *available at* <http://www.afsc.army.mil/gc/files/CAF%20Guidebook.doc> (last visited 4 Dec. 2004).

⁹¹⁹ See U.S. DEP'T OF ARMY, REG. 700-137, LOGISTICS CIVIL AUGMENTATION PROGRAM (16 Dec. 1985) [hereinafter AR 700-137] (defining the LOGCAP as "The Army's premier capability to support global contingencies by leveraging corporate assets to augment Army current and programmed Combat Support/Combat Service Support (CS/CSS) force structure).

⁹²⁰ U.S. General Accounting Office Report to the Subcommittee on Readiness and Management Support, Committee on Armed Services, U.S. Senate, *Contractors Provide Vital Services to Deployed Forces but Are Not Adequately Addressed in DOD Plans* (June 2003).

operations.⁹²¹ Not surprisingly, the issue typically raised in the past was labeled: understanding the “status” of contractor employees.⁹²² The question of contractor employee “status” might, at first glance seem to pertain almost solely to the question of when the contractor employees are entitled to POW treatment under the provisions of Geneva Conventions.⁹²³ For a discussion of contractor status under international law, see paragraph III.A.3 of this Publication. This status question is also a factor in the determination of whether and how contractor employees and other civilians may be armed, as discussed below. Previous AARs have addressed the status of contractor employees in terms of the commander’s ability to enforce orders intended to maintain good order and discipline (e.g., General Order 1) against contractor employees,⁹²⁴ as well as issues regarding entry, customs, and others.⁹²⁵ Many of these same issues arose again in Afghanistan and Iraq during major combat activities, and were discussed in Volume I of this Publication.⁹²⁶ None of these issues were completely resolved during the period covered by this Publication.⁹²⁷ For a discussion of the procedures used by U.S. Central Command to authorize civilians to carry weapons, see subparagraph 10, below.

Providing medical care to contractor employees remained a concern for the 30th Medical Brigade during full spectrum operations.⁹²⁸ Ordinarily, the government is not responsible for the medical care of contractor employees.⁹²⁹ Army policy permits providing medical and other support to contractor employees deployed with military forces on a reimbursable basis.⁹³⁰

⁹²¹ See CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN THE BALKANS 1995-1998: LESSONS LEARNED FOR JUDGE ADVOCATES 151 (13 Nov. 1998) [hereinafter BALKANS LESSONS LEARNED]; CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN HAITI, 1994-1995: LESSONS LEARNED FOR JUDGE ADVOCATES 142 (11 Dec. 1995) [hereinafter HAITI LESSONS LEARNED].

⁹²² *Id.*

⁹²³ Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Art 4 A. (4), 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135 [hereinafter GPW] (“Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model).

⁹²⁴ HAITI LESSONS LEARNED, *supra* note 115, at 143.

⁹²⁵ BALKANS LESSONS LEARNED, *supra* note 115, at 151.

⁹²⁶ CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN AFGHANISTAN AND IRAQ: VOLUME I MAJOR COMBAT OPERATIONS (11 SEPTEMBER 2001-1 MAY 2003), 172-173 (1 Aug. 2004) [hereinafter AFGHANISTAN AND IRAQ VOLUME I].

⁹²⁷ See, e.g., E-mail from Commander Brian O’Donnell, USCENTCOM Military Deputy SJA, to CLAMO, subject: USCENTCOM Arming Procedures (30 Nov. 2004) [hereinafter O’Donnell-mail].

⁹²⁸ See Captain Kristen Mayer, Transcript from After Action Review Conference, Office of the Staff Judge Advocate, V Corps, and the Center for Law and Military Operations, Heidelberg, Germany, at 1 (17-19 May 2004) (stating the 30th Medical Brigade operated several medical treatment facilities in Iraq, including the CASH in the ‘green zone’ only a few hundred meters from the CPA headquarters) [hereinafter Mayer Transcript] (on file with CLAMO).

⁹²⁹ But see Special Contract Requirements of the LOGCAP Brown and Root Contract Clause Relating to Contractor on the Battlefield Issues, Section H-19, (providing that “The government at its discretion may provide to contractor employees deployed in the theater of operations, on a cost reimbursable basis, emergency medical and dental care commensurate with the care provided to Department of Defense civilian deployed in the theater of operations. This does not include local nationals under normal circumstances.”), at: <http://www.afsc.army.mil/gc/files/Section%20H.doc> (last visited, 3 Dec. 2004).

⁹³⁰ When U.S. contractors are deployed from their home stations, in support of Army operations/weapon systems, the Army will provide or make available, on a reimbursable basis, force protection and support services commensurate with those provided to DOD civilian personnel to the extent authorized by law. These services may

Medical commanders sought advice from deployed JAs on the interpretation and application of this policy, particularly as it related to reimbursement for medical services provided. Contract employees sought medical care for various services, from broken limbs to minor ailments.⁹³¹ Medical professionals treated these conditions based on availability of providers, and as Army policy requires reimbursement for medical services, the command JA sought to collect contracts providing for cost-reimbursement of government-provided medical services. The contracts were collected in a database to aid in collecting reimbursement through third-party billing.⁹³² Collecting the contracts and relevant clauses was more difficult, and less helpful than initially anticipated. The medical treatment facilities asked contractor employees to provide copies of their contract when seeking medical care. Although this requirement produced several contracts, most of them were silent on the issue of reimbursement for medical services.⁹³³

The absence of documentation may not have significantly impacted the medical care provided to U.S. citizen contract employees as doctors understandably did not want to tell a U.S. citizen “No, we’re not going to fix your broken arm.”⁹³⁴ For cases of U.S. personnel requiring prompt treatment, medical personnel were likely to provide care regardless of contractual or policy provisions.⁹³⁵ Obtaining reimbursement for medical services remained problematic even in cases where contract documents were available and contained provisions for reimbursable medical treatment. To meet the rest of its operational needs, medical treatment facilities lacked sufficient deployed personnel to capture and track this type of treatment for third-party billing.⁹³⁶

Related to the issue of medical care is the transportation of the remains of contractor personnel killed while deployed. Subsequent to the period covered by this volume, the Commander, USCENTCOM was given authority to approve transportation of these remains.⁹³⁷

Addressing the many legally-related issues regarding contractors on the battlefield could be simplified greatly, and occasionally eliminated altogether if considered and addressed in the contract itself. Though it is unlikely every potential situation could be anticipated and written into a contract, many should be considered for inclusion in any contract that anticipates contractor employees supporting military operations. These include:

- Areas of deployment (to include potential hostile areas) and their associated risks;

include but are not limited to non-routine medical/dental care; mess; quarters; special clothing, equipment, weapons or training mandated by the applicable commander; mail, and emergency notification. Planning must be accomplished to ensure agree upon support to contractors is available to the responsible commander. Department of the Army Policy Memorandum, subject: Policy Memorandum – Contractors on the Battlefield (12 Dec. 1997), available at <http://www.afsc.army.mil/gc/files/Policy.doc> (last visited 4 Dec. 2004).

⁹³¹ Mayer Transcript, *supra* note 112, at 9.

⁹³² *Id.*

⁹³³ *Id.*

⁹³⁴ *Id.*

⁹³⁵ *Id.*

⁹³⁶ *Id.* at 8.

⁹³⁷ See Memorandum, Deputy Secretary of Defense, to Commander, U.S. Central Command, subject: Transportation of Deceased U.S. Government Contractors via U.S. Military Airlift (28 July 2004) (delegating to the Commander, USCENTCOM, authority to transport the remains of U.S. citizen contract employees accompanying or supporting OEF or OIF aboard U.S. owned or operated aircraft to military facilities within the United States), available at <http://www.afsc.army.mil/gc/files/transport.jpg> (last visited 4 Dec. 2004).

- Physical/Health limitations that may preclude contractor service in an theater of operations;
- Contractor personnel reporting and accountability systems to include plans to address contractor personnel shortages due to injury, death, illness, or legal action;
- Specific training or qualification(s) that will be required by civilian contractors to perform within a theater of operations, e.g. vehicle licensing, NBC, weapons;
- Reimbursement for government provided services, e.g. medical/dental;
- A plan to transition mission accomplishment back to the government if the situation requires removal of contractors.⁹³⁸

Future contracts may address many of the operational events that effect contractors accompanying the force by utilizing a current standardized clause developed for this precise purpose.⁹³⁹ This draft clause includes consideration of various deployed contractor employee issues ranging from clothing and equipment issue, to visas and customs. Although still in draft form as of this writing, the terms of this clause could be modified as appropriate and incorporated into any contract anticipating the deployment of contractor employees in support of military operations. Until including such clauses in contracts becomes universal practice, JAs should expect to continue advising commanders on difficult issues of providing support to contractors on the battlefield.

10. Prepare for Questions Regarding Arming Contractors.

Judge advocates providing contract law advice must be prepared to handle issues regarding civilian contractors carrying weapons. The international law issues regarding civilians accompanying the force carrying weapons is found at paragraph III.A.3. of this Publication. Throughout the period covered by this Publication, and beyond, USCENTCOM approval was required to arm DoD civilian employees, and contractors in both Afghanistan and Iraq.⁹⁴⁰ After action reviews frequently mentioned the issue of arming contractors as a continuous problem confronted by JAs.⁹⁴¹ The general impression of JAs was that many of DOD civilian and contractor employees accompanying deployed forces desired to carry weapons for personal protection. In many circumstances, military leaders and commanders also often advocated for arming civilians, especially those civilian personnel with whom they developed a close working relationship.⁹⁴²

⁹³⁸ Department of the Army Policy Memorandum, subject: Policy Memorandum – Contractors on the Battlefield (12 Dec. 1997), *available at* <http://www.afsc.army.mil/gc/files/Policy.doc> (last visited 4 Dec. 2004).

⁹³⁹ See DRAFT AFARS pt. 5125.74-9000 and Accompanying DRAFT clause 5152.225-74-9000, Contractors Accompanying the Force (June 2003).

⁹⁴⁰ E-mail from Major Robert Preston, USAF, OpLaw attorney, USCENTCOM Command Judge Advocate Section, to Major Craig Merutka, DJSA, CJTF-76, subject: Request for Comments Arming of civilians/contractors Iraq/Afghanistan, 5 June 2004 [hereinafter Preston E-mail] (on file with CLAMO); See also U.S. DEP'T OF ARMY, REG. 690-11, USE AND MANAGEMENT OF CIVILIAN PERSONNEL IN SUPPORT OF MILITARY CONTINGENCY OPERATIONS para. 1-7 g. (26 May 2004) (listing combatant commander requirements including establishing theater and/or specific operation weapons issue policy for government emergency-essential employees).

⁹⁴¹ Whitaker Notes, *supra* note 2; Interview with Lieutenant Colonel Sharon E. Riley, Staff Judge Advocate, 1st Armored Division, in Charlottesville, VA (5 Oct. 2004) (Notes on file with CLAMO).

⁹⁴² Lieutenant Colonel Sharon E. Riley, Notes from After Action Review Conference, Office of the Staff Judge Advocate, 1st Armored Division, and the Center for Law and Military Operations, Wiesbaden, Germany, (13-14 Dec. 2004) [hereinafter Riley Notes] (on file with CLAMO).

Complicating the issue of arming civilians accompanying the force were the numerous non-DOD civilian employees and contractors working for the CPA throughout Iraq. Civilian employees and contractors of many American, Coalition, and multinational organizations carried weapons, including such obvious examples as agents of the Federal Bureau of Investigation, the Diplomatic Security Service, and the Coalition Police Assistance Training Team. Considering the security situation, the presence of so many civilians carrying weapons probably contributed to the desire to arm certain DoD contractors, and added to the frustration of DoD contractors not approved to carry weapons. This problem could be avoided or mitigated if the same approval authority, or at a minimum, the same criteria and evaluation were used to approve all arming requests.⁹⁴³

As noted in Volume I of this Publication, although there is no definitive regulation on arming contractors, Department of the Army Pamphlet 715-16, *Contractor Deployment Guide*⁹⁴⁴ states that only the “Theater Commander” may authorize issuance of sidearms to contractors, and only for personal self-defense, and only after the contractor has received weapons handling and familiarization training in accordance with military regulations.⁹⁴⁵ The DA Pamphlet further clarifies that “the acceptance of self-defense weapons by a contractor employee is voluntary and should be in accordance with the gaining theater and the contractor’s company policy regarding possession and/or use of weapons.”⁹⁴⁶ The USCENTCOM policy⁹⁴⁷ remained consistent with this guidance requiring arming requests to be submitted through command channels to the deputy commander, USCENTCOM for review/approval.⁹⁴⁸ The information required as part of an arming request was substantial,⁹⁴⁹ the processing of which at least created the impression that

⁹⁴³ Sommerkamp E-mail, *supra* note 3.

⁹⁴⁴ U.S. DEP’T OF ARMY, PAM. 715-16, CONTRACTOR DEPLOYMENT GUIDE (27 Feb. 1998) [hereinafter DA PAM. 715-16]. See also U.S. DEP’T OF ARMY, FIELD MANUAL 3-100.21, CONTRACTORS ON THE BATTLEFIELD (3 Jan. 2003) (prior to 3 Jan. 2003, the Field Manual in effect was U.S. DEP’T OF ARMY, FIELD MANUAL 100-10-2, CONTRACTING SUPPORT ON THE BATTLEFIELD (4 Aug. 1999)).

⁹⁴⁵ DA PAM. 715-16, *supra* note 128, paras. 5-3(a)-(b).

⁹⁴⁶ *Id.* para. 5-3(c).

⁹⁴⁷ At the time, draft USCENTCOM policy on arming civilians stated that non-military U.S. government personnel and contractors within Iraq and Afghanistan shall not normally be armed for personal protection. If a military commander, civilian (GS) director, or general officer/civilian equivalent believes a particular case warrants special consideration for personal protection arming, a written request shall be forwarded via the chain of command to the applicable combined joint task force commander to USCENTCOM (ATTN: CCJA). Preston E-mail, *supra* note 124.
⁹⁴⁸ *Id.*

⁹⁴⁹ Information sheet, USCENTCOM, subject: Arming Civilians (undated) (on file with CLAMO). The information sheet listed the following requirements for arming requests.

The particular circumstances where the person(s) will operate.

Anticipated threat.

Why coalition military and host-nation military / civilian police / security forces are unable to provide adequate protection.

Documentation of training covering:

Weapons familiarization (per any service/USG agency standard).

Rules for the use of Force (RUF) (stressing the distinction between the ROE utilized by military forces and the RUF that controls civilian use of force).

Law of Armed Conflict.

Certification on DD Form 2760 (qualification to possess firearms or ammunition) that the person(s) is not prohibited under U.S. law from possessing a

this system either did not work at all, or was excessively slow. At least one JA suggested creating a tracking system for arming requests because of the slow process to request approval.⁹⁵⁰

Compliance with USCENTCOM policy on arming contractors was not universal. In at least one case, a military unit, apparently unaware of USCENTCOM policy, issued weapons to a contractor without approval.⁹⁵¹ The issue of arming contractors is likely to continually evolve in Iraq and Afghanistan as both the security situation and the nature of reconstruction efforts change. The lessons for JAs include keeping current on the arming policy, and ensuring that commanders and other leaders are informed.

11. Expect to Play a Prominent Role When Units Depart Facilities.

For various reasons, deployed units (and their supporting JAs) were required at one or more times to pack-up their equipment and move out of the facilities they occupied. The reasons for relocating included tactical considerations, Forward Operating Base (FOB) consolidation, and preparation for redeployment. An orderly and coordinated departure from these facilities touches on civil law practice in multiple contexts. Judge advocates should prepare to provide legal advice in the areas of property accountability, contracts, and compliance with environmental guidance.

The experience of JAs of the 1st Armored Division demonstrates a method to address the legal considerations for departing or closing FOBs.⁹⁵² To meet evolving mission requirements,

weapon (e.g., conviction in any court of a crime of domestic violence whether a misdemeanor or felony). Those security service employees that are residents of the host-nation must comply with local laws and regulations and secure applicable permits before arming will be authorized.

Acknowledgement by the person(s), and company for contract personnel, of the potential for civil and criminal liability under U.S. and host nation laws for use of weapons for personal protection

For personal protection arming, the request shall include the names of all persons requesting authorization. Blanket authorization for groups, organizations or job specialty will not be accepted.

Type(s) of weapons you are requesting to be authorized. If you command will be providing the weapons, please so indicate. Additionally please identify which command/units your civilians/contractors will be supporting within Iraq/Afghanistan. NMN-I in particular will check with the command/unit to ensure they concur in the request (very important if that command/unit will be providing the weapons for the request).

Id.

⁹⁵⁰ Whitaker Notes, *supra* note 2.

⁹⁵¹ *Id.*

⁹⁵² In OIF, the term Forward Operations Base was used generically to refer to the facility or location from which any number of military units of various sizes operate. The formal definition of Forward Operations Base is:

In special operations, a base usually located in friendly territory or afloat that is established to extend command and control or communications or to provide support for training and tactical operations. Facilities may be established for temporary or longer duration operations and may include an airfield or an unimproved airstrip, an anchorage, or a pier. A forward operations base

over the course of its OIF deployment, 1st Armored Division reduced its number of FOBs from thirty five to fifteen.⁹⁵³ The commander's intent was to leave all of these bases, a process referred to as closing, in as good or better condition than when 1st Armored Division initially occupied them. To meet this intent, JAs helped develop procedures to resolve potential legal issues when closing FOBs. This effort was directed to comply with Law of War requirements,⁹⁵⁴ and to maintain accountability, demonstrate good stewardship, and minimize potential claims for damage.⁹⁵⁵

While occupying the FOBs, 1AD units made considerable improvements to the facilities to make them operationally suitable. Improvements ranged from basic area clean-up, and window replacement and painting, to more substantial projects like rewiring, installing generators and air conditioners, and some minor military construction. Generally, units paid for these improvements with O&M funds.⁹⁵⁶ Many of the improvements were costly, and to maintain proper accountability some of these improvements, like generators, were added to unit property books.⁹⁵⁷ By necessity, some of this property would be left behind by 1st Armored Division units closing FOBs.

None of the FOBs were simply abandoned by 1st Armored Division. Once closed, all the facilities of the FOB—land, buildings, and other property—were turned-over to another entity, either another coalition military unit or government agency (called an “enduring FOB”),⁹⁵⁸ or transferred to the Iraqi Civil Defense Corps (ICDC) or through the CPA to an Iraqi ministry.⁹⁵⁹

The process of closing the FOB included a detailed inventory and valuation of all property that would be left behind. The departing unit conducted a report of survey⁹⁶⁰ to account for this property, and to update property books accordingly. The property inventory was presented to the entity taking responsibility for the FOB. If a U.S. military unit was to occupy the closed FOB, property would be transferred to that unit's property records. Similarly, if an Iraqi ministry was to take responsibility for the FOB, the property would be transferred to

may be the location of special operations component headquarters or a smaller unit that is controlled and/or supported by a main operations base.

U.S. DEP'T OF ARMY, U.S. MARINE CORPS, FIELD MANUAL 101-5-1, OPERATIONAL TERMS AND GRAPHICS, para. 1-71 (30 Sept. 1997).

⁹⁵³ Captain Jocelyn S. Urgese, Notes from After Action Review Conference, Office of the Staff Judge Advocate, 1st Armored Division, and the Center for Law and Military Operations, Wiesbaden, Germany, (13-14 Dec. 2004) [hereinafter Urgese Notes] (on file with CLAMO).

⁹⁵⁴ See Geneva Convention Relative to the protection of Civilian Persons in Time of War, 12 Aug. 1949, 75 U.N.T.S. 287, Art. 53 [hereinafter GC IV] (stating that any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or the State, or to other public authorities. . . is prohibited, except where such destruction is rendered absolutely necessary by military operations).

⁹⁵⁵ Johnson Notes, *supra* note 43.

⁹⁵⁶ *Id.*

⁹⁵⁷ See DEP'T OF ARMY, REGULATION 735-5, POLICIES AND PROCEDURES FOR PROPERTY ACCOUNTABILITY, Ch. 4 (10 June 2002) [hereinafter AR 735-5]; U.S. DEP'T OF ARMY, REGULATION 710-2, SUPPLY POLICY BELOW THE NATIONAL LEVEL, Ch. 2 (25 Feb. 2004).

⁹⁵⁸ Captain Jocelyn S. Urgese, FOB Closures Extension Operations (13 Dec. 2004) (Power Point presentation on file with CLAMO).

⁹⁵⁹ Urgese Notes, *supra* note 138.

⁹⁶⁰ See AR 735-5, *supra* note 141, Ch. 13.

property books of the CPA. As the CPA was an entity of the DoD, it conveniently had its own Department of Defense Identity Code (DoDIC)⁹⁶¹ for property accountability, which simplified the process of transferring property accountability.⁹⁶² If the ICDC was to take over operation of the FOB, the ICDC commanding officer was asked to take responsibility, and sign for the property improvements. Having the ICDC unit sign for the property tended to maximize the benefit of 1st Armored Division's improvements to the FOB. It was hoped the record of transferred property would foster an accountability procedure and minimize losses due to looting/pilfering.⁹⁶³ The division's resource manager then included the value of the property given to the ICDC as part of the 1AD's support to the ICDC.⁹⁶⁴

In addition, JAs developed a checklist for FOB closures. A copy of the checklist is at Appendix D-2. This checklist helped ensure all legal-related tasks associated with FOB closure were completed before the FOB was turned over to another entity.⁹⁶⁵ These tasks included legal reviews for reports of survey when necessary, and ensuring that LOGCAP and other contracted services for the FOB were discontinued.⁹⁶⁶ Finally, a JA accompanied the physical inspection of every FOB, and prepared a memorandum for each FOB noting environmental conditions,⁹⁶⁷ improvements, and changes to the property relevant to potential claims regarding 1st Armored Division's use of the facilities. An example of a FOB close-out inspection memorandum is at Appendix D-3.

12. Take Advantage of Hague Occupation Rules.

Judge advocates who advised military leaders in Iraq pointed out the ability to use the Hague rules governing treatment of enemy property during occupation advantageously.⁹⁶⁸ During an occupation, the Hague rules permit the occupying power to requisition publicly and privately owned property when necessary for the occupation.⁹⁶⁹ The Hague Rules require compensation for requisitioned property that is privately owned,⁹⁷⁰ but clearly contemplate fixing the value of the property requisitioned and paying compensation after the fact.⁹⁷¹ During the

⁹⁶¹ U.S. DEP'T OF ARMY, PAMPHLET 710-2-2, SUPPLY SUPPORT ACTIVITY SUPPLY SYSTEM, Para. 2-2c.(2) (30 Sept. 1998).

⁹⁶² CPT Urgese Notes, *supra* note 138.

⁹⁶³ *Id.*

⁹⁶⁴ *Id.*

⁹⁶⁵ *Id.*

⁹⁶⁶ *Id.*

⁹⁶⁷ Specific environmental conditions inspected were removal of hazardous materials, Class IV property, and fill of waste burn pits. *Id.*

⁹⁶⁸ Lieutenant Colonel Jonathon A. Kent, Notes from After Action Review Conference, Office of the Staff Judge Advocate, V Corps, and the Center for Law and Military Operations, Heidelberg, Germany, (17-19 May 2004) [hereinafter Kent Notes] (on file with CLAMO).

⁹⁶⁹ Hague Convention No. IV Respecting the Laws and Customs of War on land and its Annex: Regulation Concerning the Laws and Customs of War on Land, art. 52, Oct. 18, 1907 [hereinafter Hague IV]

⁹⁷⁰ *See, e.g., id.* art. 52, (stating that "[r]equisitions in kind and services are permitted by the Hague rules to meet the needs of the army of occupation"); U.S. DEP'T OF ARMY, FIELD MANUAL 27-50, THE LAW OF LAND WARFARE, para. 412b., (stating that "[p]ractically everything may be requisitioned under [Article 52] that is necessary for the maintenance of the army") (July 1956, C1 1976).

⁹⁷¹ Hague IV, *supra* note 153, art. 53.

occupation of Iraq, CJTF-7 occasionally used this provision to “clean up the contracting battlefield” and avoid the argument that some activities were unauthorized commitments.⁹⁷²

One example of using Hague rules advantageously involved use of an Iraqi railroad. In this instance, military authorities used an Iraqi railroad to haul some of the coalition’s logistical requirements. The initial agreement, apparently negotiated informally, paid salaries to the railroad workers, but provided no consideration for use of the railroad and equipment itself. After the fact, the railroad sought payment for these non-contracted services. Contracting procedures were not used when railroad services were initiated. Using a contract to pay for these services after the fact required treating the services as an unauthorized commitment which the appropriate contracting officer would have to ratify to avoid a potential anti-deficiency act violation.⁹⁷³ Judge advocates evaluating this action determined a contract and ratification were unnecessary to pay for the railroad services. At the time of use, the railroad services were used as a matter of military necessity. United States forces use of the railroad was best described as a requisition by an occupying power. Accordingly, the railroad’s request was paid as a compensation claim for the requisitioned property under the Hague rules.

⁹⁷² Dymond Notes, *supra* note 12.

⁹⁷³ The Anti-deficiency Act, 31 U.S.C. §1341 et. seq.

E. CLAIMS

*[A] nationally televised news story on the war in Iraq featured a judge advocate (JA) from the 82d Airborne Division. In this story, the featured content was not legal advice regarding rules of engagement or even military justice, but the JA's role as a Foreign Claims Commission (FCC). This media interest in how the U.S. government compensates Iraqi civilians for non-battle harm reflects the growing importance of the Army's FCCs in stabilizing and rebuilding Iraq.*⁹⁷⁴

Judge advocates (JAs) in Afghanistan and Iraq continued to wrestle with a variety of claims issues, particularly those involving foreign claimants. Deployed claims issues essentially revolved around a competing tension. On the one hand, commanders believed that the payment of legitimate claims helped win the hearts and minds of the populace and enhanced their units' force protection postures.⁹⁷⁵ On the other hand, the foreign claims statutory and regulatory scheme often either disallowed payment or required a lengthy procedural process before payment. Caught in the middle of this tension, JAs struggled to reconcile the law with operational necessities.⁹⁷⁶ Several lessons emerge from their efforts.⁹⁷⁷

1. Establish Appropriate Single-Service Claims Authority.

The Department of the Air Force had single-service claims responsibility for Afghanistan and Iraq during the periods of major combat activity in both countries.⁹⁷⁸ In other words, only claims personnel at the Air Force single-service claims office—the 9th Air Force/Central

⁹⁷⁴ Captain Karin G. Tackaberry, *Judge Advocates Play a Major Role in Rebuilding Iraq: The Foreign Claims Act and Implementation of the Commander's Emergency Response Program*, ARMY LAW. at 39 (Feb. 2004) [hereinafter *The FCA and Implementation of the CERP*].

⁹⁷⁵ See, e.g., Interview with Colonel David L. Hayden, Staff Judge Advocate, XVIIIth Airborne Corps, in Charlottesville, Va. (7 Oct. 2003) (videotape on file with CLAMO) [hereinafter Hayden Interview] (noting that paying valid claims is a key component of force protection because it helps maintain good relations with the local populace); Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), Operation Iraqi Freedom Lessons Learned (2003) [hereinafter 101st ABN DIV Lessons Learned] (explaining how foreign claims procedural delays had “greatly injur[ed] our relationship and credibility with the local populace”) (on file with CLAMO).

⁹⁷⁶ See, e.g., Hayden Interview, *supra* note 2, at 2 (arguing that the U.S. claims scheme is “overly technical,” and that the ability to pay claims can reap “huge dividends” for the commander).

⁹⁷⁷ This chapter should be read in conjunction with the Claims Chapter in Volume 1 of this Publication. CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN AFGHANISTAN AND IRAQ VOLUME 1 MAJOR COMBAT OPERATIONS (11 SEPT. 2001 – 1 MAY 2003) para. III.H. (1 Aug. 2004) [hereinafter *Afghanistan and Iraq Legal Lessons Learned*].

⁹⁷⁸ See U.S. DEP'T OF DEFENSE, DIR. 5515.8, SINGLE-SERVICE ASSIGNMENT OF RESPONSIBILITY FOR PROCESSING OF CLAIMS para. 3 (9 June 1990) [hereinafter DOD DIR. 5515.8] (assigning exclusive geographic responsibility to each service for the processing of tort claims for and against the United States). Under the Directive, the Air Force is responsible for, *inter alia*, claims involving the United States Central Command (CENTCOM) in countries not otherwise assigned to another military service; thus, because Afghanistan and Iraq are in the CENTCOM area of responsibility and not otherwise assigned, the Air Force had single-service claims responsibility. *Id.* para. E1.1.3. Of note, the DoD Office of the General Counsel subsequently reassigned claims responsibility in Iraq from the Department of the Air Force to the Department of the Army. See Memorandum, General Counsel, Dep't of Defense, to Sec'y of the Army, subject: Claims Responsibility—Iraq (17 June 2003) [hereinafter *DoD Iraq Claims Responsibility Memo*].

Command Air Forces (CENTAF) at Shaw Air Force Base, South Carolina, and at Prince Sultan Air Base, Saudi Arabia⁹⁷⁹—had the authority to adjudicate and pay foreign claims that arose during the operations and to appoint foreign claims commissions (FCCs) to adjudicate and pay the claims.⁹⁸⁰ This arrangement caused many difficulties for Army personnel on the ground attempting to resolve claims. Accordingly, on 17 June 2003, pursuant to a request from U.S. Central Command, the DoD Office of the General Counsel reassigned single-service claims responsibility for Iraq from the Air Force to the Army.⁹⁸¹ A copy of this memorandum is at Appendix E-1. Army JAs recommend identifying the service likely to conduct the bulk of the claims processing in advance of any major military operation, and vesting single service claims responsibility in that service.⁹⁸² For a more detailed discussion of these difficulties, see the Claims chapter in Volume 1 of this Publication.⁹⁸³

2. Establish Sufficient Claims Settlement Authority for FCCs.

The transfer of single service claims responsibility from the Air Force to the Army allowed the administration of claims processing to be significantly improved, although due to various logistical difficulties, processing was often far from what would be desired. For example, to streamline claims in the Task Force 82's (TF-82) area of responsibility in Iraq, a JA in each brigade was appointed as a one-person FCC⁹⁸⁴ with the authority to adjudicate and pay claims of \$5,000 or less within that brigade's area of responsibility. The Staff Judge Advocate (SJA) acting as a FCC was given authority for claims up to \$15,000⁹⁸⁵ and any claims over that amount were forwarded to Combined Joint Task Force Seven (CJTF-7) for adjudication.⁹⁸⁶

Judge advocates from some units expressed dissatisfaction with this arrangement. They felt the volume of high-dollar claims and the geographic separation of brigade JAs from the SJA greatly slowed adjudication of these claims.⁹⁸⁷ They recommended granting all JAs acting as

⁹⁷⁹ The Air Force eventually established a claims presence in Iraq, at the Baghdad International Airport, prior to the 17 June 2003 reassignment of single-service claims responsibility to the Army pursuant to the DoD Iraq Claims Responsibility Memo, *supra* note 5. See Transcript of After Action Review Conference, Office of the Staff Judge Advocate, 3d Infantry Division, and Center for Law and Military Operations, Fort Stewart, Ga., at 109 (18-19 Nov. 2003) [hereinafter 3ID AAR Transcript] (on file with CLAMO).

⁹⁸⁰ The Foreign Claims Act, 10 U.S.C. § 2734 (2000), was the relevant claims statute for Afghanistan and Iraq. One of the primary virtues of the Act is the ability of a duly appointed FCC to pay, within certain dollar limits, claims more quickly in-country without the delays associated with forwarding the claim to a higher claims office. See 10 U.S.C. § 2734(a).

⁹⁸¹ See DoD Iraq Claims Responsibility Memo, *supra* note 5.

⁹⁸² Captain Brian P. Adams, Client Services Attorney, Office of the Staff Judge Advocate, V Corps, Operation Iraqi Freedom (OIF) Client Services After Action Report (AAR), at 2 [hereinafter Adams AAR] (on file with CLAMO).

⁹⁸³ Afghanistan and Iraq Legal Lessons Learned, *supra* note 4, para. III.H.

⁹⁸⁴ See U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS, para. 10-6 (1 Jul. 2003) (describing the maximum settlement authority of one-person FCCs as \$15,000 and of three-person FCCs at \$50,000).

⁹⁸⁵ Lieutenant Colonel Thomas E. Ayres, Notes from After Action Review Conference, Office of the Staff Judge Advocate, 82d Airborne Division and Center for Law and Military Operations, Fort Bragg, N.C., (17-19 Jun. 2004) [hereinafter Ayres Notes] (on file with CLAMO).

⁹⁸⁶ *The FCA and Implementation of the CERP*, *supra* note 1, at 40.

⁹⁸⁷ Captain Matthew M. Newell, Notes from After Action Review Conference, Office of the Staff Judge Advocate, 1st Armored Division, and the Center for Law and Military Operations, Wiesbaden, Germany (13-14 Dec. 2004) [hereinafter Newell Notes] (on file with CLAMO).

one-person FCCs the maximum settlement authority of \$15,000.⁹⁸⁸ Judge advocates must weigh the advantages of centrally controlling adjudication of large claims against the advantages of settling claims quickly, and seek appropriate authority.

3. Train Claims Before Deployment.

A shortcoming in pre-deployment training for some units was the adequacy of claims training provided for legal teams, especially training received by junior JAs and paralegals prior to undertaking deployed claims responsibilities. As a result, a majority of claims training was done ‘on the job’ which resulted in unnecessary inefficiencies in processing claims, and a follow on effect on other duties.⁹⁸⁹ Accordingly, the 82d Airborne Division noted that it was extremely important to identify as soon as practicable deploying JAs and paralegals who would be carrying out claims administration and processing as primary duties.⁹⁹⁰ This is especially important in units where the Office of the Staff Judge Advocate (OSJA) does not perform the claims function in garrison. Early identification of claims personnel ensures they may be appropriately trained prior to deployment and thus ‘hit the ground running.’

The division of the claims workload was carried out variously by JAs and/or paralegals. For instance, in some divisions, such as the 82nd Airborne, and the 4th Infantry Division claims processing⁹⁹¹ was largely performed by the enlisted paralegals who successfully undertook the investigation and processing of most claims and paperwork.⁹⁹² Relying on deployed enlisted paralegals to take on a large share of the responsibility for investigating and processing claims appears to be an emerging trend. Deployed claims present an obvious opportunity to exploit the talents of paralegals. Non-deployed claims offices can leverage opportunities for enlisted paralegals to exercise both claims processing and investigation skills to ensure these personnel can take on deployed claims responsibilities with confidence.

4. Adequately Staff the Claims Office.

In staffing their own claims office, the 101st Airborne Division (Air Assault), identified what they saw as the minimum to operate an efficient and effective deployed claims office.

At a minimum, there should be one claims JA, an NCOIC, and a paralegal staffed in the claims office. Having a local attorney and one's own translator is a must for any claims team. Work to obtain more paralegals as needed. Make full use of any extra translators.⁹⁹³

This baseline staffing was sufficient to keep the 101st Airborne Division claims office sufficiently busy without being overwhelmed. When surge capacity was need, the claims office

⁹⁸⁸ *Id.*

⁹⁸⁹ Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), Operation Iraqi Freedom (OIF) After Action Report (AAR), at 25 [hereinafter 101st ABN DIV AAR] (on file with CLAMO).

⁹⁹⁰ Ayres Notes, *supra* note 11.

⁹⁹¹ AR 27-20, *supra* note 10, para 2-2(d)(1)(a) (commanders can appoint commissioned officers, warrant officers, noncommissioned officers, or qualified civilian employees to investigate claims incidents).

⁹⁹² Ayres Notes *supra* note 12.

⁹⁹³ *Id.*

was augmented with additional personnel. Frequently the caseload required augmentation of interpreters. On occasions, up to five interpreters/translators were required, two for claims intake, two for inspection teams, and one dedicated to document translation.⁹⁹⁴

Many brigades' commented on the value of having a local attorney as part of the claims office—as not only could they assist with translations/interpreting, but they were invaluable on questions of local Iraqi law, which was often inaccessible or had not been translated into English.⁹⁹⁵ Local attorneys also assisted in investigations by advising on appropriate amounts to be paid for damage and also with compiling of claims files.

5. Tailor Appropriate Claims Intake and Processing Procedures.

The intent of the Foreign Claims Act is to “promote and maintain friendly relations through the prompt settlement of meritorious claims.”⁹⁹⁶ Conditions in Iraq often frustrated the efforts of claims personnel to meet the prompt part of this intent. Administratively, claims could take a relatively long time to process due to the need to gather relevant information (which could often be scant, if any) and the travel involved in investigating the claims. In some instances, these delays could cause claimants awaiting adjudication to become unruly. In at least one instance for the 4th Infantry Division, a long line of claimants angrily protested due to the delay in dealing with their claims.⁹⁹⁷ One method the 1st Armored Division used to alleviate these problems was to establish effective standing operating procedures (SOPs) and to put in place checkpoints and claims processing locations to provide for a secure environment and for the safety of the claims team. Sign-in logs, weapons searches and appropriate signage were also effectively utilized by 1st Armored Division in the processing of claims submitted by the local population.⁹⁹⁸

During some periods of full spectrum operations, traveling to investigate certain claims was deemed too high a risk to claims personnel versus the benefit of paying the claims promptly. In these circumstances, the claimant was required to arrive at the claims office with all evidence justifying the claim.⁹⁹⁹ The 101st Airborne Division After Action Review (AAR) succinctly highlights the intake requirements they had in place and which were effective, noting the circumstances under which they were conducting claims processing:

In order to file a claim, all claimants had to have their identification card issued by the Iraqi Government. Problems occurred when claimants did not have their identifications because U.S. troops confiscated them during a raid and never returned them. To solve this problem, we allowed any form of identification with a claimant's picture on it. For auto accidents, many claimants were the drivers. This

⁹⁹⁴ *Id.*

⁹⁹⁵ Ayres Notes, *supra* note 12.

⁹⁹⁶ 10 U.S.C. § 2734(a) (2000).

⁹⁹⁷ Office of the Staff Judge Advocate, 4th Infantry Division, Operation Iraqi Freedom (OIF) After Action Report (AAR), at 16 [hereinafter 4ID AAR] (on file with CLAMO).

⁹⁹⁸ Newell Notes, *supra* note 14.

⁹⁹⁹ Daniel M. Froehlich, Notes from After Action Review Conference, Office of the Staff Judge Advocate, 82d Airborne Division and Center for Law and Military Operations, Fort Bragg, N.C., (17-19 June 2004) [hereinafter Froehlich Notes] (on file with CLAMO).

was a problem because the owner of the vehicle would often come in after the claims JA had settled the claim and state that he was the proper claimant. We implemented a policy that the proper claimant was the registered vehicle owner with his identification card and registration document. We also set up the database to not accept the same license plate number more than once, which alleviated multiple claims for the same vehicle. Claimants also had to bring pictures of the damage and a picture of the front of the license plate.¹⁰⁰⁰

6. Prepare for Claims Missions in Hazardous Circumstances.

Universally, legal team AARs reported that the safety of claims teams conducting investigations was of significant concern. Claims missions included two-person teams inspecting entire neighborhoods on foot with one person acting as the investigator and the other as security.¹⁰⁰¹ One AAR summed up the hazards encountered by personnel by stating “[i]t was a miracle that the claims team did not suffer any casualties.”¹⁰⁰² Shortages of ceramic body armor plates found some deployed legal personnel without complete body armor sets.¹⁰⁰³ Until this situation was resolved, supervisors had to be particularly wary of the security situation before dispatching teams for claims investigations. The shortage of body armor was not the only hazard to investigating teams. In many instances, the teams inspecting homes had no means of communication with each other or their transport vehicles. Whenever traveling, members of the claims team must have appropriate communications and body armor to conduct investigations with as much safety as possible.¹⁰⁰⁴

Deployed claims teams did not typically have assigned vehicles. Units addressed this shortcoming variously. In at least one instance, a vehicle, including mounted weapons was dedicated to the Brigade Operational Law Team (BOLT).¹⁰⁰⁵ Other claims teams relied on vehicles and drivers tasked from different units or sections. Relying on these tasked vehicles presented both advantages and disadvantages for claims teams. Tasked vehicles occasionally failed to arrive for missions, arrived late, or were tasked to other missions.¹⁰⁰⁶ Additionally, vehicles tasked to support claims missions could be deemed underutilized, resulting in claims teams receiving “use-it-or-lose-it” orders from the tasked unit’s commanders.¹⁰⁰⁷ As an advantage, tasked vehicle drivers often had excellent knowledge of the roads and neighborhoods in which they drove.¹⁰⁰⁸ At times the tactical situation presented unacceptable risks for claims teams to travel without escorts. Commanders recognized both the hazard to claims teams and the value that paying claims contributed to the overall mission. In these cases, commanders tasked

¹⁰⁰⁰ 101st ABN DIV AAR, *supra* note 16, at 31.

¹⁰⁰¹ *Id.* at 23.

¹⁰⁰² *Id.* at 22.

¹⁰⁰³ *Id.*

¹⁰⁰⁴ *Id.* at 23.

¹⁰⁰⁵ Captain Patrick J. Murphy, Notes from After Action Review Conference, Office of the Staff Judge Advocate, 82d Airborne Division and Center for Law and Military Operations, Fort Bragg, N.C., (17-19 Jun. 2004) [hereinafter Murphy Notes] (on file with CLAMO).

¹⁰⁰⁶ 101st ABN DIV AAR, *supra* note 16, at 23.

¹⁰⁰⁷ *Id.*

¹⁰⁰⁸ *Id.*

infantry units to provide escort and security for claims missions.¹⁰⁰⁹ Ideally, claims offices should ensure that vehicles are assigned to their office and if not, then time should be taken to orient those service members and drivers attached for specific taskings. A more comprehensive discussion of particular Soldier skills and equipment may be found in section J of this Publication—*Personnel, Training, and Equipment*.

7. Choose the Appropriate Currency for Claims Payments.

Army regulations require foreign claims payments to be made in the local currency of the country where claims incidents occur unless higher claims authorities authorize an exception.¹⁰¹⁰ For two primary reasons, however, JAs did not pay claims or solatia in the local currency during the period of this Publication in Afghanistan and Iraq. First, unit finance officers did not have ready access to a steady supply of local money.¹⁰¹¹ Second, the afghani and the dinar, the respective currencies of Afghanistan and Iraq, fluctuated wildly in value; U.S. dollars were more stable. Finally, the local citizens preferred payment in dollars.¹⁰¹² Payments continued to be made in U.S. dollars due to difficulties obtaining local currencies and the local preference for U.S. dollars. As paying claims in the local currency is the preferred method, JAs should actively monitor currency conditions and establish procedures under which local currency should be used.

8. Recognize the Value of Interpreters.

Interpreters were an indispensable resource in the processing of claims. Not only did they provide interpretation services during claims investigations, but they were also able to translate all claims forms, correspondence to claimants, and settlement agreements, in both English and Arabic. In addition, they were able to obtain estimates of repair costs and fair market value for claims by talking to the local populace. “Translators can provide much more than linguistic expertise. Baghdad translators are well paid and these positions attract highly educated applicants with a wealth of knowledge and experiences.”¹⁰¹³ Acquisition of Arabic word processing software and keyboards was a vital step in allowing the interpreters to perform their work effectively.¹⁰¹⁴ Judge advocates recommend attempting to acquire this software and hardware before deployment.¹⁰¹⁵

The 101st Airborne Division also identified the value of the assistance of U.S. translators in cases where local translators might be subject to undue pressures from some claimants.

¹⁰⁰⁹ *Id.* (“CPT Rossiter contacted the battalion commanders in the claimant’s AO and worked out a security detail. The infantry commanders were pleased the claims team was pushing more money into their detail area.”).

¹⁰¹⁰ See AR 27-20, *supra* note 11, para. 10-9(b) (“Payment will be made in the currency of the country in which the incident occurred or in which the claimant resided at the time of the incident, unless the claimant requests payment in U.S. dollars or another currency and such request is approved by the Commander, USARCS.”).

¹⁰¹¹ See, e.g., Office of the Staff Judge Advocate, Combined Task Force 82, Mid-Point AAR, at 8 (1 Jan. 2003) [hereinafter 82d Mid-Point OEF AAR] (on file with CLAMO).

¹⁰¹² See, e.g., Hayden Interview, *supra* note 2.

¹⁰¹³ Newell Notes, *supra* note 14.

¹⁰¹⁴ *The FCA and Implementation of the CERP*, *supra* note 1, at 41.

¹⁰¹⁵ *Id.*

The claims office had to reconfigure the translator situation several times to suit the mission.

At first, the claims section had two CAT1 (stands for “category 1”) interpreters. CAT1s are local nationals who speak English. After screening, the government hires them to work for the U.S. military. During in-home inspections, the claims team took the CAT1s with them. During non-inspection days, the CAT1s would assist in the office with intakes and follow-ups. When anti-American sentiments and hostilities in the area increased, the claims office received reports of threats against the CAT1s. Sometimes these threats impeded the CAT1s ability to do their daily work. On several occasions CAT1s were victims of terrorist activities near the CMOC. A trend arose where claimants made statements to the CAT1s such as, “you live here . . . you’re my neighbor . . . help me . . . tell me the right thing to say so they will pay my claim.” This type of claimant temperament became a problem. Additionally, many of the claims dealt with classified information, such as troop locations and raid areas. CAT1s are not privy to this information. Within one week’s time, the CAT1’s knew the ins and outs of the office. They knew the SOP, how a claimant had to answer a question to get their claim approved, and what answers would get a claimant denied.

The claims office requested a CAT2 (category 2). A CAT2 is a U.S. citizen with secret clearance who speaks fluent Arabic. Claims received a CAT2 three weeks after placing a formal request. The CAT2 travels with the unit and wears the uniform of the unit (in OIF, this included desert camouflage uniforms (DCUs), boots, and cover). This office’s CAT2 worked perfectly for the mission. The claimants did not intimidate the CAT2 interpreter. When claimants told the CAT2 to help them because she was Arab, she would point to the flag on her DCUs and tell them that she was an American.¹⁰¹⁶

9. Use Local Assistance to Facilitate Claims.

Army regulations require that FCA claims be adjudicated in accordance with local laws, customs, and standards, with some allowance for reference to general U.S. tort principles.¹⁰¹⁷ An issue for JAs in Afghanistan and Iraq was determining what exactly those local laws, customs, and standards were. Local attorneys were occasionally hired to assist JAs in making these determinations. Judge advocates noted that advice from local attorneys regarding claims settlement was often inconsistent and sometimes contradictory. Judge advocates ascertained the inconsistency of local legal advice was due to a number of factors, including both local practice and the bias of some local attorneys.¹⁰¹⁸ In Iraq at least, JAs eventually determined that although colored by local customs, Iraqi tort and liability law was similar to that practiced in the U.S.

¹⁰¹⁶ 101st ABN DIV AAR, *supra* note 16, at 25.

¹⁰¹⁷ See AR 27-20, *supra* note 11, paras. 10-5(a)-(b) (stating that an appropriate award under the FCA be based on application of “the law and custom of the country in which the incident occurred to determine which elements of damage are payable and which individuals are entitled to compensation,” but that certain U.S. tort principles remain generally applicable).

¹⁰¹⁸ Ayres Notes, *supra* note 12.

Accordingly, claims personnel often fell back on their own training in tort law and principals of equity to resolve claims.¹⁰¹⁹

Claims offices in Iraq received a large number of claims for damage to privately owned automobiles caused by military vehicles negotiating traffic on crowded Iraqi roads. Claims personnel felt these claims were particularly susceptible to inflated claims for damages/repairs.¹⁰²⁰ To address this problem, the 101st Airborne Division OSJA claims office hired a reputable local mechanic to review all auto damage claims and provide an independent estimate of repair costs.¹⁰²¹ All claims for auto damage required an independent estimate from this mechanic, who charged a nominal ten dollar fee for his inspection. The mechanic's fee was included as part of the settlement for all meritorious claims.¹⁰²² The SJA estimated the independent mechanic's estimates saved the claims office over forty thousand dollars.¹⁰²³

10. Use a Local System to Record and Track Claims.

A recurring issue throughout the AAR's was the significant difficulties encountered in trying to keep track of claims in theater, as Army JAs had no access to the U.S. Army Claims Service (USARCS) claims database. This was due to the non-existent or intermittent non-secure internet protocol router network (NIPR) access and the inability to access the USARCS database as it was web-based.¹⁰²⁴ At least one JA recommended developing a system where deployed JAs could access USARCS on secure internet protocol router enabled computers, as these are more readily available to forward-deployed personnel.¹⁰²⁵

To address the difficult and occasionally impossible task of connecting with the USARCS database, a workaround was put in place which entailed developing and maintaining separate spreadsheets/databases which were then forwarded to higher headquarters for inputting into the claims database.¹⁰²⁶ A difficulty with this system was that not all areas had access to the spreadsheets being maintained by other claims offices. As a result, there were instances where individuals were lodging claims in multiple locations. If each claims office had access to the spreadsheets of other offices, then multiple claims could be more easily identified and thus rejected. However, if the individual filed the same claim in a different area of operations (AO), then there would be no mechanism by which to identify that claim. Proper coordination among AOs is required to reduce the instances of payment of multiple claims.¹⁰²⁷

The local databases initially intended to resolve USARCS connectivity difficulties were adapted to provide other benefits to deployed claims offices. Legal teams reported frequently

¹⁰¹⁹ *Id.*

¹⁰²⁰ 101st ABN DIV AAR, *supra* note 16, at 31.

¹⁰²¹ *Id.*

¹⁰²² *Id.*

¹⁰²³ *Id.*

¹⁰²⁴ Captain Daniel J. Sennott, Notes from After Action Review Conference, Office of the Staff Judge Advocate, 1st Armored Division, and the Center for Law and Military Operations, Wiesbaden, Germany (13-14 Dec. 2004) [hereinafter Sennott Notes] (on file with CLAMO).

¹⁰²⁵ *Id.*

¹⁰²⁶ 4ID AAR, *supra* note 24, at 16.

¹⁰²⁷ See following text under heading *Address Claims form Coalition Partner Controlled Areas.*

receiving multiple claims for damage to houses and automobiles. For example, both the driver and the owner of a vehicle might file claims for damage to the same vehicle. To avoid making multiple payments for these claims, the database was expanded to include unique identifying information. For houses, claims teams used a global positioning system (GPS) receiver to record a ten-digit grid coordinate of the house that was entered in the claims database. The database was set up to reject claims with matching grid coordinates.¹⁰²⁸ This proved a more reliable system than attempting to decipher and communicate local addresses.¹⁰²⁹ For automobiles the registration number was entered and the database was configured to refuse multiple claims for the same vehicle.¹⁰³⁰

11. Communicate with the Local Population.

After the conclusion of major combat operations, claims offices recognized the need to advertise their claims procedures to local residents. The 101st Airborne Division established a close working relationship with the Public Affairs Officer (PAO) and Information Operations (IO) Officer to ensure that the claims system and the requirements for making a claim was publicized to a wide cross section of the community using local newspaper, radio, and television.¹⁰³¹ The IO campaign included information on where to go to submit claims, and the kinds of evidence necessary to substantiate claims.¹⁰³² Other JAs began presenting claims information directly at neighborhood councils, and at their commander's weekly meetings with the sheik council.¹⁰³³ This effort improved advertising the claims function, and was a "great way to win the sheiks' confidence and good will."¹⁰³⁴

In addition, installation of local telephone lines to claims officers was found to be essential to allow local claims business to be conducted. Not only did it allow contact with some claimants, but also allowed interpreters to call businesses, tradesman, etc. to assist in establishing the bona-fides of particular claims.¹⁰³⁵

Also, legal teams, such as the team at the 82d Airborne Division, developed a theater-wide claims packet in Arabic for distribution to the local population to advise on the requirements for making a claim.¹⁰³⁶ A copy of such a claims packet is at Appendix E-2. If possible these should be developed prior to deployment and printed in appropriate languages.

12. Address Claims from Coalition Partner Controlled Areas.

¹⁰²⁸ 101st Airborne AAR, *supra* note 16, at 23.

¹⁰²⁹ *Id.*

¹⁰³⁰ *Id.*

¹⁰³¹ *Id.* at 24.

¹⁰³² *Id.*

¹⁰³³ CPT Sennott Notes, *supra* note 51.

¹⁰³⁴ *Id.*

¹⁰³⁵ Captain Karin G. Tackaberry, Notes from After Action Review Conference, Office of the Staff Judge Advocate, 82d Airborne Division and Center for Law and Military Operations, Fort Bragg, N.C., (17-19 June 2004) [hereinafter Tackaberry Notes] (on file with CLAMO).

¹⁰³⁶ *Id.*

In some circumstances, legal teams encountered difficulties receiving and paying claims from local nationals in areas under the control of Coalition partners, as generally there was no FCC present, such as in the multi-national division (MND) south of Baghdad. As a result, claims began to accumulate with no mechanism in place to process them. In order to alleviate this situation, V Corps recommended that consideration be given to placing FCC's in those areas where no U.S. forces were present, or to make arrangements for other Coalition partners to accept claims and forward them to the nearest FCC for processing.¹⁰³⁷

Even with this recommendation, payment often still posed a problem due to differences in Coalition partner policies on the negligent acts of their service members.¹⁰³⁸ Emphasis needs to be placed at senior levels on the value of having a system such as the U.S. claims system. Careful coordination with Coalition partners is also required to ensure consistency in determining the payment of claims and to ensure that there is no 'double dipping' by claimants such as making the same claim with two Coalition partners and getting paid by both due to a lack of communication.¹⁰³⁹

13. Determine Values for Wrongful Death and Damage to Property.

Generally, most claims offices found that estimates for damage caused by Coalition Forces submitted by Iraqi's were likely to be inflated above the actual value of the damage. To combat this, local repair shops were approached to provide estimates for damage to vehicles; payment for damage to crops was based on figures obtained from the civil-military operations center (CMOC) agriculture section; and for damaged homes, a reputable contractor was utilized to train claims team members how to make assessments of the value of the damage. In many instances, interpreters in the employ of the claims office were able to establish suitable baselines for compensation payments by phoning local repair shops and obtaining the 'local' value as opposed to values that might be quoted to U.S. personnel. In the sensitive task of calculating appropriate payments for wrongful death claims, the assistance of a local attorney familiar with local laws and customs was of significant value in determining these payments.¹⁰⁴⁰

Learning from their experience while deployed to Afghanistan, the 10th Mountain Division recommended developing country specific claims valuation processes as soon as possible to provide a baseline for future claims JA's, especially in relation to determining fair value for both human life and livestock.¹⁰⁴¹

14. Prepare to Confront Contractor Related Damage.

¹⁰³⁷ Adams AAR, *supra* note 9.

¹⁰³⁸ Several Coalition partners had no claims processing or compensation scheme for the negligent acts of their Soldiers and this results in a deterioration of any goodwill between Coalition Forces and the civilian population.

¹⁰³⁹ Adams AAR, *supra* note 9.

¹⁰⁴⁰ Tackaberry Notes, *supra* note 62.

¹⁰⁴¹ Office of the Staff Judge Advocate, 10th Mountain Division, Operation Iraqi Freedom (OIF) After Action Report (AAR), at 7 [hereinafter 10th MNT DIV AAR] (on file with CLAMO).

The FCA does not provide any mechanism to pay claims for damage caused by contractors.¹⁰⁴² Contractors and other civilians accompanying the force play a large role in present-day military operations. Simply denying claims caused by contractor personnel caused difficulties for JAs and commanders alike, as in the eyes of an Iraqi claimant, there was little to distinguish between U.S. contractor employees and U.S. Forces. Accordingly, claimants would attribute any damage to their property generically as caused by U.S. Forces. To resolve this difficulty, the 101st Airborne Division recommended amending the FCA to allow for payments in such instances, or to amend contracts to permit reimbursement for paying these claims.¹⁰⁴³

15. Manage Detainee Property to Minimize Loses.

When units detained personnel, there was often a wide variance between units and detention facilities in applying the procedures for the inventorying and accountability of detainee's property. As a result, when detainees were released, a large amount of property was not returned to the proper owner at the time of their release as there were insufficient records or an inability to find the property. This sometimes resulted in released detainees being (understandably) upset over the non-return of their property. Accordingly, appropriate policies should be put in place and reviewed regularly to ensure that units and detention facility personnel understand and apply proper procedures to minimize instances of non-return of property.¹⁰⁴⁴ For further lessons learned on accounting for detainee property, see paragraph III.A.2.e.

16. Use the Commander's Emergency Response Program to Pay Excluded, but Worthy Claims.

Under the FCA, claims cannot be paid for injuries or damaged resulting from "action by an enemy or resulting directly or indirectly from an act of the armed forces of the United States in combat."¹⁰⁴⁵ This combat activities exclusion was a source of much consternation for legal teams and commanders.¹⁰⁴⁶ Throughout full spectrum operations in Iraq, Coalition activities which could arguably be labeled combat activities caused unintentional harm to apparently innocent locals. Injured persons, or the relatives of those killed, often filed claims seeking compensation. In many of these circumstances, commanders believed providing some financial compensation would aid in mission accomplishment. Providing some form of financial redress would help demonstrate the Coalition's intention of avoiding harm to innocent civilians, and provide compensation for destroyed property, or lost income. Several means were used to provide some form of compensation without violating the FCA combat activities exclusion.

Legal teams closely examined the facts and circumstances surrounding a claim made under circumstances that were arguably combat activities. Where the circumstances could be described fairly as something other than combat activities, the claim would be processed under the FCA. Judge advocates established ground rules for making such determinations. For

¹⁰⁴² See U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS, para. 2-40 (1 July 2003) (describing as a threshold issue that claims are not payable for damage caused by contractors).

¹⁰⁴³ 101st ABN DIV AAR, *supra* note 16, at 23.

¹⁰⁴⁴ Newell Notes, *supra* note 14.

¹⁰⁴⁵ 10 U.S.C. § 2734 (b)(3) (2000).

¹⁰⁴⁶ See Afghanistan and Iraq Legal Lessons Learned, *supra* note 4, para. III F. 2. (containing a thorough discussion of the FCA combat activities exclusion).

example, the 82d Airborne Division established that any use of weapons by U.S. Forces created a presumption of combat activities, and claims for harm caused under these circumstances would generally be denied—other circumstances warranted closer inspection.¹⁰⁴⁷ Legal teams found that serious incident reports (SIRs) from medical treatment facilities “were invaluable in distinguishing claims that involved negligent or wrongful acts of U.S. service members from those that were combat related.”¹⁰⁴⁸

Another alternative for claims denied due to the FCA combat activities exclusion was solatia. Solatia payments appeared to be an obvious and appropriate alternative to combat activities as such payments “do not necessarily derive from legal responsibility”¹⁰⁴⁹ and are intended to “convey feelings of sympathy or condolence toward the victim or the victim’s family.”¹⁰⁵⁰ As discussed at length in Volume I of this Publication, however, Army commanders did not have authority to make solatia payments in Iraq or Afghanistan during the period covered by this Publication.¹⁰⁵¹

Commanders and JAs observed that providing financial aid to persons unintentionally harmed by U.S. Forces contributed to force protection and mission accomplishment.¹⁰⁵² The FCA combat activities exclusion and lack of Army solatia authority were both obstacles to providing this kind of financial aid. Many claims that clearly fell within the FCA combat activities exclusion warranted some form of compensation due to either the circumstances of the victim, or the nature of U.S. Forces activities. In these cases, JAs turned to funds from the Commander’s Emergency Response Program (CERP)¹⁰⁵³ to compensate victims

In many cases, claims cannot be paid under the FCA because of the combat activities exclusion or because the payment of the claim would be based solely on compassionate grounds. In these cases, the CERP may provide another avenue to satisfy the claimant. The CERP creates financial means for commanders to take immediate action to impact recovery efforts and to enact economic initiatives to rebuild Iraq. . . .

The availability of the CERP funds provides commanders with the capability and flexibility to take immediate action to positively impact their area of responsibility. Commanders can use the CERP for . . . compensation for economic loss due to death or serious bodily injury. The CERP funds also continue to pay otherwise meritorious claims that may not be paid under the FCA.

¹⁰⁴⁷ Ayres Notes, *supra* note 12.

¹⁰⁴⁸ 101st ABN DIV AAR, *supra* note 16, at 34.

¹⁰⁴⁹ U.S. DEP’T OF ARMY, PAM. 27-162 CLAIMS PROCEDURES para. 10-10 (8 Aug. 2003).

¹⁰⁵⁰ *Id.*

¹⁰⁵¹ See Legal Lessons Learned from Afghanistan and Iraq, *supra* note 4, para. III F.3. (1 Aug. 2004) (explaining the debate regarding Army commander’s lack of solatia authority, and comparing the Marine Corps’ occasional use of solatia in Iraq).

¹⁰⁵² Lieutenant Colonel Dale N. Johnson, Notes from After Action Review Conference, Office of the Staff Judge Advocate, 1st Armored Division, and the Center for Law and Military Operations, Wiesbaden, Germany (13-14 Dec. 2004) [hereinafter Johnson Notes] (on file with CLAMO).

¹⁰⁵³ The CERP is discussed at length in paragraph III.D. of this Publication.

The primary use of CERP funds is “reconstruction assistance to the Iraqi people”, which is liberally defined as the “building, repair, reconstitution, and reestablishment of the social and material infrastructure of Iraq.” Commanders may compensate for losses that coalition activities cause in its area of operations. This provides the ability to settle otherwise meritorious claims denied because of the FCA’s combat activities exclusion. This compensation, however, must not be used to benefit [coalition] forces and must serve a primary purpose other than supporting individuals or businesses in a manner constituting a gift or similar unwarranted benefit. . . .

Commanders may also use the CERP funds in cases of death or serious bodily harm. This form of compensation for harm is distinct from solatia payments. The CERP payment compensates for economic losses such as the “loss of the ability of a family member to contribute to the welfare of the family whether in earning income to be used by the family or rendering household or other services for the benefit of the family.” This form of compensation is often paid when claims are denied under the FCA as a result of combat operations. For example, if a unit establishes a traffic control point (TCP) and uses small arms fire to engage a vehicle that fails to stop at the TCP, this incident will be considered a combat operation. If an innocent Iraqi civilian bystander is killed in the shooting, a claim filed by the family to compensate for the death may not be paid under the FCA because the death was not the result of “noncombat activity or a negligent or wrongful act or omission of Soldiers or civilian employees of the U.S. Armed Forces.” In this case, compensation may be paid under the CERP to “mitigate the adverse consequences of [Coalition] activities and promote social order and economic stability.”

In TF 82, these claims are usually paid under the CERP after an FCC denies the case as a FCA claim. For this reason, JAs are often the first service members with knowledge of the case and typically maintain responsibility for these CERP payments. Judge advocates must look at each case carefully and work with many other sections to ensure these payments comply with the guidelines set forth in the CJTF-7 and 82d Airborne Division FRAGOs. Often it is not immediately clear if someone is an innocent bystander or is an active participant in anti-Coalition activity. Consequently, the JAs must sift through the fog of the battlefield to advise commanders whether to make a payment.

A common scenario at TF-82 occurs after a Coalition convoy is ambushed and the attackers flee to buildings or houses. When the Coalition Soldiers return fire on the positively identified enemy in the building, the Soldiers may kill or wound the enemy as well as other local nationals. This may also happen at TCPs as Soldiers fire warning shots when vehicles fail to stop. This may cause death, injury, or property damage. Again, these situations are usually not within the scope of the FCA due to the combat activity exclusion. Investigations along with the JA’s advice, assist commanders to decide if payments are appropriate under the CERP.

The main concern for both the CERP and the FCA is ensuring payments are not made to Iraqis conducting anti-Coalition activities.¹⁰⁵⁴

Thus, legal teams use the CERP to make in effect “solatia-like”¹⁰⁵⁵ payments for combat excluded FCA claims. One JA noted that his brigade made more than one hundred such solatia-like payments for cases where the FCA’s combat activities exclusion prohibited paying the claim.¹⁰⁵⁶ Even though many of these payments were very small, “the gesture was received well by both the individual claimants and local leaders.”¹⁰⁵⁷ Judge advocates assert that the value of using CERP to make solatia-like payments cannot be overstated.¹⁰⁵⁸

17. Establish Procedures for Personnel Claims.

In addition to foreign claims issues, JAs confronted the issue of how best to process personnel claims of our own U.S. service members: rather than dealing with claims in theater, many claims offices elected to return Soldier claims to home station for adjudication.¹⁰⁵⁹ As discussed above, one factor in this determination was the deployed claims office’s lack of computer connectivity with USARCS systems. On the whole this was found to work well and helped reduce workloads of the claims offices in theater.¹⁰⁶⁰ Other units, considering the impact of losses on Soldier morale, processed claims in theater.¹⁰⁶¹ Processing personnel claims added significantly to the workload of claims offices already busy with FCA claims. Nevertheless, legal teams believed processing these claims was essential to demonstrating the command’s commitment to take care of its service members.¹⁰⁶² Such claims took approximately one month to process and the claims were paid in cash.¹⁰⁶³

After action reviews regarding personnel claims almost universally mention difficulty determining what kinds or amounts of personal property were reasonable and useful¹⁰⁶⁴ for service members to possess while deployed to Afghanistan or Iraq.

The most contentious issue was deciding what items and what quantity of items were reasonable and useful to bring on this deployment. Department of the Army

¹⁰⁵⁴ *The FCA and Implementation of the CERP*, *supra* note 1, at 42-43 (citations omitted).

¹⁰⁵⁵ See, e.g., Lieutenant Colonel Sharon E. Riley, Staff Judge Advocate, 1st Armored Division, Current Operations, Operation Iraqi Freedom, PowerPoint presentation, (Oct. 2003) (using the term “solatia-like” to describe the payment of claims out of CERP funds) (on file with CLAMO); Message, 092041ZDEC03, Headquarters U.S. Central Command to Commander, ARCENT and CJTF-180, subject: Combined Forces Command Fragmentary Order 07-231 Commanders Emergency Response Program (CERP) – Appropriated Funds (CERP-APF) (including solatia-like payments as an authorized use of the CERP) (on file with CLAMO) .

¹⁰⁵⁶ Sennott Notes, *supra* note 51.

¹⁰⁵⁷ *Id.*

¹⁰⁵⁸ Johnson Notes, *supra* note 79.

¹⁰⁵⁹ Tackaberry Notes, *supra* note 62.

¹⁰⁶⁰ 10th MNT DIV AAR, *supra* note 40.

¹⁰⁶¹ See, e.g., Newell Notes *supra* note 14; 4ID AAR, *supra* note 24 (describing the process of receiving and adjudicating personnel claims in theater).

¹⁰⁶² CPT Newell Notes *supra* note 13.

¹⁰⁶³ 4ID AAR, *supra* note 24 .

¹⁰⁶⁴ See U.S. DEP’T OF ARMY, PAM. 27-162 CLAIMS PROCEDURES para. 11-6e (8 Aug. 2003) (discussing items of property not compensable under the Personnel Claims Act, including specifically personal property not reasonable or useful to possess while deployed).

Pamphlet 27-162 failed utterly in this regard. The Pam only covers shipments of household goods. It does not identify the items, quantities, or values of items that are unreasonable to take on a deployment. It is also a problem to pay for unreasonable items or unreasonable quantities of items when the Soldier has very little evidence that he or she ever possessed the claimed item(s) in the first place. To ensure that all Soldiers in the Division were treated equitably, this office created a list of what specific items were not payable because they were not reasonable or useful for this deployment, what quantities of items were reasonable and useful to bring (i.e. it was reasonable to bring CDs but not 300 CDs), and what value of items it was reasonable to bring (i.e. it was reasonable to bring a camera but not a \$500 camera). This list at least ensured equity among the Soldiers of the Division.¹⁰⁶⁵

Not every unit used the same method to determine what items were reasonable and useful. Rather than create a list of specific items or quantities, the 82d Airborne claims office, for example, followed a policy that if the Soldier could buy the lost/damaged item in a theater post exchange/base exchange (PX/BX), the claims office would treat the claim as reasonable and pay it.¹⁰⁶⁶ Other claims offices followed a similar policy but noted the policy became difficult to follow as deployments lengthened and FOBs, with their supporting PX/BX became more established. What might be reasonable and useful for service members in one unit, at one location, may not be for others. The unit and location notwithstanding, legal teams reported difficulty in finding “reasonable and useful” personnel claims for items as elaborate as projection televisions.¹⁰⁶⁷ To reduce potential confusion with personnel claims for deployed service members, claims personnel should consult with commanders, and when possible, their counterparts in units currently deployed to establish and publish a list of reasonable and useful items before service members deploy.

Service member property left behind at home station presented a final lesson learned for personnel claims. For various reasons including barracks renovation and utilization, many Soldiers deploying to Afghanistan and Iraq were encouraged or required to place personnel belongings in storage. Several avoidable circumstances were identified that contributed to difficulty processing claims these service members filed upon return from deployment.

Due to late deployment notices, some service members were unable to personally supervise the inventory and packing of their property.¹⁰⁶⁸ Some of these service members reported that they felt compelled to give powers of attorney for commercial property storage to rear detachment personnel they did not know well or trust.¹⁰⁶⁹ Others were encouraged to store property in their unit’s supply facility. These service members sometimes packed their own property, or the unit’s rear detachment would pack the property after the service member deployed. Often packing was performed without a proper inventory. Finally, some units directed rear detachment personnel to return stored property to service member’s rooms to ease

¹⁰⁶⁵ 101st ABN DIV AAR, *supra* note 16, at 25.

¹⁰⁶⁶ Ayres Notes, *supra* note 12.

¹⁰⁶⁷ Johnson Notes, *supra* note 79.

¹⁰⁶⁸ Newell Notes, *supra* note 14.

¹⁰⁶⁹ *Id.*

the service member's redeployment. All these situations created a lack of proper or reliable inventories. These procedures all contributed to difficulties for both redeploying service members and claims offices when service members filed claims for lost property.¹⁰⁷⁰ Judge advocates should advise commanders and service members to use authorized procedures and avoid "short cuts" when storing personal property in advance of deployment. The fact that commanders and service members preparing to deploy are likely to be very busy, and consequently have limited time available for JA advice, only serves to emphasize the point that good deployment claims operations requires planning well in advance of the actual deployment.

¹⁰⁷⁰ Johnson Notes, *supra* note 79.

F. MILITARY JUSTICE

*Military Justice support must transition through the phases of military operations smoothly, providing continuity in jurisdiction and responsive support to the deployment theater and home station. Critical to success are prior planning, mission training, and staff augmentation.*¹⁰⁷¹

*While supporting deployed units-whether during training exercises, emergency relief operations, peacekeeping operations, or war-judge advocates must simultaneously maintain efficiency forward and rear, processing military justice actions in accordance with the Uniform Code of Military Justice (UCMJ), the Manual for Courts-Martial (MCM), and Army Regulations (AR).*¹⁰⁷²

Judge advocates (JAs) continued to provide military justice support to commanders in Operations IRAQI FREEDOM (OIF) and ENDURING FREEDOM (OEF) during all phases of military operations. During full spectrum operations, military justice actions posed greater challenges than those encountered during combat operations due to the increased frequency and severity of misconduct.¹⁰⁷³ Serious misconduct that was predominantly handled in the rear during combat operations was overwhelmingly addressed in theater during full spectrum operations.¹⁰⁷⁴

1. Be Prepared for Adjustments to Often-Changing Military Justice Requirements as Deployments Progress.

*The need for an efficient and just disciplinary system will never be more urgent than in war. This core competency of OPLAW JAs will be heavily practiced, as non-judicial punishment, courts-martial of all types, and perhaps even military commissions will be convened. The "time of war" provisions of the Uniform Code of Military Justice will be in effect, increasing the feasibility of courts-martial in forward areas.*¹⁰⁷⁵

¹⁰⁷¹ U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS, para. 3.5 (1 Mar. 2000) [hereinafter FM 27-100].

¹⁰⁷² INT'L AND OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, U.S. ARMY, JA 422, 2005 OPERATIONAL LAW HANDBOOK, at 197 (2004) [hereinafter 2005 OpLaw HANDBOOK] (discussing military justice in a deployed setting).

¹⁰⁷³ See, e.g., Interview with CPT Jason Denney, DREAR Trial Counsel, 82nd Airborne Division, Operation Iraqi Freedom After Action Review in Fort Bragg, N.C. (June 22, 2004) (noting that military justice actions increased during stability and support operations).

¹⁰⁷⁴ See CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, U.S. ARMY, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, VOLUME I: MAJOR COMBAT OPERATIONS (11 September 2001- 1 May 2003) at 233 (1 Aug. 2004) [hereinafter Volume I, Afghanistan and Iraq, Legal Lessons Learned].

¹⁰⁷⁵ FM 27-100, *supra* note 1, para. 5.4.4.

Legal teams in deployed environments are faced with ever-changing requirements when it comes to military justice.¹⁰⁷⁶ Ongoing mission requirements often presented significant obstacles in processing military justice actions, but deployed JAs were able to successfully meet commander's requirements in an efficient manner. For example, even though military justice actions were put on the "back burner" during combat operations in Iraq to allow JAs to focus on other areas,¹⁰⁷⁷ the full gamut of military justice remedies for misconduct, including courts-martial, were used during full spectrum operations.

During OIF and OEF, certain misconduct and offenses among service members were more common than others.¹⁰⁷⁸ Numerous JAs asserted that there seemed to be a direct correlation between the rise in misconduct with the greater amount of free time given to service members as contingency operations progressed. Nevertheless, unlike the major combat operations phase of the mission, JAs were able to successfully prosecute many of these service members in theater for their offenses.¹⁰⁷⁹

a. Anticipate That Commanders Will Desire to Conduct Urinalysis Testing In Theater and That Chain of Custody Issues Will Follow.

Commanders often wanted the ability to conduct urinalysis testing to maintain good order and discipline, but units were unable to do so until approximately October 2003.¹⁰⁸⁰ Although setting up a system through which urinalyses can be conducted is not

¹⁰⁷⁶ See Captain Michael Banks, 18th Military Police Brigade, After Action Report (1 Dec. 2003) [hereinafter Banks AAR] (on file with CLAMO).

¹⁰⁷⁷ See Volume I, Afghanistan and Iraq, Legal Lessons Learned, *supra* note 4, at 233; *see also*, Interview with Colonel Richard O. Hatch, former Staff Judge Advocate, 101st Airborne Division, in Charlottesville, Va. (Oct. 8, 2003) (notes on file with CLAMO) [hereinafter Hatch Interview] (noting that JAs and commanders were too busy to handle military justice during combat).

¹⁰⁷⁸ See After Action Review Conference, Office of the Staff Judge Advocate, 4th Infantry Division (Task Force Ironhorse), and the Center for Law and Military Operations, The Judge Advocate General's Legal Center and School, U.S. Army, in Ft. Hood, Tx., at 4 (8 Sep. 2004) (notes on file with CLAMO) [hereinafter 4 ID AAR] (stating in part that many Article 15s were processed for General Order #1 violations, including alcohol, fraternization, and disrespect. Courts-martial included those for drugs (in particular valium, which could be purchased at local pharmacies), wrongful appropriation, AWOL and desertion (the Commanding General deployed Soldiers charged with the last two offenses)).

¹⁰⁷⁹ See *id.* See also Lieutenant Colonel Mark K. Jamison, USMC, Legal Services Support Team (Iraq), Operation Iraqi Freedom II, After Action Report, (13 Nov 2004) [hereinafter Jamison AAR]. Lieutenant Colonel Jamison reported on the First Marine Expeditionary Force, which developed an embedded battalion judge advocate concept in which a JA was attached to each of the battalions in the First Marine Division. These JAs provided field-level advice to commanders on military justice matters. They also assisted the Legal Services Support Team—Iraq (LSST—Iraq), a detachment from the Legal Services Support Section of the First Force Service Support Group, in gathering evidence, identifying witnesses, and providing logistical support for cases. These JAs facilitated the processing of cases with minimal disruption to combat operations. The LSST—Iraq also adopted a concept of operations that pushed military justice to supported commands. For example, trial teams consisting of trial and defense counsel, a military judge, and a court reporter would fly to forward operating bases to conduct trials. *Id.*

¹⁰⁸⁰ See After Action Review Conference, Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), and the Center for Law and Military Operations, The Judge Advocate General's Legal Center and School, U.S. Army, in Ft. Campbell, Ky., at 43 (21 Oct. 2004) (notes on file with CLAMO) [hereinafter 101st ABD AAR]; *see also*, After Action Review Conference, Office of the Staff Judge Advocate, 1st Armored Division (1AD), and the Center for Law and Military Operations, The Judge Advocate General's

normally a JAG function, “it wouldn’t have happened without JA support and coordination with brigade commanders, the Division Surgeon (DIVSURG) and the Provost Marshall’s Office (PMO).”¹⁰⁸¹ Further coordination with one of the CONUS-based Drug Testing Labs¹⁰⁸² is also required in order to actually perform the drug testing.

Each unit is responsible for providing a qualified Unit Alcohol Drug Coordinator (UADC) to oversee the urinalysis program.¹⁰⁸³ The UADC is also responsible for providing the necessary resources for urinalysis testing, such as bottles and UA monitors, as well as logistical support to maintain proper chain of custody of the samples.

The Marine Corps’ Legal Services Support Team (LSST) in Iraq tried two fully contested special courts-martial in Iraq involving drug offenses. The trials required flying a drug expert from the Naval Drug Screening Laboratory in San Diego, California, to Iraq and the production of unit urinalysis coordinators and observers who had not deployed with their respective units. Early determination of the drug expert’s availability for trial and the timely production of drug lab documents were essential for successful prosecution of the cases.¹⁰⁸⁴

b. Recognize That the Criminal Investigation Command (CID) Will Not be as Readily Available as in Garrison and That JAs Must be Involved in Providing Solutions to Evidence Preservation Issues.

In a deployed setting, Criminal Investigation Division (CID) involvement is required in a number of investigations, to include war crime allegations and non-combat related U.S. service member deaths. As a result of this expanded role during deployments, CID has less time during deployments to focus on conducting “traditional” investigations into criminal misconduct committed by U.S. service members.¹⁰⁸⁵

Legal Center and School, U.S. Army, in Wiesbaden, Germany, at slide 5 (8 Sep. 2004) (notes on file with CLAMO) [hereinafter 1AD AAR].

¹⁰⁸¹ See Interview with Major Susan K. Arnold, former Chief of Justice, 101st ABD, in Ft. Campbell, Ky. (21 Oct. 2004) (notes on file with CLAMO) [hereinafter Arnold Interview].

¹⁰⁸² Fort Meade Drug Testing Lab (Fort Meade, Maryland) and Tripler Drug Testing Lab (Honolulu, Hawaii).

¹⁰⁸³ See U.S. DEP’T OF ARMY, REG. 600-85, ARMY SUBSTANCE ABUSE PROGRAM 1-6(i), 1-6(z)(bb), 1-25, 1-26 (15 Oct. 2001). Note that the term “UADC” is another commonly used acronym for the Unit Prevention Leader (UPL). *Id.* 1-6(z)(bb).

¹⁰⁸⁴ See Jamison AAR, *supra* note 9, at 3.

¹⁰⁸⁵ Note that a commander may order members of his/her command to conduct a formal or informal investigation into allegations of misconduct under *Army Regulation 15-6*. *Army Regulation 15-6*, para. 1-4(a) provides the following:

An administrative fact-finding procedure under this regulation may be designated an investigation or a board of officers. The proceedings may be informal or formal. Proceedings that involve a single investigating officer using informal procedures are designated investigations. Proceedings that involve more than one investigating officer using formal or informal procedures or a single investigating officer using formal procedures are designated a board of officers.

Accordingly, individual units are often required to conduct their own preliminary investigations under Rules for Courts-Martial (RCM) 303.¹⁰⁸⁶ Another factor that makes the CID mission more difficult is that Military Police Investigators (MPI), the organization responsible for investigating lower-level crimes, remain in garrison since they generally did not deploy.¹⁰⁸⁷

For these reasons, JAs must recognize that CID will not be available to investigate crimes to the same extent that they would in garrison. Therefore, legal teams must be prepared to advise their commanders to conduct their own investigations, with the JAs taking the burden of advising investigating officers regarding the scope of investigation, preserving evidence, and adhering to applicable regulations.¹⁰⁸⁸

c. Ensure That Commanders Understand Their Obligations to Provide Logistical Support When Placing Soldiers Into Pretrial Confinement

U.S. DEP'T ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARD OF OFFICERS para. 1-4(a) (30 Sep. 1996)[hereinafter AR 15-6].

When determining whether to use formal or informal procedures to investigate, *Army Regulation 15-6* further states that the appointing authority should consider: the purpose of the inquiry, the seriousness of the subject matter, the complexity of issues involved, the need for documentation, and the desirability of providing a comprehensive hearing for persons whose conduct or performance of duty is being investigated. *Id.* para. 1-4b. *See also* Jamison AAR, *supra* note 9, at 3 (providing that the Marine Corps' LSST—Iraq also experienced significant delays in the Naval Criminal Investigative Service's (NCIS) processing of evidence for criminal cases. In cases involving forensic testing, the NCIS first sent the evidence to its evidence repository in Bahrain and then shipped it to a forensic laboratory in the United States for testing. First Marine Expeditionary Force recommended that the establishment of an evidence repository in Iraq, and contracting for forensic testing services in Europe, would shorten the time for processing evidence.

¹⁰⁸⁶ *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 303 (2002) (stating that "Upon receipt of information that a member of the command is accused or suspected of committing an offense or offenses triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses."). The Discussion section of R.C.M. 303 continues, stating:

The preliminary inquiry is usually informal. It may be an examination of the charges and an investigative report or other summary of expected evidence. In other cases a more extensive investigation may be necessary. Although the commander may conduct the investigation personally or with members of the command, in serious or complex cases the commander should consider whether to seek the assistance of law enforcement personnel in conducting any inquiry or further investigation. The inquiry should gather all reasonably available evidence relating to aggravation, extenuation, or mitigation.

Id. R.C.M. 303 discussion.

¹⁰⁸⁷ *See* 4 ID AAR, *supra* note 8, at 4; 101st ABN DIV AAR, *supra* note 10, at 41; Banks AAR, *supra* note 6, at 6.

¹⁰⁸⁸ *See* 101st ABN DIV AAR, *supra* note 10, at 43 (regarding limited forensic capabilities: the 101st ABN DIV encountered difficulties transporting and storing evidence until they worked with CID to establish a method for shipping evidence to Fort Gillem, Georgia. For fungible evidence such as drugs or ammunition, they established a system of preserving the evidence through photographs and an accompanying "tag" that identified the contraband. This system allowed the trial counsel to successfully establish an evidentiary foundation and rendered the evidence admissible during the subsequent trial.).

When service members commit serious crimes, commanders may desire to place the offender into pretrial confinement.¹⁰⁸⁹ In a deployed environment, confinement facilities are not easily accessible.¹⁰⁹⁰ Accessibility is limited in Iraq and Afghanistan for a variety of reasons, including the type of geography or terrain that must be traversed, distance to the confinement facility, necessary manpower and/or guard escort requirements, time constraints, administrative processing requirements, and the vehicles and/or aircraft needed to transport the accused to the confinement facility.¹⁰⁹¹

Although all commanders want to be able to confine a Soldier when necessary, they often do not take these accessibility considerations into account. Prior to deployment, it is important that JAs explain to commanders the obligations and logistical limitations placed upon units when they put a service member in confinement.¹⁰⁹² Furthermore, paralegals must understand confinement procedures and have the ability to coordinate with confinement facilities both within and outside the theater of operations.¹⁰⁹³ It is invaluable to have a knowledgeable paralegal that is responsible for coordinating all the details to properly confine an accused, from in-processing to release.¹⁰⁹⁴

d. Be Aware of Special Pay Provisions When Drafting Specifications Regarding Alleged Misconduct by Service Members During Deployments.¹⁰⁹⁵

¹⁰⁸⁹ See MCM, *supra* note 16, R.C.M. 304 (defining pretrial restraint as the moral or physical restraint on a person's liberty which is imposed before and during disposition of offenses. Pretrial restraint may consist of conditions on liberty, restriction in lieu of arrest, arrest, or confinement.).

¹⁰⁹⁰ See 1AD AAR, *supra* note 10.

¹⁰⁹¹ This information is based on the professional experiences of Captain Brent E. Fitch while deployed to Iraq during Operation Iraqi Freedom I [hereinafter Professional Experiences].

¹⁰⁹² See 101st ABN DIV AAR, *supra* note 10, at 43.

¹⁰⁹³ See *Id.*

¹⁰⁹⁴ See *Id.*

¹⁰⁹⁵ See 37 U.S.C. § 310 (2000). Judge Advocates should not become confused with "special pay" punishments that may be imposed during deployments versus charging service members with "time of war" provisions. Since the "time of war" requirement has not been met, they are not available for use when charging service members with misconduct. See generally, 2005 OPLAW HANDBOOK, *supra* note 2 at 202 (discussing time of war language and considerations).

The MCM defines "time of war" as "a period of war declared by Congress or the factual determination by the President that the existence of hostilities warrants a finding that time of war exists." The definition applies only to the following portions of the MCM: the aggravating circumstances that must be present to impose the death penalty (R.C.M. 1004(c)(6)), the punitive articles (MCM, Part IV), and nonjudicial punishment (MCM, Part V). It does not apply to statute of limitations and/or jurisdiction over civilians.

Id.

If Congress or the President had made the determination that the "time of war" provisions had been triggered, there would be potentially increased punishments and aggravating factors for offenses committed during contingency operations. For example, some offenses can only occur during time of war, including Improper Use of a Countersign; Misconduct as a Prisoner; and Spying. See Uniform Code of Military Justice, 10 U.S.C. 801-941, arts. 101, 105, and 106 (2002)[hereinafter UCMJ]. Likewise, other criminal offenses have certain elements that can only be met during wartime, although commission of the crime during a time of war is not specifically required by regulation. See 2005 OPLAW HANDBOOK, *supra* note 2,

When drafting charges and specifications, JAs are encouraged to inform commanders that they may include the fact that an accused was receiving special pay at the time of the alleged offense.¹⁰⁹⁶ For example, during recent deployments to Iraq and Afghanistan, service members received Hardship Duty Pay¹⁰⁹⁷ and Hostile Fire/Imminent

at 204-06 (discussing time of war language and the following offenses: Misbehavior Before the Enemy (Art. 99 UCMJ), Engaging in looting or pillaging (violation of 26 U.S.C. §§ 5844, 5861, which may be charged under Art. 134 UCMJ), Mutiny or Sedition (Art. 94 UCMJ), Subordinate Compelling Surrender (Art. 100 UCMJ), Wrongful destruction of private property (Art. 109 UCMJ), Wrongful taking of private property (Art. 121 UCMJ), Improper Use of Countersign (Art. 100 UCMJ), Forcing a Safeguard (Art. 102 UCMJ), Aiding the Enemy (Art. 104 UCMJ), Misbehavior of a Sentinel (Art. 113 UCMJ), Malingering (Art. 115 UCMJ), and Offenses by a Sentinel (Art. 134), Straggling (Art. 134)); *see also* U.S. v. Monday, 36 C.M.R. 711 (A.B.R. 1966), *pet. denied*, 37 C.M.R. 471 (C.M.A. 1969); U.S. v. Sperland, 5 C.M.R. 89, 91 (C.M.A. 1952). During Urgent Fury, a Soldier who refused to board a plane at Pope Army Airfield (Ft. Bragg) was charged with misbehavior before the enemy. The judge dismissed the charge (not "before the enemy"). The accused was convicted of missing movement by design. *See* 2005 OPLAW HANDBOOK, *supra* note 2, at 204 fn 174. *See also* U.S. v. Smith, 7 C.M.R. 73 (A.B.R. 1953); U.S. v. Barnett, 3 C.M.R. 248 (A.B.R. 1951). As mentioned above, potential punishments are greater for numerous offenses during a time of war. For example, the death penalty may be imposed for desertion, assaulting or willfully disobeying a superior commissioned officer, or for misbehavior by a sentinel or lookout. *See* MCM, *supra* note 16, pt. IV, ¶¶ 9e, 14e, and 38e. It seems very unlikely, however, that the command would seek to impose the death penalty in these types of cases unless highly significant and egregious circumstances are involved. Pursuant to R.C.M. 201, adding the "time of war" element will also require referral of capital offenses to special court-martial by the officer exercising general court-martial jurisdiction over the accused. *Id.* R.C.M. 201(f)(2)(C). Finally, many "wartime" offenses have provisions that are recognized as an aggravating factor, which may allow for increased punishment. Offenses that have the potential for increased punishment due to their aggravating nature during wartime include drug offenses, loitering and/or misbehavior by a sentinel or lookout, malingering, desertion and/or solicitation to desert, mutiny, sedition, misbehavior before the enemy, homicide, and rape. With regard to statutes of limitation:

There are no statutes of limitation for the crimes of Desertion, Absence Without Leave, Aiding the Enemy, Mutiny, Murder, or Rape in time of war, and persons accused of these crimes may be tried and punished anytime. The President or Service Secretary may certify particular offenses that should not go to trial during a time of war if prosecution would be inimical to national security or detrimental to the war effort; statute of limitations may be extended to six months after the end of hostilities. The statute of limitations is also suspended for three years after the end of hostilities for offenses involving fraud, real property, and contracts with the United States.

See UCMJ Arts. 43(a), 43(c), 43(f).

Again, JAs should take special care to note that the "time of war" language found in the Manual for Courts-Martial in order to trigger these enhanced sentencing provisions is not applicable to current operations in Iraq or Afghanistan.

¹⁰⁹⁶ *See generally* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 3.5 (27 Apr. 2005) [hereinafter AR 27-10]. *See also* AR 27-10, *supra*, Table 3-1c; 37 U.S.C. Sec. 310 (regarding using special pay language as a sentence aggravator); Information Paper, Captain Jason Denney, 82nd ABN DIV (6 Oct. 2003) (discussing computation of authorized forfeitures when imposing non-judicial punishment).

¹⁰⁹⁷ *See* U.S. Dep't of Defense, Reg. 7000.14-R, Volume 7A: Military Pay Policy and Procedures-Active Duty and Reserve Pay in Financial Management Regulation (3 May 2005) [hereinafter DOD 7000.14R]. Hardship Duty Pay (HDP) supersedes foreign duty pay (FDP). Hardship Duty Pay was established effective February 4, 1999, and FDP was terminated effective February 3, 1999. *Id.* Hardship Duty Pay is payable to members entitled to basic pay, at a monthly rate not to exceed \$300, while the member is performing duty designated by the Secretary of Defense as hardship duty. *Id.* The Secretary of Defense has established that HDP shall be paid to members for performing a designated hardship mission, when

Danger Pay (HFP/IDP).¹⁰⁹⁸ Many service members were also entitled to Family Separation Allowance. Commanders were authorized to add Hardship Duty Pay to an accused service member's basic pay when computing forfeitures under Article 15, UCMJ.

Hostile Fire/Imminent Danger Pay, however, is not included when computing the amount a service member must forfeit. The Department of Defense Financial Management Regulation further states that HFP/IDP is payable in addition to all other payments or allowances in the full amount without being prorated or reduced for each month during any part of which a member qualifies.¹⁰⁹⁹ Active and Reserve Component members who qualify at any time during a month will receive the full amount of HFP/IDP regardless of the actual period of time served on active or inactive duty during that month.¹¹⁰⁰

2. Enable Deployed Commanders to Maintain Good Order and Discipline by Utilizing Other Disciplinary Measures and Avoid the Appearance That Service Members Receive “Better Deals” in Theater.

*Nonjudicial punishment provides commanders with an essential and prompt means of maintaining good order and discipline and also promotes positive behavior changes in servicemembers without the stigma of a court-martial conviction.*¹¹⁰¹

*Different military justice concerns should be addressed at each stage of the operation. Nevertheless, court-martial and NJP procedures remain largely unchanged in a deployed setting. Therefore, judge advocates should be aware of the “field due process” myth throughout the full spectrum of operations.*¹¹⁰²

Judge advocates employed a broad range of legal alternatives to courts-martial in order to allow commanders to maintain good order and discipline during full spectrum operations. Prior to transitioning to SASO, commanders were justifiably more concerned with conducting combat operations than with military justice issues.¹¹⁰³ Moreover, service members spent their time attending to more pressing needs such as maintaining their weapons or equipment and focusing on their mission during combat operations. As SASO began, however, Soldiers were able to establish a daily ‘routine,’ which often

assigned to a designated location or when serving on a designated involuntary extension of duty, or both.
Id.

¹⁰⁹⁸ See *id.* Volume 7A: Military Pay Policy and Procedures-Active Duty and Reserve Pay. Hostile Fire/Imminent Danger entitlement is payable when, as certified by the appropriate commander, a member is subjected to hostile fire or explosion of a hostile mine; or on duty in an area in close proximity to a hostile fire incident and the member is in danger of being exposed to the same dangers actually experienced by other service members subjected to hostile fire or explosion of hostile mines; or killed, injured, or wounded by hostile fire, explosion of a hostile mine, or any other hostile action. *Id.*

¹⁰⁹⁹ *Id.*

¹¹⁰⁰ *Id.*

¹¹⁰¹ See MCM, *supra* note 16, pt. V-1, para. 1.c.

¹¹⁰² 2005 OPLAW HANDBOOK, *supra* note 2, at 197.

¹¹⁰³ See Volume I, Afghanistan and Iraq, Legal Lessons Learned, *supra* note 4, at 233

included more free time than before. When combined with restricted movement, few organized activities, and other limited constructive alternatives, this free time occasionally resulted in soldiers' engaging in misconduct.

Judge advocates must strive to conduct military justice as if they were still in garrison and avoid appearances that "field due process" is in effect. This extends to processing times and proper level of disposition, as well as ensuring that the punishment fits the crime. The phrase "field due process" suggests that there are instances when a Soldier is given lighter punishment for misconduct than he/she would normally have received in a non-deployed setting. Although many JAs found that they were able to consistently process military justice actions through adjudication in a fair and proper manner, many also stated that they knew of examples where "field due process" was used.¹¹⁰⁴

Of course, commanders ultimately determine the nature and extent of punishment that service members will receive for committing certain offenses. However, JAs must continue to advise commanders regarding the importance of avoiding appearances of inconsistent treatment while in a deployed environment versus case resolution in garrison. The best way for JAs to accomplish this goal is to provide commanders with the ability to designate the appropriate level of disposition (including court-martial, non-judicial punishment, etc.) and by processing each action fairly and efficiently from the commencement of hostilities.¹¹⁰⁵

a. Be Prepared to Address Logistical Concerns Associated With Administratively Separating Soldiers

There are numerous provisions for administratively separating service members from the Army, although those displaying a pattern of misconduct or those who committed serious misconduct not rising to the level of court-martial are the most common.¹¹⁰⁶ Judge Advocates were confronted with significant obstacles when processing service members for administrative separations.

¹¹⁰⁴ Professional Experiences, *supra* note 21.

¹¹⁰⁵ *Id.* Although there will undoubtedly be some administrative and logistical considerations when processing military justice actions during hostilities, even difficult cases can be treated consistently with prior planning—i.e., it may not be realistic to try Courts-martial while deployed initially, but if service members who have committed serious misconduct are quickly transported to the rear detachment for trial, the message to service members is that offenses committed while deployed are dealt with in the same manner as home station. For less serious misconduct that is handled through non-judicial means, JAs can encourage commanders to maximize good order and discipline within his/her unit by using different ways to impose punishment. For example, an alternative to immediately executing imposed punishment is to suspend all or a portion of the punishment. The commander can inform the offending service member that the punishment will remain suspended for a certain amount of time where without further misconduct the punishment will be "rescinded." In this particular example, the service member's "reason" to behave properly would be to avoid having his/her pay docked, rank reduced, etc. See AR 27-10, *supra* note 26, paras 3-21- 3-28 (discussing execution, clemency, suspension, vacation, mitigation, remission, setting aside and restoration of punishment).

¹¹⁰⁶ See generally U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS, para. 14-12b, 14-12c. (14 JUL. 2004) [hereinafter AR 635-200]; 1AD AAR, *supra* note 10.

1. Physical and Mental Evaluations

Army Regulation 635-200, Active Duty Enlisted Administrative Separations (AR 635-200), for example, requires Soldiers to undergo a medical evaluation when he/she is being administratively separated under chapters 5 (paragraphs 5-3, 5-11, 5-12, and 5-17 only), 8, 9, 11 (paragraph 11-3b only), 12, 13, 14 (section III only), 15, and 18.¹¹⁰⁷ Also, mental evaluations are required for Soldiers being processed for separation under chapters 13, 14 (sec III), 15, or when a Soldier being processed for discharge under chapter 10 requests a medical examination.¹¹⁰⁸

Legal teams had considerable difficulties attempting to meet the regulatory requirements relating to medical and/or mental evaluations before administratively separating a service member during a deployment. To start, there were not a great number of physicians deployed into theater. Next, of those physicians that were in theater, their priority was not to examine service members being separated from the military, but rather to concentrate on combat casualties. Finally, as difficult as it was to locate a medical doctor, it was nearly impossible to locate mental health specialists, such as psychologists or psychiatrists, to perform a mental health evaluation, as required for certain chapters when separating a service member from the military.¹¹⁰⁹

Judge advocates found several solutions to these difficult situations. One solution was to personally approach medical personnel and establish an informal system whereby service members being administratively separated were given priority for evaluations.¹¹¹⁰ Other deployed JAs took advantage of the language contained in AR 635-200, which states that “separation will not be delayed for completion of the physical,” by effectively completing all of the administrative requirements for separation except the medical

¹¹⁰⁷ See AR 635-200, *supra* note 36, para. 1-32. See also U.S. DEP’T ARMY, REG. 40-501, STANDARDS OF MEDICAL FITNESS para. 8-23 and table 8-2 (1 Feb. 2005) [hereinafter AR 40-501].

¹¹⁰⁸ AR 635-200, *supra* note 36, para. 1-32(e)(f).

Soldiers being considered for separation under paragraph 5-13 must have the diagnosis of personality disorder established by a psychiatrist or doctoral-level clinical psychologist with necessary and appropriate professional credentials who is privileged to conduct mental health evaluations for the DOD components.

A command-directed mental health evaluation performed in connection with separation under paragraph 5-17 will be performed by a psychiatrist, doctoral-level clinical psychologist, or doctoral-level clinical social worker with necessary and appropriate professional credentials who is privileged to conduct mental health evaluations for the DOD components.

Id.

¹¹⁰⁹ See OFFICE OF THE STAFF JUDGE ADVOCATE, 1ST INFANTRY DIVISION, AFTER ACTION REVIEW INTERIM REPORT, at 33 (2004) (on file with CLAMO) [hereinafter IID AAR]. For mental health examination requirements, see generally AR 635-200, *supra* note 36.

¹¹¹⁰ See After Action Review Conference, Office of the Staff Judge Advocate, V Corps, and the Center for Law and Military Operations, The Judge Advocate General’s Legal Center and School, U.S. Army, in Heidelberg, Germany (27 Apr. 2004) (notes on file with CLAMO) [hereinafter V Corps AAR Transcript].

and/or mental evaluation.¹¹¹¹ The service member was subsequently sent back to home station where the medical and/or mental evaluation was completed and the separation process was completed expeditiously.

b. Ensure That Reserve and National Guard Units' Attachment Orders Clearly Dictate Proper UCMJ Authority.

Jurisdictional concerns were discussed at length in Volume I of this Publication.¹¹¹² However, identifying jurisdictional authority for purposes of imposing punishment through military justice actions continued to be a highly debated and contentious topic. It is understandable that commanders want to retain the authority to punish service members under their commands, regardless of where such service members are located. Nevertheless, due to geography and various other factors, it may sometimes be more beneficial to employ a type of "area jurisdiction" concept for units operating in Afghanistan and Iraq.¹¹¹³

¹¹¹¹ Professional Experiences, *supra* note 21. See also 101 ABN DIV AAR, *supra* note 10, at 44.

¹¹¹² See Volume I, Afghanistan and Iraq, Legal Lessons Learned,, *supra* note 4, at 233-45, See also 101 ABN DIV AAR, *supra* note 10, at 45.

¹¹¹³ See generally U.S. ARMY EUROPE (USAREUR) REG. 27-10, LEGAL SERVICES (MILITARY JUSTICE) (25 January 2002) (stating that area Courts-Martial jurisdiction bases General Court-Martial Convening Authority jurisdiction upon the physical location within USAREUR, which is approved by the CG, USAREUR/7A, and issued by the USAREUR SJA. The jurisdictional memorandum lists specific geographic areas and responsibilities assigned to each GCMCA under the area jurisdiction concept, which includes personnel assigned to HQ USAREUR/7A, USAREUR commands and their subordinate units, individual U.S. Army personnel or personnel assigned to U.S. Army units, including United States Army National Guard (ARNG) and United States Army Reserve (USAR) units attached to USAREUR. Units include brigades, battalions, companies, commands, platoons, squads, elements, detachments, teams, activities, agencies, field offices, branches, and crews, whether there is a designated commander, chief, officer in charge, or noncommissioned officer in charge. Army National Guard (ARNG) and United States Army Reserve (USAR) units in USAREUR are under the disciplinary control and military-justice jurisdiction of the CG, USAREUR/7A. Because of area jurisdiction, two commanders may have authority for military justice over a particular soldier. Furthermore, area jurisdiction affiliations continue when USAREUR soldiers deploy outside their GCMCA-area jurisdiction. During out-of-area deployments, military-justice jurisdiction remains with the unit's permanent-duty-station GCMCA, unless otherwise agreed on by the GCMCAs concerned or modified by the CG, USAREUR/7A. With the consent of the GCMCAs concerned, commanders exercising court-martial jurisdiction may agree to transfer court-martial jurisdiction in a particular case across GCM-area boundaries. When the soldier to be transferred is not already assigned or attached to the gaining command, the gaining command may publish attachment orders. General Court Martial Convening Authority includes responsibilities specified in the UCMJ and the MCM, authority to implement policy and procedures concerning the administration of military justice, and authority to use personnel resources as necessary to take actions based on the above. The administration of military justice according to area jurisdiction includes summary courts-martial, special courts-martial, GCM jurisdiction, Article 15 authority over officers and enlisted personnel, discharge under AR 635-200, retention beyond expiration of term of service in connection with court-martial charges or arrest according to AR 635-200, elimination of officers according to AR 600-8-24, resignations and requests for discharge according to AR 600-8-24, administrative reductions in rank for enlisted personnel according to AR 600-8-19, applications for discharge as a conscientious objector according to AR 600-43, line-of-duty determinations according to AR 600-8-1, release of military personnel to civil authorities according to AR 190-9 and AR 630-10, requests for military personnel to appear as witnesses before a foreign tribunal according to AR 27-40, reports of survey according to AR 735-5, unless other specific designation is made, remission or cancellation of indebtedness according to AR 600-4, claims according to Article 139 (UCMJ) and AR 27-20, Qualitative Management Program appeals and bars to reenlistment according to AR 601-

The only way to entirely avoid the issue is to ensure that attachment orders clearly state the relationship between units while clearly delineating UCMJ authority.¹¹¹⁴ However, it is unreasonable to assume that all attachment orders will always specifically address UCMJ authority. Therefore, it is important for JAs to identify orders that are unclear as to jurisdictional issues early-on and establish proper UCMJ authority before any misconduct occurs. Although it is fair to say that UCMJ jurisdictional issues are

280 requiring GCMCA action, and other actions that Army regulations or other URs require to be taken by persons exercising GCMCA). *Id.*

¹¹¹⁴ For example, the majority of attached units are designated as being under either operational or tactical control of the assigned “parent” unit. *See* JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS (12 Apr. 2001) (as amended through 30 Nov. 2004), *available at* <http://www.dtic.mil/doctrine/jel/doddict/> [hereinafter JP 1-02].

Operational control (OPCON) is the authority to perform those functions of command over subordinate forces involving organizing and employing commands and forces, assigning tasks, designating objectives, and giving authoritative direction necessary to accomplish the mission. Operational control includes authoritative direction over all aspects of military operations and joint training necessary to accomplish missions assigned to the command. Operational control should be exercised through the commanders of subordinate organizations. Normally this authority is exercised through subordinate joint force commanders and Service and/or functional component commanders. Operational control normally provides full authority to organize commands and forces and to employ those forces as the commander in operational control considers necessary to accomplish assigned missions; it does not, in and of itself, include authoritative direction for logistics or matters of administration, discipline, internal organization, or unit training.

Id.

Contrast OPCON with Tactical Control (TACON), which is defined as:

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 or maneuvers within the operational area necessary to accomplish missions or tasks assigned. Tactical control is inherent in operational control. Tactical control may be delegated to, and exercised at any level at or below the level of combatant command. When forces are transferred between combatant commands, the command relationship the gaining commander will exercise (and the losing commander will relinquish) over these forces must be specified by the Secretary of Defense. Tactical control provides sufficient authority for controlling and directing the application of force or tactical use of combat support assets within the assigned mission or task.

Id.

Finally, Administrative Control (ADCON) is defined as:

The direction or exercise of authority over subordinate or other organizations in respect to administration and support, including organization of Service forces, control of resources and equipment, personnel management, unit logistics, individual and unit training, readiness, mobilization, demobilization, discipline, and other matters not included in the operational missions of the subordinate or other organizations.

Id.

For purposes of administering military justice, ADCON is the preferred method of attachment.

most common among Reserve and National Guard units, active duty units are certainly not immune from this problem, particularly for those units that have assets assigned at a variety of locations within the area of operations.¹¹¹⁵

c. Identify the Proper Authority for Exercising Criminal Jurisdiction Over Civilians Accompanying the Force and “Battlefield” Contractors.

There are several ways that jurisdiction may be exercised over civilians and contractors. Determining whether criminal jurisdiction exists over contractors may depend upon the “type” of contractor involved in misconduct, as well as any applicable written provisions within the contract itself.¹¹¹⁶ Furthermore, civilians may be subject to the Military Extraterritorial Jurisdiction Act of 2000 (MEJA), which establishes Federal jurisdiction over offenses committed outside the United States by persons employed by or accompanying the Armed Forces, or by members of the Armed Forces who are released or separated from active duty prior to being identified and prosecuted for the commission of such offenses, and for other purposes.¹¹¹⁷

Persons “serving with or accompanying the force” may also be subject to trial by court-martial for an offense under the UCMJ.¹¹¹⁸ However, unlike Iraq and Afghanistan, the charged offense(s) against a person accompanying the

¹¹¹⁵ For example, many Military Intelligence and Military Police units have assets spread out over large geographical areas within the theater of operations.

¹¹¹⁶ See U.S. DEP’T OF ARMY, FIELD MANUAL 3-100.21, CONTRACTORS ON THE BATTLEFIELD (6 Nov. 2002) [hereinafter FM 3-100.21]; U.S. DEP’T OF ARMY, REG. 715-9, CONTRACTORS ACCOMPANYING THE FORCE (29 Oct. 1999); Policy Letter, Coalition Forces Land Component Command, subject: Uniform Policy Letter (26 Nov. 2002)(on file with CLAMO); Policy Memorandum, Headquarters, U.S. Dep’t of the Army, subject: Contractors on the Battlefield (12 Dec. 1997)(on file with CLAMO); U.S. DEP’T OF ARMY, FIELD MANUAL 100-10-2, CONTRACTING SUPPORT ON THE BATTLEFIELD (4 Aug. 1999) [hereinafter FM 3-100.21]. See also Policy Memorandum, Coalition Forces Land Component Command, subject: Managing Contractors on the Battlefield (17 Mar. 2003) (distinguishing between contingency contractors (contractor(s) brought to the theater in support of Operation Enduring Freedom/Iraqi Freedom) and sustainment contractors (contractor(s) who come to theater on a permanent change of station status))(on file with CLAMO)..

¹¹¹⁷ See U.S. DEP’T OF DEFENSE, INSTR. 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 Mar. 2005) (implementing 18 U.S.C. 3261-67, Military Extraterritorial Jurisdiction Act (MEJA), as required by 18 USC § 3266, as approved by Deputy Secretary of Defense Paul Wolfowitz on March 3, 2005). Department of Defense instruction 5525.11 calls upon each of the Uniformed Services to implement MEJA into their respective service regulations. Note that MEJA is anticipated to apply during times of declared war as well as peacetime.

¹¹¹⁸ See UCMJ art. 2(a)(10) (2002).

force must have occurred under a war formally declared by Congress.¹¹¹⁹

Therefore, it is likely that MEJA will control by attaching Federal jurisdiction (rather than UCMJ jurisdiction) for criminal offenses committed by persons accompanying U.S. forces in Iraq and Afghanistan.

Punishing civilians for misconduct will vary, depending upon the facts and circumstances involved, as well as the severity of the offense(s). As discussed above, jurisdiction over criminal acts will likely be handled by MEJA. For offenses that do not rise to the level of criminal conduct for prosecution under MEJA, commanders have several options, including sending the offender back to the continental United States (CONUS), requesting that a reprimand be given or that the offender's position be terminated by the contracting agency. Furthermore, "battlefield" contractors need to understand that they must be familiar and comply with applicable Department of Defense regulations, directives, instructions, general orders, policies, and procedures, U.S. and host nation laws, international laws and regulations, and all applicable treaties and international agreements (e.g., Status of Forces Agreements, Host Nation Support Agreements, Geneva Conventions, and Defense Technical Agreements) relating to safety, health, force protection, and operations under their contract.¹¹²⁰

3. *Trial Defense Service.*

*In 1970, with all the [1st Cavalry Division] lawyers located at the division main headquarters, such activities as interviewing witnesses for trial, advising convening authorities located outside of Phuoc Vinh and, in some instances, actively conducting trials at firebases, required traveling by air. Additionally, troops normally did not come into headquarters for personal legal assistance or to file claims; judge advocates brought legal services to them . . . [T]hanks to the division chief of staff, Col. Edward C. Meyer, a helicopter was dedicated one-half day a week for use by the Army lawyers. It was known as the "lawbird" on the days it flew.*¹¹²¹

At some time during every deployment, commanders become aware of the importance of having one or more Trial Defense Service (TDS) JAs available to counsel service members regarding their legal rights and responsibilities. Unfortunately, commanders often don't recognize the benefits of this valuable resource while in garrison and remain unaware of TDS' importance until needed while deployed. Recent deployments have confirmed that TDS attorneys are a hot commodity, as evidenced by the large number of clients seen during OEF and OIF, coupled with very full schedules.

¹¹¹⁹ U.S. v. Averette, 41 C.M.R. 363 (C.M.A. 1970).

¹¹²⁰ See Solicitations Provisions and Contract Clauses, 48 CFR § 5152.225-74-9000(a)(3) (2004). The text of the regulation continues, stating that the Contractor shall ensure that all personnel working in the AO comply with all orders, directives, and instructions of the combatant command relating to noninterference with military operations, force protection, health, and safety.

¹¹²¹ COLONEL FREDERIC L. BORCH III, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI PAGE, at 46 (2001).

To make matters more difficult, there were many large units (sometimes in excess of 3000-4000 Soldiers) that deployed without TDS legal support, increasing the burden on defense counsel in theater.¹¹²² Accordingly, TDS JA's availability were often limited, at best.¹¹²³ Furthermore, having a limited number of TDS counsel in theater often required these JAs to travel extensively throughout the area of operations to meet with clients.¹¹²⁴

a. Recognize the Value of Video Teleconferences (VTCs) and Phone Consultations.

As noted above, TDS JAs were a limited asset in light of both the number of service members needing counsel and the amount of misconduct requiring TDS consultation while in theater. Moreover, while the force was generally very disciplined, the number of soldiers needing assistance with low level issues combined with a few high profile cases strained deployed TDS counsel.¹¹²⁵ As a result, TDS attorneys were compelled to travel extensively within the area of operations to meet with clients face-to-face and provide legal support to isolated Forward Operating Bases (FOBs).¹¹²⁶ While traveling around Iraq, for example, it was not unusual for TDS JAs to get "stranded" at a particular location when advising a client, forcing them to remain at that location until they could persuade an outgoing vehicle convoy or flight to give them a ride back to their respective home base.¹¹²⁷ Worse than getting stranded were the realities of traveling within Iraq—improvised explosive devices, drive-by shootings, rocket propelled grenades, small arms fire, and mortar fire were all possible threats on any given day. Nevertheless, TDS personnel recognized that it made sense for TDS attorneys to travel a circuit to isolated FOBs rather than force commanders to provide large numbers of convoys to the TDS home base(s).¹¹²⁸ Therefore, it is critical that SJA and TDS offices work together with commanders to establish the importance of providing transportation and other logistical assets to TDS counsel as a means of reducing the exposure of Soldiers seeking TDS support.¹¹²⁹

One way to avoid putting personnel in harm's way was to utilize VTCs and telephone consultations. Although communications were initially sporadic, the lines of communication became more stable as full spectrum operations progressed, giving TDS attorneys greater ability to conduct VTCs and telephone consultations with clients rather than forcing service members to travel on dangerous routes.¹¹³⁰ In particular, the ability to consult clients via telephone was particularly valuable.¹¹³¹ The VTCs were even better

¹¹²² See 4 ID AAR, *supra* note 8, at 5 (comments by MAJ Nathan Ratcliff, Regional Defense Counsel, Region IX, regarding the limitations placed on TDS attorneys in the Iraqi Theater of Operations).

¹¹²³ *Id.*

¹¹²⁴ *Id.*

¹¹²⁵ *Id.*

¹¹²⁶ *Id.*

¹¹²⁷ *Id.*

¹¹²⁸ *Id.*

¹¹²⁹ *Id.*

¹¹³⁰ *Id.*

¹¹³¹ *Id.* (stressing that phone consultations were more widely used once lines of communication became more common within the Iraqi theater of operations. Soldiers charged with serious criminal offenses triable by court-martial were seen face-to-face, as were Soldiers assigned to larger bases where TDS was

than telephone consultations, allowing defense counsel to “meet” with their clients. However, the usefulness of VTCs was sometimes limited in comparison to phone consultations. For example, maneuver commanders needing to consult with higher headquarters concerning difficult and important operational missions took precedence over TDS.¹¹³² Additionally, VTC equipment could be difficult, if not impossible, for service members and defense counsel to find, depending upon the size, nature, and mission of the service member’s unit.¹¹³³ Finally, even if a defense counsel was able to successfully locate and reserve VTC equipment, it was often difficult to preserve client confidentiality.¹¹³⁴ As mentioned above, coordination between SJA and TDS offices with commanders to provide adequate access to assets and communications for TDS counsel and their clients will substantially reduce the number of service members placed in harms way.¹¹³⁵

b. Consider consolidating TDS offices at major bases and/or life support areas during deployments to provide geographical “area” legal support.

*Defense counsel provide defense legal services to the units for which they are assigned responsibility or on a geographic basis. Defense counsel must have the mobility to interview and consult with widely scattered clients and witnesses, and represent their clients before courts-martial and adverse administrative proceedings.*¹¹³⁶

Another way to avoid putting service members in the air or on the roads for legal support is to establish larger TDS “cells” at several of the larger operating bases. As full spectrum operations continued, TDS office locations became more stable, allowing defense counsel to establish consistent office hours.¹¹³⁷ From these “hub” TDS offices, defense counsel were able to effectively support an area of operations by providing a combination of office hours and FOB visits.¹¹³⁸

4. Identify Resources That Will Be Necessary to Adequately Accommodate and Support Military Judges and Court Reporters

We need judges learned in the law, not merely the law in books but, something far more difficult to acquire, the law as applied in action in the courtroom; judges

more readily available. However, for service members charged with non-judicial punishment or other lesser allegations that were located in more remote areas and/or Forward Operating Bases, it became common for TDS attorneys to make periodic visits to the FOBs and provide legal advice over the phone between those visits. By providing advice over the phone, service members were able to access TDS counsel in a more timely manner than by scheduling a face-to-face consultation, not to mention that there was less risk to both the service member and TDS personnel.).

¹¹³² *Id.*

¹¹³³ *Id.*

¹¹³⁴ *Id.*

¹¹³⁵ *Id.*

¹¹³⁶ FM 27-100, *supra* note 1, para. 4.4.2

¹¹³⁷ See 4 ID AAR, *supra* note 8, at 5 (comments by MAJ Nathan Ratcliff, Regional Defense Counsel, Region IX, regarding the limitations placed on TDS attorneys in the Iraqi Theater of Operations).

¹¹³⁸ *Id.*

*deeply versed in the mysteries of human nature and adept in the discovery of the truth in the discordant testimony of fallible human beings; judges beholden to no man, independent and honest—equally important—believed by all men to be independent and honest; judges above all, fired with consuming zeal to mete out justice according to law to every man, woman, and child that may come before them and to preserve individual freedom against any aggression of government; judges with the humility born of wisdom, patient and untiring in the search for truth, and keenly conscious of the evils arising in a workaday world from any unnecessary delay.*¹¹³⁹

*Service of Geographic Zones. Military judges provide judicial legal services on a geographic basis. They are assigned to the United States Army Judiciary with duty station at corps and echelons above corps. Courts-martial will be conducted in the accused's unit's area of operations and as far forward in the unit's area of operations as the commander deems appropriate. Trying courts-martial as far forward as possible will minimize disruption of the unit, provide better availability of witnesses, and speed the administration of military justice. Military judges must have the mobility to preside over courts-martial and perform magistrate duties where and when needed.*¹¹⁴⁰

Ordinarily, Military Judges did not deploy for extended periods of time into current theaters of operation. Normally, Military Judges “rode the circuit” for several weeks to one month at a time, hearing cases in several different geographical areas within a particular area of operations.¹¹⁴¹ Consequently, ensuring that Military Judges and Court Reporters have adequate living quarters, technological/automation support, and transportation while deployed was an important concern for units conducting courts-martial in deployed environments. As legal teams learned, however, meeting these seemingly basic requirements can be extremely challenging in a deployed environment, especially because Military Judges are dependent upon supporting units to provide their logistical transportation and life support.

As mentioned above, Military Judges are responsible for trying cases as “far forward” as possible. However, due to concerns for the judges’ safety and security, courts-martial proceedings have been limited to several geographic locations in Iraq and

¹¹³⁹ U.S. DEP’T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES’ BENCHBOOK para. 1-1(a)(3)(b) (15 Sept. 2002).

¹¹⁴⁰ FM 27-100, *supra* note 1, para. 4.4.2

¹¹⁴¹ See generally IID AAR, *supra* note 39.

Afghanistan during the period of this Publication.¹¹⁴² As full spectrum operations progress, commanders must determine whether it is more beneficial to expand the number of deployed locations to which Military Judges must travel versus the current system of requiring individual units to transport charged service members to larger, more centralized bases. When making this decision, commanders must balance the dangers posed to the Military Judges and his/her Court Reporter while traveling the hazardous roads and skies of Iraq and Afghanistan with the similar dangers and demands encountered by units with Soldiers accused of committing crime(s).¹¹⁴³

a. Recognize the Importance of Court Reporters Skills and Their Equipment for Courts-Martial Proceedings and Article 32 Hearings.

Several legal teams deployed with their court reporters, which proved valuable throughout the deployment.¹¹⁴⁴ In other instances, a court reporter traveled with the Military Judge throughout the circuit within the area of operations, which lessened the administrative, logistical and technological burdens on legal teams conducting courts-martial.¹¹⁴⁵

The capabilities of court reporters' recording equipment as well as their specialized skills were integral to conducting a wide variety of legal duties. Obviously, the main focus of court reporters is to record testimony in criminal proceedings. However, when not involved in criminal hearings court reporters were asked to perform duties extending beyond criminal law, to include transcribing statements for administrative investigations and claims investigations.¹¹⁴⁶ Additionally, court reporters were rarely assigned to a Brigade Operational Law Team (BOLT), requiring JAs to approach [Division] Staff Judge Advocates for court reporter support when necessary.

One piece of integral technology that court reporters possess is the digital recorder. This resource was used effectively in the *U.S. v. Akbar* Article 32 Proceeding, which was held at Fort Knox, Kentucky.¹¹⁴⁷ Although a number of witnesses were

¹¹⁴² See IID AAR, *supra* note 39; IAD AAR *supra* note 10 (listing locations where courts-martial have been held).

¹¹⁴³ It can be argued that it makes more sense both logistically and practically to require Military Judges to travel to more remote Forward Operating Bases within a deployed area of operations versus placing the responsibility on the alleged offender's unit. This viewpoint is based on practical considerations that contrast the difficulties in providing transportation, lodging/temporary billeting, convoy security detail, and a guard/escort for the Military Judge and Court Reporter with the more burdensome task of providing those same assets for the accused, necessary witnesses, JAs/paralegals, TDS counsel, and the chain of command (if needed for testimony). Furthermore, courts-martial may affect mission readiness, depending upon the type of unit and the number of assets that must be allocated to ensure offending soldiers are present at their court-martial.

¹¹⁴⁴ See 101st ABN DIV AAR, *supra* note 10, at 47. The 101st deployed with one court reporter and had many requests from other units in the area of operations to "borrow" their reporter to record/report courts-martial. Between courts-martial and Article 32 hearings, there was enough work for more than one court reporter, particularly in light of the fact that the 101st court reporter also acted as the Criminal Law Division NCOIC.

¹¹⁴⁵ *Id.*

¹¹⁴⁶ *Id.* at 48.

¹¹⁴⁷ *Id.*

unable to attend the Article 32 hearing at Fort Knox in person due to military mission requirements, the court reporter was able to record the testimony verbatim by using a digital recorder. She then posted the testimony to a secure website, whereupon court reporters at Fort Campbell, Kentucky were able to immediately begin transcribing the testimony, allowing a verbatim transcript to be produced in a matter of days.¹¹⁴⁸

5. Identify and Plan for Redeployment and Reintegration Issues

*During redeployment and demobilization, the SJA transitions back to the original home station military justice structure. This will normally include returning to the original convening authority structure, ensuring units and personnel are assigned or attached back to the appropriate organization for the administration of military justice, revoking the designations of home station convening authorities established for the operation, transferring individual cases, and rescinding the general order for the operation.*¹¹⁴⁹

It is important that units “return to normal” as quickly as possible upon redeployment. As stated in FM 27-100, upon returning to home station, units should strive to conduct their business in the same manner that they did prior to deployment.¹¹⁵⁰ However, changing jurisdictional alignments, rescinding General Orders, and making other required adjustments can often be a difficult process.

Many deployed legal personnel are under the impression that the working conditions back at garrison are relaxed. However, many rear detachment legal personnel stated that in many cases the workload was significantly increased when units deployed.¹¹⁵¹ Although this workload increase may be attributed to a number of different factors, several possible reasons include the necessity for rear detachment personnel to assist personnel that are deploying with a variety of legal issues, dealing with inexperienced legal personnel back-fill replacements, and concluding previously existing cases left behind by deploying legal personnel.¹¹⁵² Despite commanders’ statements to the contrary, many judge advocates in rear detachments had to deal with Soldiers that were left behind with either a significant history of legal problems or currently pending punitive legal actions.¹¹⁵³ Deployed legal teams must also keep in mind that upon redeployment there might be a significant number of individual cases that must be transferred back to the appropriate, realigned jurisdiction for adjudication.¹¹⁵⁴ One of the

¹¹⁴⁸ *Id.* at 50.

¹¹⁴⁹ FM 27-100, *supra* note 1, para. 3.3

¹¹⁵⁰ See Volume I, Afghanistan and Iraq, Legal Lessons Learned, *supra* note 4, for an in-depth discussion regarding jurisdiction and the different approaches that were used to assign General Court-Martial Convening Authorities.

¹¹⁵¹ See MAJ Bradley Huestis, V Corps Rear (Provisional): Military Justice After Action Report (2004) (unpub.) (on file with CLAMO) [hereinafter Huestis]; see also IID AAR, *supra* note 39, at slide 16.

¹¹⁵² Huestis, *supra* note 81 at 2.

¹¹⁵³ IID AAR, *supra* note 39, at 39.

¹¹⁵⁴ Huestis, *supra* note 81 at 13.

most valuable lessons for JAs to take away from the wide variety of military justice issues that arise during deployments is the importance of addressing as many of the aforementioned concerns as possible prior to deployment.

G. LEGAL ASSISTANCE

As many of the core legal disciplines have evolved to accommodate the changing battlefields in the Global War on Terror, so too has legal assistance. In both Operation ENDURING FREEDOM (OEF) AND Operation IRAQI FREEDOM (OIF), when units moved to Stability and Support Operations (SASO), they experienced an increase in the demand for legal assistance.¹¹⁵⁵ This is likely because, among other reasons, service members were somewhat stabilized and in close proximity to centralized resources with more access to the internet (therefore in touch with their spouses, banks, creditors, etc.). Additionally, post major hostilities, service members had time to contemplate their legal needs, which increased over time as problems from home caught up with them.¹¹⁵⁶

The legal issues Judge Advocates (JAs) are most likely to encounter, such as wills, powers-of-attorney (POAs), and family law are now largely preempted by legal teams during Soldier Readiness Processing (SRP) and proactive, preventive legal assistance, such as Family Readiness Group (FRG) briefings and commander and key leader briefings.¹¹⁵⁷ For a more general overview of legal assistance lessons learned and a discussion of the SRP, see Volume I of this Publication.¹¹⁵⁸ There were, however, additional issues that arose for some units after the publication of Volume I. This chapter focuses on those issues.

1. Legal Teams Must Plan for a Client Tracking System.

Though routine and thorough client tracking in garrison is something all Legal Assistance Offices (LAOs) take very seriously, in a deployed environment there are some obstacles to effective client tracking.¹¹⁵⁹ This is particularly true when units are geographically dispersed.¹¹⁶⁰ During OIF and OEF, individual attorneys at various levels sometimes conducted legal assistance locally with little or no system for tracking.¹¹⁶¹ If no system is emplaced to consolidate client information across a unit, JAs risk a conflict of interests.¹¹⁶² Though issues of conflicts and confidentiality between dispersed units were addressed in Volume I of this

¹¹⁵⁵ See After Action Report, Office of the Staff Judge Advocate, 101st Airborne Division, at 37, [hereinafter 101st ABN DIV AAR] (on file with CLAMO).

¹¹⁵⁶ *Id.* at 37-38.

¹¹⁵⁷ See After Action Review Conference, Office of the Staff Judge Advocate, 1st Armor Division, and Center For Law and Military Operations, in Weisbaden, Germany (13-15 Dec. 2004) Legal Assistance Power Point Presentation at 1 [hereinafter 1AD AAR] (on file with CLAMO).

¹¹⁵⁸ See CENTER FOR LAW AND MILITARY OPERATIONS, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, VOLUME I: MAJOR COMBAT OPERATIONS, 219 (11 September 2001-1 May 2003) (August 2004) [hereinafter Volume I, Afghanistan and Iraq Legal Lessons Learned].

¹¹⁵⁹ See After Action Review Conference, Office of the Staff Judge Advocate, 10th Mountain Division, and the Center for Law and Military Operations, at Fort Drum, NY, Power Point Presentation at 53 (17 Jun. 2004) [hereinafter 10th MNT DIV AAR] (on file with CLAMO).

¹¹⁶⁰ See Legal Lessons Learned from Afghanistan and Iraq, Volume I, *supra* note 4, at 225.

¹¹⁶¹ See After Action Review Conference notes, Office of the Staff Judge Advocate, 82d Airborne Division, and Center For Law and Military Operations, at 4 [hereinafter 82d ABN DIV AAR] (on file with CLAMO). See also 10th MNT DIV AAR *supra* note 5 at 53.

¹¹⁶² See 10th MNT DIV AAR, *supra* note 5, at 53.

Publication, client tracking was not.¹¹⁶³ Since Volume I, some units have reported significant problems tracking clients in a deployed environment.¹¹⁶⁴

Tenth Mountain Division, for instance, like many units who have deployed in the Global War on Terror, did not implement the Client Information System (CIS) in Afghanistan.¹¹⁶⁵ All Legal Assistance attorneys completed client cards with the intent to enter the data into the Ft. Drum CIS system upon redeployment.¹¹⁶⁶ Prior experience in the division indicated that merging two CIS databases, that is, a deployed database with the garrison database at 10th Mountain Division, was difficult.¹¹⁶⁷ Some units recommended sustaining a regular system of mailing client cards to the rear.¹¹⁶⁸ Both of these systems, however, may fail to protect against conflict if, for instance, the home station LAO has seen the spouse while the deployed LAO has seen the service member.¹¹⁶⁹

Establishing a same-time system for client tracking and at all logical units—brigades, LAO, and rear detachment—may prevent the risk of conflict.¹¹⁷⁰ If reliable access to NIPR is available, consider developing a web-based client information system—through a shared document posted to the Army Knowledge Online (AKO) website, for example—that allows entry from remote locations.¹¹⁷¹ This will diminish the risk of conflict or the risk that a JA may inadvertently prosecute a former client or advise a commander on a UCMJ matter regarding a former client.¹¹⁷²

Another recommendation is to ensure the Office of the Staff Judge Advocate (OSJA) deploys a Chief of Client Services.¹¹⁷³ Tenth Mountain Division reported that although several attorneys practiced both legal assistance and claims, no single JA had overarching responsibility for managing services, conflicts, or reporting.¹¹⁷⁴ A recommendation was to identify one person to manage the legal assistance workload for the Division.¹¹⁷⁵

2. Plan for Space and Equipment Required for Legal Assistance Before Deploying.

¹¹⁶³ See generally Volume I, Afghanistan and Iraq, Legal Lessons Learned, *supra* note 4, para IIIH.

¹¹⁶⁴ See 10th MNT DIV AAR *supra* note 5 at 53.

¹¹⁶⁵ See *id.*

¹¹⁶⁶ *Id.*

¹¹⁶⁷ *Id.*

¹¹⁶⁸ *Id.*

¹¹⁶⁹ *Id.*

¹¹⁷⁰ *Id.*

¹¹⁷¹ See *id.*; see also 82d ABN DIV AAR, *supra* note 7, at 1. Lieutenant Colonel Thomas A. Ayres, 82d Airborne Division Staff Judge Advocate, relayed that the 82d Airborne Division effectively used a collaboration site. The collaboration could be used for client tracking, but in this case it was used for criminal law. The Division Commander took his flag with him and left no rear commander with General Court Martial Convening Authority (GCMCA). The OSJA at home station scanned all documents and posted them on the AKO collaboration site for retrieval and action. This proved far faster and more effective than mailing the documents forward or relying on the Division Commander's single and unpredictable fax machine. The deployed OSJA then reciprocated once the documents bore the signature of the Commander. By analogy, and depending on access to NIPR, the AKO collaboration site might be one way for deployed Legal Assistance JAs and the home station LAO to track clients.

¹¹⁷² See 10th MNT DIV AAR, *supra* note 5, at 53.

¹¹⁷³ *Id.* at 54.

¹¹⁷⁴ *Id.*

¹¹⁷⁵ *Id.* See also 101st ABN DIV AAR, *supra* note 1, at 38.

Many units do not have abundant access to unclassified internet and phone lines.¹¹⁷⁶ Many legal teams reported that the LAO competed with the Morale, Welfare, and Recreation (MWR) lines.¹¹⁷⁷ At some locations, JAs even resorted to using MWR lines to conduct legal research, because they were the only unclassified internet access available.¹¹⁷⁸ In addition, some units had no designated, confidential area in which to conduct legal assistance.¹¹⁷⁹ When possible, legal assistance personnel should have a dedicated space for their work with sufficient cover to maintain confidentiality, as well as a dedicated priority phone line and unclassified internet terminal.¹¹⁸⁰ Space and equipment issues should be worked out with the unit prior to deployment and exercised during unit predeployment exercises so that units are aware of the LOA needs.

3. Legal Teams Must Empower Paralegals to Work at Dispersed Locations.

The 3d Brigade, 82d Airborne Division, was divided into four forward operating bases (FOBs) scattered in and around Fallujah.¹¹⁸¹ By mid-2003, the Brigade's Area of Operations (AO) included Fallujah and two corners of the Sunni triangle.¹¹⁸² The area was notoriously dangerous, making the 3d Brigade's experience in core legal disciplines different than most.¹¹⁸³ One of those differences was that there was scarcely any travel between the various units that comprised the 3d Brigade Combat Team (BCT). For a significant amount of time, there were no TA-1042A/U Digital Non-Secure Voice Terminal (DNVT) communications between the

¹¹⁷⁶ See Interim After Action Review, Office of the Staff Judge Advocate, 1st Infantry Division, at Part II, RSOI. [hereinafter IID Interim AAR] (on file with CLAMO).

Bring materials to practice law while in the RSOI phase. There will definitely be legal issues that occur while in Kuwait and you will need everything—laptops, printers, software, notary seals, forms, and research materials—to accomplish your mission. Storing numerous documents/forms on your memory sticks/thumb drives will allow you to utilize others' computers in a pinch, but you should work hard to have all of your own stuff and be self-sufficient. Access to communication devices, from DSN, to cell phones, to NIPR and SIPR is absolutely essential during this initial phase of the deployment. Begin fighting for your share of access long before you deploy. With numerous units coming and going, your division/unit will likely not get much access, and the OSJA will not have the highest priority for telephone access or computer drops. Discuss your need for access with the CG and/or CoS well before deployment, and try to lock it in. We will have our share when we get to Iraq, but we did not have our share during the RSOI phase in Kuwait. We assumed we would be in Kuwait for only 10 days and it ended up being three weeks, during which numerous issues, both legal and practical, arose.

Id., see also 10th MNT DIV AAR *supra* note 5; 82d ABN DIV AAR *supra* note 7, at 1; 101st ABN DIV AAR, *supra* note 1, at 41.

¹¹⁷⁷ See 10th MTN DIV AAR, *supra* note 5, at 6; 101st ABN DIV AAR, *supra* note 1, at 41.

¹¹⁷⁸ See 101st ABN DIV AAR, *supra* note 1, at 41.

¹¹⁷⁹ See After Action Review Conference, Office of the Staff Judge Advocate, V Corps, and Center For Law and Military Operations Heidelberg, Germany (17-19 May 2004) [hereinafter V Corps AAR] (on file with CLAMO). See also 82d ABN DIV AAR, *supra* note 7, at 6 (briefing by, MAJ Dan Froehlich, 3/82d ABN DIV emphasizing the lack of communication resources at remote FOBs scattered in and around Fallujah, Iraq in mid-2003).

¹¹⁸⁰ See V Corps AAR, *supra*, note 26 at 23.

¹¹⁸¹ See 82d ABN DIV AAR, *supra* note 7, at 6 (briefing by MAJ Dan Froehlich, 3/82d ABN DIV).

¹¹⁸² *Id.*

¹¹⁸³ *Id.*

Brigade Combat Team (BCT) units. The only means by which the JA could communicate with Battalions and other subordinate units was through Tactical Communication Satellite (TACSAT). Additionally, there was no internet access for several months.

Given this operational environment, it was very difficult to exercise legal visibility over FOBs. Therefore, paralegals in outlying areas had to be empowered. The paralegals became the eyes and ears of the JA on various issues, to include legal assistance.¹¹⁸⁴ Because the 82d Airborne Division had so vigorously and continuously gone through Soldier Readiness Processing (SRP)—not just before the deployment but before the Global War on Terror and as a matter of routine operations—was a tremendous help to the Brigade Legal Team.¹¹⁸⁵ It meant that very little legal assistance was necessary. Like many units, the entire chain of command was engaged in supporting and mandating SRPs, ensuring 100% service member compliance. Therefore, the bulk of legal assistance issues arose from within non-organic 3d Brigade assets such as Reserve units attached to 3d Brigade for the length of the deployment and slice elements from the National Guard.¹¹⁸⁶

4. Legal Teams Can Anticipate Legal Issues and Preempt Them.

a. Practice Predeployment Preventive Law.

Judge advocates should anticipate legal issues common during and after a deployment to the same extent that they are successfully anticipating predeployment legal issues.¹¹⁸⁷ Though many legal teams continued to reap the benefits of an aggressive preventive law program, as discussed in Volume I of this Publication,¹¹⁸⁸ some noted that there came a point in the deployment when service members began to seek legal assistance for pre-existing court dates back at home station.¹¹⁸⁹ Communication with home station on these points was difficult due to reduced or unreliable means of communications and time zone differences. In many cases, these service members were aware of the pending court dates before they deployed, but failed to seek legal assistance prior to deploying.¹¹⁹⁰ One suggestion is to add a warning to the predeployment legal briefing that court dates may be rescheduled in light of a deployment if the service member visits the LAO before deploying. Another method to preempt such problems is to educate the chain of command that service members who are aware of court dates should seek Legal Assistance.¹¹⁹¹

b. Anticipate Post-deployment Legal Assistance Issues.

Additionally, some units reported dealing with significant deployment-related legal assistance issues upon reintegration.¹¹⁹² Among the most common of these issues were: debt

¹¹⁸⁴ *Id.*

¹¹⁸⁵ *Id.*

¹¹⁸⁶ *Id.*

¹¹⁸⁷ See 10th MTN DIV AAR, *supra* note 5, at 55.

¹¹⁸⁸ See Volume I, Afghanistan and Iraq, Legal Lessons Learned, Volume I, *supra* note 4, at para. IIH.

¹¹⁸⁹ See 1AD AAR, *supra* note 3.

¹¹⁹⁰ *Id.*

¹¹⁹¹ *Id.*

¹¹⁹² See 101st ABN DIV AAR, *supra* note 1, at 40; 1AD AAR, *supra* note 3.

related to accounts that the service member was unaware had gone into collection such as outstanding utility bills, and debt related to overspending during the deployment as a result of service members earning extra money.¹¹⁹³ Most units also reported a spike in clients seeking separation counseling upon redeployment.¹¹⁹⁴

Both debt and family law issues can be briefed as part of predeployment legal assistance briefs.¹¹⁹⁵ For instance, legal teams can emphasize the importance of single and separated service members forwarding their mail to ensure that they or a trusted family member is receiving bills and creditor correspondence.¹¹⁹⁶ Judge advocates can also warn service members of making purchases while deployed or shortly thereafter that their income at home station cannot reasonably accommodate.¹¹⁹⁷

Legal teams should be prepared for less demand regarding personal legal issues as service members prepare to return home.¹¹⁹⁸ One legal assistance attorney and one to two paralegals may be sufficient towards the end of the deployment.¹¹⁹⁹ When service members arrive home, however, legal teams can expect a dramatic increase in the number of service members seeking help. With issues like divorce and separation spiking upon return, it may be helpful to redeploy legal assistance attorneys earlier than the rest of the office. This will ensure there is a full staff at the garrison LAO to handle the influx of actions when the rest of the unit returns.¹²⁰⁰

Legal teams found that information papers containing advice on common legal issues were also helpful. The 101st Airborne Division, for example, used a Divorce and Deployment Fact Sheet to inform service members of the general separation process and what to expect during a divorce.¹²⁰¹ In addition, when deployed, it may help to offer service members a divorce briefing similar to the one given at home station. If a service member has more specific questions, he or she can speak to an attorney. This will help screen clients and free attorneys to do other work.¹²⁰² The 101st Airborne Division also held daily or weekly briefings upon redeployment in the Fort Campbell LAO on hot issues such as divorce and taxes, thereby saving time by getting information out to a lot of service members at once instead of having attorneys give the same advice to individual clients.¹²⁰³

c. The Extension: Anticipate Service Members' Personal Legal Issues In Case of a Deployment Extension.

¹¹⁹³ See 1AD AAR, *supra* note 3.

¹¹⁹⁴ See *id.* See also 101st ABN DIV AAR, *supra* note 1, at 38.

¹¹⁹⁵ See 1AD AAR, *supra* note 3.

¹¹⁹⁶ *Id.*

¹¹⁹⁷ See 82d ABN DIV AAR, *supra* note 7.

¹¹⁹⁸ See 101st ABN DIV AAR, *supra* note 1, at 40.

¹¹⁹⁹ *Id.*

¹²⁰⁰ *Id.*

¹²⁰¹ *Id.* at 38.

¹²⁰² *Id.*

¹²⁰³ *Id.* at 40.

First Armored Division was unexpectedly extended just short of their redeployment date.¹²⁰⁴ Aside from compensating for OSJA personnel losses as some members of the legal team had already redeployed, the division experienced unique legal assistance challenges. Powers of Attorney (POAs) typically designed to expire at the end of one year were insufficient in length to cover the extension.¹²⁰⁵ As a result, several families were inconvenienced when agencies would not accept the expired POA.¹²⁰⁶ To acquire a new POA with a raised notary seal in its original form would have taken several weeks. First Armored Division created a system to solve the problems by scanning original POAs and e-mailing them to families as well as communicating with local agencies and banks to ensure compliance with the scanned POAs. In light of 1st Armored Division's extension, and the earlier extension of 3rd Infantry Division, LAOs must anticipate unit extensions in theater and plan to ensure coverage for the entire period of the service member's absence.¹²⁰⁷

Another legal assistance issue that the 1st Armored Division legal team noted was that several of their service members had to cancel or delay their wedding and/or travel plans because of this last minute extension in theater.¹²⁰⁸ This was because service members relied upon redeployment guidance when making wedding and travel plans.¹²⁰⁹ In some cases, depending on the state, marriages could be performed by proxy or by Video Teleconferencing (VTC).¹²¹⁰ At the time of this writing, four states offer this service: Texas, Montana, Colorado and solely for service members stationed abroad, California.¹²¹¹ The state of Montana offers double-proxy marriages. That is, neither party need be physically present to bind one another in a valid marriage.¹²¹²

¹²⁰⁴ See 1AD AAR, *supra* note 3, at 4.

¹²⁰⁵ *Id.*

¹²⁰⁶ *Id.* Legal Assistance attorneys recommend discussing this with commanders and encouraging them to provide service members an adequate amount of time to remedy a deficient family care plan while being mindful that some service members may attempt to use this as a subterfuge to depart theater.

¹²⁰⁷ *Id.* See also Legal Lessons Learned from Afghanistan and Iraq, Volume I, *supra* note 4, at 228.

¹²⁰⁸ See 1AD AAR, *supra* note 3, at 5-6.

¹²⁰⁹ *Id.* See also 101st ABN DIV AAR, *supra* note 1, at 38.

¹²¹⁰ *Id.*

¹²¹¹ The California proxy marriage law is limited to service members serving abroad. State Bill 7 was sponsored by Republican Sen. Jim Brulte of Rancho Cucamonga and Senate President Pro Tem John Burton, D-San Francisco and signed into law by Governor Arnold Schwarzenegger on September 10, 2004. Because it was passed as an urgency measure to allow service members stationed overseas to marry, the law took effect immediately. The law allows marriage-by-proxy in California for members of the armed forces who are stationed far away in wars or conflicts. It allows them to give their power of attorney for someone to stand in for them during their wedding ceremony. Documents have to be signed and acknowledged by a notary or by two military officers.

¹²¹² See Montana Code Annotated 40-1-301 (2) which provides:

If a party to a marriage is unable to be present at the solemnization, he may authorize in writing a third person to act as his proxy. If the person solemnizing the marriage is satisfied that the absent party is unable to be present and has consented to the marriage, he may solemnize the marriage by proxy. If he is not satisfied, the parties may petition the district court for an order permitting the marriage to be solemnized by proxy.

Additionally, some service members faced significant financial penalties for delaying their weddings, to include the loss of airline tickets, hotel reservations, and vacation packages.¹²¹³ Legal Assistance attorneys worked on their behalf to mitigate these costs, engaging leadership to advocate for the service member as well.¹²¹⁴ Though this was often successful, it may be helpful in the future to ensure that predeployment Legal Assistance briefings both to the service members and to the Family Readiness Groups mention this hazard as service members and families may find it helpful to know the terms addressing cancellation and delay in contracts with wedding vendors, travel agents, airlines, and so forth.¹²¹⁵

See also Law & The Military Proxy Weddings Being Requested in Wartime: Montana Alone Allows Double Proxies, THE MONTANA LAWYER (Aug. 2004).

¹²¹³ See 1AD AAR, *supra* note 3, at 5-6.

¹²¹⁴ *Id.* at 5.

¹²¹⁵ *Id.*

H. ADMINISTRATIVE LAW

*Administrative law issues in a deployed environment are interesting and, often times, unusual and constitute a huge portion of a deployed BCT's (Brigade Combat Team's) legal practice.*¹²¹⁶

Similar to the practice of administrative law in major combat operations, during both Operation ENDURING FREEDOM (OEF) and Operation IRAQI FREEDOM (OIF) legal teams found that administrative law issues consumed a great deal of attorney and paralegal time. Many of the same administrative law issues that legal teams addressed during major combat continued when the mission transitioned into full spectrum operations.¹²¹⁷ Numerous investigations, travel policies, war trophies, and unit artifacts remained familiar issues. Legal teams also grappled with other administrative law issues that they did not ordinarily confront in garrison, such as intelligence investigations and operating remote site post exchanges.

1. Judge Advocates Must Understand Special Regulatory Requirements for Numerous Investigations and Be Prepared to Advise Commanders When to Conduct Investigations.

*In a combat environment, it is not always easy to know when an investigation should be conducted and who should appoint it. Army regulations require investigations in certain situations, such as fatal accidents, friendly fire incidents, etc. But investigations should also be conducted into accidents that have the potential of generating a high degree of media attention. In this environment the last category taken literally would require us to investigate almost every non-combat incident in theater. Discretion needs to be used when determining when an incident should be investigated.*¹²¹⁸

Legal teams in both Afghanistan and Iraq provided legal advice and assistance in numerous investigations during full spectrum operations.¹²¹⁹ Similar to major combat

¹²¹⁶ Captain Christopher M. Ford, *The Practice of Law at the Brigade Combat Team: Boneyards, Hitting from the Cycle, and all Aspects of a Full Spectrum Practice*, ARMY LAW., Dec. 2004, at 24 [hereinafter *The Practice of Law at the Brigade Combat Team*].

¹²¹⁷ The term "full spectrum operations" is defined by U.S. Army doctrine to include "offensive, defense, stability, and support operations." U.S. DEP'T OF ARMY, FIELD MANUAL 3-1, OPERATIONS, para. 1-48 (14 Jun. 2001).

¹²¹⁸ *Id.*

¹²¹⁹ See, e.g., Lieutenant Colonel Jonathan A. Kent, Transcript of After Action Review Conference, Office of the Staff Judge Advocate, V Corps, and the Center for Law and Military Operations, Heidelberg, Germany, at 14 (17-19 May 2004) [hereinafter Kent Transcript] ([i]nvestigations and primary notification of next of kin were huge issues for me, are still issues. I'm still getting phone calls from down range about investigations that we did, and where they were filed") (on file with CLAMO); After Action Review Conference, Office of the Staff Judge Advocate, 82d Airborne Division, and the Center for Law and Military Operations, at Fort Bragg, N.C., at 2 (22 Jun. 2004) [hereinafter 82d ABN DIV AAR] (noting that 27 administrative investigations were conducted at the Division and 125 at the brigades) (notes on file with CLAMO); Operation Iraqi Freedom (OIF) After Action Review (AAR), Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), at 3 (24 Sep. 2004) [hereinafter 101st ABN DIV AAR] (on file with CLAMO); After Action Review Conference, Office of the Staff Judge Advocate, 1st Armored Division, with the Center for Law and Military Operations, in Wiesbaden, Germany, Administrative and Civil Law Notes (13-14 Dec. 2004) [hereinafter 1AD AAR] (providing that the 1AD averaged about one new investigation per day) (notes and power point presentations on file with CLAMO); Interview with Lieutenant

operations, units conducted administrative investigations into many negligent discharges and other minor disciplinary problems.¹²²⁰ Moreover, during full spectrum operations, high profile investigations, including friendly fire incidents, continued at a sustained rate.¹²²¹ Therefore, all JAs had to be trained to provide legal advice to commanders and investigating officers on the conduct of administrative investigations.¹²²²

To ensure required investigations were conducted, JAs took every opportunity to train commanders on the regulatory requirements of various investigations, to include training during mission rehearsal exercises and warfighter exercises.¹²²³ Judge advocates also drafted fragmentary orders and policy letters to clarify what incidents should be investigated.¹²²⁴ In

Colonel William R. Kern, former Command Judge Advocate, Task Force Olympia, in Fort Lee, Va. (24 Aug. 2004) [hereinafter Kern Interview] (“[i]nvestigations were the primary administrative law actions.”) (notes on file with CLAMO); After Action Review Conference, Office of the Staff Judge Advocate, 4th Infantry Division, and the Center for Law and Military Operations, Fort Hood, Tx., at 5 (8 Sept. 2004) [hereinafter 4ID AAR] (stating that the Division had numerous investigations and, in fact, the Division administrative investigations were the Battle Update Slide for the OSJA) (notes on file with CLAMO).

¹²²⁰ The 1st Armored Division, for example, had no requirement to conduct an AR 15-6 investigation into negligent discharge cases. These incidents had to be investigated, but a commander’s inquiry was generally used. Moreover, the Staff Judge Advocate related that based on a statistical analysis there seemed to be no correlation between the severity of the punishment for negligent discharges and the number of incidents. 1AD AAR, *supra* note 4, Administrative and Civil Law Notes.

¹²²¹ See CENTER FOR LAW AND MILITARY OPERATIONS, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, VOLUME I: MAJOR COMBAT OPERATIONS (11 September 2001 – 1 May 2003) para. III.G.2.b. (1 Aug. 2004) [hereinafter Volume I, Afghanistan and Iraq Legal Lessons Learned] (discussing administrative investigations, including friendly fire accident investigations). After Action Reports (AARs) reflected that friendly fire incidents (FFI) continued to be a problem. Under DoD policy, the FFIs are investigated at the direction of the Combatant Commander. During OIF and OEF, CENTCOM typically directed the Joint Task Force (JTF) to conduct the investigation, and the JTF, in turn, directed the major subordinate commander to appoint the investigating officer (so long as that commander was a general court-martial convening authority). There were some instances where the JTF or the major subordinate command appointed the investigation without direction from USCENTCOM. Once the investigation was completed, however, it was forwarded through the chain of command to USCENTCOM. U.S. DEP’T OF DEFENSE, INSTR. 6055.7, ACCIDENT INVESTIGATION, REPORTING, AND RECORD KEEPING, para. E4.7 (3 Oct 2000) [hereinafter DoDI 6055.7]; see also Office of the Staff Judge Advocate, Combined Joint Task Force Seven (III Corps), First Quarter After Action Report, Administrative Law AAR Topics (Apr. 2004) [hereinafter III Corps 1st Quarter AAR]; 4ID AAR, *supra* note 4, at 5 (describing several high-profile investigations in their area of operation, to include allegations that a battalion commander abused a detainee and that Soldiers made two Iraqis jump off a bridge, allegedly drowning one, and stating that 4ID had several friendly fire incidents); After Action Review Conference, Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), with the Center for Law and Military Operations, in Fort Campbell, Ky., at 1 (21 Oct. 2004) [hereinafter 101st ABN DIV AAR Conference] (providing that the Assistant Division Commander for Support was appointed by the Commander, CJTF-7 to investigate an incident where the 82d Airborne Division fired on a Jordanian military hospital) (notes on file with CLAMO); After Action Report, Office of the Staff Judge Advocate, 1st Cavalry Division, at 3 (Feb. 2005) [hereinafter 1CAV AAR] ([d]ue to the type of enemy operations in Baghdad and the number of different friendly forces, friendly fire incidents are prevalent.”) (on file with CLAMO).

¹²²² See, e.g., After Action Review Conference, Office of the Staff Judge Advocate, 10th Mountain Division, and the Center for Law and Military Operations, at Fort Drum, NY, Power Point Presentation (17 Jun. 2004) [hereinafter 10th MNT DIV AAR] (on file with CLAMO).

¹²²³ Office of the Staff Judge Advocate, 1st Infantry Division, First Quarter After Action Report, at 5 (May 2004) [hereinafter 1ID 1st Quarter AAR] (on file with CLAMO).

¹²²⁴ See, e.g., Memorandum, Staff Judge Advocate I Marine Expeditionary Force, to Assistant Chief of Staff, subj: Phase IVB After Action Review (undated) [hereinafter I MEF AAR] (“Develop an investigations policy letter that clearly articulates the incidents [that] must be formally investigated, and the convening authority and reviewing authority level for those incidents.”) (on file with CLAMO).

addition, legal teams recommended that an information paper be produced explaining jurisdictional alignment for not only investigations, but all administrative actions, within the Division or Corps.¹²²⁵ Because of the numerous investigations, the 1st Cavalry Division, for example, had the brigade commander appoint the investigating officer even when the commanding general (CG) was required by regulation or policy to approve the findings and recommendations. In these instances, the completed investigation was forwarded to the SJA office, who then prepared the investigation for the CG to adopt the findings and recommendations.¹²²⁶

In addition, legal personnel working in the Joint/Tactical Operations Center assisted in ensuring required investigations were conducted by monitoring the significant activities log and serious incident reports.¹²²⁷ As soon as an incident requiring investigation is reported, legal teams recommended that the Division OSJA should contact the brigade JA to ensure that he or she is aware of the incident and preparing to provide advice regarding an investigation.¹²²⁸ The legal team also must ensure that the safety officer is informed of all serious incidents.¹²²⁹ Further, JAs needed to be sensitive to efforts by units to keep investigations “in house,” by finding creative ways to define them as other than “serious incidents” that must be reported and investigated.¹²³⁰

In addition, legal teams had to devise a database to track investigations to ensure that they were being investigated in a timely manner and to respond to numerous inquiries.¹²³¹ From the

¹²²⁵ IAD AAR, *supra* note 4, Administrative and Civil Law power point presentation.

¹²²⁶ ICAV AAR, *supra* note 6, at 2.

¹²²⁷ III Corps 1st Quarter AAR, *supra* note 6, Administrative Law AAR Topics.

¹²²⁸ ICAV AAR, *supra* note 6, at 3 & 6 (advising that the “Division should publish a daily list of incidents that they will be requiring an investigation on, to include whether the investigation must be an AR 15-6 or a Commander’s Inquiry.”).

¹²²⁹ *See, e.g., id.* at 3.

¹²³⁰ *See, e.g., The Practice of Law at the Brigade Combat Team*, *supra* note 1, at 25.

¹²³¹ *See, e.g., Kent Transcript*, *supra* note 4, at 25-26 (“[t]he number of times we were pinged by Congress, Department of the Army, DoD, for issues and reaction, and ‘Hey, we need this immediately,’ and you take an attorney off of an operations law issue . . . I certainly wasn’t, at a corps level, used to dealing with that kind of scrutiny It was just an incessant stream of requests and it just took a lot of time, and a lot of resources that we didn’t have.”); ICAV AAR, *supra* note 6, at 2 (“[k]eep detailed organization of the 15-6s so anyone in the OSJA can find a relevant investigation on short notice); IAD AAR, *supra* note 4, Administrative and Civil Law powerpoint presentation (advising that OSJAs must develop a tracking database and assist units in maintaining a unit-level record keeping system). The Office of the Staff Judge Advocate, 1st Infantry Division, advised the following.

Standards regarding what needs to be tracked at the division level should be determined and disseminated prior to TOA. An agreed upon format should be established, together with the agreed upon means of communicating the information from BOLTs to division. The temptation to track everything should be avoided. As the number of investigations grows, it can become unmanageable to track all investigations and commander’s inquiries. Recommend that division OSJA track only those investigations of interest to the division command group and allow the BOLTs to track the brigade and battalion level investigations. The information on MSCs investigations and commander’s inquiries was rarely if ever required at division level.

Train the way you fight. The same personnel and procedures for tracking investigations at the FTXs prior to deployment should be employed during the deployment. At Warfighter, we shifted

beginning of the deployment, OSJAs must track investigations, identifying the date, unit, summary of the incident, status of the investigation, findings and recommendations.¹²³² This database must be synchronized with subordinate legal teams' databases and updated daily.¹²³³ Army legal teams, for example, needed to have ready access to ongoing and completed fatal training and operational accident investigations to respond to inquiries from the Fatal Accidents Program (FAP), Human Resources Command. The FAP monitors these investigations and ensures compliance with Army requirements to brief primary next of kin.¹²³⁴ Moreover, when Congress asked for reports of all sexual assaults in the Iraqi theater of operation, legal teams had to physically look at every file to determine which reports of investigation complied with Congress' request. A database that properly coded such actions would have saved days of work.¹²³⁵ Further, OSJAs should maintain a sign-in and sign-out roster which tracks the location of the investigations. Legal teams found that other sections within the unit wanted to refer to investigations for various reasons, and if the OSJA did not keep track of where the investigations were physically located, they could easily be lost.¹²³⁶ First Armored Division OSJA also found it very useful to maintain a spreadsheet with the names and units of all investigating officers to ensure that IO duties were fairly shared among the Division's units.¹²³⁷ They also advised against maintaining a tracking database on the SIPRNet, as this will inhibit the free flow of information to various headquarters who do not have easy access to the secret internet protocol router.¹²³⁸

AR 15-6 investigations from the D-Main, where the Ad Law section was, to the D-Rear. Although it seemed harmless at the time, it had lasting ramifications. The ADC-S became accustomed to being briefed on the status of investigations and continued to want to track them during the deployment, resulting in unnecessary added work for the D-Rear. It also deprived Ad Law personnel of training on tracking the investigations and made it difficult to determine staffing needs.

IID 1st Quarter AAR, *supra* note 8, at 5.

¹²³² ICAV AAR, *supra* note 6, at 3.

¹²³³ IAD AAR, *supra* note 4, Administrative and Civil Law power point presentation.

¹²³⁴ See, generally, U.S. DEP'T OF ARMY, REG. 600-34, FATAL TRAINING/OPERATIONAL ACCIDENT PRESENTATIONS TO THE NEXT OF KIN (2 Jan. 2003).

A good working relationship with FAP is necessary to ensure efficient sharing of information. The significant investigation tracking chart should indicate which investigations FAP is tracking, which will provide a quick answer when updates are needed. The JA should also take the initiative and ask FAP to provide him a list of investigations they are tracking to ensure one has not slipped through the cracks at the Corps level. Coordination with C1 Casualty is also strongly recommended for the same reason.

III Corps 1st Quarter AAR, *supra* note 6, Administrative Law AAR Topics. See also 4ID AAR, *supra* note 4, at 5 (stating that the Division had several accidents that required family presentations, including four drowning victims; requests for information would come through CJTF-7 C1 channels to the Division G1. The Brigade Commanders gave the family presentation when they redeployed); 1AD AAR, *supra* note 4, Administrative and Civil Law Notes (relating that if the OSJA did not have the investigations, no one had them). Family presentations are also addressed in Volume I, Afghanistan and Iraq Legal Lessons Learned, *supra* note 6, para III.G.2.c.

¹²³⁵ See, e.g., Kent Transcript, *supra* note 4, at 17 ("[h]ad we just been tracking that [sexual assault investigations] on a data base and coded it properly, as you data input and it's part of doctrine, that would have been a two-minute exercise of printing out a report.").

¹²³⁶ IAD AAR, *supra* note 4, Administrative and Civil Law power point presentation.

¹²³⁷ *Id.* Administrative and Civil Law notes.

¹²³⁸ *Id.* Administrative and Civil Law power point presentation.

Finally, legal teams needed to coordinate investigations during a transfer of authority. It was imperative that JAs rotating into theater coordinated with their outgoing counterparts for a list of investigations, both ongoing investigations and those that were completed.¹²³⁹ Moreover, office of the staff judge advocates (OSJAs) rotating out of theater needed to decide which reports of investigation could be packed and shipped back to home station, and which ones needed to be hand-carried because of their importance. The OSJA, 101st Airborne Division (Air Assault), for example, recommended hand-carrying both open investigations and those closed investigations with significant visibility.¹²⁴⁰

a. Be Prepared to Recommend that Commanders Conduct Investigations into Incidents that Might not Require an Investigation Under Department of Defense Policy.

In addition to incidents that are required to be investigated by DoD policy and Service regulation, JAs must be prepared to advise commanders on whether to conduct investigations into other incidents. The OSJA, III Corps advised that JAs may want to recommend that an incident be investigated to understand what happened in order to prevent reoccurrences and to prepare for likely questions from higher headquarters, the media, and family members.¹²⁴¹

First, legal teams should consider advising commanders to investigate incidents between U.S. or Coalition Forces and the local national security forces. Although local national security forces were not “Coalition” Forces, such as would require a friendly fire investigation under DoD directive or Service regulations, the OSJA, III Corps recommended that such incidents should be investigated using the same rationale for investigating friendly fire incidents.¹²⁴² Moreover, an investigation is not required if an engagement between friendly forces, that is, Coalition Forces, results in no injury to personnel or damage to equipment. Commanders also may want to consider conducting an investigation in these circumstances, however, to determine what happened and how to prevent similar incidents from occurring in the future.¹²⁴³

In addition, legal teams need to be prepared to advise commanders whether to investigate incidents resulting in local national deaths. As the Staff Judge Advocate for I Marine

¹²³⁹ *Id.*

¹²⁴⁰ OSJA, 101st ABN DIV AAR, *supra* note 4, at 6-7.

¹²⁴¹ III Corps 1st Quarter Report, *supra* note 6, Administrative Law AAR Topics.

¹²⁴² *Id.* (“DoD determined that Iraqi forces working at the direction of, or in conjunction with, U.S. or coalition forces (CF) are not friendly (or “blue”) forces. They are instead considered “green” forces. While there is no requirement for an investigation, a blue on green incident should still be investigated using the same rationale for investigating FFIs.”); *see also* Combined Joint Task Force Seven Fragmentary Order 493 to CJTF-7 Operational Order 04-01, 250135C Mar 04, subject: Investigations of all Potential Fratricide/Friendly Fire Incidents, Engagements between Members of the Coalition Forces and Members of Iraq Police and Military Forces, Accidents, and Non-Combat Related Deaths or Serious Injuries, para. A.3.C.1.B [hereinafter CJTF-7 FRAGO 493] (“All incidents involving engagement between members of the coalition forces and members of the Iraqi police and/or Iraqi security forces . . . will be promptly investigated. While these incidents are not considered friendly fire incidents, they will be investigated to determine the facts and circumstances surrounding the incident and to ascertain what actions should be taken to prevent future similar incidents.”) (on file with CLAMO).

¹²⁴³ *See* Information Paper, Office of the Staff Judge Advocate, Multi-National Corp Iraq, subject: Overview of Command Investigations in the Iraq Theater, at 2 (21 Sep. 2004) [hereinafter MNC-I Information Paper on Investigations] (on file with CLAMO).

Expeditionary Forces stated, “[i]ncidents involving the death of [non-hostile] Iraqi citizens proved especially sensitive, and usually resulted in a Division level investigation to determine the facts and circumstances”¹²⁴⁴ Judge advocates in OEF and OIF recommended an investigation into allegations that U.S. forces were engaging local nationals outside of the rules of engagement, or when it appeared that a service member’s negligence may have resulted in a local national injury or death.¹²⁴⁵ For example, the Commander, 4th Infantry Division appointed an investigating officer to conduct an investigation when the issue was whether the rules of engagement were followed during a particular operation; he also appointed an investigation when his forces were allegedly involved in a local national death, unless the death was clearly combat-related.¹²⁴⁶ Even when a non-hostile local national or foreign civilian was injured or killed during offensive combat operations, commanders often appointed an investigation if the incident was likely to engender adverse media or political interest.¹²⁴⁷ In addition, the legal team at the 82d Airborne Division recommended that all incidents with local nationals be referred to the information operations working group for inclusion in the information operations campaign.¹²⁴⁸ Detainee abuse allegations were also investigated.¹²⁴⁹

By March 2004, the combined joint task force in Iraq issued a fragmentary order requiring an investigation into all engagements between members of the coalition forces and members of the Iraqi police and military forces.¹²⁵⁰ Similarly, the CJTF-7 policy also required an investigation into all non-combat incidents involving death or serious injury to foreign national civilians so that Coalition Forces could “determine the cause, identify whether modification to tactics, techniques and procedures (TTP) and the ROE are warranted, and ascertain if compensation to the injured party is appropriate.”¹²⁵¹ With so many requirements to conduct administrative investigations, JAs also had to be vigilant in coordinating with the Criminal Investigation Command (CID) to find out if they were conducting a criminal investigation into the same incident. In these cases, the criminal investigation ordinarily takes priority.¹²⁵²

¹²⁴⁴ I MEF AAR, *supra* note 9, at 3.

¹²⁴⁵ As noted by Captain Christopher M. Ford:

In the vast majority of . . . incidents, the Soldiers have acted entirely within the bounds of the ROE and applicable FRAGOs Often, however, investigations appear as if the command is attempting to conceal the incident. Soldiers are concerned that their legitimate actions will be second guessed and that they will face disciplinary action. To counter this perception, during briefings JAs should emphasize the inherently permissible nature of the ROE. During the first briefing, it is imperative for JAs to impart the importance of cooperating with the investigating officer and providing truthful responses. Soldiers are often relieved to find that the JAs are not out to “get them.”

The Practice of Law at the Brigade Combat Team, *supra* note 1, at 25.

¹²⁴⁶ 4ID AAR, *supra* note 4, at 5. See also OSJA, 101st ABN DIV AAR Conference, *supra* note 6, at 1 (noting that the Division conducted an investigation on some incidents where compliance with the ROE was an issue).

¹²⁴⁷ MNC-I Information Paper on Investigations, *supra* note 28, at 3.

¹²⁴⁸ 82d ABN DIV AAR, *supra* note 4, at 2-3.

¹²⁴⁹ See, e.g., 4ID AAR, *supra* note 4, at 5; OSJA, 101st ABN DIV AAR Conference, *supra* note 6, at 1.

¹²⁵⁰ CJTF-7 FRAGO 493, *supra* note 27, para. A.3.C.1.

¹²⁵¹ *Id.* para. A.3.C.1.C.

¹²⁵² See, e.g., 82d ABN DIV AAR, *supra* note 4, at 2 (commenting that CID investigated every U.S. death, even accidents where there had already been a collateral investigation). 1AD AAR, *supra* note 4, Administrative and

b. Be Prepared to Advise Commanders on Numerous Reports of Survey During Full Spectrum Operations, Including those Involving Vehicle Accidents.

Although deployed, Army commanders were still required to follow Army policy on damage to, or loss of, government property.¹²⁵³ Many reports of survey proved similar to those that Army JAs saw at home station, such as losses discovered during change of command inventories.¹²⁵⁴ Legal teams also quickly discovered that they had to anticipate many vehicle accidents between Coalition Forces and local nationals and advise commanders on the requirements to conduct reports of survey.¹²⁵⁵ In the Army, if a report of survey finds the military member, through simple negligence, caused an accident involving a government owned or leased vehicle, the approval authority may waive Soldier liability.¹²⁵⁶ If a government vehicle is involved in an accident with a civilian and the accident appears to have been the result of the civilian's willful misconduct or negligence, the Army requires initiation of a report of survey if the civilian does not admit to fault and make restitution. Once the survey is complete, it is forwarded to the claims office.¹²⁵⁷

Legal teams also reviewed many investigations and reports of survey into the loss of sensitive items, such as weapons and night vision goggles.¹²⁵⁸ The Army requires an AR 15-6 investigation whenever a sensitive item is lost or destroyed.¹²⁵⁹ A report of survey, and not the AR 15-6 investigation, however, must be used to adjust property records or to assess financial liability. In these cases, a separate investigation by a survey officer is not required.¹²⁶⁰

Legal teams also addressed issues regarding the proper command authorities to act on reports of survey. One JA opined that legal teams should think through all issues before advising that a battalion commander act as both appointing and approval authority. If the report of survey

Civil Law Notes (providing that all Soldier deaths were required to be investigated under AR 15-6, which caused problems when CID was also conducting a criminal investigation into the same incident. Legal teams must coordinate with CID to ensure that the investigations are consistent).

¹²⁵³ U.S. DEP'T OF ARMY, REG. 735-5, POLICY AND PROCEDURES FOR PROPERTY ACCOUNTABILITY (10 Jun. 2002) [hereinafter AR 735-5]. Service requirements for conducting reports of survey are discussed in Volume I of this Publication. Volume I, Afghanistan and Iraq Legal Lessons Learned, *supra* note 6, para. III.G.2.d.

¹²⁵⁴ See, e.g., 1AD AAR, *supra* note 4, Administrative and Civil Law power point presentation.

¹²⁵⁵ Because of the volume of vehicle accidents, the I MEF SJA developed a standardized investigation handbook and checklist tailored to these investigations and e-mailed it to battalion executive officers and investigating officers, saving time and effort in locating the resources to conduct the investigation. I MEF AAR, *supra* note 9, at 5.

¹²⁵⁶ AR 735-5, *supra* note 38, para. 14-30(c).

¹²⁵⁷ *Id.* para. 14-30(a).

¹²⁵⁸ See, e.g., 4ID AAR, *supra* note 4, at 5; 1AD AAR, *supra* note 4. "Sensitive items" are:

[m]aterial requiring a high degree of protection to prevent unauthorized acquisition. This includes arms, ammunition, explosives, drugs, precious metals, or other substances determined by the Administrator, Drug Enforcement Administration to be designated Schedule Symbol II, III, IV, or V under the Controlled Substance Act of 1970.

U.S. DEP'T OF ARMY, REG. 190-11, PHYSICAL SECURITY OF ARMS, AMMUNITION, AND EXPLOSIVES, Glossary (12 Feb. 1998).

¹²⁵⁹ AR 735-5, *supra* note 38, para. 13-2a(6)

¹²⁶⁰ *Id.*

is appealed, the JA who provided the legal review for the approval authority cannot provide the legal review for the appellate authority, that is, the Brigade Commander.¹²⁶¹ In addition, there were some questions regarding the appellate authority for National Guard units. According to Army policy, the state Adjutant Generals (AGs) are ordinarily the appeal authority for Army National Guard reports of survey.¹²⁶² When JAs from First Armored Division attempted to forward reports of survey to a state AG, however, they were advised by the AG office that because the National Guard unit was attached to the First Armored Division, the Division Commander should act as appellate authority.¹²⁶³

c. Assist the Command in Resolving Issues Regarding Line of Duty Determinations for Mobilized Reservists.

Many RC service members were injured during operations in Afghanistan and Iraq. During OIF, in particular, it became difficult to manage line of duty determinations for RC service members prior to their release from active duty (REFRAD). To ensure access to medical care after they leave active duty for injury, illness, or disease sustained or aggravated in line of duty, service members must have a line of duty determination prior to their REFRAD. Therefore, CJTF-7 issued a fragmentary order outlining certain exceptions to the line of duty investigations policy to expedite investigations for these service members.¹²⁶⁴

As an exception, the first or higher general officer in a service member's chain of command was authorized to approve the line of duty investigation as the final approval authority, regardless of whether the general officer was a general court martial convening authority.¹²⁶⁵ In addition, these general officers and any military treatment facility commander were authorized to issue presumptive in line of duty findings for service members when a line of duty determination was not completed at the time of the injury, illness or disease, and the service member would be REFRAD without a line of duty finding. A presumptive in line of duty finding, however, could be made only if: (1) the injury, illness, or disease occurred while the service member was on active duty for more than thirty days on or after 11 September 2001; (2) it may result in a future claim for disability or incapacitation pay or was expected to require continuing medical care after REFRAD; (3) there was no indication of abuse of alcohol or drugs, or intentional misconduct or willful neglect; and (4) the service member was not absent without leave at the time.¹²⁶⁶

¹²⁶¹ Captain Michael D. Banks, OIF Lessons Learned, 18th MP BDE, JAG Section, at 20 (1 Dec. 2003) [hereinafter Banks AAR] (on file with CLAMO); AR 735-5, *supra* note 38, para. 13-49b(1).

¹²⁶² AR 735-5, *supra* note 38, para. 13-49a(2).

¹²⁶³ 1AD AAR, *supra* note 4, Administrative and Civil Law notes.

¹²⁶⁴ Combined Joint Task Force Seven Fragmentary Order 292 to CJTF-7 Operational Order 04-01, 192220C Feb 04, subject: Line of Duty (LOD) Contingency Operations Policy [hereinafter CJTF-7 FRAGO 292] (on file with CLAMO).

¹²⁶⁵ *Id.* para. 3.C.1.B; *see also* U.S. DEP'T OF ARMY, REG. 600-8-4, LINE OF DUTY POLICY, PROCEDURES, AND INVESTIGATIONS, para. 1-10c (14 May 2004) (providing that the final approving authority (the GCMCA) may request approval from HQDA that the final approval authority be a general officer in the chain of command who has access to military legal advice but does not have GCMCA). U.S. DEP'T OF NAVY, OFFICE OF THE JUDGE ADVOCATE GENERAL INSTR. 5800.7D, MANUAL OF THE JUDGE ADVOCATE GENERAL (JAGMAN), chap. 2, part E (14 Mar. 2004) [hereinafter JAGMAN]; U.S. DEP'T OF AIR FORCE, INSTR. 36-2910, LINE OF DUTY (MISCONDUCT) DETERMINATIONS (4 Oct. 2002).

¹²⁶⁶ CJTF-7 FRAGO 292, *supra* note 49, para. 3.C.1.C.

d. Understand Procedure 15 Investigations on Questionable Activity.

The DoD requires an investigation into any “questionable activity,” defined as conduct that constitutes or is related to an intelligence activity that may violate the law, any Executive Order or Presidential directive, or applicable DoD Policy.¹²⁶⁷ Department of Defense policy calls these investigations “Procedure 15 Investigations” and requires the incident to be reported through command channels to the Service office of general counsel and inspector general’s office.¹²⁶⁸ These incidents are investigated in accordance with Service procedures for conducting administrative investigations. The Army requires a final report of investigation to be forwarded to the Department of the Army Inspector General and General Counsel within thirty days of the incident.¹²⁶⁹ In addition, Service regulations generally require a legal review prior to forwarding the investigations to departmental headquarters.¹²⁷⁰

Although the unit inspector general (IG) and the JA have a role in Procedure 15 investigations, many were not familiar with the requirements to conduct these investigations. In some cases, the Service IG office will direct that the local IG conduct an investigation. Therefore, JAs need to ensure that their IGs understand that they must coordinate with the SJA for a legal review.¹²⁷¹

2. Be Prepared to Advise the Command on Numerous Ethics Issues including Fundraising, Acceptance of Gifts, and Financial Disclosure Form Requirements.

As units settled into more permanent forward operating bases (FOBs) and began interacting with the local populace, meeting with government councils and other local officials, and rebuilding infrastructure, legal teams had to be sensitive to ethics rules regarding service member fundraising and solicitation, and acceptance of gifts given because of their official position. Judge advocates also monitored closely the general officer requirement to file an SF 278, Public Financial Disclosure Form, and the OGE 450, Private Financial Disclosure Form.

a. Ensure Service Members Understand the Prohibition on Fundraising and Solicitation in an Official Capacity.

As stability and support operations began and service members were able to observe first hand the very poor conditions in which the people lived in both Afghanistan and Iraq, service members often wanted to help by asking individuals in the United States for money and goods to aid the local population. While service members generally know that they cannot solicit gifts for

¹²⁶⁷ U.S. DEP’T OF DEFENSE, REG. 5240.1-R, PROCEDURES GOVERNING THE ACTIVITIES OF DoD INTELLIGENCE COMPONENTS THAT AFFECT UNITED STATES PERSONS, para. C15.2 (Dec. 1982) [hereinafter DoD 5240.1-R]; *implemented by* U.S. DEP’T OF ARMY, REG. 381-10, U.S. ARMY INTELLIGENCE ACTIVITIES (1 Jul. 1984) [hereinafter AR 381-10]; U.S. DEP’T OF NAVY, SEC’Y OF THE NAVY INSTR. 3820.3.D, OVERSIGHT OF INTELLIGENCE ACTIVITIES WITHIN THE DEPARTMENT OF THE NAVY (17 Mar. 1999); U.S. MARINE CORPS, ORDER 3800.3B, OVERSIGHT OF INTELLIGENCE ACTIVITIES (30 Apr. 2004) [hereinafter MCO 3800.3B]; U.S. DEP’T OF AIR FORCE, INSTR. 14-104, OVERSIGHT OF INTELLIGENCE ACTIVITIES (1 Jul. 2000).

¹²⁶⁸ DoD 5240.1-R, *supra* note 52, chap. 15.

¹²⁶⁹ AR 381-10, *supra* note 52, part 15, para. C.2.a.2.

¹²⁷⁰ See, e.g., *id.*; MCO 3800.3B, *supra* note 52, encl. 2, para. 2.i.

¹²⁷¹ III Corps 1st Quarter AAR, *supra* note 6, Administrative Law AAR Topics.

themselves in their *official* capacity, many do not understand that they cannot do so on behalf of someone else in need¹²⁷² or raise funds for unit memorials.¹²⁷³ Therefore, JAs should consider drafting a policy memorandum on fundraising, and adding instruction on fundraising and solicitation to their pre-deployment training.¹²⁷⁴

Although service members generally may solicit funds in their personal capacity, in a deployed environment it may be difficult to distinguish when a service member is acting in a personal capacity and when he is using his official position.¹²⁷⁵ This is exacerbated by e-mail. A service member's well-meaning, off-handed comment to his family that the local national children need school supplies can suddenly result in solicitation of other people and businesses and give the impression that DoD is soliciting the items. Moreover, the media's search for positive human interest stories may lead them to stories regarding service members' charitable efforts. The stories may be less than favorable to the military if it is reported that the charitable work resulted in the service member being investigated and disciplined for his efforts.¹²⁷⁶

In addition, when full spectrum operations began and units moved into more permanent camps, service members began holding 5 kilometers and 10 kilometer races, weight lifting competitions, and other moral, welfare, and recreation (MWR) activities. Generally, service members wanted to charge an entry fee for these activities and donate the money collected to Iraqi charitable causes.¹²⁷⁷ Again, as explained above, service members ordinarily are not authorized to fundraise in their official capacity and give the money to local nationals. Therefore, JAs sought alternatives to assist units who desired to hold such events. For example, JAs with the 101st Airborne Division (Air Assault) gave units a template constitution so that they could set up a private organization to collect money and run these events.¹²⁷⁸ Additionally, the 1st Cavalry Division OSJA worked with their command to develop a plan to raise money for a memorial for their Soldiers, including using a private organization to collect the funds.¹²⁷⁹

¹²⁷² *Id.*; see also U.S. DEP'T OF DEFENSE, REG. 5500.7, JOINT ETHICS REGULATION, para. 3-209 and 3-210 (30 Aug. 1993) (C4, 6 Aug. 1996) [hereinafter JER].

¹²⁷³ 1CAV AAR, *supra* note 6, at 28.

¹²⁷⁴ III Corps 1st Quarter AAR, *supra* note 6, Administrative Law AAR Topics.

¹²⁷⁵ See, generally, JER, *supra* note 56, paras. 3-209 and 3-210. The JER does, however, allow organizations composed primarily of DoD employees or their dependents to fundraise among their own members for the benefits of welfare funds for their own members or dependents when approved by the head of the DoD component command or organizations. *Id.* para. 3-210.

¹²⁷⁶ See, generally, *id.* For example, in Iraq there were at least two highly publicized incidents of solicitation, one involving a blog site called "Chief Wiggles" and an incident involving the Coalition Provisional Authority Chaplain's office. In the Chief Wiggles case, President Bush publicly lauded the Soldier as a man setting the example for the very conduct for which he was being investigated. III Corps 1st Quarter AAR, *supra* note 6, Administrative Law AAR Topics.

¹²⁷⁷ 101st Airborne AAR, *supra* note 4, at 9.

¹²⁷⁸ *Id.*; see also U.S. DEP'T OF DEFENSE, INSTR. 1000.15, PRIVATE ORGANIZATIONS ON DEPARTMENT OF DEFENSE INSTALLATIONS (23 Oct. 1997); U.S. DEP'T OF ARMY, REG. 210-22, PRIVATE ORGANIZATIONS ON DEPARTMENT OF ARMY INSTALLATIONS (22 Oct. 2001); U.S. DEP'T OF NAVY, BUREAU OF NAVAL PERS., INSTR. 1710.11C, OPERATION OF MORALE, WELFARE, AND RECREATION (MWR) PROGRAMS, para. 302 (25 Jul 2001) [hereinafter BUPERINST 1710.11C]; U.S. DEP'T OF AIR FORCE, INSTR. 34-223, PRIVATE ORGANIZATIONS (PO) PROGRAM (11 Aug. 2003).

¹²⁷⁹ 1CAV AAR, *supra* note 6, at 28.

To raise money for local national charitable causes, service members also wanted to ask local business near their home station to sponsor MWR events by providing funding or goods. Therefore, legal teams had to ensure that commanders and service members understood the rules on commercial sponsorship of MWR activities and programs. Under DoD policy, units are not authorized to contact businesses and request their sponsorship of unit events.¹²⁸⁰ Only designated MWR employees are authorized to enter into commercial sponsorship agreements. Moreover, commercial sponsorship is only authorized for MWR programs and events, such as Army Family Team Building programs, and cannot be used for local charitable events.¹²⁸¹

b. Judge Advocates Must Closely Monitor Gifts Given to Commanders and Other United States Personnel Because of Their Official Position.

Legal teams reported that commanders routinely received gifts from local government officials. As in garrison, legal teams must closely monitor these gifts to ensure they comply with the Joint Ethics Regulation.¹²⁸² The SJA for Task Force Olympia reported that the value of these gifts did not generally exceed the gift rules.¹²⁸³ Nevertheless, as the JAs in the 101st Airborne Division (Air Assault) and the 1st Cavalry Division recommended, the commanders and aides should be briefed early in the deployment to pass the gifts to their JA for a legal opinion on whether the gift should be retained. That way, if questions arise later as to the propriety of the gift, there is a record and legal opinion.¹²⁸⁴ In addition, it was usually expected that the commander would present a gift in return. Judge advocates should anticipate this issue prior to deployment and determine whether Official Representation Funds are available for purchase of small gifts, such as unit coins and plaques.¹²⁸⁵

In addition, local businessmen and contractors often would present gifts to commanders in the hopes of doing business with the Coalition.¹²⁸⁶ There was also an expectation in these cases that the commanders would provide a gift in return. Legal teams often found these gifts easier to address, as they would simply return the gifts to the business.¹²⁸⁷ The legal team at the 82d Airborne Division recommended that gift rules be briefed at the battle update briefs and that subordinate commanders be asked to brief their staffs.¹²⁸⁸

¹²⁸⁰ U.S. DEP'T OF DEFENSE, INSTR. 1015.10, PROGRAMS FOR MORALE, WELFARE, AND RECREATION (MWR), encl. 9 (3 Nov. 1995); *implemented by* U.S. DEP'T OF ARMY, REG. 215-1, MORALE, WELFARE, AND RECREATION ACTIVITIES AND NONAPPROPRIATED FUND INSTRUMENTALITIES, para. 7-47 (28 Jun. 2004); BUPERINST. 1710.11C, *supra* note 63; U.S. DEP'T OF AIR FORCE, INSTR. 34-207, COMMERCIAL SPONSORSHIP PROGRAM (24 Jul 1994).

¹²⁸¹ *See, e.g.*, 101st ABN DIV AAR Conference, *supra* note 6, at 9-10; Fact Sheet, Office of the Staff Judge Advocate, 101st Airborne Division, subject: Private Organizations and Commercial Sponsorship of Moral, Welfare, and Recreation (MWR) Activities and Programs, at 1 (Oct. 2003) (on file with CLAMO).

¹²⁸² *See* JER, *supra* note 56, para. 2-300b.

¹²⁸³ Kern Interview, *supra* note 4, at 3.

¹²⁸⁴ 101st ABN DIV AAR Conference, *supra* note 6, at 1; 1CAV AAR, *supra* note 6, at 5.

¹²⁸⁵ *See* Kern Interview, *supra* note 4, at 3 (stating that in return for gifts presented by local government officials, commanders with TF Olympia presented small unit trinkets that had been purchased with official representation funds and brought from 1st Corps upon deployment).

¹²⁸⁶ *See, e.g.*, 82 ABN DIV AAR, *supra* note 4, at 3.

¹²⁸⁷ *See, e.g.*, 101st ABN DIV AAR Conference, *supra* note 6, at 1.

¹²⁸⁸ 82d ABN DIV AAR, *supra* note 4, at 3.

c. Judge Advocates Must Carefully Monitor the Requirement to File Public and Private Financial Disclosure Reports.

The general requirements for filing the Standard Form (SF) 278, Public Financial Disclosure Form and requesting extension thereof are addressed in Volume I of this Publication.¹²⁸⁹ The SJA or Chief of Administrative Law must know the status of all general officers in the command and maintain a system throughout the deployment to track the status of incoming and new general officers.¹²⁹⁰ Although the SF 278 extensions are automatic and no formal request for extension need be made, CJTF-7 (OSJA, III Corps) found it necessary to document the extensions in order to notify the Army's Standard of Conduct Office (SOCO) of the U.S. Army general officers currently serving with CJTF-7.¹²⁹¹ Consequently, the CJTF-7 SJA forwarded a blanket extension document to SOCO on behalf of all Army general officers serving in the command.¹²⁹² A copy of an SF 278 combat zone filing extension is at Appendix H-3. They also forwarded an e-mail to these general officers, telling them of the extension, and informing them that the OSJA would assist them in filing their SF 278, if necessary, and of their obligations to file the form upon redeployment. A copy of the general officer notification is at Appendix H-4.

To maintain accountability, the III Corps OSJA at CJTF-7 OSJA conducted monthly checks with the JTF's secretary of the general staff to determine the status of general officers. When a general officer left theater, the OSJA notified SOCO by e-mail. Moreover, the OSJA forwarded an e-mail to the departing general officer reminding him or her of the requirements to file the SF 278 upon redeployment.¹²⁹³

In addition to the SF 278, legal teams need to keep in mind the requirements for filing the Office of Government Ethics (OGE) Form 450, Private Financial Disclosure Form.¹²⁹⁴ These

¹²⁸⁹ See Volume I, Afghanistan and Iraq Legal Lessons Learned, *supra* note 6, para. III.G.5. The SF 278 requires general officers, among others, to report their financial interests in order to determine whether those interests conflict with their official duties. See generally, JER, *supra* note 56, para. 7-200. Ordinarily, these reports are required to be made available for public inspection thirty days after they are filed. *Id.* para. 7-208. If a filer is stationed in an area designated as a combat zone by Executive Order on the filing due date (15 May), the SF 278 filing date may be extended until 180 days after the later of the last day of the individual's service in the combat zone, or the last day of the individual's hospitalization as a result of injury received or disease contracted while serving in the combat zone. This extension is automatic—there is no need to file a formal request. The fact that the extension was exercised, however, must be prominently annotated on the form when it is eventually submitted.

¹²⁹⁰ See E-mail from Lieutenant Colonel Jonathan A. Kent, former Deputy SJA V Corps and CJTF-7, subject: AAR, at 1 (6 Jan. 2005) [hereinafter Kent E-mail] (advising in particular to coordinate with the General Officer Management Officer, the Standards of Conduct Office, and the general officer's losing command to ensure the SF 278 in properly filed) (on file with CLAMO).

¹²⁹¹ III Corps 1st Quarter AAR, *supra* note 6, Administrative Law AAR Topics.

¹²⁹² The Office of the Staff Judge Advocate for CJTF-7 offered to file the same extension for the other Services' general officers, but they declined. The OSJA obtained a list of general officers by working with the Office of the Secretary of the Joint Staff. *Id.* At least one general officer elected to file his SF 278 while deployed in support of OIF. See Kern Interview, *supra* note 4 (providing that the TF Olympia Commander completed his SF 278 while in theater and received permission from SOCO to file it through 1st Corps, instead of through CJTF-7 and USCENCOM).

¹²⁹³ III Corps 1st Quarter AAR, *supra* note 6, Administrative Law AAR Topics.

¹²⁹⁴ See generally, JER *supra* note 56, para. 7-300.

filing requirements, and the combat extensions applicable thereto, are also addressed in Volume I of this Publication.¹²⁹⁵ In August of 2003, the CJTF-7 SJA (V Corps) decided to assist OGE 450 filers in filing their disclosure forms, rather than request a blanket extension. The SJA made this decision for a number of reasons, to include: (1) the number of filers was low; (2) the OSJA had most filers previous year's SF 450 on file; (3) the OSJA was concerned about being able to track the various filing deadlines if a blanket extension was requested, as the corps was not scheduled to redeploy at the same time; and (4) they had an excellent on-line e-mail tracking system that made it easy to notify and track filers.¹²⁹⁶ To file the forms, the CJTF-7 OSJA established a web page from which filers could obtain information and download forms. They did their best to personally brief each filer; although some had to be briefed telephonically using the slide show posted on-line.¹²⁹⁷ About one-third to one-half of the filers actually filed while deployed, and the rest took advantage of the extension.¹²⁹⁸ A copy of a memorandum requesting an extension for filing the OGE 450 is at Appendix H-5. Unlike CJTF-7, the Division OSJAs deployed to Iraq did not attempt to have their OGE 450 filers file their financial disclosure forms from Iraq, but requested extensions for these individuals. In Afghanistan, the OSJA for CJTF-76 (25th Infantry Division) also assisted OGE Form 450 filers in filing their financial disclosure forms. A copy of an OSJA, CJTF-76 memorandum to Task Force commanders and staff regarding the filing requirements for the OGE Form 450 is at Appendix H-6.

The lesson here is that if the unit will be deploying in and out of theater at approximately the same time, the OSJA has a good handle on the previous year's filers, and the OSJA has a good system to track the OGE Form 450 filers, legal teams should consider having the OGE 450 filers complete their forms while deployed, rather than request extensions. This will obviate the need to track each filer individually once they redeploy to home station in order to ensure they file their forms within the time allowed by the extension.¹²⁹⁹

3. Judge Advocates May Spend Many Hours Reviewing Issues and Memoranda of Agreement With the Army and Air Force Exchange Service.

Shortly after major combat operations, units began establishing more permanent operating bases. Judge advocates need to anticipate that units will desire to bring local national businesses onto their FOBs to provide certain services and goods. Many units wanted to keep their local concessionaires, even after the Army and Air Force Exchange Service (AAFES) entered the theater. The 101st Airborne Division (Air Assault), for example, had local merchants on their FOBs, to include a barber, tailor, and a restaurant that provided internet services. Once AAFES set up their main exchange at the Division Rear, however, AAFES began to complain about the competition, as Soldiers continued to frequent local establishments because in many cases they were less expensive.¹³⁰⁰

¹²⁹⁵ See Volume I, Afghanistan and Iraq Legal Lessons Learned, *supra* note 6, para. III.G.5.

¹²⁹⁶ Kent E-mail, *supra* note 75, at 1.

¹²⁹⁷ E-mail from Captain John P. Morgenstern, Office of the Staff Judge Advocate, V Corps and CJTF-7, subject: AAR, at 1 (6 Jan. 2005) [hereinafter Morgenstern E-mail] (on file with CLAMO).

¹²⁹⁸ *Id.*

¹²⁹⁹ Kent E-Mail, *supra* note 75, at 1.

¹³⁰⁰ 101st ABN DIV AAR, *supra* note 4, at 1.

In addition, there were many units in both Afghanistan and Iraq who were located in remote areas where AAFES simply could not go; many of these units wanted to establish an AAFES Imprest Fund Activity (AIFA).¹³⁰¹ In these situations, AAFES provides the unit with inventory, change funds, equipment, and fixtures. The commander appoints an officer or senior noncommissioned officer to supervise the AIFA and to be accountable for AAFES assets loaned to the AIFA. The commanders also furnished all other administrative and logistic support.¹³⁰² Some units simply found this arrangement too difficult to maintain.¹³⁰³

With confusion over support requirements, the responsibility of units operating remote sites under the AIFA, and issues regarding whether units could allow local merchants to continue to operate on their FOBs, a memorandum of understanding (MOU) between AAFES and the Coalition Forces Land Component Command/Army Central Command was concluded on 13 May 2004, that applied to both OEF and OIF.¹³⁰⁴ The MOU set forth the responsibilities of each party regarding operations of remote AAFES exchanges, to include provision of transportation and logistical support. Additionally, MNC-I concluded an addendum to this memorandum effective 17 August 2004 to supplement their responsibilities of operating AAFES remote exchanges in Iraq.¹³⁰⁵ The Supplemental MOU provided the following.

In consideration of a 'right of first refusal,' AAFES will proactively support and partner with MNC-I Commanders, in coordination with MNC-I C1, to assist and formulate executable plans for engaging local Iraq businesses, fostering good will, and encouraging free trade on property currently secured by Multi-National Forces, including but not limited to retail goods and services.¹³⁰⁶

This Supplemental MOU was followed by an MNC-I fragmentary order, outlining the commanders' requirements to provide base support and life support to AAFES and their personnel. The fragmentary order provided that commanders must request in writing to MNC-I C1 for any new AAFES facilities or services, such as unit run imprest funds, post exchange, barber, beauty, alterations, gift store, phone banks, pressing, name brand fast food and other food.¹³⁰⁷ A sample request form is at Appendix H-7.

¹³⁰¹ An "AAFES Imprest Fund Activity" is an activity that "furnishes exchange support to a small military unit where it is impractical to establish a regular exchange outlet." DEP'T OF ARMY, REG. 147-14, AND DEP'T OF AIR FORCE, REG. 147-14, ARMY AND AIR FORCE EXCHANGE SERVICE OPERATING POLICIES, Glossary, Section II, Terms (15 Dec. 1992).

¹³⁰² *Id.* para. 2-2a.

¹³⁰³ 101st ABN DIV AAR, *supra* note 4, at 1.

¹³⁰⁴ Memorandum of Understanding (MOU) Between AAFES and CFLCC/ARCENT For the Provision and Operation of Remote Field Exchanges During Operation Enduring Freedom (OEF) and Operation Iraqi Freedom (13 May 2004) [hereinafter AAFES/CFLCC MOU] (on file with CLAMO).

¹³⁰⁵ Multi-National Corps Iraq Support Agreement Addendum to Memorandum of Understanding (MOU) Between Army and Air Force Exchange Service and Coalition Forces Land Component Command (CFLCC/Army Central Command (ARCENT) for the Provision and Operation of Remote Field Exchanges During Operation Enduring Freedom (OEF) and Operation Iraqi Freedom (OIF) (17 Aug. 2004) [hereinafter MNC-I Supplement to AAFES/CFLCC MOU] (on file with CLAMO).

¹³⁰⁶ *Id.* para. 4.

¹³⁰⁷ Multi-National Corp Iraq, Fragmentary Order 536, 171715D Aug. 04, subject: Support to Army, Air Force Exchange Service (AAFES), para. 3.D.1.A. (on file with CLAMO).

4. Anticipate Advising Commanders on a Policy Regarding Purchasing and Presenting Unit Coins.

As operations matured in both Afghanistan and Iraq, commanders found it necessary to establish policies on the purchase and presentation of coins. Judge advocates need to anticipate that commanders will desire to purchase and distribute unit coins and assist commanders and resource managers in drafting and implementing policy guidelines in this area. As one JA put it: “[e]very unit in theater wants to purchase their own coins, and they want to purchase enough coins for every soldier.”¹³⁰⁸

In particular, as in garrison, commanders need to understand that coins purchased with unit operations and maintenance (O&M) funds only may be used to recognize DoD personnel for accomplishments that further the efficiency and effectiveness of the command. These coins also may be presented to non-DoD personnel as honorary awards for services and accomplishments that significantly assist or support the unit functions, services, or operations. Coins purchased with O&M funds cannot be presented to foreign military or civilian personnel. Coins presented to foreign dignitaries must be purchased with personal funds or Official Representation Funds.¹³⁰⁹

Although outside the time period of this Publication, both MNF-I in Iraq and CJTF-76 in Afghanistan established a unit coin policy. The policies allowed OIF and OEF unit-specific coins for battalions and above. Major subordinate commands could approve and spend not more than \$1,000.00 per battalion and \$3,000.00 per brigade to purchase unit coins in any twelve-month period. The MNC-I policy required the number of coins purchased to be tracked and a monthly report submitted to the MNC-I C-8.¹³¹⁰

5. Assist the J-3 Air in Developing a Matrix That Clearly Explains Who may Travel on United States Military Aircraft and When Reimbursement is Required.

During the time covered by this Publication, the United States did not have an Acquisition and Cross Servicing Agreement with Afghanistan.¹³¹¹ Given the myriad tours and ceremonies that local government officials wanted to attend, the legal team at CJTF-180 found it necessary to devise a system, in coordination with the J-3 Air, for approval of requests for travel on U.S. military aircraft from local national government officials.¹³¹² Ultimately, the new

¹³⁰⁸ Banks AAR, *supra* note 46, at 21.

¹³⁰⁹ Memorandum, Headquarters, Third United States Army, subject: Third U.S. Army/ARCENT/CFLCC Unit Coin Policy (1 Jul. 2004) (on file with CLAMO).

¹³¹⁰ Memorandum, Multi-National Corps Iraq, subject: MNC-I Policy #5 – Purchasing and Presenting Coins for Recognition Purposes (11 Oct. 2004) (on file with CLAMO); Memorandum, Combined Joint Task Force 76, subject: CJTF-76 Policy Memorandum SJA-4, Unit Coins (1 Aug. 2004) (on file with CLAMO).

¹³¹¹ Generally, Coalition Forces are required to provide reimbursement for the cost of U.S. military airlift under an Acquisition and Cross-Servicing Agreement (ACSA) or a Cooperative Military Airlift Agreement (CMAA) under 10 U.S.C. § 2350c (2003). See U.S. DEP’T OF DEFENSE, REG. 4515.13-R, AIR TRANSPORTATION ELIGIBILITY, para. C2.2.8.5. (Nov. 1994).

¹³¹² 10th MNT DIV AAR, *supra* note 7, at 4 (notes).

command in Afghanistan, CJTF-76 created a matrix that set forth the rules on travel and reimbursement for various categories of travelers. The matrix is at Appendix H-8.

Legal teams were also intimately involved in flight requests for foreign national civilians during OIF.¹³¹³ A JA reviewed the travel request to determine its legal sufficiency. Judge advocates found that many of these requests lacked the necessary information to make a legal determination on whether it complied with DoD policy. Therefore, III Corps JAs at CJTF-7 recommended that the OSJA should issue a policy memorandum outlining the documentation that must be contained in the request for military aircraft travel. The policy should include the following information.

- a. The title and position of the individuals scheduled for the flight, including the necessity for each individual for the mission.
- b. Address the mission relevancy to the DoD mission [in theater]. It should define how the mission falls within the parameters of the CJTF-7 Mission and Commander's Intent.
- c. Address the compelling need for the use of air assets rather than other means of transportation.
- d. An explanation as to why the mission will fail or be severely jeopardized without the use of air assets.¹³¹⁴

6. Be Prepared to Advise Commanders and Staffs on Service Requirements When Soldiers Become Casualties.

Legal teams in Afghanistan and Iraq advised commanders on many issues surrounding casualty assistance requirements. Although casualty assistance is generally a personnel function of the G1/S1,¹³¹⁵ JAs were involved in assisting commanders in writing letters of sympathy to next of kin and advising commanders on the procedures for disposition of a casualty's personnel effects. This advice was in addition to providing legal advice to commanders and investigating officers on various investigations surrounding the circumstances of the casualty, as discussed in the Administrative Law section of Volume I of this Publication.¹³¹⁶ Therefore, JAs should speak with their G1/S1 counterparts prior to deployment to ensure proper coordination of these actions.

¹³¹³ See, e.g., 82d ABN DIV AAR, *supra* note 4, at 3 (commenting that the OSJA often reviewed requests for non-U.S. forces to travel on U.S. military aircraft. In one case, the Division had to receive Office of the Secretary of Defense approval to transport the remains of an Hungarian civilian on a U.S. aircraft.). Note that the Department of Defense entered into a support agreement with the Department of State providing that DoD would provide military air support for official transportation of U.S. Mission Personnel between locations in Iraq until alternative transportation was determined to be safe and available. See Memorandum of Agreement Between Department of State and Department of Defense for Support Services in Iraq, App. 2 (10 Jun. 2004) (on file with CLAMO).

¹³¹⁴ III Corps 1st Quarter AAR, *supra* note 6, Administrative Law Section.

¹³¹⁵ The Army or Marine Corps component manpower or personnel staff officer. See JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DoD DICTIONARY OF MILITARY AND ASSOCIATED TERMS (12 Apr. 2001) (as amended through 30 Nov. 2004), at <http://www.dtic.mil/doctrine/jel/doddict/data/d/index.html>, at <http://www.dtic.mil/doctrine/jel/doddict/data/d/index.html>.

¹³¹⁶ See Volume I, Afghanistan and Iraq Lessons Learned Publication, *supra* note 6, para. III.G.2.g.

Moreover, the legal team should request that the Casualty Assistance Officer include the Administrative Law Division in their casualty tracking reports.¹³¹⁷

a. Understand the Commander's Casualty Assistance Responsibilities.

Legal teams quickly discovered that they needed to be familiar with their Service policies on casualty assistance. Each military service maintains a personnel casualty assistance office to serve as the focal point for casualty assistance matters.¹³¹⁸ These offices provide guidance and information to facilitate appropriate management of casualty reporting requirements and provide timely and accurate next of kin notification for its service members.¹³¹⁹ Although these offices are located at the Service headquarters level and the units' G1/S1 is generally responsible for casualty reporting and management, JAs deployed to both Afghanistan and Iraq had to be familiar with these policies to advise their commanders. In particular, commanders requested the advice and assistance of JAs in writing letters of sympathy and condolence to next of kin.¹³²⁰

In cases involving a deceased or missing casualty, DoD policy generally requires the service member's commander to provide an appropriate letter of sympathy, condolence, or circumstance to the next of kin no later than five days after the initial notification that the service member has been placed in one of these statuses.¹³²¹ If the circumstances surrounding the incident indicate discretion is more appropriate, the letter may be forwarded at a later date.¹³²² Ordinarily, the commander most knowledgeable of the facts concerning the person and the circumstances surrounding the casualty incident prepares a letter of sympathy or circumstance designed to extend expressions of sympathy to the primary next of kin. The service member's commander uses the letter to advise the primary next of kin of the factual, detailed circumstances surrounding the person's death or missing status. These letters are also forwarded to the service member's parents, even if they are not the primary next of kin.¹³²³

¹³¹⁷ 1AD AAR, *supra* note 4, Administrative and Civil Law power point presentation.

¹³¹⁸ U.S. DEP'T OF DEFENSE, DIR. 1300.18, MILITARY PERSONNEL CASUALTY MATTERS, POLICIES, AND PROCEDURES, para. 5.4.1. (18 Dec. 2000) [hereinafter DoDI 1300.18]. There are seven "casualty statuses:" "Deceased, DUSTWUN (a temporary status), Missing, Very Seriously Ill or Injured (VSI), Seriously Ill or Injured (SI), Incapacitating Illness or Injury (II), and not seriously injured." *Id.* para. E2.1.1.7. The missing status category and repatriation were discussed in Volume I of this Publication. Volume I, Afghanistan and Iraq Legal Lessons Learned, *supra* note 6, para. III.G.2.f. In the Army, the Human Resources Command has responsibility for casualty notification and assistance; the Bureau of Naval Personnel provides the same function for the Navy and Marine Corps.

¹³¹⁹ U.S. DEP'T OF DEFENSE, JOINT. PUB. 1-0, JOINT DOCTRINE FOR PERSONNEL SUPPORT TO JOINT OPERATIONS, app. M, para. 1 (18 Nov. 1998).

¹³²⁰ *See, e.g.*, Interview with Captain Brent E. Fitch, formerly of the Office of the Staff Judge Advocate, 1st Armored Division, in Charlottesville, Va. (3 Dec. 2004).

¹³²¹ The Navy requires that the service member's commanding officer forward a letter setting forth the circumstances of the casualty incident within 48 hours of the casualty occurrence. If, however, the casualty incident occurred within the immediate location of the next of kin and the family is already aware of the circumstances, the Navy requires the commanding officer to send only an expression of condolence. *See* U.S. DEP'T OF NAVY, BUREAU OF NAVAL PERS, INSTR. 1777.3, THE NAVY CASUALTY ASSISTANCE CALLS PROGRAM (CACP) MANUAL, para. 4-1g (10 Jul. 1995) [hereinafter BUPERSINST 1770.3].

¹³²² DoDI 1300.18, *supra* note 103, para. 6.1.2.4.

¹³²³ *See, e.g.*, U.S. DEP'T OF ARMY, REG. 600-8-1, ARMY CASUALTY OPERATIONS/ASSISTANCE/INSURANCE, para. 5-1 (20 Oct. 1994) [hereinafter AR 600-8-1]. The Air Force designates these letters "circumstance letters." *See*, U.S. DEP'T OF AIR FORCE, INSTR. 36-3002, CASUALTY SERVICES, para. 5.2. (26 Aug. 1994) [hereinafter AFI 36-3002].

A higher level of command ordinarily uses a letter of condolence to convey condolence on a service member's death. These letters do not describe the circumstances surrounding the death. Other personnel, such as medical facility commanders and chaplains, while not required to prepare condolence letters, may do so.¹³²⁴ Finally, commanders of certain hospitalized personnel may, if they desire, correspond with the next of kin of the service member.¹³²⁵ The Services generally provide examples of these letters in their appropriate Service publications.¹³²⁶

b. Understand the Commander's Responsibilities for the Disposition of Personal Effects.

As U.S. casualties mounted during operations, commanders often did not follow the policies on disposition of personal effects. Frequently, units retained personal effects in theater or sent them directly to the rear without established accountability.¹³²⁷ As of October 2003, for example, only about twenty percent of the theater personal effects were traveling through the personal effects depot in Kuwait, as required.¹³²⁸ Judge advocates found that they needed to be involved in this process to ensure commanders were aware of the proper procedures on accounting for and processing a service member's personal effects.

The collection, inventory, safeguarding and disposition of personal effects is a commander's responsibility, as established in 10 U.S.C. § 4712, and implemented by Joint policy.¹³²⁹ In the Army, the G1 is the policy proponent for care and disposition of personal effects.¹³³⁰ Legal teams need to ensure that their commanders and personnel specialists understand the requirements to appoint a Summary Court Martial Officer (SCMO) within twenty-four hours of the incident. The SCMO must complete an inventory of the service member's property within forty-eight hours. The property is then packed and sealed; a Department of Defense Form 1976, or service equivalent, is used to maintain chain of custody during shipment. The property is evacuated to the Theater Personal Effects Depot—in the Iraqi theater this depot was located at Camp Wolf in Kuwait—then on to the Joint Personal Effects Depot at Aberdeen Proving Ground, Maryland. It is the latter office that has the responsibility to return personal effects to the service member or to persons eligible to receive the property.¹³³¹

¹³²⁴ AR 600-8-1, *supra* note 108, para. 5-5 and 5-6.

¹³²⁵ *Id.* para. 5-9. Personnel who may receive letters are those listed as VSI (very seriously ill or injured), SI (seriously ill or injured), SPECAT (special category of personnel whose next of kin need to be notified even though they are not listed as VSI or SI), NSI (not seriously injured) and subject to special interest.

¹³²⁶ *See id.*; BUPERSINST 1770-3, *supra* note 106; AFI 36-3002, *supra* note 108.

¹³²⁷ Message, 151151Z Oct 03, USCENCOM, subject: Return of Personal Effects from Theater for KIA, VSI, SI, NSI, evacuated, MIA, POW, and DUSTWUN [hereinafter CENTCOM Personal Effects Message] (on file with CLAMO).

¹³²⁸ *Id.*

¹³²⁹ U.S. DEP'T OF DEFENSE, JOINT. PUB. 4-06, JOINT TACTICS, TECHNIQUES, AND PROCEDURES FOR MORTUARY AFFAIRS IN JOINT OPERATIONS (28 Aug. 1996).

¹³³⁰ *See, generally*, U.S. DEP'T OF ARMY, REG. 638-2, CARE AND DISPOSITION OF REMAINS AND DISPOSITION OF PERSONAL EFFECTS (22 Dec. 2000); U.S. DEP'T OF ARMY, PAM. 638-2, PROCEDURES FOR CARE AND DISPOSITION OF REMAINS AND DISPOSITION OF PERSONAL EFFECTS (22 Dec. 2000); U.S. DEP'T OF NAVY, MED. CMD. INSTR. 5360.1, DECEDENT AFFAIRS MANUAL (17 Sep. 1987); U.S. DEP'T OF AIR FORCE, INSTR. 34-244, DISPOSITION OF PERSONAL PROPERTY AND EFFECTS (2 Mar. 2001).

¹³³¹ CENTCOM Personal Effects Message, *supra* note 112, para. 3.

Commanders do not have the authority to simply mail the personal effects directly to the service members, to persons eligible to receive the effects, or to home station.¹³³²

7. Assist the Command in Drafting an Equal Opportunity Policy that Addresses Incidents involving Coalition Forces.

During both OEF and OIF, U.S. and Coalition Forces operated side-by-side. Judge advocates must anticipate a need for command policies on human relations and equal opportunity that address issues that arise when allegations are made of sexual harassment or unfair treatment against Coalition military personnel. The policy should address the need for communication between the Coalition partners involved to facilitate resolving the allegations. The CJTF-7 policy, for example, made clear that national command elements had exclusive authority to decide whether to take administrative or criminal action against alleged perpetrators from their force. Nevertheless, as stated in the policy, CJTF-7 had a command interest in instances of ongoing unfair treatment or of treatment that impacted adversely upon Coalition morale, teamwork, cohesion or productivity. Therefore, CJTF-7 could, if necessary, meet with Coalition Forces to take necessary action to ensure coalition operational effectiveness. The CJTF-7 policy memorandum is at Appendix H-9.

8. Be Prepared to Address Unique Deployment Issues Including Nametapes in a Foreign Language, Hookah Pipes, Cohabitation of Married Couples, and Transfer of Local Nationals to the United States for Medical Care, as well as More Familiar Administrative Law Issues.

Operations in Afghanistan and Iraq also presented other administrative law issues. Issues included those unique to deployed operations. For example, once stability operations began, service members started wearing their names embroidered in Arabic on their DCU tops and desert caps. Army JAs provided legal opinions that this was not authorized by Army regulation,¹³³³ but the practice apparently continued for various reasons, including that it was perceived as a good information operations tool. Hookah or water pipes also became an issue. Many service members bought these pipes from local vendors and wanted to take them back to the United States as souvenirs when they redeployed. III Corps JAs at CJTF-7 determined that

¹³³² *Id.* para. 3.E.

¹³³³ Memorandum, Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), for Battalion S-4, 2-44 ADA, 101st Airborne Division (Air Assault), subject: Authority to wear nametapes in Arabic on DCU top, desert patrol caps, and desert camouflage hats (2 Sep. 2003) (on file with CLAMO). *See, generally*, U.S. DEP'T OF ARMY, REG. 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA (5 Sept. 2003).

hookah pipes were considered drug paraphernalia under federal law.¹³³⁴ Therefore, service members were not allowed to possess these pipes.¹³³⁵

Legal teams also continued to advise commanders on cohabitation and so-called “no-sex” policies. The 1st Cavalry Division SJA, for example, discussed this issue with the CG prior to deployment. The CG then decided not to issue division guidance regarding these issues; rather, he left it to the brigade commanders to determine policies that were tailored to the commander’s requirements.¹³³⁶ Judge advocates also dealt with the complicated issues involved in transporting local nationals to the United States for care in a military treatment facility, to include designation as a person eligible for military medical care and coordinating visa issues with the Department of State.¹³³⁷

In addition, legal teams addressed a number of administrative law issues not unique to a deployed environment. Judge advocates found, for instance, that they saw more reliefs for cause, necessitating a hands-on approach to these actions to assist commanders in preparing relief reports.¹³³⁸ Moreover, with the number of Active and Reserve Component units deployed, conscientious objector actions began to rise. With the increase in such actions came a commensurate increase in packets containing mistakes and insufficient evidence. To ensure that the packets were complete, the III Corps legal team recommended that the OSJAs at the joint task force draft an information paper to subordinate commands that address the proper procedures for processing conscientious objector packets. Administrative law attorneys at the GCMCA level also should maintain contact with their Service’s Conscientious Objector Review Board at the headquarters level to ensure the record is complete and prepared for the GCMCA’s signature.¹³³⁹ Similarly, legal teams recommended that JAs be thoroughly involved in Article 138 Complaints.¹³⁴⁰ Timely processing of these complaints proved very difficult because service

¹³³⁴ 21 U.S.C. § 863(d). “Drug paraphernalia” is defined as:

... any equipment, product, material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful under this subchapter. It includes items primarily intended or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, hashish oil, PCP, methamphetamine, or amphetamines into the human body

Id.

¹³³⁵ Information Paper, Office of the Staff Judge Advocate, Combined Joint Task Force Seven, subject: Hookah/Water Pipes Importation (Apr. 2004).

¹³³⁶ 1CAV AAR, *supra* note 6, at 4.

¹³³⁷ *See, e.g.*, Memorandum, Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), for Commander, 101st Airborne Division (Air Assault), subject: Medical Care in the United States for Peshmerga Soldier (8 Sep. 2003) (on file with CLAMO). *See also* Volume I, Afghanistan and Iraq Legal Lessons Learned, *supra* note 6, para. III.G.4. (discussing entitlement to DoD medical care, generally).

¹³³⁸ Information Paper, Office of the Staff Judge Advocate, Combined Joint Task Force Seven, subject: Relief for Cause OERs (Apr. 2004) (on file with CLAMO).

¹³³⁹ Information Paper, Office of the Staff Judge Advocate, Combined Joint Task Force Seven, subject: Conscientious Objectors (Apr. 2004) (on file with CLAMO).

¹³⁴⁰ 10 U.S.C. § 938; *implemented by* U.S. Dep’t of Army, Reg. 27-10, Military Justice (6 Sept. 2002); JAGMAN, *supra* note 50, chap. 3; U.S. Dep’t of Air Force, Instr. 51-904, Complaints of Wrongs Under Article 138, Uniform Code of Military Justice (30 Jun. 1994).

members often were stationed at FOBs with limited capabilities for forwarding complaints as required. Therefore, the legal team had to closely monitor these complaints.¹³⁴¹

9. As Units Prepare to Redeploy, Judge Advocates Must Anticipate Numerous Issues Concerning Retention of Individual War Trophies and Unit Historical Artifacts.

*The United States military is [in Iraq] to liberate the Iraqi people, not to conquer them. Consequently, the “spoils of war” do not apply. The pieces in which units are traditionally interested are now looked at as property of the Iraqi people, or as items needed for the new Iraqi Defense Force. U.S. Forces are not here to defeat a country and take home war trophies of the victory.*¹³⁴²

In both Iraq and Afghanistan the coalitions began training indigenous security forces. Consequently, captured serviceable equipment was needed during the reformation of these forces, and generally could not be taken back to the United States as either war trophies or unit historical artifacts.¹³⁴³ Volume I of this Publication discusses the numerous issues involved in seizing and requisitioning enemy public and private property. It also discusses the issues legal teams faced in both OEF and OIF regarding individual war trophies and unit historical artifacts.¹³⁴⁴ Neither of these issues was satisfactorily resolved during the time period covered by Volume I (11 September 2001 – 1 May 2003); however, many issues were resolved within the timeframe of this Publication.

a. Plan for a Comprehensive Approval Process for Retention of Individual War Trophies.

Generally, as explained in Volume I, Congress enacted a law in 1994 authorizing the Secretary of Defense to prescribe regulations allowing service members to retain as a souvenir enemy material captured or found abandoned.¹³⁴⁵ Prior to commencement of OEF and OIF, however, the Secretary of Defense had not implemented regulations pursuant to this statutory authority. Additionally, U.S. Central Command General Order Number 1A (USCENTCOM GO-1A), a punitive general order, prohibited service members from taking or retaining individual souvenirs or trophies.¹³⁴⁶ Once units began to redeploy, legal teams had to contend with numerous requests to take home war trophies, as well as violations of the punitive general order by service members attempting to take home various souvenirs as war trophies without authority.¹³⁴⁷

¹³⁴¹ Information Paper, Office of the Staff Judge Advocate, Combined Joint Task Force Seven, subject: Article 138 Complaints (Apr. 2004).

¹³⁴² Multi-National Forces Iraq, Information Paper, subject: Historical Property Request Procedures, para. 2.b. (24 Aug. 2004) [hereinafter Historical Property Request Procedures] (on file with CLAMO).

¹³⁴³ See, e.g., Message, 181630Z Mar 04, USCENTCOM, subject: CFC FRAGO 09-528 War Souvenirs in the ITO (U) (on file with CLAMO).

¹³⁴⁴ See Volume I, Afghanistan and Iraq Legal Lessons Learned, *supra* note 6, para. III.G.1.

¹³⁴⁵ 10 U.S.C. § 2579 (2000).

¹³⁴⁶ Commander, U.S. Central Command, Gen. Order No. 1A, para. 2.k. (29 Dec. 2000) [hereinafter USCENTCOM GO-1A]. See Volume I, Afghanistan and Iraq Legal Lessons Learned, *supra* note 6, appendix G-1, for a copy of CENTCOM GO-1A.

¹³⁴⁷ See, e.g., comments by Captain Brian Bank, OSJA, V Corps.

As a result of a request for guidance from the Commander, U.S. Central Command, the Deputy Secretary of Defense provided an interim implementing policy on retention of individual war trophies on 11 February 2004.¹³⁴⁸ The policy, however, only applied to “US military personnel, and to civilians serving with, employed by, or accompanying the Armed Forces of the U.S. in the Iraqi theater of operations.”¹³⁴⁹ The policy authorized retention only of specific items as war souvenirs, including bayonets, when authorized by a proper reviewing authority. Failure to comply with the implementing policy subjected individuals to administrative or disciplinary action under the Uniform Code of Military Justice, Office of Personnel Management Regulations, or other U.S. laws and regulations.¹³⁵⁰

War souvenirs: That was a big painful issue. I know CPT [John] Morgenstern worked long hours on that. LTC [Jonathan] Kent worked long hours on that. I personally helped fuel that fire quite a bit because I had an entire brigade of MPs that wanted to take home bayonets and other assorted [souvenirs], and I was routinely getting that question at every single staff call. I know there were others that were in the same boat.

Round Table Discussion, Transcript of After Action Review Conference, Office of the Staff Judge Advocate, V Corps, and the Center for Law and Military Operations, Heidelberg, Germany, at 31 (17-19 May 2004) [hereinafter Round Table Discussion] (on file with CLAMO); *See also*, “Eglin major charged with illegal Iraq war souvenirs,” Associated Press, at <http://www.wcjb.com/news.asp?id=10245> (Jul. 26, 2004) (reporting that an Air Force major had been charged with bringing captured AK-47 assault rifles, rocket-propelled grenades and other illegal war souvenirs home from Iraq).

¹³⁴⁸ Memorandum, Deputy Secretary of Defense, for Commander, US Central Command, subject: War Souvenirs (11 Feb. 2004) and Attachment, subject: Interim Guidance on Individual War Souvenirs (30 Jan. 2004) [hereinafter DepSecDef Interim Guidance on War Souvenirs] (on file with CLAMO).

¹³⁴⁹ *Id.* para. 2.1.

¹³⁵⁰ *Id.* para. 2.5. The policy limited war souvenirs to: (1) helmets and head coverings; (2) uniforms and uniform items such as insignia and patches; (3) canteens, compasses, rucksacks, pouches, and load-bearing equipment; (4) flags (not otherwise prohibited by 10 U.S.C. §§ 4714 and 7216); (5) knives or bayonets, other than those defined as weaponry; (6) military training manuals, books, and pamphlets; (7) posters, placards, and photographs; (8) currency of the former regime; or (9) other similar items that clearly pose no safety or health risk, and are not otherwise prohibited by law or regulation. *Id.* para. 3.1. For purposes of the interim guidance, a war souvenir was “acquired” if it was captured, found abandoned, or obtained by any other lawful means.” In addition, property was “abandoned” if it was left behind by the enemy. *Id.* para. 3.2.

War souvenirs did not include weaponry, including weapons; weapons systems; firearms; ammunition; cartridge casings (brass); explosives of any type; switchblade knives; knives with an automatic blade opener including knives in which the blade snaps forth from the grip (a) on pressing a button or lever or on releasing a catch with which the blade can be locked (spring knife), (b) by weight or by swinging motion and is locked automatically (gravity knife), or (c) by any operations, alone or in combination, of gravity or spring mechanism and can be locked; club-type hand weapons (for example blackjacks, brass knuckles, nunchaku); and blades that are (a) particularly equipped to be collapsed, telescoped or shortened, (b) stripped beyond the normal extent required for hunting or sporting, or (c) concealed in other devices (for example, walking sticks, umbrellas, tubes). *Id.* para. 3.3.

War souvenirs also did not include items taken from the dead or prisoners of war or other detained individuals, including items bought or traded, items deemed of value or serviceable for a future Iraqi national defense forces; items that posed a safety or health risk; items obtained under circumstances that exposed individuals or coalition forces to unnecessary danger or are otherwise contrary to existing orders or policies, such as looting private or public property or wandering the battlefield or other unsecured area, or personal items belonging to enemy combatants or civilian including letters, family pictures, identification cards, and “dog tags.” *Id.* para. 5.3.c.

As implemented, Combined Joint Task Force Seven (CJTF-7) also prohibited military equipment not designed to be issued to or carried by an individual; former Iraqi Regime or Iraqi privately owned articles of a

Based on the Department of Defense (DoD) interim policy, on 14 February 2004, USCENTCOM granted a partial waiver to USCENTCOM GO-1A, allowing individuals to retain specific war trophies.¹³⁵¹ Bayonets were included in the partial waiver, although the Coalition Forces Land Component Command (CFLCC) continued to prohibit bayonets from being mailed to the United States.¹³⁵² Combined Joint Task Force Seven (CJTF-7) further implemented the USCENTCOM policy on 23 April 2004, designating each company commander or person in the rank of lieutenant colonel or above as a reviewing officer who could approve the individual retention of war trophies.¹³⁵³ According to the policy, the service member had to request that the item be returned to him using CFLCC Form 603-1 at the time the service member turned the item over to a reviewing officer. A sample CFLCC Form 603-1 is at Appendix H-1.

The implementing guidance resolved the issues regarding retention of individual war trophies for the Iraqi Theater of Operations. Initially, at least one Army Division further implemented the guidance by prohibiting Soldiers from retaining any item designed to injure or kill, including bayonets, although the prohibition on bayonets was later rescinded.¹³⁵⁴ The implementing policy did not, however, resolve the issue for the Afghanistan theater, as it only applied to Iraq.¹³⁵⁵ However, USCENTCOM continued to allow service members to bring home

household nature, any object of art, science, archeological, religious, national, or historical value; any object retained for a commercial or resale purpose; any sand, dirt, rocks, stones, or gravel; any plant material; and any animal. Combined Joint Task Force Fragmentary Order 674 [War Souvenirs] to CJTF-7 Operational Order 0401, 232250D Apr 04, paras. 3.B.4.B.3.- 3.B.4.B.9. [hereinafter CJTF-7 FRAGO 674] (on file with CLAMO).

¹³⁵¹ See USCENTCOM Partial Waiver of USCENTCOM General Order 1A, War Souvenirs (14 Feb. 2004) [hereinafter USCENTCOM GO-1A] (on file with CLAMO); see also Message, 181630Z Mar 04, USCENTCOM, subject: CTC FRAGO 09-528 War Souvenirs in the ITO, para. 3.B.2. [hereinafter CENTCOM War Souvenir Policy] (on file with CLAMO). For a discussion of CENTCOM GO-1A and its prohibition against war trophies, see Volume I, Afghanistan and Iraq Legal Lessons Learned, *supra* note 6, para. III.G.1.b.3.

¹³⁵² See Coalition Forces Land Component Command Memorandum, subject: Clarification of Policy on Non-mailable Articles/War Trophies and OCONUS APO Mailing Procedures (Inspecting All Packages) (17 Mar. 2004) (on file with CLAMO).

¹³⁵³ CJTF-7 FRAGO 674, *supra* note 135, para. 3.B.2. Combined Forces Command Contractor Officer Representatives in the grade of captain or above who service contracts with employees likely to submit items were also designated as reviewing officers. *Id.* See also III Corps 1st Quarter AAR, *supra* note 6, Administrative Law AAR Topics (recommending that a JA be appointed as a point of contact that is familiar with the process to help units as they prepare to redeploy).

¹³⁵⁴ Interview with Lieutenant Colonel Stuart W. Risch, Staff Judge Advocate, 1st Infantry Division, in Charlottesville, Va. (5 Oct. 2004) (videotape on file with CLAMO); After Action Review Conference, Office of the Staff Judge Advocate, 1st Infantry Division, and the Center for Law and Military Operations, Wuerzburg, Germany (12-13 April 2005).

¹³⁵⁵ An information paper written by Combined Joint Task Force Seventy-Six (CJTF-76), Office of the Staff Judge Advocate, stated that the general order did not apply to bayonets, knives, swords, and military apparel that were purchased at local bazaars because they were not battlefield souvenirs prohibited by USCENTCOM GO-1A, but were simply commercially sold items of a military nature. Therefore, these items could be lawfully imported into the United States. See Information Paper, Office of the Staff Judge Advocate, Combined Joint Task Force 76, subject: Possession of Lawfully Purchased Russian or ANA Bayonets, Knives, Swords, and Military Apparel from Local Bazaars and Importing them into the U.S. (25 May 2004) (on file with CLAMO). This information paper, however, was not coordinated with Combined Forces Command – Afghanistan or U.S. Central Command; the latter command prohibited retention of weapons, munitions or military articles of equipment obtained or acquired by any means other than official issue, see Commander, U.S. Central Command, Gen. Order No. 1A, para. 2.k.3. (29 Dec. 2000) (on file with CLAMO); see also Interview with Major Todd J. Enge, USMC, former Operational Law

antique firearms legally obtained in Afghanistan, if consistent with local law, and if in compliance with U.S. Customs regulations and U.S. Bureau of Alcohol, Tobacco and Firearms rules for importation into the United States.¹³⁵⁶

The DoD policy allowing service members to retain certain items as war trophies in Iraq and not in Afghanistan may have led to confusion and additional problems with service members taking home war trophies without authority. Service members serving in Afghanistan often had either been assigned to Iraq, and therefore knew that certain items were authorized as war trophies in that theater, or had heard about the Iraq policy. Therefore, a lesson learned here is that a properly implemented policy on retention of war trophies should be implemented and briefed to service members prior to their deployment. Further, when possible such policies should be consistent throughout all theaters of operations; if they are not, service members should be briefed on the differing policies and the reasons therefore to avoid misunderstandings.

b. Know Your Service Process for Certification of Historical Artifacts and Be Prepared to Answer Command Questions on Transportation of Artifacts Back to Home Station.

Enemy material seized on the battlefield may be designated as historical artifacts.¹³⁵⁷ These artifacts may be either unit historical artifacts or museum historical artifacts. Unit artifacts are kept on the property books of a component service recognized museum, but the unit is allowed to display the items. Museum historical property is captured enemy property intended for display in a component service museum.¹³⁵⁸

Attorney, U.S. Central Command, to Lieutenant Colonel Pamela M. Stahl, Director, Center for Law and Military Operations, The Judge Advocate General's Legal Center and School (6 Dec. 2004).

¹³⁵⁶ Memorandum, U.S. Central Command, to [Distribution A], subject: Partial Waiver of USCENTCOM General Order Number 1A, 25 Jun 2002 (on file with CLAMO). This issue was also discussed in Volume I, Afghanistan and Iraq Legal Lessons Learned, *supra* note 6, para. III.G.1.b.3.

¹³⁵⁷ The Army defines the term "historical artifact" as follows.

Any object that has been designated by appropriate authority as being historically significant because of its association with a person, organization, event, or place, or because it is a representative example of military equipment that has been accessioned into the Army Historical Collection. Artifacts will cease to perform their original function.

U.S. DEP'T OF ARMY, REG. 870-20, ARMY MUSEUMS, HISTORICAL ARTIFACTS, AND ART, Glossary, Sec. II (11 Jan. 1999) [hereinafter AR 870-20]. See also U.S. MARINE CORPS, ORDER P5750.1G, MANUAL FOR THE MARINE CORPS HISTORICAL PROGRAM 4006 (28 Feb. 1992) (C1, 21 Nov. 1994).

¹³⁵⁸ Information Paper, Multi-National Corp Iraq, subject: Historical Property Legal Regulations, para. C (10 Sept. 2004) (on file with CLAMO).

Unit historical property: property which is part of a historical collection of artifacts displayed in a regimental day room, visitor's center, hall of fame, exhibit area, or other type of display not recognized by a component museum service as a museum. This includes artifacts such as tanks, artillery, vehicles, or other items displayed in front of buildings, on parade grounds, in parks, or at other locations around the installation or facility.

Museum acquisition: property that is intended for display in a facility recognized by its component service as a museum or museum activity or is otherwise affiliated with and authorized by the component service museum acquisitions/curator to receive, secure, and display historical artifacts that belong to the Department of Defense.

Similar to individual war trophies, units wanted to bring home many items as historical artifacts. Like individual war trophies, the underlying Service guidelines on unit historical artifacts were thoroughly explored in Volume I of this Publication.¹³⁵⁹ Generally, units must request approval through their Service to have the item designated as an historical artifact. In the Army, for instance, the Center for Military History (CMH) is the approval authority. Once service approval is obtained, the unit had to request permission through their Service Component Commander to USCENTCOM for authorization to transport the enemy equipment out of Afghanistan or Iraq for historical display purposes.¹³⁶⁰ A procedure to designate items as historical artifacts was in place that allowed several hundred artifacts to be approved for transportation from Afghanistan to the United States during the period covered by Volume I (11 September 2001 – 1 May 2003). In March 2003, at about the same time OIF commencement, DoD issued guidance requiring the Secretary of Defense to authorize unit artifacts.¹³⁶¹ As a result, many units serving in Iraq redeployed to home station leaving behind their requested enemy military equipment.

In October 2003, USCENTCOM re-issued legal guidance on the disposition of captured enemy equipment. The guidance generally restated earlier pronouncements that all requests for authorization to transport unserviceable captured enemy equipment out of the USCENTCOM area of responsibility (AOR) must be made through service component commanders and include documentation of compliance with: (1) appropriate component service regulations; (2) requirements to demilitarize any weapons or weapons systems; and (3) customs regulations on importing requested items into the United States.¹³⁶² A request for retention of items as historical artifacts is at Appendix H-2.

The guidance also reflected that many units did not understand the type of property that could be seized under International Law and USCENTCOM GO-1A. That is, private or public property may only be seized during operations on order of the commander when based on

Multi-National Forces Iraq, Fragmentary Order 259, subject: MNF-I Policy on Historical Property, paras. A and B (31 Aug. 2004) [hereinafter MNF-I FRAGO 259] (on file with CLAMO).

¹³⁵⁹ Volume I, Afghanistan and Iraq Legal Lessons Learned, *supra* note 6, para. III.G.1.b.1.

¹³⁶⁰ See Message, 181636Z Apr 03, USCENTCOM, subject: Legal Guidance for OIF (Disposition of Captured Enemy Equipment), paras. 1.D to 1.F (on file with CLAMO); Message, 181636Z Apr 03, USCENTCOM, subject: Legal Guidance for OIF (Disposition of Captured Enemy Equipment), paras. 1.D to 1.F (on file with CLAMO).

¹³⁶¹ U.S. DEP'T OF DEFENSE, REG. 4500.9, DEFENSE TRANSPORTATION REGULATION, Part V, Chap. 503, para. A.3. (Mar. 2003).

¹³⁶² See Message, 071657Z Oct 03, USCENTCOM, subject: Legal Guidance (Disposition of Captured Enemy Equipment), paras. 1.E. and 1.F. [hereinafter Legal Guidance (Disposition of Captured Enemy Equipment)] (on file with CLAMO). Other USCENTCOM legal guidance messages concerning the disposition of captured enemy equipment included Message, 042021Z MAR 02, USCENTCOM, subject: USCENTCOM Legal Guidance for Operation Enduring Freedom (Disposition of Captured Enemy Equipment); Message, 101604Z SEP 02, USCENTCOM, subject: USCENTCOM Legal Guidance for Operation Enduring Freedom (Disposition of Captured Enemy Equipment); Message, 181558Z Apr 03, USCENTCOM, subject: Legal Guidance for OIF (Disposition of Captured Enemy Equipment). The Army's Center for Military History did not require, and therefore would not approve, requests for common items such as AK-series weapons, RPG launchers, anti-aircraft guns, and Soviet-style tanks and artillery pieces. They would only accept these items if a specific curator requested a specific item that had a clear documented relationship to a unit or event that relates to his story line. Memorandum, U.S. Army Center of Military History, subject: Acquisition of Weapons (23 Sept. 2003).

military necessity.¹³⁶³ Yet, units were requesting items to be designated as unit historical artifacts that clearly appeared to fall outside these rules, including works of art, silver tea service sets, sculptures, china dining sets, glassware sets, serving platters, copies of the Koran, prayer rugs, wooden display cases, various ornamental items, and even license plates.¹³⁶⁴ If such items were requested, they had to be accompanied by an explanation of the military necessity which required such property to be seized and an explanation of why such property should not be returned to the Coalition Provisional Authority for the use and benefit of the Iraqi people.¹³⁶⁵

In addition, Reserve Component (RC) units had particular difficulty in obtaining approval for unit artifacts because they often did not have DoD museums near their home station. The Army's CMH, however, allowed RC units one weapon or weapons system per location (i.e., armory or drill hall). The CMH devised a system whereby the RC unit requested that CMH accept the historical item and earmark the item specifically for that unit. The unit then had to ship the item to the Army's Museum Clearinghouse in Anniston, Alabama. Once the item was entered into the museum inventory system in Anniston, it was shipped to the RC unit.¹³⁶⁶

Ultimately, Multi-National Forces Iraq (MNF-I) required that a commander appoint a temporary artifact responsible officer (TARO) to be responsible for the safety and security of the requested items. The TARO served as the primary point of contact for all matters regarding items under consideration for designation as artifacts.¹³⁶⁷ Because the approval process contained very formal procedures that required attention early in the deployment, the 1st Cavalry Division OSJA recommended that units begin the submission process six months prior to redeployment.¹³⁶⁸ Moreover, the legal team at III Corps noted that at their level of command (CJTF-7), reconciling and tracking the requests created many problems, as once requests were approved, the units had to be notified and then make arrangements to return to theater to collect the items.¹³⁶⁹

¹³⁶³ See Annex to Hague Convention No. IV Regulations Respecting the Laws and Customs of War on Land, art. 23, para. (g) (1907); USCENTCOM GO-1A, *supra* note 137, para. 2.K.(1).

¹³⁶⁴ Multinational Corps Iraq, Fragmentary Order 619, 312025 Aug 04, subject: Removal of Historical Property from Iraq, para. C.3.A.6. (on file with CLAMO); *see also* Legal Guidance (Disposition of Captured Enemy Equipment), *supra* note 147, para. 2.

¹³⁶⁵ *Id.* para. C.3.A.7.

¹³⁶⁶ Historical Property Request Procedures, *supra* note 127, para. 5.

¹³⁶⁷ MNF-I FRAGO 259, *supra* note 143, para. 3.C.3.E.

¹³⁶⁸ ICAV AAR, *supra* note 5, at 5.

¹³⁶⁹ III Corps 1st Quarter Report, *supra* note 6, Administrative Law AAR Topics.

I. CIVIL AFFAIRS

The doctrinal guides used by Civil Affairs (CA) judge advocates (JAs) deployed in support of Operation IRAQI FREEDOM (OIF) and Operation ENDURING FREEDOM (OEF) were Joint Publication 3-57, *Doctrine for Civil Affairs*,¹³⁷⁰ and Army Field Manual 41-10, *Civil Affairs*.¹³⁷¹ According to this doctrine, CA personnel, including JAs, are intended to be coordinators and facilitators between civil and military authorities. Rather than performing the long-term reconstruction of building an institution, or a system of government, CA operators seek to bring together governmental and nongovernmental assets and organizations to accomplish the “hands-on” part of the task.

CA units are designed and specially trained to facilitate coordination between military and civilian authorities in order to deconflict operational matters (civilian or military) that can impact one or more key players involved in the reconstruction effort.¹³⁷²

Thus, in conducting civil-military operations (CMO) the goal is not for CA assets to carry out the detailed work of reconstruction itself, but to initiate projects that are ultimately transitioned to nonmilitary control. Simply put, CA works its way out of a job.

A CA JA wears essentially two hats. He or she is a resource for the commander in traditional JA or staff judge advocate (SJA) roles, providing, for example, military justice and law of war advice in the operational environment. The CA JA is also a CA operator, possessing general knowledge concerning the operation and restoration of legal systems, government administration, and finance issues.¹³⁷³ This section seeks to capture the lessons learned by CA JAs acting as CA operators in both Iraq and Afghanistan during the period covered by this Publication.

1. Civil Affairs Judge Advocates Must Plan, Coordinate, and Perform Rule of Law Missions.

Under long-established doctrine, the mission of CA JAs is to carry out rule of law operations. As stated by the former SJA and Rule of Law Officer, OMC-A:

[Judge advocates] were placed in CA units to perform the legal functional specialty tasks, which includes advising and assisting the local (host nation) judicial agencies administering the legal system and establishing supervision over the local judicial system, establishing civil administration courts, and helping to prepare or enact necessary laws for the enforcement of US policy and

¹³⁷⁰ JOINT CHIEFS OF STAFF, JOINT PUB. 3-57, JOINT DOCTRINE FOR CIVIL-MILITARY OPERATIONS (8 Feb. 2001) [hereinafter JOINT PUB. 3-57].

¹³⁷¹ U.S. DEP'T OF ARMY, FIELD MANUAL 41-10, CIVIL AFFAIRS (14 Feb. 2000) [hereinafter FM 41-10].

¹³⁷² Roberts A. Borders, *Provincial Reconstruction Teams in Afghanistan: A Model for Post-Conflict Reconstruction and Development*, Journal of Development and Social Transformation, p. 8 (2003) [hereinafter *Provincial Reconstruction Teams in Afghanistan*].

¹³⁷³ Reserve CA units target their recruitment at individuals who already possess the functional specialty skills outlined in JOINT PUB. 3-57. *Id.*

international law. [Civil affairs] JAs, in addition to being judge advocates, are experienced civilian attorneys who are accustomed to dealing with legal systems other than that found in the US military. This civilian experience is extremely important to being able to provide effective support and assistance to a foreign civilian legal system that has been degraded by international isolation and armed conflict. . . . JAs in CA units specifically prepare themselves to perform rule of law missions. Because of their experience in CA units, CA JAs understand how rule of law operations fit in with public safety, public health, economic development, and other operations conducted by CA units in post-conflict and other situations.¹³⁷⁴

a. Rule of Law Operations Must Be Part of the Civil-Military Operations Plan.

A lesson learned by CA JAs conducting operations in both Operation IRAQI FREEDOM (OIF) and Operation ENDURING FREEDOM (OEF) was that there must be a deliberately developed plan for the rule of law mission. While JAs accomplished significant work in reconstructing the legal system in both countries, they did so without the benefit of a comprehensive, theater-specific rule of law plan.¹³⁷⁵ Future civil-military operations planning must incorporate a detailed rule of law plan that addresses many of the issues that CA JAs tackled in OEF and OIF. The observations and lessons learned in this section, and in section III.A.1. of this Publication will certainly inform that planning.

One senior JA advised that the CMO rule of law plan should include a senior JA designated as the U.S. military liaison with ministers and other high-ranking personnel in the host nation ministry of justice and court system.¹³⁷⁶ Certainly, at the beginning of both OEF and OIF, no senior U.S. government officials from other agencies that ordinarily assist in rule of law missions, such as Department of Justice, were present in theater to serve this function. Therefore, senior JAs must plan to take on this role, in particular during the early state of the mission.

b. Unity of Effort is Essential in Rule of Law Operations.

In planning the rule of law mission, CA JAs must be vigilant to ensure that their operations do not duplicate the efforts of other JAs, U.S. Government Agencies, and nongovernmental/international organizations (NGOs/IOs) operating in the theater. Additionally, JA rule of law operations must be planned to support the overall policy objectives of the U.S. and Coalition and not conflict with or reduce the effectiveness of properly established rule of law programs.

Moreover, due to their diverse knowledge and interpersonal skills, JAs are often designated to interface with IOs and NGOs. In both Iraq and Afghanistan, CA JAs initially

¹³⁷⁴ Memorandum, Colonel David Gordon, former Staff Judge Advocate, CJCMOTF and OMC-A (OEF) subject: Rule of Law Operations in Afghanistan 2002-2003: Lessons Observed, para. 7 (27 Apr. 2005) [hereinafter Gordon Lessons Observed] (on file with CLAMO).

¹³⁷⁵ *Id.*

¹³⁷⁶ *Id.* para. 5.

operating in CMOCs often acted as the primary interface with IOs and NGOs. Civil affairs JAs operating in both theaters had to balance the need for accomplishing a particular mission in a standard military fashion against the needs of NGOs who often desired military support without wishing to be associated with, or be mistaken as, the military.¹³⁷⁷ This involved the need for flexibility and tact to meld the two operating cultures so that resources were efficiently employed and not duplicated.¹³⁷⁸

2. Civil Affairs Judge Advocates Must Receive Specialized Training in Rule of Law Missions.

A lesson learned from both Afghanistan and Iraq is that JAs conducting rule of law missions must have a specialized set of skills—including expertise in international law and human rights law, and training in comparative law. Training in rule of law tactics, techniques, and procedures (TTPs) is also necessary. During the period of this Publication, there was no systemic program for specialized training of JAs to conduct rule of law operations. Based on this lesson learned, however, the U.S. Army Civil Affairs and Psychological Operations Command (Airborne) SJA is developing such a program.¹³⁷⁹

3. Specific Civil Affairs Judge Advocate Lessons Learned From Operation Iraqi Freedom.

Eighteen hundred CA troops deployed in support of OIF I and approximately eight hundred deployed in support of OIF II. Both deployments included several dozen JAs.¹³⁸⁰ These Army JAs served as Command JAs and International Law Officers for numerous CA battalions and brigades, as well as the 352d CA command headquarters. These CA operators were the lead military elements charged with restoring essential government services and institutions for a newly liberated Iraq.

During OIF, however, the traditional CMO model of acting as coordinators and facilitators between civil and military authorities generally was not followed for two reasons. First, as an occupier, the Coalition maintained long-term responsibility for the reestablishment of all essential government functions. Consequently, in the absence of functioning Iraqi government offices, Coalition CA assets and the Coalition Provisional Authority (CPA) became the day-to-day managers of the Ministries and Provincial Government offices.

Second, in the increasingly nonpermissive environment that began in August 2003, NGOs and IOs did not maintain operations where their personnel were being targeted or put at risk by anti-Coalition elements. Accordingly, many projects that had been transitioned to NGOs and IOs by the military during the summer of 2003 were dropped or returned to CA control and

¹³⁷⁷ *Id.*; see also E-mail from Colonel H. Allen Irish, 352d CA Command to LTC Pamela Stahl, Director, CLAMO (16 Mar. 2004) (on file with CLAMO).

¹³⁷⁸ From November 2002 to May 2003, all CA JAs in Afghanistan were at the CJCMOTF in Kabul; after June 2003, the CA JAs were at Bagram or Kabul. E-mail, Colonel David Gordon, Staff Judge Advocate, U.S. Army Civil Affairs and Psychological Operations Command, to Lieutenant Colonel Pamela Stahl, Director, CLAMO, subject: OIF/OEF Lessons Learned Handbook (28 Apr. 2005) [hereinafter Gordon E-mail] (on file with CLAMO).

¹³⁷⁹ Gordon Lessons Observed, *supra* note 5, para. 8.

¹³⁸⁰ Civil Affairs Association Website, at <http://www.civilaffairsassoc.org>, (lasted visited 21 Mar. 2005).

administration when these NGOs and IOs began pulling out of Iraq in September 2003.¹³⁸¹ Therefore, many CA JAs who entered Iraq during the early months of the occupation found themselves operating as the day-to-day managers of the Iraqi legal system, planning, financing, reconstructing, and operating the system for an indefinite period.

a. Be Prepared to Conduct Decentralized Operations.

The command structure for CMO in OIF was decentralized. In the northern half of Iraq the coordination of legal reconstruction efforts during 2003 was directed primarily by Division SJA offices with the assistance and advice of CA JAs. In the southern half of the country under the operational control of the 1st Marine Expeditionary Force (I MEF) the U.S. Army CA Government Support Teams (GSTs) provided direction to reconstructing the legal system—coordinating directly with military commanders, rather than through the Division or I MEF SJA offices. The judicial reconstruction mission of both JAs assigned to traditional units and those assigned to CA units is described in detail at paragraph III.A.1. of this Publication.

Because CA operations occurred in a decentralized fashion, they depended on the priorities, resources, and understanding of the local commanders. This decentralized employment of CA forces had significant consequences for communication and efficiency in national and regional legal reconstruction efforts. Rather than answering to a central authority, such as the Commander, 352d CA Command (CACOM), the CA brigade and battalion commanders were directly responsible to the commanders and G-3 sections that they supported. While they maintained a reporting relationship with the 352d CACOM, the 352d did not direct, coordinate, or oversee reconstruction operations across Iraq. Rather, the 352d CACOM acted as a command headquarters whose area of direct influence was the Green Zone in Baghdad, with a liaison mission to the fledgling Iraqi Ministries established by the CPA. Initially, the 352d CACOM had sought to operate as a CFLCC major subordinate command from the earliest planning, with command and control of CA units reverting to it during stability and support operations (Phase IV). This plan was not implemented.¹³⁸²

In the south, from the southern limits of Baghdad to the Kuwaiti/Saudi border, CA battalions and brigades were attached in direct support of I MEF.¹³⁸³ The CA battalions were organized as GSTs, among other missions, in support of the battalion commanders of 1st Marine Infantry Division (1st MARDIV), who served as the occupation military governors. The mission of the GSTs was in large part to restore civil government and necessary government functions in each of the seven provinces comprising the I MEF area of responsibility in southern Iraq. The CA battalions answered directly to the Commander of the 1st MARDIV and the CA brigades answered to the Commander, I MEF. In addition, one Army CA unit, the 402d CA battalion,

¹³⁸¹ Most NGOs are not designed or equipped to operate in a hostile environment. As soon as it became clear that their NGO status would not protect them, many left Iraq, leaving behind unfinished reconstruction projects that either had to be abandoned or assumed by the Coalition. See Interview with Major Chris Stockel, JA, attached to the 402d CA Bn, in An Nasariyah, Iraq (Aug. 2003).

¹³⁸² See E-mail, Lieutenant Colonel Peter Becker, OSJA, III Corps, to Lieutenant Colonel Pamela Stahl, Director, CLAMO, subject: Volume II, OEF/OIF Lessons Learned Handbook (3 May 2005) (attached comments from Colonel Michael Finn, OSJA, III Corps) [hereinafter Finn comments] (copy on file with CLAMO).

¹³⁸³ The United Kingdom forces were also positioned in the south, with responsibility for administering Basra and one neighboring province.

with one JA, was attached to British forces in the Basra area, working directly for the U.K. senior commander.

The CA units assigned to the U.S. Marine Corps enjoyed a degree of autonomy not experienced in other sectors. As a force designed for quick power projection across a seacoast, the Marine Corps is structured with tactical Civil Affairs Groups (CAGs) comprised of several dozen personnel. These CA assets are experienced in short-term missions involving emergency civil administration and the relocation or evacuation of civilian personnel. The U.S. Marine Corps' CA assets are, however, not designed to engage in the type of long term national and regional reconstruction and restoration projects needed to build a government from the ground up. Therefore, Marine Corps commanders requested U.S. Army CA units to operate with them out of recognition that their doctrine and training did not readily fit the large scale CMO mission likely to be encountered in Iraq.¹³⁸⁴ The Army JAs assigned to CA units that were attached to the Marine Corps units in the south found that they had to educate their Marine Corps counterparts on the Army CA missions and capabilities.¹³⁸⁵

In northern Iraq, generally from the northern outskirts of Baghdad to the northern Iraq border, the role of CA units differed because they were under direct U.S. Army control. In the area of reconstructing the legal system, the SJA offices of the 4th Infantry Division, the 101st Airborne Division (Air Assault), and V Corps (later replaced by 1st Infantry Division, Task Force Olympia, 1st Cavalry Division, and III Corps) assumed greater direct responsibility for reconstructing the legal system,¹³⁸⁶ relying upon CA personnel for advice more than for the

¹³⁸⁴ Despite lacking a long term doctrine, the USMC CAGs performed extremely well in Iraq. They were largely responsible for the rapid reestablishment of modest civil government and essential government services in An Nasariyah and Al Kut within weeks of those provincial capitals being occupied by the coalition.

¹³⁸⁵ During training with 2d Marine Expeditionary Brigade at Camp Lejeune, NC in the Fall of 2002, the CA JA found that the Marine Corps planners believed that a CA brigade was a self-supporting brigade akin to an infantry brigade, comprised of a couple thousand troops, with their own vehicles and logistics support, rather than the 145 person CA headquarters unit that it actually was. See After Action Report, 358th Civil Affairs Brigade, After Action Report, Marine Expeditionary Forces Exercise 2002, at 2 (15 Oct. 2002) [hereinafter MEFEX AAR] (on file with CLAMO). The Marines also initially found it difficult to deal with the high rank structure of an Army CA unit, with its more senior and experienced civilians coming from legal, medical, engineering, and other professional backgrounds. The lean Marine Corps had one officer in the rank of lieutenant colonel wearing the dual hats of battalion commander and military governor to oversee each of its seven provinces. In contrast, the 358th CA Brigade, which supported the I MEF, sent a 145 person brigade headquarters consisting of sixteen colonels, and twenty-three lieutenant colonels, among other officer ranks. The supporting CA Battalions brought a dominating rank structure as well, containing more CA lieutenant colonels and majors than an entire Marine combat brigade. This made integration difficult.

According to one CA JA working in the I MEF future plans cell:

It was clear that the Marines did not know what to do with the CA brigades, with their high rank structure and their minimal vehicular and logistic support. It took until late June 2003 for them to understand the capability the brigade brought to them in terms of subject matter expertise and their ability to coordinate between CPA, NGOs, and the military.

Interview with Lieutenant Colonel John Taylor, CA JA, USAR, I MEF Future Plans Cell, Camp Babylon, Iraq (14 Sept. 2003) [hereinafter Taylor Interview].

¹³⁸⁶ The legal system of the Kurdish (northern) area of Iraq required very little assistance from Coalition Forces, as the Kurds had been operating their own semi-autonomous government structure in northern Iraq since the imposition

execution of courthouse projects, the appointment and dismissal of judges, and direct oversight of the court operations.¹³⁸⁷

b. Conduct Training on the Legal System and Government Structure Prior to Deploying in Support of Contingency Operations.

The mission that eventually consumed the greatest time of the CA JA during OIF was the reconstruction of courts and the reestablishment of a new legal system. Unfortunately, CA units had received little training in this area prior to the beginning of major combat operations. The primary training objectives focused on the large number of civilians expected to flee from the high intensity combat and, perhaps, chemical battlefield.¹³⁸⁸ Consequently, predeployment training had focused on dealing with displaced persons (DPs) and separating enemy combatants from the DPs that might flow south toward Kuwait.

Prior to deploying in support of OIF, CA units, including JAs, conducted weeks of training on the DP mission, including the decontamination of “gassed” civilians, emergency medical care, and the establishment of short term DP camps. The JAs wrote draft rules for the governance of such camps and for the earliest possible return of refugees to their homes, in accordance with International Committee of the Red Cross and Geneva Convention requirements. Army and U.S. Marine Corps JAs also drafted plans for Article 5 Tribunals, as well as detention facilities for those enemy prisoners of war separated from the DP flow.¹³⁸⁹

Against the background of hundreds of hours of tactical CA training, little training on the Iraqi legal system or government structure occurred at the CA brigade or battalion level. Although CA JAs requested copies of the laws of Iraq from their higher headquarters, with the primary focus on the impending major combat operations these requests became a second priority and they were not answered prior to deployment.¹³⁹⁰

As the saying goes, “no plan survives first contact with the enemy,” and the OIF CA plan was no exception. With the brief exception of a water shortage in Um Qasr in the opening days of the war, there was no massive civilian emergency or significant DP mission as expected. The local Iraqis remained in their homes and did not take to the roads. Major combat operations led to the occupation of Baghdad in only three weeks and the immediate fall of the Ba’athist Government and its institutions. As a result, CMO planners, who had anticipated major combat

of the “No-fly” zone by Coalition Forces following the first Gulf War. This system was free of the Ba’athist influences of the south and did not suffer extreme physical damage during major combat operations.

¹³⁸⁷ The 358th CA Brigade placed a planning team with the 4th Infantry Division in Tikrit in September 2003 to develop a strategic plan for restoring government functions, including courts. This team, with its one JA captain, was engaged only in planning, however, and not in the oversight of the courts or the implementation of policy. Interview with Captain Frank McGovern, JA, 358th CA Brigade, Tikrit, Iraq (12 Feb. 2004).

¹³⁸⁸ MEFEX AAR, *supra* note 17, at 2.

¹³⁸⁹ Interview with Colonel Michael O’Hare, Staff Judge Advocate, 358th CA Brigade (1 Dec. 2004) [hereinafter O’Hare Interview 2004] (notes on file with CLAMO).

¹³⁹⁰ *Id.* A three day seminar was held for JA CAs at FT Dix, NJ in early 2003 that related extremely valuable cultural background information on the Iraqi Kurds, Sunnis, and Shiites, as well as other important information concerning Islam. Unfortunately, no instruction regarding the workings of the civil government and its legal system was available. *Id.*

operations continuing for many weeks or months, suddenly found that they had transitioned to stability and support operations with only the broadest outline of a plan.¹³⁹¹

It was during this time that the concept of GST was borne. Training was initiated in Kuwait for Army CA troops who had yet to cross into Iraq to learn how to administer the foreign government system. These GSTs were the CA organization established in each province to interface with the Iraqi populace and officials. Ranging in size from twelve to twenty-four CA operators, the GSTs were the civil administration face of the local military governor. A typical GST had a JA, a fiscal officer, a logistics/engineering officer, a medical expert, an education officer and a law enforcement officer, among other specialties. The military governors tasked the GSTs with getting the provincial Iraqi bureaucracies running again and overseeing the reconstruction of critical infrastructure within the province.

From the CA JA perspective, GST training, although late, was important to convey the nuances of a civil law based court system, akin to the French magistrate code system, to military attorneys who were only familiar with a system characterized by common law court precedents.¹³⁹²

The lesson learned from the JAs assigned to CA units during OIF was that all JAs must plan for judicial reconstruction missions in all contingency operations. Such plans must include obtaining a copy of the local civil and criminal laws and procedures, and conducting training on the local judicial systems and traditions. The JAs cannot afford to lose valuable time in carrying out reconstruction operations and restoring government services by deploying without adequate legal resources.

c. Establish Coordination and Communication Between Civilian Occupational Authorities and Military Governors to Facilitate the Restoration of Civil Government.

The structure of the military governance of occupied Iraq largely mirrored the Iraqi civil system it replaced. The Ministries in Baghdad, administered by CPA officials, were the centers of political power from which laws, policies, and guidance were to be provided to the eighteen provinces of Iraq.¹³⁹³ Each province was headed by a battalion commander who filled the role of the provincial governor. Unfortunately, the centralized ministries under CPA were understaffed and did not have the communications capability to direct the provincial bureaucracy.¹³⁹⁴

¹³⁹¹ Taylor Interview, *supra* note 16 (“[t]he transition from Phase 3 to Phase 4 operations occurred abruptly and much sooner than we expected. The Marines . . . were screaming for [their Army CA units] to get into action as soon as possible when the fighting stopped. The only problem was that there was no plan for what many of the units were supposed to do.”)

¹³⁹² See Interview with Captain David Ashe, U.S. Marine Corps, in Samawah, Iraq (Aug. 2003) (“[w]e wasted so much time just learning their system that could have been put to better use actually doing something. We lost at least a month just trying to understand how the Iraqi system operated. By losing that month we lost a lot of local goodwill that we had to struggle to get back.”)

¹³⁹³ See Memorandum, Judge Donald F. Campbell, Senior Advisor, Ministry of Justice, Coalition Provisional Authority, subject: Ministry of Justice National Policy Guidance, at 2-4 (26 Jun. 2005) [hereinafter National Policy Guidance] (on file with CLAMO).

¹³⁹⁴ See paragraph III.A.1.a., *supra*, for a separate discussion of the Coalition’s communications problems during the early days of the Iraqi occupation.

The CA GST model placed CA resources with expertise in civil government administration in direct contact with local personnel and Iraqi officials requiring direction and coordination. These GST brought legal, public health, medical, logistic, engineering, and law enforcement officers from CA units to the Iraqi provinces to restore necessary government services.¹³⁹⁵ By coordinating policy from the Coalition military governor with local Iraqi leaders there was a constant flow of information between the Coalition and Iraqis that promoted cooperation and accurate communication to ensure all resources were pulling in the same direction. Civil Affairs JAs worked directly with the local judiciary to provide office and other supplies, reconstruction assistance for damaged courthouses, payment of salaries for court workers, and the replacement of corrupt/highly placed Ba'athist judges, among other issues.¹³⁹⁶ Accordingly, within most provinces there was a unity of effort in restoring the legal system, which resulted in some courts restoring operations within sixty days after the cessation of high intensity combat, despite significant physical damage by looters.¹³⁹⁷

The effectiveness of the GST reconstruction and aid efforts, however, was limited by the lack of coordination during the Spring/Summer of 2003 from a central or regional authority. The CPA planned and established regional offices in several areas of Iraq, who were to act as a regional coordinating authority for four to five provinces and as a proposed conduit for the flow of information and policies from Baghdad to the Provinces. In the end, however, the communication did not work for several reasons.

Most important, there was no long range communication capability between CPA in Baghdad and CA operators in the provinces. Following the cessation of high intensity conflict against the former regime, there was no long distance phone service available within Iraq from April until July/August 2003. Additionally, cell phone service was virtually nonexistent and tactical military communications systems had inadequate range to transmit across the vast distances between the provincial capitals or to Baghdad. Even had the range been adequate, CPA had no military communications system capabilities. Accordingly, the first critical months of the OIF occupation were characterized by the provinces under military governorship communicating by tactical military communications, while CPA officials operated internally on civilian Baghdad phone lines or by e-mail.¹³⁹⁸

Even the regional CPA offices were essentially isolated from the military CA operations conducted in their immediate vicinity. The CPA South-Central, located in Al Hillah, Iraq, maintained communications with CPA in Baghdad by e-mail and satellite phones during the summer of 2003. Yet the battalion-level CA JAs who were carrying out legal reconstruction in the provinces over which CPA South-Central had jurisdiction had neither e-mail or satellite

¹³⁹⁵ Memorandum, Lieutenant Colonel Craig Trebilcock, JA, 358th CA Bde, for G-3, 358th CA Bde, subject: JAG Section Input to 358th Civil Affairs Brigade AAR, Operation Iraqi Freedom, at 1 (15 Mar. 2004) [hereinafter 358th AAR] (on file with CLAMO).

¹³⁹⁶ *Id.*

¹³⁹⁷ The courts in Babil, Karbala, and Najaf provinces were operating by the end of June 2003. Interview with MAJ Craig Bennett, JA, Al Hillah GST (Jul. 2003) [hereinafter Bennett Interview] (notes on file with CLAMO). For a thorough review of the judicial reconstruction mission, see paragraph III.A. 1. *infra*.

¹³⁹⁸ *Id.*; see also Interview with Mike Dittoe, CPA, Ministry of Justice, Baghdad (Jul. 2003) [hereinafter Dittoe Interview] (notes on file with CLAMO).

phones. Accordingly, the CPA regional administrators rarely coordinated with the CA operators in their vicinity.¹³⁹⁹

The CA JAs found that the best communications asset needed to conduct CA reconstruction missions in an austere environment such as Iraq was a satellite phone. A few such phones were available during OIF, but were given primarily to unit commanders and their primary staff to maintain communications and reporting with higher headquarters.¹⁴⁰⁰ Unfortunately, such phone assets were not available at the CA team level to enable them to communicate immediately across long distances to CPA or to higher headquarters for direction.

Additionally, the CPA planned to appoint legal regional coordinators to improve coordination and efficiency, but was hampered by lack of available personnel in theater.¹⁴⁰¹ In the absence of regional coordinators and a method of communication that could reach Baghdad from the provinces, GST JAs personally traveled up to ten hours by HMMWV each time they needed to communicate needs and problems to the Ministry of Justice. In July 2003, the Commander, I MEF, for example, appointed a single Army CA JA to act as a liaison between the GSTs in southern Iraq and the Ministry of Justice in Baghdad. Having a direct and consistent conduit through which to communicate common issues arising in the provinces saved hours of travel for the GSTs, reduced the flow of repetitive requests for the same assistance to CPA, and provided consistency in communication from CPA to the GSTs.¹⁴⁰² However, this liaison only had face-to-face communications with CPA on a weekly basis by driving to Baghdad, as there was no phone or other remote link.

Without the ability to communicate a centralized, coordinated judicial reconstruction effort, the GST responsible for coordinating the reestablishment of essential government functions in each province did so at their own initiative, often without knowledge of policies and laws generated in Baghdad. This sometimes led to an appearance of disorganization in the eyes of the Iraqis.¹⁴⁰³ Conversely, CPA often was unaware of the state of the governance system in

¹³⁹⁹ See, e.g., Bennett Interview, *supra* note 28, providing:

No one could talk to anyone else during the several months after the fighting stopped. CPA was speaking one language, military commanders were using tactical nets within their province, and the GSTs had neither system, largely relying upon travel by HMMWV to find or convey information. This led to a lack of information flow from the CPA that turned each province into a separate fiefdom lacking centralized direction.

¹⁴⁰⁰ See, e.g., Memorandum from Lieutenant Colonel Craig Trebilcock, JA, 358th CA Bde, to G-4, 358th CA Bde (14 Jul 2003) (requesting expanded availability of Satellite phones for Civil Affairs Teams coordinating reconstruction) (on file with CLAMO).

¹⁴⁰¹ Dittoe Interview, *supra* note 29. Through August 2003, the CPA Ministry of Justice responsible for legal affairs for the entire country consisted of a retired military JA acting as Minister, one Department of Justice attorney acting as an operations officer, and a USAR JA 1LT, supported by a minimal local national administrative staff. *Id.*

¹⁴⁰² Interview with Colonel Michael O'Hare, SJA, 358th Civil Affairs Brigade (Dec. 2003) [hereinafter O'Hare Interview 2003] (on file with CLAMO).

¹⁴⁰³ See, e.g., I MEF Weekly Legal Report, 11 Jul 2003 (describing that the CPA had cancelled provincial judicial elections organized in Najaf by the GST and military governor one week before they were to be held) (on file with CLAMO); Interview with Captain Sean Dunn, USMC, JA, Al Kut, Iraq (Aug. 2003) (stating that CPA published a new code of laws for the country and a Legal Gazette in August 2003 of which CA JAs in the southern half of Iraq were completely unaware) (notes on file with CLAMO).

Iraq outside of Baghdad. There were no regular reporting channels for such information from the field to CPA, which was responsible for the operation and funding of the system. Beginning in July 2003, the I MEF Commander's direction for a weekly liaison improved contact, but was not sufficient when matters were changing daily.¹⁴⁰⁴ Nevertheless, this method of in-person communication, while cumbersome and occurring only on a weekly basis, was essential to create a link between the perception at CPA in Baghdad of the state of legal affairs in the provinces and the reality occurring on the ground.¹⁴⁰⁵

Additionally, because the GSTs operated autonomously, subject to direction from the battalion commanders who served as provincial military governors, similar problems were dealt with in numerous ways. Thus, no unity of effort was achieved or lessons learned disseminated to other GSTs. By way of example, CA JAs experienced significant problems obtaining funds released from the Ministry of Justice in Baghdad to pay judges and court personnel.¹⁴⁰⁶ Because there was no one coordinating the overall legal efforts of the GSTs on a regional or national basis, each GST was separately attempting to communicate its priorities to the CPA-controlled Ministry of Justice and Ministry of Finance in Baghdad.¹⁴⁰⁷ One CA JA even related that he paid over seven hundred dollars out of his own pocket for translators, water tank cleaners, and Iraqi legal fees for checking real estate records in Fallujah and Baghdad.¹⁴⁰⁸

The lesson learned from this experience is that there must be a coordinated government reconstruction effort by a central authority, and that authority must have the means to communicate policy and direction to the CA GSTs in the field. The Coalition must have both the technical means available to permit regular communications between the occupational government or other civil authority and the military personnel tasked with coordinating the restoration of government services. Where technical issues or the physical environment prevents audio communications across long distances, a system of reporting and information sharing must be established immediately following the cessation of major hostilities to avoid duplication of effort and inefficiency.

d. Command Structure and Reporting Requirements for Civil Affairs Judge Advocates Must Facilitate the Flow of Needed Information to Implement Civil Government Reform and Reconstruction.

The CA JAs also learned that to share information on reform and reconstruction efforts, they must not only have a reliable means of communication, but also a robust command reporting structure. Without such a structure, CA elements can become isolated from each other and unable to do what such units do best—coordinate and facilitate.

¹⁴⁰⁴ Taylor Interview, *supra* note 16.

¹⁴⁰⁵ See Interview with Colonel William Durrett, Staff Judge Advocate, 1st Marine Expeditionary Force, Camp Babylon, Iraq (20 Jul. 2003) (“[o]nce meetings began in Baghdad between CPA MOJ and the civil affairs JAs we began to step on each other’s toes a little less.”) (notes on file with CLAMO).

¹⁴⁰⁶ Other issues of common interest that were handled in a decentralized fashion on a province by province basis included obtaining funding for courthouse reconstruction, replacing legal resources and libraries that had been destroyed by looters, obtaining general operational funds for each courthouse, and devising methods to replace corrupt Ba’athist judges and select new judges.

¹⁴⁰⁷ 358th AAR, *supra* note 26, at 3.

¹⁴⁰⁸ Finn comments, *supra* note 13.

Under Army CA doctrine, CA battalions operate under a CA brigade, which in turn reports to a CA command.¹⁴⁰⁹ Civil Affairs units, including their JAs, are trained and organized to work in a cooperative fashion with various levels of command and to create relationships between civil government organizations, military organizations, and international organizations, where appropriate. Their strength is not in performing the massive task of running a government, but to coordinate the various military and civilian assets necessary for a governmental structure to exist and succeed. Each CA battalion, brigade, and command possesses organic JA assets in the role of international law officers, whose responsibility in times of occupation include restoration of the occupied country's legal institutions

As stated previously, in Iraq several CA battalions were in direct support of the 1st MARDIV in southern Iraq and constituted the GSTs operating under 1st MARDIV control. Treated as standard line units by the U.S. Marine Corps, the CA battalions supporting the Marines were directed to communicate their reports and requests only through formal G-3 channels, causing a lack of inter-province coordination between CA units.¹⁴¹⁰ Accordingly, the strength of the Army CA units, their ability to operate independently to establish relationships, locate human and material resources, and bring organizations together across municipal, provincial, and national levels of government, were hampered in the south by reporting and command channels that did not facilitate this mission.

The ability of the CA JA to control his own reporting channels and to directly influence the structure of command relationships is limited. The lesson learned, however, is that it is critical that the JA voice his or her opinion where command structure and its attendant restrictions are impairing the accomplishment of mission goals. During OIF, once restrictions on direct coordination were removed in July 2003,¹⁴¹¹ brigade and battalion level JAs were able to coordinate common issues across the breadth of southern Iraq, resulting in the same mistakes not occurring in each province. It also opened lines of communication both to and from CPA, enabling needed resources to reach the Ministry of Justice in Baghdad, and the CPA to directly send policy and legal changes through CA channels to the operators on the ground that needed to implement them in a timely fashion.

e. Where Possible, Give Local Persons a Sense of Ownership in Establishing Their Own Representatives and Officials.

¹⁴⁰⁹ FM 41-10, *supra* note 2, para. 4-7.

¹⁴¹⁰ See 358th CA AAR, *supra* note 26, at 3. The USMC's own CAGs are designed to operate at the tactical level for short periods of time. The CA JAs in southern Iraq were required to make all of their reports and recommendations to the 1st MARDIV G-3, who would in turn forward that information deemed important to the I MEF G-3. The I MEF G-3 would then provide any information deemed important to the Commander, 358th CA Brigade, the 304th CA Brigade, or the 308th CA Brigade, and to the G-3 of CJTF-7 (who ideally would report pertinent information to the 352d CA Command).

¹⁴¹¹ In mid-June 2003, the I MEF Commander authorized attached brigade-level CA elements to begin direct coordination with their counterparts in the 352d CACOM in Baghdad and with the battalion level CA operators running the provincial level GSTs for 1st MARDIV. This provided the necessary "bridge" that had been missing in the flow of information concerning the status of the Iraqi courts and other Government institutions in the provinces to reach Baghdad.

When the Coalition Forces entered many regions of Iraq, it was quickly apparent that there was no functioning civil government in place with which to coordinate military administration. A week prior to the initiation of major combat operations, the provincial level Iraqi Government offices had ceased functioning in anticipation of hostilities. Many provincial officials and judges fled to their homes in Basra and Baghdad to ride out the coming conflict. This led to a serious power vacuum within the provinces as the Coalition Forces advanced toward Baghdad and CA units sought to bring even a modest level of governance to the now occupied provinces. Finding anyone in charge above the village level was frustrating.¹⁴¹²

For CA JAs, one of their initial tasks was to begin restoring the Iraqi judicial system. It took several weeks, however, simply to locate the chief judges and administrators of the Iraqi judicial system and convince them to return to their jobs. Many feared retaliation from the local population for prior judgments they had entered under the Ba'ath regime. Others feared that the Coalition might arrest them or impose punishment upon all former Iraqi officials.¹⁴¹³ Once located, CA JAs and others had to vet the judges to ensure it was appropriate to allow them to return to the bench.¹⁴¹⁴

Although different models were used in each province, all had a common trait. In each instance it was the Iraqis from the concerned province who proposed the persons to remain on the bench in their territory or to be appointed to a judgeship for the first time. The choice of models depended on each province's distinct political, tribal, and cultural issues that affected whether the provincial governors, provincial mayors, and chief judges had credibility in the eyes of the local populace. In each instance, a vetting/nominating committee was established with the consent of the Coalition military governor. The members of the committee were chosen as the result of numerous CA interviews with the members of the provincial legal union, tribal leaders, sitting judges, and laypersons of note within the community. From these informal and formal interviews, as well as in cooperation with existing information derived from returning Iraqi expatriates, military governors were able to make an informed choice as to who could be trusted to make an impartial recommendation on who should occupy the judicial positions in the provincial courts.¹⁴¹⁵

Permitting the Iraqis to have a voice in who would be their judges brought significant credibility to the military administrations. Having existed under a rigid socialist system for thirty-five years, where every significant action was dictated from Baghdad,¹⁴¹⁶ the fact that the Coalition provided the people with a voice in their own judicial leadership helped establish that the Coalition intent was to liberate Iraq from oppression, not to merely replace one oppressor with another. Iraqi judges, provincial governors, legal union leaders, and local tribal leaders

¹⁴¹² Finn comment, *supra* note 13.

¹⁴¹³ Legal Assessment of Southern Iraq, 358th Civil Affairs Brigade, Lieutenant Colonel Craig Trebilcock, at 15-16 (Sept. 2003) [hereinafter Southern Iraq Legal Assessment] (on file with CLAMO).

¹⁴¹⁴ See paragraph III.A.1.d. for a thorough discussion of the vetting process for judges as part of the judicial reconstruction mission.

¹⁴¹⁵ Legal Assessment of Southern Iraq, *supra* note 44, at 16-17.

¹⁴¹⁶ Interview with Judge Haithem Jassim Mohound, Al Kut, Iraq (8 Jun. 2003) (notes on file with CLAMO).

expressed amazement and gratitude that the Coalition respected the Iraqis enough to give them a voice in their own governance.¹⁴¹⁷

The early decision to permit the Iraqis a role in selecting their own future leaders helped mold all future interactions with the provincial leaders. Many Iraqis living under the military governors experienced a victorious U.S. military that sought to provide them with authority, support, and respect. This led to a growing spirit of cooperation between new Iraqi officials and the Coalition Forces. Had the Coalition sought to unilaterally select Iraqi judges and ignore Iraqi wishes under a mantle of occupational authority, a much more adversarial tone might well have evolved.

f. Avoid Imposing Western Values that Could Prove Destabilizing.

As the occupying power, the Coalition possessed significant power and influence within Iraq. Despite this great power and influence, it was vital not to overreach and seek to impose Western values and beliefs upon a society not built upon the same traditions. Civil affairs officers are trained to be sensitive to local values and beliefs and yet errors still happen under the well intentioned desire to “make things better.”

Such an occasion occurred in Najaf in September 2003 when the military governor proposed to appoint a woman judge to the bench.¹⁴¹⁸ Saddam Hussein had appointed a handful of women judges during his rule, who served primarily in Baghdad and were responsible for adjudicating inheritance and other family matters that would not put them in direct control over a man and his rights. However, even Saddam’s initiative to place women on the bench had been received in a lukewarm fashion by the Iraqis and it had not been expanded.¹⁴¹⁹

Despite numerous indications that such a proposition was not welcomed by the locals in Najaf, the CPA and the military governor for that Province sought to swear a woman judge onto the bench in the holiest city to Shiite Muslims in September 2003. The attempt was met by a boisterous protest outside the swearing-in ceremony that threatened to result in violence until the last-minute cancellation of the ceremony and her appointment to the bench.¹⁴²⁰ While well intentioned and apparently built upon the belief that the Coalition was seeking greater equality for women, this ceremony alienated the local population and was potentially destabilizing. Fortunately, the military governor realized that he was about to open a Pandora’s box in his province by seeking to impose Western values of gender and political equality for women upon a society that had embraced a concept of a male dominated society for over a thousand years. The battalion commander made the prudent decision to abandon the initiative where the risk was much greater than the potential payoff. The lesson learned is to always remain sensitive when seeking to apply U.S. concepts of equality and justice to a foreign culture.

¹⁴¹⁷ See, e.g., Interview with Governor of Babil Province (Jul. 2003); Interview with the Judge Magistrate, An Nasariyah (18 Apr. 2003); Interview with the Chief Judge in Najaf (2 Jun. 2003 [hereinafter Chief Judge Interview]; Interview with Najaf Legal Union Chairman (Jun. 2003) (notes of the four interviews on file with CLAMO).

¹⁴¹⁸ Interview with Specialist Rachel Roe, Paralegal Specialist, 432d CA Bn (2 Jun. 2003) [hereinafter Roe Interview] (notes on file with CLAMO) Although not a JA, SPC Roe was a Harvard Law School educated attorney who was in charge of administering legal affairs and restoration of the Najaf court system for the Najaf GST.

¹⁴¹⁹ Chief Judge Interview, *supra* note 48.

¹⁴²⁰ Roe Interview, *supra* note 49.

g. Assist the Command in Interfacing with Nongovernmental Organizations and Plan Alternatives In Case Nongovernmental Organizations Withdraw due to the Security Situation.

Among the many hats the CA JA wore during OIF was that of liaison with NGOs and IOs operating in the occupied territory. There is sometimes a conflicted relationship between many NGOs and the military. For example, the NGOs wish to be able to rely upon the intelligence available through military briefings as to the level of stability in a given region, or the location of known dangers, such as mines. Yet those same NGOs often have strong policies against direct cooperation with the Coalition due to the fear of being viewed as an agent of the U.S. Government or military and thereby becoming targets for anti-Coalition attacks. Additionally, by philosophy, many NGOs are against the use of military force as a general principle, but may be working for the same goals as military units in providing humanitarian assistance to stabilize a country.

Civil Affairs JAs found a positive role to play in interfacing with IOs and NGOs through the Humanitarian Operations Center (HOC) established by the Government of Kuwait in Kuwait City to coordinate humanitarian aid to Iraq. The JAs also interfaced with these organizations within Iraq in HACCs (Humanitarian Assistance Coordination Centers) that were established regionally within Iraq.¹⁴²¹

One of the roles that the CA JA played in the HOC was in resolving border crossing issues for IOs and NGOs. Both Coalition and Kuwaiti forces controlled access points from Kuwait into Iraq. The NGOs and IOs could use only certain crossing points for security reasons and were subject to search for those same reasons. This became a potential international issue when United Nations (UN) vehicles driven by local national contractors began to be searched. The UN claimed that their vehicles were exempt from search by the occupying power. Through the timely intervention of CA JA personnel in the HOC, coordination between the UN, Kuwaiti, and U.S. military forces was established which resolved the search issue without the matter becoming a formal protest by the UN against the U.S. Government.¹⁴²² Moreover, on 29 July 2003, Kuwait shut its border completely for a few hours, and only rapid and fervent negotiation kept supplies moving.¹⁴²³

By keeping the avenues of communication with various organizations open, JAs also were able to obtain forewarning as to when the security environment was becoming too hostile for these organizations to continue operations. As CA forces frequently assumed the responsibilities left behind by NGOs that withdrew from Iraq as an insurgency began to develop, having lines of communication with the NGOs provided forewarning for planners that U.S. troops would have to assume additional duties in the near future.¹⁴²⁴

¹⁴²¹ Interview with Captain Frank McGovern, JA, 358th CA Brigade, Al Hillah, Iraq (Jul. 2003) (notes on file with CLAMO)

¹⁴²² O'Hare Interview 2003, *supra* note 33.

¹⁴²³ Finn comments, *supra* note 13.

¹⁴²⁴ Interview with Major Christopher Stockel, CA GST coordinator for An Nasariyah (Jul. 2003) (notes on file with CLAMO)

The legal teams also needed to remain aware of the limitations of NGOs and IOs to operate in a nonpermissive environment. Traditional CA doctrine is to hand off humanitarian assistance missions to IOs, NGOs, and other appropriate authorities at the earliest opportunity, as CA assets are best used as coordinators and liaisons between the military and aid agencies.¹⁴²⁵ The CA units have not traditionally been organized to conduct long term reconstruction work themselves. This doctrine did not apply well to Iraq, however, where an increasing insurgency during the second half of 2003 caused many NGOs and IOs to withdraw operations from Iraq, leaving CA units to fill the gap in services.

Because many NGOs and IOs departed Iraq as the security situation deteriorated, resource-thin CA units began expanding the JA role and missions, including as direct distributors of aid supplies and as security on aid convoys. The lesson is that the continued participation of these organizations cannot be relied upon where the security environment is nonpermissive. Therefore, contingency plans must be in place for the possibility that other organizations will withdraw from the mission.

h. Be Prepared to Perform Other Duties on a Regular Basis, Without Losing Sight of the Primary Mission.

Similar to other JAs, the CA operational lawyer is a jack of all trades for commanders in the field when other staff resources are unavailable.¹⁴²⁶ The challenge for JAs in this situation is to be a valuable resource to the commander, without becoming so sidetracked by collateral civic support missions that the ability to conduct their legal role becomes overwhelmed. The CA JAs had to continuously work to educate commanders as to the best use of JA assets, as the organizational and communication skills that a JA brings to the mission enables him or her to fulfill many different nontraditional lawyer roles that are of great value to a commander.

While being responsive to these demands is important to being a team player within the commander's staff, these other responsibilities can dilute the CA JA's ability to function as a legal advisor and operator. In several instances restoration of functioning Iraqi courts was delayed because the JA responsible for coordination was also responsible for paying Iraqi pensioners, restoring bank operations, and providing security support for convoys. This was in addition to the legal tasks that CA JAs provide for their units, such as initiating Soldier claims for destroyed property, legal assistance, and general military justice advice.¹⁴²⁷

Therefore, CA JAs learned that during full spectrum operations, there will be an endless demand for human resources to accomplish myriad CA missions. To remain effective, the

¹⁴²⁵ JOINT PUB. 3-57, *supra* note 1, at 34.

¹⁴²⁶ In Iraq, for example, CA JAs were used to: act as money agents; run local financial institutions; conduct security missions, including convoy security; coordinate local election activity; stock hospitals with supplies; obtain clean drinking water for Iraqis, coordinate with engineers and contractors to fix sewage systems; fix the refrigeration at a morgue; and lay power lines for emergency power.

¹⁴²⁷ Civil Affairs JAs in the I MEF area were helping to organize elections, divide power between the mayors and other provincial offices, plan spending, help set up banks, provide routine security, and restore the courts/prosecutor's functions. However, they also acted as the JAs for their individual units, processing claims for lost/destroyed personal property, conducting legal assistance, performing reports of survey, and advising commanders on investigations and military justice issues. O'Hare Interview 2003, *supra* note 33.

challenge for the JA in this environment is to keep a focus on the legal mission while remaining multifunctional.

4. Specific Civil Affairs Judge Advocate Lessons Learned From Operation Enduring Freedom.

Civil Affairs JA operations in OEF during 2003-2004 shared certain similarities with those in Iraq, but overall were very distinct in their scope and focus. Issues in common included the use of CA JAs as CA operators to perform missions outside traditional CA JA doctrinal roles; the attempt to provide reconstruction assistance over long distances in an austere and dangerous environment; and the difficulty in obtaining funding to support projects. Nevertheless, CA operations in Afghanistan differed from those in Iraq. Of course, the Coalition was not considered to have occupied Afghanistan under international law and, therefore, did not have the same legal requirements to ensure proper administration of the country. Moreover, in Afghanistan Coalition Forces had direct control over only portions of the country. Finally, Afghanistan's power base was so decentralized that there was no functioning centrally-controlled legal system when Coalition Forces entered the country.

Perhaps the most fundamental difference in CA JA operations between OEF and OIF was that CA units in Iraq were decentralized and tasked out to support the diverse priorities of military commanders throughout Iraq on a provincial level. The CA legal operations in Afghanistan, on the other hand, were originally centralized under the Combined Joint Civil-Military Operations Task Force (CJCMOTF).¹⁴²⁸ The mission of the CJCMOTF in large part was to extend the influence of the Islamic transitional government of Afghanistan beyond Kabul.¹⁴²⁹ During the period covered by this Publication, the Office of the Staff Judge Advocate, OMC-A, was primarily responsible for the rule of law mission.

Based upon lessons learned from the first CA teams in country, the CJCMOTF established Provisional Reconstruction Teams, later to be called Provincial Reconstruction Teams or PRTs,¹⁴³⁰ to provide CA assistance to various regions in Afghanistan. The goal of the PRTs was to provide regional stability through the construction of schools, clinics, and wells. It permitted charitable and international organizations to coordinate their relief efforts with the Afghan national government.¹⁴³¹ The CA JAs played a role in coordinating projects with and within the PRTs.

Accordingly, while CA JAs faced the same challenges in Iraq and Afghanistan in trying to communicate over long distances with poor communications equipment and nonexistent civilian infrastructure, the vertical communication and control between the CJCMOTF and later

¹⁴²⁸ After Action Review Comments, CJCMOTF-Kabul (Colonel H. Allen Irish), at 1 (2004) (on file with CLAMO) [hereinafter CJCMOTF-Kabul AAR].

¹⁴²⁹ Lieutenant Colonel Thomas Berg, US Army, *Judge Puts Down Gavel to Pick Up Command in Afghanistan*, LANDMARKS, College of Agricultural Sciences and Natural Resources, Texas Tech University, at 4 (2004) [hereinafter *Judge Puts Down Gavel*].

¹⁴³⁰ Colonel Robert Borders, US Army, *Provincial Reconstruction Teams in Afghanistan: A Model for Post-Conflict Reconstruction and Development*, JOURNAL OF DEVELOPMENT AND SOCIAL TRANSFORMATION, at 1 (2004).

¹⁴³¹ *Judge Puts Down Gavel*, *supra* note 60, at 5.

the OSJA, OMC-A, and field CA units was more reliable and the lanes of coordination clearer than in the decentralized use of CA in Iraq.

a. Understand the Challenges of the “Lead Nation” Concept for Judicial Reconstruction Efforts and Be Prepared to Work within the Lead Nation Construct.

*There are frequent misconceptions as to the Afghan legal system. While I have frequently heard and read the simplistic phrase, “There is no law or legal system in Afghanistan,” that was not my experience. It is not accurate to state that there is an absence of formal legal and law enforcement institutions in Afghanistan. The Afghan formal legal system and law enforcement system do not function well, but both exist, and both are getting better . . . [m]any . . . judges and prosecutors have in excess of 20 years of legal experience, and have quite sophisticated understandings of their own system and legal tradition, even though they are severely handicapped by the loss of legal materials during the course of 23 years of war and unrest. These Afghan legal professionals clearly believe that they have a legal tradition and a legal system, and would be reluctant to accept foreign innovations that cannot be harmonized with the Afghan legal traditions.*¹⁴³²

The process of establishing the needed foundation for the rule of law in Afghanistan is likely to be much longer than in Iraq. The Afghan justice system and law enforcement suffer from a very low level of human resources and physical infrastructure capacity. In addition, the discontinuity of regimes over the last quarter century has left a patchwork of differing and overlapping laws, and an incoherent collection of societal structures.¹⁴³³

Coalition nations operating in Afghanistan assumed responsibility as “lead nations” for reconstructing certain aspects of the nation’s government pursuant to The Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, otherwise known as the “Bonn Agreement.”¹⁴³⁴ Under this agreement, for example, the United States was the lead nation responsible for assisting the Afghan Government in creating and training an Afghan National Army. The United States established the Office of Military Cooperation-Afghanistan to immediately begin planning for and training the Afghan army. This training mission is described at paragraph III.A.6. Likewise, Germany, who was designated the lead nation responsible for police training, made much progress towards training a capable police force during the time period of this Publication.

Under the Bonn Agreement, Italy was designated the lead nation for establishing a justice system. The Bonn Agreement provided that the Interim Administration was to create, with the assistance of the United Nations (U.N.), a Judicial Commission charged with rebuilding the

¹⁴³² Gordon Lessons Observed, *supra* note 5, para. 6.

¹⁴³³ *Establishing the Rule of Law in Afghanistan*, Special Report 117, United States Institute of Peace, at 2 (March 2004), at www.usip.org/pubs/specialreports/sr117.html [hereinafter *Establishing the Rule of Law in Afghanistan*].

¹⁴³⁴ *Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions*, S.C. Res. 1383, U.N.S.C., 4434th mtg., U.N. Doc. S/2001/1154 (2001) [hereinafter *Bonn Agreement*].

justice system under Islamic principles, international standards, the rule of law, and Afghan legal traditions. President Karzai eventually appointed a working commission in late 2002, designated the “Judicial Reform Commission” (JRC). This commission consisted of twelve members, including two women.¹⁴³⁵ The principle actors for subsequent judicial reform efforts consisted of personnel from the Afghan Government and the international community, to include the Italian Judicial Project (described below), U.N. organizations, U.S. Government Agencies, and NGOs.¹⁴³⁶ The JRC was expected to bridge the gap between the international community and the permanent Afghan legal institutions consisting of the Supreme Court, Ministry of Justice, and the Attorney General’s office.¹⁴³⁷

The OSJA at OMC-A worked closely with the JRC to ensure that the commission was aware of U.S. military activities that might impact judicial reform. More importantly, the JRC was made the official sponsor of a number of projects that the U.S. military initiated. For example, pursuant to CA doctrine, JAs initiated a survey of judicial personnel and infrastructure in the provinces.¹⁴³⁸ Recognizing the importance of having the JRC sponsor judicial initiatives as part of their judicial reform responsibilities, the JAs from OMC-A invited the JRC to participate in the initiative. Ultimately, the survey was conducted under the authority of the JRC, with the participation of the representatives of the Supreme Court, Office of the Attorney General, and the Ministry of Justice. The Italian Justice Project and the U.N. Assistance Mission to Afghanistan also assisted this effort.¹⁴³⁹

In addition, pursuant to its obligations under the Bonn Agreement, Italy established the Italian Justice Project, which they intended to be their main effort to support judicial reform. The SJA, OMC-A worked closely with the Italian Ambassador and the members of the Italian Justice Project to ensure unity of effort,¹⁴⁴⁰ and hosted meetings to plan various projects as part of the Italian Justice Project. These meetings again facilitated the work of many agencies, ensuring a unity of effort in judicial reform projects. In addition, the CA JAs, working with their Italian counterparts, assisted in developing a new interim code of criminal procedure. Initially, the code was not well received, as it was largely developed by the Coalition partners without the involvement of the Afghan institutions.¹⁴⁴¹ Nevertheless, under Italian lead, the CA community began to plan for extending the judicial system with its new criminal code to areas of the country where a court system did not function, beginning with provincial capitals.¹⁴⁴² In addition, CA JAs also performed their traditional facilitator role in collecting, printing, and distributing 1,000 copies of Afghan legal codes to regional governors on behalf of the Ministry of Justice.¹⁴⁴³

¹⁴³⁵ After Action Report, Civil Affairs Judge Advocate, Rule of Law Activities in Afghanistan (12 Nov. 2002 – 12 Nov. 2003), Colonel David Gordon, former SJA, OMC-A, at 2 (27 Apr. 2005) [hereinafter Gordon AAR] (on file with CLAMO).

¹⁴³⁶ U.S. actors included US Agency for International Development and the Department of State. *Id.*

¹⁴³⁷ *Id.* fn 1.

¹⁴³⁸ The survey was originally devised by Colonel Allen Irish, SJA, CJCMOTF and Major Kevin Lanigan, JA, CJCMOTF, prior to November 2002, but they were not able to carry out the survey because of security and other operational constraints. *Id.* at 4.

¹⁴³⁹ *Id.* at 4.

¹⁴⁴⁰ *Id.* at 3.

¹⁴⁴¹ *Establishing the Rule of Law in Afghanistan*, *supra* note 68, at 8.

¹⁴⁴² *Id.*

¹⁴⁴³ *Id.*

One example of the success experienced by the OSJA, OMC-A in coordinating with the Italian Justice Project was the Gardez Rule of Law Project. The OSJA hosted meetings regarding this project, attended by many agencies to include the Department of State's Bureau of International Narcotics and Law Enforcement Affairs, which decided to establish a police training center, and the U.S. Agency for International Development (USAID), which decided to refurbish the existing courthouse. As a result of these meetings, the group identified various issues, such as the need for trained and effective defense counsel, the need for working correctional facilities and personnel, and the need to conduct an information campaign to educate the public about the Gardez project. Pursuant to these identified needs, the working group added representatives of a private volunteer organization that was developing the capacity to train and employ defense counsels and various U.N. representatives attempting to arrange for rebuilding a prison facility in Gardez.¹⁴⁴⁴ By November 2003, USAID and other agencies were working on both court infrastructure and personnel training not only in Gardez, but also in Mazar e Sharif, Kandahar, Bamian, and Kunduz. These projects were ongoing and many were completed by June 2004.¹⁴⁴⁵

By November 2003, international community support shifted from the JRC to the permanent Afghan legal institutions. Nevertheless, during the time period of this Publication, the JRC, supported and paid for by the Italian Justice Project, conducted legal training for 450 judges and prosecutors, and reviewed a number of laws and recommended changes. The Italians also renovated the Court of Appeals building in Kabul. Further, the International Legal Foundations, an NGO, began a defense counsel program under the sponsorship of the MOJ. The property records office in Kabul was renovated by USAID. Finally, the criminal procedure code was developed by the Italians and ultimately signed into law by President Karzai.¹⁴⁴⁶

Although much was accomplished, funding to develop a legal system in Afghanistan was not always readily available and, where available, a lack of coordination between the many competing ministries and other organizations sometimes resulted in the funds not being allocated to projects. For example, of the six million dollars provided by the U.N. for legal development programs during 2003, only five hundred thousand dollars had been allocated to projects as of November 2003.¹⁴⁴⁷

Accordingly, a lessons learned by CA JAs operating in Afghanistan was that designating one country to oversee a particular responsibility in rebuilding a country can prove beneficial if that country is given support in developing a program and is willing to expend the assets and manpower to accomplish the mission. Civil affairs and other JAs must reach out to the lead nation and other organizations to ensure unity of effort. Moreover, JA rule of law projects should be accomplished in coordination with, and under the sponsorship of, the lead nation, if possible.

¹⁴⁴⁴ Gordon AAR, *supra* note 66, at 5. A JA at OMC-A, Lieutenant Colonel Platte Moring, PANG, developed and conducted a for-credit course of study at the Faculty of Law, University of Kabul. He taught legal students the basic skills of interviewing clients, preparing cases for trial, and examining and cross-examining witnesses. *Id.*

¹⁴⁴⁵ Gordon E-mail, *supra* note 9.

¹⁴⁴⁶ *Id.*

¹⁴⁴⁷ *Establishing the Rule of Law in Afghanistan*, *supra* note 64, at 6.

b. Afghan Cultural Challenges and Judicial Concepts Required Significant Predeployment Training.

The mission of the CA JAs deployed to Iraq was to overlay the rule of law and human rights concepts on a centrally controlled legal system, where one of the primary challenges was encouraging judges to operate independent of political agendas and influence. In contrast, the challenge in Afghanistan was to establish the concept of a nation-wide legal system in a country that has been characterized by decentralized tribal authority for centuries.¹⁴⁴⁸ Moreover, the CA JAs had to understand that the Islamic legal tradition of Afghanistan rested on their interpretation of the Koran: the concept that authority to make laws comes from God, not the people, is unfamiliar to military commanders and JAs who have operated under a Western government.¹⁴⁴⁹

The CJCMOTF achieved its mission through the four PRTs, the Civil-Military Coordination Office (CMCOORD), and the Kabul National Impact Team. Civil Affairs JAs played a role in the functioning of each of these entities. The CMCOORD focused its CA mission at the national level. The members coordinate with the national Ministries to train and support them. As explained in the previous subparagraph, the CA JAs played a key role in attempting to meld western concepts of the rule of law into the framework of an Islamic constitution. This work required CA JAs to have an understanding of Islamic traditions and laws. It was also important that they recognized that Afghanistan had a well-established system of informal, traditional justice that could not be ignored.¹⁴⁵⁰

Many JAs and military commanders did not have an understanding or appreciation of the Islamic system in Afghanistan before they redeployed.¹⁴⁵¹ Civil affairs JAs and other U.S. service members who derive their knowledge and value systems from a western, democratic orientation had to understand the Islamic framework to attain credibility with the local people and to avoid imposing views that may undermine the legitimacy of the Coalition presence and mission. Therefore, similar to learning the civil law system to operate effectively in Iraq, JAs must also understand other judicial systems based on religious laws. They must receive comparative law training on these various systems to permit them to provide more timely and accurate advice to their commanders regarding judicial reform and reconstruction.

¹⁴⁴⁸ Colonel Mackie K. Hancock, Commander, CJCMOTF – Kabul, *quoted in Judge Puts Down Gavel*, note 64, at 4 (“[t]here is the overarching issue of trying to extend the influence of the central government in an area of the world where there is no concept of central government.”).

¹⁴⁴⁹ Lieutenant Colonel Vincent Foulk, 19 *Legal Perspectives for Civil-Military Operations in Islamic Countries*, COMBINED ARMS CENTER MILITARY REVIEW (Jan-Feb 2002), at www.leavenworth.army.mil/milrev/English/JANFEB02/foulk.htm [hereinafter *Legal Perspectives for Civil-Military Operations in Islamic Countries*]. According to Colonel David Gordon, former SJA, OMC-A, “All the jurists in Afghanistan I dealt with would have subscribed to the principal that the authority to make laws comes from God—you will find this even in moderate Islamic legal thinking.” Gordon E-mail, *supra* note 9.

¹⁴⁵⁰ Gordon Lessons Observed, *supra* note 5, para. 6. In many instances, judges and prosecutors did not have a great deal of training or access to codified legal materials. Therefore, judges relied on their understanding of the Koran and local customs, also sometimes applying conflicting statutes created during the 1970s, the communist era, or the period of factional conflict prior to the Bonn Agreement. *Id.*

¹⁴⁵¹ See, e.g., E-Mail from Major Anthony Ricci, JA, serving with the Ministry of Justice, CPA, to Lieutenant Colonel Craig Trebilcock, Drilling Individual Mobilization Augmentee, Center for Law and Military Operations (5 Oct. 2004) (“[t]his [training] would save an enormous amount of time and frustration in the post-conflict environment and would allow for our JAG folks to better advise the commanders.”).

c. Civil Affairs Judge Advocates Must Be Prepared to Advise Commanders on Numerous Fiscal Law Issues.

Throughout 2003 and into early 2004, fiscal issues and the use of different funds for various CA missions continued to require CA JA expertise in fiscal law, particularly in the area of humanitarian assistance. Initially, CA JAs manning CMOCs were often involved in the initial review as to whether a proposed civil-military project was sustainable through available funds.¹⁴⁵² However, during the period of this Publication, there were no CA JAs manning CMOCs in Afghanistan.¹⁴⁵³ For a comprehensive discussion of fiscal law issues in both OIF and OEF, see paragraph III.D. of this Publication.

¹⁴⁵² CJCMOTF-Kabul AAR, *supra*, note 59, at 16.

¹⁴⁵³ Gordon E-mail, *supra* note 9.

J. PERSONNEL, TRAINING, AND EQUIPMENT/RESOURCES

*There were significant challenges in our preparation for OIF 2. The most significant challenge was obtaining accurate information necessary for effective deployment of the office. Information changed on a frequent, if not daily, basis. Much of the information received and relied upon was inaccurate. Such information necessary for deployment included, equipment loading requirements; personnel manning of the Joint Manning Document (JMD); training requirements for deployment (weapons qualification, driver's training, individual readiness training); medical requirements; packing lists; CIF draw (dates, lists, and equipment); and rear operations requirements. The changing and fluid nature of the information in these areas made responding to pre-deployment requirements extremely difficult at times. Being prepared for such changes and filtering out inaccurate information will make the pre-deployment process much more efficient.*¹⁴⁵⁴

Full spectrum operations in Afghanistan and Iraq in support of Operation ENDURING FREEDOM (OEF) and Operation IRAQI FREEDOM (OIF) introduced additional lessons learned in the field of personnel, training, and equipment. Although legal teams continued to encounter many of the same issues in these areas that are addressed in Volume I of this Publication,¹⁴⁵⁵ they also confronted additional issues in maintaining a deployed legal office for one year or longer, and in transferring the legal mission upon redeployment.

1. Personnel.

a. Ensure Experienced and Sufficient Personnel Remain at Home Station to Continue Garrison Legal Operations.

During deployments in support of OEF and OIF, legal teams routinely commented that rear-detachment operations must be made a priority when preparing to deploy. The Office of the Staff Judge Advocate (OSJA) at III Corps prepared a staff analysis to determine the minimum number of persons—including officers, legal administrators, paralegals, and civilians—required to maintain rear operations. Such an analysis assists the OSJA in deciding whether to request Reserve Component (RC) legal assets to backfill garrison operations. From this baseline, they then prepared a memorandum to Forces Command identifying rear operational needs. This memorandum was separate from their request for Reserve Component legal personnel to fill the Joint Manning Document (JMD) for the OSJA, Combined Joint Task Force Seven (CJTF-

¹⁴⁵⁴ Memorandum, Office of the Staff Judge Advocate, III Corps, for Center for Law and Military Operations, the Judge Advocate General's Legal Center and School, subject: III Corps, OSJA Pre-deployment AAR, para. 1.b. (3 Mar. 2004) [hereinafter III Corps Memorandum] (on file with CLAMO).

¹⁴⁵⁵ See CENTER FOR LAW AND MILITARY OPERATIONS, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, VOLUME I: MAJOR COMBAT OPERATIONS, para. III.J. (11 September 2001 – 1 May 2003) (1 Aug. 2004) [hereinafter Volume I, Afghanistan and Iraq Legal Lessons Learned].

7).¹⁴⁵⁶ Those legal offices requesting RC personnel found that this can sometimes be a long process, as discovered by the OSJA leadership at V Corps, for example, who began requesting RC personnel in December 2002; the first RC legal assets did not arrive in V Corps pursuant to that request until May 2003.¹⁴⁵⁷ Further, once these RC assets are identified, the OSJA must prepare for their arrival just as they would for any incoming personnel. For instance, a sponsor should be appointed to ensure their smooth transition into the office.¹⁴⁵⁸

Many legal teams recommended that the OSJA leave behind experienced personnel to assist the new OSJA leadership. The Staff Judge Advocate, 4th Infantry Division, for example, left behind an experienced major to take care of pending legal actions.¹⁴⁵⁹ Not only can these experienced legal personnel provide invaluable institutional knowledge to the new OSJA leadership, but they should act as a conduit between the new leadership and family members who may be unfamiliar with new personnel.

In addition, if RC personnel are to backfill garrison operations, they should have a habitual training relationship with their active component counterparts.¹⁴⁶⁰ These RC personnel must learn office systems, to include case management systems, and become comfortable with them prior to the deployment.¹⁴⁶¹ Moreover, OSJAs should strive to adopt the rear-detachment structure as early as possible so that the leadership can answer questions and assist while the new personnel are settling into their positions. For example, the OSJA, 1st Infantry Division recommended that the SJA should take the rear-detachment SJA to appointments with the commanding general to observe the

¹⁴⁵⁶ The purpose of this memorandum was to give as much advanced notice as possible to FORSCOM and the Personnel, Planning, and Training Office, OTJAG, that they would require Reserve augmentation to perform rear operations. The memorandum also served notice that personnel requirements could change once the Joint Manning Document was completed. III Corps Memorandum, *supra* note 1, para. 3.b.

¹⁴⁵⁷ Major Juan A. Pyfrom, Round Table Discussion, Transcript of After Action Review Conference, Office of the Staff Judge Advocate, V Corps, and the Center for Law and Military Operations, Heidelberg, Germany, at 21 (17-19 May 2004) [hereinafter Round Table Discussion] (on file with CLAMO). *See also* Lieutenant Colonel Richard C. Gross, Deputy Staff Judge Advocate, V Corp, After Action Review Conference, Office of the Staff Judge Advocate, V Corps, notes (17-19 May 2004) [hereinafter Gross Interview] (commenting that the RC legal personnel who assisted the garrison legal offices at V Corps through contingency temporary tours of active duty (COTTDADs) were invaluable) (notes on file with CLAMO).

¹⁴⁵⁸ *See, e.g.*, After Action Review Conference, Office of the Staff Judge Advocate, 1st Armored Division, with the Center for Law and Military Operations, in Wiesbaden, Germany, Rear Detachment Legal Operations notes (13-14 Dec. 2004) [hereinafter 1AD AAR] (providing that once RC personnel were identified a sponsor was appointed and a welcome packet forwarded to the personnel) (on file with CLAMO).

¹⁴⁵⁹ After Action Review Conference, Office of the Staff Judge Advocate, 4th Infantry Division, and the Center for Law and Military Operations, at Fort Hood, Tx., at 1 (8 Sept. 2004) [hereinafter 4ID AAR] (notes on file with CLAMO).

¹⁴⁶⁰ *See, e.g., id.* 1; After Action Review Conference, Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), and the Center for Law and Military Operations, in Fort Campbell, Ky., at 4 (21 Oct. 2004) [hereinafter 101st ABN DIV AAR Conference] (notes on file with CLAMO).

¹⁴⁶¹ 101st ABN DIV AAR Conference, *supra* note 7, at 4 (providing that the total number of cases and actions actually increased after the Division deployed, including 1,000 personnel claims that the deployed claims office sent to the rear for processing).

relationship and manner of presenting actions to the convening authority. Moreover, the deputy SJA and other branch chiefs must ensure that personnel assuming their duties meet the primary staff members and commanders whom they will support.¹⁴⁶² Also, the stay-behind OSJA leadership must be trained on staff processes, as some units reported that once personnel deployed, the rear detachments suffered a breakdown in staff processes, with various staff sections taking actions directly to the commanding general without coordination with other staff sections, including the SJA office.¹⁴⁶³

Further, to ensure proper leadership in the garrison office, the active component leadership should consider integrating the RC leaders into the rating chain for all legal personnel at home station—both active duty and Reserve. This will facilitate a clear chain of command and ensure that the Reserve OSJA leadership is unmistakably established.¹⁴⁶⁴

Deploying OSJAs must also consider the physical facility that the stay-behind personnel will inherit. Those deploying should remove their personal items from their offices and leave their office keys. This will allow replacement personnel to more easily occupy office space and conduct their legal mission.¹⁴⁶⁵

Once deployed, OSJAs reported that they routinely consulted and coordinated with their rear detachment. For example, service members who missed movement had to be deployed; injured personnel had to be medically evacuated and then redeployed in some instances; witnesses at home station courts-martial had to be sent back for trial; and separation in lieu of courts-martial cases had to be returned to home station for further processing.¹⁴⁶⁶ All of these cases required extensive coordination with the garrison SJA office. In addition, legal teams reported that it was imperative that deployed OSJAs keep the garrison office informed of the latest Soldier redeployments. Garrison offices must make it a top priority to ensure that family members are notified when service members will return and to ensure an OSJA representative meets the service member when he or she arrives home.¹⁴⁶⁷

Given the above, SJAs learned that they must leave behind a robust legal office to handle myriad rear detachment legal issues and assist the forward deployed legal team.

¹⁴⁶² Office of the Staff Judge Advocate, 1st Infantry Division, After Action Report Iraq (Mar/Apr/May), at 5 (May 2004) [hereinafter 1ID 1st Quarter AAR] (on file with CLAMO).

¹⁴⁶³ See, e.g., Gross Interview, *supra* note 4.

¹⁴⁶⁴ Operation Iraqi Freedom (OIF) After Action Review (AAR), Office of the Staff Judge Advocate, 101st Airborne Division (Air Assault), at 89 (24 Sep. 2004) [hereinafter 101st ABN DIV AAR] (on file with CLAMO).

¹⁴⁶⁵ 1AD AAR, *supra* note 5, Rear Detachment Legal Operations notes.

¹⁴⁶⁶ 1ID 1st Quarter AAR, *supra* note 9, at 14.

¹⁴⁶⁷ 1AD, for example, was notified that they would be extended in theater for three months beyond their original twelve month deployment. Several 1AD OSJA personnel had already redeployed to home station when the notification was received and had to be called off leave to return to Iraq. Moreover, the garrison legal office took on the task of calling all 1AD legal personnel family members and informing them of the extension so that they would not have to hear it through rumor or from the media. 1AD AAR, *supra* note 5, Rear Detachment Legal Operations.

This may be a particular problem for Reserve organizations and headquarters that may not be staffed to support numerous activated RC personnel.

b. Legal Teams Notified For Deployments Must Begin Coordinating the Transfer of Legal Office Authority in Theater as Soon as Possible.

*Conduct a deliberate, systematic relief with the unit that you replace. Demand an accurate and complete accounting of all their “due outs” to higher headquarters and to local claimants. . . . Get into the weeds of the files and SOPs [standard operating procedures] for the unit replaced. Plan the agenda for the battle hand-off before you get there.*¹⁴⁶⁸

As legal offices approached their redeployment dates, and new legal teams were selected to replace them, it was imperative that the deploying legal personnel begin coordinating the transfer of the legal mission as soon as possible. The OSJA at III Corps, for example, attempted to establish a good communications link with the OSJA, CJTF-7 in Iraq who they would replace. They found that it was imperative that there be a JA representative on the pre-deployment site survey (PDSS) conducted by the unit. Having a JA visit the legal team they will replace is critical in gaining deployment information to effect a well-organized transition. This allows the JA to get read-in on all pending legal actions and understand the UCMJ jurisdictional alignment, among other issues. If a JA is unable to travel into theater on a PDSS, the legal team should look for other ways to get a JA into theater.¹⁴⁶⁹

Through coordination with the legal team in theater, the OSJA found that they were better able to devise a training schedule tailored to their specific mission.¹⁴⁷⁰ Additionally, the legal team leadership must ensure that all database information is transferred to the incoming legal personnel. As one legal office discovered, “[h]andover of database materials is just as, if not more, crucial than face-to-face RIP [relief in place] activities.”¹⁴⁷¹

c. Deployed Legal Teams Must Set their Replacements Up for Success.

Be ready to let go of the mission and give it to the next guy. Let's set them up for success. Let's give them all we've got. Be ready to be criticized, and don't take it personal [sic] because it's not personal. It's just a fresh set of eyes coming to look at this, and they might do things differently, and it's going to be their job, and when it's time to go, go, and be happy you're going.¹⁴⁷²

¹⁴⁶⁸ IID 1st Quarter AAR, *supra* note 9, at 16.

¹⁴⁶⁹ The OSJA, III Corps was not able to get a JA on a III Corps PDSS. Therefore, they looked for other ways to ensure collection of deployment information. Fortunately, a unique opportunity existed to have a III Corps JA representative travel to Iraq when CJTF-7, OSJA sponsored a fiscal law conference. III Corps Memorandum, *supra* note 1, para. 2.c.

¹⁴⁷⁰ *Id.* para. 2.b.

¹⁴⁷¹ IID 1st Quarter AAR, *supra* note 9, at 9.

¹⁴⁷² Captain Ryan Dowdy, Round Table Discussion, *supra* note 4, at 33 (explaining the philosophy of his SJA, Colonel Marc L. Warren, Staff Judge Advocate, V Corps).

Deployed legal teams must manage their office with a view towards handing it over to replacement personnel. When legal teams work on an issue or action they should handle it as though they are preparing it for handover to those who will replace them—organizing it in a way that can be preserved, reproduced, and shown to those coming thereafter. Legal personnel found that this attitude paid dividends, recommending that personnel give to their replacements their hard drives and electronic address books containing the numbers of various individuals who can get things done. Legal personnel also provided their personal legal reviews and other information. This information was absolutely essential to the incoming personnel.¹⁴⁷³

d. In Long Deployments, Consider Rotating Duty Positions.

During long deployments, legal teams found it useful to rotate personnel into different jobs.¹⁴⁷⁴ The V Corps JAs and paralegals found it boosted their morale to be given the opportunity to learn a new job.¹⁴⁷⁵ Similarly, other SJAs reported that they tried to ensure that their personnel switched jobs whenever possible to keep legal personnel fresh. They recommended that personnel job stability must be balanced against personal needs and interests of the deployed legal teams.¹⁴⁷⁶

e. Leaders Must Routinely Visit Legal Teams.

*You can't get things done sitting on your FOBs [forwarding operating bases] all day. It is also boring staring at a computer. Danger is more than a FOB outside of Tikrit—get out there.*¹⁴⁷⁷

¹⁴⁷³ See, e.g., *id.*, Captain Noah V. Malgeri, at 31-32.

¹⁴⁷⁴ As Major Daniel G. Jordan, OSJA, V Corps, commented:

If you keep somebody—because that is shift work, and especially if you're the night shift, that is one of those jobs that can get to you after months of 7 days a week everyday. [Colonel Marc Warren, SJA, V Corps] was very good especially at rotating those people out and into some other job that was equally busy or more busy, but something different, something to keep their minds mentally—it's almost like exercising your brain muscles to keep them in shape because you're not just doing the same thing over and over again. You're actually getting the chance to do something else makes life a little bit easier.

Round Table Discussion, *id.*, at 20.

¹⁴⁷⁵ Captain Noah V. Malgeri, OSJA, V Corps, commented:

If you're doing the same job, I just recommend that one of the techniques that's practiced by JAG managers in this type of environment is to make sure that people are exposed to different circumstances at certain set times. If you're doing for example legal assistance, or anything, if you're the claims guy for 4 months, you're not doing it 5 days a week. You're doing it 7 days a week

Round Table Discussion, *id.*, at 19.

¹⁴⁷⁶ 4ID AAR, *supra* note 6, at 7; After Action Report, Office of the Staff Judge Advocate, 1st Cavalry Division, at 29 (Feb. 2005) [hereinafter 1CAV AAR] (on file with CLAMO).

¹⁴⁷⁷ 1ID 1st Quarter AAR, *supra* note 9, at 17 (referring to one of FOBs in their area of operation named “FOB Danger”).

During 10th Mountain Division's rotation in Afghanistan, the Chief Paralegal Noncommissioned Officer (CPLNCO) recommended that leaders must make routine face-to-face contact with each enlisted paralegal while deployed. This is particularly important because there will be legal teams from nonorganic units, including RC units, whom leaders have not met.¹⁴⁷⁸ The NCO leadership at other units echoed this comment, recommending that the CPLNCO visit all the brigades and battalions where paralegals are embedded to ensure the paralegals are properly trained and know their technical chain of command.¹⁴⁷⁹

f. Ensure Individual Replacements are Ready to Deploy at a Moments Notice.

During both OEF and OIF, legal teams found it necessary to reach back to home station for additional personnel to deploy forward. Whether it was to replace a service member who left theater because of injury or other emergency, or simply for additional support for the growing legal mission, legal teams had to ensure that those who remained at home station were prepared for immediate deployment. The 10th Mountain Division OSJA, for example, originally planned for a six month deployment to Afghanistan, but remained in theater for one year. They recommended that future legal teams plan for extended rotations and develop a strawman for manning rotations during long deployments.¹⁴⁸⁰

Additional problems may arise if a RC legal team member must redeploy. For National Guard JAGC personnel, for example, a request is made through their command channels to the state military department. In some states, however, the OSJA may discover that all or most of the Army National Guard JAs are either already deployed or are in a Title 32 Army Guard and Reserve (AGR) status. If the state does not have an available replacement, the state then forwards the request to the National Guard Bureau in Washington, D.C. Thus, replacing these Soldiers can be very time consuming and legal teams must plan accordingly.¹⁴⁸¹

g. Prior to Deployment, Ensure Personnel are Identified and Appointed to Perform Various Legal Missions.

As legal teams prepared to deploy, they had to consider whether both the rear detachment and forward deployed OSJAs contained personnel properly appointed to perform certain functions for the offices. These duties included military magistrates, victim/witness liaisons, field ordering officers and paying agents, and special assistant

¹⁴⁷⁸ After Action Review Conference, Office of the Staff Judge Advocate, 10th Mountain Division, and the Center for Law and Military Operations, in Fort Drum, N.Y., Power Point Presentation (17 Jun. 2004) [hereinafter 10th MNT DIV AAR] (on file with CLAMO).

¹⁴⁷⁹ 4ID AAR, *supra* note 6, at 7; 1AD AAR, *supra* note 5.

¹⁴⁸⁰ 10th MNT DIV AAR, *supra* note 25, at 6.

¹⁴⁸¹ See, e.g., 1CAV AAR, *supra* note 23, at 54 (providing that all branch qualified company grade JAs in the Arkansas Army National Guard were deployed with the 39th BCT in support of OIF; moreover, if the 39th BCT had to request a replacement it would be difficult because all field grade JAs in the Arkansas Army National Guard below the grade of colonel were currently in a Title 10 or Title 32 AGR status).

U.S. attorneys (SAUSAs). In addition, it was imperative that the OSJA leadership coordinate early with the Trial Defense Service (TDS) to ensure defense counsel support during the deployment.

1. Appoint Victim/Witness Liaisons Prior to Deployment.

The legal team must consider who will perform victim/witness liaison duties both in garrison and while deployed. Often, civilian personnel perform these duties at home station and, therefore, the SJA must appoint additional victim/witness liaisons from within the ranks of those who will deploy. Deployed legal teams reported that they assigned JAs, legal administrators, and senior noncommissioned officers (NCOs) to perform these duties. Moreover, the number of victim/witness liaisons that were needed depended on many variables, to include whether unit personnel were located in close proximity to the headquarters and the security situation in their area of operation. In addition, legal teams often appointed additional victim/witness liaisons, if necessary, once they deployed.¹⁴⁸²

Fourth Infantry Division, for instance, appointed two victim/witness liaisons: one captain and one legal administrator. The focus of their duties was on service member sexual assault victims.¹⁴⁸³ First Cavalry Division OSJA designated their legal assistance attorney as the Division liaison and had three additional JAs who were located with brigade combat teams assigned as victim/witness liaisons, as well. These individuals were trained prior to deployment.¹⁴⁸⁴ Additionally, the OSJA, 1st Infantry Division, appointed ten legal personnel as victim/witness liaisons. The large number of victim/witness liaisons was necessary because units operated on numerous FOBs and the security situation made it very difficult to travel between these FOBs.¹⁴⁸⁵

Legal teams also need to consider whether they have the assets to provide victim/witness liaison assistance to foreign nationals. First Infantry Division reported that they had the contacts in place through the Iraqi legal community to have a local national appointed as the victim/witness liaison.¹⁴⁸⁶

2. Consider Appointing a Field Ordering Officer and Paying Agent.

¹⁴⁸² The victim/witness liaison coordinator for 1st Infantry Division, for example, reported that it was very easy to appoint additional liaisons, once the need was identified. E-mail from Captain Zahid N. Quraishi, Office of the Staff Judge Advocate, 1st Infantry Division, to Lieutenant Colonel Pamela M. Stahl, Director, Center for Law and Military Operations (8 Sept. 2004) [hereinafter Quraishi E-mail] (on file with CLAMO).

¹⁴⁸³ 4ID AAR, *supra* note 6, at 5 (also noting that victim/witness liaison duties took a significant amount of time and that it was difficult to provide services to other FOBs because of security concerns).

¹⁴⁸⁴ See Memorandum, Multi-National Corps-Iraq (III Corps), to Director, Center for Law and Military Operations, The Judge Advocate General's Legal Center and School, subject: Victim Witness Programs in the Iraqi Theater, para. 6 (28 Sept. 2004); E-mail from Lieutenant Colonel Christopher J. O'Brien, Staff Judge Advocate, 1st Cavalry Division, to Lieutenant Colonel Pamela M. Stahl, Director, Center for Law and Military Operations (8 Sept. 2004) (on file with CLAMO).

¹⁴⁸⁵ Quraishi E-mail, *supra* note 29.

¹⁴⁸⁶ *Id.*

As stability and support operations began and deployments stretched beyond a few months, OSJAs found it necessary to replenish supplies. Virtually every OSJA recommended that the legal office train and appoint a Field Ordering Officer (FOO) and/or paying agent.¹⁴⁸⁷ Legal teams routinely commented that it would have been very difficult, if not impossible, to quickly replenish supplies without access to a FOO and paying agent. The OSJA at III Corps recommended that a FOO and paying agent should be designated and provided the necessary training as soon as the notice of deployment is received, if not earlier.¹⁴⁸⁸ The 101st Airborne Division (Air Assault), for example, had a paralegal appointed as a paying agent. Although this Soldier was lost to the office on many occasions when he was required to go on purchasing trips, the office found that the “easy access to FOO operations and funds more than makes up for the loss.”¹⁴⁸⁹ A copy of a FOO appointment order is at Appendix J-1. A copy of a Paying Agent Appointment is at Appendix J-2.

¹⁴⁸⁷ See, e.g., 10th MNT DIV AAR, *supra* note 25, at 6. The field ordering officer is generally defined as follows.

(c) When justified, the chief of the contracting office may appoint a unit member as an ordering officer. The ordering officer acts as an agent (under written direction from the chief of the contracting office) for the supporting contracting office to make local purchases (LP). Ordering officers are normally nominated by commanders and appointed by the designated HCA [head contracting authority] . . . and trained and supervised by the appointing authority or his designee (the contracting officer).

. . .

(e) Purpose for which ordering officers may be appointed and references as to limitations of their authority are—

- (1) To purchase with imprest funds.
- (2) To purchase over-the-counter and not exceeding \$2,500.00.
- (3) To place unilateral delivery orders against pre-priced indefinite delivery type supply and service contracts provided such contract terms permit and all orders are placed within the monetary limitations of the contract terms.

U.S. DEP’T OF ARMY, FEDERAL ACQUISITION REG., MANUAL NO. 2 (CONTINGENCY CONTRACTING), App. E, para. E-2 (Nov. 2003).

In contrast, paying agents are appointed by the commander.

The appointment letter shall contain the paying . . . agent’s name, rank or grade, SSN and duty station; the name, rank or grade and station of the DO [disbursing officer] . . . the duties and responsibilities of the agent; a description of the type of payments or currency conversions to be made by the paying agent; the maximum amount of funds to be advanced to the agent; the period of time the appointment covers; and, the agent’s acknowledgement of acceptance of the appointment Appointments may be for a specific transaction, for a specific period of time, or for an indefinite period of time.

U.S. DEP’T OF DEFENSE, REG. 7000.14, DOD FINANCIAL MANAGEMENT REGULATION, Vol. 5, chap. 2, para. 020604 (May 2001).

¹⁴⁸⁸ First Quarter After Action Report, Office of the Staff Judge Advocate, III Corps, Administrative Issues (Jun. 2004) (on file with CLAMO). The OSJA, III Corps noted that the FOO is normally an officer and the paying agent is normally an E-7 or above. They recommended that the FOO and paying agent should attend the required classes, have the orders issued appointing them as the FOO and paying agent and be prepared to start purchasing supplies and equipment as soon as notice of the deployment is received. *Id.*

¹⁴⁸⁹ 101st ABN DIV AAR, *supra* note 11, at 81.

3. If Required, Remember to Request Appointment of a Special Assistant United States Attorney and Train that Individual Prior to Deployment.

Another issue that JA leaders must consider immediately upon notification of deployment is staffing the Special Assistant U.S. Attorney (SAUSA) position. The U.S. Attorney must make these appointments, and the SJA memorandum requesting the appointment may take some time to process. Therefore, if the OSJA plans to deploy their SAUSA and backfill the position with another JA, the memorandum should be completed as soon as possible so that Magistrate's Court is not delayed or disrupted due to the deployment of the only SAUSA. In addition, if a RC JA will be appointed as the SAUSA, this person should be identified even prior to notification of deployment so that training periods can be used to integrate the RC appointee into the Magistrate Court operation.¹⁴⁹⁰

4. Determine as Early As Possible Which Trial Defense Service Office will Support Units and How the Support will be Provided.

As soon as the legal team is notified of deployment, the JA leadership should contact the Trial Defense Service (TDS) to determine what TDS office and which counsel will support their units and how that support will be provided. One OSJA commented that it took over a month for a decision on which office would support one of their outlying brigades and get a TDS attorney to visit the unit.¹⁴⁹¹ In addition, the legal team must determine prior to deployment what the TDS standard operating procedure will be for seeing clients. For example, will the defense counsel travel to different FOBs for Article 15 counseling or will every service member be required to go to the Division FOB for counseling?¹⁴⁹²

Additionally, paralegal support to TDS must be identified as soon as possible prior to deployment so that these paralegals can begin training on their new mission and be prepared to quickly assimilate into the TDS operation once they arrive in sector. Moreover, if TDS RC augmentees will be mobilized and deployed in support of the mission, they must receive their orders well in advance of their deployment to ensure they can deploy with the unit they will be supporting.¹⁴⁹³

h. Prepare to Manage Routine Personnel Actions While Deployed.

As in garrison, legal teams must be prepared to process personnel actions, such as awards, officer and noncommissioned officer evaluations, travel requests, and applications for conditional voluntary indefinite and voluntary indefinite status.¹⁴⁹⁴ One

¹⁴⁹⁰ *Id.* at 90.

¹⁴⁹¹ IID 1st Quarter AAR, *supra* note 9, at 11.

¹⁴⁹² *Id.*

¹⁴⁹³ *Id.*

¹⁴⁹⁴ Chief Warrant Officer Three Samuel V. Manickan, Transcript of After Action Review Conference, Office of the Staff Judge Advocate, V Corps, and the Center for Law and Military Operations, Heidelberg, Germany, at 7 (17-19 May 2004) [hereinafter Manickan Transcript] (copy on file with CLAMO).

OSJA recommended that all noncommissioned officer evaluation reports should be closed out two months prior to deployment and a new rating chain established.¹⁴⁹⁵

i. Leaders Must Take Care of Their Soldiers.

In particular during the long deployments in support of OEF and OIF, JAGC leaders had to monitor the morale and welfare of their subordinates. Leaders must ensure that their service members have the proper training, equipment, supplies, and life support to perform their missions. They should routinely talk with each individual service member and keep the lines of communication open. Leaders must ensure that service members are getting sufficient sleep; they also should ensure that the mail is picked up every day and be aware of who is not receiving mail. Senior NCOs must also take care to ensure service members receive only their fair share of unit taskings. Service members reported that guard duty was very stressful and that leaders should ensure that service members are not required to work during the day if they are pulling an all-night guard shift. Moreover, NCOs should check on their service members performing these extra duties, ensuring that they have sufficient water, food, and sleep.¹⁴⁹⁶

Additionally, leaders need to monitor service member movement in and out of theater. Senior NCOs must have a plan for reception of service members moving into theater. These service members should be picked up at the reception station and briefed on their mission. Although this sounds easy, it was not. The CPLNCO for 1st Armored Division, for example, spent many hours on the phone coordinating with individuals who could track the progress of service members traveling to the theater of operations. It was imperative that he keep in constant contact with the garrison OSJA so that they could tell him when the service member deployed. Similarly, deployed JA leaders must ensure that the garrison OSJA knows when a service member is returning to home station. That way, the OSJA can coordinate for family members to be present upon the service member's return and that a representative from the OSJA is there to receive the service member.¹⁴⁹⁷

Reserve Component Soldiers need particular care after they return to the United States. Once these Soldiers return to home station from their demobilization sites in the United States, they are given very little time before leaving active duty. The 39th Brigade Combat Team (BCT), for example, had seven days with their unit after returning to Arkansas before leaving active duty. This does not give leaders much time to observe their Soldiers that may need special attention.¹⁴⁹⁸ Leaders should also consider asking their command to allow key individuals from the OSJA to remain in an active duty status to assist with legal issues that may unexpectedly arise. The 39th BCT SJA requested that one JA captain be left in a Title 10 status, for example, to handle Soldier personnel claims for property damaged during the deployment. Additionally, JAs in a Title 10 status may

¹⁴⁹⁵ IID 1st Quarter AAR, *supra* note 9, at 11.

¹⁴⁹⁶ IAD AAR, *supra* note 5 (comments by Specialist Marvin Gibson).

¹⁴⁹⁷ *Id.*

¹⁴⁹⁸ ICAV AAR, *supra* note 23, at 61.

be needed to assist in the prosecution of UCMJ actions that are still pending from the deployment.¹⁴⁹⁹

Leaders also must make sure that family members are kept informed. Several OSJAs used newsletters to keep family members informed of their mission.¹⁵⁰⁰ Moreover, leaders should ensure that service members have the opportunity to keep in contact with their family members by giving them access to e-mail for personal correspondence and allowing them the time to make use of available video teleconferencing and telephones. Further, a family member should be appointed as a liaison to other family members in the legal office. The liaison can provide an invaluable service by keeping family members informed of the office mission, the welfare of their loved ones, and other information. Leaders must strive to reach out to these family members so that they are provided with needed information. First Armored Division, for instance, appointed a liaison to the family members and hosted potlucks and other social events with them.¹⁵⁰¹

2. Training

a. Appoint a Member of the Legal Team Responsible for Personnel and Office Readiness Immediately after Notification of Deployment and Incorporate Reserve Component Legal Personnel into Training.

Immediately upon notification for deployment, the OSJA leadership must appoint a readiness officer or NCO responsible to ensure personnel readiness and training. First, as the III Corps OSJA learned, legal teams must begin immediate coordination with the unit they are to replace to tailor their training to the mission.¹⁵⁰² The III Corps legal team began conducting a weekly leadership development program (LDP) focused on a wide variety of both legal and operational deployment issues. They also developed a legal seminar designed to present concentrated information regarding legal operations in theater and invited Active and Reserve Component JAs who were preparing to deploy with III Corps. Subject matter experts presented the legal blocks of instruction, including JAs from theater, the Center for Law and Military Operations, and the Battle Command Training Program. Staff Judge Advocates recently returned from deployment also presented their perspectives on deployment operations.¹⁵⁰³

The readiness officer should maintain a checklist of required training and personnel preparation for deployment for the office leaderships' review. A copy of the OSJA, 1st Infantry Division, Individual Training Checklist is at Appendix J-3. In addition, units deploying to OIF reported that they experienced some downtime in Kuwait awaiting arrival of vehicles, equipment, and travel into Iraq. The training officer

¹⁴⁹⁹ *Id.* at 62 (noting that a JA in a Title 32 status cannot adjudicate claims under the Personnel Claims Act or prosecute cases under the UCMJ).

¹⁵⁰⁰ *See, e.g.,* Office of the Staff Judge Advocate, 1st Cavalry Division, Newsletters (on file with CLAMO).

¹⁵⁰¹ IAD AAR, *supra* note 5, Rear Detachment Legal Operations notes.

¹⁵⁰² III Corps Memorandum, *supra* note 1, para. 2.b.

¹⁵⁰³ *Id.*

or NCO should plan for this possibility and prepare a schedule to continue Soldier training during down times. The OSJA leadership should also plan for legal training during this time, thus building their knowledge base and further exercising their systems to ensure they are sound.¹⁵⁰⁴

In addition to individual personnel readiness and training, the readiness officer or NCO should maintain a checklist of tasks required to be completed by the OSJA to ensure the office is prepared to conduct its legal mission during deployment. A copy of the OSJA, 1st Infantry Division, Deployment Readiness Checklist is at Appendix J-4.

Also, the readiness officer or NCO should work with the OSJA's operational law section to plan a JA exercise two to three months prior to the deployment. First Infantry Division, for example, conducted a three-day tactical field exercise during which the office conducted Soldier skill training to include convoy operations, react to contact drills, improvised explosive device identification and reaction, and searching detainees.¹⁵⁰⁵

Finally, the OSJA leadership must not forget other legal teams who will deploy with the OSJA. The OSJA, III Corps noted that, because of the consolidated legal office configuration, a significant number of personnel that they intended to deploy were not on the III Corps Modified Table of Organization and Equipment (MTOE), but were on the MTOEs of separate brigades. This resulted in major training and equipment issues, such as qualifying on their assigned weapon and drawing gear from CIF. They noted that this problem may be resolved by having the adjutant issue orders attaching all deployed JA personnel to the OSJA main office.¹⁵⁰⁶

The OSJA leadership must also ensure that their RC counterparts are trained and ready to deploy. The SJA must immediately ascertain whether RC units will be task organized to his or her unit and search out the RC legal personnel that will be deploying with them. The SJA for the 39th Brigade Combat Team, Arkansas Army National Guard, which deployed with the 1st Cavalry Division, found it invaluable to have worked and trained with the OSJA, 1st Cavalry Division during the pre-deployment period. According to the SJA:

¹⁵⁰⁴ The IID, for example, had each division chief create research issues in their area and assign the problems to attorneys to research. The attorneys then came together at the end of the day and discussed the answers to the issues. Office of the Staff Judge Advocate, 1st Infantry Division, Interim After Action Report, at 7 (Mar. 2004) [hereinafter IID Interim AAR] (on file with CLAMO).

¹⁵⁰⁵ *Id.* at 2. The OSJA, IID provided that:

The service members gained a tremendous amount of confidence in themselves and their NCOs (during the training exercise). Every service member wanted more training of this type. Do not rely on your unit's HHC to provide you the training for your section. Grow your own NCOs that can train your service members on a variety of subjects, from weapons, to first aid, to convoy operations, etc., in addition to all the usual legal skills.

Id. at 2-3.

¹⁵⁰⁶ III Corps Memorandum, *supra* note 1, para. 4.

None of the Judge Advocates of the 39th BOLT ever had much opportunity to work or train with RA Judge Advocates until their mobilization for OIF II. It was the good fortune of the 39th to have the strong commitment and leadership of the SJA and the Judge Advocates of the 1st Cavalry Division that fostered a positive environment for training from the early days of the mobilization at Fort Hood, Texas. It was a huge benefit to be able to establish the beginnings of the working relationship with the 1st Cavalry before the actual deployment.¹⁵⁰⁷

Thus, the SJA recommended that the RC legal teams must begin training and working with the legal team they will deploy with as soon as possible, supported by the U.S. Forces Command, OSJA.¹⁵⁰⁸

b. Soldier Training Does Not Stop Once the Legal Team Arrives in Sector.

Legal teams routinely commented that senior leaders must ensure training is conducted throughout the deployment. If possible, sergeants' time training should continue when deployed.¹⁵⁰⁹ The 1st Infantry Division legal team, for example, suggested that areas of continued training should include HMMWV operation and maintenance and training on computers and software, pluggers and Blue Force Tracker, radio operations, map/grid orientation, weapons familiarization, and combat tactics, techniques and procedures.¹⁵¹⁰ At V Corps and the 82d Airborne Division, legal teams searched buildings; JAs and paralegals found themselves disarming and searching civilians.¹⁵¹¹ To manage this training, a senior NCO with the V Corps OSJA recommended that officers and enlisted Soldiers must train together at home station "so that when we deploy we know who we are, who you have on your left and who you have on the right."¹⁵¹² Training together must then continue throughout the deployment.

In addition to Soldier skills training, senior leaders must ensure that all legal personnel are competent in their duties. Paralegals who deployed to both theaters of operation performed important, complex, and dangerous missions. One paralegal sergeant, for example, performed the daily legal mission for the 1st Armored Division Engineer unit without a co-located JA. Her duties included preparing and briefing the commander at the daily battle update brief.¹⁵¹³ Paralegals were also instrumental in completing the claims mission: working with translators, helping claimants prepare

¹⁵⁰⁷ 1CAV AAR, *supra* note 23, at 53.

¹⁵⁰⁸ *Id.*

¹⁵⁰⁹ 1AD AAR, *supra* note 5 (comments by Specialist Marvin Gates).

¹⁵¹⁰ IID 1st Quarter AAR, *supra* note 9, at 8.

¹⁵¹¹ After Action Review Conference, Office of the Staff Judge Advocate, 82d Airborne Division, and the Center for Law and Military Operations, at Fort Bragg, N.C., at 1 (22 Jun. 2004) [hereinafter 82d Airborne AAR] (notes on file with CLAMO).

¹⁵¹² Round Table Discussion, *supra* note 4, at 1 (comments by SFC Luis Millan).

¹⁵¹³ 1AD AAR, *supra* note 5 (comments by Sergeant Crystal D. Morse). Because the 1AD DIVENG was co-located on the same FOB with the Division headquarters, the DIVENG trial counsel worked out of the OSJA headquarters office and SGT Norse remained at the DIVENG headquarters. As SGT Norse commented, "paralegals need to be able to do everything."

claims, managing crowd control, searching claimants prior to allowing them to enter the claims office, and pulling other security details. Moreover, many paralegals were tasked to manage detainee operations. As one Soldier from the 101st Airborne Division (Air Assault) aptly put it, paralegals must step up and learn their legal duties. Otherwise, the first sergeant will see that they are not doing anything for the OSJA or BOLT and put them on additional details.¹⁵¹⁴ Leaders must ensure that this does not happen.

c. Be Prepared to Train Replacement Soldiers and Routinely Conduct Cross Training of Personnel in Theater.

Once major combat operations were over, the Department of Defense's stop/loss policy was lifted and many deployed legal teams lost experienced service members who were replaced by personnel who were new to the units and, in many cases, new to the military. Many found that these service members were not sufficiently trained prior to deployment to tackle the complex missions in Iraq and Afghanistan, which necessitated a great deal of training once they arrived in theater.¹⁵¹⁵ Not only did they require training on their legal duties, but also on basic Soldier skills such as convoy operations. In addition to these replacement Soldiers, other legal personnel entered the theaters because of an increase in the JA mission once stability and support operations began.

It was imperative that these newly arrived personnel assimilated quickly into the legal team. One method that V Corps found very effective was to have personnel spend some time in the Joint Operations Center (JOC) upon their arrival to gain situational awareness of the mission.¹⁵¹⁶ On the other hand, some found integration difficult when they were immediately posted to the Night Shift in the JOC/TOC, and therefore recommended that legal personnel spend no longer than two months pulling night duty.¹⁵¹⁷ A newly arrived paralegal with the 1st Armored Division also found his initial

¹⁵¹⁴ 101st ABN DIV AAR, *supra* note 11, at 4 (comments by Sergeant Spencer Beatty).

¹⁵¹⁵ See, e.g., 4th ID AAR Conference, *supra* note 6, at 7.

¹⁵¹⁶ Colonel Marc L. Warren, SJA, V Corps, rotated out the battle captains in the JOC.

If you've got an existing operation and you want to get your captain up to speed quickly, night JOC is by far the best. During combat, night JOC is the busiest. That's when all fires are going on. So, during combat, on night JOC you're going to have your absolute best and brightest. Once you get into stability operations, that night JOC position for both the young Judge Advocate or for the NCO, is the greatest place for them to get situational awareness because things happen, but they don't happen that fast as long as they've got somebody they can rely on for information, and so it became my own policy, as the deputy down there, that all my new captains if they were going anywhere near operations were going to go through that night JOC position.

Lieutenant Colonel Jonathan A. Kent, Transcript of After Action Review Conference, Office of the Staff Judge Advocate, V Corps, and the Center for Law and Military Operations, Heidelberg, Germany, at 14 (17-19 May 2004) [hereinafter Kent Transcript] (copy on file with CLAMO).

¹⁵¹⁷ Memorandum, Captain Gray B. Broughton, Office of the Staff Judge Advocate, V Corps, for Major Jonathan A. Kent, Deputy Staff Judge Advocate, V Corps, subject: After Action Report (CPT Broughton) (28 Jan. 2004) (stating that being on the night shift significantly hindered his integration into the office both socially and in involvement in on-going issues and recommending limiting the amount of time spent on the night shift to two months) (on file with CLAMO).

duties in the OSJA's operational law section to be very helpful, as it quickly provided him with the situational awareness he needed to accomplish his mission.¹⁵¹⁸

In addition, legal personnel must be trained to perform other duties within the office. Despite the fact that everyone is fully engaged in their current duties, cross-training has to be continually reinvigorated or it will slowly stop. The 1st Cavalry Division OSJA reported that on any given day they could have four to five Soldiers gone from the office performing other details, such as convoy operations, and other Soldiers had to cover their duties. Cross-training became absolutely vital for the office to keep running smoothly during Soldier absences.¹⁵¹⁹

d. Judge Advocates and Noncommissioned Officers Must Provide Training to Soldiers at the Battalion Level on Legal Issues.

Most BOLTs co-located their battalion paralegals with the BOLT. Nevertheless, if the battalion was located on a different FOB than the brigade, many times the OSJA opted to locate the paralegal with his or her battalion. Additionally, some OSJAs discovered that not all separate battalions deployed with their paralegal.

The tremendous distance between camps and the large area controlled by units often made it difficult for the BOLTs to maintain visibility over legal actions in the companies and battalions when the paralegals were consolidated at the brigade. For example, in those cases where paralegals were not located at the battalions, JAs found it challenging to provide advice to commanders immediately following an incident.¹⁵²⁰ If paralegals are not co-located with their battalions, the JA and senior NCO must identify the service member in the battalion, usually located in the S-1 section, who has been assigned the duties of managing legal actions (and ensure that a service member has been assigned those duties). Once the service member is identified, the BOLT must provide him or her adequate training to ensure legal actions are properly handled.

Given this problem, senior leaders may want to consider leaving the paralegals at their battalions, rather than consolidating them at the brigade. If the JA is considering taking this step, the paralegal must be trained to operate independently. He or she must be able to spot developing legal issues and understand when to notify the Brigade JA of any issues.¹⁵²¹ The paralegals need clear guidance on information requirements and need to locate communications to file reports.¹⁵²² If paralegals are to be located with their battalions, they must be integrated with their unit as soon as possible. Moreover, these

¹⁵¹⁸ 1AD AAR, *supra* note 5 (comments by Specialist Marvin Gibson, who arrived to 1AD out of Advanced Individual Training and was deployed to Iraq three weeks later).

¹⁵¹⁹ 1CAV AAR, *supra* note 23, at 1.

¹⁵²⁰ 101st ABN DIV AAR, *supra* note 11, at 55.

¹⁵²¹ *Id.*; see also Captain Noah V. Malgeri, Transcript of After Action Review Conference, Office of the Staff Judge Advocate, V Corps, and the Center for Law and Military Operations, Heidelberg, Germany, at 18-21 (17-19 May 2004) (commenting that he had paralegals in battalions that were not collocated with the brigade and that he routinely coordinated with these paralegals for reviews of Article 15s and other issues) (on file with CLAMO).

¹⁵²² 82d Airborne AAR, *supra* note 58, at 1.

paralegals must be manifested with their unit, and not with the division legal office or the brigade.¹⁵²³

3. *Equipment and Resources.*

A majority of the equipment and resource issues that legal teams confronted during their deployments to Afghanistan and Iraq were addressed in Volume I of this publication.¹⁵²⁴ Nevertheless, additional lessons were learned in this area once deployed and rear detachment legal teams settled into their new work areas.

a. Ensure Legal Teams have Sufficient Recording Equipment.

Many BOLTs did not deploy with appropriate recording equipment to record Article 32 hearings and administrative separation boards. As the OSJA, 101st Airborne Division (Air Assault) stated:

Borrowing equipment in theater was impractical because of the great distances between the units and the DREAR, plus the OSJA did not deploy with the analog equipment realizing that it would certainly fail in the harsh desert environment. That left the BOLTs to request the sole court reporter to bring her digital recording equipment to their location, or proceed with the hearing using the shorthand recording (stubby pencil) method. Fortunately there is an easy solution. Every BOLT should deploy with an inexpensive digital recording device of its own, either as part of their RDL, or a stand-alone device. This equipment is now fairly inexpensive, and can be used for investigations and evidence preservation outside the Article 32 context, bolstering the argument to the command in favor of its purchase.¹⁵²⁵

¹⁵²³ *Id.*

¹⁵²⁴ Volume I, Afghanistan and Iraq Legal Lessons Learned, *supra* note 2, para. III.J.3.

¹⁵²⁵ 101st ABN DIV AAR, *supra* note 11, at 58.

b. Ensure Reserve Component Automation Compatibility and that Reserve Legal Administrators have Administrator Rights.

Once their active duty counterparts deployed, some RC legal teams discovered that gaining access to the garrison server and e-mail system took an inordinate amount of time, hindering legal operations. The 101st Airborne Division (Air Assault) recommended that Reserve units backfilling installations should send advance party computer personnel to configure computer assets on the installation network. Reserve legal administrators should also secure administrator rights to assist in gaining access to and configuring computers properly.¹⁵²⁶

c. Conduct a Complete Set-Up of Automation Equipment Before Departure.

Legal teams recommended that OSJAs must conduct a complete set-up of automation equipment at least one month prior to deployment. The legal administrator or automation NCO must ensure that all programs are pre-loaded on the hard drives of each Judge Advocate Warfighting System (JAWS).¹⁵²⁷ In addition, at least one OSJA found that the JAWS traveled better in a soft case, and not the hard case generally used to transport the system. The JAWS are ordinarily hand-carried to avoid loss or damage and because many contain classified computers. They found that the hard cases were considered too large to qualify as carry-on luggage, as most carriers pose weight limits, and deploying service members already had a ruck sack, A bag, and personal carry-on items.¹⁵²⁸

¹⁵²⁶ *Id.* at 88.

¹⁵²⁷ *See* IID Interim AAR, *supra* note 51, at 1.

¹⁵²⁸ *Id.* at 2.

APPENDICES

APPENDIX A-1: COALITION PROVISIONAL AUTHORITY FORCES APPREHENSION FORM**COALITION PROVISIONAL AUTHORITY FORCES APPREHENSION FORM**
YELLOW FIELDS MUST BE FILLED IN, IF APPLICABLE, UPON APPREHENSION

<input type="checkbox"/> Offense against Civilian(s) [check one] If "Other" then describe:			
<input type="checkbox"/> Arson (I.P.C. 342)	<input type="checkbox"/> Solicitation of Fornication/Prostitution (I.P.C. 399)	<input type="checkbox"/> Rape/Indecent/Sexual Assaults/Acts (I.P.C. 393-98, 402)	<input type="checkbox"/> Murder (I.P.C. 405)
<input type="checkbox"/> Aggravated Assault/Assault With Intent To Kill (I.P.C. 410)	<input type="checkbox"/> Maiming (I.P.C. 412)	<input type="checkbox"/> Simple Assault (I.P.C. 415)	<input type="checkbox"/> Kidnapping (I.P.C. 421)
<input type="checkbox"/> Burglary or Housebreaking (I.P.C. 428)	<input type="checkbox"/> Extortion/Communicating Threats (I.P.C. 430)	<input type="checkbox"/> Theft (I.P.C. 439)	<input type="checkbox"/> Destruction of Property (I.P.C. 477)
<input type="checkbox"/> Obstructing a Public Highway/Place (I.P.C. 487)	<input type="checkbox"/> Discharging Firearm/ Explosive in City/Town/Village (I.P.C. 495)	<input type="checkbox"/> Riot or Breach of Peace (I.P.C. 495(3))	<input type="checkbox"/> Other
<input type="checkbox"/> Offense against Coalition Forces [check one] If "Other" then describe:			
<input type="checkbox"/> Violation of Curfew	<input type="checkbox"/> Illegal Possession of Weapon	<input type="checkbox"/> Assault/Attack on Coalition Forces	<input type="checkbox"/> Theft of Coalition Force Property
<input type="checkbox"/> Trespass on Military Installation or Facility	<input type="checkbox"/> Photographing/Surveilling Military Installation or Facility	<input type="checkbox"/> Obstructing Performance of Military Mission	<input type="checkbox"/> Other
Apprehending Unit:		Location Grid:	
Date of Incident: (D/M/Y)	Time of Incident:	Date of Report: (D/M/Y)	Time of Report:
/ / to / /	hrs to hrs	/ /	hrs
Detainee # _____		Key Connected Person: <input type="checkbox"/> Victim <input type="checkbox"/> Witness	
Last Name:		Last Name:	
First Name: Given Name:		First Name: Given Name:	
Hair Color:	Scars/Tattoos/Deformities:	Hair Color:	Scars/Tattoos/Deformities:
Eye-Color:	Weight: lb Height: in	Eye-Color:	Weight: lb Height: in
Address:		Address:	
Place of Birth:		Place of Birth:	
Ethn/Tribe/Sect:	Sex: <input type="checkbox"/> M <input type="checkbox"/> F	Ethn/Tribe/Sect:	Sex: <input type="checkbox"/> M <input type="checkbox"/> F
Phone#:	DOB D/M/Y: <input type="checkbox"/> Mobile <input type="checkbox"/> Regular	Phone#:	DOB D/M/Y: <input type="checkbox"/> Mobile <input type="checkbox"/> Regular
<input type="checkbox"/> Passport <input type="checkbox"/> Dr. license <input type="checkbox"/> Other (specify)	<input type="checkbox"/> Passport <input type="checkbox"/> Dr. license <input type="checkbox"/> Other (specify)	<input type="checkbox"/> Passport <input type="checkbox"/> Dr. license <input type="checkbox"/> Other (specify)	<input type="checkbox"/> Passport <input type="checkbox"/> Dr. license <input type="checkbox"/> Other (specify)
Document #:		Document #:	
Total Number of Persons Involved _____ (list names/identifying info on reverse under "Additional Helpful Information")			
<input type="checkbox"/> Vehicle Information Vehicle Number _____ of _____ Vehicle(s)			
Make:	Color:	License No.:	Owner:
Model:	Type:	Plate No.:	Number of People in Vehicle:
Year:	Names of People in Vehicle:		
Contraband/Weapons in Vehicle:			
<input type="checkbox"/> Property/Contraband	<input type="checkbox"/> Weapon	Photo Taken of Suspect with Weapon/Contraband: Yes/ No	
Type:	Model:	Color/Caliber:	
Serial No.:	Quantity:	Make:	Receipt Provided to Owner: Yes/ No
Other Details:		Where Found:	Owner:
Name of Assisting Interpreter:		Email, Phone, or Contact Info:	
Detaining Soldier's Name (Print):		Supervising Officer's Name (Print):	
Last, First MI		Last, First MI	
Signature:		Signature:	
Email:		Email:	
Unit Phone: Date: / /		Unit Phone: Date: / /	

COALITION PROVISIONAL AUTHORITY FORCES APPREHENSION FORM

Why was this person detained?

Who witnessed this person being detained or the reason for detention? Give names, contact numbers, addresses.

LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOLUME II, FULL SPECTRUM
OPERATIONS (2 MAY 2003 TO 30 JUNE 2004)



COALITION PROVISIONAL AUTHORITY FORCES APPREHENSION FORM



Why was this person detained? _____

Who witnessed this person being detained or the reason for detention? Give names, contact numbers, addresses.

How was this person traveling (car, bus, on foot)? _____

Who was with this person? _____

What weapons was this person carrying? _____

What contraband was this person carrying? _____

What other weapons were seized? _____

What other information did you get from this person? _____

Additional Helpful Information: _____

Appendix A-2: IID Judicial Assessment Checklist

FIRST INFANTRY DIVISION JUDICIAL ASSESSMENT CHECKLIST

1) PURPOSE OF THE ASSESSMENT:

- A) Determine functionality of each courthouse with the Kirkuk and As Sulamaniyyah Governments.*
- B) Evaluate physical security measures in place at each courthouse.*
- C) Assess potential project areas within each Government*

2) PREVIOUS WORK DONE:

- A) Physical inspection of 12 courthouses*
- B) Evaluation of Iraqi assessments on remaining courthouses*
- C) Assessment of trial dockets for Kirkuk Government*
- D) Survey of all sitting judges in Kirkuk and As Sulamaniyyah Governments*

3) THECHNIQUES OF EVALUATION

- A) Physical inspections*
- B) Written questionnaires*
- C) Collection existing Iraqi documents*

4) CHALLENGES TO EVALUATION

- A) Physical inspections*
 - 1) The diverse locations and security concerns make personal inspections difficult
 - 2) Coordination with local units to provide PSD
 - 3) Ensuring presence of local judges and office managers
 - 4) Locating outlying courthouses
- B) Written questionnaires*
 - 1) Most Iraqis have difficulty following even explicit instructions on what is being asked and what information is being sought
 - 2) Follow-up questions are seldom responded to
- C) Collection of existing Iraqi documents*
 - 1) Iraqis seldom tell the absolute truth simply
 - 2) Most reports are inaccurate and require independent verification

5) RESULTS OF INITIAL EVALUATION

- A) *The Iraqi courthouses are generally adequate for basic justice requirements*
- B) *Courthouse need improved security of the physical structure*
- C) *Most courthouses do not have modern technological resources (computers, faxes, phones)*
- D) *The Judges ethnicity does not reflect that of the general population*
- E) *Judges are not enforcing the law because*
 - 1) Fear of reprisals from AIF
 - 2) Cases are still being dealt with by tribal leaders
 - 3) Corruption of bias on the part of judges

6) RECCOMENDATIONS

- A) *Incoming JAG should have DOD interpreter who can invest significant time in Judicial Assessment Issues*
- B) *Tracking court dockets is the best way to determine if courts are actually functioning*
- C) *Ensure your interpreter speaks the language of law*

Proposed Check List For Assessments

Name/City:
Owner:
Grid number:
Photograph:
Telephone #:

Judicial pay (did all Judges get the pay raise):

Where are pretrial defendants being detained/ juveniles and females :

Where are post trial defendants being held/ ICS:

Communication with other courts and IPS or ICS:

Court administration/automation requirements (training/maintenance):

Are indigent defendants receiving appointed counsel (if not ,why not) and are indigent counsel being paid and how many lawyers are in the lawyers room:

Judicial training requirements:

Courthouse renovation/construction history and current requirements (ask about plumbing):

Criminal court efficiency/productivity/statistics (obstacles):

Effectiveness of Judicial Counsel's administrative support and concept of an independent judiciary:

Weapons/ source:

Weapons cards:

PSD:

ID:

FPS:

Relationship with the IPS (corruption)/getting defendants to court on time/abuse/quality of the cases)/ visit the jail:

Identify each police station that brings cases to your court:

Bail:

Assess physical security T-wall barriers, metal detectors, IPS, detention cell:

Evaluate the Executions Office, Notary Public and any other office or institution that supports the courts:

Appellate Court Boundaries:

IPCC contact:

Use of your courts for S/W and A/W AND prosecution of cases/ tracking:

TAL/CPA orders:

Legal Gazette:

Staff

- Judges:
- Clerk:
- Property Clerk:
- Bailiffs:
- Court Administrator:
- Secretaries:
- Judicial investigators:
- Prosecutors:

Other needs:

- Office Equipment (copy machine)
- Office Furniture
- Generator
- A/C
- Office Supplies

Miscellaneous:

- Tribal influence
- Sharia'a law
- Arresting witnesses/ victims/ family members

Remarks:

1. SEE IPA notes.

Ministry Slide Criteria

SECURITY

- Judges issued weapons and valid permits
- Judges assigned PSD
- Adequate perimeter barriers and set off at Courthouse
- Male and Female searches at single entry control point
- Metal detectors
- Armed and Trained guards providing 24 hour protection at Courthouse (FPS)

[Detention cell at Courthouse where needed]

RULE OF LAW

AIF intimidation

Excessive Tribal interference

Religious influence

Criminal corruption

Non-compliance with Iraqi law and procedure (to include the TAL and CPA orders)

INFRASTRUCTURE

Courthouses with adequate restrooms, electrical, water, A/C, functional courtroom, furniture, office supply, copy machine, sufficient space and free from trash.

Computers, scanners, printers, appropriate software, continuing IT training and technical support and Internet access

Working telecommunications: landlines and/or cellular telephones

Adequate Vehicles

DOJ INPUT:

APPENDIX A-3: GENEVA CONVENTION STATUS AND RIGHTS

**HEADQUARTERS
COMBINED JOINT TASK FORCE SEVEN
BAGHDAD, IRAQ
APO AE 09303**

Office of the Staff Judge Advocate

Date:

Detainee Name:

ISN:

Internment Facility:

Subject: Notice of Geneva Convention Status and Appellate Rights

1. Geneva Convention Status. This is to notify you of your status and the basis for your current detention. Your status is a Security Internee under the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (GC). The general basis of your detention is

_____.

Your internment is necessary for imperative reasons of security of the Coalition Forces.

2. Appellate Rights. You have the right to appeal your internment under Article 78, GC. If you wish to appeal, submit a written statement of your appeal to the Camp Commander of your internment facility within ten (10) calendar days. Your appeal will then be considered by a Review and Appeal Board designated under Article 78, GC, which is reprinted below.

Pursuant to Article 78, Geneva Convention Relative to the Protection of Civilian Persons, if the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.

Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by said Power.

Protected persons made subject to assigned residence and thus required to leave their homes shall enjoy the full benefit of Article 39 of the present Convention.

Proof of Service

Date of Service:

Served By: _____
(Name / Rank)

DETENTION REVIEW AUTHORITY

NOTICE OF APPEAL

APPENDIX A-3: GENEVA CONVENTION STATUS AND RIGHTS
IN ACCORDANCE WITH ARTICLE 78 OF THE GENEVA CONVENTION

Detainee Name:

ISN:

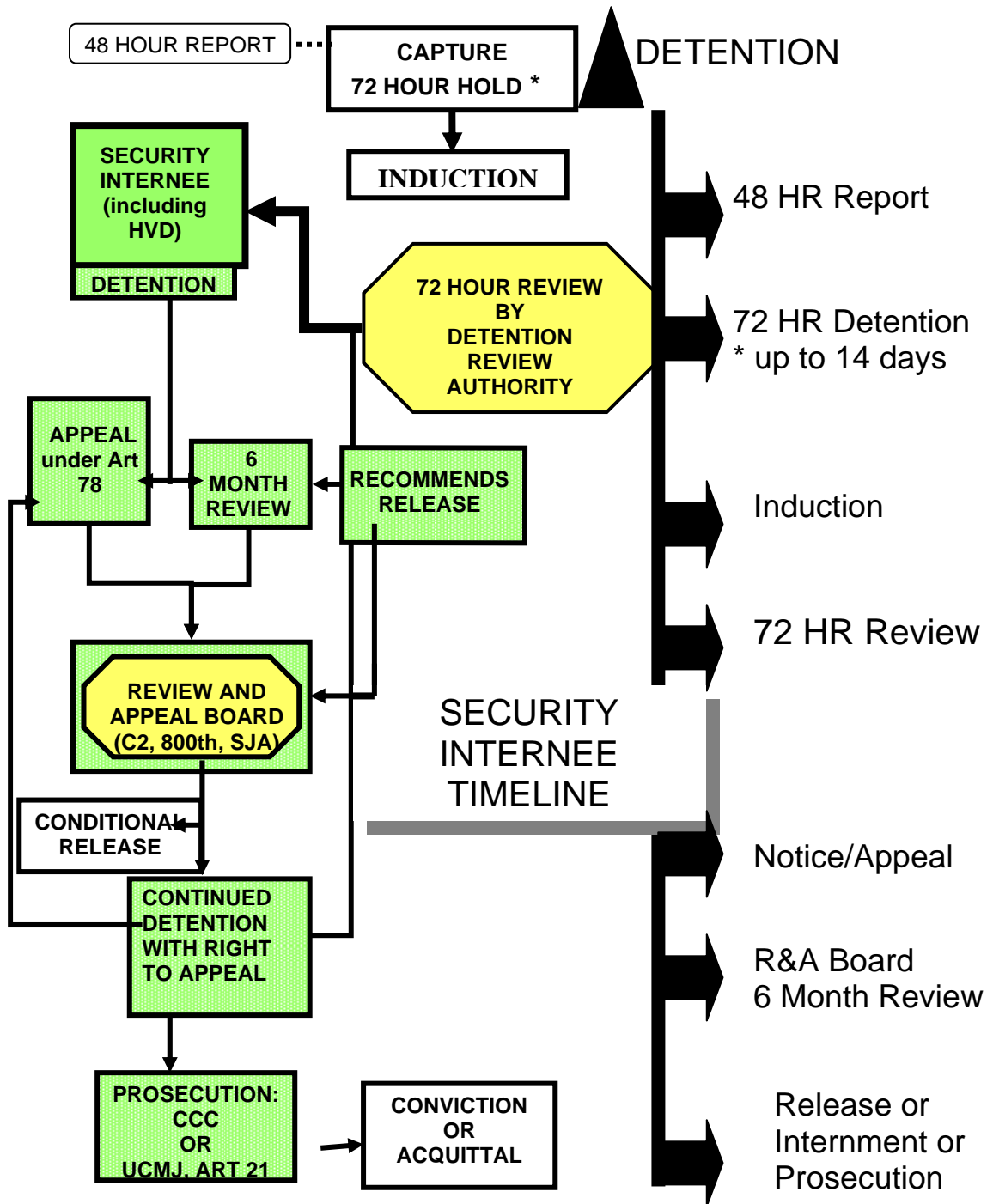
I have read and understand the attached notification of my Geneva Convention status and appellate rights.

- ☐ I hereby waive my right to appeal my internment order. I make this decision freely and voluntarily. I have not been promised, threatened, or coerced into waiving this right.
- ☐ I hereby appeal my internment order. I make this decision freely and voluntarily. By exercising this right, I wish to submit the following written statement for considered by the Article 78, GC, Review and Appeal Board.

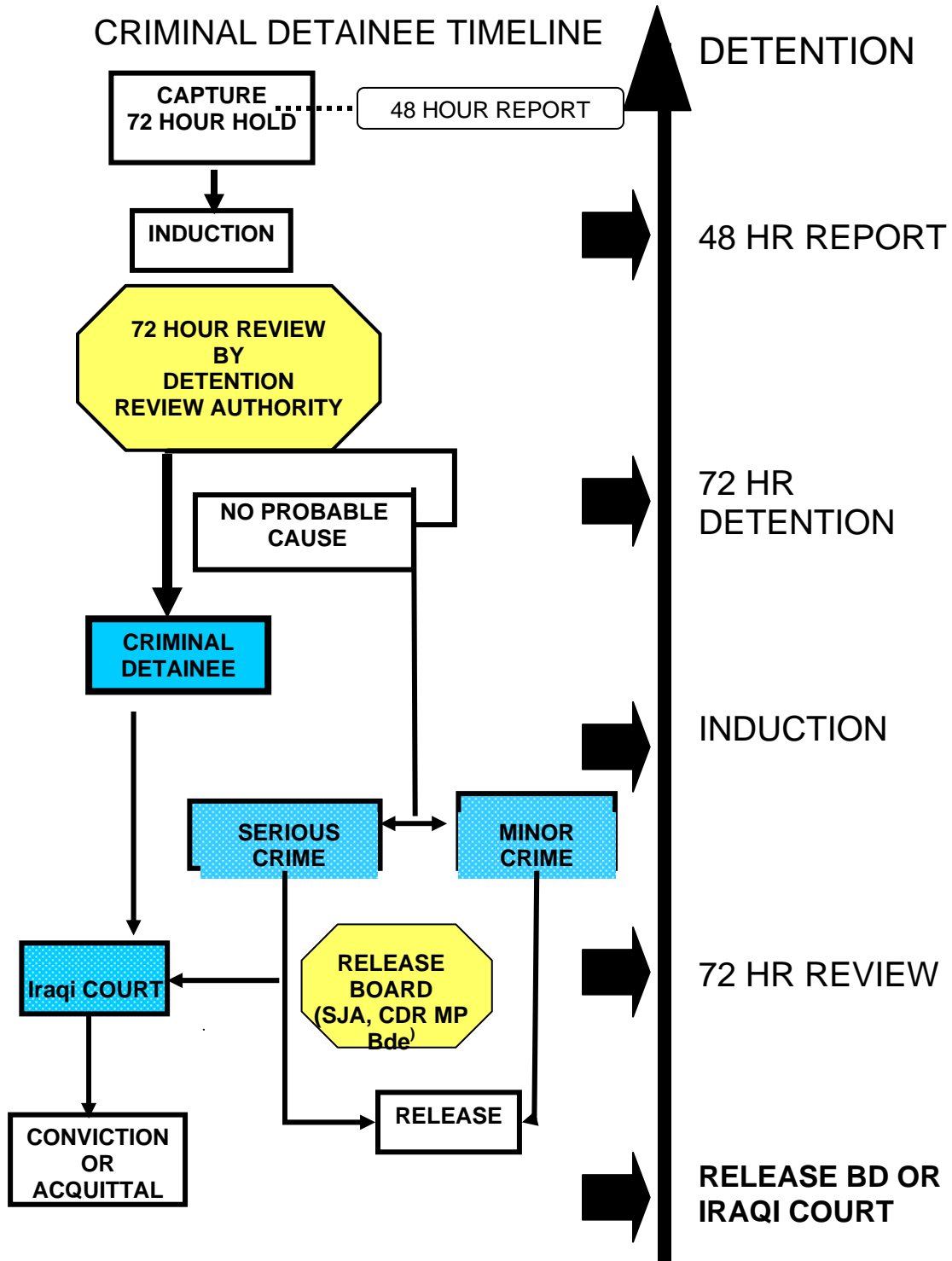
Submitted this _____ day of _____ 200__.

Signature

APPENDIX A-4: SECURITY INTERNEE TIMELINE



APPENDIX A-5: CRIMINAL DETAINEE TIMELINE



APPENDIX A-6: DETAINEE CONDITIONAL RELEASE AGREEMENT

UNCLASSIFIED//For Official Use Only
CONDITIONAL RELEASE AGREEMENT

AGREEMENT OF DETAINEE:

Understanding that I, [REDACTED] was detained on suspicion of involvement in activities that constitute an imperative threat to the stability and security of Iraq, I agree to comply with the following terms as conditions of my release:

1. I disavow and renounce violence. I will not engage in any activities harmful to Iraqi Security Forces, the Iraqi people or Multinational Forces.
2. I will obey the laws of Iraq and all orders and instructions of the Iraqi Interim Government and Multinational Forces.
3. I will cooperate fully with the Iraqi Interim Government and Multinational Forces in serving the people of Iraq, effecting a national reconciliation, and building a stable and secure Iraq.
4. If a Ba'ath Party member, I hereby disavow my membership in the Arab Socialist Renaissance Party of Iraq (Ba'ath Party). I expressly reject and denounce the Ba'ath Party and my previous association with it.
5. Whether or not a Ba'ath Party member, I understand that the Ba'ath Party is disestablished and abolished. I acknowledge that any association with, or involvement in, the Ba'ath Party or any successor organization constitutes a violation of the law.
6. I will not associate with any persons who are planning or engaging in activity harmful to Iraqi Security Forces, Multinational Forces or the Iraqi people, and will promptly report any information on such activity as soon as it becomes known to me.
7. I will cooperate fully in any investigation conducted by Iraqi Security Forces or Multinational Forces and will provide any information requested by them.
8. I will make myself available for questioning by Iraqi Security Forces or Multinational Forces on two hours notice.
9. I will not travel more than _____ kilometers from _____ without permission of my Guarantor.

I understand and acknowledge that any violation of the terms of this agreement shall result in my return to detention and prosecution.

Signed this _____ day of _____, 2004.

[REDACTED]

UNCLASSIFIED//For Official Use Only

AGREEMENT OF GUARANTOR:

Understanding that [REDACTED] has been released to me on the condition of his compliance with the conditions listed above, I give my personal bond that he will comply with the conditions and that I will serve as guarantor of his compliance. I understand that I must report any violation of the conditions of release to Iraqi Security Forces and Multinational Forces and that my failure to do so may result in my detention as a threat to the stability and security of Iraq.

Signed this day of _____, 2004.

[REDACTED]

Page 2 of 2

APPENDIX A-7: TRIBUNAL APPOINTMENT



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
HEADQUARTERS, V CORPS
BAGHDAD, IRAQ
APO AE 09014



**APPOINTMENT OF TRIBUNAL
Convening Order Number 1**

A Tribunal under Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 is hereby convened. It will hear such cases as shall be brought before it pursuant to USCENTCOM Regulation 27-13 and Army Regulation 190-8 without further action of referral or otherwise.

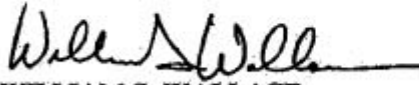
Special Instructions: Any three officers listed below may sit as a tribunal provided that at least one officer is of field grade (O-4) or above. All individuals listed below are U.S. Army officers and Judge Advocates, unless otherwise indicated. Any Judge Advocate listed below may also serve as recorder for any tribunal convened pursuant to this order. The senior member of the tribunal shall be President of the Tribunal.

Effective Date: 10 June 2003 for an indefinite period.

The following commissioned officers are authorized to serve as members of the Tribunal:

LTC [REDACTED]	CPT [REDACTED]
LTC [REDACTED]	CPT [REDACTED]
LTC [REDACTED]	CPT [REDACTED]
CDR [REDACTED]	CPT [REDACTED]
MAJ [REDACTED]	CPT [REDACTED]
MAJ [REDACTED]	CPT [REDACTED]
MAJ [REDACTED]	CPT [REDACTED]
MAJ [REDACTED]	CPT [REDACTED]
MAJ [REDACTED]	CPT [REDACTED]
MAJ [REDACTED]	CPT [REDACTED]
MAJ [REDACTED]	CPT [REDACTED]
MAJ [REDACTED]	CPT [REDACTED]

The following officer is the Reviewing Judge Advocate for any tribunal conducted pursuant to this order: COL Marc L. Warren, SJA, V Corps, CJTF-7.


WILLIAM S. WALLACE
Lieutenant General, USA
Commanding

CF:
Commander, USCENTCOM
Commander, 800th MP BDE

APPENDIX A-8: OSJA IID CHECKLIST

OSJA, FIRST INFANTRY DIVISION CHECKLIST

Name: _____ **Detainee Number:** _____

Date of Detention: _____

1. Were you originally detained by American forces or Iraqi forces?
2. When were you originally detained?
3. What jails have you been detained in?
4. How long were you at each location?
5. Have you received enough food and water at each jail?
6. Have you or another detainee been abused while in a jail, either by a guard or another detainee?
7. Are you permitted to practice your religion at this jail and the other jails?
8. Have you or other detainees been punished for violating the jail rules?
9. What punishments, if any, have you witnessed?
10. How is the medical care at each jail?
11. Was any of your property taken when you were detained? _____
If yes, what was it and do you know where it is now?
12. Do your family members know where you are?
13. Who can you talk to at this jail if you have a question or a problem?
14. Were you given a reason for your detention?
15. Are you required to do any work?

APPENDIX A-9: DETENTION FACILITY VISITS CHECKLIST

Detention Facility Visits Checklist

- 1. Are the facility rules posted in a location where they can be seen by detainee and in Arabic?**
 - 2. Are there daily procedures for the medical care, meals, water, showers, toilet, etc.?**
 - 3. Are there procedures in place for tracking evidence which accompanies the detainee? Is it separately labeled? Secured by person or locking mechanism?**
 - 4. Does in processing including procedures for discovering and reporting potential abuse?**
 - 5. Are detainees received directly from Iraqi Police/Forces and are they immediately checked for prior abuse prior to accepting them into the facility?**
 - 6. Is there a comprehensive SOP which can be referenced by all members of the staff?**
 - 7. Are staff members required to read the SOP? Do they receive training on it and how do you document that they have read the SOP and understand it?**
 - 8. Is the SOP punitive if violated as a violation of the UCMJ? Article 92?**
 - 9. Does the staff know the rules which govern detention operations? FRAGO 329? UNSCR 1546?**
 - 10. Is the staff trained in RUF/ROE? Are any nonlethal measures used to handle disciplinary or other disruptive behavior (i.e., riots, escape)?**
 - 11. Is there a Quick Reaction Force? What are the procedures for communicating with the QRF? Others on the staff?**
 - 12. Is there a distinct separation of responsibilities between MPs and MI?**
 - 13. What happens in an emergency? Is it documented in the SOP?**
 - 14. What is the average stay of a detainee and do they know they procedures to request extensions?**
 - 15. What personal things are detainees provided and what are they allowed to have in their cells? Koran?**
 - 16. How is medical care provided? Who gives daily medication to those detainees which require it?**
 - 17. How are they assigned to cells? Tribe, Age, Relationship? For example, are family members kept together?**
 - 18. Interrogations – are they video taped or recorded? Who is allowed to interrogate? Do they use incentives? Are dogs used? Do they interview High Value Detainees or are they sent to ISG/MI-JIDC? Are there any interrogations at night?**
- Questions, contact MAJ Harris at 822-2500.**
- 11 Sep 04**

APPENDIX A-10: NTC EVIDENCE COLLECTION PROCEDURES**NTC Evidence Collection Procedures**

Background. With the transfer of sovereignty, personnel detained during the conduct of coalition operations in Iraq must be tried and convicted by Iraqi courts. These are criminal hearings requiring certain evidentiary burdens of proof. Personnel detained by coalition forces will only be held and further incarcerated by Iraqi Courts if there is evidence linking the detainees to the crime. While coalition forces often detain personnel for valid reasons, they are later released by the Central Criminal Court of Iraq for lack of evidence linking the detained personnel to the crime.

Procedures. The following procedures will be followed concerning the handling and preservation of evidence taken during the course of military and other operations in order that physical and other evidence recovered will retain its evidentiary value for follow-on criminal prosecutions.

1. **Each tactical unit** conducting an operation **will appoint a single person (evidence custodian)** who will collect, receive, and handle all evidence seized during the operation. This person should be properly trained in evidence handling and preservation procedures. This is the only person who is authorized to receive evidence during an operation. Units may designate additional personnel as evidence custodians; however, only one person will be responsible for receiving evidence during an operation.
2. Evidence must be collected in a common sense manner IOT preserve the relationship between the evidence seized and persons located at the raid site. **The evidence custodian will retain control over the evidence while it is being transported to a secure location.** If a large amount of evidence is anticipated prior to an operation, a pre-raid planning conference should be held with an SJA and Law Enforcement Representative (CID or MP) attending IOT form the procedures for collecting and preserving potential evidence during that raid. The raiding unit will also notify the nearest detention facility receiving the evidence that a large amount of evidence is anticipated.
3. **Once the evidence has reached a secure site, it must be inventoried and labeled.** Each piece of evidence must be marked and identified with an Evidence Label Form (DA Form 4002). If the evidence cannot be marked with an Evidence Label Form, then units will secure the evidence in a sealed container marked for identification by the person sealing the evidence with the date, time, and initials of the person who seized the evidence. After the evidence is marked, it must be listed on a standard Military Chain of Custody Form (DA Form 4137). DA Form 4137 should accompany the evidence at all times. Units must also provide a copy of a bilingual DA Form 4137 to all detainees upon their release. If cash is seized during an operation, the exact amount

must be recorded on a DA Form 4137 and a photograph taken of the cash. Units will record the serial number on all seized firearms. If the firearm does not have a serial number, the firearm will be labeled and photographed identifying the date, location, and detainee from whom the firearm was seized. Upon seizure of an automobile, all contents in the vehicle will be recorded on DA Form 4137 and a photograph of the vehicle and its contents will be taken.

4. A DA Form 4137 must accompany the evidence and a soldier at each stage of the chain of custody must be designated as the evidence custodian and sign for the evidence. The person accepting the evidence at every stage must also conduct an inventory IOT ensure accountability. **Evidence will also accompany the detained person at all times**, except when the evidence is submitted to a forensic lab or for other technical analysis. Should this occur, the custodian of the evidence will maintain an accurate record of the person who signed for the evidence utilizing the DA Form 4137. Upon its return, the evidence must be received back from the laboratory and properly recorded in an evidence log. Coordination must occur with CID IOT submit evidence for testing.

5. The custody of evidence should never pass to a person who is not available to testify in court. Generally, only the first and last person to have control of the evidence is needed to testify in court. Those soldiers designated as evidence custodians will have their testimony preserved as soon as possible by giving testimony before an investigating judge. **When a case is transferred to court, the evidence will be signed for by an appropriate Iraqi law enforcement or judicial officer who will preserve the evidence in the manner that they received it from 52 ID forces.** Statements made by detained persons may be recorded during the course of security questioning and used in court on a case by case basis.

6. Brigade commanders will ensure that a permanent evidence storage facility is established where individuals are physically detained within their AOR, including temporary detainee holding areas within tactical units. One person or unit will be designated as the evidence custodian responsible for properly maintaining the evidence in the storage facility for future court use. At a minimum, an NCO or commissioned officer will serve as the evidence custodian at the storage facility and they must maintain a document register separate from the DA Form 4137 that will chronologically track all movement of evidence from the evidence room.

7. Any claims relating to seized property will not be processed or paid while the criminal case is still active. Once the case has been resolved, all monetary claims for seized property will be processed IAW standard claims procedure. Evidence will be disposed IAW AR 195-5, PARA 2-8.

8. This order contains the minimum standards of evidence procedure and is applicable to all 52 ID forces in Iraq. All units should be made aware of all requirements concerning the preservation of evidence. Any additional order drafted to supplement

this directive must be forwarded to 52 ID SJA-Military Justice, for review prior to release.

9. Units will ensure proper coordination with CID. CID is the primary agency responsible for investigation of war crimes and crimes against 52ID soldiers. Evidence collection, interviews, and site inspections will be conducted in consultation with the 52ID PMO. Criminal charges based on evidence gathered during a raid will be initiated only after the original military/security purpose for that operation has been completed. CID must be notified within 36 hours upon completion of a raid or other operation where a criminal act in CID's purview has been committed and a suspect detained.

10. Evidence handling and collection training will be the responsibility of the SJA Office. CID will provide support in training of evidence handling and collection. Unit level training will be conducted on DA Forms 4002 and 4137. Training should include vignettes and a practical exercise on preparing a chain of custody form.

APPENDIX A-11: CENTCOM AUTHORITY INFO PAPER



FICI-JA

REPLY TO
ATTENTION OF

HEADQUARTERS
MULTI-NATIONAL CORPS - IRAQ
BAGHDAD, IRAQ
APO AE 09342

4 Dec 2004

INFORMATION PAPER

SUBJECT: Procedures to Obtain CENTCOM Authority to Arm DoD Civilians and DoD Government Contractor Employees

1. Government contractor employees and DoD civilians are generally prohibited from carrying weapons within the CENTCOM AOR by General Order No. 1A. Commanders, however, may sponsor a request for exception to policy to arm DoD civilian employees and contractor employees for either personal protection or for contracted security. When requested for contracted security, CENTCOM will not allow such requests where the intent is to guard U.S. or Coalition MSRs, military personnel, military facilities, or military property, including property destined for military use. The incidental presence of U.S. or Coalition military personnel will not invalidate an otherwise suitable request.
2. For organizations subordinate to MNF-I, requests for exception should be submitted through the chain of command to DCDRCENTCOM. MNF-I SJA staffs these actions and provides them to the MNF-I command for recommendation. The action is provided to the CENTCOM for decision. **A request for an exception to the general policy must demonstrate how and why the situation is extraordinary.** Each request for an exception must contain the following information:
 - a. Description of where the person(s) will operate, the anticipated threat, if for contracted security, the non-military property or non-military personnel to be protected, and, if for personal protection, so state;
 - b. Documentation of individual training covering relevant weapons familiarization, Rules for the Use of Force (RUF), distinction between Rules of Engagement (ROE) and RUF, and Law of Armed Conflict (LOAC). The weapon(s) to be used must be identified;
 - c. DD Form 2760 (Qualification to Possess Firearms or Ammunition);
 - d. Written acknowledgement by individual and the employer/contractor of the potential for civil and criminal liability under U.S. and/or Host Nation laws;
 - e. List of names of all personnel requesting authorization. No blanket authorizations for groups, organizations or job specialties are allowed.
3. Personnel may only possess U.S. Government-issued weapons and ammunition. For personal protection, the M9 or equivalent 9mm sidearm is the standard weapon. For security service personnel, the standard weapons are: M9, M4, M16 or equivalent. If a specific justification is articulated, other weapon systems will be considered.
4. POC is OSJA, MNC-I, Administrative Law section, 822-2500.

APPENDIX A-12: JOINT ORDER DISPOSAL OF REFUSE AND GARBAGE

Joint Order Prohibiting the Illegal Disposal of Refuse and Garbage

امر مشترك
تحريم التخلص الغير قانوني للنفايات و المهملات

Recognizing the threat to the public health and safety posed by the illegal dumping and improper disposal of waste products, refuse, and garbage,
الاعتراف بان اغراق السوق بالسلع الغير قانونية او الغير ملائمة والمنتجات التالفة والنفايات هو تهديد للصحة والسلامة العامة

Cognizant of the illegality of such actions and the penalties provided by the Iraqi Penal Code Chapter 3, paragraph 497, 3rd Edition (1969),
العلم بان هذه الاعمال (التصرفات) غير قانونية وعقوباتها مخولة من قبل قانون العقوبات العراقي , الجزء الثالث الفقرة 497 , الطبعة الثالثة (1969) .

Recognizing the responsibilities of the Commander, Coalition Forces Northern Iraq, and the Governor, Mosul City and Ninewah Province, to enforce Coalition Provisional Authority (CPA) Order 7, CPA Memos 1 and 3, and Iraqi Public Health and Criminal laws,
الاعتراف بان قائد قوات التحالف في شمال العراق ومحافظ الموصل ومحافظ نينوى هما المسؤولان عن تطبيق امر سلطة التحالف المؤقتة رقم 7 ومذكرة نفس السلطة رقم 1, 3 وقوانين الجريمة والصحة العامة العراقية .

Determining that the cleanliness of the Province is a responsibility, ultimately, of the citizens of Ninewah Province who determine the conditions in which they live, and
ان نظافة المحافظة هي مسؤولية مواطني المحافظة اللذين يقررون نوعية وظروف الحياة التي يريدون العيش بها .

Pursuant to our authority as Commander, Coalition Forces Northern Iraq, and Governor, Mosul City and Ninewah Province,
وفقا لصلاحياتنا كقائد قوات التحالف في شمال العراق ومحافظ الموصل ومحافظ نينوى

We do hereby Order as follows:
نامر بالتالي :

Section 1 Statement of the Criminal Law to the People of Ninewah Province

القسم الاول
بيان قانون الاجرام لمواطني اقليم نينوى

1) All citizens shall be aware and conform their conduct to all provisions of the Iraqi Penal Code, to include Chapter 3, paragraph 497, 3rd Edition (1969) which prohibits

throwing, placing, disposing or leaving in a street or highway or any public place or park, refuse, rubbish, waste, dirty water, or any thing that is harmful to the health of others.

1- على كل المواطنين ان يعلموا ويتصرفوا بشكل يتماشى مع قانون العقوبات العراقي المتضمن الجزء الثالث الفقرة 497 الطبعة الثالثة لعام (1969) والذي يمنع رمي او وضع او اتلاف او ترك اية نفايات او مياه قذرة او اي شئ يضر بصحة الآخرين في الشوارع او الطرق السريعة او اي مكان عام او حديقة عامة .

2) Any person who violates this law shall be subject to detention for up to 15 days or a monetary fine.

2-اي شخص يخالف هذا القانون يعرض نفسه للتوقيف لمدة 15 يوم او غرامة مالية .

Section 2

Notice to the Police of Ninewah Province

القسم الثاني

مذكرة الى شرطة محافظة نينوى

1) All Police and Coalition Forces are hereby encouraged to aggressively police and enforce the provisions of the Iraqi Penal Code, 3rd Edition (1969) as it pertains to the disposal of wastes.

1- بنانا على ذلك على الشرطة وقوات التحالف ان تطبق المواد الواردة في قانون العقوبات العراقي الطبعة الثالثة (1969) والمتعلقة لعملية التخلص من النفايات .

2) Coalition Forces who detain an individual solely for a violation of the above Iraqi Penal Code section shall transfer custody of the individual to Iraqi authorities as soon as practicable.

2- قوات التحالف التي تعتقل اي شخص بسبب مخالفة القانون السابق الذكر عليه ان يسلموا هذا الشخص الى السلطات العراقية في اقرب فرصة ممكنة.

Executed this ____ day of September 2003.

التوقيع في يوم من اب 2003

DAVID H. PETRAEUS

Major General, US Army

Coalition Forces Commander for Northern Iraq

Governor

Mosul City and Ninewah Province

ديفيد اج باتريوس

اللواء الركن , الجيش الامريكي

غانم البصو

محافظ

الموصل ومحافظة نينوى

قائد قوات التحالف في شمال العراق

APPENDIX A-13: NOTICE TO VACATE PREMISES



REPLY TO
ATTENTION OF:

AFZB-JA-CAL

24 December 2003

NOTICE

Notice is hereby given that you must vacate your home no later than 1 February 2004. The home that you are living in is public property that will be used by the United States Army. Although you have no right, title, or interest in the home that you are living in, the United States Army will give the head of the household four hundred dollars in U.S. currency (\$400.00) so that he or she is able to move their family to a new home. If you remove all trash, sweep and mop the floors, and remove all furnishings in the home before you move, the United States Army will pay the head of the household an additional fifty dollars (\$50.00) in United States Currency. Anyone who still lives in the home on 1 February 2004 will be removed from the home and will not receive any money. On 1 February 2003, the head of the household must go to the south pedestrian gate at the DREAR, Mosul Airfield between 0900 (9:00am) and 1700 (5:00pm) to receive the four hundred dollars (\$400.00) and the additional fifty dollars (\$50.00). You must also bring an identification card to receive payment. The point of contact for this action is Captain Patrick B. Grant, OSJA, DREAR, Mosul Airfield.

JOHN B. SMITH
CPT, JA
Administrative Law Attorney

AFFIDAVIT

I, _____,
being of lawful age do swear or affirm, under oath, to the following:

- a. That I currently occupy a home in Mosul, Iraq, better described as:
- b. That I, my heirs, executors, administrators, legal representatives, successors and assigns, have no right, title or interest in said home;
- c. I understand that I must move out of said home no later than 1 February 2004;
- d. I understand that if I am still occupying said home on 1 February 2004, I will be removed from said home;
- e. My moving out of said home by 1 February 2004 is not conditioned upon any compensation from the United States;
- f. I understand that the United States is under no obligation to compensate me for said property or for moving expenses I incur from moving to a new home;
- g. I understand that any money I receive from the United States is a gift for the purpose of helping me move to a new home;
- h. Although the United States is under no obligation to compensate me, I have received four hundred fifty dollars (\$450.00) in U.S currency as a gift from the United States;
- i. I understand that the United States is not liable to me for all injury, loss, claims or damage to any person or property, arising from, related to, or in connection with the use or occupancy of the Premises or conduct or operation of the United States in or about said home.
- j. I have read this affidavit and the statements contained herein are true to the best of my knowledge.

Further affiant saith not

Date: _____ (Seal)

(Signature of Affiant)

(Printed Name of Affiant)

(Military Notary)

WITH THE ARMED FORCES OF THE UNITED STATES

AT MOSUL, IRAQ

Subscribed, sworn to and acknowledged before me on _____
by _____ the affiant. This acknowledgment is executed
in my capacity as a Commissioned Officer under the authority granted by Title 10, United States Code,
Section 1044a, which also states that no seal is required on this acknowledgment.

SIGNATURE _____ PRINTED NAME _____

MY COMMISSION EXPIRES _____ **RANK/COMPONENT** _____

NDEF AUTH 10USC 1044A _____ **OFFICIAL CAPACITY** _____

APPENDIX A-14: HARVEST APPORTIONMENT MEMO

Date:

To Whom It May Concern:

According to the Joint Arab – Kurd Harvest Agreement signed in the city of Kirkuk, Iraq

on 15 May 2003: All harvested crops will be apportioned as follows: 45% Arab, 45%

Kurd and 10% cost for machinist / harvest

This memorandum allows the land located at _____ to be harvested.

The farmer, _____, will harvest the land claimed by the signatories

below and ensure the harvest is split in accordance with the 15 May 2003 agreement.

This authorization is valid for only this harvest and expires on 01 July 2003. The Joint

Arab – Kurd Agriculture Committee in Dibs, will monitor this agreement until completion.

Farmer / Harvester

Claims Against Land

Witnessed by:

[REDACTED]
LTC, IN
Deputy Commander
173d Airborne Brigade

The original copy of this memorandum is signed blue ink.

APPENDIX A-15: DISPUTED PROPERTY CLAIM FORM

FOR OFFICIAL USE ONLY
Case Number _____
Date of final disposition _____

DISPUTED PROPERTY CLAIM FORM

Property Description/Location _____

_____ City _____

<u>NON-OCCUPANT (CLAIMANT)</u>	
<u>Biographical information:</u>	<u>Biographical information:</u>
Name _____	Name _____
Nationality _____	Nationality _____
Current Address _____	Current Address _____
Phone # _____	Phone # _____
<u>Property information:</u>	<u>Property information:</u>
Length of prior residency (in years) _____	Length of residency (in years) _____
Method/Instrument of prior possession* _____	Method/Instrument of possession* _____
_____	_____
Method/Instrument of dispossession* _____	Date of possession* _____
_____	Description of current physical state of property, to include improvements made during residency* _____
_____	_____
Date of dispossession* _____	_____
_____	_____
_____	Current liens, debts, claims on the property* _____
_____	_____
_____	_____

* ATTACH DOCUMENTATION IF AVAILABLE

APPENDIX A-16: AFGHAN NATIONAL ARMY BASIC SOLDIER TRAINING PLAN

**The Law of War
Training Plan for the Afghan National Army (ANA)**

Level 1 – Basic Soldier Training

1. Task. Implement Law of War Training as an integral part of ANA basic training in order to ensure soldiers have a basic understanding of the international legal requirements under international and domestic laws.

a. OMC-A Tasks.

(1) Ensure an acceptable law of war program is a scheduled block of instruction for soldiers undergoing ANA basic training at KMTC.

(2) Monitor and oversee the conduct of on-going training.

(3) Validate the Program of Instruction (POI) for use during Basic Training. Update the POI, as needed.

(4) Assist KMTC cadre with periodic training of cadre members during off cycle rotations.

(5) Supplement KMTC trainers with additional training materials in varying forms.

2. Current Status.

a. KMTC conducts ongoing training for Basic Trainees in battalion size elements. The training cycle lasts for ten weeks. Each battalion consists of three companies. A training cycle begins approximately once per month. The current schedule for rotation of training cycles is attached as Annex A.

b. The initial week in which the recruits arrive is called “zero week”. This week is devoted to inprocessing and equipment issue. No organized training is conducted during “zero week”.

c. During week one through week three, the three ANA companies rotate through different programs of instruction. One of these weeks is devoted to classroom instruction that includes a five hour block on the Law of War. The Law of War block is generally taught on Monday of this training week. Consequently, the Law of War block is taught

on each Monday for three consecutive weeks as the companies rotate through the training cycle.

d. Judge Advocates from OMC-A have reviewed the current Program of Instruction presently in use at KMTC and approve its use. A copy of the POI is attached as Annex B.

e. KMTC trainers will identify appropriate times during the off training cycle in order to provide Judge Advocates an opportunity to meet with KMTC ANA cadre for additional training and updates to integrate into upcoming training cycles.

f. KMTC trainers have a need for additional training materials in Dari for integration into training to enhance the effectiveness of LOW training.

3. Current Taskings.

a. OMC-A Judge Advocates.

(1) Obtain and distribute Geneva Convention summaries in Dari for on going training cycles. KMTC trainers recommend at least 30 copies of the pamphlets for each cycle.

(2) Prepare materials suitable for LOW posters. KMTC trainers have the ability to produce LOW posters for use in the barracks and on the KMTC compound to reinforce principles of the LOW. OMC-A Judge Advocates will prepare materials suitable for the preparation of such posters in Dari and forward to KMTC.

(3) Prepare materials suitable for the preparation of LOW cards in Dari for distribution to KMTC cadre. LOW cards are designed as a quick reference summary of the principle points emphasized during training. OMC-A Judge Advocates will have LOW card materials translated into Dari will seek mass production with the assistance of the Center for Law and Military Operations (CLAMO).

(4) Coordinate and meet with KMTC ANA cadre to assist with “train the trainer” sessions during off cycle times for the purpose of enhancing training effectiveness.

(5) Supply KMTC cadre with any additional training materials, as needed.

b. Camp Phoenix Judge Advocate.

(1) Assist in the coordination between KMTC cadre and OMC-A Judge Advocates.

(2) Participate in the “train the trainer” sessions with ANA KMTC cadres for more effective. Eventually, the primary task of continual “train the trainer” sessions during the off cycle with reside with the Camp Phoenix JA.

(3) Assist in the preparation and dissemination of training materials to KMTC.

c. KMTC Cadre.

(1) Integrate new training materials received into the LOW curriculum.

(2) Produce and post LOW posters for posting in unit barracks and around the KMTC compound to reinforce the principles of the LOW.

(3) Continue to provide training cycle schedules to OMC-A and Camp Phoenix JAs.

(4) Identify times and locations for the opportunity for Camp Phoenix and OMC-A JAs to “train the trainers” with ANA KMTC cadre. Support the “train the trainer” session with classrooms and needed support.

(5) Disseminate individual training materials, such as Geneva Convention summaries and LOW cards, to the ANA Cadre for their use in training.

(6) Integrate additional training materials into doctrinal manuals as they are updated.

4. Current Status (as of 10 Nov 03).

a. OMC-A Judge Advocates.

(1) Have reviewed and approved the current POI.

(2) Have observed LOW training at KMTC.

(3) Have distributed sufficient Geneva Convention summaries for the upcoming training cycle (to begin on or about 24 November 03).

(4) Have prepared materials for LOW cards. Currently awaiting translation and mass production.

(5) Have prepared materials for LOW posters. Currently awaiting translation into Dari.

(6) Awaiting translation for LOW training manual into Dari for distribution to KMTC.

(7) Attempting to obtain video tape training from ICRC for future use.

b. KMTC cadre.

(1) Have distributed current training cycle schedule. Will update as necessary.

(2) Will provide a date, time and location for “train the trainer” session for ANA cadre.

(3) Will produce posters once materials are received from OMC-A.

(4) Have received and will distribute Geneva Convention summaries to ANA Cadre.

5. This memorandum of training will be supplemented and updated as necessary.

JOHN B. DOE
MAJ, JA
Assistant Rule of Law Officer

APPENDIX A-17: AFGHAN NATIONAL ARMY BASIC NCO TRAINING PLAN

**The Law of War
Training Plan for the Afghan National Army (ANA)**

Level 1 – Basic NCO Training

1. Background.

a. In accordance with the Bonn Agreement, the United States is given overall responsibility for the training of the Afghan National Army. Accordingly, the United States is the lead nation in training conducted at the Kabul Military Training Compound. However, other nations are given primary responsibilities within the overall framework of training. Specifically, the United Kingdom has been placed in charge of the training of the non-commissioned officers (NCO) corps of the ANA. This includes the responsibility to implement Law of War Training.

b. On November 3, 2003, OMC-A Judge Advocates visited the British cadre on the KMTC compound. The purpose was to determine the nature, frequency and program of instruction of Law of War training being conducted at the NCO courses.

c. The British are conducting two different basic NCO courses. One is for junior level NCO's, the other is for senior NCO's. There is currently no law of war instruction contained in the junior NCO course. The senior NCO course has a law of war instruction block, but we were unable to obtain a POI, nor were we able to determine the number of hours devoted to law of war instruction.

2. Tasks.

a. KMTC cadre.

(1) KMTC cadre were notified as to the above deficiencies. They agreed to convince British cadre of the need to include such training into the curriculum.

(2) KMTC will supply LOW materials on hand to British cadre for their integration into the scheduled instruction.

(3) KMTC cadre will keep OMC-A informed on progress on instituting the above.

b. OMC-A Tasks.

(1) Ensure an acceptable law of war program is available for use by the British cadre.

(2) Monitor and oversee the conduct training once it is implemented.

(3) Validate the Program of Instruction (POI) for use during junior and senior NCO courses. Update the POI, as needed.

(4) Assist KMTC cadre with periodic training of cadre members during off cycle rotations.

(5) Supplement KMTC trainers with additional training materials in varying forms.

c. Camp Phoenix JA.

(1) Inasmuch as British cadre live at Camp Phoenix, the Camp Phoenix JA will meet with British cadre to advocate for inclusion of LOW training into the curriculum.

(2) Supply LOW training materials to British cadre for their inclusion into the training cycle.

(3) Inform OMC-A JAs on the status of LOW training into the NCO courses.

3. This memorandum of training will be supplemented and updated as necessary.

RUSSELL L. MILLER
MAJ, JA
Assistant Rule of Law Officer

APPENDIX A-18: OIF ROE CARDS

IRAQI SECURITY FORCES RULES FOR THE USE OF FORCE	IRAQI SECURITY FORCES RULES FOR THE USE OF FORCE
<p>NOTHING IN THESE RULES LIMITS YOUR INHERENT RIGHT TO TAKE ACTION NECESSARY TO DEFEND YOURSELF, YOUR UNIT, AND OTHER SECURITY FORCES.</p>	<p>NOTHING IN THESE RULES LIMITS YOUR INHERENT RIGHT TO TAKE ACTION NECESSARY TO DEFEND YOURSELF, YOUR UNIT, AND OTHER SECURITY FORCES.</p>
<p>1. CIVILIANS: Treat Civilians with Dignity and Respect. Make every effort to avoid civilian casualties.</p> <p>2. COALITION FORCES: Cooperate with Coalition forces and obey their commands. Do not avoid or run Coalition checkpoints. Do not aim weapons at Coalition Forces.</p> <p>3. USE OF DEADLY FORCE: Deadly force is that force which one reasonably believes will cause death or serious bodily harm. You may use NECESSARY FORCE, up to and including deadly force, against persons in the following circumstances:</p> <ol style="list-style-type: none"> In self-defense; In defense of your unit, or other Security Forces; To prevent serious offenses against persons; In defense of designated property and infrastructure. <p>4. GRADUATED FORCE: When possible, use a graduated response to hostile persons. The following are some techniques you may use if appropriate.</p> <ol style="list-style-type: none"> SHOUT: verbal warnings to HALT in native language. SHOVE: physically restrain, block access, or detain. SHOW: your weapon and demonstrate intent to use it. SHOOT: to remove the threat only where necessary. 	<p>5. IF YOU MUST FIRE YOUR WEAPON:</p> <ol style="list-style-type: none"> (1) Fire only aimed shots. (2) Fire with due regard for the safety of innocent bystanders. (3) Fire no more rounds than necessary. (4) Immediately report incident and request assistance. <p>6. CROWDS: Control civilian crowds, mobs, or rioters interfering with Security Forces with a minimum necessary force. When circumstances permit, attempt the following steps to control crowds:</p> <ol style="list-style-type: none"> Give verbal warnings to HALT. Use a show of force, including riot control formations. Detain violent offenders and those inciting violence. Use reasonable force necessary under the circumstances and proportional to the threat. <p>7. DETAINEES: You may stop, detain, search, and disarm persons as required to accomplish your mission or protect persons or designated property. Detainees will be turned over to the In Police or Military Police as soon as possible. Detainees will be treated humanely.</p>
<p>UNCLASSIFIED 02 October 2003</p>	

لا يوجد شيء في هذه الاحكام يحدد حقوقك الموروثة لا للدفاع عن نفسك، او عن اي قوات امنية.

لا يوجد شيء في هذه الاحكام يحدد حقوقك الموروثة لاتخاذ ما يلزم للدفاع عن نفسك، او عن اي قوات امنية.

- إذا استوجب إطلاق النار:
1. سدد سلاحك ثم أطلق النار.
2. أطلق النار مع الانتباه إلى الأبرياء والمتفرجين.
3. لا تطلق النار أكثر مما هو ضروري.
4. بلغ عن الحدث بسرعة واطلب المساعدة.
6. الزحام: عليك السيطرة على الزحام الذي يسببه المدنيون، والفوغانيون، والمشاغبون الذي يعيق قوى الأمن بالقوة الضرورية. وعندما تسنح الفرص قم بالمحاولات التالية للسيطرة على الزحام.
- أ. اعط الأذار الشفهي للوقوف.
- ب. استعمل عرض القوة، من ضمنها تشكيلات السيطرة على الفوضى.
- ج. اعتقل المنتهكين والعنيفين والمعرضين على العنف.
- د. استعمل القوة الضرورية المناسبة لظرف التهديد.
7. المعتقلون: يجب عليك أن توقف، وتعتقل، وتفتش، وتنزع السلاح من الأشخاص كما هو مطلوب لإكمال مهمتك أو حماة الأشخاص أو الممتلكات الخاصة. المعتقلون سوف يسلمون إلى قوى الأمن العراقي (الشرطة) بالسرعة الممكنة.

1. المدنيون: عليك أن تعامل المدنيين بوقار واحترام. عليك القيام بأي جهد لمنع الحاق الإصابات بالمدنيين.
2. قوات التحالف: عليك التعاون مع قوات التحالف واطاعة أوامره. لا تتجنب أو تهرب من نقاط التفتيش، لا توجه سلاحك نحو قوات التحالف.
3. استعمال القوة المميتة: القوة المميتة هي القوة التي عند استعمالها يعتقد الفرد أنها قد تسبب الموت أو أذى جسماني بالغ. يجب عليك استعمال القوة الضرورية، أو إلى حد القوة التي تسبب الموت في الحالات والظروف التالية:
- أ. الدفاع عن النفس.
- ب. للدفاع عن وحدتك، أو قوات امنية أخرى.
- ج. لمنع هجوم خطير ضد أشخاص.
- د. للدفاع عن الممتلكات الخاصة أو البنية التحتية.
4. القوة التدريجية: عند الامكان، استعمل القوة بالتدرج مع الشخص المعادي. أذناه بعض الطرق التي يجب اتباعها في الحالات الملائمة.
- أ. الصراخ: الأذار بالكلام باللغة المحلية للتوقف.
- ب. الدفع: لمنع بدنيا، سد المدخل أو اعتقل.
- ج. إطلاق النار: لإزالة التهديد فقط عند الضرورة.

APPENDIX D-1: CARB / BCARB CHECKLIST

UNCLASSIFIED

CARB / BCARB CHECKLIST

STEP ONE: Obtain a copy of the ARCENT Customer Handbook (ACH) from the local Contracting Office. The ACH is also available on the CJTF-7 CENTRIX Intranet at <http://irq01ws/Sections/C8/contracting/default.htm>. Review the ACH with the Contracting Office for the specific documentation required for each of the following areas, as applicable: Information Management, Supplies, Services, or Construction.

STEP TWO Work with the Contracting Office to define the proposed requirement.

STEP THREE: Obtain a verification from the Installation Property Book Officer (IPBO) that requested requirement is not obtainable from government sources in a timely manner. An IPBO verification is not required for construction.

STEP FOUR: Develop and attach a memorandum through the CARB/BCARB to the CJTF-7 DCG that describes the purpose, background information, scope of work, cost, and the impact if the request is not approved. This Step has the following express and implied tasks; consult the ACH for detailed guidance:

1. Identify a "Subject Matter Expert" within the unit to develop and draft a **Statement of Work (SOW)**. This SOW should describe what is to be acquired and should detail the performance standards to be enforced during the contract. The ultimate user is best positioned to identify the standards of performance and timeliness.
2. Coordinate with Contracting to identify the most appropriate **method for satisfying your requirement**. LOGCAP is an expensive last resort and should be used only when host nation and other commercial sources are unavailable. If security/force protection or life, healthy, and safety are a factor, detail that as a consideration on identifying the method.
3. Develop an **independent government estimate (IGE) of anticipated costs**. See ACH for format. If no estimate is possible, explain why.
4. Obtain a copy of **DA Form 3953, Purchase Request and Commitment, DD Form 448, MIPR, or CC 35, Coalition Forces Request to be Satisfied by the US**. Coordinate with C8 to determine which form is necessary to fund your particular requirement if the CARB/BCARB approves your request. With guidance from C8, prepare the proper form and submit with your proposal to the CARB/BCARB.

STEP FIVE: Staff through appropriate members and advisors to the CARB / BCARB. Please note that a legal review is mandatory for all CARB/BCARB proposals.

STEP SIX: Provide the complete and appropriately staffed package to the BCARB / CARB coordinator for placement on the board calendar.

STEP SEVEN: Come to the CARB / BCARB review prepared to advocate the proposed requirement and justify the expenditure for it.

(3) Apportioned between CPA, DOD, State Department, USAID, Treasury, and Health and Human Services.

C. New “Special Iraqi” Appropriated Fund Sources.

1. CPA Operating Funds--\$933 million (through FY 2005) for personnel costs, transportation, supply, equipment, facilities, communications, logistics requirements, studies, physical security, media support, promulgation and enforcement of regulations, and other activities, plus \$50 million for funding of reporting requirements.
2. Commander’s Emergency Response Program (CERP) Funds--\$180 million earmark from the OSD O&M account “notwithstanding any other provision of law” to fund the Commander’s Emergency Response Program in Iraq and to establish a similar program in Afghanistan.
3. The “Reres Doctrine” Revived—Section 1301 of the Second Supplemental allows use of O&M during FY 2004 up to a maximum of \$150 million for temporary construction in support of Operation Iraqi Freedom if:
 - a) the construction is necessary to meet urgent temporary operational requirements for Operation Iraqi Freedom or the Global War on Terrorism.
 - b) the construction is at a location where the U.S. is not expected to have a long term presence.
 - c) the U.S. has no intention of using the construction after the completion of the operation, and
 - d) the construction is the minimum necessary to meet the operational requirements.

IV. SOURCES OF NON-U.S. APPROPRIATED FUNDS (“IRAQI FUNDS”).

A. “Vested Assets”

1. Assets of former regime located in U.S. banks.
2. Executive Order 13290, dated March 20, 2003, and Executive Order 13315, dated August 28, 2003.
3. Now all committed/obligated.

B. “Seized Assets”

1. Assets of former regime located in places other than U.S. banks.
2. Seizures of cash and bullion.
3. Seizures of foreign bank accounts.
4. Now mostly committed/obligated.

C. Development Fund for Iraq (DFI).

1. Established by the CPA and recognized under UNSCR 1483.
2. Used for: (IAW UNSCR 1483, paragraph 14)
 - a) Meeting the humanitarian needs of the Iraqi people;
 - b) Economic reconstruction and repair of Iraq’s infrastructure;
 - c) Continued disarmament of Iraq;
 - d) Other purposes benefiting the people of Iraq.

OVERVIEW OF FISCAL LAW IN IRAQ

I. INTRODUCTION. Upon the completion of this instruction, the student will understand:

- A. The various sources of U.S. appropriated funds available for use by the CPA and CJTF-7, and
- B. The various sources of non-U.S. funds available for use by the CPA for the relief and reconstruction of Iraq and/or for the general benefit of the Iraqi people.

II. REFERENCES.

- A. DOD Appropriations Act, 2004, Pub. L. No. 108-87 (2003).
- B. Emergency Wartime Supplemental Appropriations Act, Pub. L. No. 108-11 (2003) ("First Supplemental")
- C. Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, Pub. L. No. 108-106 (2003). ("Second Supplemental")
- D. United Nations Security Council Resolution (UNSCR) 1483 (2003).
- E. United Nations Security Council Resolution (UNSCR) 1500 (2003).
- F. United Nations Security Council Resolution (UNSCR) 1511 (2003).

III. SOURCES OF U.S. GOVERNMENT APPROPRIATED FUNDS.

- A. "Traditional" Appropriated Fund Sources. DOD Appropriations Act, Pub. L. No. 108-87 (2003).
 - 1. Operations and Maintenance (O&M) funds.
 - 2. Military Personnel funds.
 - 3. Military Construction (MILCON) funds.
 - 4. Procurement funds. Used to purchase "investment items" (items with a cost greater than \$250,000 or centrally managed items).
- B. "Special Iraqi" Appropriated Fund Sources. Emergency Wartime Supplemental Appropriations Act, Pub. L. No. 108-11 (2003), Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, Pub. L. No. 108-106 (2003).
 - 1. Iraqi Freedom Fund (IFF)
 - a) Originally established in 1998.
 - b) Transfer Account
 - 2. Natural Resources Risk Remediation Fund (NRRRF)
 - a) Used for:
 - (1) Emergency fire fighting of oil fires.
 - (2) Repair of damage to oil facilities and infrastructure.
 - (3) Preserving oil distribution capability.
 - b) Funds now all committed/obligated.
 - 3. Iraqi Relief and Reconstruction Fund (IRRF).
 - a) "Old Rules" (First Supplemental).
 - (1) Used for:

LTC Andy K. Hughes
Fiscal Law Conference
November 2003

APPENDIX E-1: SINGLE SERVICE AUTHORITY



DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600



June 17, 2003

MEMORANDUM FOR SECRETARY OF THE ARMY

SUBJECT: Claims Responsibility – Iraq

1. Reference: HQ USCENTCOM Message 111127Z Jun 03, Subject: Request to Assign Army Single-Service Claims Responsibility for Iraq.
2. The reference requests transfer of claims responsibility for Iraq from the Department of the Air Force to the Department of the Army. Pursuant to DoD Directive 5515.8, the Department of the Army is hereby assigned claims responsibility for Iraq.

A handwritten signature in black ink, appearing to read "D. J. Dell'Orto".

Daniel J. Dell'Orto
Acting General Counsel

Cc:
Secretary of the Air Force
Chairman of the Joint Chiefs of Staff

APPENDIX E-2-1: STANDARD APPROVAL LETTER



**DEPARTMENT OF THE ARMY
OFFICE OF THE STAFF JUDGE ADVOCATE
82D AIRBORNE DIVISION
AL-RAMADI, IRAQ, APO AE 09384**

REPLY TO
ATTENTION OF

(Date)

Claim Number

Name:

Address:

Dear Sir:.

Your claim was considered under the provisions of the United States Foreign Claims Act (FCA), 10 U.S.C. Section 2734, implemented by United States Army Regulation 27-20.

Pursuant to that Army Regulation, your claim has been approved for payment in the amount of [REDACTED] United States Dollars. This amount is a compensation for any damages or property loss happened to you or your family. Considering all factors in a light most favorable to you, we determined that the amount of [REDACTED] to be a fair and reasonable. A voucher was forwarded to our finance personnel for issuance of funds in that amount.

If you have questions concerning this claim, please contact us in Al-Ramadi via telephone at: 426-040. The U.S. Army apologizes for this inconvenience and to you and your family.

Sincerely,

Thomas Ayres
LTC, U.S. Army
Staff Judge Advocate

APPENDIX E-2-2: STANDARD APPROVAL LETTER - ARABIC



REPLY TO
ATTENTION OF

**DEPARTMENT OF THE ARMY
Office of the Staff Judge Advocate
82nd Airborne Division
Al-Ramadi, Iraq, APO AE 09384**

رئيس القسم القضائي

8 September 2005

رقم الدعوى

حضرة الأستاذ

لقد تم الإطلاع و النظر على الدعوى المقدمة إلينا من سيادتكم و ذلك طبقاً لنصوص و لوائح القانون الأمريكي للتعويضات الأجنبية الجزء ١٠ رقم ٢٧٣٤، و المستخدم في الجيش الأمريكي لائحة رقم ٢٧-٢٠.

و بناء على هذه اللائحة تمت الموافقة على دفع مبلغ [REDACTED] دولار أمريكي. و قد جاء تقدير هذا المبلغ إستناداً على نتيجة التحقيق الذي قمنا به و المعلومات التي حصلنا عليها من مصادرنا و التي أكدت ما ورد في الدعوى. و بعد مراجعة الحقائق المذكورة و مقارنتها بأسعار السوق المحلية، قررنا أن مبلغ [REDACTED] يعتبر تعويضاً عادلاً لقيمة الأضرار التي حدثت لكم أو لعائلتكم. و قد اصدرنا قرارنا إلى مكتب الخزانة المصرفية بصرف المبلغ المذكور.

في حالة إحتياجكم للإستفسار و الإستعلام عن أى شئ بخصوص هذه القضية يرجى التفضل بالإتصال الهاتفي بنا في الرمادي رقم تليفون: ٤٢٦٠٤٠

وتفضلوا بقبول خالص الاعتذار و الأسف من الجيش الأمريكي عن حدوث أية أضرار أو مضايقات لكم و لإسرتكم.

Sincerely,

مع فائق التقدير و الإحترام

Thomas E Ayres
LTC, U.S. Army
Staff Judge Advocate

المقدم/ توماس إ أيريس
الجيش الأمريكي
رئيس القسم القضائي

APPENDIX E-2-3: ACCIDENT REPORT FORM-ENGLISH-ARABIC**Accident Report**

When in an auto accident with an Iraqi, fill out this form and give it to the Iraqi(s) involved. No individual soldier will be responsible for damage of Iraqi property. The United States Army Claims Service pays claims under the Foreign Claims Act. This report will help us assess the validity of claims made by the Iraqis and will end your unit's responsibility for damages.

Name of person making report (rank and last name

only):_____

Unit:_____ Date and Time

:_____

Location:_____

Describe incident and

damaged:_____

The United States Army attempts to repay damages that it may have caused by accidents not related to combat directly or indirectly. If you have suffered damage, such as to your property, vehicle, or person, مباشرة بالمعارك أو العمليات العسكرية. و بالتالي إذا كنت مواطناً وقعت عليك خسائر نتيجة أضرار على سيارتك أو على شخصك، فإنه then you may be able to receive compensation for your loss. Please complete the attached "Claim Form" من الممكن أن تكون مستحقاً للتعويض عن هذه الخسارة. الرجاء التكرم بإستكمال هذه الإستمارة و إحضار الأوراق و المستندات and include the information below if applicable. Then go to the Al-Ramadi Court House on Mondays, المطلوبة و ضمها لملف الدعوى ثم إحضارها إلى دار محكمة الرمادي في إحد الأيام التالية: السبت أو الاثنين أو الأربعاء من كل إسبوع Wednesdays, and Saturdays to discuss your claim. You must provide satisfactory evidence for your claim لمناقشة دعوكم المقدمة أخذاً في الإعتبار أنه من الواجب عليكم تقديم الدلائل التي تؤيد حقك القانوني في إستحقاق التعويض. إن القيام to be paid. Hiring an attorney is not required, but may be helpful. If an attorney is hired, we recommend a بتوكيل محامى ليس مطلوباً و لكنه مستحب مع إقتراحنا بتحديد نسبة الأتعاب المستحقة بم يعادل ١٠ % من مبلغ التعويض. 10% contingency fee for the attorney.

Proof of Ownership _____ دليل إثبات ملكية العقار أو الشيء المتضرر المذكور بالعريضة

Photos of Damages _____ الصور الفوتوغرافية كدليل مؤيد لحدوث الأضرار المذكورة بالعريضة

Medical bills and medical reports _____ الفواتير الطبية أو تقارير الأطباء المؤيدة للإصابات المذكورة

Witness Statement _____ شهادات شهود العيان

LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOLUME II, FULL SPECTRUM
OPERATIONS (2 MAY 2003 TO 30 JUNE 2004)

عدد ٢ شهادة رسمية معتمدة لتقدير حجم الأضرار و الخسائر من شخص متخصص بتصليح أو تثمين الشيء المتضرر مثل
مهندس، ميكانيكي، تاجر سيارات، كهربائي أو أى شخص آخر متخصص بالشيء المتضرر على حسب طبيعة الدعوى.

Two written estimates of damages by a certified repair shop, engineer, auto dealer, or any other
professional as required by the nature of your claim.

Requested amount in US Dollars

تقدير قيمة التعويضات المطلوبة بالدولار الأمريكى

Exact time and date of incident

الوقت و التاريخ المحدد لوقوع الأضرار المذكورة

Proof of Identity

تحقيق إثبات الشخصية

(If Applicable)ate Death Certific

شهادة الوفاة الرسمية (إذا كانت مطلوبة)

Address and Phone Number

عنوان و رقم تليفون الشخص المتضرر

APPENDIX E-2-4: ACTION FORM

DEPARTMENT OF THE ARMY
**Headquarters and Headquarters Company, 4th Infantry Division (M) (SJA),
Unit 92628, APO AE 09323-2628**

(Office Code)

Claim of Ahmed Hakim, 03-I4A-T001

ACTION

1. Facts. On 4 June 2003, the claimant's 1991 Mercedes sedan was struck by a HUMVEE driven by MAJ D. Dribben, USARCS, at the intersection of Chalabi and Hussein streets, Baghdad. Claimant's vehicle had the right of way; U.S. Government vehicle was unable to stop in time to avoid the collision. The collision resulted in damage to the right front of the 1991 Mercedes sedan and claimant's broken right arm.
2. Opinion. See the accident report in the file. The accident was caused by the negligence of U.S. military personnel. \$1,000 estimate from Al-Amir garage to repair vehicle; medical bills of \$100; no evidence of lost wages.
3. Authority. The Foreign Claims Act (10 U.S.C. § 2734) as implemented by AR 27-20, Chapter 10.
4. Action. That the claim be paid in the amount of \$2,500.

John H. Doe
Captain, U.S. Army
FCC I4A

APPENDIX E-2-5: SEVEN POINT MEMO

DEPARTMENT OF THE ARMY
**Headquarters and Headquarters Company, 4th Infantry Division (M) (SJA),
Unit 92628, APO AE 09323-2628**

(Office Code)

31 July 2003

MEMORANDUM FOR Commander, U.S. Army Claims Service, ATTN: JACS-TCF,

(Mr. Dribben) Fort George G. Meade, Maryland 20755-5360

SUBJECT: Claim of Ahmed Hakim, 03-I4A-T001

1. IDENTIFYING DATA:

- a. **CLAIMANT: Mr. Ahmed Hakim, Iraqi resident.**
- b. **PRESENT ADDRESS/PHONE NR OF CLAIMANT: 123 Al-Awaq Avenue Baghdad, Iraq.**
- c. **ATTORNEY: None.**
- d. **DATE OF INCIDENT: 4 June 2003.**
- e. **PLACE OF INCIDENT: Intersection of Chalabi and Hussein streets, Baghdad.**
- f. **DATE AND AMOUNT OF CLAIM: 5 June 2003; 100,000 Iraqi dinar.**
- f. **SUMMARY: Claimant is seeking damages alleging personal injury (broken right arm) and property damage arising from a collision between claimant's POV (1991 Mercedes) and U.S. Government vehicle (HUMVEE, 1/21st In) driven by MAJ D. Dribben.**
- g. **COMPANION CASES: None**

2. JURISDICTION: This claim was filed by an Iraqi resident not unfriendly to the U.S. He is a proper party claimant, and the claim is cognizable under the Foreign Claims Act (10 U.S.C. § 2734) and Chapter 10, AR 27-20. This claim was properly presented on a SF 95, contains factually specific allegations, is dated, states a sum certain and is signed by Claimant.

Office Code

Claim of Ahmed Hakim, 03-I4A-T001

3. FACTS:

a. On 4 June 2003 claimant was leaving his 1991 Mercedes POV after parking it at the intersection of Chalabi and Hussein streets, Baghdad. The car was legally parked and was out of the lane of travel. A U.S. military HUMVEE (1/21st In) driven by MAJ D. Dribben veered out of the lane of travel due to inattentive driving and struck the left front side of the claimant's POV. The claimant's left arm was broken by the impact.

b. The claimant was treated at the scene by U.S. military medics and evacuated to the El-Semad clinic, where his arm was x-rayed and casted. The claimant was also provided pain medication. A bill of \$100 for his medical care was presented along with the claim.

c. The claimant presented an estimate of repair of \$1,000 from the Al-Amir garage. The estimate covers only the damage caused by the collision.

d. Photographs of the scene and the claimant's vehicle have been uploaded to the Tort and Special Claims Database.

4. LEGAL ANALYSIS:

a. In determining liability, such claims will be evaluated under local national law. Iraqi law indicates that vehicles may be parked on the street provided they do not impede the traffic on the street in both directions. The claimant's car was properly and legally parked, and left sufficient travel lanes in both directions.

b. The Government driver was interviewed and admitted inattentive driving due to fatigue. An MP investigation of the collision revealed that the claimant's vehicle was properly parked and did not impede the HUMVEE's lane of travel.

c. Accordingly, FCC I4A finds that the claimant's damages arose from the negligent acts of the U.S. Government driver.

5. DAMAGES:

a. The claimant has demonstrated property damage in the amount of \$1,000 by an estimate of repair. The photographs of the claimant's POV show that the vehicle is worth more than \$1,000 and that the estimate covers only those damages caused by the collision. Consultation with Civil Affairs indicates that the estimate is fair and reasonable in the local economy.

b. The claimant suffered a broken arm, for which he incurred \$100 in medical costs. His arm has been immobilized in a plaster cast for two weeks, and he has

been prescribed narcotics for pain control. He will incur approximately \$200 more in medical costs for removal of the cast and physical therapy. There is no evidence of lost wages. FCC I4A finds the sum of \$1,500 reasonable for past and future medical expenses and pain and suffering.

6. RECOMMENDATION: Based upon the investigation by this FCC, it is reasonable to conclude that the claimant's damages were the result of negligence by U.S. military members. I recommend settlement of this case in the amount of \$2,500.

7. DOCUMENTS AND WITNESS LIST:

All pertinent documentation and photographs have been uploaded to the Tort and Special Claims database.

JOHN H. DOE

**CPT, JA
FCC I4A**

APPENDIX E-2-6: OFFER OR DENIAL LETTER SAMPLE

REGISTERED MAIL - RETURN RECEIPT REQUESTED

FCC I4A

SUBJECT: Foreign Claims Commission I4A, Claim of Ahmed Hakim, 03-I4A-T001

123 Al-Awaq Avenue
Baghdad, Iraq

Dear Mr. Hakim:

[notice paragraph]

This notice constitutes final administrative action on your claim against the United States in the total amount of 100,000 Iraqi dinar. The claims are for personal injury and property damage arising from a collision between your personal vehicle and a U.S. Government vehicle driven by Major Douglas Dribben at the intersection of Chalabi and Hussein streets, Baghdad, on June 4, 2003.

[jurisdiction paragraph]

Foreign Claims Commission (FCC) I4A has investigated and considered the claim under the Foreign Claims Act (FCA), Title 10, United States Code, Section 2734, as implemented by Army Regulation (AR) 27-20, Chapter 10. The claim is cognizable solely under the FCA as it concerns an inhabitant of Iraq. The Federal Tort Claims Act, Title 28, United States Code, Section 2680(k), is not applicable as it excludes claims arising in foreign countries. Under the FCA, a claim for death or personal injury may be allowed whether or not the negligent act complained of was made within the scope of employment.

[investigation paragraph]

FCC I4A has reviewed your medical records, the Iraqi and U.S. Military Police investigations of the incident, and the statements of two witnesses. At the time the collision occurred, your vehicle had the right of way, but the U.S. Government vehicle was unable to stop in time to avoid the collision. The collision resulted in damage to the right front of your 1991 Mercedes sedan and your broken right arm.

[offer paragraph]

FCC I4A offers you \$2,500 to settle your claim. This sum includes \$1,000 in damage to your vehicle (the amount of the estimate of repair of your vehicle provided by the Al-Amir garage) and \$1,500 for your injury, including medical care and pain and suffering. To accept this settlement offer, please sign the enclosed settlement agreements and return four original copies to this FCC. Upon receipt of the signed settlement agreements, I will direct the servicing finance office to issue payment.

[denial paragraph]

Your claim is denied. The FCA requires proof of negligent or wrongful acts on the part of U.S. Government employees. The available evidence indicates that the U.S. Government vehicle had the right of way and was proceeding through the intersection when your vehicle pulled out into the path of and collided with the Government vehicle. Accordingly, there is no evidence of negligence on the part of U.S. Government employees.]

[reconsideration paragraph]

If you are dissatisfied by this action, AR 27-20 provides that you may request that the decision be reconsidered. Any such request must be forwarded to this office for FCC consideration. There is no prescribed format for such a request. However, it should describe the legal and/or factual basis for relief. Any request for reconsideration must be made, in writing, within 30 days of receipt of this letter.

The FCC's action on reconsideration is final and conclusive by law.

Sincerely,

John H. Doe
Captain, U.S. Army
FCC I4A

REPLY TO
ATTENTION OFAPPENDIX E-2-7: STANDARD DENIAL LETTER

DEPARTMENT OF THE ARMY
Office of the Staff Judge Advocate
82nd Airborne Division
Al-Ramadi, Iraq, APO AE 09384

8 September 2005

Staff Judge Advocate

رئيس القسم القضائي

Dear Sir/Madam:

Claim Number:

لقد إستلمت ملف دعوى التعويض عن الأضرار الواقعة عليكم, و للأسف فقد قمت برفض الدعوى للسبب أو الأسباب التالية:

I have received your claim for damages; however, I am denying it for the following reason or reasons:

الأضرار التي وقعت عليكم كانت نتيجة إحدى الاشتباكات أو العمليات العسكرية
 The damages were the result of combat operations

☐

دليل إثبات ملكية العقار أو الشيء المتضرر المذكور بالعريضة
 Proof of ownership of the property is in question

☐

الصور الفوتوغرافية كدليل مؤيد لحدوث الأضرار المذكورة بالعريضة
 Photographic evidence of the damage

☐

الفواتير الطبية أو تقارير الأطباء المؤيدة للإصابات المذكورة
 Medical Bills/Doctors written assessment of injury

☐

شهادات شهود العيان
 Additional witness statements

☐

دليل على اهمال جنود القوات الأمريكية (شهادة الجندي أو العلامة المميزة للوحدة المتسببة في الضرر)
 Proof of negligence of US Soldiers (statement of soldier, or identifying unit)

☐

عدد 2 شهادة رسمية معتمدة لتقدير حجم الأضرار و الخسائر من شخص متخصص بتصليح أو ترميم الشيء المتضرر (مهندس، ميكانيكي، تاجر سيارات، كهربائي.... أو أى شخص آخر متخصص بالشيء المتضرر)
 Two written estimates of damages by a certified repair shop, engineer, auto dealer, or other professional as required by the nature of your claim

☐

تقدير قيمة التعويضات المطلوبة بالدولار الأمريكي
 Requested amount in US Dollars

☐

الوقت و التاريخ و المكان المحدد لوقوع الأضرار المذكورة
Exact date, time and location of accident

تحقيق إثبات الشخصية
Proof of identity

عقد التوكيل الموقع
Agency agreement

شهادة الوفاة الرسمية (إذا كانت مطلوبة)
Death certificates (if applicable)

عنوان و رقم تليفون الشخص المتضرر
Address and phone number where you can be reached

الضرر أو الأصابة التي لحقت بكم كانت نتيجة لعملية تفتيش على داركم أو كنتيجة حدوث اشتباكات عسكرية في منطقتكم. المطلوب منكم تقديم كل الحقائق التي تعرفونها عن هذه الحادثة و كل المعلومات عن أنشطة الإرهابيين أو أعداء قوات التحالف. عدم تقديم هذه المعلومات عن هؤلاء الإرهابيين و أعداء قوات التحالف يؤدي إلى رفض الدعوى و عدم أحقية طلب التعويض

سوف

Your damage or injury was a result of a search of your home or a firefight in your neighborhood, you must provide all facts you know about that activity to include what terrorists and anti-coalition forces acted in your neighborhood or family. You failed to provide these details and the names of anti-coalition terrorists in your neighborhood. Failure to provide these information will result in the final denial of your claim

يرجى بالعلم أنه يحق لكم الاعتراض على قرارنا المتخذ، و التقدم بطلب إستئناف رسمي في خلال مدة لا تزيد عن عام واحد من تاريخ إستلامكم لهذا الخطاب. تقدم طلبات الإستئناف بإسم رئيس القسم القضائي بمقر قيادة الفرقة 82 المظلية المقدم / توماس أيريس. الرجاء مراعاة إحتواء الطلب على الحقائق و البراهين الإضافية التي تؤيد أن وقوع هذه الأضرار كان لسبب آخر غير العمليات الحربية.

If you disagree with our current finding, you do have the right to appeal this decision. Appeals must be made in writing within one year after you receive this letter. The appeal should be addressed to Lieutenant Colonel Thomas Ayres, Staff Judge Advocate, 82d Airborne Division. Please include any additional evidence that demonstrates your claim did not arise during combat activities. .

في حالة إحتياجكم للإستفسار و الإستعلام عن أى شئ بخصوص هذه القضية يرجى التفضل بالإتصال الهاتفي بنا في الرمادي رقم تليفون: 426040 و تفضلوا بقبول خالص العذر و الأسف من جانب الجيش الأمريكى عن حدوث أية أضرار أو مضايقات لكم و للأسرتكم.

If you have questions concerning this claim, please contact us in Al-Ramadi via telephone at: 426 040. The U.S. Army apologizes for this inconvenience to you and your family

Sincerely,

مع خالص الإحترام و التقدير

Thomas E Ayres
LTC, U.S. Army
Staff Judge Advocate

المقدم/ توماس إ أيريس
الجيش الأمريكي
رئيس القسم القضائي

APPENDIX H-1: CFLCC WAR SOUVENIR REGISTRATION AUTHORIZATION

CFLCC WAR SOUVENIR REGISTRATION AUTHORIZATION		
Instructions: This form will be prepared for all types of war souvenirs. Original copy to Owner. Copy 1 with the souvenir, copy 2 retained by the issuing unit. Theater and included period of service to overseas command.		
Name of Owner	SSN	Grade/Port
Organization	Permanent Home Address	
I, the Owner or Receiving/Retaining Officer, do hereby certify that: 1. The following items have little to no intelligence value. 2. The retention of the following items is in compliance with military customs, traditions, regulations and the Law of Armed Conflict. 3. The following retained items are non-lethal and relatively innocuous. They are not otherwise prohibited by law. 4. The retained items are not of value or serviceable for use by a future Iraq/Pakistan/Defense Force. 5. The listed items are not resubmitted war souvenirs.		
Owner		Receiving/Retaining Officer
Description of War Souvenirs		
Describe Item	How Acquired	
1		
2		
3		
4		
5		
6		
7		
8		
9		
10		
Date	Typed Name, Grade and Org of Receiving/Retaining Officer	
Station	Signed as Command Commander LTC or Above (DD-ry) Contracting Officer Representative <div style="text-align: right;">Select One</div>	
	Signature	
CFLCC Form 603-1 15 April 04		

APPENDIX H-2: HISTORICAL PROPERTY APPROVAL

SAMPLE
DEPARTMENT OF DEFENSE
 YOUR UNIT LETTERHEAD
 OPERATION IRQI FREEDOM
 YOUR LOCATION
 APO AE XXXXX

YOUR OFFICE SYMBOL

DATE

MEMORANDUM THRU Your chain of command to MSC below CFLCC.

FOR COMMANDER, COALITION FORCES LAND COMPONENT COMMAND, ATTN
 MILITARY HISTORY GROUP, CAMP DOHA KUWAIT APO AE 09304

SUBJECT: Request for Historical Property Approval

1. The (unit designation) battalion requests retention of the below object(s) as historical property. IAW with AR 870-20 we request exception to the demilitarization requirement and authority to transport these object to an US Army Museum. (Units can suggest the Army Museum, i.e., Airborne & Special Operations Museum, or 3rd ID Museum, etc.). We agreed to act as the custodial unit and appoint an artifact responsible officer (ARO).

2. The commander will provide physical security until the object is turned over to the property book holder at the receiving museum. The commander will notify the gaining museum of the equipment's arrival in CONUS within 24 hours of offloading, and arrange to deliver it to the gaining museum.

3. The artifact(s) is listed below:

<u>Artifacts Description</u>	<u>Serial Number</u>	<u>Capturing unit</u>	<u>Unit UIC</u>
REMINGTON RIFLE	SN#XXXX	TF KBAR	W???M

4. Attached are short narratives for each item explaining where, when, how, and by whom each item was captured, and why it is significant to our unit. Photographs (if available) are also attached.

5. Point of contact is the undersigned at DSN: XXX-XXX-XXXX or email at _____.

COMMANDER
 Rank, Branch
 Commanding

APPENDIX H-3: COMBAT ZONE FILING EXTENSION

	<p>UNCLASSIFIED</p> <p>HEADQUARTERS COMBINED JOINT TASK FORCE SEVEN BAGHDAD, IRAQ APO AE 09093</p>
<p>REPLY TO ATTENTION</p>	
<p>CJTF7-JA</p>	<p>7 February 2004</p>
<p>MEMORANDUM FOR Office of The Judge Advocate General, Standards of Conduct Office, 1777 North Kent Street, Rosslyn, VA 22209-2194</p>	
<p>SUBJECT: Request for SF 278 Combat Zone Filing Extensions</p>	
<ol style="list-style-type: none">1. Request an SF 278 combat zone filing extension for those general officers serving under CJTF-7 in Iraq. The officers are listed in Annex A.2. Pursuant to 5 C.F.R. §2634.903(d)(2)(i), an individual who is serving in the Armed Forces in a designated combat zone shall be granted a filing extension of 180 days later than the last day the individual served in the designated combat zone.3. Normally, the individual filer requests the extension. However, based on the high OPTEMPO, the request is submitted on behalf of these officers.4. Copies of the approved extension will be provided to the individual General Officers, and their servicing Staff Judge Advocates.	
<p>Point of contact is the undersigned at DSN [REDACTED]</p>	
<p>Encl</p>	<p>KARL M. GOETZKE COL, JA Staff Judge Advocate, III Corps</p>
<p>UNCLASSIFIED</p>	

APPENDIX H-4: NOTICE OF APPROVED COMBAT ZONE EXTENSION

EXAMPLE EMAIL NOTICE TO GOW OF APPROVED EXTENSION

We requested a SF 275 combat zone extension on your behalf from DA Standards of Conduct Office (SDCO). This extension allows you the general officer to file the SF275 up to 180 days after your return from the combat zone. We have received approval of your extension from SDCO. Our office keeps track of these extensions, but upon your return from the combat zone, your individual Staff Judge Advocate will assist you in submitting the SF275 within the time allowed under the extension. We ask that you notify the CJTF-7 Office of the Staff Judge Advocate prior to your redeployment so that we may notify SDCO of your status. When you file your SF275, your ethics counselor must ensure that the date you departed the combat zone is annotated in the comments block of the signature page of the SF275. If you have any questions, or wish to submit your SF275 before your return to your home station, please contact CPT _____ at DSN _____ or _____ (Scomen.hq.cs.army.mil)

APPENDIX H-5: OG 450 EXTENSION REQUEST

**DEPARMTNET OF THE ARMY
HEADQUARTERS, X BRIGADE COMBAT TEAM
APO AE 09391**

AETV-XX

MEMORANDUM FOR Office of the Staff Judge Advocate, Unit 91400, Camp
Victory, Iraq,
APO AE 09342

SUBJECT: Office of Government Ethics 450 Program 2003 -Request for Extension
of Time to
File

1. _____ I hereby request an extension of time to file my DGE Form 450 for 2003 pursuant to 5 CFR 2634.903(d). I am an active duty military officer or enlisted member of the Armed Forces, a Reserve or National Guard member on active duty under orders issued pursuant to title 10 or title 32 of the United States Code, a commissioned officer of the uniformed services as defined in 10 U.S.C. 101, or an employee who is deployed or sent to a combat zone or required to perform services away from my permanent duty station in support of the Armed Forces or other government entity following a declaration by the President of a national emergency. I request a filing extension until the latter of 90 days after the last day of (a) my service in a combat zone or away from my permanent duty station, or (b) my hospitalization as a result of injury received or disease contracted while serving during the national emergency.

2. _____ I hereby request an extension of time to file my OGE Form 450 for 2003 pursuant to JER paragraph 7-303(c) due to my duty assignment, infirmity or other good cause affecting my ability to file on or before 30 November. Specific details are set forth on the attached document.

(If you chose 2, initial next to either a or b and attach explanation of reasons)

_____ I am a new filer and request an extension for 90 days.

_____ I filed last year and request an extension for 60 days.

3. I am the POC at DNVT, 559-XXXX.

JOHN D. DOE
COL, AV
Commanding

APPENDIX H-6: CONFIDENTIAL FINANCIAL DISCLOSURE

UNCLASSIFIED

DEPARTMENT OF DEFENSE
HEADQUARTERS, COMBINED/JOINT TASK FORCE (CJTF)-76
BAGRAM AIRFIELD, AFGHANISTAN
APO AE 09354

REPLY TO ATTENTION OF:

CJTF- 76-SJA

21 August 2004

MEMORANDUM FOR Task Force Commanders and Primary Staff, Combined/Joint Task Force-76

SUBJECT: Filing of Confidential Financial Disclosure Report (DGE Form 450)

1. Ethics laws and regulations require certain DoD employees, military and civilian, to file a Confidential Financial Disclosure Report, OGE Form 450, each year. The purpose of the confidential financial disclosure system is to determine and avoid conflicts between employees' official duties and their private financial interests or affiliations. Supervisors are responsible to ensure their subordinates who are required to file are identified and informed of the requirement to file. To meet Federal Government deadlines it is critical that the Office of the Staff Judge Advocate (OSJA) receive all reports no later than 16 October 2004 and that OGE Form 450 filers attend mandatory Ethics training.

2. In order to assist the Combined/Joint Task Force (CJTF)-76 meet the reporting requirements to HQDA, the following suspense dates will be met by all concerned:

ACTION REQUIRED:

SUSPENSE:

TF Commanders and Primary Staff will return consolidated lists to CJTF- 76, OSJA, of those required to file the OGE 450 (See **Reference 1- Who Must File**) along with individual's supervisors name, email address and telephone number.

13 Sep 04

OSJA will screen the lists and notify those required to file and provide guidance on how to complete the OGE 450 (See **Reference 2 - How to Complete the OGE 450, and See Reference 3 - OGE 450 with Instructions**).

15 Sep 04

OGE 450 forms due to CJTF-76, OSJA. To be complete, the OGE Form 450 must be reviewed and signed by the filer's rating official (See **Reference 4 -Supervisors Review**).

18 Oct 04

100% ethics training will be conducted for those required to file. Specific dates and times to be determined.

1 Nov 04

UNCLASSIFIED

CJTF-76-SJA

SUBJECT: Filing of Confidential Financial Disclosure Report (OGE Form 450)

3. Point of contact for this action is MAJ John Smith at XXX-XXXX. He can assist you in determining who should file a OGE Form 450, as well as assist in helping the rating official conduct a proper review of the OGE Form 450, or with any other problems in this area.

4 Encls
as

//original signed//
ERIC T. OLSON
Major General, USA
Commander

APPENDIX H-7: MFES EXCHANGE SUPPORT**HEADQUARTERS**

(MSC ADDRESS)

REPLY TO ATTENTION OF

(OFFICE SYMBOL)

DATE

MEMORANDUM THRU Commander, Multi-National Corps -Iraq, Attn: C1, Chief, Programs (MWR), Baghdad, Iraq, APC, AE 09342

FOR Commander, Coalition Forces Land Component Command, Attn: C1, Chief, Policy and Programs, Arifjan, Kuwait

SUBJECT: Request for MFES Exchange Support *LIST THE REQUEST* (Direct Operating Exchange- Tactical, AIFA-Imprest Fund, Name Brand Fast Food Concession, Local National Bazaar, A T & T Phone service, Barber and Beauty Shop, Alterations Shop, Pressing Service, Gift concessionaire)

1. Request for Exchange Support: *LIST THE REQUEST*
 - a. *Unit Designation /Name*
 - b. *Location, Camp Name. Closest Iraq city/town*
 - c. *Number of troops (camp population)*
 - d. *Dates required (Month Year -Month Year)*
 - e. *Duration: number of days*
 - f. *If an AIFA Imprest Fund, list the requested account amount and accountable officer*
2. *Unit, Camp Name* will provide the adequate support (infrastructure, utilities, logistic, medical, security, housing, etc) as outlined in MNC-I FRAGO ____ to MNC-I OPOD 04-01 and outlined during the site visit/survey by the AAFES General Manager/Team Leader.
3. As required, *Unit, Camp Name* will follow procedures established by MNC-I, FRAGO 193 to MNC-I OPOD 04-01 to request funding for facilities construction/renovation.
4. The point of contact for this memorandum is *RANK First Name Last Name at DSN/DNVT XXX-XXX-XXXX. List email address.*

First Name Last Name RANK, Branch
Position (Commander, Camp Mayor, etc)

CF: AAFES, GM -IRAQ

APPENDIX H-8: COALITION HUMAN RELATIONS EO POLICY

CJTF7

COALITION HUMAN RELATIONS AND EQUAL OPPORTUNITY POLICY

1. **Introduction.** All CJTF7 personnel are entitled to live and work in an environment free of unfair treatment and to be treated with dignity and respect. In this context, unfair treatment is behavior that, having regard to the circumstances (including the military environment), is offensive, belittling, abusive, degrading or threatening to another person or is otherwise prejudicial to morale, discipline, mutual respect, teamwork or workplace cohesion. Unfair treatment may include unlawful harassment or discrimination based on gender, sexuality, race, nationality or religious affiliation. The chain of command has a continuing challenge; it must provide a command climate that fosters attitudes and behavior about human relations and equal opportunity which lead to cohesion and mission accomplishment.

2. **Legitimate guidance and criticism.** The above policy does not prohibit the customary right of officers and NCOs to provide legitimate and appropriate criticism, guidance, advice, corrective training and counseling to subordinates in respect of work performance, behavior or service attitude.

3. **Complaints & Resolution.** Consistent with applicable national law and policy, CJTF7 personnel subjected to unfair treatment are encouraged to informally resolve issues at the lowest possible level within their units or staff sections. Where such informal resolution is impracticable or otherwise undesirable, complainants should direct such grievances to their national command authorities in accordance with applicable national policy and law. The CJTF -7 Human Relations and Equal Opportunity Office is available to provide support all coalition forces that desire assistance with grievances and resolution of complaints. The CJTF -7 Human Relations and Equal Opportunity Office is the primary point of contact for equal employment complaints and allegations involving US service personnel.

3. **Incidents involving personnel from different Coalition Forces.** From time to time, it is possible that instances or allegations of unfair treatment will arise that involve personnel from different coalition forces. In such cases, it is the responsibility of the respective national command elements to communicate with each other and promptly address the issues arising from such allegations or incidents. Unless otherwise provided for, national LNOs should act as initial points of contact where incidents of unfair treatment involve a member(s) of their force.

4. **Military justice & national jurisdiction.** Within CJTF7, discipline of service personnel is a national responsibility. Given the diversity of contributing nations within CJTF7, instances of unfair treatment may or may not constitute criminal or disciplinary offences for different countries. National command elements retain the exclusive authority to decide whether or not administrative or criminal disciplinary action will be taken against alleged perpetrators from their force.

5. CJTF7 involvement. As military justice is a national command responsibility, HQ CJTF7 will not become involved in disagreements between coalition nations concerning disciplinary or prosecutorial decisions. However, HQ CJTF7 has a legitimate command interest in instances of unfair treatment that are of an ongoing nature or otherwise impact adversely upon coalition morale, teamwork, cohesion or productivity. In extreme cases, HQ CJTF7 may meet with national command authorities with a view to taking such action as is necessary to ensure that coalition operational effectiveness is not undermined.

APPENDIX H-9: TRAVEL APPROVAL

Travel Approval

(N/Air Main Page: See FRAGO XXX for Rotary Wing Request Procedures)

SECDEF may approve travel for personnel not otherwise covered if in overall DoD interest. DoD may require such travel through DoD channels. Non-DoD-T (non-AF fixed wing) non-DoD travelers required to fill out DD Form 1381 prior to travel. DoD 4515.13-R, C1.7.1

Dedicated Fixed Wing travel requires proper approval authority and then staffing through CENTCOM for prioritization and determination of aircraft availability. See "How Airfibs Happen" for further details (available also on ACCE web-page)

Type of Traveler	Comment	Reimbursement
Invited Travelers	Task Advisers, DODS See note 1. Orders approving official approves the ITO, TF Wings approves AMR.	DoD pays; notes 1 & 2
Foreign Nationals	Only applies if no other provision under DoD 4515.13-R applies—i.e. do not use if we have an applicable ACSA. If primarily DoD interest, COMCJTF-76 approves for O-6 and below (or cis. equiv.). See note 2.	As referenced in note 1
Any counter-drug law enforcement	SECDEF or designee approves. See note 3.	Not required
UNAMA	UNAMA should route request through UN channels to DOS. SECDEF or designee approves request. Financially should be spent required or non-interference reimbursable. Otherwise See note 1 (Hill note 21)	See note 1 for ITOs
Other NGOs	Like UNAMA, primarily through DOS. Possibly invited travelers. See note 1 (Hill note 21)	
DOS (and other federal agency employees)	Unilateral authority for DoD, DoD 4515.13-R C1.2.5.3, and travel orders authorization with fluid cite: Space required then authorized. C2.2.5.3, & C1.2.2. Orders approving official approves ITO, TF Wings approves AMRs for such support.	Yes (see note 5) unless exclusively for DoD
Afghan Govt Officials other than MOD (MOL Government)	See foreign national travel, note 2 (Only applies if no other provision under DoD 4515.13-R applies). O-7 equivalents require CENTCOM approval. See also Email referenced in note 1.	
Karzi	For White House mission designation, must go through DOS. NSL Memorandum. See also notes 2 & 3.	
ANA	For support for military operations against enemy forces (may include green on green, see Phase IV OPERED) in war on terrorism, may use O&M under Rice Memo. No reimbursement required. Approval as with U.S. troops. Otherwise primarily use ACSA, note 4 (esp for static security during elections). See also notes 1 & 3. Foreign national travel (note 2) does not apply.	Under Hill Memo (4-6); no reimbursement, for ACSA see note 4
ANP	See notes 1, 2, 3. Primarily under foreign national travel (note 2) where orders approving official approves ITO, TF Wings approves AMR.	As referenced in notes
AMR	See notes 1, 2, (note 21) Primarily under foreign national travel (note 2) where orders approving official approves ITO, TF Wings approves AMRs.	See note 1 for ITO
NATO, SHAPE, ISAF, UK, Germany	Primarily under ACSA. See also notes 1, & 3. Foreign national travel (note 2) does not apply as there exist other provisions for travel in DoD 4515.13-R.	ACSA note 4. If not, see paragraph four
Other Coalition Military (UAE)	If no ACSA, see Invited Travelers (note 1) and Foreign National Travel (note 2). Foreign national travel (note 2) only applies if no other provision under DoD 4515.13-R applies.	Yes, see note 5
DoD Sponsored Media (embedded journalists)	Each member of the media must sign a travel disclaimer before departure. DoD 4515.13-R, C2.2.16.1, & C3.4.1. SECDEF or designee approves request.	No
Other Media (emergency situations) (Other media present in AOR)	Emergency: In an emergency when delayed coverage of an event would cause a serious detriment to the US military. Public Affairs Information Chief of the Military Department concerned approves. Each member of the media must sign a travel disclaimer before departure. DoD 4515.13-R, C3.4.5.2. Other: Theater Commander (CTF CG) or CFC-A CGs can authorize travel if in the primary interest of the DoD and within theater AOR. SECDEF authorizes travel outside theater and media travel requested by foreign government or another US Govt Agency. Each member of the media must sign travel disclaimer before departure. DoD 4515.13-R, C2.2.16.1, & C3.4.1, AB 106.1, 10.2 & 5. Must read chapter 2 for various, but specific details prior to rendering advice.	No
Contractors	Space required—see contract and travel orders. DoD 4515.13-R, C2.2.4.1	See also note 5
American Red Cross Full Time	If DoD travel orders, space required and reimbursable. DoD 4515.13-R, C2.2.6.3. If Space-A, no	If reimbursable see

Employees	reimbursement DoD 4515-12-R, Table C&T.1. AVN and commander authorized.	Note 1
NAF Employees	If DoD travel applies, space required and reimbursement: DoD 4515-12-R, C2.2.4. If Space-A, no reimbursement. DoD 4515-12-R, Table C&T.1. AVN and commander authorized.	
DoD Civilian Employees (AVN and CMDR approves in all cases)	Efficient Delivery: Space required; no reimbursement. DoD 4515-12-R, C2.2.2.1. Family Emergencies: with director to fly space required requires reimbursement. C2.2.2.3. Space-A: no reimbursement. DoD 4515-12-R, Table C&T.1.	If reimbursable see note 5
Aeronautical Evacuation (AE) (Direct AE or foreign national)	(1) Life Limb or Eyesight (LLE) & injury directly related to US operations. If Commander approves. (2) If LLE & otherwise covered, DOD does ABE(C) DoD 4515-12-R, C.5.6.7.2.	If inv. 2, DOD confirms they will pay
PAO Travel	See note 8. For US required PAO travel in CC's AOR, local CC approves. DoD 4515-12-R, C2.3.1 & C3.1. Must read chapter 2 for various, fact-specific details prior to rendering advice.	Generally no

Notes

1. *ITIA*. *International travel orders*. Joint Armed employees acting as national advisors to DoD components authorize only the author (and spouse) required travel if they confer with DoD officials on an official DoD matter (AW [DoD 4111.13-R, para C.2.2.7.1] and [ITIA, Appendix B, para 1]. Travel is required to have institutional order in further processing. Institutional travel order should identify DoD component and limit who to be charged. Fund (if) should be annotated on AMR.
2. *Foreign Nationals*. For foreign nationals not otherwise covered under [DoD 4111.13-R], i.e., apply only if no other provision for providing transportation—do not use this for ANA (we have an ACSA with them). COMUSCJF is the approval authority for O-6 and below (not civilian equivalent), and CENTCOM (or CC) reporting to Service (staff) is the approval authority for O-7 and above (not civilian equivalent) (see [TAM] referenced in para 7 for O-7 and above). Either way, such travel must be in the primary interest of the DoD. [DoD 4111.13-R C.10.7 & 8. A supporting memorandum should include the traveler's name and position and explain the need for travel, the insufficiency/home availability of conventional travel, the direct support it is in the primary interest of the DoD, and include whether support requested is space required (missionally, point-to-point, or non-missionally), or non-missionally (non-missionally). [DoD 4111.13-R C.10.2. The reimbursement travel, fund (if) or other reimbursement method should be annotated on AMR as well as supporting documents (travel orders). See [FACG XXX, XXX] for submitting/reimbursement request.
3. *Consideration*. SACJF or designee approves travel for any counter drug law enforcement personnel. No reimbursement is required.
4. *ACSA*. ACSAs are listed in [CJF's] rights. Staff every wing flight requests through AVN and ensure FORM CC-21 is completed and submitted to CJF for reimbursement. Reimbursement information should be included on AMR. No special authorization required.
5. *Reimbursable travel*. For all reimbursable travel, fund (if) or other reimbursement method should be annotated on AMR as well as supporting documents (if available). For AF fixed wing movement requests, send Joint Movement Request (JMR) through CJF. For Space-A travel, include form: XXXXXXXXXXXXXXX. Staff also requests through CJF for XXX code. To schedule a movement, submit Joint Movement Request (JMR) through CJF to CENTCOM Deployment Center (CDC). XXXXCh/XXX.
6. *"Access to the National Security Agency's Mission, 18 July 2003, and [JCOF Memo, 11 Sep 2003, authorize provision of "local transportation and other services to ANA (such as the Commander, U.S. Central Command, documents are accurately and appropriately to visible ANA forces, which otherwise would be unable to assist U.S. Armed Forces in connection with military operations against enemy forces in the war on terrorism."*
7. In almost all cases, requests for MIAA for president Karzai must be routed through US Embassy Kabul to DoD to OSD requesting DoD support on a reimbursable basis or, if on a non-reimbursable basis, to the NSC for their direct approval. See attached Email.
8. *PAG travel* is in Chpt 1 of [DoD 4111.13-R] (it's also) read in its entirety before making). Other than emergency travel (C.3.3.2), there is no rush. Two key questions govern approval authority: (1) who requested the travel (US or a foreign govt: C.3.3.1) and where is the travel (in or out of request sequence's AMR: C.3.2). For US requested PAG travel in CC's AOR, local CC approval. PAG may not be for goodwill. C.3.1.3.

APPENDIX J-1: FIELD ORDERING OFFICER APPOINTMENT



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
HEADQUARTERS, 1ST CAVALRY DIVISION
VICTORY NORTH
APO, AE 09379

AFVA-CS

25 March 2004

MEMORANDUM FOR Commander, BIAP Contracting Office, ATTN: MAJ Mahar, APO, AE 09335

SUBJECT: Field Ordering Officer Appointment

1. Request the following individual be appointed as a Field Ordering Officer (FOO) for HHC 1CD, CW2 Anton M. Streeter, [REDACTED]
2. Duties and Responsibilities: To perform duties as FOO for OIF 2, From 25 March 2004 To 30 September 2004.
3. Types of Transactions Authorized: Micro purchases under \$2,500.00 for general supplies and services ISO unit mission.
4. POC is the undersigned.

A handwritten signature in black ink, appearing to read "Robert J. [unclear]".

[REDACTED]
LTC, SF
ICD Division Comptroller

1

**DEPARTMENT OF THE ARMY
U.S. ARMY CENTRAL COMMAND
BIAP CONTRACTING OFFICE
APO AE 09335**

CFLCC-PARC-BIAP

27 March 2004

MEMORANDUM FOR RECORD

SUBJECT: Appointment of ordering officer

RANK: CW2

NAME: [REDACTED]

SSN: [REDACTED]

Appointment. Under AFARS 1.602-2-91, you are appointed an Ordering Officer for the purposes set forth in paragraph 2 herein. Your appointment shall become effective 27 March 2004 and remain effective until 27 March 2005 or unless sooner revoked or you are reassigned. You are under the supervision of the undersigned Contracting Officer for your actions as an Ordering Officer.

2. Authority, Limitations, and Requirements. Your appointment is subject to the use of the method of purchase and to the limitations and requirements stated below:
- a. Subject to your ensuring that funds are available and that local purchase authority exists for the Transaction, you may make purchases restricted to over-the-counter purchases using the Standard Form 44, Purchase order Invoice Voucher, provided all the following conditions are satisfied:
 - (1) You may make purchases only in response to written request, preferably, Purchase Request and Commitments (DA 3953) in support of Operation Enduring Freedom.
 - (2) The aggregate amount of the purchase transaction is not in excess of \$2500. You may not split purchases to avoid this monetary limitation.
 - (3) If you receive a DA Form 3953 Purchase Request and Commitment requesting that you purchase the items the DA3953 must be signed by the proper officials, with the exception being that you must certify funding availability from your bulk funding.
 - (4) Supplies are immediately available.
 - (5) Only expendable and durable property may be purchased.
 - (6) One delivery and one payment shall be made.
 - b. The authority stated above may not be re-delegated to any other person.
 - c. Your Procurement Instrument Identification Numbers (Pins) begin with W91QEK-04-M-9904-0001 and continue in consecutive order through W91QEK-04-M-9904-0200.
 - d. You shall maintain an Ordering officer file to collect all documents supporting your actions, and shall provide records of every purchase made by you, including copies of completed SF 44's, invoices purchases logs, and bulk funding registers to this office monthly, for the duration of this appointment.

3. Standards of and Acquisition Reporting requirements.

- a. You shall comply with the standards of conduct prescribed in DODD 5500.7-R, Joint Ethics Regulation, and shall review the regulation at least semiannually.
- b. You shall furnish the undersigned and the contracting officer to whom you are responsible such information as may be required for acquisition reporting purposes in the manner and the time so specified.

4. Termination of Appointment.

- a. Your appointment may be revoked at any time by the undersigned authority or successor and shall be terminated in writing.
- b. Should you be reassigned from your present position or should your employment be terminated while this appointment is in effect, you shall promptly notify the appointment authority in writing so that your appointment may be terminated.



MAJ, USAF
Contracting Officer

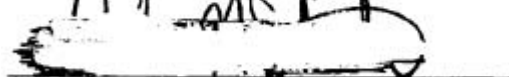
Statement of Field Ordering Officer

I,  Certify that I have been briefed and understand my duties and responsibilities as an ordering officer.

I will place my loyalty to country, ethical principles, and law above private gain and other interests and perform my duties in keeping with the highest tradition of the military service and civilian service to the U.S. Government.

I will avoid engaging in any personal business or professional activity. I will not have or retain any direct or indirect financial interest which places me in a position in which there is a conflict or the appearance of a conflict between my private interests and the public interests of the United States as it relates to my duties and responsibilities as Department of the Army government personnel.

I will accept no gifts or gratuities from those who have or seek business with DOD or from those whose business interests are affected by DOD functions.



Signature of Ordering Officer

30 Mar 04
Date

APPENDIX J-2: PAYING AGENT APPOINTMENT LETTER



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
HEADQUARTERS, COALITION FORCES NORTHERN IRAQ
MOSUL, IRAQ APO AE 09325

AFZB-CS

7 August 2003

MEMORANDUM FOR Finance and Accounting Officer, 336th Finance Company, APO AE
09889

SUBJECT: Paying Agent Appointment

1. Under the provisions of DODFMR, Volume 5, para. 020602, [REDACTED], is appointed as Paying Agent to [REDACTED], Finance and Accounting Officer, 336th Finance Command.
2. PURPOSE: To perform duties as Paying Agent for Operation Iraqi Freedom from 20 July 2003 to _____.
3. MAXIMUM ADVANCE: \$500,000 VALUE OF ALL FUNDS REQUESTED.
4. ACCOUNTING CLASSIFICATION: SAME AS PR&C.
5. SPECIAL INSTRUCTIONS: Paying Agent is authorized to make official government purchases that have been properly prepared and signed by the accompanying Ordering Officer and vendor. Funds will not be entrusted to others or intermingled with other funds. Paying Agent will receive a copy of the 336th Finance Command Paying Agent MOI and understand these instructions prior to drawing funds. Funds will be secured at all times as required by DODFMR, Vol. 5.

[REDACTED]
COL, GS
Chief of Staff

I accept my appointment as Paying Agent to LTC John J. Halloran, Jr., 336th Finance Command and agree to hold myself accountable to the United States for all public funds received. I have been counseled as to my pecuniary liability, given Standing Operating Procedures, and had all my questions relating to this appointment answered satisfactorily.

[REDACTED]
2LT, CM
Paying Agent

APPENDIX J-3: 1ID INDIVIDUAL
TRAINING CHECKLIST

**1ID INDIVIDUAL TRAINING
CHECKLIST**

TASK	NLT Date Complete		MAJ Smith	CPT Doe	CPT Jones	SGT Jackson	SPC Jane		STATUS				NOTES
SINGARs operations									100	>90	>80	<80	
PLGRS operations									100	>90	>80	<80	
Guard Duty									100	>90	>80	<80	
Search Ind./Vehicles									100	>90	>80	<80	
Detainee handling									100	>90	>80	<80	
Convoy operations									100	>90	>80	<80	
React to Ambush/Sniper									100	>90	>80	<80	
React to direct/indirect fire									100	>90	>80	<80	
React to Riots/crowds									100	>90	>80	<80	
Call for fire									100	>90	>80	<80	
Request MEDEVAC									100	>90	>80	<80	
Maintain a HMMWV									100	>90	>80	<80	
Mounted Navigation									100	>90	>80	<80	
Prepare fighting position									100	>90	>80	<80	
First Aid									100	>90	>80	<80	
Combat Lifesaver									100	>90	>80	<80	
Weapons maintenance/qualification									100	>90	>80	<80	
Field Hygiene									100	>90	>80	<80	
Country/Culture Briefs									100	>90	>80	<80	
LOW/COC/ROE briefings									100	>90	>80	<80	
Dental Cat.									100	>90	>80	<80	
Physical									100	>90	>80	<80	
Driver's License									100	>90	>80	<80	
OPSEC/SAEDA									100	>90	>80	<80	
Family member brief									100	>90	>80	<80	
Medical (shots, HIV, etc.)									100	>90	>80	<80	
ID Tags									100	>90	>80	<80	
Vision									100	>90	>80	<80	
Finance									100	>90	>80	<80	
SGLI/emergency record									100	>90	>80	<80	
Legal									100	>90	>80	<80	
OCIE/packing list									100	>90	>80	<80	
Security clearance									100	>90	>80	<80	

APPENDIX J-4: 1ID OSJA DEPLOYMENT READINESS CHECKLIST

1ID OSJA Deployment Readiness Checklist

TASK	NLT Date Complete		STATUS				Notes
ROE complete			100	>90	>80	<80	
ROE training packages complete and disseminated to Law Centers			100	>90	>80	<80	
ROE Cards printed and disseminated			100	>90	>80	<80	
ROE briefings to Units 100% complete			100	>90	>80	<80	
Jurisdictional Realignment complete			100	>90	>80	<80	
Unit Claims Officers on orders (2xBN)			100	>90	>80	<80	
UCO training complete			100	>90	>80	<80	
FRG pre-deployment briefings complete			100	>90	>80	<80	
100% Unit PDPs complete			100	>90	>80	<80	
LOW / COC briefings to units complete			100	>90	>80	<80	
Law Center Ops configured to support Rear Det			100	>90	>80	<80	
Occupation Law Briefings to unit officers			100	>90	>80	<80	
Information Papers complete			100	>90	>80	<80	
Security Clearances for deploying soldiers			100	>90	>80	<80	
HMMWV licenses for deploying soldiers			100	>90	>80	<80	
Consolidated POA's with base agencies			100	>90	>80	<80	
Vehicle's FMC and ready for railroad			100	>90	>80	<80	
Radios installed in vehicles			100	>90	>80	<80	
Vehicle load plan complete			100	>90	>80	<80	
ISU-90 Load plan complete			100	>90	>80	<80	
Reference footlockers complete			100	>90	>80	<80	
General Order #1 complete and published			100	>90	>80	<80	
Deploying soldiers identified and notified			100	>90	>80	<80	
Rear Detachment soldiers identified			100	>90	>80	<80	
Field Desks stocked with supplies			100	>90	>80	<80	
Deploying soldiers A and B bags packed and inspected			100	>90	>80	<80	
RDLs assigned to BOLTs and signed for			100	>90	>80	<80	