

# Army Lawyer

U.S. Army Judge Advocate General's Corps

Issue 6 • 2020

## Remembering the Nuremberg Trials

**16**

## Retirement Benefits to Victims

**39**

## African Militaries & the Rule of Law

**50**

## JA on the Rio Grande

**84**







## AROUND THE CORPS

CPT Robert Kuczarski, Area Support Group-Balkans CJA, pets puppies during a visit with Kosovo Forces at Klinika Veterinare (Mitro Vet), in Mitrovica/Mitrovica, Kosovo, in November 2020. KFOR Service members delivered supplies to the clinic to aid the local dogs and cats taken there. (Credit: SGT Jonathan Perdelwitz)

# Army Lawyer

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Issue 6 • 2020

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*The Army Lawyer* (ISSN 0364-1287, USPS 490-330) is published six times a year by The Judge Advocate General's Legal Center and School, Charlottesville, Virginia for the purpose of education and performance in legal responsibilities.

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*The Army Lawyer* articles are indexed in the *Index to Legal Periodicals*, the *Current Law Index*, the *Legal Resources Index*, and the *Index to U.S. Government Periodicals*. *The Army Lawyer* is also available in the Judge Advocate General's Corps electronic reference library and can be accessed at <https://tjaglcpublic.army.mil/tal>.

Articles may be cited as: [author's name], [article title in italics], *ARMY LAW*, [issue number], at [first page of article], [pincite].

On the cover: The Nuremberg Palace of Justice in Germany. (Picture credit: Nuremberg Municipal Museums, Memorium Nuremberg Trials; Photo: Christine Dierenbach)

## Table of Contents

### Departments

#### Court Is Assembled

- 2 **Trust**  
The Foundation of Readiness  
*By Command Sergeant Major Osvaldo Martinez Jr.*

#### 4 News & Notes

#### Book Review

- 7 **Billy Budd, Sailor**  
An Inside Narrative  
*Reviewed by Major Adam E. Choate*
- 11 **Soviet Judgment at Nuremberg**  
*Reviewed by Fred L. Borch III*

#### Lore of the Corps

- 16 **The Nuremberg Trials at 75**  
The International Military Tribunal and the Military Trials Under Council Law No. 10 (1945-1949)  
*By Fred L. Borch III*
- 25 **TDS at 40**  
A Short History of Its Origins  
*By Fred L. Borch III*
- 28 **An Historic First in Our Corps**  
FLEP NCOs  
*By Fred L. Borch III*

#### Azimuth Check

- 31 **Anywhere in the World in 18 Hours**  
Readiness and the Airborne Immediate Response Force  
*By Colonel Jeffrey S. Thurner, Major Donel J. Davis, Chief Warrant Officer 2 Tia M. Simmons, & Sergeant Major Matthew A. Wilkerson*

### Practice Notes

- 34 **Training the Defense of Superior Orders**  
Honoring the Legacy of the International Military Tribunal at Nuremberg After 75 Years  
*By Major M. Keoni Medici & Major Joshua P. Scheel*

- 39 **Hate the Sin, Not the Sinner's Family**  
Benefits Available to Victim Family Members of Retirement-Eligible Soldiers  
*By Major Carling M. Dunham*
- 44 **U.S. Army North OSJA Actions in the COVID-19 Response**  
*By Major Isaiah M. Garfias, Captain Charles R. Eiser, & Captain David J. Bryant*

### Features

#### No. 1

- 50 **Adherence to the Rule of Law in African Militaries**  
USAFRICOM's Roadmap  
*By Sandra Franzblau & Mark "Max" Maxwell*

#### No. 2

- 60 **The Lego Test for Lesser Included Offenses**  
MJA 2016 Provides Something New and Painful to Stumble Over  
*By Major Andrew M. Lewis*

#### No. 3

- 70 **Combining Traditional and Progressive Jus ad Bellum Threat Evaluations in Response to Autonomous Weapon Systems**  
*By Major Gregory L. Collins*

#### No. 4

- 84 **A JA on the Rio Grande**  
*By Major Beau O. Watkins*

#### Closing Argument

- 94 **Maintaining Readiness Through Commemoration at the Bataan Memorial Death March**  
*By Colonel Fansu Ku*





Command sergeants major work together to climb an open face tower at Fort Gordon, GA. (Credit: SPC Jordan Buck)

# Court Is Assembled

## Trust

### The Foundation of Readiness

*By Command Sergeant Major Osvaldo Martinez Jr.*

**For more than two centuries, the Army has taken great pride in its people—our most valuable weapon system.** In the last few years, as we have focused much of our attention on readiness, have we consequently

forgotten how to take care of our people? If we are focusing too much on readiness and neglecting our people, are we truly ready?

When the Army released the results of the 136-page report of the Fort Hood

Independent Review Committee,<sup>1</sup> many were taken aback by the results; however many were not. Everyone who read the report had an opportunity to study and reflect on the culture of not only Fort Hood, Texas, but of many of our military installations. At the end of the report, leaders were left to ask themselves, “Where do we go from here?”

The answer—in my opinion—is “trust.” Trust is one of the foundational principles of leadership, and must be developed to ensure readiness. It is pivotal that our Soldiers have trust in their leaders and in their organization—the unit to which they are assigned, and the Army in which they serve. We must work harder to earn the trust of our Soldiers, both enlisted and officer. Trust must be built daily and it must be built diligently, not only in words, but

even more critically, with actions. Army Doctrine Publication 6-0, *Mission Command: Command and Control of Army Forces*, tells us that trust is derived from successful shared experiences and that mutual trust is a key component, if not the most important ingredient, to building cohesive teams.<sup>2</sup> Ask yourself, “Are you taking the opportunity to build shared experiences with your team?” Doing the simple things can build high-performing teams with a foundation of trust: establish a common purpose; conduct team-building activities; recognize a job well done; and before anything else, lead from the front.

I recall an early morning at Fort Bliss, as I was lining up to begin the foot march for the German Armed Forces Badge for Military Proficiency, a familiar voice spoke to me. There were about one hundred Soldiers at the start line, all of us waiting to receive our instructions. I turned around to see who was calling out “Sergeant Major” to me; it was my Staff Judge Advocate (SJA), Colonel (COL) Chuck Poche. Colonel Poche stood there, just like me and the dozens of others, in full uniform with his ruck on his back. When I asked what he was doing there, he said he had nothing better to do that morning than to walk 12 kilometers with his Sergeant Major—it was a surprising and indelible moment that I will never forget. For the next hour and a half, he was there with me, every step of the way. We finished the 12-kilometer ruck march—together.

There are many other significant memories I carry forward with me and that have impacted the way I think about leadership



(Credit: Love the wind – stock.adobe.com)

experiences. We shared experiences that made it very easy for me to trust them then and still trust them today. Once we have earned the trust of our people, we must work to keep it. Once our Soldiers trust us as their leaders, they will always work hard to never let us or the organization down. Highly performing Soldiers build highly functioning organizations, and because we are tasked with the critical obligation to defend our Nation, we cannot afford any flaws in our weapon systems.

## Once we have earned the trust of our people, we must work to keep it

and caring for subordinates. Like the time my then-SJA, COL Karen Carlisle, and I jumped into a pool to save a Soldier who went down a pool slide and didn’t know how to swim, and when COL Lance Hamilton and I attempted to ride 100 miles in one day in Korea.

These leaders, among others, taught me the transformative power of shared

When our Soldiers trust their leaders and the organization, they are more likely to trust the Army and its policies. They may not always agree with the outcomes of undertakings, but they are more likely to trust that the outcomes are fair. Trust allows meaningful conversations to occur between leaders and those they lead. These conversations inform leaders of what their

Soldiers are going through and when they may need to shift or refocus their attention.

If we want to ensure that our most valuable weapon system is always ready, we must ensure we have earned—and maintain—our Soldiers’ trust. We cannot rely on policy alone to fix the challenges we face. Our challenges need to be addressed by leaders who know their Soldiers, and by Soldiers who trust their leaders. As Secretary of the Army James P. McCarthy stated on 8 December 2020, “But without leadership, systems don’t matter.”<sup>3</sup> **TAL**

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*CSM Martinez is the Regimental Command Sergeant Major of The Judge Advocate General’s Corps.*

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### Notes

1. FORT HOOD INDEP. REV. COMM., REPORT OF THE FORT HOOD INDEPENDENT REVIEW COMMITTEE (Nov. 6, 2020).
2. U.S. DEP’T OF ARMY, DOCTRINE PUB. 6-0, MISSION COMMAND: COMMAND AND CONTROL OF ARMY FORCES paras. 1-30 to -32 (July 2019).
3. Ryan D. McCarthy, U.S. Army Sec’y, Army Leaders and Committee Members Brief Reporters on Findings and Recommendations of the Fort Hood Independent Review Committee (Dec. 8, 2020).





# News & Notes

## Photo 1

PFC Rajea Money and PFC Josephine Embola fold the flag at the conclusion of the reenlistment of SSG Giselle Solis, NCOIC, General Crimes, Combined Eighth Army/2ID Military Justice. A CH-47 from 2 CAB flew members of the 2ID and Eighth Army OSJAs to the top of Pinnacle Four near Asan-si, Korea, to conduct the reenlistment, hovered in the background during the ceremony, and then flew back to Camp Humphreys.

## Photo 2

The Resolute Support/U.S. Forces-Afghanistan OSJA hosted Commander

Christopher Scheuren, German Navy judge advocate and legal advisor to Train Advise Assist Command-North, during his visit to Resolute Support Headquarters in Kabul, Afghanistan. From left to right, MAJ Katharine Adams, COL Joseph Mackey, CDR Scheuren, and Capt Melissa Fowler.

## Photo 3

CPT Rudy Dambeck, Military Justice Advisor, 2-2 Stryker Brigade Combat Team, 7th Infantry Division, became the first Army judge advocate to earn the Expert Soldier Badge during testing between 4 and 8 October 2020. CPT Dambeck was one of only 46 Soldiers—a passing rate of 16%—to

successfully complete 34 individual Soldier tasks, including weapons qualification and maintenance, a 12-mile road march, land navigation, combat lifesaver skills, and an APFT. A true warrior-lawyer, he also completed two administrative separation boards and processed courts-martial actions while in the final phase of his training for this event. He was mentored by SGT Matthew Clark from 2-2 SBCT, who was the first paralegal in the Army to earn the ESB last year. CPT Dambeck's wife, Amanda, proudly pinned the ESB on his chest after a demanding week of Army readiness challenges.

## Photo 4

Hardworking JBLM TDS gets in a hike during the monthly TDS Social Day! Top row L to R: SPC La Rosa, SPC Clarno, CPT Baek, CPT Bowyer, Mr. Parker.





Bottom L to R: CPT Harnish, CPT Kim, CPT Hall, CPT Hanzeli, CPT Deel, and SGT Mortimer.

**Photo 5**

Soldiers from the 82d Airborne Division and the Mission Command Training Program gathered to conduct an AAR in the hangar at Holland Drop Zone to discuss Warfighter 21-1 and legal issues that arose during the exercise. Top row L to R: COL Jeffrey Thurnher, CPT Sean Duffy, SGT Geoffry Starke, CPT Robert Clopton, MSG Marvin Kauger. Bottom row L to R: COL Robert Manley, CPT Danielle Curtin, SSG Alina Zamora, CPT Hayley Boyd, CPT Stephen Esposito. Not pictured: MAJ Justin Nottingham.



**Photo 6**

MAJ Greg Vetere, Senior Defense Counsel at Fort Stewart, presents Army Achievement Medals to two TDS paralegals, PFC Trevor Tamashiro and PFC Michelle Wilson, for their outstanding performance and commitment to duty. These two junior paralegals effectively implemented TDS 2.0 under challenging COVID-19 circumstances, prior to the arrival of the field office's NCOIC.

**Photo 7**

Judge advocates and paralegal Soldiers in the U.S. Army Reserve Command OSJA, joined by NCOs from JFKSWCS's legal office, honed their skills in leadership, lethality, and operating in an ambiguous







environment at Fort Bragg's Leadership Reaction Course. The office's NCOs planned and executed the training, to include opening, running, and closing the range.

**Photo 8**

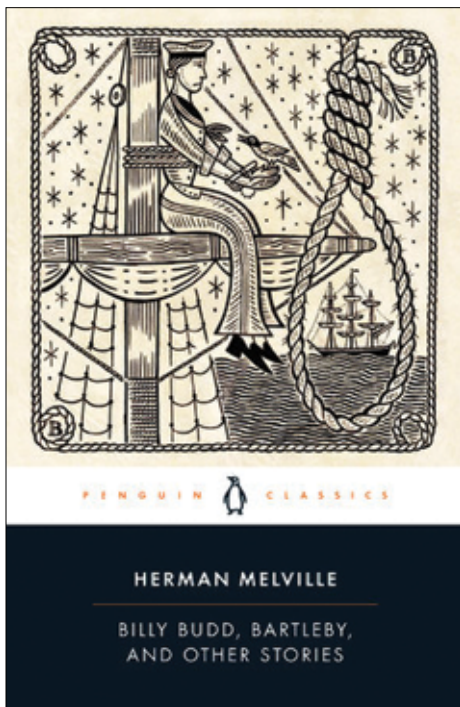
CPT Jeri D'Aurelio, Trial Defense Counsel, TDS West Region (Alaska), competes in the Finals of NBC's American Ninja Warrior. To qualify for the finals, CPT D'Aurelio placed in the top four of all female competitors nationwide. During the finals, only one woman went further on the obstacle course.

**Photo 9**

The OSJA at Fort Wainwright, AK, enjoyed the beautiful Alaskan scenery by climbing Birch Hill before the snow and the skiers.







# Book Review

## Billy Budd, Sailor An Inside Narrative

Reviewed by Major Adam E. Choate

“Struck dead by an angel of God!  
Yet the angel must hang!”<sup>1</sup>

The goals of military justice are timeless, as are the struggles of its practitioners. Every commander and judge advocate (JA) must balance the merits of an individual case and an individual accused with the need to uphold good order and discipline in their units. *Billy Budd* is Herman Melville’s final work, finished just before his death in

1891.<sup>2</sup> People assume that it is the tale of a sailor unjustly condemned to death by harsh laws and an inflexible commander. However, if read through the military lens of the commander, it reveals how the goals of our military justice system sometimes conflict with personal emotions and the toll this can take on those tasked with enforcing it.

There is a concept in moral philosophy known as the problem of dirty hands. This posits that there are times when a leader must make a choice that, on its own, appears immoral or wrong.<sup>3</sup> They do this either because there are no good choices or because their hands are tied by some countervailing consideration that is not immediately apparent.<sup>4</sup> Truly good leaders know this and do not make these decisions lightly, but they do make them. They take this burden on themselves, and the more moral they are, the heavier this burden can be.<sup>5</sup> The decision itself can appear the same externally, whether the leader making it is a moral person or not; but, an immoral person does not know or care about this struggle. It is through this internal recognition and conflict that a moral person appears.<sup>6</sup> It can be an emotional burden to decide to prosecute a case, and it is rare to find an individual that never faced a moral dilemma in military justice. However, knowing that this internal struggle is a healthy thing—one that others throughout history have dealt with—can assuage one’s conscience and inform a JA’s advice to the command.

At its heart, *Billy Budd* is about this conflict. It is important for staff and brigade JAs, chiefs of justice, and anyone in a position to advise on military justice matters to read this short work and reflect on how its commander faces this dilemma. While this work is not new, it presents a conflict that will feel familiar to any JA who has had to make a recommendation on case disposition. It is not always an easy read, with its complex syntax and somewhat archaic allusions, but it is worth visiting or re-visiting for its many time-tested lessons.

### Summary

*Billy Budd* takes place on the H.M.S. *Bellipotent*, a British warship sailing in the Mediterranean Sea in 1797. It was a dangerous time for the British. The French Directory, the prelude to the Napoleonic

wars, threatened the English Channel.<sup>7</sup> The last line of defense for Great Britain was their navy, which had its own trouble. Mere months before the events of the novel, a mutiny broke out over sailors’ treatment at Spithead on the southern coast of England, followed by a second mutiny of the fleet in the Nore—the anchorage at the mouth of the Thames River.<sup>8</sup> Together, these involved almost one-third of the entire Royal Navy.<sup>9</sup> While the Navy eventually put down the mutinies, their shadow loomed large over everything that happened afterward. Commanders were constantly wary of another mutiny and took precautions at the slightest hint of discontent.<sup>10</sup>

Against that backdrop, the H.M.S. *Bellipotent* is short of crew, so they stop a merchant ship. On the ship, which is conveniently named the *Rights-of-Man*, they forcibly enlist—or “impress”—its best sailor, Billy Budd.<sup>11</sup> To heighten the fall to come, the author describes him as the “peace-maker” of the ship, almost saintly in his innocence and good nature, and universally beloved by his fellow sailors.<sup>12</sup> He takes his impressment in stride, with an “uncomplaining acquiescence, all but cheerful,” and is soon popular on his new ship as well.<sup>13</sup> His trust in others and lack of guile borders on naiveté, but his only real flaws are a stutter that can arise when under stress and a fear of corporal punishment.<sup>14</sup> Melville creates Billy as a pure and simple paragon of innocence, which will highlight the sense of apparent injustice when the law treats him like everyone else.

While on the *Bellipotent*, Billy begins to draw the ire of the master-at-arms, a petty officer charged with maintaining order, named John Claggart.<sup>15</sup> Claggart is everything that Billy is not. He is smart; but, due to his “evil nature,” he is conniving and dishonest.<sup>16</sup> He hates the innocence in Billy and conspires to frame him for mutiny by making false accusations to the captain, Edward “Starry” Vere.<sup>17</sup>

Captain Vere is an honorable, exceptional officer, “a sailor of distinction even in a time prolific of renowned seamen.”<sup>18</sup> Like many of the commanders in today’s military, he is intelligent, well-read, contemplative, and is the equal of Admiral Horatio Nelson as a fighter.<sup>19</sup> Vere is the kind of commander that most people would



want and that most JAs would want to advise. He thinks about the second- and third-order effects of his decisions and does not allow emotions to make decisions for him. He recognizes the burden of command and does not take it lightly. If he has a flaw, it is that he can sometimes be too removed and pedantic at times,<sup>20</sup> but even this will mainly serve to allow him to articulate the rationale for his actions towards Billy.<sup>21</sup> In short, he is the perfect prism to view the competing emotions and decisions made in pursuit of “justice.”<sup>22</sup>

Vere is too good a judge of character to believe Claggart’s lies, but the accusation still causes Billy to stutter.<sup>23</sup> Captain Vere tries to comfort Billy, but in a panic at not being able to defend himself verbally, Billy involuntarily strikes out at the much smaller Claggart and kills him with one blow.<sup>24</sup> Captain Vere never believes that Billy did this intentionally. However, he knows that he must convene a court-martial to decide Billy’s fate. He calls a panel of three officers into the cabin.<sup>25</sup> Captain Vere serves as the convening authority, trial counsel, defense counsel, and judge as he struggles with what to do with Billy Budd. Billy’s character is so pure that as soon as Claggart dies, Captain Vere’s first words are to equate Billy with an “angel.”<sup>26</sup> His second words are, “Yet the angel must hang.”<sup>27</sup>

### **The Trial**

The trial of Billy is the heart of the novel, and the dialogue between Captain Vere and the panel would be familiar to anyone who has struggled with the many dimensions of military justice. Captain Vere, or any commander in a similar situation, must consider three dimensions of the case. First, the strictly legal reading of the law must be considered. The commander or their legal advisor must know the elements of the crime, the evidence available, and the likelihood of a successful prosecution. Next to be considered is the effect of the crime and disposition on good order and discipline, balanced by the rights of the accused and the particularized facts of the case. The final dimension is the personal conscience of the commander, and whether their responsibilities under the law allow them to exercise it, or if they will be forced to dirty their hands. Captain Vere considers each in turn.

### **The Legal Considerations**

From a legal standpoint, Billy stands condemned. The applicable law states, “If any... [p]erson in the Fleet, shall strike any of his Superior Officers...on any Pretense whatsoever, every such Person being convicted of any such Offense, by the Sentence of a Court Martial, shall suffer Death.”<sup>28</sup> There is no appeal, no discretion, no excuse, or mitigation. At this time, and under this regime, it is a strict liability crime to so much as strike—much less kill—a petty officer like Claggart. After all, it carries a mandatory sentence of death. Both Melville and Captain Vere are clear that Billy had no intent to injure or kill anyone.<sup>29</sup> Morally, Billy is blameless. His act was involuntary, and Claggart’s death seems almost to be an act of god. On the other hand, Claggart had the evil intentions. He had schemed and lied to his commanding officer, and if they had believed him, it would have resulted in Billy’s execution. In effect, Claggart had attempted to murder Billy by perverting the justice system. Yet, under the strict military code of the time, “innocence and guilt personified in Claggart and Budd in effect changed places.”<sup>30</sup> Some readers may become bogged down in the legal minutia of British naval law and procedure, but let us accept this plain reading of the text for our purposes.<sup>31</sup> The law condemns Billy.

### **The Military Justice Considerations**

Captain Vere is not, however, a mindless “martinet.”<sup>32</sup> He can be formal and pedantic but is also thoughtful and does not end his analysis at this superficial level. Captain Vere knows that he has a duty to maintain good order and discipline on his ship. Remember, this was “close on the heel of the suppressed insurrections,” and the ship is deployed during a time of war, so the need to maintain discipline is paramount.<sup>33</sup> He knows firsthand what happens if authority is lost, and the mutinies remain fresh on his mind.<sup>34</sup> This responsibility lies on his shoulders as the commander.

Captain Vere also knows that Billy is a sympathetic figure with compelling mitigating circumstances. Vere shares the panel’s compassion for Billy; for he, too, feels conflicted. He tells the court-martial that, most likely, a civilian court would free Billy.<sup>35</sup> However, in their current situation,

they have concerns that do not apply in the civilian world. Civilian law is not concerned with enforcing discipline. It does not have the same urgency as a court-martial where, at any moment, the enemy may be sighted. The same officers of the court may have to order sailors to their deaths, and the discipline enforced by the court ensures they will obey the orders without hesitation. This dual purpose—justice and discipline—is one of the defining features of military justice. Captain Vere recognizes this and knows the impact of leniency on Billy. Vere says that the hundreds of sailors on board would never understand why he did not punish Billy and would see it only as weakness. The sailors would “think that we flinch, that we are afraid of them.”<sup>36</sup> This would be “deadly to discipline.”<sup>37</sup>

### **Personal Considerations**

At this point, we know that—under a strict legal reading—Billy is guilty, and the proper sentence is death. Practical considerations also argue for death, as anything less risks indiscipline and mutiny; however, the officers still struggle with their personal consciences. They are clearly sympathetic toward Billy and have to choose between their personal feelings and duties as officers. Sensing that the court-martial is struggling with this moral dilemma, Vere lays out what he sees as their duty. His reasoning comes from the hard-earned knowledge gained from solitary “studies, modifying and tempering the practical training of an active career.”<sup>38</sup> As a moral leader who knows the burden of dirty hands, he does not come to his conclusion lightly. This is not the easy way out or the simple solution, and he knows this from his long experience.

Vere tells them that under a simple natural law, they could follow their personal preferences and acquit Billy.<sup>39</sup> However, when they accepted a commission, they became agents of the State, entrusted with enforcing that State’s laws. They may disagree with the policy, but it is their duty to carry it out. Captain Vere tells his fellow officers that “our vowed responsibility is this: That however pitiless that law may operate in any instances, we nevertheless adhere to it and administer it.”<sup>40</sup> There are times when personal feelings and judgment are encouraged, and there are times when



discretion cannot be allowed. Vere knows that can be a heavy burden. However, he has come to terms with his decision and knows that it is his duty to ensure that the law is faithfully enforced. In taking this burden on himself, Vere dirties his hands and becomes the tragic hero of the novel.<sup>41</sup> He ends his plea to the court-martial by hoping that even Billy “would feel even for us on whom in this military necessity so heavy a compulsion is laid.”<sup>42</sup> They duly sentence Billy to hang at dawn.

### Lessons for Today

Did Vere make the right decision? The text gives no clear answer. Melville seems to have purposely made it impossible to come down definitively on one side or the other.<sup>43</sup> Due in large part to this inscrutability, critics have read the work as everything from a critique of political revolution, to a commentary on natural law, to an acceptance of lost innocence.<sup>44</sup> However, when seen through the narrower lens of military justice, some clear lessons become apparent.

First, commanders—and the JAs who advise them—have a dual duty to both punish wrongdoers and use the military justice system to enforce good order and discipline. The non-binding disposition guidance issued in conjunction with the Military Justice Act of 2016 states that “the military justice system is a powerful tool that preserves good order and discipline while protecting the civil rights of Service members.”<sup>45</sup> It goes on to list factors that a commander should consider in disposing of a case. The first factor is the “mission-related responsibilities of the command.”<sup>46</sup> Here, this was a warship, deployed in an active warzone. The second factor is “whether the offense occurred during wartime,” which it did.<sup>47</sup> The third factor is the “effect of the offense on . . . good order and discipline of the command.”<sup>48</sup> As Captain Vere recognized, a sailor killing an officer, no matter how sympathetic, would have tragic consequences for the discipline of the ship, especially in a world where rumor and conjecture are faster than clear communication. It is only in the fourth factor that one arrives at the “circumstances of the offense.”<sup>49</sup> Commanders have to make hard choices, which may sometimes be unpopular or seem harsh, knowing that they do this for a greater good.

Second, whatever one might feel about a particular policy or case, it is the commander’s duty to enforce the law fairly and faithfully. Commanders cannot choose which laws to enforce and which ones to ignore. Judge advocates cannot decide to change a rule of evidence if they disagree with it. We must obey legal orders and laws if we are to be a nation and military of laws, and it is not our place to nullify them. One of the inappropriate considerations in the disposition guidance is “the personal feelings of anyone authorized to recommend, advise, or make a decision as to disposition.”<sup>50</sup> This clearly includes JAs and echoes Captain Vere’s admonishment that, as officers of the state, they cannot allow their personal feelings to interfere with their fair execution of the law.

Third, these principles are constant throughout time. Melville wrote *Billy Budd* in the late nineteenth century, about events in the late eighteenth century. In the early twentieth century, Major General Enoch Crowder<sup>51</sup> defended the death sentences of three privates convicted of falling asleep while on duty in the trenches of World War I.<sup>52</sup> The commander of the entire American force, General John J. Pershing, had personally insisted on the importance of automatic capital punishment for this conduct. Major General Crowder explained this harsh policy, saying that “under such circumstances no one could have been criticized for acceding to this urgent request and adhering to the principle handed down by all the fixed traditions of military law.”<sup>53</sup> When clemency was eventually granted to the men, General Crowder recognized it as “the inevitable mental conflict that arises between the stern necessities of war discipline and the natural sympathy for men who have incurred the death penalty.”<sup>54</sup> It was the same conflict that Captain Vere faced. In the twenty-first century, Secretary of Defense James Mattis recognized that the “military justice system is a powerful tool that preserves good order and discipline while protecting the civil rights of Service members.”<sup>55</sup> In a 2018 memo, Secretary Mattis told the entire military that commanders have a “duty to use it” and should not default to easier administrative solutions.<sup>56</sup> The justice system can be part of “forging disciplined troops,” and

commanders “must be willing to choose the harder right over the easier wrong.”<sup>57</sup> This is advice that Captain Vere would have taken to heart.

While the principles underlying Vere’s decisions are timeless, we must also recognize that their application can differ over time. Our system is set up to enforce discipline while also protecting the rights of the accused. In Billy’s case—under the prevailing laws of the time—he was guilty, and capital punishment was mandatory. Today, this is certainly extreme; but, in context of the time and novel, it was acceptable. The modern equivalent would be a mandatory separation or automatic reduction that a convening authority may not agree with, but must abide by. While the relative weight given to individual rights versus good order and discipline has changed over time, commanders and senior attorneys can still struggle with their interplay today. These decisions have not gotten any easier over time.

In the novel, Billy does recognize the struggle within his commander that Vere hoped he would see. When they execute him, his last words are “God bless Captain Vere.”<sup>58</sup> There is no mutiny, and as Vere had suspected, the rumors that got out among the fleet were that Billy had murdered an officer in cold blood.<sup>59</sup> Even knowing this, the decision stayed with Vere. As a moral person, he recognized his dirty hands and paid an emotional toll. When he dies in combat, his last words are “Billy Budd.”<sup>60</sup> He does not say this in remorse,<sup>61</sup> as Vere knows he could have made no other decision. It is more for the heavy burden that made such a difficult decision necessary.

### Conclusion

So, why should a JA read *Billy Budd*? First, as a work of fiction, the novel can delve into the thoughts and conflicts of its characters in a way that nonfiction often cannot. It can create worlds and dilemmas perfectly crafted to illustrate its moral choices in a timeless way. Aristotle, speaking about his own culture’s version of fiction, said that poetry is “more serious than history: in fact poetry speaks more of universals, whereas history of particulars.”<sup>62</sup> There is importance and value in reading history and



learning from the specific mistakes of those who came before, but there is nothing like great literature to demonstrate universal conflicts.

By virtue of the freedom afforded by fiction, Melville is able to show the reader the conflicted psyche of Vere in a way that a historian never could and that is still relevant today. Commanders and JAs must balance the demands of good order and discipline with individual Soldiers' rights. They must do this dispassionately, without personal animus or bias. There are no easy answers. Melville recognized this by making his tale open to multiple interpretations. However, Captain Vere is the only one who has the experience and intellect to recognize what his sense of duty calls him to do, and he is the one with the ultimate responsibility to carry it out. Making these decisions and having this weight solely on one person's shoulders can be a monumental undertaking. Every commander and JA has the duty to carefully consider each circumstance with the gravity it is due. Decisions involving someone's life or liberty are not, and should not be, easy. Good leaders reveal themselves by bearing this burden.<sup>63</sup> They do not take the easy way out, nor do they allow personal feelings to dictate their actions. They recognize the higher duty, know the personal sacrifice of their actions, and are still willing to pay the cost. This has never changed, but reading literature that echoes this across the centuries can help us realize we are not alone. **TAL**

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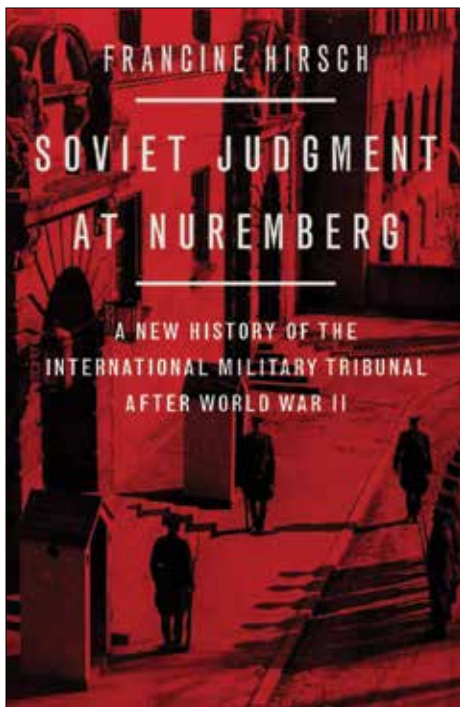
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## Notes

1. HERMAN MELVILLE, *Billy Budd, Sailor*, in *BILLY BUDD, BARTLEBY, AND OTHER STORIES* 243, 299 (Penguin Books 2016) (1924). This is a recommended edition of the book because it is an authoritative version edited with the latest research to closely approximate Melville's intent, and because it includes several helpful footnotes explaining the more esoteric references. It also includes several other of Melville's short works. *Id.* at xxix.
2. Peter Shaw, *The Fate of a Story*, 62 *AM. SCHOLAR* 591, 592 (1993) (discusses the convoluted history of the novel's writing, loss after Melville's death, rediscovery and publication in 1924, and changes made to the final draft).
3. Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 *PHIL. & PUB. AFFS.* 160, 161 (1973).
4. *Id.* at 160.

5. *Id.* at 167.
6. *Id.* at 168.
7. SIMON SCHAMA, *A HISTORY OF BRITAIN: THE FATE OF EMPIRE, 1776-2000*, at 89 (2002).
8. Anthony G. Brown, *The Nore Mutiny—Sedition or Ships' Biscuits? A Reappraisal*, 92 *MARINER'S MIRROR* 60 (2006).
9. *Id.*
10. MELVILLE, *supra* note 1, at 262.
11. *Id.* at 249.
12. *Id.* at 251.
13. *Id.* at 249.
14. *Id.* at 256, 270.
15. *Id.* at 274.
16. *Id.* at 277.
17. *Id.* at 288.
18. *Id.* at 262.
19. *Id.* at 265.
20. *Id.*
21. Richard A. Posner, *Comment on Richard Weisberg's Interpretation of "Billy Budd,"* 1 *CARDOZO STUD. L. & LITERATURE* 71, 71, 76 (1989).
22. *But see* Byron J. Calhoun, *Captain Vere as Outsider and Insider: Military Leadership in Billy Budd, Sailor*, 21 *WAR LITERATURE & ARTS* 1, 2 (2009) (arguing that Vere was lacking in many of the skills required of a modern military leader in a more general sense).
23. MELVILLE, *supra* note 1, at 298.
24. *Id.*
25. *Id.* at 300.
26. *Id.* at 299.
27. *Id.*
28. C.B. Ives, *Billy Budd and the Articles of War*, 34 *AM. LITERATURE* 31, 32 (1962).
29. MELVILLE, *supra* note 1, at 304.
30. *Id.* at 301.
31. *See, e.g.,* Ives, *supra* note 28 (asserting the law did not actually condemn Billy). *But see* Posner, *supra* note 21 (stating that Vere was correct in his judgement).
32. Posner, *supra* note 21, at 76.
33. MELVILLE, *supra* note 1, at 301. *See generally* Posner, *supra* note 21.
34. MELVILLE, *supra* note 1, at 302.
35. *Id.* at 309.
36. *Id.* at 310.
37. *Id.* *See generally* Posner, *supra* note 21, at 77.
38. MELVILLE, *supra* note 1, at 307.
39. *Id.* at 308.
40. *Id.*
41. *See* Eugene Goodheart, *"Billy Budd" and the World's Imperfection*, 114 *SEWANEE REV.* 81 (2006); Ralph W. Willett, *Nelson and Vere: Hero and Victim in Billy Budd, Sailor*, 82 *PMLA* 370 (1967).
42. MELVILLE, *supra* note 1, at 310.
43. Calhoun, *supra* note 22.

44. *See* Gregg Crane, *The Hard Case: Billy Budd and the Judgment Intuitive*, 82 *U. TORONTO Q.* 889 (2013) (arguing that the story advocates for a more intuitive and less values-based judgement). *See also* Philip Loosemore, *Revolution, Counterrevolution, and Natural Law in Billy Budd, Sailor*, 53 *CRITICISM* 99 (2011) (arguing that the story illustrates the danger of violence on the part of both the oppressed and their oppressors). *See generally* Shaw, *supra* note 2 (summarizing some of the main themes of criticism of the story, and how they have changed over time).
45. *MANUAL FOR COURTS-MARTIAL, UNITED STATES*, app. 2.1, ¶ 2.1 (2019).
46. *Id.* ¶ 2.1(a).
47. *Id.* ¶ 2.1(b).
48. *Id.* ¶ 2.1(c).
49. *Id.* ¶ 2.1(d).
50. *Id.* ¶ 2.1(b).
51. At the time of these events, Major General Enoch Crowder was the U.S. Army Judge Advocate General.
52. MAJOR GENERAL ENOCH CROWDER, *WAR DEPARTMENT, MILITARY JUSTICE DURING THE WAR* 10 (1919).
53. *Id.*
54. *Id.* at 11.
55. Memorandum from Sec'y of Def. to Sec'ys of Mil. Dep'ts et al., subject: Discipline and Lethality (13 Aug. 2018).
56. *Id.*
57. *Id.*
58. MELVILLE, *supra* note 1, at 319.
59. *Id.* at 325.
60. *Id.*
61. *Id.*
62. Silvia Carli, *Poetry is More Philosophical than History: Aristotle on Mimesis and Form*, 64 *REV. METAPHYSICS* 303, 303 (2010) (quoting Aristotle).
63. Walzer, *supra* note 3, at 168.



## Soviet Judgment at Nuremberg

Reviewed by Fred L. Borch III

This truly groundbreaking book should be read by every lawyer with an interest, general or otherwise, in the law of armed conflict (LOAC) and the International Military Tribunal (IMT) in particular. Author Francine Hirsch, a history professor at the University of Wisconsin-Madison, deserves high praise as the first scholar to publish a comprehensive study of the role played by the Soviets in the prosecution of Nazi leaders at the IMT. Prior to the publication of *Soviet Judgment at Nuremberg*, the history of the IMT was viewed almost exclusively through Western eyes, with Brigadier General Telford Taylor's personal memoir—*Anatomy of the Nuremberg Trials*—serving as the foundation for understanding the event.<sup>1</sup> By looking at Soviet participation in the war crimes prosecution, Hirsch now gives a new and valuable perspective on what happened at Nuremberg in 1945 and 1946. Or, as she puts it, her book “presents a new history...by restoring a central

and missing piece: the role of the Soviet Union.”<sup>2</sup>

The Soviets were “key actors” in the creation of the IMT and were the first among the Allies to envision a “special international tribunal” that would prosecute “the Hitlerites” (as Stalin referred to them) for war crimes. While Stalin and V. Molotov (his foreign minister) would have been happy to summarily hang or shoot the senior members of Hitler's government, they envisioned an international trial as a “grand political spectacle whose outcome was certain”—like the Moscow Trials of 1936 to 1938.<sup>3</sup> The National Socialists would be executed at the end of the legal proceedings but not before “the depths of Nazi depravity” were exposed for all to see. Also, an international tribunal would establish “a legal claim” for reparations, which Stalin and Molotov knew was required if Russia were to recover from the war that had killed millions and destroyed thousands of villages, cities, and industries.<sup>4</sup>

After the trials got underway in Nuremberg's Palace of Justice on 20 November 1945, the Soviets quickly learned that the trial they thought they were getting was not what was going to happen. Stalin believed that the evidence of war crimes committed by the Germans was so overwhelming that the IMT would be open-and-shut. But Stalin did not understand that the British, French, and Americans would insist upon full and fair proceedings—including allowing a Nazi accused to testify on his own behalf, call defense witnesses, and challenge prosecutors and prosecution evidence. For example, he and the rest of the Soviet leadership did not understand that their hand-picked judge and chief prosecutor at the IMT, Iona Nikitchenko and Roman Rudenko, respectively, would not be able to prevent the German defendants from alleging that the 1940 massacre of more than 20,000 Poles at Katyn (which the U.S.S.R. foolishly tried to blame on the Germans at the IMT), made the Soviets just as guilty of war crimes.<sup>5</sup> As Hirsch explains, the Russians thought that Nuremberg would be a story of Soviet victimhood and German treachery. They thought that the narrative would be Soviet heroism and German guilt. What they got instead was a forum where the Soviet

Union was both isolated and censured for its wartime conduct.<sup>6</sup>

*Soviet Judgment at Nuremberg* is organized chronologically. It first examines the background of the IMT<sup>7</sup> before looking at “The Prosecution's Case”<sup>8</sup> and “The Defense Case.”<sup>9</sup> The book closes with a section titled “Last Words and Judgments,”<sup>10</sup> in which Professor Hirsch provides some conclusions about the import of the Soviet Union's participation at the IMT and the tribunal's impact on the evolution of LOAC.

For those in the legal profession, probably the most interesting aspect of the book is the discussion about the origin of “waging aggressive war” and “crimes against peace” as offenses triable at the IMT. The idea for these war crimes did not originate with American, British, or French jurists. Rather, it was the Russian academic Aron Trainin who insisted that it was not sufficient to prosecute the Nazis for crimes committed *during* the conflict itself. On the contrary, the Nazis also must be tried for launching the war—committing “a crime against peace.”<sup>11</sup>

While the Allies had discussed the idea of labeling aggressive war as a punishable criminal act, it was Trainin who coined the term “crimes against peace” and argued that the crime encompassed acts of aggression, violation of peace treaties, and the like.<sup>12</sup> Consequently, because the Soviet Union persuaded the Allies that Germany's leaders must be prosecuted for crimes against peace, Article 6 of the *Charter of the International Tribunal* declared that it was a crime to (1) plan, prepare, initiate, or wage a war of aggression or a war in violation of international treaties, or (2) conspire to do so.<sup>13</sup> While the offense has become “somewhat of a dead letter” today—because there have been no prosecutions of “crimes against peace” since Nuremberg—it remains an offense under international criminal law; and, the International Criminal Court in The Hague has jurisdiction over the offense of “aggression.”<sup>14</sup>

Army lawyers will be interested in *Soviet Judgment at Nuremberg's* discussion of the defense of superior orders. Again, it was Aron Trainin who insisted that the defense must not be permitted. If it were, he argued, then the guilty would escape individual responsibility by claiming that



their actions were committed under the orders or sanction of his government or commanders. As early as December 1943, the Soviets held a public war crimes trial at which three Gestapo officials and a Ukrainian collaborator were prosecuted for murdering some 14,000 civilians (most of whom were Jewish). When the accused raised the defense of superior orders, it was rejected by the tribunal as inadmissible.<sup>15</sup>

This is an important point, since the general rule at this time was that combatants could not be punished for offenses committed under the orders or sanction of their government or commanders. The United States, for example, did not remove superior orders as a complete defense until November 1944.<sup>16</sup> Even then, the American view was that if the crime committed violated “the accepted laws and customs of war,” the defense of superior orders could be considered in determining culpability, either as a matter in defense or in mitigation in punishment.<sup>17</sup>

The Soviets, however, would have none of this “‘saving bunker’ for war criminals ‘during the stern hour of vengeance.’”<sup>18</sup> Consequently, when promulgating the *Charter* for the IMT, it was the Soviet Union’s view—more than any other single factor—that resulted in the language of Article 8: “the fact that the defendant acted pursuant to [the] order of his government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment.”<sup>19</sup> While the Allies ultimately agreed that the defense of superior orders, in and of itself, would be eliminated as a shield against individual criminal liability at the IMT, the Soviets deserve the credit for being the first to push this important change in LOAC.<sup>20</sup>

A final point about this outstanding book. Details about Soviet participation in the IMT were relatively unknown—if not forgotten—until Francine Hirsch began exploring this history. There are several reasons for this. First, the politics of the Cold War meant that the American, British, and French governments tried to downplay the Soviet role in the proceedings so that the Nuremberg trials were seen as a triumph of Western leadership and liberal democracy. Soviet participation was seen as “regrettable but unavoidable—a sort of

Faustian bargain” that was required but certainly not desired.<sup>21</sup> Second, the Soviet role at the IMT has been overlooked because the first books about the event were written by Western judges and prosecutors, like Telford Taylor. These Western writers also made clear in their books that the Soviet Union’s participation at the IMT was, in fact, a threat to the legacy of Nuremberg. After all, the Soviets had invaded Poland with their German ally in September 1939, and the Red Army had committed many war crimes in its conquest of Berlin in May 1945. Third, because the IMT did not unfold in the way Stalin and his colleagues expected—a scripted trial in which guilt was a foregone conclusion—there was little incentive for any Soviet scholar to trumpet the contributions made by Russians to the IMT. Finally, until the former Soviet archives were open to scholars like Professor Hirsch, there was a dearth of primary sources available upon which to construct a narrative about the Soviet Union’s role in the evolution of international law generally and the IMT in particular.

The IMT remains the “starting point” for discussions about “transitional justice, international law, genocide, and human rights.”<sup>22</sup> Given its importance in legal history, *Soviet Judgment at Nuremberg* provides “a new way of understanding the origins and development of the post-war movement for human rights.”<sup>23</sup> Professor Hirsch spent fifteen years researching and writing her fine book, which included examining thousands of documents from the former Soviet archives. Her superlative history of the Soviet Union’s role at the IMT deserves to reach the widest possible audience. **TAL**

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*Mr. Borch is the Regimental Historian, Archivist, and Professor of Legal History and Leadership at The Judge Advocate General’s Legal Center and School in Charlottesville, Virginia.*

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## Notes

1. TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* (1992). The Academy Award winning movie *Judgment at Nuremberg* (starring Spencer Tracy, Burt Lancaster, and Judy Garland) also played a role in shaping Western opinions about Nuremberg, but the 1961 film is not about the IMT but rather is a fictionalized version of a trial that took place after the initial Nuremberg proceedings. See *JUDGMENT AT NUREMBERG* (ROXLON FILMS 1961).

2. FRANCINE HIRSCH, *SOVIET JUDGMENT AT NUREMBERG* 6 (2020).
3. *Id.* at 4.
4. *Id.*
5. *Id.* at 320-44. In regards to the murders of Poles at Katyn, the IMT was only able to consider German guilt for the killings, and not Soviet culpability, as only Germans were on trial at the IMT. In April 1990, on the 50th anniversary of the Katyn massacre, the Soviet Union officially admitted that NKVD (People’s Commissariat of Internal Affairs) troops had committed the war crime—under the direct orders of Stalin and the Politburo. Keith Sword, *Katyn Massacre*, in *OXFORD COMPANION TO THE SECOND WORLD WAR* 646 (I. C. B. Dear ed., 1995).
6. HIRSCH, *supra* note 2, at 14.
7. *Id.* at 17-131.
8. *Id.* at 135-242.
9. *Id.* at 245-345.
10. *Id.* at 347-416.
11. *Id.* at 35.
12. *Id.* at 35, 62-63, 73.
13. *Id.* at 50-51.
14. GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 103-04 (2d ed. 2016).
15. HIRSCH, *supra* note 2, at 31-32, 385-86.
16. WAR DEP’T, *FIELD MANUAL 27-10, RULES OF LAND WARFARE* para. 345.1 (15 Nov. 1944).
17. *Id.*
18. HIRSCH, *supra* note 2, at 33.
19. TELFORD TAYLOR, *FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUREMBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10*, at 66-67 (1949).
20. Article 8 did not entirely eliminate the superior orders defense, in that defenses, such as acting under coercion or duress, were still relevant to guilt. Additionally, if a reasonable person would have had no reason to think that the order was illegal, then the superior orders defense would be applicable. SOLIS, *supra* note 14, at 388.
21. HIRSCH, *supra* note 2, at 6.
22. *Id.*
23. *Id.*

75th Anniversary

# Nuremberg Trials



## Part 1

History of Nuremberg Trials

## Part 2

Nuremberg's Impact on LOAC

November

19

2020

## Part 3

Legacy for Great Power Competition



On 19 November 2020, The Judge Advocate General's Legal Center and School hosted a commemoration of the 75th Anniversary of the beginning of trial in the International Military Tribunal at Nuremberg. This symposium featured seven notable speakers, including Mr. Fred Borch (Photo 1), JAG Corps Regimental Historian; Dr. William Meinecke (Photo 2), a historian from the U.S. Holocaust Museum Memorial who joined the symposium via Zoom; Professor Geoff Corn (Photo 3), South Texas College of Law; Professor Gary Solis (Photo 4), Georgetown Law School; Ms. Andrea Harrison (Photo 5), Legal Advisor and Deputy Head of Legal Department, International Committee of the Red Cross; Professor Tom Nachbar (Photo 6), Senior Fellow, Center for National Security Law; and Lieutenant General Charles N. Pede (Photo 7), The Judge Advocate General.

The speakers covered topics including a historical overview of the International Military Tribunal and the twelve subsequent U.S. proceedings; the contemporary implications of the shift from state to individual criminal responsibility; the legal implications of the twelve subsequent proceedings; and a look forward to how the Nuremberg Trials may continue to affect the practice of law. The symposium is available for viewing on the TJAGLCS Television YouTube channel: <https://youtube.com/c/TJAGLCSTELEVISION>. (Poster credit: Jaleesa Mitchell-Smith, TJAGLCS; Photo credit: Jason Wilkerson/TJAGLCS)

In 1995, TJAGLCS hosted a symposium in commemoration of the 50th anniversary of the Nuremberg Trials, which was transcribed in the *Military Law Review*, Volume 149, Summer 1995. This special coverage is available at <https://tjaglcspublic.army.mil/documents/27431/2247398/1995-Summer-assembled.pdf/63e78930-4c79-4472-a433-82aefc20d18d>.





**“Marking such profound history—indeed, legal history—ensures our compass is in working order and sets each of us on the right path.”**

—LIEUTENANT GENERAL CHARLES N. PEDE

To read LTG Pede’s complete remarks at the Nuremberg Trials Symposium, please refer to the forthcoming *Military Law Review*, Volume 229, Issue 2, Summer 2021. Remarks by all speakers will also be included.





A hand-carved sculpture of the IMT defendants' box, made by one of the American guards. The sculpture is on display in the library at TJAGLCS. (Credit: Jason Wilkerson, TJAGLCS)

# Lore of the Corps

## The Nuremberg Trials at 75

### The International Military Tribunal and the Military Trials Under Council Law No. 10 (1945-1949)

By Fred L. Borch III

**Seventy-five years ago**, on 20 November 1945, an international military court in Nuremberg, Germany, began criminal proceedings against twenty-two high ranking Nazis. Charged with having committed “crimes against humanity,” “crimes against

peace,” and “violations of the laws and customs of war,” the defendants were tried by four judges—one American, one Frenchman, one British, and one Russian. When this International Military Tribunal (IMT) completed its work on 31 August 1946,

twelve of the twenty-two defendants had been sentenced to death, and three received life imprisonment. With the exception of three individuals who were found not guilty, the remaining accused were sentenced to confinement, ranging from ten to twenty years. Five Nazi organizations were also declared criminal.

Immediately following the end of the IMT, the American military government held twelve more war crimes trials in Nuremberg.<sup>1</sup> They were convened under the authority of Control Council Law No. 10, a law enacted by the Allied Control Council<sup>2</sup> that governed Germany after World War II. These “Subsequent Proceedings” (as most historians call them) indicted 185 commanders, doctors, lawyers, judges, industrialists, bankers, and other Germans who had willingly participated

in war crimes, crimes against peace, and crimes against humanity. Seventy-five years have passed since the start of the IMT and the Law No. 10 tribunals. Now is the time to commemorate this important legal milestone by briefly telling the story of these thirteen Nuremberg trials, Army judge advocates' role in them, and their importance in the development of international criminal law and the law of armed conflict (LOAC).

### International Military Tribunal

There were some senior Allied leaders who believed that the guilt of major Nazi leaders was "so black" that they should be summarily executed.<sup>3</sup> Ultimately, however, the United States, United Kingdom, France, and the Soviet Union—collectively known as the Four Powers—decided that there should be some sort of judicial disposition, a trial, where those determined to be guilty of war crimes would be punished.<sup>4</sup> The result was the Allied Executive Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (Agreement) and a Charter of the International Military Tribunal (Charter). Together, the Agreement and the Charter established the law under which the Nazi leaders would be tried as well as the shape of the Tribunal that would try them.<sup>5</sup>

Probably the most important issue for the IMT was which law should be applied at the proceedings. There were two possibilities: the IMT could use existing international law and determine this law by using the traditional methods of international tribunals. Alternatively, the IMT could simply apply the law as already determined by the Four Powers. The problem with the first approach was that it opened up the defense that a crime charged in an indictment was not an offense under international law. Justice Robert H. Jackson, the lead American prosecutor, argued that "in view of the disputed state of the law of nations," it was "entirely proper" that the Four Powers should determine the criminal law that would be the basis of the IMT prosecution.<sup>6</sup> This explains why the Charter declares the law to be used at the Tribunal. It specifies that certain acts are war crimes, and that the only decision for the IMT

judges to make was which of the defendants were guilty of which crimes.

Article 6 of the Charter declared the following three crimes as prosecutable at the IMT:

1. Crimes against Peace. The crime of planning, preparing, initiating or waging a war of aggression, or a war in violation of international treaties, agreements or assurances, or conspiring to do so;
2. War Crimes, or violations of the laws and customs of war; and
3. Crimes against humanity, or inhuman acts committed against civilian populations.<sup>7</sup>

There was not much difficulty when it came to gathering evidence supporting convictions for violations of the laws and customs of war (e.g., unlawful killing of prisoners of war) or crimes against hu-

manity (e.g., unlawful killing of Jews and Roma in concentration camps). When it came to proof that the Nazis had committed crimes against peace, however, it was more problematic. As Brigadier General Telford Taylor, Mr. Justice Jackson's deputy at the IMT, wrote:

Men plan and prepare for war by acts lawful in themselves—economic estimates, military plans and maneuvers, the manufacture of weapons, political memoranda—and to prove that these were done with guilty intent to initiate an aggressive war is difficult at best. It was unusually easy in the cases of [Herman] Göring and [Joachim von] Ribbentrop, and others who were present at conferences (recorded in writing with typical German thoroughness) at which Hitler and his associates spoke openly of their intention.<sup>8</sup>

In addition to the problem of determining intent, the IMT had to interpret the term

"war of aggression." Ultimately, it held that "aggressive acts" were different from "aggressive wars." Hitler's seizure of Austria and Czechoslovakia were aggressive acts, while the invasion of Poland—and the subsequent invasion of France, the Low Countries, and the Soviet Union—constituted a "war of aggression." This distinction seems rather artificial, if not illogical, and this no doubt explains why there has been no prosecution for crimes against peace since the IMT. It is no wonder the crime today is considered "something of a dead letter."<sup>9</sup>

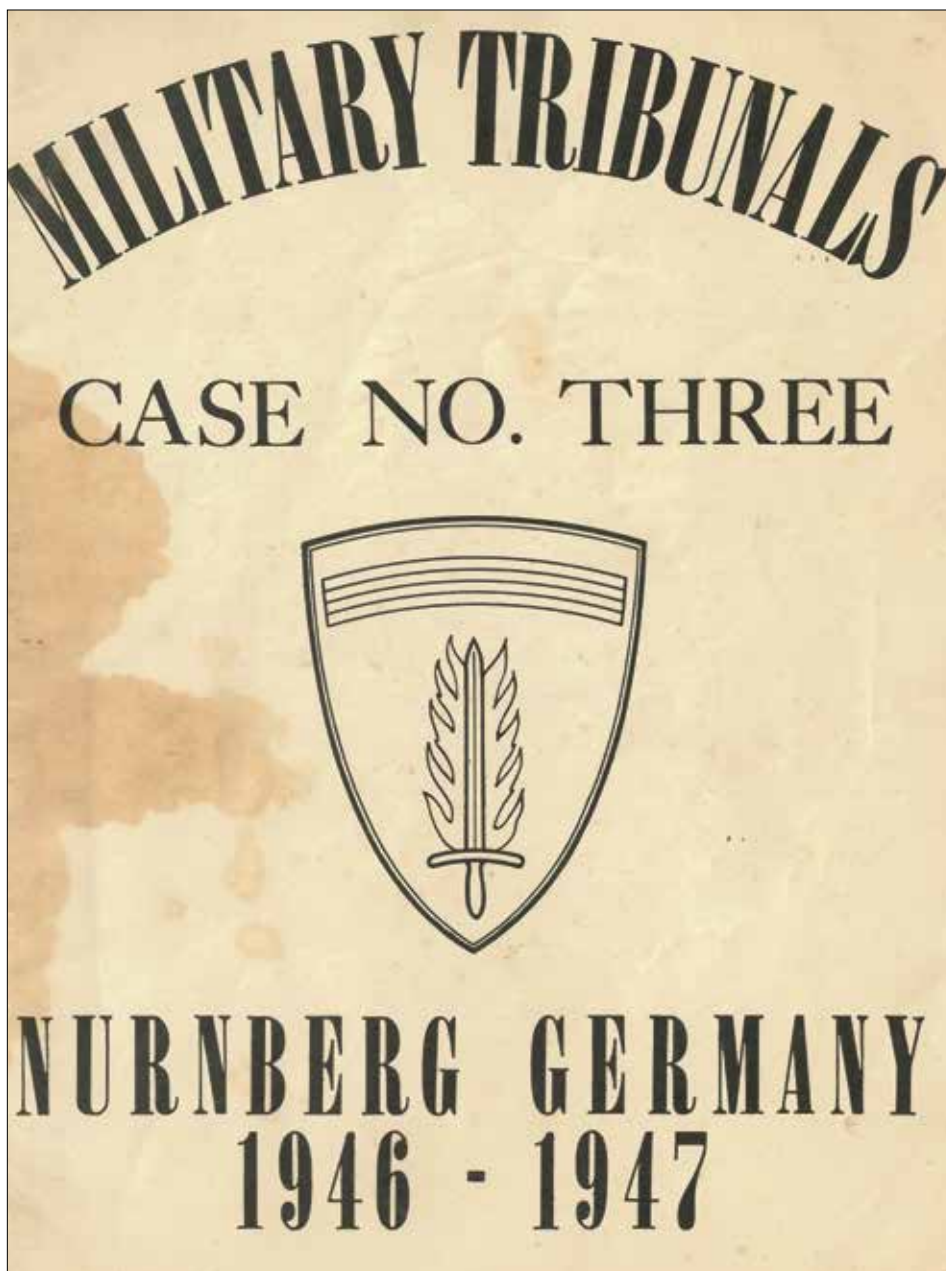
After the decision about the applicable law, the next most important issue was who to prosecute. Justice Jackson explained that the IMT would focus on major leaders and policy makers. "Our case," Jackson wrote, "is concerned with the Nazi master plan, not with individual barbarities and perversions which occurred independently of any central plan."<sup>10</sup> In theory, the IMT could

## the IMT left for another day the prosecution of the "trigger-pullers" and those like them

have prosecuted any and every German citizen who had committed a war crime. In focusing on the policy makers, and not those individuals who put these policies into effect, the IMT left for another day the prosecution of the "trigger-pullers" and those like them. Ultimately, the "major war criminals" were tried by the IMT. While all were important, those with the greatest name recognition included Herman Göring (*Reichsmarschall* and Commander of the Luftwaffe, President of the Reichstag, and Hitler's named successor), Joachim von Ribbentrop (Foreign Minister of Nazi Germany from 1938 to 1945), and Field Marshal Wilhelm Keitel (Chief of the High Command—the highest ranking officer in the German Armed Forces).<sup>11</sup>

As for the procedure at the IMT, the Charter borrowed from both common and civil law. Under Article 24(g), for example, an accused could testify on his own behalf, under oath and subject to cross-examination. While this is a fundamental right in Anglo-American jurisprudence, it is unknown in many European courts.





The cover of the program for the Military Tribunals, Case No. 3. (Photo courtesy of Fred Borch III)

On the other hand, under Article 24(j), an accused was permitted to make an unsworn statement to the Tribunal on the merits—a statement not subject to cross-examination. Lawyers trained in European civil law were familiar with this practice. Common-law attorneys, however, viewed Article 24(j) as quite extraordinary.<sup>12</sup>

For the lawyer accustomed to Anglo-American jurisprudence, the lack of a rule against hearsay and other rules of evidence designed to protect an accused were most unusual. Article 19, however,

clearly stated that the “Tribunal shall not be bound by technical rules of evidence,” and that the court “shall admit any evidence which it deems to have probative value.”<sup>13</sup> Judge advocates familiar with *Ex parte Quirin*, however, would have known that the military commission trying the German U-boat saboteurs had a similar rule, i.e., any evidence probative to a reasonable person was admissible.<sup>14</sup>

Despite this mixture of common law and civil law procedure at the IMT, the process was quite fair to the defendants.

The indictment had to specify “in detail the charges against the defendants,” and a copy of the indictment “and of all the documents lodged with the indictment” had to be given to the accused “at a reasonable time before trial.”<sup>15</sup> The defendants also had the right to present a defense and have the assistance of counsel. Finally, they had the right to cross-examine any witness called by the prosecution.<sup>16</sup>

As for the composition of the IMT itself, the four judges represented each of the Four Powers. The members were: Francis Biddle (United States); Donnedieu de Vabres (France); Lord Justice Lawrence (United Kingdom), president; and General I. T. Nikitchenko (Soviet Union). Biddle had been the Attorney General under President Franklin D. Roosevelt and had been one of the prosecutors in the military commission that tried the U-boat saboteurs.

When the IMT ended on 31 August 1946, the four judges had listened to some 360 witnesses give hours and hours of testimony. They also had considered thousands of pages of documents. In its judgment, based on a forty-two volume record of trial, the IMT found eight of the accused guilty of “conspiracy to commit crimes against peace.” The chief evidence supporting these verdicts was that the accused had participated in conferences at which Hitler and the eight accused “spoke openly of their intention” to initiate war in violation of international treaties and agreements.<sup>17</sup> The IMT also found twelve of the accused guilty of “waging aggressive war against ten nations.” While the conspiracy to commit crimes against peace and waging aggressive war were both crimes against peace, the distinction lies in the former relating to planning, preparing, and initiating war, while the latter concerned the actual *waging* of war.<sup>18</sup>

In regards to war crimes, the IMT held that the “evidence relating to war crimes has been overwhelming in its volume and detail.”<sup>19</sup> The IMT heard about the murder, ill-treatment, and deportation of civilians in occupied territories, and also the murder and mistreatment of prisoners of war (POWs). Most importantly, in finding the accused guilty of having committed war crimes, the IMT rejected the defense of “superior orders” in accordance with Article

8 of the Charter, which provided that “the fact that the defendant acted pursuant to [the] order of his government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment.”<sup>20</sup> The significance of Article 8 simply cannot be overstated. It signaled the death knell to the “act of state doctrine” that previously had provided a *complete* defense to criminal acts committed pursuant to orders from a superior government official. No longer would a soldier of any rank be able to escape punishment for killing those wounded in combat or mistreating POWs because his commander had ordered him to do so or because such crimes were sanctioned by his government.<sup>21</sup>

Finally, in regards to crimes against humanity, the IMT heard evidence that the accused had implemented programs that either degraded or exterminated “national, political, racial, religious, or other groups.”<sup>22</sup> The accused were convicted of being leaders, organizers, instigators, and accomplices in the formation or execution of a common plan or conspiracy to commit inhuman acts against civilians, including murder, extermination, enslavement, and deportation.<sup>23</sup>

Although some scholars and commentators have criticized the IMT as “victor’s justice” and a violation of the prohibition against *ex post facto* laws,<sup>24</sup> the import of the tribunal’s decisions are clear: for the first time in history, an international court had determined that there was individual criminal responsibility for violations of international law, including responsibility for acts of state.

### **Military Trials Pursuant to Control Council Law No. 10**

Since Articles 22, 23, and 30 of the Charter contemplated that there would be *multiple* IMTs, the Allies discussed plans for a second IMT, while the quadripartite judicial proceedings were underway in Nuremberg after 20 November 1945. By late October or early November 1946, however, President Truman had decided that the United States would not take part in any more IMTs. He most likely was persuaded by Justice Jackson’s final report to him on the IMT, in which Jackson argued that holding additional Four-Party trials would be inefficient. The better course of action, wrote

Jackson, was for “each of the occupying powers [to] assume responsibility for a trial within its own zone.”<sup>25</sup> A zonal prosecution “can be conducted in two languages instead of four [as occurred at the IMT], and since all of the judges in any one trial would be of a single legal system, no time would be lost in adjusting [to] different systems of procedure.”<sup>26</sup> While Jackson’s words should be taken at face value, it also was increasingly apparent to President Truman that a second IMT might “devolve into a wrangle between capitalist and communist ideologies” and that the Russians would be more interested in scoring propaganda points than punishing German war criminals.<sup>27</sup> Truman was prescient, as relations with the Soviet Union soon deteriorated into a Cold War, and the emergence of the Truman Doctrine only increased tensions between the Russians and the West.<sup>28</sup>

In January 1947, Truman informed the British, French, and Soviets that the United States would not participate in any more IMTs and that it intended to prosecute German war criminals “in national or occupation courts” as authorized by Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*. Under Article III of Law No. 10, every zone commander was authorized to prosecute “all persons...arrested and charged” for war crimes “before an appropriate tribunal.” While the French and Soviets almost certainly would have liked to have continued with the IMT as a vehicle for prosecuting war crimes, Truman’s announcement that the United States would no longer participate in a Four-Party tribunal meant that the Nuremberg IMT would be a stand-alone event in legal history. All war crimes prosecutions now would occur in the Allies’ respective zones; there would be no more quadripartite judicial proceedings.<sup>29</sup>

While Truman’s January 1947 announcement meant that there would be no IMT after Nuremberg, the U.S. Army had been busy preparing for other war crimes prosecutions long before this decision. In October 1944, Major General Myron C. Cramer, then serving as The Judge Advocate General, established the “War Crimes Division” in his office in Washington, D.C., and placed Brigadier General

John M. Weir, a career Army lawyer, in charge of it. Weir and his staff began collecting reports of war crimes. Three judge advocates also went to London to work with the United Nations Commission for the Investigation of War Crimes. The War Crimes Division (renamed the War Crimes Office in March 1945) published lists of alleged war criminals, and gave these to Allied troop commanders (and to occupation authorities after May 1945), to enable them to apprehend wanted war criminals. Along with Weir, another key figure in the Army’s efforts to gather information on war crimes was judge advocate Colonel David “Mickey” Marcus, who followed Weir as the head of War Crimes Division/Office.<sup>30</sup>

Consequently, in September 1945, when General Dwight D. Eisenhower appointed Brigadier General Edward C. Betts—the Theater Judge Advocate—to oversee the identification and apprehension of persons suspected of war crimes, much had already been done by Army lawyers. Moreover, Betts played a key role in the war crimes program because he instructed Charles H. Fahy, the head of the American Legal Division of the Allied Control Council, to draft a law that would permit the British, French, Soviets, and Americans to prosecute war criminals in zonal trials. On 20 December 1945, as a result of Betts’s directive to Fahy, Law No. 10 was enacted by the Control Council.<sup>31</sup>

Ultimately, Brigadier General Betts was responsible for the prosecutions of all cases involving war crimes committed against Americans and war crimes committed in concentration camps liberated by U.S. troops. The *Malmedy* and *Mauthausen* trials held at Dachau, Germany, are the most well-known of cases in this category.<sup>32</sup>

But while judge advocates working for Betts prosecuted the *Malmedy*, *Mauthausen*, and other similar cases at so-called Military Government Courts, where the evidence was heard by panels of Army officers, all twelve trials conducted under Council Law No. 10 were heard by a three-member panel of *civilian* judges. This alone made them unique judicial proceedings, in that no military personnel were determining findings and sentencing, as might be expected at a military tribunal. As for the law being



applied at the tribunals conducted under Law No. 10, the judges insisted that crimes listed in Law No. 10 “reflected pre-existing rules of international law,”<sup>33</sup> and they consistently rejected the criticism that the tribunals somehow were prosecuting the accused for offenses that were not criminal at the time they were committed.

Since Law No. 10 did not dictate the structure of the zonal tribunals, General Lucius D. Clay, in his role as Military Governor and commander of the American zone in Germany, promulgated Ordinance No. 7 on 18 October 1946.<sup>34</sup> Titled *Organization and Power of Certain Military Tribunals*, it established the framework for the twelve subsequent proceedings, and permitted the tribunals to hear evidence against those men and women accused of violating the crimes listed in Law No. 10. Under Article VII of Ordinance No. 7, the rules of evidence were similar to those adopted at the IMT, in that the judges could “admit any evidence which they deem to have probative value,” including hearsay.<sup>35</sup> Ordinance No. 7 also required proof beyond a reasonable doubt, and viewed this as meaning that such doubt existed when an “unbiased, unprejudiced, reflective person... could not say that he felt an abiding conviction amounting to a moral certainty of the truth of the charge.”<sup>36</sup>

While the judges at the twelve subsequent proceedings were civilians, the lead prosecutor was military: Brigadier General Telford Taylor. A thirty-seven-year-old attorney who had served as a deputy to Justice Jackson at the IMT, Taylor was not a member of the Judge Advocate General (JAG) Department. His close relationship with Jackson, however, and his prior work on the IMT made him well-qualified to lead all prosecution efforts under Council Law No. 10; and, on 29 March 1946, Jackson announced that Taylor would be in charge of all post-IMT trials. By this time, Taylor—aided by Colonel Marcus—had been able to recruit thirty-five attorneys, as well as scores of administrators, court reporters, translators, stenographers, and typists, who would assist in the prosecution of what is best described as the Nuremberg Military Tribunals.<sup>37</sup>

While an accused had the right to conduct his own defense, no accused made such

a choice; and, as a result, more than 200 attorneys served as defense counsel in the twelve military tribunals. A few represented more than one accused in the same trial. All the defense attorneys were German lawyers, with the exception of two U.S. and one Swiss attorney. Many of the German attorneys had been Nazi Party members, and a few had been members of the *Sturmabteilung* (SA) and *Schutzstaffel* (SS).<sup>38</sup> This Nazi affiliation, no matter how serious, did not disqualify these Germans from serving as defense counsel.<sup>39</sup>

Over the next twenty-eight months, Brigadier General Taylor (he was promoted because the rank of colonel was thought to have insufficient prestige for a chief prosecutor) and his staff would convene twelve trials involving 177 accused in the Palace of Justice where the IMT had been held. The accused represented “all the important segments of the Third Reich,” including: Nazi judges and prosecutors; SS and other military leaders; German industrialists and bankers; members of killing squads; and Nazi ministers and diplomats. Of the 177 accused, 142 were convicted. Twenty-five were sentenced to death; the rest received sentences to imprisonment. What follows is a very brief summary of the twelve Nuremberg Military Tribunal proceedings, starting with the *Medical Case* that began on 9 December 1946 and concluding with the *High Command Case* that ended on 28 October 1948.<sup>40</sup> With few exceptions, only the nature of the crimes charged and the results of trial are examined in the narrative that follows.

#### **Case No. 1: Medical Case**

Twenty-three physicians and other officials associated with German medical institutes were indicted for engaging in a “common design or conspiracy” to commit war crimes and crimes against humanity—the crimes being a variety of medical experiments performed by the accused on German civilians and enemy POWs without their consent. Most of the experiments occurred at the concentration camps. These included: high-altitude, malaria, and freezing experiments at Dachau; sterilization experiments at Auschwitz and Ravensbrueck; and spotted fever, poison, and incendiary experiments in Buchenwald.<sup>41</sup> When the verdicts

were announced on 19 August 1947, the three-civilian-judge court convicted sixteen accused and acquitted seven.

One of the most important aspects of the *Medical Case* was the court’s willingness to give the accused the benefit of the doubt in terms of the standard of proof. In this regard, the judges found three of the accused not guilty of having conducted horrific medical experiments on camp inmates at Dachau, even though there was “much in the record to create a grave suspicion that the defendants” participated in them.<sup>42</sup> The *Medical Case* also established that there was a right against self-incrimination at war crimes trials. After the prosecution requested the testimony of Walther Neff, who had assisted in the medical experiments at Dachau, the tribunal agreed to call Neff; but, it insisted that he be advised that any statements he made before the court could be used against him at a later trial.

#### **Case No. 2: Milch Case**

Luftwaffe Field Marshall Erhard Milch was prosecuted for his involvement in creating the Nazi’s slave labor program, which had resulted in the forced removal of at least five million enslaved laborers to Germany. He was convicted and sentenced to life imprisonment, most likely because the court learned that Milch “himself urged more stringent and coercive measures to supplement the dwindling supply of labor in the Luftwaffe.”<sup>43</sup> Released from prison in 1954, Milch died in January 1972 in Wuppertal-Barmen, Germany.<sup>44</sup>

#### **Case No. 3: Justice Case**

The fifteen accused were prosecuted for perverting the rule of law by transforming the German courts into a system of “cruelty and injustice.” They had used so-called “People’s Courts” and “Special Courts” to hold secret trials for civilians to eliminate all political opposition to Nazi Party rule. They also were charged with furthering the extermination of German Jews by applying discriminatory laws to them in legal proceedings that lacked “all semblance of due process.”<sup>45</sup>

Trial began on 5 March 1947 and ended on 4 December 1947. The import of the *Justice Case* is that it rejected the argument by the accused that LOAC violations

were the *only* offenses recognized by international law. As the tribunal put it, the killings in the concentration camps were “acts of such scope and malevolence, and they so clearly imperiled the peace of the world, that they must be deemed to have become violations of international law.”<sup>46</sup> Four accused were acquitted; the remainder were convicted of war crimes, crimes against humanity, or both. Three accused were also convicted of criminal membership in the SS. Four accused were sentenced to life imprisonment. The remainder received sentences of between five and ten years in jail.

There is a JAG Corps connection to the *Justice Case*: one of the three tribunal judges, Justin Woodward Harding (1888-1976), had served as a judge advocate colonel in World War II. Prior to his service as an Army lawyer and as a judge at Nuremberg, Harding had a distinguished law career: former Assistant Attorney General of Ohio, U.S. Attorney for the Alaska Territory, and U.S. District Court judge for the First Division of Alaska from 1929 to 1933. This made Harding the only federal judge to sit on any of the twelve tribunals.<sup>47</sup>

#### **Case No. 4: Pohl Case**

The eighteen accused in the *Pohl Case* were all members of the WVHA (*Wirtschafts- und Verwaltungshauptamt* or “Main Economic and Administrative Office”), one of the twelve main SS offices. The WVHA was responsible for overseeing the concentration camps as well as managing a number of “economic enterprises” that were “operated almost entirely by the use of concentration camp labor.” Since millions of innocent civilians had died in these camps, SS-*Obergruppenführer*, Oswald Pohl, a three-star-general equivalent who had been the chief of the WVHA, along with seventeen fellow WVHA members, were charged with conspiring to commit war crimes and crimes against humanity. The war crimes included murder and mistreatment of civilians and POWs in the camps, as well as systematic extermination of the Jews.

Ultimately, Pohl and fourteen accused were convicted. Three were acquitted. Three of the fifteen convicted men were sentenced to death (including Pohl). Three were sentenced to life imprisonment, and

the remainder received between ten and twenty-five years imprisonment.<sup>48</sup>

#### **Case No. 5: Flick Case**

Friedrich Flick and the other five accused were high-ranking directors in Flick’s group of companies, called *Flick Kommanditgesellschaft*. The six men were charged with committing crimes against humanity, chiefly by seizing properties belonging to Jews in Germany, Czechoslovakia, and other countries. The prosecution alleged that this so-called “Aryanization” of real and private property amounted to systematic plunder in violation of the laws of war.

The trial began on 21 April 1947 and ended on 22 December 1947. Three of the accused were found not guilty. The three others were convicted for using slave labor in the companies owned or controlled by them. They received sentences ranging from two-and-a-half years to seven years.<sup>49</sup>

Flick, who was convicted of using slave labor in his company, and who had received the longest sentence, managed to reconstitute his business after being released from prison. When he died in 1972, he was one of the richest people in the world, with some 300,000 employees in 330 companies.<sup>50</sup>

#### **Case No. 6: Farben Case**

There were twenty-four accused, all of whom were employed in various plants and departments in the I. G. Farben company. The gist of the fifty-one-page indictment—the longest in the twelve subsequent proceedings—was that Farben, a chemical and pharmaceutical conglomerate, had financed the Nazi regime. It had expanded its manufacturing “far in excess of the needs of a peacetime economy” so as to allow Hitler to wage aggressive war. The indictment also charged the accused with having committed war crimes by plundering the occupied territories and using slave labor in I. G. Farben’s various factories.<sup>51</sup>

While examination of witnesses ordinarily was conducted by the prosecutors, defense attorneys, and judges, the *Farben* tribunal was noteworthy in permitting the accused to *personally* conduct cross-examination. This was a rejection of the procedure at the IMT, as that tribunal held that an accused represented by counsel was

not entitled to question a witness. In *Farben*, however, the trial judges decided that “the complexity of expert testimony” justified permitting one or more of the accused to cross-examine a witness.<sup>52</sup>

#### **Case No. 7: Hostage Case**

The eleven accused were charged with ordering the execution of thousands of civilian hostages in occupied territory in reprisal for attacks on German troops. The prosecution stressed that the hostages had been killed without any investigation or trial and in accordance with “arbitrarily established ratios,” which varied “from 50 to 100 for each German soldier killed and 25 to 50 for each German soldier wounded.”<sup>53</sup> Moreover, the accused were charged with having plundered public and private property, and murdering civilians in occupied Norway, Greece, Yugoslavia, and Albania. Finally, they were charged with illegally ordering their subordinates to deny POW status to combat captives and to summarily execute them.<sup>54</sup>

The trial began on 15 July 1947 and ended on 19 February 1948. Charges against one accused were dismissed because of ill health. Two others were found not guilty. Seven of the other eight were found guilty of executing hostages without due process. Five of the eight accused also were convicted for ordering the execution of POWs. Two accused received life imprisonment, and the remainder received sentences between seven and twenty years in jail.<sup>55</sup>

The judges in the *Hostage* proceedings wrestled with the defense of superior orders. While accepting that it was no longer a bar to individual liability, the court did hold in effect that if a subordinate did not know, and could not be expected to know, that the order he carried out was illegal, *mens rea* was lacking and the subordinate could not be convicted. The litmus test was the “reasonable man standard”—where a person could not reasonably be expected to know of an order’s illegality, this lack of criminal intent precluded a finding of guilt.<sup>56</sup>

#### **Case No. 8: RuSHA Case**

The fourteen accused were members of the *Rasse- und Siedlungshauptamt der SS* or *RuSHA*, which was responsible for safeguarding the





The judges in the IMT Justice case, including Justin W. Harding, sitting just right of the flag. Harding was a judge advocate colonel in WWII, but was a civilian at the time of the trial. (Photo courtesy of Fred Borch III)

racial purity of Germany. The indictment alleged that the accused had committed crimes against humanity by participating in “a systematic program of genocide, aimed at the destruction of foreign nations and ethnic groups, in part by murderous extermination, and in part by elimination and suppression of national characteristics.”<sup>57</sup> The accused also were charged with criminal membership in the SS.<sup>58</sup>

Trial began on 20 October 1947 and ended on 10 March 1948. A female accused was acquitted. Five of the other accused were convicted solely of criminal membership in the SS and were sentenced to time served. The other eight accused were convicted of all charges. One was sentenced to life imprisonment. The remaining received sentences ranging from ten to twenty-five years.<sup>59</sup>

#### **Case No. 9: Einsatzgruppen Case**

The charges in this trial were modelled after the *RuSHA* indictment, in that the accused were charged with crimes against humanity by using the *Einsatzgruppen* to carry out “a systematic program of genocide.”<sup>60</sup> They also were charged with a variety of war crimes, including the murder of POWs and civilians in occupied territory, and the destruction of property not justified by military necessity. All of the accused were also charged with being members of a criminal organization—either the SS, Gestapo, or *Sicherheitsdienst* (SD or Security Service).<sup>61</sup>

The proceedings began on 29 September 1947 and ended on 9 April 1948. All

were convicted; but, Otto Rasch—the commanding officer of *Einsatzgruppe C*—was severed from the trial for ill health. Twenty of the accused were sentenced to death, and two were sentenced to be imprisoned for life.<sup>62</sup>

#### **Case No. 10: Krupp Case**

The indictment in *Krupp* was modelled after the charge sheet in *Farben*. The accused were charged with crimes against peace by financing the Nazis’ rise to power in Germany. Some of the accused were charged with war crimes and crimes against humanity by systematically plundering public and private property in countries occupied by the Germans during the war.<sup>63</sup>

The trial began on 8 December 1947 and ended on 31 July 1948. None of the accused were convicted of crimes against peace because the tribunal granted a motion to dismiss on the ground that the government had failed to present sufficient evidence to support a conviction as a matter of law. One accused was found not guilty of all charges.

Four of the accused were found guilty of plunder and slave labor—including Alfred Krupp, who the court considered to be the most culpable given his position in the Krupp group of companies. He was sentenced to twelve years’ imprisonment and ordered to forfeit all his real and personal property. The other convicted accused received sentences between time served and ten years.<sup>64</sup>

#### **Case No. 11: Ministries Case**

In a fifty-page indictment, the twenty-three accused were charged with committing crimes against peace by taking part in wars of aggression and invasion; committing war crimes—including the murder of Allied pilots and aircrew who made forced landings in Germany and been summarily executed; with participating in the murder, mistreatment, and persecution of German Jews in the 1930s; and with deporting and enslaving civilians in the occupied territories on a massive scale.<sup>65</sup>

The trial, which began on 6 January 1948 and finished on 13 April 1949, lasted more than fifteen months. Some of the accused were high level officials in the Foreign Office and Presidential Chancellory; others were members of the SD or SS, or both. Five accused were convicted of crimes against peace, two were acquitted, and the remainder were convicted of various offenses. One important aspect of the *Ministries* judgment is that the court refused to convict any of the accused for murder, mistreatment, or persecution of German Jews between 1933 and 1939, as it concluded that Council Law No. 10 did not make criminal any offenses that were not connected to war crimes or crimes against peace—and the offenses in question had occurred prior to the start of World War II.<sup>66</sup>

#### **Case No. 12: German High Command Case**

Wilhelm von Leeb and thirteen other high-ranking Army and Navy officers were charged with committing crimes against peace by planning various wars of aggression and invasions. They were also charged with war crimes, including the issuance of orders that “certain enemy troops be refused quarter and denied the status and rights of prisoners of war,” and the deportation and enslavement of civilians in occupied territories.<sup>67</sup> Justin Harding, the former judge advocate colonel who had participated as a judge in the *Justice Case*, also sat in judgment in the *High Command Case*.<sup>68</sup>

The trial commenced on 5 February 1948 and ended on 28 October 1948. On the first day, Johannes Blaskowitz—who had participated in the invasion of Poland and held various Army commands until

1945—committed suicide by throwing himself off a balcony at the Nuremberg prison. The court subsequently would acquit Balskowitz of all charges. As for the remaining thirteen accused, all were convicted of war crimes. The evidence was overwhelming that the accused had treated Soviet POWs with “particular inhumanity,” and that the deaths of many of these POWs “was the result of systematic plans to murder” them.<sup>69</sup> The court also heard evidence that some of the accused had implemented Hitler’s order that there was to be no interference when German civilians killed Allied airmen who had been forced to land in Germany.<sup>70</sup> Sentences imposed ranged from life imprisonment to time served.<sup>71</sup>

## Conclusion

It is not an exaggeration to say that the IMT and the twelve subsequent Law No. 10 trials are the foundation of modern international criminal law. The IMT is important because it firmly established that LOAC violations are committed by individuals—not by nations or states—and that “only by punishing individuals who commit such crimes can the provisions of international law be enforced.”<sup>72</sup> Moreover, the claim that an accused should not be punished because he was acting pursuant to the order of his government or of a superior—which previously had limited individual responsibility for LOAC violations—was rejected as an absolute defense by the IMT. After the IMT verdict, all men and women were on notice that “individuals have international duties which transcend the national obligations of obedience imposed by the individual State.”<sup>73</sup> The IMT also established that LOAC includes crimes against humanity and the crime of criminal group membership. But the IMT provided no guidance for lawyers on evidence and procedure, and very little on defenses and sentencing.

The Law No. 10 trials, however, covered all those areas in great detail—and more—and consequently are extraordinarily important. The *Justice Case*, for example, held that it was a crime for the Nazis to transform German jurisprudence into a “nationally organized system of injustice and persecution”; the decision emphasizes the importance of the rule of law in international law. The *Flick*, *Farben*, and *Krupp* decisions established

that the German industrialists who financed Hitler’s rise to power and equipped the German armed forces could be convicted of waging aggressive war in violation of international law. The *Einsatzgruppen* decision established that accused could be guilty of peacetime crimes against humanity that were not connected to the waging of aggressive war. Finally, the *Hostage Case* established that LOAC places limits on the principle of “military necessity”; killing thousands of civilian hostages in reprisal for attacks on German troops could not be justified as required by military necessity.

The Law No. 10 decisions, however, also promoted due process in LOAC. The *Medical Case* established that witnesses must be informed of their right not to incriminate themselves. Even though nothing in Ordinance No. 7 required it, all twelve tribunals permitted the accused to cross-examine witnesses against them. The judges were also willing to adopt innovative procedures, such as permitting the accused to personally conduct cross-examinations. Finally, the courts took the burden of proof seriously, acquitting some accused even when there was substantial evidence of guilt, as in the *Medical Case*.

As we mark the 75th anniversary of the start of the IMT and the twelve subsequent military tribunals, now is the time to acknowledge their impact on the evolution of LOAC and the role played by Army lawyers in the development of war crimes prosecutions. Additionally, it is important to recognize that these trials, besides their importance to lawyers and historians, aided in the denazification and democratization of Germany—and so helped create the free, stable, and economically vibrant Federal Republic of Germany that plays a major role in the world today. **TAL**

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## Notes

1. After the unconditional surrender of Germany in May 1945, the Allies assumed extraordinary authority in Germany. The defeated nation—and its capital city, Berlin—were divided into American, British, French, and Soviet zones of occupation, and military

governments were established in each zone. To coordinate the administration of these four zones, which included the right to hold war crimes trials within each zone, the commanders-in-chiefs of the four occupying armies formed an Allied Control Council. That council met on a regular basis to set—and coordinate—occupation policies in the four zones, including: food distribution, industrialization, denazification, and reparations. DAVID ZABECKI, *GERMANY AT WAR: 400 YEARS OF MILITARY HISTORY* 540 (2014).

2. The Four Power Control Council consisted of France, the Soviet Union, the United Kingdom, and the United States. Each country occupied a “zone” or sector of Germany and each also occupied a zone of Berlin. See 1 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10 (1951).

3. TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 29 (1992).

4. The Soviets were the first to suggest that a tribunal be convened to prosecute Nazis for war crimes. While there is little doubt that Stalin believed that the Nazis were guilty and deserved to be hanged as soon as possible, he “envisioned the Nuremberg Trials as [he] had the Moscow Trials of 1936 to 1938,” that is, “as a grand political spectacle whose outcome was certain.” FRANCINE HIRSCH, *SOVIET JUDGMENT AT NUREMBERG: A NEW HISTORY OF THE INTERNATIONAL MILITARY TRIBUNAL AFTER WORLD WAR II*, at 4 (2020).

5. Dina G. McIntyre, *The Nuremberg Trials*, 24 U. PITT. L. REV. 75 (1962). The Executive Agreement and the Charter both resulted from the London Conference held from 25 April to 26 June 1945. *Id.*

6. While Mr. Justice Jackson was one of four prosecutors—each of the Four Powers appointed a lead prosecutor to the IMT—he had the greatest impact because of his knowledge of international law and his experience as an Associate Justice on the U.S. Supreme Court. It was Mr. Justice Jackson, for example, who insisted that “aggressive war-making is aggressive and criminal,” a view that inexorably led to the IMT charge of “crimes against peace.” Robert Jackson had been on the U.S. Supreme Court since 1941 and, after his service as the lead American prosecutor at Nuremberg, he returned to the U.S. Supreme Court, where he served until his death in 1954. *Id.* at 82

7. Charter of the International Military Tribunal, reprinted in KEVIN JOHN HELLER, *THE NUREMBERG MILITARY TRIBUNAL AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW* 465-71 (2011).

8. TELFORD TAYLOR, *FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUREMBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW No. 10*, at 66-67 (1949).

9. GARY D. SOLIS, *THE LAW OF ARMED CONFLICT* 104 (2d ed. 2016).

10. U.S. DEP’T OF STATE, *REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS* 47 (AMS Press 1971) (1949).

11. The other accused were: Ernst Kaltenbrunner (head of the Reich Main Security Office); Alfred Rosenberg (minister for the Occupied Territories in the East until 1941); Hans Frank (governor-general of Poland); Wilhelm Frick (minister for internal affairs); Julius Streicher (publisher of the newspaper *Der Stürmer*); Fritz Sauckel (plenipotentiary of the mobilization of labor); Alfred Jodl (Colonel General and head of the *Oberkommando der Wehrmacht*); Arthur



Seyss-Inquart (commissioner for the Netherlands from 1940 to 1945); Martin Borman (deputy *Führer* after 1941 (tried in *absentia*)); Rudolf Hess (deputy *Führer* until May 1941); Erich Raeder (grand admiral and commander of the Navy until 1943); Karl Dönitz (grand admiral and commander of the Navy from 1943 to 1945); Baldur von Schirach (leader of the Hitler Youth and *Gauleiter* of Vienna); Albert Speer (minister of armaments); Konstantin Neurath (Reich protector of Bohemia and Moravia from 1939 to 1943); Hjalmar Schacht (president of the *Reichsbank* from 1933 to 1939 and minister of economics from 1934 to 1937); Fritz von Papen (former vice chancellor and ambassador to Turkey); Hans Fritzsche (head of the radio division of the Ministry of Propaganda).

12. HELLER, *supra* note 7.

13. *Id.* McIntyre, *supra* note 5, at 76.

14. *Ex parte* Quirin, 317 U.S. 1 (1942). These saboteurs were a small group of German agents who landed on beaches in New York and Florida. Their mission was to wage a campaign of sabotage on U.S. soil. The mission failed when one of the Germans turned himself in to the Federal Bureau of Investigation. For more on *Quirin*, see LOUIS FISHER, MILITARY TRIBUNALS & PRESIDENTIAL POWER 91-124 (2005).

15. HELLER, *supra* note 7, at 469 (specifically referring to Article 16 of the charter).

16. McIntyre, *supra* note 5, at 76.

17. TAYLOR, *supra* note 8, at 66-67. Presumably these treaties included The Hague Conventions of 1899 and 1907, and the Kellogg-Briand Pact of 1929. The so-called *Wannseekonferenz*, which occurred in January 1942, is a good illustration, as it was here that the Nazis planned in detail the “Final Solution” for the Jews. For more on the Final Solution, see LUCY DAWIDOWICZ, THE WAR AGAINST THE JEWS: 1933-1945 (1975).

18. McIntyre, *supra* note 5, at 84.

19. *Id.* at 86.

20. TAYLOR, *supra* note 8, at 66-67.

21. Article 8 did not entirely eliminate the superior orders defense. It is true that the IMT proceedings established that the defense of superior orders, in and of itself, was no longer a legal shield. But other defenses, such as coercion or duress, were still relevant to guilt. Additionally, if a “subordinate had no good reason for thinking that the order was unlawful,” then the superior orders defense would be applicable. SOLIS, *supra* note 9, at 388.

22. TAYLOR, *supra* note 8, at 64.

23. McIntyre, *supra* note 5, at 90.

24. *Id.* at 109-16.

25. Letter from Robert H. Jackson, U.S. Rep. to the Int’l Conf. on Mil. Trials, to Harry S. Truman, President of the U.S. (Oct. 7, 1946), <https://avalon.law.yale.edu/imt/jack63.asp>.

26. *Id.*

27. HELLER, *supra* note 7, at 22.

28. In 1947, President Truman announced that the United States would “support free peoples who are resisting attempted subjugation by armed minorities or by outside pressure.” This so-called Truman Doctrine was official recognition of the Cold War between the United States and its North Atlantic Treaty Organization allies and the Soviet Union and its Warsaw Pact allies in the east.

29. Control Council Law No. 10, *reprinted in* HELLER, *supra* note 7, at 473-76.

30. David “Mickey” Marcus (1901-1948) was a remarkable individual by any measure. A graduate of the U.S. Military Academy and Brooklyn Law School, Marcus practiced law in New York City and served as an Assistant U.S. Attorney prior to World War II. During the war, as a member of the JAG Department, Marcus served in a variety of assignments in Washington, D.C., Hawaii, and Europe. Colonel Marcus resigned his commission in 1947 and subsequently was recruited to help organize and train the military forces of the Provisional Jewish Government that would emerge as Israel in 1948. He was serving as a general in the Israeli armed forces when he was accidentally shot and killed during operations near Jerusalem on 10 June 1948. The film *Cast a Giant Shadow*, starring Kirk Douglas as Marcus, was one of the most popular movies in American theaters in 1965. *CAST A GIANT SHADOW* (Batjac Productions 1966). For more on Marcus, see Fred L. Borch, *Soldier: David “Mickey” Marcus, ON POINT*, Winter 2010, at 17. See also Steven L. Ossad, *Out of the Shadow and into the Light: Col. David “Mickey” Marcus and U.S. Civil Affairs in World War II*, ARMY HIST., Winter 2016, at 6.

31. HELLER, *supra* note 7, at 12. Edward C. Betts’s distinguished career as an Army lawyer was cut short when he died unexpectedly of “a heart ailment” on 6 May 1946. He was fifty-six years old at the time of his death in Frankfurt, Germany. *Gen. E.C. Betts, 56, Army Legal Figure*, N.Y. TIMES, May 8, 1946, at 25.

32. For more on the *Malmédy* war crimes trial, where seventy-four former SS members were tried for killing hundreds of U.S. POWs and Belgian civilians, see STEVEN P. REMY, THE MALMEDY MASSACRE: THE WAR CRIMES TRIAL CONTROVERSY (2017). For more on the *Mauthausen* war crimes trial, which focused on the crimes committed by concentration camp personnel, see TOMAZ JARDIM, THE MAUTHAUSEN TRIAL: AMERICAN MILITARY JUSTICE IN GERMANY (2012). See also JOSHUA M. GREENE, JUSTICE AT DACHAU: THE TRIALS OF AN AMERICAN PROSECUTOR (2017).

33. HELLER, *supra* note 7, at 123.

34. *Id.* at 25.

35. Article VII, Ordinance No. 7, *reprinted in* HELLER, *supra* note 7, at 479.

36. HELLER, *supra* note 7, at 140.

37. *Id.* at 17. In later years, Taylor became an outspoken critic of America’s involvement in Vietnam, arguing that U.S. actions in Southeast Asia reflected a failure “to learn the lessons of Nuremberg.” TELFORD TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY 207 (1970).

38. HELLER, *supra* note 7, at 17. The SA, or *Sturmabteilungen* (Storm Detachment), was an early Nazi paramilitary organization created by Hitler in 1920. Hitler used his SA “stormtroopers” as an instrument of street terror in his rise to political power. By the early 1930s, however, some SA leaders had become a threat to Hitler, and so he destroyed the SA in 1934. After the disappearance of the SA, the SS or *Schutzstaffeln* (Protection Squads) took its place as an independent organization within the Nazi Party. Men in the SS originally functioned as bodyguards, orderlies for mass rallies, and party propagandists. By the late 1930s, however, the SS was running the Nazi concentration camps and was involved in more than forty different economic activities, ranging from agriculture and forestry to publishing and iron production. By the end

of World War II, however, the bulk of the SS (known as the *Waffen-SS*) consisted of 800,000 men in 38 combat divisions. These combat troops were an integral part of the German Armed Forces in World War II. ZABECKI, *supra* note 1, at 1254-56.

39. HELLER, *supra* note 7, at 162-63.

40. While the *High Command Case* was the last case to begin—which explains why it is identified as Case No. 12—it was Case No. 11 that finished last, on 13 April 1949. *Id.* at 103.

41. *Id.* at 85.

42. *Id.* at 141.

43. *Id.* at 89.

44. ZABECKI, *supra* note 1, at 855.

45. HELLER, *supra* note 7, at 89.

46. *Id.* at 130.

47. *Id.* at 90.

48. *Id.* at 56-57.

49. *Id.* at 58-59.

50. *Friedrich Flick Is Dead at 89; Industrialist Who Aided Hitler*, N.Y. TIMES, July 22, 1972, at 30, <https://www.nytimes.com/1972/07/22/archives/friedrich-flick-is-dead-at-89-industrialist-who-aided-hitler-served.html> (the website provided leads to a digitized version of the article from the *N.Y. Times* print archive, before the start of online publication in 1996).

51. HELLER, *supra* note 7, at 60-61, 65, 93-96.

52. *Id.* at 142.

53. *Id.* at 96.

54. *Id.*

55. *Id.*

56. SOLIS, *supra* note 9, at 378.

57. HELLER, *supra* note 7, at 98

58. *Id.*

59. *Id.*

60. *Id.* at 99.

61. *Id.* at 99-100.

62. *Id.* For more on the *Einsatzgruppen* proceedings, see HILARY EARL, THE NUREMBERG SS-EINSATZGRUPPEN TRIAL, 1945-1958 (2009).

63. HELLER, *supra* note 7, at 100-02.

64. *Id.*

65. *Id.* at 102-04.

66. *Id.*

67. U.N. War Crimes Comm’n, XII Law Reports of Trials of War Criminals: The German High Command Trial 3-4 (1949) [hereinafter German High Command Trial].

68. HELLER, *supra* note 7, at 104.

69. *Id.*

70. German High Command Trial, *supra* note 67, at 17.

71. *Id.* at 105.

72. JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE TRIAL OF GERMAN MAJOR WAR CRIMINALS 41 (1946).

73. McIntyre, *supra* note 5, at 112.



In Saigon, circa 1969, from left to right stands COL Tom Reese, COL John Jay Douglas, TJAG MG Kenneth Hodson, LTC Robert Clark, and LTC Tobin. LTC Clarke was the first Chief of TDS. (Photo courtesy of Fred Borch III)

## TDS at 40

### A Short History of Its Origins

By Fred L. Borch III

Forty years ago, on 7 November 1980, General Edward C. “Shy” Meyer, then serving as Army Chief of Staff, approved the permanent establishment of the U.S. Army Trial Defense Service (USATDS). This was a major development in the history of the Corps because it meant that Army lawyers serving as defense counsel were now in a separate and independent organization. Prior to the creation of “TDS,” as it is commonly known, judge advocates assigned to represent Soldiers at courts-martial were assigned to specific field commands, where they worked in the local Office of the Staff Judge Advocate (SJA). They were supervised—and rated—by the SJA or someone who worked for that SJA. Since the SJA worked for the convening authority, there was a perception that the military defense counsel might not be truly independent in providing legal advice and representation and that there was a potential for unlawful command influence. Since USATDS

recently celebrated its fortieth birthday in November 2020, now is the time to examine how and why it came into existence.<sup>1</sup>

After World War II, and during the hearings on the enactment of the Uniform Code of Military Justice (UCMJ) in 1950, some military justice practitioners began agitating for the establishment of a separate organization for defense counsel. Resistance to the idea, however, came from both commanders and SJAs. Commanders objected to the idea of a vertical or “stovepipe” organization that would be operating on an Army installation. At its core, this objection was really about control. The traditional command perspective was that it was a bad idea for a commander to have less than complete control over units and people on his post because such units and people may be unresponsive to command needs. Staff Judge Advocates similarly did not like the idea that defense counsel would be operating in their courtroom but not be under

their control. Some SJAs were offended by the proposal that a separate USATDS would guard against unlawful command influence. These SJAs insisted that they were always scrupulous in avoiding such influence, and they did not believe that any perception to the contrary justified creating a separate organization for defense counsel.

This resistance notwithstanding, in 1973 the Department of Defense Task Force on the Administration of Military Justice recommended that military defense counsel in all the services be removed from the supervision of the local SJA and be placed in a separate organization.<sup>2</sup> The Secretary of Defense concurred and directed that the Army, Navy, and Air Force establish separate organization for their defense counsel. The following year, the Air Force and Navy complied. The Army, however, did not. As Colonel (COL) Robert B. Clarke—the first Chief of TDS—explained in a 1980 interview, Army court-martial rates were too high (over 16,600 general and special courts-martial in Fiscal Year 1974), and the Army JAG Corps’s retention of field grade officers was so low that the Corps “simply lacked the middle managers the program required.”<sup>3</sup>

This changed when Major General Wilton Persons became The Judge Advocate General in 1975, chiefly because Persons “had a keen interest in improving the quality of trial and defense counsel.”<sup>4</sup> When he approved COL Alton H. Harvey’s concept for a “Field Defense Services Office” (FDSO), Major General Persons—together with Harvey, who was then serving as the Chief, Defense Appellate Division (DAD)—laid the foundation for a separate defense counsel organization in the Army. Activated as a sixth branch of DAD on 1 October 1976, the purpose of FDSO was to provide advice to the field “beyond that presently available from the installation senior defense counsel.” Not only did FDSO provide “timely responses to telephonic and written requests for assistance,” but it also conducted training for military defense counsel.<sup>5</sup> The first chief of FDSO was





The first patch used by TDS, commonly known as the “Texaco star.” (Photo courtesy of Fred Borch III)

Lieutenant Colonel Joe D. Miller, and he was assisted by Major John Renfrow and Captains (CPTs) Nicolas P. “Chip” Retson and Malcolm H. Squires Jr. In 1977, FDSO personnel traveled worldwide conducting one-day seminars at various locations. Then-CPT Squires remembered that his “proudest accomplishment” was obtaining Continuing Legal Education (CLE) credit for the FDSO seminars from the four states that actually required CLE for licensed attorneys in 1977.<sup>6</sup>

At the same time that FDSO personnel were educating and training military defense counsel, they were also laying the groundwork for a separate defense counsel organization. In February 1978, based on work done by FDSO, Major General Persons went to General Bernard W. Rogers, then serving as Army Chief of Staff, and requested immediate approval of a separate organization for trial defense counsel. General Rogers, however, rejected Major General Persons’s recommendation. He and other senior commanders in the Army were skeptical about the need for a separate organization for military defense attorneys and thought that “independent” defense counsel “might unfairly manipulate the criminal justice system to their own ends.”<sup>7</sup> But, while

Rogers did not approve the establishment of a separate defense counsel organization, he did authorize a one-year pilot program—to be conducted in a major Army command.

After consulting with the Commander of the U.S. Army Training and Doctrine Command (TRADOC) and obtaining his approval, General Persons launched the test program at TRADOC on 15 May 1978. The command was the logical choice for the experiment because it was “geographically compact, had no installations outside the United States and its units were not subject to deployment.”<sup>8</sup> Much of the initial planning for the experiment *within* TRADOC was done by COL Daniel A. Lennon Jr., then serving as TRADOC’s SJA. Colonel Lennon put together basic planning elements for the test program, including organization and support of TDS field offices and selection criteria for defense counsel.<sup>9</sup>

The test program involved forty-one defense counsel at fifteen installations, with three Regional Defense Counsel (RDC) located at Forts Dix, Benning, and Knox supervising the defense work of these forty-one counsel. Defense counsel in the test program were tasked with providing: representation at all courts-martial; representation at Article 32 investigations;

custodial and other pretrial consultations; advice on Article 15, UCMJ, actions; and representation at some administrative boards.<sup>10</sup>

General Persons’s decision to start the TDS experiment at TRADOC was timely, as an October 1978 General Accounting Office (GAO) report to Congress urged the Army to create a separate organization for defense counsel “without delay.”<sup>11</sup> In February 1979, in hopes of using this GAO report as leverage with General Rogers, Major General Persons proposed to him that TDS be created now. General Rogers, however, refused. Still concerned that independent defense counsel might undermine good order and discipline, Rogers insisted that the test program be continued past the one-year mark.

In September 1979, based on positive feedback from both SJAs and convening authorities in TRADOC, the pilot program was expanded to all units located in the United States (including Alaska and Hawaii) and Panama. A few months later, it expanded to Europe and Korea. By January 1980, the test program was operating Army-wide.

In May 1980, after comprehensive evaluations—which included the views of all major commanders in the Army, as well as thirty-five general and fifty special court-martial convening authorities, and were overwhelmingly positive—the new TJAG, Major General Harvey, recommended to the new Chief of Staff that he approve the creation of USATDS. General Meyer hesitated, however, because he was concerned that a separate defense counsel organization seemed “at odds” with his unit cohesion policies.<sup>12</sup> Five months later, despite any misgivings he may have harbored, General Meyer gave formal approval to the establishment of TDS on 7 November 1980.

A year later, there were about 200 judge advocates stationed in about 60 different “Field Offices.” Each Field Office was headed by a Senior Defense Counsel (SDC), and the Field Offices were grouped into nine geographic regions, with each headed by a lieutenant colonel RDC. Europe was a special situation, in that three of the nine USATDS regions were located in Germany. Three lieutenant colonel RDCs headed these regions, with a colonel stationed in

Heidelberg at U.S. Army, Europe (USAREUR). He was the “Senior RDC” and had overall supervision for the three regions. Given that there were over 300,000 Soldiers in Europe during this Cold War era, and that the distance from USAREUR to TDS headquarters in Washington, D.C., was significant, this arrangement made sense—especially when it is remembered that there was no email or internet in this era and that the difference in time zones made communication by telephone difficult at times. As for the SDCs in the nine regions, they were either senior captains or majors, depending on the size of the field office.

While “a principal aim of TDS was to remove once and for all doubts, both in and out of the Army, that military defense counsel were not 100 percent loyal to their clients’ interests,”<sup>13</sup> there was a second goal: improving professionalism. As COL Clarke explained almost forty years ago, the issue was not that defense counsel were not doing a good job. They were. Rather, the problem was that when defense counsel worked for the SJA, or one of his staff, it was difficult for that SJA “to get too close to the defense function.”<sup>14</sup> There was fear that the judge advocate captain serving as a defense attorney might misunderstand the motives and intentions of that SJA. The newly established TDS would correct the “supervisory void” that some judge advocates believed existed by “injecting field grade defense counsel supervisors into the system.”<sup>15</sup>

In the early years of TDS, there were occasional problems with logistical support for local field offices, since support generally mirrored what was available to the local SJA, and this varied considerably from post to post. Additionally, there was occasional resistance from SJAs who were not inclined to provide sufficient administrative support to TDS if it meant that the SJA office would suffer shortages. Over time, however, these logistical issues were resolved.

One final note about the early history of TDS: the relatively small size of TDS in the larger Army meant that the unit initially did not have its own shoulder sleeve insignia. Consequently, all personnel assigned to TDS wore the World War II-era Army Service Forces (ASF) patch on the left shoulder, commonly called the “Texaco

Star” because of its similarity to the white-star-in-a-red-circle insignia used by Texaco Oil. Not until nearly 25 years later, in 2006, did the Army approve a unique shoulder patch for TDS that its members wear today. In a tip-of-the-hat to the old ASF patch, however, the new insignia has a white star with a circle in its center.

Today, USATDS is headquartered at Fort Belvoir, Virginia. It is part of the U.S. Army Legal Services Agency, which provides logistical support to USATDS. Attorneys typically serve two-year tours as defense counsel. The USATDS has nearly 600 Soldiers, about 160 of whom are Active Component and over 275 of whom are Reserve Component. Reserve Component members belong to one of three Legal Operations Detachments (LODs): the 16th LOD, the 22d LOD, and the 154th LOD. The mission of these three organizations is to provide legal services support to commanders and Soldiers who help sustain military operations. The Army National Guard has also developed a thriving TDS organization with over 125 defense counsel.<sup>16</sup>

As TDS celebrates its fortieth birthday, there is no question that it has been a phenomenal success and has improved the administration of military justice in the Army. Any concerns that some commanders may have had about “independent” defense counsel running amok and undermining good order and discipline are gone. Similarly, SJAs are comfortable with defense counsel providing services that are separate and apart from the SJA office. The TDS organization is favorably viewed by civilian criminal defense attorneys and bar associations with an interest in military law. Soldiers get first-class representation at both courts-martial and administrative hearings, and these Soldiers know that their defense counsel does not work for the SJA or the convening authority. There is every reason to think that USATDS will continue to be an integral and critical component of full and fair trials under the UCMJ. **TAL**

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## Notes

1. For a comprehensive look at the creation of the U.S. Army Trial Defense Service, see John R. Howell, *TDS: The Establishment of the U.S. Army Trial Defense Service*, 100 MIL. L. REV. 4 (1983). Much of the information from this article comes from Howell’s work.

2. *Id.* The principal purpose of the task force was to study the effects of racism in the military justice system, as racial discrimination “was perceived to be a major problem.” *Id.* at 21. During the course of its work, however, the members of the task force concluded that defense counsel “were seen by many to be creatures of the command...and unduly vulnerable to command pressures.” *Id.* at 21. Consequently, the Report of the Task Force recommended that the services create separate defense counsel organizations. *Id.* at 21-22.

3. *An Interview with Colonel Robert Clarke*, 12 ADVOCATE 363 (1980). The Army (then consisting of nearly 800,000 active duty Soldiers) tried 1,848 general and 14,814 special courts-martial for the period 1 July 1973 to 30 June 1974 (Fiscal Year 1974). Email from John P. Taitt, Chief Deputy Clerk of Ct., U.S. Army Ct. of Crim. Appeals to author (31 Aug. 2020, 8:32 AM) (on file with author). Compare these numbers with today’s statistics: fewer than 625 courts-martial (461 general and 161 special) were tried to completion in 2019. *Id.*

4. Howell, *supra* note 1, at 28.

5. *The Field Defense Services Office: A New Source of Assistance for the Field Defense Counsel*, 8 ADVOCATE 1 (1976), [https://www.loc.gov/rr/frd/Military\\_Law/pdf/Advocate\\_Sep-Oct-1976.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/Advocate_Sep-Oct-1976.pdf).

6. Email from Malcolm Squires Jr., Clerk of Ct., U.S. Army Ct. of Crim. Appeals, to author (8 Sept. 2020, 10:57 AM) (on file with author).

7. Howell, *supra* note 1, at 33.

8. *Id.*

9. *U.S. Army Trial Defense Service Begins One Year Test*, ARMY LAW., June 1978, at 10.

10. *Id.*

11. *Fact Sheet, U.S. Army Trial Defense Service*, ARMY LAW., Jan. 1981, at 27.

12. Howell, *supra* note 1, at 45.

13. *An Interview with Colonel Robert Clarke*, *supra* note 3, at 364.

14. *Id.*

15. *Id.*

16. “Defending Those Who Defend America”: U.S. Army Trial Defense Service-History, JAGCNET, <https://www.jagcnet.army.mil/Sites/USATDS.nsf/homeContent.xsp?open&documentId=C440AF1C1F-5589C285257B490069B306> (last visited Oct. 16, 2020).





SSG Perla Gonzalez, 68A-Biomedical Equipment Specialist



SSG Matthew Smith, 27D-Paralegal Specialist



SGT Kathryn Matthews, 27D-Paralegal Specialist

## An Historic First in Our Corps FLEP NCOs

By Fred L. Borch III

Late last year, two Staff Sergeants (SSG) and one Sergeant (SGT) were selected for the Funded Legal Education Program (FLEP)—the first time in history that noncommissioned officers (NCOs) have been chosen to attend law school at Army expense. This is an important historical first in our Corps because it is the first time that enlisted men and women have been eligible to earn a law degree at Army expense and then serve as judge advocates (JAs). It is also significant because expanding the program to qualified NCOs demonstrates that the Judge Advocate General’s (JAG) Corps—like our Army—is committed to ensuring that every career-oriented Soldier has the same opportunities. What follows is a short discussion of the history of the program and a quick look at the three Soldiers chosen to be the first NCO FLEP participants.

### History of the Funded Legal Education Program

Beginning in the 1930s, the Army sent a handful of line officers to law school to earn a degree. Most of these individuals—like Er-

sent a small number of line officers to law school with the intent that they earn law degrees and then practice law as members of the JAG Corps. Then-Captain Wilton Persons, for example, was a West Point graduate and Armor Cavalry officer who attended Harvard Law School at Army expense; he too would serve as TJAG before retiring as a major general in 1979.

In the early 1950s, Congress decided that it was too expensive to use taxpayer dollars for active duty personnel to attend law school. Consequently, starting with fiscal year 1953, the Army was prohibited

**expanding the program to qualified NCOs demonstrates that the Judge Advocate General’s (JAG) Corps—like our Army—is committed to ensuring that every career-oriented Soldier has the same opportunities**

nest M. “Mike” Brannon who later served as the Judge Advocate General (TJAG)—were destined to teach in the Law Department at the U.S. Military Academy because it was thought that a law degree would make them better professors. In the years immediately following World War II,<sup>1</sup> the Army also

from using taxpayer funds to send line officers to law school.<sup>2</sup>

In 1961, the Army developed an alternative to the lack of law school funding when it established the Excess Leave Program (ELP). By Army regulation, “career-motivated officers from other

branches” were permitted to take extended leave for up to three-and-a-half years to attend civilian law school and study to pass the bar exam. In this leave status, these officers received no pay and allowances and paid for all their tuition and fees. However, the ELP participants accrued time in grade for pay and promotion purposes. By 1965, the Corps had 144 officers in the program. There were 128 officers in the ELP in 1971. As these officers earned their law degrees and began serving as JAs, they formed the backbone of the Corps’s middle-management ranks.<sup>3</sup>

While the ELP worked well enough (the Corps had authority to take some 100 officers into the program every year), the Army still struggled to retain talented officers in all branches in the 1970s. This was because interest in military service was relatively low after the very unpopular Vietnam War and because the end of conscription and the transition to an all-volunteer Army made both recruiting and retention a difficult mission. In the JAG Corps, the biggest challenge was retaining mid-grade officers—senior captains and majors—and the Army concluded that resurrecting a taxpayer funded law school program would help solve this problem. Congress agreed and Senator Barry Goldwater (Republican-Arizona) introduced legislation in early 1973 that was enacted the following year as the “Funded Legal Education Program.”<sup>4</sup>

As the April 1974 *Army Lawyer* explained, every year FLEP allowed up to twenty-five active duty commissioned officers to be selected to attend law school. Officers were eligible for the program if they were serving in the grade of O-3 or below, had a baccalaureate degree, and had between two and six years of active duty service. Those selected for the program would have tuition and fees paid and would also receive full pay and allowances while in law school. In return, they agreed to a six-year active duty obligation upon completion of the program.

Initially, the ELP continued to operate concurrently with FLEP, but the JAG Corps soon recognized that FLEP was a sufficient manpower source. Consequently, the ELP was discontinued in 1975.<sup>5</sup>

### **The First NCO FLEPs**

For more than forty-five years, only commissioned officers have been eligible for the FLEP; enlisted personnel—by statute—could not take advantage of this educational opportunity. How and why did this restriction originate? Why were enlisted personnel ineligible? There are several explanations. The Army of the early 1970s was not the educated force of today. More than a few officers did not have college degrees (there were thousands who earned commissions through Officer Candidate School, which required only a high school diploma). Also, there was no requirement for enlisted personnel to have a high school degree, much less any college or university education. Additionally, civilian education was not important for promotion in the enlisted ranks. This all meant that relatively few NCOs on active duty would have been eligible when

Remember that the Army in the early 1970s was gender segregated (women served in a separate Women’s Army Corps) and it was not until 1976 that women had the same educational opportunities as men to earn a degree at the U.S. Military Academy. The point is, Army culture of the 1970s was much more limited when it came to educational opportunities. Even today, it is only very recently that female Soldiers have been permitted to attend Ranger School and the Special Forces qualification course.

Recognizing that it was time to give qualified NCOs who wanted to serve as JAs the opportunity to participate in the program, Congress amended the controlling legislation in December 2019. As a result, NCOs in all the “military departments . . . in paygrades of E-5 to E-7” (Sergeant to Sergeant First Class in the Army), with

**At its core, this expanded eligibility reflects the realization that our Corps must attract the best junior leaders to serve as JAs—men and women who are “confident, humble, innovative peer leaders” and who are “committed to the Army team.”**

the FLEP was established, and this is one reason that they were left out of the 1970s legislation. A second reason is that, as the JAG Corps’s intent was for the FLEP to stabilize its middle-management officer ranks, it probably believed that drawing from the commissioned officer population was the easiest course of action.

Finally, it is likely that institutional bias played a role in that, when the Army and Congress were creating the FLEP, these institutions did not recognize that qualified NCOs also deserved the opportunity to attend law school. Fifty years ago, the gulf between the enlisted and officer ranks was much more pronounced than it is today—at least in terms of education. Additionally, the idea that every NCO should have the same education opportunities as commissioned officers was not a widely-held view. As a result, NCOs were excluded when it came to program eligibility.

between four and eight years of active duty service, are now eligible to participate in the program.<sup>6</sup>

At its core, this expanded eligibility reflects the realization that our Corps must attract the best junior leaders to serve as JAs—men and women who are “confident, humble, innovative peer leaders” and who are “committed to the Army team.”<sup>7</sup> Additionally, just as the Basic Branch experiences of officer FLEPs enhance their value as JAs in the Corps, so too will the enlisted experiences of NCO FLEPs.

More than twenty NCOs applied for the 2020-2021 FLEP, and three were selected: SSG Perla Gonzalez, SSG Michael Smith, and SGT Kathryn Matthews.

### **SSG Perla Gonzalez**

Staff Sergeant Perla Gonzalez enlisted in 2013 and serves as a Biomedical Equipment Specialist in Military Occupational Specialty



(MOS) 68A. A Soldier in that MOS is responsible for performing repairs on medical systems and medical equipment. Staff Sergeant Gonzalez is now serving in Vilseck, Germany. She earned her Bachelor of Arts degree in Law and Society from the University of California-Santa Barbara. Staff Sergeant Gonzalez also has a Master of Arts

towards becoming a judge advocate since before [she] enlisted,” and the program will let her achieve this goal.<sup>13</sup> At the time she applied for the program, SGT Matthews had been accepted to Officer Candidate School (OCS). She gave up her OCS slot to apply for the FLEP—which turned out to be a good decision for her and our Corps.<sup>14</sup>

10. *Id.* For more on SSG Gonzalez’s incredible journey, see Joseph Lacdan, *Once Homeless, NCO Gets Rare Shot to Attend Law School Under Army Program*, U.S. ARMY (Mar. 1, 2021), [https://www.army.mil/article/243136/once\\_homeless\\_nco\\_gets\\_rare\\_shot\\_to\\_attend\\_law\\_school\\_under\\_army\\_program](https://www.army.mil/article/243136/once_homeless_nco_gets_rare_shot_to_attend_law_school_under_army_program).

11. Email from Staff Sergeant Matthew Smith to author (2 Feb. 2021) (on file with author).

12. *Id.*

13. Email from Sergeant Kathryn Matthews to author (2 Feb. 2021) (on file with author).

14. *Id.*

## Sergeant Matthews has “been working towards becoming a judge advocate since before [she] enlisted,”

degree. In her words, she “wanted to apply to law school for years, but it was never the right time.”<sup>8</sup> The Funded Legal Education Program will let her “merge [her] love for the Army with [her] love for the law.”<sup>9</sup> Staff Sergeant Gonzalez has applied to a variety of law schools, including the University of California-Hastings, University of California-Davis, Stetson University, and Baylor University.<sup>10</sup>

### SSG Matthew Smith

Staff Sergeant Matthew Smith is a MOS 27D Paralegal Specialist. He graduated from the University of Central Florida with a degree in legal studies in 2003. Smith then enlisted in the Army in 2013. He served as an administrative law paralegal at U.S. Army Pacific and as the military justice operations NCO at 8th Theater Sustainment Command. He is a qualified court reporter and now serves as the Clerk of Court, 3d Judicial District, III Corps, and Fort Hood. He will attend law school at the University of Hawaii. Becoming a lawyer has been a “childhood dream” for SSG Smith, and the program will let him become an attorney and JA.<sup>11</sup> It will “enable [him] to continue leading the Soldiers [he has] come to love.”<sup>12</sup>

### SGT Kathryn Matthews

Sergeant Kathryn Matthews earned a Bachelor of Arts degree in Anthropology and Political Science at Arizona State University in 2015, and enlisted in the Army in MOS 27D in 2017. She now serves as a Paralegal Specialist at U.S. Army Central Command, Shaw Air Force Base, South Carolina. Sergeant Matthews has “been working

### Conclusion

Since the goal of the FLEP is to allow deserving Soldiers with superb educational qualifications and demonstrated leadership skills to serve as JAs, it made perfect sense for Congress to amend the law to open the educational opportunity to mid-grade NCOs in all Army military occupational specialties. There is no doubt that there will be more NCOs selected for the program in the future, but the three selected in 2020 will forever be a JAG Corps history first.

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*Mr. Borch is the Regimental Historian, Archivist, and Professor of Legal History and Leadership at The Judge Advocate General’s Legal Center and School in Charlottesville, Virginia.*

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### Notes

1. During this time the Judge Advocate General’s Department was transformed into the Judge Advocate General’s Corps.

2. National Security Training Commission: Salaries and Expenses, Pub. L. No. 488, § 636, 66 Stat. 537 (1952).

3. JUDGE ADVOCATE GENERAL’S CORPS, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL’S CORPS 238 (1975); *Excess Leave*, ARMY LAW., Nov. 1971, at 27.

4. *Goldwater Bill for Law School at Government Expense*, ARMY LAW., June 1973, at 35; 10 U.S.C. § 2004 (1974).

5. *JAG Corps RA Strength Approaches Authorized Level*, ARMY LAW., Dec. 1975, at 39.

6. 10 U.S.C. § 2004 (1974); National Defense Authorization Act for Fiscal Year 2020, Pub. L. 116-92, § 551(a), § 551(b)(2), 133 Stat. 1385-86 (2019).

7. Memorandum from Pers., Plans & Training Off., Off. of The Judge Advocate Gen. to Staff Judge Advocates, subject: Funded Legal Education Program (July 31, 2020).

8. Email from Staff Sergeant Perla Gonzalez to author (2 Feb. 2021) (on file with author).

9. *Id.*



JAGC paratroopers assigned to the 82d Airborne Division complete as many rope climbs as they can within five minutes during their first JAG Olympics at Fort Bragg, NC. (Photo credit: SGT Christopher Gallagher)

**Beginning on 31 December 2019**, the 82d Airborne Division executed its most significant no-notice deployment in more than thirty years.<sup>1</sup> As tensions with Iran escalated, nearly 3,500 paratroopers of the Army's Immediate Response Force (IRF), including 10 judge advocates (JAs) and paralegals, rapidly deployed to the Middle East.<sup>2</sup> The first elements of this force departed Fort Bragg fewer than eighteen hours after receiving orders. The rest of the force joined shortly thereafter and maintained a presence in the U.S. Central Command area of responsibility for several months, ensuring the nation was ready to rapidly and decisively respond to any acts of aggression.

The unit cohesion, discipline, and readiness required to successfully execute such a feat does not manifest overnight but is built in pieces day to day. "Be ready" is not merely a motto for the 82d Airborne Division. Rather, it is a way of life, a culture, which permeates everything the Division does and is. This *Azimuth Check* provides insight into the ways the Army's only Airborne Division and its assigned legal professionals ensure they remain ready for anything, anytime, anywhere.

### **Unbeatable LGOPs**

From its initial jumps into Sicily, Salerno, and Normandy in World War II through present day, the 82d Airborne Division has always considered its little groups of paratroopers (LGOPs) key to how it fights and wins on the battlefield.<sup>3</sup> These groups of typically two-to-four mostly junior Soldiers must understand and be able to execute the commander's intent when geographically separated from formal leadership. The successful execution of decentralized military operations requires the most senior leaders to relinquish tight control and oversight over their troops. Similarly, the most junior paratrooper must earn their commander's trust that they will exercise disciplined initiative and sound judgment.

# Azimuth Check

## **Anywhere in the World in 18 Hours** **Readiness and the Airborne Immediate Response Force**

*By Colonel Jeffrey S. Thurnher, Major Donel J. Davis, Chief Warrant Officer 2 Tia M. Simmons, & Sergeant Major Matthew A. Wilkerson*



82d Airborne Division paratroopers conduct an airborne operation at Fort Bragg, NC. (Credit: SGT Taylor Hoganson)

With this goal in mind, the Division seeks to form cohesive squads, sections, and crews capable of successfully executing the mission.<sup>4</sup> To operate in potentially austere and dangerous conditions, LGOPs must be disciplined, master the fundamentals, and understand their leaders' intent. This is as true for junior JAs and paralegals who may have to operate while disconnected from senior JAs as it is for other paratroopers in the Division. Members of the 82d Airborne Division Office of the Staff Judge Advocate (OSJA) train to fulfill all assigned roles: Soldier, legal professional, paratrooper.

The 82d Airborne Division puts a premium on basic paratrooper skills and physical fitness. The OSJA regularly participates in training focused on ensuring all paratroopers are qualified marksmen, confident using their communications

equipment, and capable of performing basic lifesaving functions on their fellow paratroopers. Additionally, JAs train for analog operations and are expected to dominate even in a contested electromagnetic environment. Finally, the Division, and the OSJA in particular, designs and implements functional fitness programs that relate directly to combat tasks to prepare its paratroopers for the mental and physical rigors of ground combat operations.

The JAs and paralegals of the 82d Airborne Division must not only meet these high paratrooper standards, they must similarly possess the substantive legal mastery needed to support the Division. To that end, the legal team prioritizes section- and office-wide legal training events and leader professional development to ensure our legal LGOPs are prepared to provide the

necessary principled counsel—even when separated from senior JAs—to the leaders and paratroopers of the Division.<sup>5</sup> A key component of this training effort is ensuring Division JAs and paralegals understand their leaders' intent, are empowered to take the initiative within that intent, and can provide legal advice in any environment.

### **Deploy, Fight, and Win Anywhere in 18 Hours**

As the nation's main airborne contingency force, the 82d must be ready to deploy, fight, and win anywhere in the world in eighteen hours. To be truly prepared for whatever the nation might demand requires a strict focus on readiness. The Division's main mission is to deploy and defeat any adversary, anywhere, in any environment as part of a joint and coalition force. To



meet this mission, the Division's paratroopers, including OSJA members, must be ready to respond quickly to alerts, maintain airborne proficiency, and operate in the most austere of environments.

Recall alerts are a regular part of life for the men and women of the Division. Each unit must be able to marshal its team members for a potential rapid deployment. The Division routinely conducts emergency deployment readiness exercises to test a unit's ability to alert, assemble, and conduct paratrooper readiness tasks. These realistic exercises serve an important purpose in preparing a unit to assume the role of a dedicated IRF. There have been many a night when your authors have received the much-anticipated recall alert, groggily rolled out of bed, grabbed the essential ruck sack, and made their way to the Division footprint to check in. While not always the most glamorous part of the job, practicing for the moment when the recall alert does not say "EXERCISE EXERCISE EXERCISE" is essential to springing into action when truly needed.

In addition to recall rehearsals, the 82d Airborne Division frequently conducts airborne operations, often called "jumps,"

## The Division focuses on sustaining lethality during an airborne assault even under unforgiving conditions

to achieve and maintain proficiency in airborne infiltration as the cornerstone of its readiness efforts. Future near-peer adversaries will undoubtedly seek to deny access to key terrain to American and coalition forces. The Division, with its airborne proficiency, provides the nation a credible, ready, and lethal unit to dislodge the enemy and gain access to key terrain. The Division therefore focuses its airborne training on improving its capability to jump behind enemy lines and secure terrain that allows for insertion of additional troops and logistics. Through repeated nighttime mass tactical jumps, paratroopers hone their airborne proficiency under combat-replicating conditions.

Finally, if rapidly deployed, the IRF paratroopers from the 82d Airborne

Division will likely find themselves dropped into an extremely austere environment. The Division focuses on sustaining lethality during an airborne assault even under unforgiving conditions. The unit's JAs and paralegals regularly train on how to provide legal advice and support with only the items they jump with into combat. As part of this approach, they rely heavily on having key analog products and legal resources in their legal kit bag.

### Transform the Division

In addition to the 82d Airborne Division's extensive efforts to train and prepare its forces for rapid deployments, it simultaneously looks to innovate and transform for the future. The Division must rapidly adapt and outthink future near-peer adversaries. Success depends on dominating any enemy in the physical, virtual, and cognitive spaces.<sup>6</sup> To prepare for these complex environments, the Division routinely incorporates and leverages new technologies, including several artificial intelligence-powered tools that help aggregate battlefield data and create flat, fast, accurate, and lethal kill chains by honing its observe-orient-decide-act loop. A team of JAs in the Division

examines the legal implications of these potential modernization efforts, ensuring the Division can fully leverage emerging technology while maintaining steadfast adherence to the law of armed conflict.

### Conclusion

Heeding Lieutenant General Charles Pede's constant drumbeat to "Be Ready," the JAs and paralegals of today's 82d Airborne Division are preparing, on a daily basis, for the fluid combat situations of Battlefield Next. They strive to be ready at a moment's notice for whatever the nation demands, and they better themselves through rigorous training and self-improvement. Of course, today's paratroopers are merely maintaining the legacy of readiness and preparedness of this storied Division. They

stand on the shoulders of those legal giants who deployed rapidly to places like the European Theater, Grenada, Panama, and various Middle East locations. The hope—and the plan!—is that they will be ready to follow those sterling examples and honor that legacy when their time comes. All The Way! Airborne! **TAL**

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### Notes

1. *Nearly 800 Soldiers Return Home After Middle East Deployment*, U.S. ARMY (20 Feb. 2020), [https://www.army.mil/article/232951/nearly\\_800\\_soldiers\\_return\\_home\\_after\\_middle\\_east\\_deployment](https://www.army.mil/article/232951/nearly_800_soldiers_return_home_after_middle_east_deployment).
2. The 82d Airborne legal personnel who deployed as part of the Immediate Response Force included Major (MAJ) Emily Geisinger, MAJ (then-Captain (CPT)) John Loscheider, CPT Robert Clopton, CPT Hayley Boyd, Sergeant (SGT) Joshua Mass, SGT (then-corporal (CPL)) Sawyer Roberts, CPL (then-specialist (SPC)) Ryan Ferguson, SPC Kadeem Williams, SPC Caden Schneider, and SPC Bringham Blundell.
3. Drew Brooks, *82nd Airborne Podcast Examines LGOPs as a Building Block of the Division's Fighting Capabilities*, FAYETTEVILLE OBSERVER (May 7, 2017, 2:01 AM), <https://www.fayobserver.com/news/20170507/82nd-airborne-podcast-examines-igops-as-building-block-of-divisions-fighting-capabilities>.
4. Steve DeVane, *Is Leading the 82nd Airborne the 'Coolest Job Ever'? The New Commanding General Thinks It Is*, FAYETTEVILLE OBSERVER (Aug. 29, 2020, 2:06 PM), <https://www.fayobserver.com/story/news/military/2020/08/28/82nd-airborne-commander-fort-bragg-brings-diverse-background/5646615002/>.
5. TJAG & DJAG Sends Vol. 40-16, Principled Counsel—Our Mandate as Dual Professionals, JAGCNET (9 Jan. 2020).
6. U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS para. 1-122 (Oct. 2017) (C1, 6 Dec. 2017).



U.S. Army clerks with evidence collected for the Nuremberg trials. (Photo credit: Charles Alexander)

## Practice Notes

# Training the Defense of Superior Orders

## Honoring the Legacy of the International Military Tribunal at Nuremberg After 75 Years

By Major M. Keoni Medici & Major Joshua P. Scheel

*Shoot all you see and all you hear.<sup>1</sup>*

Private Myo Win Tun said his commanding officer's order was clear.<sup>2</sup> As a result, in August of 2017, the Myanmar armed forces massacred thirty civilians and buried them in mass graves. Were they "just following orders" and, if so, is that a valid defense to a war crime charge?

Initial military training casts on the heart and conscience of every Service member a strong desire to obey the orders of their superiors. This is intentional. From initial entry, all military

training transforms civilians into Service members, relentless in carrying out the orders of the officers and noncommissioned officers charged with their care. Oaths recited publicly at promotions and reenlistments capture the institutional and individual emphasis on obedience to orders.

But *obedience* is not without limits, especially in armed conflict. Members are duty bound to disobey orders they know to be *patently* illegal, such as killing a civilian not directly participating

in hostilities.<sup>3</sup> Although, what happens when moral distance and limited information exists between transmissions of the order by staff in the military hierarchy to those carrying out the orders?<sup>4</sup> Or worse, a Soldier's lack of education or experience led them to perceive an illegal order as legal. A caustic tension can exist on this very matter: do I disobey the order of the one I have sworn an oath to obey, and possibly suffer punishment under the Uniform Code of Military Justice (UCMJ), or subject myself to unforeseen judgment?<sup>5</sup>

Seventy-five years ago, the International Military Tribunal (IMT) at Nuremberg and the "subsequent proceedings" addressed the age-old service member's defense: *the defense of superior orders*. The judgments of the Nuremberg IMT and "subsequent proceedings" merit judge advocates' focused attention for application to today's practice. This article discusses the Nuremberg tribunals, the international law addressing the defense of superior orders, and the application of the defense in three of the "subsequent proceedings" cases. The article then leaps forward to a contemporary analysis of the defense of superior orders in U.S. law and provides practical recommendations for judge advocates (JAs) to train their formations.<sup>6</sup>

From 1914 until 1944, U.S. Service members could assert the defense of superior orders as a complete defense to a crime so long as they could demonstrate they acted in accordance with superior orders.<sup>7</sup> Alongside the other milestones of the Nuremberg trials, such as individual responsibility for violations of *jus cogens*<sup>8</sup> and war crimes, the IMT and "subsequent proceedings" addressed the defense of superior orders, navigated the assertion of the defense, and established a standard that endures to today.

### **The International Military Tribunal and The London Charter**

Before victory, the Allied Powers publicly expressed their intention to hold their adversaries accountable for their violations of the law of armed conflict (LOAC).<sup>9</sup> World War II (WWII) atrocities such as the Holocaust, Malmedy Massacre, and many more demonstrated the propensity of opposing forces to commit evil acts against

service members and civilians during armed conflict. In a remarkable departure from "what had been done after the last war," the Allied powers agreed to hold individuals responsible by tribunals of both an international and national character. The Allied tribunals, such as the IMT at Nuremberg and the "subsequent proceedings" convened after Germany's unconditional surrender, may forever be remembered as the "most significant tributes that Power has ever paid to Reason."<sup>10</sup>

Striving to strike a delicate balance between accountability and a fair process, the drafters of the tribunals ensured that the founding international agreement for the IMT in Nuremberg, the London Charter, addressed the defense of superior orders explicitly among the few articles of the charter. The drafters aimed to eliminate the possibility of impunity on the basis that defendants claimed to "only be following orders." In Article 8 of the London Charter, "[t]he fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."<sup>11</sup> And as written and applied, Article 8 did just that; in fairness to the defendants, they knew before trial that any assertion of the defense of superior orders would not serve as an excuse or justification for charged acts, but could mitigate punishment.

Similar to the novelty of the international tribunal itself, the drafters of the London Charter wrote Article 8 in a manner that departed from an interloping and defense-friendly defense put forth by Lassa F.L. Oppenheim.<sup>12</sup> Beginning in 1906, Oppenheim made popular the defense of superior orders as a complete defense—one that excused war crimes committed by service members pursuant to orders. The drafters of Article 8 departed from this brief development and reinstated an old standard.<sup>13</sup> Under Oppenheim's defense, belligerents would hold individuals who ordered the criminal acts responsible, rather than those who committed the acts, but this standard was not welcomed at the Nuremberg IMT.

On 20 November 1945, the Nuremberg IMT proceeded to trial without the

possibility of asserting the Oppenheim defense of superior orders to excuse criminal acts. The Nuremberg IMT judges did not excuse any of the twenty-one Nuremberg defendants' crimes based upon the defense of superior orders.<sup>14</sup> The judgment at Nuremberg IMT appeared to contain a persuasive precedent of strict application of Article 8 and, therefore, only permitted evidence concerning obedience to orders as possible mitigation in sentencing.<sup>15</sup> What may be more significant and offer a more profound legacy, however, are the subsequent proceedings convened under Control Council No. 10 and the two trials that occurred under that U.S. law.

### **"Subsequent Proceedings": The *von Leeb* and *List* Cases**

For those responsible for crimes and atrocities in WWII not tried at the Nuremberg IMT, the Allied Powers divided up the defendants based upon sectors of Allied post-war occupation. The United States pursued criminal accountability of Nazi war criminals in what has been referred to as the "subsequent proceedings," or tribunals convened under U.S. law, tried in Nuremberg, Germany. The United States instituted the "subsequent proceedings" by U.S. directive as expressed in U.S. Control Council Law Number 10 (Law No. 10).<sup>16</sup>

The drafters of Law No. 10 knew that the defense of superior orders would need to be addressed just as it was in the London Charter. That was done in Article II.4(b), which mimicked Article 8 in that, "[t]he fact that any person acted pursuant to the order . . . of a superior does not free him from responsibility for a crime, but may be considered in mitigation."<sup>17</sup> And, although the Law No. 10 drafters followed the London Charter, the outcome of the assertion and application of the defense of superior orders at the "subsequent proceedings" was different.

During a few of the twelve "subsequent proceedings," such as *United States v. Ohlendorf (The Einsatzgruppen Case)*, *United States v. List (The Hostage Case)*, and *United States v. von Leeb (The High Command Case)*, the strict Article 8 standard for defense of superior orders began to wilt.<sup>18</sup> The tribunals wrestled with the defense of superior orders and the evidence presented at trial.



Their judgments expressed a reluctance to ignore evidence excusing criminal acts but did so under different theories, such as duress or mens rea.<sup>19</sup> In *Ohlendorf*, the tribunal considered the defense of superior orders coupled with the defense of duress.<sup>20</sup> In *List* and *von Leeb*, the tribunal dealt with military commanders and high-ranking officers.<sup>21</sup> The tribunal applied the defense in their cases more akin to a mistake of law defense, which provides us with a view to the contemporary. In *von Leeb* for example, the tribunal in judgment expressed:

Furthermore, a distinction must be drawn as to the nature of a criminal order itself. Orders are the basis upon which any army operates. It is basic to the discipline of an army that orders are issued to be carried out. Its discipline is built upon this principle. Without it, no army can be effective and it is certainly not incumbent upon a soldier in a subordinate position to screen the orders of superiors for questionable points of legality. Within certain limitations, he has the right to assume that the orders of his superiors and the state which he serves and which are issued to him are in conformity with international law.<sup>22</sup>

The *von Leeb* tribunal struggled with finding guilt when a defendant did not know, nor should have known, that an order was illegal. The tribunal's judgement in *List*, more clearly articulated their reservation with a strict rejection of the defense of superior orders and instead expressed:

Implicit obedience to orders of superior officers is almost indispensable to every military system. But this implies obedience to lawful orders only. If the act done pursuant to a superior's orders be murder, the production of the order will not make it any less so. It may mitigate, but it cannot justify the crime. We are of the view, however, that if the illegality of the order was not known to the inferior, and he could not reasonably have been expected to know of its illegality, no wrongful intent necessary to the commission of a crime exists

and the inferior will be protected. But the general rule is that members of the armed forces are bound to obey only the lawful orders of their commanding officers, and they cannot escape criminal liability by obeying a command which violates international law and outrages fundamental concepts of justice.<sup>23</sup>

In the end, the *List* case further emboldened the vitality of the defense of superior orders from the complete bar envisioned in the London Charter. The defense of superior orders proved resilient to the Nuremberg IMT's singular attempt to reject this defense outright. Instead of a complete rejection, the "subsequent proceedings" addressed the defense of superior orders, which had an impact on the LOAC. Today, leaders and service members have the opportunity to assert the defense in limited circumstances and know when the defense will not apply.

### **Current U.S. Application of the Defense of Superior Orders**

A Service member's obligation to obey orders remains an essential element of the U.S. military's ability to function effectively. However, following a superior's orders is not a get-out-of-jail-free card<sup>24</sup> for an alleged LOAC violation. Because U.S. practice is to charge war crimes as offenses under the UCMJ,<sup>25</sup> and obedience to superior orders remains a viable defense, it is important for JAs to understand and be able to apply the current law in an increasingly complex and legally dynamic world.

The 2019 *Manual for Courts-Martial (MCM)* addresses obeying military orders in several parts. Within the *MCM*, Articles 90, 91, and 92, UCMJ, criminalize acts of disobedience and are the most relevant to this discussion. Article 90 prohibits "willfully disobeying the lawful command of [a] superior commissioned officer."<sup>26</sup> Article 91 adds the requirement to obey warrant officers, noncommissioned officers, and petty officers. Finally, Article 92 forbids Service members from disobeying any lawful general order, regulation, or order issued by a member of the armed forces, which it is their duty to obey.<sup>27</sup> These three articles provide the fundamental presumption

on which the defense of superior orders depends: Service members will obey the orders issued by their superiors.<sup>28</sup>

The mere existence of an order, however, does not stop the analysis or necessarily absolve the accused from criminal responsibility. The 2020 *Military Judges Benchbook* instructs that if a court-martial panel determines the accused is acting under an order,<sup>29</sup> then the fact finder must also decide whether the accused knew the order was illegal.<sup>30</sup> Therefore, defense of superior orders is a complete defense, unless: (1) the order is illegal, and (2) "the accused actually knew it was illegal or a person of ordinary sense and understanding would, under the circumstances, know the order was illegal."<sup>31</sup>

A court-martial panel, when determining whether the accused had actual knowledge of a patently illegal order, must take into account factors such as the accused's age, education, training, rank, background, and experience,<sup>32</sup> circumstantial evidence is sufficient to prove actual knowledge.<sup>33</sup> Absent proof of knowledge, the measure becomes that of a person of ordinary sense and understanding. The UCMJ clearly contemplates that a young private likely does not have the same familiarity with the law as a senior officer. Nevertheless, the reality of current practice is that neither private nor senior officer should have difficulty identifying an illegal order.

There exists a strong inference that a superior's order requiring the performance of a military duty is lawful, unless the order is patently illegal.<sup>34</sup> United States courts have also used the term "manifestly" to describe the illegal order.<sup>35</sup> The UCMJ does not define patently illegal or unlawful in the context of obeying an order, but instead provides the example of directing the commission of a crime (e.g., the torture of a detainee or the unlawful killing of a combatant incapacitated by severe wounding or capture).<sup>36</sup> As a question of law, and given that the military judge makes the determination on the legality of an order, the lack of a definition is arguably appropriate.<sup>37</sup>

Use of the terms "patently" and "manifestly" signals the crime must be obvious on its face. This is evidenced by the law not only permitting Service members to disobey, but actually *requiring* disobedience

of the order.<sup>38</sup> Consider, as an example, the widely known abuse of prisoners perpetrated by U.S. Service members at Abu Ghraib prison in Iraq. The guards perpetrated acts such as urinating on prisoners and making them remove their clothes and forming human pyramids.<sup>39</sup> If a superior orders a Service member to carry out such heinous acts, it would be immediately apparent that the order is illegal, requiring them to disobey. Identifying the illegality does not require academic prowess, but how to respond may not be so instinctive.

### Training Disobedience to an Order

The U.S. military indoctrinates its members to follow orders, even when counter to their conscience, religion, or personal philosophy.<sup>40</sup> This makes sense given the inherently harmful situations encountered in the profession of arms (e.g., rappelling from a helicopter or clearing a fortified building of armed enemy combatants). However, the law demands the opposite—disobedience—when the order is to commit a war crime.<sup>41</sup> Current law of war training contains little, if any,<sup>42</sup> discussion on how one should respond to a patently illegal order.

It seems prudent to provide Service members, especially those at the tactical level where most war crimes are ordered, the tools to respond. Judge advocates can easily accomplish this during their required classes on the rules of engagement, law of war, or detainee operations. Due to the varying speeds of war, training on this matter deserves special focus and careful articulation. The instruction might begin with asking what actions the trainee(s) will take during the following three vignettes.

#### Vignette #1

A lieutenant tells the Service members in his platoon, “Motorcycles should be engaged on sight.” Later the same day, while on a mounted combat patrol, the members approach three men riding on a motorcycle, none of whom appear to be armed or committing any hostile acts. The lieutenant demands over the radio, “Why aren’t you shooting?”<sup>43</sup>

#### Vignette #2

An enemy tank column advances on a squad’s position, and the squad leader



The Executive Committee prepares for the Nuremberg Trials. (Photo credit: Charles Alexander)

directs their squad members to seek cover in a church. As one tank passes the church, the same squad leader opens a window and yells for a squad member to grab the javelin missile system.

#### Vignette #3

During a combat operation, Service members capture three prisoners of war (POWs) and bind their hands with plastic cable ties. A private overhears a discussion between the squad leader and another member, where they agree to cut the ties, making it appear as if the POWs are trying to escape. Shortly thereafter, while readying his M4 carbine, the squad leader orders the private to cut the ties.<sup>44</sup>

#### Takeaway

Throughout the vignette discussion, JAs should guide Service members through four recommended response steps.<sup>45</sup>

Step 1: DECIDE. Make a determination whether the order is patently illegal.<sup>46</sup>

Step 2: CLARIFY. If circumstances allow, respectfully request the superior to repeat and/or clarify the order.

Step 3: DISOBEY. If the order is patently illegal, disobey the order.

Step 4: REPORT. If the superior continues with a patently illegal order, report the incident to a higher authority.<sup>47</sup>

At no point should the subordinate resort to violence against the superior. The availability of the legal defense of superior orders to a war crime largely depends on the specific jurisdiction and forum. Since U.S. Service members are ordinarily tried by courts-martial, training ought to center on the current application of the defense in the UCMJ. For a more complete understanding of the defense of superior orders, one may also study its recent application in international law<sup>48</sup> and in the courts of our coalition partners.<sup>49</sup>

### Conclusion

Commemorating the 75th Anniversary of the IMT at Nuremberg provides the Judge Advocate General’s Corps an opportunity to reexamine a portion of history involving LOAC, a history forged in the crucible of armed conflict and the courtroom. The IMT addressed a complicated issue of significance to both commander and service member: the limitation of a superior’s orders and criminal liability of an individual service member. What resulted is a bright line rule to memorialize: Patently illegal orders overcome the presumption of obedience and must be disobeyed, or the service member risks criminal liability. This standard is reflected in current U.S. law and practice.

With a re-emphasis on preparation for large-scale combat operations, JAs must incorporate the defense of superior orders in their training and leader development on the LOAC. Additionally, due to a current absence of instruction on the subject, the inclusion of guidance on the proper response to a patently illegal order is equally integral. Service members who are confused by the law concerning obedience to orders and respond inappropriately present a risk to mission and force. Let's learn from the past and prepare for the future. **TAL**

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## Notes

- Hannah Beech et al., 'Kill All You See': In a First, Myanmar Soldiers Tell of Rohingya Slaughter, N.Y. TIMES (Sept. 8, 2020), <https://www.nytimes.com/2020/09/08/world/asia/myanmar-rohingya-genocide.html>.
- Id.*
- ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 232 (Oxford Univ. Press 2d ed. 2003).
- See Major Walter M. Hudson, *Book Review*, 161 MIL. L. REV. 225 (1999) (reviewing MARK J. OSIEL, OBEYING ORDERS: ATROCITY, MILITARY DISCIPLINE AND THE LAW OF WAR (1999)).
- Gary D. Solis, *Obedience of Orders and the Law of War: Judicial Application in American Forums*, 15 AM. U. INT'L L. REV. 481, 484 (1999).
- This article intends to commemorate the International Military Tribunal at Nuremberg and does not conduct a complete review of the U.S. history of the defense of superior orders. It does not address assertions during Vietnam or any other post-WWII operations, nor does it discuss the International Criminal Tribunals for Yugoslavia or Rwanda, nor the International Criminal Court's Article 33.
- GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 377-84 (2d ed. 2016).
- Jus cogens* is defined as "[a] universal norm in customary international law. [It] is the set of norms in [CIL] that are universally recognized and accepted by the international community. Deviations from the *jus cogens* are not permitted unless they are superseded by a subsequent change in the *jus cogens*." *Jus cogens*, BOUVIER'S LAW DICTIONARY (2012). See also M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 L. & CONTEMP. PROBS. 63 (1996) (providing an explanation of *jus cogens* in an international criminal law context).
- Annex 10, Declaration of German Atrocities, Moscow Conference of Foreign Secretaries (Nov. 1, 1943). See also CASSESE, *supra* note 3, sec. 18.2, 329-31 (2003).
- Second Day, Wednesday, 21 November 1945: Morning Session*, in 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 98-99 (1947).
- Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 8, Aug. 8, 1945, 82 U.N.T.S. 279 [hereinafter London Charter].
- SOLIS, *supra* note 7, at 377-78.
- Id.* at 383-87. During *Operation Husky*—a military campaign in Sicily, Italy—U.S. Soldiers committed war crimes against Italian and German prisoners of war. The law at the time led to disparate results between a noncommissioned officer and an officer. In turn, there was a change in the U.S. Rules of Land Warfare that led to a correction in the deficiency in the defense of superior orders. See Fred L. Borch III, *War Crimes in Sicily: Sergeant West, Captain Compton, and the Murder of Prisoners of War in 1943*, ARMY LAW., Mar. 2013, at 1.
- SOLIS, *supra* note 7, at 395.
- Id.* at 387.
- Id.* at 388. See also ALLIED CONTROL AUTHORITY, GERMANY, 1 ENACTMENTS AND APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 308 (1945), [https://www.loc.gov/rr/frd/Military\\_Law/Enactments/Volume-I.pdf](https://www.loc.gov/rr/frd/Military_Law/Enactments/Volume-I.pdf) (last visited 15 Sept. 2020).
- SOLIS, *supra* note 7, at 388.
- Colonel Charles Garraway, *Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied*, 836 INT'L REV. RED CROSS 785 (Dec. 1999).
- Mens rea means "the mind of the person. [It] is the mental state of the person under discussion at a given time, particularly the person's beliefs, purpose, and expectations that are relevant to some legally significant action or inaction by that person." *Mens rea*, BOUVIER LAW DICTIONARY (2012).
- IV TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS, NUERNBERG MILITARY TRIBUNALS 480 (1950).
- XI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS, NUERNBERG MILITARY TRIBUNALS 462-63, 764-65 (1950).
- Id.* at 510-11.
- Id.* at 1236.
- A get-out-of-jail-free card is an element of the board game Monopoly produced by Hasbro, Inc.
- U.S. DEP'T OF ARMY, FIELD MANUAL 6-27, THE COMMANDER'S HANDBOOK ON THE LAW OF LAND WARFARE para. 8-42 (Aug. 2019). See also OFF. OF THE JUDGE ADVOCATE GEN., TARGETING AND THE LAW OF WAR: ADMINISTRATIVE INVESTIGATIONS & CRIMINAL LAW SUPPLEMENT (10 Sept. 2018) (explaining the necessary elements of proof to substantiate a Law of War violation and the implicated punitive articles under the UCMJ).
- UCMJ art. 90 (2016).
- UCMJ art. 92 (1950).
- Shane Reeves & David Wallace, *Can US Service Members Disobey an Order to Waterboard a Terrorist?*, LAWFARE (Apr. 6, 2016, 9:56 AM), <https://www.lawfareblog.com/can-us-service-members-disobey-order-waterboard-terrorist>.
- The panel's determination may include whether the Service member issuing the order had the authority to do so, the order related to a military duty, and was the order directed at the accused. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 16c (2019) [hereinafter MCM].
- U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES BENCHBOOK para. 5-8-1 (29 Feb. 2020) [hereinafter DA PAM. 27-9].
- MCM, *supra* note 29, R.C.M. 916(d).
- DA PAM. 27-9, *supra* note 30, para. 5-8-1.
- MCM, *supra* note 29, pt. IV, ¶ 16c(e).
- Id.* ¶ 16c(2)(a)(i).
- See SOLIS, *supra* note 7, at 391 (examining use of the term "manifestly" as used in several post-World War II cases).
- MCM, *supra* note 29, pt. IV, ¶ 16c(2)(a)(i).
- Id.* ¶ 16c(2)(a)(ii).
- Reeves & Wallace, *supra* note 28 ("A service member who obeys an illegal order is individually culpable for the crime and cannot later assert 'following orders' as a defense.").
- John Ford, *When Can a Soldier Disobey an Order?*, WAR ON THE ROCKS (July 24, 2017), <https://warontherocks.com/2017/07/when-can-a-soldier-disobey-an-order/> ("Some of the Soldiers involved in the abuse tried to assert superior orders as a defense, though none were successful.").
- Reeves & Wallace, *supra* note 28.
- MCM, *supra* note 29, pt. IV, ¶ 16c(2)(a)(i).
- See also SOLIS, *supra* note 7, at 390 ("No state's armed services instructs its members in disobeying orders.").
- See Greg Jaffe, *'The Cursed Platoon'*, WASH. POST (July 2, 2020), <https://www.washingtonpost.com/graphics/2020/national/clint-lorance-platoon-afghanistan/> (containing testimony of Soldiers in the court-martial of First Lieutenant Clint Lorange).
- See SOLIS, *supra* note 7, at 413-16 (describing the incidents leading to the 2007 court-martial of Staff Sergeant Raymond L. Girouard).
- E.g.*, *Id.* at 393.
- When time is limited, if it is not immediately apparent that the order is illegal, then the Service member must assume the order is lawful.
- See U.S. DEP'T OF DEF., DIR. 2311.01, DoD LAW OF WAR PROGRAM (2 July 2020) (examining alleged law of war violation reporting requirements).
- "The fact that a person acted pursuant to orders of his or her Government or of a superior does not relieve that person from responsibility under international law, provided it was possible in fact for that person to make a moral choice." U.S. DEP'T OF DEF., DoD LAW OF WAR MANUAL para. 18.22.4 (June 2015) (C2, Dec. 2016) (citing U.N. International Law Commission, *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, in *Report of the International Law Commission on its Second Session, 5 June to 29 July 1950* (Document A/1316), reprinted in [1950] II Y.B. INT'L L. COMM'N 374, 375, U.N. Doc. A/CN.4/SER.A/1950/Add. 1).
- See MARK J. OSIEL, OBEYING ORDERS: ATROCITY, MILITARY DISCIPLINE AND THE LAW OF WAR 77 (1999) (describing a manifestly illegal order in the German Military Penal Code's as, "what every man's conscience would tell him anyhow").





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## Practice Notes

# Hate the Sin, Not the Sinner's Family

### Benefits Available to Victim Family Members of Retirement-Eligible Soldiers

*By Major Carling M. Dunham*

*You're retired—goodbye tension, hello pension!*

Some crimes stay hidden for decades and then surface near the end of a Soldier's career.<sup>2</sup> Crimes committed at the height of a Soldier's professional development juxtapose sharply with the level of personal ethics expected at that level of leadership.<sup>3</sup> In many cases, good order and discipline demands accountability and punishment for these Soldiers and their crimes. Frequently, families are

affected by the fallout for the Soldier's crimes. What then becomes of the Soldier's spouse and dependent children, some of whom have foregone their own personal careers and communities for the siren call of "the needs of the Army"?<sup>4</sup>

Fortunately, the Uniformed Services Former Spouses' Protection Act (USFSPA) addresses the situation where a

retirement-eligible Soldier has been court-martialed for abuse of his spouse or children.<sup>5</sup> This statute provides that a qualifying victim spouse or dependent child is entitled to a portion of what would have been the Soldier's retirement benefits had the Soldier not been court-martialed.<sup>6</sup>

## Protection for victims of abuse under the USFSPA avoids the oft-cited conundrum of “punishing the family”

This article identifies the benefits of a military retirement and the unique stressors for military families; it also serves as an introduction to the USFSPA provision for victims of abuse of retirement-eligible Soldiers.<sup>7</sup> With a current emphasis on providing legal support to victims of domestic violence,<sup>8</sup> knowledge of the provision's existence and eligibility requirements is critical for military justice practitioners to advise their commanders; for defense counsel to advise their Soldier-clients; and for legal assistance attorneys to advise their family member clients.

Protection for victims of abuse under the USFSPA avoids the oft-cited conundrum of “punishing the family” for the misconduct of the Soldier—hating the sin, but not the sinner's family.<sup>9</sup> The situation is not uncommon: A high-ranking Soldier—either enlisted or officer—commits a crime which justifies trial by court-martial. For these serious offenses, a punitive discharge is an authorized punishment.<sup>10</sup> If a Service member receives a punitive discharge, he is no longer eligible to retire from the military.<sup>11</sup> A punitive discharge, then, cuts off the Soldier's eligibility to receive retired pay and other retirement benefits.<sup>12</sup> The termination of eligibility occurs at the military judge's entry of judgment following the court-martial.<sup>13</sup> The USFSPA seeks to put victim family members in the position they would have been had the abuse not occurred and had Soldier been able to retire.<sup>14</sup>

### Military Retirement: A Unique Link Back to the Military for Both Soldiers and Family Members

The military's retirement plan is one of the few retirement entitlements of its kind

in both duration and amount, and “is one of the most important and arguably the most prized benefit of long-term military service.”<sup>15</sup> In addition to receiving retirement pay, military retirees have access to the on-post commissary and exchange where they can buy groceries and other commercial

items for a reduced cost.<sup>16</sup> Military retirees also have access to TRICARE insurance for an annual fee that is typically much lower than the premiums for civilian insurance plans.<sup>17</sup> Military retirees' families also remain eligible for access to military bases, exchanges, commissaries, and insurance plans.

In many ways, life after military retirement retains more characteristics of the previous work life than any civilian job and subsequent retirement. This link between Soldier and retirement is deliberate: “Retirement,” in the context of the military, is something of a misnomer—retired pay, unlike a typical pension, is not simply compensation for past services, but also ‘reduced compensation for reduced current services.’”<sup>18</sup> This invisible link between retirement and the potential for recalled service also affects military families.<sup>19</sup> Military spouses, then, remain tied to the military in a way that civilian spouses do not.

### Stressors of Military Life

Due to the transient nature of military life, military spouses are in uniquely vulnerable positions—both financially and socially. “Indeed, military spouses may be the quintessential ‘trailing spouse,’ their situation made even more challenging because their families encounter location assignments, rather than location choices, and the result may not be conducive to employment.”<sup>20</sup> Despite military spouses statistically being more educated than other civilians of working age, they are “far less likely to participate in the labor market than the general working age population, [fifty-seven] percent compared to [seventy-six] percent in 2016.”<sup>21</sup> Some of this discrepancy is likely explained by the intangible aspect of

potential employer hesitancy to hire military spouses who have to move frequently and, occasionally, on very short notice.<sup>22</sup>

In the most recent Blue Star Families annual survey, employment is the most common concern for military spouses, even topping the concern for their Soldier's time away from family.<sup>23</sup> In addition to the strain of frequent geographic moves, deployments, and providing childcare, military spouses who are unemployed most commonly cite the demands of the Soldier's job as a barrier to seeking employment.<sup>24</sup> Of those military spouses who are employed, seventy-seven percent “experience some degree of underemployment.”<sup>25</sup> Underemployed military spouses earn approximately twenty-seven percent less income than their civilian peers.<sup>26</sup> Over a twenty-year military career, this disparity can result in approximately \$190,000 in lost income.<sup>27</sup> This amount does not account for loss of income for those spouses who are unemployed.<sup>28</sup> This unemployment and underemployment results in military families struggling to make ends meet at twice the rate of civilian families.<sup>29</sup>

Adding to financial insecurity, military spouses may struggle to develop roots in a community. Almost seventy percent of military families live off the installation.<sup>30</sup> Forty percent of military families “do not feel a sense of belonging to their local civilian community.”<sup>31</sup> A sense of connection to community develops over time, but frequent military moves often disrupt that process at each duty location.<sup>32</sup> Conversely, military spouses' identities may be wrapped up in their spouse's service. For example, one Navy pilot's wife recalls attending spouses' meetings where she was “forced to wear a shirt with ‘Mrs.’ and [her] husband's call sign on it.”<sup>33</sup> Both extremes—isolation and dependence—can be common consequences of military spouse life.

Financial insecurity coupled with tenuous community ties can create an environment ripe for abuse.<sup>34</sup> Military service is one of the top barriers to leaving an abusive relationship.<sup>35</sup> Domestic violence in the military is underreported due to myriad concerns about the spouse's career, feelings of isolation, and financial dependence on the abuser.<sup>36</sup> Adding to the problem is that



(Credit: Vitalii Vodolazskiy – stock.adobe.com)

the occurrence of violent crimes is increasing, with the trauma of service in a wartime Army at least partially to blame.<sup>37</sup>

Legal assistance attorneys and military justice practitioners must be aware of the consequences associated with a military spouse reporting a domestic offense.<sup>38</sup> Domestic violence and sexual violence committed by a Soldier can result in trial by court-martial. The authorized punishment for these crimes includes a punitive discharge.<sup>39</sup> When a retirement-eligible Soldier is court-martialed and receives a punitive discharge, the family members doubly suffer—first from the abuse itself and then from the loss of retirement benefits after decades of following their spouse's military service.

A specific provision within the USFSPA attempts to remedy this inequity.

Generally, this provision seeks to put the victims of abuse in the same place they would have been had the abuse and subsequent punitive consequences not occurred “and the member had retired under normal circumstances.”<sup>40</sup>

#### **Eligibility and Payment under the “Victims of Abuse” Provision of USFSPA**

To be eligible, a spouse must have been married to the Soldier for ten years or more, during which time the Soldier performed at least ten years of creditable service.<sup>41</sup> The Soldier must be retirement-eligible.<sup>42</sup> The spouse must also have been the victim of the abuse or the parent of the Soldier's dependent child who was the victim of abuse.<sup>43</sup> A dependent child is eligible for the retirement benefits if

the other parent died as a result of the Soldier's abuse.<sup>44</sup>

The USFSPA governs payment to spouses and dependent children who were victims of abuse by the Soldier.<sup>45</sup> There are three authorized types of payments to spouses or children from what would have been the Soldier's retirement pay: (1) a court order to pay the spouse a fixed amount from the Soldier's disposable retirement pay; (2) a court order to pay the spouse a percentage of the Soldier's disposable retirement pay; and (3) a court order to pay child support to the dependent child from the Soldier's disposable retirement pay.<sup>46</sup> Enforceable civilian court orders include “final decrees of divorce, dissolution, annulment, and legal separation, and court-ordered property settlements incident to such decrees.”<sup>47</sup> Any court order must



include the correct language and division of pay to be actionable by the Defense Finance and Accounting Service (DFAS).<sup>48</sup>

To receive payment, spouses must obtain a certification regarding the amount of retirement pay and then they must remain eligible.<sup>49</sup> First, either the issuing court or the eligible spouse may request certification from the Secretary of the Army (or designee) of the amount of monthly retired pay the Soldier would have been entitled to had the Soldier's eligibility for retirement pay not been terminated as a result of misconduct.<sup>50</sup> This calculation will ignore any reductions in grade or forfeitures of pay adjudged at the court-martial.<sup>51</sup> The certified amount will be deemed to be the disposable retired pay of the Soldier.<sup>52</sup> The total amount of the disposable retired pay of a Soldier payable under all court orders may not exceed fifty percent of the disposable retired pay.<sup>53</sup> Second, the spouse must remain eligible for payment. Payment under the court order will terminate if the Soldier dies, if the spouse dies, if the spouse remarries, by the terms of the court order itself, or if the court-martial sentence that terminated eligibility is set aside or mitigated to no longer include a punitive discharge.<sup>54</sup>

In addition to a portion of retirement payment, the spouse and dependent children are eligible to receive medical and dental care, exchange and commissary privileges, and any other benefits afforded to dependents of military retirees.<sup>55</sup> This includes the right to the Survivor Benefit Plan.<sup>56</sup> Even though eligibility under the USFSPA is terminated by the Soldier's death, with concurrent eligibility under the Survivor Benefit Plan, the spouse is still put in the place they would have been absent the Soldier's misconduct. Other benefits include the right to use Space-Available transportation and to use military discounts where offered.<sup>57</sup>

## Conclusion

Both military justice practitioners and legal assistance attorneys must familiarize themselves with the USFSPA, particularly when the Soldier is retirement-eligible. The protections available to victims of abuse should be taken into consideration by a military justice practitioner when advising

the commander or client on possible courses of action. Understanding that the USFSPA provides a safety net for victims of abuse of retirement-eligible Soldiers, the commander need not shy away from a court-martial of the Soldier when the underlying misconduct may warrant one. A defense counsel should be able to advise their Soldier-client on potential protections available to the Soldier's family members. The legal assistance attorney should competently advise abuse victims on the available protections under the USFSPA and the steps needed to establish eligibility. The Army's leadership stated that "[p]eople are our greatest strength, our most valuable asset, and our most important weapons system."<sup>58</sup> Knowledge and application of the USFSPA is a way for us to implement our leadership's philosophy of taking care of people. **TAL**

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## Notes

1. *101 Retirement Quotes for Every Type of Retiree*, GIFTS, <https://www.gifts.com/blog/retirement-quotes> (last visited Sept. 15, 2020).

2. See Dan Lamothe, *A Soldier Rose to Become a General. His Daughter Says He Abused Her for Years*, WASH. POST (Dec. 16, 2018, 10:11 PM), [https://www.washingtonpost.com/world/national-security/a-soldier-rose-to-become-a-general-his-daughter-says-he-abused-her-for-years/2018/12/16/965a976a-fd61-11e8-83c0-b06139e540e5\\_story.html](https://www.washingtonpost.com/world/national-security/a-soldier-rose-to-become-a-general-his-daughter-says-he-abused-her-for-years/2018/12/16/965a976a-fd61-11e8-83c0-b06139e540e5_story.html) (discussing how Major General Grazioplene's alleged abuse of his daughter came to light decades after it occurred).

3. See Timothy Williams, *General Charged with Sexual Misconduct*, N.Y. TIMES (Sept. 27, 2012), <https://www.nytimes.com/2012/09/28/us/decorated-general-charged-with-violations-of-military-law.html>; Alan Blinder & Richard A. Oppel Jr., *How a High-Profile Military Sexual Assault Case Foundered*, N.Y. TIMES, (Mar. 12, 2014), <https://www.nytimes.com/2014/03/13/us/how-a-military-sexual-assault-case-foundered.html> (discussing how Brigadier General Sinclair's alleged crimes started when he was already a colonel).

4. U.S. DEP'T OF ARMY, REG. 601-280, ARMY RETENTION PROGRAM para. C-1(b) (1 Apr. 2016).

5. 10 U.S.C. § 1408(h)(4); U.S. DEP'T OF DEF., 7000.14-R, DoD FINANCIAL MANAGEMENT REGULATION vol. 7B, ch. 59 (Jan. 2019) [hereinafter DoD FMR]. This provision also applies to Soldiers who are involuntary separated from active duty due to a civilian criminal conviction. DoD FMR sec. 590304. See U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND

DISCHARGES para. 2-14 (8 Feb. 2020) [hereinafter AR 600-8-24]; U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED SEPARATIONS para. 14-5 (19 Dec. 2016) [hereinafter AR 635-200]. For simplicity, this article will only refer to those Soldiers who were separated from the service by a court-martial.

6. 10 U.S.C. § 1408(h).

7. This article does not address benefits available to victims of abuse when the Soldier is not retirement-eligible. For information on transitional compensation, see DoD FMR, *supra* note 5, ch. 60.

8. See Policy Memorandum 20-03, Headquarters, Office of the Judge Advocate Gen., U.S. Army, subject: Domestic Violence Victim Representation Program (19 June 2020) [hereinafter DV Policy Memo].

9. The saying of "hate the sin, love the sinner" is widely attributed to a line in one of Saint Augustine's letters: "[W]ith due love for the persons and hatred of the sin." 1 NICENE AND POST-NICENE FATHERS (Philip Schaff ed., Hendrickson Pub. 1996) (1887).

10. MANUAL FOR COURTS-MARTIAL, UNITED STATES, app. 12 (2019) [hereinafter MCM].

11. See Loeh v. United States, 73 Fed. Cl. 327, 329 (Fed. Cl. 2006) ("Although the statutes and rules governing military retirements are not the models of clarity, a careful review of the applicable statutes reveals that a military officer punitively discharged from the Navy loses his eligibility for retirement."). See AR 600-8-24, *supra* note 5, para. 6-12(c)(2) (a Regular Army, Army Reserve, or National Guard "commissioned officer with [twenty] years [of Active Federal Service], of which [ten] years is active commissioned service, may upon request and the approval of [the Secretary of the Army] be retired"); AR 635-200, *supra* note 5, para. 12-4(a) ("A Soldier who has completed [twenty] but less than [thirty] years of [Active Federal Service] may be retired at his or her request."). By contrast, if a board recommends separation, a Soldier who has completed twenty years or more of qualifying active service has the opportunity to apply for retirement. See AR 635-200, *supra* note 5, para. 2-6(b). However, applying for retirement under these conditions does not guarantee approval of the retirement. *Id.*

12. McCarty v. McCarty, 453 U.S. 210, 211 (1981); 10 U.S.C. § 12740 (a person who is convicted under the Uniform Code of Military Justice and who is "separated pursuant to a sentence of a court-martial with a dishonorable discharge, a bad conduct discharge, or (in the case of an officer) a dismissal is not eligible for retired pay."); DoD FMR, *supra* note 5, sec. 590303; *Retired Pay*, MIL. COMP., <https://militarypay.defense.gov/Pay/Retirement.aspx> (last visited Sept. 15, 2020) (describes types of retirement pay and how each is calculated). See, e.g., United States v. Becker, 46 M.J. 141, 144 (C.A.A.F. 1997) ("[T]he value of retired pay should be recognized as the single most important consideration in determining whether to adjudge a punitive discharge."); United States v. Boyd, 55 M.J. 217, 221 (C.A.A.F. 2001) (after this case, the Court of Appeals for the Armed Forces required all military judges "to instruct on the impact of a punitive discharge on retirement benefits.").

13. DoD FMR, *supra* note 5, sec. 590303. See UCMJ art. 60c (2016).

14. DoD FMR, *supra* note 5, sec. 590101.

15. Paul C. Taylor & Laura J. Taylor, *Evaluating the Financial Cost of an Involuntary Military Separation*, 14 J. LEGAL ECON. 1, 1 (2007).

16. *Id.* at 11-12.
17. *Id.* at 12; *Retirees' Use of Civilian Coverage*, TRICARE (Oct. 2007), <https://tricare.mil/survey/hcsurvey/issue-briefs/issuebriefQ1FY08.pdf>; *Health Coverage Options for Military Retirees*, NAT'L DEF. RSCH. INST. & RAND HEALTH (2007), [https://www.rand.org/pubs/research\\_briefs/RB9236/index1.html](https://www.rand.org/pubs/research_briefs/RB9236/index1.html).
18. *Loeh v. United States*, 53 Fed. Cl. 2, 5 (Fed. Cl. 2002) (quoting *McCarty v. McCarty*, 453 U.S. 210, 221-22 (1981)).
19. *See United States v. Hennis*, 75 M.J. 796, 802, 844 (A. Ct. Crim. App. 2016), *aff'd* *United States v. Hennis*, 79 M.J. 370 (C.A.A.F. 2020) (appellant was a young, single Soldier at the time he committed the murders of Kathryn Eastburn and two of her young daughters. However, when the Army recalled appellant to prosecute him twenty years later, he had a family. During the sentencing case, the defense admitted multiple photos of the appellant and his family members, some of which included appellant opening presents with his children in front of a Christmas tree. Appellant was sentenced to death.).
20. COUNCIL OF ECON. ADVISORS, *MILITARY SPOUSES IN THE LABOR MARKET 1* (May 2018), <https://www.whitehouse.gov/wp-content/uploads/2018/05/Military-Spouses-in-the-Labor-Market.pdf>.
21. *Id.* at 2. Ninety percent of military spouses are women, who, in addition to the other demands of military life and employment, face the "motherhood penalty." Julie Bogen, *The Dismal Career Opportunities for Military Spouses*, ATLANTIC (Apr. 17, 2019, 4:06 PM), <https://www.theatlantic.com/family/archive/2019/03/majority-military-spouses-are-underemployed/585586/>.
22. Bogen, *supra* note 21.
23. DEP'T OF APPLIED RSCH., *BLUE STAR FAMILIES & INST. FOR VETERANS & MIL. FAMS.*, SYRACUSE UNIV., 2019 MILITARY FAMILY LIFESTYLE SURVEY 6, <https://bluestarfam.org/wp-content/uploads/2020/03/BSF-2019-Survey-Comprehensive-Report-Digital-rev200305.pdf> (last visited Sept. 15, 2020) [hereinafter 2019 SURVEY].
24. *Id.* at 8.
25. *Id.*
26. COUNCIL OF ECON. ADVISORS, *supra* note 20, at 3.
27. *Id.*
28. *Id.*
29. Bogen, *supra* note 21.
30. 2019 SURVEY, *supra* note 23, at 7.
31. *Id.* at 9.
32. *Id.* at 29.
33. Elissa Strauss, "It's All Me," SLATE (July 18, 2016, 3:07 PM), <https://slate.com/human-interest/2016/07/the-lonely-and-high-pressure-life-of-a-military-wife.html>.
34. *See Sarah M. Buel, Fifty Obstacles to Leaving, a.k.a., Why Abuse Victims Stay*, COLO. LAW., Oct. 1999, at 19, 20.
35. *Id.* at 24.
36. *Domestic Violence in the Military*, DOMESTIC SHELTERS (Oct. 1, 2014), <https://www.domesticshelters.org/articles/escaping-violence/domestic-violence-in-the-military>.
37. Mary Slosson, *Violent Sex Crimes by U.S. Army Soldiers Rise: Report*, REUTERS (Jan. 19 2020, 7:25 PM), <https://www.reuters.com/article/us-army-health-report/violent-sex-crimes-by-u-s-army-soldiers-rise-report-idUSTRE80J01C20120120>.
38. *See* DV Policy Memo, *supra* note 8.
39. MCM, *supra* note 10, app. 12.
40. 10 U.S.C. § 1408(h); DoD FMR, *supra* note 5, sec. 590101.
41. DoD FMR, *supra* note 5, sec. 590301(A). As opposed to the so-called 20/20/20 spouse (Soldier has served 20 years; the Soldier and spouse have been married 20 years; and there have been 20 years of overlapping service and marriage), a spouse under this chapter need only be 20/10/10 (Soldier has served 20 years; the Soldier and spouse have been married 10 years; and there have been 10 years of overlapping service and marriage). *Id.*
42. *Id.*
43. *Id.* sec. 590301(A)(1)-(2).
44. *Id.* sec. 590301(B).
45. 10 U.S.C. § 1408(h).
46. DoD FMR, *supra* note 5, sec. 590302.
47. DEF. FIN. & ACCT. SERV., <https://www.dfas.mil/Garnishment/usfspace/legal/> (Mar. 19, 2019).
48. *See* DoD FMR, *supra* note 5, ch. 29, fig. 29-2 (July 2019) (listing example language for court orders). A court order containing faulty language is the top reason for rejected claims by DFAS. *How to Divide Military Retired Pay*, MILITARY (July 9, 2015), <https://www.military.com/paycheck-chronicles/2015/07/09/how-to-divide-military-retired-pay>.
49. DoD FMR, *supra* note 5, §§ 590501-590502.
50. 10 U.S.C. § 1408(h)(4); DoD FMR, *supra* note 5, sec. 590501(A).
51. DoD FMR, *supra* note 5, sec. 590501(B).
52. *Id.* sec. 590501(C).
53. 10 U.S.C. § 1408(e)(1); DoD FMR, *supra* note 5, sec. 590501(C). The court order can also specify that whenever retirement pay is increased—for example, as a cost of living adjustment—the amount payable by the court order would be accordingly increased. *See* 10 U.S.C. § 1408(h)(4). *See also* DoD FMR, *supra* note 5, sec. 590501(D).
54. DoD FMR, *supra* note 5, sec. 590502. Two notes about the eligibility involving dependent children: First, payments made to an eligible spouse due to being the parent of a dependent child who was the victim of abuse will not cease solely because the child is no longer considered a dependent child. "Payment requires only that the child was dependent at the time of the abuse, and not necessarily at the time of payment." *Id.* sec. 590501(G). Second, if a court order provides for payment of child support from the Soldier's disposable retired pay, then payment of the amount must be made to the dependent child and payments begin on the service of the court order. *Id.* sec. 590302. Neither the statute nor the FMR address termination of eligibility when eligibility is based on the parent being deceased as a result of the abuse. It is the author's belief that the same rules would apply—death of dependent child, death of Soldier, or terms of court order itself. However, the issue is not addressed and, therefore, is outside the scope of this article.
55. *Id.* sec. 590503.
56. *Id.* *See* 10 U.S.C. § 1448. In general, "[m]ilitary retirement pay stops upon the death of the retiree! The Survivor Benefit Plan (SBP) allows a retiree to ensure, after death, a continuous lifetime annuity for their dependents." *Survivor Benefit Plan Overview*, MIL. COMP., <https://militarypay.defense.gov/Benefits/Survivor-Benefit-Program/Overview/> (last visited Nov. 10, 2020). The SBP is most akin to a life insurance policy, as the Soldier pays premiums and it "protects survivors against a loss of financial security upon the death of a retired member." *Id.*
57. *See* Kate Horrell, *7 Things Every Spouse Should Know About Retirement Benefits*, MIL.SPOUSEFEST, <https://milspousefest.com/military-spouse-retirement-benefits/> (last visited Sept. 15, 2020). Space-Available, commonly referred to as "Space-A," travel is traveling on military, rather than civilian, flights for little to no cost. *See Plan Your Trip With Space-A Travel*, MIL. ONESOURCE (Apr. 16, 2020, 7:31 PM), <https://www.militaryonesource.mil/recreation-travel-shopping/travel/travel-planning/plan-your-trip-with-space-a-travel>. For more information on specific eligibility requirements, see U.S. DEP'T OF DEF., DIR. 4515.13, AIR TRANSPORTATION ELIGIBILITY (22 Jan. 2016) (C5, 23 Oct. 2020).
58. Sergeant Major of the Army Michael A. Grinston et al., *Action Plan to Prioritize People and Teams*, U.S. ARMY (13 Oct. 2020), [https://www.army.mil/article/239837/action\\_plan\\_to\\_prioritize\\_people\\_and\\_teams](https://www.army.mil/article/239837/action_plan_to_prioritize_people_and_teams).



Jenny Durkan, the mayor of Seattle, addresses Soldiers from the 62d Medical Brigade during her visit to the Seattle Convention Center in April 2020. (Photo credit: PFC Laurie Ellen Schubert)

## Practice Notes

# U.S. Army North OSJA Actions in the COVID-19 Response

*By Major Isaiah M. Garfias, Captain Charles R. Eiser, & Captain David J. Bryant*

### The Big Picture

The Department of Defense (DoD) response to the coronavirus disease of 2019 (COVID-19) is a domestic response on a scale never before seen. United States Army North (USARNORTH)—the Army Service Component Command responsible for domestic response operations, headquartered in Joint Base San Antonio-Fort Sam Houston, Texas—led the Army’s response effort to this catastrophic event. Strictly by the numbers, USARNORTH oversaw 8,208 DoD personnel operating across five Regional Task Forces and ten Regional Defense Coordinating Elements (DCE). In addition, USARNORTH employed fourteen Urban Augmentation

Medical Task Forces (UAMTF). In total, there were 4,400 medical personnel on the ground treating civilians.<sup>1</sup>

The path that leads to military service providers treating civilians is a long one that is legally and administratively nuanced; and, it is uniquely juxtaposed against the immediate need to save lives and prevent human suffering. The balancing of proper authorities, potential claims for liability, and the constitutional protections of U.S. citizens are but a few of the issues that have arisen from the DoD COVID-19 response. To fully understand the DoD response during COVID-19, one must first understand the role of USARNORTH and the unique mission set of the USARNORTH Office of the Staff Judge Advocate (OSJA).



## Responding to a DSCA Event

While USARNORTH's first priority is Homeland Defense, it is also responsible for coordinating Defense Support of Civil Authorities (DSCA) for disaster or emergency response efforts.<sup>2</sup> For context, it is helpful to understand how the Army responds to a "typical" domestic disaster. The situation routinely begins with a weather or news report. The usual suspect is a hurricane barreling toward the United States—think Florida or states on the Gulf of Mexico. As the situation starts to develop, the Tenth Amendment to the U.S. Constitution becomes relevant. The Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States."<sup>3</sup> In the case of a domestic disaster response, we are mostly concerned with a state's retained police powers. Because the states did not give up their police powers, it is the responsibility of the state to prepare for and respond to a natural disaster and protect the general welfare of its inhabitants. The Federal Government can, and usually does, provide support to a state in a disaster response; but, in order for the Federal Government to have the authority to take action, the state must take the lead and generally needs to request help from the Federal Government.

Following a hypothetical hurricane response example, the state of Florida gets a weather report stating that a Category 5 hurricane is heading its way. If the Governor believes the expected impacts will be severe enough, he will declare a state of emergency. The Governor marshals assets and determines whether the state needs federal assistance. If the Governor determines federal assistance is needed, the Governor will ask the President to make a Stafford Act<sup>4</sup> declaration; this makes more federal resources available to the President to assist the state with their response and recovery effort. The state then starts requesting specific types of support. This request comes in the form of a document called a Request for Assistance (RFA) and is sent to the Federal Emergency Management Agency (FEMA). The Federal Emergency Management Agency staffs the request and then makes a determination whether, and how, the request can be fulfilled.

In many cases, the DoD is determined to not be the most appropriate federal agency to provide the requested support. In those cases, the more appropriate agency provides the support.<sup>5</sup> If the capability is more appropriately provided by the DoD, as in the case of aviation assets or high water vehicles, the DoD is then asked to support. The RFA is forwarded to the Defense Coordinating Officer (DCO), a USARNORTH asset, for validation and then to either the Combatant Commander or the Secretary of Defense for approval. Once approved, the request becomes a Mission Assignment (MA). The MA is then pushed down through USNORTHCOM and USARNORTH to be prepared to receive a specific unit capable of performing the task as a Mission Assignment Task Order (MATO). United States Forces Command determines which unit is most capable of completing the MATO. Once decided, USARNORTH assumes operational control, commonly referred to as OPCON. If the sourced unit is an Air Force, Navy, or Marine Corps unit, USARNORTH assumes tactical control, commonly referred to as TACON. United States Army North coordinates the logistics, provides needed staffing, and publishes orders for the subordinate units.

In between USARNORTH and the unit is a Joint Task Force which is forward on the ground in the disaster area. This task force receives and processes all units through joint reception, staging, onward movement, and integration (JRSO&I); it also provides logistical support. The Joint Task Force judge advocate (JA) is usually the one who provides the unit a legal briefing during JRSO&I. Thereafter, the subordinate unit begins to provide the requested capability to the state and local government.

## Legal Limitations

Operating solely within the domestic environment brings unique legal challenges that are not commonly presented to most OSJAs, specifically within their national security law sections. Military operations taking place within the homeland are subjected to significant limitations, forcing JAs to strictly scrutinize all operations and ensure their commands conform to

domestic law and policy. These limitations ensure the constitutional protections afforded to citizens of the United States are not disrupted. The legal limitations include the Standing Rules for the Use of Force<sup>6</sup> (SRUF), the Posse Comitatus Act<sup>7</sup> (PCA), and intelligence oversight and sensitive information policy.<sup>8</sup> Each of these limitations is necessary to understand the unique legal issues USARNORTH OSJA faced during the COVID-19 response.

The SRUF applies when Title 10 Service members are operating within U.S. territory.<sup>9</sup> These rules were specifically codified based on domestic and constitutional laws and provide guidance on using force domestically, presumably against civilians.<sup>10</sup> Compare this to the more widely known Standing Rules of Engagement (SROE), designed to provide guidance on how to effectively engage an enemy in combat operations outside the United States. When providing training to Service members operating domestically, it is crucial for the instructing JA to distinguish between these two sets of rules.

Both sets of rules are codified in the Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3121.01B, *Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces*.<sup>11</sup> While "hostile act" and "hostile intent" guidance is present in both the SROE<sup>12</sup> and the SRUF,<sup>13</sup> the differences between the sets of rules are significant. For example, the SRUF does not include escalation of force criteria, colloquially known as the "5 Ss" (shout, show, shove, shoot to warn, shoot to kill).<sup>14</sup> Instead, when acting under the SRUF, if a Service member faces a "hostile act" or a "hostile intent," they must attempt de-escalation measures and exercise their inherent right of self-defense; however, they may not apply the same escalation of force principles they may have learned in their SROE instruction.<sup>15</sup>

The PCA has a unique and nuanced history within the United States and is widely written about and discussed.<sup>16</sup> Put simply, the PCA prohibits Title 10 Service members from conducting law enforcement functions within the homeland absent an exception.<sup>17</sup> Exceptions to the PCA are rarely invoked and must come from either the Constitution or Congress.<sup>18</sup>

When operating within the homeland, Title 10 Service members must receive a PCA briefing explaining their limitations and how they may respond to requests for assistance.<sup>19</sup>

It is vital for all DoD personnel who operate domestically to fully understand and integrate intelligence oversight and sensitive information policies into their knowledge base. Protecting Americans' right to privacy is balanced against the DoD's need to provide security, often by using intelligence assets to gain information about an area where Service members will be operating. The servicing JA must understand their commander's left and right limits to ensure they can obtain as much key information as possible, while also upholding Americans' civil and privacy rights. Walking this tightrope can prove challenging and sometimes places the bulk of the burden on the JA, especially in the domestic context.

Fiscal considerations also give rise to unique issues. The Economy Act<sup>20</sup> and the Stafford Act<sup>21</sup> are the statutes with fiscal considerations that are most commonly invoked during domestic operations. Both are applied under specific guidelines and are highly regulated to ensure compliance with those guidelines. The Economy Act allows one federal agency to order goods and services from other federal agencies, but every agency requesting that service or goods is required to pay for it.<sup>22</sup> The Stafford Act makes it mandatory, with limited exceptions, for the servicing federal agency to be reimbursed for "incremental" costs they expended during an operational response mission, such as a hurricane or pandemic.<sup>23</sup> Attorneys must ensure the correct "pot of money" is being used at all times. Maintaining fiscal responsibility can be extremely challenging in the very dynamic domestic operations environment because operations are executed on short timelines and assets and capabilities are unknown.

Providing legal support to the USARNORTH Headquarters requires a firm understanding of the authorities that allow the DoD to operate in a domestic setting. As a JA, operating domestically is a unique mission set and requires substantial expertise. This expertise balances the DoD mission with the constraints present in the SRUF,

the PCA, the constitutional protections inherent to all U.S. persons, Intelligence Oversight restrictions, and unique domestic threats. The USARNORTH Headquarters does an excellent job overseeing the use of DoD forces domestically, which is enabled by its persistent attorneys integrating with the staff and taking every opportunity to educate their teammates. Currently, the USARNORTH OSJA has a handful of elite civilian subject matter experts that have, time and time again, proven invaluable at ensuring DoD personnel operating domestically do not violate U.S. persons' constitutional protections. These subject matter experts teach at USARNORTH and around the country on topics such as Intelligence Oversight, the PCA, the Insurrection Act,<sup>24</sup> the Stafford Act, the Economy Act, Immediate Response Authority,<sup>25</sup> and the SRUF, just to name a few.

#### **COVID-19**

The "typical" domestic disaster that requires a DoD response is usually concentrated in a particular area, like Hurricane Katrina in New Orleans, Hurricane Maria in Puerto Rico, or even the security of the Southwest Border. The difference between the above examples and COVID-19 are twofold: 1) the expansive nature of the pandemic requires multiple command elements and 2) it is a threat that requires a unique response. Historically, USARNORTH had one task force assigned to coordinate with the state and local government; COVID-19 required five. A "typical" disaster response prompts one or a handful of states to declare a state of emergency. During COVID-19 *all of* the states declared a state of emergency. At the risk of belaboring the obvious to a reader that has undoubtedly been affected by the pandemic, it needs to be stated that the magnitude of the COVID-19 threat was unprecedented, and the DoD response was a testament to the adaptability, endurance, and persistence of the U.S. military.

In the case of the USARNORTH response to COVID-19, DoD assistance mostly came in the form of medical and engineering capabilities. For example, fourteen of the Army's fifteen UAMTFs augmented the medical staffs in civilian hospitals throughout the country. The U.S.

Navy's (USN) USS *Comfort* and USS *Mercy* hospital ships treated overflow patients from civilian hospitals. The U.S. Army Corps of Engineers (USACE), developed and constructed hospital overflow capacity at multiple sites. The COVID-19 response presented significant logistical and coordination challenges based on the scope of required assistance and the duty to protect those individuals providing the assistance from being infected; these challenges included the adherence to social distancing policies and personal protective equipment protocols. Any DSCA response requires coordination with FEMA and local, municipal, township, and state governments. This is necessary to implement the correct capabilities under the correct authorities. In a normal DSCA response, leadership can work through logistical and capability requirements with all the interested parties in the same room, setting expectations and hashing out roles and responsibilities. The COVID-19 outbreak required a DoD response across the entire United States, with logistical support predominantly provided by a workforce adapting to a remote working environment.

The DoD response to COVID-19 was exceptional and something this Nation should view with a sense of pride. It was also beset by challenges never before faced and required DoD, USNORTHCOM, and USARNORTH to adapt quickly and effectively to ensure they were never "late to need."

Legal coordination also presented unique challenges. During COVID-19, the USARNORTH OSJA coordinated legal support from all five Joint Task Forces and the subordinate DCEs. Approximately ninety-one<sup>26</sup> Judge Advocate General's Corps (JAG Corps) personnel supported the COVID-19 response. This legal support was spread across the nation and required solving myriad unique legal problem sets based on 1) the nature of the task force or DCE and 2) the area in which they were operating. For example, subordinate legal advisors presented the headquarters with legal issues ranging from liability for DoD medical personnel, Privacy Act violations, and potential intelligence oversight issues, to ethics surrounding the acceptance of gifts and Reserve mobilization statute issues.

Providing support to address these issues posed many challenges that arise only in the DSCA context. It was accomplished by maintaining consistent operational communication, establishing an USARNORTH National Security Law Division (NSLD) legal synch with subordinate legal advisors, publishing a legal annex with guidance on expected legal issues, maintaining a shared inbox to field legal inquiries, and cross-leveling legal guidance and best practices on a daily basis. Some of the unique legal issues our office fielded are discussed below.

## Legal Issues Addressed

### *Medical Practice*

The rapid influx of DoD health care providers (HCPs) to temporary and makeshift medical facilities, and eventually to private and public healthcare facilities, presented a host of credentialing issues unique to these disparate local jurisdictions. Licenses, credentials, and privileges are terms of art within the medical field, each requiring a baseline understanding by the JA. A medical license is the occupational license—bestowed either by an approved professional association or agency, following testing by a medical board—that permits the HCP to legally practice medicine.<sup>27</sup> Credentials are documents maintained by the medical facility where the HCP works. They constitute evidence of an HCP's qualifications.<sup>28</sup> Based on the HCP's credentials, the medical facility will give permission to the HCP to provide specific medical and other health care services to patients in the facility. This permission is called "privilege."<sup>29</sup> Upon domestic deployment into COVID-19 hotspots, state licensing portability acts and federal disaster privilege statutes abolished requirements that DoD or civilian HCPs be credentialed or privileged in the local jurisdiction. DoD HCPs report to and are under the supervision of the Medical Treatment Facility Commander.<sup>30</sup> The Commander validates the specific licensing or certification level necessary for each HCP.<sup>31</sup>

Early in the MA process, and during the deployment of HCPs outside of a DoD medical treatment facility, FEMA Regions recognized the failures of the draft language within the Statements of Work<sup>32</sup> to address credentialing, privileges, liability, patient

billing, etc. In an attempt to proactively and uniformly address these shortcomings, a USARNORTH civilian legal expert drafted a Memorandum of Agreement (MOA) template.<sup>33</sup> Following discussions with a FEMA Regional Counsel, USNORTHCOM adopted the MOA as standard operating procedure and not only directed subordinate units to use the MOA template, but issued Office of the Secretary of Defense (OSD)-required language for future MAs. This language addressed the appropriate authority for DoD HCPs to work in local hospitals and eliminated the need for discussion of liability coverage.

### *Gifts/Meals*

The well-settled prohibition against accepting gifts from a prohibited source experienced a resurgence following several requests for legal reviews concerning state medical facilities attempting to provide meals for DoD personnel. This was experienced in the state of New York, where the MA required the state to reimburse twenty-five percent to FEMA for costs,<sup>34</sup> the argument was made that the state can provide food, but the unit must ensure personnel will not receive per diem for those meals. United States Army North opined that the Soldiers concerned are prohibited from accepting the gift of free meals from the state.<sup>35</sup> Each meal accepted constitutes a gift or gratuity, which does not fall within any exception to accept.<sup>36</sup> The fact that Soldiers accepting such meals would reduce their entitlements and accept a proportionate per diem rate in exchange, per provisions of the Joint Travel Regulation,<sup>37</sup> does not change the characterization of the meal as a gift. The provision of twenty-five percent reimbursement or cost-matching arrangement, essentially a quid-pro-quo between New York and FEMA, does not change the end result for the Soldiers concerned.

Similar to the medical practice context, in late April 2020, OSD issued a memorandum to promote consistency and uniformity throughout the DoD response.<sup>38</sup> The memorandum addressed offers of donations from private industry to the DoD in support of the COVID-19 response. The memo designated the Under Secretary of Defense for Acquisition and Sustainment as

the focal point for the receipt and staffing of all offers of donation.<sup>39</sup> While the memorandum openly stated its purpose was to handle these donations in a timely, consistent, and coordinated fashion across the department during response activities, it also served to reinforce the prohibition on accepting gifts of meals during a DSCA event.

### *Mobilization of Forces*

In many overseas missions, National Guard and Reserve units deploy as part of contingency operations, but they do so in a Title 10 status and are usually mobilized under one mobilization authority.<sup>40</sup> While operating in a domestic environment, National Guard units can operate under a Title 10, Title 32, or State Active Duty status; and, along with Reserve units, they can mobilize under a number of mobilization authorities.<sup>41</sup> Within the JA community for the COVID-19 response, National Guard and Reserve attorneys—and paralegals advising at both USARNORTH and as FEMA Region Legal Advisors—cobbed together Inactive Duty Training, Active Duty for Training, and Annual Training periods to bridge the gap prior to the issuance of mobilization orders under 10 U.S.C. § 12302.

There were many unique legal issues that arose while operating as the higher command of Reserve units under different mobilization authorities, and working alongside National Guard units in a Title 32 status. For example, National Guard forces in a Title 32 status are subject to the laws of their state, but they are not subject to the restrictions of the PCA.<sup>42</sup> The Presidential Memorandum<sup>43</sup> that authorized 100% reimbursement of National Guard forces limited this assistance to COVID-19 response activities authorized by sections 403 and 503 of the Stafford Act.<sup>44</sup> Law enforcement activities are not authorized by sections 403 and 503. Therefore, to address this and allow the greatest possible latitude for National Guard forces, DoD drafted language within the corresponding MA which stated, "safety and security missions, not to include law enforcement activities, are authorized as part of this Mission Assignment."<sup>45</sup> However, as security is widely accepted as a law enforcement activity,<sup>46</sup> this led to considerable confusion regarding the



potential for federal reimbursement for the National Guard securing COVID-19 testing and treatment facilities or filling in for sick prison guards.<sup>47</sup>

In addition to the movement restrictions, redeploying Service members were subject to isolation and symptom monitoring. As units approached the termination of their mobilization orders, the question arose whether these isolation periods could be added to each MA and reimbursed by FEMA as a cost inherent to the mobilization.<sup>48</sup> Lastly, as the initial operational tempo of COVID-19 waned, some FEMA Regions inquired whether Emergency Preparedness Liaison Officers mobilized for longer durations under 10 U.S.C. § 12302 could be transitioned to other DSCA events—such as hurricane response.<sup>49</sup>

### ***Intelligence Oversight and Sensitive Information***

The use of intelligence assets and the collection of information in the course of a DSCA event and the COVID-19 response presented many unique intelligence oversight and sensitive information issues. As entire units mobilized and deployed to COVID-19 hotspots, commanders sought to employ intelligence personnel to provide situational awareness of domestic criminal activity as well as conduct contact tracing<sup>50</sup> and predictive analysis. Department of Defense Law Enforcement (LE) officers may collect, maintain, and disseminate criminal intelligence (CRIMINT) when it affects or impacts the DoD against specific individuals or organizations. These individuals or organizations are reasonably suspected of being potentially involved in a definable criminal activity or enterprise affecting DoD interests.<sup>51</sup> However, this falls outside the lawfully assigned mission of a DoD Intelligence Component (DIC) of either defense-related foreign intelligence or defense-related counter-intelligence.<sup>52</sup> Additionally, even DoD LE is prohibited from gathering CRIMINT and personally identifiable information regarding persons without a connection to DoD or a reasonable expectation of threat or direction of interest toward DoD personnel or facilities.<sup>53</sup> To further exacerbate the issue, the 2019 DSCA Execute Order contained language that “supported

Combatant Commanders are authorized to utilize DIC capabilities and personnel for other than intelligence activities to provide damage assessment and situational awareness reporting for an event that is expected to cause significant impact and result in a declared emergency or major disaster.”<sup>54</sup> When read broadly, and without the context of the preceding paragraph, this language gave rise to requests to use intelligence personnel to review publicly available information to analyze access to medical care, predictive analysis regarding the spread of the virus, population density, infrastructure assessments, and crime rates. Any of these activities could have quickly incurred command liability for questionable intelligence activities.<sup>55</sup>

The use of intelligence personnel aside, the assignment of DoD HCPs within public and private medical facilities created several legal issues concerning the reporting of treatment metrics—to include deaths, infections, and bed counts—where DoD elements would potentially acquire information concerning non-DoD affiliated personnel (NDAP).<sup>56</sup> As the initial wave of the pandemic subsided and alleviated the burden upon medical facilities, public health officials refocused efforts to determine the spread of the virus, and consider potentially using existing mobilized forces to trace the contacts of infected individuals, through contact tracing. While DoD Service members would be prohibited from collecting information from NDAPs,<sup>57</sup> the National Guard Bureau had an extremely limited opportunity to engage in contact tracing if National Guard forces were operating in a non-federalized status and detailed to the state public health department.

### **Conclusion**

One of the greatest challenges for any headquarters is to hit the ground running when crisis arises. Guidance needs to be immediate, consistent, and adaptable to the many legal issues subordinates or staff sections might encounter. Even more burdensome to the servicing JA is the unique nature of domestic operations. As an Army, we are not accustomed to domestic operations. The command and its legal advisor find themselves with a complex, nuanced set of legal authorities and an operation that the

unit has never conducted planning for or training to execute. Ensuring these Soldiers completely grasp the mission and understand their left and right limits requires an engaged and dynamic commander and legal advisor. This was provided in volume under the command of USARNORTH and its OSJA team. **TAL**

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### **Notes**

1. See Jonathan Rath Hoffman, Assistant to the Sec’y of Def. for Pub. Affs., *Defense Official Provides Update on COVID-19 Response*, U.S. N. COMMAND (Apr. 24, 2020), <https://www.northcom.mil/Newsroom/News-Input/Article/2164295/defense-official-provides-update-on-covid-19-response/> (the relevant information can be found at 1:11). See also Jonathan Rath Hoffman, *Assistant to the Secretary of Defense Hoffman Updates Reporters on DoD Operations*, U.S. DEP’T OF DEF. (Apr. 24, 2020), <https://www.defense.gov/Newsroom/Transcripts/Transcript/Article/2165054/assistant-to-the-secretary-of-defense-hoffman-updates-reporters-on-dod-operation/> (transcript of the original speech).
2. *Id.*
3. U.S. CONST. amend. X.
4. Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 100-707, 102 Stat. 4689 (1988) (amending the Disaster Relief Act of 1974, Pub. L. No. 93-288, 88 Stat. 143; 42 U.S.C. §§ 5121-5208).
5. U.S. DEP’T OF DEF., DIR. 3025.18, DEFENSE SUPPORT OF CIVIL AUTHORITIES (DSCA) para. 4e. (29 Dec. 2010) (C2, 19 Mar. 2018) [hereinafter DoDD 3025.18]. This directive provides the “CARLL” factors for evaluating all requests from civil authorities for Department of Defense (DoD) support. The “CARLL” factors are Cost, Appropriateness, Readiness, Risk, Legality, and Lethality. *Id.*
6. See CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3121.01B, THE STANDING RULES OF ENGAGEMENT AND STANDING RULES FOR THE USE OF FORCE encl. L (2005) [hereinafter CJCSI 3121.01B].
7. 18 U.S.C. § 1385.
8. See U.S. DEP’T OF DEF., 5240.1-R, PROCEDURES GOVERNING THE ACTIVITIES OF DoD INTELLIGENCE COMPONENTS THAT AFFECT U.S. PERSONS (Dec. 1982) (C2, 26 Apr. 2017); U.S. DEP’T OF DEF., DIR. 5200.27, ACQUISITION OF INFORMATION CONCERNING PERSONS AND ORGANIZATIONS NOT AFFILIATED WITH THE DEPARTMENT OF DEFENSE (7 Jan. 1980) [hereinafter DoDD 5200.27].

9. CJCSI 3121.01B, *supra* note 6, para. 1.a.
10. Provisions of the Bill of Rights that limit the Federal use of force domestically include the Fourth Amendment right against unreasonable search and seizure and the Fifth Amendment Due Process Clause. *See* U.S. CONST. amend. IV; U.S. CONST. amend. V
11. CJCSI 3121.01B, *supra* note 6.
12. *Id.* encl. A.
13. *Id.* encl. L, encl. N.
14. *Id.*
15. When training units on the SRUF, members of USARNORTH will include de-escalation as a step to be used prior to executing some form of self-defense. The training includes specific examples of the types of de-escalation that can be used and apply the steps in vignette.
16. 18 U.S.C. § 1385.
17. *Id.* The PCA provides:  
Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.
- Id.*
18. *Id.*
19. Joint Chiefs of Staff, CJCS Defense Support of Civil Authorities Execute Order (30 July 2019) [hereinafter DSCA EXORD].
20. 31 U.S.C. § 1535.
21. 42 U.S.C. § 5121.
22. U.S. DEP'T OF DEF., 7000.14-R, DoD FINANCIAL MANAGEMENT REGULATION vol. 11A, ch. 3, para. 030801 (Sept. 2019) [hereinafter DoD FMR].
23. *Id.* ch. 19, para. 190201.
24. 10 U.S.C. §§ 331-335. The Insurrection Act is an exception to the PCA. It gives the President authority to commit militia and Federal armed forces to restore law and order at a state's request; respond to a rebellion; or to suppress an insurrection, domestic violence, unlawful combination, or conspiracy; if it hinders execution of state or federal law, and constitutional rights are being deprived, and the state is unable, fails, or refuses to protect those rights, or opposes or obstructs execution of Federal law. *See* 10 U.S.C. §§ 251-253.
25. DoDD 3025.18, *supra* note 5, para. 4i. The Immediate Response Authority is best described as follows:  
In response to a request for assistance from a civil authority, under imminently serious conditions and if time does not permit approval from higher authority, DoD officials may provide an immediate response by temporarily employing the resources under their control, subject to any supplemental direction provided by higher headquarters, to save lives, prevent human suffering, or mitigate great property damage within the United States. Immediate response authority does not permit actions that would subject civilians to the use of military power that is regulatory, prescriptive, proscriptive, or compulsory.
- Id.*
26. U.S. DEP'T OF ARMY, COVID-19 RESPONSE LEGAL PERSONNEL ROSTER (16 May 2020) (on file with author).
27. U.S. DEP'T OF DEF., 6025.13, DEFENSE HEALTH AGENCY PROCEDURE MANUAL vol. 4, encl. 2, para. 5.a (29 Aug. 2019).
28. *Id.* para. 2.j.
29. *Id.* para. 4.a.
30. U.S. DEP'T OF DEF., INSTR. 6200.03, PUBLIC HEALTH EMERGENCY MANAGEMENT (PHEM) WITHIN THE DoD (28 Mar. 2019).
31. 10 U.S.C. § 1094(d).
32. Within a request for assistance, a statement or work outlines how the assistance mission will be completed. It needs to be drafted with specificity.
33. A Memorandum of Agreement "will be used to document the specific terms and responsibilities that two or more parties agree to in writing. [They] can be used to document a single reimbursable purchase, non-recurring reimbursable support, and non-reimbursable support." U.S. DEP'T OF DEF., INSTR. 4000.19, SUPPORT AGREEMENTS encl. 3, para. 2.a(2) (25 Apr. 2013).
34. U.S. DEP'T OF HOMELAND SEC., FEDERAL EMERGENCY MANAGEMENT AGENCY, MISSION ASSIGNMENT 4480DR-NY-DOD-10 (4 Apr. 2020).
35. This information is based on the author's recent professional experience and daily staff updates as the Chief, National Security Law Division, for U.S. Army North from 8 June 2018 to 3 July 2020 [hereinafter Professional Experiences].
36. 5 C.F.R. § 2635.204 (2020); U.S. DEP'T OF DEF., 5500.07-R, JOINT ETHICS REGULATION (JER) ch. 2 (30 Aug. 1993) (C7, 17 Nov. 2011).
37. DoD FMR, *supra* note 22, vol. 7A, ch. 25.
38. Memorandum from Sec'y of Def. to Chief Mgmt. Off. Dep't of Def., subject: Offers of Donation from Private Industry to the DoD in support of the Coronavirus Disease 2019 Response (24 Apr. 2020), *superseded by* Memorandum from Sec'y of Def. to Chief Mgmt. Off. Dep't of Def., subject: Offers of Donation from Private Industry to the DoD in support of the Coronavirus Disease 2019 Response (5 May 2020).
39. *Id.*
40. *See generally* 10 U.S.C. §§ 12301-12304.
41. In addition to 10 U.S.C. §§ 12301-12304, the National Guard may be mobilized in a Title 32 status via 32 U.S.C. § 502(f), as well as additional authorities to call the National Guard and Reserve for training under 10 U.S.C. § 10147, § 12301(b), and 32 U.S.C. § 502(a).
42. NAT'L GUARD BUREAU, NAT'L GUARD REG. 500-5/AIR NAT'L GUARD INSTR. 10-208, NATIONAL GUARD DOMESTIC LAW ENFORCEMENT SUPPORT AND MISSION ASSURANCE OPERATIONS para. 4-3.b (18 Aug. 2010).
43. *See, e.g.*, Memorandum on Providing Federal Support for Governors' Use of the National Guard to Respond to COVID-19, Daily Comp. Pres. Doc., 2020 DCPD No. 00211 (Mar. 30, 2020).
44. *See* 42 U.S.C. § 5170b and 42 U.S.C. § 5193 respectively.
45. *See, e.g.*, U.S. DEP'T OF HOMELAND SEC., FEDERAL EMERGENCY MANAGEMENT AGENCY MISSION ASSIGNMENT 4504DR-KS-DOD-01 (14 Apr. 2020) [hereinafter FEMA MISSION ASSIGNMENT 4504].
46. U.S. DEP'T OF DEF., INSTR. 3025.21, DEFENSE SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES subsec. 1c(1)(e) (27 Feb. 2013).
47. After coordination with the Office of the General Counsel for the Office of the Secretary of Defense, USARNORTH opined that a force protection mission is not law enforcement. Prohibited law enforcement activities included, "search, seizure, arrest, and other actions that subject civilians to the use of military power that is regulatory, prescriptive, proscriptive, or compulsory." Therefore, the National Guard may perform missions associated with "safety and security" so long as the personnel did not engage in those acts considered compulsory by nature, and are doing so in a State Active Duty status. National Guard personnel must contact civilian law enforcement agencies and allow them to conduct search, seizure, arrest, etc., or risk not receiving reimbursement from the Federal Emergency Management Agency (FEMA) for those law enforcement activities. FEMA MISSION ASSIGNMENT 4504, *supra* note 45. *See also* Email from Major Isaiah M. Garfias, U.S. Army North, to Major Daniel R. Soeffing, U.S. Army Reserve Legal Command et al. (6 Apr. 2020, 6:45 PM) (on file with author).
48. United States Army North coordinated with the DoD representative at FEMA National to obtain guidance issued to all the FEMA Regions to add twenty days to every Mission Assignment. This alleviated the Defense Coordinating Officer/Defense Coordinating Elements from having to discuss this problem with each State and get them to agree to the twenty day extension. Email from Major Isaiah M. Garfias, U.S. Army North, to Major Shawna M. Young, U.S. Army Reserve Legal Command et al. (27 Apr. 2020, 3:49 PM) (on file with author). *See also* Professional Experiences, *supra* note 35.
49. United States Army North responded in the negative. Emergency Preparedness Liaison Officers called to active duty pursuant to 10 U.S.C. § 12302 respond to the specific national emergency the president has declared—and only that national emergency. Service members mobilized under this statute cannot be re-purposed outside the scope of the national emergency declaration. Email from Major Isaiah M. Garfias, U.S. Army North, to MAJ Shawna M. Young, U.S. Army Reserve Legal Command et al. (May 18, 2020, 3:47 PM) (on file with author). *See also* Professional Experiences, *supra* note 35.
50. Contact tracing is the process of identifying persons who may have come into contact with an infected person and the subsequent collection of information about these contacts.
51. U.S. DEP'T OF DEF., INSTR. 5525.18, LAW ENFORCEMENT CRIMINAL INTELLIGENCE (CRIMINT) IN DoD (18 Oct. 2013) (C3, 1 Oct. 2020).
52. U.S. DEP'T OF DEF., MANUAL 5240.01, PROCEDURES GOVERNING THE CONDUCT OF DoD INTELLIGENCE ACTIVITIES para. 3.2 (8 Aug. 2016).
53. DoDD 5200.27, *supra* note 8.
54. DSCA EXORD, *supra* note 19.
55. U.S. DEP'T OF DEF., DIR. 5148.13, INTELLIGENCE OVERSIGHT (26 Apr. 2017).
56. DoDD 5200.27, *supra* note 8.
57. *Id.* U.S. DEP'T OF ARMY, REG. 380-13, ACQUISITION AND STORAGE OF INFORMATION CONCERNING NON-AFFILIATED PERSONS AND ORGANIZATIONS (30 Sept. 1974).



Brigadier General Yosef Shalangwe, TJAG, Nigerian Armed Forces, addresses the fifth Africa Military Law Forum with Ms. Sandra Franzblau facilitating, at the International Institute for Humanitarian Law, Sanremo, Italy, 12 September 2019. (Photo courtesy of Sandra Franzblau)



## No. 1

# Adherence to the Rule of Law in African Militaries

## USAFRICOM's Roadmap

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By Sandra Franzblau & Mark "Max" Maxwell

*Nations must create a military its people run to, not run from.<sup>1</sup>*

There is a relationship between a military that abides by the rule of law and governance consistent with democratic values. New democracies most plainly illustrate this relationship. Africa best illustrates this dynamic and offers an incredible opportunity for growth toward stronger governance consistent with democratic values. For this very reason, the U.S. Department of Defense (DoD) recognized early in developing its newest geographic combatant command,<sup>2</sup> the U.S. Africa Command (USAFRICOM), that a rule of law division was essential in working with African militaries. United States Africa Command supports good governance and democratic values by promoting military adherence to the rule of law through its Office of Legal Counsel. The Office of Legal Counsel structures security cooperation activities with African militaries using a roadmap with three interrelated lines of effort: soldier accountability; command adherence to the law; and military professionalism.

### The Challenge

In 1985, very few of Africa's fifty-four countries could be categorized as democratic in orientation.<sup>3</sup> By 2015, a majority of African nations<sup>4</sup> had introduced political reforms which were

either democratic or in the process of becoming so.<sup>5</sup> While representational government has increased, and Africa's potential is boundless, peace and security remain elusive and even absent in many sectors of the continent. There are those who use its vast ungoverned space to train extremists, or who exploit underfunded or non-existent security forces to engage in a variety of illicit activities. All have the same result of destabilizing regions and threatening other countries at a significant cost to their citizenry. The result is that countries in Africa often must turn to those outside Africa to confront problems from within.

In the hope of finding the right prescription for achieving peace and security, African countries working alone—and with a variety of international organizations and other countries—have tried multiple strategies with varying degrees of success.<sup>6</sup> Identifying the correct methodology for security assistance<sup>7</sup> to work with African partners to improve the professionalism and capability of their armed forces is a strategic imperative for the United States and its allies.

There can be no lasting peace if citizens are frightened of their own military. This leads to a well-documented and never-ending cycle of insecurity and conflict. The United Nations has estimated

that up to fifty percent of post-conflict societies slip back into violence.<sup>8</sup> That statistic speaks to the relationship between the rule of law and the military, and the importance of this roadmap in securing a lasting peace.

A government's legitimacy to govern is tied directly to its ability to respect the rule of law.<sup>9</sup> Logically, a military's respect for the law is integral to a government's legitimacy. It has been our experience at USAFRICOM that countries struggling to strengthen their governance often have militaries as their most developed agency.<sup>10</sup> Thus, through respect for the law, militaries are essential in modeling good governance.<sup>11</sup> Simply stated, peace and security are not attainable for those countries with unaccountable soldiers, rogue commanders, and unprofessional militaries.

### **The Roadmap: Accountability, Command Adherence to the Law, and Military Professionalism**

Good governance is a tall order for any country. The competing interests of governance make this extraordinarily complex and challenging. Although complex, a country can measure its capability to govern; its capacity to do so; and its political will to govern well.<sup>12</sup> Capability and capacity will vary among countries, but the most important factor in establishing good governance is a country's political will to do so.<sup>13</sup> Without it, any reform is notional, at best.

If political will exists, improvements are possible through the careful identification as to what capability or capacity gaps exist—and what methods could be used to address those gaps. There are no exclusive pathways to achieving peace and security. Numerous factors play into a country's ability to establish peace and security—such as geography, natural resources, population, and its unique history. One factor directly in the hands of a country's leaders, however, is governance. One pathway to good governance is to improve militaries by applying a roadmap which lays a solid foundation to focus efforts in three key areas: soldier<sup>14</sup> accountability; command adherence to the law; and overall professionalism in the military ranks.

This is an area of interest for USAFRICOM which was, in part, established to assure that relations with African

countries would endure.<sup>15</sup> The strategic vision was to work as partners with African countries to improve their security forces capacity with the goal that, eventually, Africa's strengthened democratic institutions could solve their own challenges.<sup>16</sup> A few years after USAFRICOM was operational, President Barack Obama emphasized this point in his address at the University of Cape Town: "Now America has been involved in Africa for decades. But we are moving beyond the simple provision of assistance, foreign aid, to a new model of partnership between America and Africa—a partnership of equals that focuses on your capacity to solve problems, and your capacity to grow."<sup>17</sup> This philosophy is foundational to USAFRICOM's approach.

The focus on soldier accountability, command adherence to the law, and overall military professionalism provides an analytic framework for working with willing partner militaries to improve gaps in capacity and capability. Resourcing decisions to improve each of those lines of effort can be made more competently by carefully assessing the capability, the capacity, and the political will of individual governments to address shortcomings. This ensures investments and resources are used strategically, precisely, and effectively to improve identified outcomes.

The conceptualization of a roadmap for adhering to the rule of law originated at the Office of Legal Counsel, Legal Engagements Division. This office is dedicated to working with African military partners to improve military operational adherence to the rule of law.<sup>18</sup> While all U.S. Combatant Commands have legal offices, no other Command has a division that is solely focused on partner military adherence to the rule of law. The reasons for having a Legal Engagements Division in a Combatant Command focused on African security should be somewhat self-evident. Given the trajectory of democratic change in Africa, and its importance to global security, partner militaries that adhere to the rule of law<sup>19</sup>—and are professional and accountable—are the militaries USAFRICOM seeks to partner with.<sup>20</sup>

What is not self-evident is how we get there. Focusing on soldier accountability, command adherence to the law, and overall

military professionalism is an effective means to promote overall adherence to rule of law. Historical efforts to do so can be reviewed within this framework, resulting in best practices and a clearer understanding of practical next-level engagements to facilitate improvements.

Before taking specific action, USAFRICOM must first determine which partners have the political will to effect positive change. United States Africa Command first looks to those partner countries who request security force assistance. Fundamental to that request is that the call for positive change originate with the African partner. To gauge which countries desire this, USAFRICOM relies upon the Department of State (DoS), which sets U.S. Government foreign policy to include security assistance priorities. The DoS identifies country priorities through consultation with other U.S. governmental agencies. Those experts understand the particular challenges individual countries face in establishing good governance.<sup>21</sup>

United States Africa Command also works with the DoS, to include individual U.S. Embassies, and the African partner to develop individual country cooperation plans. These yearly, updated, non-binding agreements describe the type of security assistance, force, and cooperation activities each individual country desires and that the U.S. Government would support in achieving strategic military objectives within the next one to three years.<sup>22</sup>

These comprehensive processes ensure our activities can achieve both short- and long-term strategic goals. Military expertise, the theater campaign plan, and the input of other U.S. Government agencies result in a robust interagency process that is nested in national security and defense policy.<sup>23</sup> These processes yield many benefits, most notably collaboration and de-confliction. It is in this environment that USAFRICOM seeks to enable those countries that desire improvement to their military institutions.

### **The Roadmap: Accountability**

The roadmap to facilitate positive change begins with soldier accountability because it is a foundational principle that the military must serve its people.<sup>24</sup> This requires

two things: 1) commanders must enforce discipline and 2) the systems of discipline must be fair and resourced. When a soldier engages in misconduct or commits a crime, the credibility of the military is at stake. If there are enough failures in accountability, the very legitimacy of the government can come into question. Thus, the stakes are high. A credible investigative procedure that is consistently employed after allegations of criminality or misconduct, and a resulting fair and transparent prosecution, establishes the overall credibility of the force. For governments that understand what is at stake and respond accordingly, the legitimacy of the military is preserved and even enhanced.

Over the last decade, the Legal Engagements Division has learned about its African partners and their civilian and military legal traditions through participation in activities and meetings. Before making any recommendations when addressing accountability, the Office of Legal Counsel Legal Engagements Division fully understands that Africa is incredibly diverse. Africa is comprised of fifty-four countries, and they each have their own unique legal system. Some countries have legal systems modeled on the Napoleonic Code, while other countries' legal systems developed along a common law framework. The differences in Africa's legal systems argue against one-size-fits-all approaches to legal engagements and against efforts to impose American military frameworks onto African landscapes.

In the United States, "military justice" is a term that encompasses a range of disciplinary options: from the most formal of trials for serious crimes—a court-martial—to informal, command-controlled tribunals that balance efficiency and disciplinary prerogatives like non-judicial punishment.<sup>25</sup> In America, military commanders retain jurisdiction over U.S. military personnel. In contrast, the term "military justice" in many African countries is more limited to criminal cases investigated and adjudicated by a magistrate.<sup>26</sup> Other types of misconduct are handled non-judicially, outside of the magistrate system.<sup>27</sup> Those militaries would not consider the term military justice to include military misconduct.<sup>28</sup> Further, many countries'

military justice cases are adjudicated in civilian courts within their Ministry of Justice. These arrangements may be for convenience (e.g., there are not enough military offenders per year to justify staffing and resourcing military prosecutors and courts) or for ideological reasons (i.e., military subordination to the citizenry is reinforced and the development of an elite military culture is discouraged by sending all criminal cases involving soldiers to civilian courts).<sup>29</sup>

Drawing from this base of expertise, Legal Engagements has identified three factors that, regardless of the legal system, are necessary for soldier accountability to its citizens: 1) the commitment of adequate resources to those justice mechanisms (capability); 2) laws that clearly articulate offenses and the mechanisms for their investigation and adjudication (capacity); and 3) the political will at all levels to allow justice to run its course.

First, countries need to have legislation and regulations that ensure soldier—and hence military—accountability. Drafting legislation that creates a comprehensive military justice system, and which amends loopholes in the law that are antithetical to accountability, can be difficult and time-consuming. Reaching the right balance between military control over minor disciplinary infractions, and military and civilian responses to serious criminal misconduct by military members, is certainly difficult.

Second, there must be resources to ensure that soldiers who engage in misconduct or commit crimes are held accountable. There must be properly trained personnel in the systems of accountability who have the correct resources and equipment to do their jobs, whether magistrates, investigators, or court personnel. When the prosecution and adjudication responsibilities are carried out by civilians, military legal advisors play a critical role in the process. Through close relationships with their commanders, military legal advisors become aware of soldier misconduct, make recommendations as to the appropriate level and forum for handling the misconduct, and when a formal criminal process is recommended, liaise with the appropriate military or civilian prosecutors' offices. All militaries benefit by having astute and well-trained

military legal advisors, given their multiple roles in soldier accountability.

Third, there must be political will—both inside and outside of the military—to hold soldiers accountable. The political sensitivities can be fraught when those who possess the nation's weapons of war are asked to lay them down to submit to civilian or even military review and censure. Where military leadership does not support accountability, an inflexion point is created for civilian leadership: they must risk challenging military authority while seeking to establish a strong and independent justice system. This is where only those with strong political will have a chance at success, and where choosing partners who are willing to put forth the effort is imperative.

Of the three factors required to ensure soldier accountability to its citizens, the greatest challenge is political will. This is because political will is essential to ensuring legislation is comprehensive, and that justice and misconduct systems are properly resourced. While no two countries are alike, political will is the essential predicate. Country prioritization occurs after a comprehensive interagency process that assesses all factors and determines relative political will before allocating U.S. resources.

To identify capacity and capability gaps in accountability, USAFRICOM engages directly with African military legal advisors and magistrates, the experts on their own systems of accountability. The Legal Engagements Division has determined the best opportunity to engage with African military legal advisors and magistrates is the Africa Military Law Forum (AMLF). The AMLF is the only professional forum for military legal professionals in Africa. This forum has the overarching goal of promoting the rule of law through soldier adherence to the law of armed conflict, international human rights law, and relevant domestic laws.<sup>30</sup> The Legal Engagements Division hosts the AMLF annually with ever-increasing numbers of African militaries sending delegates; most recently, thirty-five African countries were represented. Most importantly, African delegates have invested in the AMLF by electing their own representative leadership to develop topics of focus, to represent the interests of four geographic areas within Africa, and to

network with each other to mentor and discuss best professional practices in advising their militaries through their moderation of chat groups.

Many delegates and current AMLF leadership represent the highest level of legal officer within their own militaries—that is, The Judge Advocate General or the equivalent. It is within this forum that the experts on African military systems of accountability can mentor one another and focus attention on improving military justice capability.

“[The] AMLF gives us a chance, for example today at our round table, to talk about the different legal systems and military justice systems,” said Brigadier General Paul Dikita Ilunga, the Chief of the Legal Service of Land Forces in the Democratic Republic of the Congo.<sup>31</sup> “We also talked specifically about challenges to each of our respective countries at the level of the armed forces and the military justice systems in those different countries. This [(the AMLF)] is really very valuable,” said Ilunga.<sup>32</sup> He also noted that:

It gives us an opportunity to sit together as legal advisors, to exchange information, to share expertise and best practices. The AMLF really helps us to reinforce our capabilities and to better understand the legal systems and services of our partner nations and other countries . . . being able to learn from one another helps to reinforce our capabilities. This way, we become closer and stronger. It is an extremely interesting opportunity and not only that. We get a better appreciation of the system that is provided by the United States, and we are able to see the different mechanisms that are in the works as far as support of our and neighbouring countries.<sup>33</sup>

Institutions that support soldier accountability must include the participation of legal professionals. They provide guidance to the criminal investigator or serve as the investigator, prosecute the crime, serve as defense counsel, or adjudicate the crime.

The previously described systems often have a magistrate only, which is essential when an allegation of criminality must

be investigated and prosecuted; however, commanders need legal guidance from their own advisors—a job description that is different from that of magistrate. Few African militaries had this capability until recently.<sup>34</sup>

Legal advisors<sup>35</sup> can help the commander with both military justice and the tone of command. Having access to legal expertise allows the commander to ensure command actions are, at a minimum, consistent with the rule of law. While this is crucial in military operations, access to legal advice reinforces accountability because military legal advisors can assist the commander with what is appropriate and acceptable behavior of subordinates. Holding someone accountable is necessary after laws or regulations are broken. Making a military lawyer part of the commander’s team helps inform the commander of what the law or regulations require and, in the process, could help the commander avoid making a decision that is contrary to the law or regulations.

With the counsel of a legal advisor, the commander sets a tone and establishes that prohibited behavior will not be tolerated. This creates deterrence. From the soldier’s perspective, knowing that he or she will be treated fairly creates confidence in the military justice system. This, in turn, promotes good order and discipline within the ranks and lends legitimacy to the institution.

The Legal Engagements Division, working with the International Institute for Humanitarian Law,<sup>36</sup> reached out to African military commanders and legal advisors for their assessment of the primary challenges their commanders confront in accessing legal guidance.<sup>37</sup> Three areas of concern were identified:

1. A dearth of legal advisors within countries after a long period of armed conflict. This resource constraint naturally influences the military’s ability to recruit and staff legal advisors.
2. Institutional and structural impediments to command access to legal advisors. This is particularly relevant within magistrates-only militaries, or where legal advisors are only found at the Headquarters.
3. Beyond constrained resources, or institutional and structural challenges,

there remains a failure to use standard processes when issues of accountability arose. In particular, these African military commanders and military legal advisors identified that justice was neither swift (a slow or absent response) nor sure (an absence of doctrine mandating standard operating procedures for investigations) when allegations of misconduct or criminality arose.<sup>38</sup>

## The Roadmap: Command Adherence to the Law

The roadmap goes beyond individual soldier accountability and moves into command adherence to the rule of law—a commander’s leadership responsibility. Many African military leaders recognize the importance of ethical and accountable militaries that follow the rule of law. During his keynote address, Major General (Dr.) E. Z. Mnisi, the Adjutant General of the South African National Defence Forces, stated, “A Commander’s understanding of legal concepts is imperative to combating our current challenges.”<sup>39</sup>

The Accountability Colloquium, co-hosted by USAFRICOM and a different African military each year, brings African military commanders and military legal advisors and magistrates together to discuss current challenges in military operations and their adherence to the rule of law.<sup>40</sup> This annual event is a means of addressing military capability in adhering to the rule of law in operations. It is the only event that brings African military commanders and their legal advisors together in one venue. Topics discussed at the Colloquium have historically included soldier accountability, the law of armed conflict in peacekeeping operations, preventing gender-based violence in armed conflict, and command adherence to the rule of law.

Bringing African military members together to discuss challenges and potential solutions is the key to improving capability and capacity to adhere to the rule of law, as African military members are the experts at identifying both the problem set and potential solutions. Explaining the importance of African military collaboration, Lieutenant Colonel Joseph Biomdo, Legal Services, Kenya Defense Forces, stated that:



[T]he Accountability Colloquium is a good forum, where parties share ideas on the challenges they face. They look at possible solutions that they've had, and they also share ideas on how to go about the different challenges that they identified. Some of the challenges that we face as a nation are almost identical to other countries, and by sharing ideas, you are able to get solutions, or at least ideas, on how to resolve the conflicts.<sup>41</sup>

Legal advisors are defined by and embrace the following overarching principles: the more complex modern armed conflict becomes, the more nuanced the application of the law; and, a country must entrust its military commanders to properly use and manage the use of force in armed conflicts. Between the complexity of modern conflict, and the potential for incorrect application of state-sanctioned force, stands the military legal advisor as the most capable staff advisor to guide the commander through this complicated terrain.

Military operations for different countries take place in a wide variety of contexts. Armed conflicts within Africa take place between countries; within the country's own borders; or in discrete joint operations across borders in cooperation with neighboring states, where there is no state-on-state conflict. Since inception, USAFRICOM has discovered that most African military operations are designed to assist law enforcement, whether police or gendarme, with threats that are too great for law enforcement to confront alone, such as terrorism.<sup>42</sup>

The law that the commander must follow in peacetime, when militaries are assisting law enforcement, is different from the law which applies during international armed conflict.<sup>43</sup> Most African military operations are in support of law enforcement. The ultimate goal for those military operations should be to stop the criminal activity and develop a prosecutable case.<sup>44</sup> Those military operations should be planned with very different considerations than a military operation that takes place during an international armed conflict.

For all military operations, military commanders must first know what

authority they have. When the operation is in support of law enforcement, there should be a whole-of-government process established which identifies the scope of the military's involvement. This should include their use of force measures and the authority to detain personnel. It should be clear who would investigate and adjudicate the crime, and what the standard procedure is for the transfer of evidence from the site of criminal activity secured during the military operation to the appropriate investigative agency. Procedures should have a goal of building a prosecutable case so that justice will be served.

On the other hand, during armed conflict between countries, the goal is to secure peace by applying military force against valid military targets. At all times, and for all military operations, military lawyers are essential for providing advice. They help commanders understand their legal responsibilities and, in turn, what risks they need to mitigate. This advice could be as varied as the appropriateness of targeting an individual; the use of certain munitions; the scope of a soldier's right of self-defense; the appropriate application for the rules of engagement; or the appropriate handling of a captured enemy belligerent.

Command access to military lawyers is a legal requirement grounded in Article 82, Additional Protocol I of the Geneva Conventions, which mandates that:

[T]he Parties to the conflict in time of armed conflict, shall ensure that legal advisors are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instructions to be given to the armed forces on this subject.<sup>45</sup>

Military legal advisors must understand the military and the law. "Would you rather have a lawyer with legal knowledge but no military experience, or an unformed lawyer with military experience?" asked Brigadier General B. Mkula, South Africa National Defense Force.<sup>46</sup> "Because one will get you killed, and one will get you arrested."<sup>47</sup> Access alone to a military legal advisor does not ensure that a commander

understands how to incorporate legal guidance into operations. Incorporating legal guidance into an operation requires a relationship between commander and legal advisor, one that builds upon mutual respect and trust. Brigadier General Dan Kuwali, Chief of Legal Services for the Malawi Defense Forces, explained<sup>48</sup>:

[T]he relationship between military commanders and legal advisors: military commanders are supposed to lead their troops in the barracks as well as on the battlefields. Whereas legal advisors are supposed to guide commanders on making informed decisions so that combat operations are in accordance with the law. The commander wants to accomplish the mission efficiently. He needs to understand legal advice. In so doing they can professionally and efficiently achieve their mission.<sup>49</sup>

### **The Roadmap: Military Professionalism**

The third line of effort on the roadmap is to improve overall military professionalism within the ranks. In even the most difficult situations, institutional structures that ensure soldier accountability and command adherence to the rule of law will fail if the military members are not professionals.<sup>50</sup> There must be an understanding within the ranks that there are legal, moral, and ethical restrictions on the military. Accepting those restrictions is the building block of professionalism.

Professionalism starts with trust;<sup>51</sup> within the ranks, this means the trust among fellow soldiers and in their commander. Second is the trust soldiers hold between themselves and the citizenry they serve, thereby making soldiers public servants. Citizen trust of the military must be the core of the military's legitimacy. Establishing this trust requires a dedication to career-long training. This transforms a soldier from a civilian to a member of the profession of arms.

What is essential and most challenging to the profession of arms is a sense of shared ethos. A lack of ethos within the military manifests itself in a variety of self-defeating behaviors: promotions that are not meritorious; insufficient basic resourcing; blatant corruption; and an

absence of the concept that military members are public servants with the unique attribute that they may lawfully use lethal force on behalf of the State.

“The challenges of professionalizing Africa’s militaries are innumerable but not insurmountable.”<sup>52</sup> This is the thesis of Dr. Emile Ouédraogo’s<sup>53</sup> article, *Advancing Military Professionalism in Africa*. Dr. Ouédraogo summarizes the challenges of inculcating a professional ethos in many African militaries:

A majority of African states have duly adopted these democratic values and basic principles of military professionalism in their various constitutions and military doctrines. They are shared and accepted by the majority of African countries that have transitioned or are in the process of transitioning to a democracy. Moreover, many military leaders have been exposed to these values and principles through trainings in Western military academies and staff colleges. It is important, too, to note that these values are rooted in African culture. Protection of the kingdom, submission to the king, loyalty, and integrity vis-à-vis the community were core values of African ancestral warriors. It was only during the colonial and neo-colonial eras that this civil military relationship foundered and these values eroded. The newly created African states set up armies to symbolize their nations’ independence, but these militaries essentially provided security just to the new regimes. Since then, we have witnessed an ongoing struggle to recapture the historical values of military professionalism.<sup>54</sup>

Professionalization is incrementally developed throughout a military career. Starting at the tactical level, a soldier is inducted into the military. Tactical training includes the basics of how to shoot a weapon, build a fighting position, and evade an enemy. Because the soldier is being entrusted to use force on behalf of the state, this training must include the law of armed conflict and international human rights

law concepts. This should be provided to soldiers using vignettes.<sup>55</sup> These real-world problem sets help the soldier understand the rationale behind why they should respond a certain way in any operation, to include best practices and what is forbidden.

Military leadership must provide strategic training and military doctrine<sup>56</sup> to develop competency and instill in a soldier a sense of responsibility to the country served, unity, and pride to be a soldier. Tactical training instructs soldiers on how to conduct themselves when engaging in operations. The training on doctrine is based on the rules imposed by the State. Finally, the training must culminate in military exercises that are built around real-world operations to build a ready, capable, and professional fighting force able to succeed on real battlefields.

These foundational requirements must be part of the military’s doctrine, institutionalized from the highest level to the newly inducted private. This must become part of a military’s culture. Without it, the military is nothing more than a cadre of individuals with lethality. Some militaries shun this type of training or provide it to their senior ranks but not their enlisted soldiers; however, there are more foot soldiers than generals, and training to be a member of the profession of arms is at least as important for the private as it is for a general.

Some militaries in Africa were formed from former militias whose allegiance is not to the nation as a whole.<sup>57</sup> For a military to attain a high level of professionalism, every soldier must be inculcated with the notion that they are part of the profession of arms on behalf of the country. Training and education must emphasize that soldiers serve a unique role: on behalf of the state, they are given the unique authority to use force, and on occasion, lethal force. This license to use force, however, comes with heavy responsibilities. Training and military doctrine should expose soldiers to what it means to be part of the profession of arms.

The best way that USAFRICOM models this professionalism is through joint exercises with our African partners. United States Africa Command sponsors nine multinational military exercises on the African continent, and is the largest military exercise sponsor there. The

exercises train U.S. Forces while also promoting interoperability with African partner militaries and maritime elements.<sup>58</sup> Each exercise concludes with an assessment of each participating military’s skills and their ability to operate consistent with applicable law. The exercises are executed by USAFRICOM’s components: U.S. Army Africa, Naval Forces Africa, and Special Operations Command Africa.<sup>59</sup>

Since 2016, USAFRICOM’s military exercises have included rule of law objectives. Prior to 2015, no African military legal advisors would normally attend any of USAFRICOM’s exercises. Since 2016, almost all exercises have at least one, and often several, partner military legal advisors in attendance—a change brought about by assigning one member of the Legal Engagements Division to support the joint exercise program and develop rule of law objectives.

The rule of law objectives require that an African military or maritime legal advisor attend the exercise and be incorporated into the trained audience. They serve in a command legal advisor capacity in the operations center or headquarters element. Prior to the commencement of the exercise, and within the operations center or headquarters, the African military or maritime legal advisor provides the legal framework applicable to the exercise to their fellow staff officers and commander. They are incorporated into the operations or headquarters staff during the exercise. A U.S. judge advocate (JA) is also assigned to the exercise. They assist their African military legal counterpart in integrating into the staffing process and mentor them as they serve as a command legal advisor. They also work collaboratively on the numerous legal problem sets faced by the exercised command.

The final rule of law objective is for the U.S. JA to 1) assess African partner units on their adherence to applicable law in the trained operations; 2) evaluate their African colleagues’ ability to identify legal issues and provide accurate guidance; and 3) gauge the staff and commander’s ability to incorporate legal guidance into their decisions. These short assessments are provided to the Legal Engagements Division, the command’s exercise branch, and the U.S. Embassy

country teams to facilitate future dialogue with partner militaries on addressing legal capability and capacity gaps.

For context, it is helpful to review the multinational military exercise, Shared Accord 2019, which took place in and around the Rwanda Defense Force Gabiro Training Center in Rwanda from 14-18 August 2019. The exercise is modeled after the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic—also known as MINUSCA. Peace operations-based exercises are critical because African countries are the largest troop-contributing force providers for peacekeeping operations, and the African continent has the most peacekeeping missions globally.<sup>60</sup> Therefore, peace operations-based exercises like Shared Accord provide a valuable opportunity to exercise the interoperability of both U.S. and African militaries.

Approximately 1,000 military members from 26 countries, including the United States, participated in Shared Accord 2019. “It was very interesting to work with the U.S., Rwandan, and Moroccan legal advisors,” Captain Baboucarr Sanneh said.<sup>61</sup> “It builds experience. We’re able to learn from one another and it prepares us for future engagements.”<sup>62</sup> Lieutenant Methode Ndizeye, the Legal Staff Officer for the Rwandan Defense Forces Headquarters said, “Incorporating legal advisors into the mission-analysis aspect of the exercise was having real-world benefits . . . I have seen improvement for legal advisors within the African militaries as the militaries develop.”<sup>63</sup>

There are numerous training and engagement opportunities by USAFRICOM that help African soldiers better understand their profession of arms. Training and engagements focused on the soldier’s expertise in the use of force, sense of responsibility to the country’s citizenry through following the rule of law, and sense of soldierly unity, are essential to professionalism.

## Conclusion

In March 2020, U.S. Ambassador R. Clarke Cooper<sup>64</sup> spoke in Nouakchott, Mauritania, at the conclusion of “Flintlock,” the largest special operations exercise on the continent. He acknowledged the incredible importance of military exercises in working toward the

rule of law.<sup>65</sup> With more than 1,600 service members from thirty African and Western nations attending, as well as U.S. Special Operations soldiers, Ambassador Cooper made the following remarks:

Today our forces are engaged in the defeat of violent extremism from the shores of the Red Sea to the coast of the Atlantic; together, we are combating piracy and countering illicit trafficking from the Mediterranean Sea to the Gulf of Guinea; across the Sahel, we are cementing security, and pursuing peace. . . . The United States has an unwavering and longstanding commitment to Africa. We support good governance, security, the rule of law, opportunities for economic growth, and anti-corruption efforts.<sup>66</sup>

A nation whose soldiers are accountable, whose commanders adhere to the rule of law, and who has a professional military, promotes security and peace. Following this roadmap can more effectively help willing partner nations build militaries that garner the trust and confidence of their citizens. If the past thirty years’ trajectory of increasing truly representational governance continues, the future could see hard-won gains. Those gains, however, will only be possible with soldiers who are accountable, whose commanders follow the law through reliance on their legal advisors, and whose ranks exemplify a profession of arms. Along the way, USAFRICOM will be there to help, assist, and mentor those countries who desire such a military—a military grounded in the rule of law. **TAL**

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*The authors would like to thank the Office of Legal Counsel attorneys for their edits and recommendations. The authors would like to dedicate this article to their friend and colleague, Colonel André Retief for his sage and unvarnished perspective, keen intellect, and*

*relentless pursuit of educating commanders and legal advisors on the law of armed conflict. He will be missed.*

## Notes

1. This concept is attributed to Ambassador Alexander M. Laskaris, LINKEDIN, <http://www.linkedin.com/in/laskaris-alexander-4103b35> (last visited Dec. 15, 2020). Ambassador Laskaris is also the Deputy to the Commander for Civil-Military Engagement at USAFRICOM. See *Press Briefing with U.S. Africa Command Senior Leaders: Special Briefing via Telephone*, U.S. DEP’T OF STATE (May 30, 2019), <https://2017-2021.state.gov/press-briefing-with-u-s-africa-command-senior-leaders/index.html>.
2. Within the U.S. Government, geographic combatant commands serve as a single focal point for security cooperation activities and operations in any one area. See JOINT CHIEFS OF STAFF, JOINT PUB. 1, DOCTRINE FOR THE ARMED FORCES OF THE UNITED STATES (25 Mar. 2013) (C1, 12 July 2017).
3. Max Roser, *Democracy*, OUR WORLD IN DATA, UNIV. OXFORD EDS. & GLOBAL CHANGE DATA LAB PUB., <https://ourworldindata.org/democracy> (June 2019).
4. The use of nation, country, and state are interchangeable in this article, even though the authors recognize that there is a legal distinction.
5. Roser, *supra* note 3.
6. African countries work alone, and with other organizations on a wide variety of security force assistance initiatives. For example, they work with the African Union, regional organizations such as the Economic Community of Western African States (known as ECOWAS), the European Union, the United Nations, and individual countries bilaterally, to include the United States. For a contextual summary of the complex security force landscape in Africa, see Jahara Matissek, *International Competition to Provide Security Force Assistance in Africa: Civil-Military Relations Matter*, OFF. DEPUTY ASSISTANT SEC’Y ARMY FOR DEF. EXPORTS & COOPERATION (Oct. 21, 2020), <https://www.dasadec.army.mil/News/Article-Display/Article/2390283/international-competition-to-provide-security-force-assistance-in-africa-civil/>.
7. Security assistance, security force assistance, and security cooperation are terms of art which are inter-related. Security assistance is a broad term used to encompass programs authorized by the Foreign Assistance Act and Arms Export Control Act, in which the United States provides defense articles, military training, and other services: those authorities reside with the Department of State. Security Force Assistance are Department of Defense (DoD) activities that contribute to unified action by the United States Government to support the development of the capacity and capability of foreign security forces and their supporting institutions. Finally, security cooperation activities are undertaken by the DoD to encourage and enable international partners to work with the United States to achieve strategic objectives. This includes all DoD interactions with foreign defense and security establishments that build defense and security relationships, develop allied and friendly military capabilities, or provide service members with peacetime and contingency access to host nations. See U.S. DEP’T OF DEF., INSTR. 5000.68, SECURITY FORCE ASSISTANCE (SFA) (27 Oct. 2010).
8. See Graciana del Castillo, *Building Peace and Stability Through Economic Reconstruction*, U.N. INST.

FOR DISARMAMENT RSCH., <https://unidir.org/files/publications/pdfs/building-peace-and-stability-through-economic-reconstruction-en-417.pdf> (last visited Nov. 2, 2020).

9. It is interesting to note the importance of this core truth, illustrated by the rogue acts of certain nations pretending to follow the rule of law in attempts to appear legitimate. For example, Russian-aligned forces did not wear their military uniforms in the Ukraine occupation and annexation, in contravention of the law of war. See Sam Sokol, *Russian Disinformation Distorted Reality in Ukraine. Americans Should Take Note*, FOREIGN POL'Y (Aug. 2, 2019, 4:40 PM), <https://foreignpolicy.com/2019/08/02/russian-disinformation-distorted-reality-in-ukraine-americans-should-take-note-putin-mueller-elections-antisemitism/>. China insisted on building artificial islands in the South China Sea, destroying its rich coral beds for construction, and then claimed exclusive economic zone rights under the Law of Sea. These positions were rejected in the Hague's Permanent Court of Arbitration. See Press Release, Permanent Court of Arbitration, *The South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China)* (July 12, 2016), <https://pca-cases.com/web/sendAttach/1801>.

10. This point was previously explored in *The Public Lawyer*. Jeremy Greenwood et al., *Rule of Law Development at the U.S. Africa Command: Moving from the Rule of Personality to the Rule of Law*, PUB. LAW. 1, 2 (2015).

11. See *id.*

12. "Strategies and tactics must be fashioned that create a match—not a mismatch—between aims and the means available for acting on those aims." DENNIS ROSS, STATECRAFT AND HOW TO RESTORE AMERICA'S STANDING IN THE WORLD 22 (2007). In other words, every state will have different ways and means to accomplish their desired end state. *Id.*

13. Political will is an oft discussed precursor to a government's ability to address a perceived problem. It is frequently invoked as a baseline requirement for change, while simultaneously remaining difficult to ascertain and for some, to even define. A most excellent treatment of the concept can be found online. See Lori Ann Post et al., *Defining Political Will*, 38 POL. & POL'Y 653 (2010).

14. We use the term soldier, but the concept of accountability embraces all uniformed service members, whether Navy, Marine, Air Force, Coast Guard, or for some African militaries, Gendarmerie.

15. Jeff Schogol, *AFRICOM Shaping Up as Model of Support*, STARS & STRIPES (Mar. 27, 2007), <https://www.stripes.com/news/U.S.Africa.Command-shaping-up-as-model-of-support-1.62055>.

16. *Id.*

17. J. Peter Pham, *President Obama's Legacy in Africa is A State of Mind*, NEWSWEEK (Aug. 28, 2016, 2:10 AM), <https://www.newsweek.com/president-obamas-legacy-africa-state-mind-493774>.

18. The Office of Legal Counsel Legal Engagements Division is currently comprised of a U.S. Coast Guard Judge Advocate General (JAG) Division Chief, a civilian attorney serving as its Deputy, a Department of Justice attorney from the Overseas Prosecutorial Development Assistance and Training Program, and a U.S. Army Judge Advocate. The Legal Engagements Division supplements its staff with Reserve and National Guard JAs and paralegals when possible.

19. Congress has included mandatory rule of law considerations built into security cooperation authorizations. They can be more effectively addressed with a legal engagements division focused on partner military ability to adhere to the rule of law. Examples include human rights vetting requirements found within a series of laws widely known by the name of the Senator who sponsored them, the Leahy laws, which apply to both the Department of State and the Defense of Defense. There are also congressionally-mandated human rights training requirements for other authorizations, addressed later in this article under professionalism. See Training with Friendly Foreign Countries: Payment of Training and Exercise Expenses, 10 U.S.C. § 321 (2016); Prohibition on Use of Funds for Assistance to Units of Foreign Security Forces That Have Committed a Gross Violation of Human Rights, 10 U.S.C. § 362.

20. Partner forces abiding by the rule of law enable U.S. Forces to work by, with, and through them. The "by, with and through" doctrine originated in U.S. Central Command, but has applicability globally and is used by USAFRICOM. Stated conversely, partner militaries which fail to abide by the rule of law constrain U.S. Force ability to work by, with, and through them. For more on the formation of this doctrine, see Joseph L. Votel & Eero R. Keravuori, *The By-With-Through Operational Approach*, 89 JOINT FORCE Q. 40 (2018).

21. It should be noted that the primary U.S. Government agency responsible for international development, to include addressing issues of good governance, is the U.S. Agency for International Development (USAID). Further, USAID is prohibited from working with foreign militaries. Thus, the Department of State (DoS) and the DoD work with militaries is complementary to USAID programs. The United States Agency for International Development works to support the rule of law by promoting legal and regulatory frameworks that improve order and security, legitimacy, checks and balances, and equal application and enforcement of the law. The United States Agency for International Development rule of law programs focus on three goals of increasing democratic legal authority; guaranteeing rights and the democratic process; and providing justice as a service. See *Mission, Vision and Values*, USAID, <https://www.usaid.gov/who-we-are/mission-vision-values> (Feb. 16, 2018).

22. See JOINT CHIEFS OF STAFF, JOINT PUB. 3-20, DEPARTMENT OF DEFENSE SECURITY COOPERATION ch. 3 (23 May 2017).

23. Ensuring security force assistance and cooperation activities are consistent with National Security and Defense polices. The interagency process used by USAFRICOM includes: the DoS, USAID, the Department of Justice Overseas Prosecutorial Development Assistance and Training Program, the Federal Bureau of Investigation, the Department of Homeland Security, the Department of the Treasury, and many others. This interagency process resides at USAFRICOM through the inclusion of representatives of these agencies within the command. United States Africa Command also works with NATO allies and other foreign partners who provide liaison officers within the command, who often have their own bilateral security force assistance projects in Africa, to obtain a comprehensive perspective of the international security assistance landscape impacting individual African countries.

24. It is broader than that found within *DoD Dictionary of Military and Associated Terms*. See OFF. OF THE CHAIRMAN OF THE JOINT CHIEFS OF STAFF, DEPARTMENT OF

DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS (Dec. 2020).

25. UCMJ art. 15 (2016); UCMJ art. 18 (2016).

26. Since inception, all legal engagements with partner militaries generate an after action report or assessment. Over time, this information has enabled Legal Engagements to learn the differences and nuances of individual military institutions. As both Africa military institutions change and understanding their systems takes time and resources, this work is ongoing. Those reports are on file with the Office of Legal Counsel.

27. *Id.*

28. *Id.*

29. *Id.*

30. Captain Franziska Hesse, *AFRICOM Hosts Annual Africa Military Law Forum*, U.S. AFR. COMMAND (Mar. 13, 2018), <https://www.africom.mil/Story/30485/africom-hosts-annual-africa-military-law-forum>.

31. *Id.*

32. *Id.*

33. *Id.*

34. For example, Rwanda went from a magistrates-only system to one which includes command legal advisors. See 39 RWANDA MINISTRY OF DEFENSE OFFICIAL GAZETTE No. 39 Summary, Article 49, at 31 (24 Sept. 2012). Cameroon is reviewing similar changes.

35. Conceptually, there are two broad classes of military legal advisors: those who focus on military operational law and command guidance, and those who focus on military justice. While the aspirational goal is to develop an effective blend of the two, that may be a reach for many developing militaries. Although there are some African militaries that have military legal advisors who can provide full spectrum guidance for its commanders, most militaries are still developing this capacity; however, what is critical is that most of USAFRICOM's African partners recognize the need for legal advisors who know both the law and the military.

36. The International Institute for Humanitarian Law is a non-governmental organization with staff and leadership from the International Criminal Law Tribunal, U.S. Army and NATO allied legal advisors, and other experts in humanitarian law. The Institute's mission is to train professionals in international humanitarian law, refugee law and migration law, and disseminates developments in international humanitarian law through publishing, conducting research, and holding workshops and conferences. This includes promulgation of the Sanremo Handbook on Rules of Engagement. See *The Foundation*, INT'L INST. FOR HUMANITARIAN L., <http://iihl.org/the-foundation/> (last visited Nov. 5, 2020).

37. While working with the International Institute for Humanitarian Law, the Legal Engagements Division hosted a military-to-military event in 2015 on the issue of command access to legal advice. Participating African military commanders and their legal advisors participated in a table-top exercise called Brave Resolve, identifying their military's primary challenge to accessing legal advice. The resulting report was provided to participants for validation, is unpublished, and remains on file at the Office of Legal Counsel, Legal Engagements Division.

38. *Id.*

39. The keynote address took place at the Accountability Colloquium VII in Pretoria, South Africa from 3 to 5 March 2020. See Sandra Franzblau, *Legal Colloquium*



*Strengthens Relationships Between African Commanders and Legal Advisors*, U.S. AFR. COMMAND (Apr. 21, 2020), <https://www.africom.mil/article/32710/legal-colloquium-strengthens-relationships-be>.

40. Office of Legal Counsel Engagements use the term “African military legal advisors” for magistrates and, depending on the military, any professional that the military uses to obtain legal guidance.

41. Specialist Apolonia Gaspar, *AFRICOM Hosts Accountability Colloquium*, U.S. AFR. COMMAND (Mar. 6, 2019), <https://www.africom.mil/article/31599/africom-hosts-accountability-colloquium>.

42. See generally Cornelius Friesendorf, *International Intervention and the Use of Force: Military and Police Roles*, GENEVA CTR. FOR THE DEMOCRATIC CONTROL OF ARMED FORCES (2012), <https://www.peacepalacelibrary.nl/ebooks/files/383260469.pdf>. Professor Friesendorf’s article is an excellent model of when police forces lack the capacity to handle a national security crisis and must turn to the military; however, he outlines pitfalls of the military overreaching and potential human rights considerations. There are also a wide variety of professional organizations who have made the same observations. For example, “Today, in many contemporary armed conflict situations, armed forces are increasingly expected to conduct not only combat operations against the adversary but also law enforcement operations in order to maintain or restore public security, law and order.” Gloria GAGGIOLI, LEGAL ADVISOR, INT’L COMM. OF THE RED CROSS, *THE USE OF FORCE IN ARMED CONFLICTS: INTERPLAY BETWEEN THE CONDUCT OF HOSTILITIES AND LAW ENFORCEMENT PARADIGMS* (2020), <https://www.icrc.org/en/doc/assets/files/publications/icrc-002-4171.pdf>.

43. This article is not a law of war treatise. *But see* U.S. DEP’T OF DEF., *DoD LAW OF WAR MANUAL* (12 June 2015) (C2, 13 Dec. 2016).

44. The Posse Comitatus Act prohibits the U.S. Army and Air Force from assisting law enforcement within the United States, with the DoD restricting the Navy and Marines through regulation. *See Use of Army and Air Force as Posse Comitatus*, 18 U.S.C. § 1385; U.S. DEP’T OF DEF., INSTR. 3025.21, *DEFENSE SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES* (27 Feb. 2013) (C1, 8 Feb. 2019). Not including the U.S. Coast Guard, which operates as both a law enforcement agency and a member of the U.S. Armed Forces, the only exception to the deployment of the regular military on U.S. soil is found in the Insurrection Act, which authorizes the President to deploy the regular U.S. military in cases of insurrection and rebellion. *See Use of Militia and Armed Forces to Enforce Federal Authority*, 10 U.S.C. § 252. This is in stark contrast to partner militaries in Africa, which regularly assist law enforcement within their own borders in a wide variety of endeavors to include border patrol, wildlife protection, anti-trafficking, and counter-terrorism.

45. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 82, June 8, 1977, 1125 U.N.T.S. 3.

46. *See* Franzblau, *supra* note 39. The quotes and notes from the Colloquium were taken by Captain Kelly A. Borders, USAF, Office of the Command Judge Advocate, Combined Joint Task Force, Horn of Africa, and are on file at the Office of the Legal Counsel.

47. *Id.*

48. The remarks from the Accountability Colloquium VI, held on February 26-28, 2019, were released online through the Defense Media Activity Europe Africa.

*See* Interview by Sergeant Edward Salcedo, U.S. Army, with Brigadier Gen. Dan Kuwali, Chief of Legal Servs., Malawi Def. Force, in Lilongwe, Malawi, *Accountability Colloquium VI*, DEF. VIS. INFO. DISTRIB. SERV. (Feb. 28, 2019), <https://www.dvidshub.net/video/664164/accountability-colloquium-vi>.

49. *Id.*

50. The history of African militaries is the subject of treatises, not this article. However, it must be acknowledged that following many African Union member states’ independence, too many militaries seized political power, ruled dictatorially, and corrupted their armies with catastrophic victimization of their citizenry. As those countries move toward a democratic orientation, their governments and militaries redefine who they are. They do not need to look far in finding historical precedence of honor within their armies. Before colonialism, soldiers often fought honorably. “These armed men—and sometimes women—fought for territorial expansion, tribute, and slaves; they also defended their families, kinsmen, and their societies at large with their cherished ways of life. And when they fought, they typically did so with honor, sparing the elderly, women, and children.” ROBERT B. EDGERTON, *AFRICA’S ARMIES: FROM HONOR TO INFAMY, A HISTORY FROM 1791 TO THE PRESENT* (2002) (emphasis added).

51. *See* Colonel Charles D. Allen & Colonel William G. Braun III, *Trust: Implication for the Army Profession*, MIL. REV., Sept.-Oct. 2013, at 73.

52. *Id.*

53. Dr. Émile Ouédraogo earned a PhD with honors from the Center for Diplomatic and Strategic Studies in Paris, France, on security sector reform and governance in the ECOWAS Region and has an extensive resume. He is an adjunct professor at the Africa Center for Strategic Studies; a member of the African Security Sector Network; the founding President of the Fondation pour la Sécurité du Citoyen of Burkina Faso; and a retired Colonel with the Burkina Faso Army. He served with the African Union as a security sector reform and governance expert for Madagascar and, from 2008 to 2011, he was a Minister of Security of Burkina Faso. As a Parliamentarian in the National Assembly of Burkina Faso and the ECOWAS Parliament, he sat on the Political Affairs, Peace, Defense, and Security Committees.

54. Emile Ouédraogo, *Advancing Military Professionalism in Africa*, AFR. CTR. FOR STRATEGIC STUD. (July 31, 2014), <https://africacenter.org/wp-content/uploads/2016/06/ARP06EN-Advancing-Military-Professionalism-in-Africa.pdf>.

55. Foreign Security Sources: Authority to Build Capacity, 10 U.S.C. § 333. For certain types of security cooperation and assistance, such as at 10 U.S.C. § 333, Congress requires that the United States also train the partner force on human rights law, as well as other professional trainings. *Id.* Those authorizations are executed by the DoD lead for global legal engagement and capacity building, the Defense Institute for International Legal Studies (DIILS). All DIILS activities are planned, coordinated, and conducted in support of geographic combatant commands such as USAFRICOM. The Office of the Legal Counsel routinely supports the DIILS programs in Africa by providing adjunct training staff and coordinating with DIILS on rule-of-law-related events. *See* Nancy Parvin, *DIILS Charter*, DEF. INST. INT’L LEGAL STUDS. (Jan. 10, 2017), <https://globalnetplatform.org/diils/diils-charter>.

56. Military doctrine is the fundamental set of principles that guides military forces as they pursue national security objectives. The Rand Corporation gives an insightful understanding into the matter. *See generally Military Doctrine*, RAND CORP., <https://www.rand.org/topics/military-doctrine.html> (last visited Nov. 5, 2020).

57. Ending civil war and conflict through the inclusion of former militias or at least militia members into the nations’ armed forces is not unusual, but it has significant challenges. Vanda Felbab-Brown gives an instructive understanding of the problem set using Somalia as its subject. *See* Vanda Felbab-Brown, *Report: The Problem with Militias in Somalia: Almost Everyone Wants Them Despite Their Dangers*, BROOKINGS (Apr. 14, 2020), <https://www.brookings.edu/research/the-problem-with-militias-in-somalia-almost-everyone-wants-them-despite-their-dangers/>.

58. Training with Friendly Foreign Countries: Payment of Training and Exercise Expenses, 10 U.S.C. § 321. Congress authorizes funding for joint international military exercises through 10 U.S.C. § 321. This authority also requires rule-of-law-related objectives be considered: “Elements of training.—Any training conducted pursuant to paragraph (1) shall, to the maximum extent practicable, include elements that promote— (A) observance of and respect for human rights and fundamental freedoms; and (B) respect for legitimate civilian authority within the foreign country concerned.” *Id.* § 321(a)(4).

59. U.S. Africa Command’s components are U.S. Army Africa, U.S. Naval Forces Africa, U.S. Marine Forces Africa, U.S. Air Forces Africa, and U.S. Special Operations Command-Africa.

60. As of 21 March 2020, Ethiopia is the largest troop-contributing country to peacekeeping operations in the world. Of the top twenty contributors, twelve are African nations during the same time period. *Troop and Police Contributors*, U.N. PEACEKEEPING, <https://peacekeeping.un.org/en/troop-and-police-contributors> (last visited Nov. 5, 2020).

61. Captain Baboucar Sanneh, legal staff officer from the Gambia Armed Forces Headquarters, was one of three African partner nation military legal advisors who participated in the multinational military exercise Shared Accord 2019, executed by U.S. Army Africa. *See* Off. of Legal Counsel, U.S. Afr. Command, *Shared Accord 19 Emphasis, Rule of Law*, U.S. AFR. COMMAND (Nov. 1, 2019), <https://www.africom.mil/article/32204/shared-accord-19-emphasis-rule-of-law>.

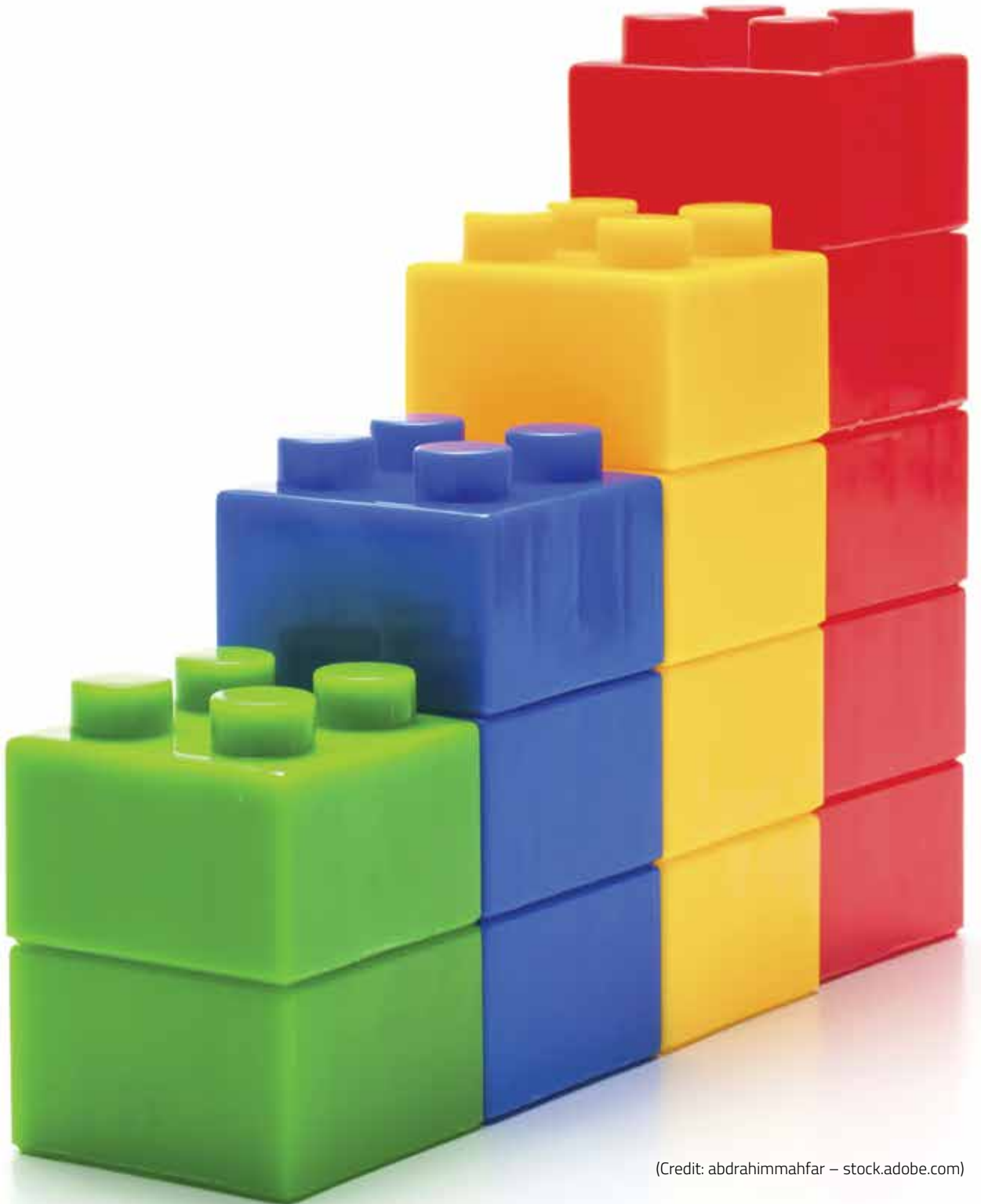
62. *Id.*

63. *Id.*

64. Ambassador Cooper is the Assistant Secretary of State for Political-Military Affairs.

65. R. Clarke Cooper, Assistant Sec’y, Bureau of Political Affs., U.S. Dep’t of State, Remarks to Multinational Forces and VIPs Upon Conclusion of Flintlock 2020 (Feb. 28, 2020), <https://2017-2021.state.gov/remarks-to-multinational-forces-and-vips-upon-conclusion-of-flintlock-2020/index.html>; Jim Garamone, *Africom’s Exercise Flintlock 2020 Strengthens Partnerships*, U.S. DEP’T OF DEF. (Mar. 3, 2020), <https://www.defense.gov/Explore/News/Article/Article/2100743/afcoms-exercise-flintlock-2020-strengthens-partnerships-security/#:~:text=17%2C%202020,annual%20special%20operations%20forces%20exercise>.

66. Cooper, *supra* note 65; Garamone, *supra* note 65.



(Credit: abdrahimmahfar – stock.adobe.com)

## No. 2

# The Lego Test for Lesser Included Offenses

## MJA 2016 Provides Something New and Painful to Stumble Over

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*By Major Andrew M. Lewis*

*The question of what constitutes a lesser-included offense [in the military justice system] . . . is a Hydra.<sup>1</sup>*

The complicated history of determining lesser included offenses (LIOs) under the Uniform Code of Military Justice (UCMJ) gained a new chapter with the Military Justice Act of 2016 (MJA 2016). While MJA 2016 simplified and clarified certain areas of military justice, it has only muddied the waters regarding LIO identification. Prior to MJA 2016, determining the LIO of a given punitive article under the UCMJ required performing a strict elements test from *United States v. Jones*; this test often proved challenging to counsel and judges alike.<sup>2</sup> Confusion over LIOs was particularly common when it came to the relationships between the various rape and sex offenses, and determining which LIOs they implicated.<sup>3</sup>

In an attempt to simplify LIO analysis, MJA 2016 has instead released a kraken of confusion. The Military Justice Act of 2016 sought to combine (1) the certainty of the elements test with (2) the convenience of looking to a list of offenses in the *Manual for Courts-Martial (MCM)*.<sup>4</sup> The Military Justice Act of 2016 did the first part by codifying the judicially-created elements test in Article 79(b)(1), UCMJ.<sup>5</sup> It accomplished the second part by allowing the President to designate offenses that are “reasonably included in

the greater offense” in Article 79(b)(2).<sup>6</sup> The President did so by listing such offenses in Appendix 12A, effective 1 January 2019.<sup>7</sup> However, when the President designated offenses that contained elements not present in the greater offense as LIOs, the current understanding of LIOs was turned on its head.<sup>8</sup>

Instead of acquiring a simpler process for LIO determinations, practitioners now find themselves in uncharted, and potentially dangerous, territory. Failure to correctly identify proper LIOs can lead to Constitutionally-improper notice, legally incorrect instructions, confusion of members, or other issues on appeal.<sup>9</sup> Depending on when the issue is identified, the remedy may be as drastic as dismissal of charges.<sup>10</sup>

To avoid these pitfalls and provide proper notice to military accused, practitioners must develop a new method for analyzing the relationships between offenses and identifying those raised by the preferred charges, a task previously in the hands of the strict elements test.<sup>11</sup> Filling this gap requires the development and application of a new method for determining LIOs, which this article refers to as the “Lego Test.”<sup>12</sup>

The proposed Lego Test identifies (1) the elements contained in an offense; (2) the elements raised by any enumerated LIOs in Appendix 12A; and (3) the offenses that can be formed by this collection of elements. Put differently, practitioners identify “building blocks”—or elements—from the charged offense(s) and the LIOs contained in Appendix 12A, then combine them to “build” offenses of which the accused may be convicted. Accordingly, under the new version of Article 79, an accused will now be on notice to defend against all of (1) the preferred charges, (2) those enumerated in Appendix 12A, and (3) those “built” via the Lego Test.

This article first traces the history of LIO analysis, focusing on the importance of the due process requirement of proper notice. This history will start with the first adoption of an elements test in 1993,<sup>13</sup> through the military’s attempts to conform the elements test to the UCMJ, and ultimately the return of the strict elements test in 2010.<sup>14</sup> That framework must be understood to ensure that the Lego Test is in compliance because the notice requirement will, likely, endure post-MJA 2016. Second, this article analyzes the changes brought by MJA 2016 and the new Appendix 12A, and what those changes mean for the primacy of the elements test in determining what constitutes an LIO. Third, the Lego Test is introduced and explained in order to provide practitioners with a method for identifying LIOs under MJA 2016. Finally, the Lego Test will be used with the new Article 120(b)(2)(A)<sup>15</sup> to demonstrate the significant practical implications of these recent changes and how, under MJA 2016, an accused is potentially on notice of a whole host of previously-unimagined offenses.

### **A History of LIO Analysis Under the UCMJ**

When addressing and analyzing LIOs under the UCMJ, military appellate courts have been primarily concerned with one issue: whether the accused was properly placed on notice that they must defend against such a charge.<sup>16</sup> This requirement found its roots in notions of due process—that an accused should only be required to defend against what is on a charge sheet or indictment.<sup>17</sup>

While notice may appear to be a relatively straight-forward concept, the method by which military appellate courts have determined whether that notice has been provided was continually developing.

#### **The First Elements Test**

Prior to 2019, Article 79’s text only required that “an accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein.”<sup>18</sup> Such a broad definition meant courts had a great deal of latitude to determine what offenses were “necessarily included” in the greater offense.

The first elements test came from the Supreme Court’s 1989 decision in *Schmuck v. United States*, which established an elements test for determining federal LIOs.<sup>19</sup> Prior to *Schmuck*, military courts had applied a loose test that granted broad discretion to military judges in determining LIOs.<sup>20</sup> Under this test, military judges could instruct LIOs when the “offenses [were] substantially the same kind,” even when the offenses contained different elements.<sup>21</sup> This reading of Article 79 placed significant responsibility in the hands of military judges, at both the trial and appellate levels, to determine what exactly was “fairly embraced” by the charged offenses.<sup>22</sup> In retrospect, it is easy to recognize how such variability could run afoul of the due process requirement of notice. Despite these potential issues, the impetus for change did not come from within the military appellate system. Instead, it came from the U.S. Supreme Court.

With *Schmuck*, the Supreme Court adopted an “elements test” to determine LIOs for federal criminal offenses.<sup>23</sup> The Court hoped to reduce confusion and provide some certainty on what instructions would be appropriate in a given case.<sup>24</sup> The Court was concerned that the inherent relationship approach—in use at the time—allowed for “questions of degree and judgment,” increasing the variability of results; this ran afoul of the “certainty and predictability” sought in criminal procedure.<sup>25</sup> Notably, when addressing the constitutional requirement of notice under such an approach, the Court expressed concern that LIOs would not be identified until after all the evidence had been introduced at trial.<sup>26</sup> Given the

similarities between the federal rule and Article 79, it is unsurprising that military courts took notice of the Court’s decision in *Schmuck*.

With *United States v. Teters*, the Court of Military Appeals *de facto* established *Schmuck*’s elements test as the standard for determining LIOs under the UCMJ.<sup>27</sup> The military followed the Supreme Court’s lead and explicitly did away with the “fairly embraced” test.<sup>28</sup> While this decision may have provided a working test for enumerated punitive articles, the *Teters* test still had to grapple with the peculiarities of the military justice system, particularly the General Article.<sup>29</sup>

#### **The Elements Test Meets the Military Justice System**

Over the next seventeen years, military courts sought to carve out exceptions to the elements test in order to accommodate some of the unique features of the military justice system.<sup>30</sup> Throughout these cases, the military justice system, and its practitioners, tried to wriggle away from an elements test that would have resulted in significant changes to its practice. For example, in *United States v. Foster*, the Court of Appeals for the Armed Forces (CAAF) held that all enumerated punitive articles in the UCMJ contained an implicit element—that the conduct was prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces—in order to allow offenses under the General Article to be an LIO of enumerated offenses.<sup>31</sup> Without this implicit element, the elements test would have prevented an Article 134 offense from ever being an LIO of an enumerated offense, even if they were listed as such in the *MCM*.

This time period also saw CAAF read the requirements for proper notice rather broadly, providing some flexibility to military practitioners. The Court of Appeals for the Armed Forces held that notice was provided not just through the required elements of the statute, but also through those alleged in the specification.<sup>32</sup> This was known as the “pleadings-elements approach” to LIO determinations.<sup>33</sup> Notably, in expanding the definition of notice, CAAF looked beyond the statutory language—to the presidentially-provided explanation



to Article 79—a practice that later CAAF decisions would back away from.<sup>34</sup>

### **Notice Moves the Military Back Toward the Strict Elements Test**

The late-2000s saw CAAF—and military jurisprudence—move toward a stricter interpretation of the elements test, while continuing to rely on the importance of proper notice for determining the validity of LIOs. For example, in addressing whether a violation of Article 134(2) (service discrediting conduct) was an LIO of Article 134(3) (non-capital offenses), the court looked to whether the accused was on notice that by pleading guilty to the incorporated offense under Article 134(3), he was also admitting guilt to Article 134(2).<sup>35</sup>

The next year, in *United States v. Miller*, CAAF held that a Court of Criminal Appeals could not substitute a finding of guilty to a “simple disorder” under Article 134 for a finding of guilty to an enumerated punitive offense, following a finding of factual insufficiency to the enumerated offense.<sup>36</sup> Relying on the importance of fair notice and the due process requirements of the Fifth Amendment, the *Miller* case overruled *Foster* and held that an Article 134 offense is not *per se* included in all of the enumerated punitive articles.<sup>37</sup> However, this holding did not address other LIO issues relating to Article 134.<sup>38</sup>

### **United States v. Jones and the Return of the Strict Elements Test**

The LIO odyssey finally arrived back at a strict elements test with CAAF’s 2010 decision in *United States v. Jones*, which held that a strict elements test was the only manner that would ensure that an accused is provided proper notice.<sup>39</sup> In *Jones*, the military judge *sua sponte* gave instructions for indecent acts under Article 134 and as an LIO of rape under Article 120—even though they possessed no common elements.<sup>40</sup> Following deliberations, the accused was convicted of the LIO of committing an indecent act.<sup>41</sup> Telegraphing its answer, CAAF framed the issue as:

[W]hether an offense is “necessarily included” in, a subset of, or an LIO of a charged “greater” offense when it has no elements in common with

the elements of the charged offense but is nonetheless either listed as an LIO in the MCM or has been held by this Court to be an LIO on some other ground.<sup>42</sup>

In answering the presented issue, CAAF notably began its analysis by framing the issue as one “implicat[ing] constitutional due process imperatives of notice” and the authority to designate LIOs, two issues at the center of the new Article 79.<sup>43</sup> The Court of Appeals for the Armed Forces opined that proper notice is provided when an LIO is a subset of the greater offense “in every instance,” and not dependent on case-specific facts—a repudiation of the pleadings-elements approach.<sup>44</sup> The court noted that decisions, such as *Foster*, in drifting away from the elements test of *Teters*, ran afoul of its recent focus on “the significance of notice and elements in determining whether an offense is a subset (and thus an LIO) of the greater offense.”<sup>45</sup>

In addition, CAAF affirmed that the authority to designate LIOs rested solely with Congress, and not the President.<sup>46</sup> This issue was raised because the government argued that the MCM’s explanation sections, which provided lists of LIOs, were sufficient to provide due process notice of possible LIOs the accused may face.<sup>47</sup> The Court of Appeals for the Armed Forces found, however, that the designation of criminal offenses under the UCMJ is a power of Congress—not the President.<sup>48</sup> Accordingly, the determination of LIOs should be based on the Congressionally-created elements.<sup>49</sup>

The *Jones* majority was careful to distinguish this limit on executive power from the authorities specifically delegated to the President under the UCMJ. For example, while persuasive to courts, the President’s listing of ways that Article 134 can be violated was “not defining offenses but merely indicating various circumstances in which the elements of Article 134, UCMJ, could be met;” and, therefore, distinct from the issue at hand.<sup>50</sup> The court went on to contrast Articles 36 and 56, which authorize the President to prescribe certain rules and maximum punishments, with Article 79; which, at the time, delegated no authority to the President to determine LIOs.<sup>51</sup> In

doing so, CAAF left open the possibility that—in the future—Congress could delegate such authority to the President.<sup>52</sup>

After *Jones*, and until 1 January 2019, the determination of LIOs was based on a strict elements test, with reference to those elements prescribed by statute. When performing such a test,

one compares the elements of each offense. If all of the elements of offense X are also elements of offense Y, then X is an LIO of Y. Offense Y is called the greater offense because it contains all of the elements of offense X along with one or more additional elements.<sup>53</sup>

With a refined LIO landscape, it was then up to practitioners to perform, and—in some cases—stumble over the elements test.

### **The Importance of Notice and the Way Ahead**

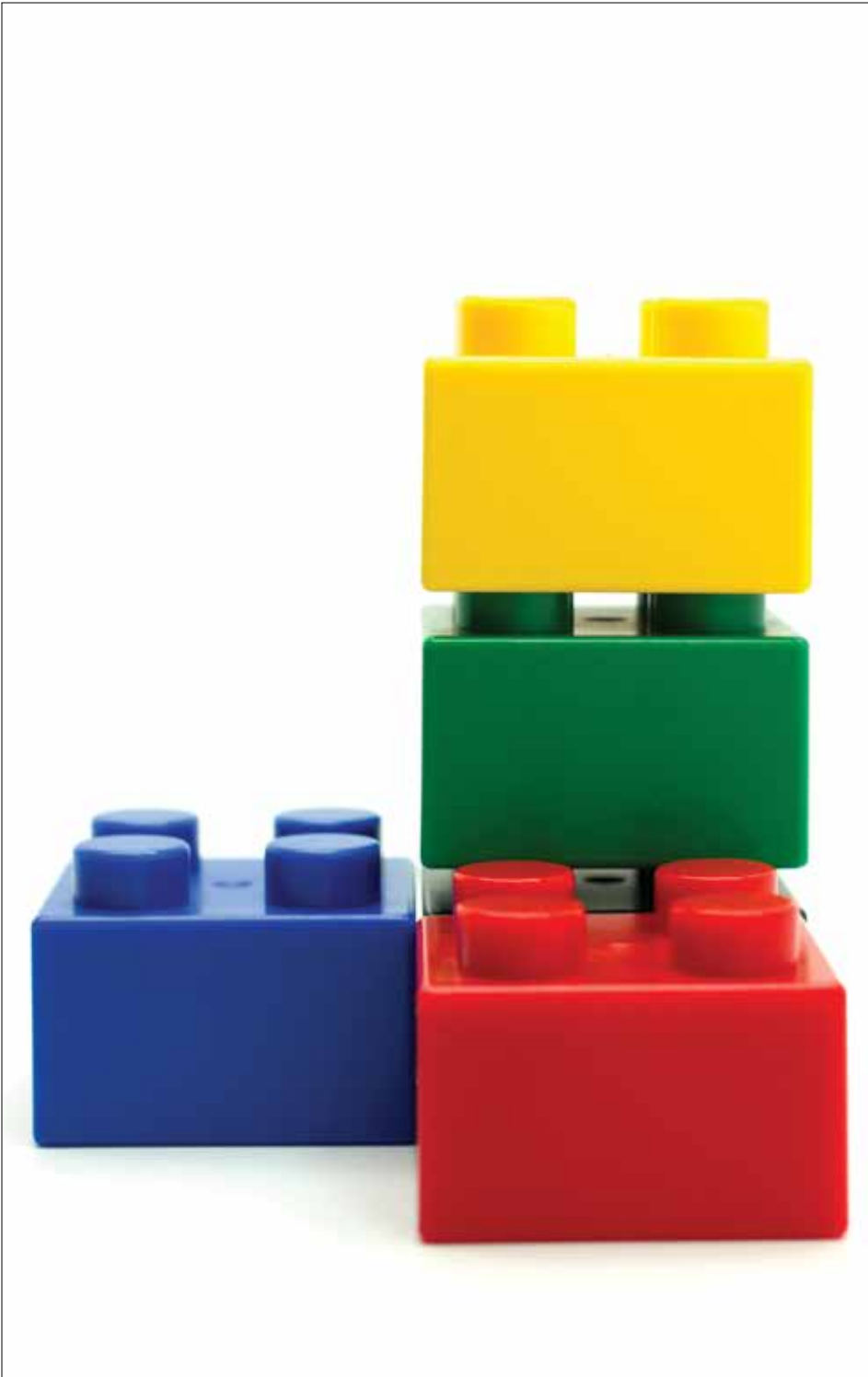
In the post-*Jones* world, CAAF continued to focus on the importance of due process and notice when examining pleadings, even when not specifically addressing LIOs.<sup>54</sup> While the strict elements test may be a relatively new approach, the focus on due process and notice has been of consistent concern. Under the strict elements test, the necessary notice was provided through examination of the elements of the offense(s) on the charge sheet. However, in an MJA-2016 world, such due process notice can now originate from a second source.

### **Military Justice Act of 2016**

The Military Justice Act of 2016 arguably represents the most significant changes to the UCMJ in the past half-century.<sup>55</sup> Included within those changes is a complete reworking of the processes for determining LIOs under the UCMJ. Unlike many of the developments that LIO determinations have seen in the past forty years, these changes are *statutory*, rather than judicially-inspired.

### **The New Article 79 and Delegation to the Executive**

Article 79 was dramatically amended by MJA 2016 to provide the Executive the authority to designate LIOs.<sup>56</sup> Whereas the pre-2019 version of Article 79 provided one basis for identifying LIOs, the new Article



(Credit: galichstudio – stock.adobe.com)

79 keeps the “necessarily included” language,<sup>57</sup> while also specifically authorizing the President to designate offenses “reasonably included” in the greater offense.<sup>58</sup> The President designates LIOs through executive order and lists those offenses in

Appendix 12A of the *MCM*.<sup>59</sup> It appears that the drafters took note of the discussion in *Jones* regarding Congress’s authority to delegate this authority to the Executive, and did so.<sup>60</sup> With the signing of Executive Order 13825, the President exercised that

authority and designated a host of specified LIOs of which an accused is now on notice to defend against.<sup>61</sup>

Based on both a plain reading of the statute, and its accompanying explanation, it would appear that determining *all* of an offense’s LIOs would require both performing a strict elements test *and* looking to Appendix 12A.<sup>62</sup> This, however, raises the question of what happens if an LIO in Appendix 12A contains an element not present in the greater offense. Answering that question requires a closer examination of the new Appendix 12A.

#### ***Appendix 12A LIOs that Violate the Elements Test***

Examination of the new Appendix 12A reveals that the President has, in fact, designated as LIOs offenses which would not satisfy the strict elements test. Specifically, a number of the Article 120 violations for rape and sexual assault have LIOs listed in Appendix 12A that contain an element not present in the greater offense: a lack of consent.<sup>63</sup> The presence of a lack of consent as an element in some, but not all, Article 120 offenses has long been a source of confusion for both counsel and judges.<sup>64</sup>

The new Appendix 12A lists a number of LIOs that run directly counter to CAAF’s holding in *United States v. Riggins*, and would not be LIOs under the strict elements test.<sup>65</sup> For starters, Appendix 12A lists Article 128—assault with intent to commit rape—as an LIO of all rape offenses under Article 120, and assault with intent to commit sexual assault as an LIO of all sexual assault offenses.<sup>66</sup> Assault with intent to commit a specified crime contains two elements: (1) that the accused assaulted a certain person, and (2) that at the time of the assault, the accused intended to commit the specified crime.<sup>67</sup> An assault is defined as “an unlawful attempt or offer, made with force or violence, to do bodily harm to another, whether or not the attempt or offer is consummated. It must be done without legal justification or excuse and without the lawful consent of the person affected.”<sup>68</sup> Accordingly, a lack of consent is an element of assault with intent to commit rape or sexual assault. Given that it is listed as an LIO for all rape and sexual assault offenses, and many of those

do not require proof of a lack of consent, it would not be an LIO under the strict elements test of *Jones*.<sup>69</sup>

Furthermore, simple assault under Article 128 is listed as an LIO of rape by force causing or likely to cause death or grievous bodily harm.<sup>70</sup> Under the statutory definitions, a person *cannot* legally consent to force causing or likely to cause death or grievous bodily harm.<sup>71</sup> As in *Riggins*, if charging this theory of rape, the government would not have to prove a lack of consent; they only have to prove that the described force was used, even if that force would have resulted in a legal inability to consent.<sup>72</sup> Therefore, lack of consent is not an element of this subsection of rape. However, its listed LIO—simple assault—has a lack of consent as one of its elements, and would not be an LIO under *Jones*.<sup>73</sup>

Now that an accused charged with any rape or sexual assault offense is on notice via Appendix 12A that an assault may be an LIO of the charged offense, are they on notice that the government may prove a lack of consent? Does that mean that the accused is now entitled to argue the affirmative defense of consent or mistake of fact as to consent? Now that an accused is on notice of a lack of consent, what other offenses will they have to defend against? While the Analysis section for Article 79 contemplates the President's authority to designate LIOs that would not strictly satisfy the elements test, it does not address any of the attendant issues with having an LIO contain elements not included in the greater offense.<sup>74</sup>

### Enter the Lego Test

The Military Justice Act 2016's amendment to Article 79, and the publishing of Appendix 12A, has ended the reign of the strict elements test over the LIO universe. While *Jones*'s reasoning and logic still apply to identifying LIOs under Article 79(b) (1), they are no longer the final authority for determining *all* LIOs. To adapt to the new LIO world in which the military justice system now finds itself, a new test is needed. The Lego Test satisfies that need by adhering to the principle well-established by case law—the use of elements ensures that proper notice is provided to an accused. The Lego Test differs from the strict elements test in that those elements come

from the charged offense, as well as those listed in Appendix 12A.

The Lego Test is a three-step process that involves identifying elements, or “building blocks,” and then using those “blocks” to “build” offenses, of which the accused is now on notice to defend against.

## **The Lego Test is a three-step process that involves identifying elements, or “building blocks,” and then using those “blocks” to “build” offenses, of which the accused is now on notice to defend against.**

First, practitioners will look to the charged offenses and identify all of the elements (the “building blocks”) contained therein. This practice should be second-nature to seasoned practitioners, as it has been the method for determining LIOs since *Jones*.<sup>75</sup> The second step involves identifying any enumerated LIOs in Appendix 12A and, likewise, breaking those into their elements. The final step is to take all the elements identified in the first and second steps and determine what offenses can be created, or “built,” from those elements—or their legally less serious versions.

Under the new Article 79, an accused will now be on notice to defend against all of the preferred charges, including those listed in Appendix 12A and those identified via the Lego Test. Put differently, an accused is now on notice of a collection of elements against which he or she must defend. Once provided proper notice of those elements, an accused may properly be convicted of any offense which contains some combination of those elements.<sup>76</sup> When constructing those offenses, it is not necessary that the statutory language be identical; rather, practitioners should continue to use the normal principles of statutory interpretation.<sup>77</sup>

While building offenses from a collection of elements may seem out of place in a criminal justice system, it is wholly in accord with established military appellate decisions. Throughout its opinions, from *Teters* to *Jones* and *Riggins*, CAAF has been primarily concerned with the due process

requirement that an accused be provided proper notice of which offenses they may stand convicted.<sup>78</sup> Using the Lego Test to build offenses satisfies this requirement. Furthermore, CAAF's concern over the Executive improperly identifying LIOs has been answered with the amending of

Article 79, so all the elements noticed by Appendix 12A are done so through proper delegation of Congressional authority.<sup>79</sup>

### Illustrative Example: Sexual Assault and the Lego Test

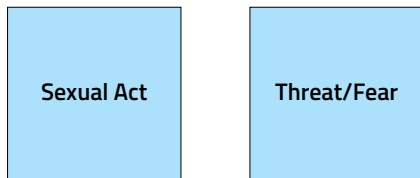
To illustrate how the Lego Test may play out at trial, it is helpful to use an actual punitive article. Given that it has been at the center of many an LIO issue, Article 120 and its various subsections will serve as an apt demonstrative aid.<sup>80</sup>

For this example, an accused is charged with committing a sexual assault by threatening or placing the victim in fear.<sup>81</sup> Performing the Lego Test, the first step is to examine the elements of the charged offense.<sup>82</sup> The first element is the sexual act alleged.<sup>83</sup> The second is issuing the threat that places the victim in fear.<sup>84</sup>

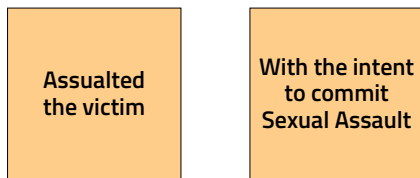
The next step of the Lego Test involves identifying any listed LIOs in Appendix 12A and breaking them into their elements. Article 128, assault with the intent to commit sexual assault, is listed as an LIO of all sexual assault violations.<sup>85</sup> Assault with intent to commit a specified crime has two elements. The first is that the accused assaulted the victim; the second is that when the accused did so, he intended to commit a sexual assault.<sup>86</sup> As the first element—committing an assault—is an offense comprised of multiple elements, it too must be broken down. Depending on the facts at issue, an assault can be charged a number of ways.<sup>87</sup> One of the elements of assault, regardless of how it is charged, is that it

## Illustrative Example: Sexual Assault and the Lego Test

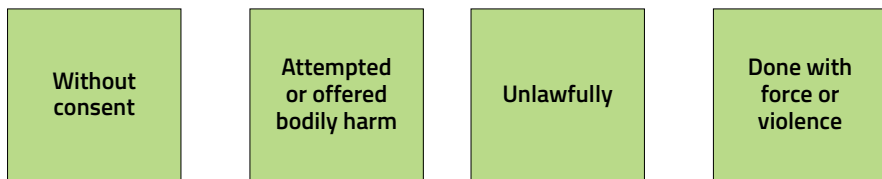
### Charged Offense: Sexual Assault via Threat/Fear – Article 120(b)(1)(A) (2019) elements:



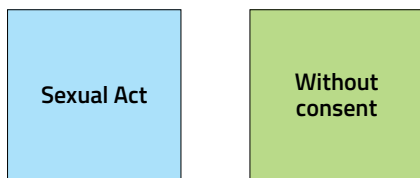
### Appendix 12A LIO: Assault with Intent to Commit Sexual Assault – Article 128(c) elements:



### Assault elements:



### Built Offense: Sexual Assault Without Consent – Article 120(b)(2)(A) (2019)



was committed without the consent of the victim.<sup>88</sup> Therefore, in the current example, this Article 128 offense adds a number of elements: (1) that the act occurred without the consent of the victim; (2) that the accused attempted to do, or offered to do, bodily harm to a certain person; (3) that the attempt or offer was done unlawfully; and (4) that the attempt or offer was done with force or violence.<sup>89</sup>

Having identified the building blocks, the final step of the Lego Test involves identifying those offenses of which the accused has been provided proper notice to defend against. An offense that is now an LIO under the Lego Test, but would not have been under the strict elements test, is a sexual assault committed without the

consent of the victim.<sup>90</sup> This sexual assault contains two elements: (1) that the accused committed a sexual act upon the victim; and (2) that the act was done without the consent of the victim.<sup>91</sup> The first element comes from the charged offense and the second element is one of the elements of the listed LIO in Appendix 12A.<sup>92</sup> Notably, this offense would *not* be an LIO under the strict elements test, as a lack of consent is not raised by placing someone in fear.<sup>93</sup>

Should a trial counsel or a military judge<sup>94</sup> propose an instruction for sexual assault without consent, an astute defense counsel may argue that it is not a proper LIO because it does not fit neatly into either Article 79(b)(1) *or* Article 79(b)(2). They would argue that (1) it is not an

LIO under the strict elements test, and therefore not “necessarily included in the offense charged” and (2) it is not listed in Appendix 12A, therefore no further discussion or analysis is necessary.<sup>95</sup> While some military judges may accept this argument, and therefore end the discussion, some may not. These judges may instead look to decades of precedent focused on the importance of notice and ask whether the accused was on notice that they would have to defend against these elements, and therefore this offense.<sup>96</sup> A defense counsel would be hard-pressed to explain how they were not aware that a lack of consent may be an issue, given that an offense containing that element is listed in Appendix 12A. If it came down to a rigid reading of the new Article 79, against decades of precedent focused on the due process requirement of notice, history would seem to be on the side of notice. Given the recent statutory change, and the corresponding uncertainty as to how courts will interpret these changes, defense counsel do their client a disservice by ignoring potential offenses raised by the Lego Test, as well as the associated defenses they may unlock.<sup>97</sup>

### Practical Implications

Responsibility for performing this test will fall on the shoulders of all practitioners but, as they must ultimately determine what to instruct as an LIO, military judges will bear the brunt of these decisions.<sup>98</sup> This responsibility is significant, as incorrect LIO determinations can have drastic consequences, including the dismissal of charges.<sup>99</sup> As it will likely take time for cases tried under the new Article 79 to work their way through the appellate process, military judges will function without the specific guidance of appellate decisions for the immediate future. However, as discussed *supra* in “A History of LIO Analysis Under the UCMJ,” a military judge focusing on whether an accused was fairly on notice that they must defend against a certain charge, and its elements, will be adhering to decades of precedent and judicial guidance.<sup>100</sup>

Counsel for both parties will also continue to play active roles in the manner in which LIOs are determined and litigated. While military judges should instruct on



LIOs properly identified by the Lego Test, trial counsel can always consider charging in the alternative, as that will also provide proper notice to the accused.<sup>101</sup> Across the aisle, a diligent defense counsel will either ask for a preliminary ruling as to what LIOs are potentially available, or be prepared to defend against any offense raised by the Lego Test. Neither party will be viewed kindly if they continue to operate with a pre-2019 mindset when it comes to LIO identification.

## Conclusion

The 2019 version of Article 79 created a new LIO landscape for military justice practitioners. With Congress explicitly delegating the authority to designate LIOs to the Executive, the strict elements test of *Jones* is no longer controlling for LIO determinations. While that test is no longer controlling, its elements-based analysis lives on, now in the Lego Test. Offenses—both on the charge sheet and identified in Appendix 12A—must be broken down to their basic elements to determine what offenses are actually available for instruction as LIOs. In doing so, practitioners will be following the text of the amended Article 79 and, most importantly, will be adhering to decades of precedent protecting an accused's due process right to proper notice.

The Lego Test will accomplish what the strict elements test used to—it will provide a relatively easy method by which practitioners can ascertain which offenses may be instructed as LIOs.<sup>102</sup> It is also, by its nature, adaptable to future changes. Should the President list additional offenses in Appendix 12A, the same methodology would still apply to properly identify LIOs.

The Military Justice Act of 2016 dramatically changed many aspects of military justice practice, including how to determine LIOs. However, these changes do not mean that practitioners should abandon principles that have guided military justice practice pre-MJA 2016. Notice will continue to be the guiding force in identifying LIOs, and applying the Lego Test will ensure an accused's right to that proper notice will remain protected. **TAL**

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## Notes

1. *United States v. Weymouth*, 43 M.J. 329, 342 (C.A.A.F. 1995) (Crawford, J., concurring in the result).
2. *United States v. Jones*, 68 M.J. 465, 470 (C.A.A.F. 2010). The strict elements test is performed by lining up the elements of one offense with another. If the elements of one offense are a subset of those of another offense, then the first is an LIO of the second. *Id.* See also discussion *infra* notes 47, 55 and accompanying text.
3. See, e.g., *United States v. Riggins*, 75 M.J. 78 (C.A.A.F. 2016); *United States v. Mostenbocker*, No. 201600285, 2017 CCA LEXIS 359 (N-M. Ct. Crim. App. Aug. 10, 2017).
4. MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016) [hereinafter 2016 MCM].
5. UCMJ art. 79(b)(1) (2016).
6. UCMJ art. 79(b)(2) (2016).
7. Exec. Order No. 13,825, 83 Fed. Reg. 9,889, 10,346–53 (Mar. 1, 2018) (publishing Appendix 12A to the MCM).
8. For example, Article 128, Assault with intent to commit rape, is listed as an LIO for all Rape offenses under Article 120. Such an assault offense requires proof that the victim did not consent to the assault. However, lack of consent is not an element in each rape offense under Article 120. Therefore, the presidentially-identified LIO contains an element not present in the greater offense. See *infra* Appendix 12A LIOs that Violate the Elements Test.
9. See *Schmuck v. United States*, 489 U.S. 705, 720–21 (1989).
10. *United States v. Riggins*, 75 M.J. 78, 85–86 (C.A.A.F. 2016).
11. See, e.g., *United States v. Jones*, 68 M.J. 465, 470 (C.A.A.F. 2010).
12. This name comes from the way charges will now be “built,” not the pain associated with standing on such a piece. Lego Brand building bricks are toy blocks that are used to build structures by stacking the bricks on top of one another. See generally *About Us: The LEGO® Brand*, LEGO, <https://www.lego.com/en-us/aboutus/lego-group/the-lego-brand/> (last visited Feb. 8, 2021).
13. *United States v. Teters*, 37 M.J. 370 (C.M.A. 1993).
14. *Jones*, 68 M.J. 465.
15. UCMJ art. 120(b)(2)(A) (2017).
16. See, e.g., *Schmuck v. United States*, 489 U.S. 705, 717–18 (1989); *Jones*, 68 M.J. at 468; *United States v. Baker*, 14 M.J. 361, 367–68 (C.M.A. 1983), *overruled by Teters*, 37 M.J. 370 at 375–76; *United States v. Mostenbocker*, No. 201600285, 2017 CCA LEXIS 359, at \*19 (N-M. Ct. Crim. App. Aug. 10, 2017).
17. See *Schmuck*, 489 U.S. at 747; *Jones*, 68 M.J. at 468 (quoting *United States v. Medina*, 66 M.J. 21, 26–27 (C.A.A.F. 2008)).

18. UCMJ art. 79 (2016) (emphasis added).

19. *Schmuck*, 489 U.S. at 716–18. *Schmuck* was examining Federal Rule of Criminal Procedure 31(c) which provided, “The defendant may be found guilty of an offense necessarily included in the offense charged,” language almost identical to that of Article 79. *Id.* at 708 n.1; *Teters*, 37 M.J. at 375.

20. *Baker*, 14 M.J. at 367–68.

21. *Id.*

22. See *id.* at 368.

23. *Schmuck*, 489 U.S. at 716–18.

24. *Id.* at 721 (quoting *United States v. Schmuck*, 380 F.2d 384, 389–90 (7th Cir. 1988)).

25. *Id.*

26. *Id.* at 719–21.

27. *United States v. Teters*, 37 M.J. 370, 375–76 (C.M.A. 1993).

28. *Id.* at 376.

29. UCMJ art. 134 (2016). Article 134 criminalizes three types of acts: (1) “those disorders and neglects prejudicial to good order and discipline;” (2) “conduct of a nature to bring discredit upon the armed forces;” and (3) “crimes and offenses not capital.” *Id.*

30. See, e.g., *United States v. Weymouth*, 43 M.J. 329, 333 (C.A.A.F. 1995); *United States v. Foster*, 40 M.J. 140, 143 (C.M.A. 1994), *overruled in part by United States v. Miller*, 67 M.J. 385, 386 (C.A.A.F. 2009).

31. *Foster*, 40 M.J. at 143.

32. *Weymouth*, 43 M.J. at 333.

33. *Id.* at 335.

34. *Id.* at 333. See, e.g., *United States v. Jones*, 68 M.J. 465, 471–72 (C.A.A.F. 2010).

35. *United States v. Medina*, 66 M.J. 21, 27 (C.A.A.F. 2008). In *Medina* the accused had been charged with multiple specifications of assimilated crimes under Article 134(3), however, during the guilty plea inquiry the military judge had the accused also confirm that his conduct was service discrediting. On appeal, the Army Court of Criminal Appeals amended the findings for two of the specifications, instead finding him guilty of the purportedly LIO of Article 134(2). *Id.* at 22.

36. *United States v. Miller*, 67 M.J. 385, 386 (C.A.A.F. 2009).

37. *Id.* at 388–89.

38. Such issues included “whether a lesser included offense that includes elements not included in the greater offense may be affirmed in other circumstances, i.e., where the lesser included offense is listed in the Manual for Courts-Martial, United States or where the lesser included offense is not objected to at trial and is instructed upon by the military judge.” *United States v. McCracken*, 67 M.J. 467, 468 n.2 (C.A.A.F. 2009).

39. *Jones*, 68 M.J. at 468.

40. *Id.* at 466–67.

41. *Id.* at 468. This was common practice at the time, as CAAF pointed out that the MCM listed Indecent Act as an LIO of Indecent Assault, and Indecent Assault as an LIO of Rape and that Indecent Acts had been previously held to be an LIO of Rape. *Id.* at 467 (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶¶ 45.d(1)(c), 63.d(2) (2005); *United States v. Schoofield*, 40 M.J. 132 (C.M.A. 1994)).

42. *Id.* at 467.
43. *Id.* at 468 (emphasis added).
44. *Id.*
45. *Id.* at 470 (emphasis added).
46. *Id.* at 468, 471–72.
47. *Id.* at 470.
48. *Id.* at 471.
49. *Id.*
50. *Id.*
51. *Id.* at 472.
52. *Id.*
53. *Id.* at 470.
54. The Court of Appeals for the Armed Forces’ focus on the importance of pleadings providing the necessary notice of the elements to be defended against was at the center of *United States v. Fosler* in which the court held that Article 134 offenses must “expressly or by necessary implication” allege the terminal element. *United States v. Fosler*, 70 M.J. 225, 226 (C.A.A.F. 2011).
55. See, e.g., Amy Bushatz, *Need to Know: These New UCMJ Laws Start Jan. 1*, MILITARY.COM (Dec. 31, 2018), <https://www.military.com/daily-news/2018/12/31/need-know-these-new-ucmj-laws-start-jan-1.html>; Marine Administrative Message, 631/18, 052049Z NOV 18, Commandant, Marine Corps, subject: Military Justice Act of 2016 Training for Commanding Officers With Court-Martial Convening Authority.
56. UCMJ art. 79 (2016).
57. UCMJ art. 79(b)(1) (2016).
58. UCMJ art. 79(b)(2), 79(c) (2016).
59. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 3.b.(3)(B) (2019) [hereinafter 2019 MCM]. Appendix 12A existed prior to MJA 2016, but was only for convenience, as the strict elements test was the ultimate arbiter of LIOs. See 2016 MCM, *supra* note 4, app. 12A.
60. See *supra* notes 51–52 and accompanying text.
61. Exec. Order No. 13,825, 83 Fed. Reg. 9,889, 10,346–53 (Mar. 1, 2018) (publishing Appendix 12A to the MCM).
62. 2019 MCM, *supra* note 59, pt. IV, ¶ 3.b.(1).
63. See *infra* notes 65–73 and accompanying text.
64. See UCMJ art. 120 (2017); *United States v. Riggins*, 75 M.J. 78, 81–82, 84 (C.A.A.F. 2016).
65. *Riggins* dealt with an accused that was convicted of various specifications of assault consummated by a battery, in violation of Article 128, as LIOs of sexual assaults and abusive sexual contacts that were accomplished by placing the victim in fear. *Riggins* was a military judge-alone case in which the military judge decided *sua sponte* to consider the Article 128 violations as LIOs, even though the defense objected to the assaults being LIOs. In holding that Article 128 is not an LIO of a sexual assault or abusive sexual contact accomplished by placing the victim in fear, CAAF distinguished between situations in which the government must prove facts in which a person would be legally unable to consent, and situations in which the government is required to affirmatively prove that the victim did not, in fact, consent to the conduct in question. The Court of Appeals for the Armed Forces held that since Article 120 offenses committed via fear did not affirmatively require the government to prove a lack of consent, then an offense that requires that element, such as assault consummated by battery, is not an LIO under the strict elements test. *Riggins*, 75 M.J. at 81–84. Put differently, a lack of consent is not an implied element of a sexual assault, or abusive sexual contact, by placing the victim in fear. *United States v. Oliver*, 76 M.J. 271, 274 (C.A.A.F. 2017) (citing *Riggins*, 75 M.J. 78 at 83–84).
66. 2019 MCM, *supra* note 59, app. 12A at A12A-6 to -7.
67. 2019 MCM, *supra* note 59, pt. IV, ¶ 77.b.(5).
68. 2019 MCM, *supra* note 59, pt. IV, ¶ 77.c.(2)(a).
69. See *Riggins*, 75 M.J. at 83–84.
70. 2019 MCM, *supra* note 59, app. 12A at A12A-6.
71. UCMJ art. 120(g)(7)(B) (2017).
72. See *Riggins*, 75 M.J. at 83–84.
73. 2019 MCM, *supra* note 59, pt. IV, ¶ 77.c.(2)(a). See, e.g., *United States v. Johnson*, 54 M.J. 67, 69 n.3 (C.A.A.F. 2000) (a lack of consent is an element of assault consummated by battery); *United States v. Arab*, 55 M.J. 508, 515 (A. Ct. Crim. App. 2001) (a lack of consent is an element of assault).
74. 2019 MCM, *supra* note 59, pt. IV, ¶ 79 analysis, at A17-1.
75. See *United States v. Jones*, 68 M.J. 465, 470 (C.A.A.F. 2010).
76. Provided that the evidence properly raises those elements or offenses. See 2019 MCM, *supra* note 59, pt. IV, ¶ 79 analysis, at A17-1.
77. See *United States v. Gaskins*, 72 M.J. 225, 235 (C.A.A.F. 2013); *United States v. Bonner*, 70 M.J. 1, 2 (C.A.A.F. 2011).
78. See discussion *supra* A History of LIO Analysis Under the UCMJ and note 65.
79. See *Jones*, 68 M.J. at 472.
80. UCMJ art. 120 (2017). This example will use the 2017 version of Article 120, as that is the one that will confront the new Article 79. *Id.*
81. UCMJ art. 120(b)(1)(A) (2017). The 2012 version of this charge was the one at issue in *United States v. Riggins*. *United States v. Riggins*, 75 M.J. 78, 83 (C.A.A.F. 2016).
82. See *supra* fig. (containing a visual depiction of the Lego Test as applied to this example).
83. UCMJ art. 120(b)(1)(A) (2017).
84. *Id.*
85. 2019 MCM, *supra* note 59, app. 12A at A12A-7.
86. *Id.*, pt. IV, ¶ 77.b.(5).
87. See UCMJ art. 128(a) (2018).
88. See *supra* note 73.
89. 2019 MCM, *supra* note 59, pt. IV, ¶ 77.b.(1).
90. UCMJ art. 120(b)(2)(A) (2017) (sexual assault without consent). This specific subsection of Article 120 did not exist prior to MJA 2016. It replaces sexual assault via bodily harm. UCMJ art. 120(b)(1)(B) (2012).
91. 2019 MCM, *supra* note 59, pt. IV, ¶ 60.b.(2)(d).
92. See *infra* app., fig. “Built Offense: Sexual Assault Without Consent—Article 120(b)(2)(A) (2019).”
93. See *United States v. Riggins*, 75 M.J. 78, 83–84 (C.A.A.F. 2016).
94. Military judges have a *sua sponte* duty to instruct on LIOs “reasonably raised by the evidence.” 2019 MCM, *supra* note 59, pt. IV, ¶ 3.b.(4). This does not require a significant amount of evidence—only “some evidence to which the court members may attach credit if they so desire.” *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000).
95. See UCMJ art. 79(b) (2016).
96. See discussion *supra* A History of LIO Analysis Under the UCMJ.
97. For example, evidence of an accused’s military character is admissible to show the probability of innocence for Article 128, but not for Article 120. Therefore, the instruction of certain LIOs will make previously-inadmissible evidence both relevant and admissible. 2019 MCM, *supra* note 59, MIL. R. EVID. 404(a)(2)(A).
98. See discussion *supra* note 94; see, e.g., *United States v. Ober*, 66 M.J. 393, 405 (C.A.A.F. 2008) (citing *United States v. Westmoreland*, 31 M.J. 160, 163–64 (C.M.A. 1990)).
99. See, e.g., *United States v. Riggins*, 75 M.J. 78, 86 (C.A.A.F. 2016)..
100. See discussion *supra* A History of LIO Analysis Under the UCMJ.
101. See 2019 MCM, *supra* note 59, R.C.M. 307(c)(3) discussion (G)(v). This strategy requires some cleanup, should the accused be convicted of both offenses.
102. Assuming they are reasonably raised by the evidence. See discussion *supra* note 94.



## AROUND THE CORPS

CPT Justin Kman presents SFC William Voelcker (pictured center) with the class gift from AIT Class 018-20. The students demonstrated the skills they acquired at AIT by presenting their instructor with an Article 15, charging him with, among other things, providing exceptional leadership. CPT Kman found him guilty of all specifications. (Credit: SSG Kathryn Altier)



(Credit: sommersby – stock.adobe.com)



## No. 3

# Combining Traditional and Progressive *Jus ad Bellum* Threat Evaluations in Response to Autonomous Weapon Systems

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By Major Gregory L. Collins

*As was true in previous armed conflicts, this new technology raises profound questions—about who is targeted, and why; about civilian casualties, and the risk of creating new enemies; about the legality of such strikes under U.S. and international law; about accountability and morality.<sup>1</sup>*

A cloud of tension hovers over the Combatant Command operations center.<sup>2</sup> Two adjacent States are quickly destabilizing after a recent natural disaster. One State is an ally of the United States, while the other State is a competitor. The operations center team waits for an international armed conflict to erupt. The influx of third-party agencies and nongovernmental organizations assisting with the natural disaster recovery further complicates the confusion on the ground, in the air, and at sea.

The competitor State uses this chaos as cover to achieve its objectives in the region. Amidst the disorder, the operations center team must parse out lawful military objectives within the swarm of State assets, nongovernmental organization platforms, and civilian objects. A targeting working group determines criteria for how the Combatant Commander should evaluate the numerous civilian

and military autonomous systems flying, driving, cruising, and hovering throughout the region. There is no playbook for evaluating autonomous systems in volatile and uncertain environments. So, the targeting working group must combine traditional targeting criteria with a healthy dose of imagination, understanding of the intent behind international law, and focus on the mission.

Numerous hypothetical scenarios demonstrate why States should combine traditional and progressive *jus ad bellum* evaluations of autonomous weapon systems (AWS) to evaluate threats posed by cutting-edge technologies. Autonomous weapon systems capabilities disrupt the traditional evaluations of State coercive acts under *jus ad bellum*.<sup>3</sup> Now, States may employ AWS to conduct coercive acts that do not justify a use of force response under traditional *jus ad bellum* evaluations.<sup>4</sup>

Therefore, this article argues that States should update and adapt their *jus ad bellum* evaluative frameworks for State coercive acts to apply both 1) a traditional instrument-based evaluation and 2) a progressive effects-based evaluation when responding to AWS actions.

The rapid expansion of AWS technology will continue to outpace law and policy.<sup>5</sup> There are tremendous incentives for both States and non-state actors<sup>6</sup> to develop AWS.<sup>7</sup> To take advantage of the current limitations of traditional *jus ad bellum* evaluations, States will deliberately employ AWS technologies whose consequences fall below the customary threshold of an armed attack.<sup>8</sup>

To keep international law in front of technology, this article provides a framework for national security law attorneys and policy makers to overcome these traditional limitations in evaluating AWS coercive acts. This article proposes that States should simultaneously evaluate AWS employment through both the lenses of traditional *jus ad bellum* instrument-based evaluations<sup>9</sup> and by adopting the progressive consequence-based evaluations.<sup>10</sup>

## **The rapid expansion of AWS technology will continue to outpace law and policy.**

Updating the framework of *jus ad bellum* analysis will allow attorneys and policy makers more flexibility in advising commanders on appropriate responses to AWS.

In providing this proposed framework, the article first summarizes the traditional *jus ad bellum* principles.<sup>11</sup> The principle of necessity receives deeper analysis because its dimension of imminence is a key factor for the proposed framework.<sup>12</sup> After achieving a common understanding, the article then defines levels of autonomy and outlines the impact of autonomy on traditional notions of *jus ad bellum*. Next, the article proposes a framework for evaluating threats posed by AWS and criteria to determine whether AWS actions justify a use of force response. Finally, three vignettes illustrate the complexity and nuances surrounding possible employment of AWS

by applying the proposed framework. This article concludes that adopting this proposed framework is the best way for the law to stay in front of AWS, even as it advances at breakneck speed.

### **Jus ad Bellum**

The first step in providing a new framework for evaluating AWS actions is to review the most important traditional principles of *jus ad bellum*. *Jus ad bellum* defines when States may resort to armed force.<sup>13</sup> The *Department of Defense (DoD) Law of War Manual* describes *jus ad bellum* principles to include: “a competent authority to order the war for a public purpose; a just cause; the means must be proportionate to the just cause; all peaceful alternatives must have been exhausted; and a right intention on the part of the just belligerent.”<sup>14</sup>

In the aftermath of World War II, the international community collectively created the United Nations (U.N.) in an attempt to regulate State action.<sup>15</sup> Article 2(4) of the U.N. Charter prohibits States from “the threat or use of force” against other States.<sup>16</sup> Despite the Article 2(4) prohibition, Article 51 of the U.N. Charter also

authorizes the “inherent right of individual or collective self-defence if an armed attack occurs.”<sup>17</sup> Unfortunately, since the ratification of the U.N. Charter, this Article 51 exception has often swallowed the Article 2(4) prohibition.<sup>18</sup>

Therefore, outside of the U.N. Charter, the customary right of self-defence may also determine what coercive State actions justify a use of force response under *jus ad bellum*.<sup>19</sup> In practice, each State action requires a fact-specific evaluation of factors to determine whether a coercive act amounts to a “use of force.”<sup>20</sup> And, in circumstances when a use of force has not yet occurred, then there is also “little evidence of any current agreed-upon standards” for explaining the concept of imminence.<sup>21</sup> Therefore, for judge advocates advising commanders in dynamic environments, the most important

*jus ad bellum* principle for evaluating coercive acts is necessity because “imminence has emerged as ‘the most problematic variable’ of anticipatory self-defense.”<sup>22</sup>

### **Necessity**

The principle of necessity “dictates that a state may not use force unless it is left with no other viable options.”<sup>23</sup> If an armed attack occurs, Article 51 of the U.N. Charter authorizes a State to exercise its inherent right of self-defense.<sup>24</sup> Therefore, when evaluating the coercive acts of a State that do not yet amount to an armed attack, imminence plays an important role in determining the necessity of a response.<sup>25</sup>

#### *Determining Imminence*

The concept of imminence is a key component of evaluating the necessity of a State’s response.<sup>26</sup> In the 1837 *Caroline* case, then-U.S. Secretary of State Daniel Webster described the first commonly accepted *jus ad bellum* criteria<sup>27</sup> to permit “certain forcible pre-attack responses” to an imminent threat.<sup>28</sup> Secretary Webster’s letters argued that a State “need not sit idly by as the enemy prepares to attack; instead, a state may defend itself once attack is ‘imminent.’”<sup>29</sup>

However, the *Caroline* case did not create a precise evaluative framework for States to determine whether an imminent threat justified a use of force response for two reasons. First, each coercive State act must undergo a fact-specific evaluation of whether it amounts to an “imminent threat.”<sup>30</sup> Second, each State individually interprets what type of threat it believes amounts to “instant, overwhelming, leaving no choice of means, and no moment for deliberation.”<sup>31</sup> One of the challenges for any *jus ad bellum* analysis is that there is “no single adjudicator *ex post*.”<sup>32</sup>

Certainly, the vast majority of the international community considers specific types of coercive acts to justify a use of force response.<sup>33</sup> However, such a justified use of force response often depends on whether the coercive act amounted to a “use of force” or an “armed attack.”<sup>34</sup> So, the concepts of “use of force” and “armed attack” within *jus ad bellum* must be distinguished to understand the challenges posed in evaluating AWS actions.

### *Distinguishing “Use of Force” and “Armed Attack”*

The inherent right of self-defense relies on an evaluation of whether a State action amounts to an “armed attack” or a “use of force.”<sup>35</sup> Generally, an armed attack is the “physical or kinetic force applied by conventional weaponry.”<sup>36</sup> However, international law does not simply define an “armed attack.”<sup>37</sup> Instead, within the exception of Article 51’s inherent right of self-defense, States have independently determined different thresholds for considering a coercive act to be what it considers an “armed attack.”<sup>38</sup> Attempts to distinguish a “use of force”<sup>39</sup> from an “armed attack” requires a subjective evaluation of the coercive acts.<sup>40</sup> The more similar the use of force is to an armed attack, the more likely it is that a use-of-force response to that original coercive act will be lawful.<sup>41</sup>

Does *jus ad bellum* change when States employ AWS? Before attempting to address that question, it is important to review some basic concepts of autonomy and appreciate the spectrum of possible AWS.

### **Autonomous Weapon Systems**

Autonomous systems may be categorized based on their level of autonomy.<sup>42</sup> To facilitate conceptualizing the vignettes and framework proposed later in the article, the following subsections present the three most common sources for definitions of “autonomy.”

### **Debating the Definition of Autonomy**

The military, academia, and nongovernmental organizations are shaping the ongoing debate over the definition of “autonomy” as applied to AWS.<sup>43</sup> First, DoD Directive (DoDD) 3000.09, *Autonomy in Weapon Systems*, defines autonomy as a weapon system that, “once activated, can select and engage targets without further intervention by a human operator.”<sup>44</sup>

The second, and arguably the most commonly referenced, description for autonomy relates the system’s level of automation to the decision-making cycle or the “observe, orient, decide, act (OODA) Loop.”<sup>45</sup> When relating to the OODA Loop, semi-autonomous weapon systems are “human in the loop” systems because a human “makes the decision whether to

engage a target.”<sup>46</sup> Supervised autonomous weapon systems are “human on the loop” systems because humans are “supervising [the AWS’s] operation in real time.”<sup>47</sup> Finally, fully autonomous weapon systems are “human out of the loop” systems because “once activated, fully autonomous weapons can search for, detect, decide to engage,

## **at the time of the U.N. Charter’s creation, it was impossible for States to anticipate the technological revolution of autonomous systems and artificial intelligence**

and engage targets all on their own and the human cannot intervene.”<sup>48</sup>

Third, the International Committee of the Red Cross’s (ICRC) report of an expert meeting on AWS provided a much broader definition of “autonomy” than DoDD 3000.09.<sup>49</sup> The ICRC defined “autonomy” as systems “which can act without external control and define their own actions albeit within the broad constraints or bounds of their programming and software.”<sup>50</sup> The ICRC focused its analysis for AWS on critical functions of the weapon system, to include: “target acquisition, tracking, selection, and attack.”<sup>51</sup>

For the remainder of this article, the OODA Loop description of autonomous systems is used to relate the *jus ad bellum* framework to the technology.

### **Autonomy Impacting Jus ad Bellum**

The concept of autonomy is fundamental to a *jus ad bellum* consequence-based evaluation because factors evaluated include state involvement and military character.<sup>52</sup> Fully autonomous (human out of the loop) AWS degrade the direct causal link between AWS coercive acts and the State decision-maker.<sup>53</sup> For example, a fully autonomous AWS that crosses into the territory of another State based on flight navigation programmed by artificial intelligence may be less attributable to the State than a semiautonomous (human in the loop) AWS that was directed by a State agent to cross into the territory of another State.<sup>54</sup> Simultaneous Threat Evaluations of AWS further analyzes these factors and the incorporation of autonomy.

### **Simultaneous Threat Evaluations of AWS**

Autonomous weapon systems are capable of employing both traditional weapons and cutting-edge technologies.<sup>55</sup> Therefore, a *jus ad bellum* threat analysis of AWS must undergo simultaneous evaluations for both traditional and cutting-edge threats. These

simultaneous evaluations should combine the principles of both instrument-based evaluations and consequence-based evaluations.<sup>56</sup>

### **Traditional Instrument-Based Evaluations of AWS**

The traditional determination of whether a State coercive act was an armed attack depends on an objective evaluation of the “type of coercive instrument . . . selected to attain the national objectives.”<sup>57</sup> The prohibitive language of the U.N. Charter created an objective instrument-based evaluation for coercive acts rather than a more subjective consequence-based evaluation.<sup>58</sup> The instrument-based evaluation “eases the evaluative process by simply asking whether force has been used, rather than requiring a far more difficult assessment of consequences that have resulted.”<sup>59</sup>

The traditional instrument-based evaluation attempts to create a binary decision for the international community—either the State’s coercive act used an instrument that constituted an armed attack or it did not.<sup>60</sup> However, at the time of the U.N. Charter’s creation, it was impossible for States to anticipate the technological revolution of autonomous systems and artificial intelligence.<sup>61</sup>

For military practitioners, the DoD outlines traditional evaluation criteria for AWS.<sup>62</sup> Still, military practitioners also will have to deal with cutting-edge technologies employed by AWS.<sup>63</sup> Many of these new technologies will be designed to carry out coercive acts that remain below the

traditional thresholds required to justify a use of force response under the instrument-based evaluation of *jus ad bellum*.<sup>64</sup> In these circumstances, States must shift from the objective instrument-based evaluation to a subjective consequence-based evaluation of AWS coercive acts.

### **Progressive Consequence-Based Evaluations of AWS**

The consequence-based evaluation of whether a State's coercive act constituted an armed attack depends on a subjective evaluation of the threats posed by new technologies that "focuses on both the level of harm inflicted and certain qualitative elements" of a coercive act.<sup>65</sup> The *Tallinn Manual 2.0's* consequence-based evaluation factors are: 1) severity,<sup>66</sup> 2) immediacy,<sup>67</sup> 3) directness,<sup>68</sup> 4) invasiveness,<sup>69</sup> 5) measurability of effects,<sup>70</sup> 6) military character,<sup>71</sup> 7) state involvement,<sup>72</sup> and 8) presumptive legality.<sup>73</sup> These factors address the spectrum of potential coercive acts.<sup>74</sup> The *Tallinn Manual 2.0's* consequence-based evaluation provides greater subjectivity and flexibility when analyzing coercive acts because it evaluates significantly more factors than the instrument-based evaluation.<sup>75</sup> No individual factor is dispositive.<sup>76</sup>

These subjective consequence-based evaluation factors were developed to counter the emergence of computer network attacks (CNA) in the 1990s.<sup>77</sup> Like the challenges posed by the emergence of CNA, this evaluative framework should also be used to assess emerging AWS technologies whose coercive acts fall below the traditional thresholds of armed attack. As with cyber operations,<sup>78</sup> for AWS it "is not the instrument used that determines whether the use of force threshold has been crossed, but rather . . . the consequences of the operation and its surrounding circumstances."<sup>79</sup> To determine whether a CNA "fell within the more flexible consequence-based understanding of force . . . , the nature of the act's reasonably foreseeable consequences would be assessed to determine whether they resemble those of armed coercion."<sup>80</sup>

The application of a multi-part test (MPT) in the *jus ad bellum* are not unique to CNA.<sup>81</sup> Multi-part tests, like the consequence-based evaluative framework proposed above, attempt to "clarify vague or

indefinite baseline texts."<sup>82</sup> Professor Ashley Deeks demonstrates in *Multi-Part Tests in the Jus ad Bellum*, that MPTs are "the best worst option"<sup>83</sup> where "States and scholars confront a highly contentious area of international law where the texts and customary rules offer only limited guidance to navigate recurring factual situations"<sup>84</sup> and where "reaching consensus on formal amendments or supplements to the Charter would be extremely costly and very challenging."<sup>85</sup>

However, Professor Deeks also acknowledges the common critiques of MPTs.<sup>86</sup> First and foremost, proposed MPTs "lack formal status in international law."<sup>87</sup> Second, MPTs are often criticized for the following reasons: 1) MPTs are too indeterminate to offer real guidance;<sup>88</sup> 2) application of MPTs may facilitate unequal application of the law to similarly situated States;<sup>89</sup> 3) MPTs bind no particular actor other than, possibly, the States that propose them;<sup>90</sup> and 4) MPTs are "often difficult to apply and can obscure as much as they reveal."<sup>91</sup> In addition to these general critiques of MPTs, a specific concern exists regarding the *jus ad bellum* concept of imminence that "decoupling the right to self-defense from the trigger of a concrete armed attack or imminent threat thereof could open a Pandora's box of forcible actions."<sup>92</sup>

Therefore, applying both the instrument-based evaluations for traditional weapon systems and consequence-based evaluations for non-traditional weapons technologies should "structure and defend state uses of force in nontraditional contexts while preserving the relevance of the U.N. Charter."<sup>93</sup>

### **Applying the Simultaneous Threat Evaluations**

To conceptualize the application of these two evaluative frameworks, the following three vignettes 1) briefly describe a hypothetical scenario; 2) apply both the instrument-based and consequence-based evaluations to those hypothetical scenarios; and 3) discuss the impact of autonomy on those evaluations. This exercise allows the reader to explore the challenges in applying both the text of the U.N. Charter and evaluating the many factors of the consequence-based evaluative framework.

### **Vignette #1—Third-Party Actors**

State Green and State Red are engaged in an international armed conflict (IAC) over a disputed international border.<sup>94</sup> States Green and Red exchange cross-border artillery fire.<sup>95</sup> State Yellow is sympathetic to State Red. But, State Yellow declared its neutrality in the IAC between States Green and Red.<sup>96</sup> State Red authorizes State Yellow to use State Yellow AWS inside of State Red territory to deliver humanitarian aid to civilians affected by the IAC.

While delivering humanitarian aid, the State Yellow AWS also electronically jams the electromagnetic spectrum.<sup>97</sup> The jamming degrades all electronic systems within a 5 kilometer radius of the State Yellow AWS.<sup>98</sup> State Yellow declares in a press release that it is only jamming the electromagnetic spectrum to protect its AWS from attack during the humanitarian aid delivery operations. However, State Green determines that State Yellow AWS are only conducting these "humanitarian aid delivery operations" to areas fewer than 5 kilometers from the disputed international border. State Yellow's AWS jamming adversely affects both States Green and Red: civilian and military communication equipment are temporarily disabled; internet and Bluetooth technologies are degraded; and commercial and military power grids are overloaded to the point where breakers are tripped and systems reset. However, there is no permanent damage from any of the State Yellow jamming. Over the last two days, State Green has also observed State Red military forces maneuvering along the disputed international border within State Red territory while State Yellow AWS were jamming within those areas.

#### *Instrument-Based Evaluation of Vignette #1*

If State Green applies the traditional instrument-based evaluation of coercive acts by State Yellow, then State Green will likely not be able to justify a use-of-force response.<sup>99</sup> There is no indication that State Yellow conducted an armed attack against State Green.<sup>100</sup> And, under the customary international law principle of necessity, there does not appear to be a threat that is "instant, overwhelming, leaving no choice of means, and no moment for deliberation."<sup>101</sup>



State Yellow AWS have not physically breached the territorial sovereignty of State Green.<sup>102</sup> Traditionally, interference with the electromagnetic spectrum does not fall in line with customary notions of imminent threats.<sup>103</sup> Further, State Yellow made a public declaration of self-defense as its purpose for electromagnetic jamming. At this stage of the IAC between States Green and Red, State Yellow's AWS actions fly below the traditional threshold of coercive acts that an objective instrument-based evaluation would consider to justify a use-of-force response.<sup>104</sup> Therefore, State Green should also evaluate State Yellow AWS actions under the more subjective consequence-based evaluation.

*Consequence-Based Evaluation of Vignette #1*  
If State Green applies a consequence-based evaluation of the State Yellow AWS actions, then State Green should be justified in a use-of-force response to the electromagnetic jamming. Therefore, State Green should evaluate every factor to determine whether it would be justified under *jus ad bellum* to respond with a use of force.<sup>105</sup>

1. *Severity*: Low—State Yellow AWS does not pose a physical threat to individuals or property. State Yellow's jamming only temporarily disrupts the performance of State Green (and State Red) electronics and systems.<sup>106</sup>
2. *Immediacy*: High—State Yellow AWS jamming immediately affects State Green electronics and systems in the vicinity of the disputed international border.<sup>107</sup>
3. *Directness*: High—There is direct causation between State Yellow's jamming and the adverse impact on State Green.<sup>108</sup>
4. *Invasiveness*: Medium—State Yellow AWS jamming affects areas inside of State Green. However, merely breaching the territorial sovereignty of a targeted State does not "*per se* rise to the level of a use of force."<sup>109</sup>
5. *Measurability*: High—Like a battle-damage assessment after an armed attack, State Green should attempt to quantify the impact of State Yellow AWS jamming.<sup>110</sup>

6. *Military Character*: Low—Typically, a nexus between a coercive action and a military operation heightens the likelihood of characterization as use of force.<sup>111</sup> However, State Yellow is not a participant in the IAC between States Green and Red. And, State Yellow claims that the purpose of its jamming is solely for self-defense while delivering humanitarian aid.<sup>112</sup>
7. *State Involvement*: High—State Yellow publicly declared its involvement and its actions are observable by the international community.
8. *Presumptive Legitimacy*: Low—Most forms of coercion are presumptively lawful, absent a prohibition to the contrary.<sup>113</sup> Generally, there are no prohibitions against electromagnetic jamming.<sup>114</sup>

Next, State Green must weigh the relative importance of each of the consequence-based factors.<sup>115</sup> No formula determines the threshold of coercive acts that justify a use force response.<sup>116</sup> So, State Green assumes risk in reaching its conclusion.<sup>117</sup> State Green should justify a use of force response against State Yellow AWS by demonstrating that the factors of immediacy, directness, invasiveness, measurability, and state involvement create consequences that "resemble those of armed coercion."<sup>118</sup> In this hypothetical situation, the electromagnetic impact on State Green would likely be sufficient to justify a proportionate<sup>119</sup> use-of-force response to State Yellow AWS, especially if State Green is able to tie State Yellow AWS actions to a State Red armed attack within the IAC.

#### *Impact of Autonomy on Vignette #1*

Another layer of complexity for either evaluation is formed based on the level of autonomy of the State Yellow AWS. For a traditional weapons system, a State could attribute the effects of the weapon system to the State operator of that system.<sup>120</sup> However, for AWS, the level of autonomy directly impacts the ability of one State to attribute the effects of coercive AWS actions. For example, if State Yellow AWS is a semi-autonomous system,<sup>121</sup> then the consequence-based evaluation factors of "state involvement" and "military character"

should increase to account for the direct State Yellow control of the AWS.<sup>122</sup> But, if the "humanitarian aid delivery operations" were conducted by a semi-autonomous system owned and operated by an independent nongovernmental organization, then the factors of "state involvement" and "military character" should decrease to account for the lack of State Yellow control of the AWS. Unfortunately for State Green, this likely decrease in attribution does not change the actual electromagnetic impacts on State Green.

Taken a step further, if State Yellow AWS employed a fully autonomous system,<sup>123</sup> then the factors of "state involvement" and "military character" should also decrease.<sup>124</sup> Even though State Yellow deployed the AWS, State Yellow would be able to demonstrate that the employment decisions were determined by the fully autonomous system's artificial intelligence (AI).<sup>125</sup> For example, the AI in a fully autonomous system would determine the time, location, duration, and frequency of electromagnetic jamming in support of the humanitarian aid delivery operations.<sup>126</sup> All of these employment decisions would undermine direct attribution back to State Yellow.<sup>127</sup> Vignette #1 demonstrated the challenges associated with evaluating AWS coercive acts under the direct control and acknowledgment of State actors. Next, Vignette #2 moves further down the spectrum of potential AWS actions that complicate direct attribution back to a State and does not clearly meet thresholds that justify a use of force response under *jus ad bellum*.

#### **Vignette #2—Nonconsensual AWS**

State Green and State Red are still in an IAC over their disputed international border. State Yellow is still neutral. However, in this hypothetical scenario, State Red remotely takes control of a State Yellow-owned business's autonomous delivery system (ADS) through a complex cyber operation. The State Yellow-owned business did not consent to this State Red cyber operation.

The State Yellow-owned business operates an extensive network of ADS that move products across the international borders of States Green, Red, and Yellow.

State Green intelligence reports indicate that, from the cyber operation, State Red can now access all of State Yellow's ADS video feeds and global positioning system (GPS) coordinates. State Red denies any involvement in the cyber operation. Based on the travel history of the State Yellow ADS, State Red has likely gained comprehensive graphic and positional data on all major State Green cities, highways, and infrastructure. Now, despite the compromised ADS, the State Yellow-owned business refuses to voluntarily stop using its ADS in State Green.

#### *Instrument-Based Evaluation of Vignette #2*

Again, if State Green applies the traditional objective instrument-based evaluation of State Yellow ADS actions, then State Green will be unable to justify a use-of-force response. There is no armed attack and no indication of a use of force by State Yellow.<sup>128</sup> State Yellow is also a victim of State Red's cyber operation. The State Yellow ADS are operating within State Green territory through previous consent granted by State Green. Therefore, State Green should shift to evaluate the impacts of the cyber operation on the ADS by using the subjective consequence-based evaluation to determine if a use-of-force response against the State Yellow ADS is lawful.<sup>129</sup>

#### *Consequence-Based Evaluation of Vignette #2*

Even if State Green applies a consequence-based evaluation of State Red's actions using State Yellow ADS, State Green will likely not be able to justify a use-of-force response against State Yellow ADS. Again, State Green should evaluate every factor before making its determination.<sup>130</sup>

1. *Severity*: Low—There is no indication that State Yellow's ADS pose any threat to physical injury or destruction to property.<sup>131</sup>
2. *Immediacy*: Low—State Green cannot articulate the "immediate consequences" posed by this cyber operation.<sup>132</sup>
3. *Directness*: Low—There is significant attenuation between the State Red cyber operation and any known consequences for State Green.<sup>133</sup>
4. *Invasiveness*: Medium—The use of cyber operations to commandeer devices in

the physical domain complicates the invasiveness analysis.<sup>134</sup> However, this cyber operation may also constitute a physical harm that "crosses into the target State."<sup>135</sup>

5. *Measurability*: Low—State Green cannot determine the measurability of the effects.<sup>136</sup>
6. *Military character*: Low—State Green must determine whether there is a nexus between a coercive action and a military operation.<sup>137</sup> Also, State Yellow ADS's status as a fellow victim of the same State Red cyber operation attenuates the connection to military operations that would justify an attack on State Yellow ADS, despite the fact that the State Yellow ADS are the platforms collecting the data.<sup>138</sup>
7. *State Involvement*: Low—State Green must demonstrate a nexus between the coercive action and state involvement. State Red denies responsibility for the cyber operation. State Yellow's ADS are merely the mechanisms that State Red used to accomplish its cyber operation.
8. *Presumptive Legitimacy*: Low—There is no prohibition against cyber espionage.<sup>139</sup>

State Green will likely be unable to justify a use-of-force response against State Yellow ADS because even the subjective consequence-based evaluation factors do not create consequences that "resemble those of armed coercion."<sup>140</sup> Though State Green would be unable to justify a use-of-force response, State Green could still pursue other legal and diplomatic options to prevent State Yellow ADS from future overflights.<sup>141</sup>

#### *Impact of Autonomy on Vignette #2*

Once again, the level of autonomy of the State Yellow ADS will impact the consequence-based evaluation. On one side of the spectrum, if State Red's cyber operation took control of the State Yellow semi-autonomous systems, then State Green should be able to attribute the State Yellow ADS actions directly to State Red. This type of active control over State Yellow ADS would be akin to commandeering a traditional military platform or hijacking an aircraft and therefore increase the "directness" factor of the consequence-based evaluative

framework.<sup>142</sup> At the other end of the spectrum, if State Red's cyber operation merely received graphic and positional data from State Yellow's fully autonomous systems, then State Green would have difficulty attributing any of the State Yellow ADS actions to State Red. This type of passive receipt of information gained by State Red from a fully autonomous system would be more akin to information received during peacetime cyber espionage.<sup>143</sup> In addition to the complexity of attribution, Vignette #2 attempted to demonstrate the uncertainty in threat evaluations of AWS when their end-result mimics espionage instead of use of force. Finally, Vignette #3 evaluates another *jus ad bellum* threat analysis that offers some complexity based on the location of the coercive acts and the fully autonomous AWS.

#### **Vignette #3—Unmanned Underwater Vehicles**

For this hypothetical scenario, State Green and State Red are not in an IAC. However, both States Green and Red disagree about overlapping claims to their territorial waters and exclusive economic zones (EEZ)<sup>144</sup> in the Purple Sea. Maritime commercial fishing fleets from both States Green and Red operate year-round in the Purple Sea. State Green is a capitalist democracy. State Green-flagged fishing vessels are owned and operated by private individuals or corporations. State Red is a communist dictatorship. State Red claims that its flagged fishing fleet is privatized; however, State Red maintains overall control of the licensing, operations, and employment of all State Red-flagged fishing vessels. State Red also uses a number of shell corporations to structure its control over all State Red-flagged fishing vessels and their support ships. State Green, and much of the international community, consider the State Red-flagged fishing vessels to be the proxy navy<sup>145</sup> for State Red.

In the last five years, a State Red fishing shell corporation invested heavily in the research and development of unmanned underwater vehicles (UUVs).<sup>146</sup> State Red UUVs are fully autonomous systems deployable from both land and fishing fleet support ships. Once released into the Purple Sea, the State Red UUVs use AI to navigate underwater for periods of up to three

months.<sup>147</sup> State Red kept its AI programming top secret. The State Red fishing shell corporation declared that these UUVs were “only for the commercial purpose of tracking fish within Purple Sea.” However, these State Red UUVs are built to specifications similar to conventional military torpedoes that allow them to travel underwater up to 40 knots.<sup>148</sup> Also, their reinforced hulls allow them to collide with objects and remain operational, even after a collision.

Unfortunately, in the last three weeks, tensions continued to flare between States Green and Red over their disputed territorial waters and EEZs. The number of collisions between State Red UUVs and State Green-flagged fishing vessels increased from two collisions in the past five years to nine collisions in the past twenty-one days. All collisions occurred within the high seas<sup>149</sup> of Purple Sea. So far, none of the State Green fishing vessels have been seriously damaged.<sup>150</sup>

Yesterday, State Green recovered a State Red UUV inside its own EEZ. The State Red UUV appears to have malfunctioned and sunk to the shallow seafloor. Upon further examination, State Green discovered that this State Red UUV carried an explosive payload within its hull large enough to sink a State Green warship.

#### *Instrument-Based Evaluation of Vignette #3*

If State Green applies the traditional objective instrument-based evaluation of actions by State Red, then State Green will likely be unable to justify a use-of-force response. Though there appears to be a use of force by State Red UUVs (the collisions<sup>151</sup> between State Red UUVs and State Green-flagged fishing vessels), these actions have not risen to the level of an “armed attack” by State Red.<sup>152</sup> The State Red UUVs are operating in the high seas of the Purple Sea and within the disputed EEZ of State Green. Therefore, State Green should shift to evaluate the impacts of the State Red UUVs by using the more subjective consequence-based evaluation to determine if a use-of-force response against the State Red UUVs is lawful.

#### *Consequence-Based Evaluation of Vignette #3*

If State Green applies a consequence-based evaluation of the State Red

UUV actions, then State Green will likely be able to justify a use-of-force response. State Green should evaluate every factor before making its determination.<sup>153</sup>

1. *Severity:* High—State Red UUV pose a threat to the physical safety of State Green mariners and fishing vessels.<sup>154</sup> The intensity of the collisions and the potential for catastrophic loss of a fishing vessel weigh against the State Red UUV actions.<sup>155</sup>
2. *Immediacy:* High—State Green can articulate the “immediate consequences” posed by these State Red UUV collisions.<sup>156</sup>
3. *Directness:* Medium—There is some attenuation between the State Red UUV actions and known consequences for State Green.<sup>157</sup> For example, State Red UUVs’ collisions impacted commercial fishing vessels of State Green, but not State Green warships.<sup>158</sup> The mere presence of a State Red UUV inside the EEZ of State Green does not amount to an “armed attack.”<sup>159</sup>
4. *Invasiveness:* Low—State Red UUVs are operating as instigators on the high seas and within a disputed EEZ, neither of which intrude into State Green.<sup>160</sup>
5. *Measurability:* Medium—State Green is able to measure the effects of the specific collisions.<sup>161</sup> However, it is more difficult for State Green to measure the overall impact of State Red UUVs operating within its EEZ and territorial waters.<sup>162</sup>
6. *Military character:* Medium—State Green must determine whether there is a nexus between the State Red UUV collisions and a military operation.<sup>163</sup> Also, State Red’s deliberate use of shell corporations obfuscates direct attribution to the State Red military.<sup>164</sup>
7. *State Involvement:* Medium—State Green must demonstrate a nexus between the coercive action and state involvement. Like military character, State Red’s use of shell corporations intentionally degrades State Green’s ability to attribute State Red UUV actions to State Red.
8. *Presumptive Legitimacy:* Medium—The U.N. Convention on the Law of the Sea (UNCLOS) regulates most actions demonstrated by this hypothetical scenario.<sup>165</sup> However, like the U.N. Charter, UNCLOS never anticipated

the employment of UUVs.<sup>166</sup> So, there is still uncertainty as to whether UNCLOS applies to UUVs based on the definitions agreed to by the State parties.

Overall, State Green should be able to justify a proportionate<sup>167</sup> use-of-force response against State Red UUVs because the subjective consequence-based evaluation factors created consequences that “resemble those of armed coercion.”<sup>168</sup>

#### *Impact of Autonomy on Vignette #3*

State Red UUV autonomy will significantly impact the consequence-based evaluation of State Red actions. State Green will be wading into complicated waters as it attempts to attribute State Red’s employment of fully autonomous systems to State Red.<sup>169</sup> There is significant debate as to who is “accountable” for the actions of fully autonomous systems—is it the politicians who decide to use them; the commander who deploys them in the physical environment; or the computer programmer who coded the AI software?<sup>170</sup>

Also, without access to State Red UUVs and the algorithms the AI used to “learn”<sup>171</sup> these actions, it will be nearly impossible for State Green to demonstrate the intent behind the collisions. Notably, when attributing actions of military or paramilitary activities to a State,<sup>172</sup> the unique dimensions of AI were not considered as part of either the “effective control” test set forth by the International Court of Justice in *Nicaragua*<sup>173</sup> or the “overall control test” set forth by the International Criminal Tribunal for the Former Yugoslavia in *Tadić*.<sup>174</sup> For example, State Red could downplay any attribution by claiming that the State Red UUVs collided because of navigational errors in programming rather than intentionally colliding with State Green-flagged fishing vessels. Or, State Red could blame the AI software—positing that the State Red UUVs “learned”<sup>175</sup> on its own to collide with State Green-flagged fishing vessels in an attempt to gain access to the schools of fish.

Once again, the consequence-based evaluative factors would allow State Green to consider these aspects of autonomy on attribution in ways not previously conceived by the traditional instrument-based

evaluative framework. Though the subjective consequence-based evaluative framework does not provide a simple answer, it at least offers a framework for autonomy to be evaluated.

## Conclusion

Combining traditional instrument-based use of force evaluations with progressive consequence-based use-of-force evaluations provides a flexible and comprehensive lens for States to evaluate *jus ad bellum* threats posed by AWS. In many ways, AWS are merely a new means to deliver both traditional weapons and cutting-edge technologies.<sup>176</sup> However, their present development and likely future growth means that States will take advantage of AWS' unique capabilities in ways never envisioned by the drafters of the U.N. Charter.<sup>177</sup> Likewise, customary international law and State practice will take time to develop.<sup>178</sup> Therefore, like the international community's response to the emerging threat of computer network attacks, States, academia, and nongovernmental organizations must develop and adopt a new *jus ad bellum* framework for evaluating AWS actions.<sup>179</sup>

Under the current instrument-based evaluative framework, States will be unable to justify a use of force response to AWS actions that do not resemble the effects of an armed attack. Adopting the dual-lens view of both 1) the objective instrument-based evaluation and 2) the subjective consequence-based evaluation for AWS actions will provide States with greater adaptability and flexibility in lawfully countering AWS actions.

Though more subjective, the consequence-based evaluations ultimately allow States to relate the impacts of AWS to a non-exhaustive list of factors.<sup>180</sup> This article posed three vignettes in an attempt to evaluate examples of possible AWS coercive acts that are below traditional armed attack thresholds. States should build off of the lessons learned from the emerging threat of cyber operations and develop an evaluative framework for AWS threats. *Tallinn Manual 2.0's* consequence-based evaluation will be more responsive to new technologies and more flexible at assessing whether AWS actions resemble armed coercive acts.<sup>181</sup>

Fortunately, a combination of these evaluations for traditional threats and future technologies creates a dual framework for States to apply to AWS. As more and more AWS fly, drive, crawl, swim, and hover into future conflict zones, this combination of both instrument-based and consequence-based evaluations will arm States with the ability to determine whether a use-of-force response to AWS is justifiable under *jus ad bellum*.<sup>182</sup> **TAL**

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## Notes

1. Remarks at National Defense University, 2013 Daily Comp. Pres. Docs. 00361 (May 23, 2013) (commenting on the use of "lethal, targeted action against al Qaeda and its associated forces, including with remotely piloted aircraft commonly referred to as drones"). See also Heather M. Roff, *Lethal Autonomous Weapons and Jus Ad Bellum Proportionality*, 47 CASE W. RES. J. INT'L L. 37, 37 (2015) (Rajesh Uppai, quoting Dimitry Rogozin, *Russia Deployed Family of Killer Robots, for Combat and Demining in Syria and for Counter Terrorism Operations*, INT'L DEF., SEC. & TECH. (June 26, 2019), <https://idstch.com/military/army/russia-developing-family-of-killer-robots-conduct-war-games/> ("We have to conduct battles without any contact, so that our boys do not die, and for that it is necessary to use war robots.")).
2. This hypothetical situation illustrated in the introduction is fictional. Names, characters, places, events, and incidents are products of the author's imagination or used in a fictitious manner. Any resemblance to actual persons or actual events is purely coincidental.
3. See Rebecca Crotoof, *Regulating New Weapons Technology: The Impact of Emerging Technologies on the Law of Armed Conflict*, in THE IMPACT OF EMERGING TECHNOLOGIES ON THE LAW OF ARMED CONFLICT 9 (Eric Talbot Jensen & Ronald T.P. Alcalá eds. 2019).
4. See generally Melissa K. Chan, *China and the U.S Are Fighting a Major Battle Over Killer Robots and the Future of AI*, TIME (Sept. 13, 2019, 9:45 AM), <https://time.com/5673240/china-killer-robots-weapons> (noting that the world's superpowers are moving forward with the development of autonomous weapon systems (AWS) while simultaneously undermining attempts by the international community to regulate future development). An evaluation of non-use of force responses to coercive acts, to include countermeasures, is outside the scope of this article.
5. See Crotoof, *supra* note 3, at 9. See also Ashley Deeks et al., *Machine Learning, Artificial Intelligence, and the Use of Force by States*, 10 J. NAT'L SEC. L. & POL'Y 1, 14 (2019) ("Another significant challenge—one faced by anyone creating an algorithm that makes recommendations driven by underlying bodies of law—is the difficulty of translating broad legal rules into very precise code . . . Efforts to transform this into code would therefore require constant debate and the ability to continuously edit and change fundamental sections of the algorithm.") (citation omitted). But see Christopher M. Ford, *Autonomous Weapons and International Law*,

69 S.C. L. REV. 413, 414 (2017) ("While autonomy may give rise to circumstances in which the application of the law is rendered uncertain or difficult, the current normative legal framework is sufficient to regulate the new technology."); Charles P. Trumbull IV, *Autonomous Weapons: How Existing Law can Regulate Future Weapons*, 34 EMORY INT'L L. REV. 533, 538 (2020) ("The pace of technological advancement and its effects on the conduct of hostilities, however, is rapidly outpacing the more glacial evolution of [international humanitarian law].") (citation omitted).

6. Acknowledging the fact that non-state actors may also develop and deploy AWS, further analysis of non-state actors is outside the scope of this article.

7. Nathalie Weizmann, *Autonomous Weapon Systems Under International Law* ACADEMY, 8 GENEVA ACAD. INT'L HUMANITARIAN L. & HUM. RTS. 4-5 (2014) (commenting on the international debate regarding the number of threats and asymmetric advantages posed by the development of AWS).

8. Michael N. Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUM. J. TRANSNAT'L L. 885, 897 (1999).

9. *Id.* at 909.

10. *Id.* at 915.

11. U.S. DEP'T OF DEF., DoD LAW OF WAR MANUAL para. 1.11.1 (June 2015) (C2, Dec. 2016) [hereinafter LAW OF WAR MANUAL].

12. CHIARA GIORGETTI ET AL., INTERNATIONAL LITIGATION IN PRACTICE: THE RULES, PRACTICE, AND JURISPRUDENCE OF INTERNATIONAL COURTS AND TRIBUNALS 32 (2013).

13. LAURIE R. BLANK & GREGORY P. NOONE, INTERNATIONAL LAW AND ARMED CONFLICT: FUNDAMENTAL PRINCIPLES AND CONTEMPORARY CHALLENGES IN THE LAW OF WAR 15 (2013) ("*Jus ad bellum* is the Latin term for the law governing the resort to force.").

14. LAW OF WAR MANUAL, *supra* note 11, para. 1.11.1. See also Roff, *supra* note 1, at 40 (describing the six principles of *jus ad bellum* as just cause, right intention, proper authority, last resort, the probability of success, and proportionality).

15. See U.N. Charter pmbl.

16. U.N. Charter art. 2, ¶ 4 ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

17. U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.").

18. Ashley Deeks, *Multi-Part Tests in the Jus ad Bellum*, 53 HOUS. L. REV. 1035, 1045 (2016) ("A core struggle in the *jus ad bellum* is between crafting a system that allows states to resort to force too readily, on the one hand, and creating a system that prohibits the use of force too comprehensively on the other."). To complicate matters further, the "inherent right of self-defense" is not defined within the U.N. Charter. See Roff, *supra* note 1, at 51 ("Often both sides to a conflict view their causes as just and both often invoke their rights of self-defense."). See also Alan L. Schuller, *Inimical Inceptions of Imminence—A New Approach to*



*Anticipatory Self-Defense Under the Law of Armed Conflict*, 18 UCLA J. INT'L L. & FOREIGN AFFS. 161, 166 (2014), (commenting that self-defense has been the most common justification for the use of force by States).

19. Schmitt, *supra* note 8, at 913. *See also* U.N. Charter ch. VII (the U.N. Security Council (UNSC) may authorize use of force; however, situations that receive a UNSC Resolution are outside the scope of this article).

20. Schmitt, *supra* note 8, at 908 (commenting that the concept of use of force is generally understood to mean armed force).

21. Schuller, *supra* note 18, at 168, 170 (describing the different concepts of “anticipatory,” “preventative,” and “pre-emptive” self-defense and commenting on the “several schools of thought regarding just how imminent a threat must be for a state to lawfully act first.”) (citation omitted).

22. *Id.* at 172. Though judge advocates should evaluate all principles of *jus ad bellum*, an in-depth analysis of the other principles is outside the scope of this article. *See* Geoffrey S. Corn, *Self-defense Targeting: Blurring the Line Between the Jus ad Bellum and the Jus in Bello*, 88 INT'L L. STUD. 57 (2014). *See also* Roff, *supra* note 1, at 40.

23. Schuller, *supra* note 18, at 167 (citing Michael N. Schmitt, *Preemptive Strategies in International Law*, 24 MICH. J. INT'L L. 513, 530-31 (2003) (“The principle of necessity requires that all reasonable alternatives to the use of force be exhausted . . . [and] no viable option to the use of force exists.”). U.S. ARMY JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., OPERATIONAL LAW HANDBOOK 4 n.9 (2012) (“To comply with the necessity criterion, States must consider the exhaustion or ineffectiveness of peaceful means of resolution, the nature of coercion applied by the aggressor State, the objectives of each party, and the likelihood of effective community intervention. In other words, force should be viewed as a ‘last resort.’”). *See also* Roff, *supra* note 1, at 40.

24. U.N. Charter art. 51. *See also* Roff, *supra* note 1, at 44 (describing where a State “loses its right not to be harmed by threatening an imminent violation of [another State's] rights . . . [and one State] may inflict harm on [another State] to thwart an attack against it and to potentially restore [the State's] rights”). *See also* Schuller, *supra* note 18, at 174-85 (describing recent examples in history where States justified their actions under Article 51). The concept of anticipatory self-defense in *jus ad bellum* is outside the scope of this article.

25. Schuller, *supra* note 18, at 168.

26. *Id.*

27. Letter from Daniel Webster, U.S. Secretary of State, to Lord Ashburton, British Plenipotentiary (Aug. 6, 1842), <https://avalon.law.yale.edu/19th-century/br-1842d.asp> (“It will be for that Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation . . . since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.”) (emphasis added) [hereinafter Webster].

28. Deeks, *supra* note 18, at 1052.

29. Schuller, *supra* note 18, at 169 (quoting Michael N. Schmitt, *Cyber Operations and the Jus Ad Bellum Revisited*, 56 VILL. L. REV. 569, 590 (2011)) (citations omitted).

30. *Id.* at 170.

31. *Id.* *See also* Webster, *supra* note 27.

32. Deeks, *supra* note 18, at 1049-50 (“In the international context, where there is no single adjudicator *ex post*, those states and other actors that assess whether a particular set of facts meet a multi-factor test may possess different facts, may take different views of those facts, and may be unable to assess the facts they have objectively because of their strong political interests in the outcome.”).

33. *See generally* U.N. Charter art. 51 (for example, an armed attack against a State military force is a type of coercive act explicitly listed in the U.N. Charter). *See also* Schuller, *supra* note 18, at 167-68 (“In the narrow context of a discussion regarding the concept of imminence, one must focus on an armed attack that has not yet taken place, for once an attack has already occurred imminence *ad bellum* is irrelevant because the right to respond in self-defense is clear.”).

34. *See* Schmitt, *supra* note 8, at 904-08. *See also* Roff, *supra* note 1, at 44 (“In conventional war, we look to the three loci of imminent harm: the state, the human combatants, and the people. . . . In practice, however, there is not a clean or clear distinction between imminent harm to a state's interests and the people's because, on most accounts, imminent harm is always bootstrapped to human combatants and the civilian population (if the defending military fails).”).

35. *See* Schmitt, *supra* note 8, at 904-08. *See also* Schuller, *supra* note 18, at 174.

36. Schmitt, *supra* note 8, at 908.

37. Schuller, *supra* note 18, at 174.

38. *Id.* at 161.

39. TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 330-37 (Michael N. Schmitt ed., 2d ed. 2017) [hereinafter TALLINN MANUAL 2.0] (“Rule 69—Definition of use of force” provides an in-depth analysis for examining what acts constitute a use of force for a cyber operation. The group of experts acknowledge outright that “[t]he United Nations Charter offers no criteria by which to determine when an act amounts to a use of force.”).

40. Schmitt, *supra* note 8, at 909 (“determination of whether or not the standard [for use of force] has been breached depends on the type of the coercive instrument—diplomatic, economic, or military—selected to attain the national objectives in question.”).

41. *Id.* at 935 (“If it is not armed force, is the CNA nevertheless a use of force as contemplated in the U.N. Charter? It is if the nature of its consequences track those consequence commonalities which characterize armed force.”). *See also* Tallinn Manual 2.0, *supra* note 39, at 333-36 (“States are likely to consider and place great weight on the following factors, inter alia, when deciding whether to characterize any operation, including a cyber operation, as a use of force. It must be emphasized that [the factors articulated in TALLINN MANUAL 2.0] are merely factors that influence States making use of force assessments; they are not formal legal criteria.”). The consequence-based evaluative framework discussed in this article will be drawn directly from the Tallinn Manual 2.0 factors.

42. PAUL SCHARRE, ARMY OF NONE: AUTONOMOUS WEAPONS AND THE FUTURE OF WAR 27-28 (2018).

43. *See generally* Paul Scharre & Michael Horowitz, *An Introduction to Autonomy in Weapon Systems 2* (Ctr. For a New Am. Sec., Working Paper, Feb. 2015), <https://www.cnas.org/publications/reports/>

an-introduction-to-autonomy-in-weapon-systems. *See also* Weizmann, *supra* note 7, at 4-5.

44. U.S. DEP'T OF DEF, DIR. 3000.09, AUTONOMY IN WEAPON SYSTEMS 13-14 (21 Nov. 2012) (C1, 8 May 2017) (creates both a general definition for autonomy and further definitions of semi-autonomous weapon systems and human-supervised autonomous weapon systems).

45. SCHARRE, *supra* note 42, at 23 (describing Air Force strategist John Boyd framework for “the cognitive process pilots go through when engaging enemy aircraft” as the “OODA Loop,” which stands for observe, orient, decide, and act).

46. SCHARRE, *supra* note 42, at 44.

47. *Id.* at 45.

48. *Id.* at 47.

49. INT'L COMM. OF THE RED CROSS, EXPERT MEETING ON AUTONOMOUS WEAPON SYSTEMS: TECHNICAL, MILITARY, LEGAL AND HUMANITARIAN ASPECTS 62 (2014) (the International Committee of the Red Cross and other nongovernmental organizations are attempting to shape the development of international law and policies as they relate to the regulation of AWS).

50. *Id.* (commenting on the continuum of possible systems—from “remote controlled to automated and then to autonomous”).

51. *Id.* (“Therefore, for a discussion of autonomous weapon systems, it may be useful to focus on autonomy in critical functions rather than autonomy in the overall weapon system. Here the key factor will be the level of autonomy in functions required to select and attack targets (i.e. critical functions), namely the process of target acquisition, tracking, selection, and attack by a given weapon system.”).

52. TALLINN MANUAL 2.0, *supra* note 39, at 336.

53. *See generally* SCHARRE, *supra* note 42, at 46-47.

54. Alan L. Schuller, *At the Crossroads of Control: The Intersection of Artificial Intelligence in Autonomous Weapons Systems with International Humanitarian Law*, 8 HARV. NAT'L SEC. J. 379, 388-89 (2017). A full discussion regarding the attribution of artificial intelligence to the government leaders, military units, or computer programmers is outside the scope of this article.

55. *See* Schmitt, *supra* note 8, at 913 (describing how cutting-edge weapons technologies like cyber operations were not generally contemplated by the U.N. Charter: “There was no need to look beyond armed force because intermediate forms of coercion such as CNA were not generally contemplated.”).

56. *Id.* at 911-17.

57. *Id.* at 909.

58. *Id.* at 911 (“Undesirable consequences fall along a continuum, but how could the criteria for placement along it be clearly expressed? In terms of severity? Severity measured by what standard of calculation? Harm to whom or what?”).

59. *Id.*

60. *Id.* at 912 (“[T]he use of force standard serves as a logical break point in categorizing the asperity of particular coercive acts. Any imprecision in this prescriptive short-hand is more than outweighed by its clarity and ease of application.”).

61. *Id.* (Like CNA, AWS “challenges the prevailing paradigm, for its consequences cannot easily be placed in a particular area along the community values threat

continuum. . . Its effects freely range from mere inconvenience . . . to physical destruction . . . to death.”).

62. See U.S. DEP’T OF ARMY, TECHNIQUES PUB. 3-01.15, MULTI-SERVICE TACTICS, TECHNIQUES, AND PROCEDURES FOR AIR AND MISSILE DEFENSE 68-69 (14 Mar. 2019).

63. See generally Norway: GPS Jamming During NATO Drills in 2018 a Big Concern, ASSOCIATED PRESS (Feb. 11, 2019), <https://apnews.com/eb300e709dfa4c6fa9d7d-65a161d698b>. See generally Bryan Ripple, *Enemy Drone Operators May Soon Face the Power of THOR*, WRIGHT-PATTERSON A.F. BASE (Sept. 24, 2019), <https://www.wpafb.af.mil/News/Article-Display/Article/1969142/enemy-drone-operators-may-soon-face-the-power-of-thor/>.

64. See generally TOC, *Non-Lethal Weapons for Unmanned Aerial Vehicles (UAVs) and Robots Are Being Developed by the Russian State Corporation Rostec*, BULGARIAN MIL. (Jan. 15, 2019), <https://bulgarianmilitary.com/2019/01/15/non-lethal-weapons-for-uavs-and-robots-are-being-developed-by-the-russian-state-corporation-rostec/>.

65. TALLINN MANUAL 2.0, *supra* note 39, at 333. The Tallinn Manual 2.0 was created by the International Group of Experts at the invitation of the NATO Cooperative Cyber Defense Centre of Excellence to address cyber operations. In doing so, the International Group of Experts also comprehensively created a consequence-based evaluative framework for States to use when attempting to characterize an operation as a use of force.

66. *Id.* at 334.

67. *Id.*

68. *Id.*

69. *Id.* at 334-35.

70. *Id.* at 335-36.

71. *Id.* at 336.

72. *Id.*

73. *Id.* at 336-37. See *infra* app. A (a graphical depiction of the spectrum of coercive acts based on the author’s interpretation of the spectrum of coercion described in Michael N. Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUM. J. TRANSNAT’L L. 885 (1999)). See also NAT’L SEC. L. DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 219-20 (2020) [hereinafter OPERATIONAL LAW HANDBOOK]. See also Schmitt, *supra* note 8, at 911-17.

74. TALLINN MANUAL 2.0, *supra* note 39, at 333-37.

75. *Id.* at 333-37. See also OPERATIONAL LAW HANDBOOK, *supra* note 73, at 219-20.

76. TALLINN MANUAL 2.0, *supra* note 39, at 337.

77. Schmitt, *supra* note 8, at 885. See *infra* app. B (a graphical depiction of the proposed normative framework for CNA based on the author’s interpretation of the spectrum of coercion described in Michael N. Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUM. J. TRANSNAT’L L. 885 (1999)).

78. TALLINN MANUAL 2.0, *supra* note 39, at 564 (defining “Cyber Operation” as “The employment of cyber capabilities to achieve objectives in or through cyberspace”).

79. *Id.* at 328.

80. Schmitt, *supra* note 8, at 916.

81. Deeks, *supra* note 18, at 1038-39 (“This goal of preserving the traditional *jus ad bellum* framework while ensuring the Charter retains contemporary relevance explains why [multi-part tests] proliferate in the use of force area. States and scholars have proposed MPTs to guide decision-making about when it is permissible to use force in anticipation of an armed attack; when a state may use force inside another state to rescue its nationals; when a given cyber activity rises to the level of a use of force; when a state may use force inside another state against an organized armed group of nonstate actors; and [ . . . ] when a state may use nonconsensual force inside another state to suppress ongoing genocide or crimes against humanity.”).

82. *Id.* at 1044-47 (commenting that multi-part tests in the *jus ad bellum* provide (1) law specification and (2) law development (avoiding formal U.N. Charter amendments); (3) reduce the likelihood of interstate conflict; and (4) reduce transaction costs for states).

83. *Id.* at 1051.

84. *Id.* at 1047-48.

85. *Id.* at 1048.

86. *Id.* at 1048-51.

87. *Id.* at 1039.

88. *Id.* at 1048.

89. *Id.* at 1049.

90. *Id.* at 1050.

91. *Id.*

92. *Id.* at 1052-53.

93. *Id.* at 1040.

94. See generally U.N. Charter art. 2(4), art. 51.

95. Assume for the purpose of this hypothetical scenario that States Green and Red are engaged in an IAC where both State military forces are operating within their own territories. These armed attacks initiated within each of their own territories and affected the opposing State. The simplification of armed attack to merely cross-border artillery strikes avoids further complexities posed by the occupation of sovereign territories, which is outside the scope of this hypothetical scenario.

96. Considerations for the possible loss of neutral status for State Yellow is outside the scope of this article.

97. JOINT CHIEFS OF STAFF, JOINT PUB. 3-13.1, ELECTRONIC WARFARE para. I.4.h. (8 Feb. 2012) [hereinafter JP 3-13.1]. See also JOHN R. HOEHN, CONG.. RSCH. SERV., IF11118, DEFENSE PRIMER: ELECTRONIC WARFARE (Sept. 18, 2019).

98. The jamming does not specifically target State Green; it equally degrades both States Green and Red electronics.

99. Because States Green and Red are already in an IAC, any use of force evaluation between those States should be done under the *jus in bello* framework. However, *jus ad bellum* continues to apply to actions between States Green and Yellow. This hypothetical scenario attempts to demonstrate the challenges of evaluating third-party State actions within IACs between two States.

100. See U.N. Charter art. 51. See also Schuller, *supra* note 18, at 168. If State Yellow AWS conducted an armed attack against State Green military forces, then State Green military forces would be able to respond

under their inherent right of self-defense with options that include lethal force.

101. Webster, *supra* note 27.

102. State Yellow AWS are physically operating within the territory of State Red and with State Red’s consent.

103. Crotoof, *supra* note 3, at 24 (commenting that interference with the electromagnetic spectrum does “not meet the armed attack threshold justifying recourse to physical use of force”).

104. TALLINN MANUAL 2.0, *supra* note 39, at 333.

105. See TALLINN MANUAL 2.0, *supra* note 39, at 337. When referring to these factors, the use of “high”/“medium”/“low” in the analysis is short-hand for relating the likelihood that the international community and customary international law would support a justification for a use of force response. For example, if all factors were “high,” then there is an extremely high likelihood that a State Green use of force response would be justifiable under Articles 2(4) and 51 of the U.N. Charter.

106. See *id.* at 334 (“[C]onsequences involving physical harm to individuals or property will in and of themselves qualify a cyber operation as a use of force. Those generating mere inconvenience or irritation will never do so.”). If the electronic jamming permanently destroyed State Green electronic systems or was the proximate cause of a fatality or destruction of property (e.g., if State Yellow jamming caused a State Green fatal aviation mishap or an explosion at an industrial plant), then the severity factor would increase dramatically.

107. See *id.* (“The sooner consequences manifest, the less opportunity States have to seek peaceful accommodation of a dispute or to otherwise forestall their harmful effects.”). State Yellow AWS jamming is manifesting along the disputed international border and within States Green and Red.

108. See generally JP 3-13.1, *supra* note 97, para. I.4.h. (describing the deliberate nature of electromagnetic jamming).

109. See TALLINN MANUAL 2.0, *supra* note 39, at 334-35 (commenting that espionage breaches territorial sovereignty, but the acts may not rise to the level of a use of force).

110. State Green should attempt to quantify the total impact—for example: “State Green was unable to use 10,000 civilian cell phones, 16 hospital life-support systems, and 2 civilian airport radar systems. The total degradation lasted 48 hours over a 3-day period of time.” Depending on how State Green quantifies the effects, then the measurability factor may increase. However, if State Green is not sophisticated enough to quantify the effects or is unwilling to acknowledge the effects (e.g., State Green may not want to admit that State Red degraded all State Green counter-battery radars), then the measurability level may decrease.

111. See TALLINN MANUAL 2.0, *supra* note 39, at 336.

112. State Green should attempt to prove a military nexus—for example, if the jamming preceded an armed attack by State Red artillery, then State Green should be able to overcome State Yellow’s assertion that its jamming is only for self-defense and so the military character level may increase.

113. See OPERATIONAL LAW HANDBOOK, *supra* note 73, at 220. See also TALLINN MANUAL 2.0, *supra* note 39, at 336-37 (commenting that outside of an armed attack, actions that are not expressly forbidden are permitted).

114. See generally David Bosco, *When Can States Jam Radio Broadcasts?*, FOREIGN POL'Y (Oct. 5, 2012, 4:16 PM), <https://foreignpolicy.com/2012/10/05/when-can-states-jam-radio-broadcasts/>.
115. TALLINN MANUAL 2.0, *supra* note 39, at 337.
116. Schmitt, *supra* note 8, at 914. See also Schuller, *supra* note 18, at 168.
117. TALLINN MANUAL 2.0, *supra* note 39, at 337. For example, State Green may be subject to condemnation from the international community and possible adverse action if it was determined that its response violated the prohibition against use of force in Article 2(4) of the U.N. Charter.
118. Schmitt, *supra* note 8, at 916 (explaining that any use of force response would still be subject to evaluation under the principle of proportionality).
119. Schuller, *supra* note 18, at 167 (The *jus ad bellum* principle of proportionality “limits any defensive action to that necessary to defeat an ongoing attack or deter or preempt a future attack”) (citation omitted). Proportionality is the next most significant principle to evaluate the lawfulness of a State Green response to AWS actions. However, the *jus ad bellum* proportionality analysis is outside the scope of this article.
120. TALLINN MANUAL 2.0, *supra* note 39, at 334 (The factor of “directness” assesses the “attenuation between the initial act and its consequences . . . directness examines the chain of causation”).
121. State Yellow human decides where and when to conduct aid delivery/jamming missions.
122. TALLINN MANUAL 2.0, *supra* note 39, at 336.
123. State Yellow allows artificial intelligence to determine where and when to deliver aid based on independent algorithms.
124. TALLINN MANUAL 2.0, *supra* note 39, at 336.
125. Deeks, *supra* note 5, at 24 (“If a state makes a decision on the basis of machine learning, the state may not be able to identify or explain the reasoning underpinning that decision. As a result, that state may attempt to deflect scrutiny by pointing to the nature of algorithmic decision-making. A state in this position would effectively be arguing that, if it cannot foresee what an algorithm will do, it cannot be held responsible.”).
126. SCHARRE, *supra* note 42, at 46 (describing that fully autonomous systems can “search for, decide to engage, and engage targets on their own and no human can intervene.”). See also KELLEY M. SAYLER, CONG. RES. SERV., R45178, ARTIFICIAL INTELLIGENCE AND NATIONAL SECURITY 12-13 (2020) (explaining how the military will use AI applications “similar to those for commercial semiautonomous vehicles, which use AI technologies to perceive the environment, recognize obstacles, fuse sensor data, plan navigation, and even communicate with other vehicles”) (citation omitted).
127. Schuller, *supra* note 54, at 396 (in discussing the “decide” phase of autonomous weapon systems, practitioners must “consider whether the link between programming and lethal kinetic action might become so diluted that we cannot reasonably say a human decided to kill”). See also Crotoof, *supra* note 3, at 24 (discussing the possibility that “autonomous weapon systems may malfunction and commit an action that appears to be a serious violation of international humanitarian law without anyone being able to be held accountable under existing law”). For example, a number of factors influence the ability to attribute AI actions to a State: whether the AI programming was created by the government or a civilian corporation; whether the State updated the AI programming in response to other AI actions; and what level of government or industry holds itself responsible (the civilian government leadership authorizing procurement of the AI, the military leadership deploying it on the battlefield, or the computer programmers who created the AI). However, an in-depth analysis of the ability to attribute AI decision-making to States is outside the scope of this article.
128. Like Vignette #1, this hypothetical scenario considers States Green and Red to be in an IAC (subject to *jus in bello*). States Green and Yellow are not engaged in an armed conflict (subject to *jus ad bellum*). This hypothetical scenario poses a unique challenge whereby a State Red cyber operation impacts the physical systems of a neutral third-party State in coercive acts short of an “armed attack.”
129. Because of the ongoing IAC between States Green and Red, any response by State Green to State Red cyber warriors would be subject to *jus in bello*.
130. TALLINN MANUAL 2.0, *supra* note 39, at 337.
131. Assume for this hypothetical scenario that State Green cannot tie State Red’s use of information gathered from the State Yellow ADS to a State Red armed attack against State Green. For example, there is no evidence that State Red is using imagery and GPS coordinates from the State Yellow ADS to direct an armed attack. However, if State Green were able to demonstrate that the State Red cyber operation resulted in the destruction of State Green property by State Yellow ADS, then the severity factor would increase based on the physical damage.
132. See TALLINN MANUAL 2.0, *supra* note 39, at 334.
133. See *id.*
134. See *id.* at 335 (“[T]hough highly invasive, cyber espionage does not *per se* rise to the level of a use of force.”).
135. See generally OPERATIONAL LAW HANDBOOK, *supra* note 73, at 219-20.
136. Without access to the State Red computer servers and military plans, State Green will not be able to determine which information, if any, State Red used from the cyber operation to their advantage in the IAC.
137. See TALLINN MANUAL 2.0, *supra* note 39, at 336. If State Green can tie military actions to the cyber operation, then the military factor will be high. For example, if State Red is using the video feeds and GPS coordinates from State Yellow ADS to dynamically target State Green military objectives, then temporal proximity between the observation by the State Yellow ADS of the effects of the indirect fires with the use of indirect fires by State Red would constitute an armed attack. Therefore, a use of force response to this type of armed attack would likely be justified. See also Schuller, *supra* note 18, at 168.
138. However, if State Green is able to demonstrate that State Red is using information from its cyber operation to dynamically target State Green in real time with conventional weapons (e.g., using the State Yellow ADS as observers for indirect fire), then the military character would increase.
139. See OPERATIONAL LAW HANDBOOK, *supra* note 73, at 209-10.
140. Schmitt, *supra* note 8, at 916.
141. The non-use-of-force alternatives for State Green to prevent State Yellow ADS overflights are outside the scope of this article.
142. TALLINN MANUAL 2.0, *supra* note 39, at 334 (“[D]irectness examines the chain of causation . . . Cyber operations in which cause and effect are clearly linked are more likely to be characterized as uses of force than those which are highly attenuated.”).
143. *Id.* at 168-74 (providing a full description of “Rule 32—Peacetime cyber espionage”).
144. United Nations Convention on the Law of the Sea, pt. V, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].
145. See generally Ryan Goodman, *Legal Limits on Military Assistance to Proxy Forces: Pathways for State and Official Responsibilities*, JUST SEC. (May 14, 2018), <https://www.justsecurity.org/56272/legal-limits-military-assistance-proxy-forces-pathways-state-official-responsibility/>.
146. Michael N. Schmitt & David S. Goddard, *International Law and the Military Use of Unmanned Maritime Systems*, 98 INT’L REV. RED CROSS 567, 571 (2016) (providing a comprehensive evaluation of the unique challenges that unmanned maritime systems, which include UUVs, pose to existing law). An in-depth evaluation of UUVs is outside the scope of this article.
147. See SAYLER, *supra* note 126, at 14 (discussing the U.S. Navy’s “Sea Hunter” program which is designed to “provide the Navy with the ability to autonomously navigate the open seas, swap out modular payloads, and coordinate missions with other unmanned vessels—all while providing continuous submarine-hunting coverage for months at a time”) (citation omitted).
148. MK 48 Mod 7 Common Broadband Sonar System (CBASS) Heavyweight Torpedo, LOCKHEED MARTIN, <https://www.lockheedmartin.com/en-us/products/mk-48-mod-7-common-broadband-advanced-sonar-system-cbass-heavyweight-torpedo.html> (last visited Nov. 17, 2020) (describing the physical characteristics of the Mk 48 torpedo with a speed of 28 knots).
149. UNCLOS, *supra* note 144, pt. VII.
150. Within the same timeframe, there have been no documented collisions between State Red UUVs and State Red-flagged fishing vessels.
151. See generally Convention on the International Regulations for Preventing Collisions at Sea, pt. A.1.(a) Nov. 20, 1972, 1050 U.N.T.S. 16 [hereinafter COLREGS] (this hypothetical assumes that both States Green and Red are signatories to the COLREGS, and therefore these collisions will be subject to the COLREGS because “[t]hese Rules shall apply to all vessels upon the high seas and in all waters connected therewith navigable by seagoing vessels”). But see Schmitt & Goddard, *supra* note 146, at 577 (noting that unmanned maritime systems may not be subject to UNCLOS or COLREGS).
152. Schmitt, *supra* note 8, at 908.
153. TALLINN MANUAL 2.0, *supra* note 39, at 337.
154. See COLREGS, *supra* note 151, at 22-25 (for example, State Green should emphasize that State Red UUV are in violation of the COLREGS regarding “Rule 2—Responsibility” of due regard, “Rule 6—Safe Speed,” “Rule 7—Risk of Collision,” and “Rule 8—Action to Avoid Collision”).

155. See TALLINN MANUAL 2.0, *supra* note 39, at 334. The scope, duration, and intensity of the consequences of State actions will most significantly impact the severity evaluation.

156. See *id.* at 334.

157. See *id.*

158. See UNCLOS, *supra* note 144, art. 29 (“[W]arship” means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.”).

159. See *id.* art. 38, art. 45 (the rights of “Transit Passage” and “Innocent Passage” may allow authorized to travel through territorial waters of other States subject to specific limitations).

160. See TALLINN MANUAL 2.0, *supra* note 39, at 335.

161. State Green should be able to demonstrate the damage from the collisions and may be able to record a collision with State Red UUVs.

162. Without sufficient counter-UUV operations, it will be difficult for State Green to demonstrate the overall number of State Red UUVs deployed within its EEZ and territorial waters. Likewise, without evaluating each individual State Red UUV, it will be impossible for State Green to determine how many State Red UUV are carrying explosive payloads and whether their AI programming is for peaceful or nefarious purposes.

163. See TALLINN MANUAL 2.0, *supra* note 39, at 336 (commenting that “the use of force has traditionally been understood to imply force employed by the military or other armed forces”). If State Green can tie the actions of State Red UUVs to the State Red military, then the military factor will increase.

164. Therefore, State Green should attempt to clarify the relationship between State Red and its fishing shell corporations.

165. See TALLINN MANUAL 2.0, *supra* note 39, at 335.

166. Schmitt & Goddard, *supra* note 146, at 577.

167. Schuller, *supra* note 18, at 167.

168. Schmitt, *supra* note 8, at 916.

169. Deeks, *supra* note 5, at 24. See also Schuller, *supra* note 54, at 396.

170. See generally *Losing Humanity: The Case against Killer Robots*, HUM. RTS. WATCH (Nov. 19, 2012), <https://www.hrw.org/report/2012/11/19/losing-humanity/case-against-killer-robots> (“If the killing were done by a fully autonomous weapon, however, the question would become: whom to hold responsible. Options include the military commander, the programmer, the manufacturer, and even the robot itself, but none of these options is satisfactory.”). See also Crotoft, *supra* note 3, at 20.

171. Schuller, *supra* note 54, at 404-08 (“Agents learn by being provided data sets from which an onboard algorithm can be programmed to attain rational goals.”). A further explanation of how AI “learns” is outside of the scope of this article.

172. Goodman, *supra* note 145.

173. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶¶ 115-16 (June 27) (The International Court

of Justice evaluated the United States’ participation in Nicaragua using what has been referred to as the “effective control” test which determined that “the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua.”).

174. Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 131 (July 15, 1999), <https://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf> (“In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity.”).

175. Schuller, *supra* note 54, at 404-08.

176. Ford, *supra* note 5, at 453 (“The mechanism of control can be exercised through physical or technological means. Historically, weapons were controlled through physical means. . . . Control can be manifest across either or both vectors.”) (citations omitted).

177. Schmitt, *supra* note 8, at 897 (commenting on the use of CNA, that “a lesser-advantaged state hoping to seriously harm a dominant adversary must inevitably compete asymmetrically”).

178. Trumbull, *supra* note 5.

179. TALLINN MANUAL 2.0, *supra* note 39, at 333-36.

180. *Id.* at 337.

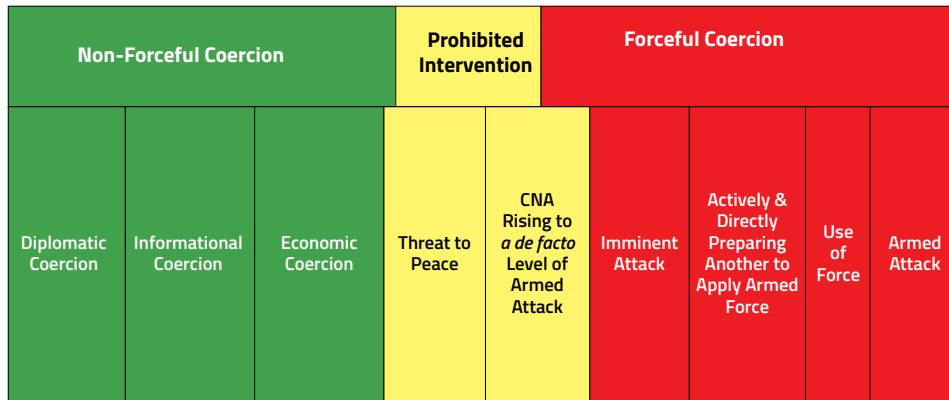
181. TALLINN MANUAL 2.0, *supra* note 39, at 330-37. See also, Schmitt, *supra* note 8, at 916.

182. Major Micah Smith, Cyber Operations I, slide 43 (Nov. 5, 2019) (unpublished PowerPoint presentation) (on file with author).



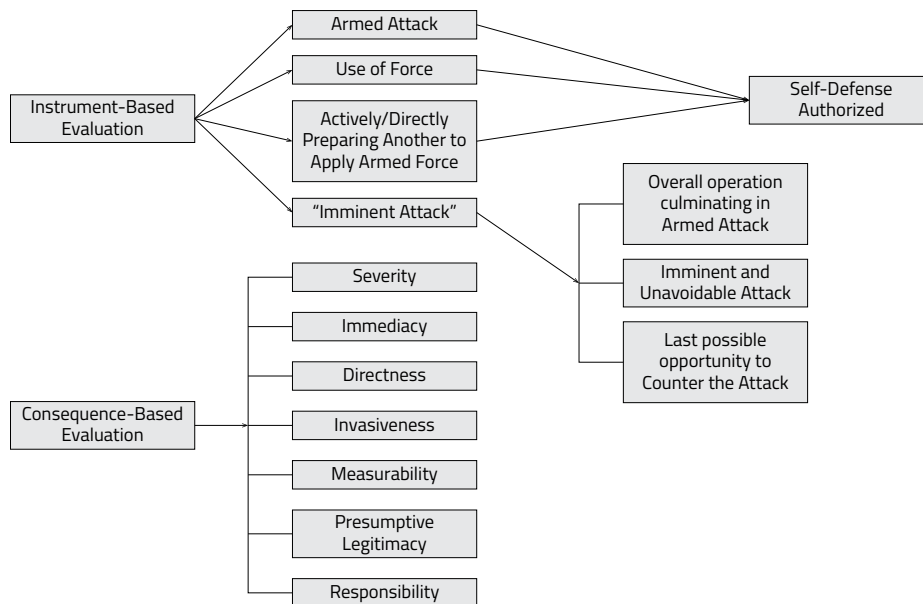
## Appendix A. Spectrum of Coercion

Professor Michael N. Schmitt



## Appendix B. Proposed Normative Framework for CNA

Professor Michael N. Schmitt





(Credit: spiritofamerica – stock.adobe.com)

## No. 4

# A JA on the Rio Grande

*By Major Beau O. Watkins*

*Del Rio is not the edge of the Earth, but you can see it from there.<sup>1</sup>*

In the summer of 2018, the U.S. Attorney General's office requested the Armed Services provide twenty-one active duty and reserve judge advocates (JAs) to assist in handling criminal illegal immigration cases. The overburdened system was exacerbated by the Assistant U.S. Attorney (AUSA) staffing shortage along the United States' southern border.<sup>2</sup> I volunteered and was assigned to the Western District of Texas, Del Rio Division.<sup>3</sup> From a professional standpoint, working with the AUSA office in Del Rio, Texas, was rewarding. It introduced me to an area of law in which I had no background, and it allowed me to broaden my perspective of what justice means—and what it means to be in the Army.

This article provides an overview of this broadening assignment and lists the benefits a JA can enjoy by serving as a Special Assistant U.S. Attorney (SAUSA) on the U.S. southern border. The section entitled Area of Operations and Scope of Duties describes my time in Del Rio, Texas, and my job as a Special Assistant United States Attorney for the Western District of Texas. Next, the section, Immigration, discusses the basics of immigration and criminal law—including terminology, key players, and process. The final section, Application, consists of a series of examples illustrating the intersection of the administrative and criminal process. Last, the sections Lessons Learned and Conclusion offer thoughts and observations from a JA perspective.

## Area of Operations and Scope of Duties

### Area of Operations

Del Rio, Texas, is a small city along the United States-Mexico border. It sits on the Rio Grande River at the intersection of two major highways, 277 and 90.<sup>4</sup> A map<sup>5</sup> of the area shows that the city sits directly across the Rio Grande River from Ciudad Acuna, Coahuila, Mexico.

Del Rio's sparse population, network of rural roads, and surrounding highways make this area—and the U.S. district court jurisdiction in that area<sup>6</sup>—an ideal location for drug smuggling, human trafficking, illegal entry, and other border crimes. For instance, during the fiscal year of 2017, the Western District of Texas had 5,570 criminal filings.<sup>7</sup> In 2018, their criminal filings for immigration cases grew by twenty-one percent.<sup>8</sup> In 2017, the Del Rio Division alone had 1,403 criminal filings.<sup>9</sup>

I can't say that I was surprised by this volume of cases. Since the entire purpose of this assignment was to deal with the immigration crisis on the U.S. southern border, logically, the Department of Justice (DoJ) would assign me to a "border town." But, while I had some experience as a SAUSA at a magistrate court at Aberdeen Proving Ground in Maryland, my scope of duties in Del Rio was far larger and different in many ways.

### Scope of Duties

As a result of severe staffing shortages—particularly along the Rio Grande River, and an increased emphasis on border security and immigration control, the DoJ and the Department of Defense (DoD) signed a memorandum of understanding (MOU), which stated the DoD would provide twenty-

immigration law. Below is a brief overview of some key provisions. Later, the various administrative and criminal laws are applied to fact-based scenarios, so this overview serves as a brief refresher of general immigration law topics.

Immigration law is enforced through the Immigration and Nationality Act (INA),

inadmissible within the context of 8 U.S.C. § 1182(a)(6).<sup>14</sup> An alien who is present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General is inadmissible.<sup>15</sup>

- Credible Fear of Persecution: A well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion. A person who meets this definition is now a refugee.<sup>16</sup>
- 8 U.S.C. § 1325 (Improper Entry by Alien): This criminal violation is committed when an alien enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or eludes examination or inspection by immigration officers, or attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact.<sup>17</sup>
- 8 U.S.C. § 1326 (Reentry of Removed Aliens): This criminal violation is committed when an alien who has previously been denied admission, excluded, deported, or removed enters, attempts to enter, or is at any time found in the United States. Penalty typically does not exceed two years unless some other conditions are met, such as commission of an aggravated felony subsequent to [their] previous removal.<sup>18</sup>

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ty-one active and reserve JAs to serve on the border for 179 days. They would assist in prosecuting reactive border immigration cases, with a focus on misdemeanor improper entry and felony illegal re-entry cases. This included drafting pleadings, assisting with plea negotiations, and making court appearances. It also included drafting prosecution memorandums and coordinating with law enforcement agencies to prepare cases for grand jury indictment. Representing the United States at initial appearances, preliminary and detention hearings, guilty pleas, and bond revocation hearings was also part of the duty description. I was fortunate enough to be one of the active duty Army JAs selected to assist the DoJ.

The border regions were busy during my six months assigned there. I represented the United States at approximately 450 felony initial appearances, 45 preliminary and/or detention hearings, over 300 guilty pleas, and over 100 sentencing proceedings; I prepared over 100 indictments for grand jury; and I conducted over 25 guilty pleas. In total, I served as lead attorney in over 180 criminal matters.

### Immigration

#### Law Basics

Any JA assigned to the border should possess a general understanding of U.S.

codified as 8 U.S.C. §§ 1101-1537. The INA is administrative (i.e., it is not a criminal code), but it does have criminal provisions.<sup>10</sup> I focused on the criminal provisions and had little interaction with Immigration and Customs Enforcement (ICE) agents, immigration judges, or immigration attorneys. The criminal process is distinct and separate from the administrative aspect. However, the administrative immigration procedures can have a critical effect on the criminal process, and vice versa. As a result, it is important to understand the administrative side because it is always in the background of the criminal process.

#### Key Terms

To effectively practice immigration law, an attorney should be familiar with the following key terms and phrases.

- Alien: Any person not a citizen or national of the United States.<sup>11</sup>
- Immigration officers: Any employee or class of employees of the Service or of the United States designated by the Attorney General, individually or by regulation.<sup>12</sup> All Border Patrol (BP) agents are considered immigration officers.<sup>13</sup>
- Expedited Removal Proceedings (ERP): An alien is subject to expedited removal if a BP agent determines the alien is

#### Lawful Admission into the United States

There are a variety of means to enter the United States legally; however, there are conditions. 8 U.S.C. § 1181(a) states, “[N]o immigrant shall be admitted into the United States unless at the time of the application for admission he (1) has a valid unexpired immigrant visa . . . and (2) presents a valid unexpired passport or other suitable travel document.” The first condition is most likely obvious: you need to have some form of official documentation in order to enter the United States as an immigrant. 8 U.S.C. § 1225(3) states, “All aliens, including alien crewmen, who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States shall be inspected by immigration officers.”



In short, to enter the United States, one must have the appropriate paperwork and be inspected by an immigration officer at a designated port of entry. If those two things are not in place, it could lead to an expedited removal proceeding (ERP).

### **Expedited Removal Proceedings**

Most undocumented immigrants are removed through an ERP. An ERP precludes any further hearing or review if an immigration inspecting officer determines the alien meets the requirements of 8 U.S.C. § 1182(a)(6)(A)(i).<sup>19</sup> The authority to sign the expedited removal orders is typically withheld to supervisors and above in the Border Patrol.<sup>20</sup> However, there are situations when further review is required, such as when the alien makes a request for asylum or articulates a credible fear of persecution.<sup>21</sup> One of the most important limitations on the use of ERPs is their restriction to those aliens apprehended within 100 (air) miles of the border.<sup>22</sup> If a law enforcement officer (LEO) apprehends an alien outside of this 100-mile area, or the alien can show they have lived for two years continuously in the United States, the alien is not subject to an ERP.<sup>23</sup>

Notably, ERPs are also universally used after an alien has been convicted of a violation of 8 U.S.C. §§ 1325 and 1326 due to the limited appellate rights.<sup>24</sup> If an alien re-enters the United States illegally after having been removed or having departed voluntarily under an order of removal, the prior order of removal is reinstated and “*the alien may not apply for any relief and shall be removed at any time after the re-entry.*”<sup>25</sup> In effect, since releasing an alien would subject them to immediate deportation—and therefore their appearance cannot be reasonably assured (as required by 18 U.S.C. § 3142(b)), the AUSA must request any alien charged with a crime be held in DoJ confinement facilities.<sup>26</sup>

Assuming an alien is convicted for a violation of 8 U.S.C. § 1326, after serving their time in a DoJ confinement facility, they will be released to ICE, which will begin the deportation process under the previous deportation order, which remains in effect.<sup>27</sup> The judge who sentenced the defendant for their criminal conduct can also order the alien removed at the completion of their sentence.<sup>28</sup>

In summary, the effect of a previous deportation order ensures no undocumented immigrant who has previously been removed subject to a deportation order can be released on bond or their own recognizance, as they will, practically speaking, be a risk of failure to appear. If they are released, on bond or otherwise, ICE agents could deport them since they still lack legal status to be in the United States. The practical implications of this are discussed later in this article through the analysis of fact patterns. With an understanding of how the administrative process works, we can now analyze the criminal provisions of the INA.

### **Criminal Provisions**

Title 8 of the INA is one of the primary titles dealing with criminal violations of the INA.<sup>29</sup> Some criminal acts apply to both immigrants and U.S. citizens. One of the most important things to remember is that once an LEO files a criminal complaint on an alien, the alien is entitled to all the rights and privileges of a U.S. citizen.<sup>30</sup> This means they are entitled to an attorney, at no expense to the defendant (if they cannot afford

### **Example 1—8 U.S.C. § 1326: Re-Entry of Removed Aliens<sup>32</sup>**

#### *Facts*

Defendant A, a citizen of Honduras, paid a smuggler in Piedras Negras, Mexico, \$1,000 to be smuggled into the United States.<sup>33</sup> Defendant A had previously lived in the United States for three years before being apprehended, and an immigration judge ordered his deportation in October 2012. In September 2018, Defendant A was met by the smuggler at the bus station (*la parada de autobus*) and guided down to the Rio Grande River across from Eagle Pass, Texas. This portion of the river is only knee- and ankle-deep during the summer months. After crossing the river, Defendant A crossed an easement along the sides of roads, rivers, and other features regularly patrolled by BP Agents—colloquially known as a “drag.” Border patrol agents working the drag spotted the footprints of Defendant A and, after tracking him for approximately thirty minutes, discovered him hiding in thick brush. After identifying themselves to Defendant A, BP agents questioned him.<sup>34</sup> Defendant A

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one), and all the other rights to which a U.S. citizen is entitled in the judicial process.<sup>31</sup> I can vouch that the defense attorneys that I met in Del Rio were intelligent, compassionate, and diligent in their work; they zealously represented their clients, even in the face of a massive caseload.

### **Application**

For a JA to better understand how the law works on the border, specifically the intersection of the administrative and criminal sections of the INA, three examples of what a JA serving on the border can expect to experience are provided. These are in no particular order, but were scenarios I encountered frequently.

freely admitted to not having immigration documents allowing him to be in the United States legally and to having just crossed the Rio Grande River, and he expressed fear of returning to his home country due to gangs. Based on his statements and his wet and muddy clothing, BP agents arrested Defendant A. A background check revealed that Defendant A was previously deported for a violation of 18 U.S.C. § 1325. This is Defendant A’s second illegal re-entry offense.

#### *Initial Appearance*

The government must hold the initial appearance without unnecessary delay, which typically means within twenty-four hours.<sup>35</sup>

### *Preliminary and Detention Hearing*

In accordance with 18 U.S.C. § 3142(f), the preliminary and detention hearing must be held within five days (not including Saturdays, Sundays, or legal holidays). These hearings are waived in the vast majority of cases. This is due to two factors: (1) the clear evidence of illegal entry,<sup>36</sup> which would make a preliminary hearing pointless; and (2) the ICE detainer which is immediately put in place upon confirmation of their illegal status, which would make a detention hearing fruitless.<sup>37</sup> Assuming they do not waive the preliminary or detention hearing, the prosecution must be prepared to put on evidence. This means a witness, usually a BP agent, must be available to testify.

Due to the large number of arrests and wide geographic area, it is not feasible to bring in BP agents from every arrest to identify the defendant in court and testify to the circumstances of their arrest. Usually, it is an agent from the BP's prosecution office. This is a BP agent detailed to testify in these hearings. Since the rules of evidence do not apply, this is permissible under federal law.<sup>38</sup> This agent will gather and review the apprehension report and, if possible, speak to the

how the defendant was apprehended and any admissions made by the defendant.<sup>40</sup> The custodian of records would then testify about the absence of a record of a regularly conducted activity, such as the application for citizenship, or about a record of a previous deportation.<sup>41</sup>

### *Sentencing*

Sentencing is straightforward. The probation office will apply the Federal Sentencing Guidelines to the defendant and their crime, and then they provide their recommendations to the judge. The biggest difficulty is in determining the previous criminal history of the defendant and ensuring the sentencing guidelines are accurate.

### ***Example 2—8 U.S.C. § 1324: Bringing in and Harboring Certain Aliens***<sup>42</sup>

This offense is self-explanatory in large part, but there are some other points that are important to remember. One of the main provisions is the inclusion of conspiracy to bring in or harbor undocumented immigrants.<sup>43</sup> If convicted of conspiracy to bring in or harbor certain aliens, the defendant(s) could receive a maximum of

road and to call the number to coordinate the pickup. Border patrol agents in an overlook position notice a vehicle, a cab, and a half-Toyota pickup. The vehicle drives down a narrow Farm to Market road,<sup>48</sup> flashes its headlights twice, and then pulls over. This is an area notorious for human and drug trafficking, and nearby agents are dispatched to trail the vehicle and conduct a traffic stop. As the agents who are on overlook watch, the vehicle turns around and heads north. Then, the responding agents approach the suspected smuggler; the smuggler pulls over, at which time all five undocumented immigrants "bail out" into the brush. After a brief foot chase, all five undocumented immigrants are apprehended. After BP agents advise the undocumented immigrants of their *Miranda*<sup>49</sup> rights in a language they can understand, all knowingly and voluntarily waive their rights and identify the driver as the one who picked them up on the road. The vehicle has a decal of "Jesus Malverde," on the bumper.<sup>50</sup>

### *Initial Appearance*

Anecdotally, it was my experience that a large proportion of human traffickers are U.S. citizens. Most of these individuals have significant criminal histories or have significant ties to Mexico; either of which would make them a risk of failure to appear. To make the argument for detention until the preliminary and detention hearing, I relied on two things: (1) the nature of the offense; and (2) the Pre-Trial Services Report (PTSR). The first step is always to consider the nature of the offense.

When considering the nature of the offense, the key things to look for are the danger to the community and the risk of flight.<sup>51</sup> Transporting undocumented immigrants with no seatbelts is probably not sufficient; transporting five undocumented immigrants stacked on top of each other in the back seat would present a risk of danger to the community. Likewise, engaging in a high-speed pursuit presents a danger to the community or, alternatively, a risk of flight and failure to appear. A large portion of this is also dependent on the magistrate who is making the decision; some magistrates have zero tolerance for those who risk the lives of undocumented immigrants, while others

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agent who actually made the arrest. They will also review any pictures of the illegal alien obtained at the time of the arrest; then, they will go to the jail and compare it to the defendant. They can then visually identify the defendant in court, as well as testify whether an ICE detainer is in place. If ICE has a detainer, the prosecutor should argue the defendant is a risk of failure to appear.<sup>39</sup>

### *Trial*

While trials do happen, they are not the norm. Most undocumented immigrants waive trial. In the event they do not plead guilty, these cases are relatively easy to prove. Witnesses are generally the arresting BP agents and a custodian of records. The BP agents would, obviously, describe

ten years' confinement.<sup>44</sup> Also, seizure and forfeiture provisions apply. A large number of vehicles used in alien smuggling endeavors are seized every year.<sup>45</sup> Even more importantly, the penalty increases to life in prison if any person is killed, suffers serious bodily injury, or is placed in jeopardy of life during the smuggling operation.<sup>46</sup>

### *Facts*

Five Mexican nationals meet with "Cuco" in Piedras Negras, Mexico, to be smuggled into the United States.<sup>47</sup> They are met by a foot guide and are guided across the Rio Grande River. After traveling a day through the brush, one of the undocumented immigrants is given a phone number. They are told to wait beside a

might have a more relaxed standard on the definition of risk.<sup>52</sup> After considering the nature of the offense, a JA should next turn their attention to a review of the PTSR and Pre-Trial Services (PTS) recommendation.

The PTS office will interview the defendant prior to the detention hearing and will seek to determine the defendant's eligibility for a bond. They make this determination based on their criminal history, familial status, employment, financial status, and—in Del Rio—their connections with Mexico. Personnel at PTS will make a recommendation as to whether the magistrate should consider releasing the defendant on bond. Typically, the AUSA does not oppose a recommendation by PTS for bond, though occasionally it does happen. In the event the magistrate determines the defendant should be released on bond, PTS is the organization that supervises their release, not the probation office.

#### *Preliminary and Detention Hearings*

The vast majority of defendants, in my experience, waive the preliminary and detention hearings. This is for various reasons, but typically because the evidence is overwhelming. However, in the event the defendant does decide to contest the preliminary and detention hearing, the JA would proceed as in the § 1326 case mentioned above; and, additionally, they would offer the PTSR for the judge's consideration.

A preliminary hearing would proceed generally the same as an offense under 8 U.S.C. § 1326. However, the LEO may be Homeland Security Investigations (HSI). If HSI is involved, they do not have a dedicated agent stationed in the AUSA office, and the agent who actually investigated the case will be present to testify.

Detention hearings are different. Under 18 U.S.C. § 3142, the government must release a defendant unless the judicial officer determines that such release will neither reasonably assure the appearance of the person nor endanger the safety of the community.<sup>53</sup> In this case, I argued the defendant had close ties with Mexico, they had no incentive to return to the United States, and there was a risk of failure to appear. Alternatively, I argued that they were transporting more passengers than the

vehicle designer intended, and this created an unreasonable risk to the community.

#### *Trial*

Trials for violations of 8 U.S.C. § 1324 do occur, and they present a unique set of problems. The number one issue is the retention of one or more of the undocumented immigrants as a material witness. Under Western District of Texas policies, if they are not otherwise disqualified, a defendant may get one downward departure on their sentencing guidelines; but only if they agree to waive the deposition of the material witness and stipulate to their testimony.<sup>54</sup> This means any stipulation of fact as to what the material witness might say must be airtight and address all the elements of the offense. Attention to detail is paramount. If the defendant does not agree to waive the deposition, the JA must be prepared to coordinate and conduct this deposition. For those who have never conducted a deposition in a human smuggling case, they can be difficult, as many material witnesses are reluctant to testify against undocumented immigrant transporters for fear of retaliation.<sup>55</sup> These types of trials generally proceed with the arresting officers as well as the custodian of records to identify the status of the undocumented immigrants.

#### *Sentencing*

This would proceed in a similar fashion to Example 1, but with the added information of the attempted flight and the danger presented to the undocumented immigrants.

#### **Example 3—19 U.S.C. § 1459: Reporting Requirements for Individuals<sup>56</sup>**

This law applies to all individuals, including U.S. citizens. It mandates individuals only enter through a designated border crossing point, and they must immediately report the arrival and present themselves and all articles for inspection. This carries a civil and criminal penalty. The criminal penalty can be up to one year in jail.

#### *Facts*

Defendant C is a U.S. citizen who HSI believes is a foot guide for alien smuggling. However, HSI has no actionable

intelligence. Border patrol agents apprehend Defendant C as he walks through the brush near the Rio Grande River. His clothes are wet and muddy, indicative of someone who has just crossed the Rio Grande River. He has two pre-paid phones on his person. When questioned by BP agents, Defendant C admits to having crossed the Rio Grande River at a place other than a designated point of entry.<sup>57</sup>

#### *Initial Appearance*

Since this individual is a U.S. citizen, and there are no facts presented that would indicate he is a danger to the community, it is likely that—absent a significant criminal history—the magistrate would grant a bond.

#### *Preliminary and Detention Hearing*

Typically, this would just consist of the arresting LEO testifying.

#### *Trial*

Here, the JA would have to present evidence from the nearest port of entry proving the defendant did not cross at the port of entry, as well as present testimony of the arresting officer.

#### *Sentencing*

This would proceed like Example 1.

### **How Things Work—A Typical Day**

To put all the background information and examples together, it is helpful to understand a daily battle rhythm for this JA assignment. My arrival in Del Rio and my nesting with the AUSA office was seamless. Below is an outline of a typical duty day during my time in Del Rio.

I typically arrived at the office between 0730 and 0800. As soon as I arrived, if I had not checked the day before, I checked the AUSA shared calendar to determine if I had court—as this status can sometimes change overnight. Once I determined I had court, I checked the judge's calendar. On the judge's calendar, I reviewed which LEO filed the complaint. If BP filed the complaint, it was often—but not always—an illegal re-entry case (i.e., a violation of 8 U.S.C. § 1325 or 8 U.S.C. § 1326). If it involved HSI, the Drug Enforcement Agency, the Federal Bureau of Investigation (FBI) or others, I would know it required further research and would call

the relevant agency to gather more information and prepare for any hearing. Since the judges typically post what cases are on the docket the day before, the legal assistant would call the agencies the day before to ensure a representative who could testify about the case was present. It is the agencies' responsibility to check the docket; but, when there is no witness for the government present, the JA—as the representative of the government—will be the person who is left holding the bag.<sup>58</sup>

Anecdotally, the majority of cases coming from BP are either violations of 18 U.S.C. § 1326 or 18 U.S.C. §1324. Cases

cause.<sup>62</sup> The defendant has the right to call witnesses, cross-examine prosecution witnesses, and present argument. I made every effort to meet with law enforcement prior to the hearing to familiarize myself with any nuances of the case and to prepare the agent to testify. Some of the nuances could be whether there was the risk of death or serious bodily harm to any undocumented immigrants or details on how the undocumented immigrant attempted to abscond into the brush. The hearings could be quite contentious. Even though the rules of evidence generally do not apply, occasionally defense counsel attempted to

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coming from HSI and the FBI are common and can involve a variety of cases, such as bulk money, human, and drug smuggling.

Reviewing the complaints clues the attorney in to a variety of potential issues. The main issue is whether the defendant is a U.S. citizen. As I mentioned above, for any undocumented immigrant who has previously been deported, ICE puts a detainer in place. In most cases that I reviewed, there had already been a final order of removal placed on the alien and, as a result, the defendant was subject to expedited removal.

Almost every other day the magistrates hear felony initial appearances, often in groups as large as fifteen or more.<sup>59</sup> These initial appearances, by law, take a significant amount of time.<sup>60</sup> Once complete, the prosecutor must then address the court. Typically, I requested a three-day delay to conduct the detention hearing and preliminary hearing on the same day.<sup>61</sup> This would allow PTS time to conduct interviews and investigate the defendants' criminal history. Besides initial hearings, there could be preliminary or detention hearings.

The burden of proof for the government at the preliminary hearing is probable

turn the hearing into a "fishing expedition" or a suppression hearing.<sup>63</sup> In addition to preliminary hearings, I also represented the government at guilty pleas.

Representing the government at guilty pleas takes a significant amount of time and preparation. It was imperative I checked and double-checked the stipulation of fact for accuracy and completeness. Furthermore, during the actual plea, I would ensure, for the record, the defendant was pleading guilty freely and voluntarily. On days where I represented the government at guilty pleas, the number of defendants was between thirty and forty at a time; and, on one occasion, I represented the government at fifty-two illegal re-entry guilty pleas.

***Preparing Cases for Indictment***

Comparing the military system of preparing charges for court-martial and preparing charges in the federal system is like comparing a mule and a goat; they both have four legs and they both eat everything, but they are still different animals. I am being facetious, but you get the idea: they are dissimilar in the pretrial stages.

The vast majority of cases in Del Rio, especially the ones I worked on, were reactive immigration offenses. These cases generally follow the fact patterns outlined above. Once an immigration offense is committed, the responding LEO will call the on-duty AUSA. This AUSA will ask the LEO a variety of questions to determine whether there is an offense, what it should be charged as, and what evidence the prosecutor needs to secure a guilty verdict. Until final sentencing of the defendant, the LEO remains closely engaged with the AUSA office; and, if the prosecutor needs additional interviews or witnesses, the LEO responds promptly. After the LEO files the complaint with the court, the court provides a copy to the AUSA office. Once at the AUSA office, the legal assistants will create a draft indictment (with charges matching the complaint or modifying it) and a draft prosecution memorandum. Then, they will provide initial discovery to the SAUSA or AUSA for their review.

Reviewing these draft indictments is a mirror image of preparing a case for prefferal of charges, and JAs should conduct themselves accordingly. The most critical aspect is determining sufficiency of evidence. This typically consists of reviewing previous deportation orders, criminal history, details of the arrest, and previous smuggling operations, among other details. After determining whether the evidence supports the charged offense, the prosecutor also calculates the potential sentence based on the offense, criminal history, and role of the defendant in the offense.<sup>64</sup> Once this is complete, the JA should submit the indictment to their supervisor for review. After reviewing, the supervisor and responsible LEO will present the case to the grand jury for indictment.

An Article 32 preliminary hearing is more analogous to the preliminary hearings I described previously in this article.<sup>65</sup> In both, the JA may present witnesses and evidence; but the rules of evidence do not apply, and there is limited discovery. Another similarity is that the finding of no probable cause by either a preliminary hearing officer, or the magistrate, is not necessarily the end of the case. In the military, charges may still be referred to trial by court-martial and—in the civilian federal



context—a grand jury may still indict even if the magistrate does not find probable cause. The grand jury will never see a magistrate’s opinion of whether or not there is probable cause; whereas a General Court-Martial Convening Authority will see the report of the Article 32 preliminary hearing officer.<sup>66</sup> It is important to note that, if a grand jury finds no probable cause, the JA cannot indict until they do. insert As a JA is involved in many more grand jury and sentencing hearings than trials, the article next discusses JA involvement in sentencing hearings.

### **Sentencing Hearings**

Any JA who has served as a trial counsel knows sentencing hearings can, at times, be more stressful than an actual trial. The need to secure witnesses, construct an argument for an appropriate sentence, secure and be ready to present evidence, as well as preparing the courtroom, the bailiff, etc., can be a headache. The civilian federal system is another matter entirely.

The biggest difference is the reliance, by all parties, on the probation office and the report they prepare called the pre-sentence report.<sup>67</sup> First, the probation office will interview the defendant (who has their counsel with them) and seek to confirm any information they give. Most of this information concerns their familial connections; connections to the United States; and their financial situation. The probation office also confirms and gathers details of the defendant’s criminal history. This usually involves a brief summary of any previous convictions, and some of these can be quite blood curdling. I can recall two reports that involved defendants who became angry with their wife/girlfriend and attacked them with a machete.<sup>68</sup>

Once the probation office completes the pre-sentence report, they provide it to both the government and the defense for review and corrections. Most of the time, defense counsel will have only minor corrections; but, occasionally, there will be major issues—such as discrepancies in dates of conviction or dates of sentencing. These can have a huge impact on the Federal Sentencing Guidelines.<sup>69</sup> Occasionally, defense counsel will file a request for

sentencing below guidelines, which will require a government response.

Like in military jurisprudence, the federal system allows a defendant an opportunity to address the court, and most seemed to exercise this opportunity or allowed their defense counsel to present arguments. A person would have to have a heart of stone to not feel some sympathy for the tales of woe, misfortune, poverty, and crime. However, the criminal history of many of these defendants will often-times disabuse any sympathy one may have. I kept track of many of the cases I prepared for Grand Jury indictment and logged what type of criminal history the defendants had. The following list of offenses are some of the more notable ones I observed: identity theft; drug and alien smuggling; indecency with a child; driving while intoxicated; hit and run; burglary; theft; domestic battery with intent to inflict grave bodily harm; assault with a deadly weapon; rape; and resisting arrest. These were all offenses committed in the United States, either prior to or after the subject’s first deportation—the majority of which, in my experience, occurred after the first deportation. Even assuming these individuals had only immigration offenses, I often referred to the principles of military justice and found many of the tales of woe more evidence of extenuation than of either necessity or mitigation.<sup>70</sup>

### **Lessons Learned and Conclusion**

Many JA broadening assignments impart lessons in what systems, processes, or even culture the broadened JA should seek to import into the Judge Advocate General’s (JAG) Corps. This SAUSA assignment is no different. The first lesson I would seek to implement is better utilization of paralegals. The second lesson is to develop a comprehensive plan for plea deals. Third, better coordination and synchronization with law enforcement agents would ease many military justice burdens that trial counsel and chiefs of justice experience in the JAG Corps

My time in Del Rio would not have been successful without the outstanding team of legal assistants I worked with in the Del Rio office. While not “paralegals” per se, they operated as paralegals and with an impressive degree of flexibility and

professionalism.<sup>71</sup> Allocating more time for military paralegals to learn their craft with dedicated study sessions and hands-on experience will be one of my priorities in the future. This is difficult, due to having to maintain Soldier skills; but, the JAG Corps should devote more time to paralegal training, as well as teaching attorneys how to better utilize their paralegals. A one-on-one discussion between senior paralegals and new trial counsel, as well as creative mentoring of junior paralegals, could improve efficiency for counsel and paralegals—particularly if this is continued regularly.

Another way to improve efficiency involves chiefs of justice developing a comprehensive plan for plea deals. Plea deals in the civilian federal system are relatively straightforward. The defendant pleads to the most readily provable charge, the Federal Sentencing Guidelines provide what the expected punishment is—based on the conduct and criminal history—and *voila*: the defendant knows what their range of sentencing is going to be.<sup>72</sup> Anyone familiar with the military system knows that reaching a plea deal is no simple matter. I would recommend military justice advisors, trial counsel, and chiefs of justice spend significant amounts of time discussing cases prior to preferral with commanders to develop a comprehensive plan for approaching plea deals.

The greatest take-away from my experience in Del Rio was the benefits of close coordination with law enforcement agencies. The high degree of professionalism and experience of the law enforcement agencies was incredible and made prosecutors’ lives much easier; it eliminated much of the needless hassle that military justice advisors and trial counsel often experience. There were no “requests for opines”—which must be handled within a certain period of time—and I never heard a law enforcement agent say, “We have closed that case.” Many military justice advisors and trial counsel go to extraordinary lengths to foster good relations with law enforcement, but this is typically on an individual, one-on-one basis. In Del Rio, communication with law enforcement was something that happened on a daily basis, and sync meetings on large cases were consistent and thorough. It would behoove a military justice

practitioner and supervisor to foster close coordination with law enforcement at all levels. This is something I will heavily emphasize as a military justice practitioner. Furthermore, there is at least one step the

cases and operating in the courtroom. It is my belief that building connections with other agencies and leaders can only be an asset down the road, especially if there is a future need for joint operations. I sincerely

## It would behoove a military justice practitioner and supervisor to foster close coordination with law enforcement at all levels.

Army as a whole can take to institutionalize close coordination between military justice practitioners and law enforcement: embed a Criminal Investigation Command (CID) or military police (MP) agent inside the military justice office, as the JAG Corps did with special victim prosecutors.<sup>73</sup>

Having practiced military justice at Fort Bragg, North Carolina, I was constantly running back and forth to the CID or MP offices, or sending my paralegals to those offices for various reasons—such as interviewing agents, reviewing evidence, or double-checking discovery. This was a significant drain on my office's time and resources. Embedding a CID agent at the military justice office could have alleviated this. As mentioned above, in Del Rio, there is a BP agent permanently assigned to the AUSA office. This agent facilitated the coordination with various border patrol stations and assisted in the production of witnesses and evidence. Having this agent relieved legal assistants and AUSAs from having to track down evidence and witnesses; it also relieved BP from having to send widely dispersed agents on varying schedules to the AUSA office. This resulted in the faster processing of cases, something every busy prosecutor and law enforcement officer wants. I highly recommend that the Army consider a pilot program of embedding CID and MP personnel in the military justice offices of major installations.

I consider my time as a SAUSA in the Del Rio sector an incredible learning and broadening experience. Seeing how other agencies operate and function, while not earth shattering, was still an incredibly helpful experience. It allowed me to hone my craft and gain confidence in both preparing

hope the DoD and DoJ will continue to look for opportunities to collaborate and cross-train in the future. **TAL**

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*MAJ Watkins is the Chief of Client Services in Fort Riley, Kansas.*

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*The author would like to thank the entire Del Rio Division U.S. Attorney's Office. He would especially like to thank the Chief, Matthew Watters, and Deputy Chief, Jody Gilzene. They were both amazing attorneys and mentors, and it was a privilege to work with them and the rest of the Del Rio team.*

### Notes

1. Rojelio Fernandez Munoz, Attorney at Law, Uvalde, Texas (circa July 2018). Mr. Munoz and his son mentored me when I was a young attorney in South Texas prior to my attendance at the Judge Advocate Officer Basic Course. Mr. Munoz and his son took me under their wings and helped me transition from a law student to an attorney. I considered Mr. Munoz a good friend and an excellent mentor. To my deep regret, he passed prior to the publishing of this article.
2. Katie Benner, *Defense Dept. to Help Justice Dept. Prosecute Immigration Cases*, N.Y. TIMES (June 21, 2018), <https://www.nytimes.com/2018/06/21/us/politics/immigration-justice-defense-department.html>.
3. Rose L. Thayer, *Military Sending 21 Attorneys to Help Prosecute Border Cases*, STARS & STRIPES (June 21, 2018), <https://www.stripes.com/news/us/military-sending-21-attorneys-to-help-prosecute-border-cases-1.534070>.
4. *QuickFacts Del Rio City, Texas*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/delriocitytexas> (last visited Nov. 23, 2020).
5. Map of Del Rio, Tex., GOOGLE MAPS, <http://maps.google.com> (search "Del Rio, Texas," in search Google Maps field).
6. In terms of districts, Del Rio is in the U.S. District Court for the Western District of Texas which covers over 92,000 square miles. It has seven divisions, including the Del Rio Division. The Del Rio Division manages seven counties: Edwards, Kinney, Maverick, Terrell, Uvalde, Val Verde, and Zavala. See Office Locations, U.S. DIST. CT. W. DIST. OF TEX., [\[www.txwd.uscourts.gov/court-information/office-locations/\]\(http://www.txwd.uscourts.gov/court-information/office-locations/\) \(last visited Aug. 24, 2020\) \(click on "Del Rio" to view the counties served. Also, please note that, while I was there, at least part of Dimmit County fell within the Del Rio sector. This mostly included prosecuted cases from Dimmit County.\).](https://</a></li></ol></div><div data-bbox=)

7. OFFS. OF THE U.S. ATT'YS, U.S. DEP'T OF JUST., THE UNITED STATES ATTORNEY'S ANNUAL STATISTICAL REPORT FOR FISCAL YEAR 2017, at 4 (2017), <https://www.justice.gov/usao/page/file/1081801/download> (June 16, 2020) [hereinafter U.S. ATT'Y FY 2017 REPORT].

8. ORLANDO L. GARCIA, UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF TEXAS, 2017 FISCAL YEAR STATISTICS 1 (2017), <https://www.txwd.uscourts.gov/wp-content/uploads/District%20Statistics/2017/Fiscal%20Year%20Statistics%20-%202017.pdf>.

9. *Id.* For comparison, the U.S. District Court for Maryland only had 505 criminal filings in 2017. OFF' OF THE U.S. ATT'YS, *supra* note 7, at 3.

10. See Reentry of Removed Aliens, 8 U.S.C. § 1326.

11. 8 U.S.C. § 1101(a)(3).

12. 8 U.S.C. § 1101(a)(18).

13. 8 C.F.R. § 1.2 (2020).

14. Inadmissible Aliens and Expedited Removal, 8 C.F.R. § 235.3 (LEXIS through November 12, 2020 issue of the Federal Register) (omitting amendments appearing at 85 Fed. Reg. 72547 (2020), 85 Fed. Reg. 72549 (2020), and 85 Fed. Reg. 71827 (2020)).

15. Inadmissible Aliens, 8 U.S.C.S. § 1182 (Lexis through Public Law 116-193, approved October 30, 2020).

16. 8 U.S.C. § 1101(a)(42).

17. Improper Entry by an Alien, 8 U.S.C.S. § 1325 (Lexis through Public Law 116-193, approved October 30, 2020).

18. See 8 U.S.C. § 1326(b) for a full list which offenses raise the possible levels of imprisonment.

19. Designating Aliens for Expedited Removal, 69 Fed. Reg. 48877, 48880 (Aug. 11, 2004).

20. 8 C.F.R. § 1.2 (2020).

21. Inspection by Immigration Officers; Expedited Removal of Inadmissible Aliens; Referral for Hearing, 8 U.S.C.A. § 1225(b)(1)(A)(i) (West 2009).

22. Designating Aliens for Expedited Removal, 69 Fed. Reg. at 48879.

23. 8 U.S.C.A. § 1225(b)(1)(A)(iii)(II) (West 2009).

24. United States v. Barajas-Alvarado, 655 F.3d 1077, 1082 (9th Cir. 2011).

25. Detention and Removal of Aliens Ordered Removed, 8 U.S.C.A. 1231(a)(5) (West 2018) (emphasis added).

26. Release or Detention of a Defendant Pending Trial, 18 U.S.C.S. § 3142 (LEXIS through PL 115-298, approved 7 Dec. 2018).

27. 8 U.S.C.A. § 1231(a)(5) (West 2018).

28. Expedited Removal of Aliens Convicted of Committing Aggravated Felonies, 8 U.S.C. § 1228(c).

29. Another common immigration violation is contained in 18 U.S.C.A. § 1028. See Fraud and Related Activity in Connection with Identification Documents, Authentication Features, and Information, 18 U.S.C.A. § 1028 (LEXIS 2011).

30. Plyler v. Doe, 457 U.S. 202, 210 (1982).
31. Typically referred to as *Miranda* rights. See *Miranda v. Arizona*, 384 U.S. 436 (1966).
32. Reentry of Removed Aliens, 8 U.S.C. § 1326.
33. Smuggling of people and goods along the border is pervasive, lucrative, and can include local public officials. See *Maverick County Commissioner, 2 Accomplices Accused of Money Laundering, Cash Smuggling Scheme*, KSAT (Oct. 18, 2012, 6:05 PM), <https://www.ksat.com/news/2012/10/18/maverick-county-commissioner-2-accomplices-accused-of-money-laundering-cash-smuggling-scheme/>.
34. U.S. Border Patrol Agent are required to become fluent in speaking Spanish. See *Are Trainees Required To Learn The Spanish Language?*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/faqs/are-trainees-required-learn-spanish-language> (last visited Aug. 24, 2020).
35. Fed. R. Crim. P. 5.1.
36. It is onerous for an undocumented immigrant to refute that their clothes are muddy and wet and to explain why they are without identification. It is also hard to refute when they confessed to unlawfully crossing the river.
37. U.S. Immigration and Customs Enforcement, Policy No. 10074.2, Issuance of Immigration Detainers by ICE Immigration Officers (effective Apr. 2, 2017), <https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf>.
38. Fed. R. Crim. P. 5.1(e).
39. Fraud and Related Activity in Connection with Identification Documents, Authentication Features, and Information, 18 U.S.C.A. § 3142 (West 2011).
40. In my experience, the vast majority of undocumented immigrant readily admit they are illegally present in the United States and provide their country of origin, typically Mexico or another country in Central America.
41. Fed. R. Evid. 803(6)-(7).
42. Bringing in and Harboring Certain Aliens, 8 U.S.C.A. § 1324 (West 2011).
43. *Id.*
44. Lesser penalties may be applicable if the smuggling was of a family member or not for profit, but this was rare in my experience.
45. I was not able to find specific numbers for the value of vehicles seized, but was able to discover the Western District of Texas obtained \$5,841,458.57 in criminal forfeitures during fiscal year 2017. See U.S. ATT'Y FY 2017 REPORT, *supra* note 7.
46. Bringing in and Harboring Certain Aliens, 8 U.S.C.A. § 1324(1)(B) (LEXIS). While assigned to Del Rio, I worked on a case where five illegal aliens died when the vehicle they were being transported in rolled over while attempting to evade law enforcement. *KABB/WOAI, 5 Dead After SUV Being Chased by Border Patrol Crashes*, NEWS 4 SAN ANTONIO (June 17, 2018), <https://news4sanantonio.com/news/local/12-immigrants-ejected-4-die-after-car-being-chased-by-border-patrol-crashes>.
47. Smugglers typically use nicknames in an attempt to evade law enforcement. Some of these can be quite colorful; one individual had a Spanish nickname which roughly translated to “Sheep.”
48. Farm to Market road is the title given to state-named roads in Texas.
49. *Miranda v. Arizona*, 384 U.S. 436 (1966).
50. María Isabel Carrasco Cara Chards, *Malverde: The Story Behind the Man Who Became the Patron Saint of Drug Dealers*, CULTURA COLECTIVA (July 9, 2018), <https://culturacolectiva.com/history/jesus-malverde-narc-saint>. Jesus Malverde is the patron saint of smugglers and drug traffickers. *Id.*
51. Release or Detention of a Defendant Pending Trial, 18 U.S.C.S. § 3142(e)(3) (LEXIS through PL 115-298, approved Dec. 7, 2018).
52. In my experience, magistrates and judges took a hard line on those who attempted to flee police and/or risked the lives of the undocumented immigrant they were transporting.
53. Release or Detention of a Defendant Pending Trial, 18 U.S.C.A. § 3142(b) (LEXIS through PL 115-298, approved Dec. 7, 2018).
54. Memorandum from James M. Cole, Deputy Att’y Gen. on Department Policy on Early Disposition or “Fast Track” Programs to All U.S. Att’y’s (Jan. 31, 2012), <https://www.justice.gov/sites/default/files/dag/legacy/2012/01/31/fast-track-program.pdf>.
55. Alan Feuer, *In El Chapo’s Trial, Extraordinary Steps to Keep Witnesses Alive*, N.Y. TIMES (Oct. 1, 2018), <https://www.nytimes.com/2018/10/01/nyregion/el-chapo-trial-witnesses.html>. While this article does not reference human smuggling, it does illustrate how dangerous some of these criminal enterprises can be to witnesses. *Id.*
56. Reporting Requirements for Individuals, 19 U.S.C.S. § 1459 (LEXIS through PL 115-298, approved Dec. 7, 2018).
57. On one occasion in Del Rio, an alleged U.S. Army deserter of six years was apprehended illegally crossing the border and pleaded guilty to a violation of 19 U.S.C. § 1459.
58. This rarely happens, but it would behoove a diligent attorney to always double-check.
59. On one occasion, I conducted initial appearances for twenty-one felonies in one morning, all for violations of 8 U.S.C § 1326.
60. Judges are required to personally address every defendant and for every defendant to respond individually, which takes a significant amount of time as all proceedings require an interpreter. Fed. R. Crim. P. 11; *United States v. Arqueta-Ramos*, 730 F.3d 1133 (9th Cir. 2013).
61. Release or Detention of a Defendant Pending Trial, 18 U.S.C.A. § 3142(f)(2) (LEXIS through PL 115-298, approved Dec 7, 2018).
62. Fed. R. Crim. P. 5.1(e).
63. *Id.*
64. Note that, prior to the filing of the indictment, the law enforcement organization will have interviewed all relevant witnesses and will have gathered—or be in the process of gathering (e.g., phone analysis)—all evidence.
65. Fed. R. Crim. P. 5.1.
66. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 406(b) discussion (2019) [hereinafter MCM].
67. In Example 1, I briefly mentioned the use of a pre-sentence report drafted by the probation office and its reliance by all parties to determine the appropriate sentence.
68. A machete is a bladed implement used in agriculture to clear undergrowth. The average length is twenty to twenty-four inches with a wide curved blade.
69. UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL (2018).
70. “Matter in extenuation of an offense serves to explain the circumstances surrounding the commission of an offense, including those reasons for committing the offense which do not constitute a legal justification.” MCM, *supra* note 66, R.C.M. 1001(d)(1)(A). Mitigating evidence is evidence presented which might convince the judge/panel to give the Defendant a lesser sentence. In military jurisprudence, these would be things such as evidence of the accused’s service record, courage, awards, etc. See *id.* R.C.M. (d)(1)(B).
71. Legal assistant Megan McKenna was instrumental in ensuring I had a successful tour at the Del Rio office.
72. The Military Justice Act of 2016 took a significant step in the right direction with its inclusion of segmented sentencing; but, it is not clear at this time if this will either reduce or increase the variances in sentencing between jurisdictions. This is for a variety of reasons, but it is mainly due to the wide discretion commanders have when it comes to accepting guilty pleas—which I discuss further in this article.
73. C. Todd Lopez, *Army’s Special Victims Prosecutors Bring Enhanced Expertise to Courtroom*, U.S. ARMY (Oct. 17, 2013), [https://www.army.mil/article/113253/armys\\_special\\_victims\\_prosecutors\\_bring\\_enhanced\\_expertise\\_to\\_courtroom](https://www.army.mil/article/113253/armys_special_victims_prosecutors_bring_enhanced_expertise_to_courtroom).



At the finish line with their finishers' medals. Left to right: Stacy Craver, COL Ku, COL Ku's sister, and Ms. Craver's husband. (Photo courtesy of COL Ku)

**The theme for this issue of the *Army Lawyer* is Readiness.** The undercurrent of the issue focuses on memory—memory of the atrocities committed by the Nazis, but also memory of those who have fought for what is right. This issue of the *Army Lawyer* reminds us of the sacrifice of those who have gone before us and that we must be ready to give the same. I completed my first Bataan Memorial Death March in the Military Individual (Light) division in 2019. The event honors and remembers the sacrifice of the thousands of Filipino and American Soldiers who were captured by the Japanese military in World War II and forced to march over 65 miles to prison camps.<sup>2</sup> Those who survived faced even more torture. Every step of the 26.2-mile trek, I felt the history, patriotism, and emotion embodied in the memorial march through the sand and rocky mountain terrain.

To prepare for this memorial march, I knew I had to be physically, mentally, and emotionally ready. The internet offered information on how to prepare for the physical aspects of the march. Having completed other marathons, I understood the physical and mental demands of the mileage. I incorporated rucking with boots and weights into my weekly long runs. After a recurring injury forced me to switch from the heavy to the light division, I relied on CrossFit to prepare my body for the physical demands of the mileage. Past participants of the memorial march also shared their stories with me, and reading the book *Tears in the Darkness: The Story of the Bataan Death March and Its Aftermath* helped me to imagine, even if barely, the real experience.<sup>3</sup> While these stories were inspiring, nothing compared to the actual experience of being out there, talking and listening to the marchers and runners, each with their individual motivations for embarking on this journey. Their stories instill humility in anyone willing to listen, and motivate others to return to honor the human spirit on display in abundance that day.

# Closing Argument

## Maintaining Readiness Through Commemoration at the Bataan Memorial Death March

By Colonel Fansu Ku

*We're the battling bastards of Bataan;  
No mama, no papa, no Uncle Sam.  
No aunts, no uncles, no cousins, no nieces,  
No pills, no planes, no artillery pieces  
And nobody gives a damn.<sup>1</sup>*



## Top Ten Reasons to Complete the Bataan Memorial Death March

10. Human Resiliency. See what you are capable of and build more of it.
9. Gratitude. Look around and remind yourself how much you have to be thankful for.
8. Live the Running Dream. Put one foot in front of the other and just do it. This 26.2-mile event is unlike any other.
7. “Be the Voice.” A proud Marine mom said it best when asked to share her motivation for doing this march year after year:

Be the voice. Thank those who serve, honor the wounded, and never forget the fallen by sharing their stories with others. I have carried the pictures and various items given by families with me on all of my endeavors—across the desert, to the East Coast, West Coast, and in between, as well as to other countries; sharing their stories, saying their names as their families have requested so that others may know them—by both face and name. There is no monetary gain from what I do; my heart and my physical ability to do this is all I that have to give to the families, many who are my friends, of the fallen and to the injured Marines I’ve come to know. I hope that by participating in events that I am passionate about, I can inspire others to be the voice.<sup>4</sup>

6. Honor the Heroes. Joseph Campbell once said, “A hero is someone who has given his or her life to something bigger than oneself.”<sup>5</sup> We get to honor those who can no longer be there, those who survived, and those who didn’t. You have the rare opportunity to meet the survivors of the actual Bataan Death March, and there won’t be many more years where survivors are there to meet you.
5. Never Forget the Sacrifices. This event is a humbling reminder of the price of



A stunning sunrise greeted the marchers at the 2019 Bataan Memorial Death March after it snowed the day prior. (Photo courtesy of COL Ku)

4. Unity. During a time of much discord, you get to see people from all backgrounds come together and share a sense of community, pride, patriotism, and overall accomplishment, regardless of their finishing time.
  3. Reminder. A glorious reminder that you are alive.
  2. Future. Set an example for the future generation that sometimes the most rewarding things that we do are hard.
  1. You Get to. Remember that, if you choose to embark on this journey, you *get* to do this, and you *get* to go home at the end of the journey. Many of the Battling Bastards of Bataan did not. They paid the ultimate price of freedom so that you get to go home.
- The 2020 memorial race was cancelled due to COVID-19. I hope to have the opportunity to participate again in 2021. Until then, I continue to remember their sacrifice every time I lace up my shoes and value the increased physical, mental, and emotional

readiness this event offers to those who take up the challenge. **TAL**

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*COL Ku is a Military Judge in the Second Judicial Circuit at Fort Bragg, North Carolina.*

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### Notes

1. MICHAEL NORMAN & ELIZABETH M. NORMAN, *TEARS IN THE DARKNESS: THE STORY OF THE BATAAN DEATH MARCH AND ITS AFTERMATH* 128 (2009).
2. BATAAN MEMORIAL DEATH MARCH, <https://bataan-march.com/about-bataan/> (last visited Nov. 14, 2020).
3. NORMAN & NORMAN, *supra* note 1.
4. Message from Marilyn Olson, Founder of Bataan Memorial Death March Training Group on Facebook to author.
5. *The Power of Myth: The Hero's Adventure* (Alvin H. Perlmuter, Apostrophe S, & Public Affairs Television June 21, 1988), <https://billmoyers.com/content/ep-1-joseph-campbell-an-d-the-power-of-myth-the-hero%E2%80%99s-adventure-audio/>.



## AROUND THE CORPS

DS Khiree Washington and SFC William Voelcker pin PV2 Jared Di Marco and PV2 Emma Quinlan with their new ranks as Privates First Class in a meritorious promotion ceremony during the AIT Class 018-20 graduation ceremony at Fort Lee, VA. (Credit: SSG Kathryn Altier)



## AROUND THE CORPS

The Army's newest court reporters learn their craft at the 64th Court Reporter Course at TJAGLCS in Charlottesville, VA. (Credit: Jason Wilkerson, TJAGLCS)







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