Environmental Aspects of Overseas Operations: An Update

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Introduction

This article updates the article entitled "Environmental Aspects of Overseas Operations," published in the April 1995 edition of *The Army Lawyer*,[1] which directed judge advocates to recognize and understand the application of four sources of environmental law in regard to overseas operations. These sources of law are:

(1) the domestic environmental law of the United States;
(2) the law of host nations;
(3) the traditional law of war; and
(4) international environmental law.

Unlike the previous article, this update focuses on only one of these four sources of law: the domestic law of the United States. This emphasis is based upon the realities of current operations, doctrine, and the practices of the military lawyers who have grappled with these issues during the past several years.

Since 28 February 1991,[2] the United States military has executed dozens of overseas operations. In each instance, the protection of the natural environment was an important issue for both military leaders and supporting judge advocates. One of the more vexing problems in this area is the search for and determination of the rules, regulations, and law which dictate United States environmental stewardship in foreign nations. A review of these operations, however, reveals that the nature of each individual operation[3] influenced the application of the law more than any other single factor.

Bearing in mind the importance of this operational context, it is important to note that not one recent operation was conducted in an armed conflict environment. Instead, the operations were all located elsewhere on the conflict spectrum, and they are frequently referred to as peace operations, stability and support operations (SASO), or operations other than war (OOTW).[4] In these types of operations, the military forces of the United States usually enter a nation without the direct use of military force. This fact is relevant to the discussion of what sources of law control the entering force's legal obligation to the host nation's natural environment. The law of war does not formally apply within the peace operation context, but judge advocates must determine how the other sources of law might impact the environmental law equation.

The actions of military lawyers in recent operations best illustrate the role played by judge advocates in helping commanders execute their environmental law obligations. This article will provide the reader with a summary of the legal analyses and solutions from Operations Restore Hope (Somalia), Sea Signal (Cuba), Uphold Democracy (Haiti), and Joint Endeavor (Bosnia-Herzegovina). Each of these operations was executed within a foreign nation, albeit for different purposes and under different circumstances. An evaluation of the different circumstances in each of these operations demonstrates the variable nature of the environmental law issues that confront the contemporary judge advocate.

The Role of The Judge Advocate

In order to execute the environmental aspect of the mission, judge advocates must perform five primary tasks. Determining the applicable sources of law is the first step in this process. In each of the four operations referenced above, the domestic law of the United States and host nation law were applied to protect the host nation's natural environment. In regard to future peace operations, judge advocates can safely assume that these two sources of law will occupy most of their time. With this in mind, military lawyers should focus their efforts on finding the elements of domestic and host nation law that might regulate the activities of United States forces in the area of operations.

1. Major Richard M. Whitaker, *Environmental Aspects of Overseas Operations*, ARMY LAW., Apr. 1995, at 27.

2. This was the final day of Operation Desert Storm.

3. The doctrinal term normally used to express the various types of operations is *operational environment. See* DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS, 2-0 through 2-1 (14 June 1993). United States military doctrine recognizes that military forces execute operations in three primary environments: (1) war, (2) conflict, and (3) peacetime. Within each environment, the goals, conditions, and rules are different. I chose not to use the term *operational environment* within the text to avoid the dual and potentially confusing use of the term *environment*.

4. The Army officially adopted the term *peace operation* in December 1994, with the issuance of a new field manual that expresses Army doctrine for such operations. *See* DEP'T OF ARMY, FIELD MANUAL 100-23, PEACE OPERATIONS, iv (30 Dec. 1994). For a detailed discussion of SASO and OOTW see Major Richard M. Whitaker, *Civilian Protection Law in Military Operations: An Essay*, ARMY LAW., Nov. 1996, at 4-7.

Second, judge advocates must master the relevant sources of law. They must have a complete understanding of how these sources of law operate. In other words, they must know what events trigger the application of the law in specific circumstances. Once a lawyer has determined what events trigger the law's application, the lawyer should next determine what actions the commander is required to take and which exceptions, exemptions, exclusions, or variances might offer the commander alternative courses of action.

Third, judge advocates must provide commanders with a complete understanding of the law and an explanation of courses of action in regard to the law. This task requires lawyers to have a solid understanding of the mission because they must explain what impact each course of action might have upon operational success. Examples of factors that lawyers should include in their advice are: (1) monetary costs associated with each course of action, (2) any possible delay in the accomplishment of a mission-essential task, (3) the impact on the popular support of the population of the host nation (both the short-term and the long-term impact), and (4) media impact (either positive or negative).

Fourth, lawyers must execute the commander's decision. This requires an understanding of what actions are necessary to satisfy the legal requirements of each relevant source of law. In regard to the domestic law of the United States, this might mean performing some type of environmental assessment, requesting an exemption to the application of a rule that requires an environmental assessment, or taking action to reduce or to avoid an adverse environmental impact revealed within some type of assessment.

Finally, lawyers must remain alert to environmental issues that relate to the original course of action selected by the commander. For example, a lawyer must advise the command that disposition of confiscated weapons and ordinance must be done in accordance with the environmental protection rules that control other aspects of the operation.

The Domestic Law and Policy of the United States

As mentioned above, the domestic law of the United States has figured prominently into the consideration given to the environment in every recent operation. The first question for the military lawyer in regard to domestic law requirements is whether or not an environmental assessment must be performed, and if so, what type of assessment. The second question is, despite the type of assessment performed, what type of environmental standards will be established for the operation. The third question is how will the lawyer, working through the operational staff, ensure compliance with the standards.

The National Environmental Policy Act (NEPA)[5] is the starting point for answering these questions. Generally, NEPA requires federal agencies to review their proposed actions and to prepare environmental assessments or impact statements for major federal actions that significantly affect the quality of the human environment.[6] The problem with the performance of such a review is the amount of time required for both a formal review and the compilation of either an assessment or an impact statement. For some federal actions, the passage of time is not a critical factor. In the context of a peace operation, however, time is a critical element of operational success, and the commander must have maximum flexibility. It is primarily because of this reason that Executive Order Number 12,114 formally states that NEPA does not apply to federal actions overseas.[7] Based upon this authority, case law, and the language of the NEPA itself, the United States Government's position is that the NEPA does not apply to overseas military operations.[8]

In situations in which the NEPA does not apply, the analysis shifts to Executive Order 12,114.[9] The Order requires the Department of Defense (DOD) to analyze and to document major DOD actions that will significantly affect the environ-

5. 42 U.S.C. §§ 4321-70a (1996).

6. Environmental assessments (EAs) are concise public documents which provide sufficient evidence and analysis to determine if the more detailed environmental impact statement (EIS) is necessary. 40 C.F.R. § 1508.9 (1996). Environmental impact statements serve to insure that the policies and goals defined in the NEPA are integrated into the proposed action and that the decisionmakers and the public are informed as to the alternatives which would avoid or minimize the adverse impacts. 40 C.F.R. § 1502.1 (1996).

7. Exec. Order No. 12,114, 44 Fed. Reg. 1,957 (1979), *reprinted in* 42 U.S.C. § 4321 (1982) [hereinafter EO 12,114]. Portions of EO 12,114 are reprinted and discussed in DEP'T OF ARMY, REG. 200-2, ENVIRONMENTAL EFFECTS OF MAJOR DOD ACTIONS, apps. G, H (23 Dec. 1988) [hereinafter AR 200-2]. The express purpose of the Executive Order is twofold. First, to "further the purpose of NEPA" and two other environmental protection statutes. Second, to balance the importance of protecting the environment through the operation of these three statutes against the importance of the United States foreign policy and national security policies. The Executive Order executes this two-prong mandate by serving as the "United States Government's exclusive and complete determination of the procedural and other actions to be taken by Federal agencies to further the purposes of NEPA, with respect to the environment outside the United States, its territories, and possessions." EO 12,114.

8. NEPA Coalition of Japan v. Aspin, 837 F. Supp. 466 (D.D.C. 1993). The court examined the NEPA and found that a nonextraterritorial construction of the statute is required because of: (1) the strong presumption against extraterritorial application of United States statutes (which do not contain a clear and independent expression of extraterritorial application); (2) the possible adverse impact on existing treaty obligations; and (3) the adverse effect on United States foreign policy. S*ee also* E.E.O.C. v. Arabian Am. Oil Co. (ARAMCO), 111 S. Ct. 1227 (1991); Smith v. United States, 113 S. Ct. 1178 (1993); Whitaker, *supra* note 1, at 27-28 (discussing the extraterritorial issue in much greater detail). *But see* Environmental Defense Fund v. Massey, 986 F.2d 528 (D.C. Cir. 1993).

9. *See* Whitaker, *supra* note 1, at 29-30 (describing in detail how the Executive Order works).

ment of: (1) global commons (e.g., oceans or Antarctica), (2) a foreign nation not participating with the United States in the action,[10] (3) a foreign nation which receives from the United States (during the action) a product which is prohibited or strictly regulated by federal law, or (4) any area outside the United States with natural or ecological resources of global importance.[11] These four types of actions are referred to as environmental events.

If any one of the four environmental events occurs, the DOD must conduct a documented review of the major action that it contemplates, *unless an exemption applies*.[12] The most significant and frequently relied upon exemption relates to "actions taken by or pursuant to the direction of the President or [a] Cabinet officer when the national security or interest is involved or when the action occurs in the course of an armed conflict."[13]

In most cases, military lawyers should think of the foregoing analysis in the following way: where the host nation is not a participating nation and where none of the exemptions apply, Executive Order 12,114 requires that military leaders conduct one of several different types of documented reviews. The type of review is based upon which one of the four environmental events occurs. For example, if the event occurs within a global common, the agency must prepare an environmental impact statement. If the event occurs in a foreign nation, the agency must prepare either a "bilateral or multilateral environmental study or a concise environmental review of the specific issues involved," [14] which would include an environmental assessment, summary environmental analysis, or other appropriate documents.

Executing the Operational Law Mission In Regard to the Environment

General Considerations

Executive Order 12,114 always mandates *some degree* of environmental stewardship by United States forces in regard to its operations outside of the United States and its territories. Judge advocates should add this short document to their operational law library and refer to it during the operational planning phase. In addition to the Executive Order, military lawyers should turn to the two more specific documents that implement the Order—*DOD Directive 6050.7*[15] and *Army Regulation 200-2* (*AR 200-2*).[16]

When executing a mission within a foreign nation, the military leader should first consider three general rules which assist in the interpretation of all other rules. First, the United States, based upon operational realities and necessities, should take all reasonable steps to act as a good environmental steward.[17] Second, the United States should respect treaty obligations and the sovereignty of other nations. This means, at a minimum, "exercising restraint in applying United States laws within foreign nations unless Congress has expressly provided otherwise."[18] Third, any acts contemplated by officials within the DOD that require "formal communications with foreign governments concerning environmental agreements and other formal

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10. The definition of a participating nation is broad, and this status has been attributed to nations in a number of important operations to avoid the more demanding requirements of EO 12,114. *See* Message, Headquarters, United States Atlantic Command, subject: Applicability of Executive Order 12,114 on Operation Uphold Democracy (231921Z Nov. 94) (on file with author) [hereinafter Haiti Message] ("USACOM is not required under [EO 12,114 and DOD Dir. 6050.7] to either invoke an exemption or complete an environmental study/review for Operation Uphold Democracy. However, to promote environmental stewardship in the spirit of [EO 12,114], an environmental review will be conducted."). *See also* Electronic Mail Message from Robert E. Dunn, Attorney Advisor, International and Operations Law Division, Office of the Judge Advocate, United States Army Europe and Seventh Army, to Major Richard M. Whitaker, Professor, International and Operational Law Department, The Judge Advocate General's School, subject: Environmental Law in Bosnia (Mar. 28, 1997) (copy on file with author) [hereinafter Dunn Message]. Mr. Dunn explained that during the planning phase for Operation Joint Endeavor, both his office and the Office of the Legal Advisor to the United States European Command shared the opinion that Bosnia and other "former warring faction" nations were "participating nations" under the provisions of EO 12,114 and that there was no need to go through all the EO 12,114 exemption "hoops." Instead, lawyers supporting Operations Joint Endeavor and Joint Guard have been executing the general environmental steward mandate by referring to the Germany Overseas Baseline Guidance Document as a guide in Bosnia, "to the extent that doing so does not unacceptably interfere with operations, especially force protection." *Id.*

11. The Executive Order explains that "natural or ecological resources of global importance" refers to resources either designated by the President or by international agreement as having global importance. EO 12,114, *supra* note 7, § 2, para. 2-3.

12. Whitaker, *supra* note 1, at 29 (reprinting the list of exemptions).

13. EO 12,114, *supra* note 7, para. 2-5 (iii).

14. *Id.* para. 2-4.

15. Dep't of Defense, Directive 6050.7, Environmental Effects Abroad of Major DOD Actions (31 Mar. 1979) [hereinafter DOD Dir. 6050.7].

16. AR 200-2, *supra* note 7.

17. *See* EO 12,114, *supra* note 7, § 1. *See also* AR 200-2, *supra* note 7, para. 1-5.

18. AR 200-2, *supra* note 7, para. 8-3 (b). This general rule has a substantial impact on the interpretation of domestic law requirements. For instance, the scope and format of any environmental review conducted within a foreign nation is controlled not just by United States laws and regulations, but by relevant international agreements and arrangements. *See id.* para. 8-5 (a).

arrangements with foreign governments" must be coordinated with the Department of State.[19]

The Required Analysis and Actions

The three general rules given above should be kept in mind throughout the decision-making process. The required analysis, however, comes from Executive Order 12,114, in conjunction with *DOD Directive 6050.7* and *AR 200-2*. The Army Regulation simply restates the DOD Directive, thereby avoiding additional and possibly more onerous requirements.[20] The DOD Directive, which is very similar to Executive Order 12,114, provides the same four types of environmental events described within the Executive Order:

1. major federal actions that do significant harm to the environment of global commons;
2. major federal actions that significantly harm the environment of a foreign nation that is not involved in the action;
3. major federal actions that are determined to be significant[ly] harm[ful] to the environment of a foreign nation because they provide to that nation: (1) a product, or involve a physical project that produces a principal product, emission, or effluent, that is prohibited or strictly regulated by Federal law in the United States because its toxic effects [to] the environment create a serious public health risk; or (2) a physical project that is prohibited or strictly regulated in the United States by Federal law to protect the environment against radioactive substances;
4. major federal actions outside the United States that significantly harm natural or ecological resources of global importance designated by the President or, in the case of such a resource protected by international agreement binding on the United States, designated for protection by the Secretary of State.[21]

Judge advocates must consider whether a proposed operation might generate any one of the four environmental events listed above. If the answer is yes, then the military leader should either seek an exemption or direct the production of an environmental study (ES) or an environmental review (ER) to formally take into account the operation's impact on the environment.

The Participating Nation Exception

As judge advocates proceed through the flowchart of analyses and actions which are required by regulation, the most important and frequently encountered problem is the "participating nation" determination.[22] This is because the majority of overseas contingency operations do not generate the first, third, or fourth types of environmental events listed above. Accordingly, a premium is placed upon the interpretation of the second type of environmental event (major federal actions that significantly harm the environment of a foreign nation that is not involved in the action).

The threshold issue appears to be whether or not the host nation is participating in the operation. If the host nation is participating, no study or review is technically required.[23] Known as the "participating nation exception," this situation existed in two of the four major contingency operations referenced earlier—Operation Uphold Democracy and Operation Joint Endeavor.[24] Thus, the planners for these operations concluded that both Haiti and Bosnia would act as participating nations during the course of each respective operation,[25] and military leaders in these operations avoided the requirement for a formal review or study. In Operation Restore Hope and Operation Sea Signal, the United States could not avail itself of the participating nation exception because neither Somalia nor Cuba participated with the United States forces in either operation. Accordingly, the United States had a choice of accepting the formal obligation to conduct either an ES or an ER, or seeking an exemption. In both cases, the United States sought and received an exemption.[26]

19. *Id*. para. 8-3 (c). Judge advocates who work with environmental law issues should open up a line of communication with a point of contact (POC) at the Department of State (DOS) early on in the process. In practical terms this means discussions with the appropriate member of the "country team" or working through the combatant commander's staff and the Joint Staff to get access to a POC.

20. *Id.* app. H.

21. *Id.* app. H, para. B.

22. *Id.* app. H, para. B1a.

23. Even though not always technically required, a study or review of some nature has been promulgated in every recent operation.

24. *See* Haiti Message, *supra* note 10; Dunn Message, *supra* note 10.

25. Interview with Lieutenant Colonel Richard B. Jackson, Chair of the Int'l and Operational L. Dep't, The Judge Advocate General's School, United States Army, in Charlottesville, Virginia (Mar. 20, 1997) [hereinafter Jackson Interview]. Lieutenant Colonel Jackson, who served as a legal advisor in the United States Atlantic Command Staff Judge Advocate's Office during both Operation Uphold Democracy and Operation Sea Signal, notes that Cuba never did anything by act or omission that could be construed as cooperating or participating in Operation Sea Signal. On the other hand, the entrance of United States forces into Haiti was based upon an invitation that was reduced to writing and signed by the Haitian head of state, President Emile Jonassaint, on 18 September 1994. In fact, this agreement, signed by former President Jimmy Carter and President Jonassaint (referred to as the Carter-Jonassaint Agreement), expressly stated that Haitian authorities would "work in close cooperation with the U.S. Military Mission." *See also* Center for Law and Military Operations, The Judge Advocate General's School, United States Army, Law and Military Operations in Haiti, 1994-1995–Lessons learned for Judge Advocates , app. C (1995).

How does the military lawyer and operational planner distinguish between participating and nonparticipating nations? The applicable Army regulation states that the foreign nation involvement may be signaled by either direct or indirect involvement with the United States and even by involvement through a third nation or an international organization.[27]

The regulatory guidance is helpful, but additional discussion on this point is necessary because of the uncertain nature of peace operations. One technique for discerning participating nation status is to consider the nature of the United States entrance into the host nation. There are generally three ways that military forces enter a foreign nation: (1) a forced entry, (2) a semi-permissive entry, or a (3) permissive entry. United States forces that execute a permissive entry are typically dealing with a participating (cooperating) nation. Conversely, United States forces that execute a forced entry would rarely deal with a participating nation. The analysis required for these two types of entries is fairly straightforward.

The semi-permissive entry presents a much more complex question. In this case, the judge advocate must look to the actual conduct of the host nation. If the host nation has signed a stationing or status of forces agreement, or has in a less formal way agreed to the terms of the United States deployment within the host nation's borders, the host nation is probably participating with the United States (at a minimum, in an indirect manner). If the host nation expressly agrees to the United States' entry and agrees to cooperate with the military forces of the United States, the case for participating nation status is even stronger.[28] Finally, if the host nation agrees to work with the United States on conducting a bilateral environmental review, the case is stronger still.[29]

There is no requirement for a status of forces or other international agreement between the host nation and the United States forces in order to document participating nation status. Participation and cooperation, however evidenced, is the only element required under Executive Order 12,114 and its implementing directive. Lawyers, however, look to written agreements as the most logical and obvious evidence of such participation. In recent operations, the United States and its host nation partners have documented the requisite participation within such agreements.

The decision to assume participating nation status is made at the unified command level by the combatant commander.[30] Once this election is made, the second decision of what type of environmental audit[31] to perform is also made at the unified command level.[32] In the cases of Operations Uphold Democracy and Joint Endeavor, the complete action was prepared by the tandem effort of the respective J4-Engineer Section and the Staff Judge Advocate's Office.[33] It was also these members of the staff who disseminated the environmental guidelines and standards adopted in the operations plans.

Operation Joint Endeavor provided the most recent example of a participating nation. Under the terms of the Dayton Peace Accords,[34] the parties agreed to "welcome and endorse" the arrangements and agreements to implement the Accord's military aspects, to include the mission of the Implementation Force (IFOR) led by United States forces.[35] The detailed nature of the Accord, particularly Article VI, removes any doubt that all parties agreed to participate in an endeavor to bring peace to

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26. *See* Memorandum, Director, Joint Staff, to The Under Secretary of Defense for Acquisition and Technology, subject: Exemption from Environmental Review (17 Oct. 1994) [hereinafter Kross Memorandum]. In regard to Operation Sea Signal, LTG Walter Kross (the director of the Joint Staff) forwarded the request for exemption. The request was based on a disciplined review of Sea Signal's probable environmental impact, a short rendition of the facts, and a brief legal analysis and conclusion. *See also* CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, UNITED STATES ARMY, AFTER ACTION REPORT, UNITED STATES ARMY LEGAL LESSONS LEARNED, OPERATION RESTORE HOPE, 5 DECEMBER 1992-5 MAY 1993, 23 (30 Mar. 1995) [hereinafter RESTORE HOPE AAR]. It is important to note that in both operations, even though United States forces received an exemption from the review and documentation requirement, the United States still prepared an environmental audit, and United States forces applied well-established environmental protection standards to events likely to degrade the host nation's environment.

27. *See* AR 200-2, *supra* note 7, app. H, para. A1a.

28. *See* Memorandum, Major Mike A. Moore, United States Atlantic Command J4-Engineer, to Lieutenant Colonel Richard B. Jackson, subject: Environmental Concerns of MNF (24 Jan. 1995) [hereinafter Moore Memorandum] (explaining that EO 12,114 did not apply to Operation Uphold Democracy because Haiti was a participating nation and that United States forces should coordinate with Haitian authorities to conduct a bilateral environmental audit).

29. *Id.*

30. *See* DOD Dir. 6050.7, *supra* note 15.

31. *See* Moore Memorandum, *supra* note 28. The word "audit" was adopted in lieu of the words "review" or "study" to make clear that the environmental assessment was driven by policy and not by the formal documented review or study requirement of EO 12,114 or DOD Directive 6050.7.

32. Telephone Interview with Lieutenant Colonel Mike A. Moore, United States Atlantic Command J4-Engineer (Mar. 27, 1997) [hereinafter Moore Interview]. Lieutenant Colonel Moore served as the action officer tasked with the determination of Command environmental/legal responsibilities during Operations Sea Signal and Uphold Democracy. He was also tasked with ensuring that an environmental audit was performed for Operation Uphold Democracy. Based upon his coordination with judge advocates in the Command's legal office, he and the Command's Staff Judge Advocate recommended that the Commander-in-Chief adopt the participating nation status and conduct a thorough environmental audit. Lieutenant Colonel Moore noted that the authority to make the decision rested at the unified command level. He also stated that several of the exemptions in EO 12,114 were delegated down to United States Atlantic Command.

33. *Id.*

the nations of the former Yugoslavia. The obligation to work together, to coordinate decisions, and to provide logistical support is abundantly clear.

The operational planners for Operation Joint Endeavor and their legal advisors integrated this analysis into their planning.[36] They found that each of the nations impacted by the operation were participating nations. They forwarded their conclusions to General George A. Joulwan, the Commander-in-Chief, European Command, who approved the participating nation status by approving the environmental appendix to the operation plan.[37] General Joulwan's action took advantage of the participating nation exception, which neutralizes the formal documented review requirement of Executive Order 12,114 and *DOD Directive 6050.7*.

The only possible argument which would support the contention that the participating nation exception did not apply in either Operation Uphold Democracy or Operation Joint Endeavor is that the nations which hosted these operations did not freely volunteer to host United States forces. Instead, the argument might go, both Haiti and Bosnia-Herzegovina agreed to the entrance of the multinational forces only after the United States applied the world class coercion of a super power. Is a nation considered a "participating nation" if the participation is the product of coercion? This question does not have a simple answer. It is clear, however, that host nations that consent to the entry of United States forces within a legitimate international agreement fall within the participating nation exception of Executive Order 12,114.

The next issue concerns what elements are necessary to have an enforceable (or legitimate) international agreement. The 1996 United States Army Operational Law Handbook states that the elements required for an international agreement are: "(1) an agreement, (2) between governments (or agencies, instrumentalities, or political subdivisions thereof) or international organizations (3) signifying an intent to be bound under international law."[38] Under contemporary international law, if the "intent to be bound" is formed while under duress, the agreement is invalid.[39]

If, however, the intent is formed under pressure which is applied as a result of lawful action that is orchestrated under the provisions of the United Nations Charter, the resulting leverage is not unlawful, and the intent formed on the part of the host nation is not the result of improper coercion.[40] For example, the United States entry into Haiti as the lead nation for a multinational force, as authorized under the provisions of United Nations Security Resolution 940 (which was authorized under the provisions of Chapter VII of the United Nations Charter), was lawful.[41] The Carter-Jonassaint Agreement,[42] negotiated

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34. General Framework Agreement for Peace in Bosnia and Herzegovina, Dec. 14, 1995, Bosn.-Herz., 35 I.L.M. 75. *See also* Dayton Agreement on Implementing the Federation of Bosnia and Herzegovina, Nov. 10, 1995, Bosn.-Herz., 35 I.L.M. 170. The text of the Dayton Accords was initialed in Dayton, Ohio on 21 November 1995, and signed in Paris, France, on 14 December 1995. The United Nations Security Council, in acknowledgment of the Accords, issued Resolution 1031 which authorizes a multinational implementation force (IFOR) "to take all necessary measures to effect the implementation" of Annex 1-A of the Accords. *See* S.C. Res. 1031, U.N. SCOR, 50th Sess., 3607th mtg., UN Doc. S/RES/1031 (1995) [hereinafter Resolution 1031].

35. Resolution 1031, *supra* note 34, Art. II.

36. *See* Operations Plan 4243, United States Atlantic Command, Annex D, app. 5, Tab B (unclassified) (2 Dec. 1995) [hereinafter Joint Endeavor Operation Plan] (pertaining to "environmental considerations and services" for Operation Joint Endeavor). The planners wrote that one of several major assumptions was that "[a]ll foreign nations potentially impacted by [the] operation are active participants or [are] otherwise involved in the operation." *Id*. The import of this assumption is that it grants the "participating nation" exception to Executive Order 12,114's formal environmental review or study requirement. The plan went on to document that the limited amount of time available to prepare for the execution of the operation warranted the use of the exception. Very important to this analysis and not mentioned within the plan is the fact that the decision to take advantage of the participating nation exception can be made at the Unified Command level. Accordingly, the Commander and Chief, United States European Command, does not have to forward this decision to a higher level of authority.

37. *Id.*

38. International & Operational L. Dep't, The Judge Advocate General's School, U.S. Army, JA 422, The 1996 Operational Law Handbook, 3-3 (1 June 1996) [hereinafter JA 422] (paraphrasing Dep't of Army, Reg. 550-51, Foreign Countries and National Authority and Responsibility for Negotiating, Concluding, Forwarding, and Depositing of International Agreements (1 May 1985)). *See also* Restatement (Third) of the Foreign Relations Law of the United States § 301 (1987) [hereinafter Restatement].

39. Under traditional (or pre-United Nations Charter) "international law, consent to a treaty could not be invalidated on the basis of coercion of a state or its representative." However, the prohibition on the use or threat of force in international relations, found in article 2(4) of the United Nations Charter, has made coercion an improper form of leverage during the negotiation of an international agreement. *See* Restatement, *supra* note 38, § 331. *See also* Dep't of Army, Pamphlet 27-161-1, Law of Peace, 8-8 (1 Sept. 1979).

40. *See* Restatement, *supra* note 38, § 331, cmt. d.

41. In 1994, the United Nations Security Council authorized the creation of a multinational force to rid Haiti of an "illegal de facto regime," to stop violations of human rights law, and to restore the legitimately elected President to power. *See* S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg., U.N. Doc. S/RES/940 (1994). The subsequent diplomacy (including all international agreements and implementing arrangements) between the de facto regime and the later restored legitimate regime were properly executed under the Resolution 940 mandate.

42. *See supra* note 25 and accompanying text.

under the authority of Resolution 940 to provide for the peaceful entry of the multinational force, was similarly lawful and valid. Consequently, the terms of cooperation expressed in that lawful and valid agreement signified a certain degree of participation by Haiti in the operation, and the agreement satisfied the requirements of the participating nation exception.[43]

The Exemptions

If the facts in a particular operation are similar to those in either Operation Joint Endeavor or Operation Uphold Democracy, judge advocates would, under most circumstances, find that the host nation is a participating nation. No further action would be required under the provisions of the service regulations that implement Executive Order 12,114. In cases where the facts do not indicate a participating nation, military lawyers must continue to search for answers within these regulations. The most probable course of action is to determine whether the proposed operation properly falls within one of the exemptions in Executive Order 12,114. If an exemption applies, and is granted by the proper authority, the Executive Order requires no further action (i.e., no formal documented review or study is required under *DOD Directive 6050.7*).[44]

Operations Restore Hope and Sea Signal provide recent examples of exempted operations. In Operation Sea Signal, for example, military lawyers quickly determined that Cuba was not a participating nation. They then considered the ten exemptions provided in *DOD Directive 6050.7* (reprinted in *AR 200-2*)[45] and forwarded a request for a national security exemption.[46]

The ten exemptions are broad and would likely provide exempted status to most foreseeable overseas military operations. Consequently, these operations would be exempted from the documented review requirements in Executive Order 12,114.[47] Unlike the participating nation exception, however, exempted status requires the military leader to take an affirmative step to gain a variance from the formal documentation requirements.[48] In the case of Operation Sea Signal, the Commander in Chief, United States Atlantic Command, forwarded a written request for exempted status for the construction and operation of temporary camps at Naval Station Guantanamo Bay, Cuba. The request was forwarded through appropriate legal channels and the Joint Staff (through the Chairman's Legal Advisor's Office) to Mr. Paul G. Kaminski, The Under Secretary of Defense for Acquisition and Technology, for approval. Mr. Kaminski approved the request, citing the importance of Operation Sea Signal to national security.[49]

The entire written action was only three pages long, including the one page (three short paragraphs) signed by Mr. Kaminski.[50] The action is shorter than most actions that involve the environment, because it may be drafted and forwarded with little prior review of environmental impact. In fact, the military lawyers involved in the process (the probable drafters of the action) need only know that the proposed operation is:

(1) a major federal action;
(2) which will likely cause significant harm to the host nation's environment;
(3) where the host nation is not participating; and
(4) one of the ten exemptions is applicable.

Once the exemption is approved, the exempted status should be integrated into the operation plan. If this event occurs after the original plan is approved, the exempted status should be added as an additional appendix to the plan to provide supplemental guidance for the environmental considerations section of the basic plan.

Executing the Operation Plan

Whether the operation plan contains a participating nation assumption or serves as further documentation of an approved Executive Order 12,114 exemption, the result is the same. In both cases, no formal documented review or study is required.

43. If the host nation agrees to participate with the United States and does so, then a prima facie case for a "participating nation" is made. However, the agreement must be one that is enforceable (i.e., lawfully entered). Since almost no contract or agreement between any person or entity is entered into without some degree of leverage, the issue is not whether coercion occurs, but whether the coercion is lawful. Even in the case of a lawful forced entry, if at some point the host nation cooperates with the United States efforts to minimize adverse environmental impacts, the host nation could arguably be categorized as a participating nation.

44. DOD DIR. 6050.7, *supra* note 15.

45. *Id*. The list of ten exemptions includes activities of the intelligence components (DIA, NSA, etc.), actions with respect to arms transfers, actions taken with respect to membership in international organizations, and actions taken when national security or interests are involved. *See* Whitaker, *supra* note 1, at 29.

46. *See* Memorandum, Under Secretary of Defense for Acquisition and Technology, to Director, Joint Staff, subject: Exemption from Environmental Review Requirements for Cuban Migrant Holding Camps at Guantanamo, Cuba (Operation Sea Signal Phase V) (5 Dec. 1994).

47. *See* Whitaker, *supra* note 1, at 29.

48. Under the participating nation exception, the unified commander may simply approve the operation plan that integrates the exception into its environmental considerations appendix. *See, e.g.*, Joint Endeavor Operation Plan, *supra* note 36.

49. The decision memorandum integrated into the final action informed the Under Secretary of Defense for Acquisition and Technology (the approval authority) that the United States Atlantic Command had determined that Cuba was not a participating nation and that a significant impact on the host nation environment was likely. The author of the memorandum requested that the approval authority grant an exemption based upon the national security interests involved in the operation. *See* Kross Memorandum, *supra* note 26.

This does not, however, mean that commanders should not initiate some type of study or audit to minimize the environmental impact of the operation. The United States seeks to avoid the formal review or study requirement in order to enhance operational flexibility and, in turn, to enhance the opportunity for operational success,[51] but it is United States policy to reduce potential adverse consequences to the host nation's environment.[52] The practical result of this policy is that United States forces require "adherence to United States domestic law standards for environmental actions where such procedures do not interfere with mission accomplishment."[53] Accordingly, from the planning phase to the execution phase, the environment is an important aspect of all United States operations.

Early involvement by judge advocates is "essential to ensure that all appropriate environmental reviews [sic] have been completed"[54] either prior to the entry of United States forces or soon thereafter.[55] Additionally, lawyers at all levels of command must be cognizant of an operation's environmental dimension to ensure that the doctrinally required environmental consideration is integrated into operation plans and orders, training events, and civil-military operations.[56]

Once the operation plan is drafted and approved, the military lawyer's job is not complete. The lawyer must be heavily involved in the execution phase. Leaders, having read the general guidance contained in the operation order, will seek the lawyer's assistance in the onerous task of translating this guidance into action.[57] The judge advocate must ensure that this translation takes a form that those who are charged with its execution can easily understand.[58]

Joint doctrine provides the framework for translating the guidance contained in the operation order and for related legal work.[59] This framework contains seven elements for environmental planning and compliance. These elements are:

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50. The action memorandum provided: (1) the "general rule," as required by Executive Order 12,114 and DOD Directive 6050.7, (2) the explanation of why the operation does not fall within either of the two exceptions (either an action that does not cause a significant environmental impact or an action involving a host nation that is a "participating" nation), and (3) the four courses of action. The courses of action were provided as follows:

> (1) make a determination that the migrant camp operation has no significant impact;
> (2) seek application of the national security interest or security exemption;
> (3) seek application of the disaster and emergency relief operation exemption; or
> (4) prepare an [sic] "NEPA-like" environmental review.

Id.

The action memorandum then provided discussion regarding each of the four options. The memorandum explained that the first option "is without merit" because the "migrant camp will clearly have an adverse impact on the environment." It found merit with each of the exemptions but concluded that approval of an exemption alone might later subject the Department of Defense to criticism on the ground that it actively avoided its environmental stewardship responsibility. The last option was rejected as setting an inappropriate and unsound precedent of admitting legal responsibilities not actually required by the law. *Id*.

51. It is not the intent of United States forces to circumvent their environmental stewardship responsibilities. Military leaders must work within the system of law to balance operational success with many concerns, to include their environmental stewardship obligations.

52. *See* DEP'T OF DEFENSE, JOINT PUBLICATION 4-04, JOINT DOCTRINE FOR CIVIL ENGINEERING SUPPORT, II-7, para. 4a (26 Sept. 1995) [hereinafter JOINT PUB. 4-04] ("[O]perations should be planned and conducted with appropriate consideration of their effect on the environment in accordance with applicable [United States and host nation] agreements, environmental laws, policies, and regulations.").

53. *See* RESTORE HOPE AAR, *supra* note 26, at 23. During Operation Restore Hope, the multinational force, under United States leadership, determined that the actions of United States forces in that operation were exempted from the formal review or study requirement of Executive Order 12,114, but the force adhered to United States domestic law to the greatest extent possible (defined as the extent to which such adherence did not frustrate operational success).

54. *Id*. para. 4b. The author of the AAR used the term "review" in the general sense, not intending to indicate that a formal review, as contemplated in various regulatory sources, was required during United States operations in Haiti. As indicated earlier, the preferred term when no formal review or study is required is "audit."

55. *Id.*

56. *Id.* para. 4c.

57. Interview with Lieutenant Colonel George B. Thompson, Jr., Chief of the Int'l and Operational L. Div., Office of The Judge Advocate, Headquarters, United States Army, Europe and Seventh Army, in Willingen, Germany (Feb. 4, 1997). Lieutenant Colonel Thompson points out that a number of judge advocates "have their hands full working the day to day environmental piece." One such judge advocate, Major Sharon Riley (who is currently deployed to Bosnia-Herzegovina), has spent a good portion of her time assisting commanders in determining acceptable environmental standards by balancing operational considerations and realities with the DOD general environmental standards.

58. *Id*. The translation will usually require more than a single articulation. For example, some degree of soldier training must occur to ensure that soldiers understand the basic rules. This articulation of the standards is typically very basic. A more sophisticated articulation is made for subordinate commanders and engineering personnel who execute the environmental compliance mission.

59. *See* JOINT PUB 4-04, *supra* note 51, at II-8.

(1) policies and responsibilities to protect and preserve the environment during the deployment;

(2) certification of local water sources by medical field units;

(3) solid and liquid waste management;

(4) hazardous materials management (including pesticides);

(5) flora and fauna protection;

(6) archeological and historical preservation; and

(7) base field spill plan.[60]

Lawyers can use this framework when assisting military leaders in the construction of an environmental compliance standard. In each of the previously mentioned operations, a checklist similar to the seven element framework set out above was used to construct an environmental compliance model that took into account each element or item on the checklist. For example, during Operation Joint Endeavor, military lawyers working in conjunction with both the civil engineering support elements and medical personnel established concise standards for the protection of host nation water sources and the management of waste.[61] This aspect of host nation environmental protection was executed and monitored by a team comprised of judge advocates, medical specialists, and representatives from the engineer community.[62]

By using this same type of framework, lawyers can also troubleshoot problems that arise in compliance. For example, during Operation Restore Hope, judge advocates working for the task force legal advisor conducted weekly coordination meetings with members of the task force staff and used a checklist similar to the seven element list described above. The same approach was subsequently used in Operations Sea Signal, Uphold Democracy, and Joint Endeavor. Using this approach, lawyers in Operation Restore Hope discovered that the task force engineers planned to use waste oil to suppress the dust problem (typical of many areas in Somalia) that hampered early aspects of the mission. Working with the task force staff, task force lawyers advised the use of environmentally sound dust suppressants.[63]

In addition to the seven elements listed above, military lawyers must also integrate into the operation plan a directive for documentation of initial environmental conditions. In Operation Joint Endeavor, unit commanders took photographs and made notes in regard to the status of land that came under the control of their units.[64] As a result of this excellent planning and execution, United States forces were protected against dozens of fraudulent claims filed by local nationals.[65]

When searching for applicable standards to apply to the seven elements expressed in Joint Publication 4-04, military lawyers can direct their search to several readily available sources. First, they can review and consider the environmental standards set out in Department of Defense directives and regulations. Second, they can consider the rules and standards set out in the DOD Overseas Environmental Baseline Guidance Documents (OEBGD).[66] Although baseline documents are not technically applicable to overseas contingency operations

60. *Id.* (providing a description and examples for some of the elements).

61. *See* HEADQUARTERS, UNITED STATES EUROPEAN COMMAND, OFFICE OF THE LEGAL ADVISOR, INTERIM REPORT OF LEGAL LESSONS LEARNED: WORKING GROUP REPORT, 3 (18 Apr. 1996). Management and disposal of waste involved a significant expenditure of task force manpower and fiscal assets. Early identification of environmental issues and continued monitoring is critical.

62. *See* Joint Endeavor Operation Plan, *supra* note 36, Annex D, app. 5, Tab B, para. 3c(1). This obligation was written into the operation plan under the heading "Potable water." The central theme of this objective was to protect host nation water sources from contamination through "suitable placement and construction of wells and surface treatment systems, and siting and maintenance of septic systems and site treatment units." *Id.*

63. Unfortunately, the suppressants did not perform well, and the task force eventually had to resort to waste oil. However, the effort made to avoid the use of oil demonstrates the sensitivity of United States forces to the Somali environment. Once the decision was finally made to use waste oil, the task force developed a plan to limit the use of oil and to prevent an unnecessarily harsh impact on the environment. *See* RESTORE HOPE AAR, *supra* note 26, at 24.

64. *See* Joint Endeavor Operation Plan, *supra* note 36, para. 3c14.

65. *See, e.g.,* Memorandum, Captain David G. Balmer, Foreign Claims Judge Advocate, 1st Armored Division (Task Force Eagle), to Major Richard M. Whitaker, Professor, Int'l & Operational L. Dep't, The Judge Advocate General's School, United States Army, subject: Suggested Improvements for Chapter 10 of Operational Law Handbook (4 Dec. 1996) (on file with author). Captain Balmer stated that the number of claims alleging environmental damage was "fairly high, and very difficult to adjudicate in the absence of photographs taken prior to the occupation of the area by United States forces." Captain Balmer also stated that such pictures repeatedly "saved the day when fraudulent claims were presented by local nationals."

66. Department of Defense Directive 6050.16 requires that:

> DOD components operating abroad develop country specific "baseline" guidance documents. The baseline consists of standards applicable to similar operations conducted in the United States. The baseline is compared with existing host nation law. After consultation with the United States Diplomatic Mission in the host nation, the "Executive Agent" for that country determines whether to apply the baseline standards or the host nation standards.

DEP'T OF DEFENSE, DIRECTIVE 6050.16, DOD POLICY FOR ESTABLISHING AND IMPLEMENTING ENVIRONMENTAL STANDARDS AT OVERSEAS INSTALLATIONS, para. C (20 Sept. 1991) [hereinafter DOD DIR. 6050.16].

See also JA 422, *supra* note 38, at 16-2.

where the United States presence is less than permanent,[67] they provide a solid starting point for the formulation of environmental standards.

In each of the operations described in this article, the measures established within a country-specific baseline document were used (to varying extents) to develop the applicable environmental standards. For example, in Operation Joint Endeavor, the Germany baseline document was integrated into the operation plan as a reference[68] and as a "source of additional environmental standards, as [might be] deemed appropriate" in the interpretation or supplementation of the plan.[69]

It is important to bear in mind, however, that any particular country-specific baseline document does not control what United States forces do in a contingency operation.[70] These guidelines are only used as a tool; they provide lawyers and other staff officers with a starting point when dealing with host nation environmental issues. A number of experts in this area recommend that lawyers and staff officers avoid the use of the term "overseas environmental baseline guidance document," as it might confuse those charged with actual execution of environmental compliance.[71] Everyone involved in this process must clearly understand that all of the guidelines, to include the baseline documents, are merely advisory in nature.

A third source of guidance for the construction of a system of standards is the growing collection of after action reports, operation plans, and operation orders from recent operations. The plans from each of the foregoing operations would serve as excellent starting points.[72] With each successive operation, United States forces have become more experienced in their handling of the environmental dimension of overseas operations.[73]

Command environmental standard operating procedure manuals, regulations, and instructions serve as the final source of guidance. For example, United States Atlantic Command is in the process of writing an Atlantic Command Instruction on environmental security, which provides detailed guidance on overseas operational compliance, cleanup, conservation, and environmental planning and training.[74]

The Future and Changes in U.S. Policy and Law

Much of the analysis offered in this article could change if the current draft version of Department of Defense Instruction 4715.II is approved and issued by the Secretary of Defense to replace DOD Directive 6050.7.[75] The Instruction is seen as a

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67. The OEBGD "applies where EO 12,114 does not apply, ... It establishes the environmental standards by which we run our installations overseas." Briefing Slides, Colonel Richard D. Rosen, Deputy Legal Counsel, Office of the Chairman of the Joint Chiefs of Staff, subject: Combatant Commander's Environmental Responsibilities Overseas, slides 10-11 (unpublished slide presentation, on file with author).

68. *See* Joint Endeavor Operation Plan, *supra* note 36, at 3c.

69. *Id.* The general guidance in the plan stated that:

> [O]perations shall be conducted in a manner that exhibits leadership in the area of protection of human health and the environment. Operations will be conducted with the effects on the environment considered to the extent feasible under the existing conditions. Commanders will ensure potential harm to the environment is avoided or minimized when possible. The referenced OEBGD may be used as a source for additional environmental standards, as deemed appropriate. Units will operate under their respective service environmental procedures while ensuring compliance with the following minimum standards and mitigative measures.

Id.

70. *See* DOD Dir. 6050.16, *supra* note 66. *See also* Dunn Message, *supra* note 10.

71. Officers from all levels felt that using the term baseline guidance document might lead to a misunderstanding of its actual application. Telephone Interview with Mr. William Mackie, J4-International Legal Engineer Division (Mar. 27, 1997) [hereinafter Mackie Interview]; Interview with Lieutenant Colonel John M. McAdams, Jr., Judge Advocate Division, Headquarters, United States Marine Corps, in Charlottesville, Virginia (Mar. 27, 1997) [hereinafter McAdams Interview]. *See also* Jackson Interview, *supra* note 25; Moore Interview, *supra* note 32.

72. The legal work done in regard to the environment during Operation Restore Hope was excellent. The work done during Operation Uphold Democracy was even better, and the work already done and currently being done in Operation Joint Endeavor is better yet. These improvements are largely because: (1) judge advocates have done a superb job of documenting their lessons learned and (2) the service judge advocate general's corps has made capturing lessons from recent operations a priority.

73. McAdams Interview, *supra* note 71. Lieutenant Colonel McAdams served as the Joint Task Force Legal Advisor during Operation Sea Signal and stated that environmental issues consumed an appreciable amount of his time. He believes that he profited from the legal work done in Operation Restore Hope and feels that the United States Atlantic Command clearly profited from the lessons he and his staff learned during Sea Signal. He stated that he saw the product of these lessons in the execution of Operation Uphold Democracy. Specifically, he cites the decision to perform a more detailed environmental audit during Uphold Democracy, instead of the less detailed assessment performed during Sea Signal.

74. A draft version of the Atlantic Command Instruction is on file with the author.

75. *See* Mackie Interview, *supra* note 71. Mr. Mackie stated that Draft DOD Instruction 4715.II has been coordinated with each of the unified commands and each of the services, except for the Army. His opinion is that once the Army finishes its review, formal adoption will require at least one additional year. Accordingly, in his opinion, the instruction will not become effective until after June 1998.

compromise between a revised version of Executive Order 12,114 (with a more restrictive mandate for the Department of Defense) and the favorable mandate of the current version of the Executive Order. Some military lawyers believe that if the draft instruction is approved it will have a significant impact on the flexibility of military leaders charged with the execution of overseas contingency operations.[76]

The most controversial aspect of the proposed instruction is its impact on the participating nation exception of Executive Order 12,114. Currently, in planning for a contingency operation, the unified commander is free to make a determination that a host nation is a participating nation. Once this determination is reached, the unified command is not required to conduct any specific type of environmental review or to coordinate with the host nation (unless required by an independent international agreement) in assessing potential adverse consequences to a host nation's environment.[77] If the draft instruction is approved, it will reduce the discretion of combatant commanders by directing them to "coordinate and approve implementation of [the] Instruction by the environmental executive agents in their geographical areas of responsibility."[78] Previously, this type of coordination was only required under DOD Directive 6050.16 for permanent United States installations in foreign nations, not for contingency operations.

The draft instruction further reduces the discretion of combatant commanders in nations where no environmental executive agency has been appointed by directing them to:

(1) identify applicable host nation environmental laws and regulations prescribing environmental analysis for actions occurring within the nation;

(2) determine whether the host nation has an environmental analysis regime;

(3) consult with host nation authorities on environmental analysis issues as required to maintain effective cooperation;

(4) provide DOD Components with information on the host nation's environmental analysis regime;

(5) consult with the Chief of the U.S. diplomatic mission in the host nation on significant issues arising from DOD environmental analysis in that country; and

(6) ensure preparation of environmental analysis in compliance with this instruction for major DOD actions necessary to perform assigned missions of the command, including military operations, joint training, and logistics.[79]

The participating nation exception is substantially changed by the foregoing procedures and by another section in the draft instruction that provides additional guidance in regard to such nations.[80] That section states that unless an exemption is applicable, the participating nation status of the host nation does not serve as a categorical exception to the requirement to conduct some type of environmental review.[81] Instead, the operational planners must determine if the host nation is already applying an environmental analysis regime to the DOD action.[82] If the host nation is applying its own regime, the operational planners must request a copy of the host nation's analysis report. The planners should then use the report to "make informed decisions" about the execution of the operation.[83] If the host nation is not performing any form of environmental analysis or refuses to produce a report of such an analysis, the United States should offer to assist with some type of analysis.[84]

The United States may elect to proceed with the operation, even if the host nation has no intention of analyzing the environmental impact of the operation or releasing the report of such an analysis. If the United States makes this election, however, they must conduct an environmental audit "on the basis of whatever information is readily available."[85]

As referenced above, a unified command may still request the exemptions provided in Executive Order 12,114.[86] However, the language of the draft instruction in regard to the

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76. Working Memorandum, Colonel Ronald J. Later, Deputy Director for Logistics, United States Atlantic Command, to Joint Staff, J5 (Attention: Commander Mark Rosen), subject: DODI 4715.II, Analyzing Defense Actions With the Potential for Significant Environmental Impacts Outside the United States—Action Memorandum (Undated Working Memorandum, on file with author).

77. Although, as stated earlier in this article, the United States performs such assessments as a matter of policy.

78. Dep't of Defense, Instr. 4715.II, Analyzing Defense Actions With Potential for Significant Environmental Impacts Outside the United States, para. E5 (Undated Draft Version, on file with author).

79. *Id.* para. E5b.

80. *Id.* para. F3b.

81. *Id.*

82. The planners must "[consult] with the Executive Agent (or the cognizant combatant commander if no Executive Agent has been designated for the designated nation)." *Id*. para. F3b(1).

83. *Id.* para. F3c(2).

84. *Id.* para. F3c(3).

85. *Id.* para. F3c(4).

exemptions is very different from the language of DOD Directive 6050.7. The draft instruction only exempts the DOD component from formal analysis that precedes the action.[87] Accordingly, even the leadership of exempted operations must conduct an environmental audit to consider the effects of the operation on the host nation's environment.[88]

The goal of the draft instruction is to "strengthen compliance with Executive Order 12,114" so as to avoid the possibility of the issuance of a more stringent executive order.[89] The strategy is to design a compromise regime that is less restrictive than a new executive order might be, but more restrictive than the current rules. It appears that this strategy will prevail, and the Department of Defense will soon have a new instruction to guide its overseas operations in regard to the environment.

Conclusion

As our nation becomes increasingly environmentally conscious, the attention focused on integrating environmental considerations into all phases of overseas operations will increase. A number of other initiatives are now under way to incorporate an increased awareness of the environment into both the planning and execution phases of all military operations and activities. In fact, as the Army Judge Advocate General's Corps rewrites its current version of its own keystone doctrinal source for legal operations, it has initiated a separate review into the role the environment should play in operational law doctrine.[90]

Judge advocates, as they have traditionally done, must continue to stay cognizant of changes in both doctrine and law in this area. In the end, their advice must be based upon a complete understanding of the law, the mission, and common sense. This article should help judge advocates from all services provide accurate, up to date, and meaningful advice.

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86. *Id.* para. F2.

87. *Id.*

88. A formal analysis, such as an environmental study or review, is not required.

89. Joint Staff Action Processing Form, Commander Mark Rosen, J5, DODI 4715.II Action Officer, subject: Analyzing Defense Action Impacts Outside the United States (10 May 1996) (copy on file with the author).

90. The current version of the Army Judge Advocate General's Corps doctrine on "Legal Operations" described environmental law practice as one of the discrete areas of the law that judge advocates practice within the operational context. *See* DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL OPERATIONS 3 (3 Sept. 1991). The leadership of the Judge Advocate General's Corps recently directed the judge advocates charged with updating the current doctrinal manual with conducting a separate review regarding how the Corps should integrate environmental protection and considerations into its doctrine. *See* CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, UNITED STATES ARMY, DRAFT FIELD MANUAL 27-100, LEGAL OPERATIONS (unpublished draft version, on file with author).