

Khobar Towers' Progeny: The Development of Force Protection

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As the United States military engages in operational missions at a record pace, the need for commanders to understand their force protection responsibilities has never been greater. Force protection responsibility for deployed personnel is one of the most confusing and contentious issues in every military operation. Because terrorism is a constant concern, commanders agonize over their force protection responsibilities and demand that the boundaries of their force protection authority be defined with laser-like preciseness. As confusing as force protection issues may first appear, the basic legal structure creating force protection responsibility is actually quite simple. Once understood, the framework establishing force protection responsibility will become an ally in the battle to protect American troops from terrorism.

Since 1977, terrorist attacks have claimed the lives of over 300 Department of Defense (DOD) affiliated personnel.¹ Despite this fact, the recent high-priority emphasis on force protection did not occur until after the 1995 and 1996 terrorist attacks against American military forces in Saudi Arabia. The first attack was the 13 November 1995 car bombing of the Riyadh headquarters of the Office of the Program Manager, Saudi Arabian National Guard (OPM/SANG), which killed five Americans and injured thirty-five others.² Less than eight months later, on 25 June 1996, terrorists conducted a more devastating attack on United States Air Force personnel living in the Khobar Towers³ complex in Dhahran, Saudi Arabia. Terrorists detonated a fuel truck loaded with 20,000 pounds of explosives, killing nineteen Air Force members and wounding hundreds of others.⁴ Afterwards, Secretary of Defense William J. Perry declared that "the Khobar Towers attack should be seen as a watershed event pointing the way to a radically new mind-

set and dramatic changes in the way we protect our forces deployed overseas from this growing threat."⁵ This "watershed event" has led to the new emphasis on how the military exercises its force protection responsibilities. Because the greatest emphasis is placed on protecting troops when they are in foreign countries, this article will address the aspects of force protection for DOD personnel located overseas.

Background

Prior to the Khobar Towers bombing, military members rarely heard the words "force protection." "Anti-terrorism" was the expression used to describe the measures taken to prevent terrorist attacks. After Khobar Towers, "force protection" overtook "anti-terrorism" as the term of choice, and became familiar to every military member located overseas. In every operational mission that takes place today, force protection is an overriding concern that often dictates how the mission is performed, where military personnel live, and how military personnel conduct themselves on and off duty.⁶

Force protection is not a synonym for "anti-terrorism." Instead, force protection is a larger effort designed to provide comprehensive security for military members, with "anti-terrorism" being a subset of force protection.⁷ The DOD definition of force protection is:

[T]he security program designed to protect soldiers, civilian employees, family members, facilities, and equipment, in all locations and situations, accomplished through

1. CHAIRMAN, JOINT CHIEFS OF STAFF HANDBOOK 5260, COMMANDER'S HANDBOOK FOR ANTITERRORISM READINESS 1 (1 Jan. 1997) [hereinafter CJCS HANDBOOK 5260].

2. *Id.*

3. Khobar Towers is a housing compound built by the Saudi Arabian government near Dhahran, Saudi Arabia. The compound consists primarily of high-rise apartment buildings. These buildings were the residential quarters of the personnel assigned to the 4404th Air Wing (Provisional).

4. CJCS HANDBOOK 5260, *supra* note 1, at 1.

5. Honorable William J. Perry, REPORT ON THE PROTECTION OF UNITED STATES FORCES DEPLOYED ABROAD (15 Sept. 1996) (on file with author).

6. Jennifer Bauduy, *U.S. Troops Rebuilding Haiti Watch Their Backs*, WASH. TIMES, May 25, 1999, at 19. Because of unrest in Haiti, the 500 American troops stationed there have been barred from taking recreational excursions and can only leave Camp Fairwinds for mission essential tasks.

7. CJCS HANDBOOK 5260, *supra* note 1, at 20. For instance, "anti-terrorism" and "counter-terrorism" both fall under the umbrella of force protection, but they are two very different things. "Anti-terrorism" actions are defensive measures used to reduce the vulnerability to terrorism, to include limited response and containment. "Counter-terrorism" actions are offensive measures taken to prevent, deter, and respond to terrorism. Force protection is even used to describe protective health measures. When the recent announcement was made regarding mandatory anthrax vaccinations for DOD personnel, it was described as a "force protection" issue.

planned and integrated application of combating terrorism (antiterrorism and counterterrorism), physical security, operations security, personal protective services, and supported by intelligence, counterintelligence, and other security programs.⁸

Before “the security program designed to protect” can be put into place, a determination must be made as to who is responsible for establishing and administering this “program.” For personnel located overseas, the law provides a simple answer. Without exception, the responsibility belongs to either the Secretary of State or the geographic commander in chief (CINC).

The Secretary of State

The force protection role of the Secretary of State is directly provided for in The Omnibus Diplomatic Security Act of 1986 (Omnibus). This Act directs the Secretary of State to develop and implement policies and programs to provide for the security of United States government operations of a diplomatic nature, to include the protection of all government personnel on official duty abroad.⁹ Although the term “all government personnel” includes military personnel, the statute goes on to specifically exclude “personnel under the command of a United States area military commander.”¹⁰ The area military commander refers to the combatant commanders of the combatant or unified commands.¹¹ Because these commanders are assigned a geographically specific area of responsibility, they are also referred to as geographic commanders or geographic CINCs.¹²

At first glance, it appears that the Secretary of State may have been assigned a task by Congress for which he is ill-prepared and ill-equipped to execute. However, the Secretary of State does not have to perform this force protection mission by himself. The law provides that through the use of inter-agency agreements, to the maximum extent possible, other federal agencies must support the Secretary of State in his effort to protect United States government personnel.¹³ Furthermore, the Secretary of State may agree to delegate operational control of his security and protection responsibilities of other federal agencies to the heads of those federal agencies.¹⁴

The Secretary of State cannot manage every minute detail of his assigned security functions for every country in the world. The Secretary needs and has an individual in each country who serves on his behalf. In each foreign country, the chief of mission¹⁵ acts on behalf of the Secretary of State for the direction, coordination, and supervision of all government executive branch employees.¹⁶

Secretary of Defense and the Geographic CINC

The Secretary of Defense is responsible for establishing DOD policies and assigning responsibilities to implement the DOD Force Protection Program.¹⁷ From the Secretary of Defense, various specific responsibilities flow down through the under secretaries of defense, the secretaries of the military departments, the Chairman of the Joint Chiefs of Staff, and eventually reach the geographic CINCs.¹⁸ Although DOD policy is that force protection is the responsibility of anyone in a command position,¹⁹ the geographic CINC is the only DOD figure who is given force protection responsibility by statute. The combination of the Omnibus and Title 10 of the United States

8. *Id.*

9. 22 U.S.C.A. § 4802 (West 1999).

10. *Id.*

11. CJCS HANDBOOK 5260, *supra* note 1, at 34. These unified commanders which would also be area military commanders are United States Commander in Chief, Europe (USCINCEUR); United States Commander in Chief, Pacific (USCINCPAC); United States Commander in Chief, Atlantic Command (USCINACOM); United States Commander in Chief, Central Command (USCINCCENT); and United States Commander in Chief, Southern Command (USCINCSO).

12. For the remainder of this article, the unified commander will be referred to as the geographic CINC.

13. 22 U.S.C.A. § 4805(a).

14. *Id.*

15. The chief of mission is the senior ranking American at the embassy or consulate, usually the ambassador.

16. 52 U.S.C.A. § 3927 (West 1999).

17. U.S. DEP'T OF DEFENSE, DIR. 2000.12, DOD ANTI-TERRORISM/FORCE PROTECTION PROGRAM (15 Sept. 1996) [hereinafter DOD DIR. 2000.12].

18. *Id.*

19. U.S. DEP'T OF DEFENSE, DIR. 2000.16, DOD COMBATING TERRORISM PROGRAM STANDARDS para. 4.1.3 (15 Sept. 1996) [hereinafter DOD DIR. 2000.16]. This statement is taken to mean that every commander, down to the lowest level, is responsible for the protection of the personnel under his command. It is expected that he will take appropriate measures to protect his troops from problems ranging from terrorism to disease.

Code gives the geographic CINC the force protection responsibility for all personnel under his command.²⁰ Although the Secretary of Defense remains at the top of the responsibility pyramid for personnel overseas, the geographic CINC is responsible for the success or failure of the force protection program.

The idea that the geographic CINC is not responsible for all military personnel stationed or deployed within the geographic CINC's area of responsibility is a difficult concept to grasp. Title 10, U.S.C.A. § 1062 states: "Except as directed by the Secretary of Defense, all forces operating within the geographic area assigned to a unified combatant commander shall be assigned to, and under the command of, the commander of that command."²¹ This may very well be the source of the incorrect belief that the geographic CINC has command of, and thus force protection responsibility over, all military personnel operating in the CINC's area of responsibility. The simple explanation is that the Secretary of Defense has "directed" that certain military personnel operating in the CINC's area of responsibility will not be assigned to the geographic CINC, and thus are not under his command. These individuals are the force protection responsibility of the Secretary of State, unless the Secretary delegates the responsibility back to the Secretary of Defense.²² Individuals assigned to a United States embassy in organizations such as the Marine Security Guard Detachment, the Defense Attaché Office, or the Office of Defense Cooperation are typical examples of military personnel not "under the command" of the geographic CINC.

Ensuing Confusion

As a result, the statutes create two categories of DOD personnel stationed overseas: those who are the force protection responsibility of the chief of mission and those who are the force protection responsibility of the geographic CINC. The geographic CINC has force protection responsibility for DOD personnel directly under his command, and the chief of mission is responsible for everyone else, with the proviso that the Sec-

retary of State may agree to delegate force protection responsibility to the Secretary of Defense.²³

As simple as the arrangement sounds, there were several problems with this approach. In some countries, there were disputes between the Department of State and the DOD over who had force protection responsibilities for certain DOD organizations. In the case of some countries, no one had a list of all the DOD organizations actually stationed within the country,²⁴ making it difficult to identify who had force protection responsibility for whom. In Spain, the American Embassy's "1995 Annual Report of DOD Elements Under [Command] Authority" listed a total of sixty DOD military and civilian personnel who were the force protection responsibility of the chief of mission.²⁵ The American Embassy in Madrid conducted a recount, this time counting all DOD personnel who were not under the command of the "area military commander," or geographic CINC. By using the correct counting method, the number of DOD personnel for whom the chief of mission had force protection responsibility rose from what was originally thought to be sixty to 962.²⁶ A Secretary of State message to all diplomatic and consular posts addressed this confusion.²⁷ The message stated that because the Secretary of State, and by extension the chief of mission, "has ultimate responsibility for the protection of all United States government employees who are not clearly repeat clearly the authority of an area military commander, it is crucial that you be completely familiar with the situation in your country of assignment."²⁸

After Khobar Towers, the need to address these issues and replace the old memorandum of understanding (MOU) between the Department of State and the DOD became obvious. The first step was a MOU on the security of DOD elements and personnel on the Arabian Peninsula. The Secretary of State and the Secretary of Defense signed this agreement on 15 September 1996, less than three months after the attack on Khobar Towers.²⁹ The second step was a new "Universal" MOU between the Department of State and the DOD, signed on 16 December 1997.³⁰

20. See 22 U.S.C.A. § 4802 (West 1999); 10 U.S.C.A. § 164 (West 1999).

21. 10 U.S.C.A. § 1062(a)(4).

22. 22 U.S.C.A. § 4805(a).

23. *Id.*

24. For instance, in the United Kingdom there are over 150 different DOD units or elements scattered across the country.

25. Message, 220752Z Aug 96, American Embassy, Madrid, subject: Com[mand] Authority Over and Responsibility for [United States government] Executive Branch Employees—Spain (22 Aug. 1996).

26. *Id.*

27. Message, 301519Z Jul 96, Secretary of State, subject: Chief of Mission Authority Over and Responsibility for [United States government] Executive Branch Employees (30 July 1996).

28. *Id.* In fairness to the Madrid Embassy, this same confusion was experienced by many embassies around the world.

The MOU for the Arabian Peninsula

After the Khobar Towers incident, the Secretary of Defense created the Downing Commission to investigate the causes of that attack.³¹ The Commission found that the division of responsibility for force protection in the 1992 Department of State and the DOD MOU did not adequately support American forces in countries with a large American military presence.³² In the case of Saudi Arabia, the Commission found that some forces fell into a “seam,” where neither the chief of mission nor the geographic CINC exercised force protection responsibility.³³ The purpose of the MOU for the Arabian Peninsula was to eliminate “gray areas” by clearly assigning security responsibilities for all DOD elements and personnel either to the DOD or to the Department of State.³⁴

The countries to be covered by the MOU for the Arabian Peninsula were Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, United Arab Emirates, and Yemen,³⁵ all of which are located in the United States Central Command area of responsibility. A “bright-line” rule was established giving the DOD responsibility for all DOD elements and personnel on the Arabian Peninsula, except for Defense Attaché Offices, Marine Security Guard Detachments, and DOD personnel detailed to other United States government agencies.³⁶ An exceptions mechanism allowed the force protection responsibility for a DOD element to revert back to the chief of mission when it was the most reasonable or practicable arrangement.³⁷ The reallocation had to be specific and in writing.³⁸

The next step was for the chief of mission in each of these countries to negotiate a memorandum of agreement with United States Commander in Chief, Central Command, (USCINCCENT) regarding the security responsibility for each DOD element within that country. The standard format for each of these memorandums of agreement is approximately two pages outlining responsibilities, roles, and relationships, followed by two annexes. The two annexes specifically list every DOD element within the country and assign them, for force protection purposes, to either the chief of mission or USCINCCENT.

Once the agreements were signed, a fundamental problem became apparent. In the Kingdom of Saudi Arabia the senior military officer in the country was to assume force protection responsibility for all DOD elements in Saudi Arabia that were not the responsibility of the chief of mission. For Saudi Arabia, USCINCCENT delegated this task on 14 July 1996³⁹ to the Commander, Joint Task Force, Southwest Asia (JTF/SWA).⁴⁰ United States Commander in Chief, Central Command, Operation Order (OPORD) 1-96 gave the Commander, JTF/SWA, force protection responsibility for the DOD elements assigned in Saudi Arabia, which were not the force protection responsibility of the chief of mission. The problem with this approach was that the Commander, JTF/SWA, only exercised tactical control over air assets being used in Operation SOUTHERN WATCH.⁴¹ The Commander, JTF/SWA, would need either operational control or tactical control over the units located in Saudi Arabia to authoritatively direct specific force protection measures. This created an untenable problem if left unresolved.

29. Message, 190156Z Sep 96, Secretary of State, subject: DOD Elements and Personnel on the Arabian Peninsula (19 Sept. 1996) [hereinafter Secretary of State Message].

30. Message, 162100Z Dec 97, Secretary of Defense, subject: MOU between [Department of State] and DOD on Security of DOD Elements and Personnel in Foreign Areas (16 Dec. 1997) [hereinafter Secretary of Defense Message].

31. The Secretary of Defense appointed General Wayne Downing, the retired former Commander-in-Chief of U.S. Special Operations Command, to conduct an assessment of the Khobar Towers bombing. His investigation into the bombing is referred to as the “Downing Commission.”

32. THE DOWNING COMMISSION REPORT, executive summary at ix (on file with author).

33. *Id.*

34. Secretary of State Message, *supra* note 29, para. 2.

35. *Id.* para. 7.

36. *Id.* para. 2.

37. *Id.*

38. *Id.*

39. United States Commander in Chief, Central Command, OPORD 1-96, Force Protection (14 July 96) (replacing USCINCCENT Letter of Instruction for Force Protection in Kingdom of Saudi Arabia (12 Apr. 96)).

40. The Commander, JTF/SWA, was an Air Force major general. The only other permanently assigned general officers in country were the Commander, United States Military Training Mission (an Army major general), and the Commander, 4404th Wing in Dhahran (an Air Force brigadier general).

41. This meant that the commander of JTF/SWA basically controlled aircraft while they were in the air in the Persian Gulf region. He had no control over support units on the ground in the Persian Gulf region. SOUTHERN WATCH is the name of the mission to enforce the no-fly zone over southern Iraq.

The initial effect of OPORD 1-96 was to give force protection responsibility to a commander who had no authority to order specific force protection measures.⁴² Since this was the commander who would be held accountable if there was a successful terrorist attack on DOD personnel in Saudi Arabia, the policy amounted to liability without authority. The issue was finally resolved by what is known as “dual-hatting.” The Commander, JTF/SWA, was appointed to also serve as the Commander, Central Command Air Forces (CENTAF)⁴³ Forward. As Commander, CENTAF Forward, the Commander, JTF/SWA, was given the command authority needed to resolve force protection issues. When a force protection issue arose, he could take off his JTF/SWA “hat” and put on his Commander, CENTAF Forward “hat,” and he would have the appropriate authority to direct the necessary force protection measures.

The Universal MOU

A more difficult task was to draft a new MOU that could be applied on a world-wide basis yet still be acceptable to both the Department of State and the DOD. On 16 December 1997, Secretary of Defense William Cohen and Secretary of State Madeleine Albright co-signed a “Universal” MOU to “clearly define the authority and responsibility for the security of DOD elements and personnel in foreign areas not under the command of a geographic CINC.”⁴⁴ By allowing the transfer of operational force protection authority for DOD elements and personnel back and forth between the geographic CINC and the chief of mission, the Universal MOU provided a more logical allocation of force protection responsibilities between the geographic CINCs and the chiefs of mission. In some countries, the chief of mission might have had the force protection responsibility for a DOD element, even though the geographic CINC might have been in the best position to provide this assistance, or vice versa. The Universal MOU was designed to rectify this prob-

lem, and establish the principle that force protection for DOD elements should be assigned to either the geographic CINC or the chief of mission, based on who is in the best position to provide force protection.⁴⁵

This new Universal MOU on force protection adapted and superseded the 1996 Arabian Peninsula MOU.⁴⁶ Initially, the Universal MOU applied to nine countries: Bahrain, Kuwait, The Republic of the Marshall Islands, Oman, Qatar, Saudi Arabia, Turkey, United Arab Emirates, and Yemen.⁴⁷ For these countries, the geographic CINC and the chief of mission had either negotiated or started negotiations on country-specific memorandums of agreement regarding the force protection of military elements and personnel. After the initial MOU, other countries were to be added to the “covered countries” list once the country-specific memorandums of agreement were signed. The DOD gave priority to certain countries by providing a list of “intended countries” that were to be added to the Universal MOU.⁴⁸ The Secretary of Defense emphasized that there was an urgency in finalizing the memorandums of agreement for the “intended countries,” and gave a target date of six months from the signing of the Universal MOU to complete the country-specific memorandums of agreement.⁴⁹

Before a country can be added to the “covered country” list in the Universal MOU, the geographic CINC and the country’s chief of mission must negotiate a memorandum of agreement. Each memorandum of agreement outlines the chief of mission’s responsibility, the geographic CINC’s responsibility, responsibility for temporary duty personnel, direction for the Emergency Action Committee (EAC), and direction on coordination.⁵⁰ As described above, each memorandum of agreement must also include an “Annex A” and an “Annex B.” Annex A consists of an inventory of the DOD elements and personnel for whom the chief of mission retains or assumes force protection responsibility.⁵¹ Annex B consists of an inventory of

42. For instance, since he only had tactical control over air assets while they were flying in support of SOUTHERN WATCH, the Commander, JTF/SWA, could not have ordered the 4409th Operations Group in Riyadh, Saudi Arabia, to increase security police patrols, set up barricades, build walls of sandbags, and the like.

43. The United States Central Command Air Forces (CENTAF) is headquartered at Shaw Air Force Base, South Carolina. This is the air arm of the United States Central Command.

44. Secretary of Defense Message, *supra* note 30.

45. *Id.* para. 4.

46. *Id.* The message stated that for the original seven countries on the Arabian peninsula, there was to be no change to the security relationships that had been worked out with the respective chiefs of mission.

47. *Id.*

48. *Id.* The intended countries were Djibouti, Ethiopia, Kenya, Jordan, Eritrea, Pakistan, Egypt, Rwanda, Algeria, Spain, Belgium, Israel, United Kingdom, Bosnia, Morocco, Croatia, Serbia, Italy, Germany, Netherlands, Greece, Cyprus, and Japan.

49. *Id.* The Universal MOU was signed on 16 December 1997. *Id.* At the six-month point, the memorandum of agreement process had been completed for only one country on the intended country list, Cyprus.

50. Memorandum of Understanding Between the Department of State and the DOD on Security of DOD Elements and Personnel in Foreign Areas (16 Dec. 1997).

51. Secretary of Defense Message, *supra* note 30.

the DOD elements and personnel for whom the geographic CINC retains or assumes force protection responsibility.⁵² Annex B includes CINC-assigned forces for which the geographic CINC has always had force protection responsibility, as well as the non-CINC-assigned forces which were previously the force protection responsibility of the chief of mission.

Once a memorandum of agreement is negotiated between the chief of mission and the geographic CINC, the chief of mission must submit the draft memorandum of agreement to the Department of State for approval. In contrast, the geographic CINC is not required to submit the document to the DOD for approval.⁵³ The chief of mission and geographic CINC will sign but not date the document. After the signing, the chief of mission and geographic CINC will transmit messages to the Department of State and the DOD respectively, stating that the country-specific memorandum of agreement has been signed. The Department of State and the DOD will then act to place the country on the "covered countries" list in the Universal MOU. The effective date for adding a country to the "covered country" list is the date the memorandum was signed by the Secretaries of State and Defense or their representatives, unless the parties agree to a different effective date.⁵⁴ Once signed, the date is annotated on the country-specific memorandum of agreement. This date indicates when the memorandum of agreement went into effect. The Department of State and the DOD will then transmit messages informing the chief of mission and the geographic CINC of the date when the country in question was placed on the "covered country" list.⁵⁵

The Universal MOU includes provisions to remove a country from the "covered country" list. The first step is for the party who desires the removal, either the Department of State or the DOD, to give written notice to the other party. Either the Secretary of Defense or the Secretary of State, or their designated representatives, must sign this notice. The country in question will be deleted from the "covered country" list effective sixty days from the date of the original notice, unless the parties agree to a different time period.⁵⁶

Dispute resolution is addressed in the Universal MOU. If the chief of mission and the geographic CINC are unable to resolve an issue, they are to refer the issue to the Secretary of Defense and Secretary of State-designated representatives in Washington, D.C. If these designated representatives fail to resolve the problem, the issue will then be forwarded to the Under Secretary of State for Management and the Under Secretary of Defense for Policy. If the matter cannot be resolved at this level, the final step is to refer the issue directly to the Secretary of Defense and the Secretary of State.⁵⁷

The Universal MOU itself may be terminated. Termination occurs sixty days after one party gives notice to the other party of its intention to withdraw from the agreement, unless the parties agree to a different termination date.⁵⁸

Force Protection and Command Relationships

When a geographic CINC assumes force protection responsibility under a country-specific memorandum of agreement for DOD elements and personnel not in his chain of command, another problem is created: the geographic CINC assumes responsibility for forces with which he has no command relationship. Another big issue is who has force protection responsibility for personnel who are either in a temporary duty status in or who are passing through a foreign country. Some of the possible scenarios that are potential problem areas are Joint Task Forces (JTFs), naval personnel making port calls, Air Mobility Command aircrews transiting through a geographic CINC's area of responsibility, personnel assigned to the North Atlantic Treaty Organization (NATO), peacekeepers, and even DOD contractors. The crux of the problem is that when a geographic CINC assumes force protection responsibility through a country-specific memorandum of agreement for military personnel not normally under his command, the geographic CINC does not have any inherent command authority over those forces.⁵⁹ This is the same problem encountered on the Arabian Peninsula: without command authority over these forces, the geographic CINC cannot give the necessary orders to ensure that force protection measures are taken.

52. *Id.* The inventory in Annex B is made up of two categories of DOD personnel. The first category consists of CINC-assigned forces for which the geographic CINC has always had force protection responsibility. The second category consists of the non-CINC-assigned forces that were previously the force protection responsibility of the chief of mission but by agreement are now the force protection responsibility of the geographic CINC.

53. *Id.*

54. Memorandum of Understanding between the Department of State and the Department of Defense on Security of DOD Elements and Personnel in Foreign Areas (16 Dec. 1997).

55. Secretary of Defense Message, *supra* note 30.

56. *Id.*

57. *Id.*

58. Secretary of Defense Message, *supra* note 30, para. X, A.

59. Message, 220043Z Apr 98, Joint Staff, subject: Clarification of Policy in DOD 2000.12 and 2000.16 (22 Apr. 1998).

Types of Command Authority

To better understand the dilemma, it is necessary to review the types of command authority and their definitions. There are four basic types of command relationships: combatant command; operational control; tactical control; and support.⁶⁰ Combatant commanders, that is, geographic CINCs, exercise combatant command⁶¹ over forces assigned or reassigned by the National Command Authority.⁶² Combatant command is the authority to “perform those functions of command over assigned forces involving organizing and employing commands and forces, assigning tasks, designating objectives, and giving authoritative direction over all aspects of military operations, joint training, and logistics necessary to accomplish the missions assigned to the command.”⁶³ Combatant command authority cannot be delegated or transferred.⁶⁴

Operational control is the command authority that may be exercised by commanders at any echelon at or below the level of combatant commander.⁶⁵ Operational control gives a commander the authority to perform virtually the same tasks as listed above for combatant command, with the very important difference that operational control can be transferred or delegated.⁶⁶

Tactical control is command authority over assigned or attached forces or commands, that is “limited to the detailed and usually local direction and control of movements or maneuvers necessary to accomplish assigned missions or tasks.”⁶⁷

“Support” is a relationship established by a superior commander between subordinate commanders when one organization should aid, protect, complement, or sustain another force.⁶⁸

When military units are operating within a geographic CINC’s area of responsibility, unless the President or the Secretary of Defense directs otherwise, these forces are to be assigned or attached to the command of the CINC.⁶⁹ For instance, during the Persian Gulf War, units that were deployed to the United States Central Command area of responsibility from the European Command were assigned or attached to the command of the United States Commander in Chief, Central Command. However, transient forces, such as transient aircrews, do not come under the chain of command of the geographic CINC solely by their movement across area of responsibility boundaries.⁷⁰ The elements and personnel that are the force protection responsibility of the chief of mission are in this position because the Secretary of Defense has “directed otherwise,” that is; they have been assigned to someone other than the geographic CINC. If a geographic CINC does not have command authority (operational or tactical control) over a unit, then he lacks the necessary authority to order that unit to take specific force protection actions.

The Proposed Solution

The Joint Staff decided to use the same solution that was used on the Arabian Peninsula. On 15 October 1996, Secretary of Defense William J. Perry delegated to the United States Commander in Chief, Central Command, tactical control over non-CINC assigned forces for force protection purposes.⁷¹ This authority covered all DOD personnel assigned or temporarily assigned to the Arabian Peninsula. In April 1998, the Joint

60. JOINT PUBLICATION 0-2, UNIFIED ACTION ARMED FORCES (UNAFF) III-3, fig. III-2 (24 Feb. 1995) [hereinafter JOINT PUB. 0-2].

61. 10 U.S.C.A. § 161 (West 1999). Two types of combatant commands are established by statute: unified combatant commands and specified combatant commands. A unified combatant command has broad, continuing missions and is composed of forces from two or more military departments. A specified combatant command also has a broad, continuing missions but is composed of forces from a single military department. For the purposes of this article, references to the combatant commander refer to a unified combatant command.

62. JOINT PUB. 0-2, *supra* note 60, at III-3.

63. *Id.* at GL-4.

64. *Id.* at III-5.

65. *Id.* at III-8.

66. *Id.*

67. *Id.* at III-9.

68. *Id.* at III-10.

69. *Id.* at III-5. The various military organizations that are normally the force protection responsibility of the chief of mission have not been assigned or attached to the command of the geographic CINC by the Secretary of Defense.

70. *Id.* A typical example of this situation would be when a Transportation Command C-141 stops at Rota Naval Air Station (NAS), Spain, to refuel and spend the night while on its way to Saudi Arabia. Rota NAS is in the EUCOM area of responsibility, but the C-141 is flying to Saudi Arabia to conduct operations in the CENTCOM area of responsibility. This C-141 aircrew is not in the EUCOM chain of command while it is on the ground at Rota NAS.

Staff responded to an inquiry from United States European Command with a message stating that the Secretary of Defense “will delegate” tactical control for force protection to the geographic CINCs.⁷² This delegation did not officially occur until 28 September 1998, when Secretary of Defense William Cohen sent a memorandum to the geographic CINCs informing them of their new authority to exercise tactical control for force protection purposes.⁷³ Once the responsibility for non-CINC assigned personnel is transferred from the chief of mission to the geographic CINC under the country-specific memorandum of agreement process, the geographic CINC may exercise tactical control for force protection purposes over these personnel.⁷⁴

Tactical control for force protection enables the geographic CINCs to “order implementation of force protection measures and to exercise the security responsibilities outlined in the MOU.”⁷⁵ The authority also applies to DOD personnel temporarily assigned to the geographic CINC’s area of responsibility, “to include aircraft and their aircrews.”⁷⁶ The Secretary of Defense’s memorandum also authorized the geographic CINCs to “change, prescribe, modify, and enforce force protection measures for covered forces,” “inspect and assess security requirements,” and “direct immediate force protection measures (including temporary relocation) when, in the judgment of the responsible CINC, such measures must be accomplished without delay to ensure the safety of the DOD personnel involved.”⁷⁷ With this solution, the geographic CINCs now had the force protection authority they had previously lacked.

The negotiating and signing of all memoranda of agreement was halted in June 1998 because of a concern by DOD attorneys that the geographic CINCs could become subject to State Department Accountability Review Boards (ARB).⁷⁸ Federal statutes direct the Secretary of State to convene an ARB in “any case of serious injury, loss of life, or significant destruction of property at or related to a United States [g]overnment mission abroad.”⁷⁹ The ARB consists of four members appointed by the Secretary of State and one appointed by the Director of the Central Intelligence Agency.⁸⁰ This Board has the power to administer oaths, order depositions, and require the attendance and testimony of individuals, as well as the authority to make findings and recommendations.⁸¹

A concern arose over who would conduct an investigation if a terrorist attack was made against one of the elements for which force protection responsibility had transferred from the chief of mission to the geographic CINC. The DOD did not like the idea of a geographic CINC having to answer to a Department of State ARB. Part of the problem may have been caused by a clause in the Universal MOU that states:

[I]t is understood between the parties that all DOD elements and personnel in the covered countries identified as not under CINC command remain under [chief of mission] authority, as provided in Section VI, but that security responsibility for such elements and

71. Memorandum, Secretary of Defense to the Commander in Chief, United States Central Command, subject: Delegation of Force Protection Responsibility and Authority for the Arabian Peninsula (15 Oct. 96). This action should not be confused with the action USCINCENT took with respect to the Commander, JTF/SWA, discussed earlier. In each case, there was a problem of a lack of a command relationship with the DOD elements for which the commander was being assigned force protection responsibility. Although each problem was solved by different methods, the net result was that each commander was given the authority to exercise force protection responsibility over DOD elements with which he previously lacked a command relationship.

72. Message, 220043Z Apr 98, Joint Staff, subject: Clarification of Policy Described in DOD Directive 2000.12 and 2000.16 (22 Apr. 1998).

73. Memorandum, Secretary of Defense to the Commanders in Chief, United States Atlantic Command, United States Central Command, United States European Command, United States Pacific Command, United States Southern Command, subject: Delegation of Outside Continental United States Force Protection Responsibility and Authority to Geographic Combatant Commanders (28 Sept. 1998).

74. *Id.* The qualifier in this case is that force protection responsibility for these personnel must first be transferred from the chief of mission to the geographic CINC under a country-specific memorandum of agreement. The geographic CINC does not have force protection responsibility for the transferred forces until the memorandum of agreement is signed and placed on the covered country list.

75. *Id.*

76. *Id.*

77. *Id.*

78. Message, 181352Z Aug 98, United States Commander, Europe, subject: COM-CINC Agreement on Security (18 Aug. 1998) [hereinafter COM-CINC Agreement on Security Message].

79. 22 U.S.C.A. § 4831 (West 1999). The Secretary of State may also authorize a board in any case of a serious breach of security involving intelligence activities of a foreign government directed at a United States government mission abroad.

80. *Id.* § 4832.

81. *Id.* § 4833.

personnel is assumed by DOD, unless security responsibility is otherwise allocated pursuant to their MOU.⁸²

While the issue was pending resolution, a decision was made to continue with the memorandum of agreement process for the countries where there would not be a transfer of security responsibility.⁸³

On 22 March 1999, the Secretary of Defense announced that the issue had been resolved.⁸⁴ The Departments of State and Defense agreed that DOD would “conduct investigations under existing defense regulations for incidents which would normally require the Secretary of State to convene an ARB.”⁸⁵ This agreement applies to DOD personnel who for force protection purposes have been transferred from the chief of mission to the geographic CINC.⁸⁶

Taking Care of the Strays

As force protection responsibilities were sorted out, difficult questions arose regarding who had the responsibility for the various “stray” units that are routinely spread across a geographic CINC’s area of responsibility. These “strays” include personnel assigned to the military arm of NATO, “stovepipe” organizations,⁸⁷ “peacekeepers,” and even DOD contractors. Typically, these issues are handled as they arise on a case-by-case basis.

NATO Personnel

When United States military personnel are assigned to NATO, they do not have a command relationship with the

United States Commander in Chief, Europe (USCINCEUR) unless they are “dual-hatted.”⁸⁸ “Dual-hatted” in this case means that a United States service member could fill a NATO billet, while at the same time filling a United States billet. If the United States half of the “dual-hatted” position is in the USCINCEUR chain of command, then it is through this United States billet that USCINCEUR will exercise force protection responsibility over that individual. If the United States service member in this example is not “dual-hatted” and belongs solely to NATO, then he becomes the force protection responsibility of the chief of mission.⁸⁹ The United States Commander in Chief, Europe, is responsible for all personnel with whom he has a command relationship, and the chief of mission is responsible for the remaining military personnel within that country. In the case of NATO-assigned personnel, this could create a situation where a United States service member is the force protection responsibility of USCINCEUR, while the United States service member in an office across the hallway is the responsibility of the chief of mission. This is precisely the situation that the Universal MOU, along with the country-specific memorandums of agreement, was designed to correct. Unfortunately, the Memorandum of Agreement for Belgium, where a significant number of NATO personnel are stationed, has not been negotiated. However, the issue was addressed in the Memorandum of Agreement for Turkey, which has been negotiated, signed, and is in effect. United States Commander in Chief, Europe, and the chief of mission for Turkey agreed to assign force protection responsibility for all NATO assigned personnel in Turkey to USCINCEUR.⁹⁰ When the Memorandum of Agreement for Belgium is completed, it is probable that, similar to the Turkish agreement, most NATO personnel will be assigned to USCINCEUR for force protection purposes.

82. Memorandum of Understanding Between the Department of State and the DOD on Security of DOD Elements and Personnel in Foreign Areas, para. VII, C (16 Dec. 1997).

83. COM-CINC Agreement on Security Message, *supra* note 78. Many of these countries are in Africa, where the only DOD presence in the country is at the United States Embassy.

84. Message, 221200Z Mar 99, Secretary of Defense, subject: Resolution of Accountability Review Board (ARB) Requirements Under the 1997 DOS/DOD Universal MOU on Security of DOD Elements and Personnel in Foreign Areas (22 Mar. 1999).

85. *Id.*

86. *Id.*

87. Stovepipe organizations are military units that are stationed outside the United States and are thus within a geographic CINC’s AOR. However, the stovepipe organization’s chain of command does not go through the geographic CINC, but instead goes directly back to a parent organization in the United States.

88. Interestingly enough, USCINCEUR is also dual hatted. United States Commander in Chief, Europe, is not only the combatant commander of United States European Command (USEUCOM), commanding all United States’ military personnel assigned to him in the USEUCOM theater, he also serves as the Supreme Allied Commander, Europe (SACEUR), commander of NATO’s military arm. However, the fact that USCINCEUR is also SACEUR does not change the force protection relationships for NATO-assigned personnel.

89. Message, 011614Z Jun 98, Joint Staff, subject: Responsibility for Force Protection of NATO Assigned Forces (1 June 1989).

90. Memorandum of Agreement between Commander in Chief, United States European Command and Chief of Mission, American Embassy, Ankara, subject: Security and Force Protection of DOD Elements and Personnel in Turkey, annex B. The American personnel assigned to NATO billets in Turkey are located in Ankara and Izmir.

United States military personnel assigned as peace observers are another group that occasionally falls through the force protection net. These personnel are assigned to multinational United Nations organizations and are usually in remote locations far from other DOD personnel.⁹¹ The normal rules for force protection responsibilities apply to peace observers; since they are not under the command of the geographic CINC they are the responsibility of the chief of mission. However, in the case of the multinational force observers (MFO) stationed in the Sinai Peninsula of Egypt, the Department of the Army provided force protection⁹² because the Egyptian chief of mission was uncomfortable accepting force protection responsibility of such a large and combat-like unit. The United States Commander in Chief, Central Command (USCINCCENT) had not performed these duties in the past due to political sensitivities.⁹³ Following establishment of the MFO, political sensitivities changed and a recommendation was made to reassign force protection responsibility to USCINCCENT.⁹⁴

Another interesting issue arose concerning peacekeeping forces in Morocco, which is in the USEUCOM area of responsibility. Approximately thirty United States military personnel are assigned to a United Nations operation known as the Mission for a Referendum in Western Sahara (MINURSO). This peacekeeping force operates in a disputed area of Morocco, referred to as the Western Sahara. Originally twenty-six countries contributed over 1700 military observers, 300 policemen, and 800 to 1000 civilian personnel to MINURSO. Because the sovereignty of the Western Sahara was in dispute, the chief of mission in Morocco did not normally exercise security functions in the disputed region, which meant that the chief of mission would not exercise force protection responsibility for the thirty American personnel assigned to MINURSO.⁹⁵ However,

an agreement was reached that directed the chief of mission in Morocco to assume force protection responsibility for all personnel assigned to or on temporary duty (TDY) with MINURSO.⁹⁶

DOD Contractors

Another complex issue regarding force protection responsibility involves contractors hired by the DOD. Oftentimes, contract employees will accompany United States forces on contingency operations and provide services such as food preparation, computer support, and engineering support. For example, the engineering firm of Brown and Root provided support to deployed United States forces in contingency operations in Somalia and Bosnia. Contractors will oftentimes eat, work, and live alongside deployed military personnel. The question is “who provides force protection for these contractors?”

By law, the chief of mission has responsibility for DOD contractors and their employees.⁹⁷ There does appear to be an exception for situations that are declared a “crisis” by the National Command Authority (NCA) or the geographic CINC.⁹⁸ When a “crisis situation” is declared, the DOD components work with contractors performing essential services to develop and implement plans and procedures to ensure the contractor can continue to perform.⁹⁹ Although vague, the DOD guidance can be interpreted as direction to DOD components to provide force protection for contractors when either the NCA or the geographic CINC declares a crisis. In routine cases, however, the DOD has no legal obligation to provide force protection for contractors or their employees unless specific language is included in the contract.¹⁰⁰ The DOD attempted to strengthen force protection for contractors performing outside of the United States by requiring them to do the following:

91. Some of these multinational peacekeeping forces are located in Guatemala, Georgia, Western Sahara, Jerusalem, Iraq/Kuwait, and Egypt.

92. Memorandum, Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict, to the Secretary of Defense, subject: Force Protection Responsibilities for Peace Observer Forces (6 May 1997).

93. *Id.* It should be noted that USCINCCENT would have lacked a command relationship with U.S. personnel in the MFO-Egypt, and thus would not have had the authority to exercise force protection responsibilities.

94. *Id.*

95. Message, 102133Z Mar 98, Secretary of State, subject: State-DOD MOU on Security–Rabat (10 Mar. 1998).

96. *Id.*

97. Message, 201545Z Jan 98, United States Commander in Chief, Europe, subject: Anti-terrorism Force Protection Guidance for DOD Entities Employing DOD Contractors (20 Jan. 1998) [hereinafter USCINCEUR Message].

98. U.S. DEP’T OF DEFENSE, INSTR. 3020.37, CONTINUATION OF ESSENTIAL DOD CONTRACTOR SERVICES DURING CRISES (26 Jan. 1996) [hereinafter DOD INSTR. 3020.37]. This Instruction defines “crisis situation” as “Any emergency so declared by the National Command Authority or the overseas Combatant Commander, whether or not U.S. Armed Forces are involved, minimally encompassing civil unrest or insurrection, civil war, civil disorder, terrorism, hostilities buildup, wartime conditions, disasters, or international conflict presenting a serious threat to DOD interests.” *Id.*

99. *Id.* para. D.3.

100. USCINCEUR Message, *supra* note 97.

1. If the contractors are U.S. companies, affiliate with the Overseas Security Advisory Council;
2. Ensure U.S. national personnel register with the U.S. Embassy and that their third-country nationals comply with the requirements of the Embassy of their nationality;
3. Prior to their travel outside the United States, provide [anti-terrorism/force protection] awareness information to personnel commensurate with that which DOD provides to the military, DOD civilian personnel, and their families to the extent such information can be made available; and
4. Receive the most current [anti-terrorism/force protection] guidance for personnel and comply with the DOD Foreign Clearance Guide (DOD 4500.54-G), as appropriate.¹⁰¹

Other than the provisions listed above, the DOD cannot force contractors and their employees to follow all DOD force protection guidelines in a foreign country, unless these requirements are specified in the contract. While DOD wants to strengthen force protection measures used by contractors operating overseas, contractors and their employees cannot force DOD to provide them force protection.

Force Protection and International Agreements

When DOD personnel are assigned to an overseas location, they must abide by the laws of the United States as well as the laws of the host nation. A force protection program must operate within the same restraints. Multilateral and bilateral inter-

national agreements create the framework within which overseas force protection programs must operate. All actions to combat terrorism outside the United States must comply with applicable Status of Forces Agreements (SOFA), international agreements, and memoranda of understanding.¹⁰²

One of the most basic principles of international law is a nation's right to control its sovereign territory.¹⁰³ This means that the host nation has the ultimate responsibility to prevent terrorist attacks against American installations overseas.¹⁰⁴ Overseas, American forces are normally allowed to police inside the fence at American installations, while the host nation is responsible for policing everything outside of the installation. When a host nation fails to control its territory, it can have disastrous results for American military installations. The failure by the Saudi Arabian government to control a public parking lot next to the Khobar Towers complex was perhaps the major factor in the failure to prevent that terrorist attack. Terrorists were able to park an explosives-laden truck in a parking lot only eighty feet from the building they ultimately destroyed.¹⁰⁵ On two previous occasions, officials from the 4404th Wing in Dhahran had asked the Saudi government to move the parking lot fence in order to create a larger buffer zone between the parking lot and the installation's buildings.¹⁰⁶ The Saudi government refused both requests, presumably because the parking lot serviced a public park and a mosque.¹⁰⁷

The NATO SOFA

The largest number of United States military personnel stationed overseas are found in European countries that are members of NATO.¹⁰⁸ Their status in NATO countries is controlled by the NATO SOFA.¹⁰⁹

101. U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 252.225-7043, FORCE PROTECTION FOR DEFENSE CONTRACTORS OUTSIDE THE UNITED STATES (Jan. 13, 1999) [hereinafter DFARS]. See Memorandum, Deputy Secretary of Defense, to Secretaries of the Military Departments, subject: Interim Antiterrorism/Force Protection (AT/FP) Policy for Defense Contractors Overseas (28 Jan. 1998). This Memorandum defines a defense contractor as:

Any individual, firm, corporation, partnership, association, or other legal nonfederal entity that enters into a contract directly with DOD or a DOD component to furnish services, supplies, or both, including construction. Thus, Defense Contractors may include [United States] nationals, local citizens, or third country nationals. For purposes of this interim policy, Defense Contractors do not include foreign governments or representatives of foreign governments that are engaged in selling to DOD or a DOD component or foreign corporations wholly-owned by foreign governments.

The policy set out in the Memorandum was to be incorporated in the new version of *DOD Directive 2000.12*.

102. U.S. DEP'T OF DEFENSE, INSTR. 2000.14, DOD COMBATING TERRORISM PROGRAM PROCEDURES para. D.1.c (15 June 1994) [hereinafter DOD INSTR 2000.14].

103. *Island of Palmas Case* (United States v. Netherlands), 2 R.I.A.A. 829, (Perm. Ct. Arb. 1928).

104. U.S. DEP'T OF DEFENSE, HANDBOOK O-2000.12-H, PROTECTION OF DOD PERSONNEL AND ACTIVITIES AGAINST ACTS OF TERRORISM AND POLITICAL 4-3 (Feb. 1993) TURBULENCE [hereinafter DOD O-2000.12-H].

105. Matt LaBash, *Scapegoat: How a Terrorist Bombing Destroyed a General's Career*, A.F. TIMES, Dec. 8, 1997, at 10.

106. *Id.* at 14.

107. *Id.*

The NATO SOFA provides a good example of the relationship the United States has with most nations hosting American personnel. Provisions in the NATO SOFA create the framework by which American installations are protected.¹¹⁰ Article VI of the NATO SOFA allows members of a visiting force to possess and carry arms if authorized in their orders.¹¹¹ The NATO SOFA further provides that military units or formations have the right to police any installations that they occupy pursuant to an agreement with the receiving state, or host nation.¹¹² “To police” means that the visiting American forces can “take all appropriate measures to ensure the maintenance of order and security on such premises.”¹¹³ American forces may police outside of American installations only if an arrangement or agreement has been made with the host nation.¹¹⁴ Originally, the concept of American forces patrolling or policing outside of an installation was limited to American military police attempting to quell disorders caused by American personnel.¹¹⁵ With the advent of force protection, this Article of the NATO SOFA can be used as the authority by which the host nation can allow American forces to police and patrol more broadly outside of overseas American installations. However, American forces arresting non-Americans on foreign soil is a major stumbling

block. The NATO SOFA does not give American forces the authority to arrest a national of the host nation while he is on an American installation, except in an emergency situation.¹¹⁶

Outside of an American installation, the general rule is that American forces have the authority to arrest American personnel only.¹¹⁷ The only exception to this rule appears to be if American military forces arrest a foreign national while he is in *flagrante delicto*.¹¹⁸ For instance, if American military police caught a terrorist outside of an American installation placing a bomb next to the perimeter fence, the military police would be within their rights to arrest the terrorist and then hand him over to the law enforcement authorities of the host nation.¹¹⁹ In Germany, under certain conditions, American military authorities may take into “temporary custody” a person not subject to their jurisdiction.¹²⁰ The person must be caught or pursued in *flagrante delicto*, and either their identity cannot be established immediately or there is reason to believe the person will flee from justice.¹²¹ The German government can also request that the American military authorities make such an arrest.¹²² American military authorities may also take a person into temporary custody if there is danger in delay, a German police

108. Approximately 110,000 U.S. personnel are stationed in the European theater. Congress has mandated that this number be reduced to 100,000.

109. Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Forces, June 19, 1951, 4 U.S.T. 1792 [hereinafter NATO SOFA].

110. The discussion about the NATO SOFA also applies to the Partnership for Peace (PFP) SOFA, since the PFP SOFA and the NATO SOFA have identical terms. As of 1 February 1998, the PFP SOFA is in effect in the following countries: Albania, Austria, Bulgaria, Czech Republic, Estonia, Finland, Georgia, Hungary, Kazakhstan, Latvia, Lithuania, Macedonia, Moldova, Poland, Romania, Slovak Republic, Slovenia, Sweden, and Uzbekistan.

111. NATO SOFA, *supra* note 109, art. VI.

112. *Id.* art. VII, para 10(a).

113. *Id.*

114. *Id.* art. VII, para 10(b).

115. SERGE LAZAREFF, STATUS OF MILITARY FORCES UNDER CURRENT INTERNATIONAL LAW 254 (1971).

116. *Id.* at 252.

117. *Id.* at 254.

118. *Id.* at 255. In *flagrante delicto* is defined as “in the very act of committing the crime.” The Japanese government expressly granted American Forces in Japan the right to arrest in *flagrante delicto*. In *flagrante delicto* is not mentioned in the NATO SOFA, but it is alluded to in a statement made by the Juridical Sub-Committee (negotiating the NATO SOFA) that if the military authorities of the sending state arrest a national of the receiving state, the arrestee must be handed over immediately to the receiving state police.

119. An interesting issue arises over who has the right to prosecute the terrorist in this example, especially if the terrorist succeeded in killing an American national. Once again, the issue of territorial sovereignty arises, which gives the nation where the crime was committed the primary jurisdiction in prosecuting the crime. However, the United States has enacted 18 U.S.C. § 2332, which makes it a violation of United States law to kill, conspire to kill, or cause serious bodily injury to a United States citizen when he is outside of the United States. The United States Attorney General must certify in writing that in his judgement the offense was intended to coerce, intimidate, or retaliate against a government or civilian population. This legislation gives the United States the extraterritorial jurisdiction it needs to prosecute terrorists in its own courts, but it does not solve the problem that this principle is not generally accepted in international law, i.e., many nations will not hand jurisdiction over to the United States.

120. The Supplementary Agreement to the Agreement between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces With Respect to Foreign Forces Stationed in the Federal Republic of Germany, 3 Aug. 1959, amended 21 Oct. 1971, and 18 May 1981), 1 U.S.T. 531.

121. *Id.* art. 20, para. 1(a).

122. *Id.* art. 20, para. 1(b).

officer cannot be called in time, and the person has committed or is attempting to commit an offence within, or directed against an American installation.¹²³ This second provision only applies if the person is a fugitive from justice or there are good reasons to fear that he will seek to evade criminal prosecution after committing the offence.¹²⁴ Under both exceptions, the military authorities taking the individual into temporary custody may disarm the detainee.¹²⁵ They may also search for and seize any items in the possession of the detainee that may be used as evidence.¹²⁶ The detainee then must be delivered without delay, along with the seized weapons and evidence, to the nearest German public prosecutor or police officer.¹²⁷

The NATO SOFA also requires that the host nation and the sending state “seek such legislation as it deems necessary to ensure the adequate security and protection within its territory of installations . . . of other [c]ontracting parties, and the punishment of persons who may contravene laws enacted for that purpose.”¹²⁸

The Middle East

Some countries where DOD personnel are stationed do not have official agreements with the United States. Many countries in the Middle East either do not have a status of forces agreement with the United States or have an agreement that is classified. A classified agreement makes it difficult for the personnel deployed to or stationed in these countries to know the limitations of their force protection authority.

One Middle Eastern country that does have an unclassified agreement with the United States regarding status of forces is Egypt.¹²⁹ Throughout the agreement with Egypt, United States military personnel are referred to as “special missions.” The

only section of the agreement that addresses force protection is a statement that the Egyptian government “shall spare no effort, as far as possible, in providing assistance for the safety of the members of the special missions in carrying out their activities mentioned in this Agreement.”¹³⁰ The assistance is to conform to all Egyptian laws and regulations.¹³¹ The Agreement limits the “policing” powers of the American military in Egypt. While on Egyptian military facilities, American military police “may take all appropriate measures over United States personnel to ensure the maintenance of order and security.”¹³² Outside of Egyptian military facilities, American military police may be employed only as necessary to maintain order and discipline among American troops, and only by prior arrangement with the appropriate Egyptian authorities.¹³³ This agreement seems to allow American military police in Egypt the right to police its own forces for the maintenance of order and discipline, and little else.

When American forces are based on overseas installations, they must rely on the local government for force protection support. Because of the limited American authority outside of an installation, the host nation authorities have to provide the essential security outside the fence line, or through an agreement, allow the American forces the authority to do so. Even if the host nation refuses or fails to protect an American installation, the United States always reserves the right of self-defense to protect American facilities, property, and personnel.¹³⁴ All overseas installations need some type of agreement with the local authorities to delineate the type of support that will be provided by the host nation and the amount of authority that will be granted to American forces policing outside the installation fence.

123. *Id.* art. 20, para. 2.

124. *Id.* This second exception for arresting a person not subject to United States jurisdiction in Article 20, paragraph 2, is very similar to the exception in paragraph 1. Paragraph 1 has the *in flagrante delicto* requirement, while paragraph 2 seems to allow the taking into custody of a person who has already committed the offence, with the proviso that it must be dangerous to delay the arrest because the person will probably flee.

125. *Id.* art. 20, para. 3.

126. *Id.*

127. *Id.* art. 20, para. 4.

128. NATO SOFA, *supra* note 109, art. VII, para. 11.

129. Agreement Concerning Privileges and Immunities of United States Military and Related Personnel in Egypt, with Related Letter and Agreed Minute, Exchange of Notes at Cairo on 26 July 1981; *entered into force* 5 Dec. 1981, 33 U.S.T. 3353, T.I.A.S. 10349.

130. *Id.* para. II, (B).

131. *Id.*

132. *Id.* para. II, (F), 9, A.

133. *Id.* para. II, (F), 9, B.

134. DOD O-2000.12-H, *supra* note 104.

The Protection of the Force

The signing of the Universal MOU and the subsequent negotiations were a significant step forward, but these steps only relate to who has responsibility for the force protection of military units. The Universal MOU and country-specific memorandums of agreement do not provide specific guidance as to “how” to protect DOD personnel. The “how to” guidance is found in a series of DOD directives and instructions. These publications begin by creating a hierarchy of responsibility and then devolve down into the specifics of protecting the force.

Department of Defense Directive 2000.12

The publication that establishes the DOD force protection program is *DOD Directive 2000.12*.¹³⁵ The primary purposes of this Directive are to assign responsibilities for the protection of DOD personnel and their families, facilities, and other resources from terrorism; to establish the Chairman, Joint Chiefs of Staff, as the focal point in DOD for force protection issues; and to expand the responsibilities of the combatant commanders “to ensure the force protection of all DOD activities in their geographic area of responsibility.”¹³⁶

The Directive assigns responsibilities to the Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict, the Chairman of the Joint Chiefs of Staff, the Under Secretary of Defense (Comptroller), the Under Secretary of Defense for Acquisition and Technology, the Under Secretary of Defense for Policy, the Assistant Secretary of Defense for Force Management Policy, the Under Secretary of Defense for Personnel and Readiness, the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence, the Director, Defense Intelligence Agency, the Secretaries of the

Military Departments, and last but probably most importantly, the Commanders of the Combatant Commands—that is, the geographic CINCs.¹³⁷

The first responsibility listed for the geographic CINCs is to review the force protection status of all military activities within their geographic area of responsibility.¹³⁸ Other requirements include identifying force protection resource requirements, assessing command relationships as they relate to force protection,¹³⁹ identifying predeployment training requirements,¹⁴⁰ establishing command policies and programs for force protection,¹⁴¹ assessing the terrorist threat and disseminating that information to subordinate commanders,¹⁴² and coordinating force protection measures with the host nation.¹⁴³

Department of Defense Instruction 2000.14

More responsibilities are spelled out for the geographic CINCs in *DOD Instruction 2000.14*.¹⁴⁴ This Instruction implements *DOD Directive 2000.12* by establishing policy, assigning responsibilities, and prescribing procedures.¹⁴⁵ Broad policy concepts are stated, such as “it is DOD policy to protect DOD personnel and their families, facilities, and other material resources from terrorist acts.”¹⁴⁶ *DOD Instruction 2000.14* assigns responsibilities to the Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict, the Secretaries of the Military Departments, the Chairman of the Joint Chiefs of Staff, the Commanders of the Unified Combatant Commands, and the Assistant Secretary of Defense for Command, Control, Communication, and Intelligence.¹⁴⁷ Many of the responsibilities assigned by *DOD Instruction 2000.14* to the parties listed above are similar to the responsibilities assigned to the same parties in *DOD Directive 2000.12*. For instance, *DOD Directive 2000.12* assigns the secretaries of the military

135. DOD DIR. 2000.16, *supra* note 19, para. 4.1.3. At the time this article was written, a draft revision of this Directive was pending but not finalized.

136. *Id.* para. A.

137. *Id.*

138. *Id.* para. E, 9.

139. *Id.* para. E, 9, d.

140. *Id.* para. E, 9, f.

141. *Id.* para. E, 9, g.

142. *Id.* para. E, 9, h, i.

143. *Id.* para. E, 9, j.

144. DOD INSTR. 2000.14, *supra* note 102.

145. *Id.* para. A.

146. *Id.* para. D, 1, a.

147. *Id.* para. E.

departments the task of providing “resident training to personnel assigned to high-risk billets and others, as appropriate.”¹⁴⁸ This task is given a bit more specificity in *DOD Instruction 2000.14*, where the secretaries of the military departments are directed to ensure high-risk personnel and individuals assigned to high-risk positions attend the “Individual Terrorism Awareness Course.”¹⁴⁹ The Instruction also includes a list of fourteen anti-terrorism related courses and schools.

Department of Defense Instruction 2000.16

The main purpose of this Instruction, *DOD Combating Terrorism Program Standards*, is to implement policy and prescribe performance standards for the protection of personnel as directed by *DOD Directive 2000.12*.¹⁵⁰ This Instruction only assigns responsibilities to the Assistant Secretary of Defense for Special Operations and Low Intensity Conflict and the heads of other DOD components.¹⁵¹ The prescribed procedures are found in enclosure 1 of the Instruction. These prescribed procedures are set out in the form of thirty-three program or “DOD Standards.” These standards affirmatively require that certain actions be taken. These standards are addressed to two categories of people or organizations: (1) “combatant commanders, chiefs of service, and directors of DOD agencies and field activities,” and (2) commanders.¹⁵² These standards range from broad generalizations, such as: “Combatant commanders . . . are responsible for the implementation of DOD antiterrorism/force protection (AT/FP) policies within their organizations”¹⁵³ to more specific requirements, like a “CINC . . . shall ensure that an AT/FP officer . . . is assigned at each installation or base, and deploying organization ([for example] battalion, ship, squadron).”¹⁵⁴

This Instruction also has some requirements that are certain to be difficult to establish and enforce. Department of Defense Standard 19 requires a commander in an area with a medium, high, or critical terrorist threat level, to “conduct physical security assessments of off-installation residences for permanently assigned and temporary-duty DOD personnel.”¹⁵⁵ After the review is completed, the commander will recommend to the appropriate authorities, as necessary, the lease or construction of housing in safer areas.¹⁵⁶ Department of Defense Standard 19 is difficult to comply with in countries like Italy and Germany, where thousands of DOD families live off base on the civilian economy. Many commanders will not have the time, money, or manpower to conduct such assessments. Another difficult standard to comply with is DOD Standard 33, which states that “commanders at levels shall take appropriate measures to protect DOD personnel and reduce the vulnerability to terrorist use of [weapons of mass destruction (WMD)].”¹⁵⁷ This standard is vague as to precisely what is required of commanders. It also creates a potentially expensive requirement without any recommendation regarding how to fund such measures.

Department of Defense Standard 5 creates a requirement that each geographic CINC publish an AT/FP plan or OPORD.¹⁵⁸ The plan is to be clear in its intent and should be written from the geographic CINC level down to the installation or base level.¹⁵⁹ Although the format of the plan or OPORD is not specified, the plan must include procedures to collect and analyze terrorist threat information, procedures to analyze vulnerabilities to terrorist attacks, procedures for enhanced antiterrorism protection, and procedures for responding to terrorist attacks.¹⁶⁰ In USEUCOM, the geographic CINC has issued USCINCEUR OPORD 98-01 that implements the guidance in *DOD Directive 2000.12*, *DOD Handbook O-2000.12-H*, and the standards in *DOD Instruction 2000.16*.¹⁶¹

148. See DOD DIR. 2000.12, *supra* note 17, para. E, 8, e.

149. DOD INSTR. 2000.14, *supra* note 102, para. E, 2, a. There are many similarities between *Department of Defense Directive 2000.12* and *Department of Defense Instruction 2000.14*, but they are separate and not combined for a reason. *Department of Defense Directive 2000.12* was issued by the Secretary of Defense, William Perry. *Department of Defense Instruction 2000.14* was issued by the Assistant Secretary of Defense for Special Operations/Low Intensity Conflict, as part of his responsibilities assigned to him under *Department of Defense Directive 2000.12*.

150. DOD DIR. 2000.16, *supra* note 19, para. 1.1.

151. *Id.* para. 5.

152. *Id.* at enclosure 1. The term “commanders” is not well defined in this Instruction. Paragraph 5.3.3. states “[t]he [h]eads of [o]ther DOD [c]omponents shall: [i]dentify the level of command (i.e., the specific subordinate commanders) required to meet these standards.”

153. *Id.* para. E1.1.1. (DOD STANDARD 1).

154. *Id.* para. E1.1.23. (DOD STANDARD 23).

155. *Id.* para. E1.1.19. (DOD STANDARD 19).

156. *Id.*

157. *Id.* para. E1.1.33. (DOD STANDARD 33).

158. *Id.* para. E1.1.5. (DOD STANDARD 5).

159. *Id.*

The OPORDs produced by the geographic CINCs must meet all the requirements contained in *DOD Directive 2000.12* and *DOD Instruction 2000.16*.

The new guidance did not clearly address whether the DOD personnel assigned to the chief of mission for force protection had to comply with the standards established in *DOD Instruction 2000.16*. The Instruction also required the geographic CINC to review the force protection status of all DOD personnel assigned within the geographic CINC's area of responsibility. The Joint Staff finally concluded that DOD personnel under the force protection responsibility of the chief of mission must follow and meet the State Department Overseas Security Policy Board standards.¹⁶² There is no additional requirement that these personnel meet DOD force protection standards. The geographic CINC should periodically review the force protection status of all DOD personnel who are the responsibility of the chief of mission.¹⁶³ If the geographic CINC has a concern over the force protection provided by the chief of mission, the CINC and the chief of mission must try to work out their differences. If the problem cannot be resolved, the issue must be forwarded through DOD and Department of State channels for resolution.¹⁶⁴

Department of Defense Handbook O-2000.12-H

The DOD publication that provides the nuts and bolts guidance for force protection is the handbook known as *DOD O-2000.12-H*. The handbook is published under the authority of *DOD Directive 2000.12*, to serve as the practical companion to that directive. The stated purpose of this handbook is to serve as a reference document for the military services.¹⁶⁵ Several

hundred pages of material provide information to help develop programs for antiterrorism awareness, education, and training.¹⁶⁶ Topics covered range from broad, general areas such as the methodology behind terrorist threat analysis to more specific subjects, such as how to properly plug a sewer pipe. This vast amount of material has become the basis for most antiterrorism training programs, as it is the most comprehensive, practical, and useful DOD publication regarding force protection measures.

Financing Force Protection

A sticking point in almost any modern military plan or operation is "how do you pay for it?" There are now several options when it comes to paying for force protection measures. Force protection measures can always be funded in the same way most military projects are funded, which is through the Programming, Planning, and Budgeting System (PPBS).¹⁶⁷ However, this method can take years to produce a tangible result. The stated purpose of the PPBS planning phase is to define "the national military strategy necessary to help maintain national security and support U.S. foreign policy two to seven years in the future."¹⁶⁸ Many force protection problems are time sensitive, and this two to seven-year time lag is unresponsive to time sensitive situations. Two better alternatives remain for funding force protection measures: the CINC Initiatives Fund¹⁶⁹ and the Combating Terrorism Readiness Initiatives Fund.¹⁷⁰

CINC Initiatives Fund

The CIF allows the military, under special circumstances, to obtain funds quickly and avoid the time-consuming PPBS process. The stated purpose of this fund is "to support unforeseen contingency requirements critical to CINC joint warfighting readiness and national security interests."¹⁷¹ Funds may be pro-

160. *Id.*

161. USCINCEUR Operations Order 98-01, Antiterrorism/Force Protection (21 Feb. 1998).

162. Message, 182225Z Aug 98, Joint Staff, subject: Applicability of DOD Instruction 2000.16 Standards to DOD Personnel Under the Force Protection Responsibility of a Chief of Mission (18 Aug. 1998).

163. *Id.*

164. *Id.*

165. DOD O-2000.12-H, *supra* note 104, at 1-3.

166. *Id.*

167. U.S. DEP'T OF DEFENSE, DIR. 7045.14, THE PLANNING, PROGRAMMING, AND BUDGETING SYSTEM (22 May 1984) [hereinafter DOD DIR. 7045.14].

168. *Id.* para. 4.1.

169. 10 U.S.C.A. § 166(a) (West 1999). See CHAIRMAN, JOINT CHIEFS OF STAFF INSTR. 7401.01, CINC INITIATIVES FUND (11 June 1993) [hereinafter CJCSI 7401.01].

170. CHAIRMAN, JOINT CHIEF OF STAFF INSTR. 5261.01, COMBATING TERRORISM READINESS INITIATIVES FUND, (1 Aug. 1998) [hereinafter CJCSI 5261.01].

171. CJCSI 7401.01, *supra* note 1

vided for nine authorized activities listed in the statute enacting the CIF.¹⁷² The ninth item on the authorized activities list is “force protection.”¹⁷³ Force protection was not one of the original authorized activities when the statute was enacted in 1991, but was added by amendment in 1997, in the wake of the Khobar Towers bombing.¹⁷⁴

Requests for funds must be submitted in a specific format found in *Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 7401.01*, Enclosure B. Before the submission can be forwarded to the Joint Staff for action, either the geographic CINC or his deputy must approve it.¹⁷⁵ Once the request reaches the Joint Staff, the Chairman of the Joint Chiefs of Staff is the final approval authority.¹⁷⁶ Although funds can be obtained for force protection purposes by using the CINC Initiative Fund, the Combating Terrorism Readiness Initiatives Fund has been the preferred method of obtaining money for force protection projects. It should be noted that the most recent version of *CJCSI 7401.01* is dated 11 June 1993, and does not reflect the 1997 amendment to 10 U.S.C. § 166(a), which added “force protection” as an activity authorized to receive CINC Initiative Fund.

Combating Terrorism Readiness Initiatives Fund

The Combating Terrorism Readiness Initiatives Fund¹⁷⁷ can be used in situations characterized as “unforeseen,” “emergency,” and “unanticipated.” The Combating Terrorism Readiness Initiatives Fund policy statement makes clear that this fund is only to be used “to fund emergency or other unforeseen high

priority combating terrorism requirements,”¹⁷⁸ or to allow a geographic CINC to “react to unanticipated requirements from changes in terrorist threat level or force protection doctrine/standards.”¹⁷⁹ These exigent circumstances must be legitimate, and should not be a cover to “subsidize ongoing projects, supplement budget shortfalls, or support routine activity that is normally a service responsibility.”¹⁸⁰

The process begins when the service components within a geographic CINC’s area of responsibility submit a request that a project be approved for funding under the Combating Terrorism Readiness Initiatives Fund.¹⁸¹ *Chairman, Joint Chief of Staff Instruction 5261.01*, Enclosure A, requires that each request follow a specific format.¹⁸² The geographic CINC or his deputy will review the request, approve or disapprove it, and then forward the request to the Chairman of the Joint Chiefs of Staff.¹⁸³ The forwarded request remain in the same format found in Enclosure A. The Chairman of the Joint Chiefs of Staff is the final approval authority for Combating Terrorism Readiness Initiatives Fund requests.¹⁸⁴ The Chairman is to evaluate each request on its individual merit, and is not to apportion a fixed percentage of the Combating Terrorism Readiness Initiatives Fund to each geographic CINC.¹⁸⁵

All Combating Terrorism Readiness Initiatives Funds are in the operation and maintenance (O&M) appropriation. The restrictions placed on the use of O&M funds also apply to the use of the Combating Terrorism Readiness Initiatives Fund.¹⁸⁶ Expenditure of the Combating Terrorism Readiness Initiatives

172. 10 U.S.C.A. § 166(a). The nine activities are force training, contingencies, selected operations, command and control, joint exercises, humanitarian and civic assistance, military training and education of foreign personnel, personnel expenses of defense personnel for bilateral or regional cooperation programs, and force protection.

173. *Id.*

174. *See* 10 U.S.C.A. § 166(a) amends.

175. CJCSI 7401.01, *supra* note 169, at 2.

176. *Id.*

177. CJCSI 5261.01, *supra* note 170.

178. *Id.* para. 4.a.

179. *Id.* para. 4.b.

180. *Id.*

181. For instance, in the EUCOM area of responsibility, United States Army Europe (USAREUR), United States Air Force Europe (USAFE), and United States Navy Europe (NAVEUR), must all submit their requests to EUCOM for initial review and approval before the requests are forwarded to the Joint Chiefs of Staff. Naturally, the very beginning of the process is when someone at the local base level identifies a problem or a need, which is then submitted by the local commander to the component command.

182. CJCSI 5261.01, *supra* note 170, at A-1.

183. *Id.* para. 4.g.

184. *Id.* para. 4.h.

185. *Id.* para. 4.c.

Fund is limited to things such as equipment, minor construction, supplies, materials, rent, communication, and utilities.¹⁸⁷ Although exceptions may apply, the Combating Terrorism Readiness Initiatives Fund should not normally be used to fund civilian personnel positions.¹⁸⁸ The key fiscal law concept that must be remembered is that the Combating Terrorism Readiness Initiatives Fund must be obligated before the end of the fiscal year for the bona fide needs of that fiscal year.¹⁸⁹ To make certain that this principle not be forgotten, the Joint Staff sent a message to the unified commands. The primary purpose of this message was to remind the unified commands to obligate funds received for fiscal year 1998 before the end of the fiscal year.¹⁹⁰

Conclusion

The emphasis on force protection is not a passing fad. As long as terrorist attacks remain a threat, force protection will

remain an essential feature of military life. The foundation for the DOD force protection program is a scattered mishmash of messages, agreements, statutes, and regulations.

The first and most important step in any force protection program is to determine who is responsible for every military unit located overseas. If another terrorist attack similar to the Khobar Towers attack occurs, the chain of responsibility will be analyzed first. After the Khobar Towers attack, Congress put "considerable pressure" on then Secretary of Defense William Perry to find someone culpable.¹⁹¹ The result was that Brigadier General Terry Schwalier, the Commander of the 4404th Wing Provisional in Dhahran, Saudi Arabia, was denied promotion to Major General by Secretary of Defense William Cohen.¹⁹² There is no reason to think that after the next terrorist attack the reaction will be any different.

186. *Id.* para. 4.d. The fiscal principles that apply to the Combating Terrorism Readiness Initiatives Fund also apply to the CINC Initiative Fund.

187. *Id.* para. 4.e.

188. *Id.* para. 4.d.

189. *Id.*

190. Message, 310045Z Jul 98, Joint Staff, subject: CBT Readiness Initiatives Fund Obligation (31 July 1998).

191. See LaBash, *supra* note 105, at 11.

192. *Id.*