Bringing International Agreements Out of the Shadows:
Confronting the Challenges of a Changing Force

Mr. Geoffrey Corn
Special Assistant to the Judge Advocate General for Law of War Matters
Office of the Judge Advocate General

Colonel James A. Schoettler, Jr.
Assistant Chief, International and Operational Law (IMA)
Office of the Judge Advocate General

The legal practice related to international agreements has received minimal attention during recent years. Although the Office of the Judge Advocate General is the proponent for *Army Regulation* (*AR*) *550-51*,[1] expertise in this area has generally been confined to a small number of uniformed and civilian members of the Judge Advocate General's Corps who have been involved in extensive agreements practice. For these experts, the experience they have derived from "sitting around the agreements campfire" has been essential to augment the authority reflected in *AR 550-51*, and other Department of Defense (DOD) and Joint authorities related to this practice. While this paradigm may have been effective during the period of limited Army expeditionary operations, with most training taking place locally, it is no longer satisfactory.

The practice in the area of international agreements is changing just as the Army's focus is changing. Army forces are moving towards a more expeditionary orientation, seeking ever more effective "out of area" training opportunities and virtually always within the context of an increasing emphasis on the authority and responsibility of combatant commands. As a result, the International and Operational Law Division (DAJA-IO) recommended to The Judge Advocate General to update *AR 550-51* to provide a more effective and comprehensive treatment of this area of practice.

In order to maximize the effectiveness of this revision, DAJA-IO recently hosted a two-day regulation review and revision conference at the National Conference Center in Leesburg, Virginia.[2] Participants included several members of the Corps with recognized expertise in this area of practice and representatives from major commands (MACOMs) and other offices (including the Department of Army (DA) Office of the General Counsel) that engage in this practice area. The purposes were to share the objectives of the action officers at DAJA-IO responsible for the revision of the regulation and to initiate proposed changes that would maximize the future utility of the regulation. Leveraging the collective expertise of the participants resulted in a greatly enhanced focus for the revision effort that will be implemented as the revision is completed over the next year.

What follows below is a discussion of some of the key issues addressed during the conference. The purpose of this discussion is to highlight these key issues for the Corps and provide a primer on the essential aspects of providing legal support to the international agreements process. This article is not intended to serve as a substitute for developing a comprehensive understanding of the Army regulation or other controlling authorities. On the contrary, such an understanding is essential to engaging in this area of practice, and it is the express intent of the authors to emphasize the value of knowing the "chapter and verse" as it relates to international agreements. The article will, however, attempt to provide what might be best characterized as a "commentary" to the Army regulation in order to facilitate the development of legally sound agreements practice throughout the Corps.

Before turning to this discussion, it is important for military practitioners to understand the purpose and requirements of *AR 550-51*. The regulation implements a delegation of authority to negotiate and conclude international agreements.[3] This delegation has been granted to the Secretary of the Army (SA) by the Secretary of Defense and higher authorities.[4] The regulation lists the subordinate agencies within the DA to which the SA's authority has been further delegated, and establishes procedural requirements that must be met in order for the delegated authority to be used.[5] These procedural

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[1] U.S. DEP'T OF ARMY, REG. 550-51, INTERNATIONAL AGREEMENTS (15 Apr. 1998) [hereinafter AR 550-51].

[2] The authors shared responsiblity for the revision of *AR 550-51*, and proposed convening the working group in order to ensure consideration of different command perspectives related to international agreements practice in the Army. Much of the information contained herein was gathered by the authors during this conference. An excerpt of the Draft *AR 550-51* (as of 25 May 2005) is at the Appendix.

[3] *See* U.S. DEP'T OF DEFENSE, DIR. 5530.3, INTERNATIONAL AGREEMENTS para. 13 (11 June 1987) (C1, Feb. 18, 1991) [hereinafter DOD DIR. 5530.3]; *see also* AR 550-51, *supra* note 1, at para. 5.

[4] *See* AR 550-51, *supra* note 1, para. 5.

[5] *See generally id*.

requirements include the preparation of fiscal and legal memoranda to support the negotiation of the agreement, as well as required coordination with various agencies within DOD and DA.[6] The regulation also lists categories of agreements for which the delegated authority is either withheld or subject to a requirement for prior approval by higher authority.[7]

Compliance with the regulation requires careful planning by the proponent of the international agreement and early involvement of legal counsel. Unfortunately, in a high tempo operational environment, compliance may become an obstacle to quickly putting in place necessary arrangements for a last minute exercise or other international activity, and proponents may be tempted to find ways to circumvent the regulation's requirements or pressure counsel to interpret the scope of the regulation narrowly. Proponents and their counsel who succumb to these temptations risk (at a minimum) an uncomfortable scrutiny of their command's international activities by higher headquarters and potentially could find themselves in the "penalty box" with respect to future activities.

At the same time, it needs to be acknowledged that the regulation itself lacks guidance in certain key areas that create doubts as to its scope. While a conservative approach might be to conclude that all international arrangements should be treated as international agreements subject to the regulation or its joint counterpart,[8] a careful examination of the regulation and the legal authorities upon which it is based suggests that this approach is not justified. Therefore, an overarching purpose of DAJA-IO's review and revision of *AR 550-51* is to improve the clarity of the regulation—to include a better articulation of what arrangements do or do not fall within its scope—and facilitate full and uniform compliance with its requirements by commands and agencies throughout the Army.

To Be Or Not To Be, That Is the First Question!

One of the concerns validated by the symposium was the lack of a consistent understanding of what constitutes an international agreement. Establishing such a common understanding is essential for the legally sound agreements practice throughout the Army. While authorities ranging from the *Code of Federal Regulations*[9] to *AR 550-51* include definitions, criteria, or both to analyze what qualifies as an international agreement, Army practice suggests a "know it when you see it" standard. One of the most important objectives of the pending regulation revision is to provide a more effective definition of international agreement that reconciles existing legal and regulatory guidance with the evolving practice among subordinate commands.

The current version of *AR 550-51* provides an extremely broad definition of international agreement:[10]

> "Any written agreement that is concluded with one or more foreign governments (including their agencies, instrumentalities, or political subdivisions) or with an international organization, and —
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> *(a)* Is signed or agreed to by personnel of any organizational element of the DOD, or by representatives of the Department of State, or any other Department or Agency of the U.S. Government.
>
> *(b)* Signifies the intention of the parties to be bound by international law.

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[6] *Id.* para. 6(b).

[7] It is important for all readers to understand is that *AR 550-51* only provides the "procedural authority" to negotiate international agreements. *Id.* para. 5.c. Before an international agreement can be negotiated, the proponent must also identify the "substantive legal authority" that authorizes each obligation proposed to be assumed by the United States in the international agreement to be negotiated. This authority must be found outside the regulation, for example, in provisions of the U.S. Code or other federal regulations.

[8] As discussed *infra*, *AR 550-51* regulates the negotiation and conclusion of international agreements that deal with predominantly DA matters. *Id.* para. 5(a). International agreements that deal with matters falling within the purview of joint commands typically will be governed by CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTR., 2300.01B, INTERNATIONAL AGREEMENTS (1 Nov. 2003) [hereinafter CJCS INSTR. 2300.01B] rather than *AR 550-51*, while agreements dealing with matters at the DOD-level are governed by DOD DIR. 5530.3.

[9] Coordination, Reporting and Publication of International Agreements, 22 C.F.R. pt. 181 (2005).

[10] The regulation also provides that an international agreement includes any oral agreement that meets the criteria for an international agreement. Such an agreement must be reduced to writing by the DOD representative who enters into the agreement. AR 550-51, *supra* note 1, at glossary, sec. II.a. (defining international agreements).

(c) Is denominated as an international agreement, or as a memorandum of understanding, memorandum of agreement, memorandum of arrangements, exchange of notes, exchange of letters, technical arrangement, protocol, note verbale, aide memoire, agreed minute, contract, arrangement, statement of intent, letter of intent, statement of understanding, or any other term connoting a similar legal commitment."[11]

AR *550-51* provides two specific examples of international agreements:

"A North Atlantic Treaty Organization (NATO) Standardization Agreement (STANAG) that provides for mutual support or cross-servicing of military equipment, ammunition, supplies and stores, or the mutual rendering of defense services, including training."

"Umbrella agreements, implementing arrangements, and cross-servicing agreements concluded under the NATO Mutual Support Act (10 U.S.C. § 2341, et seq.)."[12]

The regulation also lists a number of agreements that are *not* to be considered international agreements for the purposes of *AR 550-51*:

(a) Contracts made under the *Federal Acquisition Regulations* (FAR).

(b) Foreign Military Sales Credit Agreements.

(c) Foreign Military Sales Letters of Offer and Acceptance or Defense Sales Agreements.

(d) Shipping contracts performed under an international government bill of lading or other similar transportation documents.

(e) Foreign Military Sales Letters of Intent.

(f) Standardization Agreements (STANAGs) and Quadripartite Standardization Agreements (QSTANAGs) that record the adoption of like or similar military equipment, ammunition, supplies and stores; or operational, logistic, and administrative procedures.

(g) Leases under 10 U.S.C. §§ 2667 or 2675.

(h) Leases under 22 U.S.C. § 2796.

(i) Agreements that establish only administrative procedures.

(j) Acquisitions or orders made pursuant to cross-servicing agreements concluded under the authority of the NATO Mutual Support Act (10 U.S.C. § 2341, et seq.) and *DOD Directive 2010.9*.[13]

This definition, including the list of excluded agreements, mirrors the definition found in *DOD Directive 5530.03*, which is, in turn, incorporated by reference in *CJCS Instruction 2300.01B*.[14] The *CJCSI*, however, also emphasizes the essential criteria of an international agreement when it states "the operative requirement is whether the agreement signifies intention of the parties to be bound in international law."[15]

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[11] *Id.*

[12] *Id.* The regulation notes that "[a]ny extension, revision, or other amendment or modification" to an agreement defined in the regulation is also to be treated as an international agreement. *Id.*

[13] *See* AR 550-51, *supra* note 1; *see also* U.S. DEP'T OF DEFENSE, DIR. 2010.9, ACQUISITION AND CROSS-SERVICING AGREEMENTS (28 Apr. 2003)

[14] DOD DIR. 5530.3, *supra* note 3, at enclosure 2, para. E.2.1.1; CJSC INSTR. 2300.01B, *supra* note 3, para. 5.

[15] CJCS INSTR. 2300.01B, *supra* note 3, para. 5.

This "intent to be bound" standard is indeed the *sine quo non* of an international agreement.[16] The standard implies that when an agreement between two nations does not signify such an intent to be bound under international law, the agreement does not rise to the level of an international agreement *for purposes of authorities controlling the negotiation and conclusion of international agreements*.[17] While this defining criterion is well-accepted throughout the government, including the DOD, there is virtually no guidance in *AR 550-51* or superior DOD-level authorities to illuminate the meaning of this standard. As a result, it appears that different commands throughout the Army have adopted differing understandings of this standard. For example, one command might focus on whether the agreement requires the commitment of financial resources during execution to determine whether it signifies intent of the parties to be bound by international law. Others may focus on whether the terms require deviation from previously executed international agreements—such as status of forces agreements. Thus, an agreement that merely confirms obligations already assumed under an international agreement would not be a new international agreement. Still others may focus on whether the document requires more than *de minimis* performance by the United States. Thus, even though an agreement may involve some minor new obligation (*e.g.*, to use reasonable efforts to provide a periodic status report on a matter), the failure to perform the obligation would not be material and would have no remedy or consequence, making it effectively non-binding.

All of these various approaches to defining the meaning of "intent to be bound by international law" reflect several common themes. The first of these themes is the lack of an effective or uniform understanding of this standard on an Army-wide basis. The second theme is the perception that the procedural requirements related to the negotiation and conclusion of international agreements are an impediment to mission accomplishment for many commands, and therefore, international arrangements should be creatively "defined out" of the regulation where possible. The third theme is that the majority of the arrangements concluded between subordinate Army commands and their international counterparts do not rise (or should not be deemed to rise) to a sufficient level of significance to qualify as "international agreements."

Collectively, these common themes expose the need for *AR 550-51* to provide clear guidance to the field about what is, and equally importantly what is not, an international agreement. In order to provide a more effective definition of international agreement for purposes of the regulation, it is useful to refer to the criteria published in 22 C.F.R § 181.1.[18] These criteria are established by the Department of State for the purpose of "deciding whether any undertaking, oral agreement, document, or set of documents, including an exchanger of notes or of correspondence, constitutes an international agreement within the meaning of the [Case] Act . . ."[19] These criteria are:

> 1. Identity and intention of the parties (state entities entering into a legally (not politically or morally) binding obligation).
> 2. Significance of the Arrangement (excludes "minor or trivial" undertakings).
> 3. Specificity, including objective criteria for determining enforceability (excluding vague or general terms incapable of enforcement).
> 4. Necessity of two or more parties (excluding unilateral undertakings).
> 5. Form (acknowledging that the form of an arrangement is not controlling in analyzing whether it is an international agreement, it is nonetheless relevant to this analysis).[20]

The revised *AR 550-51* will take these factors into account. Additionally, the revision will emphasize that arrangements that manifest a clear intent *not* to create a binding obligation under international law (*e.g.*, statements of aspiration or intent—sometimes referred to as political arrangements) or arrangements that merely reconfirm obligations under existing international agreements (*e.g.*, a Status of Forces Agreements (SOFA)) do not independently qualify as international agreements unless they also include new substantive obligations. It must be noted, however, that as a general rule, the DOD favors a very narrow interpretation of valid exceptions to the definition of international agreement and is particularly sensitive to agreements that address on "policy significant" issues (see discussion below) even if the treatment of "policy

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[16] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 301 (3d ed. 1987) (defining, an international agreement as "an agreement between two or more states or international organizations that is intended to be legally binding and governed by international law").

[17] *Id.* § 301 n.2. (noting that "[a] nonbinding agreement is sometimes used in order to avoid processes required by a national constitutional system for making legally-binding agreements.").

[18] 22 C.F.R. § 181.1 (2005); *see also* DOD DIR. 5530.01, *supra* note 3, at enclosure 3.

[19] 1 U.S.C. § 112b (2000) (stating that the Case Act requires that international agreements be transmitted to Congress within sixty days after the agreement comes into force with respect to the United States). *Army Regulation 550-51* includes procedures to ensure Army compliance with the Case Act. AR 550-51, *supra* note 1, para. 9.d.

[20] 22 C.F.R. § 181.1.

significant" issues is derived from existing authority.[21] Accordingly, the revised regulation will indicate that an implementing agreement will only fall outside the definition of an international agreement so long as it does not: (i) in any way expand or deviate from the basic agreement, *and* (ii) address policy significant issues.

"Below the threshold" arrangements remain, in the opinion of the authors, an important component of international agreements practice. Commanders often need to memorialize, with their foreign counterpart, the existing authorities that will apply to an exercise or other activity with a foreign government. "Excludable agreements" permit the commander to do this without having also to engage the procedural apparatus of *AR 550-51*. Moreover, the authority to enter into such arrangements is not derived from international agreement authorities, but instead from the inherent authority of the respective commander to set the conditions for mission execution.

It is equally important to emphasize, however, that the scope of this category of excludable agreements must be narrowly construed and subjected to careful legal oversight by the servicing staff judge advocate. Any proposal for the use of such an arrangement should be subject to the same initial legal review requirement applied to proposed international agreements. This should result in an opinion articulating exactly why the proposed arrangement does not qualify as an international agreement. The opinion should also establish the permissible scope of the arrangement, with intermediate review requirements. In short, the narrow scope of this category of excludable agreements should be contrasted with the over-reliance on this category by some commands as a means to circumvent the procedural requirements related to international agreements. Accordingly, any decision to classify a proposed arrangement as falling below the threshold of international agreement should be subject to significant scrutiny by the proponent of the arrangement and by the legal advisor. To this end, rather than relying on a determination of whether an arrangement falls within or outside the definition of international agreement, commands should create a formal review process for all proposed international undertakings to ensure the proper categorization and accordant procedures for negotiating and concluding such arrangements.

Expanding the Concept of the "Agreement Process" to Ensure Sufficient Legal Oversight

Because the determination of whether a proposed arrangement qualifies as an international agreement will have a profound impact on establishing the proper authority and procedure for the negotiation and conclusion of such an arrangement, it is absolutely essential that legal review begin at the earliest possible point in the agreement concept development process, and continue throughout the process. Accordingly, the revised regulation will include the following broad definition of the "agreement process:"

> The process by which an arrangement between the Army or an Army element and a foreign nation or international organization is conceived, proposed, negotiated, concluded, and implemented. The Agreement Process begins at the concept development phase, and continues through implementation of the ultimate arrangement.

The revised regulation will also require initiation of a legal review at the earliest possible point in this process.

Further, the revised regulation will recommend that each MACOM/Army Service Component Command (ASCC) to designate a central office of record for the agreement process. The purpose of this requirement is to ensure that a focal point for management of the agreement process exists at the MACOM/ASCC level due to the increasing necessity for such commands to engage in the agreement process. This central command focal point will be responsible for receiving all agreement proposals at the concept phase of development and subsequently ensuring the required legal review is obtained. It is essential that this initial review take place as early as possible in the agreement process to allow the servicing legal office to opine on whether the subject of the proposed agreement does or does not qualify as an international agreement and to review the proponent's determination about other matters that may be determinative as to approval or coordination requirements.[22]

The initial legal review is essential in order to determine the scope of authority vested in the command to pursue the arrangement. A determination that the arrangement is not an international agreement also should be accompanied by a legal

[21] *See infra* notes 35-39 and accompanying text.

[22] For example, if the legal office determines that the arrangement is an international agreement, the legal office would review the proponent's determination whether the international agreement involves a "policy significant" matter or a "predominantly DA matter." Both of these determinations impact which approval and coordination requirements would apply to the agreement.

opinion about whether the command is vested with appropriate procedural and substantive authority to pursue the "excludable agreement."

Any limitations, substantive or procedural, deemed essential to the servicing legal office's opinion should be clearly articulated. Ideally, the command's local procedures should require continued review or involvement of the servicing legal office to ensure that the terms of the ultimate arrangement does not alter the opinions reached in the initial review and complies with other applicable law and regulation.

During the conference, representatives from the United States Army, Europe (USAREUR), Office of the Judge Advocate (OJA), outlined how the proposed process is currently implemented. In USAREUR, the G-8 includes an Agreements Division, which serves as the central focal point for all international arrangements and agreements for the command. When a staff proponent determines that a mission requires the conclusion of some type of arrangement with a foreign counterpart, a request to negotiate such an agreement is submitted to the Agreements Division. This request is then forwarded to the International Law Division of the OJA, which renders an opinion as to whether the proposed arrangement is or is not an international agreement, the source of authority for pursuing the initiative, and any limits on the substance or procedures related to negotiating and concluding the arrangement (note that all of these issue are addressed regardless of whether the arrangement does or does not qualify as an international agreement). The opinion also establishes subsequent review requirements.

If the legal opinion indicates that authority does not exist to pursue the initiative, the Agreements Division notifies the proponent, with possible recommendations as to how to obtain proper authority (*e.g.*, requesting a delegation from the combatant command). If the legal opinion indicates that authority does exist for the initiative, the Agreements Division will coordinate the development of drafts and the identification of an appropriate group to participate in any negotiation meeting. This team will normally include a representative from the OJA.

The procedure followed in USAREUR provides a good model for local implementation of the Agreements Process. Accordingly, the revised regulation will encourage creation of a central agreements office at each MACOM, and the participation of a qualified legal advisor in any negotiation teams whenever feasible. A centralized office and early involvement of legal expertise will ensure that the limits of applicable authority are respected and that any proposed revisions to a previously approved agreement concept do not result in a modification that is inconsistent with the initially determined scope of authority.

It must be emphasized that in today's operational environment, there are many instances in which MACOM/ASCC interests will intersect with those of combatant commands responsible for the geographical area in which the MACOM/ASCC's international counterpart is located.[23] It is also possible that, due to the complex nature of international initiatives, MACOM/ASCC interests intersect with those of the DOD or its field operating agencies. While *AR 550-51* may expressly require coordination with the combatant command or the DOD in such cases, and may even require that the MACOM/ASCC secure prior approval of the combatant command or the DOD before negotiation certain international agreements, there may be instances where such prior approval or coordination is not required. In those instances, the MACOM/ASCC should still be sensitive to the interests of these organizations and should coordinate with them wherever possible. This coordination can occur in technical channels. For example, when preparing initial opinions in response to Agreement Division requests, the USAREUR OJA routinely consults with the U.S. European Command Legal Advisor about the proposed initiative. Such coordination serves the dual purposes of vetting the judgments reached by the OJA in its opinion and ensuring the combatant command is well informed of agreement initiatives conducted in the area of responsibility (AOR).

The intent of the revisions discussed above should be clear. First, it is essential that legal oversight begin at the earliest possible point in the process of developing the agreement concept. A broad definition of the "agreement process" and the establishment of a command focal point for that process is intended to facilitate early involvement of qualified legal personnel. Second, it is essential that any proposed arrangement with a foreign entity be subject to legal review to ensure that both the substance and the procedure related to the arrangement fall within the authority of the proponent command. Third, coordination with higher headquarters along technical lines (*e.g.*, coordination between MACOM/ASCC legal advisors and the responsible Combatant Command legal advisors) should be the rule, and not the exception, to validate judgments related to the agreement, resolve differences early in the process, and ensure maximum situational awareness of agreement initiatives.

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[23] *See generally* JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, DOCTRINE FOR JOINT OPERATIONS ch. II (10 Sept. 2001) [hereinafter JP 3-0] (discussing the doctrinal relationship between combatant and component commands).

The Decreasing Scope of Predominately Army Agreements and the Reality of Operating Under Joint Authorities

As noted above, maximum coordination of agreement initiatives with the combatant command is encouraged, even where not required by *AR 550-51* or the DOD directive. For MACOM/ASCC's, this coordination is related to the broader issue of how best to judiciously use the MACOM/ASCC's authority for pursuing an agreement initiative. If, based upon legal review, the command determines that an initiative does not qualify as an international agreement, its authority to pursue the initiative would be derived from the responsibility of the command to set the conditions for accomplishing whatever mission the initiative is related to.[24] If the initiative qualifies as an international agreement, however, the MACOM/ASCC authority must be derived from a delegation from either the DA under *AR 550-51*[25] or from the combatant command under *CJCSI 2300.01B*.[26] Thus, whenever a MACOM/ASCC is pursuing an international agreement (in other words, when the servicing legal office, based upon the initial legal review, reaches the conclusion that the proposed arrangement is not a "excludable agreements") the procedural basis for the MACOM/ASCC's negotiating authority is derived through either "green" (*AR 550-51*) or "purple" (*CJCSI 2300.01B*) delegation.[27]

Under AR *550-51*, an agreement concluded under "green" authority pertains to a "predominantly DA matter."[28] Agreements falling into this category are negotiated and concluded based on the authority delegated to the Secretary of the Army by *DOD Directive 5530.03*,[29] and further delegated to the MACOM commander by *AR 550-51*.[30] The revision of the regulation will preserve this delegation (although it will extend it to ASCC's).

In the last two decades, the number of agreements that address a "predominantly DA matter" has been diminished by combatant commanders' increasing assertion of authority over international agreement practice. This is manifested by the following excerpt from a 1999 interim change to DOD directive 5530.03:

> Before negotiation, military command and other DOD organizational elements assigned to or located within the geographic areas of responsibility of Unified commands shall advise the appropriate Unified Commands of any international negotiations that might have an impact on the plans and programs of such commands, and shall furnish them with a copy of each agreement upon conclusion.[31]

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[24] The implied authority for an Army Service Component Commander to direct activities, not otherwise prohibited by law or policy, necessary to ensure a properly trained, equipped, and ready force is available, to the Combatant Commander is often referred to as "Title 10 responsibility." This is a reference to the statutory mission of the Army established as follows in Title 10 of U.S. Code, section 3062:

> § 3062. Policy; composition; organized peace establishment
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> (a) It is the intent of Congress to provide an Army that is capable, in conjunction with the other armed forces, of—
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> (1) preserving the peace and security, and providing for the defense, of the United States, the Territories, Commonwealths, and possessions, and any areas occupied by the United States;
>
> (2) supporting the national policies;
>
> (3) implementing the national objectives; and
>
> (4) overcoming any nations responsible for aggressive acts that imperil the peace and security of the United States.
>
> (b) In general, the Army, within the Department of the Army, includes land combat and service forces and such aviation and water transport as may be organic therein. It shall be organized, trained, and equipped primarily for prompt and sustained combat incident to operations on land. It is responsible for the preparation of land forces necessary for the effective prosecution of war except as otherwise assigned and, in accordance with integrated joint mobilization plans, for the expansion of the peacetime components of the Army to meet the needs of war.

Id. This concept is doctrinally referenced in the discussion of ADCON contained in JOINT PUBLICATION 3-0, *supra* note 17, at II-10 – II-11.

[25] AR 550-51, *supra* note 1, para. 1.

[26] CJCS INSTR. 2300.01B, *supra* note 3, at enclosure A.

[27] In all cases, the substantive basis for the negotiation also must be identified. Neither *AR 550-51* nor *CJCS Instr. 2300.01B* provide substantive authority for an international agreement or a "excludable agreement ". *See* AR 550-51, *supra* note 1, para. 5.c.; *see also* CJCS INSTR. 2300.01B, *supra* note 3, para. 1.

[28] AR 550-51, *supra* note 1, para. 5.a.

[29] DOD DIR. 5530.3, *supra* note 3, para. 13.

[30] AR 550-51, *supra* note 1, para. 5.b.

[31] *See* Memorandum, General Counsel of the Department of Defense, subject: Interim Guidance on DOD Directive 5530.03 (International Agreements) (12 Sept. 1997).

This expansive mandate clearly requires coordination by the MACOM/ASCC of any negotiations having a potential impact on the combatant command AOR, even if the authority to negotiate and conclude the agreement is derived through the Army channel of authority set out in *AR 550-51*.[32] As a result, it is imperative that the MACOM/ASCC (including their servicing legal offices) establish a close working relationship with an appropriate counterpart at the combatant command that is responsible for the AOR or AOR's in which the MACOM/ASCC routinely operates. This relationship can then be leveraged to do the following: streamline coordination efforts (which often times are conducted under time constraints); identify appropriate coordination points; informally vet judgments related to the source of authority to pursue an agreement or the nature of a proposed agreement (*e.g.*,, is it or is it not an international agreement?); and streamline subsequent coordination requirements with higher authorities at DOD.

While maximum coordination between Army elements and combatant commands with a stake in the outcome of agreement initiatives is clearly essential to a legally sound agreements practice, this does not justify a conclusion that the "predominantly DA matter" channel of delegation is irrelevant. Although the line between a DA matter and a Joint matter is often times blurry, both the DOD directive and the current (and anticipated revised) version of *AR 550-51* manifest an intent to preserve for the Army a legitimate realm of authority over international agreements related predominantly to the execution of Army missions. Coordination requirements maximize situational awareness between the combatant commands and the MACOM/ASCC commands—a result consistent with this realm of authority—but do not eliminate the authority itself.

In order to attempt to better clarify the meaning of a "predominantly DA matter," the proposed revision to the regulation will define this phrase as:

> A matter related to the execution of a specified or implied Army task not derived from a mission assigned by a non-Army command (Department of Defense or a subordinate Combatant Command).

The definition will include the following additional guidance about interpreting the "predominantly DA matter" concept:

> Because virtually any matter addressed by an international agreement and/or arrangement within a Combatant Command AOR could be of some interest to the Combatant Command, it is often difficult to distinguish between a predominately DA matter and a predominately Combatant Command matter. As a general rule, agreements and/or arrangements intended for the primary purpose of recruiting, organizing, supplying, equipping, training, servicing, mobilizing, demobilizing, maintaining, outfitting, and constructing Army forces, equipment and facilities shall be considered to fall within the meaning of predominately DA matters. For example, an international agreement and/or arrangement intended to enhance the readiness of Army forces by providing training opportunities for those forces would be a predominately DA matter.

Due to the sensitivity about the lines between joint and single service activities, the regulation will further provides that where there is doubt about whether a negotiation or agreement involves a predominantly DA matter, the proponent must coordinate the matter with the combatant command.

This emphasis on missions derived from Army obligations, and not from an express or implied tasking from a combatant command, is an attempt to reconcile the scope of proper Army authority with the need to set conditions for accomplishing Army missions. This is perhaps best illustrated with regard to setting the conditions for "out of area" training events. Consider the experience of USAREUR. The Commander, USAREUR, is tasked with the mission of training and preparing Army forces for potential provision to a combatant commander.[33] This mission is derivative of the Army mission to provide a trained and ready force, and therefore while serving the interests of the combatant command that ultimately might receive the force, it is not a mission derived from an express or implied task related to a joint mission. It therefore is properly regarded as a predominantly DA matter. Contrast this scenario with the same type of training conducted in execution of the

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[32] AR 550-51, *supra* note 1, para. 4.a.(ii).

[33] According to the official website for Headquarters, U.S. Army Europe:

> **MISSION STATEMENT**
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> As a forward based land component, USAREUR demonstrates national resolve and strategic leadership by assuring stability and security, and leading joint and combined forces *in support of the Combatant Commander*.

See USAREUR, *Mission Statement*, *available at* http://www.hqusareur.army.mil/missionstatement.htm (last visited 21 July 2005) (emphasis added).

combatant commander's theater engagement strategy. The training is now in execution of a task imposed by the combatant command, and therefore authority must be derived through the Joint channel.

It should be noted that this view is not universally accepted, with several DOD attorneys experienced in this area asserting an extremely limited scope for what should properly be considered a predominantly DA (or service) matter. This, however, is simply another important reason for maximum coordination between Army and combatant commands. Ultimately, the consequence of a debate between the Army and the combatant commands as to the applicability of "green v. purple" authority will be minimized by early and extensive coordination. A conclusion that an agreement initiative does not properly fall into the "pure Army authority" category would not halt the initiative, but merely require reliance on Joint authorities for the delegation. In such a situation, the Army command must ensure full compliance with the procedures established in *CJCSI 2300.01B*[34] and any supplementary regulations of the applicable Combatant Command.

Understanding the Meaning and Effect of "Policy Significance"

Perhaps the most elusive concept related to international agreements practice is that of "policy significance." Under *DOD Directive 5530.3*, "all proposed international agreements having policy significance shall be approved by OUSD(P) before any negotiation thereof, and again before they are concluded."[35] Accordingly, understanding the scope of the term "policy significance" is essential to legally sound practice in this area because a conclusion that an issue is policy significant has the practical effect of nullifying any express or implied delegation of negotiation and conclusion authority under *AR 550-51*. In this regard, "policy significance" can have a profound impact on agreements practice.

The constraint related to policy significance initially established in the DOD directive is incorporated in all relevant agreement authorities,[36] but the directive only provides a general definition of policy significance. Per the directive, the essential component of a policy significant issue is that by its nature, it "would require approval, negotiation or signature at the OSD or the diplomatic level".[37] Determining what falls within this category can obviously be difficult, and in many ways policy significance represents the proverbial "ball that is determined to be glass only after the juggler has dropped it."

Any Army command with significant international engagement activities should consider the long-term benefit of a comprehensive review of local greements practice, and the development of a local regulation or standing operating procedure controlling such practice. It is hoped that the eventual revision of *AR 550-51* will facilitate the reconciliation of compliance with the internatikonal agreement requirements and the needs of a transforming and more expeditionary Army.

In order to aid in the interpretation of this term, the revised regulation will include a list of examples of policy significant issues. This list was derived from both references to other service authorities[38] and also the symposium participants' collective experience. While this list is non-exclusive, ideally, it will facilitate the recognition of most policy significant issues. Once again, however, the importance of vetting "suspected" policy significant issues with the appropriate combatant command legal advisors, and where appropriate, the DOD general counsel, cannot be overemphasized. It will often be the case that such legal advisors will have extensive experience in dealing with such issues, and will therefore be able to rapidly assess whether this constraint is triggered.

As noted above, if it is determined that an issue falls within the definition of policy significance, DOD approval is required prior to any negotiation related thereto. There is no exception to this constraint. Here again is another justification for maximum coordination with the combatant command or DOD legal advisor or both—only through prompt identification of such issues can the necessary coordination and approvals be accomplished.

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[34] CJCS INSTR. 23001.01B, *supra* note 3, para. 3.

[35] DOD DIR. 5530.03, *supra* note 3, para. 8.4.

[36] *See* AR 550-51, *supra* note 1, para. 6.a.(1); *see also CJS INSTR.* 2300.01B, *supra* note 3, at enclosure A, para. 4.

[37] *See* DOD DIR. 5530.03, *supra* note 3, para. 8.4.1.

[38] *See, e..g.*, CJCS INSTR. I 2300.01B, *supra* note 3; U.S. DEP'T OF THE AIR FORCE, INSTR. 51-701, NEGOTIATING, CONCLUDING, REPORTING, AND MAINTAINING INTERNATIONAL AGREEMENTS attachment 1, sec. C (9 May 1994) (listing agreements that have "policy significance"); U.S DEP'T OF NAVY, SECNAV INSTR. 5710.25A, INTERNATIONAL AGREEMENTS para. 4.d (2 Feb 1998). This list is also based on the many comments received during the "regulation and review revision conference" described in the introduction to this article.

"Policy significance" is not a legal question, per se. Accordingly, under the regulation, the proponent of an international agreement will be required to make the initial judgment about policy significance. The servicing legal office will review this judgment, and the basis thereof, for sufficiency. Early involvement by the servicing legal office in the agreements process, and frequent dialogue with the combatant command legal advisor, will substantially mitigate the risk that a questionable judgment will be reached by the proponent on this issue.

Setting the Conditions for an Effective Agreements Practice

The effort to revise *AR 550-51* is only the first step in improving Army international agreements practice. In addition to providing guidance to the field, one of the primary objectives of this revision process is to stimulate a comprehensive review and possible revision of local agreements practice. Establishing a local agreements policy that (i) includes a command focal point for agreements issues, (ii) maximizes legal involvement in the Agreements Process, (iii) mandates comprehensive coordination with the supported Combatant Command(s), (iv) outlines the procedures for working through the Agreements Process, and (v) establishes an analogous process for command "excludable agreements" that are determined to fall below the threshold of international agreement will set the conditions for effective and efficient international agreements practice.