

## Unique Aspects of Article 139 Claims Overseas

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### I. Introduction

Article 139 of the Uniform Code of Military Justice<sup>1</sup> is a powerful tool that can be used by victims of larceny and vandalism to obtain compensation for the loss of their property. Designed to discourage the “wasting, spoiling, and destroying” of private property,<sup>2</sup> it permits claims to be filed directly against servicemembers who wrongfully take or willfully damage private property.<sup>3</sup> However, its provisions can overlap with the Foreign Claims Act,<sup>4</sup> which permits claimants residing overseas to recover for this same type of damage.<sup>5</sup> Judge advocates and claims professionals working overseas must be aware of this overlap and take appropriate steps to ensure that claims are processed properly.

#### A. Article 139

Article 139 allows any person or entity to file a claim directly against servicemembers who willfully damage or wrongfully take their property.<sup>6</sup> The claims are paid directly from the pay of the servicemember responsible for the damage or theft.<sup>7</sup> For example, if Private Doe vandalizes his neighbor’s vehicle, the neighbor can file a claim directly against Doe and obtain compensation for the damage directly from Doe’s pay.

It is critical to process these claims quickly. Since willful damage and wrongful taking of private property are also crimes under the punitive articles of the Uniform Code of Military Justice,<sup>8</sup> the servicemembers responsible will usually face disciplinary action, which may include non-

judicial punishment<sup>9</sup> and administrative separation from the service<sup>10</sup> or trial by court-martial. These actions often result in significant forfeitures of pay or the complete termination of entitlement to pay.<sup>11</sup> For this reason, Article 139 claims should never be delayed pending the outcome of disciplinary action.<sup>12</sup>

#### B. Foreign Claims Act

The Foreign Claims Act permits payment of claims for, among other things, property damage caused by servicemembers.<sup>13</sup> Such claims are payable even when the servicemembers were acting outside the scope of their duties.<sup>14</sup> The Foreign Claims Act only applies overseas and is designed to engender good will and promote friendly relations between U.S. forces and host nations.<sup>15</sup> So, for example, if Private Doe vandalizes a local national’s vehicle while stationed in Kosovo, the Foreign Claims Act would permit the local national to file a claim directly against the United States for this damage.<sup>16</sup> In this area, Article 139 overlaps with the Foreign Claims Act.<sup>17</sup>

The same overlap occurs in countries covered by a Status of Forces Agreement. These agreements generally contain a provision allowing the United States to compensate local nationals under U.S. law for damage caused by U.S. servicemembers not acting in the scope of their duties.<sup>18</sup>

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<sup>1</sup> UCMJ art. 139 (2012).

<sup>2</sup> U.S. DEP’T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES para. 9-2b (21 Mar. 2008) [hereinafter DA PAM 27-162].

<sup>3</sup> U.S. DEP’T OF ARMY, REG. 27-20, CLAIMS ch. 9 (8 Feb. 2008) [hereinafter AR 27-20].

<sup>4</sup> 10 U.S.C. §2734 (2012).

<sup>5</sup> AR 27-20, *supra* note 3, para. 10-3a.

<sup>6</sup> *Id.* para. 9-3.

<sup>7</sup> *Id.* para. 9-8h.

<sup>8</sup> *Id.* para. 9-5a. Wrongful taking of private property can be charged as larceny under article 121 of the Uniform Code of Military Justice and willful damage of private property can be charged under article 109. UCMJ, arts. 109, 121 (2012).

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<sup>9</sup> See generally MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. and pt. V [hereinafter MCM].

<sup>10</sup> See generally U.S. DEP’T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED SEPARATIONS (6 Jun. 2005); U.S. DEP’T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (12 Apr. 2005).

<sup>11</sup> MCM *supra* note 9 R.C.M. 1003(b)(2) and pt. V, ¶5. In courts-martial, sentences to forfeiture of pay generally take effect no later than 14 days after sentence is adjudged. UCMJ art. 57. In addition, certain sentences at a court-martial automatically result in forfeitures of pay. UCMJ art. 58b.

<sup>12</sup> AR 27-20, *supra* note 3, para. 9-4a.

<sup>13</sup> *Id.* para. 10-3a.

<sup>14</sup> *Id.*

<sup>15</sup> DA PAM 27-162, *supra* note 2, para. 10-1.

<sup>16</sup> Such a claim would be filed with a Foreign Claims Commission. See AR 27-20, *supra* note 3, para. 10-6a.

<sup>17</sup> *Id.* para. 9-5e.

<sup>18</sup> See, e.g., Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, 19 Jun. 1951, Art. VIII, para. 6, available at [http://www.nato.int/cps/en/natolive/official\\_texts\\_17265.htm](http://www.nato.int/cps/en/natolive/official_texts_17265.htm) [hereinafter NATO SOFA].

These “ex-gratia” claims are paid by the United States under the Foreign Claims Act.<sup>19</sup>

So, for example, if Private Doe vandalizes a local national’s vehicle while stationed in Germany, where the North Atlantic Treaty Organization Status of Forces Agreement applies, the Foreign Claims Act would permit the local national to file a claim against the United States for the damage. The only difference is that the claim is initially submitted to a “receiving state claims office” (in our example, this would be a “Schadensregulierungsstelle des Bundes,” a department of the German government<sup>20</sup>) so it could make a nonbinding recommendation.<sup>21</sup> The claim is subsequently transferred for resolution under the Foreign Claims Act to the U.S. claims office responsible for that country.<sup>22</sup> Again, Article 139 overlaps with the Foreign Claims Act in this area.

### C. Avoiding double payment; Precedence of Article 139

Claims professionals overseas need to be aware of the overlap explained above. Because such claims may be payable under more than one provision, they need to be tracked properly to avoid double payment.<sup>23</sup> In addition, the Article 139 claim should be processed first to ensure that the servicemember responsible rather than the American taxpayer pays for the damage.<sup>24</sup>

Tracking claims under both Article 139 and the Foreign Claims Act can be difficult. The Article 139 claim may not be filed with the same command or even the same service as the claim filed under the Foreign Claims Act. Article 139 claims are processed by the command of the servicemember who caused the damage.<sup>25</sup> Most claims under the Foreign Claims Act are referred to a single service of the U.S. forces (the Army, Air Force, or Navy) responsible for all tort claims within the country where the claim arose, regardless of whether the damage was caused by a Soldier, Airman, Sailor, or Marine.<sup>26</sup> So, for example, an Article 139 claim

for vandalism by an Airman in Germany would be filed with the Air Force, while the same claim filed under the Foreign Claims Act would be forwarded from the receiving state claims office to the Army under the “single service” claims concept.<sup>27</sup>

Even when only one service is involved, claims under Article 139 and the Foreign Claims Act may be sent to different offices. As mentioned above, Article 139 claims are initially sent to a local commander.<sup>28</sup> Claims under the Foreign Claims Act are referred to a Foreign Claims Commission, which is usually appointed by a Command Claims Service.<sup>29</sup> For example, an Article 139 claim for vandalism by Soldiers in Kaiserslautern, Germany, would be forwarded to a local commander in Kaiserslautern, while an identical claim under the Foreign Claims Act would be forwarded to the appropriate Command Claims Service, the U.S. Army Claims Service Europe in Wiesbaden.<sup>30</sup>

It is critical for claims professionals who process claims that may result in the overlap mentioned above to check with other claims offices, as appropriate.<sup>31</sup> When adjudicating an Article 139 claim, check with the office responsible for processing Foreign Claims Act claims to determine if it is working on a similar claim. Offices adjudicating Foreign Claims Act claims involving willful damage or wrongful taking of property need to conduct a similar check.

Article 139 claims should take precedence over identical claims filed under the Foreign Claims Act. It is better to ensure that payment comes from the servicemember responsible for the loss, rather than the U.S. government. This fulfils the statutory purpose of Article 139 by promoting discipline and protecting the community from vandalism and theft.<sup>32</sup>

The simplest way to ensure that Article 139 claims are processed first is to notify potential claimants, including local nationals, of their right to file such claims. These potential claimants are usually interested in ensuring that the servicemember responsible for the damage to their property is held accountable. Notifying potential claimants may be difficult, however, when receiving state claims offices are involved.<sup>33</sup> In these cases, it is important to coordinate

<sup>19</sup> AR 27-20, *supra* note 3, para. 7-4b(3).

<sup>20</sup> More information (in German) and addresses for these offices can be found at the German Finance Ministry website at [http://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Bundesvermoegen/Bundesanstalt\\_fuer\\_Immobilienaufgaben/Schadensregulierungsstellen/schadensregulierungsstellen-des-bundes.html](http://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Bundesvermoegen/Bundesanstalt_fuer_Immobilienaufgaben/Schadensregulierungsstellen/schadensregulierungsstellen-des-bundes.html).

<sup>21</sup> AR 27-20, *supra* note 3, para. 7-13; NATO SOFA, *supra*, Art. VIII, para. 6a.

<sup>22</sup> AR 27-20, *supra* note 3, para. 7-4b(3); NATO SOFA, *supra*, Art. VIII, para. 6b.

<sup>23</sup> AR 27-20, *supra* note 3, para. 2-15d(2).

<sup>24</sup> DA PAM 27-162, *supra* note 2, para. 9-2a.

<sup>25</sup> AR 27-20, *supra* note 3, para. 9-8c.

<sup>26</sup> *Id.* para. 1-19.

<sup>27</sup> DEP’T OF DEFENSE, INSTRUCTION 5515.08, SUBJECT: ASSIGNMENT OF CLAIMS RESPONSIBILITY (Nov. 11, 2006) encl. 2.

<sup>28</sup> Such claims are forwarded to the offender’s Special Court-Martial Convening Authority. AR 27-20, *supra* note 3, para. 9-8c.

<sup>29</sup> *Id.* para. 10-6a. A Foreign Claims Commission can be composed of one or three persons. *Id.* para. 10-7a.

<sup>30</sup> DA PAM 27-162, *supra* note 2, para. 2-15c(2).

<sup>31</sup> AR 27-20, *supra* note 3, para 2-15d(2).

<sup>32</sup> DA PAM 27-162, *supra* note 2, para. 9-2a.

<sup>33</sup> AR 27-20, *supra* note 3, para. 7-13.

closely with these offices to ensure they provide potential claimants with the proper information. Information papers, translated into the local language, may assist in this effort.

When claims are filed under both Article 139 and the Foreign Claims Act for the same incident, the best practice is to hold the Foreign Claims Act claim in abeyance until the Article 139 claim is paid. For example, if Private Doe's vehicle vandalism generates claims under both Article 139 and the Foreign Claims Act, the latter claim should be held in abeyance until the Article 139 claim is processed. If undue financial hardship to the claimant will result, the Foreign Claims Act claim may be paid and the claimant informed of the obligation to repay the United States if the Article 139 claim later succeeds.<sup>34</sup> Unfortunately, it may be difficult for the United States to recoup a double-payment from a foreign claimant.<sup>35</sup> If the Article 139 claim is not successful, the claim should be promptly processed under the Foreign Claims Act. Using the example above, if Doe has already been discharged from the military when the claims are filed, the claim under the Foreign Claims Act should be immediately processed and paid, as appropriate.

## II. Conclusion

The overlap between Article 139 and the Foreign Claims Act is just one of the many challenges that claims professionals overseas face. Proper tracking of these claims is critical to ensure that claimants are not compensated under both Article 139 and the Foreign Claims Act. In addition, close coordination with potential claimants and foreign claims officials will help ensure that the Article 139 claims are processed first, so payment comes from the servicemember responsible for the damage.

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<sup>34</sup> *Id.* para. 9-8e. Payment of an Article 139 claim under the Foreign Claims Act should be approved only when necessary to prevent financial hardship to the claimant, not merely to avoid an inconvenience. DA PAM 27-152, *supra* note 2, para 9-8e.

<sup>35</sup> The ability of the United States to collect claim overpayments from a foreign national may be complicated if the foreign national is not employed by the United States or otherwise have financial dealings with the United States. One method of collecting debts owed to the United States is by administrative offset against other payments due to the debtor from the United States. 31 U.S.C. §3716 (2012). For example, claims overpayments made to employees of the United States under the Personnel Claims Act, 31 U.S.C. §3721 (2012), can be collected through deductions from the employee's pay. DA PAM 27-162, *supra* note 2, para. 11-37. This means it is not available for individuals not employed by the United States.